

42nd Annual
Pacific Northwest Institute on
SPECIAL EDUCATION
& THE LAW

October 27-29, 2025
Hilton Bellevue
Bellevue, Washington

Mini-Courses

Presented by:



COLLEGE OF EDUCATION

UNIVERSITY *of* WASHINGTON

Institute website: pnwi.uw.edu

Program Overview

Pre-Institute Mini-Courses

Monday, October 27, 2025

7:30 AM	Registration desk opens
7:30–9:00 AM	Continental breakfast
9:00–11:00 AM	Morning Mini-Courses (A, B, C)
11:00 AM–12:30 PM	Lunch on your own
12:30–2:30 PM	Early afternoon Mini-Courses (D, E, F)
2:30–3:00 PM	Refreshment break
3:00–5:00 PM	Late afternoon Mini-Courses (G, H, I)

Pacific Northwest Institute

Tuesday, October 28, 2025

7:00 AM	Registration desk opens
7:00–8:30 AM	Continental breakfast
8:30–10:00 AM	First General Session
10:00–10:30 AM	Refreshment break
10:30–12:00 PM	Tuesday morning Workshops (1-3)
12:00–1:00 PM	Hosted luncheon
1:00–2:30 PM	Tuesday afternoon Workshops (4-6)
2:30–3:00 PM	Refreshment break
3:00–4:30 PM	Tuesday late afternoon Workshops (7-9)
4:30–6:00 PM	Reception

Wednesday, October 29, 2025

7:00 AM	Registration desk opens
7:00–8:30 AM	Continental breakfast
8:30–10:00 AM	Second General Session
10:00–10:30 AM	Refreshment break
10:30 AM–12:00 PM	Wednesday morning Workshops (10-12)
12:00 PM	Adjourn

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42nd Annual
Pacific Northwest Institute on
SPECIAL EDUCATION & THE LAW

October 27-29, 2025

Hilton Bellevue | Bellevue, Washington

PRE-CONFERENCE MINI-COURSE A

**The 101 on Section 504
and the IDEA**

presented by:

Betsey A. Helfrich

Attorney at Law

The Law Office of Betsey Helfrich LLC

St Louis, MO

sponsored by:



COLLEGE OF EDUCATION

UNIVERSITY *of* WASHINGTON

and

www.law.uw.edu

The 101 on Section IDEA and Section 504

Betsey A. Helfrich
The Law Office of Betsey Helfrich, LLC

IDEA v. 504

- Individuals with Disabilities Education Act of 1975
- Regulations (2006) 34 CFR 300.1- 300.818

- Section 504 of the Disabilities Act of 1973
- Regulations (1977) 34 CFR 104.32-38

IDEA

Individuals with Disabilities Education Act of 1975

20 USC 1400 *et seq.*

Andrew F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (U.S. 2017):
"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

IDEA - What is FAPE?

FAPE (Free Appropriate Public Education) as special education and related services that are:

Provided at public expense, under public supervision and direction, and without charge;

Meet the standards of the State Educational Agency (SEA);

Include preschool, elementary school, or secondary school education; and

Are provided in conformity with the student's Individualized Education Program (IEP).

34 CFR §300.17

Section 504

Section 504 of the Rehabilitation Act of 1973

(September 26, 1973), codified at 29 U.S.C. § 701 et seq.

- Regulations at 34 C.F.R. Part 104
- First U.S. federal civil rights protections for persons with disabilities
- Non-discrimination law

Section 504

Section 504 of the Rehabilitation Act provides, in pertinent part, that “no otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”

29 U.S.C. § 794(a)

Section 504 - FAPE

34 CFR 104.33(b) defines an appropriate education as the provision of regular or special education and related aids and services that:

1. Are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met.
2. Are based upon adherence to procedures that satisfy the requirements set forth in the regulations.

IDEA 101: Process & Tips

What is an IEP?



An Individualized Education Program (IEP) is a legally required, written document developed under IDEA for every student eligible for special education services.



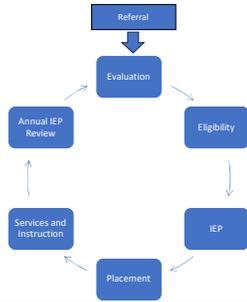
It outlines the student's present levels of performance, measurable annual goals, specially designed instruction, related services, accommodations, and how progress will be monitored, ensuring the student receives a Free Appropriate Public Education (FAPE) tailored to their individual needs.



"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Andrew F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (U.S. 2017):

Special Education Roadmap



IDEA – Child Find

Child Find:

The affirmative, ongoing obligation of states and local districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction that either have, or are suspected of having, disabilities and need special education as a result of those disabilities.

34 CFR 300.111(a)(1)(i)

Child find must include children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade.

34 CFR 300.111(c)

Evaluation: IDEA Initial Evaluations

(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under this part.

34 CFR 300.301

Evaluation: IDEA Initial Evaluations

(2) Must consist of procedures—

- (i) To determine if the child is a child with a disability under §300.8;
and
- (ii) To determine the educational needs of the child.

