40th Annual
Pacific Northwest Institute on

# SPECIAL EDUCATION & THE LAW

October 9-11, 2023
Hilton Vancouver Washington
Vancouver, Washington

*In partnership with:*

COLLEGE OF EDUCATION
UNIVERSITY of WASHINGTON

*and*

CONTINUUM COLLEGE
UNIVERSITY of WASHINGTON

**WWW.UWSCHOOLLAW.ORG**

# Program Overview

## Pre-Institute Mini-Courses

**Monday, October 9, 2023**

| | |
|---|---|
| 8:00 AM | Registration desk opens |
| 8:00–9:00 am | Continental breakfast |
| 9:00–11:00 am | Morning Mini-Courses |
| 11:00 am–12:30 pm | Lunch on your own |
| 12:30–2:30 pm | Early afternoon Mini-Courses |
| 2:30–3:00 pm | Refreshment break |
| 3:00-5:00 pm | Late afternoon Mini-Courses |

## Pacific Northwest Institute

**Tuesday, October 10, 2023**

| | |
|---|---|
| 7:30 AM | Registration desk opens |
| 7:30–8:30 am | Continental breakfast |
| 8:30–10:00 am | First General Session |
| 10:00–10:30 am | Refreshment break |
| 10:30–noon | Tuesday Morning Workshops (1-3) |
| 12:00–1:00 PM | Hosted luncheon |
| 1:00–2:30 PM | Second General Session |
| 2:30–3:00 pm | Refreshment break |
| 3:00–4:30 pm | Tuesday Afternoon Workshops (4-6) |
| 4:30–6:00 pm | Welcome Reception |

**Wednesday, October 11, 2023**

| | |
|---|---|
| 7:00 AM | Registration desk opens |
| 7:00–8:00 am | Continental breakfast |
| 8:15–9:45 am | Wednesday Early Morning Workshops (7-9) |
| 9:45–10:00 am | Refreshment break |
| 10:00 am–11:30 am | Wednesday Late Morning Workshops (10-12) |
| 12:00 PM | Adjourn |

40th Annual
Pacific Northwest Institute on
Special Education and the Law

October 9-11, 2023

# TABLE OF CONTENTS

First General Session

# IDEA and §504 Discipline Update: Key Points from the 2022 DOE Guidance

By:

**Jose Martín**
Attorney at Law
Richards Lindsay & Martín,LLP
Austin, Texas

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# IDEA and Section 504 Discipline Update: Key Points from the 2022 USDOE Guidance

Presented by
**Jose L. Martín, Attorney**
Richards Lindsay & Martín, L.L.P.—Austin, Texas
jose@rlmedlaw.com


## Why the Rules Exist

- Think of the rules on discipline of students under §504 as a set of doctrines that serve to limit application of State and local disciplinary policies.
- In understanding these doctrines, it is helpful to identify the policy reasons why they exist.

## Why the Rules Exist

- First, federal courts started finding that expulsion of students with disabilities from school for behaviors related to disability was inherently discriminatory and in violation of IDEA.

  See, e.g., *Stuart v. Nappi*, 443 F.Supp. 1235 (D.Conn. 1978); *Doe v. Koger*, 551 IDELR 515 (N.D.Ind. 1979); *S-1 v. Turlington*, 552 IDELR 267 (5th Cir. 1981); *Kaelin v. Grubbs*, 554 IDELR 115 (6th Cir. 1982); *School Bd. of Prince William v. Malone*, 556 IDELR 406 (4th Cir. 1985); *Doe v. Maher*, 557 IDELR 353 (9th Cir. 1986).
- USDOE went on to adopt that position (see *OCR Staff Memorandum*, 16 IDELR 491 (OCR 1989)).

## Why the Rules Exist

- Then, OCR issued guidance under §504 indicating a series of short-term removals (each ≤ 10 consecutive school days) that exceeds 10 total school days could create a "pattern" that collectively amounts to a disciplinary change in placement.

*OCR Policy Memorandum: 00168* (October 28, 1988)(setting forth factors to be considered in determining whether there is a "pattern of exclusions"—(1) length of each removal, (2) proximity to one another, and (3) total amount of exclusion); see also *OCR Memorandum*, 307 IDELR 07 (OCR 1989). At times, in light of IDEA regulations, similarity of behaviors is an additional factor. *See* 34 C.F.R. §300.536(a)(2)(ii).

## Why the Rules Exist

- The guidance limiting accumulations of short-term removals was necessary to prevent schools from engaging in excessive use of short-term removals, which can compromise a student's ability to receive FAPE.

Still echoing that policy priority, USDOE's commentary to the 2006 IDEA regulations stated that "discipline must not be used as a means of disconnecting the child with a disability from education." 71 Fed. Reg. 46715 (August 14, 2006)

## Why the Rules Exist

"Children with disabilities are at greater risk of disciplinary removals that significantly interrupt their learning, often unnecessarily." "As a suspended child's education is interrupted, he or she is more likely to fall behind, become disengaged from school, and to drop out." ***Dear Colleague Letter*, 68 IDELR 76 (OSEP 2016)**

In the above letter, USDOE cited studies indicating that home suspensions are not effective in reducing misbehavior and impose adverse consequences on students (lower academic performance, increased possibility of dropping out). ***Dear Colleague Letter*, 68 IDELR 76 at fns. 5, 21, 22 (OSEP 2016)**.

## Why the Rules Exist

- Thus, the early cases and guidance identified the following major policy concerns with respect to discipline of students with disabilities:
  1. Long-term disciplinary removals (>10 consecutive school days) for behavior related to disability violate IDEA (and constitute impermissible disability-based discrimination); and
  2. Excessive short-term disciplinary removals jeopardize a student's right to a FAPE.

## Data on Discipline Disproportionality

- *"U.S. Government Accountability Office (GAO) and the U.S. Commission on Civil Rights (USCCR):* GAO released a report in March 2018 in which it analyzed CRDC discipline data from the 2013-14 school year. This report found that Black students, boys, and students with disabilities were disproportionately disciplined "regardless of the type of disciplinary action, level of school poverty, or type of public school attended."

*Request for Information Regarding the Nondiscriminatory Administration of School Discipline* (USDOE—June 8, 2021), at 86 Fed. Reg. 30,449.

## Data on Discipline Disproportionality

- "Despite representing only 13 percent of the student population, they represented 25 percent of all students who received one or more out-of-school suspensions and 15 percent of those who were expelled without educational services in 2017-18. Black students with disabilities represented 26 percent of expulsions without educational services although they accounted for only 18 percent of all students provided services under IDEA in 2017-18."

*Request for Information Regarding the Nondiscriminatory Administration of School Discipline* (USDOE—June 8, 2021), at 86 Fed. Reg. 30,449.

## Basic Rules for Disciplinary Removals Under IDEA and Section 504

1. Limitation doctrines apply only to disciplinary actions that remove students from the classroom or campus.
2. Identify *short-term* disciplinary removals.
3. Identify *long-term* disciplinary removals.
4. Apply the rules for each type of removal *separately*.
5. For short-term removals, schools start the year with 10 available removal days at their disposal without IDEA or §504 implications.

6. Although schools might be able to exceed the 10-day total, accumulated short-term removals beyond that total can *easily* constitute a "pattern of removals" that amounts to a change in placement and triggers the manifestation determination review (MDR) and notice requirement.
7. Before removals reach a total of 10 days, schools should have an IEP or §504 team meeting to proactively address behavior in the IEP or §504 Plan (e.g., FBA, BIP, services).
8. For long-term removals, schools must proceed to a MDR meeting as soon as possible, and before the removal reaches its 10th consecutive school day.
9. In a long-term discipline setting, student must receive a FAPE.

## July 2022 OSEP Discipline Guidance on IDEA

- ***Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions* (OCR—July 19, 2022)**

  A 55-page update to discipline guidance on IDEA.

  Nothing really new, since neither the law nor the regulations have changed since 2006.

  Really a compendium of OSEP's positions on discipline under IDEA, updated to the current era.

## July 2022 OSEP Discipline Guidance on IDEA

- ***Question A-3—Are there specific requirements for supporting the children with disabilities whose behavior impedes learning or that of others?***

  Yes. Guidance cites to the regulation requiring IEP teams to consider positive behavior interventions, strategies, and supports if the student exhibits behavior that impedes their learning or that of others. 34 C.F.R. §300.324(a)(2)(i).

## July 2022 OSEP Discipline Guidance on IDEA

- ***Question A-3—Are there specific requirements for supporting the children with disabilities whose behavior impedes learning or that of others?***

  Subsequent questions and answers indicate that an IEP team's responses could be changes to the IEP, assessment of behavior with parent consent (i.e., FBA).

  Note that this guidance reinforces *Letter to Christensen, 48 IDELR 161* (OSEP 2007), where OSEP stated the consent for evaluation requirement of IDEA applied to FBAs, contrary to the holding of *D.S. v. Trumbull BOE*, 77 IDELR 22 (2nd Cir. 2020).

## July 2022 OSEP Discipline Guidance on IDEA

- ***Question B-3—Is restraint or seclusion appropriate discipline?***

  The Guidance says no, although it may need to be used in emergency situations (imminent danger of serious physical harm).

  *Note*—Of course. physical restraint or seclusion are not behavioral interventions, but rather emergency measures. *See, e.g.*, 2016 OCR Dear Colleague Letter—*Restraint and Seclusion of Students with Disabilities*, 116 LRP 53792 (OCR 2016).

## July 2022 OSEP Discipline Guidance on IDEA

- ***Question C-1—When does a disciplinary removal constitute a change in placement?***

  1. Long-term removal—Removal to a disciplinary setting of more than 10 consecutive school days, or
  2. Accumulations of short-term removals of more than 10 total school days in a school year that represent a pattern of removals.

  This is the long-standing answer, which is codified in the IDEA regulation. *See* 34 C.F.R. §300.536.

## July 2022 OSEP Discipline Guidance on IDEA

- ***Question C-3—Can imposition of short-term removals be a reason to reconvene the IEP team?***

  Yes. "Frequent use of short-term disciplinary removals or informal removals of children with disabilities may indicate that the child's IEP does not appropriately address their behavioral needs, which may result in a denial of FAPE."

  *Note*—This is why we have Rule 7 in Jose's method (convene IEP or 504 team when short-term removals reach 4 or 5 school days in a school year).

## July 2022 OSEP Discipline Guidance on IDEA

- ***Question C-6—Are informal removals, such as shortened school days considered in calculating a change in placement?***

  Yes, if the IEP team "does not also consider other options such as additional or different services and supports that could enable a child to remain in school for the full school day."

  *Note*—Shortening a student's school day due to behavior is generally viewed as an inappropriate way to address the behavior, as it reduces instruction and structured program time.

## July 2022 OSEP Discipline Guidance on IDEA

- ***Questions E-1 & E-2—Special circumstance offenses (drugs, weapons, serious bodily injury)***
  1. Students that commit these offenses are still entitled to manifestation determination review (MDR),
  2. Can be removed up to 45 school days to interim alternative education setting (IAES) even if the behavior is related, and
  3. Are entitled to FAPE services during any period of removal.

## July 2022 OSEP Discipline Guidance on IDEA

- ***Questions E-4 & E-5—Risk Assessments and IDEA***

  Noting the modern use of risk/threat assessments in schools, the Guidance simply states that such assessments must be undertaken in a manner that respects the students' rights under the IDEA with respect to discipline.

  Moreover, the risk assessment should be coordinated with the IEP team, to consider whether behavioral supports or other safety measures should be included in the IEP.

## July 2022 OSEP Discipline Guidance on IDEA

- ***Question G-3—Who is qualified to conduct an FBA?***

  "Each LEA must ensure that all personnel necessary to carry out the purposes of IDEA are appropriately and adequately prepared, including personnel who conduct FBAs. 34 C.F.R. §300.207."

  *Note*—In reality, IDEA neither defines FBAs, nor states who are "properly trained professionals" that should conduct them. This is a matter of district practice and policy.

## July 2022 OSEP Discipline Guidance on IDEA

- ***Question G-3—Who is qualified to conduct an FBA?***

  The Appendix to the Guidance indicates that an FBA is "used to understand the function and purpose of a child's specific, interfering behavior and factors that contribute to the behavior's occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior." *See* p. 52.

- ***Questions I-1 to 1-11—Protection for students suspected to be eligible for special education?***

  IDEA regulations extend the discipline protections to students that are not in sp ed, but are suspected of being eligible, such as students who are in the process of being evaluated. *See* 34 C.F.R. §300.534.

  *Other situations*—(1) parent has expressed concerns *in writing* that the student might need sp ed, (2) parent has requested a sp ed evaluation, or (3) teachers have expressed concern about a student's behavior to the sp ed director or other supervisory staff.

- ***Questions I-1 to 1-11—Protection for students suspected to be eligible for special education?***

  Protections do not apply if the parent has refused an offer of a sp ed evaluation.

  The fact that the student is receiving RtI/MTSS assistance does not, in and of itself, raise a suspicion of disability. *See* Question I-5.

  If parent requests evaluation after the disciplinary action, the disciplinary action can continue if there was no basis to suspect disability, but the district must "expedite" the evaluation (i.e., shorter than normal timeline). *See* Question 1-6.

- ***Question J-5—Protection for IDEA students in virtual programs***

  All IDEA discipline protections apply to sp ed students in virtual programs. "Children receiving FAPE in a virtual setting are entitled to the same discipline procedures afforded to all children with disabilities."

## In-School Suspension

- In-school suspension (ISS) can be a removal that is not counted as a "true" short-term under the discipline rules.

  "It has been the Department's long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in §300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified in the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement." 71 Fed. Reg. 46715 (August 14, 2006); see also *Dear Colleague Letter*, 68 IDELR 76 fn. 29 (OSEP 2016).

## ISS

- In-school suspension (ISS) can be a removal that is not counted in the short-term removal limitation.

  Almost identically-worded commentary was included with the 1999 version of the IDEA regulations. *See* 64 Fed. Reg. 12619 (March 12, 1999). Thus, USDOE's 2006 comment that its position on ISS was "longstanding."

## ISS

- The July 2022 OSEP discipline guidance on IDEA reiterates this long-standing doctrine.

  The Q & A recites the 2006 commentary to the regulations, with the criteria to be met for an ISS removal to not "count" as a true short-term removal under the rules.

  *Q & A: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSEP July 19, 2022), at Question C-1, C-7, fn. 20.

## ISS

- ***Policy underpinning***—Use of ISS with participation in curriculum avoids the disconnection to education that concerns USDOE with home suspensions.

  In fact, court cases have held that short-term ISS with participation in education does not implicate substantive due process concerns. See, e.g. *Wise v. Pea Ridge Sch. Dist.*, 107 LRP 64097 (8th Cir. 1988); *Laney v. Farley*, 107 LRP 50017 (6th Cir. 2007)("An ISS could, but does not necessarily, deprive a student of educational opportunities in the same way that an out-of-school suspension would.")

## ISS

*What about under §504?*—OCR held that a school violated §504 when it failed to implement the §504 plan of a student with ADHD while assigned to ISS. ***Norwalk (VA) Pub. Schs., 46 IDELR 21 (OCR 2005).*** Indeed, the ISS teacher was unaware the student even had a §504 plan. See also *Westerville (OH) City Dist.*, 112 LRP 37564 (OCR 2012)(failure to provide any services in ISS to student with ADHD).

*Note*—OCR has generally applied an analysis for ISS removals consistent with that under IDEA, going back nearly 30 years. See e.g., *Ocean Springs (MS) Sch. Dist.*, 120 LRP 20273 (OCR 2020); *Rutherford (TN) CS*, 62 IDELR 271 (OCR 2013); *Newton CSD (GA)*, 116 LRP 1171 (OCR 2015); *Chester Cty. (TN) Sch. Dist*, 17 IDELR 301 (OCR 1990); *Greenville Cty. (SC) Sch. Dist.*, 17 IDELR 1120 (OCR 1991).

## ISS

Curiously, however, there is no mention of ISS in the 2022 OCR discipline guidance under §504.

***Does this mean there has been a change in OCR policy on ISS?*** Unlikely. Otherwise, the guidance would have indicated so. Moreover, using ISS instead of home suspensions aligns with OCR policy priorities on continuity of educational services and limits on out-of-school suspensions.

Also, following a rule of IDEA is generally viewed as appropriate under §504 as well.

## ISS

- The OSEP IDEA Q & A also adds the following:

"It is important to recognize that even if all three of these factors are met, an in-school suspension still removes the child from the educational placement determined to be appropriate by the child's placement team, and additional actions may need to be taken by the child's IEP Team. For example, the **repeated use of in-school suspension may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address their behavioral needs.** Therefore, the child's IEP Team should consider whether additional positive behavioral interventions and supports or other strategies would assist the child in the current placement."

*Q & A: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSEP July 19, 2022), at Question C-7.

## ISS

- Thus, schools using ISS for §504 students must heed the warning that repeated need to remove the student to ISS may be indicative that either:

1. The 504 Plan might not be meeting the student's behavioral needs, and/or
2. The 504 Plan might not be implemented properly, and/or
3. The student may need other or additional behavioral supports, interventions, or other strategies.

*Q & A: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSEP July 19, 2022), at Question C-7.

## ISS

- Given that several factors are involved, the guidance also states that whether an ISS counts as a day of suspension "depends on the unique circumstances of each case."

  But, there has been no follow-up guidance on how the individual ISS factors should be interpreted or applied…

## ISS

- **Factors in ISS guidance**:

  Opportunity to continue to:

  1. appropriately participate in the general curriculum;
  2. receive IEP services; and
  3. participate with nondisabled students to the same extent as in current placement.

## ISS

- **To what degree must the IEP services be continued in the ISS setting for this policy to apply?**

  Must the IEP services be duplicated in ISS? That is not required even if the student is placed long-term in an IAES. "The LEA is not required to provide all services in the child's IEP when a child has been removed to an IAES." *Q & A on Discipline Procedures*, 52 IDELR 231, at Question C-3 (OSERS 2009).

  The USDOE commentary to the 2006 regulations addressed this point several times:

## ISS

"We caution that we do not interpret 'participate' to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom." 71 Fed. Reg. 46716.

"We read the Act of modifying the concept of FAPE in circumstances where a child is removed from his or her current placement for disciplinary reasons." Id.

"An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services…" Id.

## ISS

- Caselaw (the little there is) has tended to analyze the ISS services requirement in a broad generalized fashion.

  Student who punched teacher and was placed in ISS for a few days accessed his coursework and made good grades. The ISS days did not count as short-term removals under §300.530. ***Jefferson Cty. BOE*, 75 IDELR 178 (SEA Alabama 2019)** (noting that Alabama regulations incorporated the USDOE commentary on ISS).

## ISS

Without detail, an Ohio HO found that a child "continued his services and education during any in-school suspension." ***In re: Student with a Disability*, 115 LRP 14973 (SEA Ohio 2015).** Thus, he determined that the ISS was not a removal from his educational placement.

Student with ED, SLD, and OHI was placed in an ISS. Setting was staffed by a paraprofessional, and he received assignments from his teachers, so the services in ISS were appropriate. ***China Spring Ind. Sch. Dist.*, 110 LRP 36343 (SEA Texas 2010)**.

## ISS

Middle-school student with SLDs was placed in ISS where he "was in school, attending classes in the ISS room" and "received services." The court agreed with the HO that the time in ISS was not a "suspension" or a failure to implement the IEP. ***Garmany v. District of Columbia*, 61 IDELR 15 (D.D.C. 2013).**

## ISS

Student with unspecified disability was placed in an ISS for portions of days, and "staff reported that in ISS, the Student continued to receive special education and related services." ***In re Student with a Disability.*, 75 IDELR 206 (SEA Minnesota 2019).** Although the HO did not specify the services, the student apparently had an opportunity to "catch up on coursework" while in ISS. Taking the time in ISS out of the equation, there were fewer than 10 days of removal, so MDR was not required.

## ISS

**Author's position on ISS services and §504 or IDEA:**

- Exact duplication of IEP services likely not required
- Related services likely required per §504 Plan or IEP
- 504 Plan/IEP accommodations must be implemented in ISS
- School must have method to get assigned work and needed additional services to the ISS setting without delay
- *Key indicator*: whether student is able to complete the assigned daily work in ISS

## ISS

- What is the precise meaning of the **LRE** portion of the ISS guidance?

  One interpretation is that the LRE-related ISS guidance is intended to prevent LEAs from creating segregated ISS settings for students with disabilities (or from using other sp ed settings as informal ISS units)

  Another interpretation could be that a school cannot take advantage of the ISS guidance if the ISS setting does not have the exact proportion of disabled and nondisabled students

## ISS

- What is the precise meaning of the LRE portion of the ISS guidance?

  There is no caselaw on this point, but the first interpretation seems to make most sense, as USDOE would undoubtedly oppose segregated ISS placements.

  *Author's position*—Use of regular ISS setting likely satisfies the LRE component of the ISS guidance

- **Overall Practical Thoughts on Use of ISS?**

  ISS can be a valuable alternative to potentially ineffective and definitely limited home suspensions.

  Schools wishing to take advantage of guidance must have system in place to get assignments and needed additional services to the ISS setting quickly.

  System must ensure ISS services decision is individualized.

  Documenting provision of §504 and IEP accommodations and services in ISS important in case of disputes over tally of short-term removals (e.g., accommodated work samples).

  Repeated or excessive use of ISS can signal a problem with the 504 Plan or IEP, its implementation, or a need to revise behavior interventions or supports.

## July 2022 OCR Discipline Guidance

- ***Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973* (OCR—July 19, 2022)**

  A 36-page update to discipline guidance on §504, but applicable to IDEA students as well.

  As with other USDOE guidance documents, it states that it is "nonbinding" and does not impose new legal requirements.

  Really a compendium of OCR's positions on discipline under §504, updated to the current era.

## July 2022 OCR Discipline Guidance

- ***FAPE for Students with Disability-Based Behavior* (pgs. 4-13)**

  "For students with *disability-based* behavior that interferes with their own or others' ability to learn, their Section 504 plan may identify individualized behavioral supports for responding to the behavior and supporting the student's behavioral needs, explain how the school will implement the supports, and describe how the team can assess whether the supports are effective."

  See p. 5.

## July 2022 OCR Discipline Guidance

- ***FAPE for Students with Disability-Based Behavior***

  *Commentary*—Note that OCR apparently not only expects 504 Plans to contain **behavioral supports** for students with disability-related behavior, it wants the committee to state how the team can "assess whether the supports are effective."

  This is akin to the IDEA requirement that the IEPs contain measures to determine if the student is progressing on the IEP goals.

  *Ideas*—Could be based on number of discipline referrals, teacher reports, removal days…

## July 2022 OCR Discipline Guidance

- ***FAPE for Students with Disability-Based Behavior***

  OCR notes that behavioral issues can trigger **child-find** under §504, and indicate the need for a §504 evaluation, and that staff should be trained on this point. (See p. 6).

  *Factors*—Records received from prior schools, staff observations, info provided by parents, disciplinary actions, use of restraints, use of long-term removal…

## July 2022 OCR Discipline Guidance

- ***FAPE for Students with Disability-Based Behavior***

  It also notes that even after eligibility, a student's mental health or home problems could deteriorate, resulting in additional behavioral problems that may require the §504 committee to meet again to review more data and revise the 504 Plan (i.e., reevaluation). (See p. 7).

  *Note*—Failure of a committee to respond to worsening behavior problems within a reasonable time can lead to OCR complaints and findings of denial of FAPE (reasonableness of response time depends on severity of problems)

## July 2022 OCR Discipline Guidance

- ***FAPE for Students with Disability-Based Behavior***

  *Note on Different-Language Parents*—OCR states that parents that do not speak English need to receive notices in the language they understand, and schools should ensure that they "participate in their child's Section 504 meetings through the use of qualified interpreters with knowledge of any specialized terms or concepts." (See p. 8).

  Probably already a school practice, but OCR now calls it a "responsibility."

## July 2022 OCR Discipline Guidance

- ***FAPE for Students with Disability-Based Behavior***

  On students that are passing their classes, OCR states:

  > "The fact that a student is doing well academically does not justify the school denying or delaying an evaluation when the district has reason to believe the student has a disability, including if the student has disability-based behavior resulting in removal from class or other discipline (*e.g.*, afterschool detentions)." (*See* p. 9).

## July 2022 OCR Discipline Guidance

- ***FAPE for Students with Disability-Based Behavior***

  *Commentary*—This position is consistent with the understanding that a student's impairments may impact major life activities other than learning/academics.

  For example, a student's ADHD may manifest in inappropriate behaviors indicating that the condition is impacting concentration, thinking, or brain function, even if the student is performing well academically.

## July 2022 OCR Discipline Guidance

- ***FAPE for Students with Disability-Based Behavior***

  *Commentary*—OCR states that 504 committees might include "psychologists" and "behavior specialists." (*See* p. 9).

  "Observations of the student by psychologists or other professionals while the student is in class or during other activities can be useful." (*See* p. 9).

  For most schools short on staff and other resources, the availability of such experts for §504 meetings is but a fleeting (yet pleasant) dream or fantasy…

- ***FAPE for Students with Disability-Based Behavior***

***FBAs under §504?***—OCR states the following:

"If there is reason to believe the student's behavior may be based on the student's disability, one purpose of the evaluation is an individualized assessment of the behavior, and the Section 504 team may determine that an **FBA** is appropriate for that student. If the school does not assess a student's challenging behaviors during the evaluation process, including disability-based behaviors that pose a threat to the safety of the student or others, the Section 504 team would lack the information needed to design a program that will meet the student's individual educational needs, and the student could be denied FAPE." (*See* p. 10).

- ***FAPE for Students with Disability-Based Behavior***

*Commentary*—OCR concedes that FBAs are "not specifically discussed in Section 504's regulations," but sees FBA data as part of an appropriate §504 evaluation for student behavior that is "based on the student's disability." (*See* pgs. 9-10).

"Through a behavioral assessment, the Section 504 team can learn about the nature of the behavior, the function the behavior serves for the student, factors indicating when the behavior might occur, and the consequences of the behavior." (*See* p. 10).

- ***FAPE for Students with Disability-Based Behavior***

***Potentially Relevant FBA Data:***

- Type of behavior
- Severity of behavior
- Frequency of behavior
- Location and time of day
- Interventions already attempted (and results)
- Potential antecedents for behavior
- Potential function of behavior
- Teacher observation
- Parent input

- ***FAPE for Students with Disability-Based Behavior***

***OCR's Position on Addressing Disability-Related Behavior***

"Where a student's evaluation shows that challenging behavior *is caused by or directly and substantially related to the student's disability or disabilities*, the placement decision by the Section 504 team must identify individualized services, such as behavioral supports, to meet the student's educational needs." (*See* p. 10)(emphasis added).

*Commentary*—Note the use of the language from the manifestation determination review (MDR) standard of IDEA, as emphasized above. *See* 34 C.F.R. §300.530(e).

- ***FAPE for Students with Disability-Based Behavior***

***OCR's Position on Addressing Disability-Related Behavior***

*Commentary*—Thus, **OCR takes the position that only when behavior is *related* to the student's disability does the duty to address the behavior with services and supports arise.**

OCR acknowledges the contrast with IDEA, where IEP teams must consider positive behavioral interventions, supports, and strategies when a child's behavior "impedes their learning or the learning of others," regardless of whether the behavior is related to disability or not. *See* 34 C.F.R. §300.324(a)(2)(i), cited in footnote 60.

In fact, notice that this entire section II of the guidance is entitled "Providing FAPE for Students with *Disability-Related* Behavior," and that this point is reiterated multiple times.

- ***FAPE for Students with Disability-Based Behavior***

***OCR's Position on Addressing Disability-Related Behavior***

*Commentary*—Ostensibly, therefore, a §504 committee would not have to address behavior not related to disability as part of the §504 Plan, and instead proceed with regular discipline.

This is a new perspective and approach from OCR, and would appear to require teams faced with a student's problem behaviors to make a preliminary determination of whether the behaviors are related to disability (using the high IDEA standard, at that).

If the team finds the behaviors not to be related to disability, there would be no duty to address the behavior with §504 Plan services or interventions? This is an unusual position…

- ***FAPE for Students with Disability-Based Behavior***

***Behavior Supports, Including Behavioral Intervention Plans***

"To support a student's needs, Section 504 teams can consider using information obtained through a behavioral assessment to proactively develop and implement a behavioral intervention plan (BIP) and incorporate the BIP into the student's Section 504 plan." (*See* p. 10).

*Note*—This is a longstanding OCR position. See, e.g., *Elk Grove (CA) Unified Sch. Dist.*, 25 IDELR 759 (OCR 1996)(stating that where a student's behavior manifests itself in repeated or serious misconduct such that modifying the child's negative behavior becomes a significant component of what actually takes place in the child's educational program, a district is required to develop an individual behavioral management plan).

- ***FAPE for Students with Disability-Based Behavior***

***Behavior Supports, Including Behavioral Intervention Plans***

Cited examples of behavioral supports (*see* p. 10):

- Counseling
- School-based mental health services
- Physical activity
- "Cool down" protocol with counselor or "Behavior Coach"

OCR states that the "BIP should include information about: acceptable replacement behaviors, who will teach the student to use those behaviors and how, what staff should do to support the student if the behavior of concern recurs, and how the Section 504 team will monitor and measure the BIP's implementation and effectiveness." (*See* p. 11).

- ***FAPE for Students with Disability-Based Behavior***

***Behavior Supports, Including Behavioral Intervention Plans***

*Commentary*—Again note how OCR reiterates that the BIP should state "how the Section 504 team will monitor and measure the BIP's implementation and effectiveness."

This is not even a requirement of the IDEA regulations, as IEPs must only state how progress will be measured on the annual goals. *See* 34 C.F.R. §300.320(a)(3)(i).

Again, the Plan could state that effectiveness of BIP will be monitored by review of discipline referrals, removals, teacher observation, teacher documentation…

- ***FAPE for Students with Disability-Based Behavior***

***Behavior Supports, Including Behavioral Intervention Plans***

Informal behavior strategies often prove insufficient to address behavior problems, as the case below shows:

In a complaint investigation, the school explained to OCR that it implemented informal behavioral strategies for the student, such as letting him take walks. However, without an actual plan in place, OCR determined that the interventions were inconsistent and ineffective. This was evident from the student's increasing disciplinary infractions, including several suspensions. ***Lincoln (NC) Charter Sch.*, 63 IDELR 83 (OCR 2013).**

- ***FAPE for Students with Disability-Based Behavior***

If the BIP is not working, "the school may reconvene the Section 504 team to determine if additional or different services are necessary." (See p. 11).

*Commentary*—In a footnote, OCR states that "a full reevaluation is not required every time an adjustment in placement is made."

*Procedure Question*—What is an "adjustment," as opposed to a "change in placement"? This is not defined in the Appendix. Why is not any revision to the 504 Plan a change in placement? Could a committee change a BIP without looking at various sources of data? Is no meeting required? OCR offers no guidance on distinguishing what is an "adjustment" and what exactly is and is not necessary to accomplish one. (See fn. 65).

- ***FAPE for Students with Disability-Based Behavior***

***Behavior Supports, Including Behavioral Intervention Plans***

**Shortening of the school day** in response to misbehavior cannot take place without exhausting behavioral supports:

"It would violate Section 504 to respond to a student's disability- based behavior by shortening the length of the student's school day, thus reducing the minutes or hours the student is in the educational environment, without reconvening the Section 504 team to determine if additional or different services are needed, or if an additional evaluation is necessary." (See p. 12).

*Question*—How does a school ensure equal access to the full curriculum if a student is on a shortened day?.. Seems best to avoid this option, or refer to sp ed at this point.

- ***FAPE for Students with Disability-Based Behavior***

  ***Behavior Supports, Including Behavioral Intervention Plans***

  **Shortening of the school day**

  *Commentary*—It is curious that OCR would not state that if the §504 committee shortens the school day, it must address how the student will nevertheless have an equal opportunity to access the full curriculum, as with credit recovery programs, summer programs, online instruction, etc…

- ***FAPE for Students with Disability-Based Behavior***

  ***FAPE Requirement and Student Discipline***

  **MDR Requirement**—OCR restates the requirement for an MDR reevaluation prior to disciplinary changes in placement (i.e., removals of >10 consecutive schools days or excessive accumulations of short-term removals constituting a "pattern of removals." (See p. 14).

  Since a removal would become a change in placement after its 10th consecutive day, "schools may need to expedite the manifestation determination to avoid violating Section 504 FAPE requirements." (See p. 15).

  *Practical Note*—Schools should start scheduling the MDR meeting as soon as possible after the campus recommends a disciplinary change in placement.

- ***FAPE for Students with Disability-Based Behavior***

  ***FAPE Requirement and Student Discipline***

  Failure to conduct an MDR prior to the 10th day of a long-term removal is a violation of §504, as the MDR must take place prior to the disciplinary action becoming a change in placement (i.e., prior to its 10th consecutive day).

  See, e.g., ***Polk County (FL) Pub. Schs.*, 122 LRP 9434 (OCR 2022)**(school violated §504 when student was removed 16 consecutive days for a vape offense without an MDR, and had to enter into a voluntary resolution agreement with OCR. School thought a tobacco vape was a drug offense, but to skip the MDR, a meeting would have had to be held to determine if there was current use anyway).

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

Convening an MDR meeting after a disciplinary change in placement has been imposed will not cure the violation. See, e.g., ***Chimacum (WA) Sch. Dist. No. 49,56* IDELR 275 (OCR 2011)**(school violated §504 when it conducted an MDR one week after imposing a total of 16 suspension days).

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Pattern-of-removals disciplinary changes of placement***—When do multiple short-term removals (e.g., suspensions) "become" a pattern-of-removal change of placement?

Ostensibly, the guidance says it applies an analysis that is consistent with that under IDEA. *See* fn. 86 and 34 C.F.R. §300.536(a)(2), which applies the following factors:

- Length of each removal
- Proximity of removals to one another
- Total removal days
- Similarity of behaviors leading to removals (See fn. 87)

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Pattern-of-removals disciplinary changes of placement***—

But, lately, it appears that OCR might consider *any* additional suspension once the student has already had 10 suspension days in one year to automatically constitute a pattern-of-removal change of placement.

See, e.g., ***Tombstone (AZ) Unified Sch. Dist.*, 80 IDELR 138 (OCR 2021)**(OCR states that "On March 30, 2021, the Student had his 11th day of out-of-school suspension and his placement was changed," with no application of the pattern-of-removal factors.); ***Modesto (CA) City Sch. Dist.*, 118 LRP 38143 (OCR 2018)**(MDR required past 10 days of suspensions, without "pattern" analysis).

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Pattern-of-removals disciplinary changes of placement—***

Note the difference in an older case, where OCR carefully analyzed a series of suspensions, and looked at each of their lengths, and how far in time they were from one another. ***Nurview (CA) Union Sch. Dist.*, 41 IDELR 158 (OCR 2003)**(applying the pattern factors analysis, finding no pattern where some suspensions were short, and a longer one happened a long time after the last).

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Pattern-of-removals disciplinary changes of placement—***

Moreover, once there have been a total of 10 suspension days, OCR appears to require the team to meet to make a determination as to whether any additional short-term removals would create a pattern of removals, based on the factors. See ***Sacramento (CA) City Unified Sch. Dist.*, 118 LRP 38123 (OCR 2018)**("Here, there was no determination as to whether the disciplinary actions constituted a pattern of exclusion from the School,….").

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

See also, ***Blackstone Valley Reg'l Vocational Technical School*, 122 LRP 3419 (SEA Massachussetts 2022)**(State hearing officer determined that "any additional day of removal after a cumulative total of 10 days in a school year is a change of placement.")

In addition, the case makes the point that if a student commits a long-term removal offense, but the school has already imposed some short-term suspensions, the school will not have a full 10 school days to remove the student prior to the MDR.

- ***FAPE for Students with Disability-Based Behavior***

  ***FAPE Requirement and Student Discipline***

  *Practical Guidance*—If a §504 student commits a long-term removal offense and the campus recommends a long-term removal, the school must take into account how many short-term removal days have been imposed in that school year.

  For example, if the student has had 4 suspension days, the school has only 6 school days to work with to convene the §504 committee MDR meeting

  *Additional guidance*—It seems best to ensure that the school does not exceed a total of 10 "true" short-term removal days in a school year, to be cautious.

- ***FAPE for Students with Disability-Based Behavior***

  ***FAPE Requirement and Student Discipline***

  ***Extraordinary Safety Situations***—

  "Section 504 FAPE requirements do not interfere with a school's ability to address those extraordinary situations in which a student's behavior, including disability-based behavior, is an immediate threat to their own or others' safety. For example, nothing in Section 504's FAPE requirements prohibits schools from contacting mental health crisis intervention specialists or law enforcement under such extraordinary circumstances, even if the result is that those professionals remove the student from school." (*See* p. 16).

- ***FAPE for Students with Disability-Based Behavior***

  ***FAPE Requirement and Student Discipline***

  ***Extraordinary Safety Situations***—

  *Commentary*—While OCR correctly states that schools have a right to report student's criminal offenses to law enforcement, referrals to mental health authorities are best made in coordination with parents, and with their consent.

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Additional Guidance on MDRs***

Examples of MDR-relevant data (see p. 17):

- Previous evaluation data
- Section 504 Plan
- Plan implementation data (to ensure fidelity)
- Outside evaluation data
- Parent input
- Academic and discipline records
- Teacher notes, observation, and data

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Additional Guidance on MDRs***

Second prong of MDR (i.e., was plan implemented properly?):

> "In reviewing information about the implementation of the student's Section 504 plan as part of this evaluation, the team may find that the school failed to provide behavioral supports and services required by the plan to address the behavior underlying the proposed discipline. In this instance, the behavior would be based on disability because the school failed to meet the student's behavioral needs as required by the Section 504 plan." (See p. 17).

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Additional Guidance on MDRs***

Of course, if either the behavior is found to be causally, substantially, or directly related to disability or to an improperly implemented 504 Plan, "the school is prohibited from carrying out any discipline that would exclude the student on the basis of disability." (See p. 18).

Such a finding may mean the student needs additional or different behavior supports; "accordingly, the Section 504 team must continue the evaluation" to determine if the 504 Plan is appropriate.

- ***FAPE for Students with Disability-Based Behavior***

  ***FAPE Requirement and Student Discipline***

  ***Additional Guidance on MDRs***

  *Commentary*—OCR notes that the impact of the student's behavior on other students "is a relevant factor," and may mean that a change in educational setting is needed to better meet the student's behavioral needs. (*See* p. 19).

  "For a student whose disability-based behavior cannot be addressed in less restrictive settings even with supplementary aids and services, placement in a more restrictive setting could be appropriate until the student's needs can be met in a less restrictive setting." (*See* p. 20).

- ***FAPE for Students with Disability-Based Behavior***

  ***FAPE Requirement and Student Discipline***

  ***Additional Guidance on MDRs***

  "For instance, the Section 504 team may determine that, based on the student's needs, the appropriate placement for a particular student with a disability who has autism is in a separate classroom with staff trained specifically to support students with autism, located in the same school, with individualized behavioral supports and services to enable the student to learn safely and productively in that classroom." (*See* p. 20).

- ***FAPE for Students with Disability-Based Behavior***

  ***FAPE Requirement and Student Discipline***

  ***Additional Guidance on MDRs***

  *Question*—But what "more restrictive" educational setting exists for §504-only students? Sp ed settings would not be available to non-IDEA students due to funding restrictions and IDEA evaluation and consent requirements. Not sure what OCR would be referring to with respect to "separate classrooms" with specially trained staff for §504-only students….

  In a footnote, OCR cites the IDEA requirement for a "continuum of placements," but such requirement does not exist in the §504 regulations. (*See* fn. 109).

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Additional Guidance on MDRs***

Of course, OCR notes that in cases of serious behavior problems related to disability, "the Section 504 team may also determine that an evaluation to determine the student's eligibility under IDEA is needed." (*See* fn. 110).

*Commentary*—One wonders how much of the Guidance is really thinking of IDEA students and their underlying §504 rights. Remember that OCR deals with many complaints from IDEA students, as opposed to §504-only students.

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirement and Student Discipline***

***Additional Guidance on MDRs***

*If behavior is not related*—Per bedrock doctrine, if the behavior is found not to be related to disability, "Section 504 permits the school to discipline the student as it proposed as long as it does so in the same manner that it disciplines similarly situated students without disabilities,…." (*See* p. 21).

*Note*—If other students placed in a disciplinary program receive services, §504 students are equally entitled to receive services. But, if expelled students do not receive services, then the §504 student would receive no services as well.

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirements and Risk/Threat Assessments***

OCR states that staff conducting threat assessments should be aware of a student's disabilities, and should "coordinate with the student's §504 team," as it might add behavioral supports that may "mitigate or eliminate the threat or risk." (*See* p. 22).

"Even if a student is removed from school following a threat or risk assessment, the school must ensure that the student continues to receive the services required for FAPE and that the student is afforded any applicable procedural rights, including, as needed, by notifying and consulting the student's Section 504 team."

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirements and Risk/Threat Assessments***

*Commentary*—OCR appears to say that a risk assessment could result in the student's removal from school, as long as FAPE continued to be provided and the student's §504 team is notified, and there is no mention of an MDR requirement in these cases.

Likely, this approach is responsive to current climate of school violence, as in situations where a risk assessment results in significant concerns that a particular student could cause mass harm in a school setting.

Is this a modern §504 exception to the MDR requirement?..

- ***FAPE for Students with Disability-Based Behavior***

***FAPE Requirements and Risk/Threat Assessments***

*Commentary*—It should be noted, however, that in another part of the Guidance OCR states that risk/threat assessment staff should be trained to "distinguish incidents that are best resolved by involving a crisis intervention professional and providing other reasonable modifications to help the student de-escalate from incidents that otherwise could pose a serious and immediate safety threat requiring removal from school." (*See* p. 26)

Thus, schools should be careful in removing students pursuant to findings in a threat/risk assessment, and instead think of safety measures that could be put in place to address the potential safety risk of the student's attendance at school.

- ***FAPE for Students with Disability-Based Behavior***

***"Informal" Disciplinary Removals***

OCR knows that sometimes school campuses impose "informal" disciplinary removals that are not documented or counted for purposes of the schools' disciplinary procedures, and may be simply called "excused absences." (*See* p. 22-23).

Thus, it reiterates that all these "informal" removals "are subject to the same Section 504 requirements as formal disciplinary removals."

OCR's position is that §504 requires "accurate records" for schools to determine its obligations under the discipline rules, and to ensure parents' access to educational records. (See p. 23). *See also*, 34 C.F.R. §100.6(b) which requires LEAs to keep records necessary to ascertain legal compliance.

- ***FAPE for Students with Disability-Based Behavior***

***Informal Disciplinary Removals***

Examples of "informal" removals (see p. 23):

- Requiring a parent to pick up their child early
- Shortening the student's day without 504 team action
- Requiring student to be in virtual instruction
- Forcing a parent to transfer child to another school
- Requiring parent to attend class with the student

- ***FAPE for Students with Disability-Based Behavior***

***Limited MDR Exception for Current Drug/Alcohol Use***

If student commits a drug or alcohol offense at school and is a "current" user, student forfeits right to MDR or 504 due process hearing, even if addicted.

Rule differs from the special offenses provision of IDEA, and originates from a provision in the ADA (29 U.S.C. §705(20)(C)(iv)); see p. 24.

Student is treated as a similarly situated non-disabled student (with only a right to local due process per local policy or State law). See *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, 67 IDELR 189 (OCR 2015).

- ***FAPE for Students with Disability-Based Behavior***

***Limited MDR Exception for Current Drug/Alcohol Use***

In addition, such a student would also forfeit their right to a §504 due process hearing with respect to the disciplinary action:

"[T]he due process procedures discussed above do not apply to disciplinary actions related to current illegal drug or alcohol use." (See p. 24).

- ***FAPE for Students with Disability-Based Behavior***

  ***Limited MDR Exception for Current Drug/Alcohol Use***

  *Commentary*—What substantiates that a student is currently engaging in the use of drugs or alcohol?

  There must be evidence of use or distribution (distribution is considered within the definition of "use") "recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem." *OCR Senior Staff Memorandum*, 19 IDELR 859 (OCR 1992).

  Is *possession* of drugs or alcohol alone enough?

  Without some evidence indicating use or distribution, mere possession might not trigger ADA exception. *OCR Staff Memorandum*, 17 IDELR 609 (OCR 1991).

- ***FAPE for Students with Disability-Based Behavior***

  ***Limited MDR Exception for Current Drug/Alcohol Use***

  *Question*—What if there is no evidence of "current" use, such as in a situation of mere possession of a cannabis vape pen?

  Conservatively, school should proceed with §504 MDR meeting to determine if there is a substantial link between behavior and disability or an inappropriately implemented §504 plan.

- ***FAPE for Students with Disability-Based Behavior***

  ***Additional <u>Eligibility</u> Exception for Current <u>Drug</u> Use***

  Section 504 "excludes from the definition of a student with a disability, and from Section 504 protection, any student currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use." ***Section 504 Q & A*, 121 LRP 5510 (OCR January 10, 2020)**.

  Thus, schools could go further with students currently using drugs and exclude them from §504 eligibility and protections as long as they remain current users of drugs.

- ***Reasonable Modifications to Disciplinary Policies***

  "Reasonable modifications can also include not applying a policy to students for behaviors that are manifestations of their disability or disabilities." (*See* p. 25).

  As an example, OCR states that a school could modify a policy of assigning students to sit on the bus in alphabetical order and stay in their assigned seats for a student who has disability-related difficulties staying in their seat.

  > "In order to support the student in remaining safely seated and avoid rule violations that could result in exclusion from the bus or other consequences, the school could modify its policy of seating students in alphabetical order by assigning the student to sit in the front or by a bus aide…."

- ***Reasonable Modifications to Disciplinary Policies***

  *Commentary*—Making modifications to disciplinary policies appears to be couched in discretionary terms (i.e., "may") in the OCR guidance. To date, OCR decisions have not found districts in violation of §504 for deciding not to make modifications to disciplinary policies, but this may change after this Guidance.

- ***Reasonable Modifications to Disciplinary Policies***

  OCR provides this example in the Guidance:

  > The yearbook club has a no-interruption rule during meetings. Students who interrupt must miss the following meeting. OCR suggests that this rule should be modified for a student with ADHD who frequently interrupts others.
  >
  > OCR states that if the parent filed a complaint, it would likely find that the school failed to consider a modification to the rule, including behavioral interventions that could assist the student in complying with the rule. (*See* p. 25-26).

- ***Reasonable Modifications to Disciplinary Policies***

  OCR states that another example of modification of policies could prevent disability discrimination in interactions between §504 students and **school-based law enforcement personnel**:

  > "Examples of modifications that may be reasonable, depending on the circumstances, include: using de-escalation strategies; removing distractions and providing time and space to calm down the situation when the child poses no significant safety threat; avoiding or minimizing touching a child whose disability makes them sensitive to touch; and waiting for a parent to arrive."

  This is an extension of OCR's doctrine of modifying a school policy that may discriminate or harm a §504 student (e.g., no food in class for child with diabetes that needs frequent snacks).

- ***Reasonable Modifications to Disciplinary Policies***

  Certainly, it is in the interests of both students and schools for school resource officers (SROs) to not unnecessarily escalate a disciplinary incident involving a student with disabilities.

  Following this Guidance will require the following:

  - Administrators must be trained to minimize SRO involvement in disciplinary incidents that do not involve a crime;
  - Administrators must inform SROs of a student's disabilities,
  - Administrators must ensure all BIP strategies are implemented, even if an SRO is involved,
  - SROs must be trained to use de-escalation strategies with students with disabilities.

- ***Reasonable Modifications to Disciplinary Policies***

  See, e.g., ***Ysleta Ind. Sch. Dist.*, Docket No. 134-SE-0122 (TEA March 2022)**, a sp ed case where a high school student with ADHD and ODD was involved in an altercation with another student and security officers and an SRO became involved.

  After the student shoved an officer, he was handcuffed, and later, when he continued to threaten the officers and resisted arrest, he was tased twice and charged with felonies.

  The HO held that although the BIP was initially implemented, it should have been re-implemented when the SRO was present, to allow the student his cool-down opportunity.

  She held the behavior was related to a failure to implement the BIP.

- ***Reasonable Modifications to Disciplinary Policies***

  OCR comments on the need to train SROs on bias, developmentally and age-appropriate responses to behavior, responses to disability-based behavior, and working collaboratively with school administrators (see p. 26):

  *Commentary*—This type of administrator-SRO collaboration is easier in schools that formally employ the SROs, but more complicated when the SROs are employees of local police departments and work with the school based on an MOU arrangement.

  But, it is clear from caselaw that improper escalation by SROs with a §504 or IDEA student can easily create serious legal risks for the school district…

- ***Reasonable Modifications to Disciplinary Policies***

  *Commentary*—This aspect of the Guidance may turn out to have the most far-reaching impact.

  OCR is essentially saying that even if you apply a school rule or policy equally to a §504 student, imposition of even a short-term disciplinary removal may run afoul of §504, as OCR may simply determine that the district should have modified the rule as it applies to the §504 student.

  What disciplinary policies, in OCR's opinion, should be subject to accommodation? The entire student code of conduct? And what is "reasonable" in the context of a modification of a rule? We really do not know the answers to these questions…

- ***General Prohibition of Disability Discrimination in Student Discipline***

  OCR states that disability discrimination can take place with respect to discipline in two ways:

  1. School subjecting the §504 student to **"unnecessary different treatment"** based on disability, or
  2. School's criteria, policies, practices, or procedures have **"unjustified discriminatory effects"** based on disability (see p. 27)

  Of course, OCR acknowledges that with respect to disability-related behavior, different treatment is required (e.g., MDR).

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Unnecessary Different Treatment**

  What OCR is referring to is schools disciplining students with disabilities more severely than non-disabled students for the same offense. (See p. 28).

  On these issues, OCR uses the following analysis:

  1. Was the student treated differently?
  2. Did the school offer a legitimate non-discriminatory reason for the different treatment? And
  3. Was the school's stated reason a mere pretext for discrimination?

- ***General Prohibition of Disability Discrimination in Student Discipline***

  OCR notes that it could look at circumstantial **statistical evidence**, "such as if students with disabilities are underrepresented in the student population, but overrepresented among students disciplined for particular conduct." (See p. 28).

  What would be a **legitimate nondiscriminatory reason** for disciplining a §504 student more harshly than a nondisabled student for the same offense?

  OCR notes that a valid example could be if the §504 student had committed the violation previously and the code of conduct allowed for more serious disciplinary action for repeat offenses. (See p. 29).

- ***General Prohibition of Disability Discrimination in Student Discipline***

  OCR gives a scenario example of unlawful different treatment:

  Student with a mental disability gets into a fight with a nondisabled peer.

  Teacher refers the §504 student to the Principal for discipline, while nondisabled student is only given a warning.

  Neither student has any prior disciplinary history.

  Teacher, however, maintains that the §504 student started the fight.

- ***General Prohibition of Disability Discrimination in Student Discipline***

  OCR gives a scenario example of unlawful different treatment:

  If the teacher is correct, OCR would find no violation.

  If the nondisabled student admitted to the teacher it was him that started the fight, then OCR would find the offered reason was a mere pretext for discrimination.

  Moreover, if a classroom aide told OCR that the teacher told him that she always refers students with mental disabilities to the Principal for discipline because she assumed they posed a risk, that would be additional circumstantial evidence of discrimination.

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Discriminatory Effect of Discipline Criteria, Policies, Practices, or Procedures**

  "Disciplinary policies and procedures that result in unjustified discriminatory effects based on a disability, even if unintentionally, violate Section 504." (*See* p. 30).

  *Note*—OCR cites a regulation that prohibits districts from using policies or practices that have the effect of discriminating on the basis of disability. 34 C.F.R. §104.4(b)(4).

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Discriminatory Effect of Discipline Criteria, Policies, Practices, or Procedures**

  OCR points out that even if a policy "is neutral on its face, it may still have the discriminatory effect…." (*See* p. 31).

  "A school may impose legitimate safety requirements necessary for the safe operation of the school's services, programs, or activities, but the school must ensure that its safety requirements are based on actual risks, not mere speculation, stereotypes, or generalizations about individuals with disabilities."

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Discriminatory Effect of Discipline Criteria, Policies, Practices, or Procedures**

  To analyze if a policy has a discriminatory impact, "OCR would compare the policy's effects on students with and without disabilities." (*See* p. 31).

  OCR notes that in some cases, statistical evidence may reveal that a policy has a "disparate impact" that is based on disability.

  *Note*—To OCR, if a policy is applied in a way that is purportedly neutral, but statistically impacts students with disabilities to a disproportionate degree, it is suspect.

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Discriminatory Effect of Discipline Criteria, Policies, Practices, or Procedures**

  *Note*—OCR adds that "while statistical evidence alone does not prove discrimination, it can raise a question regarding whether school districts are imposing discipline in discriminatory ways, warranting further investigation." (*See* p. 31).

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Discriminatory Effect of Discipline Criteria, Policies, Practices, or Procedures**

  If OCR determines that a discipline policy has discriminatory effects, it will examine whether there is "evidence that the policy is necessary for the provision of safe operation of services, programs, or activities." (*See* p. 31).

  If not, then OCR would likely consider the policy to be discriminatory and in violation of §504.

  *Note*—But, who is best positioned, and has authority, to determine if a discipline policy is needed for the safe operation of a school?...

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Discriminatory Effect of Discipline Criteria, Policies, Practices, or Procedures**

  At this point, OCR would examine whether an **"alternative policy"** exists that would be comparably effective. (See p. 31).

  If it thinks so, then OCR would require the school to "reasonably modify" the disciplinary policy. (See p. 32).

  *What if no modification can eliminate the potentially discriminatory effect of the policy?* Then "the school may need to revise or eliminate the policy in its entirety."

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Discriminatory Effect of Discipline Criteria, Policies, Practices, or Procedures**

  *Note*—This is a controversial guidance position, as it envisions OCR, a federal agency, stepping in the role of elected board district members to (1) determine if a discipline policy is needed for safety, (2) determine if alternative policies could be equally effective, (3) determine how a policy could be modified to avoid discriminatory impact, and/or (4) determine that the policy must be eliminated.

- ***General Prohibition of Disability Discrimination in Student Discipline***

  **Discriminatory Effect of Discipline Criteria, Policies, Practices, or Procedures**

  *Note*—In fact, these 2022 OCR positions are quite similar to the positions taken by OCR and DOJ in a 2014 discipline guidance document. **See *Dear Colleague* Letter, 114 LRP 1091 (OCR/DOJ—January 8, 2014).**

  That discipline guidance, in turn, was rescinded by the following administration in 2018—Now the present administration is reasserting it.

  Again, this demonstrates that this is a sensitive and debatable area of federal enforcement and interpretation….

## Final Thoughts on OCR Discipline Guidance

- Guidance restates much of the existing limiting doctrines on short-term and long-term removals.
- OCR expands on discipline-related requirements not found in the regulations, such as FBAs and BIPs.
- Guidance addresses modern tools such as risk/threat assessments and interplay with §504 duties.
- OCR provides itself ample options to find imposition of a local disciplinary action to violate §504 (regular doctrines, reasonable modification analysis, different treatment analysis, disparate impact analysis).

## Final Thoughts on OCR Discipline Guidance

- Most likely, OCR is taking some of these "extension" positions in light of the persistent data indicating that students with disabilities are subject to disciplinary exclusions at a much higher rate than their nondisabled peers.

Second General Session

# Special Education Law Year in Review

By:

**Jan Tomsky**
Attorney at Law/Partner
Fagen Friedman & Fulfrost, LLP
Oakland, California

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

F3 Law

# Special Education Law Year in Review

**PNW Institute on Special Education and the Law**

**Presented by: Jan E Tomsky**

1 F3Law.com

## What We'll Cover . . .

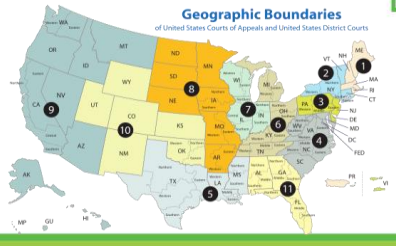
F3 Law

- Selected recent judicial decisions from 2022-2023, organized by topic (U.S. Circuit Courts, District Courts + new U.S. Supreme Court Decision)
- Latest federal guidance from OSEP/OSERS

2 F3Law.com

## Circuit Court Map

F3 Law




3 F3Law.com

# Noteworthy Judicial Decisions



# Assessments and Eligibility



## Miller v. Charlotte-Mecklenberg Schs. Bd. of Educ. (4th Cir. 2023)

F3 Law

**Facts:**

- District agreed to assess elementary school student after learning that he had been diagnosed with autism
- Eligibility team considered data from multiple assessments before determining that student failed to meet North Carolina's (or IDEA's) autism eligibility criteria
  - Comprehensive evaluation included autism rating scales and assessments in areas of adaptive behavior, vision, hearing, education, speech and language, and occupational therapy
- Parents claimed district did not meet its child find duty when it made determination student was not eligible for services

## Miller v. Charlotte-Mecklenberg Schs. Bd. of Educ. (4th Cir. 2023)

F3 Law

**Decision:**

- 4th Circuit affirmed district court's decision in district's favor
- IDEA does not require any district to provide IEP to any student whose parent requests one
- District satisfies child find obligation when it conducts a comprehensive evaluation and considers student's need for IDEA services
- "[Parent's] disagreement with the outcome of [student's] evaluation does not amount to a failure to conduct an evaluation in the first instance"
- Alleged "deficits" in classroom did not entitle him to IEP when student failed to meet eligibility criteria

(Miller v. Charlotte-Mecklenberg Schs. Bd. of Educ. (4th Cir. 2023) 83 IDELR 1)



## Minnetonka Pub. Schs. v. M.L.K. (8th Cir. 2022)

F3 Law

**Facts:**

- District identified struggles with reading and attention of elementary student with autism during his second year of kindergarten
- By third grade, student was receiving 75 minutes of specialized reading instruction each day
- Parents claimed district's failure to classify student as having dyslexia and ADHD in addition to autism amounted to denial of FAPE
- District court agreed and required district to reimburse parents for private reading instruction



## Minnetonka Pub. Schs. v. M.L.K. (8th Cir. 2022)

F3 Law

**Decision:**

- 8th Circuit reversed district court, holding that failure to classify student as a student with dyslexia did not result in denial of FAPE
- Student made appropriate progress in reading during his second- and third-grade years
- Court stated that classification of student's disability is largely immaterial, provided district evaluates in all areas of suspected disability and develops IEP reasonably calculated to provide FAPE

(Minnetonka Pub. Schs., Indep. Sch. Dist. No. 276 v. M.L.K. (8th Cir. 2022) 81 IDELR 123)

## D.O v. Escondido Union Sch. Dist. (9th Cir. 2023)

F3 Law

**Facts:**

- Therapist advised district at IEP meeting that she had diagnosed student with autism, which was not previously suspected
- Parent did not deliver therapist's report to IEP team
- Awaiting report, district did not begin assessment plan process for four months
- ALJ: District was justified in waiting to see what tests private therapist used in order to avoid duplication
- District court overturned ALJ: Four-month delay was not reasonable; delay was partially due to staff skepticism of diagnosis



## D.O v. Escondido Union Sch. Dist. (9th Cir. 2023)

F3 Law

**Decision:**

- 9th Circuit reversed district court, finding no violation of IDEA or California assessment requirements and concluding district's delay was reasonable
- District court's finding that district's "delay was due, at least in part, to skepticism of its staff" was materially incorrect
- District could not appropriately conduct autism assessment of student without reviewing private report and any assessment it conducted without such report might have been invalid
- Even if delay was procedural violation, there was no denial of FAPE as it did not hinder parent participation or deprive student of educational benefit

(D.O. v. Escondido Union School Dist. (9th Cir. 2023) 82 IDELR 125)



## Guevara v. Chaffey Joint Union Sch. Dist. (C.D. Cal. 2022)

F3 Law

**Facts:**

- 17-year-old student moved to district from Honduras and resided with legal guardians
- Guardians filed multi-count due process complaint alleging:
  - Child find violation based on failure to assess upon enrollment in 2018
  - Failure to assess after student exhibited poor academic performance
  - Denial of meaningful participation in IEP process at October 2019 team meeting
  - Conducting improper assessments resulting in finding of ineligibility in October 2019

## Guevara v. Chaffey Joint Union Sch. Dist. (C.D. Cal. 2022)

F3 Law

**Decision:**

- District court affirmed ALJ decision in district's favor on all points
  - "Piecemeal and cryptic nature" of communications from advocate to district failed to put district on notice of possible disability upon enrollment
  - Student received poor grades because he spoke less English than others in the class, was uninterested in doing classwork and preferred to socialize
  - District made several attempts to contact attorney who hung up phone during team meeting and waited reasonable time before deciding guardians had intentionally left meeting
  - District conducted appropriate assessments in all areas of suspected disabilities
    - Determination of ineligibility (SLD, ID, OHI, ED and SLI) was supported by assessment results and reports

(Guevara v. Chaffey Joint Union School Dist. (C.D. Cal. 2022) 81 IDELR 277)



## Behavior



## L.J.B. v. North Rockland Cent. Sch. Dist. (S.D.N.Y. 2023)

F3 Law

**Facts:**

- Disruptive behaviors by student with multiple disabilities escalated when he was not assigned to his preferred staff member
- Teacher implemented various (and numerous) behavior strategies called for in student's IEP
- Interventions succeeded to point where student had no further incidents and made academic progress
- Parents claimed district denied FAPE by failing to conduct FBA
- SRO found no FAPE denial in district's actions

## L.J.B. v. North Rockland Cent. Sch. Dist. (S.D.N.Y. 2023)

F3 Law

**Decision:**

- Court upheld SRO's decision finding no evidence of denial of FAPE
- District successfully addressed student's behaviors through interventions to point where FBA was not necessary
  - Previous biting and hitting behaviors, which might have otherwise required FBA, ceased when IEP team had teachers use consistent positive reinforcement, checklist reward system, token board and holding up "stop" sign
- Court also rejected parents' claim that New York law required FBA
  - State regulations only require FBA and BIP when student exhibits persistent behaviors that impede his learning despite consistent interventions, which was not the case here

(L.J.B. v. North Rockland Cent. Sch. Dist. (S.D.N.Y. 2023) 83 IDELR 13)



## San Jose Unif. Sch. Dist. v. H.T. (N.D. Cal. 2022)

F3 Law

**Facts:**

- Parent requested district conduct FBA for student based on list of behavioral issues that included lack of social skills and difficulty focusing
- District's behavior specialist conducted FBA, but was not provided with information from parent and was told not to communicate with parent after parent did not respond to initial contact
- After revisions to FBA did not address parent's concerns, parent requested independent FBA; district denied request and filed for due process hearing
- ALJ found faulty assessment but no denial of FAPE; ordered district to fund IEE



## San Jose Unif. Sch. Dist. v. H.T. (N.D. Cal. 2022)

F3 Law

**Decision:**

- Court upheld ALJ's finding that district did not conduct its FBA appropriately because it unreasonably failed to obtain parent's input in conducting assessment
- District "was responsible for using reasonable efforts to secure parent's participation in the assessment process"
- Court also upheld ALJ's order for district to fund independent FBA
- But court also found no denial of FAPE because BCBA credibly testified that recommendations she included in FBA would not have changed even if she had been provided with parent's input

(San Jose Unified School Dist. v. H.T. (N.D. Cal. 2022) 82 IDELR 37)

# Bullying

19 F3Law.com

## B.D. and K.D. v. Eldred Cent. Sch. Dist. (S.D.N.Y. 2023)

F3 Law

**Facts:**

- Parents of eighth-grader with autism, ADHD and chronic kidney disease asserted that student was being bullied at school
- District convened IEP meeting to address parents' concerns about bullying and to develop safety plan for student
  - Plan stated that its purpose was to "provide a safe and secure learning environment that is free from harassment, intimidation, or bullying"
- Parents sought reimbursement for private placement, claiming that plan was inadequate response to peer bullying and denied student FAPE because it made student responsible for his own safety

20 F3Law.com

## B.D. and K.D. v. Eldred Cent. Sch. Dist. (S.D.N.Y. 2023)

F3 Law

**Decision:**

- Court upheld SRO's ruling that parents were not entitled to reimbursement for student's unilateral private placement
- Although safety plan required certain action on student's part (leaving class early and reporting bullying incidents when they occurred), obligations for implementation were placed entirely on district personnel
  - Requirements included separating student from offenders when problems arose, monitoring common areas, and educating other students about bullying
- Parents failed to demonstrate that district was deliberately indifferent to bullying or failed to take reasonable steps to prevent it

(B.D. and K.D. v. Eldred Cent. Sch. Dist. (S.D.N.Y. 2023) 83 IDELR 31)

21 F3Law.com

# Child Find

22 F3Law.com

## J.M. v. Summit City Bd. of Educ. (3d Cir. 2022)

F3 Law

**Facts:**

- During student's first month in first grade, staff recognized behavioral problems
- District assembled multidisciplinary team to develop plan and implement behavioral and academic interventions
- Parents supplied IEE that diagnosed student with SLD
  - At parents' request, district conducted five evaluations and determined that student wasn't eligible for special education
- Ultimately, district found student eligible in second grade after he was diagnosed with autism and ADHD
- Parents claimed student should have been found eligible earlier

23 F3Law.com

## J.M. v. Summit City Bd. of Educ. (3d Cir. 2022)

F3 Law

**Decision:**

- 3d Circuit found district fulfilled its child find obligations
- District appropriately determined that student responded positively to interventions and did not have SLD for which services were needed
- District started using RTI in first grade
- District had amassed array of data, and designated 14 staff members to consider it, all of whom agreed with eligibility determination, and chose to continue successful interventions in lieu of special education services

(J.M. v. Summit City Bd. of Educ. (3d Cir. 2022) 81 IDELR 91)

24 F3Law.com

## Ja B. v. Wilson County Bd. of Educ. (6th Cir. 2023)

F3 Law

**Facts:**

- Eighth-grade student exhibited various disruptive behaviors, both at home and in school, soon after moving to Tennessee from Illinois
- Behaviors resulted in in-school suspensions and, ultimately, hospitalization
- Student did not receive special education services in Illinois
- District, which provided various classroom interventions, largely attributed behavior issues to relocation from another state
- Parents asserted child find violation, claiming that student's behavioral problems and disciplinary referrals required immediate evaluation



## Ja B. v. Wilson County Bd. of Educ. (6th Cir. 2023)

F3 Law

**Decision:**

- 6th Circuit ruled in district's favor on child find claim
- Court acknowledged that while districts cannot use RTI process to delay or deny IDEA evaluation, district in this case did not have reason to suspect a disability when student enrolled
- Student had attended district for very brief time and parents acknowledged that move across state line likely contributed to his behavior
- "[W]e conclude only that on these facts, especially given [student's] general education background and recent move, the school district did not violate its statutory child-find responsibility"

(Ja B. v. Wilson County Bd. of Educ. (6th Cir. 2023) 82 IDELR 191)



## Constitutional Claims

## Fisher v. Moore (5th Cir. 2023)

F3 Law

**Facts:**

- IEPs for student with several mental and physical disabilities and for student with severe behavior problems required escorts during transition periods and throughout school day
- Notwithstanding IEP requirements, students were "both allowed to wander . . . out of their respective classes" without supervision and "ended up in the boys' restroom, where one student forced other student "to perform oral sex on him"
- Parents asserted 14th Amendment claims against district staff claiming they acted with deliberate indifference



## Fisher v. Moore (5th Cir. 2023)

F3 Law

**Decision:**

- 5th Circuit declined to adopt "state-created danger" theory of liability for harm caused by third parties and ordered district court to dismiss parent's constitutional claim
- Court: District employees are immune from litigation for alleged constitutional violations if the right they violated was not clearly established at the time
- "Our holding today should not be misunderstood to say [student] – or any future plaintiff – lacks any federal redress whatsoever. To the contrary, we have recognized that Title IX provides a cause of action for 'student-on-student harassment' under certain circumstances"

(Fisher v. Moore (5th Cir. 2023) 82 IDELR 215, rehearing denied, (5th Cir. 7/14/23) 123 LRP 21063)



## Exhaustion of Remedies

## Perez v. Sturgis Pub. Schs. (U.S. 2023)

F3 Law

**Facts:**

- Student, who was deaf, attended district schools from ages 9 through 20
- When district announced that it would not permit student to graduate, he and his family filed IDEA administrative complaint (i.e., state compliance complaint) alleging that district failed to provide student FAPE
- Parties settled IDEA FAPE claim
- Student then sued in federal district court seeking compensatory damages under ADA
- District court and 6th Circuit dismissed claim for failure to exhaust IDEA administrative remedies



