Special Education Legal Issues: A Preschool Update

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Presented by
Julie J. Weatherly, Esq.
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, Alabama 36695
(251) 607-7377 (phone)
(251) 607-7288 (fax)
Web site: www.specialresolutions.com

Being in legal hot water or "deep due due process" concerning the education of a child with a disability is sometimes inevitable because of the extensive nature of the provisions of and protections afforded to parents of children with disabilities under the Individuals with Disabilities Education Act (IDEA). There are, however, common missteps that can lead to a legal dispute about which many public school educators and other service providers may be unaware. This presentation is designed to provide practical tips for avoiding legal disputes and a legal update related to children with disabilities, with a focus upon Early Childhood Special Education issues.

A. Conduct Appropriate "Child-Find" Activities

The law requires that public agencies locate, evaluate and identify children who have or are suspected to have a disability and a need for special education services. There has been a lot of recent litigation in this area (particularly as RTI is sweeping the nation), where it has been alleged that a denial of FAPE occurred based upon untimely referral and completion of an evaluation of a child with a disability.

1. "I think that we are in compliance as long as we have determined eligibility by the child's 3rd birthday, right?"

D.L. v. District of Columbia, 67 IDELR 238 (D. D.C. 2016). In this ongoing class action lawsuit, a significant number of preschoolers with disabilities were not timely evaluated or appropriately transitioned from Part C to Part B programs. Thus, the district denied FAPE to these children and is ordered to ensure that at least 95 percent of all of its Part C graduates receive a smooth transition to Part B by their third birthdays, that at least 8.5 percent of its children between ages 3 and 5 are enrolled in special education, and that at least 95 percent of its preschoolers referred to Part B receive a timely eligibility determination. The plaintiffs' complaint here alleged that the district's actions violated the IDEA from April 6, 2011 to the present and violated Section 504 up to March 22, 2010. The district, among other missteps, failed to timely implement Part B services for almost 30 percent of children with disabilities in the district. Although the district's data indicated otherwise, the data recorded children as receiving a smooth transition even if they did not receive services by their third birthday, which was based on the district's view that it was merely required to have an IEP and classroom assignment in place by that date, rather than services delivered by that date. However, the IDEA regulations require that a child's services commence by his third birthday -- not that they are merely "available" on that day. Though the district has made some progress and demonstrated good faith since 2011, "[e]ven the best of intentions, however, will not bring a state or jurisdiction into compliance with the IDEA's affirmative obligations." "The District's lack of effective Child Find and transition polices is particularly troubling in light of the intense scrutiny and seemingly constant admonishment it has received over the last decade." The district also violated Section 504 because it demonstrated bad faith and gross misjudgment with respect to its child find, evaluation and transition obligations prior to March 23, 2010. However, the district should have another chance to achieve compliance before the court takes more intrusive steps, such as appointing a special master to oversee its child find activities.

2. "I'm sorry, but we can't accept this referral from the private preschool program because they must first implement an RTI process and provide us with some data."

Memorandum to State Directors of Special Education, 67 IDELR 272 (OSEP 2016). It is critical for agencies to timely identify preschoolers with disabilities who may be in need of special education services. Districts may not use a private or public preschool program's failure to implement an RTI process as a basis for denying or delaying an evaluation of a child who is suspected of having a disability and need for services. While the use of RTI strategies is supported, a district that receives a referral from an outside preschool program must initiate a child's evaluation within a reasonable period of time when there is reason to believe or suspect that the child is disabled and in need of services and regardless of whether the child has ever engaged in the RTI process. LEAs may not reject a referral solely on the basis that the preschool program must first monitor the child's developmental progress using RTI. Where there is no reason to suspect that a referred child has a disability, an evaluation may be refused, but the LEA must provide the parent a written notice of refusal to conduct an evaluation.

3. "Well, until the child is actually enrolled in the school district, we can't refer him for an evaluation."

C.C. v. Beaumont Indep. Sch. Dist., 65 IDELR 109 (E.D. Tex. 2015) (unpublished). A district has a duty to evaluate under the IDEA when it has reason to suspect that a child has a disability and may be in need of special education services. Here, the district had reason to suspect the need to evaluate a 3 year-old when his mother, a district diagnostician, played an audio recording of her son's speech for the district's SLP. Based upon the mother's conversations with the SLP, the district had notice of the child's disability by his third birthday on January 25, 2013. In addition, the district's policy of not evaluating any child that is not enrolled in its programs violates the IDEA and likely contributed to the delay here. If the district had evaluated the child in a timely fashion, he would have received services approximately 30 days earlier. Thus, the hearing officer's award of compensatory speech services is affirmed.

B. Conduct Appropriate Evaluations and Re-evaluations before Making Recommendations

1. "I called the records custodian from the former district but haven't heard back about the records that I requested."

To facilitate transition of transfer students, the 2004 IDEA provides that the new school in which the child enrolls shall take "reasonable steps" to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education and related services to the child, from the previous district in which the child was enrolled, pursuant to FERPA regulations. In addition, the previous district in which the child was enrolled shall take "reasonable steps" to promptly

respond to such request from the new district.

2. "The parents brought in these five private evaluation reports. I guess we need to go with what those say!"

Educators should remember that districts have the right to conduct independent evaluations by experts of their choosing when a parent is demanding services. This is particularly the case in potentially adversarial situations and school personnel should request evaluations by professionals/experts of the district's choosing, for purposes of determining eligibility and services.

Independent Sch. Dist. No. 701 v. J.T., 2006 WL 517648, 45 IDELR 92 (D.C. Minn. 2006). Where district agreed to use former district's evaluation when it prepared IEP, when parent asked for IEE and was able to prove former district's evaluation was inappropriate, new district required to fund IEE.

Shelby S. v. Kathleen T., 45 IDELR 269 (5th Cir. 2006). School district has justifiable reasons for obtaining a medical evaluation of the student over her guardian's refusal to consent. If the parents of a student with a disability want the student to receive special education services under the IDEA, they are obliged to permit the district to conduct an evaluation.

M.T.V. v. DeKalb Co. Sch. Dist. , 45 IDELR 177, 446 F.3d 1153 (11th Cir. 2006). Where there is question about continued eligibility and parent asserts claims against District, District has right to conduct reevaluation by expert of its choosing.

G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012). Parents did not show a denial of FAPE to their child with autism and a brain injury based upon a failure to reevaluate his special education needs during his kindergarten year. Here, the parents effectively denied consent for the district's proposed reevaluation when they imposed significant conditions upon their consent for reevaluation. Rather than signing the consent form the district provided, the parents wrote a seven-point addendum which stated that the district would use the parents' chosen evaluator, that the parents would have the right to discuss the assessment with the evaluator prior to its consideration by the IEP team, and that the evaluation results would be confidential. The district court was correct when it held that the parents effectively withheld their consent for the reevaluation. Clearly, the parents' conditions "vitiated any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district." In addition, the lack of an underlying evaluation prevented the parents from obtaining an IEE at public expense.

3. "I see some characteristics of autism in these evaluation results, but if I mention autism, the parents will be very angry."

Amanda J. v. Clark Co. Sch. Dist., 160 F.3d 1106 (9th Cir. 2001). Because of the district's "egregious" procedural violations, parents of a child with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996, as well as compensation for inappropriate language services during the child's time within the district. Where the district failed to timely disclose the child's records to her parents, including records which indicated that child possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process. There is no need to address whether the IEPs proposed by the district were reasonably calculated to enable the child to receive educational benefit because the procedural violations themselves were a denial of FAPE.

4. "Well, he may have autism or he may not. Here's the card of someone downtown who can do that evaluation for you, Mr. and Mrs. Smith. Let us know what they say."

N.B. v. Hellgate Elem. Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had once been privately diagnosed with autism, but school district staff suggested that the parents arrange for an autism evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.

5. "Well, if you ask me, I think he has ADHD, OCD and ODD and just needs some medication. I think I'll suggest that to Mom."

Unfortunately, there have been cases where teachers or other school personnel have made their own diagnoses of medical conditions without being qualified to do so. A proper referral for an evaluation must be made rather than statements to parents as to what school personnel believe to be a disability. The IDEA provides that the State Educational Agency shall prohibit State and LEA personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services under this title. However, the law noted further that nothing in this paragraph "shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a child's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services…."

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995). An action for damages can be brought under IDEA, Section 504 or Section 1983 for failure to timely identify a child as disabled. But see, Barnes v. Gorman, 122 S. Ct. 2097 (2002)(overturning Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001)). Because punitive damages may not be awarded in private suits brought under Title VI of the Civil Rights Act of 1964, such damages are not available under the ADA or Section 504. Title VI and other constitutional Spending Clause legislation (such as ADA and Section 504) is "much in the nature of a contract: in return

for federal funds, the [recipients] agree to comply with federally imposed conditions." [Note: The Third Circuit revised its position on damages for violations of the IDEA and aligned with other circuit courts in finding that money damages are not available for IDEA claims. See, Chambers v. School Dist. of Philadelphia Bd. of Educ., 53 IDELR 139, 587 F.3d 176 (3d Cir. 2009).

Letter to Hoekstra, 34 IDELR 204 (OSERS 2000). It is not the role of educators to diagnose ADD or ADHD or to make recommendations for treatment. That responsibility belongs to physicians and family. School officials may provide input at parents' request and with their consent about a student's behavior that may aid medical professionals in making diagnosis.

6. "The law only requires us to evaluate a child every three years. I don't think that he's changed all that much, so we don't need to reevaluate, do we?"

❖ When there's debate, re-evaluate!

West-Linn Wilsonville Sch. Dist. v. Student, 63 IDELR 251 (D. Ore. 2014). School district should have re-evaluated a student's behavioral needs and convene an IEP meeting before changing his educational placement. When the student began punching, shoving and using threatening gestures during his third-grade year, the district should have evaluated the student rather than discontinuing his participation in a mainstream music class, removing him from an inclusion PE class with others in his self-contained autism program and delivering his one-to-one instruction in a room next to the principal's office. Clearly, the district had notice of the need for a reevaluation by April 6, 2011, when the principal informed the director of student services that the special education teacher felt unsafe around the child. Although the district argued that it was merely implementing short-term solutions to accommodate the child until the end of the school year, its response "essentially turned the reevaluation process on its head." Thus, the district is ordered to reevaluate the student, convene an IEP meeting and identify an appropriate placement for the upcoming school year. The ALJ's award of tuition reimbursement, however, is denied based upon the parents' failure to provide the 10-day notice of private school placement to the district and their lack of cooperation with the district's efforts to develop an IEP for the child's 4th grade year.