34 CFR 300.301

Eligibility Determination: IDEA

Determination of eligibility

(a) General. Upon completion of the administration of assessments and other evaluation measures—

- (1) A group of qualified professionals and the parent of the child **determines whether the child is a child with a disability**, as defined in §300.8, in accordance with paragraph (c) of this section **and the educational needs of the child**;

34 CFR 300.306

Practical Tips for Eligibility Determination

- Eligibility determinations are made collaboratively by the team.
- Avoid any actions that might suggest predetermined eligibility.
- Accurate data interpretation and analysis form the cornerstone of appropriate eligibility determinations.
- Adhere to the state's eligibility criteria.
- The evaluation data must support all 3 Prongs of eligibility.
 - Meet eligibility criteria
 - Demonstrate adverse educational impact
 - Need special education and related services

Legal Tips for Eligibility Determinations

- Courts have held that when considering the adequacy of an IEP, it is the student's individual needs that are more important than whether the identified diagnosis is correct. *St. Louis Pub. Sch. District* (Missouri AHC 2017) (Parents were not successful in hearing to demonstrate that student was denied FAPE because student did not have educational autism eligibility).
- *Eric H. v. Judson Ind. Sch. Dist.*, 37 IDELR 280 (W.D. TX 2002) (upholding district's decision to remove Asperger's classification based on the district's reevaluation which showed that student did not demonstrate characteristics of that disorder at school. The court rejected the parents' argument that the diagnosis should stay because of their fears that he might experience problems in the future)
- Solidify IEE process

Eligibility Determination To Present Level of Academic Achievement and Functional Performance (PLAAFP)

- Once it's determined that a child has a disability and requires special education and related services, an Individualized Education Program (IEP) must be crafted for the child.
- The data utilized to determine eligibility should provide a comprehensive understanding and paint a clear picture of the student's current levels of functioning.
- The evaluation report should serve as the groundwork for formulating the IEP.

Developing PLAAFP Statements

- Use multiple sources of data to clearly define student strengths and weaknesses
- Develop PLAAFP using input from all stakeholders
- Remember to address academic achievement and functional performance
- Don't forget to focus on strengths of student
- Compare student performance to classroom or school expectations and learning standards
- Does the PLAAFP pass the "Stranger Test"?

Legal Tips For PLAAFP Statements

- If the statement of PLAAFP does not consider the unique needs of the child, establish a baseline for establishing goals and monitoring progress, or allow informed parental participation in the IEP process, then the IEP may be insufficient to provide FAPE. *Beer v. USD 512 Shawnee Mission*, 82 IDELR 223 (D. Kan. 2023)
- Be specific in PLAAFP regarding student "behaviors"
- Specify parent concerns

Measurable Annual Goals

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to—

- (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- (B) Meet each of the child's other educational needs that result from the child's disability

34 CFR 300.320



Practical Tips for Developing Measurable Annual Goals

- Target needs from PLAAFP
- Set progress monitoring methods with goals
- Use clear, simple language
- Align goals with state learning standards
- Consider using a SMART goal format
- Does it pass the "Stranger Test"?

Stranger Test: Measurable Annual Goals



Can I tell this goal was written specifically for this student?



Do I know how to instruct the student to achieve this goal?



How will I measure progress on this goal?

Legal Tips for Measurable Annual Goals

- Demonstrate consideration of parent input
- Individualize
- Reconvene if needed
- Document

Measurable Annual Goals to Special Education and Related Services

Annual goals are crafted to meet the student's needs, driving the provision of special education and related services.



Special education and related services deliver specially designed instruction to assist the student in achieving their IEP goals.

Special Education and Related Services

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

34 CFR 300.320(4)

Practical Tips for Special Education and Related Services

- Align services with annual goals
- Maintain educational relevancy
- Individualized instruction based on student needs
- Collaborative decision making
- Explore the scope of practice for related services
- Regular review and adjustment

Legal Tips for Special Education and Related Services

- Is this needed to support FAPE?
- Be mindful of saying no and how to say no
- Bring/get input from needed personnel
 - nurse
 - food service
 - transportation personnel

Legal Tips For Special Education and Related Services

O.P. v. Jefferson Co. Bd. of Educ., 82 IDELR 152 (N.D. Ala. 2023):

Hearing officer's decision that the IEP for a first grader with significant physical disabilities contained appropriate PT and OT services is upheld.

At the due process hearing, the school's physical therapist testified that she had reviewed the parent's independent PT evaluation and noted that it was very similar to her own. However, she disagreed with the parents' evaluator's position that the school should provide two monthly sixty-minute sessions or pay for outpatient PT.

Legal Tips For Special Education and Related Services

While more PT would benefit the student, the school-provided PT of one monthly thirty-minute visit was sufficient to allow the student to be safe and independent in the school environment, especially when considered in conjunction with her adapted PE program, which also focused on gross motor skills in the areas of balance, strength, and hand/eye coordination.

The district's OT testified that she had reviewed the parent's private OT evaluation and also concluded that it was similar to hers but disagreed with the extent of school-based OT services recommended. Her recommendation of one sixty minute session per week, in conjunction with consultation with the classroom staff and special education case manager, was sufficient to address the student's educational needs. She testified that outpatient PT and OT are aimed at medical improvement, but school-based occupational therapy is directed at reaching the goals set out in the IEP.