## Perez v. Sturgis Pub. Schs. (U.S. 2023)

F3 Law

**Decision:**

- Supreme Court reversed lower courts' rulings
- "Nothing [in the IDEA] shall be construed to restrict" the ability to seek "remedies" under "other Federal laws"
- Because IDEA's exhaustion requirement applies only to lawsuits that "seek relief . . . also available under" IDEA, Court found that it posed no bar where non-IDEA plaintiff sues for remedy unavailable under IDEA, such as compensatory damages
- Prior ruling in Fry v. Napoleon Community Schools "went out of its way to reserve rather than decide this question"

(Perez v. Sturgis Pub. Schools (2023) 82 IDELR 213)



## Doe v. Knox County Bd. of Educ. (6th Cir. 2023)

F3 Law

**Facts:**

- District refused request by parent of student with misophonia (decreased tolerance for certain sounds) to ban students from eating food and chewing gum in academic classes, alleging, in part, refusal to ban such activities affected the student's grades
- Parents sued district under Section 504 and the ADA
- District sought to dismiss claim, asserting parents failed to exhaust IDEA administrative remedied because they were essentially seeking relief for denial of FAPE
- District court agreed with district and dismissed parents' claim

## Doe v. Knox County Bd. of Educ. (6th Cir. 2023)

F3 Law

**Decision:**

- 6th Circuit reversed lower court
- Court: Request for FAPE must involve specialized instruction—that is a change to content, methodology, or delivery of instruction
- Parents asked for accommodation to access general education classes and their complaint did not request (or suggest that student needed) any instructional changes
- 6th Circuit distinguished circumstances in this case from those in Perez v. Sturgis Public Schools

(Doe v. Knox County Bd. of Educ. (6th Cir. 2023) 82 IDELR 103)



# IEPs and Provision of FAPE



## Falmouth Sch. Dep't. v. Mr. and Mrs. Doe (1st Cir. 2022)

F3 Law

**Facts:**

- When IEP team convened in middle of student's second-grade year, student was still reading and writing at kindergarten level despite having received full year of specialized instruction using the SPIRE reading methodology
- Student's special education teacher identified orthographic processing as his "biggest challenge"
- District proposed incremental increases in amount of specialized instruction student should receive and did not further evaluate his orthographic issues or reconsider type of specialized reading instruction he might need

## Falmouth Sch. Dep't. v. Mr. and Mrs. Doe (1st Cir. 2022)

F3 Law

**Decision:**

- 1st Cir: District denied FAPE when it failed to adjust educational methodology in response to student's lack of appropriate progress
- Methodologies used by district did not allow student to make progress in light of his circumstances under Endrew F.
- Although IEP team amended IEP to include Lindamood-Bell instruction after private evaluators indicated student needed that methodology to make progress, special education teacher could not implement that program without assistance

(Falmouth Sch. Dep. v. Mr. and Mrs. Doe (1st Cir. 2022) 81 IDELR 151)



## District of Columbia Int'l Charter Sch. v. Lemus (D.D.C. 2023)

F3 Law

**Facts:**

- IEP for seventh-grade student with ID called for 19 hours per week of SAI
- Charter school amended IEP seven times between December 2017 and August 2019
- Nearly three years later, student's skills stayed the same or had worsened, but IEP had reduced SAI to 5.6 hours per week
  - Assessments showed that student's skills had developed to only second-grade level, reading skills had not improved, math skills regressed; student made limited progress on goals, and received "mostly zero" grades in written expression
- Parents claimed denial of FAPE



## District of Columbia Int'l Charter Sch. v. Lemus (D.D.C. 2023)

F3 Law

**Decision:**

- District denied FAPE by failing failed to demonstrate why reducing student's SAI services by over 70 percent was appropriate
- Citing student's declining test scores, poor grades, lack of improvement, and deteriorating skills, court questioned whether assessments were conducted, or results considered, to support drastic reduction in SAI
- Court pointed to confusion over proposed amendments to IEPs, which indicated both increase and decrease in service hours, with checkmark scribbled out, indicating that amendments purported to increase service hours, when they, in fact, decreased them

(District of Columbia Int'l Charter Sch. v. Lemus (D.D.C. 2023) 83 IDELR 19)

## J.T. v. Denver Pub. Schs. (D. Colo. 2023)

F3 Law

**Facts:**

- District's IEPs for student with developmental delays increased her time in general education between second and third grade
- Parent requested less time in general education, but district objected because student benefited significantly from inclusion and modeling by her peers
- Subsequently, district modified student's IEP to reduce her time in general education because student made little progress in fourth grade and consistently performed at first-grade level
- Parent claimed IEPs were inadequate and denied student FAPE



## J.T. v. Denver Pub. Schs. (D. Colo. 2023)

F3 Law

**Decision:**

- Court: District's IEP was appropriate at time it was offered, as evidence demonstrated that student had significantly benefited from increased time in general education and district had not yet observed a lack of progress
- District responded appropriately to student's needs over time by revising her IEPs when facts demonstrated that increased time in general education was proving unsuccessful
- Parent inappropriately focused on student's slow on minimal progress rather that on whether district appropriately revised its program to meet student's needs

(J.T. v. Denver Pub. Schs. (D. Colo. 2023) 82 IDELR 163)



# Interim Alternative Educational Settings ("IAES")

## G.D. and R.D. v. Utica Cmty. Schs. (E.D. Mich. 2023)

F3 Law

**Facts:**

- Kindergartner, with undisclosed disability, attacked staff by throwing supplies, books, pieces of broken thermometer, and base of telephone
- District sought to suspend student and conducted MDR
- MDR team concluded that conduct was manifestation of student's disability, but district removed student to IAES because it believed student had used dangerous weapons
- Parents challenged removal
- ALJ determined that removal was not warranted



## G.D. and R.D. v. Utica Cmty. Schs. (E.D. Mich. 2023)

F3 Law

**Decision:**

- Court agreed with ALJ, concluding that, because student did not possess "dangerous weapons," he should not have been placed in IAES
- Manner of object's use can be relevant to whether it is "dangerous weapon" and has the capacity to inflict serious bodily injury to warrant removal to IAES
  - "Plastic phone receivers and thermostats, no matter how broken and jagged, are not readily capable of causing a substantial risk of death [when thrown by kindergarten student]"
- Court also agreed that four hours of instruction per week that student received in IAES failed to provide him FAPE

(G.D. and R.D. v. Utica Cmty. Schs. (E.D. Mich. 2023) 83 IDELR 12)



# Parent Participation

## C.K. v. Baltimore City Bd. of Commissioners (D. Md. 2023)

F3 Law

**Facts:**

- After district evaluated student with OHI, anxiety and SLD, it sent draft IEP to parents
- IEP included 30 hours in general education with classes of 25 students, and five hours of special education support weekly
- Parents believed student required full-time special education setting
- Parents claimed district predetermined IEP and placement by using "drop-down" selections with default settings and by identifying specific high school where student would be placed



## C.K. v. Baltimore City Bd. of Commissioners (D. Md. 2023)

F3 Law

**Decision:**

- Court found no evidence of predetermination and affirmed ALJ's decision that district offered student FAPE
- District chose general education teacher as service provider because it was default choice, but advised parents that selection could be changed at IEP team meeting if student needed more restrictive placement
- IEP team also made clear to parents that IEP could be implemented at any district high school, including one identified in draft IEP
- Using default settings within IEP forms did not amount to procedural violation

(C.K. v. Baltimore City Bd. of Commissioners (D. Md. 2023) 83 IDELR 81)



## E.W. v. Dep't of Educ., State of Hawaii (D. Hawaii 2023)

F3 Law

**Facts:**

- District developed IEP and BIP for 8-year-old student with autism
- Parent was involved in development of student's behavior interventions
- District, however, did not incorporate BIP as part of student's IEP, instead creating it as "stand-alone" document
- IEP also did not include statement that incorporated BIP by reference
- Parent asserted that she was denied meaningful participation because IEP and BIP were separate documents

## E.W. v. Dep't of Educ., State of Hawaii (D. Hawaii 2023)

F3 Law

**Decision:**

- Court: IEP team did not violate IDEA or deny FAPE
- No IDEA requirement that BIPs must be physically incorporated into IEP document
- IEP's supplementary aids and supports included many behavioral interventions based on student's needs and on parental input
  - "[B]ehavioral supports were not unilaterally chosen by [district] . . .; record shows that parent participated and conveyed her 'input and concerns'"
- District provided parent with copy of BIP and its BCBA explained to parent each component of BIP

(E.W. v. Dep't of Educ., State of Hawaii (D. Hawaii 2023) 83 IDELR 14)



## G.G. v. Conejo Valley Unif. Sch. Dist. (C.D. Cal. 2022)

F3 Law

**Facts:**

- Parents asked district to assess privately placed student
- During assessment process, school psychologist requested names of outside providers to obtain additional information
  - Parents delayed providing names until day before IEP team meeting
- IEP team found student eligible under ED and OHI categories and developed IEP
- Parents did not consent to proposed services and placement
- Parents sought reimbursement for private school placement, alleging, among other claims, denial of meaningful participation



## G.G. v. Conejo Valley Unif. Sch. Dist. (C.D. Cal. 2022)

F3 Law

**Decision:**

- District court affirmed ALJ decision in district's favor
- District did not deny meaningful participation by not reconvening IEP team meeting after school psychologist ultimately spoke with student's outside providers
  - Parents' delay in providing release for psychologist to speak with outside providers "caused this issue"
- District was not obligated to discuss private school placement options at IEP team meeting
  - Private school where student attended was not certified

(G.G. v. Conejo Valley Unified School Dist. (C.D. Cal. 2022) 82 IDELR 27)

# Placement and LRE

52 F3Law.com

## Doe v. Newton Pub. Schs. (1st Cir. 2022)

F3 Law

**Facts:**

- Parents rejected district's proposed IEP that would have placed high school student with autism, anxiety and depression in educational program offered at his high school that would give student access to social worker for counseling, as well as other counseling session
- Instead, parents unilaterally placed student in private residential setting and sought reimbursement
- Subsequently, district proposed "extended evaluation" at therapeutic day program

53 F3Law.com

## Doe v. Newton Pub. Schs. (1st Cir. 2022)

F3 Law

**Decision:**

- District could have, but did not, offer therapeutic placement at which student could have received FAPE prior to parents' unilateral residential placement
- But court ruled that reasonableness of parents' decision to place student in residential program factored into their reimbursement award
- Determining that residential placement was overly restrictive, court held that parents were only entitled to tuition costs, not boarding or travel expenses

(Doe v. Newton Pub. Schs. (1st Cir. 2022) 81 IDELR 211)

54 F3Law.com

## J.P. v. Belton Sch. Dist. No. 124 (8th Cir. 2022)

F3 Law

**Facts:**

- 9-year-old student with severe disabilities made little to no progress toward his IEP goals during his time in special education classroom
- District proposed changing student's placement from special education classroom in his neighborhood school to state-run school for children with severe disabilities
- Parents claimed that proposed move would violate district's LRE obligation because of its lack of integrated setting



## J.P. v. Belton Sch. Dist. No. 124 (8th Cir. 2022)

F3 Law

**Decision:**

- 8th Circuit upheld district's proposed placement
  - Court: LRE requirement does not exist in isolation; district needs to ensure student receives appropriate educational benefit
  - Evidence showed that student received minimal benefit at neighborhood elementary school
  - Not only was student making minimal progress toward his IEP goals, but he did not participate in activities with his nondisabled peers
  - Student had tendency to become overwhelmed by sensory input and would be more receptive to learning in state school's smaller, "less chaotic," environment.

(J.P. v. Belton Sch. Dist. No. 124 (8th Cir. 2022) 81 IDELR 124)



## D.R. v. Redondo Beach Unif. Sch. Dist. (9th Cir. 2022)

F3 Law

**Facts:**

- Student with autism spent 75 percent of school day in general classroom with supplementary aides and services
- District believed that, although student made good progress on goals, he required more direct special education instruction
- District proposed SDC placement for 56 percent of school day
- Parents rejected IEP proposals and removed student to private placement
- ALJ and district court upheld district's proposed placement as LRE

## D.R. v. Redondo Beach Unif. Sch. Dist. (9th Cir. 2022)

F3 Law

**Decision:**

- 9th Circuit overturned district court's decision
- Case hinged on first factor of Rachel H. test—academic benefits of general classroom placement
  - Proper benchmark for assessing whether student received academic benefits from placement in general classroom is not grade-level performance, but rather is whether student made substantial progress toward meeting academic goals established in IEP
  - Fact that student receives academic benefits in general classroom as result of supplementary aids and services is irrelevant to analysis required under Rachel H.
- 9th Circuit, however, denied reimbursement claim because parents privately placed student in even more restrictive setting

(D.R. v. Redondo Beach Unified School Dist., (9th Cir. 2022) 82 IDELR 77)



## Knox County (Tenn.) v. M.Q. (6th Cir. 2023)

F3 Law

**Facts:**

- District believed that kindergartner with autism needed too many supports to benefit from general education placement
- IEP team recommended self-contained placement
- Parents believed that student could be educated satisfactorily in general education setting
- Parents' inclusion specialist testified that special education placement would deprive student of appropriate peer models and give him fewer opportunities to work on social skills
- District court concluded that proposed placement was not LRE for student



## Knox County (Tenn.) v. M.Q. (6th Cir. 2023)

F3 Law

**Decision:**

- 6th Circuit upheld lower court ruling in parents' favor
- District failed to consider whether services and supports available in self-contained placement could be provided in general education setting
- Student previously made good progress in inclusion preschool program with use of supplementary aids and services
- Testimony of preschool teacher that student could work on all of his IEP goals in general education classroom helped convince court that district could modify general education kindergarten class to accommodate student's needs

(Knox County (Tenn.) v. M.Q. (6th Cir. 2023) 82 IDELR 214)

# Postsecondary Transition

61 F3Law.com

## del Rosario v. Nashoba Reg'l Sch. Dist. (D. Mass. 2023)

F3 Law

**Facts:**

- District developed postsecondary transition plan for adult student with autism that it believed included student's strong aptitude for culinary arts as well as focusing on her poor interpersonal skills
- Transition plan included food preparation for corporate cafeteria and for two assisted living facilities
- Parent claimed that transition plan denied student FAPE by doing very little to prepare her for desired career as professional baker
- IHO ruled that transition plan was appropriate and provided FAPE by reflecting student's interests and addressing her unique needs

62 F3Law.com

## del Rosario v. Nashoba Reg'l Sch. Dist. (D. Mass. 2023)

F3 Law

**Decision:**

- Court agreed with IHO
- Student's aptitude for culinary arts was undermined by her poor interpersonal skills and inability to accept feedback or criticism
- Plan that focused on teamwork and self-advocacy, in addition to food preparation, met student's postsecondary transition needs
  - Student was able to work with non-preferred coworkers, work on complying with supervisors' directives, and work on accepting feedback and criticism
  - District's plan provided student "with exposure to other transferable skills which could be utilized in her chosen field as well as other work settings"

(del Rosario v. Nashoba Reg'l Sch. Dist., (D. Mass. 2023) 83 IDELR 11)

63 F3Law.com

# Reimbursement Claims

64 F3Law.com

## J.S. v. Autaga County Bd. of Educ. (M.D. Ala. 2023)

F3 Law

**Facts:**

- Parents enrolled kindergartner with ADHD in private school after district attempted to place him in alternative school for behavioral reasons
  - Student had grabbed principal's neck with both hands after fleeing his classroom
- Private school provided instruction for four days per week for four hours per day; student was placed in classroom with one teacher for 11 students, of whom he was the only child with a disability; parent also sat outside classroom in hall, in case needed to assist with behavior
- Parents subsequently sought reimbursement, alleging denial of FAPE and asserting appropriateness of private school placement
  - Parents argued that student's behavior improved during time he attended private school

65 F3Law.com

## J.S. v. Autaga County Bd. of Educ. (M.D. Ala. 2023)

F3 Law

**Decision:**

- Court upheld IHO's decision denying reimbursement claim
- Without reaching decision as to whether district denied FAPE, court determined that private school placement was not appropriate for student
  - Any possible improvement in behavior was likely due to fact that parent remained on site while class was in session to address any behavioral outbursts
  - Regardless, behavior problems persisted, as private school switched student from four days per week of schooling to total of two hours per week of tutoring on behavior and academics
  - Private school also did not offer occupational therapy student needed to address his severe motor deficits

(J.S. v. Autauga County Bd. of Educ. Stamford Bd. of Educ. (M.D. Ala. 2023) 83 IDELR 63)

66 F3Law.com

## Dervishi v. Stamford Bd. of Educ. (D. Conn. 2023)

F3 Law

**Facts:**

- Parent of adult student with autism requested that district place student at private school two hours from home (four-hour commute)
- While district opposed such placement, it agreed to pay student's tuition "as an accommodation" to parent
- District, however, refused to pay for transportation
- Parent filed for due process, seeking reimbursement for four years of transportation expenses
- IHO rejected parent's claim



## Dervishi v. Stamford Bd. of Educ. (D. Conn. 2023)

F3 Law

**Decision:**

- District court affirmed IHO's decision
- District established that placement was unilateral choice of parent (notwithstanding that district paid tuition) by providing evidence of its consistent objection to placement and yearly recommendation of local, public placements that offered FAPE
- Additionally, private school was not state-approved, so district could not have legally recommended it, even if it had wanted to
- Although PWNs were noncompliant by failing to clearly refuse parent's requested placement or provide notice of discussion of placement, such procedural violations did not amount to denial of FAPE

(Dervishi v. Stamford Bd. of Educ. (D. Conn. 2023) 83 IDELR 10)



## Residential Placement

## N.N. v. Mountain View-Los Altos Union HSD (N.D. Cal. 2023)

F3 Law

**Facts:**

- Parents believed district failed to identify student as eligible for special education in her sophomore year in high school (2017-2018), leading to her enrollment in out-of-state private residential programs in Utah and Montana, with concurrent enrollment in public school in Montana during 2018-2019 and 2019-2020
- Court determined district denied FAPE during 2017-2018 by delaying assessment, but did not deny FAPE during 2018-2019 and 2019-2020 because student did not need special education services
- Parent then sought reimbursement for residential placement tuition



## N.N. v. Mountain View-Los Altos Union HSD (N.D. Cal. 2023)

F3 Law

**Decision:**

- Court: No reimbursement of expenses incurred in years for which court had previously found no violation of IDEA
- Additionally, services obtained for student addressed only mental health needs and did not support provision of specially designed educational instruction
  - Utah wilderness program was primarily response to mental health issues
  - Montana program was recommended to internalize tools student learned in Utah, was not licensed RTC, and did not address academic issues
  - Student did well in Montana public schools with Section 504 accommodations

(N.N. v. Mountain View-Los Altos Union High Sch. Dist. (N.D. Cal. 2023) 83 IDELR 7)



# Restraint and Seclusion

## Doe v. Aberdeen Sch. Dist. (8th Cir. 2022)

F3 Law

**Facts:**

- Special education teacher secluded one student 274 times, seized two students when she barricaded them in small room for behavioral infractions such as hanging up coat incorrectly or pushing cabinet
- Teacher also pushed another student into swimming pool, and also forcibly stripped off one student's clothes to put him in bathing suit
- Parents sued teacher, asserting Fourth Amendment claims



## Doe v. Aberdeen Sch. Dist. (8th Cir. 2022)

F3 Law

**Decision:**

- Holding that teacher "substantially departed from accepted standards," 8th Circuit affirmed district court's ruling that allowed parents to proceed with their Fourth Amendment claims
- Teacher could not use doctrine of "qualified immunity" to avoid litigation
- Teacher's actions could not be viewed as reasonable in light of federal guidance classifying seclusion and restraint as "emergency" behavioral interventions to prevent imminent physical harm

(Doe v. Aberdeen Sch. Dist. (8th Cir. 2022) 81 IDELR 121)



## Latest Federal Guidance

## Child Find

Letter to Sharpless

- For states that require written requests from parents for assessment of their child, districts need to properly address parents' verbal request that can be reasonably understood as request for an initial evaluation under IDEA, but where additional actions are required under state law
  - Examples of reasonable responses include: providing parents with information and assistance such as copy procedural safeguards notice; further explaining right to, and procedures for, initiating an assessment; and providing assistance that parents may require to submit such request
- Failure to provide additional information or assistance could potentially violate IDEA's child find obligations

(Letter to Sharpless (OSEP 2022) 82 IDELR 39)



## Early Childhood Education

Dear Colleague Letter on IDEA Services in Head Start

- OSEP expressed concern about delays in identification of children with possible disabilities, as well as untimely IEP and placement decisions
- OSEP emphasized importance of ongoing collaboration between SEAs, LEAs and their Head Start program partners to effectively meet IDEA requirements and ensure provision of FAPE
- OSEP reminded districts that Head Start programs have screening/child find/referral requirements
- IEP teams should consider various ways, including virtual coaching and consultation, to deliver services while child is in Head Start program

(Letter to State Directors of Special Education (OSEP 2022) 82 IDELR 12)



## Highly Mobile Students

Letter to State Directors of Special Education

- OSERS/OSEP noted that highly mobile students are more likely to experience recurring educational disruptions and challenges
- Special education and related services available under IDEA are critical to helping eligible students meet such educational challenges
- Districts should complete their assessments for these children within expedited time frame (within 30 days if possible)
- Districts should not delay completing initial assessment because student has not completed MTSS process
- Highly mobile students with IEPs transferring to district may need ESY as comparable service

(Letter to State Directors of Special Education (OSERS/OSEP 2022) 82 IDELR 69)

## Personnel Qualifications

Memo to State Directors of Special Education

F3 Law

- OSEP clarified states' obligations regarding IDEA Part B requirements related to personnel qualifications and alternate certifications
  - Note: See printed materials for complete summary of IDEA rules in this area
- OSEP recognized that states continue to face many challenges stemming from COVID-19 pandemic, including impact on exacerbating shortage of special education teachers and related services providers, and noted that some states currently have policies and procedures that may not be consistent with IDEA requirements
- But OSEP reminded SEAs that they may not waive IDEA personnel qualification requirements on emergency, temporary or provisional basis

(Memorandum to State Directors of Special Education (OSEP 2022) 81 IDELR 287)



## State Complaint Procedures

Letter to Oettinger

F3 Law

- Even if student who is the subject of state complaint has already graduated, SEA still must investigate and resolve the matter, regardless of whether complaint focuses on individual student or focuses on systemic IDEA violations
- Complaint still must meet all requirements of IDEA and state law, including time limitations
- Regarding possible remedies for violations, OSEP noted that "[b]ecause the purpose of compensatory services is to remedy a failure to provide [FAPE] in order to address the needs of the child, for children who are beyond the period of eligibility for IDEA services, compensatory services could take the form of an additional period of eligibility"

(Letter to Oettinger (OSEP 2023) 123 LRP 11297)



## Transition (Part B to Part C)

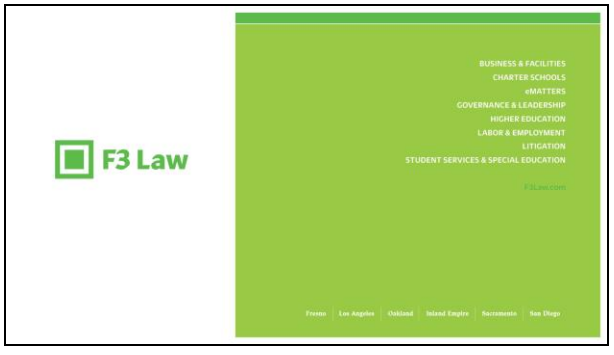
Letter to Nix

F3 Law

- Districts must participate in transition planning conference arranged by EIS provider, as failure to attend such conference makes it difficult for district to meet all of its Part B responsibilities, including ensuring that IEP is developed and implemented by child's third birthday
- Upon receipt of Part C referral, district must provide parents with copy of procedural safeguards and either conduct initial evaluation, or, if it does not suspect disability, provide parents with PWN explaining basis for decision not to evaluate
- IDEA's 60-day evaluation timeline and 30-day IEP meeting timeline are subject to the requirement that child who transitions from Part C to Part B has IEP developed and implemented by time child reaches age 3

(Letter to Nix (OSEP 2023) 123 LRP 11295)


F3 Law
Thank you for attending!
And thank you for all you do
for students!
82
F3Law.com


F3 Law
BUSINESS & FACILITIES
CHARTER SCHOOLS
eMATTERS
GOVERNANCE & LEADERSHIP
HIGHER EDUCATION
LABOR & EMPLOYMENT
LITIGATION
STUDENT SERVICES & SPECIAL EDUCATION
F3Law.com
Fresno | Los Angeles | Oakland | Inland Empire | Sacramento | San Diego

Workshop 1

# Applied Behavior Analysis and Programs for Students with Autism—Standard of Practice and Legal Defensibility—Addressing the Confusion, Issues, Legal Standard, and More

By:

**Mary Schillinger**

Educational Consultant/Former Assistant Superintendent of Education
Collaboration for Success
Simi Valley, California

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

**Contemporary ABA Programs for Students With Autism: Defensibility, Logistics, and Effectiveness – Legal Cases Selection**
Presented by Mary Schillinger
PNW 2023

---

## What is ABA?

### IEPs' reference to ABA intervention defeats parents' predetermination claim

**Case name:** *L.M.P. ex rel. E.P., D.P., and K.P. v. School Bd. of Broward County, Fla.*, 71 IDELR 101 (11th Cir. 2018).

**Ruling:** Without deciding whether a Florida district declined to offer ABA services as a matter of policy, the 11th U.S. Circuit Court of Appeals held that the parents of 3-year-old triplets with autism could not prevail on a claim that the district predetermined their children's services. The 11th Circuit ruled that the inclusion of an ABA-based intervention strategy in each child's IEP prevented the parents from challenging the district's alleged policy.

**What it means:** Parents seeking relief for an alleged procedural violation of the IDEA must show they suffered an actual injury as a result of the district's actions. If the district can show that the purported injury did not occur, the court may hold that the parents do not have a right to sue. Here, the IEPs stated that the children would receive instruction using the Picture Exchange Communication System, which the court classified as an ABA-based intervention. Because the IEPs included some form of ABA services, the parents could not sue the district for denying those services as a matter of policy.

**Summary:** Parents who claimed that a Florida district excluded them from the IEP process by refusing to consider their 3-year-old triplets' need for ABA-based instruction could not convince the 11th Circuit that the district predetermined their children's programs. Noting that each child's IEP included the use of the Picture Exchange Communication System -- an ABA-based intervention -- the 11th Circuit held that the parents did not have the right to challenge the district's alleged policy. The three-judge panel explained that the parents could not simply allege the existence of an improper district policy. In order to sue the district for predetermination, the parents had to show that they suffered an injury as a result of that policy. Although the parents claimed that the district injured them by impeding their participation in the IEP process, the court pointed out that all three of the IEPs at issue included ABA services in the form of PECS-based instruction. "The [district's] inclusion of an ABA-based service in the children's IEPs in this case, regardless of how it was intended to be used or whether it matched the specific services requested by the parents, refutes [the parents'] argument that they were denied meaningful participation," the 11th Circuit wrote. "[The parents] simply were not denied any ABA-based service in their children's IEPs." Because the parents limited their appeal to the district's alleged procedural violation, the 11th Circuit did not consider whether the PECS-based instruction was adequate or whether the children required additional ABA services to receive FAPE. The 11th Circuit affirmed the District Court's ruling in the district's favor.

## When does a student need ABA?

### 'Clear consensus' of evaluative data undercuts offer of 6:1 placement

**Case name:** *A.M. ex rel. E.H. v. New York City Dep't of Educ.*, 69 IDELR 51 (2d Cir. 2017).

**Ruling:** A New York district denied FAPE to a 6-year-old boy with autism when it disregarded multiple

evaluation reports showing that he needed one-to-one instruction and intensive ABA therapy to receive FAPE. The 2d U.S. Circuit Court of Appeals vacated a decision at 66 IDELR 243 that denied the parent's reimbursement request and remanded the case for further proceedings.

**What it means:** This ruling does not require IEP teams to adopt all recommendations by outside evaluators. Rather, it shows that an IEP team cannot disregard a "clear consensus" of evaluative materials showing that a child needs a particular service, methodology, or placement to receive FAPE. Although the district in this case did not conduct its own assessments, private evaluators and current service providers agreed that the child required a one-to-one placement with intensive ABA services to make progress. As such, the IEP team erred relying on the district psychologist's recommendation for a 6:1+1 program that did not use a specific methodology.

**Summary:** Given that every evaluation of a 6-year-old boy's needs as they related to educational methodology and class size recommended intensive ABA therapy in a one-to-one setting, a New York district violated the IDEA by offering a 6:1+1 placement with no specific methodology. The 2d Circuit vacated the District Court's ruling at 66 IDELR 243 that the child's IEP was substantively appropriate. The three-judge panel explained that when the reports and evaluative data before the IEP team "yield a clear consensus," the IEP developed for the child must reflect that consensus. "This remains true whether the issue relates to the content, methodology, or delivery of instruction in a child's IEP," U.S. Circuit Judge Richard C. Wesley wrote. The court pointed out that all of the reports that addressed the child's needs with regard to class size and methodology called for a one-to-one setting with intensive ABA therapy. Furthermore, none of the evaluative materials available to the IEP team suggested that the child could benefit from a larger placement or a different methodology. The court also observed that the district did not conduct any evaluations of its own that would raise questions about the recommendations in the evaluative materials. Because all of the available information supported the child's need for an ABA-intensive one-to-one placement, the court held that the IEP team erred in relying on the district psychologist's opinion that the district could educate the child in a less restrictive setting that would not use a specific methodology. The 2d Circuit remanded the parent's reimbursement claim so that the District Court could evaluate the appropriateness of the child's private placement. The 2d Circuit also held that New York's special education regulations require an IEP developed for a child with autism to identify any temporary transitional support services to be provided to the child's new classroom teacher if the child is transferring from a private school to a public school program, or to a less-restrictive classroom setting.

## Choice of methodology

### District's eclectic program satisfies 'peer-reviewed research' provision

**Case name:** *Joshua A. by Jorge A. v. Rocklin Unified Sch. Dist.*, 52 IDELR 64 (9th Cir. 2009).

**Ruling:** The 9th U.S. Circuit Court of Appeals affirmed a decision reported at 49 IDELR 249 that the eclectic program proposed for a 6-year-old boy with autism was appropriate. While the eclectic approach was not peer-reviewed, it was based on peer-reviewed research to the extent practicable.

**What it means:** The IDEA requires districts to provide instruction based on peer-reviewed research "to the extent practicable." Nonetheless, a district can use any methodology that will allow a child to receive FAPE. Federal courts have consistently upheld the use of eclectic programs for children with autism. See, e.g., *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 46 IDELR 45 (E.D. Tenn. 2006). The eclectic program in this case was tailored to the child's needs and designed to confer a meaningful benefit. *Editor's note: Per court order, this decision has not been released for publication in official or permanent law reports.*

**Summary:** A California district did not violate the IDEA when it denied a parent's request for an ABA-based autism program. Concluding that the district's eclectic program was appropriate, the 9th Circuit affirmed a decision in the district's favor. The court rejected the parent's argument that the eclectic program failed to meet the IDEA's peer-reviewed research requirement. Although the program itself was not peer reviewed,

the court noted that it was "based on peer-reviewed research to the extent practicable." The court observed that the district only had to provide the child with a basic floor of opportunity. "We need not decide whether the district made the best decision or a correct decision, only whether its decision satisfied the requirements of the IDEA," the 9th Circuit wrote in an unpublished decision. The court also found that the IEP targeted the child's unique needs, was administered by qualified personnel, and was implemented based on accepted principles in the field of autism education. Determining that the district offered the child FAPE, the 9th Circuit granted judgment in the district's favor.

## Parents' preference for ABA doesn't prevent offer of TEACCH program

**Case name:** *A.S. by Mr. and Mrs. S. v. New York City Dep't of Educ.*, 63 IDELR 246 (2d Cir. 2014).

**Ruling:** A New York district did not violate the IDEA when it offered to place a student with autism in a program that used the TEACCH method despite the parents' preference for an ABA-based program. In an unpublished decision, the 2d U.S. Circuit Court of Appeals upheld a District Court's entry of judgment for the district.

**What it means:** A district may use any educational methodology that allows a student with a disability to make non-trivial progress. Neither the parents' preference for a different methodology nor evidence that the student would make greater progress with a different technique will make the district's program inadequate. In this case, the parents maintained that the student needed an ABA-based program to learn. However, the evidence indicated that the student could receive FAPE in the district's 6:1:1 TEACCH classroom. *Editor's note: Per court order, this decision has not been released for publication in official or permanent law reports.*

**Summary:** The parents of a student with autism might have preferred that their child attend an ABA-based program, but their preference did not preclude a New York district from using the TEACCH method to provide the student's educational services. The 2d Circuit ruled in an unpublished decision that the parents were not entitled to reimbursement for the student's placement in a learning center for children with autism. The three-judge panel rejected the parents' claim that the "overwhelming testimony" at the IEP meeting and the due process hearing showed that the student would not benefit from the TEACCH methodology. Nor did that evidence support the parents' argument that the student needed instruction using the ABA method to receive an educational benefit. "[T]he school district's witness testified that TEACCH was an appropriate instructional method for [the student]," the 2d Circuit wrote. Finding no evidence that the student needed an ABA-based program, the court deferred to the district's choice of educational methodologies. The 2d Circuit affirmed the District Court's judgment in the district's favor.

## District may offer TEACCH program despite teen's history, success with ABA

**Case name:** *P.S. v. New York City Dep't of Educ.*, 63 IDELR 255 (S.D.N.Y. 2014).

**Ruling:** Absent evidence that their son needed an ABA-based program to make educational progress, the parents of a 14-year-old boy with autism could not show that a New York district denied their son FAPE when it proposed a placement in a 6:1 class that used the TEACCH method. The U.S. District Court, Southern District of New York granted judgment for the district on the parents' IDEA claim.

**What it means:** Just because a student with a disability has benefited from a particular methodology in the past doesn't mean that the district must continue using that method. To the contrary, a district may use any educational methodology that allows the student to receive an educational benefit. Although the student received instruction exclusively with the ABA method during his 10 years in a private school for children with autism, there was no evidence that he needed an ABA-based program to learn. The fact that the TEACCH classroom incorporated ABA principles further demonstrated the appropriateness of the student's proposed IEP.

**Summary:** Neither a teenager's past success with ABA-based programs nor testimony that ABA was superior to TEACCH invalidated a New York district's offer to place the student in a 6:1 TEACCH program. Finding no evidence that the student needed an ABA program to receive an educational benefit, the District

Court upheld an administrative decision in the district's favor. The court acknowledged that the student responded well to the ABA method and that he had used that method during his 10 years in a private school for children with autism. However, none of the evidence in the record suggested that the student needed an ABA-based program to make progress. According to the district's social worker, the court observed, the ABA method was not the "exclusive" means for teaching the student effectively. "In addition, multiple witnesses testified that TEACCH and ABA both employed strategies that are 'amenable to [the] highly structured, predictable learning environment' required by [the student]," U.S. District Judge Lorna G. Schofield wrote. Although the director of the student's private school testified that ABA was the superior methodology, the court pointed out that the district had no obligation to maximize the student's educational benefit. The court concluded that the student would receive FAPE in the TEACCH classroom despite his parents' preference for an ABA-based program.

## IEP's brief mention of ABA doesn't require school to use specific method

**Case name:** *M.T. and R.T. ex rel. E.T. v. New York City Dep't of Educ.*, 67 IDELR 92 (S.D.N.Y. 2016).

**Ruling:** The parents' concerns that a public school program might use an educational methodology other than ABA did not allow them to recover the cost of their 7-year-old son's private placement. Noting that the child's IEP was silent as to methodology, the U.S. District Court, Southern District of New York affirmed an administrative decision in the district's favor at 115 LRP 17270.

**What it means:** Any reference to a specific methodology in a child's IEP may lead the parents to believe that the child needs that methodology to receive FAPE. If an IEP team decides to mention a specific methodology as part of the child's educational history, it should make sure that the IEP states the purpose of that reference. The IEP here stated that the child successfully used ABA, Floor Time, and Sensory Integration at his private school during the previous school year. Given the historical nature of that statement, the parents could not show that the IEP required the school to use ABA.

**Summary:** An IEP's reference to "ABA, Floor [T]ime, and [Sensory Integration]" in its description of a 7-year-old boy's educational history did not require a New York district to assign the child to a school that used an ABA methodology. Finding no evidence that the proposed public school placement was inappropriate, the District Court denied the parents' request for tuition reimbursement. U.S. District Judge Richard J. Sullivan explained that the parents had misread the child's IEP. Although the document mentioned a number of educational methodologies, including ABA, it did not state that the student required ABA-based instruction to make progress. Instead, the judge observed, the IEP noted that the child had benefited from ABA-based instruction in his unilateral private placement during the previous school year. Judge Sullivan rejected the parents' argument that the proposed school's failure to ensure the use of ABA made the placement inappropriate. "To conclude that [the school] would fail to provide FAPE merely because it could not guarantee [the child] would receive the ABA instruction mentioned in [his] IEP would be to rewrite [the] IEP and engage in speculation," the judge wrote. The 2d U.S. Circuit Court of Appeals held in *M.O. and G.O. v. New York City Department of Education*, 65 IDELR 283 (2d Cir. 2015), that parents of students with disabilities may challenge prospective placements based on evidence that the assigned school is unable to provide the services identified in the student's IEP. Claims based on a school's ability to provide services that do not appear in the IEP are not permissible.

## Eclectic program offers FAPE to 3-year-old with autism

**Case name:** *P.C. and S.C. ex rel. J.C. v. Harding Twp. Bd. of Educ.*, 61 IDELR 223 (D.N.J. 2013).

**Ruling:** The U.S. District Court, District of New Jersey ruled that the parents of a preschooler with autism were not entitled to reimbursement for the cost of a private learning center in which they unilaterally placed their child. The court held that the district offered the 3-year-old FAPE when it recommended placing him in an eclectic public school program designed for students with autism.

**What it means:** A district is required to provide an appropriate educational methodology, not necessarily

the one the parent prefers. The fact that a parent believes that an eclectic approach won't be as beneficial to a child as full-time ABA instruction doesn't mean the district must focus on the parent's preferred methodology. Here, the district offered an ABA-based program that utilized a variety of methodologies. There was no evidence that the child's exposure to other methodologies would prevent him from continuing to make progress and reap meaningful educational benefit.

**Summary:** The parents of a 3-year-old with autism might have preferred their son to receive full-time one-to-one ABA instruction, but their New Jersey district didn't have to foot the bill for it. The district's eclectic program for children with autism would have addressed the student's needs while offering opportunities to develop social skills, according to the District Court. The parents enrolled the student in a private learning center that provided the child with ABA instruction. The following year, when the student was about to turn 3, the district recommended placing him in its preschool autism program for 30 hours per week. The program utilized a variety of methodologies, including three hours of daily one-to-one ABA-based instruction. It also offered a socialization program and opportunities to interact with typically developing peers. The parents rejected the offer, kept the student in the learning center, and filed a due process complaint seeking reimbursement. They argued in part that the child needed a full-time ABA program and that the use of other methodologies would hinder his progress. An ALJ concluded, in a decision reported at 9 ECLPR 47, that the district's program would have provided the child with FAPE. In addressing the parents' appeal of that decision, the court relied largely on the ALJ's "thorough and well-reasoned" analysis. The court pointed to the ALJ's findings that there was no evidence that the student's progress using ABA would have been impaired by his exposure to other methodologies during the school day. In addition, there was insufficient evidence that the student needed 30 hours per week of one-to-one ABA instruction, as the parents claimed. The learning center's director acknowledged that the student progressed in that program although it provided the student only 17.5 hours of ABA instruction per week. Finally, the court noted that the ALJ rejected the parents' expert's view that any time spent on school activities other than targeted ABA instruction was wasted time. Rather, there was testimony that given the student's speech-language deficits, he would benefit from opportunities to interpret body language and get along socially.

## Lack of supporting research won't stop district from using SCERTS model

**Case name:** *Board of Educ. of the County of Marshall v. J.A. by Mark. A. and Fran A.*, 56 IDELR 209 (N.D. W.Va. 2011).

**Ruling:** A West Virginia district that planned to use the SCERTS method to educate a preschooler with autism did not have to pay for the child's private placement. The U.S. District Court, Northern District of West Virginia reversed a decision at 52 IDELR 146 that the district's failure to offer an ABA-based program amounted to a denial of FAPE.

**What it means:** Neither the IDEA nor the Part B regulations require a district to use an ABA methodology to educate a child with autism. In addition, most courts and hearing officers that have considered the issue have held that the IDEA's reference to peer-reviewed research does not preclude the use of eclectic or untested teaching methodologies. Although the parents in this case preferred an ABA-based program, they failed to show that the child needed a particular methodology to receive FAPE. Moreover, the SCERTS model was flexible and could be adapted to meet the child's specific needs.

**Summary:** The fact that the SCERTS model for teaching children with autism has little supporting research did not mean that a West Virginia district was required to offer a preschooler an ABA-based program. Concluding that the district offered the child FAPE, the District Court reversed an administrative decision in the parents' favor. According to the district's educational expert, the court observed, the SCERTS method is a comprehensive, evidence-based model based on recommendations by the National Research Council. However, the court pointed out, the district could use the SCERTS model even if its individual components had not been subjected to peer review. "The IEP must include only a statement on 'the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child,'" U.S. District Judge Frederick P. Stamp Jr. wrote. "This language does not prohibit the use of methodologies that are not peer-reviewed." The court acknowledged that the child might have some difficulty transitioning from the ABA instruction he received at his private school to

a SCERTS-based program, but noted there was no evidence that those difficulties would prevent the child from receiving FAPE. Moreover, there was no evidence that the child needed an ABA-based program to receive an educational benefit. Finding that the district's offer was appropriate, the court reversed an order requiring the district to pay for the child's private placement.

## Implementation (provision of ABA services)

### Student's ongoing difficulties show implementation failure was material

**Case name:** *Sumter County Sch. Dist. 17 v. Heffernan ex rel. T.H.*, 56 IDELR 186 (4th Cir. 2011).

**Ruling:** Although a middle schooler with autism made gains in some skill areas in the spring of 2006, those small improvements did not show that the student received a non-trivial educational benefit. The 4th U.S. Circuit Court of Appeals held that a South Carolina district's failure to provide all of the ABA services required by the student's IEP amounted to a denial of FAPE.

**What it means:** Several Circuit Courts have held that only a material failure to implement a student's IEP will qualify as a denial of FAPE. However, because the question of materiality turns on the facts of each case, a district's best bet is to implement students' IEPs as written. The district in this case provided the student with 7.5 to 10 hours of ABA therapy each week as opposed to the 15 hours required by his IEP. Although the district maintained that the student received FAPE in spite of the reduced ABA services, the evidence showed that the amount of services was inadequate.

**Summary:** An IHO's finding that a middle schooler with autism received more than a minimal educational benefit during the 2005-06 school year did not allow a South Carolina district to avoid liability for its failure to provide the full amount of ABA therapy required by the student's IEP. The 4th Circuit held that the district's material implementation failure resulted in a denial of FAPE. The 4th Circuit rejected the notion that it was bound by the IHO's conclusion that the student received an educational benefit. While the court was required to give due weight to the IHO's factual findings, it was free to draw its own conclusions from those findings. The 4th Circuit pointed out that the student was "very aversive" to teaching in the beginning of the school year, and engaged in behaviors such as biting himself and wiping his face until it bled. The board-certified ABA therapist who worked with the student in his autism classroom testified that the teacher and classroom aides did not understand or properly implement ABA techniques. Only by working with the student for several months was the therapist able to correct the problems resulting from staff members' improper implementation of ABA techniques. The 4th Circuit observed that the evidence as a whole supported the District Court's conclusion that the implementation failure resulted in a denial of FAPE. "While there is evidence showing that [the student] made some gains in certain skill areas tested in the spring of 2006, these gains were not so significant as to *require* a conclusion that [the student] received some non-trivial educational benefit from the 2005-06 IEP as implemented by the district," Chief U.S. Circuit Judge William B. Traxler Jr. wrote. The court thus affirmed the District Court's ruling that the district denied the student FAPE.

### Records demonstrate IEU's efforts to provide appropriate ABA services

**Case name:** *G.K. by C.B. and T.K. v. Montgomery County Intermediate Unit*, 65 IDELR 288 (E.D. Pa. 2015).

**Ruling:** Noting that an intermediate educational unit attempted to provide appropriate ABA services to a preschooler with autism, the U.S. District Court, Eastern District of Pennsylvania rejected the parents' claim that the IEU denied the child FAPE. The court held that the parents were entitled to reimbursement only for the private services obtained when the IEU did not have a provider available.

**What it means:** Implementing a child's IEP can be difficult when a parent actively objects to the district's

choice of providers or educational methodologies. While a district has no control over the parent's conduct, it can limit its own liability by documenting its efforts to work with the parent and provide the child's services. In this case, two ABA providers stopped working with the child because of the mother's alleged interference with service delivery. The IEU's records of its efforts to find a qualified service provider that the parents would approve undercut the parents' request for services from a provider of their choosing.

**Summary:** An IEU's efforts to provide ABA services to a preschooler with autism despite his parents' contentious relationship with its contracted providers substantially reduced its obligation to pay for private Lovaas therapy. The District Court affirmed a decision at 10 ECLPR 92 that the IEU only had to pay for services the parents obtained when it did not have a provider available. The court observed that the parents' objection to the IEU's providers appeared to stem from their preference for the Lovaas services their son received under Part C of the IDEA. However, the evidence showed that the providers had the education and training necessary to deliver ABA services, and that the child made progress using a slightly different ABA method. The court also pointed out that the IEU attempted to ease the parents' concerns, giving them a choice of providers despite having no legal obligation to do so. In addition, the child's March and October 2012 IEPs indicated that he made progress in the IEU's program. As such, the parents failed to prove that the IEU denied the child FAPE. U.S. District Judge Nitza I. Quiáoñes Alejandro recognized that many of the alleged implementation problems stemmed from the parents' actions, including the mother's purported attempts to "micromanage" service delivery. Nonetheless, the court held that the IEU had a responsibility to ensure the continuous provision of services. The court ruled that the parents could recover the cost of private ABA services they obtained during the four months that the district did not have a provider available for the child.

## Lack of records raises questions about student's receipt of services

**Case name:** *Glen Cove (NY) Sch. Dist.*, 58 IDELR 143 (OCRII, New York (NY) 2011).

**Ruling:** OCR determined that a New York district failed to implement a student's IEP by failing to ensure that she received the full amount of ABA services outlined in her IEP for the 2008-09 school year. Pursuant to a resolution agreement, the district agreed to remedy Section 504 compliance concerns.

**What it means:** Regardless of whether a district provides special education services itself or through a third party, it's important to maintain consistent, current, and thorough records of when students receive services. This will help districts track any outstanding services due. Districts should also record students' receipt of any compensatory services. In failing to track the ABA services a student received, the district here could neither furnish proof that she received the entire amount of services her IEP called for nor show that it provided make-up sessions for 42 hours of missed services.

**Summary:** Although a district claimed it provided the full amount of ABA services in a student's IEP, its inability to back up that claim with documentation raised Section 504 compliance concerns. Pursuant to her 2008-09 IEP, the student was supposed to receive 132.5 hours of one-to-one ABA services. However, records showed that the student missed 42 hours of services. The district pointed out that independently provided ABA services began approximately one month later than scheduled, but that it made-up all outstanding hours of services due. The student's father denied that she received any make-up services, and OCR noted that the district was unable to furnish any documentation substantiating the make-up sessions. OCR determined that the student missed a total of 22.5 hours of ABA services over a two-month span. The district claimed that thereafter, the independent provider trained a paraprofessional to provide the student with services in a special location, and as a result, the district stopped maintaining records of the services. However, the paraprofessional denied that she ever rendered such services to the student. In fact, she informed OCR that the student did not receive services every day as required by her IEP. Because the district was again unable to prove that it provided any compensatory services, OCR determined that it failed to provide the student with 10.5 hours of ABA services in an additional two-month period. Next, OCR pointed to the district's failure to provide documentation substantiating its claim that it made-up eight hours of services that the student missed during a subsequent two-week period. Finally, the district failed to record a paraprofessional's provision of ABA services to the student during the last three months of the school year. OCR determined that the student missed one hour of services during that period. Without

proof that the student actually received the amount of compensatory services as the district averred, OCR concluded that remedial action was necessary.

## Access to/funding for ABA services

### Parents fail to show ABA program's criteria, waitlist are discriminatory

**Case name:** *Z.F. by M.A.F. and J.F. v. Ripon Unified Sch. Dist.*, 70 IDELR 19 (E.D. Cal. 2017).

**Ruling:** Parents who claimed that a California district and a private nonprofit organization unlawfully restricted their children's access to ABA services were not entitled to relief under Section 504. The U.S. District Court, Eastern District of California held that the parents' failure to establish "deliberate indifference" to their children's rights required it to grant the district's motion for judgment.

**What it means:** The fact that a popular special education program has a waitlist or eligibility criteria does not in itself prove that a district intentionally denied students access to necessary services. To establish liability under Section 504, the parents must show that the district: 1) knew the student's federally protected rights were likely to be violated; and 2) failed to act despite that knowledge. These parents argued that the district and the nonprofit wrongfully used the waitlist and eligibility criteria to screen out otherwise qualified children. However, they did not explain how the enforcement of the program's requirements amounted to deliberate indifference.

**Summary:** A California district will not have to defend allegations that it discriminated against children with autism by failing to ensure their participation in an ABA program operated by a private nonprofit organization. The District Court granted judgment for the district on the parents' Section 504 claims based on the parents' failure to establish deliberate indifference. U.S. District Judge Troy L. Nunley explained that parents seeking relief for disability discrimination under Section 504 must allege some form of intentional discrimination. Parents can meet this standard by submitting evidence that the district was deliberately indifferent. This means that the district knew a violation of the child's federally protected rights was likely and failed to act despite that knowledge. The parents in this case argued that the district and the nonprofit organization wrongfully deprived their children of necessary ABA services by enforcing certain eligibility criteria and having a waitlist for services. However, the court pointed out that the parents did not indicate how those actions amounted to deliberate indifference. "[The parents] state that '[u]sing eligibility criteria that might screen out qualified people with disabilities is a violation of federal law,'" Judge Nunley wrote, noting that the parents cited to the Section 504 regulations. "Yet, [the parents] do not assert how this law indicates knowledge or failure to act on the part of [the district and the nonprofit organization]." The judge further observed that the parents did not submit any evidence in support of their argument. Instead, they cited to witnesses' declarations that the ABA program was operated in a discriminatory manner. Because the parents' evidence did not raise the possibility that the district acted with deliberate indifference, the court held that the district was entitled to judgment. The requirements for the ABA program, which the nonprofit organization operated in a five-county area, appeared in a document titled "Early Intensive Behavioral Treatment Procedures and Program Guidelines." The document states that the IEP team determines whether to place the child in the ABA program. The court indicated that the district in this case conducted the required IEP meetings.

### Florida must permit parents to tap Medicaid to pay for ABA services

**Case name:** *K.G. by Garrido v. Dudek*, 11-20684-CIV-LENARD/O'SULLIVAN (S.D. Fla. 2013).

**Ruling:** The U.S. District Court, Southern District of Florida granted a request to permanently enjoin the Florida Agency for Health Care Administration from denying parents Medicaid funds to pay for ABA treatment for their children with autism. Concluding that the agency erred in its determination that ABA isn't a medically necessary treatment, the court ordered the agency to fund ABA for the three children whose parents requested the injunction.

**What it means:** Educational agencies, with certain restrictions, may use Medicaid or other public benefits in which a child participates to pay for IDEA services. However, agencies should ensure that the planned service is considered medically necessary in their state before making any promises to the parent that Medicaid will pay for it. In this case, the Florida Agency for Health Care Administration incorrectly determined that ABA is experimental, and therefore not a medically necessary treatment for autism. Before a District Court ruled that the determination was incorrect, students with autism could not use their Medicaid benefits to pay for ABA in Florida.

**Summary:** There's a small window of opportunity for children with autism to learn behavioral skills, and a court found that Florida effectively shut it for students reliant upon Medicaid funds when it incorrectly labeled ABA "experimental." The District Court ordered the Florida Agency for Health Care Administration to begin authorizing Medicaid payments for ABA treatment. The parents of three children with autism sought a permanent injunction requiring the agency to cover ABA services to Medicaid-eligible children. The court noted that states are not required to pay for services with Medicaid funds that are not medically necessary, such as experimental forms of treatment. However, in this case, the agency's determination that ABA is experimental was arbitrary, capricious, and unreasonable, both in its process and in its conclusion. The court pointed out that the agency did not follow its usual procedures for determining whether a treatment is experimental. No analyst or nurse was assigned to research ABA or review published reports or articles from authoritative medical and scientific literature. Moreover, no one at AHCA ever reviewed whether other states' Medicaid programs, Medicare, or commercial insurance plans, covers ABA. Finally, no AHCA staff member discussed the treatment with a physician, the court noted. Instead, the agency's officials made a cursory review of limited material provided by the agency's legal counsel. Those materials, for the most part, were not "reliable evidence," as defined by Florida law, the court observed, because they were not published reports or articles from authoritative medical and scientific literature. Reliable evidence would have demonstrated to the agency that ABA is not experimental, but "an effective and significant treatment to prevent disability and restore developmental skills to children with autism," U.S. District Judge Joan E. Lenard wrote.

## District can't redefine 'FAPE' to exclude provision of in-home ABA services

**Case name:** *Clark County Sch. Dist.*, 61 IDELR 180 (SEA NV 2012).

**Ruling:** A Nevada district violated the IDEA not only by defining FAPE to exclude in-home ABA services, but by requiring parents to arrange and pay for any in-home ABA therapy identified as "supplemental services" in their children's IEPs. The Nevada ED ordered the district to revise its policies to align with the IDEA and provide staff training on those revisions.

**What it means:** A special education policy that makes certain types of services unavailable regardless of a child's unique needs will almost surely run afoul of the IDEA. Districts would thus be well advised to review their special education policies and ensure that they call for individualized determinations of students' needs. The protocol at issue in this case stated that FAPE would be provided in the classroom, and that "[in-home ABA therapy] is not a mandated provision of the IDEA." This protocol impermissibly limited the scope of services made available to ensure that students with disabilities received FAPE.

**Summary:** A policy that classified in-home ABA therapy as a short-term supplemental service that was not necessary for the provision of FAPE landed a Nevada district in hot water with the state ED. Determining that several components of the district's in-home ABA protocol violated the IDEA, the ED directed the district to revise its policies and procedures. The ED pointed out that the IDEA requires each student's IEP team to decide which services the student requires to receive FAPE. By adopting a blanket policy that effectively redefined FAPE to exclude the provision of in-home ABA therapy, the ED observed, the district prevented students' IEP teams from making those individualized determinations. The district also erred in adopting a policy that precluded the evaluation of a student's need for in-home ABA services until it had developed the student's initial IEP. The ED recognized that the district included in-home ABA therapy in some student's IEPs as a "supplemental service." However, noting that the IDEA expressly requires districts to provide services "at no cost," the ED explained that the classification did not justify a district policy requiring parents to arrange those services and seek reimbursement for any up-front expenses. "Even if

[the district] has a practice that allows a parent to request assistance from [the district] in the provision of services, the initiative is impermissibly on the parents and, further, the [in-home ABA] protocol and related documents do not reflect this practice," the ED wrote. The ED gave the district 30 days to revise its policies and procedures and provide staff training.

## Amount of ABA services

### Failure to specify amount of ABA doesn't make child's IEP deficient

**Case name:** *Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 53 IDELR 153 (S.D. Ohio 2009).

**Ruling:** Despite claiming that an Ohio district refused to provide the 30 hours of weekly ABA services their son required, the parents of a 6-year-old boy with autism could not establish a right to tuition reimbursement. The U.S. District Court, Southern District of Ohio held that the district offered the child FAPE.

**What it means:** Neither the IDEA nor the courts require districts to provide a particular amount of ABA services to a child with autism. In fact, nothing in the IDEA requires districts to use an ABA methodology. The only question is whether the proposed IEP addresses the child's individual needs and is designed to provide an educational benefit. Although the district here did not commit to a specific amount of ABA services, it offered to provide up to 30 hours of ABA each week. It was the parents' lack of cooperation with the IEP process that prevented the district from finalizing that offer.

**Summary:** Finding no evidence that an Ohio district offered inadequate ABA services to a 6-year-old boy with autism, the District Court held that the child's proposed IEP was appropriate. The court affirmed a due process decision that denied the parents' reimbursement claim. The court first rejected the parents' argument that districts are required to provide children with autism between 30 and 40 hours of ABA services each week. While some students with autism may require extensive ABA services, the court noted that neither the IDEA nor judicial decisions require a set amount of ABA. In addition, the court pointed out that the district offered to provide 30 hours of ABA services. However, because extensive ABA services would limit the time the child spent in activities such as art, music, physical education, and recess, the IEP team needed to discuss the child's participation in those activities. "The school district attempted to discuss [the 30-hours-a-week] option with [the parents], but needed additional information from the parents regarding additional services for [the child]," U.S. District Judge Edmund A. Sargus Jr. wrote. The court noted that the parents refused to sign the IEP or participate in further discussions unless the district specified the amount and location of the child's one-to-one ABA services. That evidence undermined the parents' claim that the district predetermined the child's ABA services. Moreover, the court observed that the parents did not participate in the IEP process in good faith. Determining that the IEP was appropriate, the court denied the parents' request for relief.

### Superiority of private ABA services doesn't make toddler's IFSP deficient

**Case name:** *A.G. and L.G. ex rel. N.G. v. Frieden*, 52 IDELR 65 (S.D.N.Y. 2009).

**Ruling:** Determining that the IFSP developed for a toddler with autism was both procedurally and substantively appropriate, the U.S. District Court, Southern District of New York held that the state's Part C agency complied with the IDEA. The court determined that the parents were not entitled to reimbursement for their son's private services.

**What it means:** Parents are not entitled to reimbursement for early intervention services merely because the private services provide the child with a greater benefit. Instead, the question is whether the IFSP is calculated to provide some benefit to the child. Here, experts for both parties testified that the child would benefit from the 20 hours of weekly ABA therapy proposed in the IFSP. While the child might have made greater progress if he received 30 to 40 hours of ABA therapy each week, the Part C agency had no obligation

to maximize the child's potential.

**Summary:** The parents of a toddler with autism might have preferred that their son receive at least 30 hours of ABA therapy each week, but that did not invalidate the agency's offer to provide 20 hours of ABA services. The District Court held that the proposed IFSP would meet the child's unique needs. The court rejected the parents' claim that the IFSP was procedurally deficient. Even if, as the parents claimed, the agency proposed a 20-hour program in advance of the IFSP meeting, there was no evidence that the district predetermined the child's services. On the contrary, the evidence showed that the IFSP team considered the parents' input. "At least one element of the IFSP -- an evaluation of [the child] for physical therapy -- was added as a result of the comments of [the child's] mother," U.S. District Judge Lewis A. Kaplan wrote. In addition, the court noted that the IFSP team considered reports from private evaluators about the student's early intervention needs. As for the substance of the child's program, the court observed that the proposed IFSP would provide some non-trivial educational benefit. The parents' own experts testified that the child would make some progress with only 20 hours of ABA therapy each week. Although the experts testified that 40 hours of weekly ABA therapy was the optimum level of services, there was no evidence that the child required additional ABA services to benefit from his IFSP. The court thus determined that the parents were not entitled to reimbursement for the early intervention services they obtained from a private provider.

## IEP team's offer of 5 hours of ABA overlooks child's severe deficits

**Case name:** *Department of Educ., State of Hawaii*, DOE-SY0910-030 (SEA HI 2010).

**Ruling:** The parents of a student with severe speech-language and social skills deficits established that the Hawaii ED denied the student FAPE when it offered just five hours of ABA services per week. Finding that the student's unilateral placement in a private school was appropriate, an IHO ordered the ED to pay for the student's private tuition for the 2009-10 school year and the 2010 extended school year.

**What it means:** When developing an IEP, districts must consider the opinions of those most familiar with the student's needs. Where the student is transitioning from private to public school, the team should invite private school staff members to IEP meetings or at least obtain and consider their recommendations. Here, the IEP team consisted only of the parent, student and Hawaii ED team members who were unfamiliar with the child. Without the benefit of the private school's input, the ED developed an IEP which failed to address the child's profound communication and behavioral deficits.

**Summary:** An IEP team's decision to offer just five hours of ABA intervention to a student with profound communication and behavioral deficits put the Hawaii ED on the hook for the student's private tuition. An impartial hearing officer reasoned that the offer contravened the recommendations of the student's private school teacher, private psychologist and private speech language therapist, none of whom were invited to the two IEP meetings. The student was largely nonverbal and required continual redirecting outside of a one-to-one setting, according to the psychologist. The student had been attending private school pursuant to a settlement agreement. The initial IEP placed the student in a general education class in public school with one hour of ABA per day. The student's parents requested a due process hearing, alleging that the ED failed to offer the student FAPE. Under *Rowley*, an IEP must be calculated to enable the student to receive some educational benefit, the IHO noted. The IHO pointed to the psychologist's evaluations and parental and teacher input establishing that the student lacked the communication and behavioral skills to interact or participate in a classroom and needed at least 30 hours ABA therapy to acquire language and social skills. A general education class "was not the type of educational setting that Student needed or could benefit from," the IHO wrote. Although the second IEP moved the student to a resource room, it repeated the offer of five hours of ABA services, an offer that contravened the recommendations of those who knew the student best.

# ABA and placement

## SDC placement balances preschooler's distractibility, wish for social interaction

**Case name:** *B.M. by R.M. v. Encinitas Union Sch. Dist.*, 60 IDELR 188 (S.D. Cal. 2013).

**Ruling:** Although evaluation data showed that a preschooler with autism was highly distractible, his parent could not persuade a District Court that he needed a home-based ABA program to receive FAPE. The court affirmed the ALJ's decision at 5 ECLPR 117 that a special day class for preschoolers with disabilities was the child's LRE.

**What it means:** IEP teams should consider the full range of a student's deficits and abilities when determining his LRE. While some factors, such as attentional difficulties, may weigh against mainstreaming, other factors may show that an increased level of socialization is appropriate. The child in this case had strong nonverbal skills and a desire to interact with others. The SDC placement, which consisted of a small classroom with minimal distractions and minimal visual stimulation, balanced the child's distractibility against his need to develop language and interpersonal skills.

**Summary:** Evidence that a child with autism would benefit from attending an SDC for preschoolers with disabilities undermined the parent's claim that the child needed a home-based ABA program. Determining the proposed placement was the child's LRE, the U.S. District Court, Southern District of California granted the district's motion for judgment. Testimony from district evaluators and independent experts showed that the child was highly distractible and had difficulty sustaining attention on adult-directed tasks. However, evaluations also showed that the child had strong nonverbal skills and a desire to interact with adults and peers. The court observed that the proposed SDC could address the child's distractibility while giving him opportunities to generalize speech-language skills and practice social interaction. U.S. District Judge M. James Lorenz found no fault with the ALJ's decision to credit the testimony of district witnesses over the opinions of the parent's evaluators. "After considering all the relevant evidence, the ALJ concluded that the testimony of district personnel, who had daily or regularly scheduled time with [the student], was more persuasive than that of [the parent's] witnesses, whose opinions were largely based on file reviews," Judge Lorenz wrote. The court also rejected the parent's claim that the ALJ applied an incorrect standard in determining that the proposed IEP offered the child FAPE. Although the parent maintained that the district failed to offer a meaningful educational benefit, the court determined that the "basic floor of opportunity" standard set forth in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (U.S. 1982), still applied.

## Child's failure to acquire basic skills shows need for self-contained class

**Case name:** *S.K. ex rel. N.K. v. Parsippany-Troy Hills Bd. of Educ.*, 51 IDELR 106 (D.N.J. 2008).

**Ruling:** A grade schooler with autism received only a "negligible benefit" during his three years in a mainstream classroom. Thus, a District Court concluded that a more restrictive placement was necessary. The court affirmed a due process decision that declared a self-contained class to be the student's LRE.

**What it means:** A district should not segregate a student with a disability from his non-disabled peers solely to maximize the student's educational benefit. When a student is receiving little or no benefit in a mainstream placement, however, a more restrictive placement may be appropriate. In this case, the evidence showed that the student needed intensive special education to receive an educational benefit. The self-contained class offered the specialized instruction he required while providing opportunities for mainstreaming. *Editor's note: Per court order, this decision has not been released for publication in official or permanent law reports.*

**Summary:** A student's continued struggles in the general education classroom supported a New Jersey district's decision to place the student in a self-contained class for students with autism. The U.S. District Court, District of New Jersey held that the ABA-based class, which offered intensive instruction and mainstreaming opportunities, was the student's LRE. The parent maintained that the district was placing undue emphasis on the student's academic performance. U.S. District Judge Stanley R. Chesler disagreed. Although the student received numerous supports and accommodations in the general education classroom, including a one-to-one aide, the student was unable to acquire basic skills in math, language

and reading comprehension. Moreover, the parent's own evaluator testified that the student would fall further behind if he continued to receive instruction in a large group. The court found the evaluator's testimony persuasive. "Her opinion is not, as [the parent] characterizes it, that [the student] would achieve superior academic benefits in a self-contained classroom, but rather that a self-contained placement is necessary for [the student] to develop the fundamental skills he has failed to develop in the several years he has spent in [a] regular classroom," Judge Chesler wrote in an unpublished decision. The court nonetheless rejected the district's motion to make the self-contained class the student's stay-put placement. Until the parent exhausted her right to appeal, the district could not remove the student from his mainstream placement.

### Autism SDC balances student's need for structure, interaction with peers

**Case name:** *Fullerton Elementary Sch. Dist.*, 2010080889 (SEA CA 2010).

**Ruling:** The parent of an 11-year-old boy with autism failed to show that his son needed a shortened school day and in-home ABA services to receive an educational benefit. Determining that the student's proposed services and SDC placement were appropriate, an ALJ found that the district offered the student FAPE in the LRE.

**What it means:** Just because a student with a disability would benefit from a particular service doesn't mean that the district has an obligation to provide it. The IDEA only requires districts to provide students with a "basic floor of opportunity." So long as the district complies with the IDEA's procedures, offers services that meet the student's needs, and places the student in the LRE, it will satisfy its FAPE obligation. Although the parent here preferred a more intensive home-based program, the proposed IEP met the student's disability-related needs while giving him the opportunity to interact with children his age.

**Summary:** A California district did not violate the IDEA when it declined a parent's request to split an 11-year-old boy's instructional day between an autism SDC and a home-based ABA program. Concluding that the district offered the student FAPE in the LRE, the ALJ granted the district permission to implement the proposed IEP without parent approval. The ALJ rejected the parent's claim that the student needed in-home ABA services to receive FAPE. Although the student needed such services during his preschool years due to his attentional difficulties and limited skills, the student had since made substantial progress. "As a result of the collaboration between the home and school program over the years, [the student] has progressed to where his goals can be met in the school environment without a home program," the ALJ wrote. The ALJ pointed out that the teacher for the autism SDC had worked with the student for the past several years. The student would receive discrete trial training for one hour each day, and would have access to support services such as picture schedules and a Picture Exchange Communication System. Furthermore, the ALJ observed, the SDC placement would allow the student to interact with SDC classmates and nondisabled peers -- an option that was not available in the parent's preferred home program. Finding no evidence that the proposed IEP was inappropriate, the ALJ determined that the district offered the student FAPE.

## ABA outside of regular school hours

### District may cancel ABA services not essential for child's progress

**Case name:** *C.G. and L.G. ex rel. B.G. v. New York City Dep't of Educ.*, 55 IDELR 157 (S.D.N.Y. 2010).

**Ruling:** Echoing a state review officer's conclusion, the U.S. District Court, Southern District of New York ruled that a district was free to cease offering afterschool ABA services to a student with autism and behavioral and toileting issues. The evidence supported the SRO's ruling that the student's day school program offered him access to meaningful benefit.

**What it means:** Districts facing financial challenges may be tempted to remove students with disabilities from some supplementary programs. If they do so, they better make sure that the additional services are not so closely linked with a student's program that he cannot benefit without them. Here, the district ceased offering afterschool ABA services to a student with autism but continued his day school program and parent training services. The parents did not show that the change denied the student FAPE, however, because the evidence indicated that he would have access to meaningful benefit even without the afterschool services.