S.D. v. Portland Pub. Schs., 64 IDELR 74 (D. Me. 2014). School district must fund private school tuition for a 6th grader with a variety of reading and anxiety disorders based upon its failure to reevaluate the student. When the student's IEP team drafted his IEP, it was with the understanding that he was reading at level 7 in the Wilson Reading System. However, the student's new Wilson-certified instructor discovered early in the school year that the student was actually reading at a level 2. This discovery should have triggered a reevaluation of the student's IEP, rather than simply to continue instruction at a lower level. The district's failure to determine whether the student's decline stemmed from his previous teacher's failure to follow the Wilson program, a memory retention deficit, flawed proficiency assessments or some other reason amounted to a denial of FAPE.

C. Make Appropriate Eligibility Decisions

1. "For special education eligibility, all you need is a doctor's prescription or a DSM diagnosis!"

Marshall Joint Sch. Dist. No. 2 v. Brian and Traci D., 54 IDELR 307 (7th Cir. 2010). Where the ALJ's decision that the student continued to be eligible for special education under the IDEA focused solely on the student's need for adapted PE, the district court's decision affirming it is reversed. The ALJ's finding that the student's educational performance *could* be affected if he experienced pain or fatigue at school is "an incorrect formulation of the [eligibility] test." "It is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does.*" The evidence showed that the student's physician based her opinion that he needed adapted PE on information entirely from his mother and upon an evaluation that lasted only 15 minutes with no testing or observation of the student's actual performance. In contrast, the student's PE teacher testified that he successfully participated in PE with modifications. "A physician cannot simply prescribe special education; rather, the [IDEA] dictates a full review by an IEP team" and while the team was required to consider the physician's opinion, it was not required to defer to her view as to whether the student needed special education. Further, the student's need for PT and OT did not make him eligible for special education under the IDEA, as those services do not amount to specialized instruction.

2. "I don't care what this private psychologist says. He's a quack and I never read anything he writes."

In the process of conducting evaluations, the IDEA regulations require that school personnel consider the results of independent educational evaluations obtained by parents. Thus, if the parents bring an outside evaluation to the meeting, appropriate "consideration" must be given to it. However, this does not mean that the recommendations of a private evaluator must be implemented.

T.S. v. Ridgefield Bd. of Educ., 20 IDELR 889, 10 F.3d 87 (2d Cir. 1993). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

DiBuo v. Board of Educ. of Worcester Co., 37 IDELR 271, 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child's physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

Watson v. Kingston City Sch. Dist., 43 IDELR 244, 2005 WL 1791553 (2d Cir. 2005). Lower court's ruling that district was not required to incorporate recommendations of private evaluator is upheld.

D. Once a Child is Deemed Eligible for Services, Avoid Action that Appears to be a "Predetermination of Placement" or Somehow denies Parental Input into Educational Decision-making

A predetermination of placement or making placement decisions without parental input or outside of the IEP Team/placement process will likely lead to a finding of a denial of FAPE in and of itself. Many courts have referred to a "predetermination of placement" as a fatal error under the IDEA, pointing out that sufficient opportunity for parental participation in educational decision-making is a fundamental right under the Act.

1. School members of the IEP Team meet prior to the IEP meeting, complete and sign the final IEP, and leave it to the special education teacher to present the IEP to the parent for signature later that afternoon.

2. School personnel arrive together at the annual IEP meeting with the IEP completed in full and ready to be signed by the parents.

    a. What about preparing draft IEPs before the meeting?

B.B. v. State of Hawaii, Dept. of Educ., 46 IDELR 213 (D. Haw. 2006). Parent was allowed input as to the student's IEP goals, even though they were in draft form. The PLEP and goals were discussed, modified and ultimately agreed upon by the entire IEP team, including the mother.

E.W. v. Rocklin Unif. Sch. Dist., 46 IDELR 192 (E.D. Cal. 2006). Meeting to prepare draft IEP goals and objectives for student with autism is not an impermissible predetermination of placement. This is particularly the case where the information concerning student's deficits and present level of performance were presented by the parents and the private providers at the IEP meeting.

G.D. v. Westmoreland, 17 IDELR 751, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation.

Hudson v. Wilson, 558 EHLR 186 (W.D. Va. 1986). School district that designed proposal for IEP before meeting with student's mother and grandmother, but *provided extensive involvement for both at subsequent IEP meeting, met statutory requirements* for IEP development set forth in the Act.

Letter to Helmuth, 16 EHLR 503 (OSEP 1990). Prior to an IEP meeting, district may prepare a draft IEP, which does not include all of the required components, but such a document may be used only for purposes of discussion and may not be represented as a completed IEP.

Regulatory commentary from the U.S. DOE: A few commenters to the proposed regulations recommended that the final regulations should require that parents receive draft IEPs prior to the IEP meeting. The US DOE responded that:

> With respect to a draft IEP, we encourage public agency staff to come to an IEP Team meeting prepared to discuss evaluation findings and preliminary recommendations. Likewise, parents have the right to bring questions, concerns, and preliminary recommendations to the IEP Team meeting as part of a full discussion of the child's needs and the services to be provided to meet those needs. We do not encourage public agencies to prepare a draft IEP prior to the IEP Team meeting, particularly if doing so would inhibit a full discussion of the child's needs. However, if a public agency develops a draft IEP prior to the IEP Team meeting, the agency should make it clear to the parents at the outset of the meeting that the services proposed by the agency are preliminary recommendations for review and discussion with the parents. The public agency also should provide the parents with a copy of its draft proposals, if the agency has developed them, prior to the IEP Team meeting so as to give the parents an opportunity to review the recommendations of the public agency prior to the IEP Team meeting, and be better able to engage in a full discussion of the proposals for the IEP. It is not permissible for an agency to have the final IEP completed before an IEP Team meeting begins.

71 Fed. Reg. 46678.

b. What about the use of computerized IEPs?

Elmhurst Sch. Dist. 205, 46 IDELR 25 (SEA Ill. 2006). District predetermined placement based upon team's lack of discussion of placement options, unwillingness to consider the home-based ABA program already in place for the student, and a computer-generated IEP with another student's name included on several pages.

Roland M. v. Concord Sch. Comm., 1989 WL 141688 (D. Mass. 1989), aff'd, 910 F.2d 983 (1st Cir. 1990). Although procedural violations were not sufficient to find a denial of FAPE, the use of a computer generated IEP resulted in a "mindless" IEP.

Rockford (IL) Sch. Dist. #205, 352 IDELR 465 (OCR 1987). Computer generated IEPs lacking clear statements of current levels of educational performance, annual goals, or short-term objectives violated the IDEA, as the IEP was not "readily comprehensible" to the parents. Parents interviewed indicated that they did not fully understand the symbols, codes and other markings in the children's IEPs and did not consider themselves sufficiently informed to ask questions.

3. During the IEP meeting, the regular education teacher exclaims, "but in our staff meeting yesterday, I thought we decided that regular education participation is not appropriate."

Spielberg v. Henrico Co., 441 IDELR 178, 853 F.2d 256 (4th Cir. 1988). Placement determined prior to the development of the child's IEP and without parental input was a *per se* violation of the Act and sufficient to constitute a denial of FAPE in and of itself.

N.L. v. Knox Co. Schs., 38 IDELR 62, 315 F.3d 688 (6th Cir. 2003) The right of parental participation is ***not*** violated where teachers or staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made.

Doyle v. Arlington Co. Sch. Bd., 19 IDELR 259, 806 F. Supp. 1253 (E.D. Va. 1992). School officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind.

IDEA Regulatory clarification: The IDEA requires that parents be afforded an opportunity to participate in meetings with respect to-- (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child. However, a meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b) (3).

Sand v. Milwaukee Pub. Schs., 46 IDELR 161 (E.D. Wis. 2006). The IDEA does not bar professionals from preparing for an IEP meeting and the fact that IEP team members spoke in preparation for the meeting did not deny the parents meaningful participation in the process.

A.E. v. Westport Bd. of Educ., 46 IDELR 277 (D. Conn. 2006). Nothing in IDEA requires the parents' consent to finalize an IEP. Instead, IDEA only requires that parents have an opportunity to participate in the drafting process. In addition, the parents participated extensively in the placement, attending all IEP meetings and being represented by a qualified parent advocate. They submitted letters, recommendations and proposed IEPs. It is important to note that, aside from the proposed placement in the district's chosen program, the parents' proposed IEP was substantially similar to the IEP that was revised and many of the parents' suggestions were adopted. As the hearing officer pointed out regarding predetermination of placement, there is a difference between being "open-minded" and "blank-minded." While a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement.

4. The teacher says during the IEP meeting, "but our Early Childhood Coordinator already told us that we can only recommend…."

5. The IEP Chairperson begins the meeting by saying, "we are here today to develop an IEP for Billy to get some in-home Early Childhood Services."

Berry v. Las Virgenes Unif. Sch. Dist., 54 IDELR 73 (9th Cir. 2010) (unpublished). District court's determination that district personnel predetermined placement is affirmed. Based upon the assistant superintendent's statement at the start of the IEP meeting that the team would discuss the student's transition back to public school, the district court had properly found that the district determined the student's placement prior to the meeting.

6. The teacher simply decides not to invite parents to IEP meetings anymore because meetings "take way too long" when parents attend.

7. Dad calls the day before the IEP meeting indicating that he has medical issues and wants to reschedule the meeting for the next week. The IEP "due date" will expire by then, so the Team goes ahead and has the meeting.

Doug C. v. Hawaii Dept. of Educ., 61 IDELR 91 (9th Cir. 2013). Education Department's failure to reschedule an IEP meeting when requested by the parent amounts to a denial of FAPE to the student. Thus, the case is remanded to the district court to determine the parent's right to private school tuition reimbursement. Where the ED argued that it had to hold the IEP meeting as scheduled to meet the student's annual review deadline, the argument is rejected because the father was willing to meet later in the week if he recovered from his illness and the ED should have tried to accommodate the parent rather than deciding it could not disrupt the schedules of other team members without a firm commitment from the parent. In addition, the ED erred in focusing on the annual review deadline rather than the parent's right to participate in IEP development. While it is acknowledged that the ED's inability to comply with two distinct procedural requirements was a "difficult situation," the ED should have considered both courses of action and determined which was less likely to result in a denial of FAPE. Here, the ED could have continued the student's services after the annual review date had passed and the parent did not refuse to participate in the IEP process. Given the importance of parent participation in the IEP process, the ED's decision to proceed without the parent "was not clearly reasonable" under the circumstances.

8. The LEA Representative says at the IEP meeting, "well, that's our offer and if you don't like it, you can take us to mediation."

R.L. v. Miami-Dade Co. Sch. Bd., 63 IDELR 182, 757 F.3d 1173 (11th Cir. 2014). To avoid a finding of predetermination of placement, a school district must show that it came to the IEP meeting with an open mind and that it was "receptive and responsive" to the parents' position at all stages. While some district team members seemed ready to discuss a small setting within the public high school as requested by the parents, the LEA Representative running the meeting "cut this conversation short" and told the parents that they would have to pursue mediation if they disagreed with the district's placement offer at the Senior High School. "This absolute dismissal of the parents' views falls short of what the IDEA demands from states charged with educating children with special needs."