Legal Tips For Special Education and Related Services

"The court is deeply sympathetic to [the student's] parents' wish for [the student] to receive services that will maximize her educational opportunities and cause her to progress in school at the same pace as her classmates. **Unfortunately, the IDEA does not require a school district to maximize a child's potential, nor can it promise—or deliver—progress at any particular pace for any child.** Because [the parents] have not shown that the Board denied [the student] a free appropriate public education based on its provision of occupational and physical therapy, the court will deny their motion for judgment on the administrative record and will grant the Board's motion for judgment on the administrative record."

Legal Tips For Special Education and Related Services

- Is this needed to support FAPE?

- Bring/get input from needed personnel
 - nurse
 - food service
 - transportation personnel

Placement in Least Restrictive Environment (LRE)

- (2) Each public agency must ensure that—
- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
 - (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR 300.114

Legal Tips For Placement In LRE

- Demonstrate steps to keep student in LRE prior to move on continuum
- Consider interaction with nondisabled peers
- Do not surprise parents with change of placement

IDEA Legal Risks

- State Child Complaint Procedures
- IDEA Administrative Due Process
 - Appeals
 - Remedies & Attorneys' Fees
- OCR Complaint
- Charge or Lawsuit Alleging Discrimination

Section 504 101: PROCESS & TIPS

Section 504

Section 504 of the Rehabilitation Act provides, in pertinent part, that “no otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”

29 U.S.C. § 794(a)

504 Regulations- Essentials

1. Child Find
2. FAPE
3. Educational Setting
4. Evaluation and Placement
5. Procedural Safeguards
6. Non-Academic Services

34 CFR 104.32-38

UPDATE TO 504 REGULATIONS

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

Expected release date kept changing

No changes to regulations expected

CRDC Data

Current Data Released November 2023

- 2020-2021 School Year

<https://www2.ed.gov/about/offices/list/ocr/data.html>

SECTION 504 STUDENTS

According to the Civil Rights Data Collection, released November 2023:

National Average of Section 504 (only) students:

- 1.02% in 2009–2010
- 1.48% in 2011–2012
- 1.81% in 2013–2014
- 2.29% in 2015–2016
- 2.71% in 2017–2018

Current data 2020-2021 = 3.26%

Office for Civil Rights

- Law enforcement agency of the U.S. Department of Education
- 12 regional offices throughout the country employing attorneys and investigators
- Investigate complaints, initiate compliance reviews, directed investigations, provide policy guidance
- Enforces:
 - Section 504 and Title II (disability)
 - Title IX of the Education Amendments (sex discrimination)
 - Title VI of the Civil Rights Act (race, color, national origin discrimination)
 - Age Discrimination Act (any age, not just over certain number)
 - Boy Scouts Equal Access Act (open forum access)

OCR

- Early March 2025, 7 of 12 OCR offices ordered closed
- OCR locations in Boston, Chicago, Cleveland, Dallas, New York, Philadelphia and San Francisco are being closed.
- Offices will remain in Atlanta, Denver, Kansas City, Seattle and Washington, D.C.
- Two parents and the Council of Parent Attorneys and Advocates sued the U.S. Education Department, Education Secretary and Acting Secretary for Civil Rights over the reduction in force to OCR's staff. They are asking the U.S. District Court, District of Columbia, to compel ED to restore OCR's ability to investigate and process discrimination complaints in a prompt and equitable manner.
 - Case: *Victim Rights Law Center v. U.S. Department of Education*: ruling June 18, 2025, granting a preliminary injunction to temporarily restore OCR employees
 - United States Supreme Court ruled on July 9, 2025, allowing the layoffs to move ahead

Section 504	Statutory language of the law itself
Regulations	Issued by the U.S. Department of Education to provide greater detail about how it will implement the requirements of Section 504
OCR Guidance	Issued by the U.S. Department of Education's enforcement arm, OCR, providing greater detail into how it will enforce 504 and its regulations
OCR Case Resolutions and Case Law	Real world case decisions from OCR and courts examining specific scenarios

OCR Resource Guide

OCR December 2016, *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools:*

<https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>

FAQs on OCR Website (page last reviewed 6/30/25):

<https://www2.ed.gov/about/offices/list/ocr/504faq.html>

504: Develop / Refine a Legally Compliant Process at Your School

Compliance Officer

- Section 504 requires that school districts designate at least one employee to coordinate the district's efforts to comply with Section 504.

34 CFR104.7(a)

In-School Trainings

- Include Notice of Nondiscrimination
- The District's Section 504 Coordinator is:

Ms. Carol Brady
Director of Student Services
125 Locust Street
(phone)
(email)

Your Building 504 Coordinator is:

Referrals

Referrals

- Child find obligation
- Understand and refine the process in your District
- Have clear timelines & forms
- Who reviews referrals?

Referrals / Sample Process

Referrals:

- Provide 504 referral form
- Upon referral, within no more than 30 calendar days, a multidisciplinary team will be convened by the District in order to review all pertinent information. If the multidisciplinary team believes that additional evaluation information is necessary as part of the 504 eligibility, that assessment will be provided at no cost to the parents.
- If additional assessment is needed, parental consent is required in order to conduct that assessment and the assessment process will be concluded for eligibility determination within no more than 60 calendar days from the date of parental consent.