**Summary:** Neither a child's behavioral or toileting needs nor the protestations of his parent established that a New York district had to continue providing afterschool ABA services to a child with autism. The District Court affirmed a state review officer's decision that the child's IEP was calculated to confer meaningful benefit even without the services. The student attended a day school for several years where he was assigned a paraprofessional for behavioral issues. The district also provided parent training and 15 hours of afterschool one-to-one ABA services per week. The parents argued that the afterschool services were essential for the child to receive FAPE. The SRO disagreed, and the parent challenged the decision in federal court. The District Court noted that FAPE requires an IEP that is likely to provide progress and not regression. The question was whether the progress the student achieved in school was only possible when coupled with his afterschool services. According to his day school teacher, the person most familiar with his educational development, continuing the services would be a "benefit" rather than a necessity for progress. In fact, the teacher conceded that the student could meet all of his short-term academic goals in about a year without that benefit. Furthermore, although the day school director indicated the family "required additional support," the district was addressing those needs. "While some areas, such as toilet training, may be difficult to address in school, such limitations are not sufficient to demonstrate that the IEP is calculated to yield regression rather than progress ... especially in light of the parent training conducted by [the day school] to help deal with such issues," U.S. District Judge Barbara S. Jones wrote.

## 5-year-old's gains in communication, social skills validate proposed IEP

**Case name:** *Monroe Twp. Bd. of Educ.*, 6 ECLPR 22 (SEA NJ 2008).

**Ruling:** The parents of a 5-year-old boy with autism failed to show that their son's proposed IEP was inappropriate. Not only was the child making progress in all academic areas, the ALJ observed, but the proposed ESY program was specifically designed to complement the services the child received during the school year.

**What it means:** Local education agencies have no obligation to maximize a student's potential. So long as an IEP is reasonably calculated to provide a meaningful educational benefit, the LEA fulfills its duty to provide FAPE. *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41 (3d Cir. 1999). The parents in this case wanted the district to provide after-school services as well as services during the school day. However, they failed to show that the child required after-school services to receive a meaningful educational benefit.

**Summary:** A New Jersey district did not violate the IDEA by failing to offer after-school ABA services to a child with autism. An ALJ concluded that the child made sufficient progress in the self-contained ABA-based program that he attended during school hours. It was the child's success in the program that swayed the ALJ's decision. The ALJ pointed out that the child made progress in all areas of academic instruction while attending the district's program. "In particular, his attention span has improved and he recognizes school authority," the ALJ wrote. "His pre-writing and coloring skills have improved, and his social interactions have expanded with increased verbalization." The ALJ further noted that the child responded well to the program's structured environment and had minimal behavioral problems. Because the child was receiving a meaningful educational benefit, the district had no obligation to provide additional services after school. The ALJ also denied the parents' request for a recreation-based ESY program. While the parents' chosen program had a longer day, it offered only one hour of academic instruction. The district's proposed ESY program offered more opportunities for specialized instruction and related services. Finding that the district's program was designed to work with the child's school year program and prevent regression -- the underlying purpose of ESY services -- the ALJ found that the district's program was appropriate.

## Reimbursement for private ABA services

### LEA has no duty to reimburse parent for unlicensed provider's ABA therapy

**Case name:** *Ramirez-Ortiz ex rel. PAPR v. Commonwealth of Puerto Rico Dep't of Educ.*, 60 IDELR 132 (D.P.R. 2013).

**Ruling:** The Puerto Rico ED did not have to reimburse the parent of a student with severe autism for ABA therapy she obtained pursuant to an administrative order. Noting that the provider was not licensed in Puerto Rico, the District Court denied the parent's request for relief.

**What it means:** Educational agencies have no obligation to pay for special education services delivered by a provider that fails to meet the state's qualification requirements. That said, LEAs must ensure that they provide the services students with disabilities need to receive FAPE. Although the court in this case held that Puerto Rico law prohibited the ED from paying for ABA services provided by an unlicensed therapist, it noted the student had a clear need for behavioral services. The court advised the ED to meet with the parent and develop a program that would meet the student's disability-related needs.

**Summary:** Noting that a student's ABA therapist was not licensed to practice psychology in Puerto Rico, the District Court held that the Puerto Rico ED did not have to pay for several years' worth of services. The court denied the parent's request for reimbursement. The court explained that the IDEA requires educational agencies to ensure that all special education services providers meet the state's qualification requirements, including those for certification, licensing, or registration. Puerto Rico law states that only individuals authorized by the Board of Examiners of Psychologists can practice psychology in the territory. "Whether Puerto Rico requires its behavior modification therapists to be certified in psychology is within its province," U.S. District Judge Gustavo A. Gelpí wrote. The court recognized that an ALJ had ordered the ED to pay for "psychological therapy services" the parent obtained for the student. However, because the therapist who provided those services was not licensed to practice psychology under Puerto Rico law, the court held the ED did not have to reimburse the parent for the ABA therapy. The court did remind the ED of its duty to provide the student FAPE, and suggested that it might "find a legal and ethical way by which to assist this child and his family with the financial burden incurred paying for his treatment." It also advised the ED to develop and implement an appropriate IEP for the student.

### IEP's provision for 1:1 paraprofessional bolsters offer of 6:1+1 placement

**Case name:** *B.K. and Y.K. ex rel. G.K. v. New York City Dep't of Educ.*, 63 IDELR 68 (E.D.N.Y. 2014).

**Ruling:** Although the parents of a 6-year-old boy with autism wanted their son to remain in his one-to-one private school program, the U.S. District Court, Eastern District of New York held that a 6:1+1 public school program would meet the child's academic, behavioral, and social needs. The court granted the district's motion for judgment on the parents' reimbursement claim.

**What it means:** Misunderstandings about the roles of various personnel may contribute to a parent's fears about a new placement. A district can reduce the likelihood of an IEP dispute by encouraging the parents to ask questions about relevant staff members and sharing information about their respective roles. The parents here argued that the one-to-one health paraprofessional identified in the IEP would not be able to provide the instructional support their son needed. However, the IEP's description of the paraprofessional's duties showed that the paraprofessional would provide academic and behavioral support in addition to assisting the child with toileting and lunchroom tasks.

**Summary:** Determining that a New York district could meet the needs of a 6-year-old boy with autism in a 6:1+1 setting with full-time one-to-one paraprofessional support, the District Court held that the parents were not entitled to reimbursement for the student's private one-to-one ABA program. The court ruled that the proposed placement would provide the behavioral and instructional supports the child required while

offering opportunities to develop social skills. U.S. District Judge Nicholas G. Garaufis rejected the parents' claim that the child required one-to-one instruction to address his maladaptive behaviors, which included "body tensing, flopping, crying, vocal protests, and biting his clothing." Although the parents' behavioral expert and the assistant director of the private program testified that the child required frequent redirection, the district's psychologist testified that the highly controlled program inhibited the child's development. Additional evidence showed that the child was ready to begin academic instruction and would benefit from socialization opportunities that were not available in the one-to-one program. Furthermore, the court pointed out that the district offered one-to-one assistance within the 6:1+1 class. Judge Garaufis noted that while the IEP included a full-time health paraprofessional, the individual who filled that role would do more than assist the child with toileting and lunchroom tasks as the parents believed. "The IEP provides that [the child's] paraprofessional will assist him in completing the teacher's assignments, and the BIP identifies the paraprofessional as someone who will assist in implementing the BIP and managing [the child's] maladaptive behaviors," the judge wrote. Concluding that the proposed placement balanced the child's academic, behavioral, and social needs, the court held that the IEP was substantively appropriate.

## Teen's past progress in private school fails to justify continuation of placement

**Case name:** *West Windsor-Plainsboro Reg'l Sch. Dist., Bd. of Educ. v. M.F. and M.F. ex rel. A.F.*, 56 IDELR 106 (D.N.J. 2011).

**Ruling:** The parents of a teenager with autism could recover the cost of their son's supplemental in-home ABA program from a New Jersey district. The U.S. District Court, District of New Jersey held that the district's agreement to continue the student's placement in a school for children with autism despite his lack of recent gains resulted in a denial of FAPE.

**What it means:** Just because a student previously made progress in a particular placement doesn't mean the placement will continue to be appropriate. If the student develops so many new skills that the placement becomes too easy, the IEP team must consider a placement that will allow the student to continue to make progress. The district here might have avoided liability for denial of FAPE had it followed through on its offer of a public school placement rather than continuing the inappropriate placement. *Editor's note: Per court order, this decision has not been released for publication in official or permanent law reports.*

**Summary:** A New Jersey district had to reimburse a teenager's parents for the cost of the student's supplemental in-home ABA program, all because it failed to offer the student an appropriate placement. The U.S. District Court, District of New Jersey ruled that the home program was necessary for the student to make progress. The district argued that the ALJ applied the wrong standard when she determined that it failed to offer the student FAPE. Instead of considering whether the student's placement in a private school for children with autism was appropriate, the ALJ focused on the superior benefits of the home program. The District Court disagreed, noting that the ALJ clearly found the private school placement to be inappropriate. Although the student had made significant progress during his time at the private school, experts for both parties testified that the curriculum had become too easy for the student by the end of the 2006-07 school year. Moreover, the court observed, the experts testified that the student needed an intensive, one-to-one ABA program to receive FAPE. "Going forward, [the student] required a full-time ABA program in order to make meaningful educational progress, rather than a program that merely incorporated the principles of ABA," U.S. District Judge Freda L. Wolfson wrote in an unpublished decision. The court noted that the district had proposed a public school placement for the student for the 2007-08 school year. However, the district agreed to continue the private school placement while the parents had their experts review the public program. Determining that the student's progress during that time was solely due to the in-home ABA program, the court held that the parents were entitled to recover the cost of those services.

# Applied Behavior Analysis & Programs for Students with Autism –

Standards of Practice & Legal Defensibility
Addressing the Confusion, Issues, Legal Standards, and More

MARY SCHILLINGER, CONSULTANT, COLLABORATION FOR SUCCESS

39TH PNWI – SPECIAL EDUCATION AND THE LAW
VANCOUVER, WA
OCTOBER 9 – 11, 2023

## Learning Objectives

Attendees will become knowledgeable regarding the issues and indications for Applied Behavior Analysis in Programs for Students with Autism

Attendees will have access to case law examples relating to ABA and FAPE offers

Attendees will become knowledgeable about the range of flexibility and consistency of ABA programming

Attendees will know strategies for use of ABA in a variety of LRE settings

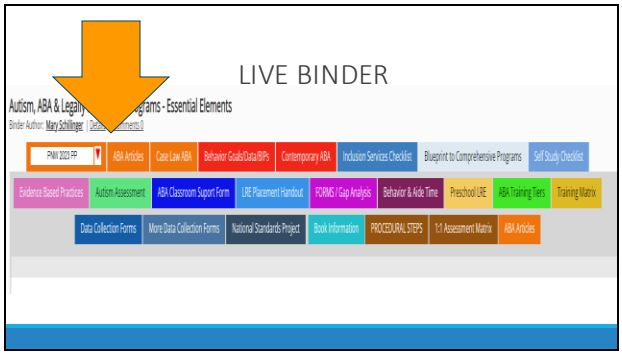
Attendees will know strategies for data collection including documentation of **intervention fidelity**

Attendees will obtain a self study tool for use in conducting a gap analysis

## Link to Live Binder

Handouts and Documents

http://bit.ly/2aXQ2vn




# ABA – Who, What, When, Where, If…

## CONTROVERSY & CASE LAW

## WHAT IS ABA?

Applied behavior analysis (ABA) is the science of applying experimentally derived principles of behavior to improve socially significant behavior. ABA takes what we know about behavior and uses it to bring about positive change (Applied). Behaviors are defined in observable and measurable terms in order to assess change over time (Behavior). The behavior is analyzed within the environment to determine what factors are influencing the behavior (Analysis).

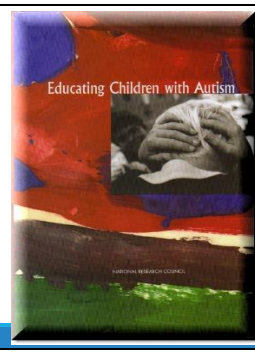
## BREAKING DOWN A BEHAVIOR INTO IT'S SEQUENCIAL / ESSENTIAL COMPONENTS

| Task Analysis | | | | | |
|---|---|---|---|---|---|
| **Student decides he/she wants to see a movie with a friend** | | | | | |
| **Student checks the computer for movie times & locations** | | | | | |
| **Student writes down movie times and locations** | | | | | |
| **Student approaches friend at school** | | | | | |
| **Student asks friend if they would be interested in seeing a movie with him** | | | | | |
| **Friend says yes and student continues** | | | | | |
| **Student discusses the movie times and locations with friend** | | | | | |
| **Student and friend decide how to get to movies and where to meet** | | | | | |

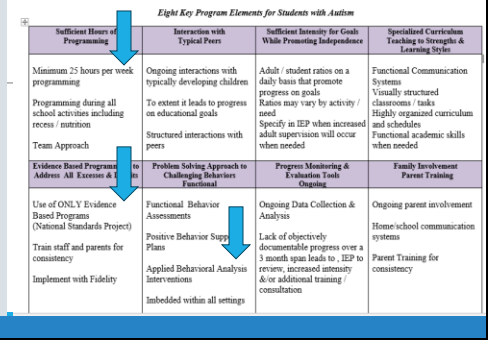
National Research Council

National Academy Press (2001)

ISBN:
0-309-07269-7




Blueprint to Comprehensive Programs ON LIVE BINDER



*Eight Key Program Elements for Students with Autism*

| Sufficient Hours of Programming | Interaction with Typical Peers | Sufficient Intensity for Goals While Promoting Independence | Specialized Curriculum Teaching to Strengths & Learning Styles |
|---|---|---|---|
| Minimum 25 hours per week programming<br><br>Programming during all school activities including recess / nutrition<br><br>Team Approach | Ongoing interactions with typically developing children<br><br>To extent it leads to progress on educational goals<br><br>Structured interactions with peers | Adult / student ratios on a daily basis that promote progress on goals<br>Ratios may vary by activity / need<br>Specify in IEP when increased adult supervision will occur when needed | Functional Communication Systems<br>Visually structured classrooms / tasks<br>Highly organized curriculum and schedules<br>Functional academic skills when needed |
| **Evidence Based Programs to Address All Excesses & Deficits** | **Problem Solving Approach to Challenging Behaviors Functional** | **Progress Monitoring & Evaluation Tools Ongoing** | **Family Involvement Parent Training** |
| Use of ONLY Evidence Based Programs (National Standards Project)<br><br>Train staff and parents for consistency<br><br>Implement with Fidelity | Functional Behavior Assessments<br><br>Positive Behavior Support Plans<br><br>Applied Behavioral Analysis Interventions<br><br>Imbedded within all settings | Ongoing Data Collection & Analysis<br><br>Lack of objectively documentable progress over a 3 month span leads to , IEP to review, increased intensity &/or additional training / consultation | Ongoing parent involvement<br><br>Home/school communication systems<br><br>Parent Training for consistency |

## Address all Excesses & Deficits

Repetitive / Rigid Thinking & Behavior

Behaviors – Non Compliance & Aggression
- Address Them!!
- Functional Assessments
- ABA Reinforcement

Special Interests
- Social Skills
- Age Appropriateness

Communication

Socialization
- Social Skills Curriculum

Play & Leisure
- Age appropriate

Learning to Learn
- Teach proactive observational learning skills

## National Research Center Recommendations

***Checklist of Recommendations***

***National Research Council***

***Educating Children with Autism***

| Rec # | Recommendation |
|---|---|
| 1-2 | Assessment of: social behavior, language and nonverbal communication, adaptive behavior, motor skills, atypical behaviors, and cognitive status |
| 1-2 | Young children …. Do a follow-up diagnostic and educational assessment within one to two years of initial evaluation. |
| 2-1 a | Provide written information re autism and services to parents at the beginning of the assessment process. |
| 2-1 b | Provide written results of assessment and a contact person prior to the initial IEP. During IEP, give parents opportunity to voice questions, concerns and perspectives. |
| 3-1 | Appropriate educational objectives that are observable, measurable behaviors and skills. |
| 3-1 a | Objectives include the development of social skills to enhance participation in family, school, and community activities. |
| 3-1 b | Objectives for development of: expressive verbal language, receptive language, and non-verbal communication skills. |

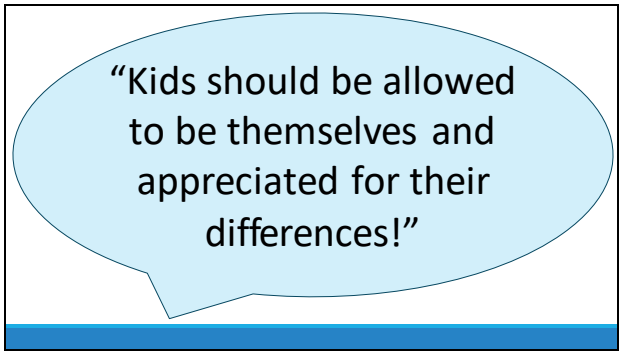
| Appropriate Times to Use Direct ABA Teaching |
|---|
| **Teaching novel skills.** |
| **When students are inattentive or have not mastered attending skills in large group settings.** |
| **When more repetition is needed.** |
| **When assessing the student.** |
| **When the student is showing difficulty learning the new skill over time** |

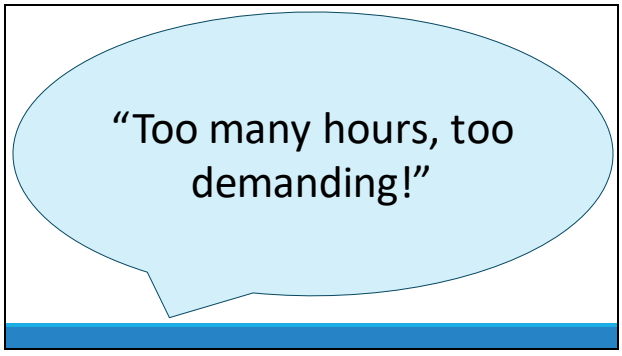
## WHAT IS THE CONTROVERSY??

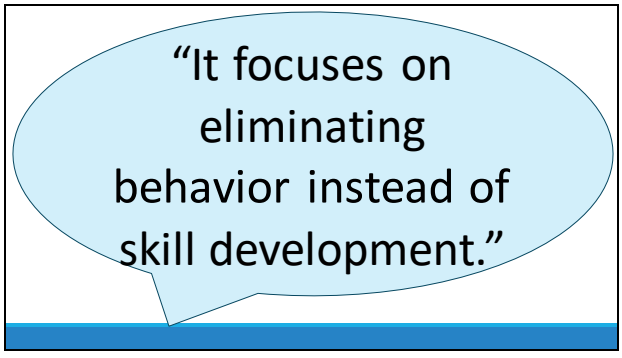
38,500,000 RESULTS FROM A GOOGLE SEARCH "APPLIED BEHAVIOR ANALYSIS CONTROVERSY"

"It's overly formulaic.."

"A person can function well in the world without acting "normal!"

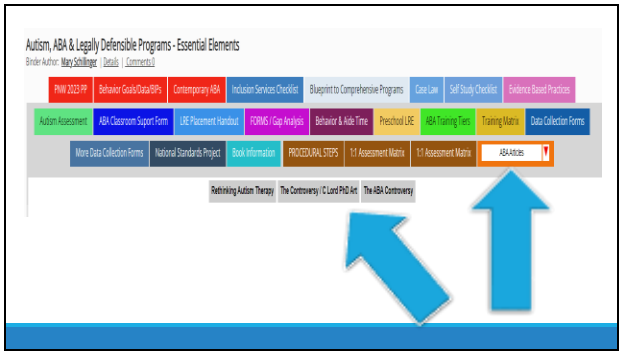

"Kids should be allowed to be themselves and appreciated for their differences!"


"Too many hours, too demanding!"


"It focuses on eliminating behavior instead of skill development."

"It's robotic and NOT FUN!"

## Emerging Articles Addressing the Controversy…..



# ABA – Who, What, When, Where

## CASE LAW

Sped Case Law rulings continue to support the use of some form of ABA…

## Case Example #1: ABA Services

D.S. and J.S. v. Rockville Ctr Union Free Sch. Dist. (E.D.N.Y. 2022)

- Parents funded supplemental ABA program for student during school hours and sought to recover cost of program, claiming student only made progress because of ABA services
- Court rejected claim, finding district's IEPs met student's needs
  - Although progress was slow and inconsistent both before and during ABA program, student made appropriate progress toward annual goals
  - IEP team amended IEP as needed, including strategies to address distractibility
  - Parents request for additional services suggested ABA instruction was sometimes inconsistent

(D.S. and J.S. v. Rockville Ctr. Union Free Sch. Dist. (E.D.N.Y. 2022) 80 IDELR 185)

## Case Example #2: ABA Services

N.T. v. Garden Grove Unif. Sch. Dist. (C.D. Cal. 2016)

- Decision to place grade schooler in SDC rather than private at-home ABA program parents preferred did not violate IDEA
- IEP offered by district met student's need for small-group and individual services
- Court rejected parents' argument that student could only make educational progress with private, at-home ABA program, as student made significant progress toward goals during previous school year in program similar to that proposed by district

(N.T. v. Garden Grove Unif. Sch. Dist. (C.D. Cal. 2016) 67 IDELR 229)

## Case Example #3: ABA Services

M.T. and R.T. v. New York City Dep't of Educ. (S.D.N.Y. 2016)

- IEP document mentioned number of educational methodologies, including ABA, and noted that student had benefited from ABA-based instruction in his unilateral private placement during the previous school year
- Such mentions did not require district to assign student to school that used an ABA methodology
  - "To conclude that [school] would fail to provide FAPE merely because it could not guarantee [student] would receive the ABA instruction mentioned in [his] IEP would be to rewrite IEP and engage in speculation"

(M.T. and R.T. v. New York City Dep't of Educ. (S.D.N.Y. 2016) 67 IDELR 92)

## Case Example #4: ABA Services

*P.S. v. New York City Dep't of Educ., 63 IDELR 255 (S.D.N.Y. 2014)*

- A teenager's past success with ABA-based programs nor testimony that ABA was superior to TEACCH invalidated a NY district's offer to place the student in a 6:1 TEACCH program.
- The District Court found no evidence that the student needed an ABA program to receive an educational benefit. The court acknowledged that the student responded well to the ABA method and that he had used that method during his 10 yrs in a private school for children with autism.
- The court concluded that the student would receive FAPE in the TEACCH classroom despite his parents' preference for an ABA-based program.

**Case Example #5**
*Las Virgenes Unif. Sch. Dist., 63 IDELR 144 (SEA CA 2013)*

- Hearing officer's ruling in favor of placement in a school district's program for students with high functioning autism (titled the Social Communication Program) highlighted the key elements of the student's program that made the program comprehensive and defensible:
- …….. "the IEP included behavior goals that, when read in conjunction with the BSP, addressed Student's unique needs in the area of behavior. Goal four targeted staying calm; goal five targeted gaining adult attention appropriately without shouting out, making faces or getting out of his seat; goal six targeted compliance with instructions without displaying interfering behaviors such as engaging in "silly talk," refusing to work, or getting out of his seat; …"
- …."goal seven targeted appropriate transitions; goal nine targeted doing non-preferred academic tasks without displaying inappropriate behaviors such as calling out, getting out of his seat or making silly faces. Thus, where the IEP as a whole addressed Student's behavior, District did not deny Student a FAPE by not listing them separately in a BSP. Most importantly, the actual offer of placement and services was reasonably calculated to address Student's behavioral challenges."

Additional Case Law Examples…


Comprehensive & Defensible Programs

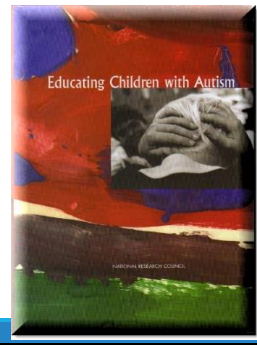
Law & Compliance

Implementation & Tools

National Research Council

National Academy Press (2001)

ISBN:
0-309-07269-7




National Research Center Recommendations

***Checklist of Recommendations***

***National Research Council***

***Educating Children with Autism***

| Rec # | Recommendation |
|---|---|
| 1-2 | Assessment of: social behavior, language and nonverbal communication, adaptive behavior, motor skills, atypical behaviors, and cognitive status |
| 1-2 | Young children …. Do a follow-up diagnostic and educational assessment within one to two years of initial evaluation. |
| 2-1 a | Provide written information re autism and services to parents at the beginning of the assessment process. |
| 2-1 b | Provide written results of assessment and a contact person prior to the initial IEP. During IEP, give parents opportunity to voice questions, concerns and perspectives. |
| 3-1 | Appropriate educational objectives that are observable, measurable behaviors and skills. |
| 3-1 a | Objectives include the development of social skills to enhance participation in family, school, and community activities. |
| 3-1 b | Objectives for development of: expressive verbal language, receptive language, and non-verbal communication skills |

Self – Study Checklist

Comprehensive Autism Programs

**Self-Study Checklist for Comprehensive Program Components**

| Program Component Description | OK | Areas of Need |
|---|---|---|
| **Assessment** | | |
| Training of assessment teams in Autism diagnosis | | |
| Establish peer review teams for assessment results review | | |
| Establish "Case Autopsy Teams" to review cases resulting in due process due to assessment issues | | |
| Training for general education teachers in early symptoms of Autism or Autistic Like behaviors | | |
| Assessment includes Parent Surveys and Interviews as well as Developmental History | | |
| Assessment is done for growth periodically with both informal and formal tools. Data is tallied and evaluated for key areas of focus. The data is summarized in clear, understandable format. | | |
| Assess social behavior | | |
| Assess language and nonverbal communication | | |
| Assess adaptive behavior | | |
| Assess motor skills | | |
| Assess atypical behaviors | | |
| Assess cognitive status | | |
| Frequent communication with parents throughout the assessment process | | |
| Reports written in clear, understandable language with information and sources for parent support | | |

# ABA – What's the Issue?

Students with ASD By and Large are Challenged Learners

- ABA Has Shown How to Teach Alternatives to Problem Behaviors
- ABA Has Shown How to Bring the Teaching To Them So They Can Learn
- ABA Has Shown the Critical Importance of Being Systematic
- ABA Has Shown The Value of Teaching What is Meaningful and Bringing Into Everyday Life
- ABA Has Shown How to Eventually Teach Them To Come To The Learning and Become Better and Broader Learners

## Autism is characterized by Excesses & Deficits

| Excesses | Deficits |
|---|---|
| ◦Self-Stimulation | ◦Communication |
| ◦Non-Compliance | ◦Socialization |
| ◦Aggression | ◦Play and Leisure |
| ◦Strong Interests & Impulses | ◦Learning to Learn |

## WHAT IS ABA?

- Applied Behavior Analysis is a methodology used to decrease problematic behaviors and to teach skills to children **AND** adults of **ALL** functioning levels
- ABA is based on Learning Theory which was formulated almost 100 years ago by the founding fathers of Behaviorism (John B. Watson and Ivan Pavlov)
- The foundations of ABA are:
  - Behaviors are learned through our experiences and interactions with the environment
  - Behaviors can be unlearned
  - Reliance on scientific methodology

It's simply **GOOD TEACHING**

## WHAT IS ABA?

**Applied:** The application of the theory and principles of Behaviorism

**Behavior:** Observable & Measurable

**Analysis:** Look for a relationship between behavior & environment / Must **analyze** effectiveness of treatment

## Range of ABA

**RIGID** — **LACKADAISICAL**

**STRUCTURED** — **FLEXIBLE**

"Traditional"

"Contemporary Behavior Therapy"

## WHAT'S GOOD ABA?

Focuses on Multiple Areas (i.e., behavior control, communication, play, social, self help)
Primarily Uses Activity, Play and Social Reinforcers
Uses Systematic and Natural Teaching Techniques
Works in Natural Settings
Teaches Child to Handle Distractions
Provides Extensive Parent Training
Endorses Research Based Treatments
Staff Receive On-going Training and Supervision
Requires Proper Intensity
Relies Upon Objective Evaluations

## OLD School ABA

## "New" School Example

## What are different examples of problematic behavior?

- Self-stimulation that becomes obsessive or injurious
  - The obvious and the subtle
- Noncompliance
- Tantrums
- Aggression
  - self
  - others
  - property

## What can we do about changing problematic behavior?

- Look at them systematically (assessments)
- Understanding why the problematic behavior is taking place: Function!!
- Teach replacement behaviors

## Behaviors are learned

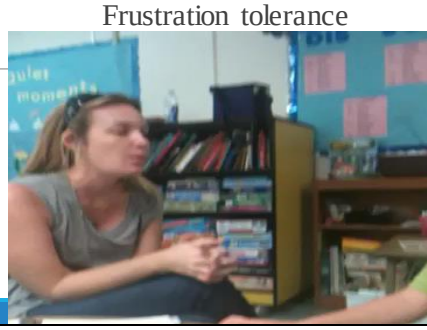
- Fill a specific need or needs
- Functions are understandable
- Behaviors can be pursued in illegitimate ways, if needs are not met
- Can be complicated
- May have compounded functions
- Predictable

## Proactive Teaching

## What is Proactive Teaching?

- Practical and Reactive versus Proactive
- Crucial component in any behavioral program
- Teaches replacement behaviors
- Planned and systematic behavior management program

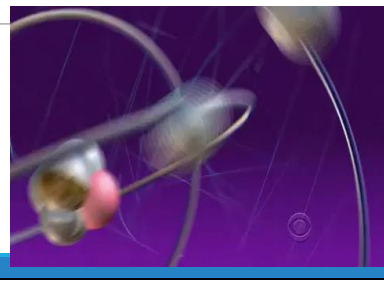
## Frustration tolerance



## Reinforcement: Our Power!!

- What is reinforcement?
- Have you ever used it in your personal/social life?

## Big Bang theory



## Some of What is Out There

- Rote, Rigid, and Repetitive
- Artificial and Robotic
- Formulaic and Protocol Driven
- Unrealistic and Difficult to Integrate Into the Classroom

## The Value of a Progressive ABA Approach

- Structured Yet Fluid
- Naturalistic Emphasis
- Classroom Integrated
- Positive, Warm, and Individually Tailored

## Your Social Skills Curriculum…..

Have a Social Skills Curriculum

Adapt to individual needs

Choose the social skills that are *pivotal to social progress*

Teach for generalization;

- Individual
- Small group
- Large group
- Whole campus

## A Few Critical Thoughts Regarding Social Skill Programs

No Magic
Exposure and Good Intentions Not Enough
Artificial and Overly Structured ABA Goes Nowhere
Individualization Is Critical
Being Systematic Is Critical
Authenticity Is Critical
Social Skills and Friendships vs. Quadratic Equations

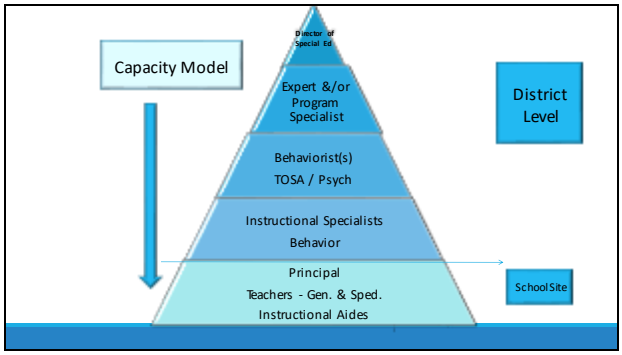

ONE EXAMPLE.....

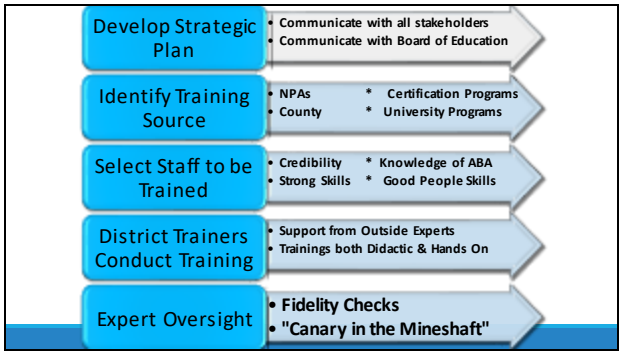
Autism Partnership's Crafting Connections

Taubman, M., Leaf, R. & McEachin, J., (2011). *Contemporary Applied Behavior Analysis for Enriching the Social Lives of Persons with Autism Spectrum Disorder.* New York, NY: DRL Books, L. L. C.

# Building Capacity

BEHAVIOR INTERVENTION STRATEGIES






## District Behavior Specialist Role

Special Education teacher or School Psychologist

Strong background in ABA

State certified / Board Certified Behavior Analyst preferred

In the field experience in schools

Experience & training in development of social skills training programs

Trained in formal and informal behavior assess.

Able to work collaboratively

## Sped. Teacher on Special Assignment

- 'Seasoned' teacher respected by peers
- Knowledge of good coaching techniques
- Experience at all levels preferable
- Training in Behavior Intervention and ABA
- Able to conduct district trainings
- Job Description on LiveBinder

## Instructional Specialist – Behavior Role

One job classification above Instructional Assistant

Report to the Program Specialist and TOSA

Model ABA with individual students / aides

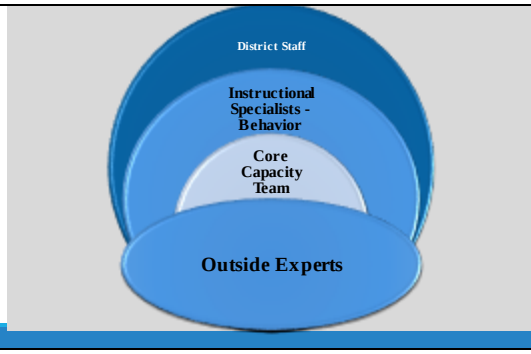
Service provider for ABA & Social Skills

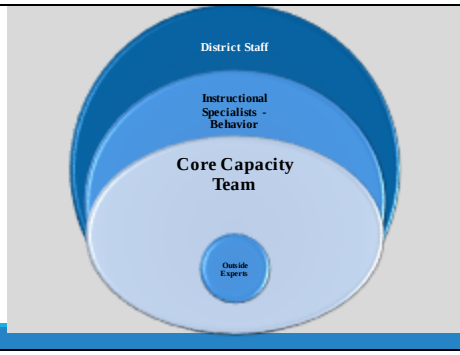
Write "Programs" with TOSA oversight

Create materials to support programs, eg. Reinforcement boards etc.

Support "Intensives"

J D on LiveBinders



# Social Skills Training & Staff Training

## CASE LAW

## Case Example #1: Social Skills Training

Las Virgenes Unif. Sch. Dist. (SEA CA 2013)

- ALJ upheld district's proposed placement in its program for students with autism who did not have intellectual disability (Social Communication Program)
- Elements of that made program comprehensive, defensible and appropriate for student included focus on social skills
- Social skills were embedded throughout day and included accommodations such as priming, self-monitoring systems, a token economy, training in emotional vocabulary, and warnings before transitions

(Las Virgenes Unif. Sch. Dist. (SEA CA 2013) 63 IDELR 144)

## Case Example #2: Staff Training

Chandler (AZ) Unif. Sch. Dist. (OCR 2015)

- Parents alleged district staff failed to protect first-grader with autism from three classmates who bullied him due to his difficulties with communication and social interaction
- District resolved complaint by agreeing to conduct in-service training for all administrators and staff members regarding "responding adequately and timely to a complaint of disability harassment"
  - Training would also teach staff members how to properly redress peer harassment and "how to support students with [autism] in the classroom and in the school"

(Chandler (AZ) Unif. Sch. Dist. (OCR 2015) 66 IDELR 23)

# SOCIAL SKILLS TRAINING

## Your Social Skills Curriculum…..

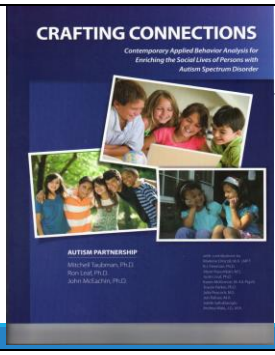
Have a Social Skills Curriculum

Adapt to individual needs

Choose the social skills that are *pivotal to social progress*

Teach for generalization;

- Individual
- Small group
- Large group
- Whole campus




ONE EXAMPLE…..

Autism Partnership's Crafting Connections

Leaf, R., Taubman, M., & McEachin, J., (2011). *Contemporary Applied Behavior Analysis for Enriching the Social Lives of Persons with Autism Spectrum Disorder.* New York, NY: DRL Books, L. L. C.

## HOW?

SOCIAL SKILLS TAXONOMY

SOCIAL AWARENESS

SOCIAL COMMUNICATION

SOCIAL INTERACTION

SOCIAL LEARNING

SOCIAL RELATEDNESS

*Not mutually exclusive*

*Early, Intermediate, & Advanced in Each*

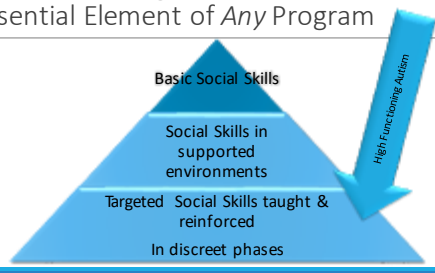
## *Curriculum Topics for Social Skills – Secondary*

Trading Information
Two Way Conversation
Electronic Communication
Choosing Appropriate Friends
Appropriate Use of Humor
Starting and Joining Conversations
Exiting Conversations
Good Sportsmanship
Get Togethers
Handling Arguments
Changing Reputations
Handling Teasing and Embarrassing Information
Handling Bullying
Handling Cyber Bullying
Minimizing Rumors and Gossip

## *Humor Feedback Signs Example*

| **Laughing AT You** | **Laughing WITH You** |
|---|---|
| Laugh and roll their eyes | Laugh and smile |
| Look at someone else and then laugh | Compliment your joke or sense of humor |
| Laugh before the joke is over | Laugh and shake their head 'yes' |
| Long pause before they laugh | They say, "That's a good one" and smile |
| Laugh and make a face | They say, "You're funny" and smile |
| Laugh, point at you, and shake their head 'no' | Ask you to tell another joke or start telling jokes themselves |
| Sarcastically say, "Your funny" | Say, "I'll have to remember that one" |

## Social Skills Programs
## Essential Element of *Any* Program




## Determining where to start….

Assess for established , emerging, and deficit skills

| Established Skills | Emerging Skills | Deficits |
|---|---|---|
| Topical knowledge – has plenty of relevant things to talk about with peers | Responding to adults (responds to familiar adults, but not unfamiliar teachers) | Gets angry when she cannot be the center of attention |

## Questions to guide selection of Target Social Skills

- ✓Will the skill result in better peer relationships, greater general success in the student's peer group, and reduced social stigma?
- ✓Will teaching this skill result in a better quality of life for the student?
- ✓Will this skill be a building block for more advanced social skills in the future?

Taubman, Leaf, & McEachin. Crafting Connections DRL 2014

## Things to consider for staff training..(ABA)

All training conducted by qualified staff

Supported by the "Expert"

All special education staff are trained

General education and administrative staff should have a working knowledge of ABA.

Training is on-going

Training fits the needs of the staff

Builds a "culture" of ABA

## Training – Approaches for General Ed Classroom

Characteristics & learning styles

Intervention strategies

Visual schedules & structures

Techniques to avoid over stimulation

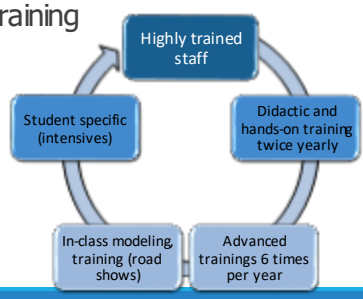
Dealing with obsessive behaviors

Techniques for redirection and focus

Reinforcement & pitfalls of punishment

Teaching social skills

## Staff Training



## ABA Training

At ALL levels of support staff
- Sped Teachers
- Gen. Ed. Teachers
- Administrators
- DIS Support
- Parents

Builds a "Culture" of ABA

Staff reinforce each other's progress

## Foundational Training - ABA

What is ABA?

ABA & Autism

Problematic Behavior
- ABC's of Behavior
- Functions of Behavior
- Practical Efforts
- Reactive Programming
- Proactive Programming

Discrete Trial Teaching

Other Behavioral Methodologies

Teaching Interactions

Bringing it Into the Classroom - Embedding

## Hands On Autism Training – 4 Days

Topic Presentation

"Hands On" 1 / 3 (approx) Trainee with Students
- Observation, guidance, prompting, & modeling by training staff

Debriefing / Role Play

Repeat above sequence each day……

## Advanced ABA Trainings

- Proactive Planning: Implementation / Teaching
- Proactive Planning: Replacement Skills/Assessment
- Data Collection
- Breaking Down Skills / Lesson Planning
- Social Skills Training
- Troubleshooting / case conferences

## Training for School Administrators

- History & characteristics
- The basics of ABA including the theory & why it works
- Instructional techniques to watch for
- Assisting with difficult behaviors
- Classroom Environment – the ABA classroom
  - Walk through guides
  - Goal setting guides
  - Guidelines for guidance of teachers and aides
- When instructional aides are called for
- Working with parents

## Autism Methodology Training Matrix

### Building Capacity

Mary Schillinger M.A., Assistant Superintendent
LVUSD

Brandie Rosen, Program Specialist LVUSD

Adapted from : The Administrator's Guide to Building and Maintaining a Comprehensive Autism Program, by Mary Schillinger M. A., (LRP Publications, 2010), with chapters by Brandie Rosen, M.A., & Jan Tomsky, Esq.

# Thank you for attending!

Workshop 2

# Manifestation Determination Examination

By:

**Betsey A. Helfrich**
Attorney
The Law Office of Betsey Helfrich, LLC
St. Louis, Missouri

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# Manifestation Determination Review
# Meeting Check List

Betsey A. Helfrich

bhelfrichlaw.com

## ❒ Determine if a Manifestation Determination Review Meeting is Needed

- Has placement changed due to a violation of the student code of conduct?
  - If the proposed change substantially or materially affects the composition of the educational program and services provided to the child, then a change in placement occurs. *Letter to Flores*, 211 IDELR 233 (OSEP 1980)
  - First 10 cumulative school days of suspension in a school year do not constitute a change of placement.
  - A change in placement occurs when:
    - The removal is for more than 10 consecutive school days; or
    - The child has been subjected to a series of removals that constitute a pattern:
      - Because the series of removals totals more than 10 school days in a school year;
      - Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
      - Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 CFR 300.536

  - Do not overlook partial day removals and informal removals.
    - A school day is defined as: "any day, including a partial day, that children are in attendance at school for instructional purposes." 34 CFR 300.11(c)

## ❒ Schedule & Plan the Manifestation Determination Meeting

- Manifestation determination review meeting must be held within 10 school days of "any decision to change the placement of a child with a disability because of a violation of a code of student conduct." 34 CFR 300.530(e)

- Invite attendees:
  - Work collaboratively with parents to schedule meeting at convenient time within the applicable timeframe
  - The MDR should be conducted by the district, the parent, and relevant members of the IEP team (as determined by the parent and the district). 34 CFR 300.530(e)
  - Consider and invite school personnel who have relevant information
    - personnel who conducted investigation
    - teachers familiar with student
    - key IEP team members

- Prepare for meeting
  - Determine who will take meeting notes
  - Copy recent IEP and evaluation documentation
  - Bring discipline data and incident write-up
  - Review relevant information and draft meeting agenda

## ❒ Conduct Thorough Manifestation Determination Review Meeting

- What the team reviews:
  - Was the conduct in question was caused by or had a direct and substantial relationship to the child's disability; or
  - If conduct in question was the direct result of the [district's] failure to implement the IEP.

  34 CFR 300.530 (e)(1)

- What Must the MDR Team Review?
  - Any relevant information provided by the parent.
  - Observations of the student; and
  - IEP and current placement.

  34 CFR 300.530 (e)

- Other Information to Consider:
  - Current disciplinary records
  - Past incidents with dates and actions taken
  - Has the type of behavior been addressed before?
  - Diagnoses
  - Whether current problems result of inappropriate program or placement
  - Whether cumulative effect of all short-term suspensions will adversely affect student's program
  - Whether disability significantly impairs the student's behavioral controls
  - Evaluation and diagnostic results

- Tips for a smooth meeting:
  - Listen to parent and student (if present) regarding the incident
  - Ensure all team members participate and share their input
  - Examine details from the person who investigated the incident including the demeanor of the student, what he/she was doing before the incident, and any key statements during the incident
  - Remember that the parents have the right to address the board of education, appeal the decision, and all other rights general education students are afforded in addition to the manifestation determination meeting
  - If parent records meeting, the District should also record and maintain a copy

❒ **Determine if Conduct is Related to the Student's Disability**

- What to consider:
  - Was the conduct in question caused by or had a <u>direct and substantial</u> relationship to the child's disability? 34 CFR 300.530
  - Gather team input and examine IEPs, evaluations, discipline reports and teacher observations
  - Examine student's IDEA disability and compare to key facts surrounding incident
  - Provide prior written notice regarding decision

❒ **Determine if the Student's Conduct was the Result of the District's Failure to Implement the IEP**

- Analyze whether District personnel were aware of and implementing the students BIP if applicable. *See Swansea Pub. Schs.,* 47 IDELR 278 (SEA MA 2007)

- Determine if student conduct resulted from District's failure to timely implement student's IEP. *See Toledo City Schs.,* 115 LRP 30 (SEA OH 14)

- More than a "de minimis" failure to implement all elements of that IEP should exist to demonstrate a failure to implement. See *Special School District of St. Louis County and the Bayless School District* (MO AHC 2022)

## ❒ Continue to Provide the Student FAPE

- An LEA must provide FAPE to all students with disabilities between the ages of 3 and 21 inclusive, including children with disabilities who have been suspended or expelled. 34 CFR 300.101(a)

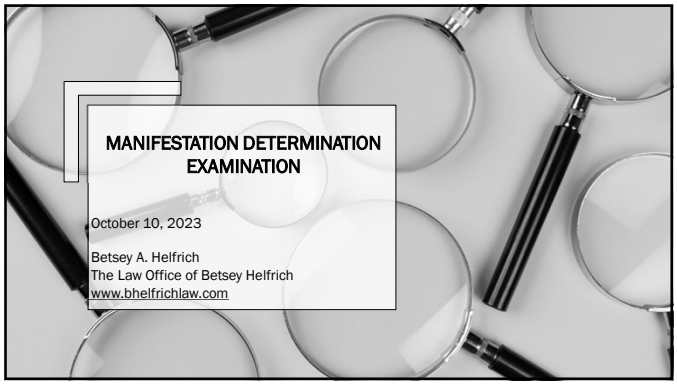
- If conduct was determined to be related to the child's disability:
  - Conduct a functional behavioral assessment, unless the [district] had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
  - If a BIP already has been developed, review the BIP and modify it, as necessary, to address the behavior.
  - And, except as provided in 34 CFR 300.530(g) return the child to the placement from which the child was removed, unless the parent and the [district] agree to a change of placement as part of the modification of the BIP. 34 CFR 300.530 (f)

- If the conduct was determined to be not related to the child's disability:
  - The child is subject to the same sanctions for misconduct as a child without a disability.
  - The child must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 CFR 300.530 (d)(i)

## ❒ Train & Review Discipline Procedures

- Study discipline numbers on a quarterly basis and examine areas for improvement
- Revise procedures for communication between special education and general education departments regarding disciplinary consequences
- Training topic ideas:
  - Discipline under the IDEA
  - Conducting manifestation determination meetings
  - IDEA & Section 504 disabilities and how disabilities may impact student behavior
  - FERPA compliance
  - Documenting and implementing BIPs
  - Handling difficult parent conversations

- Keep record of each employee participating in training and maintain training materials



## MANIFESTATION DETERMINATION EXAMINATION

October 10, 2023

Betsey A. Helfrich
The Law Office of Betsey Helfrich
www.bhelfrichlaw.com

## Discipline Tips

- Be mindful of first amendment rights & off-campus conduct
- Know your state law & work with general education administrators
- Study the numbers!

## PROTECTIONS FOR STUDENTS WITH DISABILITIES

IDEA & Section 504 eligible students receive additional disciplinary protections

Individuals with Disabilities Education Act 1975

Section 504 of the Rehabilitation Act of 1973

## UPDATE TO 504 REGULATIONS

**The U.S. Department of Education announced on May 6, 2022, it was seeking comments on amending the Section 504 regulations (45 years after the original publication of the regulations implementing Section 504)**

## OCR Guidance - Disability and Discipline

U.S. Department of Education Office for Civil Rights July 19, 2022

*Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973*

- *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973 and accompanying Fact Sheet*
- *Questions and Answers Addressing the Needs of Children with Disabilities and the Individuals with Disabilities Education Act's (IDEA's) Discipline Provisions.*
- *Positive, Proactive Approaches to Supporting the Needs of Children with Disabilities: A Guide for Stakeholders.*

## Discipline Data – Students with Disabilities

School-age students with disabilities served under IDEA represented 13.2 percent of total student enrollment but received 20.5 % of one or more in-school suspensions and 24.5 % of one or more out-of-school suspensions

Over 3 million missed days from school due to out-of-school suspension

1,591,473 = The total number of disciplinary removals students with disabilities experienced over the 2019-20 school year

"Out-of-school suspensions do not serve as a deterrent for future problem behavior and can lead to school dropout"

*Source: OSEP BLOG: Discipline Discussions: The Impact and Harm of Exclusionary Discipline*

## Additional Protections for Students with Disabilities

- Procedural Rights & Notice
- Manifestation Determination
- IDEA states an LEA must provide FAPE to all students with disabilities between the ages of 3 and 21 inclusive, *including children with disabilities who have been suspended or expelled*.

  34 CFR 300.101(a)

## Communication

- Before discipline is issued, know if student is an IDEA or Section 504 protected student
- Superintendent/Principal communicate with special education department
- Communicate with Superintendent/Principal early
- Be mindful of IEP drafting and documentation

## IEP Drafting

Present Level:

No:

Bobby has behaviors at school

Bobby frequently gets in trouble at school

Bobby's ADHD causes him to receive school discipline

## IEP Drafting

Present Level:

Yes

Bobby's ADHD diagnoses sometimes causes him to lose focus in the classroom and be disorganized in the afternoons.

Bobby's ODD and PTD diagnosis is evident at school in response to directives from teachers.

## Change of Placement

- Placement under the IDEA
- Change in Placement:
  - If the proposed change substantially or materially affects the composition of the educational program and services provided to the child, then a change in placement occurs. *Letter to Flores*, 211 IDELR 233 (OSEP 1980)
- What is a disciplinary removal:
  - Removal from the current educational placement in response to a violation of the student code of conduct.

## Change of Placement & Manifestation Determination

A Manifestation Determination Meeting must be held within 10 school days of "any decision to change the placement of a child with a disability because of a violation of a code of student conduct." 34 CFR 300.530(e)

The Department of Education issued a memorandum in 1995 discussing numerous discipline issues including the use of manifestation determinations.

The concept of a manifestation determination was placed in statutory language in 1997 as was the regulatory interpretation that educational services cannot cease for children with disabilities even if they have been suspended or expelled.

## Short-Term Removals

- Removal of first 10 cumulative school days in a school year or less:
  - No obligation to provide alternative services during first 10 cumulative school days of suspension.
  - No obligation to have IEP Team meeting before suspension, no manifestation determination required, and no duty to have follow-up meeting.
  - No obligation to conduct manifestation determination, to review behavior intervention plans ("BIPs") or consider functional behavior assessment ("FBA").

  * However, although suspensions for 10 consecutive school days or less do not constitute a change in placement, Dear Colleague Letter, 68 IDELR 76 (OSERS/OSEP 2016), advised that districts' authority to implement short-term disciplinary removals doesn't negate their obligation to address whether the student needs new or different behavioral interventions and supports to receive FAPE in the least restrictive environment.

## School Day

- Defined: "any day, including a partial day, that children are in attendance at school for instructional purposes"

  34 CFR 300.11(c)

## Change of Placement

- When is a removal a CHANGE OF PLACEMENT?
  - More than 10 consecutive school days

  *OR*
  - A series of removals that exceed 10 cumulative school days and constitute a pattern

## Greater than 10 days Consecutively = *ALWAYS a Change of Placement*

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | X | |
| | X | X | X | X | X | |
| | X | X | X | X | X | |
| | | | | | | |

## Greater than 10 days Cumulatively: *MUST Determine if a PATTERN Exists*

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | X | X | X | |
| | | X | | | | |
| | X | | | X | X | |
| | | X | X | X | X | |
| | | | | | | |

## Pattern of Exclusion

- **A pattern of exclusion is formed if:**
  - *The series of removals total more than 10 school days in a year; **and***
  - *The child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; **and***
- Additional factors as:
  - *The length of each removal,*
  - *The total amount of time the child has been removed, and*
  - *The proximity of the removals to one another.*
- Determination of pattern made by District, not IEP team.

## Scenario

- Bobby was suspended on September 24th for 5 days OSS for fighting.
- On November 10th, Bobby pushes another student and the High School Principal is going to give Bobby 3 days OSS.

- *What do you need to do?*
- *Look at pattern?*
- *Manifestation determination?*

## Determining Change of Placement

- Bobby was suspended on September 24th for 5 days OSS for fighting.
- On November 10th, Bobby pushes another student and the High School Principal is going to give Bobby 3 days OSS.

- *What do you need to do?*
- *Look at pattern?*
- *Manifestation determination?*

**No need to look at a pattern, only 8 days of OSS*

## Scenario – When did placement change?

- Sarah makes a serious threat of harm against the school.
- The principal investigates and gives her a 10 day suspension, her first for the year, on November 1st.
- The Superintendent considers the matter and on November 10th gives Sarah an additional 30 days out of school.

## Answer

- Sarah makes a serious threat of harm against the school.
- The principal investigates and gives her a 10 day suspension, her first for the year on November 1st.
- The Superintendent considers the matter and on November 10th gives Sarah an additional 30 days out of school.*

## Scenario

Scenario

- Aug. 28, 2023 – Marsha gets 9 Days OSS for making a threat.
- Oct. 31, 2023– 3 Days OSS for frequent tardiness to class.
- Nov. 15, 2023 – 5 Day OSS for profane language and telling another student she will kill them.
- Jan. 5, 2024 – 9 Days OSS for fight w/ punches thrown.

❑ *When did placement change?*

## Answer

- Aug. 28, 2023 – Marsha gets 9 Days OSS for making a threat.
- Oct. 31, 2023– 3 Days OSS for frequent tardies to class.
  - Look at pattern here.
- Nov. 15, 2023 – 5 Day OSS for profane language and telling another student she will kill them.
  - *Look at pattern, placement likely changed.
- Jan. 5, 2024 – 9 Days OSS for fight w/punches thrown.

## Scenario

Peter, an IEP student, has been having a rough time lately and usually right after lunch his behavior starts getting out of hand. The principal has been calling mom to come pick him up after Peter eats. Mom doesn't seem to mind but yesterday indicated she was running out of time off from work…

## Iss and partial days

- It has been the Department's long-term policy that an in-school suspension would not be considered a part of the days of suspension addressed in §300.530 as long as the child is **afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement**. This continues to be our policy. Portions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals as defined in §300.536.
  - 71 Fed. Reg. 46,715 (2006)
  - Letter to Mason, OSEP 2018

## Informal Removals

*Questions and Answers Addressing the Needs of Children with Disabilities and the Individuals with Disabilities Education Act's (IDEA'S) Discipline Provisions (2022):*

"The calculation of the 10 school days of suspension addressed in 34 C.F.R. § 300.530 could include exclusions that take place outside of IDEA's discipline provisions which occur because of a child's behavior. Actions that result in denials of access to, and significant changes in, a child's educational program could all be considered as part of the 10 days of suspension and also could constitute an improper change in placement."

- Informal exclusions during part or all of day based on behavior:
- Examples:
  - *Requiring parent not to send their child to school, school-sponsored activity, or pick them up early*
  - *Placing student on shortened school day without convening team*
  - *Placing student on virtual instruction when other students get in-person*
  - *Threatening law enforcement referral or transfer to alternative school if parent does not agree to restraint and seclusion or to pick the student up early*
  - *Telling parent the student may not attend school without the parent being present to manage the behavior*

## Case Law

*Lawton and Johnson-Lawton v. Success Acad. Charter Schs.* Inc., 72 IDELR 176 (E.D.N.Y. 2018):

Parents of disabled children claimed disability discrimination related to school's discipline procedures, which included calling parents to come pick up their children after behavior incidents.

School's Motion to Dismiss discrimination claims was denied.

"The complaint is rife with allegations of bad faith or gross misjudgment, not the least of which was the establishment of the 'Got to Go' list targeting [students with disabilities] for removal, as well as the daily removals, frequent suspensions, and repeated threats to call the police and [child welfare authorities] on four-and five-year-olds."

## Actions Required for Long-term Suspensions

- Follow general education procedures: due process, notification, notice of hearing before Board and…
- MUST provide parents with Procedural Safeguards
  - *When the decision is made to long-term suspend the student that results in change of placement*
- MUST hold a Manifestation Determination Meeting to determine if conduct is related to the child's disability
  - *Within 10 school days of the decision to change placement*

## Day 11

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determines the extent to which services are needed, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

*4 CFR 300.530*


## The Manifestation Determination Meeting

- WHEN is it held?
  - Within 10 school days of decision to long-term suspend
- WHO attends?
  - LEA representatives
  - Parents
  - Relevant members of the IEP team

- WHAT to consider?
  - Student's file, the IEP, teacher observations and relevant information provided by parents
- WHY?
  - Is there a direct and substantial relationship between behavior and disability
  - Did behavior result from not implementing the IEP?

## Manifestation Determination

Reminder: The Manifestation Determination Meeting must be held within 10 school days of "any decision to change the placement of a child with a disability because of a violation of a code of student conduct."

34 CFR 300.530(e)

## Scenario - Scheduling the Manifestation Meeting

- Marsha gets a 10 day suspension from the principal on October 1st.
- The Superintendent gives a 45 day additional suspension on October14th.
- When do you hold the manifestation determination meeting?

## Answer - Scheduling the Manifestation Meeting

- Marsha gets a 10 day suspension from the principal on October 1st.
- The Superintendent gives a 45 day additional suspension on October14th.
- When do you hold the manifestation determination meeting?
- Answer: 10 school days from October 14th = by October 28th

## Scheduling the Manifestation Meeting

- Bobby gets a 10 day suspension from the principal on November 15th
- The Superintendent gives a long-term suspension of 50 additional days on November 23rd
- School is closed November 24th – 26th
- When do you hold the manifestation determination meeting?

## Answer- Scheduling the Manifestation Meeting

- Bobby gets a 10 day suspension from the principal on November 15th
- The Superintendent gives a long-term suspension of 50 additional days on November 23rd
- School is closed November 24th – 26th
- When do you hold the manifestation determination meeting?
- Ten school days from November 23rd is December 10th

## Scheduling the Manifestation Determination Meeting

- What if you agree with the parents to meet on December 10th but they do not show up or contact you?

## Answer - Scheduling the Manifestation Determination Meeting

- What if you agree with the parents to meet on December 10th but they do not show up or contact you?

  - Schedule a 2nd attempt to meet

## Manifestation Determination Scenario

- Mandy, a student with a disability is suspended for 20 days for pulling another student's pants down during gym class. Mandy's mom is notified of the manifestation determination meeting and she attends. However, she became unhappy with the building principal's comments during the meeting and demands that she be dismissed from the meeting.

## Who attends Manifestation Determination?

- *Fitzgerald v. Fairfax Co. Sch. Bd.,* 50 IDELR 165 (E.D. Va. 2008):
  - Student with anxiety is suspended with recommendation for expulsion after firing a paintball gun at a school building and buses on 3 occasions. MDR team found the conduct unrelated over parent disagreement. The parents sued after hearing officer sided with District claiming District violated the right to determine who would serve on MDR committee and failed to provide them an "equal right" to determine whether the student's conduct was a manifestation.

- Holding: IDEA does not require that parents consent to the composition of an MDR team. Second, the IDEA's "emphasis on parental involvement does not give parents the right to veto or otherwise block the [school district's] ability to implement an IEP or discipline a student."

## MDR Team

The MDR should be conducted by the district, the parent, and relevant members of the IEP team (as determined by the parent and the district). 34 CFR 300.530 (e)

Always invite parents

Principal?

SRO?

## Discipline Infraction

Not the role of the MDR Team to determine what the conduct was

- Right to address the Board regarding conduct and length of suspension

*South Lyon Cmty. Schs.*, 50 IDELR 237 (SEA MI 2008): voiding the MDR team's determination where the team identified the misconduct as attempting to sell drugs, but student's actual behavior as determined by the principal and superintendent was passing a note that said, "I have pillz," with no further intent found.

## What the Team Reviews

1. Was The conduct in question was caused by or had a direct and substantial relationship to the child's disability; or

2. If conduct in question was the direct result of the [district's] failure to implement the IEP.

34 CFR 300.530 (e)(1)

## Manifestation Determination Details

➢What Must the MD Team Review?

- Any relevant information provided by the parent.
- Observations of the student; and
- IEP and current placement.

34 CFR 300.530 (e)

*List of relevant information is not exhaustive.
71 Fed. Reg. 46,719 (2006)

## Other Considerations

➢Past incidents with dates and actions taken.
➢Has the type of behavior been addressed before?
➢Whether current problems result of inappropriate program or placement.
➢Whether cumulative effect of all short-term suspensions will adversely affect student's program.
➢Whether disability significantly impairs the student's behavioral controls.
➢Evaluation and diagnostic results.

## Meeting Tips

- Be mindful of parental participation
- Be mindful of pre-determination
- IEP/504 Recording of Meetings

## Failure to Implement the IEP

- *Swansea Pub. Schs.*, 47 IDELR 278 (SEA MA 2007): finding that a child's emotional and oppositional behavior "spiraled out of his control" when an assistant principal confronted the child rather than allowing him to back off as provided in his BIP.

## Failure to Implement:

District "had not yet implemented" the student's IEP because they were unable to find it from her transferring school.

*Toledo City Schs*., 115 LRP 30 (SEA OH 14)

## Failure to Implement

*Special School District of St. Louis County and the Bayless School District* (MO AHC 2022):

- 16-year-old male student
- Current educational placement was homebound service
- Student meets the eligibility criteria for educational diagnoses in the area of Other Health Impairment (OHI) based on ADHD
- Discussion of placement (medical issues)
- School receives notice that student committed first degree robbery
- SSD gives student 10 day suspension, then extended to one calendar year

- Manifestation determination meeting held
- "During the manifestation determination meeting, the IEP team reviewed Student's medical diagnoses and their respective effects, including autism, ADHD, generalized anxiety disorder, and oppositional defiant disorder. The IEP team considered the reason for suspension, which was the filing of a criminal charge of robbery in the first degree against Student. Then, the IEP team discussed Student's current IEP, including his recent evaluation and independent evaluation with input from the team."

- "The IEP team determined that Student's criminal charge was neither caused by, nor did it have a direct and substantial relationship to, Student's disability. The IEP team also determined that Student's conduct was not a direct result of the failure to implement the Student's IEP."
- "The IDEA permits schools to suspend children who violate a code of student conduct. Neither the IDEA nor the Missouri State Plan for Special Education (June 2021) (State Plan) defines the term "code of student conduct."
- Mother didn't meet her burden to demonstrate the code of conduct only applies to conduct occurring at school.
- Schools may suspend students for "conduct which is prejudicial to good order and discipline."

- Team agreed, conduct not related to student's disability
- Failure to implement IEP argument failed:
  - In such circumstances, a parent must show "more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."
  - "All we can surmise from the record is that during the hours between 9:30 and 11:15 pm on January 18, 2022, Student was arrested and thereafter charged with armed robbery. No provision of the IEP would have directly prevented Student from leaving his home at this time."

## Related

Was the conduct in question caused by or had a direct and substantial relationship to the child's disability?

- Be mindful of how eligibility and present levels are worded
- A chokehold and assault of a classmate by a student with ED were related to his disability where his BIP specifically targeted the student's history of resorting to physical violence when angered.

*District of Columbia Pub. Schs*, 114 LRP 34500.

## Factors

Impulsivity:

- "Watch me do this"
- "Record me"
- Drafted and deleted email
- "I knew it was wrong"

Ability to Comprehend Actions:

An important factor in determining whether a student's conduct is caused by or is directly and substantially related to his or her impulsivity (or even poor judgment, for that matter) is an examination of whether the student was able to fully comprehend the potential consequences of his or her actions. Okemos Pub Schs, 45 IDELR 115 (SEA MI, 2006)

## Case Example

*C.D. v. Atascadero Unif. Sch. Dist.*, 83 IDELR 80 (C.D. Cal. 2023):

-Parent felt student's conduct was due to poor impulse control and communication difficulties

-District and hearing officer found that the behavior was not a manifestation of student's ADHD, intellectual disability, or speech and language impairment

-Detailed documentation kept by involved staff about what happened before, during, and after the incident, confirmed that the student's behavior of physical aggression was a choice

-Student waited until a preferred staff member left before engaging in the aggressive behavior toward his teacher

-Student used functional language during incident - in response to a request that he move away from construction site, the student communicated that he was refusing to comply and that he felt he was safe

-The student put on his glasses to demonstrate that he was aware that flying debris could hurt his eyes

-Court upheld District's decision as not related

## Case Example

*Lemus v. District of Columbia International Charter Sch.*, 83 IDELR 18 (D.D.C. 2023):

-Student expelled for threatening to shoot his math teacher

-MDR team found unrelated

-MDR team's decision found that it was the student's relationship with gangs and not his TBI that caused him to threaten to shoot his math teacher after she reported the student's use of gang gestures during class

-IDEA mandates that MDR teams review all relevant information in the student's file, including the IEP, any teacher observations, and any relevant information provided by the parents

-"Relevant information" is information that is pertinent to whether the conduct is directly and substantially related to a disability. Here, the team reviewed the student's evaluations and diagnostic results, information from the student's mother, observations of the student, and other information

## Case Example Continued

- The parent's claim that the team was required to consider the student's PTSD was rejected as PTSD is not a recognized disability under IDEA.
- Hearing officer was correct in finding that the student's threat was not the product of his disability but instead was based upon his association with gang members
- District and hearing officer decision upheld

## Case Example

*Miller School District Missouri AHC,* Case No. 19-0691 (2019)

- High School Student
- Educational Autism
- Emailed a student and counselor indicating he had a knife at school
- School investigated, found steak knife, student admitted he had knife
- Counselor asked if he understood it was wrong, he said yes
- Manifestation determination meeting was two hours long
- Team reviewed all key data, decided not related
- This incident was planned, knew it was wrong, out of character
- District decision upheld by hearing officer

## Case Example

*In re Martin County School Board*, (FL 2021):

- An administrative law judge approved an MDR team's conclusion that the misconduct of a Florida high schooler did not constitute a manifestation of his disability
- The teen's IEP team removed a BIP after it determined the teen's behavior no longer impeded learning, he showed "marked improvement," and he ceased to manifest aggressive noncompliant behavior.
- The teen subsequently posted a threat on social media. The school suspended him for 10 days and recommended expulsion.
- The district conducted an MDR and found that the teen's misconduct wasn't a manifestation of disability or the result of an IEP implementation failure.
- The parent filed for due process asserting that the MDR process, decision, disciplinary hearing, and discipline discriminated against the teen and denied the teen FAPE.
- The Hearing Officer determined that the MDR team meaningfully considered the teen's disability, including "considerable information" from the parent, relevant available data, school records, medical, and discipline history. Also, the team was properly constituted, and its determination was appropriate and not predetermined. Finding that there was no evidence that the disciplinary decision was based on the teen's disability, the District's decision was upheld.

## Scenario

- Katie is a student with an educational disability of OHI based on her ADHD. She has received 3 days OSS this year for bullying. Last Friday she gave a classmate a note with a "kill list" on it and made serious threats of harm to her classmates. The Principal gives Katie 10 days OSS for this conduct and then the Superintendent suspends Katie for an additional 50 days, until the end of the school year. You conduct a manifestation determination. The conduct is determined not to be related to Katie's disability. What is your obligation to Katie now?