E. Present Clear, Full and Final Recommendations for Services

All services recommended and ultimately delineated in an IEP should be set forth in a fashion that is specific enough for parents (and service providers) to have a clear understanding of the level of committed services on the part of the school district and exactly what is being offered and will be provided to the child. This will help to avoid misunderstandings and ensure that parents have indeed been provided with meaningful participation in the educational decision-making process and sufficient opportunity to consider a single and final proposal from the school agency for services. If a child has already been placed by the parents in a private preschool program, school agencies should still offer everything that the child would receive for FAPE if he/she was placed in the public program.

1. "Ok, so you don't like the school's first offer. Let's discuss three other options for you to consider."

Glendale Unif. Sch. Dist. v. Almasi, 33 IDELR 221, 122 F.Supp.2d 1093 (C.D. Cal. 2000). Where district offered four possible placements to student, three of which were district programs and one was continued placement at private school at parents' expense, offer of several placements was a procedural violation that denied FAPE. District must make a formal, specific offer of placement.

2. "It is the Team's recommendation that she be provided with three to five hours per week of special education services."

Letter to Ackron, 17 EHLR 287 (OSEP 1990). While the regulations do not explicitly require an IEP to state the amount of services with respect to the specific number of hours or minutes, the IEP must indicate the amount of services in a manner appropriate to the types of services and in a manner sufficiently clear to all persons involved in developing and implementing the IEP. The use of a range of times would not be sufficient to indicate the school's commitment of resources.

3. "She will receive OT services on an 'as needed' basis."

Letter to Gregory, 17 EHLR 1180 (OSEP 1991). The amount of time for related services must be stated with sufficient clarity to be understood by all persons involved in the development and implementation of the IEP.

4. "Ok, so we offer these services to supplement what you are already accessing privately."

Blount Co. Bd. of Educ. v. Bowens, 63 IDELR 243 (11th Cir. 2014). District court's decision is affirmed upholding tuition reimbursement to parents for private preschool placement for an autistic child. The district's characterization of the private placement as a unilateral placement by the parents is rejected because the district included the private program in the child's ultimate IEP and, therefore, effectively approved the program as

the child's educational placement. The district could have avoided this issue if it had offered the child an appropriate placement in the first place, instead of waiting for the parent to act.

F. Make Educational Recommendations or Decisions Based upon the Individual Needs of the Child

Sometimes, service recommendations are made based upon the availability of programs or services, rather than upon the child's individual needs. Under IDEA and 504, availability of services should never appear to be the determinant factor in making service recommendations. Rather, recommendations for services must be made on the basis of each child's individual educational needs. Otherwise, this could be considered a form of predetermination of placement, as well as a failure to consider the individual needs of a child.

1. "Well, it may be true that he needs that, but I'll be honest with you--we just don't have that here."

LeConte, 211 EHLR 146 (OSEP 1979). School personnel "without regard to the availability of services" must write the IEP.

Letter to Tymeson, 62 IDELR 123 (OSEP 2013). A district may not refuse to provide P.E. to a preschooler with a disability just because it does not offer P.E. to students generally. While the IDEA regulations do not require a district to provide P.E. to all children receiving a FAPE if the district does not provide it generally to children in the same grades, this only relieves the district of the duty to provide P.E. to all students with disabilities without regard to the content of their IEPs or their unique needs. The regulations do not relieve districts of the duty to provide P.E. to those students with disabilities who have unique needs requiring P.E. and who have IEPs that include P.E. as part of the student's special education and related services.

Deal v. Hamilton Co. Bd. of Educ., 43 IDELR 109, 392 F.3d 840 (6th Cir. 2004). District denied parents of student with autism the opportunity to meaningfully participate in the IEP process when it placed their child in a program without considering his individual needs. Though parents were present at the IEP meetings, their involvement was merely a matter of form and after the fact, because district had, at that point, pre-decided the student's program and services. Thus, district's predetermination violation caused student substantive harm and therefore denied him FAPE. It appeared that district had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant "school system personnel thus did not have open minds and were not willing to consider the provision of such a program," despite the student's demonstrated success under it.

2. "Our preschool program is offered for four days per week for a half day. That's really all these young kids can handle."

A.M v. Fairbanks North Star Borough Sch. Dist., 46 IDELR 191 (D. Alaska 2006). Where district coordinator for intensive preschool services told parents that a full day intensive program "was not developmentally appropriate" for preschoolers, with or without autism, this was not considered a "blanket policy" because there was testimony that if a full-day program had been deemed necessary by the IEP Team, it could have been implemented.

3. "But we *always* do it that way."

T.H. v. Board of Educ. of Palantine Community Consolidated Sch. Dist., 30 IDELR 764 (N.D. Ill. 1999). School district required to fund an ABA/DTT in-home program after ALJ determined that district recommended placement based upon availability of services, not the child's needs.

K.F. v. Francis Howell R-III Sch. Dist., 49 IDELR 244, 2008 WL 723751 (E.D. Mo. 2008). Parents of an autistic student who was dismissed from school three hours earlier than nondisabled students have standing to sue for damages under Section 504 to compensate them for financial losses they incurred in caring for the student an additional three hours per week. In addition, parents were not required to exhaust administrative remedies because the shortened school day was not a decision that resulted from any student's IEP process and applied universally to all students placed in the program at issue.

Springfield (MO) R-XII Sch. Dist., 56 IDELR 112 (OCR 2010). District did not discriminate against preschoolers with disabilities merely because it planned to provide them with instruction in a centralized location. Rather, the district was making its placement decisions based on each child's individual needs as determined through an evaluation conducted under the IDEA. In 2010, the district began developing an early childhood special education center with 13 classrooms where it planned to place most of its preschoolers with disabilities, as well as some students without disabilities who would serve as peer models, in 2011. An advocate for students with disabilities argued that the district was creating the new center for all preschool children with disabilities without making individualized determinations as to whether it was the least restrictive setting or otherwise appropriate for them. While Section 504 does not require a district to provide FAPE to preschoolers or to place them in the LRE, it does prohibit schools from excluding students on the basis of a disability and to take into account the needs of each child in determining the services to be provided them. Based upon a review of numerous IEPs, it is found that the district's IEP teams were making placement determinations based on each child's individual needs following an evaluation. Further, there was no evidence that students placed at the center would be deprived of an appropriate education, including necessary related aids and services, or that they would not have an equal opportunity to participate. Finally, although the district was not required to comply with LRE under Section 504, it is noted that typical students will be attending the center.

4. "We've never done that before and we're not starting now."

5. "My schedule won't allow for that."

6. "But my class doesn't have those services."

G. Avoid Making Decisions based Solely upon Cost

While it is true that the provision of special education services can be costly, cost is generally not a defense for the failure to offer services that are required to meet a child's educational needs and to provide educational benefit.

1. "I'm sorry, but that would just be too expensive and we just experienced severe budget cuts for Early Childhood special education services."

Letter to Anonymous, 30 IDELR 705 (OSEP 1998). Lack of sufficient resources and personnel is not a proper justification for the failure to provide FAPE.

Cedar Rapids Comm. Sch. Dist. v. Garret F., 29 IDELR 966, 526 U.S. 66 (1999). Twelve year-old student who was quadriplegic after a motorcycle accident is entitled to one-to-one nursing care to perform urinary bladder catheterization, tracheotomy suctioning, ventilator setting checks, ambu bag administrations, blood pressure monitoring, observations to determine respiratory distress or autonomic hyperreflexia and disimpation in the event of autonomic hyperreflexia as a related service, because the services of a physician were not necessary.

2. "That would be taking money away from the other children in the program."

3. "Can you imagine how much that would cost if we did that for all of our children?"

H. Notify Parents of Their Rights and Give Them Prior Written Notice of Proposals or Refusals

The IDEA requires that a copy of the procedural safeguards be given to the parents only 1 time per year, except that a copy must be provided upon initial referral or parental request for evaluation; upon the first occurrence of filing of a complaint for due process; and upon request by a parent. The regulations clarify further that a copy of the procedural safeguards must be given to the parents only one time a school year, except that a copy also must be given to the parents—

(1) Upon initial referral or parent request for evaluation;
(2) Upon receipt of the first State complaint; and upon receipt of the first due process complaint in a school year;
(3) In accordance with the discipline procedures in §300.530(h) (when a change in placement is recommended); and
(4) Upon request by a parent.

34 C.F.R. §300.504. In addition, a school agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists. The law also provides that a parent may elect to receive notices by electronic mail (e-mail) communication, if the agency makes such option available.

In addition, to the provision of procedural safeguards, a particularly important procedural safeguard available to parents is the receipt of prior written notice. Generally, school personnel remember to send the written notice required when the school system proposes to initiate a change in the identification, evaluation or placement of a child. However, this notice is sometimes forgotten upon refusal to initiate a change in identification, evaluation, placement or the provision of FAPE to the child.

1. The parents obviously do not agree with the proposed preschool program but have not been given a copy of their parent rights and, therefore, were not aware of their right to sue and challenge the program.

Jaynes v. Newport News, 35 IDELR 1, 2001 WL 788643 (4th Cir. 2001). Parents entitled to reimbursement for Lovaas program due to district's repeated failure to notify them of their right to a due process hearing. Where the failure to comply with IDEA's notice requirements led to a finding of denial of FAPE, court may award reimbursement for substantial educational expenses incurred by parents because they were not notified of their right to challenge the appropriateness of the district's program.

2. The parent asks the preschool teacher if her child could be evaluated for speech services. The teacher replies, "forget it, she'll never qualify."

3. Parents indicate to the Special Education Coordinator that they want a change in placement for their child to a private preschool and they want the school agency to pay for it. The Coordinator responds, "there's no way the district is going to pay for your child to attend that private school. I wouldn't even bother asking."

Myles S. v. Montgomery Co. Bd. of Educ., 824 F. Supp. 1549 (M.D. Ala. 1993). IDEA requires notice of the district's refusal to change a child's IEP, even if the parents have previously consented to the IEP. The notice must be written and must include an explanation of why the district refuses to make the proposed change. Oral notification of the refusal is not sufficient.

I. Have Required School Staff in Attendance at IEP Meetings and Be Sure that they Understand their Roles/Responsibilities

Under the IDEA, the public agency shall 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 if appropriate, at least 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 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 already described; (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) if appropriate, the child.

For preschool children and in the case of a child who was previously served under Part C of the IDEA (Early Intervention), an invitation to the child's initial IEP meeting must, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services.

School personnel attending IEP meetings must ensure that all required school personnel are there to participate (at least members (2) through (5) above). Often, school agencies fail to ensure that the appropriate mandatory members are present at every IEP meeting or fail to excuse such members if they do not attend.