Section 504 Team

Team Members

Section 504 Regulations:

- Districts must ensure that the placement decision is made by a group of persons, **including persons knowledgeable about the child**, the meaning of the evaluation data, and the placement options... [34 CFR 104.35\(c\)](#)
- 504 - The regulations do not explicitly include parents, but "parents are key members of this knowledgeable group."
 - Escondido (CA) Union Elem. Sch. Dist., 109 LRP 24519 (OCR 1/06/09)

504 Team

Convene "group of knowledgeable persons" within 30 calendar days of determination that reason to suspect exists.

Who?

Student's teacher

Counselor

School nurse
(depends on situation)

Parents

Case Law

Arizona State Univ. (AZ) Preparatory Acad., 124 LRP 1765 (OCR 2023):

School invited one of the student's teachers to participate in 504 meeting along with the parent and the Section 504 coordinator.

Teacher did not attend the meeting long enough to participate in discussions about the student's needs.

OCR found Section 504 did permit the parent and the Section 504 coordinator to update the student's plan by themselves.

"Two people is insufficient to constitute a 'group of persons knowledgeable' about the student and his accommodation needs."

Conduct an Evaluation

Evaluation Could Consist of:

- Review of existing data
- Observation
- Request for medical or additional outside information
- Assessment
- FBA

See 4 CFR 104.35(b)(1)

*Remove assessment barriers

Evaluation Options When Behavior is a Factor

- Information from parents or guardians can be especially valuable;
- Observations of the student by psychologists or other professionals while the student is in class or during other activities
- Consider Functional Behavior Assessment

Assessments and other evaluation materials must be tailored to address the specific area of educational need, administered by trained personnel consistent with the instructions for that assessment or evaluation, and valid for the purpose for which they are used to best ensure the results accurately reflect the factor that the assessment or evaluation is intended to measure.

See, *OCR Dear Colleague Letter, July 17, 2022*

504 & Parental Consent

Must a recipient school district obtain parental consent prior to conducting an initial evaluation?

Yes. OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.

Section 504 and the Education of Children with Disabilities at <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (question 42)

504: Determine Eligibility

IDEA Eligibility

Child with a disability means a child with intellectual disability, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities and "who, by reason thereof, needs special education and related services."
34 CFR 300.8

Disability under Section 504

A student is disabled within the meaning of Section 504 if he or she:

1. Has a physical or mental impairment which substantially limits one or more major life activities;
2. Has a record of such an impairment; or
3. Is regarded as having such an impairment.

34 CFR 104.3(j)

Section 504 - Student with a Disability

Students who satisfy this definition are entitled to a Free and Appropriate Public Education (FAPE):

A person who has a physical or mental impairment which substantially limits one or more of such person's major life activities.

29 U.S.C. § 705(20)(B)

Impairment Defined

- Any physiological disorder or
- Condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as:
 - Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
- Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability
- Physical or mental impairment:
 - Includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, **dyslexia** and other specific learning disabilities, **Attention Deficit Hyperactivity Disorder**, Human Immunodeficiency Virus Infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction and alcoholism.

Major Life Activities - What Do They Encompass?

- Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping**, walking, **standing, lifting, bending**, speaking, breathing, learning, **reading, concentrating, thinking, communicating**, and working.
- A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Major Life Activities Cont.

...reaching, lifting, bending, writing, communicating and interacting with others.

*reflected in 2016 Final Rule

Substantial Limitation

- Interpreted broadly
- Compare the student to the average student of the same age/grade in the population
- OCR 2015
 - Does OCR enforce a single formula or scale that measures substantial limitation?
 - NO
 - "Determination must be made on a case-by-case basis with respect to each student."

OCR Guidance

Released February 20, 2024:

- “We issued these new resources to give students, including those with asthma, diabetes, food allergies, and GERD, as well as their families and schools, important tools to understand when and how they are protected by federal disability rights laws,” said Assistant Secretary for Civil Rights Catherine E. Lhamon.

June 20, 2024:

-Resources regarding cancer, epilepsy, and sickle cell disease released

September 24, 2024:

- Resources regarding anxiety, bipolar, depression, eating disorders

February 2024 Guidance

Asthma –

Under Section 504, a student with asthma can be a student with a disability for purposes of Section 504 if the student’s asthma substantially limits one or more of the student’s major life activities. 34 C.F.R. § 104.3(j)(1)(i).

Asthma can substantially limit the operation of the respiratory system, which is a major bodily function, and therefore a major life activity under Section 504.

Asthma can also affect an individual’s breathing, which is a major life activity under Section 504.

Whether asthma substantially limits an individual’s breathing can be established by a medical examination or medical tests (such as a spirometry, an exhaled nitric oxide test, or a bronchial provocation test). But medical tests are often not required to determine that a student is substantially limited in a major life activity. For example, a student’s history of past asthmatic reactions may provide sufficient information to determine that a student has asthma that substantially limits a major life activity. A school may always accept that a student has a disability without any documentation or medical tests.

Asthma (Cont’d)

What might a school need to do to address a student’s asthma? If the student’s asthma has resulted in the student having a disability under Section 504, that student may require certain modifications (sometimes referred to as accommodations) to meaningfully access or benefit from the school’s educational opportunities. 34 C.F.R. §§ 104.4, 104.44. This is true even if the student is not substantially limited in the major life activity of learning.