## Conduct IS NOT Related to the Disability

- Student **CAN** be long-term suspend
- LEA may apply the same discipline consequences as peers
- IEP team must. . .
  1. Determine services and placement beginning on the 11th day that allow the student to. . .
     a) Receive educational services to continue to participate in general education just in an alternate setting during the suspension
     b) Progress towards IEP goals
     c) Receive an FBA, if appropriate
  2. Provide parent with NOA for change of placement

34 CFR 300.530(f)

## Conduct IS Related to the Disability

- Student **CANNOT** be long-term suspend
- IEP team must. . .
  1. Conduct or review an FBA of the student
  2. Develop or review/revise a BIP for the student
  3. Make a placement decision
     a) Return child to current placement with BIP in place
     b) Change placement with BIP in place
     c) In case of 45 day suspension for drugs, weapons, or serious bodily injury, continue the placement in the interim alternative educational setting determined by LEA

## Behavior Intervention Plans

The obligation to revise and review a BIP exists even if the BIP was created shortly before the conduct occurred.

*District of Columbia Pub. Schs.*, 68 IDELR 83 (SEA DC 2016):

Student with ED and ADHD had a history of aggression and difficulty controlling his anger.

On Oct. 14, 2015, he threw a desk at a peer.

The district suspended the student.

On October 23, the MDR team determined that the behavior was a manifestation of a disability. However, it didn't review the BIP because the BIP was developed shortly before the October 14 incident.

On October 28, the student and dean engaged in a confrontation in which the student threw a bottle at him.

Despite the fact that the BIP was developed just prior to the misconduct, the district violated the IDEA where the MDR team failed to address whether the BIP needed changes in the wake of the incident.

## BIP TIPS

- Share with SRO/those who need to know
- Don't limit ability to call police when emergency
- Don't prescribe days of suspension

## Scenario

Bobby got a 20 day suspension in October for fighting. The IEP team met and determined the conduct was not related to his OHI educational diagnosis based on Bobby's ADD. In January Bobby gets another 15 day suspension for fighting again. It can be assumed the same information will be reviewed and it likely won't be related again as the facts of the incident are very similar to the October incident. Does the team have to meet again to conduct a manifestation determination?

Is the IEP Team required to hold a manifestation determination each time that a student is removed for more than 10 consecutive school days or each time that the public agency determines that a series of removals constitutes a change of placement?

Answer: Yes. 34 CFR §300.530(e) requires that "within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct" the LEA, the parent, and relevant members of the child's IEP Team must conduct a manifestation determination (emphasis added).

*OSEP 2009 Discipline Q&A*

*Jay F. v. William S. Hart Union High Sch. Dist., 70 IDELR 156 (C.D. Cal. 2017), aff'd, 74 IDELR 188 (9th Cir. 2019, unpublished)*

## Scenario

- Bobby is ED. He makes a threat to "blow up" the Superintendent. Superintendent wants to "expel" the student. You know Bobby's statement is related to his disability. The Superintendent tells you the 45 day rule applies for this.
- True/False?

## 45 Day Interim Alternative Placement

- School personnel may remove a student to an interim alternative educational setting for up to 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the child:
  - Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a state or local educational agency;
  - Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
  - Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

34 CFR 300.530 (g)

## Serious Bodily Injury Defined

"Serious bodily injury" has the same definition found at Section 1365(h)(3) of the U.S. criminal code. 34 CFR 300.530 (i)(3).

That provision defines serious bodily injury as bodily injury that involves: 1) a substantial risk of death; 2) extreme physical pain; 3) protracted and obvious disfigurement; or 4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 USC 1365 (h)(3); and 71 Fed. Reg. 46,722 (2006).

## Scenario

Steve gets a pocket knife from Grandpa Sam for Christmas. He is so excited that on January 3rd he brings it in his backpack and shows all of his friends. The knife is discovered by the teacher and turned over to the principal. It is a small pocket knife, with a blade of 1.5 inches. The Principal suspends Sam for 10 days OSS and the Principal suspends for an additional 30 days for having a weapon at school. You feel that this conduct may be related to Sam's disability, the Superintendent says "use the 45 day rule for weapons." Is this applicable?

## Weapon Defined

The IDEA adopts the definition of "weapon" provided in the U.S. Criminal Code. 34 CFR 300.530(i)(4).

That provision defines the term "dangerous weapon" as "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length." 18 USC 930(g)(2).

*G.D. v. Utica Comm. Schs.*, 83 IDELR 12 (E.D. Mich. 2023): items used by kindergarten student were not readily capable of causing a substantial risk of death, and the school district erred in moving the student to an IAES

## 45 Day Rule Interpreted

- 45 Days is not the limit you can suspend in these instances, you can give more suspension – but the 45 days can be issued even if related to the disability

What constitutes an appropriate IAES?

- Answer: What constitutes an appropriate IAES will depend on the circumstances of each individual case. An IAES must be selected so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

71 Federal Register 46722.

Does a school need to conduct a manifestation determination when there is a violation under 34 CFR §300.530(g), which refers to a removal for weapons, drugs, or serious bodily injury?

Answer: Yes. Within 10 school days of any decision to change the placement of child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team conduct the manifestation determination. 34 CFR §300.530(e). However, when the removal is for weapons, drugs, or serious bodily injury under§300.530(g), the child may remain in an IAES, as determined by the child's IEP Team, for not more than 45 school days, regardless of whether the violation was a manifestation of his or her disability. This type of removal can occur if the child: carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the State educational agency (SEA) or LEA; knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the SEA or LEA; or has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the SEA or LEA.

"Unique circumstances" do not permit a school to order a change of placement without conducting an MDR. 71 Fed. Reg. 46,714 (DOE 2006)

## BIPS and SROs

- Make SRO aware of BIP contents when legitimate educational interest
- SRO should not be in charge of implementation of BIP
- Is it a good idea to specify in a student's BIP that there could be police referral?

No. Schools always reserve your right as a school system to make a referral to law enforcement when a child has engaged in a criminal offense or you believe the child has engaged in some criminal offense whether that is in a BIP or not.

## SROs & Restraint

*AG V. Fatteleh*, 81 IDELR 135 (W.D. NC 2022):

Student with autism and mental and behavioral disabilities enrolled in school district's day treatment program.

A local police officer and city employee was assigned as the school's SRO.

Student was overstimulated and visited the quiet room with his special education teacher and a teaching assistant, who restrained the student.

The SRO claimed he saw the student spit at the teacher and handcuffed him.

The SRO placed the student on the floor and put his knee into the student's back for 38 minutes while the teacher and teaching assistant watched.

Judge found that the parent established that the SRO failed to reasonably accommodate the student's disability.

The court noted that the SRO did not read the student's IEP or have knowledge of his disability and how it manifested.

SRO tried no other de-escalation techniques, the judge noted.

The judge also pointed out that the city had no policies requiring training specific to interacting with students with disabilities.

Motion to dismiss denied.

## FREQUENTLY ASKED QUESTIONS

## Do students who aren't yet identified as Special Education students have discipline protections?

Students may assert the discipline protections of IDEA if the school had "knowledge" that the student might be a student with a disability, prior to the behavior in question.

A district has "knowledge" when:

(1) The parent has expressed concern in writing that the student needs special education services to supervisory or administrative personnel or a teacher of the student; or,

(2) The parent has requested an evaluation; or,

(3) The student's teacher or other school staff has expressed specific concern about a pattern of the student's behavior directly to the director of special education or to other supervisory personnel in accordance with the agency's established child find or special education referral system

34 CFR 300.534

## Do students who aren't yet identified as Special Education students have discipline protections?

When does a District have knowledge?

- A mere request for academic help is likely insufficient to satisfy this requirement.
- *Chippewa Local Sch. Dist.*, 117 LRP 7220 (SEA OH 17): The district wasn't required to conduct a manifestation determination review where there were emails from the parents requesting academic help to help student "catch up" after missing school due to vacation and illness but no requests for special education.

## If the District had knowledge

- Follow IDEA disciplinary procedures
- Hold manifestation determination meeting
- Base the meeting on current information and the suspected disability areas
- District must provide services to the student during the long-term suspension, including homebound based on the suspected disability or compensatory services after the IEP is developed

## Scenario

Jan was evaluated under the IDEA and after the evaluation was completed, a determination of ineligibility was made by the team in November. Right before Christmas break, Jan is suspended out of school for 15 days. Her parents request a manifestation determination meeting and say they will get their lawyer involved if they have to because they know their rights and Jan is protected under the IDEA.

## Answer

As Jan does not fall within the protections of the IDEA, no need for a manifestation determination.

A school District is not determined to have had knowledge that a student is a student with a disability when:

- The parents have not allowed an evaluation of the child pursuant to 34 CFR 300.300 through 34 CFR 300.311 ; or
- The parents have refused services under Part B; or
- The student has been evaluated in accordance with 34 CFR 300.300 through 34 CFR 300.311 and determined to not be a child with a disability.

## Scenario

Kate Smith, a general education student, received a 30-day suspension for a disciplinary infraction. The day after the decision to long term suspend was made, Kate's mom called the school and requested an initial evaluation for special education. What should the school do next?

## Answer

- If a request for evaluation is made during the period the student is subject to disciplinary measures, the evaluation will be expedited. Until the evaluation is completed (assuming the public agency is not deemed to have knowledge that the student is a student with a disability prior to the behavior that precipitated the disciplinary action), the student remains in the educational placement determined by the public agency, which can include suspension or expulsion without educational services. If the student is determined to be a student with a disability, the public agency shall provide special education and related services and follow all required procedures for disciplining students with disabilities.

* Be mindful of discipline indicating a child find obligation as well.

## Conclusions

Train

Communicate

Know Board Policy

Workshop 3

# Does the Section 504 Plan Have to Include THAT? Using Evaluation Data to Make Decisions

By:

**Dave Richards**

Attorney at Law
Richards Lindsay & Martín, LLP
Austin, Texas

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# Does the Section 504 Plan Have to Include THAT? Using Evaluation Data to Make Decisions

David Richards, Attorney at Law
RICHARDS LINDSAY & MARTIN, LLP
13091 Pond Springs Rd. Ste. 300
Austin, Texas 78729


## A little housekeeping…

- These slides are intended to summarize rules and cases that are often very complex. Neither the slides nor the presentation are legal advice.
- Please consult a licensed attorney in your state for questions with respect to a particular set of facts.
- Language **highlighted in yellow** is Dave's emphasis
- Internal citations are omitted for ease of reading.

2

## Section 504 levels the playing field– Equality between disabled and nondisabled students

"No otherwise qualified individual with a disability in the United States… shall, solely by reason of her or his disability, be **excluded from participation** in, be **denied the benefits** of, or be **subjected to discrimination** under any program or activity receiving Federal financial assistance …." 29 U.S.C. § 794(a).

3

## What's the Section 504 FAPE supposed to do?

- The Section 504 Plan levels the playing field.
  - Under Section 504, FAPE is "the provision of regular or special education and related aids and services that… are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met…."

4

## It's all about leveling the playing field…

- How about an example?
  - Consider the duty owed to students with a severe allergy to peanuts and tree nuts—the right to an equally safe school environment. *Washington (NC) Montessori PCS*, 60 IDELR 78 (OCR 2012).

5

## It's all about leveling the playing field…

- *Washington (NC) Montessori PCS*
  - Civil rights comparison: how safe is the school environment school for *nondisabled* kids? Says OCR

"[the] vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school."

6

## It's all about leveling the playing field…

*Washington (NC) Montessori PCS*

- So, how safe should school be for disabled kids?

"Section 504 and Title II require that the School provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility."

7

## The § 504 Free Appropriate Public Education (FAPE)

- It's provided at no cost to parents
- It's appropriate
  - It's individualized
  - It doesn't reduce grade-level curriculum expectations
  - It includes behavior interventions as needed
  - It's provided in the LRE
  - It's created pursuant to the required process

8

## The § 504 Evaluation Why process matters

- *Tyler (TX) ISD*, 56 IDELR 24 (OCR 2010).
  - "In relying on an individualized healthcare plan and not conducting an evaluation pursuant to Section 504, the TISD circumvents the procedural safeguards set forth in Section 504."

9

## The § 504 Evaluation Why process matters

- *Dracut (MA) Public Schools,* 110 LRP 48748 (OCR 2010).
  - "A significant distinction between serving the Student on a Section 504 Plan which references a Health Plan, versus a health plan alone, is that the Student without the Section 504 Plan does not have any of the procedural protections that he is afforded under Section 504."

10

## The § 504 Evaluation

- Committee knowledge requirement
- The order matters: evaluation always precedes placement
- Evaluation does not mean test
  - Gathering of data or drawing upon data from a variety of sources
  - Formal testing is not required (unless state law or 504 Committee says otherwise)
- Comprehensive Re-evals every 3 years
  - Annual reviews?

11

## The 504 Evaluation

*Bradley County (TN) Schools,* 43 IDELR 143 (OCR 2004).

- *Bradley County* & two common questions:
  - Why does evaluation always precede initial placement or a significant change of placement?
  - Why does the process matter if the school can provide what the student needs informally?

12

## The 504 Evaluation

*Bradley County (TN) Schools,* 43 IDELR 143 (OCR 2004).

- "The District had numerous meetings with the complainant and the Student in efforts to help him complete course requirements for English 12. But the fact remains that these evaluation and placement decisions were not made by a Section 504 review committee in accordance with the evaluation and placement procedures required by OCR's regulations."

13

## The 504 Evaluation

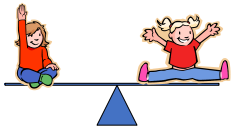
*Bradley County (TN) Schools,* 43 IDELR 143 (OCR 2004).

- Why does the Section 504 process matter?
- "The purpose of these requirements is to assure that an informed decision is made as to a student's eligibility and need for services. As the District did not follow these procedures, there is no way to know if the services that were provided to the Student actually were appropriate."

14

## § 504's Goal: level the playing field

Think of this teeter totter, perfectly balanced, as a level educational playing field.

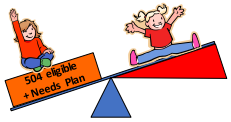




15

## § 504's Goal: level the playing field

The student with a qualifying § 504 impairment and need for a Plan has an impairment that interferes with the level playing field.

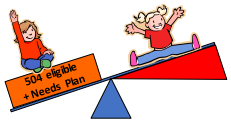






## § 504's Goal: level the playing field

Evaluation data identifies the areas of need and degree or amount of 504 services needed to level the playing field.

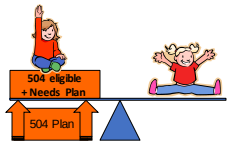






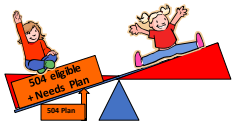
## § 504's Goal: level the playing field

The 504 Plan should reduce the impact of the impairment to level the playing field by providing appropriate services & accommodations.



## § 504's Goal: level the playing field

If the § 504 services & accommodations are insufficient to level the playing field, there is more work to be done.

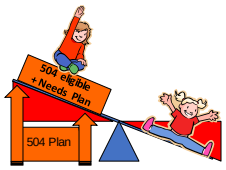






## § 504's Goal: level the playing field

If the § 504 services and accommodations are excessive, the playing field is not level, and there is more work to be done.







## Medical data as part of the 504 evaluation

- Is a medical diagnosis required?
  - "Note, there is nothing in Section 504 that requires a medical assessment as a precondition to the school district's **determination** that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, as mentioned earlier, the **determination** of whether an individual has a disability need not demand extensive analysis.)" *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (July 2016)(p. 23)(emphasis added).

## Medical data as part of the 504 evaluation

- What if the school thinks it needs medical data? *Bethlehem (NY) CSD,* 52 IDELR 169 (OCR 2009).
  - A student allergic to peanuts, dairy, egg, kiwi, and crab wanted to participate in the school's culinary arts program.
  - Allergist: student could safely participate if he wore gloves while handling peanuts and didn't ingest any foods to which he is allergic.
  - Staff "concluded that they required additional information about the extent and nature of the student's allergies."

22

## Medical data as part of the 504 evaluation

- What if the school thinks it needs medical data? *Bethlehem*
  - Parents provided consent for school to follow up with allergist who was on vacation when the district attempted contact.
  - "School staff acknowledged that they made no subsequent efforts to obtain the additional information." The student was denied enrollment in the class.

23

## Medical data as part of the 504 evaluation

- What if the school thinks it needs medical data? *Bethlehem*
  - OCR found a violation as the school did not convene a Section 504 Committee to make these determinations and did not identify the student as a student with a disability.
  - Further, the school denied him enrollment because the school believed it did not have adequate medical information to determine if the student could participate safely. The data was available, and school said it was necessary, but school made decision without it.

24

## Medical data as part of the 504 evaluation

- What if the parent prevents access? *Montgomery County (MD) Pub. Schools*, 31 IDELR 84 (OCR 1999).
  - Parent says student has multiple chemical sensitivity and provides a few medical records
  - School has questions and ask to see additional records, talk to the doctor or conduct its own medical evaluation.
  - Parent refuses and complains to OCR when 504 evaluation determines that student is not MCS.

25

## Medical data as part of the 504 evaluation

- What if the parent prevents access? *Montgomery County*
  - District completes evaluation with the data is has, finds no MCS, but says it will reconsider if allowed access to requested data.
  - Parent complains to OCR about no MCS
  - OCR: the district "had insufficient evaluative materials to make an informed placement decision as required by Section 504." No 504 violation as the parent refusal prevented access to the data.

26

## Medical data as part of the 504 evaluation

- Who makes the placement decision? NOT THE DOCTOR! *Brevard County*, 109 LRP 56512 (SEA FL 08/12/09)
  - "Petitioner's physicians are not experts on education generally or ESE in particular. Given the nature of their pediatric practices, their counsel on Petitioner's physical capacity to attend public school should be taken into consideration, but only in light of their very limited understanding of what the public school was offering in this instance."

27

## Medical data as part of the 504 evaluation

- A doctor's report is not a 504 evaluation. *Vineland (CA) Elementary School District*, 49 IDELR 20 (OCR 2007).
  - "A physician's medical diagnosis may be considered as part of the evaluation process. However, a medical diagnosis of an illness does not automatically qualify a student for services under Section 504."
- Why don't parents pay for evaluations? *Santa Rosa County (FL) School District*, 110 LRP 48657 (OCR 2009).

28

## Some lessons on gathering and reviewing data

- The duty is not to provide every possible service and accommodation until § 504 can do no more.
- Data limits the required accommodations to those things needed to level the playing field (no more, and no less)
- FAPE is more than reasonable accommodation

29

## Some lessons on serving students under 504….

- Awesome analysis of disability and the need for services. *Manalapan-Englishtown RBD*, 107 LRP 27925 (SEA NJ 2007).
  - The elementary student had an acute peanut allergy
  - Doctor required that EpiPen be used "expeditiously" following exposure to peanut protein (ingested, touched or inhaled).
  - If student waited for paramedics to administer the EpiPen, "there is absolutely no way" he would survive.

30

## Some lessons on serving students under 504….

- *Manalapan-Englishtown, Continued*
  - LIKELIHOOD OF EXPOSURE: "Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free."

31

## Some lessons on serving students under 504….

- *Manalapan-Englishtown, Continued*
  - LIKELIHOOD OF EXPOSURE: "Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day."

32

## Some lessons on serving students under 504….

- *Manalapan-Englishtown, Continued*
  - RESOURCES ON BUS: "A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen."

33

## Some lessons on serving students under 504….

- *Manalapan, Continued*
- A little commentary on the ALJ's analysis: Let's review...
  - Exposure to the allergen is likely every day.
  - There is significant risk of serious bodily injury or death on the bus
  - Resources to manage the risk are not present on the bus
  - Someone needs to be added to the bus to:
    - Monitor the student for allergic reaction
    - Expeditiously administer an Epi-Pen
    - Notify appropriate emergency medical personnel for additional response

34

## Some lessons on serving students under 504….

- *Manalapan, Continued*
- SOLUTION: "Therefore, a nurse, aide or other trained adult is required for those purposes."
  - A little commentary:
    - Would the analysis change if the student were older and could self-care? That's why 504 Plans change over the years.
    - Note the identification of a universe of appropriate service providers from which to choose (from very expensive to low-cost).

35

## Some lessons on serving students under 504….

- Most parents would choose the nurse, BUT FAPE does not require the most qualified person to perform the task
  - FAPE requires appropriate response.
    - Not the best response
    - Not the parent-preferred response
  - Different 504 Committees may make different choices *among appropriate alternatives*
  - Parent preferred accommodation or service must be considered, BUT Committee determines FAPE.

36

## Some lessons on serving students under 504….

- Data lessons from a demand for a "No Spray' Policy. *Zandi v. Fort Wayne Community Schools*, 112 LRP 48082 (N.D. IN. 2012).
  - "Without a medical or other expert opinion establishing that perfume sprayed in the building elicited a different reaction than perfume already sprayed on a person who enters the building, Josh cannot show that even an effective policy would have prevented his reactions from occurring."

37

## Some lessons on serving students under 504….

An important limitation on the right to choose methodology. *I.S. v. School Town of Munster*, (N.D. Ind. 2014).

- A student with dyslexia was provided with an IEP that included reading services.
- The school provided a Read 180 program (although the choice of program was not named in the IEP).
- That choice of methodology by the school was inappropriate for the student.

38

## Some lessons on serving students under 504….

*Munster,* Cont'd

"[W]hile I.S.'s most significant area of need was in decoding words (sounding them out), the Read 180 program 'did not provide significant remediation' in that area, and left him 'without intensive, systematic phonics instruction for one school year.' Worse yet, the hearing officer found that the Read 180 program was actually damaging to I.S.'s reading skills."

39

Some lessons on serving students under 504….

*Munster*, Cont'd

"Because of his difficulty sounding out words, I.S. developed a tendency to guess words based on their beginning sounds, which is a very difficult habit to break. However, Read 180 focuses on fluency skills prior to developing accurate decoding skills, which promotes 'faster guessing' and reinforces this detrimental habit."

40

Some lessons on serving students under 504….

*Munster*, Cont'd

The court: "Because the IEP "failed to specify an appropriate methodology or exclude the Read 180 program, which would have produced no benefit, I.S.'s 5th grade IEP was not tailored to his unique needs or likely to produce progress instead of regression…"

41

Some lessons on serving students under 504….

Data determines need & limits accommodation (not expectation)

- Need must arise from impairment (parental preference does not create the right). *Lincoln Elementary SD 156*, 47 IDELR 57 (SEA IL. 2006).
- The microwave case…*A.M. v. N.Y.C. DOE*, 112 LRP 3144 (E.D. NY 2012) *cert. den'd*, (U.S. 2013).
  - "It is undisputed that diabetics do not need to eat hot food in order to manage their diabetes successfully. Therefore, even if J.M. sometimes skipped lunch and disliked the food on the school menu, that did not warrant a further accommodation in addition to what the school had already provided."

42

Some lessons on serving students under 504….

Data determines need & limits accommodation (not expectation)

- Parentally-desired vs. doctor required. *Murfreesboro (TN) City Sch. Dist.*, 34 IDELR 299 (OCR 2000).
  - Parent of student with asthma kept student home and would not return student to school until nurse was present.
  - The doctor responded by letter that "he was not aware of any acute medical indication for keeping the Student home from school, and that it is reasonable to provide *nonmedical* personnel with appropriate training in the administration of her medications."

43

Some lessons on serving students under 504….

Educational Sense + Nondiscrimination Sense

- Does the proposed accommodation make sense educationally for this student?
  - Unlimited water fountain access. *North Lawrence (IN) Community Schools*, 38 IDELR 194 (OCR 2002).
  - Concerns over lost instructional time, *Shelby County (TN) School District*, 108 LRP 88122 (OCR 2008).
  - An automatic excused absence? *Fayette County (GA) School District*, 44 IDELR 221 (OCR– Atlanta 2005).

44

Some lessons on serving students under 504….

Some additional thoughts on homebound

- Homebound is likely the most restrictive setting– the student may be educated without access to peers (nondisabled or otherwise).
- A small but growing problem:
  - Students that don't want to go to school
  - Parents who can't or won't make them
  - Doctors willing to be complicit
  - The Question: Does disability require the student to remain at home?

45

Some lessons on serving students under 504….

Some additional thoughts on homebound

- Is the student really confined to the home? *Calallen ISD v. John McC.*, Docket No. 132-SE-1196 (SEA Tex. 1997).

  "Some students need continuous homebound services. John is not among them. One is hard pressed to justify continuous homebound services for a student who drives the family car, goes out on dates, and regularly participates in other activities outside the home."

46

Some lessons on serving students under 504….

Some additional thoughts on homebound

- Is the student really confined to the home? *Plano ISD*, 62 IDELR 159 (SEA TX. 2013).
- "Outside of school Student is not restricted to home. Student goes to the local shopping mall with friends, McDonalds, and other social gatherings. Student enjoys swimming and playing soccer…. Student appears robust and healthy and seems to engage in activities involving mold, pollen, and other people when the activity suits student."

47

Some lessons on serving students under 504….

Some additional thoughts on homebound

- Is the student really confined to the home? *Bellingham Public Schools*, 41 IDELR 74 (SEA MASS. 2004).

  "Student testified that he regularly leaves his home, particularly after the end of the school day. He described various things that he typically enjoys doing outside of his home within the community—for example, 'hanging out' with his many friends, watching football games, seeing his girlfriend, driving a car (he has his learner's permit)….

48

Some lessons on serving students under 504….

Some additional thoughts on homebound

- Is the student really confined to the home? *Bellingham (cont'd)*
  - "Parents would not consent to home tutoring being scheduled after school hours, because the tutoring would then interfere with Student's spending time with his friends. The inescapable conclusion is that Student is not, for any reason, confined to his home."

49

Some lessons on serving students under 504….

Some additional thoughts on homebound

- Can the student be educated at school? *Lourdes (OR),* 57 IDELR 53 (OCR 2011).
  - "Further, because LPCS placed the student in an in-home tutoring environment, which was a more restrictive environment than what the student had previously and subsequently been provided, LPSC failed to comply with [the Section 504 LRE requirement at] 34 C.F.R. §104.34(a)."

50

Some lessons on serving students with technology under 504

Tech is almost always beneficial, but that's not the test. *High v. Exeter Township Sch. Dist.*, 54 IDELR 17 (E.D. PA. 2010).

- "although assistive technology will almost always be beneficial, a school is only required to provide it if the technology is necessary. Moreover, the failure to provide assistive technology denies a student FAPE only if the student could not obtain a meaningful educational benefit without such technology."

51

## Some lessons on serving students with technology under 504

- Are student needs met without the tech? *Grant v. St. James Parish*, 33 IDELR 212 (E.D.LA. 2000).
- Does he use it at school? *Jefferson County School Dist. R-1*, 39 IDELR 119 (SEA CO. 2001).

52

## Some lessons on serving students with technology under 504

- Is it possible to accommodate in such a way that the student doesn't learn skills he's capable of learning? *Sherman v. Mamaroneck Union Free School District*, 340 F.3d 87 (2nd Cir. 2003).
- Technology is no replacement for direct instruction. *City of Chicago School District 299*, 62 IDELR 220 (SEA IL 2013).

53

## Some lessons on serving students with technology under 504

- Scaling the accommodation. *Los Angeles Unified School District*, 111 LRP 75098 (CA SEA 2011).
  - IDEA-eligible student with ataxic Cerebral Palsy, mild/moderate intellectual disability, asthma, seizures and developmental delays.
  - Student is nonverbal. He communicates with vocalizations, expressions, some ASL, gestures and a School-provided communications device, a "Springboard"

54

## Some lessons on serving students with technology under 504

- Scaling the accommodation. *Los Angeles USD*
  - The student's technology needs are limited to his communication difficulties.
  - The Springboard was chosen after evaluating student's communication needs, and the determination that a dynamic display system with voice output would meet student's unique needs.
  - Parent demanded an iPad2 instead, arguing that "the iPad 2 would be better suited to meet his [communication technology] needs."

55

## Some lessons on serving students with technology under 504

- Scaling the accommodation. *Los Angeles USD*

**"However, a school district is not obligated to provide the most technologically advanced AT device, or a device that would serve other purposes.** Instead, a district is required to assess and determine a student's unique AAC needs and then to provide the AAC which addresses the need. The District established that it properly assessed Student and that the SpringBoard and the SpringBoard Lite were AAC devices especially well suited to serve Student's augmentative communication needs."

56

## Section 504 Plans & what comes next when the Student graduates

- What about the next phase of the student's life?
  - 504 has no regulations on transition to adult life
    - Nondiscrimination requires equality of participation by 504 students in the work interest, college planning, career and "adult life" programs provided to all students
    - But what about the advocacy skills necessary to navigate the adult world?

57

## Section 504 Plans & what comes next when the Student graduates

- The 504 Committee evaluates the student, understands her disability-related needs & prepares her school environment for her.
  - In HS, the student has no responsibility for the provision of appropriate accommodations. Eligibility and placement are done for her.
  - Postsecondary education and the workplace are a different story.
    - Does the student know how to talk about her impairment? Explain the accommodations and services needed and why they are needed?
  - Engage the student in the 504 Committee process to encourage self-advocacy

58

## What if things are likely to change?

- If we have learned anything from 2020-2021, it's that education must adapt to change.
- The next section examines how to plan for change that is is anticipated, thus preventing the need for 504 meetings in what may be a series of changes from school to home and back again.

59

## What's the Section 504 FAPE supposed to do?

- To prevent discrimination, the 504 Plan must keep up with changes to the student's disability and changes in the student's educational environment.

60

Some lessons on serving students under 504….

What if the student's needs typically change during the year?

- **15-day waiting period even for multiple anticipated blocks of absences?** *Traverse City (MI) Pub. Schs.*, 59 IDELR 144 (OCR 2012).
  - Despite the fact that the student is multiply disabled and has frequent, recurring absences, the school refused to provide a "just-in-case plan" for homebound services during ragweed season, instead relying on policy which created a 15-day delay between verification by a physician and start of services.

61

Some lessons on serving students under 504….

What if the student's needs typically change during the year?

- **15-day waiting period even for multiple anticipated blocks of absences?** *Traverse, cont'd.*
  - "OCR concludes that the District's failure to modify its practices and procedures to provide for educational services for foreseeable absences related to recurring or episodic conditions related to students' disabilities, without requiring an IEP meeting in every instance or waiting fifteen days to provide home instruction, violates the Section 504 regulation [on Free Appropriate Public Education] at 34 C.F.R. §104.33[.]" (Bracketed material added).

62

Some lessons on serving students under 504….

What if the student's needs typically change during the year?

- **15-day waiting period even for multiple anticipated blocks of absences?** *Traverse, cont'd.*
  - Author's Note: if episodic plans are appropriate for IDEA-eligible students (where the procedural protections are higher) the concept should apply with equal if not more force to Section 504 students, especially in light of the Congress' treatment of episodic impairments under the ADAAA.

63

Some lessons on serving students under 504….

What if the student's needs typically change during the year?

- *Here's a result where the school's IEP Team planned ahead. Eric H. v. Methacton Sch. Dist.*, 38 IDELR 182 (E.D. Pa. 2003).
  - Student with a fragile immune system due to complications from leukemia was offered an IEP that provided for homebound instruction for one hour per day after he had missed three days of school in a row. Were he to miss 20 school days in a row, the IEP team would meet to determine whether additional services were necessary.

64

Some lessons on serving students under 504…

What if the student's needs typically change during the year?

- What these cases describe is the responsibility of the school to plan for anticipated changes to the student's condition and corresponding services to prevent unnecessary delays.
  - Note, the contingency planning is based on data showing that student needs change during the year. Example:
    - What about ADHD student who sometimes comes to school off his medication and needs additional behavior management and executive function support?
  - The need for an observable trigger for the services.

65

Then school closed for the pandemic…

The need for Section 504 Plan B

- We had 504 Plans in place for our kids, and then the pandemic happened and we started distance learning.
- The following are not suggested accommodations or services, but questions to ask when looking at a student's current data and Plan A to formulate a Plan B.
- The logic and reliance on evaluation data to create the 504 Plan does not change with the pandemic. However….

66

## Recognizing the need for Section 504 Plan B

- Changed facts must be considered.
  - Start with the student's current evaluation data and 504 Plan.
  - Ask: When we move from school to distance learning, or from distance learning back to school or hybrid or ??, what has changed and what remains the same with respect to:
    - Learning Environment?
    - Educational Demands on the Student?
    - Disability-related Concerns?
- Even if the student's disability-related needs haven't changed, how the school will meet those needs may have to change.

67

## Recognizing the need for Section 504 Plan B

When the student is not at school, what's missing:

- An environment designed for instruction, with limited distractions.
  - How will you address and limit distractions in an environment you don't physically control for the student who really can't afford more distractions?
- Broad range of instructional personnel, service providers, and other resources.
  - If the student needs counseling or re-teaching, how/when will that occur?

68

## Recognizing the need for Section 504 Plan B

When the student is not at school, what's missing:

- Near-constant supervision for behavior, motivation, and redirection.
  - When the student grandstands during your Zoom, proximity is no longer available.
- Peers and socialization opportunities.
  - If the student benefits from working with peers, how will you accomplish this?

69

## Recognizing the need for Section 504 Plan B

- Looking at the evaluation data, does the move to distance learning require skills or tools that the student does not have? For example,
  - Ability to perform independent computer and keyboard work
  - Executive skills
  - Focus and attention to task
  - Self-Motivation
  - Access to internet and other technology necessary for distance learning
  - A quiet place to study and learn

70

## Recognizing the need for Section 504 Plan B

- Looking at the evaluation data, how does the student's disability impact access to and benefit from distance learning? Examples:
  - Is this a student with asthma, chemical sensitivity, perfume, cologne, food or other allergies for which the move to distance learning removes or decreases the need for accommodation?

71

## Recognizing the need for Section 504 Plan B

- Looking at the evaluation data, how does the student's disability impact access to and benefit from distance learning? Example:
  - Is this a student increasingly fearful/anxious about the pandemic or experiencing significant trauma from extended exposure to an abusive or neglectful environment? How will you evaluate and address these new concerns?

72

## Recognizing the need for Section 504 Plan B…

- A Section 504 Committee can create a contingency plan for a student to address future school opening or closing and other foreseeable events.
- The Plan would include a "trigger" (the school's decision to close, reopen, etc.) and a Plan for this student should that occur.

73

## Recognizing the need for Section 504 Plan B…

- Trigger examples:
  - "Should the student be returned to distance learning due to school closure, quarantine of the student, or parent choice, the following plan will apply:"
  - "Should the student return to school because distance learning is no longer an available option, the student has completed quarantine, or due to parent choice, the following plan will apply:"
- Talk with your school attorney about utilizing contingent plans created in 504 meetings.

74

## The law does not always foresee complications

- Statutes and regulations tend to be based on things that have happened and are responses to prevent bad outcomes next time.
- Nothing like this pandemic has happened in the "lifetimes" of 504 of IDEA
  - AND, these laws aren't very old. Relatively speaking.
- Application of law to novel situations can result in sometimes unfair expectations and burdens. This is likely one of those times…

75

## The Section 504 Process

It's a change of placement to move to distance learning and back again.

- The decision to provide educational services at home for students across the country was for purposes of health & safety.
- The rationale behind the change does not mean that it is exempt from legal consequences arising from federal disability law.
  - Schools still must comply with IDEA & 504.
  - Move to virtual schools is a change of placement
  - IEP Teams/504 Committees need to act by meeting or otherwise amending the Plan.

76

## School to Home to School to who knows?

Some complicating factors to consider: Parent Choice (where available)

**The Parent Choice Complication (in some schools).**

To address parent safety concerns, many schools are allowing parents to choose whether their students return to re-opened brick & mortar schools.

- Parent sometimes may also choose to remain on distance learning or return to distance learning

77

## School to Home to School to who knows?

Some complicating factors to consider: Parent Choice (where available)

- Section 504/ADA require that parents of all students have the choice if available to parents of nondisabled students.
  - For some IDEA-eligible students, the choice could deprive the student of FAPE if FAPE cannot be provided in the home via distance learning.
  - Talk with school attorney: Can ADA/504 parent choice be allowed to force the school *not to provide FAPE?*

78

## Takeaways on Contingency Planning

- Pandemic Plan B thinking can be helpful in some extremely common 504 situations outside of a pandemic:
  - The student with ADHD who is not consistent with his medication. When medicated, the student functions within average range academically, socially, emotionally, and behaviorally. Without his meds? Different story.
  - The student with a visual impairment who leaves her glasses at home or the student with a hearing impairment who removes her hearing aides.

79

## Some lessons on serving students under 504….

- Student effort matters
  - A FAPE and he's failing? Yep. *Beaufort County (SC) School Dist.*, 29 IDELR 75 (OCR 1998).
  - Lead a horse to water…. *Sequoia Union High School District*, 47 IDELR 209 (SEA CA 2007).
  - A Section 504 duty to maximize potential? NO

80

## A quick summary of lessons:

- The 504 Plan is not an all-you-can-eat buffet
- Accommodations address need arising from impairment to level the playing field
- As expense and inconvenience of accommodation increase, so too should data
- OCR: following CDC guidance on all-things pandemic related likely results in Section 504 & ADA compliance.

81

## A quick summary of lessons:

- FAPE is not the right to the parent-preferred accommodation
- The Speedo-Bikini Rule
- Nothing beats understanding the impairment and its impact on the student.

82

Workshop 4

# FAPE in Virtual/Online Context

By:

**Jose Martín**
Attorney at Law
Richards Lindsay & Martín, LLP
Austin, Texas

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

**SAMPLE POLICY LANGUAGE IDEAS FOR VIRTUAL PROGRAMS WITH RESPECT TO STUDENTS WITH DISABILITIES**


**Mission and Goals.** The mission of the District's virtual program is to promote high academic achievement, leading to appropriate opportunities for post-school experiences. Its goals include increasing students' ability to work independently, self-discipline and self-motivation, ability to maintain on-task attention with minimal external prompts, self-monitoring of attendance and participation, ensuring proper parental role in monitoring student attendance and participation, and ability to work with technology and technology applications.

**Equity and Access.** Despite the web-based and online nature of the District's instructional program, the District will ensure that students with disabilities enjoy equal access to the educational benefits and opportunities offered by the technology, as well as equal treatment in the use of such technology. Students with disabilities shall not be excluded from, or be denied the benefits of, the web-based and online program on the basis of disability as long as their respective committee of knowledgeable persons determines that the web-based and online program is appropriate to provide them a FAPE with or without the provision of appropriate and individualized accommodations, modifications, aids, and/or services.

**IEPs and Section 504 Plans.** For students with disabilities wishing to enroll in the District's web-based and online program that have existing and current IEPs or Section 504 plans, the District shall convene IEP team or Section 504 committee meetings respectively, and such meetings shall include persons from their prior educational placement and carefully consider data from various sources to reevaluate their needs specifically with respect to participation in the web-based and online program. If the reevaluation determines that with appropriate and individualized accommodations, modifications, aids, and/or services, including parent training and orientation, the program is appropriate for the student to receive a FAPE in light of their unique needs, then the IEP or Section 504 plan will be revised to include the services, aids, supports, accommodations, and modifications that will be required in order for the IEP to be reasonably calculated to confer educational benefit in the web-based and online program. After reevaluation, it may be determined that based on some students' unique needs, the web-based and online program is not appropriate to confer a FAPE, even with the provision of appropriate and individualized accommodations, modifications, aids, and/or services. Such a determination may be made in the initial application process, or after the student has participated in the program for some time. Moreover, such a determination is subject to the parents' rights and procedural safeguards under IDEA and Section 504 respectively.

**Factors relevant to appropriateness of web-based or online program for specific students.** The following are some of the factors that may be relevant in an IEP team's determination of whether the web-based or online program is appropriate to provide a FAPE, with or without the provision of appropriate and individualized accommodations, modifications, aids, and/or services:

Non-medical attendance problems or school avoidance
Ability to remain on task with minimum prompts
Social skills deficits requiring live interaction with other students
Need for significant one-to-one instruction
Need for life-skills instruction
Ability to work independently
Self-motivation skills
Previous performance in virtual programs
Ability and willingness of parents to play expected role
Need for alternate schedule
Compliance problems
Emotional problems
Academic ability
Ability to work with technology (with training and support)

Although the above listing represents some key relevant factors, others may also apply.

**Related Services.** Related services are those needed in order for the student to benefit from his educational program. Some related services can feasibly and appropriately provided to the student on a web-based or online basis, while some services, such as occupational therapy, may require in-person delivery of services. The District services will arrange for services required to be provided personally either at a bricks and mortar facility or the home, and parental preference will be considered in the decision. Should transportation be necessary in order for a student to access related services, the District will provide transportation from and to the home.

**Parental Role.** The inherent nature of web-based and online programs envisions an active and important role for parents in implementing and monitoring the program. Parents assist in the implementation of the program by facilitating the attendance and participation of the student in the web-based and online program, and ensuring that the student remains on-task as required for participation and progress in the program. Parents will be provided training and orientation with respect to the applicable technology and their role in the program. Parents will also be expected to communicate and coordinate frequently with online instructors with respect to the student's performance and progress. Failure of parents to play their expected role with respect to

the web-based and online program may jeopardize a student's performance and progress on the program.

**Preliminary Needs Assessments.** As part of the collection of various sources of data needed to reevaluate students with disabilities specifically with respect to participation in the web-based and online program, the District may conduct needs assessments to help ascertain the unique needs of the child vis-à-vis web-based and online programs, as well as the parents' ability and willingness to meet expectations with respect to parental role, as set forth above.

**Accessibility.** The District provides individuals with visual disabilities with an equal opportunity to participate in or benefit from its online or web-based instructional program. Access of students with visual disabilities to the program, and its associated websites and web pages, shall be as effective and integrated as that provided to non-disabled students, and with substantially equivalent ease of use. With respect to students with other types of disabilities, including hearing or manual impairments, the program shall also be accessible and meet the equally effective and integrated standard. Should the program use a device or feature that is not fully accessible, the District will provide accommodations, assistive technology, or modifications that permit students with disabilities to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner, and with substantially equivalent ease of use. In meeting the accessibility standards, the District will refer to standards under either Section 508 of the Rehabilitation Act, W3C's Web Content Accessibility Guidelines, or other standard or combination of standards that will render its electronic and information technologies accessible.

**Equipment.** Parents must understand and acknowledge that any equipment provided by the District remains the property of the District and must be returned if the student withdraws from the program, graduates, or services are otherwise terminated. Parents and students must commit to using the technology as directed and make best efforts to avoid damage to either hardware or software. Misuse of, or damage to, the technology despite warnings and training is a factor that the student's IEP team may consider in determining whether the web-based or online program is appropriate to meet the student's needs.

# FAPE in the Virtual/Online Context

Presented by
**Jose L. Martín, Attorney**
Richards Lindsay & Martín, L.L.P.—Austin, Texas
jose@rlmedlaw.com


## Growth and Benefits of Virtual Programs

- The data that exists, is indicative of significant increase in enrollment in virtual programs.
- Data on level of participation of students with disabilities remains unclear
- **Potential benefits**:
  - Self-pacing
  - Greater student control of learning
  - Lack of peer distractions/conflicts
  - Option for students with health issues
  - Allows for instruction in remote rural areas

## Growth and Benefits of Virtual Programs

- **Potential benefits**:
  - Highly differentiated instruction
  - On-going feedback on progress
  - Flexible scheduling of work
  - Multimodal presentation of content
  - Possible cost savings (?)

## Challenges to Providing Special Education FAPE in Virtual Programs

- A number of challenges, some more complex than others
- *Major problem*—the present IDEA legal framework is based on group instruction in brick-and-mortar public schools
- Another is that the inherent nature of virtual programs is such that they will not be able to meet the needs of some students with disabilities.

## Types of Programs

- **Virtual/Online**—Asynchronous, requires student initiative, communication with teacher only by email/phone
- **Remote**—Likely synchronous, teacher provides instruction in classroom, remote students participate by camera/mic
- **Live Online**—ZOOM-based instruction, peers appear on platform from their homes, assignments turned in electronically

## Equity and Access Issues

- Non-discrimination mandate under §504 means that virtual programs cannot *categorically or arbitrarily* deny or exclude students with disabilities.
- A key issue will be virtual programs' admission or screening policies, which must be designed to avoid arbitrary discrimination.

## *Dwight Common (IL) Sch. Dist.*, 122 LRP 3182 (OCR 2021)

When a student went on a hybrid live/virtual program, the team did not address how the plan accommodations would apply or be implemented in the virtual setting.

As a result, some teachers simply did not implement some accommodations because they believed they were not applicable virtually or would call attention to the disability.

When team met again, it also did not address whether and how the plan would apply in a virtual setting, or any differences in how the plan should be implemented virtually.

School agreed to a voluntary resolution.

## *Dwight Common (IL) Sch. Dist.*, 122 LRP 3182 (OCR 2021)

*Notes*—Many districts acted under the assumption that when a §504 student goes to a virtual program, the §504 plan just transfers as is, when the reality is that the change to virtual environment likely implicates the need to review and revised the §504 for the virtual setting.

Some accommodations can be implemented identically in the virtual setting (e.g., extra time), some will no longer apply (e.g., go to nurse for blood sugar readings), and others may need to be revised (e.g., physical prompts/reminders, behavioral interventions).

## *27J Schools (CO)*, 80 LRP 172 (OCR 2021)

When a student who had successfully participated in online education during lock-down sought to enroll in the school's virtual program, he was denied.

The virtual program accepted students with disabilities, but indicated that the student's IEP would have to be reviewed to determine whether the virtual program could implement it.

If the student required an intensive or supportive learning environment to the degree that the online platform is not able to provide FAPE in the LRE, then admission would be denied.

## *27J Schools (CO)*, 80 LRP 172 (OCR 2021)

Crucially, OCR found that there was no evidence that an IEP team considered whether changes to the IEP (or presumably, the virtual program) could enable the virtual program to meet the student's needs.

And, of course, the school implicitly conceded FAPE was possible virtually, as the student had been on virtual programming all through lockdown…

*Discussion Point*—Is a virtual program expected to meet the needs of every student with a disability? What if the student had performed poorly in virtual instruction despite legitimate efforts to revise the services?...

## *27J Schools (CO)*, 80 LRP 172 (OCR 2021)

*Notes*—The issue for virtual programs to finesse is considering data and factors, through the IEP/504 team process, that ensures that (1) the program does not categorically or arbitrarily discriminate on the basis of disability, and (2) the placement is not provided to students whose disability-related needs are in contravention to the inherent features of virtual programs, after considering accommodations and modifications.

## *Grapevine-Colleyville (TX) ISD*, 122 LRP 21133 (OCR 2022)

The District's website indicated that students with disabilities could enroll in its online program only if their accommodations could be implemented effectively with the District's chosen software program (Adobe Connect).

Also, the website stated that no dyslexia, ESL, or GT services would be provided in the online program.

OCR found that the statement had a "chilling" effect on enrollment by students with disabilities, who are entitled to accommodations they might need to have an equal opportunity to participate in a school's virtual choice program.

The District agreed to enter into a voluntary resolution with OCR.

## *Northern Utah (UT) Academy for Math*, 123 LRP 10963 (OCR 2023)

Some recent OCR letters of findings, such as this one, addresses the tech accessibility of online programs to students with disabilities.

Here, OCR noted that the school's online program limited access to content and functions by users with disabilities who use keyboards to navigate websites.

Also, the program was missing meaningful alternative text for graphics, images, or links, which posed a barrier to users with certain disabilities.

## *Northern Utah (UT) Academy for Math*, 123 LRP 10963 (OCR 2023)

Moreover, pdf documents were not accessible to users with visual impairments who use screen readers.

School voluntarily agreed to corrective action, including an audit of the online program, testing, and revising to ensure it meets an accepted accessibility standard (e.g., Web Content Accessibility Guidelines (WCAG), version 2.1, level AA).

## *Northern Utah (UT) Academy for Math*, 123 LRP 10963 (OCR 2023)

*Notes*—This corrective action plan is similar to that required of districts whose web pages are found to not be properly accessible to persons with disabilities…

*See also* ***Sumner County (TN) Sch. Dist.*, 123 LRP 15835 (OCR 2023)**, for another VP accessibility OCR decision, similar to the above.

- ***Quillayute Valley (WA) SD*, 108 LRP 17959 (OCR 2007)**

  Contract virtual program that is part of a Washington district

  Written criteria precluded modified curriculum, counseling, aide support, more than 40 mins/wk of sp ed services, some tech devices

  Unwritten criteria did not allow admission if reading/writing ability below 6th grade or if student lacked ability to work independently

- ***Quillayute Valley (WA) SD*, 108 LRP 17959 (OCR 2007)**

  OCR found admission criteria discriminatory and not "reasonably necessary to achieve the mission and goals of the education program."

  Criteria that are applied only to students with disabilities are likely to be seen as discriminatory

  **Note**—But, there are ways of incorporating some of the programs' valid concerns in ways that do not violate §504 (more later…)

- ***Fulton County (GA) Schs.*, 81 LRP 84 (OCR 2022)**

  Georgia district unilaterally withdrew a 5th grader with AU from its VP, after determining it could not implement his IEP in that setting.

  District guidance, however, required IEP team to assess appropriateness of VP placement prior to enrollment.

  "It appears the VP personnel unilaterally made the decision to withdraw the Student without assessing the student's needs…."

- ***Fulton County (GA) Schs.*, 81 LRP 84 (OCR 2022)**

  *Note*—Notice that it would appear that OCR approves of a pre-admission appropriateness determination for VP placements, if:

  1. It does not categorically discriminate on the basis of disability,
  2. Modifications are considered that might render the VP placement appropriate, and
  3. Admission criteria and decision-making are based on whether the student can receive a FAPE in the VP.

## Access/Equity vs. Appropriateness of Placement

- ***Is virtual/online instruction a parent option or an IEP placement decision on a particular setting within the continuum of school placements?***

  Better answer is that online instruction is a setting within the continuum of placements, and therefore determined by the IEP team.

  Why? Setting may not be appropriate to enable FAPE for every IDEA students (as is the case with all other settings…)

- **Factors Relevant to Appropriateness of Online Option**

  Non-medical attendance problems or school avoidance
  Ability to remain on task with minimum prompts
  Social skills deficits requiring live interaction with other students
  Need for significant one-to-one instruction
  Need for significant life-skills instruction
  Ability to work independently
  Self-motivation skills
  *Previous performance in virtual programs
  Ability and willingness of parents to play supervisory role
  Need for alternate schedule
  Compliance problems
  Emotional problems
  Academic ability
  Ability to work with technology (with training and support)

- **Saying No to Virtual Program Placement**

  Agreeing to a placement that is likely inappropriate due to the unique nature of the student's disabilities will generate problems:

  - Lack of progress (for various reasons)
  - Parent requests for extensive at-home in-person services
  - Difficulties re-transitioning student back to school

  *Note*—IEPT could do a trial placement for a defined period, after which a permanent placement decision is made…

- **Saying No to Virtual Program Placement**

  ***Downington Area Sch. Dist. v. K.D.*, 69 IDELR 162 (Pa.Comm.Ct. 2017)**

  Gifted 6th grade student with ADHD placed in an online math program.

  But student sought out other peers online, played games, and was frequently off-task, as was the case when the District had previously tried an online program with him.

  HO found that the VP program was inappropriate, and Court agreed it was a "poor fit."

## Open Enrollment Virtual Programs

- **Model exacerbates problem of lack of fit of VP for certain students**

  States must decide which LEA has the FAPE responsibility (*Dear Colleague Letter* (OSERS/OSEP 2016))—Likely, the open enrollment VP, if it is its own LEA

  *Dilemma*—Open enrollment VPs may get students impossible to serve virtually, and expose VP to liability

## Open Enrollment Virtual Programs

- ***Commonwealth Connections Academy Charter Sch.* (SEA Pennsylvania 2016)**
  - 8th-grader with ADHD (OHI) transferred from regular district to the VP charter
  - Prior school's IEP had direct sp ed instruction in social skills, organizational skills, and math
  - VP provided software programs, live lectures, recordings of lectures

- ***Commonwealth Connections Academy Charter Sch.* (SEA Pennsylvania 2016)**
  - VP also provided "virtual support" from a "learning support teacher"
  - Student did not take advantage of help, and started falling behind and failing
  - VP put him in "supplemental support program" but without IEP meeting
  - Then, parent rejected additional 1:1 support in the home

- ***Commonwealth Connections Academy Charter Sch.* (SEA Pennsylvania 2016)**
  - HO found school failed to provide services comparable to prior IEP
  - HO—"Soon after enrolling it became apparent, the Student's attention and organizational deficits would interfere with online learning."
  - Also, procedural violations
  - HO awarded 1000 hrs of comp ed

- ***Cincinnati Learning Sch.* (SEA OH 2016)**
  - Teenager enrolled in online charter that offered resource room to supplement VP
  - IEP did not state an amount of resource time, and student often did not attend
  - Lots of missing work, logging in inconsistently
  - SEA found violation, as IEP did not state specific amount of services or face-to-face classes, leaving it up to the student

- ***Cincinnati Learning Sch.* (SEA OH 2016)**
  - Despite escalating problems, school did not hold an IEP meeting
  - **Note**—If the VP places a high degree of responsibility on the student as a matter of policy, is that contrary to the IDEA?...
    - But, in open enrollment situations, there are no criteria for admission
    - And, services must be stated on IEP (could be "minimum of…")

- ***In re: Student with a Disability* (SEA Pennsylvania 2016)**
  - Student with SLDs and ED enrolled in VP
  - But, student had a history of school avoidance, so he started not participating, and failed many classes
  - HO found denial of FAPE—VP did not reevaluate situation or amend IEP
  - "Charter continued to apply its online model to Student, a model which relies upon the child to access instruction."

- **Open Enrollment VP Problems:**
  - Truant or school-avoidant students enrolled by parents as an alternative to attendance
  - Students with off-task tendencies, low capacity for independent work, low motivation, school resistant
  - Parents not willing/able to function as learning coaches/monitors
  - Students that need significant hands-on instruction, social skills instruction

## Compliance with Legal Norms in Virtual Context

- Virtual programs must assume all IDEA and §504 requirements apply to them (e.g., IEP progress reports under IDEA)
- But, those laws envision group instruction in brick-and-mortar schools.
- Some emerging cases show how the legal requirements might apply:

- ***Dear Colleague Letter* (OSERS/OSEP 2016)**
  - "The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools that are constituted as LEAs or are public schools of an LEA."
  - **Child-find** applies in VPs, although it presents "unique challenges" in VP context

- ***Virtual Community Sch. of Ohio*, 62 IDELR 124 (OCR 2013)**

  Fully virtual program not affiliated with a public school district

  §504 plans developed informally by a §504 Coordinator after discussion with parent, sometimes after talking with prior school, but without §504 evaluation/meeting

  Parents at times were asked to go to doctors to substantiate their children's disabilities

- ***Virtual Community Sch. of Ohio*, 62 IDELR 124 (OCR 2013)**

  No child-find process, no reevaluations, spotty notice of parent rights

  §504 plans not examined "even though many plans would not have previously provided for placement of the student in an on-line educational environment."

  **Note**—OCR understands that IEPs and §504 plans will have to be adapted to "fit" into an online education setting

- ***Virtual Community Sch. of Ohio*, 62 IDELR 124 (OCR 2013)**

  **Discussion**—School website stated it was an "ideal scenario" for students with disabilities, including "students removed from school due to disciplinary reasons"

  Might this be oversell? Can VPs be appropriate for any student?...

  Any VP must have §504 policies/procedures

## Least Restrictive Environment (LRE)

- LRE speaks to students' being educated alongside nondisabled peers—a concept based on instruction in brick-and-mortar schools and physical exposure to peers
- LRE regulations require placement in campuses where the student would attend were they nondisabled, unless IEP requires another arrangement (in which case, they require placement in the school next closest to the home)—34 CFR 300.116

## Least Restrictive Environment (LRE)

- So how does LRE work in virtual settings? Some cases have applied the mandate traditionally:
- ***S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D.Pa. 2014)**

  Student with severe migraines alleged VP was inappropriate, denied him FAPE

  School had made numerous attempts to accommodate his condition, absences, tardies

- ***S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D.Pa. 2014)**

  He had previously been provided a hybrid VP with some school attendance, but he neither attended school, nor worked well on the VP

  School finally fashioned a fully VP, fashioned on the VP parents preferred, but parents lost faith in the program after student did not perform

  Expert for parents raised LRE, arguing VP was a highly restrictive placement

- ***S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D.Pa. 2014)**

  Expert argued VP did not allow learning of behavior and social interaction with peers

  **Court**—Student's condition made him incapable of attending program other than VP

  It applied traditional LRE analysis, finding that school had made "extraordinary" efforts to accommodate student prior to determining "the most restrictive option" was needed

- ***Tacoma Sch. Dist.* (SEA WA 2016)**

  District expelled high-schooler with ADHD and ODD, due to risk of violence

  After emergency expulsion term, school moved student to its VP (no IEP meeting)

  But, student produced little work and was mostly off-task

  HO—VP inappropriate for student's unique needs, and provided no social interaction

- ***Hernandez v. Grisham*, 78 IDELR 12 (D.N.M. 2020)**

  Parents of IDEA students brought claim challenging state rule limiting in-person instruction in districts with high COVID numbers

  Rule did not violate due process, as it was necessary to protect public's health and safety

  Court noted that "there is no general right to an in-person education under the Constitution."

- ***Hernandez v. Grisham*, 78 IDELR 12 (D.N.M. 2020)**

  Responding to the claim that at-home instruction violated LRE, the Court held that since *all* students are educated at home, that becomes the mainstream setting for purposes of the LRE analysis.

  *Note*—The court takes the unusual position that COVID closures change what the regular setting is. But is not LRE ultimately about the degree to which a student with a disability is exposed to nondisabled peers?

- ***Does traditional LRE analysis really apply in the virtual context?***

  Does it matter that most programs are choice-based programs? Does the parent waive LRE if they choose the private school?...

  Or, must IEP teams limit admissions to VPs only to students who require the most restrictive environment in light of their needs?... This "traditional" application would minimize the VP option for students with disabilities

- ***Does traditional LRE analysis really apply in the virtual context?***

  Or, does the law allow for *virtual* interaction with peers as part of the LRE calculus? "Virtual" LRE?

  A ***continuum of virtual placements*** exists, where some VPs allow for interaction with peers, others have some, others have none

  Or does the the law hold that virtual interaction is not as valuable as physical interaction? It really has not addressed the issue…

- ***Does traditional LRE analysis really apply in the virtual context?***

  Some Hearing Officers are already ruling that virtual programs that offer opportunities for virtual interaction with peers are less restrictive than homebound instruction with no interaction with peers. ***Student v. Frisco Ind. Sch. Dist.*, 123 LRP 8155 (SEA Texas 2023).**

- ***Does traditional LRE analysis really apply in the virtual context?***

  In ***Rabel v. New Glarus Sch. Dist., 79 IDELR 71 (W.D.Wis. 2021)***, a court ruled that a private virtual program that provided synchronous or live instruction in a group with peers with disabilities was less restrictive than the public school's virtual program of prerecorded lessons, which offered no opportunity for at least online interaction with peers.

- ***Does traditional LRE analysis really apply in the virtual context?***

  In ***J.D. v. Pennsylvania Virtual Charter Sch., 77 IDELR 287 (E.D.Pa. 2020)***, a court ruled that a 19-year-old with Autism needed to learn with other same-age students in a classroom setting to receive FAPE, and thus the virtual charter's proposal of placement in a private sp ed school was appropriate.

  Apparently, the home-based program did not offer *any* peer interaction, and the student had experienced behavior problems in the home program, as reported by his in-home providers.

- ***Does traditional LRE analysis really apply in the virtual context?***

  And, USDOE has stated the following:

  > Prior to the COVID-19 pandemic, for schools that did not offer virtual instruction to all children, special education provided virtually in the child's home was generally considered one of the most restrictive environments, as it typically provided little or no opportunity for the child to be educated with nondisabled peers.
  >
  > *Return to School Roadmap,* 79 IDELR 232 (OSERS 2021), at Question G-3.

- ***Does traditional LRE analysis really apply in the virtual context?***

  USDOE adds that:

  > Virtual learning provided during the pandemic may be deemed less restrictive if it is available to all children and provides the child with a disability meaningful opportunities to be educated and interact with nondisabled peers in the regular educational environment.
  >
  > *Return to School Roadmap,* 79 IDELR 232 (OSERS 2021), at Question G-3.

- ***Does traditional LRE analysis really apply in the virtual context?***

  Thus, a hint that USDOE envisions a spectrum of restrictiveness within virtual programs, with those offering interactive opportunities with peers being less restrictive than those that do not (e.g., pre-recorded, self-paced based, or asynchronous virtual instruction).

## Appropriateness Disputes Involving VPs

- As VPs enter the arena of placements, they have entered the world of FAPE litigation, which may focus on some of the unique aspects of VPs
- ***Benson Unified Sch. Dist.*, 56 IDELR 244 (SEA Arizona 2011)**

  Parents of a student with multiple chemical sensitivities disputed the District's proposal to change her from homebound services to VP

- ***Benson Unified Sch. Dist.*, 56 IDELR 244 (SEA Arizona 2011)**

  School argued the VP offered a superior curriculum; parent argued the VP offered too little one-to-one instruction, that neither parent was able to serve as "learning coach," and that student would be exposed to print chemicals

- ***Benson Unified Sch. Dist.*, 56 IDELR 244 (SEA Arizona 2011)**

  Student's treating psychologist testified she lacked the ability to "self-motivate"

  **HO found for school**—HB teacher indicated student was responsible and requiring more independent work would be beneficial

  And, program would be print-free and a paraprofessional could serve the function of "learning coach" (implications?...)

- ***School Dist. of Pittsburgh v. C.M.C.* (W.D. Pa. 2016)**
  - Teen with Asperger's and anxiety had fear of school after an altercation
  - District proposed a mostly VP
  - Court found student was not a good candidate for a VP, as she was obsessed with computers and the internet
  - And, the VP offered no social interaction

- ***Virtual Community Sch. of Ohio*, 43 IDELR 239 (SEA Ohio 2005)**
  - Parents of a low-functioning child with Down's alleged that a VP failed to provide an appropriate IEP or confer a FAPE, and sought reimbursement for private placement
  - Parents had sought out VP after disputes with a regular school
  - VP required parents to play significant role

- ***Virtual Community Sch. of Ohio*, 43 IDELR 239 (SEA Ohio 2005)**
  - After a time, VP team felt that student required more intensive instruction and hands-on assistance, and sought a change in placement to another regular school
  - Then, parents argued lack of staff training, inappropriate IEP, failure to provide and maintain technology
  - Parent stopped participating, student stopped completing any of the VP work

- ***Virtual Community Sch. of Ohio*, 43 IDELR 239 (SEA Ohio 2005)**

  **HO found for VP**—"When parents elect to enroll their children in a virtual school they assume the responsibility of their new role as education facilitator and eyes and ears for the teacher."

  HO found all tech issues were promptly addressed, and denied reimbursement (equitable grounds?...)

- ***Virtual Community Sch. of Ohio*, 43 IDELR 239 (SEA Ohio 2005)**

  **Discussion Point**—What should a school do if a parent opts for at-home instruction, but despite best efforts, it's just not working for the student?

  What does IEP team do? If it decides the student must return to school and the parent refuses, what happens?

- ***DOE State of Hawaii*, 112 LRP 31884 (SEA Hawaii 2012)**

  Student with cognitive, hearing, health impairments, and behavior problems was placed in a District-operated charter school that offered a hybrid VP and bricks-and-mortar program (main portion of instruction took place online)

  Parents serve as "learning coaches," but get training and assistance in that function

  Quickly, problems developed in both parts of program

- ***DOE State of Hawaii*, 112 LRP 31884 (SEA Hawaii 2012)**

  Student did almost no VP work, and was frequently absent or tardy to school portion

  Program made various attempts to provide additional assistance and services to both parent and student, with little results

  Team concluded student needed the structure and face-to-face services of a regular campus program and proposed a change in placement

- ***DOE State of Hawaii*, 112 LRP 31884 (SEA Hawaii 2012)**

  **HO found for school**—Student needed highly structured and consistent program, and his behaviors "posed too great of a challenge for the parent as a 'learning coach.'"

  HO held student required a structured placement on a regular campus

  **Note**—A potentially typical VP dispute scenario, after a difficult student is initially accepted, but then problems develop…

- ***DOE State of Hawaii*, 112 LRP 31884 (SEA Hawaii 2012)**

  **Discussion Question**—Disputes over proposed placements in a VP or proposed changes in placement *out* of a VP—which will be more common?...

## Degree of Individualization

- VPs must be prepared to offer a high degree of individualization to students, based on their IEPs and evaluation data
- Changes to the IEPs must be made to reflect the accommodations, services, aids, and supports that the student will need to work in the VP
- Lack of proper individualization may lead to FAPE disputes, **and** equity-based challenges
- A word on amounts of online instruction vs. amounts on prior IEPs

## The Fit of the Current Legal Framework

- The current legal framework envisions brick-and-mortar schools and group learning
- Legislation tends to lag behind innovation, and plays catch-up, after period of confusion
- IF there is another IDEA reauthorization, it must address VPs (LRE application, LRE in parent choice placements in VPs, higher expectations on parents, factors relevant in making determinations of appropriateness for VPs, among others)

## Related Services in VPs

- Services necessary for student to benefit from their special education (34 CFR 300.34)
- Some services will "come with the territory" of VPs—parent training, technology training, tech setup, tech monitoring, consultation with parents
- Some may be provided virtually or by videoconferencing—Speech therapy, counseling

## Related Services

- Could admission criteria include requirement that student not need any hands-on related services? Unlikely

## Behavior, Social, or Motivational Issues

- VPs give students greater flexibility and control over their learning experience, but also place greater responsibility on students
- Thus, VPs may not be appropriate for younger students or other students who are dependent learners and have difficulties assuming the responsibilities of VPs.
- This factor plays into admission decisions (and later disputes)

## Behavior, Social, or Motivational Issues

- VPs may have to include tech safeguards to address off-task behavior, work completion
- VPs must plan for interventions that make sense in a virtual context, such as increased monitoring of students, increased contacts with parents, training of parents on tech and supervisory role
- **Social skills issues**—Most challenging to address in VPs, may signal need for non-VP

## Factors Relevant to Appropriateness of Virtual Program

- Attendance problems or school avoidance
- Ability to remain on task with minimum prompts
- Social skills deficits requiring live interaction with other students
- Need for significant hands-on instruction
- Need for life-skills instruction
- Ability to work independently
- Previous performance in virtual programs

## Factors Relevant to Appropriateness of Virtual Program

- Ability and willingness of parents to play expected role
- Need for alternate schedule
- Compliance problems
- Emotional problems
- Academic ability
- Ability to work with technology (with training and support)

## Potential Cons of Online Programs

- If student is not motivated to participate, teacher has limited options to keep student on-task
- Parent involvement needed to ensure student logs into system
- Online programs may be less reinforcing than live attendance, creating off-task behaviors
- Limited options to deal with students that resist online instruction
- Limited BIP options
- Limited social interaction with peers

## Potential Cons of Online Programs

- May not be a good option for all types of students (those that need hand-over-hand, have limited response, significant cognitive impairments

## Addressing the Increased Role of Parents

- Parents in many VPs assume new roles as monitors and facilitators of their child's educational programs when they agree to participate in the online program (*Virtual Comm. Sch. of Ohio* (OCR 2005)).
- Ability and willingness of parents to play this role, with assistance, is a factor in whether the VP will be appropriate for the student.
- But, schools cannot demand or expect parents to be the implementors/providers…

## Addressing the Increased Role of Parents

- Role must be clear in **written policies**
- **Needs Assessments** can help identify whether parents, with training, can master the tech and monitoring roles
- If parents are failing in their roles, IEP team should meet, and propose more supports
- If even with more support, parents cannot perform minimum role, VP may not be proper

***Greenfield Commonwealth (MA) Virtual Sch.*, 122 LRP 7089 (OCR 2021)**

Virtual program had parent sign a contract that provided that she must serve as the "learning coach" and "primary support person" for her teen with disabilities.

Parent was expected to be the student's scribe for notes, help pace assignments, explanation of assignment instructions, tech assistance, and other support needs throughout the day.

It also stated: "Learning Coaches understand and agree that certain services cannot be provided in the online format and become the responsibility of the Learning Coach."

After the student struggled, parent asked for AT evaluation, but team never met to consider request.

***Greenfield Commonwealth (MA) Virtual Sch.*, 122 LRP 7089 (OCR 2021)**

When student failed, parent filed OCR complaint.

OCR—"School may be requiring parents and guardians to provide special or regular education or related aids or services necessary to ensure their children receive a FAPE, which is a legal obligation under Section 504 that the School cannot unilaterally transfer to parents as 'learning coaches.'"