The IDEA does provide that a member of the IEP team is not required to attend an IEP meeting, **in whole or in part**, if the parent of a child with a disability and the public agency **agree** that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the meeting." When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and public agency **consent** to the excusal and the member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting. Parental agreement and consent to any excusal must be in writing.

1. "Yes, I am the LEA Rep., but I don't *do* special education. You'll have to ask someone else, because I really know nothing about it. And I certainly can't make any commitments on behalf of the agency!"

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 35 IDELR 126, 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, the 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.'s skills in the development of her second grade IEP."

In re: Student with a Disability, 116 LRP 25857 (SEA S.D. 2015). District is ordered to fund child's daycare placement and develop a new IEP where, among other things, the special education director serving as the LEA Representative left the IEP team meeting before it was over but was not properly excused via parent and district agreement in writing that her presence was not necessary. The lack of appropriate team members was one of the reasons that the team failed to discuss the proper continuum of placements for the student.

2. "Sorry I'm an hour late, but the Principal just told me I needed to be here because I'm the only regular education teacher left in the building. I'm not really sure what help I can be, since I don't teach special education. So, can I go now?"

S.B. v. Pomona Unif. Sch. Dist., 50 IDELR 72 (C.D. Cal. 2008). The district's failure to include the student's private preschool teacher (the regular education teacher) was a procedural violation that resulted in a loss of educational opportunity for the student. Had the teacher been at the important IEP meeting, she could have shared her observations of the student's abilities and special needs from the year that the student was in her classroom. "At the very least, she could have elaborated on what she had told the transdisciplinary assessment team." A preponderance of the evidence shows that the teacher's participation at the November 2004 IEP meeting, as mandated by the IDEA, "would have assisted the IEP team in devising a program that was better tailored to Student's abilities and special needs. Accordingly, the District's procedural violation of the IDEA resulted in Student's loss of an educational opportunity and his denial of FAPE."

Arlington Cent. Sch. Dist. v. D.K. and K.K., 37 IDELR 277 (S.D. N.Y. 2002). The absence of a general education teacher at an IEP meeting for LD student denied him FAPE and supported award of tuition reimbursement for private placement. The presence of the teacher at the meeting might have illuminated the extent to which visual instruction was offered as a part of the district's mainstream curriculum and the likelihood that he could ever be integrated successfully into its general education program.

M.L. v. Federal Way Sch. Dist., 42 IDELR 57, 387 F.3d 1101 (9th Cir. 2004). The failure of the school district to have a regular education teacher at the IEP meeting for an autistic and intellectually impaired student was sufficient to find a denial of FAPE. The district's omission was a "critical structural defect" because there was a possibility of placement in an integrated classroom and the IEP recommended might have been different had the general education teacher been involved. When the general education teacher was unable to attend, district should have cancelled the meeting and not proceeded without the benefit of input from the general education teacher regarding curriculum and environment there.

J. Allow for Participation of "Discretionary" Members Invited by Parents

Under the IDEA, parents are entitled to bring with them to the IEP meeting "other individuals who have knowledge or special expertise regarding the child." 34 C.F.R. § 300.321. Generally, unless confidentiality is violated, school personnel should allow such persons to attend and participate in the meeting. However, it should be remembered that the IEP process is not a "voting" process. Rather, it is a process by which the entire IEP Team, with the parent, is to attempt to reach "consensus" as to the components of a child's IEP and program.

1. "You can't bring your attorney with you to the meeting."

As to the attendance of attorneys at IEP meetings, the U.S. DOE commented as follows:

> [The IDEA] authorizes the addition to the IEP team of other individuals at the discretion of the parent or the public agency only if those other individuals have knowledge or special expertise regarding the child. The determination of whether an attorney possesses knowledge or special expertise regarding the child would have to be made on a case-by-case basis by the parent or public agency inviting the attorney to be a member of the team.
>
> The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at the IEP meeting. Even if the attorney possessed knowledge or special expertise regarding the child, an attorney's presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child. Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged.

64 Fed. Reg. 12478 (1999). More recently, the U.S. DOE issued the following letter regarding attorneys at IEP meetings:

Letter to Andel, 67 IDELR 156 (OSEP 2016). While the school district must inform parents in advance of an IEP meeting as to who will be in attendance, there is no similar requirement for the parent to inform the school district, in advance, if he/she intends to be accompanied by an individual with knowledge or special expertise regarding the child, including an attorney. "We believe in the spirit of cooperation and working together as partners in the child's education, a parent should provide advance notice to the public agency if he or she intends to bring an attorney to the IEP meeting. However, there is nothing in the IDEA or its implementing regulations that would permit the public agency to conduct the IEP meeting on the condition that the parent's attorney not participate, and to do so would interfere with the parent's right…." It would be, however, permissible for the public agency to reschedule the meeting to another date and time "if the parent agrees

so long as the postponement does not result in a delay or denial of a free appropriate public education to the child."

2. "Sure, your next door neighbor can come but can't say anything."

Tokarz, 211 EHLR 316 (OSEP 1983). Individuals who are involved in IEP meeting at discretion of child's parents are participants in meeting and are permitted to actively take part in proceedings.

3. "We don't consider a member of the press a knowledgeable person."

Chicago Bd. of Educ., 257 IDELR 308 (OCR 1981). School district was justified in terminating IEP meeting where newspaper reporter, present at parents' request, refused to leave conference, as there was insufficient evidence that reporter had special knowledge which would have made his presence necessary.

4. "Sorry, you're going to have to leave because we weren't notified ahead of time that you were coming."

Monroe Co. Sch. Dist., 352 EHLR 168 (OCR 1985). Parents are entitled to have other persons present at IEP meeting at their discretion and district that asked parents' guest to leave because parents failed to give advance notice of her participation violated IDEA requirements.

5. "Okay, since everyone is still here, let's just take this to a vote since we can't seem to agree."

Sackets Harbor Cent. Sch. Dist. v. Munoz, 34 IDELR 227, 725 N.Y.S.2d 119 (N.Y. App. Div. 2001). Where the IEP committee chair allowed IEP decision to be "taken to a vote," the court upheld decision requiring a re-vote where child's aide and therapists' votes were not counted.

6. "Since we don't all agree, I guess we can't move forward with this IEP."

B.B. v. State of Hawaii, Dept. of Educ., 46 IDELR 213 (D. Haw. 2006). IDEA does not explicitly vest within parents the power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. When a parent's suggestions are not accepted and incorporated into the IEP, that does not necessarily constitute an IDEA violation. Here, the mother meaningfully participated in the IEP meeting and provided input. She provided information regarding student's medical condition, letters from his doctors and results from educational diagnostic tests. In addition, she was allowed input as to the student's goals, even though they were in draft form. The PLEPS and goals were discussed, modified and ultimately agreed upon by the entire IEP team, including the mother.

L.M. v. Hawaii Dept. of Educ., 46 IDELR 100 (D. Haw. 2006). The DOE did not commit any procedural violations relative to the grandmother's participation in the IEP development process. The IDEA does not explicitly vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. Rather, the IDEA requires that parents be afforded an opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions. The fact that a parent's suggestions are not accepted and incorporated into the IEP does not necessarily constitute a violation of the IDEA.

K. Be Prepared to Show that a Child is Receiving FAPE

Although maximizing a child's potential is not required under the IDEA, courts have held that the FAPE standard requires that the educational benefit received is more than "de minimis" and that there must be some tangible gain in abilities. One of the leading cases interpreting Rowley's "some educational benefit" standard to require more than "de minimis" benefit is Polk v. Central Susquehanna Intermediate Unit 16, 441 IDELR 130 (3d Cir. 1988), cert. denied, 111 LRP 3226, 488 U.S. 1030 (1989). In Polk, the court ruled that the IDEA "calls for more than a trivial educational benefit" and requires an IEP to provide "significant learning" and confer "meaningful educational benefit."

1. "He is not making any progress because all of the other children in his class are way ahead of him in all skill areas."

As the Rowley Court noted, the contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each child with a disability. Thus, in demonstrating that a child has made educational progress or derived "some educational benefit" from his/her program, one would not compare the child's progress to that of other disabled children or to that of his/her same-aged or grade level peers. Rather, progress is based upon the disabilities and abilities of the individual child.

K.K. v. Alta Loma Sch. Dist., 60 IDELR 159 (C.D. Cal. 2013). While the parents of an SLD grade schooler may have been dissatisfied with the progress their daughter had made, they are not entitled to reimbursement for the cost of a private Lindamood-Bell program. An IEP offers meaningful educational benefit if it is tailored to the student's unique needs and is reasonably calculated to produce more than *de minimis* benefits when gauged against the student's abilities. Testimony for district employees showed that the IEP team considered detailed evaluations of the student's skills and limitations and used the information from those evaluations to determine her goals and services. With respect to progress, the student made advancements in the third grade in writing paragraphs on her own and made progress in fluency and reading comprehension, while meeting many third grade standards. Although not progressing as quickly as her nondisabled peers, the student's slow-but-steady progress showed that her IEPs offered meaningful benefit to her.

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000). While an IEP must be "likely to produce progress, not regression or trivial educational advancement," the progress and development of a child with a disability should be measured not in relation to the rest of the regular education class, but with respect to the individual student. Declining percentile scores on standardized testing does not represent a lack of educational benefit. Rather, declining scores show only that the student's disability prevents the student from maintaining the same level of academic progress achieved by his nondisabled peers. The district court was correct to focus on the fact that the student's test scores and grade levels in math, written language, passage comprehension, calculation, applied problems, dictation, writing, word identification, broad reading, basis reading cluster and proofing improved during his years with the district.

2. "I don't think the present levels of performance are based upon current data."

The IDEA requires an IEP to include a statement of a child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (or, for preschool children, how the disability affects the child's participation in appropriate activities). The description of a child's present levels of performance is a very important piece of the IEP and should be developed and revised appropriately to accurately reflect the current strengths and challenges of the child, so that progress can be measured and demonstrated.

Obviously, to demonstrate educational benefit and progress, school agencies must be able to show where the child started at the beginning of an IEP's implementation and how the child has progressed from that point. If there is no appropriate starting point and no current and updated data available upon which to base educational benefit or progress, the agency will have a hard time showing that FAPE was afforded the child or that the IEP is appropriate.

E.H. v. New York City Dept. of Educ., 67 IDELR 61 (S.D. N.Y. 2016). The district has not shown that the IEP was likely to produce progress because it contained goals that were designed to expire by the time the new IEP was to begin. Here, the district erred in relying on 6-month goals contained in a December 2011 progress report from a private school in developing goals for the 2012-13 school year's IEP. The progress report, developed by the private school that the child attended for 3 years, included goals that the school expected the student to meet by June 2012, which the parent and the private school teacher testified that the child had progressed on. Nonetheless, the school district relied on the December 2011 report when it convened in June 2012. Thus, the goals in the proposed IEP for the 2012-13 school year did not reflect the child's present levels of academic achievement and functional performance and, therefore, denied FAPE.