Section 504 may require a school to provide modifications such as: permitting a student to carry and self-administer quick-relief medication through an inhaler or otherwise; excusing a student from activities that risk triggering an asthma attack; ensuring the educational environment is free of a student’s asthma triggers, including during field trips and extra-curricular activities where possible; and/or allowing the student to make up work, without penalty, and excusing late arrivals and absences when they miss class due to a medical appointment or when asthma hinders a student’s ability to complete their work.

Furthermore, even if a student with asthma has a disability but does not need modifications, they would still be protected from discrimination, such as disability-based harassment. For example, Section 504 may require a school to respond to bullying or harassment targeted at students because of their medical condition, or because they are regarded as or have a record of having a disability. 34 C.F.R. § 104.3(j)(1)(ii) & (iii). Such bullying or harassment, for example, could be related to a student’s use of an inhaler or to a student’s asthma symptoms.

Final Note on the September Guidance

“The issue of whether an impairment substantially limits a major life activity should not demand extensive analysis. 29 U.S.C. § 705(20)(B) (incorporating 42 U.S.C. § 12102(4)(B), which incorporates § 2(b)(5) of the findings and purposes of the ADA Amendments Act of 2008).”

“The term substantially limits must be construed broadly in favor of expansive coverage, to the maximum extent permitted by the statutory language. 29 U.S.C. §705(20)(b) (incorporating 42 U.S.C. § 12102(4)(A).”

Mitigating Measures

Substantial limitation must be determined without the use of mitigating measures (medication, medical devices, health plans, accommodations, etc.).

Can consider use of eyeglasses/contacts



Episodic Impairments

The ADAAA specifically provides that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

28 CFR 35.104(d)(1)(iv)

Section 504 - What to do at the eligibility meeting?

- Provide Procedural Safeguards if not previously provided
- Review all existing relevant data and information, including data and information provided by the parent
- Is this a student with a disability?

Eligibility & Plan Drafting

Two part determination:

(1) whether the student has a physical or mental impairment that substantially limits a major life activity (eligible); and

(2) if so, whether the student needs services under 504 in order to meet his/her educational needs as adequately as the needs of nondisabled students are met (plan).

Technically Eligible Students

What must a school district do for a student who has a disability but does not need any special education or related services?

A: If, as a result of a properly conducted evaluation, the school district determines that the student does not need special education or related services, the district is not required to provide aids or services. Neither the Amendments Act nor Section 504 obligates a school district to provide aids or services that the student does not need. But the school district must still conduct an evaluation before making a determination. Further, the student is still a person with a disability, and so is protected by Section 504's general nondiscrimination prohibitions and Title II's statutory and regulatory requirements. See 28 C.F.R. § 35.130(b); 34 C.F.R. §§ 104.4(b), 104.21-23, 104.37, 104.61 (incorporating 34 C.F.R. § 100.7(e)).

Draft a Section 504 Plan

Creating 504 Plans to Meet Student Needs

Under Section 504, an appropriate education is defined as “the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of [the 504 regulations].”

34 CFR 104.33(b)(1)

What Accommodations Should and Should Not Do

“Section 504 does not require a public school district to provide students with disabilities with potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students.”

J.D. v. Pawlet Sch. Dist. (2nd Cir. 2000)

What Accommodations Should and Should Not Do

- District did not violate Section 504 when it denied a parent's request to heat up the food that an 11 year-old boy with diabetes brought in for lunch every day.
- A district does not have to provide every accommodation a parent requests for a student with a disability. Rather, the district only needs to ensure that the student has meaningful access to its programs and services.

Moody v. New York City Dep't of Educ. (2nd Cir. 2013)

Drafting the Plan

- Is this needed to provide an equal opportunity?
- Be specific
- Treat each student and situation individually
- Does the student need any services or supports to address any disability-related behavior?

Drafting the Plan

- Universal tools?
- Don't list teacher names
- Be specific
- Treat each student and situation individually

Review & Revise

- Teachers will fill out planner each day
- Student will receive extended time on assignments
- Student will receive a copy of notes

Drafting the Plan

- Allow open book test
- Give take home test
- Employ a pass/fail grading system
- Allow student to retake tests
- Require student to read aloud only when he/she volunteers

Attendance Accommodations

Peter's absences related to his disability will be excused

Peter's medical condition will be taken into consideration if absences become an issue.

Scenario

The District has a No headphones policy. This means no headphones, no ear buds etc... No device is to be seen in school or in the classroom. No exceptions. Bobby needs either needs headphones so his tests can be read aloud to him on his software or he needs to leave the classroom to take tests. Bobby's mom prefers he stays in the classroom for the test. The teacher informs her about the No headphones rule...

School Policy

Can a 504 team modify a school policy?

- Yes. If application of a local policy would cause discrimination on the basis of disability or prevent receipt of a FAPE, it must be modified.
- A school "must still consider whether the student is entitled to a reasonable modification of policies, practices, or procedures." "The extent of a school district's obligation to make reasonable modifications is fact-dependent and requires a case-by-case analysis." (See OCR Dear Colleague Letter, at question 10, 58 IDELR 79 (OCR 2012)).