*Note*—This appears to be an excessive expectation of support, throughout the day, on parents in a virtual program. But, was the transfer of duty to the parent effected "unilaterally"? A contract was signed… Still, excessive parental expectations likely deny FAPE.

## Addressing the Increased Role of Parents

- **Troy (MI) Sch. Dist., 122 LRP 3417 (OCR 2021)**

During COVID, Michigan district provided virtual program, but therapists mostly worked with the parent, expecting her to provide the service on her own.

She was required to attend every virtual session to provide support to the student.

Staff also did not provide student with access to equipment he normally would use at school.

## Addressing the Increased Role of Parents

- **Troy (MI) Sch. Dist., 122 LRP 3417 (OCR 2021)**

  District agreed to a voluntary corrective plan.

  *Note*—The student was one with apparently highly challenging disabilities. But expecting the parent to provide most direct services second-hand and attend all sessions was an abdication of the District's responsibilities to provide FAPE.

## Addressing the Increased Role of Parents

- **Franklin-McKinley Sch. Dist., 123 LRP 11831 (SEA California 2023)**

  School sought a 45-day removal to virtual IAES for a 3rd grade OHI and SI student with aggressive behavior and tantrums that frightened students and staff.

  HO agreed student was substantially likely to cause injury, but found that the IAES was not appropriate.

  VP provided significantly reduced services and did not specify components clearly.

## Addressing the Increased Role of Parents

- **Franklin-McKinley Sch. Dist., 123 LRP 11831 (SEA California 2023)**

  The entire burden of overseeing the student's participation and progress in the VP was placed on the parent (and, for a student with severe non-compliance).

  *Note*—If a school sues for a 45-day IAES placement, it better be able to show that the IAES will contain the services and aids that will be needed for FAPE…

## Addressing the Increased Role of Parents

- **Rockdale County Sch. Dist., 122 LRP 41381 (SEA Georgia 2022)**

  District offered VP as a stop-gap measure for student with SLD and other undisclosed disabilities (likely a VI) after parent refused to return student to her school or accept a transfer to another.

  Parents sabotaged the VP by making student unavailable by preventing her from turning on her laptop camera and microphone.

## Addressing the Increased Role of Parents

- **Rockdale County Sch. Dist., 122 LRP 41381 (SEA Georgia 2022)**

  When school offered comp VP services to make up for missed sessions, parent also made student turn off her camera and microphone, "forcing her teachers and service providers to teach to a black screen."

  Parents then filed for DP, alleging a failure to implement the IEP.

## Addressing the Increased Role of Parents

- **Rockdale County Sch. Dist., 122 LRP 41381 (SEA Georgia 2022)**

  HO found that "it is the parents who have not made [the student] available," and thus the District was not responsible for any implementation failures.

  HO also noted that parents refused consent for additional evaluations requested by the District.

## Addressing the Increased Role of Parents

- **Probably Reasonable School Expectations of Parents**
  - Ensure student logs in in morning
  - Light monitoring of student
  - Quiet area for program
  - Light tech assistance
  - Communication with instructional staff

## VP Written Policy Ideas (See Materials)

- **Mission and Goals** provision (see OCR decisions)
- **Equity and Access Statement**
- Provision on **IEPs and 504 Plans**, and need to determine whether VP is appropriate for student, reevaluations of appropriateness
- **Factors relevant to appropriateness**
- **Related services**
- **Parent Roles** and **Needs Assessments**
- **Accessibility**
- **Equipment**

## Ideas for IEP Teams Dealing with Students Opting for Remote Learning

- ***Crucial Initial Question*—Can the student realistically be provided a FAPE with virtual/remote services?**
  - If data indicates student cannot realistically receive a FAPE remotely, even with modifications, the IEP team should indicate so, and consider offering a live instructional program as the offer of FAPE
  - If State allows parents to choose remote learning anyway, develop a remote program, with the caveat that it may not yield appropriate progress

## Ideas for IEP Teams Dealing with Students Opting for Remote Learning

- **Can the student realistically be provided the necessary IEP services?**

  Team must try to duplicate the needed special education services in a virtual format

  As we'll see in the cases, hearing officers and courts tend to want to see the same amounts of time and frequency of services as in the live IEP

  Think of options for providing inclusion assistance virtually

## Ideas for IEP Teams Dealing with Students Opting for Remote Learning

- **Can the student realistically be provided the necessary IEP services?**

  Remember that a viable remote learning option is camming into the actual live classroom, with 2-way audio and video capabilities

  *Note*—This option addresses concerns over equality of instructional times, full school day, and is probably preferable from a social standpoint

## Ideas for IEP Teams Dealing with Students Opting for Remote Learning

- **Can the student realistically be provided the necessary IEP services?**

  The amount of virtual sp ed instruction provided must be sufficient to afford appropriate progress (i.e., meet IEP goals), as with the live services

  *Note*—IEP teams must realize that some students may require more sp ed instruction in the virtual setting due to the difference in instructional model

## Ideas for IEP Teams Dealing with Students Opting for Remote Learning

- **Can the student be provided the necessary related services?**

  Most related services can be provided on a teletherapy basis (speech, OT, PT, counseling, etc)

  Amounts and frequency should be the same

  *Note*—Teletherapy may require providers to obtain an additional parental consent to teletherapy…

## Ideas for IEP Teams Dealing with Students Opting for Remote Learning

- **Can the student be provided the necessary related services?**

  For some students, some parent training may be necessary as a related service for the virtual program

  Parents may need training on accessing the technology, logging on, strategies to keep student on task and motivated, maintaining a private quiet learning space at home

## Ideas for IEP Teams Dealing with Students Opting for Remote Learning

- **Can the student be provided the necessary accommodations?**

  The IEP team must review the accommodations normally provided in the classroom and see if they are applicable in the virtual setting

  Some accommodations may need to be redesigned to "fit" or make sense in the virtual setting (e.g., "make notes from peers available" may change to "copy of teacher notes," "reteach difficult concepts" may change to "point to helpful online resources")

## Ideas for IEP Teams Dealing with Students Opting for Remote Learning

- **Can the student be provided the necessary behavioral interventions?**

  Behavioral interventions must be considered if the student exhibits behavior that impedes their learning or that of others. *See* 34 CFR 300.324(a)(2)(i).

  Some students may engage in different behaviors in the virtual setting than in the classroom, and the BIP must so reflect

## Discipline in Virtual Setting

- **Initial Question**—Do the IDEA discipline rules apply equally to at-home misbehavior during online/virtual instruction?

  I.e., is there any waiver of the IDEA discipline rules during COVID?

## Discipline in Virtual Setting

In its 2022 discipline guidance document, OSEP stated that all IDEA discipline protections apply to sp ed students in virtual programs.

"Children receiving FAPE in a virtual setting are entitled to the same discipline procedures afforded to all children with disabilities."

*Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions* (OCR—July 19, 2022), at Question J-5.

## Discipline in Virtual Setting

- **What is a "removal" in the virtual context?**

  Likely, a removal or exclusion from virtual or online services

  Thus, 3 days of exclusion from virtual services should be interpreted as equal to 3 days of at-home suspension

  And, the limit of 10 "safe" removal days per school year would also apply

## Discipline in Virtual Setting

- **What is a "removal" in the virtual context?**

  But, this form of suspension would be available for behavior that creates a serious disruption to the online educational environment

  *Note*—Schools may want to consider additional Code of Conduct provisions applicable in the unique context of the online/distance learning environment.

## Discipline in Virtual Setting

- **What is a "disciplinary change of placement" in the virtual context?**

  Likely, a removal or exclusion from virtual or online services of more than 10 consecutive school days

  Or, a series of short-term removals that are more than 10 days total and create a "pattern" (due to total amount, proximity of removals to one another, size of each removal, and similarity of underlying behaviors).

## Discipline in Virtual Setting

- **What is a "disciplinary change of placement" in the virtual context?**

  Disciplinary changes in placement would require prior MDR IEP meeting and finding of "no-link"

## Discipline in Virtual Setting

- **What if a student starts displaying inappropriate behavior in the virtual context for the first time?**

  Recurring misbehavior would give rise for the need to conduct an FBA and develop a behavior plan for virtual setting

  And, for some students, the continued virtual setting can generate new stresses and behaviors

## Discipline in Virtual Setting

- **How to go about developing behavior interventions for virtual setting?**

  A different format for behavioral intervention…

  Positive reinforcers can be applied virtually

  Referrals to campus administrators can happen virtually

## Discipline in Virtual Setting

- **How to go about developing behavior interventions for virtual setting?**

  Consequences might apply (could be loss of privileges, if possible), private discussion, silencing of microphone, demerits that can lead to grade reductions or loss of privileges, emails to parents)

## Discipline in Virtual Setting

- **Does the Code of Conduct apply equally at home?**

  Perhaps not to same degree—Some behaviors, such as possession of inappropriate items that appear in the background of the screen, should not be viewed as if the student possessed the item at school

  E.g., media case of student whose BB gun was in the background in his room during an online lesson.

## Discipline in Virtual Setting

- **Does the Code of Conduct apply equally at home?**

  If parents have the option of VPs, school boards will want to consider adding "virtual" behaviors to the Code of Conduct

  Misuse of platform, sharing of inappropriate material on platform, leaving the screen during instruction, disrupting instruction electronically, virtual dress expectations, etc…

## Discipline in Virtual Setting

- **What about parental behavior during virtual instruction?**

  School should set forth commonsense ground rules:

  Private area for instruction, avoiding interruptions, assisting with timeliness of login, refraining from having family members viewing, not communicating with teachers during lessons (set up virtual teacher-parent conferences instead), assisting in ensuring proper student behavior and participation during lessons

## Failure to Adjust At-Home Services

- ***District of Columbia Pub. Schs.*, 120 LRP 33834 (SEA DC 2020)**

  Although the IEPT had agreed in April 2020 that behavior support services (BSS) were needed for a student (ADHD, SLD), they were not added to the IEP in the form of a BIP until June, when BSS were also added

  Meanwhile, during the COVID closure, the student had experienced significant problems with distance learning, missing many assignments and exhibiting extreme problems keeping on-task and self-initiating.

## Failure to Adjust At-Home Services

- ***District of Columbia Pub. Schs.*, 120 LRP 33834 (SEA DC 2020)**

  HO found that the delay in incorporating the needed services during the closure amounted to a denial of FAPE, which warranted comp services

  Acknowledging the difficulty in ascertaining the needed comp services based on lack of BSS, HO ordered independent tutoring (150 hrs) and counseling (20 hrs) in the school setting

- ***Norris Sch. Dist.*, 120 LRP 30203 (SEA California 2020)**

  7-year-old with AU and speech-language impairments was provided access to FAPE by means of "material packets" and checks with parents during COVID closure

  After the student refused to participate in the "material packets," school did not attempt any direct instruction thru videoconferencing or other options, as staff assumed student would be averse to such services

- ***Norris Sch. Dist.*, 120 LRP 30203 (SEA California 2020)**

  For about 2 months, no services were provided beyond the packets

  HO found that LEA could have collaborated with the parents to find ways to provide direct instruction, including providing parent training, but LEA did not hold an IEP meeting

  HO ordered comp speech (40 hrs), tutoring (77 hrs), and behavior services (49 hrs) by qualified providers chosen by the parents

## Parent/Student Refusal to Cooperate with At-Home Services

- ***Department of Education, State of Hawaii*, 77 IDELR 300 (SEA Hawaii 2020)**

  Upon COVID closure, school officials sought an appropriate program to meet the needs of a student with multiple disabilities and complex needs

  The parent, however, refused to cooperate, rejected meetings, cancelled scheduled meetings, refused to work with certain service providers, failed to respond to emails, and failed to provide necessary consents

## Parent/Student Refusal to Cooperate with At-Home Services

- ***Department of Education, State of Hawaii*, 77 IDELR 300 (SEA Hawaii 2020)**

  HO noted that the school was unable to get outside agencies involved without the parent's consent

  "Respondent's failure to implement student's IEP-2/5/20 was caused primarily by Parent 1's refusal to attend team meetings and sign consents for Student to enter the programs proposed by the DOE."

## Parent/Student Refusal to Cooperate with At-Home Services

- ***Department of Education, State of Hawaii*, 77 IDELR 300 (SEA Hawaii 2020)**

  Parent asked HO to order the home program she was implementing informally, but he held that she had failed to prove it was appropriate for the student's many needs

  The HO thus declined to provide relief and dismissed the parent's complaint,

- ***District of Columbia Pub. Schs.*, 77 IDELR 82 (SEA DC 2020)**

  LEA offered student with SLDs and speech impairments virtual services to implement his IEP during COVID closure

  After student missed a number of sessions, the school offered makeup speech sessions

  HO noted that student missed sessions although he was provided a laptop

- ***District of Columbia Pub. Schs.*, 77 IDELR 82 (SEA DC 2020)**

  "Petitioner did not present any authority to support the view that a hearing officer should penalize a school district for a student's absence in this context."

  *Note*—The offer of makeup sessions, despite questionable reasons for absences, saved the school from liability on this point.

Workshop 5

# Extreme Behaviors and Placement in the Least Restrictive Environment: Precedent, Process, and Practical Tips

By:

**Elizabeth Polay**

Attorney
Garrett Hemann Robertson P.C.
Salem, Oregon

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT: PRECEDENT, PROCESS, AND PRACTICAL TIPS

**40th Annual Pacific Northwest Institute on Special Education and the Law**
**Delivered: October 10, 2023**

Elizabeth L. Polay
Attorney/Shareholder
Garrett Hemann Robertson P.C.
Salem, OR
(503) 581-1501
epolay@ghrlawyers.com
Website: ghrlawyers.com

## I. Introduction

"Least Restrictive Environment" may be one of the most used, and simultaneously misunderstood, terms of art in the special education vernacular. The COVID-19 pandemic has led to an increase in extreme, aggressive, or dangerous behaviors that continues to perplex parents and districts alike. At what point does a student's behavior necessitate a removal from a student's current placement? How long should new strategies or supports be tried before changing to a more restrictive placement? In this session, we will dive into the meaning of "LRE" and provide practical takeaways from the progression of case law in its application to difficult situations involving extreme student behavior.

## II. Legal Framework: Statutory and Regulatory Definitions

The first source of information we should look to for any legal term is the statute itself. The Individuals with Disabilities Education Act (IDEA) defines "least restrictive environment" (LRE). The Code of Federal Regulations provides a similar definition.

### A. Least Restrictive Environment

#### i. Statutory Definition

20 USC 1412(a)(5): Least restrictive environment

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

**ii. Regulatory Definition**

300 CFR 300.114(a)(2): Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

There is no formula or bright-line rule set out in the IDEA or its implementing regulations that helps us determine LRE.

**B. What about placement?**

Do the statutes or regulations tell us anything more about LRE in their descriptions of placement?

i. 34 CFR 300.116:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that —

(a) The placement decision —

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118.

(b) The child's placement —

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

**C. What do we get from statutory or regulatory language alone in determine placement and LRE?**

i. "To the maximum extent appropriate"

ii. "Educated with children who are not disabled"

iii. Removal only occurs when:

a. nature and severity of disability are such that

b. education in regular classes

c. with the use of supplementary aids and services

d. cannot be achieved satisfactorily.

iv. "Consideration is given to any potential harmful effect on the child"

v. Consideration given "on the quality of services that he or she needs"

vi. Child is not removed from education in age-appropriate regular classrooms "solely because of needed modifications in the general education curriculum"

The difficult with determine placement for any student in special education is that there are so many considerations and factors that are taken into account, it's impossible to have a bright-line rule or set criteria to determine the LRE for each child. The IDEA is meant to be applied to the individual child, which leads to the complexity of the issue. Case law from the United State Supreme Court to state administrative decisions shows us how these abstract concepts work in practice and provides us with rules of thumb we can use in making actual placement decisions.

## III. Case Law Refinements and Clarifications

Two seminal cases set the backdrop for questions surrounding least restrictive environment and placement.

### A. Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386 (2017).

We all know the *Endrew F.* case by heart now, but it's always good to remember that this is the standard we look to for any provision of special education and related services, including placement and LRE. To understand placement and LRE, we first need to understand what the standard is for provision of a free appropriate public education (FAPE).

Some specific reminders about the case as it applies to placement and LRE:

i. The backdrop for *Endrew F.* was *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Remember the standard from *Rowley*:

   a. FAPE means IEP "reasonably calculated to enable the child to receive educational benefits."

   b. For children fully integrated in the regular classroom, this would typically require an IEP "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

   c. That was the language we used to define a FAPE for 35 years from 1982 to 2017…

ii. Facts: Endrew F., a child with autism, received annual IEPs from preschool through 4th grade. Endrew had significant behaviors that impacted his progress in the general education classroom. But the district presented an IEP for 5th grade that was largely the same as the previous IEPs. Parents put Endrew in a private school that developed a robust BIP. Endrew made significantly more progress at the private school than he had in the public school. The 10th Circuit Court of appeals said "some educational benefit" meant just something more than de minimis progress.

iii. The clarification of the standard in *Endrew F.*:

   a. *Rowley* was limited to the facts of that case – a general education student making progress from grade to grade.

   b. *Endrew F.* clarified that the standard articulated in *Rowley* could be generalized to all students who qualify for services under the IDEA.

   c. **The standard: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.**

   d. This standard also applies to placement determinations and LRE.

**B. <u>Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by & Through Holland</u>, 14 F.3d 1398 (9th Cir. 1994).**

i. Facts: Rachel had an intellectual disability – IQ of 44. Parents requested Rachel be placed in full-time general education placement. The district believed Rachel could not benefit from the general education placement. Proposed half-time general education and half-time special education. The court held the appropriate placement was full-time general education with supplemental services.

ii. This case created a new test for determining the appropriateness of special education placements for districts within the Ninth Circuit's jurisdiction.[1]

iii. **In addressing the issue of the appropriate placement for a child with disabilities under the requirements of 20 U.S.C.S. § 1412(5)(b), a four-factor balancing test is applied, in which the court considers:**

a. **the educational benefits of placement full-time in a regular class;**

b. **the non-academic benefits of such placement;**

c. **the effect the student has on the teacher and children in the regular class; and**

d. **the costs of mainstreaming the student.**

iv. **NOTE:** No single factor outweighs the others on its own!

For purposes of this session, we're going to spend a lot of time focused on that 3rd factor: the effect the student has on the teacher and children in the regular class. Many times, this boils down to a student's behavior: Are they causing significant disruptions in class? How frequently is the classroom being cleared? Have staff or students been injured?

**C.** Some regulatory language tells us more about considerations we need to make in evaluating the LRE for a student whose behavior may be having a significant impact on FAPE and on the learning environment for others.

i. 34 CFR 300.324(a)(2)(i): In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

ii. 34 CFR 300.320(a)(4): A statement of the special education and related services and supplementary aids and services to be provided to the child:

a. To advance appropriately toward attaining the annual goals;

b. To be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities; and

c. To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

**IV.** OSERS Guidance: On July 19, 2022, the Office of Special Education and Rehabilitative Services issued guidance regarding how to address significant behavior needs for

[1] Some jurisdictions have promulgated similar tests (e.g., *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989)). The factors for those other tests are not significantly different from the 9th Circuit *Rachel H.* test, but the *Rachel H.* test is controlling in the Ninth Circuit.

students. This guidance was entitled "Positive, Proactive Approaches to Supporting Students with Disabilities." It can be found on the Department of Education's website here: https://www.ed.gov/news/press-releases/new-guidance-helps-schools-support-students-disabilities-and-avoid-discriminatory-use-discipline.

Some key takeaways from the guidance are:

**A.** Use an evidence-based approach to support and respond to student needs;

**B.** An emphasis on universal academic and behavioral supports – Universal design and PBIS;

**C.** Use of targeted supports like smaller groups for targeted instruction in skill areas and restorative practices; and

**D.** Use of individualized and intensive supports like FBAs and BIPs.

If you have not read through the guidance and the accompanying Q&As that were issued the same day regarding behavior and discipline for students with disabilities, I recommend spending some time with the department's recommendations. The documents clue us in to what OCR would do with complaints that may be filed with their office.

**V.** I have found that one of the best ways to understand making good placement decisions and determine an appropriate LRE for students is to dig into the case law and see what courts and other decision-makers are doing with the facts before them. To that end, I've pulled 12 recent cases with some interesting results that may surprise you.

**A. Case Study 1: J.B. v. Tuolumne Cty. Superintendent of Schools, 78 IDELR 188, 121 LRP 12282 (E.D. Cal. 2021)**.

**i. Facts**: This case centered around a 4th grade student with a history of dangerous behavior from an early age, including violent outbursts, self-harming behaviors, and delusions. For some time, the parents and the district appeared to be in agreement regarding placement and services, including an initial placement in a nonresidential "Nexus" program within the home school district. However, the student's behavior deteriorated in 2017 and 2018, leading to a disagreement between the parties about placement and other issues. Some of the behaviors the student demonstrated were making threatening and negative comments to peers, showing aggression to adults and peers, including hitting, kicking, and pushing throughout 2017. The school team tried to address these behaviors with additional supports, including a BIP.

After October 2017, the student's behavior took a "considerable turn for the worse." Between October 18, 2017, and January 29, 2018, the student engaged in three behavior incidents, including eloping from campus, striking a teacher with a fire extinguisher, and striking staff with rocks. Other incidents that occurred after January 2018 included punching other students, yelling

obscenities at a teacher, and bringing a pocketknife to school. The teachers and support staff tried to navigate the changing behaviors in various ways.

By May 2018, the student's behaviors had escalated to the point that the IEP team imposed daily searches of the student's pockets and socks to prevent him from hiding contraband that could be used as a weapon. By October 2018, both the district and the parents agreed the student required some form of residential placement.

**ii. Question**: The court held there was a clear "tipping point" at which a more restrictive placement should have been considered by the IEP team. What do you think that tipping point was?

a. **Answer**: The court held that the "tipping point" was when the district imposed daily searches of the student's socks and pockets. The court stated: "Critically, nothing in the record suggests that the [district] should have known in early 2018 that these efforts would likely be futile. The court particularly notes that the record indicates that all involved were generally inclined to try to keep J.B." in the district. Large number of remedies were awarded, including compensatory services, reimbursement for a private, residential placement, and a PhD-level behaviorist to conduct a new FBA and develop new BIP and a number of other assessments.

b. **Takeaways**: One big piece that was lacking in this instance was assessment data. Many interventions were tried, but there seems to be a concern over assessments that were needed and data that could have been used to support the student's needs. A "tipping point" might be once the IEP team considers a support or service that is beyond the control or ability of the student's current placement to manage. There was also a lack of bodily autonomy for the student at the point that his pockets and socks were being searched on a daily basis.

**B. Case Study 2: <u>In re Student with a Disability</u>, 120 LRP 13163 (MT SEA, March 10, 2020)**.

i. **Facts**: The student in this case attended the district's schools from kindergarten through eighth grade. While in the district's schools, the student had a history of saying or thinking "shocking things" due to mental health issues, but never acted on his thoughts. The student had a 504 plan that included weekly contact with a counselor at school as needed to discuss his thoughts and to excuse himself from class when feeling angry. During the 2018-19 school year, the student followed his 504 plan and only talked to the school counselor regarding his thoughts. During the summer between the 2018-19 and 2019-20 school years, the student experienced an incident that exacerbated his depressive symptoms, including the tendency to make statements about harming himself, other people, animals, etc.

During the 2019-20 school year, the student's class had the option of attending a neighboring school district's high school for ninth grade or remaining at a school in the district. The student chose to attend the neighboring school district's high school because it provided face-to-face accelerated classes. His home district only offered accelerated classes through online courses. The student had the same 504 plan in place in the neighboring school district's high school.

On September 12, 2019, the student spoke with the school counselor in his new school. He informed the counselor about certain thoughts he was having, including thoughts of harming animals. He told the counselor he had killed or tortured several animals in the past and that he was "destined to move on and kill people and couldn't change the future." After the student spoke to the school counselor, the SRO took the student to a psychiatric facility where the parents picked him up.

The neighboring district instituted an emergency suspension on September 12, 2019, effective through September 26, 2019, or until a due process hearing took place. The student's out-of-district attendance was revoked due to the conversation with the school counselor. After receiving the phone call from the neighboring school district about the transfer revocation, the home school district superintendent reviewed the student's psychological report in his education file, which increased his concerns about student's attendance at school. When the student returned to his home district, he was not allowed to attend the district school because of the concerns regarding the student's mental health and the safety of other students. The student was placed in an online program.

ii. **Question:** Was the district's online placement appropriate for this student?

   a. **Answer:** The district inappropriate predetermined the student's placement in the online program upon return to the resident district. The district failed to ensure that the least restrictive environment was considered by the IEP team when discussing the student's placement. The district started the IEP formation process with the assumption that the student would be attending an online option rather than starting with an evaluation of what supports the student needed to be successful and then choosing the least restrictive environment where those supports could be provided.

   b. **Takeaways:** Even external behaviors combined with concerning verbalizations are not enough to remove a student from the general education environment. The IEP team must first consider what supports or interventions could help that student make progress – like an FBA/BIP. Ultimately, the district evaluated the student and found him eligible for special education. The student's private mental health counselor also provided information to the district that although the student had disturbing thoughts, he had not acted out on his thoughts.

This lack of action was considered a predictor of his future behavior, which could not be used as a justification for a placement change.

**C. Case Study 3: J.C.T. v. Chappaqua Central Sch. Dist., 75 IDELR 252, 119 LRP 47180 (S.D. NY, 2019).**

i. **Facts:** A student with bipolar disorder had poor attendance and sometimes became overwhelmed by frustration and anxiety such that he would withdraw from classroom activities. The student used aggressive and sexually explicit language about peers and teachers. He made inappropriate hand gestures, including pretending to shoot a teacher with a pencil. He had altercations with other students on the bus. The parents were concerned about the student's behaviors outside of school as well. Eventually, a private psychologist recommended residential placement. The district conducted an FBA/BIP but the supports it entailed did not fully extinguish negative behaviors. The district's offer of FAPE was a general education program with supports like a full-time 1:1 teaching assistant, a 12:1 skills class, and other program modifications and accommodations.

ii. **Question:** Is the district's offer of placement the LRE for this student?

a. **Answer:** The general education placement with supports was the student's least restrictive environment where the district could provide FAPE. The judge "empathiz[ed] with the parents over the student's out-of-school behavior" but found that the teachers were able to manage the student's interfering behavior at school while still providing the student's instructional and support services.

b. **Takeaways:** Remember that the LRE is the placement in which the student can make progress appropriate in light of their circumstances. Progress does not mean all negative behaviors are extinguished. Strictly out-of-school behaviors are not likely to have bearing on placement decisions.

**D. Case Study 4: Coronado Unified Sch. Dist., 119 LRP 45947 (CA SEA, November 13, 2019).**

i. **Facts:** A 15-year-old student with emotional disturbance eligibility had been placed in a residential placement for behaviors like suicidal ideation, head banging behaviors, and running away. Some of the student's inappropriate behaviors included climbing on and jumping over objects in the common area, using profanity, not following computer rules, making inappropriate sexual remarks, knocking over a chair, throwing objects, punching and kicking padded walls, and one incident of pushing staff. The school staff had been able to successfully resolve all of student's behavior problems with verbal dialogue. Although the student was impulsive, he responded well to redirection. He could be aggressive at times, but when he calmed down, he took responsibility for his actions and appropriately expressed his feelings.

The district sought to bring the student home, but the parent disagreed with the step-down plan from the residential placement.

ii. **Question:** What is the LRE for this student?

a. **Answer:** The agency said the district provided "uncontroverted evidence" that the student's behavioral problems did not require residential placement. The student's behavior was "limited to defiance, difficulty with boundaries, impulsivity, and some difficulty managing his mood."

b. **Takeaways:** Behaviors such as defiance, impulsivity, minor physical outbursts, and mood management difficulties are not necessarily enough to justify more restrictive placement. The agency was persuaded by the ability of the staff to verbally redirect the student when escalated and the student's actions upon being calm.

c. *Special note*: A family's living situation does not dictate placement needs in school setting either. The parent was deployed on military duty and was concerned about the transition home happening while the parent was deployed. The agency said this was not a factor in determining the student's placement.

**E. Case Study 5: Nashua Sch. Dist., 80 IDELR 146, 122 LRP 3266 (NH SEA, 2021).**

i. **Facts:** A student with multiple disabilities evidence interfering behaviors like refusal to do schoolwork, aggressive behaviors, hitting peers, and emotional dysregulation. When districts moved to remote learning in the spring of 2020 because of the COVID-19 pandemic, the student's behaviors became worse. Upon return to in-person learning over the summer, the student's aggression stayed elevated. There was a loss of adaptive skills in the home setting during remote learning. The student had limited time remaining in public school due to age (the opinion is heavily redacted and does not tell us the student's age, but reading between the lines, this is probably an 18–21-year-old transition student). The family advocated for residential placement. The district advocated for a therapeutic day program.

ii. **Question:** What is the LRE in light of increasing aggressive behavior and the student's age?

a. **Answer:** The agency held: "While the District's proposed placement in a day program might confer educational benefit, there is insufficient evidence on this record to conclude that it would enable this Student to achieve meaningful educational progress in light of all the circumstances." Loss of student's adaptive skills during remote learning was key in light of student's age and time left in public school.

b. **Takeaways:** Remember those other factors of the *Rachel H.* test – the nonacademic benefits to student here included her age and that "time was of the essence" because of the time she had left in public school settings. "Some" educational progress is not enough to be appropriate or provide a student with LRE – progress must be "meaningful … in light of all the circumstances."

**F. Case Study 6: A.B. v. Clear Creek Ind. Sch. Dist., 787 Fed. Appx. 217 (5th Cir. 2019) (unpublished).**

i. **Facts**: The student in this case was an elementary-age student with diagnoses of autism, ADHD, and speech impairment. The student attended the district's "Learning to Learn" program for first grade. The Learning to Learn program was a self-contained program focusing on teaching communication and social skills. The student did so well in first grade that he was moved to the Social Communication program in second grade, which focused on higher-functioning students who are more able to benefit from an academic curriculum.

Second grade was also a success for the student. For third grade, he was moved to primarily attend general education classes with an aide. Although he was presenting and following a modified curriculum, the student's behavior took a turn for the worse at the beginning of third grade. He began to engage in behaviors that ranged from going to the bathroom frequently and playing with the window blinds to flopping on the floor and screaming. On occasions when he was disruptive, he was temporarily removed from the general education classroom.

The district proposed placing the student back in the Learning to Learn program. The student's parents filed for due process and got "stay put" in the general education program. During that time, the district put plans in place that successfully addressed the negative behaviors, and the student was able to make academic progress. But the district still wanted to change the placement because they attributed all the success to the support of the 1:1 aide.

ii. **Question:** Is general education with a 1:1 aide the LRE for this student? Or is the self-contained program without 1:1 aide the LRE?

a. **Answer:** The court said: The legal standard for placement is not whether a student benefits *from* a less restrictive environment but whether the student can receive benefit *in* a less restrictive environment. The use of 1:1 supports did not create a "classroom within a classroom" or "change curriculum beyond recognition." The student's social skills improved in the gen-ed setting because the student had the opportunity to "model the conduct of his general-education classmates."

b. **Takeaways:** Adding a 1:1 aide as a support does not change the level of restrictiveness of a student's placement under the law. The value of

gen-ed peers from which to model behavior can bring non-academic value to a student with disabilities, even if most of the student's academic progress comes from 1:1 teaching.

**G. Case Study 7: East Stroudsburg Area Sch. Dist., 119 LRP 36802 (PA SEA, 2019).**

i. **Facts:** A kindergarten student with autism was placed in the general education classroom. The student displayed many behavioral problems, including elopement, kicking, biting, hitting, crawling under desks, running around the classroom, rolling on the floor, touching peers, falling out of their chair, "head-butting" staff, and crawling on furniture. The student required adult support while using the bathroom and eating. The district proposed a self-contained placement in an autistic support class. The parents disagreed and proposed full-tine general education. The parents suggested the district solve the elopement issue by using a seatbelt in the classroom chair to keep the student seated throughout the day. The district calculated the student's behaviors disrupted the classroom, on average, every 4.5 minutes. Despite attempts to manage the behavior with SDI, supplemental aids, and other services, the behaviors did not improve.

ii. **Question:** What is the LRE for this student? Self-contained autism classroom or general education with supports?

a. **Answer:** The agency said: the student needed to be in a self-contained classroom. The student's presence in the general education classroom "impeded the student's learning and the learning of others in the classroom."

b. **Takeaways:** Data is KEY!! The district had clear data that showed disruptions, on average, every 4.5 minutes. The 3rd factor of the *Rachel H.* test can definitely tip the scales on balance, but you need data to back up that decision. The district had also documented the interventions and strategies it had tried in the general education classroom, without improvements. If you have not tried any strategies to mitigate the behavior or you can't show the strategies you have tried with data to back up a lack of improvement, you may have a harder time changing a student's placement to something more restrictive.

**H. Case Study 8: A.H. v. Smith, 367 F. Supp. 3d 387 (S.D. Md. 2019).**

i. **Facts**: A student with autism and a common variable immune deficiency was homeschooled or in private school most of his academic career. The parents contacted the public school when they moved into the district at issue in this case. The parents requested the district place the student at his current private school, or, alternatively, a fully self-contained program in the district. The parents also requested a full-time RN for the student.

The district proposed inclusion in general education for lunch and recess, but the parents objected. The student's behaviors included eloping during recess/lunch, feet stamping, screaming at teacher, reaching over a table for a preferred item, hitting his head against hard objects, and "tantrums. The student could participate in group activities without disruption when "given prompting, cueing, and praise from an aide. The private school had a BIP that was working well, and district agreed to implement it. Parents filed a due process complaint and did not send the student to public school. They sought tuition reimbursement for the private placement.

ii. **Question:** What is the LRE for this student? Private school or self-contained classroom? Or general education inclusion program?

a. **Answer:** The court said the parents' concerns about safety during general education lunch and recess were "speculative" and not a basis to conclude district failed to provide FAPE with its placement offer. District had trained staff and teachers "experienced in working with students who elope, tantrum, have self-injurious behaviors, are unpredictable, and have compulsions and rituals." Trained staff was likely to prevent eloping behavior at lunch/recess, especially given offer of supports including private school BIP. The district's offer of FAPE was appropriate.

b. **Takeaways:** Speculation about safety issues is not enough for a more restrictive placement. There must be real data to back up a placement in a more restrictive setting. Offering robust supports, including a thorough BIP, will often provide FAPE in a less restrictive setting.

**I. Case Study 9: J.S. v. Keystone Oaks Sch. Dist., 76 IDELR 125, 120 LRP 11448 (W.D. Pa. 2020).**

i. **Facts:** A student had an obsession with a female classmate to the point of harassment of the female classmate. The student threatened to set fire to anyone who might date the female classmate. He exposed his genitals to other male students and destroyed classwork of fellow students. Upon psychiatric evaluation, he was given a provisional diagnosis of unspecified schizophrenia spectrum and other psychotic disorders.

Parent and district agreed to look into private partial hospitalization programs. Parent visited district's proposed placement but did not immediately agree. Shortly after tour, student embraced the female student against her will and would not let her go. The following day, student – with participation of the parent – was admitted to the partial hospitalization program. After approximately one year, the district created an IEP for a 3-month transition back to the district's school. Parent alleged district did not make "any reasonable efforts" to accommodate the student in the regular classroom before placing him in the partial hospitalization program.

ii. **Question:** Should the district have taken more steps or implemented further interventions prior to placing the student in the partial hospitalization program?

a. **Answer:** The court said the partial hospitalization program was appropriate at the time it was made. "Critical mental health concerns … which escalated so quickly … [the student's] mental health needs were greater than what the District mental health therapist could support."

b. **Takeaways:** This situation escalated very quickly, and district professionals had to act with a constantly evolving set of facts. Key to the analysis was the notes of professionals who evaluated and/or interviewed the student, documenting the severity of these concerns and safety issues. Safety threats were not generalized but targeted to one female student in particular.

c. *Note:* Compare with Case Study 2. A big difference here was action on the negative talk and threats. Lack of action versus action in historical incidents can tip the scales one way or another.

**J. Case Study 10: Banwart v. Cedar Falls Comm. Sch. Dist., 489 F. Supp. 3d 846 (N.D. Ia. 2020).**

i. **Facts:** A 14-year-old student with multiple disabilities, including reactive attachment disorder and autism, engaged in disruptive behaviors including threats of violence to himself and others, mood swings, defiance, verbal aggression towards others, physically blocking staff from leaving rooms, knocking over/kicking chairs, and dumping trash can on the head of a teacher. In one particular instance, student blockaded himself in a room and would not come out for an extended period of time, despite many attempted interventions, necessitating a call to law enforcement.

Student's parents went on vacation for a week and student stayed with relatives. The student did not attend school during that week. When parents returned, behavior quickly escalated further, including an incident in which student stole the family car and drove 20 miles from home. Parents unilaterally placed student in out-of-state residential in large part because of "student's behavior at home." The school felt residential was too restrictive because IEP and BIP were working prior to parents' vacation. The school felt vacation was a temporary setback and student's behavior would resolve in time.

ii. **Question:** Did the student need residential placement at the time parents pulled the student to be provided a FAPE in the LRE?

a. **Answer:** Court says no – the evidence showed the IEP was allowing student to make progress at school and agreed parents' vacation was a temporary setback. No reason to believe that once the student/parents

worked past the temporary disruption that the IEP would not work as it had before the parents' vacation.

b. **Takeaways:** Remember – FAPE and LRE do not provide the "best" placement. *Rowley* and *Endrew F.* have made it clear that FAPE is provided when the student's programming is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Meaningful progress does not mean maximizing potential. Document efforts and progress on student's needs and goals! Documentation of progress can provide support to a parent's challenge that a district-offered placement is inappropriate.

**K. Case Study 11: <u>Middleborough Public Schools</u>, 123 LRP 17757 (MA SEA, June 2, 2023).**

i. **Facts:** Student was nearly 18 years old at time of a due process hearing. Student experienced global communication disorder secondary to ASD – difficulties with expression, processing, and complexity of language and had an FSIQ of 30. Student attended a self-contained program in the district, which was a separate program with six students and three staff. Student used communication devices and had a designated de-escalation space. School staff incorporated more sensory strategies and opportunities for breaks.

When student returned to school in fall of 2022, was more dysregulated than previous year, demonstrating aggressive behaviors that required 2-3 staff to get him into the building safely. Behaviors included scratching, pinching, grabbing, throwing objects at staff, punching staff with a closed fist in the chest, groin, and face. Between September 26, 2022, and April 12, 2023, there were 68 incidents of staff injury reported.

Staff lowered academic demands and modified behavior plan, but the student was not able to attend to academic tasks, even with support in 1:1 setting. He could not demonstrate skills from previous year. The student was also served by an RBT who consulted with his program approximately 2-2.5 hours per week, who agreed his behaviors had significant impact on his day. District conducted an evaluation and recommended the student attend an out-of-district placement to support communication and behavior needs in a 1:1 setting.

ii. **Question:** Does the district have enough support to move the student to a restrictive out-of-district 1:1 placement?

a. **Answer:** The ALJ says yes. Witnesses credibly described a significant increase in dysregulation during the 2022-023 school year. The ALJ relied on negative educational consequences due to the student's behaviors, including missing academic instruction *and* being separate from peers. The level of staff injury was also significant.

b. **Takeaways:** Staff had clear documentation of: (1) negative effects to the student; (2) negative effects to the staff; and (3) numerous strategies that had been tried before proposing a placement change. This clear data supported the need for a change in placement.

**L. Case Study 12: <u>Columbus City Schools</u>, 123 LRP 3419 (OH SEA 2022)**.

i. **Facts**: A student with autism had their placement changed in June 2022 to "Emotional Disturbance resource room" from "high incidence resource room" to begin at the start of the 2022-23 school year. There were ongoing concerns from parents and teachers regarding hyperactivity, depression, repetitive behaviors, argumentative behaviors, receptive communication, written communication, interpersonal relationships, play and leisure, coping skills, and internalizing/externalizing behaviors. Student threatened to harm himself and others. He would visit "many times throughout each week" with "student services staff" when this occurred. The student received mental health counseling outside of school and took medication for his mental health diagnoses.

Only two goals on IEP: (1) Use of self-calming and self-regulation technique and (2) Focus and remaining on task for 20 minutes or longer without teacher prompts. The IEP stated that "when in larger classes without support, the student becomes anxious and can escalate easily." The IEP was amended November 18, 2022, and placement changed to home instruction.

Notes from school counselor beginning August 2022 concerned student's escalating mental health concerns. The school had called parents, used de-escalation techniques, and referred to a behavior specialist. The school made a safety plan and contacted outside resources for help. Student began eloping from the classroom and refusing to go to class, missing instructional time.

There is heavily redacted information in the opinion, but it is clear the student's mental health concerns were escalating and he had discussed either threat of harm to himself or others.

ii. **Question:** Parents requested a private placement. The district put the student on home instruction. Which is the LRE?

a. **Answer:** The answer appears to be "neither." Although the state agency acknowledges the staff "worked diligently with the parent, the student, staff from the crisis line and other resources to support the student," the agency was concerned that the discussion was only "about changing the student's placement to more restrictive environments." The agency looked at past reports and determined that suggested interventions had not been tried appropriately in small group or co-taught environments and were not addressed in the IEP.

b. **Takeaways:** There were clear behavior detail reports for significant behavior incidents and clear documentation regarding what was tried.

The issue was that there was no documentation of what was recommended but NOT tried!! Even with a smaller number of significant behavior incidents, document why certain interventions are not tried or do not work if you feel a more restrictive placement is necessary and consider alternatives to home instruction like therapeutic outside placements.

c. *Special note*: The COVID-19 pandemic interrupted the evaluation process for this student. An evaluation was never completed that was initiated right before schools closed in March 2020. This was an important fact. Make sure you document what you do with your evaluations and data!

VI. **Practical Tips**: What do we do with all this information? Based on the language of the statutes and regulations and case law, I have some suggested practical tips that can help you navigate difficult placement and LRE decisions, as well as conversations with parents:

**A. Meet**: Convene an IEP team meeting to discuss behavioral concerns.

**B. Data**: Review existing data. If you don't have any, then get some!

**C. Evaluate**: Consider any additional evaluations to be conducted that will provide you the data you need to determine the LRE for a student.

**D. Develop**: Develop/review/revise an FBA and/or BIP.

**E. Consider**: Consider any additional supports that need to be added to the student's plan. Document the supports you try (or don't try).

**F. Timeframe**: Set a timeframe for additional review. Determine as a team when you will come back together to examine whether the supports you are trying are helping the student make meaningful educational progress or not.

**G. Remove**: Remove the word "NO" from your vocabulary. So many disagreements happen with parents simply because district personnel too frequently say "no" without properly considering a parent's request. Similar phrases might be "we don't do that here" or "we've never done that before, and I don't think we can." Instead, ask additional questions about the underlying reasons for the parent's request. See if there is another way you can meet the need if you disagree with the parent's request. Show that you are thoughtfully considering what they think their child needs and provide a reasonable and appropriate solution if you disagree.

# Placement in the Least Restrictive Environment

Precedent, Process, and Practical Tips

Elizabeth L. Polay

ghr
GARRETT HEMANN ROBERTSON P.C.

Pacific Northwest Institute On Special Education and the Law
October 10, 2023

1

## Where we are going…

- Legal Framework: Statutory and Regulatory Definitions
- Case Law Refinements and Clarifications
- Case Studies
- Practical Tips

2

## What does "Least Restrictive Environment" mean?

- Statutory Definition under the IDEA:
  - 20 USC 1412(a)(5): Least restrictive environment
  - (A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
- Federal Regulations parrot this language: 34 CFR 300.114(a)(2)

3

## What about "placement"?

- Federal regulations (34 CFR 300.116) state:
- In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that —
  - (a) The placement decision—
    - (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
    - (2) Is made in conformity with the LRE provisions of this subpart, including §§300.114 through 300.118;
  - (b) The child's placement—
    - (1) Is determined at least annually;
    - (2) Is based on the child's IEP; and
    - (3) Is as close as possible to the child's home;
  - (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
  - (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
  - (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

4

## What can we get from the statutory language alone?

- "To the maximum extent appropriate"
- "Educated with children who are not disabled"
- Removal only occurs when:
  - nature and severity of disability are such that
  - education in regular classes
  - with the use of supplementary aids and services
  - cannot be achieved satisfactorily
- "Consideration is given to any potential harmful effect on the child"
- Consideration given "on the quality of services that he or she needs"
- Child is not removed from education in age-appropriate regular classrooms "solely because of needed modifications in the general education curriculum"

5

## Case Law Refinements and Clarifications

| *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1* | *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by & Through Holland* |
|---|---|
| • United States Supreme Court<br>• March 2017 | • Ninth Circuit Court of Appeals<br>• January 1994 |

6

## *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*

- Why are we talking about a 2017 case before a 1994 case?
  - To understand placement and LRE, we first need to understand FAPE
  - *Endrew F.* was the first case to address the FAPE standard since *Rowley* in 1982
  - The Supreme Court has made it clear that *Endrew F.* was not a new FAPE standard but only a clarification of the standard set out in *Rowley*
- *Rowley* standard:
  - FAPE means IEP "reasonably calculated to enable the child to receive educational benefits"
  - For children fully integrated in the regular classroom, this would typically require an IEP "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."
  - That was the language we used to define a FAPE for 35 years from 1982 to 2017…

7

## *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*

Facts:

- Endrew F., a child with autism, received annual IEPs from preschool through 4th grade
- Endrew had significant behaviors that impacted his progress in the general education classroom
- But the district presented an IEP for 5th grade that was largely the same as the previous IEPs
- Parents put Endrew in a private school that developed a robust BIP
- Endrew made significantly more progress at the private school than he had in the public school
- The 10th Circuit Court of appeals said "*some* educational benefit" meant just something more than de minimis progress

8

*Rowley* was limited to the facts of that case - a general education student making progress from grade to grade

*Endrew F.* clarified that the standard articulated in *Rowley* could be generalized to all students who qualify for services under the IDEA

**The standard: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.**

## *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*

9

## *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by & Through Holland* (The *Rachel H.* or *Holland* case)

Facts:

- Rachel had an intellectual disability – IQ of 44
- Parents requested Rachel be placed in full-time general education placement
- The district believed Rachel could not benefit from the general education placement
  - Proposed half-time general education and half-time special education
- The court held the appropriate placement was full-time general education with supplemental services

**Created a new test for determining the appropriateness of special education placements for districts within the Ninth Circuit's jurisdiction**

10

## The Ninth Circuit *Rachel H.* 4-Part Test

1. The educational benefits of placement full-time in a regular class
2. The non-academic benefits of such placement
3. The effect the student has on the teacher and children in the regular class
4. The costs of mainstreaming the student

11

## Important Note!!

No single factor outweighs the other three factors on its own!

12

## What do we do with that 3rd factor?

- "The effect the student has on the teacher and children in the regular education class"
- 34 CFR 300.324(a)(2)(i): In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior
- 34 CFR 300.320(a)(4): A statement of the special education and related services and supplementary aids and services to be provided to the child:
  - To advance appropriately toward attaining the annual goals;
  - To be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities; and
  - To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section

13

## July 19, 2022 OSERS Guidance


14

## What do we do with all this?

15

## Case Study 1:
*J.B. v. Tuolumne Cty. Superintendent of Schools*
78 IDELR 188, 121 LRP 12282 (E.D. Ca. 2021)

- Jurisdiction: Eastern District of California (March 2021)
- Facts:
  - 4th grade student with history of dangerous behavior from an early age, including violent outbursts, self-harming behaviors, and delusions
  - District placed student in an in-district program called "The Nexus Program"
  - Between 10/18/17 and 1/29/18 – three behavior incidents
    - Eloping from campus
    - Striking teacher with a fire extinguisher
    - Striking staff with rocks
  - After January 2018 – additional incidents included: punching students, yelling obscenities at teachers, bringing pocketknife to school
  - IEP Team tried various interventions over the 2017-18 school year
  - May 2018 – IEP Team met to impose daily searches of his pockets and socks to prevent student form hiding contraband
- **Question: The court held there was a clear "tipping point" at which a more restrictive placement should have been considered by the IEP Team. What do you think that tipping point was?**

16

## Case Study 1: Answer

- **Question: The court held there was a clear "tipping point" at which a more restrictive placement should have been considered by the IEP Team. What do you think that tipping point was?**
  - The court held that the "tipping point" was when the district imposed daily searches of the student's socks and pockets
  - The court stated: "Critically, nothing in the record suggests that the [district] should have known in early 2018 that these efforts would likely be futile. The court particularly notes that the record indicates that all involved were generally inclined to try to keep J.B." in the district.
  - Large number of remedies awarded, including compensatory services, reimbursement for a private, residential placement, and a **PhD-level behaviorist to conduct a new FBA and develop new BIP and a number of other assessments**
- **Takeaways:**
  - One big piece that was lacking in this instance was assessment data
  - A "tipping point" might be once the IEP team considers a support or service that is beyond the control or ability of the student's current placement to manage

17

## Case Study 2: In re Student with a Disability
120 LRP 13163 (MT SEA, March 10, 2020)

- Jurisdiction: Montana State Educational Agency (March 2020)
- Facts:
  - Student had a history of thoughts about torturing animals and killing people
  - Student confided these thoughts in a school counselor but did not act on them
  - Student engaged in other negative behaviors, including fighting, hitting, tripping others, breaking a school calculator, and being rude to teachers and staff
  - Like other students in the district, student was given an option to attend neighboring district's high school for face-to-face accelerated classes – student chose neighboring district option
  - At new district, student again disclosed his thoughts of torturing animals and eventually killing people
  - New counselor reported to SRO and student was taken to psychiatric facility
  - Student's enrollment at neighboring district was rescinded
  - Upon return to home district, placed in online courses out of concern for other students' safety
  - Parents requested student be allowed to attend in person and district refused
- **Question: Is district's online placement appropriate in this situation?**

18

## Case Study 2: Answer

- **Question: Is district's online placement appropriate in this situation?**
  - The district inappropriately predetermined the student's placement in the online program.
  - The district failed to ensure that the least restrictive environment was considered by the IEP team when discussing the student's placement.
  - The district started the IEP formation process with the assumption that the student would be attending an online option rather than starting with an evaluation of what supports the student needed to be successful and then choosing the least restrictive environment where those supports could be provided.
- **Takeaways:**
  - Even external behaviors combined with concerning verbalizations are not enough to remove a student from the general education environment
  - Must first consider what supports or interventions could help that student make progress – like an FBA/BIP

19

Case Study 3:
*J.C.T. v. Chappaqua Central Sch. Dist.*,
75 IDELR 252, 119 LRP 47180 (S.D. NY, 2019)

- Jurisdiction: Southern District of New York (December 2019)
- Facts:
  - Student with ADHD and Bipolar Disorder
  - Poor attendance
  - Used aggressive and sexually explicit language about peers and teachers
  - Made inappropriate hand gestures, including pretending to shoot a teacher with a pencil
  - Had altercations with other students on the bus
  - Parents were concerned about behaviors outside of school as well
  - Private psychologist recommended residential placement
  - District conducted FBA/BIP that did not fully extinguish negative behaviors
  - District said that the least restrictive environment for the student was a general education placement with supports like a full time 1:1 teaching assistant, a 12:1 skills class, and other program modifications and accommodations
- **Question: Is the district's offer of placement the LRE for this student?**

20

## Case Study 3: Answer

- **Question: Is the district's offer of placement the LRE for this student?**
  - The general education placement with supports was the student's least restrictive environment where the district could provide FAPE.
  - The judge "empathiz[ed] with the parents over the student's out-of-school behavior" but found that the teachers were able to manage the student's interfering behavior at school while still providing the student's instructional and support services.
- **Takeaways:**
  - LRE = placement in which the student can make progress appropriate in light of their circumstances
  - Progress does not mean all negative behaviors are extinguished
  - Strictly out-of-school behaviors are not likely to have bearing on placement decisions

21

Case Study 4:
*Coronado Unified Sch. Dist.*,
119 LRP 45947 (CA SEA, November 13, 2019)

- Jurisdiction: California State Educational Agency (November 2019)
- Facts:
  - District had placed student in residential placement for behaviors like suicidal ideation, head banging behaviors, and running away
  - Student's behavior had improved but still included: leaving designated areas without permission, climbing on objects, using profanity, making inappropriate sexual remarks, throwing objects, punching or kicking padded walls, and responding aggressively when upset
  - Residential placement teachers reported that these disruptive behaviors could be resolved through verbal dialogue with the students and that when the student calmed down, he took responsibility for his actions and appropriately expressed his feelings
  - District sought to bring the student home
  - Parent disagreed with step-down from residential
- **Question: What is the LRE for this student?**

22

## Case Study 4: Answer

- **Question: What is the LRE for this student?**
  - The agency said: The district provided "uncontroverted evidence" that the student's behavioral problems did not require residential placement
  - The student's behavior was "limited to defiance, difficulty with boundaries, impulsivity, and some difficulty managing his mood"
- **Takeaways:**
  - Behaviors such as defiance, impulsivity, minor physical outbursts, and mood management difficulties are not necessarily enough to justify more restrictive placement
  - Special note: family's living situation does not dictate placement needs in school setting either
    - Parent was deployed on military duty
    - Agency said this was not a factor

23

Case Study 5:
*Nashua Sch. Dist.*
80 IDELR 146, 122 LRP 3266 (NH SEA, 2021)

- Jurisdiction: New Hampshire State Educational Agency (November 2021)
- Facts:
  - Student with multiple disabilities
  - Interfering behaviors like: refusal to do schoolwork, aggressive behaviors, hitting peers, and emotional dysregulation
  - Remote learning in Spring 2020 because of the COVID-19 pandemic - behaviors got worse
  - When returned to in-person learning over the summer, aggression had stayed elevated
  - Loss of adaptive skills in the home setting during remote learning
  - Student had limited time remaining in public school setting due to age
  - Family advocated for residential placement
  - District advocated for therapeutic day program
- **Question: What is the LRE in light of increasing aggressive behavior and student's age?**

24

## Case Study 5: Answer

- **Question: What is the LRE in light of increasing aggressive behavior and student's age?**
  - The agency held: "While the District's proposed placement in a day program might confer educational benefit, there is insufficient evidence on this record to conclude that it would enable this Student to achieve meaningful educational progress in light of all the circumstances."
  - Loss of student's adaptive skills during remote learning was key in light of student's age and time left in public school
- **Takeaways:**
  - Remember those other factors of the *Rachel H.* test – the nonacademic benefits to student here included her age and that "time was of the essence"
  - "Some" educational progress is not enough to be appropriate or provide a student with LRE – progress must be "meaningful … in light of all the circumstances"

25

## Case Study 6:
*A.B. v. Clear Creek Ind. Sch. Dist.*
787 Fed. Appx. 217 (5th Cir. 2019) (unpublished)

- Jurisdiction: Fifth Circuit Court of Appeals (October 2019) – Southern District of Texas
- Facts:
  - Student with autism, ADHD, and a speech impairment
  - First grade – self-contained program called "Learning to Learn"
  - First grade went so well that the student was moved to a "Social Communication" classroom for second grade
  - Third grade – Moved to general education with 1:1 aide
  - Student's behavior worsened: avoided schoolwork by taking frequent trips to the bathroom, playing with window blinds, flopping on the floor, and screaming
  - District wanted to put student back in "Learning to Learn" program
  - Student's parents filed due process and got "stay put" in the gen ed program
  - During that time, District put plans in place that successfully addressed negative behaviors and student made academic progress
  - District still wanted to change placement because attributed all progress to 1:1 aide
- **Question: Is gen ed with a 1:1 aide the LRE for this student? Or is self-contained program without 1:1 aide the LRE?**

26

## Case Study 6: Answer

- **Question: Is gen ed with a 1:1 aide the LRE for this student? Or is self-contained program without 1:1 aide the LRE?**
  - The court said: The legal standard for placement is not whether a student benefits *from* a less restrictive environment but whether the student can receive benefit *in* a less restrictive environment
  - The use of 1:1 supports did not create a "classroom within a classroom" or "change curriculum beyond recognition"
  - The student's social skills improved in the gen-ed setting because the student had the opportunity to "model the conduct of his general-education classmates."
- **Takeaways:**
  - Adding a 1:1 aide as a support does not change the level of restrictiveness of a student's placement under the law
  - The value of gen-ed peers on which to model behavior can bring non-academic value to a student with disabilities, even if most of the student's academic progress comes from 1:1 teaching

27

Case Study 7:
*East Stroudsburg Area Sch. Dist.*
119 LRP 36802 (PA SEA, 2019)

- Jurisdiction: Pennsylvania State Educational Agency (August 2019)
- Facts:
  - Kindergarten student with autism in general education classroom
  - Student displayed many behavioral problems, including elopement, kicking, biting, hitting, crawling under desks, running around the classroom, rolling on the floor, touching peers, falling out of chair, "head-butting" staff, crawling on furniture
  - Student required adult support while using the bathroom and eating
  - District proposed self-contained placement in autistic support class
  - Parents disagreed and proposed full-time gen ed
  - Parents suggested the district solve the elopement issue by using a seatbelt in the classroom chair to keep the student seated throughout the day
  - The district calculated the student's behaviors disrupted the classroom, on average, every 4.5 minutes
  - Despite attempts to manage the behavior with SDI, supplemental aids, and other services, behaviors did not improve
- **Question: What is the LRE for this student? Self-contained autism classroom or general education with supports?**

28

## Case Study 7: Answer

- **Question: What is the LRE for this student? Self-contained autism classroom or general education with supports?**
  - The agency said: Student needed to be in self-contained classroom
  - Student's presence in the gen ed classroom "impeded the student's learning and the learning of others in the classroom"
- **Takeaways:**
  - Data is KEY!! The district had clear data that showed disruptions, **on average**, every 4.5 minutes
  - The 3rd factor of the *Rachel H.* test can definitely tip the scales on balance, but you need data to back up that decision
  - The district had also documented the interventions and strategies it had tried in the general education classroom, without improvements

29

Case Study 8:
*A.H. v. Smith*
367 F. Supp. 3d 387 (S.D. MD., 2019)

- Jurisdiction: District of Maryland (February 2019)
- Facts:
  - Student with autism and common variable immune deficiency
  - Homeschooled or in private school most of his academic career
  - Contacted public school when parents moved into the district
  - Requested district place student at his current private school or, alternatively, fully self-contained program in the district
  - Parents also requested a full time RN for the student
  - District proposed inclusion in general education for lunch and recess, but parents objected
  - Student's behaviors included eloping during recess/lunch, feet stamping, screaming at teacher, reaching over a table for a preferred item, hitting his head against hard objects, and "tantrums"
  - Student could participate in group activities without disruption when "given prompting, cueing, and praise from an aide"
  - Private school had a BIP that was working well and district agreed to implement it
  - Parents filed a due process claim and did not send student to school - sought tuition reimbursement
- **Question: What is the LRE for this student? Private school or self-contained classroom? Or general education inclusion program?**

30

## Case Study 8: Answer

- **Question: What is the LRE for this student? Private school or self-contained classroom? Or general education inclusion program?**
  - The court said parents' concerns about safety during gen ed lunch and recess were "speculative" and not a basis to conclude district failed to provide FAPE with its placement offer
  - District had trained staff and teachers "experienced in working with students who elope, tantrum, have self-injurious behaviors, are unpredictable, and have compulsions and rituals"
  - Trained staff was likely to prevent eloping behavior at lunch/recess, especially given offer of supports including private school BIP
- **Takeaways:**
  - **Speculation about safety issues is not enough for a more restrictive placement**
  - **Must have real data**
  - **Offering robust supports, including thorough BIP, will often provide FAPE in a less restrictive setting**

31

## Case Study 9:
## *J.S. v. Keystone Oaks Sch. Dist.*
76 IDELR 125, 120 LRP 11448 (W.D. Pa., 2020)

- Jurisdiction: Western District of Pennsylvania (March 2020)
- Facts:
  - Student was obsessed with a female classmate - to the point of harassment
  - Student threatened to set fire to anyone who might date the female classmate
  - Student exposed his genitals to other male students
  - Student destroyed classwork of fellow students
  - Psychiatric evaluation - provisional diagnosis of unspecified schizophrenia spectrum/other psychotic disorders
  - Parent and district agreed to look into private partial hospitalization programs
  - Parent visited district's proposed placement but did not immediately agree
  - Shortly after tour, student embraced the female student against her will and would not let her go
  - The following day, student - with participation of the parent - was admitted to the partial hospitalization program
  - After approximately one year, the district created an IEP for a 3-month transition back to the district's school
  - Parent alleged district did not make "any reasonable efforts" to accommodate the student in the regular classroom before placing him in the partial hospitalization program
- **Question: Should the district have taken more steps or implemented further interventions prior to placing the student in partial hospitalization program?**

32

## Case Study 9: Answer

- **Question: Should the district have taken more steps or implemented further interventions prior to placing the student in partial hospitalization program?**
  - The court said the partial hospitalization program was appropriate at the time it was made.
  - "Critical mental health concerns … which escalated so quickly … [the student's] mental health needs were greater than what the District mental health therapist could support."
- **Takeaways:**
  - This situation escalated very quickly and district professionals had to act with a constantly evolving set of facts
  - Key to the analysis was the notes of professionals who evaluated and/or interviewed the student, documenting the severity of these concerns and safety issues
  - Safety threats were not generalized, but targeted to one female student in particular

33

## Case Study 10:
*Banwart v. Cedar Falls Comm. Sch. Dist.*
489 F. Supp. 3d 846 (N.D. Ia, 2020)

- Jurisdiction: District court for Northern District of Iowa
- Facts:
  - 14-year-old student with multiple disabilities, including reactive attachment disorder and autism
  - Disruptive behaviors included threats of violence to himself and others, mood swings, defiance, verbal aggression towards others, physically blocking staff from leaving rooms, knocking over/kicking chairs, dumping trash can on the head of a teacher
  - In one particular instance, student blockaded himself in a room and would not come out for an extended period of time, despite many attempted interventions, necessitating a call to law enforcement
  - Student's parents went on vacation for a week and student stayed with relatives
  - Did not attend school during that week
  - When parents returned, behavior quickly escalated further, including incident in which student stole the family car and drove 20 miles from home
  - Parents unilaterally placed student in out-of-state residential in large part because of "student's behavior at home"
  - School felt residential was too restrictive because IEP and BIP were working prior to parents' vacation
  - School felt vacation was a temporary setback and student's behavior would resolve in time
- **Question: Did student need residential placement at the time parents pulled the student to be provided a FAPE in the LRE?**

34

## Case Study 10: Answer

- **Question: Did student need residential placement at the time parents pulled the student to be provided a FAPE in the LRE?**
  - Court says no - the evidence showed the IEP was allowing student to make progress at school and agreed parents' vacation was a temporary setback
  - No reason to believe that once the student/parents worked past the temporary disruption that the IEP would not work as it had before the parents' vacation
- **Takeaways:**
  - Remember - FAPE and LRE do not provide the "best" placement. *Rowley* and *Endrew F.* have made it clear that FAPE is provided when the student's programming is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"
  - Meaningful progress does not mean maximizing potential
  - Document efforts and progress on student's needs and goals! Documentation of progress can provide support to a parent's challenge that a district-offered placement is inappropriate

35

## Case Study 11:
*Middleborough Public Schools*
123 LRP 17757 (MA SEA, June 2, 2023)

- Jurisdiction: Massachusetts State Educational Agency
- Facts:
  - Student was nearly 18 years old at time of hearing
  - Global communication disorder secondary to ASD - difficulties with expression, processing, and complexity of language; PSIQ of 30
  - Student attended a self-contained program in the district - separate program with six students and three staff
  - Student used communication devices and had a designated de-escalation space - staff incorporated more sensory strategies and opportunities for breaks
  - When student returned to school in fall of 2022, was more dysregulated then previous year: aggressive behaviors that required 2-3 staff to get him into the building safely
  - Behaviors included scratching, pinching, grabbing, throwing objects at staff, punching staff with a closed fist in the chest, groin, and face
    - Between September 26, 2022 and April 12, 2023, there were 68 incidents of staff injury reported
  - Staff lowered academic demands and modified behavior plan
  - Was not able to attend to academic tasks, even with support in 1:1 setting - could not demonstrate skills from previous year
  - Was served by an RBT who consulted with his program approximately 2-2.5 hours per week - agreed his behaviors had significant impact on his day
  - District conducted an evaluation and recommended the student attend an out-of-district placement to support communication and behavior needs in a 1:1 setting
- **Question: Does the District have enough support to move student to a restrictive out-of-district 1:1 placement?**

36

## Case Study 11: Answer

- **Question: Does the District have enough support to move student to a restrictive out-of-district 1:1 placement?**
  - ALJ says yes - Witnesses credibly described a significant increase in dysregulation during the 2022-23 school year
  - ALJ relied on negative educational consequences due to the student's behaviors, including missing academic instruction **and** being separated from peers
  - Staff injury was also significant here
- **Takeaways:**
  - Staff had clear documentation of:
    - Negative effects to student
    - Negative effects to staff
    - Numerous strategies that had been tried before proposing a placement change
  - This level of documentation supported the need to change the student's placement

37

## Case Study 12:
## *Columbus City Schools*
## 123 LRP 3419 (OH, 2022)

- Jurisdiction: Ohio State Educational Agency
- Facts:
  - Student with ASD: placement had been changed in June 2022 to "Emotional Disturbance resource room" from "high incidence resource room" to begin at the start of the 2022-23 school year
  - Ongoing concerns from parents and teachers re: hyperactivity, depression, repetitive behaviors, argumentative behaviors, receptive communication, written communication, interpersonal relationships, play and leisure, coping skills, and internalizing/externalizing behaviors
  - Student threatened to harm himself and others - he would visit "many times throughout each week" with "student services staff" when this occurred
  - Received mental health counseling outside of school and took medication for his mental health diagnoses
  - Only two goals on IEP: (1) Use of self-calming and self-regulation technique and (2) Focus and remaining on task for 20 minutes or longer without teacher prompts
  - IEP stated that "when in larger classes without support, the student becomes anxious and can escalate easily"
  - IEP amended November 18, 2022 and placement changed to home instruction
    - Notes from school counselor beginning August 2022 concerning student's escalating mental health concerns
    - School had called parents, used de-escalation techniques, and referred to a behavior specialist
    - School made a safety plan and contacted outside resources for help
    - Student began eloping from classroom and refusing to go to class, missing instructional time
  - Heavily redacted information from the opinion, but it is clear the student's mental health concerns were escalating and he had discussed either threat of harm to himself or others
- **Question: Parents requested a private placement. District put on home instruction.**
  - **Which is the LRE?**

38

## Case Study 12: Answer

- **Question: Parents requested a private placement. District put on home instruction. Which is the LRE?**
  - The answer appears to be "neither"
  - Although the state agency acknowledges the staff "worked diligently with the parent, the student, staff from the crisis line and other resources to support the student," the agency was concerned that the discussion was only "about changing the student's placement to more restrictive environments"
  - The agency looked at past reports and determined that suggested interventions had not been tried appropriately in small group or co-taught environments and were **not addressed in the IEP**
- **Takeaways:**
  - **There were clear behavior detail reports for significant behavior incidents and clear documentation regarding what was tried.**
  - **The issue was that there was no documentation of what was recommended but NOT tried!!**
  - **Even with a smaller number of significant behavior incidents, document why certain interventions are not tried or do not work if you feel a more restrictive placement is necessary**
    - **And consider alternatives to home instruction like therapeutic outside placements**
  - **Special note: COVID interrupted the evaluation process for this student - an evaluation was not completed right before schools closed in March 2020. This was an important fact**
    - **Make sure you document what you do with your evaluations and data!**

39

## Practical Tips


40

## Questions?

**Elizabeth L. Polay**
**503-581-1501**
epolay@ghrlawyers.com

GARRETT HEMANN ROBERTSON P.C.

41

Workshop 6

# Student Record Roundup: Complying with Student Confidentiality Laws

By:

**Betsey A. Helfrich**
Attorney
The Law Office of Betsey Helfrich, LLC
St. Louis, Missouri

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# Student Confidentiality

# Checklist

Betsey A. Helfrich

bhelfrichlaw.com

## ❒ Review Applicable Laws and Board of Education Policies

- Family Education Rights and Privacy Act (FERPA)
  - Federal law that protects the privacy of students' education records. 20 USC 1232g; 34 CFR 99
  - FERPA:
    - Prohibit Disclosure: Prohibits schools and agencies from disclosing a student's educational records or personally identifiable information contained in those records without written parental consent.
    - Access: Gives parents or eligible student the opportunity to inspect and review the student's educational records.
    - Amendment: Gives parents or eligible students the right to request amendment of records they believe are inaccurate or misleading.