D.S. v. Department of Educ., 62 IDELR 112 (D. Haw. 2013). Student's IEPs were not reasonably calculated to provide him with meaningful educational benefit where they did not adequately address new sexualized behaviors with goals and objectives. According to his private school, the student began engaging in behaviors including grabbing the breasts of female skills trainers, exposing his body parts and removing his clothes in 2009

and 2010. However, his 2011 IEPs relied only upon 2009 assessments when the student's new behaviors had not yet surfaced. Clearly, the ED was on notice of the behavior and was obligated to further investigate the scope of those behaviors in order develop an adequate IEP.

Aaron P. v. Dept. of Educ., 59 IDELR 236, 897 F.Supp.2d 1004 (D. Haw. 2012). The IEP proposed for the 4-year-old nonverbal autistic child is fatally flawed because it neither describes the behavior that the student will learn to control nor does it establish a route for the student to reach that goal. An IEP must include a statement of the student's present levels of academic achievement and functional performance. While an outside assessment relied upon by the ED described the student's behavioral challenges in detail (including the fact that she had "temper tantrums" when confronted with any change or demand), the IEP's PLEPs did not mention these behaviors. In addition, even the ED's own assessments noted behaviors including frustration when presented with a task, occasional crying, pushing test materials off the table, falling to the floor, and attempting to bang her head on the floor. While the IEP contained a health goal calling for the student to demonstrate increased physical and emotional regulation, this goal was not sufficient, because the PLEPs did not describe the student's aggressive/self-injurious behaviors and the goal does not explain how the goal will be accomplished. Because the proposed IEP was fatally flawed, the parents are entitled to private school tuition reimbursement.

Ravenswood City Sch. Dist. v. J.S., 59 IDELR 77, 870 F.Supp.2d 780 (N.D. Cal. 2012). District denied FAPE where it drafted an IEP for an LD student without identifying present levels of performance as a baseline to measure future progress. An IEP begins by measuring a student's present level of performance, which provides a benchmark for measuring progress toward stated IEP goals. Concise and clearly understandable baseline data should have been included in the student's IEP so that his progress could have been evaluated. Instead, the district did not base the goals on reasoned criteria and produced goals that were too vague. Thus, it owes the child compensatory education services for denying him access to meaningful educational benefit.

Red Clay Consol. Sch. Dist. v. T.S., 59 IDELR 287, 893 F.Supp.2d 643 (D. Del. 2012). Parents' claim that it was impossible to track the seventh-grader's progress on his 6th and 7th-grade IEPs is rejected. The hearing panel's conclusion that the district's omission of baseline historical data rendered the student's IEP defective is contrary to law. While the Third Circuit has yet to address this issue, the Sixth and Eighth Circuits have both held that there is no strict requirement that IEPs include historical baseline data. Moreover, the district was still able to effectively measure the student's progress under each IEP where they contained goals based on his present levels of educational progress. For example, his 6th grade IEP referenced the fact that he could identify only 6 out of 50 sight words at the start of his 6th grade year and mentioned that he could count in 1 out of 10 trials with a number line at the start of that year. By the end of the school year, evaluations revealed that he had progressed to being able to identify 44 of 50 sight words and could count in 6 out of 10 trials with a number line. Thus, the student's present level evaluations offered a form of baseline data with which to measure progress.

Kirby v. Cabell Co. Bd. of Educ., 46 IDELR 156 (S.D. W.V. 2006). Hearing officer's decision that IEP was appropriate where it did not document present levels of performance is reversed. "Without a clear identification of [the student's] present levels, the IEP cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed." However, the parents are not entitled to reimbursement for a private evaluation because they had the evaluation done before the hearing officer determined whether the district's evaluation was appropriate.

3. "I'm not sure how to write a goal that is measurable."

If the annual goals are not measurable, how is the agency to demonstrate progress or educational benefit? In order to ensure that a goal is measurable, IEP teams should give considerable thought to how progress on a proposed annual goal will be evaluated. Automatically checking or using "teacher observation" (or any other option) is not appropriate. Teams should think about data collection alternatives, including those that exist within a particular program that is being used (reading program, behavioral program, etc.) and what data will be needed to complete the required progress reports throughout the school year.

Service providers should always be asked what data they will look at when measuring a child's progress on an annual goal. If there is no sure answer to that question or if data do not exist or cannot be generated to support stated progress on an Annual Goal Progress Report, question whether the goal is measureable. This is particularly important when short-term objectives/benchmarks are not included.

R.B. v. New York City Dept. of Educ., 63 IDELR 74, 15 F.Supp.3d 421 (S.D. N.Y. 2014), aff'd on other grounds, 64 IDELR 126 (2d Cir. 2014) (unpublished). Because of space limitations on the district's IEP form, the IEP team was not able to include details in the field designated as "annual goals." However, the team used the "short-term objectives" field to expand upon each goal. Although the annual goals in the IEP were "short and broadly worded," the IEP contained detailed and objective standards that allowed for progress measurement on a short and long-term basis. For example, the student's reading comprehension skills could be measured, in the short term, by whether he is able to answer certain questions about a text at a sufficient rate of accuracy as observed and tested by his teacher. Because all of the IEP objectives were detailed, measureable and tailored to the needs of the student, the lack of detail in the goals themselves did not result in a denial of FAPE. In addition, the lack of baseline data in the goals did not amount to a procedural violation because they were stated in absolute terms that the district could measure without a baseline.

B.P. v. New York City Dept. of Educ., 64 IDELR 199 (S.D. N.Y. 2014). When viewed in isolation, the 16 annual IEP goals for a student with autism, ADHD and other disabilities were not measurable because they did not identify the specific measure to be used but, instead, cross-referenced certain short-term objectives. However, the detailed short-term objectives included enough detail for school staff to evaluate the student's progress. For example, an objective supporting the student's sensory processing goal

called for him to take a break after a verbal cue from an adult in 4 out of 5 opportunities when his environment was overwhelming him. In addition, the short-term objectives appear sufficiently tailored to the annual goals and are intended to support their achievement. The IEP also listed short-term and annual goals relating to the student's visual and spatial needs, such as copying a teacher's design using pattern blocks and making a plan and mapping out a community outing.

C.L.K. v. Arlington Sch. Dist., 62 IDELR 173 (S.D. N.Y. 2013). IEP for 11 year-old autistic student is appropriate. Parents' argument that the IEP did not contain goals addressing each of the child's disability-related needs is rejected, as the IDEA requires an IEP to contain goals "designed to meet" a child's needs, but there is no requirement that an IEP contain goals that explicitly reference each need. In addition, even where certain goals were overly broad, courts have found IEPs to be satisfactory where the IEP's short-term objectives are sufficiently detailed. Here, the child's IEP contained short-term objectives, as well as annual goals that addressed study skills, reading, math, speech-language skills, social skills, motor skills that were reasonably related to her educational deficits. While the goals did not cite to each one of her needs in detail, they were adequate to offer FAPE.

Bridges v. Spartanburg Co. Sch. Dist. Two, 57 IDELR 128 (D. S.C. 2011). Challenge to measurability of IEP goals based upon measuring proficiency in terms of percentages is rejected and parents are not entitled to reimbursement for two private reading programs. The use of percentages as a measurement of progress on IEP goals does not invalidate them. Where the percentage is tied to a discreet task, such as writing essays with defined parts or calculating surface area of three-dimensional objects, the district can determine whether the student is achieving the goal. For instance, the 8th grade IEP required student to achieve at least 70% accuracy at a 5th grade level in tasks that included writing essays, identifying figurative language in a reading passage, and answering detailed questions about a reading passage. The 9th grade IEP required him to master the general education curriculum with at least 80% mastery. "While the goals were not expressed in the manner that [the parents] consider to be the optimal manner, the goals were sufficiently measureable to reasonably gauge [student's] progress." In fact, the student demonstrated dramatic improvement in the area of reading.

4. "I don't need data to show it. I just know that he's made educational progress."

In order to defend against a FAPE challenge, school agencies must measure progress on annual goals (and objectives/benchmarks, if applicable) and maintain specific data in order to demonstrate that progress has been made
Courts are all about demonstrable data these days!

M.H. v. Pelham Union Free Sch. Dist., 67 IDELR 154 (S.D. N.Y. 2016). Where the school district maintained detailed documentation of the student's progress in reading, math, comprehension and motor skills, the student's slow but steady progress during the previous two school years showed that he was receiving FAPE. The court was able to identify numerous gains that the student had made during the 2011-12 and 2012-13

school years, including reading words beginning with "th" and "sh" and progressing from reading 40 "consonant-vowel-consonant" words to reading every one that he encountered. The documentation also reflected that the student had learned to perform basic addition without using manipulatives, was following multi-step directions and answering reading comprehension questions. Further, progress reports showed that the student had mastered 10 of the 24 annual IEP goals and made varying degrees of progress toward another 10 of them. Thus, the student's progress demonstrates that the district's program was likely to yield progress, not regression, for the 2013-14 school year. Thus, the parents are not entitled to reimbursement for the student's unilateral private school placement.

O.S. v. Fairfax Co. Sch. Bd., 66 IDELR 151, 804 F.3d 354 (4th Cir. 2015). Based upon progress reports and teacher testimony that the student with OHI received nontrivial educational benefit from his kindergarten and first-grade IEPs, FAPE has been provided. The court refuses to change its position that the IDEA only requires an IEP to provide nontrivial educational benefit and rejects the parents' argument that the preamble to 2004 IDEA modified the "basic floor of opportunity" standard set forth by the U.S. Supreme Court in the Rowley case. The 2004 statute's shift in focus from access to education to results did not alter the "some educational benefit" standard. Rather, the 2004 provision requiring districts to assess student "progress" does not include a modifier, such as "meaningful" progress, which Congress could have done if it had intended to change the standard. While other Circuit Courts have used the term "meaningful benefit" when describing the FAPE standard, that term simply means that an IEP must provide more than minimal or trivial benefit.

McKay v. School Bd. of Avoyelles Parish, 66 IDELR 283 (W.D. La. 2015). Although the district's documentation log of toileting activities for a 9-year-old autistic student were deficient, the student was not denied FAPE, because he progressed in the other six academic and nonacademic areas identified in his IEP. The student's toileting goal required him to use the restroom with 100% accuracy on 3 of 5 attempts. However, the documentation log focused only on scheduled diaper changes, identifying the individual who changed the diaper, the date and time, and whether the diaper was wet or dry. While this did not contain enough information to determine if the student was meeting his toileting goal, the IDEA does not require that a student improve in every area to obtain an educational benefit from his IEP. Thus, the lack of progress in toileting skills did not amount to a denial of FAPE.