Cell Phones

- Is the student eligible under Section 504 under the proper standard?
- Determine if exception is needed under proper standard
- Draft exception clearly!
 - Can use cell phone except during *instructional time*?
- Train and share information with those who need to know
- *Piotrowski v. Rocky Point Union Free Sch. Dist.*, 76 IDELR 209 (E.D.N.Y. 2020): motion to dismiss denied in case where school is alleged to have punished student repeatedly for using his cell phone to use a diabetes-management app, as allegations sufficient to state bad faith/gross misjudgment.

Decisions

- Section 504 does not require that all members of the team agree to educational decisions. If parents disagree with the team decision, they may resolve the dispute through a due process hearing.
 - *Calvert County (MD) Pub. Schs., 41 IDELR 139 (OCR 2003)*
 - See also *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools (OCR 2016)*

- Provide Notice of Action and Procedural Safeguards

Saying No

- Get the team's input, including the parents'
- Discuss, consider & document
- Is this accommodation/related service required to provide Bobby an equal opportunity to access his education at the same level as his non-disabled peers?

Saying No

What To Say:

-Ultimately, based on the input of the team, I am going to deny that request as not required for FAPE for Bobby.

-I'll provide you a notice of action and your procedural safeguards.

What NOT To Say:

-We don't do that here.

-I already talked to the superintendent and she said no.

-That would cost way too much money and our budget has no room for it.

-We would have to hire someone to do that and the District will never go for it.

Due Process Appeal Procedures

- If parent intends to challenge an action proposed or refused by the District regarding identification, evaluation, programming (provision of FAPE) or placement, they must follow the District’s appeal procedures.
- Example Procedural Safeguards:
 - If a parent/guardian, or eligible student, intend to challenge the action proposed or refused by the School District, the parents/guardians or eligible student must file a written notice of appeal within ten (10) calendar days from the time that the parents/guardians or eligible student receives written notice of the proposed or refused action.

Implement the Plan!

Who Should Receive a Copy?

- Districts may disclose personally identifiable information concerning a student to “school officials” within the institution who have a “legitimate educational interest” in the student. FERPA regulations allow the school to determine which individuals possess such an interest.

34 C.F.R. § 99.31(a)(1)
- 504 Distribution Best Practices
 - Keep documentation of distribution
 - Don’t forget bus drivers and cafeteria staff

Implement the Plan!

- Teachers must implement the provisions of 504 plans!
 - OCR Guidance 2009
- If a modification is no longer appropriate or needed, team should convene to determine whether the plan should be changed.

FERPA

Family Educational Rights and Privacy Act

- Protects student records
- Provides parents access to student records
- Allows vehicle for amendment of student records

Joint Guidance on the Application of FERPA and HIPAA to Student Health Records

The U.S. Department of Education and the Office for Civil Rights at the U.S. Department of Health and Human Services released updated joint guidance in December 2019 addressing the application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule to records maintained on students.

<https://www.hhs.gov/sites/default/files/2019-hipaa-ferpa-joint-guidance.pdf>

US DOE Student Privacy Policy Office:

Guidance for School Officials on Student Health Records April 12, 2023



School Official

- An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions:
- (1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
- (B) A contractor, consultant, **volunteer**, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—
 - (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
 - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
 - (3) Is subject to the requirements of §99.33(a) governing the use and re-disclosure of personally identifiable information from education records.

34 CFR 99.31

Best Practices

- Per 34 CFR 99.7, in your annual FERPA notice specify criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.
- Remind in writing not to re-disclose
- Engage in MOU or contract

Avoid Discrimination & Keep Students Safe

Osseo Area Schs. v. A.J.T. (8th Cir 2024)

- Student has rare form of epilepsy and has seizures throughout the day
- Seizures are so frequent in the morning that she can't attend school before noon
 - She is alert and able to learn until about 6:00 p.m.
- Before moving to Minnesota, Student's Kentucky school provided evening instruction at home
- Minnesota School District rejected parents' request for evening instruction:
 - Claimed that state law does not require it
 - Wanted to avoid setting unfavorable precedent for itself and other districts

Osseo Area Schs. v. A.J.T. (8th Cir 2024)

- While A.J.T. was in elementary school, the District provided intensive one-on-one instruction for 4.25 hours each school day.
- Then, the District prepared for A.J.T. to enter middle school. The middle school's standard day ended at 2:40 p.m., so the District proposed cutting back her day to about 3 hours.
- Despite the even shorter day, it again rejected her parents' request for evening instruction. It also rejected their various proposals to at least maintain her 4.25-hour day, including a proposal to continue keeping her at the elementary school.
- Parents filed due process and won, District appealed
- Eighth Circuit ruled for Parents on IDEA claim

Osseo Area Schs. v. A.J.T. (8th Cir 2024)

- "As an initial matter, we reject the notion that the IDEA's reach is limited to the regular hours of the school day. Neither the District nor amici identify anything in the IDEA implying—let alone stating—that a school district is only obligated to provide a FAPE if it can do so between the bells."