- Individuals with Disabilities Education Act (IDEA)
  - The IDEA implementing regulations require the protection of student records. 34 CFR 300.623
  - The IDEA regulations require:
    - Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.
    - One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.
    - All people collecting or using personally identifiable information must receive training or instruction regarding the state's policies and procedures under 34 CFR 300.123 and 34 CFR Part 99.
    - Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who have access to personally identifiable information.

- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
  - Federal law that provides national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge.
  - Typically, HIPAA doesn't apply to an elementary or secondary school because the school either: (1) is not a HIPAA covered entity or (2) is a HIPAA covered entity but maintains health information only on students in records that are "education records" under FERPA and, therefore, not covered by the HIPAA Privacy Rule.
  - In a few limited circumstances, an educational agency or institution subject to FERPA can also be subject to HIPAA:
    - For instance, a school that provides health care to students in the normal course of business, such as through its health clinic, is also a "health care provider" under HIPAA.
    - If a school that is a "health care provider" transmits any PHI electronically in connection with a transaction for which HHS has adopted a transaction standard, it is then a covered entity under HIPAA.

- Washington Public Records Act
  - Chapter 42.56 RCW
  - Calls for disclosure of public records unless an exception applies

- Childrens Online Children's Online Privacy and Protection Act (COPPA)
  - COPPA applies to commercial web sites and online services directed to children under 13 that collect personal information from children

❒ **Understand Access Rights to Records under Each Law**

- Who has access rights?
  *Eligible Students under FERPA:*
  - Rights transfer to student when he or she turns 18 years of age or enters a postsecondary educational institution at any age.
  - Even if rights transfer to student FERPA provides ways in which a school *may* – but is not required to – share information from an eligible student's education records with parents, without the student's consent.
    - Examples:
      Schools may disclose education records to parents if the student is claimed as a dependent for tax purposes.
      Schools may disclose education records to parents if a health or safety emergency involves their son or daughter.

Schools may inform parents of the student, if he or she is under 21, has violated any law or policy concerning the use or possession of alcohol or a controlled substance.
Student grants access in writing.

34 CFR 99.31

*Eligible students under IDEA:*

- A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law):
  - -All rights accorded to parents under Part B of the Act transfer to the child
  - - State of Washington – age of majority is 18 years old

*Parents under FERPA:*

- Parent is defined as "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 20 USC 1232g
- FERPA provides rights to either parent, regardless of custody, unless the school has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights. 34 CFR 99.4

*Parents under IDEA:*

- Under IDEA regulations and for purposes of determining who is entitled to procedural safeguards, "parent" means:
  (1) A biological or adoptive parent of a child;
  (2) A foster parent, unless State law, regulations or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
  (3) A guardian generally authorized to act as the child's parent or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
  (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
  (5) A surrogate parent who has been appointed in accordance with IDEA

## ❒ Understand what Records Are Covered

- FERPA broadly defines an education record as:
  As any record that is (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR 99.2
- These records include but are not limited to grades, transcripts, class lists, student course schedules, health records and student discipline files, student work, information on computers etc…
- Records are protected if they contain "personally identifiable information" about the student.
- Personally identifiable information (PII) includes name, parents' names, address, personal identifiers (e.g., SSN), indirect identifiers (date of birth, place of birth, mother's maiden name, race);
- PII includes other information that, alone or in combination, is linked or linkable to a specific person that would allow a reasonable person in the school community to identify the student with reasonable certainty;
- PII includes information requested by a person who the school reasonably believes knows the identity of the student to whom the record relates.

## ☐ Provide Timely Access to Records

- Under FERPA schools must comply with a request to inspect and review education records within 45 days.
  - Review and follow school policies that require a shorter response
- Schools are only required to grant access. No requirement to make copies.
  - Generally required to give copies, or make other arrangements for access, only if failure to do so would effectively deny access- example would be a parent or eligible student who does not live within commuting distance.

- Pursuant to IDEA regulations 34 CFR 300.613:
  - Access must be provided without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made.
  - The right to inspect and review education records includes: (1)The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) The right to have a representative of the parent inspect and review the records.
- Under the Washington Public Records Act RCW 42.56.520:

- Within five days following receipt of a public records request, schools must respond by providing access or copies, seeking clarity on the request, or deny the request

- Record keeping requirements:
  - Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who have access to personally identifiable information. IDEA (34 CFR 303)
  - Maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student. FERPA (34 CFR 99.32)

❒ **Protect Confidential Student Information from Improper Disclosure**

- What PII can be disclosed
  - De-identified data
  - Data shared with written consent
  - Data shared under a FERPA exception

- Consent
  - IDEA consent (34 CFR 300.622)
    Parental consent must be obtained before personally identifiable information is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in education records, and the disclosure is authorized without parental consent under 34 CFR part 99 (FERPA).

- What Are Some Exceptions to the Consent Rule:
  - To parents of a dependent student;
  - To authorized representatives of Federal, State, and local educational authorities conducting an audit, evaluation, or enforcement of education programs;
  - To organizations conducting studies for specific purposes on behalf of schools;
  - School officials with a legitimate educational interest
  - In a health or safety emergency; and
  - Directory information

    34 CFR 99.31

☐ **Share Key IEP Information with Professionals who Need the Information to do their Job**

- Each public agency must ensure that— (1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and (2) Each teacher and provider described in paragraph (d)(1) of this section is informed of— (i) His or her specific responsibilities related to implementing the child's IEP; and(ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. 34 CFR 300.323(d)
- Maintain confirmation of staff member receipt and understanding of IEP information
- Consider necessity of sharing with bus drivers, nurses, cafeteria staff, SROs etc..

❒ **Develop Procedures for Access to Video Footage**

- What to consider:
  - Is this a student record under FERPA or state law?
  - How do we maintain video footage?
  - Once a request for access is made, do not destroy or purge related footage

❒ **Train & Review Confidentiality Procedures**

- Maintain accurate records of who accesses student records
- Develop policies regarding responding to requests for information
- Train front office professionals and key staff on student confidentiality
- Keep record of each employee participating in training and maintain training materials

# STUDENT RECORD ROUNDUP: COMPLYING WITH STUDENT CONFIDENTIALITY LAWS

October 11, 2023

Betsey A. Helfrich
The Law Office of Betsey Helfrich, LLC

1

## STUDENT RECORDS & CONFIDENTIALITY

- FERPA
- COPPA
- WASHINGTON PUBLIC RECORDS ACT
- IDEA

2

## WHAT IS FERPA?

Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act is a federal law that protects the privacy of students' education records.

The law applies to all schools, colleges and universities that receive funds under an applicable program of the U.S. Department of Education.

20 USC 1232g; 34 CFR 99

3

## 3 MAIN PURPOSES OF FERPA

Prohibit Disclosure:

- Prohibits schools and agencies from disclosing a student's educational records or personally identifiable information contained in those records without written parental consent.

Access:

- Gives parents or eligible student the opportunity to inspect and review student's educational records.

Amendment:

- Gives parents or eligible students the right to request amendment of records they believe are inaccurate or misleading.

4

## IDEA & CONFIDENTIALITY

The IDEA implementing regulations at 34 CFR 300.623 require:

a) Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

b) One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

c) All people collecting or using personally identifiable information must receive training or instruction regarding the state's policies and procedures under 34 CFR 300.123 and 34 CFR Part 99.

d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who have access to personally identifiable information.

5

## IDEA & FERPA

US Department of Education Guidance Document:

*IDEA and FERPA Crosswalk -*

*A side-by-side comparison of the privacy provisions under Parts B and C of the IDEA and FERPA*

6

# ACCESS

7

## WHO HAS RIGHTS?

FERPA:

- Parents and eligible students.
- Parent is defined as "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 20 USC 1232g
- Rights transfer to student when he or she turns 18 years of age or enters a postsecondary educational institution at any age.

8

## FERPA QUIZ

Mom lives in Arizona. Mom gets visitation with her children on holidays. Mom calls you and asks to see her child's recent progress report. You know this is mom, she is very involved, and she recently participated via zoom in her child's review of existing data meeting. Dad told you last Friday that Mom is behind on child support payments and has asked you that you not share any information with mom until "she pays up." What do you do?

9

## ANSWER

- Typically both parents have the right to gain access to the student's education records.
- FERPA provides rights to either parent, regardless of custody, unless the school has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

34 CFR 99.4

10

## FERPA QUIZ

Sally used to live with her grandma while mom was in Florida with her boyfriend. Mom is back in town and Sally is living with mom. Mom and grandma are no longer speaking and grandma emails you and just wants to know how Sally is doing on her grades. Can you share information with her?

11

## FERPA QUIZ

Katie has been living with her friend's parents for about 18 months now. Her friend's mom calls you and asks for a copy of Katie's IEP data. Can you provide the information to her?

12

## ANSWER

FERPA:

Parent is defined as "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 20 USC 1232g

13

**IDEA DEFINITION OF PARENT:**

Under IDEA regulations and for purposes of determining who is entitled to procedural safeguards, "parent" means:

(1) A biological or adoptive parent of a child;

(2) A foster parent, unless State law, regulations or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the child's parent or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with IDEA

14

## FERPA QUIZ

Bobby is 18 years old and a senior. He was suspended from the school bus for his behavior for 10 days. He approaches you and says, "I'll be walking to school now. If my dad contacts you and asks for my discipline records, I refuse for you to give them to him. I'm 18, I know my rights…"

15

## ANSWER: ELIGIBLE STUDENT RIGHTS

- All rights transfer to the student when:
  - He/she turns 18 years old or enters a postsecondary institution at any age.
- However, FERPA provides ways in which a school *may* – but is not required to – share information from an eligible student's education records with parents, without the student's consent. For example:
  - Schools may disclose education records to parents if the student is claimed as a dependent for tax purposes.
  - Schools may disclose education records to parents if a health or safety emergency involves their son or daughter.
  - Schools may inform parents of the student, if he or she is under 21, has violated any law or policy concerning the use or possession of alcohol or a controlled substance.
  - Student grants access in writing.

34 CFR 99.31

16

## IDEA TRANSFER OF RIGHTS

**34 CFR 300.520:**

Transfer of parental rights at age of majority.

A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law):

-All rights accorded to parents under Part B of the Act transfer to the child;

- A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

**RCW 26.28.010 Age of Majority:** Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.

17

## WHAT IS AN EDUCATION RECORD?

18

## FERPA QUIZ

Katie is an administrative assistant at the school. She gets a call from a parent who demands their student's full educational record including records regarding Student Steve maintained separately by the school's behavior specialist. Katie tells the parent that she will send her the student's permanent record, which includes transcripts and grades and "that is it."

Is Katie correct?

19

## ANSWER: EDUCATION RECORD

- The terms "cumulative folder" and "permanent folder" do not appear in FERPA. The term "education record" is broadly defined in FERPA as any record that is (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for the agency or institution.

34 CFR 99.2

- These records include but are not limited to grades, transcripts, class lists, student course schedules, health records and student discipline files, student work, information on computers etc….

- What about Emails? Texts? Videos?

20

FERPA applies to education records that are directly related to a specific student and are maintained by the school district or its agents.

FERPA applies to paper records, electronically stored records, and audio and visual records.

Records are protected if they contain "personally identifiable information" about the student.

Personally identifiable information (PII) includes name, parents' names, address, personal identifiers (e.g., SSN), indirect identifiers (date of birth, place of birth, mother's maiden name, race);

PII includes other information that, alone or in combination, is linked or linkable to a specific person that would allow a reasonable person in the school community to identify the student with reasonable certainty;

PII includes information requested by a person who the school reasonably believes knows the identity of the student to whom the record relates.

21

## RIGHT TO INSPECT…

- Under FERPA schools must comply with a request to inspect and review education records within 45 days.

  *Be mindful of school policies that require shorter response

- Schools are only required to grant access. No requirement to make copies.
  - Generally required to give copies, or make other arrangements for access, only if failure to do so would effectively deny access- example would be a parent or eligible student who does not live within commuting distance.

- School may not destroy records if request for access is pending.

22

## IDEA ACCESS

§300.613 Access rights:

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. **The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made.** (b) The right to inspect and review education records under this section includes— (1)The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) The right to have a representative of the parent inspect and review the records.

23

## RECORD KEEPING REQUIREMENTS

- IDEA (34 CFR 303):

"Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who have access to personally identifiable information."

- FERPA (34 CFR 99.32):

Maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

24

# DISCLOSING PERSONALLY IDENTIFIABLE STUDENT INFORMATION

25

## FERPA QUIZ

- You are shopping at Target and a parent approaches you. After commenting about the weather she says, "I have been talking with some other parents. We heard that the police were up at school the other day because a student eloped from the building. I feel as a parent I have the right to know if the police are ever involved with a student at school. I think the police were there because of Billy… right?"

26

## ANSWER

Keep student information confidential

There is no right to know in this situation

Pause. Re-direct.

27

FERPA does not protect information gained solely through personal observations, common knowledge, or sources other than actual education records. *Jensen v. Reeves*, 45 F.Supp.2d 1265 (D. Utah 1999), aff'd, 3 F. App'x905 (10th Cir. 2001).

•If information was derived from a source other than a school record, FERPA is not implicated even if an education records contains the same information. *Daniel S. v. Board of Educ.*, 152 F.Supp.2d 949, 954 (D. Ill. 2001).

- However, general notion of privacy, Board Policies, etc..

28

## WHAT IS PERSONALLY IDENTIFIABLE INFORMATION (PII)?

- Personally identifiable information includes:
  - Student's name
  - The name of student's parent/guardian or other family member
  - The address of the student or student's family
  - A personal identifier, such as the student's SSN or student number
  - Date of Birth
  - A list of personal characteristics that would make the student's identity easily traceable
  - Other information that would make the student's identity easily traceable

29

## CAN PERSONALLY IDENTIFIABLE INFORMATION BE SHARED?

- Generally, three categories of data that may be shared without outside agencies:

1. De-identified data
2. Data shared with written consent
3. Data shared under a FERPA exception

30

## IDEA CONSENT

34 CFR 300.622 Consent:

Parental consent must be obtained before personally identifiable information is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in education records, and the disclosure is authorized without parental consent under 34 CFR part 99 (FERPA).

31

## WHEN IS CONSENT NOT REQUIRED BEFORE DISCLOSING PII IN EDUCATION RECORDS?

Disclosure may be made to other school officials, ***whom the District has determined to have legitimate educational interests***;

To schools in which a student seeks or intends to enroll;

To State and local officials pursuant to a State statute in connection with serving the student under the juvenile justice system;

To comply with a judicial order or subpoena (reasonable effort to notify parent or student at last known address)

32

## WHAT ARE EXCEPTIONS TO GENERAL CONSENT? (CONT.)

- To parents of a dependent student;
- To authorized representatives of Federal, State, and local educational authorities conducting an audit, evaluation, or enforcement of education programs;
- To organizations conducting studies for specific purposes on behalf of schools;
- In a health or safety emergency; and
- Directory information.

34 CFR 99.31

33

## DIRECTORY INFORMATION

Defined: Information in the education record of a student that would not generally be considered harmful if disclosed without the consent of a parent or eligible student.

- See individual Board of Education Policy
- Train front office professionals

Parents must be given annual notice of directory information and right to opt out

- How do you record and track opt out?
- Always confirm before releasing info

34

## WHAT IS DIRECTORY INFORMATION?

- Directory information - information in the education record of a student that would not generally be considered harmful if disclosed.

- Student's name
- Major field of study
- Participation in officially recognized activities and sports
- Weight and height of members of athletic teams
- Dates of attendance
- Degrees and awards received
- The most recent previous school attended
- Photographs

35

## FERPA QUIZ

A school designates name, address, telephone listing, email address, and honors and awards received as directory information. A non-profit organization that has programs for disabled children asks the school for directory information on students who have a certain disability. Can the names and contact information for these students be disclosed to the organization as directory information?

36

## ANSWER:

No. You cannot link directory information with information that can never be directory information, such as disability status. You may always seek consent from the parent.

37

## FERPA QUIZ

A school may designate and disclose any information on a student, including special education status as "directory information," as long as the school notifies parents and provides them with an opportunity to opt out.

38

## ANSWER

False. A school may only designate "directory information" items about a student that would not generally be considered harmful or an invasion of privacy if disclosed. Information such as a student's social security number or special education status may not be designated as "directory information."

39

## SCENARIO: REPORTER REQUEST

Sunny School District designates name, grade level, and honors and awards received as general directory information. A news reporter calls your school and informs you that he is writing an article about the success of female students who made the honor roll for the current school year. Are the names and contact information for all of the female students who made the honor roll for the current school year "directory information?"

Example taken from U.S. Dept. of Education
www2.ed.gov/policy/gen/guid/ptac/pdf/slides.pdf

40

## ANSWER:

No. You cannot link "directory information" with an item that cannot be designated as a "directory information" item, such as race, national origin, gender or ethnicity status. The school could send home a note to the parents of these students and ask them to sign a consent form giving permission to disclose the students' names to the organization.

Example taken from U.S. Dept. of Education
www2.ed.gov/policy/gen/guid/ptac/pdf/slides.pdf

41

## CONSENT EXCEPTIONS CONT.

- District may disclose education records to child welfare agency representatives when reporting child abuse and neglect.
  - FPCO guidance 2004
- FERPA exception for health and safety emergency may also apply.
  - Is knowledge of information necessary to protect the health or safety of student or other individuals?
  - "[I]t must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease." (FPCO Guidance, "Addressing Emergencies on Campus," at 3, June 2011.)

34 CFR 99.31(a)(1)

42

## HEALTH AND SAFETY EMERGENCY

- ED guidance states that this exception cannot be used for disclosures on a routine, non-emergency basis

- "[I]t must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease." (FPCO Guidance, "Addressing Emergencies on Campus," at 3, June 2011.)

43

## SCENARIO: STUDENT RECORDS

As the school nurse at the middle school you feel that you need to share information with the student's counselor, teacher, and building principal. Which law, FERPA or the HIPAA Privacy Rule, protects the privacy of student health records?

Example taken from U.S. Dept. of Education www2.ed.gov/policy/gen/guid/ptac/pdf/slides.pdf

44

## ANSWER:

**FERPA**. At the elementary/secondary level, any records that a school nurse maintains that are directly related to a student are considered "education records" subject to FERPA – not the HIPAA Privacy Rule. A school nurse may share information on students with other school officials if these school officials have **a legitimate educational interest** in the records. Typically, if there is a health condition about which other teachers and school administrators need to be aware in order to provide a safe and healthy environment for the student, then the school could include such a criteria for what it considers to be a "legitimate educational interest."

45

## HIPAA

Does the HIPAA Privacy Rule apply to an elementary or secondary school?

Generally, no. In most cases, the HIPAA Privacy Rule does not apply to an elementary or secondary school because the school either: (1) is not a HIPAA covered entity or (2) is a HIPAA covered entity but maintains health information only on students in records that are "education records" under FERPA and, therefore, not PHI covered by the HIPAA Privacy Rule.

https://www.hhs.gov/sites/default/files/2019-hipaa-ferpa-joint-guidance.pdf

46

## HIPAA

In a few limited circumstances, an educational agency or institution subject to FERPA can also be subject to HIPAA. For instance, a school that provides health care to students in the normal course of business, such as through its health clinic, is also a "health care provider" under HIPAA. If a school that is a "health care provider" transmits any PHI electronically in connection with a transaction for which HHS has adopted a transaction standard, it is then a covered entity under HIPAA. As a covered entity, the school's health care transactions must comply with the HIPAA Transactions and Code Sets Rule (or Transactions Rule).

47

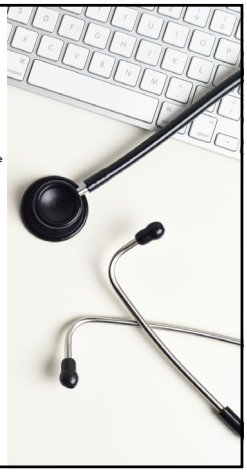
## JOINT GUIDANCE ON THE APPLICATION OF FERPA AND HIPAA TO STUDENT HEALTH RECORDS

The U.S. Department of Education and the Office for Civil Rights at the U.S. Department of Health and Human Services released updated joint guidance in December 2019 addressing the application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule to records maintained on students.

https://www.hhs.gov/sites/default/files/2019-hipaa-ferpa-joint-guidance.pdf

US DOE Student Privacy Policy Office:

*Guidance for School Officials on Student Health Records* April 12, 2023



48

## FERPA QUIZ

Mom sends the school a note that states that since Billy has been very ill, he can only eat certain foods. Even though students are allowed to eat snacks on the bus and are known to trade snacks, the school's front office doesn't want to share this information with the bus driver because they don't want to violate HIPAA.

Can they share this note with the student's bus driver?

49

## ANSWER

Districts may disclose personally identifiable information concerning a student to "school officials" within the institution who have a "legitimate educational interest" in the student.

FERPA regulations allow the school to determine which individuals possess such an interest.

34 CFR 99.31(a)(1)

50

## SCHOOL OFFICIALS

School transportation officials (including bus drivers), may qualify as school officials. *Letter to Anonymous*, (FPCO 2017)

Outside people who perform professional and business services for the district as part of its operations, including independent contractors, may also be considered to have a legitimate educational interest, which may prove relevant where schools hire private companies to supply transportation services. 34 CFR 99.31; *Questions and Answers on Serving Children with Disabilities Eligible for Transportation,* (OSERS 2009).

51

## FERPA QUIZ

The front office decides to share the note about Billy with Billy's bus driver. They also decide to tack the note up in the teacher's lounge on the bulletin board so everyone is aware of the issue. Is this compliant with FERPA?

52

## ANSWER: LEGITIMATE EDUCATIONAL INTEREST

- Per the U.S. Department of Education: "A school official generally has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility."

53

## FERPA QUIZ

College students home for the summer want to volunteer at the school a few days a week. A parent objects to their participation in the classroom stating that they are violating FERPA since the students are not employees. Is this true?

54

## SCHOOL OFFICIAL

An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) A contractor, consultant, **volunteer**, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(1) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(3) Is subject to the requirements of §99.33(a) governing the use and re-disclosure of personally identifiable information from education records.

34 CFR 99.31

55

## BEST PRACTICES

- Per 34 CFR 99.7, in your annual FERPA notice specify criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.
- Remind in writing not to re-disclose
- Engage in MOU or contract

56

## KEEPING STUDENT INFORMATION CONFIDENTIAL

*Ferry v. Jefferson City Public Schools (MO 2022)*:

-Tenured teacher who served as an instructional technology coordinator with the District for 11 years

-Ms. Ferry began copying the Google Drive assigned to her on the District's domain to her personal Google account

-Some of the files included confidential student information

-Consequently, the District stopped the transfer to Ms. Ferry's account and placed her on administrative leave pending an investigation

-She explained she did this on the advice of counsel to preserve the information for use in a discrimination suit she had filed against the District in 2017

-The District issued a statement of charges and terminated her

57

## KEEPING STUDENT INFORMATION CONFIDENTIAL

*Ferry v. Jefferson City Public Schools:*

-Teacher won on appeal and then District appealed to Missouri Supreme Court

-Teacher argues her conduct did not constitute a disclosure, as defined in FERPA, in that she did not release confidential student information to any third person

-Teacher admitted she copied and transferred thousands of files, hundreds of which contained confidential student information, including individual education programs, physical therapy evaluations, physical therapy progress notes, students' MOSIS ID numbers, and other records containing confidential information regarding specific students, to her personal Google account.

-Ms. Ferry further admitted she had no legitimate educational interest in accessing and transferring the confidential student information. Indeed, she stated she copied the records to her personal Google account so she might use them in her discrimination suit against the District.

-Even though Ms. Ferry didn't share with outside party, FERPA prohibits the District from permitting its teachers to access and transfer confidential information without a legitimate educational interest.

-Because Ms. Ferry effectuated a prohibited disclosure from the District to herself and violated a board policy and administrative procedure when she accessed and transferred confidential student information without a legitimate educational interest, the Board had the authority to terminate her contract.

-District prevails

58

## IDEA - WHO GETS A COPY?

- Federal Regulations:

Accessibility of child's IEP to teachers and others. Each public agency must ensure that— (1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, **and any other service provider who is responsible for its implementation;** and (2) Each teacher and provider described in paragraph (d)(1) of this section is informed of—(i) His or her specific responsibilities related to implementing the child's IEP; and(ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

34 CFR 300.323(d)

59

## CASE EXAMPLE:

- Students are not responsible for informing staff members about the contents of their IEPs & 504 plans

*Durant (IA) Community School District*, (OCR 04/22/13): A ninth-grader approached his high school principal on the first day of school and asked where he should eat lunch. Although the student mentions past difficulties with peers, the principal tells the student to eat in the cafeteria with the rest of the student body. Student has a fight in the cafeteria that results in a three-day suspension and criminal charges for assault.

Had the district informed relevant staff members that the student had an IEP requiring him to eat lunch apart from his peers, incident and OCR investigation could have been avoided.

60

## FERPA QUIZ

You have a great relationship with your local police department. They are investigating a break in over the weekend and they suspect one of the high school students. They ask you for his discipline history report to see if he is a "bad actor." Can you give it to them?

61

## ANSWER

- Generally Law enforcement agencies unconnected to the school have no authority under FERPA to receive student records.
- School Resource Officers?
- Could get parental consent
- Subpoena
- Health and safety emergency?

62

## SCHOOL RESOURCE OFFICERS

February 2019, U.S. Department of Education released a comprehensive set of frequently asked questions on schools' responsibilities under FERPA in the context of school safety:

https://studentprivacy.ed.gov/resources/school-resource-officers-school-law-enforcement-units-and-ferpa

63

# VIDEO FOOTAGE

- All 50 states have enacted some form of an open records law
- Many are modeled after the federal Freedom of Information Act (FOIA)
- Review state law & board policies
- Develop a procedure

64

# VIDEO

US Department of Education, Privacy Assistance Technical Center, *Frequently Asked Questions:*

https://studentprivacy.ed.gov/frequently-asked-questions

65

**When is a photo or video of a student an education record under FERPA?**

As with any other "education record," a photo or video of a student is an education record, subject to specific exclusions, when the photo or video is: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. (20 U.S.C. 1232g(a)(4)(A); 34 CFR § 99.3 "Education Record")[1]

Directly Related to a Student:

FERPA regulations do not define what it means for a record to be "directly related" to a student. In the context of photos and videos, determining if a visual representation of a student is *directly* related to a student (rather than just incidentally related to him or her) is often context-specific, and educational agencies and institutions should examine certain types of photos and videos on a case by case basis to determine if they directly relate to any of the students depicted therein. Among the factors that may help determine if a photo or video should be considered "directly related" to a student are the following:

- The educational agency or institution uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident);
- The photo or video contains a depiction of an activity:
  - that resulted in an educational agency or institution's use of the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the photo or video for disciplinary action involving a student);
  - that shows a student in violation of local, state, or federal law;
  - that shows a student getting injured, attacked, victimized, ill, or having a health emergency;
- The person or entity taking the photo or video intends to make a specific student the focus of the photo or video (e.g., ID photos, or a recording of a student presentation); or
- The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education record.

A photo or video should not be considered directly related to a student in the absence of these factors and if the student's image is incidental or captured only as part of the background, or if a student is shown participating in school activities that are open to the public and without a specific focus on any individual.

66

**If a video is an education record for multiple students, can a parent of one of the students or the eligible student view the video?**

When a video is an education record of multiple students, in general, FERPA requires the educational agency or institution to allow, upon request, an individual parent of a student (or the student if the student is an eligible student) to whom the video directly relates to inspect and review, or "be informed of" the content of the video, consistent with the FERPA statutory provisions in 20 U.S.C. § 1232g(a)(1)(A) and regulatory provisions at 34 CFR § 99.12(a). FERPA generally does not require the educational agency or institution to release copies of the video to the parent or eligible student.

In providing access to the video, the educational agency or institution must provide the parent of the student (or the student if the student is an eligible student) with the opportunity to inspect and review or "be informed of" the content of the video. If the educational agency or institution can reasonably redact or segregate out the portions of the video directly related to other students, without destroying the meaning of the record, then the educational agency or institution would be required to do so prior to providing the parent or eligible student with access. On the other hand, if redaction or segregation of the video cannot reasonably be accomplished, or if doing so would destroy the meaning of the record, then the parents of each student to whom the video directly relates (or the students themselves if they are eligible students) would have a right under FERPA to inspect and review or "be informed of" the entire record even though it also directly relates to other students.

67

## RESOURCES

- March 2016, U.S. Department of Education published a *Data-Sharing Tool Kit for Communities: How to Leverage Community Relationships While Protecting Student Privacy*
- FAQ on Photos and Videos:

  https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa
- Letter to Wachter (Bus video):

  https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Wachter%20%28Surveillance%20Video%20of%20Multiple%20Students%29_0.pdf

68

## WASHINGTON PUBLIC RECORDS ACT

- Chapter 42.56 RCW
- Enacted in 1973
- Calls for disclosure of public records unless an exception applies

69

## WHAT IS A RECORD

**RCW 42.56.101**

"Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

"Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

Exemption: "[p]ersonal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients." RCW 42.56.230

70

## RESPONDING TO RECORDS REQUESTS

The Public Records Act prescribes specific details of how a public agency must respond to a public records request (RCW 42.56.520)

Within five days following receipt of a public records request, schools must do one of the following:

- Make the requested records available for inspection; or
- Provide the requested records; or
- Acknowledge receipt of the request and provide a reasonable estimate of when records will be available; or
- Seek clarification if the request is unclear or does not adequately identify the records sought; or
- Deny the request in accordance with state law.

71

## WASHINGTON CASE

*Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wash. 2d 196, 201–02 (2007):

-assault on school bus between two elementary students

-parents reviewed bus video and asked for copy through public records request

- school said video was exempt from public disclosure

- case proceeded to Washington Supreme Court

Court: an agency withholding public records bears the burden of proving the applicability of a statutory exemption

Court: The student file exemption contemplates the protection of material in a public school student's permanent file, such as a student's grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address, telephone number, Social Security number, and other similar records.

Here, the surveillance camera serves as a means of maintaining security and safety on the school buses. The videotape from the surveillance camera differs significantly from the type of record that schools maintain in students' personal files.

The surveillance videotape of students from a camera on a public school bus is exempt under the student file exemption only if the District establishes the videotape is both "personal information" and "in any files maintained for students."

72

## COPPA

- Children's Online Privacy and Protection Act (COPPA)
- COPPA applies to commercial web sites and online services directed to children under 13 that collect personal information from children
- Overlap with FERPA and state confidentiality laws
- FTC's FAQ on COPPA and Schools: https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#Schools

73

## COPPA

Where a school has contracted with an operator to collect personal information from students for the use and benefit of the school, and for no other commercial purpose, the operator is not required to obtain consent directly from parents and can presume that the school's authorization for the collection of students' personal information is based upon the school having obtained the parents' consent.

**When Can a School Provide Consent under COPPA?**

Under COPPA, a school can consent on a parent's behalf only when:

- The data collected is used only for a school authorized educational purpose;
- The company provides the school notices required under COPPA;
- If the school requests it, the company provides the school a description of the types of personal information collected; an opportunity to review a child's personal information and/or have the information deleted; and the opportunity to prevent further use or online collection of a child's personal information; and
- Operators to delete children's personal information once the information is no longer needed for its educational purpose.

74

## COPPA – BEST PRACTICES

- Review terms of service
- Enter MOU regarding student data

"As a best practice, the school should consider providing parents with a notice of the websites and online services whose collection it has consented to on behalf of the parent under COPPA. Schools can identify, for example, sites and services that have been approved for use district-wide or for the particular school."

"In addition, the school may want to make the operators' direct notices regarding their information practices available to interested parents. Many school systems have implemented Acceptable Use Policies for Internet use (AUPs) to educate parents and students about in-school Internet use. The school could maintain this information on a website or provide a link to the information at the beginning of the school year."

75

## COPPA

In deciding whether to use online technologies with students, a school should be careful to understand how an operator will collect, use, and disclose personal information from its students. Among the questions that a school should ask potential operators are:

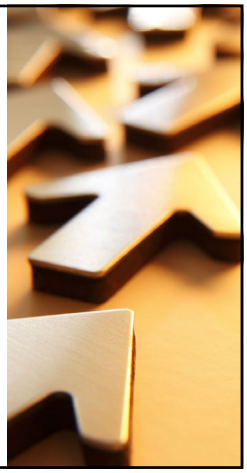
- What types of personal information will the operator collect from students?
- How does the operator use this personal information?
- Does the operator use or share the information for commercial purposes not related to the provision of the online services requested by the school? For instance, does it use the students' personal information in connection with online behavioral advertising, or building user profiles for commercial purposes not related to the provision of the online service? If so, the school cannot consent on behalf of the parent.
- Does the operator enable the school to review and have deleted the personal information collected from their students? If not, the school cannot consent on behalf of the parent.
- What measures does the operator take to protect the security, confidentiality, and integrity of the personal information that it collects?
- What are the operator's data retention and deletion policies for children's personal information?

76

## CONCLUSION

Student Confidentiality Best Practices:

- Develop/revise solid record keeping practices
- Train all staff regarding obligations
- Pause and review requirements



77

## QUESTIONS?

Betsey A. Helfrich
bhelfrichlaw.com

78

Workshop 7

# Update of Recent Ninth Circuit Decisions

By:

**Jan Tomsky**
Attorney at Law/Partner
Fagen Friedman & Fulfrost, LLP
Oakland, California

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

F3 Law

# Ninth Circuit Update

**PNW Institute on Special Education and the Law**

**Presented by: Jan E Tomsky**

1 F3Law.com

## What We'll Cover . . .

F3 Law

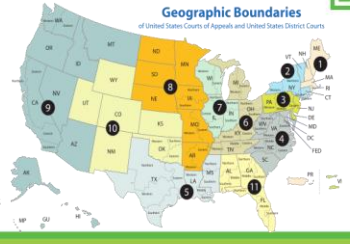
- Overview of decisions issued by Ninth U.S. Circuit Court of Appeals from past five years (2019-2023) concerning provision of services to students under IDEA and Section 504
  - Case analysis
  - Court's rationale
  - Practical implications
  - Note: "Unpublished" decisions are not considered binding precedent, but they may be – and often are – cited as persuasive authority

2 F3Law.com

## The Ninth Circuit

F3 Law

Alaska
Arizona
California
Hawaii
Idaho
Montana
Nevada
Oregon
Washington
Guam
Northern Marianas




3 F3Law.com

# ADA/ Section 504 Claims



## Smith v. Orcutt Union Sch. Dist. (2022)

F3 Law

**Facts:**

- 10-year-old student with autism had significant behavior issues at home and school
- Parent obtained home ABA therapy for student and asked district to allow outside ABA therapists to accompany him during the school day, but district denied the request
- Parent sued, claiming that that district violated student's right under Title II of ADA and Section 504 by failing to accommodate his outside ABA therapists and therefore denying him access to an education
- District court dismissed action



## Smith v. Orcutt Union Sch. Dist. (2022)

F3 Law

**Decision:**

- Ninth Circuit affirmed lower court's dismissal
- Parent failed to prove that district denied student services that he needed to enjoy meaningful access to the benefits of a public education
- While student had serious behavioral issues, parent did not offer anything to show how those issues kept him from accessing an education, "and the district court was not required to draw the inference that they did"
- Evidence only discussed value of ABA therapy to children with autism

(Smith v. Orcutt Union Sch. Dist. (9th Cir. 2022, unpublished) 81 IDELR 153)

## Smith v. Orcutt Union Sch. Dist. (2022)

F3 Law

**Why Does This Case Matter?**

- Evidence demonstrating that a specific therapy is medically necessary for a student is not enough to establish that such therapy necessary for the student to access the student's education
- In this case, although student's doctor had prescribed ABA therapy for student's autism, nothing in the record discussed whether such treatment would be of particular use in allowing student to remain in class, engage with the material, or otherwise access his education.



## Bullying



## Csutoras v. Paradise High Sch. (2021)

F3 Law

**Facts:**

- Student with ADD received academic accommodations under Section 504, but plan did not contain any social interaction accommodations
- Student was assaulted at football game
- Assaulting student admitted that assault was motivated by student's relationship with another student
- Student claimed ADA and Section 504 violation based on USDOE directives in Dear Colleague letters related to peer-on-peer harassment/bullying on basis of disability

## Csutoras v. Paradise High Sch. (2021)

F3 Law

**Decision:**

- District court and Ninth Circuit rejected student's claim
- Court applied precedential "deliberate indifference" standard (where "the school's response to the harassment or lack thereof was clearly unreasonable in light of the known circumstances")
- District was not on notice of any "obvious" need for social-related accommodation, there had been no prior incidents of bullying/harassment directed at student, and no allegations that district ignored any widespread bullying or harassment of disabled students

(Csutoras v. Paradise High Sch. (9th Cir. 2021) 12 F.4th 960, 79 IDELR 152)



## Csutoras v. Paradise High Sch. (2021)

F3 Law

**Why Does This Case Matter?**

- Courts generally do not accept guidance issued from USDOE as binding authority; instead, they are bound to apply prior judicial precedent
- Here, Ninth Circuit found no evidence that Dear Colleague letters addressing bullying were issued as authoritative or official position of USDOE for purposes of private damages actions



## Constitutional Claims

## Herrera v. Los Angeles Unif. Sch. Dist. (2021)

F3 Law

**Facts:**

- Student with autism and asthma attended end-of-year trip to community pool with classmate and school aide
- Aide watched student from designated observation area; saw student exit pool and go to locker room
- Aide waited outside locker room for student to emerge, but student did not change clothes and instead went back to pool
- When aide returned to pool to look for student, lifeguards were trying, unsuccessfully, to resuscitate him
- Parents sued aide and district under Section 1983



## Herrera v. Los Angeles Unif. Sch. Dist. (2021)

F3 Law

**Decision:**

- Ninth Circuit found no liability for constitutional claim of deprivation of familial relationship, as aide's conduct did not amount to deliberate indifference
- Parents provided no evidence that aide knew of immediate threat to student after he watched him enter locker room
- Aide had no "actual knowledge or willful blindness of impending harm"
- Aide was subjectively unaware that student was exposed to dangers of pool "and therefore cannot be liable for his death"

(Herrera v. Los Angeles Unified Sch. Dist. (9th Cir. 2021) 80 IDELR 2)



## Herrera v. Los Angeles Unif. Sch. Dist. (2021)

F3 Law

**Why Does This Case Matter?**

- Ninth Circuit's ruling points out that if districts and educators can show that injury occurred when they were arguably still protecting the student, deliberate indifference standard for constitutional liability is not met
- Nonetheless, districts should consider need for additional supervision during outings that, by their nature, could place students at some risk

## L.F. v. Lake Washington Sch. Dist. #414 (2020)

F3 Law

**Facts:**

- Parent attended meeting at which district determined Section 504 services were not necessary to address his daughter's anxiety
- Parent then began series of numerous communications with district employees that became increasingly aggressive, making certain staff feel intimidated and bullied
- District imposed "Communication Plan" that limited parent to bi-weekly meetings and advised parent that, apart from these meetings, staff would not respond to further communications
- Parent claimed that "Communication Plan" violated First Amendment



## L.F. v. Lake Washington Sch. Dist. #414 (2020)

F3 Law

**Decision:**

- Ninth Circuit found no constitutional violation
- No violation where government entity ignores (or threatens to ignore) communications from outside specified channels
- "Communication Plan" did not bar parent from contacting school employees; rather, it advised him that staff would no longer respond to substantive communications about his daughter's educational services
- Even assuming "Communication" Plan restricted speech, regulation of expressive activity in non-public forum need only be reasonable

(L.F. v. Lake Washington Sch. Dist. #414 (9th Cir. 2020) 947 F.3d 621, 75 IDELR 239)



## L.F. v. Lake Washington Sch. Dist. #414 (2020)

F3 Law

**Why Does This Case Matter?**

- While districts must ensure that parents have right to participate in their child's education, this case points out that districts may set reasonable limits on such participation in instances where a parent's conduct has become hostile or intimidating toward staff
- Here, although the Communication Plan established certain limitations, it still allowed that parent to meet regularly with district administrators

# Eligibility and Evaluations



## Crofts v. Issaquah Sch. Dist. No. 411 (2022)

F3 Law

**Facts:**

- Parents requested evaluation, believing student had dyslexia, based, in part, on independent assessment's conclusions
- District found student eligible under SLD category, with assessment report also citing to parents' assessor's findings
- Parents believed district should have formally evaluated student for dyslexia and that failure to do so violated IDEA requirement to evaluate "in all areas of suspected disability"
- District refused parents' IEE request and filed for due process
- ALJ and district court ruled in district's favor



## Crofts v. Issaquah Sch. Dist. No. 411 (2022)

F3 Law

**Decision:**

- Ninth Circuit upheld district's assessment, finding that it met all legal requirements (also finding that district's IEPs were appropriate)
- District conducted battery of assessments to evaluate student's reading and writing skills areas that dyslexia could impact
- Parents' insistence that district should have evaluated student for dyslexia rather than recognizing her difficulties with reading, writing, and spelling under the broader SLD category was "based on a distinction without a difference"

(Crofts v. Issaquah Sch. Dist. No. 411 (9th Cir. 2022) 80 IDELR 61)

## Crofts v. Issaquah Sch. Dist. No. 411 (2022)

F3 Law

**Why Does This Case Matter?**

- Remember that districts are only required to assess student in particular areas related to suspected disability
- IDEA does not provide parents with right to dictate specific areas that district must assess as part of its comprehensive evaluation
- Of course, if district determines that particular assessment for dyslexia is needed to determine whether student has disability (SLD), then it must conduct such assessment



## D.O. v. Escondido Union Sch. Dist. (2023)

F3 Law

**Facts:**

- Therapist advised district at IEP meeting that she had diagnosed student with autism, which was not previously suspected
- Parent did not deliver therapist's report to IEP team
- Awaiting report, district did not begin assessment plan process for four months
- ALJ: district was justified in waiting to see what tests private therapist used in order to avoid duplication
- District court overturned ALJ: Four-month delay was not reasonable; delay was partially due to staff skepticism of diagnosis



## D.O. v. Escondido Union Sch. Dist. (2023)

F3 Law

**Decision:**

- Ninth Circuit reversed district court, finding no violation of IDEA or California assessment requirements and concluding district's delay was reasonable
  - District court's finding that district's "delay was due, at least in part, to skepticism of its staff" was materially incorrect
  - District could not appropriately conduct autism assessment of student without reviewing private report and any assessment it conducted without such report might have been invalid
  - Even if delay was procedural violation, there was no denial of FAPE as it did not hinder parent participation or deprive student of educational benefit

(D.O. v. Escondido Union School Dist. (9th Cir. 2023) 82 IDELR 125)

## D.O. v. Escondido Union Sch. Dist. (2023)

F3 Law

**Why Does This Case Matter?**

- Ninth Circuit in this case acknowledged that circumstances might exist where district cannot conduct appropriate evaluation for a specific disability without access to a private assessment report
- Due to test-retest effect, publishers of assessment instruments may restrict how frequently any particular assessment can be re-administered and still be considered valid and reliable
- Here, district's expert testimony to this effect and its carefully documented attempts to obtain private assessment report justified its four-month delay in proposing assessment plan



## C.M.E. v. Shoreline Sch. Dist. (2023)

F3 Law

**Facts:**

- Parent of adult student requested that district evaluate her son for special education
- District sent parent consent form describing proposed initial evaluation, which included review of existing data, academic evaluation, age-appropriate transition assessment, and interview
- Parent sent back consent form with modifications, indicating that she did not consent to initial evaluation because she objected to transition assessment and interview, claiming they were unnecessary
- ALJ and district court agreed with district's request to override parent's refusal to consent



## C.M.E. v. Shoreline Sch. Dist. (2023)

F3 Law

**Decision:**

- Ninth Circuit agreed with ALJ and lower court
- District was legally required to include an age-appropriate transition assessment because student was over age 16
- District also reasonably believed that interviewing student "with questions about his interests, strengths, preferences, and needs" was reasonable method of determining his postsecondary goals
  - Parent's objections were based on alleged "traumatic experience" student had in previous interview and district agreed to ensure assessment and interview would be conducted in manner that was comfortable for student

(C.M.E. v. Shoreline Sch. Dist (9th Cir. 2023, unpublished) 82 IDELR 219)

## C.M.E. v. Shoreline Sch. Dist. (2023)

F3 Law

**Why Does This Case Matter?**

- When districts decide to use IDEA's consent override procedures, they must assemble all necessary staff to testify that each of the proposed assessments are appropriate and necessary
- In this case, district was on firm ground when it asserted that IDEA requires that students' IEPs include "appropriate measurable postsecondary goals based upon age-appropriate transition assessments"
- Student interviews can be, and most often are, important component of transition assessment



## Exhaustion of Remedies



## Student A. v. San Francisco Unif. Sch. Dist. (2021)

F3 Law

**Facts:**

- Parents of five unrelated students with disabilities alleged that district systematically failed and refused to fulfill its obligations to:
  - Timely identify and evaluate students who qualify for special education
  - Offer appropriate special education services, and
  - Provide sufficient resources for its special education program
- Parents did not use IDEA administrative process prior to filing lawsuit, claiming that exhausting due process hearing process would be useless since they sought systemic, district-wide reforms that due process could not achieve

## Student A. v. San Francisco Unif. Sch. Dist. (2021)

F3 Law

**Decision:**

- Ninth Circuit affirmed lower court's dismissal of complaint
- Parents did not identify any policy, much less one of general applicability, that IDEA administrative process could not address
- Parents complaint neither identified policies or practices that needed to be addressed nor explained why pursuit of administrative remedies could not correct their deficiencies
- Parents' assertions were "allegations of bad results, not descriptions of unlawful policies or practices"

(Student A. v. San Francisco Unified Sch. Dist., (9th Cir. 2021) 9 F.4th 1079, 79 IDELR 122)



## Student A. v. San Francisco Unif. Sch. Dist. (2021)

F3 Law

**Why Does This Case Matter?**

- Courts have acknowledged that exception to exhaustion of remedies requirement exists when lawsuit alleging denial of FAPE resulted from systemic practice or district policy
- Ninth Circuit has defined a systemic claim as one that either "implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act"
  - If claim does not meet this definition, exhaustion is likely required



## McIntyre v. Eugene Sch. Dist. 4J (2020)

F3 Law

**Facts:**

- Student with ADD and Addison's disease alleged district failed to implement Section 504 plan (testing accommodations and health protocol)
  - Claim alleged that despite plan's emergency protocol requiring school officials to call 911, school officials declined to call for an ambulance
  - Claim also alleged that district failed to submit documentation for student to receive testing accommodations with the College Board, declined to properly record academic credit for independent study and physical education classes from her junior year, and refused to help student obtain the necessary evaluations and approvals for IB and College Board testing accommodations.
- District court dismissed ADA/Section 504 claims on exhaustion grounds

## McIntyre v. Eugene Sch. Dist. 4J (2020)

F3 Law

**Decision:**

- 9th Circuit reversed: Student did not have to seek relief in an administrative proceeding before suing in federal court
  - Accommodations did not qualify as "special education" or "related services" under IDEA
  - Student was seeking relief for the denial of equal access as opposed to denial of FAPE
  - Under Ery test, student could sue other public facilities that failed to provide disability-related testing and any adult at the school could assert same right to accommodations for employment-related examinations

(McIntyre v. Eugene Sch. Dist. 4J (9th Cir. 2020) 976 F.3d 902, 77 IDELR 121)



## McIntyre v. Eugene Sch. Dist. 4J (2020)

F3 Law

**Why Does This Case Matter?**

- This case was one of the first to suggests that Ery decision only applies when student/parent seeks relief for denial of FAPE
  - Court: "Thus, to require exhaustion, a lawsuit must seek relief for the denial of FAPE as defined by the IDEA"
  - IDEA requires districts to develop IEPs detailing special education and related services student needs to receive appropriate educational benefit; Section 504, in contrast, requires districts to ensure that students with disabilities are receiving educational services as effective as those made available to their nondisabled peers



## Paul G. v. Monterey Peninsula Unified Sch. Dist. (2019)

F3 Law

**Facts:**

- Conservator of adult student with autism filed for due process, alleging that student had been denied FAPE because no residential facility in California would accept him
- OAH dismissed claim against CDE and conservator settled with district
- No resolution of issue at due process
- Conservator then sued in federal court for damages and other remedies under ADA and Section 504
- District court dismissed complaint for failure to exhaust administrative remedies under IDEA

## Paul G. v. Monterey Peninsula Unified Sch. Dist. (2019)

F3 Law

**Decision:**

- Ninth Circuit affirmed district court's dismissal
- Claim was educationally related (access to particular kind of school pursuant to IEP) and, therefore, should have been brought under IDEA
- Conservator pursued remedies under IDEA and after settlement "switched gears" to turn to other remedies
- Exceptions to exhaustion rule did not apply
- No systemic violation

(Paul G. v. Monterey Peninsula Unified Sch. Dist. (9th Cir. 2019) 933 F.3d 1096, 74 IDELR 275)



## Paul G. v. Monterey Peninsula Unified Sch. Dist. (2019)

F3 Law

**Why Does This Case Matter?**

- In Fry v. Napoleon Community Schools (2017), U.S. Supreme Court provided clues for courts to decide whether relief sought would be available under IDEA, thereby requiring exhaustion of administrative remedies
  - Whether plaintiff could have brought essentially same claim if alleged conduct had occurred at public facility that was not a school, and
  - Whether adult at the school could have pressed essentially same grievance

But then there's Perez from the U.S. Supreme Court in 2023:



## Perez v. Sturgis Public Schools

F3 Law

**Decision:**

- Because exhaustion requirement applies only to lawsuits that "seek relief . . . also available under" IDEA, Court found that such requirement posed no bar where non-IDEA plaintiff sues for remedy unavailable under IDEA, such as compensatory damages
- Prior ruling in Fry v. Napoleon Community Schools "went out of its way to reserve rather than decide this question"

(Perez v. Sturgis Pub. Schools (2023) 82 IDELR 213)

# Independent Educational Evaluations (IEEs)



## L.C. v. Alta Loma Sch. Dist. (2021)

F3 Law

**Facts:**

- August 10, 2017: District agreed to fund vision therapy IEE for student
- District informed parents that assessor did not meet cost criteria identified in its IEE policy, and repeatedly provided parents with opportunity to petition district to allow exception
- December 5, 2017: District filed for due process hearing after being informed by advocate that parties were at impasse
- ALJ found no unnecessary delay, but district court reversed, finding that district should have advised parents as to amount of excess cost



## L.C. v. Alta Loma Sch. Dist. (2021)

F3 Law

**Decision:**

- Ninth Circuit: No legal basis for district court's decision
- Ongoing communication existed between parties from August until December
- Longest delay in communication was during Thanksgiving break
- Impasse reached on November 30; district filed for due process hearing only 5 days later
- No legal authority obligating district to identify any particular information concerning amount of excess cost

(L.C. v. Alta Loma Sch. Dist. (9th Cir. 2021, unpublished) 849 F. App'x 678, 78 IDELR 271)

## L.C. v. Alta Loma Sch. Dist. (2021)

F3 Law

**Why Does This Case Matter?**

- When parent requests IEE at public expense, district must—without unnecessary delay—either file due process complaint or fund IEE
- Here, Ninth Circuit noted that what constitutes "unnecessary delay" is fact-specific inquiry
  - "For example, when parties 'continued to discuss provision of an IEE,' there was no unnecessary delay in the school district waiting to file for a due process hearing until the parties reached 'a final impasse.' When a school district's delay is 'unexplained,' however, that weighs in favor of finding unnecessary delay."



# Least Restrictive Environment (LRE)



## Solorio v. Clovis Unif. Sch. Dist. (2019)

F3 Law

**Facts:**

- District proposed moving 14-year-old student with intellectual disability to special day class ("SDC") for 42 percent of the school day, which would include all of her academic instruction
- Proposed changed stemmed from district's concern about student's lack of progress in general academic classes
- When parent objected to proposed placement change, district filed due process complaint seeking ruling that its IEP offered FAPE to student
- ALJ and district court found in district's favor

## Solorio v. Clovis Unif. Sch. Dist. (2019)

F3 Law

**Decision:**

- Ninth Circuit affirmed, applying Rachel H. balancing test
- Student was not receiving academic benefit from her general education curriculum
- She could not participate in their classes, could not understand texts did
- Student was not deriving substantial nonacademic benefit from her presence in general education
- Although student had no behavioral issues, two of three Rachel H. factors weighed against general education classroom as LRE

(Solorio v. Clovis Unified Sch. Dist. (9th Cir. 2019, unpublished) 748 F.App'x 146, 74 IDELR 2)



## Solorio v. Clovis Unif. Sch. Dist. (2019)

F3 Law

**Why Does This Case Matter?**

- In Sacramento City Union Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994), Ninth Circuit adopted a four-factor balancing test for determining compliance with LRE:
  - Educational benefits of placement full-time in general classes
  - Non-academic benefits of such placement
  - Effect the student has on the teacher and children in the general class
  - Costs of mainstreaming (rarely used)



## R.M. v. Gilbert Unif. Sch. Dist. (2019)

F3 Law

**Facts:**

- District wanted to increase service minutes provided to kindergarten student with Down syndrome, who had been attending his home school
- IEP team also proposed implementing IEP at another school in its "Academic SCILLS" program
- District issued PWN stating that student would be attending the new school with increase of service minutes to 125 per day outside of general education classroom
- Parents filed for due process, claiming proposed IEP was not LRE and that new setting constituted placement change

## R.M. v. Gilbert Unif. Sch. Dist. (2019)

F3 Law

**Decision:**

- ALJ, district court and Ninth Circuit upheld district's FAPE offer
- Student's needs were not being met in general ed classroom, where he was "his own learning island" with his paraprofessional
- "Lack of educational benefit in a general classroom outweighs any comparably small social benefits"
- Move to new school was change of location, not change of placement because new school could execute student's IEP as written, without making any significant changes to service minutes

(R.M. v. Gilbert Unified Sch. Dist. (9th Cir. 2019, unpublished) 768 F.App'x 720, 74 IDELR 92)



## R.M. v. Gilbert Unif. Sch. Dist. (2019)

F3 Law

**Why Does This Case Matter?**

- Ninth Circuit has made it clear that the four factors in Rachel H. balancing test do not necessarily carry equal weight
- "Even when the other factors weigh in favor of mainstreaming, the student's academic needs weigh most heavily against a mainstream environment." (Baquerizo v. Garden Grove Unified School Dist. (9th Cir. 2016) 826 F.3d 1179)



## D.R. v. Redondo Beach Unif. Sch. Dist. (2022)

F3 Law

**Facts:**

- Student with autism spent 75 percent of school day in general classroom with supplementary aides and services
- District believed that, although student made good progress on goals, he required more direct special education instruction
- District proposed SDC placement for 56 percent of school day
- Parents rejected IEP proposals and removed student to private placement
- ALJ and district court upheld district's proposed placement as LRE

## D.R. v. Redondo Beach Unif. Sch. Dist. (2022)

F3 Law

**Decision:**

- Ninth Circuit overturned district court decision
- Case hinged on first factor of Rachel H. test—academic benefits of general classroom placement
  - Proper benchmark for assessing whether student received academic benefits from placement in general classroom is not grade-level performance, but rather is whether student made substantial progress toward meeting academic goals established in IEP
  - Fact that student receives academic benefits in general classroom as result of supplementary aids and services is irrelevant to analysis required under Rachel H.
- Ninth Circuit, however, denied reimbursement claim because parents privately placed student in even more restrictive setting

(D.R. v. Redondo Beach Unified School Dist. (9th Cir. 2022) 82 IDELR 77)



## D.R. v. Redondo Beach Unif. Sch. Dist. (2022)

F3 Law

**Why Does This Case Matter?**

- Ninth Circuit noted that even if student might have received greater academic benefits in district's SDC than in general classroom, IDEA's "strong preference" for educating disabled children alongside their nondisabled peers is not overcome by showing that special education placement may be academically superior to placement in general classroom
  - "If a child is making substantial progress toward meeting his IEP's academic goals, the fact that he might receive a marginal increase in academic benefits from a more restrictive placement will seldom justify sacrificing the substantial non-academic benefits he derives from being educated in the regular classroom."



## Parent Participation

## Daniels v. Northshore Sch. Dist. (2022)

**Facts:**

- Parents requested district provide them with physical copies of fourth-grade student's assessment protocols and declined to participate in meetings to determine student's eligibility without such materials
- District denied request, citing copyright concerns
- District declined to hold IEP meeting without parents
- Parents alleged that they needed physical copies of testing protocols to meaningfully participate in eligibility meeting, and also claimed district violated the IDEA by failing to develop student's IEP in their absence
- ALJ and district court denied claims



## Daniels v. Northshore Sch. Dist. (2022)

**Decision:**

- Ninth Circuit agreed that district provided parent with ample opportunities to meaningfully participate in IEP development
  - State law does not require districts to provide physical copies of protocols and parents were given ample opportunity to inspect them
- District did not improperly require parent to be present at meeting to establish IEP, as state law required at least one parent to be present during initial determination of eligibility for special education services
- Since parents did not meet with evaluation team to discuss evaluation results, district was not required to move forward with IEP

(Daniels v. Northshore Sch. Dist. (9th Cir. 2022, unpublished) 81 IDELR 154)



## Daniels v. Northshore Sch. Dist. (2022)

**Why Does This Case Matter?**

- Districts make every effort to include parents in IEP process and thoroughly document those efforts
- Here, district demonstrated that it tried to accommodate parents' requests by offering additional time to review and process testing protocols and data without distraction and making school psychologist available to interpret assessment results
  - As a result, parents could not explain how a lack of physical copies prevented them from meaningfully participating in development of student's IEP

# Private Schools

58 F3Law.com

## Capistrano Unif. Sch. Dist. v. S.W. and C.W. (2021)

F3 Law

**Facts:**

- Parents unilaterally withdrew student from public school and enrolled her in private school
- Parents told district that student would stay in private school for the rest of first grade and for second grade
- They sought reimbursement for private school tuition, programs, and related services for both school years
- One of several issues that ultimately reached Ninth Circuit was whether district was obligated to develop second grade IEP for student

59 F3Law.com

## Capistrano Unif. Sch. Dist. v. S.W. and C.W. (2021)

F3 Law

**Decision:**

- Ninth Circuit concluded district was not required to develop IEP while student was in private school
- Court did not differentiate between whether or not claim for reimbursement is pending
- "[R]egardless of reimbursement, when a child has been enrolled in private school by her parents, the district only needs to prepare an IEP if the parents ask for one. There is no freestanding requirement that IEPs be conducted when there is a claim for reimbursement."

(Capistrano Unified Sch. Dist. v. S.W. and C.W. (9th Cir. 2021) 21 F.4th 1125, 80 IDELR 31)

60 F3Law.com

## Capistrano Unif. Sch. Dist. v. S.W. and C.W. (2021)

F3 Law

**Why Does This Case Matter?**

- Ninth Circuit noted that IDEA at 20 U.S.C. § 1412(a)(10)(A) is titled "[c]hildren enrolled in private schools by their parents," and provides that such children need not be given IEPs
- Ninth Circuit recognized that there are not three classes of private school students – student is either placed in private school by IEP team or student is not
- Nonetheless, court stated that district still needs to prepare IEP if parents ask, so districts should be on high alert to monitor correspondence from parents of private school students



# Procedural Violations



## N.F. v. Antioch Unif. Sch. Dist. (2021)

F3 Law

**Facts:**

- Student with ADHD, anxiety and XYY syndrome was initially suspended prior to winter break, with suspension lasting through holidays
- After break, student was removed for three more days, triggering requirement to hold MD review on January 18 (10 school days from initial removal in December)
- District allegedly provided one day notice to parents of MD review
- District held MD review without parents, found student's conduct to be manifestation of disability and returned student to prior placement

## N.F. v. Antioch Unif. Sch. Dist. (2021)

F3 Law

**Decision:**

- Court rejected parents' claim that district improperly held MD meeting without them
- Parents' "lack of presence in the same room as [district] staff . . . did not deprive parents of any meaningful opportunity to participate in the determination of the basis for student's behavior"
- Even if procedural violation occurred, there was no denial of FAPE because results of meeting permitted student to return to classroom

(N.F. v. Antioch Unified Sch. Dist. (9th Cir. 2022, unpublished) 81 IDELR 7)



## N.F. v. Antioch Unif. Sch. Dist. (2021)

F3 Law

**Why Does This Case Matter?**

- Districts should always try to secure parental presence and participation at MD meeting; but they also have IDEA responsibility to hold meeting within 10 days of student's removal from educational placement for disciplinary reasons
- What about Ninth Circuit's decision in Doug C. (parent participation trumps meeting procedural deadlines)? Will other courts/ALJs apply Doug C. principles to MD reviews?



## Residential Placement

## M.S. v. Los Angeles Unif. Sch. Dist. (2019)

F3 Law

**Facts:**

- 16-year-old with ED was dependent child of court after having been removed from grandparents' home
- Court ordered DCFS to provide placement, which it did at locked RTC due to student's need for intensive psychiatric care
  - District provided special education at NPS located within locked facility
- Issue at due process was whether district should have offered RTC placement at IEP meeting as part of FAPE
  - ALJ found that district was not obligated to offer or fund RTC because DCFS provided appropriate placement to address student's mental health needs



## M.S. v. Los Angeles Unif. Sch. Dist. (2019)

F3 Law

**Decision:**

- District court reversed ALJ's decision and Ninth Circuit affirmed
- District had independent obligation to ensure that continuum of alternative placements was available to meet student's educational needs and to consider necessity of residential placement
- Development of IEP was effectively predetermined by district by team's failure to discuss need for residential placement
- Procedural violation effectively denied FAPE by potentially depriving student of educational benefit

(M.S. v. Los Angeles Unified Sch. Dist. (9th Cir. 2019) 913 F.3d 1119, 73 IDELR 195)



## M.S. v. Los Angeles Unif. Sch. Dist. (2019)

F3 Law

**Why Does This Case Matter?**

- Ninth Circuit explicitly rejected district's contention that DCFS's first-in-time residential placement—made pursuant to California law—effectively relieved district of its duty to maintain an "open mind" regarding potential residential placement for educational purposes, as required by IDEA
- State law "merely supplements the IDEA—it does not supersede it or otherwise relieve entities within its purview of their obligations thereunder"

# Stay-Put



## S.C. v. Lincoln County Sch. Dist. (2021)

F3 Law

**Facts:**

- Parent of student, who had severe form of Prader-Willi Syndrome, filed for due process hearing, alleging district had not provided FAPE to student during the period under review (May 21, 2018 to May 21, 2020)
- District developed proposed IEP in September 2020, which was not considered at hearing
- ALJ found district denied FAPE and ordered placement at residential facility to be funded by district
- When district did not comply, parents sued in district court seeking stay-put order



## S.C. v. Lincoln County Sch. Dist. (2021)

F3 Law

**Decision:**

- Ninth Circuit reversed lower court, finding stay-put applied and, accordingly, district was obligated to fund residential placement until it developed new IEP addressing deficiencies identified by ALJ
- Court: District's argument that it could unilaterally nullify ALJ's order by developing September 2020 IEP "is illogical and contrary to the IDEA's procedural safeguards"
- Considering ALJ's order as conditional would require parent to file new due process challenge to September 2020 IEP to receive benefit from favorable ruling in her previous due process challenge

(S.C. v. Lincoln County Sch. Dist. (9th Cir. 2021) 79 IDELR 241)

## S.C. v. Lincoln County Sch. Dist. (2021)

F3 Law

**Why Does This Case Matter?**

- IDEA regulations provide that "[i]f the hearing officer in a due process hearing … agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of [stay put]"
- Although stay-put rule does not prohibit districts from proposing new IEP while due process is pending, such IEP would not serve to nullify any stay-put relief ordered by ALJ if it was not addressed as part of hearing



## Oliver C. v. State of Hawaii Dep't of Educ. (2019)

F3 Law

**Facts:**

- Parents of preschooler with severe medical conditions moved from the Honolulu School District to Windward School District "across the island"
- Windward Department of Education ("DOE") determined that Benjamin Parker Elementary School in the Windward District could implement student's IEP
- Parents objected and filed for due process hearing, also seeking stay-put order to allow student to remain at his school in Honolulu during all proceedings
- IHO and district court denied stay-put request and held that Benjamin Parker was appropriate placement



## Oliver C. v. State of Hawaii Dep't of Educ. (2019)

F3 Law

**Decision:**

- Ninth Circuit affirmed, rejecting claim that moving student from Honolulu to Benjamin Parker school would significantly change his educational placement
- "Change in placement occurs 'when there is a significant change in the student's program'"
- Benjamin Parker school could implement student's IEP and move to that school was not change in placement
- Move was justified due to extended transportation time from Honolulu that would limit instructional hours required in his IEP and possibility of medical emergency during long bus ride

(Oliver C. v. State of Hawaii Dep't of Educ. (9th Cir. 2019, unpublished) 762 F.App'x 413, 74 IDELR 1)

## Oliver C. v. State of Hawaii Dep't of Educ. (2019)

F3 Law

**Why Does This Case Matter?**

- Ninth Circuit again cited to OSEP's Letter to Fisher, 21 IDELR 992 (OSEP 1994) to point out that, under the IDEA, "a change in location alone would not substantially or materially alter the child's educational program"




**Thank you for attending!**
**And thank you for all you do for students!**



F3 Law

BUSINESS & FACILITIES
CHARTER SCHOOLS
eMATTERS
GOVERNANCE & LEADERSHIP
HIGHER EDUCATION
LABOR & EMPLOYMENT
LITIGATION
STUDENT SERVICES & SPECIAL EDUCATION

F3Law.com

Fresno | Los Angeles | Oakland | Inland Empire | Sacramento | San Diego

Workshop 8

# Assistive Technology vs. Really Cool Tech: Knowing and Explaining the Difference

By:

**Geneva Jones**

Founding/Managing Director
Geneva Jones & Associates
Sugar Land, Texas

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# Assistive Technology vs. Really Cool Tech:

## Knowing and Explaining the Difference

GJ&A

1

## Assistive Technology Defined

2

## Assistive Technology

Assistive technology device means 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 such device.

34 C.F.R. § 300.5

3

## Assistive Technology Service

An assistive technology service is any service that directly assists a child with a disability in the selection, acquisition, or use of an AT device. AT services may include:

- Evaluating the student's needs;
- Purchasing, leasing, or otherwise providing for the acquisition of AT devices by children with disabilities;
- Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing AT devices;
- Coordinating and using other therapies, interventions, or services with AT devices;
- Providing training or technical assistance to a child with a disability or, if appropriate, the child's family; and
- Providing training or technical assistance for professionals, employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the child's major life activities.

34 CFR 300.6

4

## Assistive Technology Service

The IEP Team and/or Section 504 Committee must determine if a student needs assistive technology devices and/or services.

5

## Assistive Technology Service

Assistive Technology services or an Assistive Technology Device can be provided as a supplementary aide and service and utilized by the classroom teacher.

Assistive Technology can also be a related service and implemented by an assistive technology specialist and/or part of a student's goals or objectives in the IEP.

6

## Developing the IEP

In developing each child's IEP, the IEP Team must consider whether the child needs assistive technology devices and services.

34 C.F.R. § 300.324

7

## Documenting AT Needs

The Office of Special Education Programs within the U.S. Department of Education has requires the IEP Team to include to specifically state whether a child requires Assistive Technology devices or services.

Letter to Anonymous, 18 IDELR 627 (OSEP 1991).

8

## Documenting AT Needs

The IEP Team is also required to describe the Assistive Technology devices and services that the Team recommends/offers to the student.

District of Columbia Pub. Schs., 120 LRP 22532 (SEA DC 06/21/20)

9

## Funding

Where the IEP team determines that the student needs the device or service to receive FAPE and it includes the offer of the Assistive Technology device in the IEP, the education agency is responsible for funding and providing the device.

The education agency is responsible for the acquisition and maintenance of the Assistive Technology device

Where the device is not required to provide the student a FAPE, the education agency is not required to purchase devices the student would require regardless of whether the student is attending school.

Letter to Anonymous, 24 IDELR 388 (OSEP 1996).
Letter to Cohen, 19 IDELR 278 (OSERS 1992).

10

## Maximize the Student's Experience is NOT Required

A district is not required to select a more costly device that may provide more or better assistance to the student and maximize his or her education.