5. "He didn't meet this annual goal. By late Fall, I sort of suspected he wouldn't."

When it is clear during the year that a child is not making sufficient progress to meet annual goals, this should be addressed immediately by the child's IEP team to make an effort to determine why. It could be that the goal is not appropriate or is set too high for the child. It could also signal a need for a reevaluation or revision to the IEP.

D.N. v. Board of Educ. of Center Moriches Union Free Sch. Dist., 66 IDELR 163 (E.D. N.Y. 2015). District's proposed 1:1+1 program for 10 year-old autistic student was not

appropriate where an IEP socialization goal stated that when the student was greeted by a peer, he would respond with an appropriate gesture or greeting with no more than one prompt and with 80% accuracy. In the proposed 1:1 program, however, the child would have no exposure to other children and would spend his entire day with one teacher and one aide. Thus, it was impossible for the child to accomplish the goals and objectives set out in the IEP. In the private program, the child attended class with three other autistic students where he worked on peer interaction and social skills. Thus, the private placement was appropriate for reimbursement purposes.

6. "I like these goals from last year's IEP. I'll just use them again."

Schools should not recycle or re-use present levels or goals, particularly where a child has not made progress on the goals. Courts do not look favorably upon the use of recycled goals or statements of performance on IEPs, particularly when the child has not been successful previously.

E.S. v. Katonah-Lewisboro Sch. Dist., 55 IDELR 130 (S.D. N.Y. 2010). Parents are entitled to tuition reimbursement for private schooling where the school district basically recycled the teenaged student's last IEP and the IEP goals and objectives were not based upon the student's current levels of performance, which had improved substantially. The repetition of the goals and objectives from the prior year's IEP is "troubling" and the IEP team should have designed a new program to take into account the objectives that the student had already met, as well as the objectives that continued to be a challenge to him, rather than repeating the former IEP. Clearly, the IEP team had available the private school teachers' progress reports showing substantial improvement in reading, writing, math and history during the past year. District erred in simply reprinting the unedited IEP from the prior year.

7. "Since he didn't master all of his annual goals, he was denied FAPE."

The IDEA does not guarantee that a child with a disability will make educational progress. What it does guarantee, however, is that school personnel will make good faith, reasonable efforts to make FAPE available to a disabled child. Schools should document all of their efforts in this regard.

Reyes v. Manor Indep. Sch. Dist., 67 IDELR 33 (W.D. Tex. 2016). The parents' argument that FAPE was denied because the 19 year-old failed to master any of his IEP goals is rejected. The district took extensive measures to address the student's aggression and self-injurious behaviors, and the district could not help the student with functional skills until it addressed his unpredictable aggression toward staff members. The district consulted with a board certified behavior analyst, who remained with the student all day in his separate classroom and trained two full-time aides with respect to the student's behavior. Those staff members monitored and recorded the student's behavior every 5 to 15 minutes in an effort to identify the precursors to his aggression. In addition, the behavioral interventions employed allowed staff to work toward progress on the student's IEP goals. For example, the district introduced a tablet into the student's routine and

attempted to teach him to say "yes" or "no" to reflect his desires; the student began to tolerate the sound of an electronic razor near his face; and, on occasion, the student did fold towels of different sizes. While the student's progress was slow and not always consistent, there was progress nonetheless sufficient to constitute FAPE.

Endrew F. v. Douglas Co. Sch. Dist., 64 IDELR 38 (D. Co. 2014), aff'd, 66 IDELR 31, 798 F.3d 1329 (10th Cir. 2015), cert. granted, (2016). District provided FAPE to 4th grader with autism where it took steps to address the student's increasingly severe behaviors, which included bolting from the classroom and urinating and defecating in a "calming room" on two occasions, climbing furniture, hitting computers and TV screens, yelling, kicking others, kicking walls, banging his head and asking others to punish him. When the student's teacher was unable to determine the cause of his behaviors after charting the timing and circumstances of specific acts, she scheduled a meeting with the district's autism and behavior specialist. However, the meeting did not occur because the student was withdrawn from the district, but the IEP team met to document their data and to formulate an initial plan regarding the student's behavioral issues. Because the district took steps to manage the behavior, the court cannot find a denial of FAPE. Thus, parents are not entitled to recover the costs of a unilateral private school placement where the student had received "some educational benefit" from the district's program.

Seashore Charter Schs., 115 LRP 1116 (SEA Tx. 2014). The charter school's inability to completely eliminate aggressive and self-injurious behaviors of an autistic student did not constitute a denial of FAPE. In fact, the student made "significant behavioral progress" during the school year and school staff followed the student's BIP. In addition, the school brought in a behavioral consultant who helped to revise the student's BIP, improve the school's data collection system and trained and consulted with staff to ensure the integrity of the behavioral data. By using this integrated approach, the duration, intensity and frequency of the student's aggressive, self-stimulatory and self-injurious behaviors decreased. Although there was "troubling" photographic evidence of some physical injuries to the student, it could not be established that school staff inflicted those injuries and such injuries "were as likely to occur at home or outside the school environment as they were to occur at school."

Lathrop R-II Sch. Dist. v. Gray, 54 IDELR 276, 611 F.3d 419 (8th Cir. 2010). District court's ruling that school district provided FAPE to student with autism is affirmed. Where the student exhibited severe problem behaviors during sixth and seventh grade, such as finger biting, hand flapping, loud outbursts and sexual behaviors, the student's IEPs included "a host of strategies to address them." For example, the district conducted an FBA and developed a behavioral management plan to address the behaviors and his IEP included a sensory diet with strategies for keeping the student on task, as well as a one-to-one aide. The district also provided autism training to staff, employed related service providers experienced with autism and hired an autism specialist to consult with the IEP team. The fact that the IEP did not contain specific goals for behavior did not mean that the student was denied FAPE, where the team did consider PBIS to address behavior, as required by the IDEA. In addition, the student made progress, which

indicated that the school district made a good-faith effort to address his behaviors and to provide FAPE to him.

8. "I'm not real sure why we proposed that amount of speech therapy, but based upon my experience, that's what he needs."

L.M.H. v. Arizona Department of Educ., 116 LRP 30725 (D. Ariz. 2016). While a preschooler with a speech impairment made some progress with his December 2011 IEP, the IEP was not substantively appropriate. The school district's failure to consider any peer-reviewed research when deciding the number of service minutes denied FAPE to the student. While the district was not required to provide three to five individual sessions of speech therapy per week as recommended by the American Speech-Language Hearing Association, the district should have considered some peer-reviewed evaluative data in determining an appropriate amount of services for the student. However, the IEP team based its decision solely on the speech therapist's professional knowledge and coursework. "[B]y not following the suggested standards under any peer-reviewed research, [the district] only provided an opportunity for minimal academic advancement, which violates the IDEA." Thus, the ALJ's decision finding the amount of speech services appropriate is reversed and the case is remanded for consideration of reimbursement for private services and compensatory education.

L. Remember that LRE Applies to Placement of Preschoolers

1. "But we don't have preschool programs for nondisabled children."

Dear Colleague Letter, 58 IDELR 290 (OSEP 2012). A school district with limited or no preschool programs for nondisabled students is not absolved from its obligation to comply with the IDEA's LRE requirement applicable to disabled preschoolers. The LRE provision applies whether or not the school district operates public preschool programs for nondisabled children and districts "must explore alternative methods to ensure that the LRE requirements are met" for disabled preschoolers. These methods may include: 1) providing opportunities for them to participate in preschool programs operated by other public agencies (such as Head Start or community-based child care); 2) enrolling preschool children with disabilities in private programs for nondisabled preschool children; 3) locating classes for preschool children with disabilities in regular elementary schools; or 4) providing home-based services. In addition, if a school district determines that placement in a private preschool program is necessary for a child to receive FAPE, the district must make that program available at no cost to the parent.

Madison Metropolitan Sch. Dist. v. P.R., 598 F.Supp.2d 938, 51 IDELR 269 (W.D. Wis. 2009). ALJ's determination that the school district must fund a portion of the preschooler's tuition to attend the Little Red Preschool is upheld. Where school districts do not operate inclusive public preschool programs, paying for the placement in a private preschool with children without disabilities is an option, according to the U.S. Department of Education. Where the IEP team agreed that it was appropriate for this student to participate full-time with non-disabled peers in age-appropriate settings and

that non-disabled peer interaction was important for this student, funding part of the tuition for the preschool program is appropriate.

Board of Educ. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ., 184 F.3d 912, 30 IDELR 891 (7th Cir. 1999). Parents are entitled to reimbursement for a private preschool program where they placed their 3 year-old with Down syndrome because the district's proposed placements did not satisfy the IDEA's LRE requirements. Not having its own program for preschoolers with disabilities, the district initially proposed placement in a program limited to students with disabilities which was located five miles from the child's home in an elementary school in another school district. After parents rejected that offer, the district offered to have the IEP team consider a state-funded "at risk" program. The district's first placement proposal did not enable the student to share a classroom with typically developing children and did not satisfy LRE because evidence indicated that his disability and IEP did not prevent him from benefiting educationally in a more inclusive setting. Nor was the placement in the at-risk program able to provide FAPE. Irrespective of whether it was similar to Head Start and was targeted for nondisabled children, there was no evidence that this particular program was ever evaluated in light of the student's unique educational needs.

2. "She just can't make it in the regular classroom. I know it won't work."

3. "But it would be better for her to have that in-home ABA program. We don't want to send him to your program."

B.M. v. Encinitas Union Sch. Dist., 60 IDELR 188 (S.D. Cal. 2013). Child does not need a home-based ABA program where there is evidence that the autistic preschooler would benefit from attending a separate day class (SDC) for preschoolers with disabilities within the district. Although testimony from district evaluators and independent experts showed that the child was highly distractible and had difficulty sustaining attention on adult-directed tasks, evaluations also showed that the child had strong nonverbal skills and a desire to interact with adults and peers. The proposed SDC could address the child's distractibility while giving him opportunities to generalize speech-language skills and practice social interaction. There was no fault in the ALJ's decision to credit the testimony of district witnesses over the opinions of the parent's evaluators where the ALJ considered all relevant evidence and concluded that the testimony of district personnel, who had daily or regularly scheduled time with the child was more persuasive than that of the parent's witnesses, whose opinions were largely based on file review. The parent's claim that the ALJ applied an incorrect standard in determining that the proposed IEP offered the child FAPE is also rejected because it afforded the child with a "basic floor of opportunity" as set forth by the Supreme Court.

4. "But the private preschool program has more nondisabled children in the class. Thus, it is the LRE."