Student denied FAPE:

- A.J.T. made de minimis progress overall. She regressed in toileting, and District removed the toileting goal from her IEP because there was not enough time in the school day. And A.J.T. would have made more progress with evening instruction.
- "The expert testimony shows that the District's choice to prioritize its administrative concerns had a negative impact on A.J.T.'s learning."
- On March 25, 2025, the district court awarded the parents attorneys' fees as the prevailing party under IDEA on the FAPE case
- Court ordered the District to pay attorneys' fees and costs in the following amounts within one week of signing the Order: \$174,617.56 in fees for work done at the administrative and district court level; \$60,185.16 for unpaid fees and costs the 8th Circuit awarded A.J.T.

A.J.T. v. Osseo Area Schools (US 2025)

- January 17, 2025, the US Supreme Court agreed to hear this case
- On appeal from the 8th Circuit regarding student’s Section 504 claims
- Court of Appeals found that the school district failed to provide a free appropriate public education in violation of the IDEA
- However, the court dismissed discrimination claims brought under the ADA and the Rehabilitation Act.
- Bad faith/gross misjudgment v. deliberate indifference standard under review

Supreme Court Ruling

A.J.T. v. Osseo Area Schs., (June 12, 2025):

- The 8th circuit held that in order to successfully assert a federal claim under 504/ADA for money damages in the Eighth Circuit, parents must prove that the district intentionally discriminated by acting “**with bad faith or gross misjudgment.**” Parents did not meet this standard
- The Supreme Court reviewed: Whether the ADA and 504 require “bad faith or gross misjudgment” standard when seeking relief for discrimination relating to their education.

Supreme Court Ruling

Court held:

- Students bringing ADA and 504 claims related to their education are not required to make a heightened showing of “bad faith or gross misjudgment,” but instead are subject to the same standards that apply in other disability discrimination cases.
- Deliberate Indifference
Standard “does not require a showing of personal ill will or animosity toward the disabled person ...Rather, to show deliberate indifference, it is enough that a plaintiff prove the defendant disregarded a ‘strong likelihood’ that the challenged action would ‘result in a violation of federally protected rights.’ [citations omitted].

Extracurricular and Non-Academics

- ADA and Section 504 - may not deny a qualified disabled person to the opportunity to participate in or benefit from an aide, benefit or service.
- Issue of accessibility and equal opportunity
- District "shall provide non-academic and extracurricular services and activities in such a manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities."

34 C.F.R. § 104.37

OCR: Dear Colleague Letter (2013)

- A District must conduct an individualized inquiry to determine whether reasonable modifications or necessary aids or services would provide a student with a disability with an equal opportunity to participate in an extracurricular activity.
- Provision of an equal opportunity "does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities for students with disabilities."
- Letter provided examples:
 - Light with starter pistol for runner who is deaf.

Athletic Teams/Clubs

- Train coaches
- Have a rubric or concrete way to determine team status
- Aides?
 - Mountain biking
- Accommodations
 - Fundamental alteration?
 - Learn routine in advance
 - Don't pre-determine

Scenario

It is homecoming time! Jan has a one-on-one paraprofessional with her during the school day to assist with her medical and personal needs. Her mom has informed you that she would like to attend homecoming and they expect the aide to attend as well. The aide has agreed to attend but has to leave at 9pm due to a childcare issue. You let mom know that Jan can attend homecoming but will need to be picked up at 9pm.

Field Trips

- May not prohibit a student from going on a field trip simply because the student has a medical condition.
- Must include the student and provide accommodations and services the student needs, because of the condition, to remain safe on the trip.
- Ex: *Eastern (OH) Local Schs., 70 IDELR 78 (OCR 2017)*
 - A principal and school nurse who expressed doubt that a high schooler could manage her diabetes care on two field trips violated Section 504 when they effectively barred her from the outings.

Field Trips

- May prohibit disabled student from participating if participation presents unacceptable risk to student's health or safety. Must demonstrate reason/justification.
- Must provide reasonable accommodation for equal opportunity
- Can't require parent to accompany if similar obligation not imposed on other parents.
 - *Calcasieu Parish (LA) Sch. (OCR 2005)* - violation of 504 where district required parents of student with insulin-dependent diabetes to attend field trips.

Aftercare

What is needed to allow student to have an equal opportunity to access program?

- Standard applies even if schools hire a separate company or organization to run their afterschool programs. See *Archway Classical Acad. Lincoln (AZ)*, 79 IDELR 142 (OCR 2021).

- Nurses?
 - What can be delegated
- Extra staff?

Discipline of Students with Disabilities

Discipline under
504 and IDEA

**IDEA and Section 504 eligible
students receive additional
disciplinary protections**

OCR Guidance - Disability and Discipline

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

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

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

Communication

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

Change of Placement?

Short-Term Suspension

-10 school days or less=NO change of placement

Long-Term Suspension

-More than 10 consecutive days OR more than 10 days cumulative and a pattern

-Pattern:

- The length of each removal,
- The total amount of time the child has been removed, and
- The proximity of the removals to one another

IDEA: Conduct IS NOT Related to the Disability

- Student CAN be long-term suspended
- LEA may apply the same discipline consequence as peers
- IEP team must...

(1) Determine services and placement beginning on the 11th day that allow the student to...