Board of Educ. of the Hendrick-Hudson Cent. Sch. Dist. v. Rowley, 553 IDELR 656 (U.S. 1982).

11

## District's Cannot Cut Corners to Save Money

Education agencies cannot select a device that is inconsistent with or otherwise does not meet the student's needs based on the cost of the device.

Greenwood County Sch. Dist. #52, 19 IDELR 355 (SEA SC 1992).

12

## The Student Likes His/Her Personal Device Better

Education agencies cannot "opt-out" of providing an Assistive Technology device required by a student's IEP by permitting the student to use his own device.**

Washoe County Sch. Dist., 69 IDELR 201 (SEA NV 2016).

**Unless…

- It is done through a Release Agreement

13

## Parent/Student Preference Does Not Equal FAPE

An Education Agency is not required to provide a student or parent's preferred Assistive Technology device based solely on their preference. It is only required to provide the student with the Assistive Technology device that meets the student's individual needs.

Logan City Sch. Dist., 75 IDELR 25 (SEA UT 2019).

14

## H.G. by Davis v. School Dist. of Upper Dublin

- The IEP Team conducted an AT assessment and developed a plan detailing several different interventions and various point people for their implementation.
- "While the Plan did not specifically address the use of an iPad, this is of no import. A school district does not fail to provide a child with a FAPE simply because it employs one assistive technology over another, so long as the technology employed is reasonably calculated to permit the child to receive educational benefits. See Sherman v. Mamaroneck Union Free Sch. Dist., 340 F.3d 87, 93-94 (2d Cir. 2003) (holding that a school district did not fail to provide a child with a FAPE when it denied the assistive technology preferred by the student's family in favor of a different technology reasonably calculated to permit educational benefit).
- Here, the District's assistive technology plan included use of a laptop."

115 LRP 16574

15

## H.C. ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist.

- Parents argued that the student's IEP did not adequately address assistive technology because it specified the use of the "Radium" broadcast FM system as opposed to the "Phonak" personal system.
- The Court held that the District did not deny a FAPE simply because the IEP provided for a different assistive technology than the model preferred by the parents' audiologist, particularly where the parents offered no evidence to demonstrate the inadequacy of the Radium system.
- "The IDEA does not require that an IEP furnish "every special service necessary to maximize each handicapped child's potential," Rowley, 458 U.S. at 199, and a school district does not fail to provide a child with a FAPE simply because it employs one assistive technology over another, so long as the technology employed is reasonably calculated to permit the child to receive educational benefits, see Sherman v. Mamaroneck Union Free Sch. Dist., 340 F.3d 87, 90, 94 (2d Cir. 2003)"

61 IDELR 121

16

## Having Hard Conversations

17

## Assistive Technology

Assistive Technology device is any item, piece of equipment, software program, or product system that is used to increase, maintain, or improve the functional capabilities of persons with disabilities.

18

## Low/Mid Tech

Low and Mid Tech Assistive Technology devices are equipment that does not require much training, may be less expensive, and do not have complex or mechanical features.

- Talking calculator
- Graphic organizer
- Visual schedule
- Velcro
- Binder clips
- Memory aids
- Colored transparency
- Audio book
- Voice amplification
- Electronic dictionary
- Manuel scooter
- Notetaking systems
- Braille translation software
- Adapted seating (wiggle cushions, bouncy ball chairs, tennis balls on the legs of the chair)
- Adapted keyboards
- Gait trainers
- Mounting systems
- Communication boards/Picture exchange
- Tactiles
- Magnifier
- Portable Ramps
- Adaptive seatbelts
- Reminder systems

19

## High Tech

High Tech Assistive Technology devices are equipment that can be complex with mechanical features, software, and programming.

- E-Reader
- Touch screen devices
- Speech recognition software
- Text-to-speak
- Progress monitoring software
- Special-purpose computers
- Specialized software
- Electronic mobility devices
- Power lifts
- Eye-gaze trackers
- Smart boards
- Alerting devices
- GPS monitoring devices
- Ipads/Kindle/Tablets
- Hands-Free mouse using eye movement
- Voice recognition

20

## Immerging Request for New Technology

- LOTS OF DYSLEXIA PRODUCTS
  - Laser AI Reader
  - Devices and software for Text to Speech, Highlighting, Screen Masking, as well as Picture Dictionaries
- Segway
- GPS Tracker
- Hands-free Mouse
- Reading Pen
- Music therapy headphones
- Smart watches
- Conversion of text/handwriting to sound software
- Writing Software
- Smart Gloves
- Car for the visually impaired
- Eye tracking
- Artificial Vision Device
- Robotic Arm
- Stair-climbing wheelchairs
- Ultrasonic Cane with GPS and voice response
- Braille Watch

21

When is New Technology Required

22

What Educational NEED Does the Technology Address?

23

Let's Consider:

The Segway

24

Let's Consider:

The GPS Tracker

25

Let's Consider:

Smart Gloves

26

Let's Consider:

Writing Software

27

When Does New Technology Change FAPE?

28

If you offer Drivers Education, do you need a car for the visually impaired so that students with visual impairment can participate?

29

As Technology Advances our Concept of What Constitutes FAPE will naturally evolve.

30

## Assistive Technology

Assistive technology device means 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 such device.

34 C.F.R. § 300.5

31

## Geneva Jones

National Speaker and Special Education Law Expert
Licensed in:
California
New York
Texas

Geneva Jones & Associates
2245 Texas Drive, Suite 300
Sugar Land, TX 77479

WWW.Geneva-Jones.Com

2 YEARS SUPER LAWYERS
3 YEARS RISING STARS

32

Workshop 9

# Education Decision-Maker Dilemmas

By:

**Betsey A. Helfrich**
Attorney
The Law Office of Betsey Helfrich, LLC
St. Louis, Missouri

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# Decision Maker Checklist

Betsey A. Helfrich

bhelfrichlaw.com

## ❒ Prepare and Train Staff to Handle Parent Matters that Impact their Job

- Request current copies of parenting plans and custody orders
  - Train front office professionals to review and save key information to protect student safety in student information systems
- Examine student dismissal procedures
  - Ensure District written policies reflect current practices
- Refine procedures to respond to requests for information and release of student documentation
- Develop protocol for staff to respond to requests from parents to call their attorney, draft letters of fitness, or testify at custody proceedings

## ❒ Properly Respond to Parent Requests for Student Records

- Family Education Rights and Privacy Act (20 USC 1232g; 34 CFR 99)
  - Parent is defined as "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 20 USC 1232g
  - FERPA provides rights to either parent, regardless of custody, unless the school has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights. 34 CFR 99.4
  - FERPA has been interpreted to provide step-parents the right to obtain student records. *Letter to Parent* (FPCO 2004)
  - Obtain parental consent in writing when authority in question

- IDEA Regulations (34 CFR 300.613):
  - Access must be provided without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made.

- Washington Law (RCW 26.09.22)
  - Access to child's education and health care records

    (1) Each parent shall have full and equal access to the education and health care records of the child absent a court order to the contrary. Neither parent may veto the access requested by the other parent.

    (2) Educational records are limited to academic, attendance, and disciplinary records of public and private schools in all grades kindergarten through twelve and any form of alternative school for all periods for which child support is paid or the child is the dependent in fact of the parent requesting access to the records.

❒ **Plan IEP and 504 meetings to Ensure Parent Participation**

- Parents are key members of the IEP and 504 Teams
  - Under Section 504 Districts must ensure that the placement decision is made by a group of persons, *including persons knowledgeable about the child*, the meaning of the evaluation data, and the placement options… 34 CFR 104.35(c)
  - IEP Teams must Include:

    (1) The parents of the child;

    (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

    (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;

    (4) A representative of the public agency who—

    (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

    (ii) Is knowledgeable about the general education curriculum; and

    (iii) Is knowledgeable about the availability of resources of the public agency.

    (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

    (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

    (7) Whenever appropriate, the child with a disability.
  - When parents cannot attend in person, they may agree to use alternative means of meeting participation, such as video conferences and conference calls. 34 CFR 300.328
  - Do not place compliance with timelines over parental participation

## ❒ Carefully Consider who Has Decision Making Rights

- Under IDEA regulations and for purposes of determining who is entitled to procedural safeguards, "parent" means:
  (1) A biological or adoptive parent of a child;
  (2) A foster parent, unless State law, regulations or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
  (3) A guardian generally authorized to act as the child's parent or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
  (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
  (5) A surrogate parent who has been appointed in accordance with IDEA
  34 CFR300.30
- The biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. 34 CFR 300.30
- Washington State: Unless guardianship or other measures are taken in accordance with state law, IDEA rights transfer to the student at the age of majority – Age 18. WAC 392-172A-05135

## ❒ Train All Levels of Building Professionals

- Training topic ideas:
  - Parent participation under the IDEA
  - Conducting difficult manifestation determination meetings
  - FERPA compliance
  - Handling difficult parent conversations
  - Strategies to determine appropriate protocol for difficult parent issues
  - How to respond to requests for letters of fitness or testimony in court

- Keep record of each employee participating in training and maintain training materials

By Betsey A. Helfrich
October 11, 2023

# *Educational Decision Maker Dilemmas*

## Scenario

You are the Principal at Sunny Elementary. Your front office gets a call from Johnny's mom at 11:15am. She says that little Johnny has a dentist appointment in 15 minutes and she is unable to leave work to get him. She says she will send her neighbor and she authorizes the school to release her Johnny to her neighbor.

The neighbor arrives and shows his ID.

The student recognizes the neighbor and leaves with him.

## Case Review

San Diego, California

Student, Enrique's mother was deported and Enrique went to live with his father.

Mom called the school approximately 1 month after deportation and spoke to the office manager.

Mom said Enrique had a dr. appointment and she couldn't leave work.

## Case Review

Mom said she would send her boyfriend to pick him up.

Office manager checked and saw that boyfriend was not listed on Enrique's emergency card as an authorized person who can pick him up.

Office manager said if boyfriend showed ID when he came to school, he could pick up Enrique.

## Case Review

When boyfriend showed up, they checked his ID, Enrique seemed "happy to see him".

Enrique was taken to Mexico.

Dad sued the District, the Principal and office manager.

## Case Review

Case hinged on the District handbook which read: "If a student needs to be dismissed during the day, the school will only let him or her be signed out by someone who is listed on the emergency card…We will not release your child to anyone not listed on the emergency card."

Boyfriend was not listed on emergency card.

Jury awarded the father $2 million in damages and Enrique $850,000.

## Student Dismissals

- What do you have in writing?
- Does what is in writing reflect your current practice?
- Has your staff been trained on dismissal procedures and policies?
  - Focus on consistency among buildings
  - Use student information systems to flag key/emergency information

## Scenario

You are having a busy day in the office. You receive a call from parent, Bob Smith. He asks you to recall last Monday when little Billy's mom brought him in late to school and Billy's shirt was on backwards and his hair was uncombed. You say you remember. He says, "Good. I need you to call my lawyer, Allie McBell, at #816-555-0000 today to tell her about that day." Should you just give Allie a quick call to help Bob out?

## Answer

No

Parents may ask staff to call their attorney to relay information.

"We are not permitted to speak to attorneys directly. I can direct you to my principal if you want to further discuss this."

# IDEA & Parent Participation

## Scenario

Mom lives in Southern California. She gets visitation with her children on holidays. She calls and asks for a copy of her child's most recent 504 documentation and asks to Zoom into the eligibility meeting. Dad has previously told you that Mom is behind on child support payments and has asked that you not share any information with Mom until "she pays up."

## Answer

Family Education Rights and Privacy Act

- Parent is defined as "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 20 USC 1232g
- FERPA provides rights to either parent, regardless of custody, unless the school has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights. 34 CFR 99.4

## Access to Records- IDEA

IDEA Regulation (34 CFR 300.613):

- Access must be provided without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made.

## Access to Records- Washington

RCW 26.09.22:

- Access to child's education and health care records.
  - (1) Each parent shall have full and equal access to the education and health care records of the child absent a court order to the contrary. Neither parent may veto the access requested by the other parent.
  - (2) Educational records are limited to academic, attendance, and disciplinary records of public and private schools in all grades kindergarten through twelve and any form of alternative school for all periods for which child support is paid or the child is the dependent in fact of the parent requesting access to the records.

## Scenario - Access

Mom and Dad are divorced. Dad is recently remarried. Student lives with Mom every 2 weeks and Dad every 2 weeks. Mom calls you and says that she does not give permission to Dad's new wife to request report cards or have access to the student's special education documentation and she talked to her lawyer and you need Mom's written permission before you share any information directly with stepmom.

## Answer

A stepparent has FERPA rights where the stepparents is present on a day-to-day basis with the natural parent and child and the other parent is absent from that home. That stepparent has the same rights as natural parents.

*See Letter to Anonymous*, 109 LRP 25235 (FPCO 2009)

## Access to Records

*Letter to Anonymous*, 118 LRP 3628 (FPCO 2017):

- First grade teacher discussed child's homework, behavior and attendance with mother's new spouse during parent teacher conference
- Father filed complaint saying FERPA rights were violated
- Because it appeared mother gave teacher permission to share information about the child with her partner, no FERPA violation occurred
- "FERPA gives parents, *both custodial and noncustodial alike* (emphasis added), the right to inspect and review their children's education records, the right to seek to amend the education records and the right to consent to the release of education records, including to a new spouse or paramour, unless the school has evidence that there is a court order or State law which specifically provides to the contrary."

## Scenario

Dad and Mom are recently estranged, but still married. Bobby's annual IEP meeting is tomorrow. Bobby's dad calls you and says:

I have a restraining order against Mom. You will need to send her an email banning her from campus and the IEP meeting tomorrow.

## Restraining Orders

- Ask for a copy
- Who does it apply to?
- What are the restrictions?
- Is this a temporary or permanent order?
- School District role in enforcement of the order?
- The rights of married parents to participate in their child's IEP remain unchanged unless order directs otherwise
  - be creative to allow both parties to participate

## Parental Participation

Email to Bobby's Mom:

*Bobby's annual review due date is coming up next Thursday. I know it is late notice, but we need to meet on Wednesday. The meeting will be in my office at 1pm. Hope to see you there. I know you indicated next week wasn't great for you work-wise, however we are required to meet before the 504 expires on Thursday.*

## Revised:

*Good afternoon. I would like to schedule a time to meet with you and Bobby's 504 team to conduct his annual review. I know we discussed some changes we think would be beneficial before next school year. His annual review date is next Thursday, however you indicated to me when we spoke that next week isn't great for you work-wise. If you can give me some dates that work on your end for the following week I can get a meeting set up. Bobby's current 504 plan will remain in effect until we get the chance to meet and revise it.*

## Team Members

Section 504 Regulations:

- Districts must ensure that the placement decision is made by a group of persons, *including persons knowledgeable about the child*, the meaning of the evaluation data, and the placement options… 34 CFR 104.35(c)
- 504 - The regulations do not explicitly include parents, but "parents are key members of this knowledgeable group."
  - Escondido (CA) Union Elem. Sch. Dist., 109 LRP 24519 (OCR 1/06/09)

## 504 Team

Convene "group of knowledgeable persons" within 30 calendar days of determination that reason to suspect exists.

Who?

| | | | |
|---|---|---|---|
| Student's teacher | Counselor | School nurse (depends on situation) | Parents |

## Parental Participation

*St. Hope (CA) Pub. Schs.*, 120 LRP 18723 (OCR 2020):

Student had a medical condition that caused her to miss a significant amount of school.

District's attempt to develop a Section 504 plan during a phone call with the parent failed as not all team members were present and it did not address the parent's concerns.

- not a decision made by a group of persons knowledgeable about the student based on a variety of sources

Only three of the student's five teachers signed the 504 plan which was developed during a phone call (not a meeting)

Dean of school distributed plan to obtain teachers' signatures and left the plan at the front desk for the parent to sign.

## Team Members

IDEA Team Members:

34 CFR 300.321

General. The public agency must ensure that the IEP Team for each child with a disability includes:
(1) The parents of the child;
(2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
(3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
(4) A representative of the public agency who—
(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
(ii) Is knowledgeable about the general education curriculum; and
(iii) Is knowledgeable about the availability of resources of the public agency.
(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
(7) Whenever appropriate, the child with a disability.

## Parent Participation

B.D. v. District of Columbia, 80 IDELR 38 (D.C.D.C. 2021):

Student with multiple disabilities

Dispute between parents and IEP team regarding placement

Meeting date was rescheduled. Before rescheduled date, parents placed student in a facility and assumed meeting wasn't going forward based on response letter of District. When they learned meeting was proceeding, parents asked to reschedule, explaining that while they "would very much like to attend an IEP meeting," they had assumed the meeting was cancelled. Because they thought meeting was canceled they hadn't made child care arrangements or prepared for meeting.

The school moved forward with the meeting and the meeting minutes noted the need to "remain in compliance [with the requirement that IEPs be updated at least annually]."

Parents asked for a new meeting and ultimately the team met again but meeting was limited.

Parents received Prior Written notice informing them of student's change of placement.

Parents claimed that moving forward with the meeting without them violated their procedural rights.

The Court agreed noting:

"In order to ensure meaningful participation, LEAs "must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting." 34 C.F.R. § 300.322(a). This includes "[s]cheduling the meeting at a mutually agreed on time and place." *Id.* § 300.322(a)(2). When parents cannot attend in person, they "may agree to use alternative means of meeting participation, such as video conferences and conference calls." *Id.* § 300.328. But DCPS may only hold a meeting without a parent if it is "unable to convince the parents that they should attend." *Id.* § 300.322(d).

"The regulatory scheme puts a clear thumb on the scales--parental participation is required up until the point the local educational agency can no longer convince the parents they "should" attend an IEP meeting. See 34 C.F.R. § 300.322(d). Accordingly, the District may be required to accommodate parents even where they are difficult, contentious, or comparatively more at fault in a scheduling mix-up."

## Parent Participation

**B.B. v. DOE State of Hawaii, 78 IDELR 249 (D.C. Ha. 2021)**

- **Student - an 8 year-old boy who has been diagnosed with Autism Spectrum Disorder, Attention-Deficit/Hyperactivity Disorder, Oppositional Defiant Disorder, and Separation Anxiety Disorder.**
- **IEP Team began examining potential alternative placements.**
- **Mom refused to work with district officials and ignored requests to schedule meetings.**
- **Student's Mother created a home program which she stated she found through an internet advertisement and began partially implementing.**
- **Student's Mother requested that the DOE pay for her self-administered home program, which she claims costs up to $16,000 per month.**
- **The Administrative Hearings Officer found that Student's Mother prevented the DOE from establishing a suitable placement for Student. This decision was upheld by district court.**
- **Student's Mother refused to provide Student's current medical records to the IEP team. She canceled meetings, ignored requests, and refused to provide consent for Student to attend a separate facility.**
- **Student's Mother did not establish a procedural violation by the DOE because she herself caused the delay in implementation of the IEP.**


## Scenario

Jan, age 16, now lives with her boyfriend and his mom. Jan's mom still lives in your district boundaries and is less than pleased that Jan isn't living at home but is allowing it until the end of the school year. It is time for Jan's annual review meeting. Jan and her boyfriend's mom contact you and direct you not to invite Jan's mom to the meeting. What do you do? Who is the decision maker at the meeting?

## Definition of Parent

Under IDEA regulations and for purposes of determining who is entitled to procedural safeguards, "parent" means:

(1) A biological or adoptive parent of a child;
(2) A foster parent, unless State law, regulations or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
(3) A guardian generally authorized to act as the child's parent or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
(5) A surrogate parent who has been appointed in accordance with IDEA

34 CFR 300.30

## Definition of Parent – Washington

WAC 392-172A-01125 Parent.: (1) Parent means:

(a) A biological or adoptive parent of a child;
(b) A foster parent;
(c) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the student, but not the state, if the student is a ward of the state;
(d) An individual acting in the place of a biological or adoptive parent including a grandparent, stepparent, or other relative with whom the student lives, or an individual who is legally responsible for the student's welfare; A surrogate parent who has been appointed in accordance with WAC 392-172A-05130.

## Definition of Parent – Washington

WAC 392-172A-01125:

(2)(a) Except as provided in (b) of this subsection, if the biological or adoptive parent is attempting to act as the parent under this chapter, and when more than one party meets the qualifications to act as a parent, the biological or adoptive parent must be presumed to be the parent unless he or she does not have legal authority to make educational decisions for the student. (b) If a judicial decree or order identifies a specific person or persons under subsection (1)(a) through (d) of this section to act as the "parent" of a child or to make educational decisions on behalf of a child, then that person or persons shall be determined to be the "parent" for purposes of this section. (3) The use of the term, "parent," includes adult students whose rights have transferred to them pursuant to WAC 392-172A-05135.

## Definition of Parent

34 CFR 300.30:

The biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section.

## Scenario

Mom doesn't believe in doctors and doesn't want her child to receive a diagnosis, Dad wants a 504 plan for his son. Mom is open to the idea but refuses to provide a doctor's note. Can the 504 evaluation team go forward?

*Yadkin County (NC) Schs.*, 76 IDELR 132 (OCR 2019):

-Student with behavior concerns

-Teacher indicated to the parent that the Student "could potentially receive a 504 plan due to this reported diagnosis if she were to provide a medical diagnosis to the school."

-District argued that "it was not officially made aware" of the student's disability because it never received a medical diagnosis from the parent.

-Child find obligations at 34 CFR 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability

-District resolved the complaint prior to issuance of the findings

*A medical diangosis is not required to start the 504 process

## Section 504 Decisions

- Section 504 does not require that all members of the team agree to educational decisions. If parents disagree with the team decision, they may resolve the dispute through a due process hearing.
  - *Calvert County (MD) Pub. Schs.*, 41 IDELR 139 (OCR 2003)
  - See also *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools* (OCR 2016)
  - Provide Notice of Action and Procedural Safeguards

## Saying No

**What To Say:**

**-Ultimately, based on the input of the team, I am going to deny that request as not required for FAPE for Bobby.**

**-I'll provide you a notice of action and your procedural safeguards.**

**What NOT To Say:**

**-We don't do that here.**

**-I already talked to the superintendent and she said no.**

**-That would cost way too much money and our budget has no room for it.**

**-We would have to hire someone to do that and the District will never go for it.**

## Section 504 Procedural Safeguards

Required Elements:

1. Notice
2. Opportunity for parents to review relevant records
3. Impartial Hearing with:
   a. Opportunity for parent participation; and
   b. Representation by counsel
4. Review procedure

## IDEA - Who meets the definition of "parent?"

*Q.T. v. Pottsgrove Sch. Dist.,* 123 LRP 18151 (3d Cir. 2023):

- Student lived with adult cousin.
- A court order granted primary physical and legal custody of the student to the student's grandmother who lived in another district while also preserving the educational rights of the biological father.
- The adult cousin has been making educational decisions for the student for several years, including providing consent for an evaluation that concluded that the student was not eligible for IDEA services and requesting an IEE.
- The district proposed a 504 plan instead of an IEP for the student, and the cousin filed for due process on the student's behalf seeking IDEA services.

The hearing officer based on the Court order and language of the IDEA regulations that give priority to biological parents and court-appointed educational decision-makers found cousin couldn't file due process.

Court found that under IDEA, the term "parent" clearly includes "an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare."

Cousin was acting in the place of the student's natural parent. The evidence shows that the student has lived with the cousin for two years and that she has been supporting the student and assumed all personal obligations related to school requirements.

Accordingly, under IDEA, the cousin qualified as a parent for purposes of IDEA as the individual with whom the student lives and who is legally responsible for her welfare.

## Guardians

- Established by Court?
- Power of Attorney?
- Living with Relative?
- *Family & Children's Ctr., Inc. v. School City of Mishawaka*, 19 IDELR 780 (N.D. Ind. 1993): noting that a relative may be identified as a parent under state law if the relative accepts full legal responsibility for the student and lives with the student
- *Oakland Unified Sch. Dist.*, 114 LRP 34251 (SEA CA 14): finding that a district was required to notify a child's great-aunt of his IEP meetings under state law once she became his legal guardian
- *Clinton Pub. Schs.*, 115 LRP 15936 (SEA MA 15): finding that because the parent designated the grandparents as the student's caregivers, the grandparents had the authority to file for due process on the student's behalf.

## Scenario

Dad and Mom are divorced. Dad has visitation but is not the educational decision maker. Mom has agreed with the rest of the IEP team to change student's placement to a private placement. Dad disagrees and wants stay put to take effect. He files a due process complaint. You had the consent of mom in writing for an immediate change of placement. Will this case proceed to hearing?

- A parent who does not have the right to make educational decisions cannot bring claims relating to the child's education.
- *Rech v. Alden Cent. Sch. Dist.*, 68 IDELR 224 (W.D.N.Y. 2016): a parent who does not have legal authority to make educational decisions has no standing to bring a FAPE claim on their child's behalf
- *A.B.-L. v. North Shore Cent. Sch. Dist.*, 72 IDELR 160 (E.D.N.Y. 2018): because there was no evidence of any joint decision-making authority with respect to education in favor of the noncustodial mother, the mother had no standing to bring claims under the IDEA

Washington State child custody and parenting plans are governed by RCW 29.09

- Primary residential parent
- Shared residential schedule
- Major decision-making authority
- Ask for most recent copy

## Scenario

Billy has been evaluated and recently determined by an IEP team to meet initial IDEA eligibility criteria. Both parents attended the review of existing data and eligibility meeting. Mom gives her consent to the provision of initial services. Dad said he wanted to think about it. Five days later, dad informs you in writing that he is revoking parental consent to provide IDEA services. The next day mom writes you a notarized letter giving her consent to re-start services.

## Scenario

- Review applicable custody documentation
- Who has educational decision making rights? What if it's both parents?
- Address the heart of the concern
- Pause and seek counsel

*Scituate Public Schools*, 122 LRP 40151 (SEA MA 22): The district violated the procedural rights of the mother and the student under Massachusetts state law and the IDEA when it didn't evaluate student based on mother's consent even though father refused consent.

## 504 & Parental Consent

Must a recipient school district obtain parental consent prior to conducting an initial evaluation?

Yes. OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.

Section 504 and the Education of Children with Disabilities at https://www2.ed.gov/about/offices/list/ocr/504faq.html (question 42)

## Scenario

Greg just turned 18 and his IEP meeting is approaching. Greg made some questionable decisions lately and is at odds with is parents about his college plans. His parents provide you a notarized document from Greg's nurse practitioner stating:

> *Due to Greg's below average IQ and my assessment, I deem him incapable of making age-appropriate decisions and recommend his parents remain his educational decision makers under the IDEA.*

## Eligible Student

WAC 392-172A-05135 Transfer of parental rights to the student at age of majority.
(1) Subject to subsections (4) and (5) of this section, when a student eligible for special education services reaches the age of eighteen or is deemed to have reached the age of majority, consistent with RCW 26.28.010 through 26.28.020: (a) The school district shall provide any notices required under this chapter to both the student and the parents; and (b) All other rights accorded to parents under the act and this chapter transfer to the student. (2) All rights accorded to parents under the act transfer to students at the age of majority who are incarcerated in an adult or juvenile, state, or local correctional institution. (3) Whenever a school district transfers rights under this section, it shall notify the student and the parents of the transfer of rights. (4) Students who have been determined to be incapacitated pursuant to chapter 11.88 RCW shall be represented by the legal guardian appointed under that chapter.

## Eligible Student

(5) Students over the age of eighteen who have not been determined incapacitated under chapter 11.88 RCW, may be certified as unable to provide informed consent or to make educational decisions, and have an educational representative appointed for them pursuant to the following procedures:

(a) Two separate professionals must state in writing they have conducted a personal examination or interview with the student, the student is incapable of providing informed consent to make educational decisions, and the student has been informed of this decision. The professionals must be: (i) A medical doctor licensed in the state where the doctor practices medicine; (ii) A physician's assistant whose certification is countersigned by a supervising physician; (iii) A certified nurse practitioner; (iv) A licensed clinical psychologist; or (v) A guardian ad litem appointed for the student.

(b) When it receives the required written certification, the school district will designate an educational representative from the following list and in the following order of representation: (i) The student's spouse; (ii) The student's parent(s); (iii) Another adult relative willing to act as the student's educational representative; or (iv) A surrogate educational representative appointed pursuant to and acting in accordance with WAC 392-172A-05130. (c) A student shall be certified as unable to provide informed consent pursuant to this section for a period of one year. However, the student, or an adult with a bona fide interest in and knowledge of the student, may challenge the certification at any time. During the pendency of any challenge, the school district may not rely on the educational representative under this section until the educational representative obtains a new certification under the procedures outlined in (a) of this subsection. If a guardianship action is filed on behalf of the student while a certification is in effect, the school district must follow any court orders in the guardianship proceeding regarding the student's capacity. (6) Nothing within this section shall prevent a student, who has reached the age of majority, from authorizing another adult to make ucational decisions on that student's behalf using a power of attorney consistent with the requirements in chapter 11.125 RCW.

## Eligible Student

*Leigh Ann H. v. Riesel ISD*, 80 IDELR 3 (5th Cir. 2021):

Student who recently turned 18 argued that his exclusion from a manifestation determination review meeting denied him a meaningful right to participate.

The district held a second meeting about a week later and the student attended.

Student disagreed with the result of the manifestation determination meeting and challenged decision.

The Court ruled in favor of the district on the harmless procedural error.

## Difficult Parent Dilemmas

*J.D. v. East Side Union High School District,* 78 IDELR 35 (N.D. Cal. 2021):

IEP team sent parent a Prior Written Notice informing the parent that their child was no longer eligible for IDEA services.

Parent claimed decision wasn't a proper team decision.

Hearing officer upheld District decision due to the actions of Student's father.

Father repeatedly interrupted others and prevented them from presenting their reports at meetings and repeatedly canceled meetings that were scheduled.

## Communication

*L.F. v. Lake Washington Sch. Dist. #414, 75 IDELR 239 (9th Cir. 2020):*

- District established communication plan with parent that limited discussions about his daughter's need for Section 504 plan to biweekly in- person meetings with administrators
- Plan did not bar parent from contacting school employees; rather, it advised him that employees would not respond to substantive communications
- Parent claimed that district's actions violated his First Amendment rights
- Communications plan did not restrict parent's right to advocate on student's behalf
- Plan was reasonable in light of parent's repeated emails to school staff
- School was not forum for public expression and, as such, district could set reasonable limits on time, place, and manner of parent's communications

## Conclusion

Tips:

- Ask for documentation in writing
- Pause
- Train

THE END!

Thank you!

bhelfrichlaw@gmail.com

Workshop 10

# Addressing Bullying Behavior when the Student with a Disability is the Victim and the Perpetrator

By:

**Geneva Jones**
Founder/Managing Director
Geneva Jones & Associates
Sugar Land, Texas

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# Addressing Bullying Behavior when the Student with a Disability is the Victim and the Perpetrator

GJ&A

1

## Federal Definition

Bullying is characterized by aggression used within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated.

Bullying is physical, verbal, or psychological actions inflicting or attempting to inflict discomfort upon another through a real or perceived imbalance of power.

*Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013).*

2

## Federal Definition 2

Bullying can involve overt physical behavior or verbal, emotional, or social behaviors

- excluding someone from social activities
- making threats
- withdrawing attention
- destroying someone's reputation

and can range from blatant aggression to far more subtle and covert behaviors.

*Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013).*

3

## Federal Definition 3

Cyberbullying, or bullying through electronic technology

- Cellphones
- Computers
- online or social media

- can include offensive text messages or emails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

*Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013).*

4

## Campus/Agency Anti-Bullying Policies

Many school purchase or use whole-school anti-bullying programs that included canned materials and formulaic solutions.

While these programs are designed for the masses they often fail to sufficiently address the needs of students with disabilities.

5

## StopBullying.Gov

"Stop Bullying on the Spot

When adults respond quickly and consistently to bullying behavior they send the message that it is not acceptable. Research shows this can stop bullying behavior over time.

Parents, school staff, and other adults in the community can help kids prevent bullying by talking about it, building a safe school environment, and creating a community-wide bullying prevention strategy."

6

## Bullying of Students with Disabilities

Students with disabilities are especially vulnerable to bullying, harassment, and teasing in school and this mistreatment can negatively impacted the student's ability to receive an appropriate education.

7

## Actual Bullying

## We All Have A Story

8

## Cyberbullying

The Mean Girls & Boys

9

## Perceived Bullying

When Student's Do Not Feel Safe

10

## Special Education Student's Who Bully

Students with disabilities can be the perpetrator of bullying.

When students with disabilities engages in bullying behavior, the individualized education program (IEP) team must determine whether the conduct may be the expression of an aspect of a disability, whether identified or not.

11

## Special Education Student's Bully

The IEP team must consider the use of positive behavioral interventions and supports and other strategies to address bullying behavior that impedes the student's learning.

34 CFR 300.324 (a)(2)(i).

12

## Billy's Obsession

- Billy is a student identified as having an intellectual disability.
- He attends high school in a life skills classroom with mainstreaming and inclusion for electives, whole campus activities, and field trips.
- Billy believes that he is in a relationship with a cheerleader named Suzie.
    - Billy is NOT in a relationship with Suzie.
    - Billy spends his passing periods and lunch trying to find Suzie on campus.
    - Billy uses social media to stalk Suzie and post odd comments and photos on her profiles.
    - Suzie is afraid of Billy.

13

## Billy's Obsession Continued

- Is interfering with his ability to participate in the educational environment.
- Is interfering with his ability to maintain appropriate social and personal relationships.
- Allowing this to continue could lead to harm to Billy or Suzie.

14

## Relying on School-Wide Anti-Bullying Programs May Violate Federal Laws

- Section 504
- 14th Amendment – Special Relationship
- Title IX
- IDEA

15

## OCR Dear Colleague Letter

Schools have an obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE in accordance with his IEP or Section 504 plan. The school should, as part of its appropriate response to the bullying, convene the IEP or Section 504 team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP or 504 plan is no longer designed to provide FAPE.

61 IDELR 263 (OSERS/OSEP 2013)

16

## Free Appropriate Public Education (FAPE)

When Bullying impede a student's ability to benefit from his educational services the school must conduct an IEP to consider and address bullying or harassment of the student to ensure that the student is able to derive an educational benefit.

Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013)

17

## FAPE

IEP team must individualize the student's IEP to develop skills in awareness, coping, problem solving, safety, and appropriate responses necessary for the student to benefit from their education.

18

## Address Bullying Through the IEP

19

## What is the Cause?

1. Disability Related Harassment/Bullying
2. Lack of Social Skills/Misunderstanding Social Cues
3. Environment
4. Triggering Event
5. Easy Target
6. Obsession/Aggression/Persecution
7. Responsive/Reactionary
8. Learned Behavior
9. Trying to Fit In

20

## Instruction

What do we need to teach the student?

- How to identify verbal, relational, physical or cyber bullying behavior
- How to know who are friends and who are worthy of being a friend.
- Coping skills/Social Skills
- What is expected under the student code of conduct
- Self-Advocacy & Assertiveness Training: how to say “No”, “Stop”, or get help
- Realistic strategies for safety of self and others

21

## Avoidance Accommodations

- Allowing a student to use the teachers/office restroom
- Allow a student to leave or arrive at class early
- Changing the student's lunch period, bus, class schedule
- Keeping student away from the target of bullying or obsession
- Providing a 'safe space' for lunch
- Move student's locker or changing area for P.E.

22

## Empowerment Accommodations

- Sitting student near friend
- Providing a peer mentor
- Exposing student to classes or situations to build confidence
- Monitor or shadowing (passing periods, lunch, recess, locker-room, transportation unstructured time)
- Ability to Check-In with safe person on campus
- Assign special "privileges" on extracurricular or large group activities

23

## Goals and Behavior Plans

- Improve social understanding/recognizing social norms
- Improve self-awareness
- Age Appropriate Self Advocacy/Pragmatics/Responses
  - "I know you are but what am I?"
- Reporting Bullying – How and When to Get Help (Don't forget the adage "snitches get stiches"
- Building health peer relationships/participate in friendship groups
- Self-identify when student is being excluded or isolated
- Age and developmentally appropriate reactions, responses, and avoidance

24

## Services

- Social skills/friendship groups or programs
- Counseling
  - Assertiveness
  - Being a friend
  - Anger management
  - Impulse management
- Speech therapy – pragmatics

25

## Campus

- Direct teachers to pay specific attention to bullying of students with disabilities.
- Inclusion with supervision.
- Teaching the beauty of inclusion and diversity.

- *Teachers, parents, and campus administrators set the tone.

26

## Final Thoughts

27


Geneva Jones
National Speaker and Special Education Law Expert
Licensed in:
California
New York
Texas
Geneva Jones & Associates
2245 Texas Drive, Suite 300
Sugar Land, TX 77479
WWW.Geneva-Jones.Com
Rated by
Super Lawyers
2022
visit SuperLawyers.com

28

Workshop 11

# When IDEA FAPE and ADA/504 Equal Access Collide in School Choice

By:

**Dave Richards**
Attorney at Law
Richards Lindsay & Martín, LLP
Austin, Texas

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# When IDEA FAPE and ADA/504 Equal Access Collide in School Choice

Presented by:

DAVID M. RICHARDS, ESQ.,
RICHARDS LINDSAY & MARTIN, LLP
13091 POND SPRINGS RD. STE 300, AUSTIN TEXAS 78729

1

## A little housekeeping…

- Neither the presentation nor the PowerPoint are legal advice. Facts, state law and local policy may create different results. Consult a licensed attorney in your state for questions about a specific set of facts.
- Text in bold represents emphasis by the author.
- Note the differences in OCR vs. federal court treatment (FAPE vs. reasonable accommodation).

2

2

## The IDEA-ADA/Section 504 Relationship

- **Some basics on the relationship**
  - IDEA students also have 504 protections. *Letter to Mentink,* 19 IDELR 1127 (OCR 1993).
  - IDEA eligibility does not foreclose 504/ADA rights.
    - 20 U.S.C. 1415(l). Language discussed below.

3

3

## The IDEA-ADA/Section 504 Relationship

- **An IDEA IEP & a 504 Plan?**
- "35. If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504?
- No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP." OCR Revised Q&A # 35

4

4

## The IDEA-ADA/Section 504 Relationship

- **IDEA rights add to the student's other rights, *with an exhaustion requirement.***
  - "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities …" 20 U.S.C. 1415(l).

5

5

## The IDEA-ADA/Section 504 Relationship

- **IDEA rights add to the student's other rights, *with an exhaustion requirement.***

"… except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. 1415(l).

6

6

## The IDEA-ADA/Section 504 Relationship

- **What do ADA & Section 504 do?**
  - Prohibit exclusion from participation and denial of benefit in the school's programs and activities.
  - Require equally effective aids, benefits and services.
  - Require reasonable modifications in policy, practice, and procedure.

7

7

## The IDEA-ADA/Section 504 Relationship

- **A brief look at what the IEP must cover....**
  - Notice the nondiscrimination/equal access language of ADA/504 inserted into IDEA.

8

8

## The IDEA-ADA/Section 504 Relationship

- **Required elements of the IEP**

"(II) a statement of measurable annual goals, including academic and functional goals, designed to—

- (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum;" 20 U.S.C. 1414(d)(1)(A)(i).

9

9

## The IDEA-ADA/Section 504 Relationship

- **Required elements of the IEP**
  - "(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—" 20 U.S.C. 1414(d)(1)(A)(i).

10

10

## The IDEA-ADA/Section 504 Relationship

- **Required elements of the IEP**
  - "(aa) to advance appropriately toward attaining the annual goals;
  - (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
  - (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;" 20 U.S.C. 1414(d)(1)(A)(i)(IV).

11

11

## The IDEA-ADA/Section 504 Relationship

- **Recognize how simple choices can have a big impact on IDEA FAPE.**

The wrong accommodation or service can jeopardize IDEA FAPE. *Sherman and Nishanian v. Mamaroneck Union Free Sch. Dist.,* 39 IDELR 181 (2d Cir. 2003); *City of Chicago Sch. Dist. 299*, 62 IDELR 220 (SEA IL 2013).

12

12

## Please do not misunderstand…

- The author loves magnet schools, specialized programs, accelerated classes and the numerous opportunities available in schools today.
- The author respects the IDEA, ADA and Section 504 regulations regarding equal access for students with disabilities to same.
- The author's concern is ignoring the impact of the parent's Section 504/ADA choice of school or program on the school's ability to deliver IDEA FAPE to the student in the chosen program or school.

13

13

## Please do not misunderstand…

- Some programs and classes cannot meet the needs of some students with IEPs (nor some nondisabled students.)
  - The question: When services, devices or entire classrooms can be added or changed outside of the IEP process (due to ADA/504 rights of choice/access), how can the IEP team protect FAPE?

14

14

## Equal Access/choice and the student with an IEP

- What happens when students exercise choice from among the amazing educational offerings but IDEA FAPE isn't possible where they choose to go?
- A case from Hawaii lays out the complexity of the problem. *Department of Educ., State of Hawaii*, 112 LRP 31884 (SEA HI 05/21/12).

15

15

## Equal Access/choice and the student with an IEP

***Department of Educ., State of Hawaii,* 112 LRP 31884 (SEA HI 05/21/12).**

- IDEA-eligible student with cognitive, hearing, health impairments, and behavior problems was enrolled in the Hawaii Technology Academy (HTA), for two days a week, while the main portion of instruction, for three days a week, took place online.
- The student and HTA were on opposite sides of Oahu.
- The program provided the parent with significant assistance and training in functioning as a "learning coach" with respect to the online portion of the program.

16

16

## Equal Access/choice and the student with an IEP

***Department of Educ., State of Hawaii,* (cont'd)**

- The student produced virtually no work in the online program and was frequently absent or tardy for the in-school portion. The mix of troubles created bad results.
  - Hearing Officer: "A skill that was covered at School on Thursday would have to be continually taught and repeated to Student the following Tuesday. It was difficult for Student to make progress in this type of learning situation.
  - "Parent 1 was having the same experience at home with Student's progress. Student was also having a difficult time mastering the online curriculum."

17

17

## Equal Access/choice and the student with an IEP

***Department of Educ., State of Hawaii,* (cont'd)**

- The distance between the school and home proved problematic as well.
  - "The SLP testified that Student was scheduled to come to the School from 9:00 a.m. to 12:00 p.m. Sometimes Student would arrive at 11:00 a.m. Student required a structured setting, with a structured program and structured expectations."
  - "When Student was late, Student missed valuable time with Student's teachers, peers and service providers.

18

18

**Equal Access/choice and the student with an IEP**
***Department of Educ., State of Hawaii,* (cont'd)**

- The distance between the school and home proved problematic as well.
  - "The SLP juggled SLP's schedule and the schedules of the other speech therapy students SLP serviced to accommodate Student and make up Student's lessons."
  - Student still missed half of the speech sessions.

19

19

**Equal Access/choice and the student with an IEP**
***Department of Educ., State of Hawaii,* (cont'd)**

- After various attempts to modify the program and provide additional support in the online component, the IEP team recommended that the student return to a full-time, face-to-face classroom.
  - Staff believed that the student's needs, including significant work avoidance and off-task behaviors, required the structure of a bricks-and-mortar classroom environment.
  - In addition, staff were concerned that the student was not producing work in the online portion of the program.

20

20

**Equal Access/choice and the student with an IEP**
***Department of Educ., State of Hawaii,* (cont'd)**

- **Hearing officer agreed that the hybrid program was not working.**
  - "Part of the reason the hybrid program was not working was because Student needed a very structured program with a lot of consistency."

21

21

## Equal Access/choice and the student with an IEP

***Department of Educ., State of Hawaii,* (cont'd)**

- **Hearing officer agreed that the hybrid program was not working.**
  - The **online program was inconsistent** because the student's behaviors posed too great of a challenge for the parent as a "learning coach." In turn, the **school portion was inconsistent** because the student was frequently absent or tardy, leading to disruption in structure.

22

22

## Equal Access/choice and the student with an IEP

***Department of Educ., State of Hawaii,* (cont'd)**

- **Hearing officer agreed that the hybrid program was not working.**
  - The hybrid program was not appropriate to meet the student's needs. The student required a full-time, face-to-face program on a school campus.

23

23

## Equal Access/choice and the student with an IEP

***Department of Educ., State of Hawaii,* (cont'd)**

- ***A little commentary:* This case is a prime example of "what the student needs for FAPE doesn't fit the choice."**
  - The parent sees a district program or school and utilizing school choice and/or ADA/504 nondiscrimination to gain access, moves the child to the program.
  - For some students, such a move may make IDEA FAPE impossible because the necessary services and supports may not be feasible in the choice setting.

24

24

**Equal Access/choice and the student with an IEP**
***Department of Educ., State of Hawaii,* (cont'd)**

- ***A little more commentary:* how the conflict between choice and IDEA FAPE can play out.**
  - When conflict happens, the IEP team determines it cannot provide a FAPE in light of the student's unique needs.

25

25

**Equal Access/choice and the student with an IEP**
***Department of Educ., State of Hawaii,* (cont'd)**

- ***A little more commentary:* how the conflict between choice and IDEA FAPE can play out.**
  - The parent challenges the decision in due process, arguing the program failed to provide the accommodations, services, etc., that would have made the program appropriate for the student.
  - Failures can sometimes relate back to issues outside the school's control such as an excessively tardy or absent student.

26

26

**Equal Access/choice and the student with an IEP.**
**Two years later, *Jason E. v. Department of Educ., State of Hawaii,* 64 IDELR 211 (D. Hawaii 2014).**

- **Following the HO's order**
  - HTA unenrolled the student based on the Hearing Officer's order. Parent revoked IDEA consent and homeschooled for a year.
  - In 2014, parent re-enrolled the student in HTA, consented to special ed services, and then revoked consent. Section 504 took over.

27

27

**Equal Access/choice and the student with an IEP.**
**Two years later, *Jason E. v. Department of Educ., (cont'd).***

- **Says the court: The result is neither sustainable nor appropriate.**
  - "Student is enrolled as a sixth-grade general education student at HTA despite the fact that he is chronologically a ninth grader and academically performs at the level of a kindergartner or first grader. Evidently, Student is receiving certain special education services including one-to-one instruction at HTA through a Section 504 plan."

28

28

**Equal Access/choice and the student with an IEP.**
**Two years later, *Jason E. v. Department of Educ. (cont'd).***

- **The court recognizes the school's dilemma & parent loses.**
  - Hawaii state law requires access to HTA for all students unless the school exceeds capacity. H.R.S. Section 302D-34(b)(2).
  - "While Plaintiffs argue that HTA is not providing sufficient special education services; such an argument is unavailing given that HTA has attempted to provide Student with the more robust services of the IDEA (which includes the implementation of an IEP) and that Parent has voluntarily elected to forgo these services by revoking IDEA consent."

29

29

**Equal Access/choice and the student with an IEP.**

- Can the school prevent the problem for both students with disabilities and nondisabled students by implementing prerequisites to choice? Yep.

30

30

## Prerequisites & Entrance Criteria

***Rosemount-Apple Valley-Eagan ISD #196*, 112 LRP 56386 (OCR 03/22/11).**

- The IEP team agreed to the parent's request that the student would take four honors classes (despite reservations "about any student transitioning to 9th grade with that level of rigor and workload without an Academic Prep course").
- There did not seem to be any eligibility requirements for the honors courses in the district.
- The request that student be placed in advanced band, however, was not successful.

31

31

## Prerequisites & Entrance Criteria

***Rosemount-Apple Valley-Eagan ISD #196*, (cont'd)**

- **Nondiscriminatory gatekeeping**
  - "Nothing in Section 504 or Title II requires schools to admit into accelerated classes or programs students with disabilities who would not otherwise be qualified for these classes or programs."
  - "Section 504 and Title II require that qualified students with disabilities be given the same opportunities to compete for and benefit from accelerated programs and classes as are given to students without disabilities." *Id.*

32

32

## Prerequisites & Entrance Criteria

***Rosemount-Apple Valley-Eagan ISD #196*, (cont'd)**

- **Nondiscriminatory gatekeeping**
  - Schools can create appropriate eligibility requirements or criteria to determine which students should be admitted into the accelerated class or program.
  - "The District has employed eligibility criteria in determining which students are placed in the advanced band. The Student has not met the eligibility criteria despite having the same opportunity to compete for placement in the advanced band."

33

33

## Prerequisites & Entrance Criteria

***Rosemount-Apple Valley-Eagan ISD #196*, (cont'd)**

- **Nondiscriminatory gatekeeping**
  - "The District has correctly noted that the Student has no identified educational need that would be met by being in the advanced band and is not entitled to placement in that band through the IEP team process."

34

34

## Prerequisites & Entrance Criteria

- ***A little commentary* on NOT employing prerequisites or entrance criteria.**
  - Without entrance criteria or prerequisites, when the class or program proves inappropriate for the student, the school loses some leverage with the argument that the student is ill-equipped to be there (since it allowed the choice).
  - Legitimate criteria solve that problem, to some degree, by making sure the students in the program are qualified to be there (think "otherwise qualified." A host of cases provide additional illustration.

35

35

## Prerequisites & Entrance Criteria for programs and classes (a quick summary)

- Importance of commitment in GT class. *New York City Sch. Dist. Bd. of Educ.,* 17 IDELR 87 (SEA NY 1990).
- Mix of eligibility factors is best. *St. Charles (IL) Cmty. Unit Sch. Dist. #303,* 17 IDELR 910 (OCR 1991).

36

36

**Prerequisites & Entrance Criteria for programs and classes (a quick summary)**

- Single factor eligibility is precarious. *Darien (CT) Bd. of Educ.,* 22 IDELR 900 (OCR 1995).
- 8th-grade writing requirement for HS magnet. *C.O. v. Portland Pub. Schs.,* 58 IDELR 272 (9th Cir. 2012), *cert. denied,* 113 LRP 786, 133 S. Ct. 859 (U.S. 2013).

37

37

**Prerequisites & Entrance Criteria for programs and classes (a quick summary)**

- No violation when student's composite scores not high enough. *Bayonne (NJ) Sch. Dist.,* 35 IDELR 36 (OCR 2001).
- No violation when student lacked a required math credit. *Horry County (SC) Sch. Dist.,* 35 IDELR 39 (OCR 2001).

38

38

**Prerequisites & Entrance Criteria for programs and classes (a quick summary)**

- No violation when student enrolled late, the program was full, and he didn't fill out the application. *Southfield (MI) Pub. Schs.,* 112 LRP 28804 (OCR 04/23/12).
- Open Enrollment & Lottery Admissions (space or luck control entry).

39

39

## Digging a little deeper on IDEA FAPE

**Can the IDEA student demand FAPE everywhere?**

- "Even with regard to LEA programs, the IDEA does not require that LEAs make all services needed by all students with disabilities available at all locations." *Letter to Anonymous,* 40 IDELR 236 (OSEP 2003).
- Example: centralized services for students with low incidence disabilities (hearing disorders). *Barnett v. Fairfax County Sch. Bd.,*17 IDELR 350 (4th Cir. 1991), *cert. denied,* 112 LRP 24728, 502 U.S. 859 (1991).

40

40

## Digging a little deeper on IDEA FAPE

**Can the IDEA student demand FAPE everywhere?**

- That logic doesn't apply to more common services (diabetes). *In re: Student with a Disability,* 113 LRP 50627 (DOJ 12/09/13).

41

41

## Digging a little deeper on IDEA FAPE

- **Some questions to explore.**
  - Are there limits to the accommodations and services a special education or Section 504 student can receive in accelerated classes?
  - Does parent choice require the school to place the student in an accelerated class, program or school where the student's IEP cannot be implemented?
  - Do the answers depend on whether OCR or the federal courts are reviewing the school's decision?

42

42

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs,* 108 LRP 69569 (OCR 12/26/07).

- OCR addressed the issue of accommodations and services for IDEA and 504-eligible students in a very limited way in 2007.
- The guidance applies to "**accelerated classes.**" An accelerated class is OCR-speak for Advanced Placement, Honors, Magnet, Gifted, etc.

43

43

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- OCR found two problematic approaches utilized by schools.
  - "Specifically, it has been reported that some schools and school districts have refused to allow qualified students with disabilities to participate in such programs.

44

44

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- OCR found two problematic approaches…
  - Similarly, we are informed of schools and school districts that, as a condition of participation in such programs, have required qualified students with disabilities to give up the services that have been designed to meet their individual needs."

45

45

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- How does OCR view accelerated programs?
  - "Participation by a student with a disability in an accelerated class or program ***generally*** would be considered part of the regular education or the regular classes referenced in the Section 504 and the IDEA regulations."
  - The problem with "generally."

46

46

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- So, what does that mean?
  - "Thus, if a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program."

47

47

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- How about an example?
  - "If a student's IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program, and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class."

48

48

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- How about an example?

  "The same would be true for other needed related aids and services, such as extended time on tests or the use of a computer to take notes."

  *A little commentary:* This is where things get complicated.

49

49

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- What does the guidance tell us? *A little Dave commentary.*
  - If the student's IEP or 504 plan calls for something in a regular class or program, he gets it in the accelerated program as well.
  - No trading allowed. Student can't be asked to give up IEP or 504 plan element to participate in accelerated program.

50

50

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- *A little Dave commentary (cont'd).*
  - No apparent requirement for *additional* accommodations or services in accelerated class beyond those already in the IEP or 504 plan? Does that work?
  - No apparent concern over whether services or accommodations, *when applied to accelerated class,* will be a fundamental alteration (unfair advantage). Unless that's why "generally" is in the explanation…

51

51

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- OCR on FAPE vs. Reasonable Accommodation.
  - "The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education a 'reasonable accommodation' standard, or other similar limitation. The clear and unequivocal answer to that is no." *Response to Zirkel,* 20 IDELR 134 (OCR 1993).

52

52

**OCR on IDEA, 504 and accelerated classes**
*Dear Colleague Letter:* (OCR 12/26/07) (cont'd).

- OCR on FAPE vs. Reasonable Accommodation.
  - Reasonable accommodation **DOES APPLY** to nonacademic and extracurricular activities. *Crete-Monee (IL) Sch. Dist. 201-U*, 25 IDELR 986 (OCR 1996).
  - However, the federal courts look to a reasonable accommodation standard in ADA/Section 504 rather than FAPE (see below).

53

53

Federal Courts & Reasonable Accommodation
*Doe v. Haverford Sch.,* 39 IDELR 266 (E.D. Pa. 2003).

- Private school, reasonable accommodation analysis.
- 11th grader with sleep apnea and phase-delayed syndrome (sleep cycle from 3:00 or 4:00 a.m. to noon).
- Two *more* requests for accommodations are rejected.
- Promotion to 12th grade, despite failure to meet promotion criteria.
  - Five additional months to complete schoolwork from the third quarter and in excess of two additional months to complete schoolwork from the fourth quarter for four courses.

54

54

## Federal Courts & Reasonable Accommodation

*Doe v. Haverford Sch.,* 39 IDELR 266 (E.D. Pa. 2003).

- **The Court:**
  - "Allowing the plaintiff to make up quizzes, tests, and exams months after his classmates completed these tasks gives the plaintiff months of preparation that his classmates did not have."
  - "Although tests are designed to test what a student knows, part of taking the tests and part of the educational process is to prepare to take quizzes, tests, and exams in a timely fashion."

55

55

## Federal Courts & Reasonable Accommodation

*Doe v. Haverford Sch.,* 39 IDELR 266 (E.D. Pa. 2003).

- **The Court:**
  - "Haverford's conclusion that avoiding those parts of its educational requirements lowers its academic standards is a decision for the school to make...."
  - *A little commentary:* This is not a FAPE standard case. BUT aren't we really just talking about the scaling of an appropriate accommodation to the point it is no longer appropriate? Too much of a good thing can be inappropriate and unfair.

56

56

## Federal Courts & Reasonable Accommodation

*K.P. v. City of Chicago Sch. Dist. #299*, 65 IDELR 42 (N.D. Ill. 2015).

- 8th-grade student with a learning disability and an IEP wants to use a hand-held calculator on the MAP test.
- MAP test is 1/3 of the rubric for students wanting access to the district's selective enrollment high schools.
- In this computerized test, an on-screen calculator is available for a portion of the exam and then disappears, requiring students to perform computations on their own.

57

57

## Federal Courts & Reasonable Accommodation

*K.P. v. City of Chicago Sch. Dist. #299*, 65 IDELR 42 (N.D. Ill. 2015).

- Student's IEP allowed use of a calculator in the classroom and in district and state assessments "with allowable accommodations/modifications that are necessary to measure academic achievement and functional performance."
- The school refused to allow the student to use a calculator on the MAP (other than when it was provided in the assessment itself).

58

58

## Federal Courts & Reasonable Accommodation

*K.P. v. City of Chicago Sch. Dist. #299*, 65 IDELR 42 (N.D. Ill. 2015).

- **Requested calculator doesn't level this playing field.**

"Quite the contrary. It would permit K.P to replace her allegedly limited computational skills with a mechanical tool of infinite capacity (at least in the context of this case) that likely exceeds the computational capabilities of perhaps all — and certainly most — non-disabled students. That is not a reasonable accommodation but a substitution of artificial intelligence for the very skill the test seeks to measure."

59

59

## Federal Courts & Reasonable Accommodation

*K.P. v. City of Chicago Sch. Dist. #299*, 65 IDELR 42 (N.D. Ill. 2015).

- **Requested calculator doesn't level this playing field.**

"Quite the contrary. It would permit K.P to replace her allegedly limited computational skills with a mechanical tool of infinite capacity (at least in the context of this case) that likely exceeds the computational capabilities of perhaps all — and certainly most — non-disabled students. That is not a reasonable accommodation but a substitution of artificial intelligence for the very skill the test seeks to measure."

60

60

## Federal Courts & Reasonable Accommodation

*G.B.L. v. Bellevue Sch. Dist. #405*, 60 IDELR 186 (W.D. Wash. 2013).

- IDEA student with ADHD and sensorineural hearing loss was accepted into the school district's PRISM program, an "accelerated program for highly gifted students with more advanced curriculum and a faster pace."
- His IEP included 48 accommodations & modifications, and 9 special education services.

61

61

## Federal Courts & Reasonable Accommodation

*G.B.L. v. Bellevue Sch. Dist. #405*, (cont'd).

- "The accelerated PRISM program has a critical component of homework and students are expected to develop understanding and comprehension of the material outside of class. The homework is also more difficult than in the regular education program."

62

62

## Federal Courts & Reasonable Accommodation

*G.B.L. v. Bellevue Sch. Dist. #405*, (cont'd).

- **Homework:**
  - In his regular education classes the previous year, "which [have] much less homework than the PRISM program, the Student spent four hours each night doing homework. The PRISM program stresses the importance of keeping up with homework as class lessons are sequential and 'catching up' on homework creates problem."
  - "Both his grades and mood quickly declined over the course of the school year." Parents requested limited homework.

63

63

## Federal Courts & Reasonable Accommodation

*G.B.L. v. Bellevue Sch. Dist. #405*, (cont'd).

- **The accommodation request arises from the student's difficulty keeping pace with the required out-of-class work.**
  - His "therapist Dr. Kwon suggested a two hour per night limitation on the amount of homework assigned." The therapist also argued that the homework burden was the student's "greatest source of stress." The District denied the request
    - "finding that this would fundamentally alter the PRISM program curriculum standards, grading standards, and performance expectations."

64

64

## Federal Courts & Reasonable Accommodation

*G.B.L. v. Bellevue Sch. Dist. #405*, (cont'd).

- The ALJ: "Imposing a limitation that merely allowed for the already self-imposed time limit would have made no difference in the Student's ability to continue in the program and learn the course material."
- Both ALJ and district court found the teacher's testimony on the issue persuasive, especially with respect to the finding that completing the required homework was essential to the PRISM program.

65

65

## Federal Courts & Reasonable Accommodation

*G.B.L. v. Bellevue Sch. Dist. #405*, (cont'd).

- *A little commentary:*
  - Buried in the recitation of the facts was this interesting detail: the school accepted the student into the PRISM program despite "an entrance score one point below the requirement."
  - The school's gatekeeping eligibility criteria effectively predicted the student's difficulty. Note the problem that arises from ignoring well-crafted criteria.

66

66

## Federal Courts & Reasonable Accommodation

*A little commentary on OCR's guidance*

Consider this logic:

- In the 2007 guidance, OCR treated grade level curriculum and accelerated curriculum as identical (although there may be significant differences).
- In other contexts, OCR recognizes that remedial and special education classes may offer below-grade level curriculum, and accelerated classes may offer above grade level curriculum.

67

67

## Federal Courts & Reasonable Accommodation

*A little commentary on OCR's guidance*

Consider this logic:

- Accelerated classes, by definition, are meant to be different from regular classes of the same subject matter.
- Accelerated classes typically move at a faster pace, involve more reading and writing, and can be otherwise more intense versions of their regular education grade-level curriculum counterparts.

68

68

## Federal Courts & Reasonable Accommodation

*A little commentary on OCR's guidance*

- "While a transcript may not disclose that a student has a disability or has received special education or related services due to having a disability, **a transcript may indicate that a student took classes with a modified or alternate education curriculum.** This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a student's academic credentials and achievements." *In re: Report Cards and Transcripts for Students with Disabilities,* 51 IDELR 50 (OCR 2008).

69

69

## Federal Courts & Reasonable Accommodation

*A little commentary on OCR's guidance*

- **"Transcript notations concerning enrollment in different classes, course content, or curriculum** by students with disabilities **would be consistent with similar transcript designations for classes such as advanced placement, honors, and basic and remedial instruction,** which are provided for both students with and without disabilities, and thus would not violate Section 504 or Title II."(emphasis added). *In re: Report Cards and Transcripts for Students with Disabilities,* 51 IDELR 50 (OCR 2008).

70

70

## Federal Courts & Reasonable Accommodation

*A little commentary on OCR's guidance*

Consider this logic:

- Transcript accuracy requires proper reference to the level of curriculum mastered by the child—including accelerated classes above grade level and remedial classes below.
- BUT OCR seems unconcerned when accommodations or services on IEPs or 504 plans, as applied to an accelerated class, may fundamentally alter what makes the class accelerated, while still communicating mastery in the transcript.

71

71

## The IEP team needs to protect IDEA FAPE

Some choices will undermine/prevent FAPE.

- IEP Team Review when collaborative kinder services can't be provided at magnet school. *In re: Student with a Disability,* 105 LRP 13107 (SEA VA 09/22/04).

72

72

## The IEP team needs to protect IDEA FAPE

*In re: Student with a Disability,* 105 LRP 13107 (SEA VA 09/22/04).

- A pre-k student eligible due to developmental delay (verbal and fine motor apraxia) had limited use of fingers/hands, could not communicate orally, and difficulty with nonverbal as well.
- The school proposed a K-classroom with disabled and nondisabled students, a special education teacher providing consult services, a one-to-one aide, and occupational therapy and speech language therapy.
- The parent preferred placement in a magnet elementary where the student gained entry through a lottery.

73

73

## The IEP team needs to protect IDEA FAPE

*In re: Student with a Disability,* (cont'd).

- "[The student attended preschool in] a self-contained special education setting. The collaborative kindergarten environment is intended to provide the special education student with a year of transition experience when moving from preschool to kindergarten."
- In the collaborative classroom, the special education students are not separated from the nondisabled students. It is a regular ed classroom, with a special education teacher and an aide for disabled students.

74

74

## The IEP team needs to protect IDEA FAPE

*In re: Student with a Disability,* (cont'd).

- "A one-to-one aide alone, with the general education teacher, could not provide the services that can be provided by the special education teacher."
- Hearing Officer: Even though "Student 'won' the lottery for the magnet school and would be accepted there, his IEP requires a collaborative kindergarten program that the magnet school does not provide."

75

75

## The IEP team needs to protect IDEA FAPE

*In re: Student with a Disability,* (cont'd).

- "Therefore, Student would not be accepted there without a change in his IEP, and the IEP committee will not change the IEP from requiring a collaborative kindergarten program for Student."
- The June 9, 2004, IEP was affirmed, and the student was assigned to the collaborative kindergarten program as the school had proposed.

76

76

## The IEP team needs to protect IDEA FAPE

Some choices will undermine/prevent FAPE.

- IEP teams should review when the student's unique socialization needs can't be met in the choice high school. *Washoe County Sch. Dist.,* 36 IDELR 80 (SEA NV 2002).

77

77

## The IEP team needs to protect IDEA FAPE

*Washoe County Sch. Dist., 36 IDELR 80 (SEA NV 2002).*

- A high school-aged, IDEA-eligible student diagnosed as "developmentally disabled" complained of a variety of harassment-like incidents at her regular high school.
- The student had performed well in her modified classes, earning A-B grades. "She liked her teachers very well and liked her classes." Her IEP goals are primarily limited to life skills.

78

78

**The IEP team needs to protect IDEA FAPE**

*Washoe County Sch. Dist., (cont'd).*

- The parent sought placement of the student at Truckee Meadows Community College High School. A memorandum prepared by TMCCHS for the IEP Team questioned whether this choice was appropriate for this student.

79

79

**The IEP team needs to protect IDEA FAPE**

*Washoe County Sch. Dist., (cont'd).*

- "The classes offered at TMCCHS are rigorous college level academic courses. It is an advanced, accelerated academic program for students who are ready for college level coursework. Brianna's goals are not commensurate with the courses available at TMCCHS or the mission of our program, which is to assist students who are academically prepared of the unique challenges of a college curriculum."

80

80

**The IEP team needs to protect IDEA FAPE**

*Washoe County Sch. Dist., (cont'd).*

- "Please note that TMCCHS has the least opportunity for social interaction of all Washoe County School District schools due to the unique college structure and setting of our high school student's schedules."

81

81

**The IEP team needs to protect IDEA FAPE**

*Washoe County Sch. Dist., (cont'd).*

- "In fact, the school operates much more like a college campus than a high school. TMCCHS does not have typical high school programs such as assemblies, clubs and athletic events. There are essentially four events that occur throughout the year that are social in nature including an introduction at the inception of the semester, a prom, a barbecue at the end of the year, and then graduation."

82

82

**The IEP team needs to protect IDEA FAPE**

*Washoe County Sch. Dist., (cont'd).*

- "There is no direct campus life at TMCCHS. There is no lunchroom, no snack time, no high school campus cafeteria and classes meet generally three times a week."
- Hearing Officer: For a student working on social skills, a regular high school was the appropriate placement.

83

83

**The IEP team needs to protect IDEA FAPE**

Some choices will undermine/prevent FAPE.

- IEP Team Review when the student's unique behavioral needs can't be met in lottery magnet school. *Metro-Nashville (TN) Pub. Sch. District,* 38 IDELR 18 (OCR 2002).

84

84

## The IEP team needs to protect IDEA FAPE

*Metro-Nashville (TN) PSD., (cont'd).*

- A student identified as emotionally disturbed under the IDEA had a history of verbal & physical aggression toward staff, students and self.
- "She throws objects at staff and students, uses profanity, drops books loudly on the floor to gain attention, is disruptive on the bus, and becomes very angry and defiant when asked to complete classroom assignments or is not called upon to answer a question in class."

85

85

## The IEP team needs to protect IDEA FAPE

*Metro-Nashville (TN) PSD., (cont'd).*

- "Sometimes these actions escalate to unsafe levels. The Student's disciplinary history shows infractions for disrupting the learning environment, breaking school windows after becoming angry with a teacher, leaving the building, and use of vulgar and obscene language toward staff."

86

86

## The IEP team needs to protect IDEA FAPE

*Metro-Nashville (TN) PSD., (cont'd).*

- **Her placement.** "Students in the MIP (Moderate Intervention Program) classrooms can move about freely, work individually with the aide or teacher, work at a table setting with their peers or choose to work quietly by themselves at a separate table. These classrooms offers students greater flexibility than the regular classroom."

87

87

## The IEP team needs to protect IDEA FAPE

*Metro-Nashville (TN) PSD., (cont'd).*

- "The student's IEP indicates she needs quiet time to calm down after aggressive behaviors. Former offices in the classrooms offer this private, time out area. There are nine students, a teacher, and an aide in the Student's MIP classroom. The student interacts with non-disabled peers during lunch, art, music, physical education, library and assemblies."

88

88

## The IEP team needs to protect IDEA FAPE

*Metro-Nashville (TN) PSD., (cont'd).*

- The parent complained when the student won admission via lottery to Head, one of the district's magnet schools.
- "Students in grades 5-8, with an interest in math or science, can apply for entry-level positions to HEAD. All applicants are put on a waiting list and a random lottery is used to fill vacancies. Applicants are assigned a random lottery number and are notified by mail of the result.… There are instances when, even though eligible, students choose to remain at their sending school."