R.H. v. Plano Indep. Sch. Dist., 50 IDELR 8 (E.D. Tex. 2008) (magistrate ruling adopted by the district court). Parents of a 4-year-old boy with a disability cannot recover the

costs of their son's placement in a private preschool where the district offered FAPE in the LRE. The placement identified in the child's IEP was a public preschool that served nondisabled students as well as students with disabilities. However, the parents noted that, depending on fluctuations in enrollment, up to 50% of their child's classmates might be children with disabilities. In contrast, the private preschool served a greater percentage of typically developing students. While the private preschool might serve fewer students with disabilities, the relative percentage of students with disabilities in each classroom is not relevant to the LRE analysis. "[T]here is no magic number of nondisabled peers a classroom must have in order to satisfy the IDEA." By offering the child an opportunity to interact with typically developing peers, the district satisfied the LRE requirement.

M. Be Sure to Address the Issue of Extended School Year Services (ESY) Appropriately

Although many federal circuit courts had recognized entitlement for some children to extended year services prior to 1999, not all of them had done so. However, the IDEA regulations specifically provide for the consideration of the provision of ESY services to all children with disabilities. 34 C.F.R. § 300.106.

Under the regulations, each public agency must ensure that extended school year services are available as necessary to provide FAPE and extended school year services must be provided only if a child's IEP team determines, on an individual basis that the services are necessary for the provision of FAPE to the child. In implementing these requirements, a public agency may not—
(i) Limit extended school year services to particular categories of disability; or
(ii) Unilaterally limit the type, amount, or duration of those services.

The regulations define "extended school year services" as special education and related services that—
(1) Are provided to a child with a disability--
(i) Beyond the normal school year of the public agency;
(ii) In accordance with the child's IEP; and
(iii) At no cost to the parents of the child; and
(2) Meet the standards of the SEA.

School personnel should be aware of the school system's ESY policies and procedures and have appropriate data to support recommendations regarding ESY eligibility.

1. "Of course we provide for ESY. Anyone can participate in summer school."

2. "Our ESY program for preschoolers runs from June 16 until July 19."

3. "Sorry, we don't have ESY anymore since the school board cut our summer school programs."

Bend Lapine Sch. Dist. v. K.H., 105 LRP 23730 (D. Ore. 2005). Failure to consider or

discuss eligibility for Extended Year Services is an IDEA violation that amounts to a denial of FAPE.

4. "But all of our preschool children get ESY in the form of home visits."

5. "Because your child is only mildly disabled, we know he won't qualify for ESY, so we don't need to address it. Only our severe and profound children get ESY."

Baugh, 211 EHLR 481 (OSERS 1987). When extended school year is an issue for a student, school personnel must determine a student's eligibility for the services at an IEP meeting.

6. "It is clear that he needs ESY services in order to continue to progress over the summer or at least to maintain the skills he has right now."

Reinholdson v. School Bd. of Indep. Sch. Dist. No. 11, 46 IDELR 63 (8th Cir. 2006). District court's decision that the school district fully complied with procedural requirements regarding ESY services is upheld. The purpose of ESY services is to prevent regression and recoupment problems, rather than advance the educational goals outlined in the student's IEP. Letter to Myers, 16 EHLR 290 (OSEP Dec. 18, 1989). As a result, the services in the ESY program may differ from those provided during the school year. The IEP team's decision in December to defer until spring the specifics of the ESY services necessary to help the Student maintain the skills he learned during the school year was reasonable under the circumstances.

Casey K. v. St. Anne Community High Sch. Dist. No. 302, 46 IDELR 102 (C.D. Ill. 2006). District's proposed ESY program is appropriate. ESY services have "a limited purpose, which is to prevent regression in the summer, not produce significant educational gains."

McQueen v. Colorado Springs Sch. Dist. No. 11, 45 IDELR 157, 419 F.Supp.2d 1303 (D. Colo. 2006). School district's policy, based upon Colorado Department of Education guidelines, that requires that ESY services address only maintenance and retention of skills already mastered, rather than acquisition of new skills, is not in violation of the IDEA. Clearly, the relevant case law and OSEP guidance support endorsing the "significant jeopardy" standard as the basis for the content of ESY services.

7. "For kids who turn 3 during the summer, we start their initial services when the school year starts."

Letter to Anonymous, 22 IDELR 980 (OSEP 1995). In order to be eligible to receive Preschool Grant funds, a state's Part B plan must include policies and procedures assuring the availability of FAPE for all children with disabilities aged three to five, inclusive. The SEA may not allow public agencies responsible for providing FAPE to preschool-aged children with disabilities to use cut-off dates for determining eligibility, if their effect would be to deny provision of FAPE beginning on the child's third birthday. Therefore,

the Department of Education cannot deny FAPE, including ESY services, if needed, to children who are born in the summer months.

N. Avoid Being Overly Specific and Including Unnecessary Additions, Details or "Promises" in IEPs

Although IEPs are required to contain educational goals and specially designed services to assist a child with a disability to achieve those goals, it is not expected that IEPs be so detailed as to serve as a substitute for a daily lesson plan. Parents are not entitled to choose the specific teacher, curriculum, methodology or school site and it is not required that IEPs contain such details.

1. The parent advocate insists that the child's daily schedule must be written into the IEP.

Virginia Dept. of Educ., 257 EHLR 658 (OCR 1985). IEPs are not expected to be so detailed as to be substitutes for lesson plans.

Paoella v. District of Columbia, 46 IDELR 271 (D.C. Cir. 2006). There is no requirement that, when determining an appropriate placement in a school, the student's precise daily schedule must be developed. Rather, a daily schedule is to be developed by a special education team or teacher based at the school.

2. School personnel comply with the attorney's request to write in the IEP that Barbara Smith will be the child's teacher, that all teachers will use only ABA with the child, and the district will pay for the child's hearing aid.

Letter to Hall, 21 IDELR 58 (OSERS 1994). IDEA does not expressly mandate a particular teacher, materials to be used, or instructional methods to be used in the student's IEP.

Lachman v. Illinois St. Bd. of Educ., 441 IDELR 156, 852 F.2d 290 (7th Cir. 1988). Parents, no matter how well-motivated, do not have the right to choose a particular methodology to be used.

Dear Colleague Letter, 66 IDELR 21 (OSEP 2015). Based upon concerns being heard "in the field," including the fact that SLPs may be left out of the loop when determining eligibility for students with ASD, educational agencies are reminded that ABA therapy is just one methodology that may be appropriate for a child with autism. Part C and Part B require IEP teams to determine a child's services based on the child's unique needs, and evaluations conducted under Part C must include assessment of the child's needs in several areas, including communication, physical and adaptive development. Under Part B, districts must ensure that evaluators assess children in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social/emotional status, general intelligence, academic performance, communicative status and motor abilities. The objective of the evaluation and IEP development process is for the IEP team to create

a program tailored to the specific child's needs. That cannot occur if key service providers are not involved and services are restricted to a particular methodology. "We recognize that ABA therapy is just one methodology used to address the needs of children with ASD and remind States and local programs to ensure that decisions regarding services are made based on the unique needs of each individual child."

G.A. v. River Vale Bd. of Educ., 62 IDELR 37 (D. N.J. 2013). District is not required to pay for a hearing aid for preschooler with mild to moderate hearing loss in his left ear where a desktop speaker, in conjunction with the student's right ear, would have allowed the student to receive FAPE. While the court sympathizes with the parents' concern for obtaining the best device for the child, the IDEA merely requires the district to offer a device that provides significant learning and will confer meaningful benefit. While an ear-level device might have been optimal for the student, the audiological evaluation did not state that the student could not obtain meaningful benefit without one.

Slama v. Indep. Sch. Dist. No. 2580, 39 IDELR 3, 259 F.Supp.2d 880 (D. Minn. 2003). Change from parent's chosen personal care attendant (PCA) to school district-employed aide did not constitute a change in placement by the district for which notice to the parent was required.

O. Address Behavioral Strategies or Interventions as Part of the IEP Process

If a child needs a behavior management program, it should be discussed as a support service or intervention at the IEP/504 meeting. The IDEA requires that any time a child exhibits behavior that impedes his or her learning or that of others, the IEP Team must consider appropriate strategies, including positive behavioral interventions, strategies and supports to address the behavior.

1. "Since she's a speech-only child, we don't need to address behavioral strategies for her as part of the IEP."

P. Avoid Inappropriate "Changes of Placement" Through the Use of Disciplinary Removals and Be Sure to Make Appropriate Manifestation Determinations

Disciplinary removals from IEP-based services for more than ten (10) days at a time and, generally, for more than ten (10) days cumulatively in a school year are considered to constitute a "change in placement" for a child with a disability which triggers procedural requirements. The IDEA requires that prior to changing the placement of a child with a disability through the use of disciplinary action, the following must occur: (1) a manifestation determination must be made by the child's IEP team; (2) the IEP team must plan a functional behavior assessment of behavior and then use assessment results to develop a behavioral intervention plan; and (3) the IEP team must determine what services are to be provided to the child, for any removal period beyond ten (10) days in a school year, in order that the child may continue to participate in the general curriculum and advance toward achieving his/her IEP goals.

1. "This is not a suspension….just keep her home for five days for a 'cool-off' period."

2. "This is not a suspension, just don't come back without his medication."

3. "Don't come back without a psychiatric evaluation."

4. "I don't know how to make a manifestation determination, but we need to get him out of this program. So, let's do whatever it takes."

Q. Respond Appropriately to a Request to Bring a Service Animal to School

1. "You can't be serious. We don't allow for dogs in school."

2. "We have staff and other children who are allergic to dogs. So sorry."

While the issue of service animals in school has apparently not been what many thought it would be right away, I have seen a noticeable increase in the number of requests being made to bring a service animal to school recently. Interestingly, there is little case authority so far on the issue, but there are "new" federal regulations in place and enough reported litigation "in the works," (as well as dogs in training right now) such that special education administrators need to be prepared to appropriately assist staff in addressing requests by parents for service animals to attend school with their children. Of course, you need to work with your school attorney in the development of clear and defensible procedures for addressing these requests as well.

Cases decided under state laws

Kalbfleisch v. Columbia Cmty. Unit Sch. Dist. Unit No. 4, 53 IDELR 266 (Ill. App. Ct. 2009). Lower court decision is affirmed allowing a 5-year-old student with autism to attend school with his service dog, since Illinois law provides that districts must permit service animals to accompany students with disabilities to all school functions, whether inside or outside of the classroom.

K.D. v. Villa Grove Cmty. Unit Sch. Dist. No. 302, 55 IDELR 78 (Ill. Ct. App. 4th Dist. 2010). A student with autism has the right to have his service dog attend school with him, as the dog meets the Illinois statute's definition of "service animal" and the statute on its face permits the dog to attend school with the student. The parents are not required to exhaust IDEA's administrative process because the administrative agency's expertise is not involved when the sole question is whether the dog constitutes a service animal under the Illinois School Code, a matter that is irrelevant to any educational benefit that he provides to K.D. As long as the dog provides some benefit to the student--which this one does when it applies deep pressure to calm the child and prevents the child from eloping when tethered to the child--it is a "service animal" under the Illinois Code. In addition, the district's argument that an adult-handler, and not the student, must control the dog for it to "accompany" the student is rejected.

Guidance under federal law

On March 15, 2011, regulations under Title II of the Americans with Disabilities Act (ADA) went into effect. The following are highlights of these provisions:

a. Regulatory guidance under the ADA

Importantly, the new regulations include a definition of "service animal" as follows:

> any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effect of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for purposes of this definition.

28 C.F.R. § 35.104.

Other provisions in the new ADA regulations under 28 C.F.R. § 35.136 relative to service animals can be summarized as follows:

b. General: Generally, a public entity shall modify its policies, practices and procedures to permit the use of a service animal by an individual with a disability.

Exceptions: However, a public entity may ask an individual to remove a service animal from the premises if: (1) the animal is out of control and the animal's handler does not take effective action to control it; or (2) the animal is not housebroken.

If the public entity properly excludes a service animal as provided above, it shall give that individual the opportunity to participate in the service, program, or activity without having the service animal on the premises.

c. Animal under handler's control: A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of such would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).

d. Care or supervision: A public entity is not responsible for the care or supervision of a service animal.

e. Questions about the animal: A public entity cannot ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquires about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

f. Access to areas of the public entity: Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.

g. Surcharges: A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

h. Miniature horses: A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider: (1) the type, size, and weight of the horse and whether the facility can accommodate these features; (2) whether the handler has sufficient control of the miniature horse; (3) whether the miniature horse is housebroken; and (4) whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

All of the above requirements also apply to miniature horses.

Guidance interpreting federal law

To date, there has been some reported authority regarding the issue of service animals in school. The following are some cases that may provide some guidance and insight as you develop/revise your service animal procedures:

Fry v. Napolean Comm. Schs., 65 IDELR 221 (6th Cir. 2015), cert. granted, (2016). Parents may not pursue their 504/ADA claims against the student's former district until they exhaust their IDEA administrative remedies. If the IDEA's administrative procedures can provide some form of relief or if the claims relate to the provision of FAPE, then exhaustion is required. Here, the parents were clearly disputing the appropriateness of the student's IDEA services, arguing that the presence of the service dog would allow the student to be more independent so that she would not have to rely upon a one-to-one aide for toileting assistance and retrieval of dropped items. They also maintained that the student needed the dog in school so that she could form a stronger bond with the dog and feel more confident. These allegations bring the case squarely within the scope of the IDEA. Developing a bond with the dog that would allow the student to function more independently outside the classroom is an educational goal, just as learning to read Braille or learning to operate an automated wheelchair would be. Thus, the parents are required to exhaust their administrative remedies. [Note: The dissenting judge opined that the wish to use a service dog at school had no relationship to the student's education and exhaustion should not have been required].

Alboniga v. School Bd. of Broward Co., 65 IDELR 7 (S.D. Fla. 2015). The ADA regulation stating that public entities are not responsible for the "care and supervision" of service animals does not justify the district's insistence on having a 6-year-old boy's parent provide a handler for his service dog. The district's failure to provide an employee to assist the child with the dog's routine care amounts to a failure to accommodate. In the vast majority of cases, permitting the use of a service animal is a reasonable accommodation. The fact that the child's teachers and paraprofessionals were able to detect and address his seizures has no bearing on the parent's desire to have the seizure-alert dog present in the classroom. "[R]efusing [the parent's] requested accommodation if it is reasonable in favor of one the [district] prefers is akin to allowing the public entity to dictate the type of services a [person with a disability] needs in contravention of that person's own decision's regarding his own life and care." The district's argument that providing an employee to help the child walk the dog would amount to care and supervision is rejected. The parent is not asking the district to walk the animal; rather, she wants an employee to accompany her son outside so that he can take care of the dog. This requested assistance is no different from having an employee help a child with diabetes use an insulin pump or help a blind child to deploy a white cane. "[The district] is being asked to accommodate [the child], not to accommodate, or care for, [the dog]." Thus, the district is ordered to provide the assistance the child requires to provide his service animal with routine care such as feeding, watering, and walking. It is also enjoined from requiring the parent to maintain additional liability insurance for the dog

and from requiring that the parent obtain vaccinations in excess of those required by Florida law.

West Gilbert (AZ) Charter Elem. Sch., Inc., 115 LRP 52095 (OCR 2015). While students with disabilities have the right under 504 and the ADA to be accompanied at school by a service animal, when another person allergic to dog dander and the person with a service animal must spend time in the same facility, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility. While the school here attempted to accommodate both the students by modifying their schedules, installing air filters and providing additional cleaning, these attempts were insufficient to ensure that the allergic student continued to receive FAPE. The school never formally reevaluated the allergic student's needs after the introduction of the service dog, nor did it convene the IEP team to discuss incorporating additional services into the student's IEP. As such, the measures the school took were not based on an assessment of the student's individual conditions and educational needs, but on the so-called "common sense" of school personnel. To resolve the 504/ADA violation, the school agreed to reevaluate the student as soon as possible, revise his IEP if necessary, provide him with compensatory education services and revise its policies and procedures.

M.T. v. Evansville Vanderburgh Sch. Corp., 62 IDELR 79 (S.D. Ind. 2013). Case will not be dismissed at this time on the basis of failure to exhaust administrative remedies under IDEA. Because exhaustion is an "affirmative defense" the parents had no obligation to allege facts negating the defense in their complaint. One of the students relies on her dog to monitor her blood sugar level because of her diabetes and the other student relies on her dog to help her if she has a seizure and to assist with mobility. Here, the parents claim discrimination under 504/ADA based upon the district's new policies that place special burdens on students wishing to bring their service animals to school. As a result, the student with diabetes went to school without her dog for two days, while the other student attended without hers for approximately two weeks.

Catawba County (NC) Schs., 61 IDELR 234 (OCR 2013). While Title II allows a school to exclude a service animal if "the animal would fundamentally alter the nature of the service, program or activity," the district's position that it would fundamentally alter the student's IEP and interfere with its goals is rejected. In fact, the principal commented that "I do not know what the dog does" and the Superintendent similarly lacked such knowledge. The district must permit student to bring the dog to school where dog is trained to redirect the student's self-injurious behaviors by identifying when his anxiety levels rose and lying beside him to calm the student and prevent him from having a "melt down." A review of the student's IEP indicated that the dog's presence would not interfere with his goals of becoming independent and learning to self-regulate but would further those goals by preventing his aggression, eliminating the need to place him in a "calming tent," and reducing the need for staff members to intervene.

Jackson Co. (MI) Intermed. Sch. Dist., 59 IDELR 172 (OCR 2012). School district failed to balance the purposes and provisions of Section 504 and Title II when it decided that a

personal aide canceled out the need of an elementary schooler with cerebral palsy to use her service animal at school. The district applied the Section 504 FAPE standard and determined that the student was not entitled to have her service animal accompany her to school because all of the tasks the animal performed—helping the child with balance and support, retrieving dropped items, and taking off her coat—were already performed by an aide. One of the fundamental purposes of Title II is to increase the independence of individuals with disabilities. As such, Title II regulations require public entities to reasonably modify policies, practices, or procedures when necessary to avoid disability discrimination. In addition, Section 504 includes provisions that support providing students with disabilities with opportunities to access district programs as independently as possible. Limiting the ability of a student and parent to choose the particular type of aid the child will use inappropriately inhibits the child's independence and results in discrimination. Here, by repeatedly asserting that the student's needs were already being met by her aide, the district disregarded the child's right to achieve independence at school to the greatest extent possible. Moreover, evidence suggests that refusing to allow the service animal to assist the student during a nine-month-long school year would result in a prolonged and complete separation that would likely cause the child's working relationship with the animal to deteriorate—decreasing her chances for attaining independence out of school as well. On this basis, remedial action is in order to address Section 504 and Title II violations.

C.C. v. Cypress Sch. Dist., 56 IDELR 295 (C.D. Cal. 2011). The request of a six-year-old student with autism for a preliminary injunction to require the school district to allow him to bring his service dog to school is granted. The dog is a service animal because he is specially trained to prevent the student from the potentially harmful act of elopement, as well as preventing him from shrieking and throwing tantrums. In addition, the district has not shown that it would be required to fundamentally alter its educational program, though there is a possibility that some program changes and additional expenses will be necessary. However, none of potential changes or expenses "are so drastic that the accommodation requested would be unreasonable." The issue of whether the service dog enhances the student's educational opportunities is "completely irrelevant," as is the question of whether the dog is educationally necessary under the ADA/Section 504. While the district's strongest argument concerns the impact the dog's presence will have on other children in the program, the district only briefly addressed this point by arguing that it would "have to teach the remaining students to ignore the dog" and raising "largely unsupported concerns about canine aggression." Thus, the district's "fleeting discussion" of the impact on other children is not sufficient here to show a fundamental change to its program.

Cave v. East Meadow Union Free Sch. Dist., 47 IDELR 162 (E.D.N.Y. 2007), aff'd, 49 IDELR 92 (2d Cir. 2008). Despite claiming that their son's request to bring his service dog to school had nothing to do with his IEP, the parents of a high schooler with a hearing impairment could not pursue Section 504 and ADA claims against the district. The parents' failure to exhaust their administrative remedies under the IDEA barred their discrimination suit under the ADA, where the dispute boiled down to a request for an IEP modification. Although the parents maintained that the district unlawfully prevented the

student from accessing a public facility, the district would need to make changes to the student's IEP to accommodate the dog's presence. "It is hard to imagine, for example, how [the student] could still attend the physical education class while at the same time attending to the dog's needs, or how he could bring [the dog] to another class where another student with a certified allergic reaction to dogs would be present." While the IDEA did not permit the parents to recover the $150 million in compensatory and punitive damages that they sought, it did offer a remedy: the parents could request a due process hearing and seek to have the service dog identified as an accommodation in the student's IEP. As such, the parents had to exhaust their administrative remedies before filing suit. Thus, the case is remanded with instructions to dismiss the case for lack of jurisdiction.

R. Avoid Creating Unnecessary Educational Records

Obviously, IDEA's requirements result in the generation of somewhat overwhelming paperwork burdens. School personnel should create and maintain only those records necessary to appropriately educate the child and nothing more. Beware of emails!

1. "I didn't know that the parent was entitled to see my personal notes."

2. "I forgot to mention that the parent and I have been emailing each other for years."

3. "You mean to tell me that the parent can get copies of my emails to other staff members?"

S. Avoid FERPA/Confidentiality Violations

1. "Well, she called and said she was the kid's attorney, so I *had* to talk to her!"

2. "He said he had a power of attorney, so I gave him the information about Johnny."

3. "I have an appointment with the news guy this afternoon. They are interested in that bomb threat made by Johnny yesterday."