89

89

## The IEP team needs to protect IDEA FAPE

*Metro-Nashville (TN) PSD., (cont'd).*

- "If a student with a disability's IEP can be implemented at Head, they are enrolled…. Since the Student wanted to attend Head, the Complainant met with Middle School personnel and the Student's IEP was reviewed…."
- The behavior intervention strategies identified in the Student's IEP could not be implemented at Head; therefore, it was determined that the Student needed to remain in the MIP setting at the Middle School.

90

90

## The IEP team needs to protect IDEA FAPE

*Metro-Nashville (TN) PSD., (cont'd).*

- Evidence shows other students with disabilities are attending Head. "Therefore, there is insufficient evidence to support a violation of Section 504 and Title II with regard to this allegation."
- When the middle school behavioral setting later proved ineffective, the IEP team determined with parent agreement to change the Student's educational placement to the Severe Behavior Intervention Program (SBI Program) which is offered at the Murrell School (Murrell).

91

91

## The IEP team needs to protect IDEA FAPE

*Metro-Nashville (TN) PSD., (cont'd).*

- "Murrell is the District's only self-contained special education facility that specializes in working with students with severe emotional and behavior disorders.
- It has an enrollment of approximately 60 students. There is a psychologist and a social worker assigned to Murrell who work with the students. In addition, each classroom has only 3 or 4 students, with a teacher, an aide, and a counselor.
- Students remain at Murrell until an IEP team determines that a student's behavior has improved and they can return to their zoned school."

92

92

## The IEP team needs to protect IDEA FAPE

**Consider this analysis with the school attorney**

- Does the choice school or program's structure, teaching method, school environment, etc., require consideration to ensure the student's IDEA FAPE needs can be met there?
- Should the results of this review convince the appropriate team or committee that the student could not receive FAPE in the choice program or school, the IEP team (with appropriate consultation with the school attorney) could reject the placement pursuant to federal law.

93

93

## Final Thoughts and Takeaways to Discuss with the School Attorney

1. State law must be considered as part of this analysis as state choice programs vary in their approaches. This is especially true with respect to open enrollment or choice in a school district *other than the student's resident district.*

2. Students eligible under the IDEA have a right to IDEA FAPE together with the rights of nondiscrimination and equal access under Section 504/ADA. The rights include equal opportunity to participate and benefit in choice schools & programs.

94

94

## Final Thoughts and Takeaways to Discuss with the School Attorney

3. Categorical exclusion of IDEA or 504-eligible students in choice schools/programs is discriminatory.

4. For the LEA with IDEA FAPE responsibility for the child, student access to choice schools or programs provided by the LEA without IEP team review for FAPE can result in IDEA FAPE rights being undermined by 504/ADA nondiscrimination rights.

95

95

## Final Thoughts and Takeaways to Discuss with the School Attorney

5. Access to choice schools and programs can be restricted based on legitimate nondiscriminatory criteria tied to the choice school or program's mission or methodology. Where a student with disability fails to meet the criteria, she can be denied admission or continued attendance in the choice school or program just as a nondisabled student who failed to meet criteria would be denied admission or continued attendance.

96

96

## Final Thoughts and Takeaways to Discuss with the School Attorney

6. ED and the federal courts recognize that "the IDEA does not require that LEAs make all services needed by all students with disabilities available at all locations" and that some services to address low incidence disabilities can be provided in centralized locations.

7. The lack of *common special education services* in a choice school or program will likely not support a finding that IDEA FAPE cannot be provided there.

97

97

## Final Thoughts and Takeaways to Discuss with the School Attorney

8. In the context of accelerated programs, ED guidance prohibits requiring IDEA and Section 504-eligible students to give up pieces of their existing IEPs or 504 plans in order to access accelerated classes but leaves open the possibility of exceptions (see discussion on "generally"). The federal courts apply a reasonable accommodation standard.

98

98

## Final Thoughts and Takeaways to Discuss with the School Attorney

9. ED has recognized that some students cannot be provided IDEA FAPE in their chosen school or program. Where IEP teams make individualized determinations based on student need and determine that the provision of special education FAPE cannot be provided to a particular student in a particular choice school or program, OCR has upheld the school's placement and denial of the choice school or program.

99

99

Workshop 12

# Successful IEP Meetings: Lessons from Both Sides of the Table

By:

**Elizabeth Polay**
Attorney
Garrett Hemann Robertson P.C.
Salem, Oregon

Pacific Northwest Institute on Special Education and the Law
October 9-11, 2023
Vancouver, Washington

# SUCCESSFUL IEP MEETINGS:
# LESSONS FROM BOTH SIDES OF THE TABLE

**40th Annual Pacific Northwest Institute on Special Education and the Law**
**Delivered: October 11, 2023**

Elizabeth L. Polay
Attorney/Shareholder
Garrett Hemann Robertson P.C.
Salem, OR
(503) 581-1501
epolay@ghrlawyers.com
Website: ghrlawyers.com

## I. Introduction

IEP meetings are the keystone of the IDEA. They form the foundation for a student's education but can also be a source of frustration, missed communication, and tense relationships between district staff and parents of students with disabilities. This session will provide suggestions for successfully navigating the often-fraught waters of facilitating IEP meetings with an eye toward ensuring legal compliance. In representing both parents and districts over the course of my legal career, I will share valuable insights from advocating and participating in IEP meetings from both perspectives.

The suggestions, recommendations, and ideas for holding successful IEP meetings are from one perspective – mine! There are many ways to have successful IEP meetings that may not be included here, but hopefully there are some takeaways in this session that can help you engage meaningfully with parents and district staff and form relationships that benefit students.

I have structured this presentation in four main sections. Holding successful IEP meetings is not just something that occurs in isolation at the meeting itself. It takes time, preparation, and communication with district staff and parents. In that vein, I suggest thinking along the lines of what to do: (1) before the meeting; (2) during the meeting; (3) after the meeting; and (4) other considerations outside the meeting process.

## II. Before the Meeting

### A. Preparing effectively

**i.** *Define roles*: Determine who will address what issues and how they will be addressed.

**a.** In preparing for any IEP meeting, it is best to think about the purpose and structure of the meeting ahead of time. Meet with your "team," whether you are a district professional, a parent, or a parent advocate, and discuss what roles each person you are working with will take.

**b.** Questions you might ask of yourself or your team:

1. Who will be facilitating the meeting? Will it be run mostly by one person, or will it be collaborative between different people? This might depend on the purpose of the meeting and the prior history with the parent/district.

2. Who will be addressing questions from the parent? Will there be a main point person for addressing questions? Will specific people be expected to respond to specific categories of questions?

3. Will there be outside or other providers in attendance? Are there any releases we need in order to communicate with those providers ahead of time? How will their questions and concerns be addressed? Who will coordinate with the outside providers?

ii. *Communicate with the "other side" before the meeting*: I don't like to say that members of the IEP team are on one "side" or the other. Everything is at an IEP meeting to be on the side of the student. Different IEP team members may disagree about *how* to serve a student, but everyone on the IEP team is there to ensure that a student's special education needs are met. However, communication between the district and school teams needs to occur prior to a meeting. Items you might discuss with the "other side" prior to the meeting include:

   a. What is the purpose of the meeting? What do we hope to accomplish?

   b. How much time do we have for the meeting? Do we need to be prepared to schedule additional meetings?

   c. Are there certain people that either the district or the parent feels are necessary to attend beyond those required by the IDEA? Who will be in charge of inviting those people?

   d. What issues, if any, need to be addressed prior to or outside of the IEP meeting process?

iii. *Set meeting norms*: IEP meetings can be highly emotional environments for both parents and district staff. Over the years, I have found that the most productive IEP meetings are those that set a standard for communication during the meeting at the outset.

   a. Consider setting ground rules for communication prior to and during the meeting. It is sometimes helpful to send a copy of those ground rules to the parent or representative ahead of time. Be willing to accept comments or feedback if the parent has concerns about the meeting norms. Ideas to consider for your meeting norms:

      1. Respectful communication, i.e., refraining from interrupting, name calling, outbursts, etc.

2. Avoid acronyms! It is hard sometimes as special education professionals to remember that parents are not versed in special education alphabet soup. Take time to explain what terms of art mean and how they are used.

3. Create a procedure for questions or comments that fall outside the expected purpose of the meeting. I've seen things like a "parking lot" of ideas with a visual representation on a white board or art easel to ensure that parents know their concerns will be addressed in some way, even if it is outside of the meeting's scope.

**b.** Consider providing an agenda prior to the meeting. Be flexible with the agenda and open to feedback from the parent regarding the agenda items.

**c.** **Note:** It is important to communicate with the parent or parent advocates regarding any language or disability related needs they may have. Ensure you have appropriate accommodations, supports, and/or translators available to allow the parents to meaningfully participate.

**B. Providing necessary (and unnecessary) records**

**i.** Often, parents request a copy of their student's educational records prior to an IEP meeting. Sometimes these requests can be voluminous and time-consuming, and frequently, a district may receive them with only a short amount of time to comply. It's important to know the parent's rights under FERPA and the IDEA regarding access to their student's records so that you can appropriately respond.

**ii.** First, what is an educational record?

**a.** Under the Family Educational Rights and Privacy Act ("FERPA" 34 CFR 99.3), there is a two-part definition:

1. The record must be directly related to the student AND

2. Maintained by an educational agency or institution or by a party acting for the agency or institution.

**b.** There are also certain types of records that are excluded from the definition of educational records under FERPA (also all found in 34 CFR 99.3). Some examples are:

1. Sole possession records: "Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record."

2. Law enforcement records: "Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8."

3. Employment records: exclusively related to employee status.

4. Grade on peer-graded papers before they are collected and recorded by the teacher.

**iii.** What about emails as educational records?

**a.** This is an important topic to address because many times requests are made to include "communications" regarding a student or between district staff and a student's parents. You should always check your own state's records laws and regulations for any extra protections granted to parents in this area. But for purposes of FERPA, *emails are not considered educational records protected by FERPA*.

**b.** In *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 536 U.S. 426 (2002), the Supreme Court defined the word "maintain" under FERPA: "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled."

**c.** A string of 9th Circuit cases indicate that emails that in "individual inboxes or the retrievable electronic database" are not "maintained" in the same way a student's folder in a permanent file is maintained for purposes of FERPA.

1. *S.A. v. Tulare County Office of Educ.*, 53 IDELR 143 (E.D. Cal. 2009): Emails identifying a student "whether in individual inboxes or the retrievable electronic database, are maintained in the same way the registrar maintains a student's folder in a permanent file is fanciful."

2. *S.B. v. San Mateo-Foster City Sch. Dist.*, 118 LRP 31608 (N.D. Cal. 04/11/17), aff'd, Burnette v. San Mateo Foster City Sch. Dist., 72 IDELR 147 (9th Cir. 2018, unpublished): Following Owasso for the rule that "maintain" means something more than living on an email server with the possibility of retrieval.

**d.** What should you do when a parent asks for "all the emails" prior to an IEP meeting?

1. First – consult your state law and regulations for any additional protections granted to parents in your jurisdiction. Consult with legal counsel as needed.

2. I typically engage in a two-part inquiry:

i. What is the reason the parent is requesting the emails? Is there an underlying issue you can address without going to the time and expense of pulling all relevant emails from the district's email server?

ii. Does your district/jurisdiction have another process parents can use to access the records? What are the requirements of your jurisdiction's public records laws? Is there a court proceeding in which a subpoena can or has been issued?

3. Try to find a compromise with the parent, or at the very least, narrow the request. Although a district may not be required to provide emails that are not made part of the student's educational file, a lot of goodwill can be found in workable solutions that get to the heart of the parent's concern.

e. Remember the timing component of responding to FERPA requests:

1. 34 CFR 300.613 states that the records must be provided:

i. Without unnecessary delay

ii. Before any meeting regarding an IEP

iii. Before any due process hearing or resolution session

iv. And in no case more than 45 days after the request has been made

2. How do you practically respond to requests for student's educational records when the parent makes a request just days before an IEP meeting?

i. Find out what the greatest need is prior to the meeting. Can you narrow the request down to the most recent IEPs and evaluations? Is there a specific document the parents need to feel prepared for the IEP meeting?

ii. Communicate with the parent about how to meet that need.

iii. Create a plan and collaborate with the parent on when/how to provide the remaining records. I have usually found parents to be reasonable (even upset parents) when we find a way to get them the documents they really need prior to an IEP meeting and are transparent about when we can get them the remaining documents in the student's file. There are always

exceptions to the rule, but in general, this process has worked for my districts to collaborate with parents in a positive way and maintain positive relationships.

**f.** Understand the parents' rights regarding educational records:

**1.** So far, we have talked about the parents' right to "inspect and review" the students education records – found in 34 CFR 99.10.

**2.** Parents have other rights as well, specifically broader access rights under the IDEA. Per 34 CFR 300.613, parents have the following additional rights regarding their student's records:

**i.** Right to inspect and review extends to records that are collected, maintained, **or used by the agency under the IDEA;**

**ii.** Parents have a right to a response from the district to reasonable requests for explanations and interpretations of the records;

**iii.** Right to request copies of the records if failing to provide those copies would effectively prevent the parent from exercising their right to inspect and review; and

**iv.** Right to have a representative of the parent inspect and review.

**g.** Everything you do regarding the student's educational file in preparation for an IEP meeting can be viewed through the lens of "what records/explanations will help the parent meaningfully participate in the IEP process?"

**iv.** All your preparation prior to an IEP meeting can be viewed through the lens of parental participation.

**a.** What is the purpose of preparing data, reports, drafts IEPs, documents, etc.?

**1.** To create legally compliant IEPs and programs that serve students; AND

**2.** To allow the parent to participate fully and stymie future challenges.

**v.** What about provision of draft IEPs and reports prior to an IEP meeting?

**a.** This is a judgment call. It is not required anywhere in the law that you must provide drafts of documents prior to the meeting.

**b.** However, in many cases, it can help your meeting run smoother and help you anticipate and address parent concerns prior to the meeting if you do provide drafts for review. Always label the documents as "draft" and remind the parent that this is just for review in preparation for a discussion in which any and all of the documents may change.

**C. Special note on parent participation:** It's not just about records, however. While the student is always the center of the IEP process, Congress and courts have put huge emphasis on the meaningful participation of parents in the IEP development process. If you shift your view to remember that whatever preparations you make will also facilitate meaningful participation of the parent, you can avoid a lot of disagreements and disputes with the parent throughout the IEP process.

**i.** The seminal case in the 9th Circuit on parent participation is *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038 (9th Cir. 2013)

**a.** The facts as stated in the case: [Student] was an 18-year-old student in the Maui District of the Hawaii Department of Education. He was diagnosed with autism at age two. As a result of his condition, the Department determined that Student is eligible to receive special education and other related services, and his educational rights are protected by the IDEA.

The IEP team and Doug C. first discussed the annual IEP meeting date during a student support meeting in September 2010. Kaleo Waiau, a special education coordinator at Maui High School, testified that Doug C. and members of the education team all agreed that the IEP meeting would be held on October 28. Doug C. testified that he thought that they had only agreed, tentatively, to meet sometime in late October. In any event, Waiau called Doug C. on October 22 to confirm the October 28 meeting. Doug C. stated that he was unavailable that day, and they settled instead on either November 4 or 5 (the testimony on which is inconsistent). Doug C. testified that the November date was also tentative, subject to checking his calendar and confirming. The following day, Doug C. called Waiau to let him know that he was not available on that day, and they settled firmly on November 9 instead.

On the morning of November 9, Doug C. e-mailed Waiau at 7:27 a.m. He explained that he was sick and therefore unable to attend the IEP meeting. He suggested rescheduling the meeting for the following week, on either November 16 or 17. The annual review deadline for Student's IEP was Saturday, November 13. According to Waiau, some of the members of the IEP team were not available on Friday, November 12. Therefore, Waiau offered to reschedule for either Wednesday, November 10, or Thursday, November 11, accommodating the other members' schedules while still holding the meeting before the deadline. Doug C. responded that he could possibly participate on either of those days, but could not definitively commit to either day since he was ill

and could not guarantee that he would recover in time. Waiau also suggested that Doug C. participate by phone or the Internet. But Doug C. explained that (1) he wanted to be physically present at his son's IEP meeting and (2) he did not feel physically well enough to participate meaningfully through any means that day.

Waiau decided to go forward with the meeting on November 9 as scheduled. He testified that he had already asked "13 people on three separate occasions to change their schedules and cancel other commitments" to schedule the meeting. Therefore, without a firm commitment from Doug C. for one of the two dates he proposed, Waiau refused to reschedule the meeting. Waiau and the IEP team held the meeting without the participation of Doug C. The only Horizons Academy staff member on Student's IEP team also did not attend.

With these key participants absent, the IEP team changed Student's placement from Horizons Academy to the Workplace Readiness Program at Maui High School. After the meeting, Waiau sent Doug C. the new, completed IEP for his review. The team held a follow-up IEP meeting on December 7 with Doug C. and a staff member from Horizons. At the follow-up meeting, the team reviewed the already completed IEP "line by line." Waiau testified that Doug C. provided no substantive input, while Doug C. explained that he rejected the IEP in its entirety because he was excluded from the development process. No changes were made to the IEP during the December 7 meeting.

**b.** What did the court say about parental participation? Some key statements of law from the case below:

**1.** “Parental participation in the IEP and educational placement process is critical to the organization of the IDEA.” This is so for two reasons: (1) Parents represent the best interests of their child in the IEP development process; and (2) parents provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.

**2.** The regulatory framework of the IDEA places an affirmative duty on agencies to include parents in the IEP process. The district is required to “take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded an opportunity to participate” including providing ample notice and “scheduling the meeting at a mutually agreed on time and place” – 34 CFR 300.322(a)

**3.** If a parent cannot attend, the district must offer other methods of participation such as video or teleconference – 34 CFR 300.322(c), 300.328.

4. A meeting may only be conducted without a parent if "the public agency is unable to convince the parents that they should attend" 34 CFR 300.322(d) (emphasis added).

5. Parents must be involved in the "creation process" **unless they affirmatively refuse to attend**.

c. The Ninth Circuit's holding:

1. "The fact that it may have been frustrating to schedule meetings with or difficult to work with Doug C. (as the Department repeatedly suggests) does not excuse the Department's failure to include him in Spencer's IEP meeting when he expressed a willingness to participate."

2. "Because the Department's obligation is owed to the child, any alleged obstinance of Doug C. does not excuse the Department's failure to fulfill its affirmative obligation to include Doug C. in the IEP meeting when he expressed a willingness (indeed eagerness) to participate, albeit at a later date."

3. "When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE."

4. In this case, the competing procedural requirements were parental participation and the annual deadline for the student's IEP review. **Focusing on the "vital importance" of parental participation in the IEP creation process, the court held the decision to prioritize strict deadline compliance over parental participation is "clearly not reasonable."**

**ii. Why focus so much on parental participation?**

a. It's an important part of preparing for any IEP meeting. It can also shape your discussion during an IEP meeting. Parents and districts will not always agree – the law does not require that we always agree with parents during an IEP meeting. But it does require that we provide opportunities for parents to meaningfully participate in the development of their child's IEP.

b. **If you spend time thinking about ensuring the parent's meaningful participation <u>throughout the IEP process</u>, you can stop a lot of problems or disputes before they even start.**

**D.** Think back through the preparation topics above with the lens of ensuring meaningful parental participation? How would you address these topics now?

i. Defining roles;

ii. Communicating with the "other side" before the meeting;

iii. Setting meeting norms; and

iv. Providing necessary (and unnecessary records).

## III. During the Meeting

### A. Reviewing the Agenda

i. In my experience, the few minutes it takes to review the agenda for the meeting is never a waste of time. It centers everyone on the IEP team and allows for focus on the items at hand.

ii. Some of the most successful meetings I have attended involved taking five minutes at the beginning of the meeting to:

a. Lay out the ground rules for communication;

b. Review the agenda for the meeting;

c. Adjust the agenda/plan for the meeting as necessary;

d. Provide a way for topics beyond the scope of the purpose of the meeting to be addressed.

1. Maybe they can be addressed during the meeting.

2. If they cannot – how will they be addressed?

iii. **Being transparent about the plan for the meeting and working to ensure everyone, including the parents, are on the same page about that plan will actually save time and save relationships (and help the meeting be more productive!).**

### B. How to Review the IEP

i. **Please, please, please DON'T read the IEP!!**

ii. Other options for reviewing the IEP:

a. Describe a summary of each section of the IEP and allow team members to provide input and feedback.

b. Ask everyone to read a specific portion to themselves and discuss any questions, changes, additions, etc.

**iii.** Have a plan to address each topic and notify team members ahead of time what you intend for them to share. Things to think about during the meeting:

**a.** Are you reviewing the full IEP? Or are you only reviewing portions as part of an IEP review?

**b.** Contact the parent prior to the meeting regarding parent concerns.

**c.** Prepare team members to share present levels and progress. Ask them to explain the information without reading it verbatim from a report or document.

**d.** Discuss information with any specialists who will be attending the meeting and give them time on the agenda.

**iv.** There are many ways to review the IEP with the parent and the remaining IEP team during the meeting. Spend time in advance deciding how you want to do this. Plan the meeting with the purpose in mind. Execute by enlisting the help of your team members, including the parent!

## C. Consensus

**i.** Consensus is a term that is thrown around in special education but not everyone has a clear understanding of what it means and how to get it. Common misconceptions lead to misunderstanding with the parent, which can foster distrust and disputes.

**ii.** What is consensus?

**a.** There is not a clear definition of "consensus" in the law of special education. It is possibly best defined by its process, rather than a strict definition.

**b.** In the 9th Circuit, we have the case of *M.S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003), which gives us some idea about how consensus works in practice. Relying on U.S. Supreme Court precedent, the 9th Circuit explained that consensus in the IEP process is not always attainable. Because Congress "apparently recognized that a cooperative approach would not always produce a consensus between the school officials and parents …" it created "procedural safeguards" to insure **full participation** of parents and proper resolution of substantive disagreements.

**c.** The court said:

**1.** Although the formulation of the IEP is ideally achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes that is not possible.

2. If parties reach consensus, the IDEA is satisfied, and the IEP goes into effect.

3. If not, the district has the duty to formulate the plan to the best of its ability in accordance with the information developed at prior meetings.

4. But it must afford the parents a due process hearing in regard to that plan.

iii. How do we get consensus?

a. Consensus should not be a vote or a "majority rules" situation. It should be attained through a collaborative process including all members of the IEP team. **Remember the lens on parental participation: Ensure the parent has adequate means and opportunity to participate**.

b. Even if the end result is that there is no consensus, a district will cut off procedural challenges if parental participation is prioritized.

c. **Tip:** Document consensus on each issue in the meeting minutes. It is also a good practice to document consensus in the Prior Written Notice (PWN).

## D. Explaining Goals and Progress Effectively

i. **Baseline data (and measurable criteria)** can be a point of contention during IEP meetings.

a. What is required?

1. Baseline data is often referred to by parents, districts, and factfinders/courts as a measure of the student's current ability related to a specific annual goal or objective in the IEP. Some believe this must be a specific numerical calculation. Some believe it can be more anecdotal. Some believe it's not required at all.

2. There is some case law to suggest that it is required in certain situations. In Oregon, we recently had some decisions come out regarding baseline data:

i. *Hood River Cty. Sch. Dist. v. Student*, 79 IDELR 40 (D. Or. July 1, 2021): School districts must provide specific numerical baseline data **when the district chooses to establish numerical criteria for the annual goals and objectives**.

**ii.** *See also West-Linn Wilsonville Sch. Dist. v. Student*, 63 IDELR 251 (D. Or. July 30, 2014): Courts have rejected a requirement of numeric baseline data as necessary to comply with the IDEA.

**iii.** *See also Ashland Sch Dist. v. Parents of Student R.J.,* 585 F. Supp. 2d 1208 (D. Or. 2008), *aff'd* 588 F.3d 1004 (9th Cir. 2009): "The IEP and the reports provided to Parents quantified that which is readily capable of being quantified, such as the number of hours per week a particular service would be provided, a description of the service, R.J.'s attendance record, and her grades ... [T]here is no easy way to quantify goals such as having the right friends or making good decisions."

**iv.** Some other jurisdictions have agreed: *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419 (8th Cir. 2010): "In any event, we will not compel a school district to put more in its IEPs than is required by law [referring to baseline data]."

**3.** Regardless of whether it is required or not, you should come to an IEP meeting ready to discuss the student's present levels of academic and functional performance. This **is** a requirement of the IDEA.

**i.** This data should be the basis of the goals you draft for the student. Be prepared to discuss how the goals you propose are related to the data you currently have on the student. If you don't have the data you need to support a goal area – then determine a plan to get that data.

**ii.** Although *numeric* baseline data may not be required in some circumstances, objective measures that show a student's current functioning level and the intended progress over the life of the IEP will ensure compliance.

**iii. Importantly – objective measures will ensure transparency with the parents and improve relationships!**

**ii.** Be prepared to discuss **specially designed instruction** with families in a way that it can be understood.

**a.** This is another term of art that can be very confusing for parents. Prepare for this discussion, especially for parents who are new to the special education vernacular.

**b.** The definition of SDI under the IDEA: Adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction

(a) to address the unique needs of the child that result from the child's disability and

(b) to ensure access of the child to the general curriculum so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children

**c.** Discuss how the content, methodology, or delivery of instruction will change based on the student's individual needs. The worst thing to do here is be vague.

**d.** Be specific, but not in terms of methodology! Remember, methodology is strictly within the purview of the district unless a specific methodology is needed in order to provide FAPE.

**e.** Most parents have no clue what it actually looks like to teach in a classroom, let alone teach special education in whatever setting is being discussed. Be transparent and prepared to discuss the logistics of what this really looks like

## E. Accommodations and Modifications

**i.** Tips for discussion of accommodations and modifications:

**a.** Focus the conversation on the student's needs, not what is "possible" or "difficult" for staff.

**b.** Avoid phrases like "we don't do that here" or "we can't provide XYZ" or "NO".

**c.** Respond with questions like:

**1.** Why do you think the student needs that?

**2.** What need would that serve for the student?

**3.** Are there other ways we could meet that need?

**ii.** Once accommodations or modifications have been agreed to, be specific and clear about who, how, where, and what will be provided.

**a.** Avoid using "as needed" as a frequency descriptor. Many districts think this protects their discretion or ability to provide an accommodation. Some state and federal agencies are finding it to be out of compliance with the law because it allows districts to fail to provide an

accommodation at individual staff discretion. It also is not transparent for parents and can cause contention.

**b.** Avoid "to be determined by a specific teacher." Same as above.

**c.** Make the frequency and duration objective and specific.

**F. Extended School Year (ESY)**: ESY is also often misunderstood and confusing to parents. Many parents who are new to special education don't even know this is something that can or should be provided or discussed**.** It's important to base ESY discussions on data, so you need to plan ahead to have that data ready to review.

**i.** Remember the requirements for ESY to avoid complaints from parents:

**a.** 34 CFR 300.106:

**1.** Each public agency must ensure that ESY services are available as necessary to provide FAPE.

**2.** ESY must be provided if IEP team determines, on an individual basis, that services are necessary for a FAPE.

**3.** Districts may not:

**i.** Limit ESY services to particular categories of disability; or

**ii.** Unilaterally limit the type, amount, or duration of those services

**b.** ESY is defined as special education and related services that are provided to a child with a disability:

**1.** Beyond the normal school year;

**2.** In accordance with the IEP; and

**3.** At no cost to parents.

**ii.** Whatever your state's standard for determining ESY eligibility, ensure you are prepared with data to discuss with the parent. **Do not predetermine what an ESY program will look like for an individual student.**

**iii.** Common mistakes I hear during IEP meetings regarding ESY:

**a.** "That student isn't the type of student who goes to ESY".

**b.** "Our ESY program is X number of weeks, Y number of days per week, and Z number of hours per day".

**c.** "We have a formula to determine how many hours of ESY a student receives".

**d.** "ESY is only during the summer" (!!! Hint: it's not!).

**e.** "We don't have any [summer/winter/spring] break data, so we don't see regression or a reason the student should qualify".

## G. Placement/Least Restrictive Environment (LRE)

**i.** The definition of LRE under the IDEA: To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

**ii.** Placement is defined under the federal regulations (34 CFR 300.116) by an explanation of the process for determining placement, including:

**a.** Who makes the decision (the IEP team);

**b.** When it is made (at least annually);

**c.** How it is made (based on the IEP, as close as possible to home, considering potential harmful effects, etc.)

**iii.** Placement can be a very emotional subject for parents. If you anticipate a placement change, communication is key:

**a.** **While avoiding predetermination**: It's ok to tell parents you are considering some different placement. I always preface this discussion with the concern about meeting a student's needs. Are they making progress in their current placement? What have we tried to adjust in their placement to help them receive a FAPE?

**b.** During that conversation, offer to let the parents observe the placement(s) – and go with them on the visit if you can! But remind the parents that the placement consideration is just one option to be considered by the full IEP team, including them.

**iv.** How to discuss placement at the IEP meeting:

**a.** Remember that districts must "ensure that a continuum of alternative placements is available to meet the needs" of the child – 34 CFR 300.115.

**b.** The keys to successful placement discussions are:

1. Preparation (of the parent and the school team); and

2. A thorough and transparent conversation about benefits and harmful effects (if any)

c. Don't give short shrift to the conversation! Although patience and tempers may be short by the time you get to "placement" on your meeting agenda, try to recenter so that you can have a complete discussion about placement and options. Take the time to explain the extent of removal and the nonparticipation justification of the IEP.

d. **Note:** Too many times, I have seen this part of the meeting get sped through because of timing or fatigue or any number of reasons. This is the part of the student's program that tends to create the largest number of disputes. Spend the time you need to help the parent understand the conversation and to give space to hear their concerns and questions.

v. **How to handle difficult placement discussions.** I often get asked how to handle situations in which the services/placement that everyone agrees on is not available. Perhaps there is a waitlist or perhaps we are still doing research on the right facility for an outside placement. Whatever the reason is, what do we do when there is not a placement available?

a. **Always check with your own legal counsel.** But here are some strategies I have used successfully that have avoided complaints.

b. **Preparation here is key**: If you discussed a placement prior to the meeting with the parent, you can prepare them for this so they are not surprised in front of the rest of the IEP team during the meeting.

c. Work with the parent to find an agreeable stop-gap measure while waiting for the placement to become available:

1. Alternative placement options (never desirable but sometimes necessary)

i. Online/distance options

ii. Homebound (check your state's specific requirements)

iii. Partial days

iv. Personalized learning environments

v. **Note**: None of these are ideal because what you really want is the placement that is available. But if you can come to an agreement with the parent about what to do while on a waitlist, you will avoid some complaints.

2. Maintain current placement with extra supports (Warning here – this may set you up for a claim that the placement you are waiting for is too restrictive and does not provide FAPE)

**d.** Once you have agreed on a stop-gap placement, determine whether compensatory education should be provided for that period of time.

### H. Tips for handling difficult requests from parents.

**i.** Act from a place of curiosity or inquiry, rather than making judgments or decisions in the moment.

**ii.** Ask for more information about why the request is being made – try to determine the underlying need.

**iii.** Table the issue to provide more time to research and consider the request.

**a.** But not for too long!

**b.** Set up the next meeting while still at the table.

**iv.** Determine if you can meet that same need in a different way.

**v.** Engage in discussion with the parent rather than shutting them down.

**vi.** Once a decision has been made, articulate how the underlying need will be met and document the decision in a PWN.

## IV. <u>After the Meeting</u>

### A. Sending documentation

**i.** Make sure you send any required Prior Written Notices (PWNs):

**a.** Try to avoid the generic "we held an IEP meeting and created an IEP". As a parent advocate, I hated these. But I don't like them as district counsel either. They are not specific to the student's needs and don't show that we carefully considered how to provide a FAPE.

**b.** The best PWN I see include line-by-line statements about what was agreed to in the IEP, documenting consensus or parent disagreement at each step.

**c.** If the parent made some specific requests for atypical services or accommodations, make sure that is documented in a PWN.

**ii.** Other documentation that you either must or should send to the parent:

**a.** The finalized IEP! Do send this to the parent as soon as it is available.

**b.** Evaluation reports. Send as soon as available.

**c.** Eligibility documents. Send as soon as available.

**d.** Meeting minutes. I like to send the meeting minutes to parents. Sometimes parents want to correct or challenge the minutes, but even if that happens, it gives the district the opportunity to have a conversation about disagreement. It also tells the district where the parent's concerns are so they can be addressed.

**iii.** How to handle requests to change documentation after a meeting:

**a.** There is a process under FERPA that describes how parents can request changes to documents. Be familiar with that process and with your district's policies implementing that process.

**b.** As stated under FERPA (34 CFR 99.20):

**1.** If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

**2.** The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

**3.** If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

**c.** **Tip**: If you choose not to amend the record, inform the parents of the right to a hearing as required, but you can also offer to place the parents' statement in writing about their disagreement with a particular record in the student's file with the contested part of the record. This sometimes negates the need for a hearing because a parent is satisfied with that compromise. It is one of the possible outcomes if the parent chooses the hearing anyway, so it fast-tracks the process without the parent requesting a hearing.

**B. Outstanding requests:** Make sure you follow up on any outstanding requests from the parent. Did you use a "parking lot" for items beyond the scope or purpose the meeting? Take time to discuss how those will be addressed, when, and by whom. Make sure there is follow through.

**C. Future contact:** Provide contact information for a point person if the parent has concerns, questions, or new issues arise. Make sure the person who is responsible for communication is responsive and timely.

## V. Other Considerations

### A. How to respond to challenging parents?

**i.** First – remember parents are advocating for their child, the most precious person in their life. They will be emotional, and they should be! This is their kid. Try to extend grace and understanding if you have a parent who is particularly difficult to communicate with.

**ii.** There are steps you can take to protect yourself and your staff when parent communications become excessive, abusive, or threatening.

**iii.** The key to any successful IEP process is communication. Hiding the ball helps no one and breeds resentment, confusion, and frustration.

- **a.** "Preempt" the parents' concerns by anticipating their questions and providing information as soon as possible (don't wait for the meeting)
- **b.** Communicate:
  1. Before the meeting about the purpose, the agenda, any significant changes you think may occur.
  2. After the meeting regarding finalizing decisions and next steps (including how to communicate going forward).
  3. More than you think you should.
- **c.** It may feel excessive, but in most cases, more communication is better and will foster positive relationships (and in turn, avoid complaints). Parents are not special education experts (most of the time).
- **d.** Remember to avoid acronyms.
- **e.** Be responsive when parents ask questions.

**iv.** Document, document, document!

- **a.** Keep clear records of any discussions you have with parents outside of the IEP meeting:
  1. Send confirming emails to the parents.
  2. Make a contact note in the student's file.
  3. If you keep a working file for a student, ensure that you incorporate that working file into the student's file (exception: sole possession records/personal memory aids)

**v.** When communication goes south….

**a.** The Ninth Circuit has upheld communication plans that limit excessive or abusive communications from parents. You can create a communication plan that limits district staff's exposure to abusive communications and channels excessive parent communication in a reasonable way. You must still provide a method for the parent to communicate their questions and concerns and you must still respond in a reasonable manner.

**b.** *L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621 (9th Cir. 2020)

**1.** Facts: Beginning in March 2015, parent engaged in a pattern of "sen[ding] incessant emails to staff accusing them of wrongdoing; ma[king] presumptuous demands; level[ing] demeaning insults; ... and in face-to-face interactions, act[ing] in an aggressive, hostile, and intimidating manner." As disagreements arose, parents' communications became increasingly excessive, described by the building principal as "many times more than is typical". Responses were extraordinarily time-consuming, and staff felt threatened and intimidated. On November 23, 2015, the District imposed a Communication Plan. Substantive communications would be limited to biweekly, in-person meetings with the parent and another administrator. Parent was advised not to email or attempt to communication in any form with any District employees aside from the biweekly meetings, "as they will not respond to [his] emails or attempts to communicate". Plan did not apply to emergency events, did not affect parent's right to appeal decisions, and did not bar him from attending school activities or accessing school records. Parent was told he had the right to challenge the communication plan by filing an appeal in state court. When the parent violated the plan in January 2016, the District cut back the biweekly meetings to once a month.

**2.** The parent claimed the communication plan violated his First Amendment right to free speech. The Court found that he was not completely prohibited from communicating with his children's teachers, rather, the communication plan specified channels for any communications to which he wanted a response. The plan did not attempt to impose any sanctions on the parent's behavior, only limited what the district would respond to.

**c.** **Note**: A First Amendment claim was at issue in the Lake Washington case, not a FAPE issue. The 9th Circuit has addressed communication plans in the context of FAPE and upheld them if certain conditions are met. *See Forest Grove Sch. Dist. v. Student*, 73 IDELR 115 (D. Or. Nov. 27, 2018) (A communication protocol that limited the district's response to a parent's excessive emails did not violate the parent's right to

meaningfully participate in the development of the student's IEP because it did not "seriously infringe" on the parent's opportunity to participate.)

**My number one tip for people on "both sides" of the table:**

**Pick up the phone and talk to each other!**

It may seem old-fashioned, but emails, text, sharing of documents, etc. --- none of that completely replaces human connection, tone, and understanding. For school district personnel, it gives you a chance to show the parents the great work you are trying to do for their child. For parents, it is an opportunity to work collaboratively and have your voice heard.

So many disputes can be avoided simply by talking to each other! Just do it! And good luck!

# Successful IEP Meetings

Lessons from Both Sides of the Table

Elizabeth L. Polay

GARRETT HEMANN ROBERTSON PC

Pacific Northwest Institute on Special Education and the Law
October 11, 2023

1

Story Time!

My first IEP meeting…

What have I learned since then?

2

- Having a successful IEP meeting (or meetings!) depends on more than what happens during the meeting itself
- Think about what to do:
  - Before the IEP meeting
  - During the IEP meeting
  - After the IEP meeting
  - Other considerations outside the meeting process
- Note: This is one perspective – Mine! Please feel free to chime in with your own experiences, suggestions, and ideas. We can all learn from each other here!

## Topics of Discussion Today

3

## Before the Meeting…

- Preparing effectively
- Providing necessary (and unnecessary) records
- Special Note: Think through the lens of parental participation

4

## Preparing Effectively

- Define roles
  - Who is facilitating the meeting?
  - Who will be addressing questions from the parent?
  - Will there be outside or private providers in attendance?
- Communicate with the "other side" before the meeting
- Set meeting norms
  - Set ground rules for communication prior to and during the meeting – and send a copy of those to the parent/representative (if you are a parent or parent advocate – ask if there are any ground rules to be considered)
    - Respectful communication
    - Avoid acronyms! This is very important!
  - Provide an agenda prior to the meeting
  - Allow for time to provide feedback on the agenda
- Special Note: Ensure you are prepared to meet any language or disability related needs for the parents/participants

5

## Providing Necessary Records

**Why is this important prior to an IEP meeting?**

- Often, parents make requests for voluminous school records before an IEP meeting
- District staff should know the requirements when this occurs and be prepared to respond to foster good relationships and ensure meaningful parent participation

**What is an educational record under FERPA?**

- 34 CFR 99.3: Two-part definition:
  - Directly related to the student
  - Maintained by an educational agency or institution or by a party acting for the agency or institution.
- Types of records to consider (examples):
  - Sole possession records
  - Law enforcement records
  - Employment records: exclusively related to employee status
  - Grade on peer-graded papers before they are collected and recorded by teacher
  - **Emails…**

6

## Emails as Educational Records

- In *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 536 U.S. 426 (2002), the Supreme Court defined the word "maintain" under FERPA
  - "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled."
- A string of 9th Circuit cases indicate that emails that in "individual inboxes or the retrievable electronic database" are not "maintained" in the same way a student's folder in a permanent file is maintained for purposes of FERPA
  - *S.A. v. Tulare County Office of Educ.*, 53 IDELR 143 (E.D. Cal. 2009): Emails identifying a student "whether in individual inboxes or the retrievable electronic database, are maintained in the same way the registrar maintains a student's folder in a permanent file is fanciful."
  - *S.B. v. San Mateo-Foster City Sch. Dist.*, 118 LRP 31608 (N.D. Cal. 04/11/17), *aff'd, Burnette v. San Mateo Foster City Sch. Dist.*, 72 IDELR 147 (9th Cir. 2018, *unpublished*): Following *Owasso* for the rule that "maintain" means something more than living on an email server with the possibility of retrieval
- **So what do you do when a parent asks for emails/communications prior to an IEP meeting?**
  - What is the reason the parent is requesting the emails? Try to understand the underlying issue.
  - Does your district/jurisdiction have another process the parents can use to access the records?

7

## Timing of Providing Records

**34 CFR 300.613**

- Without unnecessary delay
- Before any meeting regarding an IEP
- Before any due process hearing or resolution session
- In no case more than 45 days after the request has been made

**Practicality of quick turnaround requests**

- Find out what the greatest need is prior to the meeting
- Communicate with the parent about how to meet that need
- Create a plan and collaborate with the parent on when/how to provide the remaining records

8

## What are parents' rights regarding educational records?

- 34 CFR 99.10: Parents have the right to **inspect and review** the student's education records
- The IDEA gives broader access rights to parents/eligible students than FERPA, so be aware of those
- 34 CFR 300.613:
  - Right to inspect and review extends to records that are **collected**, maintained, **or used by the agency under the IDEA**
  - Parents have a right to a response from the district to reasonable requests for explanations and interpretations of the records
  - Right to request copies of the records if failing to provide those copies would effectively prevent the parent from exercising their right to inspect and review; and
  - Right to have a representative of the parent inspect and review

9

# The Key Takeaway:

**What records/explanations will help the parent meaningfully participate in the IEP process?**

10

## Parental Participation

- All your preparation prior to an IEP meeting can be viewed through the lens of parental participation
- What is the purpose for preparing data, reports, draft IEPs, documents, etc.?
  - 1) Create legally compliant IEPs and programs for students
  - 2) Allow the parent to participate fully and stymie future challenges
- Note: Provision of draft IEPs or reports prior to an IEP meeting is a judgment call
  - It's not required anywhere in the law to provide drafts of documents prior to the meeting
  - However, in many cases, it can help your meeting run smoother and help you anticipate and address parent concerns prior to the meeting

11

- The seminal case in the 9th Circuit is *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038 (9th Cir. 2013)
- Facts:
  - First meeting to discuss the student's IEP - September 2010
  - All members of the education team agreed to meet on October 28
  - Parent testified that he thought they only tentatively agreed to meet sometime in late October
  - Special education coordinator called parent on October 22 to confirm October 28 meeting
  - Parent said he was unavailable that day, so they settled on November 4 or 5 - parent believed this date was also tentative, subject to checking calendar and confirming
  - Parent called back the next day to settle firmly on November 9 instead

## Parental Participation: What does it mean?

12

## *Doug C.* continued…

- Facts (cont.)
  - Morning of November 9, Parent emailed Coordinator at 7:27 a.m. – parent was sick and unable to attend; suggested rescheduling to the next week on November 16 or 17
  - Annual review for the student's IEP was due Saturday, November 13
  - Some members of the school team were not available on Friday, November 12, so Coordinator offered to reschedule for November 10 or 11
  - Parent responded he could possibly participate on either of those days but could not commit because he was ill
  - Coordinator also suggested participation by phone or internet
  - Parent declined because (1) he wanted to be physically present and (2) he did not feel physically well enough to participate meaningfully through any means that day
  - District decided to go forward with the meeting on November 9 as scheduled because he had already asked "13 people on three separate occasions to change their schedules and cancel other commitments"
  - At the meeting on November 9, the student's placement was changed

13

## *Doug C.* (part 3)

- Facts:
  - District held a follow-up IEP meeting on December 7 with the parent and the new placement staff
  - The previously complete IEP was reviewed "line by line"
  - Parent provided no substantive input but rejected the IEP in its entirety because he was excluded from the development process
  - No changes were made at the December 7 meeting

14

## *Doug C.* decision

- What did the court say about parental participation?
- Statements of law:
  - "Parental participation in the IEP and educational placement process is critical to the organization of the IDEA."
  - Two reasons:
    - Parents represent the best interests of their child in the IEP development process
    - Parents provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know
  - The regulatory framework of the IDEA places an **affirmative** duty on agencies to include parents in the IEP process
  - The District is required to "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded an opportunity to participate" including providing ample notice and "scheduling the meeting at a mutually agreed on time and place" – 34 CFR 300.322(a)
  - If a parent cannot attend, the district must offer other methods of participation such as video or teleconference – 34 CFR 300.322(c), 300.328
  - A meeting may **only** be conducted without a parent if "the public agency is *unable* to convince the parents that they should attend" 34 CFR 300.322(d) (emphasis added).
  - Parents must be involved in the "creation process" unless **they affirmatively refuse to attend**

15

## *Doug C.* Holding

"The fact that it may have been frustrating to schedule meetings with or difficult to work with Doug C. (as the Department repeatedly suggests) does not excuse the Department's failure to include him in Spencer's IEP meeting when he expressed a willingness to participate."

"Because the Department's obligation is owed to the child, any alleged obstinance of Doug C. does not excuse the Department's failure to fulfill its affirmative obligation to include Doug C. in the IEP meeting when he expressed a willingness (indeed eagerness) to participate, albeit at a later date."

"When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE."

- In this case, the competing procedural requirements were parental participation and the annual deadline for the student's IEP review

**Focusing on the "vital importance" of parental participation in the IEP creation process, the court found the decision to prioritize strict deadline compliance over parental participation as "clearly not reasonable."**

16

## Examples:

- Parent requested an IEP meeting because they disagree with the student's current placement. Since that time, they have been unreachable by phone, email, or through use of the district's parent messaging app. No deadline is approaching.
  - What should the district do?
- Student's case manager requested an IEP meeting because they are concerned the student needs a more restrictive placement. Parent responded once to agree to a meeting but a date could not be determined. Two dates were available but no firm confirmation was received by the parent. No deadline is approaching.
  - What should the district do?
- The student's annual IEP deadline is in one month. The district tries to reach the parent but is unable to reach the parent over a series of weeks. The parent is nonresponsive to phone calls, messages, emails, or letters.
  - What should the district do?
- The parent disagreed with the student's placement at the last IEP meeting and requested a private placement. The district has offered to meet with the parent multiple times but the parent refuses, citing that they will not agree to an IEP meeting until the district agrees to their proposed private placement.
  - What should the district do?

17

## Why spend so much time on parental participation?

It's an important part of preparing for a meeting

It can also shape your discussion during an IEP meeting

- Parents and districts will not always agree – the law does not require that we always agree during an IEP meeting
- But it does require that school districts provide opportunities for parents to meaningfully participate in the development of their child's IEP

If you spend time thinking about ensuring the parent's meaningful participation **throughout the IEP process**, you can stop a lot of problems before they even start

18

## So let's look back at some preparation topics through the lens of parental participation:

- **Define roles**
  - Who is facilitating the meeting?
  - Who will be addressing questions from the parent?
  - Will there be outside or private providers in attendance?
- **Communicate with the "other side" before the meeting**
- **Set meeting norms**
  - Provide an agenda prior to the meeting
  - Allow for time to provide feedback on the agenda
- **Providing necessary records**
  - (And maybe some unnecessary ones like draft IEPs and reports)

19

## During the Meeting

- Reviewing the agenda
- How to review the IEP
  - Hint: Don't read it!
- Consensus
- Explaining goals and progress effectively
- Accommodations and Modifications
- Extended School Year
- Placement/LRE/Nonparticipation Justification

20

- **This is not a waste of time**
- Some of the most successful meetings I have attended involved taking five minutes at the beginning of the meeting to:
  - Lay out the ground rules for communication
  - Review the agenda for the meeting
  - Adjust the agenda/plan for the meeting as necessary
  - Provide a way for topics beyond the scope of the purpose of the meeting to be addressed
    - Maybe they can be addressed during the meeting
    - If they cannot - how will they be addressed?
  - Being transparent about the plan for the meeting and working to ensure everyone, including the parents, is on the same page about that plan will save time and save relationships (and help the meeting be more productive!)

## Reviewing the Agenda

21

## How to review the IEP

**Please, please, please DON'T read the IEP**

Other options:

- Summarize each section of the IEP and allow team members to provide input and feedback
- Ask everyone to read a specific portion to themselves and discuss any questions, changes, additions, etc.

Have a plan to address each topic and notify team members ahead of time what you intend for them to share

- Are you reviewing the full IEP? Or are you only reviewing portions as part of an IEP review?
- Contact parent prior to the meeting regarding parent concerns
- Prepare team members to share present levels and progress
- Discuss information with any specialists who will be attending the meeting and give them time on the agenda

There are many ways to review the IEP with the parent and the remaining IEP team during the meeting

- Spend time deciding how you want to do this in advance
- Plan the meeting with the purpose in mind
- Execute by enlisting the help of your team members, including the parent!

22

## Consensus

- What is it?
- How do we get it?

23

## What is consensus?

- There is not a clear definition of "consensus" in the law
- It is maybe best defined by its process, rather than a strict definition
- In the 9th Circuit, we have *M.S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003):
  - Relying on U.S. Supreme Court precedent, the 9th Circuit explained that consensus is not always attainable
  - Because Congress "apparently recognized that a cooperative approach would not always produce a consensus between the school officials and parents …" it created "procedural safeguards" to insure **full participation** of parents and proper resolution of substantive disagreements
  - What the court said:
    - Although the formulation of the IEP is ideally achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes that is not possible
    - If parties reach consensus, the IDEA is satisfied and the IEP goes into effect
    - If not, the **district** has the duty to formulate the plan to the best of its ability in accordance with the information developed at prior meetings
    - But it must afford the parents a due process hearing in regard to that plan

24

## So how do we get consensus?

- Consensus should not be a vote or a "majority rules" situation
- Consensus should be attained through a collaborative process
- **Remember the lens on parental participation: Ensure the parent has adequate means and opportunity to participate**
- Even if the result is that there is not consensus, a district will cut off procedural challenges if parental participation is prioritized
- Note:
  - Document consensus on each issue in the meeting minutes
  - Preview for later in the presentation – document consensus in the PWN!

25

- Baseline data (and measurable criteria)
  - What is required
  - What is maybe required?
- Specially designed instruction
  - What is it?
  - How to discuss it with families

## Explain goals and progress effectively

26

## Baseline Data

- Baseline data is often referred to by parents, districts, and fact-finders/courts as a measure of the student's current ability related to a specific annual goal or objective in the IEP
- Some believe this must be a specific numerical calculation
- Some believe it can be more anecdotal
- Some believe it's not required at all
- There is some case law to suggest that it is required in certain situations
  - In Oregon, we recently had some decisions come out on baseline data
  - *Hood River Cty. Sch. Dist. v. Student*, 79 IDELR 40 (D. Or. July 1, 2021)
    - School districts must provide specific numerical baseline data **when the District chooses to establish numerical criteria for the annual goals and objectives**
    - *See also West-Linn Wilsonville Sch. Dist. v. Student*, 63 IDELR 251 (D. Or. July 30, 2014): Courts have rejected a requirement of numeric baseline data as necessary to comply with the IDEA
    - *See also Ashland Sch Dist. v. Parents of Student R.J.*, 585 F. Supp. 2d 1208 (D. Or. 2008), *aff'd* 588 F.3d 1004 (9th Cir. 2009): "The IEP and the reports provided to Parents quantified that which is readily capable of being quantified, such as the number of hours per week a particular service would be provided, a description of the service, R.J.'s attendance record, and her grades … [T]here is no easy way to quantify goals such as having the right friends or making good decisions."
  - Some other jurisdictions have agreed: *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419 (8th Cir. 2010): "In any event, we will not compel a school district to put more in its IEPs than is required by law [referring to baseline data]."

27

## Baseline Data (cont.)

Regardless of whether it is required or not, you should come to the IEP meeting ready to discuss the student's present levels of academic and functional performance

- This data should be the basis of the goals you draft for the student
- Be prepared to discuss how the goals you propose are related to the data you currently have on the student
- If you don't have the data you need to support a goal area - then determine a plan to get that data
- **Although *numeric* baseline data may not be required in some circumstances, objective measures that show a student's current functioning level and the intended progress over the life of the IEP will ensure compliance**
  - **Importantly - they will also ensure transparency with the parent and improve relationships!**

28

## Specially Designed Instruction

- This concept can be very confusing to parents
- Prepare for this discussion, especially for parents who are new to the special education vernacular
- The definition of SDI under the IDEA:

  Adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction

  (a) to address the unique needs of the child that result from the child's disability and

  (b) to ensure access of the child to the general curriculum so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children
- Discuss how the content, methodology, or delivery of instruction will change based on the student's individual needs
- The worst thing to do here is be vague
  - Be specific (not in terms of methodology)
  - Most parents have no clue what it actually looks like to teach in a classroom, let alone teach special education in whatever setting is being discussed
  - **Be transparent and prepared to discuss the logistics of what this really looks like**

29

## Accommodations and Modifications

Focus the conversation on the student's needs

Avoid phrases like "we don't do that here" or "we can't provide XYZ" or "NO"

Respond with questions like:

- Why do you think the student needs that?
- What need would that serve for the student?
- Are there other ways we could meet that need?

Once accommodations or modifications have been agreed to, be specific and clear about who, how, where, and what will be provided

- Avoid "as needed"
- Avoid "to be determined by a specific teacher"
- Make the frequency and duration objective and specific

30

## Example:

- High school student has a disability that affects her executive functioning. This demonstrates as a lack of focus on academic tasks and disorganization with deadlines and materials.
- The parent requests a 1:1 aide for the student
- What are some ways the district could respond that will:
  - Ensure meaningful participation for the parent;
  - Avoid predetermination and procedural violations; and
  - Properly address the student's needs?

31

## Extended School Year (ESY)

**Why is this important to think about ahead of time?**

- ESY discussions are supposed to be based on data as much as possible
- We have to plan ahead to have that data ready for review

**Remember the requirements to avoid complaints from parents**

- 34 CFR 300.106:
  - Each public agency must ensure that ESY services are available as necessary to provide FAPE
  - ESY must be provided if IEP team determines, on an individual basis, that services are necessary for a FAPE
  - Districts may not:
    - Limit ESY services to particular categories of disability; or
    - Unilaterally limit the type, amount, or duration of those services
- ESY is defined as special education and related services that are:
  - Provided to a child with a disability
    - Beyond the normal school year;
    - In accordance with the IEP; and
    - At no cost to parents

32

## ESY (cont.)

Whatever your state's standard for determining ESY eligibility is, ensure you are prepared with data to discuss with the parent

Do not predetermine what an ESY program will look like for an individual student

33

"That student isn't the type of student who goes to ESY"

"Our ESY program is X number of weeks, Y number of days per week, and Z number of hours per day"

"We have a formula to determine how many hours of ESY a student receives"

"ESY is only during the summer" (!!!)

"We don't have any [summer/winter/spring] break data, so we don't see regression or a reason the student should qualify"

## Common Mistakes Related to ESY (in the context of an IEP meeting discussion)

34

## Placement and Least Restrictive Environment (LRE)

- Definition of LRE under the IDEA:
  - To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
- Placement is defined under the federal regulations (34 CFR 300.116) by an explanation of the process for determining placement, including:
  - Who makes the decision (the IEP team)
  - When it is made (at least annually)
  - How it is made (based on the IEP, as close as possible to home, considering potential harmful effects, etc.)

35

## How to discuss placement in a productive way

Placement can be a very emotional subject for parents

If you anticipate a placement change, communication is key

- **While avoiding predetermination…**
- It's ok to tell parents you are considering some different placements
- In that conversation, offer to let them observe the placement(s) – and go with them if you can!
- But remind them that the placement consideration is just one option to be considered by the team

36

## Discussing placement at the IEP meeting

- Remember that districts must "ensure that a continuum of alternative placements is available to meet the needs" of the child – 34 CFR 300.115
- The keys to successful placement discussions are:
  - Preparation (of the parent and the school team); and
  - A thorough and transparent conversation about benefits and harmful effects (if any)
- Don't give short shrift to the conversation!
  - Although patience and tempers may be short by the time you get to "placement" on your meeting agenda, try to recenter so that you can have a complete discussion about placement and options
  - Take the time to explain the extent of removal and the nonparticipation justification of the IEP
- **Note:** Too many times, I have seen this part of the meeting get sped through because of timing or fatigue or any number of reasons. This is the part of the student's program that tends to create the largest number of disputes. Spend the time you need to help the parent understand the conversation and to give space to hear their concerns and questions.

37

## Handling difficult placement discussions

- What to do if services/placement are not available
  - Always check with your own legal counsel
  - Preparation here is key: If you discussed a placement prior to the meeting with the parent, you can prepare them for this so they are not surprised in front of the rest of the IEP team during the meeting
  - Work with the parent to find an agreeable stop-gap measure while waiting for the placement to become available
    - Alternative placement options (never desirable but sometimes necessary)
      - Online/distance options
      - Homebound (check your state's specific requirements)
      - Partial days
      - Personalized learning environments
      - Note: None of these are ideal because what you really want is the placement that is currently unavailable. But if you can come to an agreement with the parent about what to do while on a waitlist, you will avoid some complaints.
    - Maintain current placement with extra supports (Warning here – this may set you up for a claim that the placement are waiting for is too restrictive and does not provide FAPE)
  - Once you have agreed on a stop-gap placement, determine whether compensatory education should be provided for the period of time between the two agreed-upon placements

38

## Tips for how to handle difficult requests from parents

- Act from a place of curiosity or inquiry, rather than making judgments or decisions in the moment
- Ask for more information about why the request is being made – try to determine the underlying need
- Table the issue to provide more time to research and consider the request
  - But not for too long!
  - Set up the next meeting at the table
- Determine if you can meet that same need in a different way
- Engage in discussion with the parent rather than shutting them down
- Once a decision has been made, articulate how the underlying need will be met
- Document the decision in a PWN

39

## After the Meeting

- Sending documentation
- Outstanding requests
- Future contact

40

## Sending documentation

**Make sure you send any required Prior Written Notices (PWNs)**

- Try to avoid the generic "we held an IEP meeting and created an IEP"
- The best PWN I see include line-by-line statements about what was agreed to in the IEP, documenting consensus or parent disagreement at each step
- If the parent made some specific requests for atypical services or accommodations, make sure that is documented in a PWN

**Other documentation:**

- The finalized IEP!
- Evaluation reports
- Eligibility documents
- The meeting minutes?

41

## How to handle requests to change documentation after a meeting

- There is a process under FERPA that describes how parents can request changes to documents
- Be familiar with that process and with your district's policies implementing that process
- As stated under FERPA (34 CFR 99.20):
  - If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record
  - The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request
  - If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21
- **Tip**: If you choose not to amend the record, inform the parents of the right to a hearing as required, but you can also offer to place the parents' statement in writing about their disagreement with a particular record in the student's file with the contested part of the record. This sometimes negates the need for a hearing because a parent is satisfied with that compromise. It is one of the possible outcomes if the parent chooses the hearing anyway, so it fast-tracks the process without the parent requesting a hearing.

42

## Logistics after the meeting

Follow up on any outstanding requests

Provide contact information for a point person if the parent has concerns, questions, or new issues arise

43

## Other Considerations

How to respond to challenging parents?

- Preemptive information
- Excessive communication
- Documentation
- Communication plans

Pick up the phone!

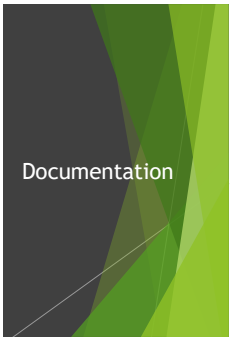
44

## Communication!

- The key to any successful IEP process is communication
- Hiding the ball helps no one and breeds resentment, confusion, and frustration
- "Preempt" the parents' concerns by anticipating their questions and providing information as soon as possible (don't wait for the meeting)
- Communicate:
  - Before the meeting about the purpose, the agenda, any significant changes you think may occur
  - After the meeting regarding finalizing decisions and next steps (including how to communicate going forward)
  - More than you think you should
    - It may feel excessive, but in most cases, more communication is better and will foster positive relationships (and in turn, avoid complaints)
    - Parents are not special education experts (most of the time)
    - Remember to avoid acronyms
    - Be responsive when parents ask questions

45

- Document, document, document!
- Keep clear records of any discussions you have with parents outside of the IEP meeting
  - Send confirming emails to the parents
  - Make a contact note in the student's file
  - If you keep a working file for a student, ensure that you incorporate that working file into the student's file (exception: sole possession records/personal memory aids)




46

## When communication goes south…

- The Ninth Circuit has upheld communication plans that limit excessive or abusive communications from parents
- *L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621 (9th Cir. 2020)
- Facts:
  - Beginning in March 2015, parent engaged in a pattern of "sen[ding] incessant emails to staff accusing them of wrongdoing; ma[king] presumptuous demands; level[ing] demeaning insults; … and in face-to-face interactions, act[ing] in an aggressive, hostile, and intimidating manner."
  - As disagreements arose, parents communications became increasingly excessive, described by the building principal as "many times more than is typical"
  - Responses were extraordinarily time-consuming and staff felt threatened and intimidated
  - On November 23, 2015, the District imposed a Communication Plan
    - Substantive communications would be limited to biweekly, in-person meetings with the parent and another administrator
    - Parent was advised not to email or attempt to communication in any form with any District employees aside from the biweekly meetings, "as they will not respond to [his] emails or attempts to communicate"
    - Plan did not apply to emergency events, did not affect parent's right to appeal decisions, and did not bar him from attending school activities or accessing school records
    - Parent was told he had the right to challenge the communication plan by filing an appeal in state court
    - When the parent violated the plan in January 2016, the District cut back the biweekly meetings to once a month

47

## *Lake Washington* (cont.)

- The parent claimed the communication plan violated his First Amendment right to free speech
- The Court found that that he was not completely prohibited from communicating with his children's teachers, rather, it specified channels for any communications to which he wanted a response
- The plan did not attempt to impose any sanctions on the parent's behavior, only limited what the District would respond to
- Note: This case does not address any FAPE implications under the IDEA or Section 504, but courts in the 9th Circuit have upheld other communication plans
  - *See Forest Grove Sch. Dist. v. Student*, 73 IDELR 115 (D. OR. Nov. 27, 2018) (A communication protocol that limited the District's response to a parent's excessive emails did not violate the parent's right to meaningfully participate in the development of the student's IEP because it did not "seriously infringe" on the parent's opportunity to participate.)

48


49

## Questions?

**Elizabeth L. Polay**
epolay@ghrlawyers.com
503-581-1501

GARRETT HEMANN ROBERTSON P.C.

50

# 40th Annual
# Pacific Northwest Institute on Special Education and the Law

**October 9-11, 2023**

## Inquiries

For questions about the Institute, Washington State clock hours, WSASP clock hours, WSBA and OSBA CLEs, registration questions or general inquiries, please contact Madeleine Dunwoody, UW Conference Management, 206-685-6367, or email slawd@uw.edu

## Program Development
## University of Washington Continuum College

University of Washington College of Education
University of Washington Continuum College
www.continuum.uw.edu

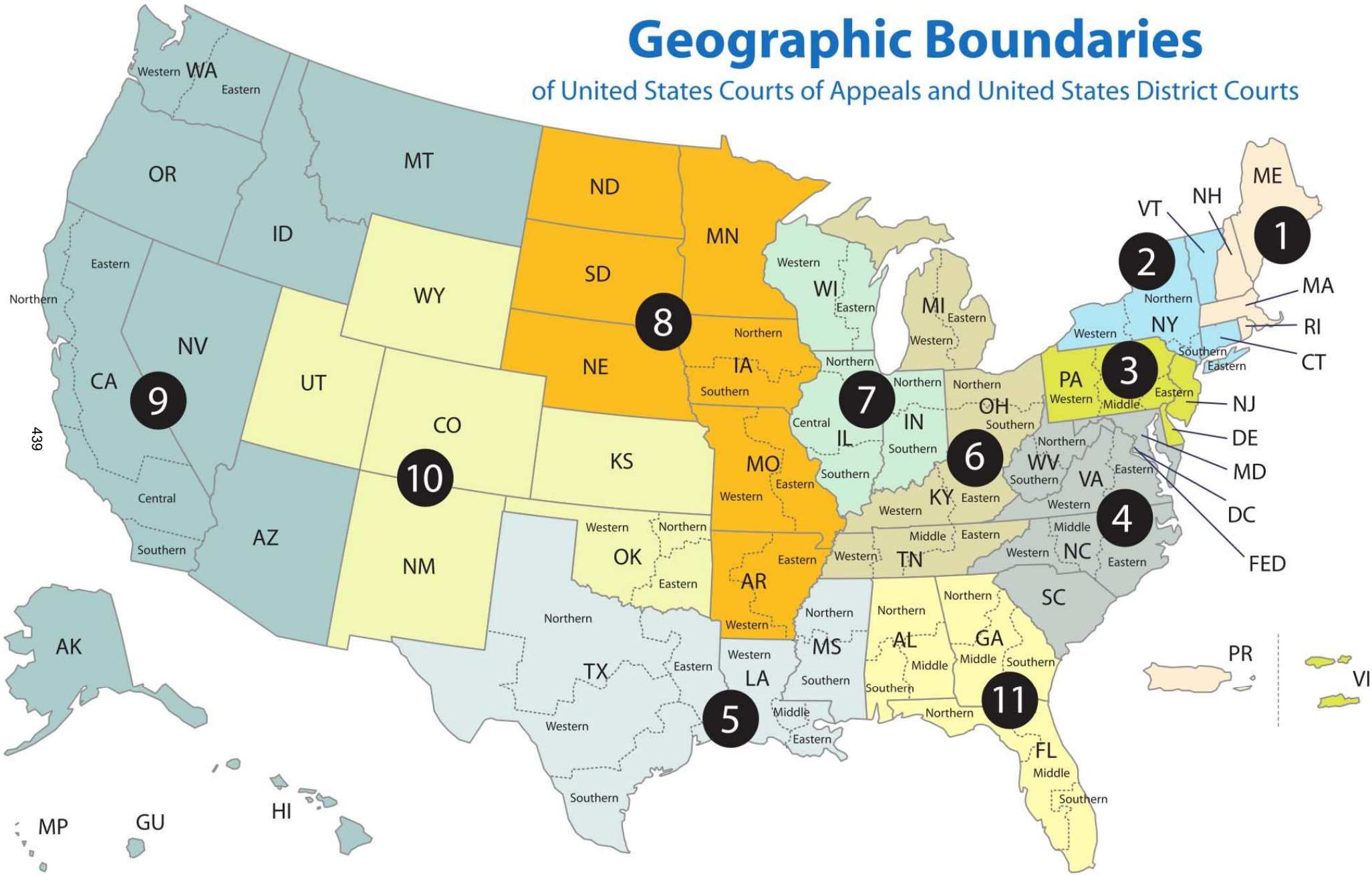
## Conference Management

UW Conference Management
University of Washington Continuum College
www.conferencemanagement.uw.edu

UW Continuum College, the continuing education branch of the University of Washington, has been building bridges between the UW and communities across the globe since 1912. Continuum College offers a wealth of opportunities for achieving academic, professional, and personal growth.

This year's Pacific Northwest Institute is held on the ancestral lands of many tribes who made their homes along the Columbia River, including the Cowlitz, Chinook, Klickitat, Yakama, Grand Ronde, Wasco, and Wishram tribes. We acknowledge their descendants living in the world today and thank the caretakers of this land, who have lived here and continue to live here since time immemorial.

**Institute website: www.uwschoollaw.org**


Geographic Boundaries
of United States Courts of Appeals and United States District Courts
Western WA
Eastern
OR
MT
ND
MN
ID
SD
WY
8
NE
Eastern
Northern
NV
CA
9
UT
CO
10
KS
Central
Southern
AZ
NM
Western
Northern
OK
Eastern
Northern
TX
Western
Eastern
Southern
AK
HI
MP
GU
Western
WI
Eastern
MI
Eastern
Western
Northern
IA
Southern
MO
Western
Eastern
AR
Western
Eastern
7
Northern
Central
IL
Southern
IN
Northern
Southern
Northern
OH
Southern
6
KY
Western
Eastern
TN
Middle
Eastern
Western
MS
Northern
Southern
LA
Middle
Eastern
5
Northern
Western
Middle
Southern
AL
Northern
Middle
Southern
GA
Northern
SC
11
Northern
FL
Middle
Southern
Western
NY
Northern
Southern
Eastern
PA
Western
Middle
Eastern
3
2
VT
NH
ME
1
MA
RI
CT
NJ
DE
MD
DC
FED
Northern
Western
WV
Southern
Eastern
VA
Western
4
Middle
Western
NC
Eastern
PR
VI