- (a) Receive educational services to continue to participate in general education just in an alternate setting during the suspension
- (b) Progress towards IEP goals
- (c) Receive an FBA, if appropriate

Section 504: Conduct IS NOT Related to the Disability

- Section 504 students:
 - Can be suspended with no services
 - Must be afforded the same opportunity to make up work etc...during time of suspension as general education students

Conduct IS Related to the Disability

- 504/IEP Student CANNOT be long-term suspended
- 504 team must...

- (1) Return child to current placement
- (2) Consider/Revise BIP

THANK YOU!!

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42nd Annual
Pacific Northwest Institute on
SPECIAL EDUCATION & THE LAW

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PRE-CONFERENCE MINI-COURSE B

**Overcoming Hostility to IDEA and 504 FAPE
by Nondisabled Students, their Parents and
School Employees**

presented by:

David Richards

Attorney at Law

Richards Lindsay & Martín, LLP

Austin, TX

sponsored by:



COLLEGE OF EDUCATION

UNIVERSITY *of* WASHINGTON

and

www.law.uw.edu

OVERCOMING HOSTILITY TO IDEA & 504 FAPE FROM NONDISABLED STUDENTS, THEIR PARENTS AND SCHOOL EMPLOYEES

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A little housekeeping...

- **The slides and the presentation are not legal advice.**
 - Facts, state law, and local policy can make a tremendous difference.
 - The slides are intended as an introduction to these issues and dynamics. The slides are NOT intended to provide a comprehensive listing of all relevant cases.
 - Dave's comments and observations are based on the published decision and will not include all issues or facts presented.
 - Language in bold is emphasis added by the author

Active Cooperation is Sometimes Required

- The school's ability to provide FAPE under either Section 504 or IDEA can require *active* cooperation by nondisabled students and their parents to protect allergic students from allergens.
- That a student with a disability might require a service or accommodation because of impairment should not surprise anyone.

IDEA Eligibility Evidences Need for Services

- *Daniel R.R. v. State Bd. of Educ.*, 441 IDELR 433 (5th Cir. 1989).
 - “Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or **they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs.**” (Emphasis added).

Differing Treatment Can Be Fair Treatment

- To satisfy the FAPE duty under either Section 504 or IDEA, the school is often required to provide the student with a disability additional or different services and supports that their nondisabled peers do not receive.
- Nondisabled students and their parents may object:
 - Because they are required to change their lifestyle.
 - Because they see the services as unfair advantage.

Services for One Student, Objection by Another

- FAPE for one student may impacts the lifestyles of others:
 - As a parent I want to determine what my child eats at school. The school's peanut restrictions prevent that.
 - I want to know WHY my student can't bring a peanut butter sandwich to school.
 - Why is our community's culture banned from the school for one child? This is horse country.

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The Facts:
- Having tried less intrusive accommodations (which failed), the elementary school banned all peanut and tree-nut products to protect a student with a severe, life-threatening allergy. The ban is part of the student's Section 504 Plan.
- The Plaintiff is the parent of another student in the school. Plaintiff objected to the ban and notified the school that she would not comply. She informed the school of her refusal to cooperate in a note.

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The Note:
- "To meet my child's needs, I will provide my child with the proper nutrition in her school lunch as I, in my sole discretion, deem appropriate. The School is not permitted to take any disciplinary action — including, but not limited to, taking away her food or removing her to a different location."
- "Any such action against my child will be discriminatory, harassment, and an act of retaliation in violation of her rights under the Rehabilitation Act and infringes on our individual rights, including our right against despotic control and our right to freedom of choice."

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The Allegations:
 - (1) The ban violates constitutional rights of parent and student;
 - (2) The ban was a breach of the school's fiduciary duty and an abuse of power;
 - (3) The school used intimidation and harassment to compel student and parent to comply;
 - (4) Since plaintiff and child are not parties to the 504 Plan, they cannot be bound by a ban created pursuant to the plan; and
 - (5) The ban ignores nutritional and medical needs of Plaintiff's child.

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The School's Response:
 - School had a legal obligation to accommodate the allergic student and act on medical data indicating that lesser accommodations were insufficient to eliminate the risk of harm.
 - OCR had informed the school that the student with the allergy is entitled to FAPE.

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The Court's Response:
 - The Plaintiff and child have no standing to challenge the Section 504 Plan of another student by way of the Rehabilitation Act of 1973.
 - The nutritional needs argument loses because Plaintiff's daughter is not Section 504 eligible.
 - Plaintiff had sought Section 504 eligibility for her daughter who allegedly, due to medical condition, was *required* to consume nut products.
 - No eligibility was found, and this issue was not appealed.

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The Court's Response: the liberty and property interest claims fails:
 - "Plaintiff argues that the nut-ban policy deprives her of a liberty or property interest because it requires her to purchase more expensive foods she otherwise would not have to buy.... The nut-ban policy does not require plaintiff to purchase any specific food item; it only prohibits plaintiff's child from bringing to school one very narrow class of items."

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The Court's Response: the contract theory fails:
 - "Plaintiff further argues that because she and her daughter are not parties to the 504 plan, she cannot be bound by the nut-ban policy that was implemented pursuant to that plan. We reject this contract-based argument because the nut-plan policy imposed by the school is not a matter of contract; rather, it is based on the school district's statutory authority to adopt policies and procedures for the health, safety, and educational benefit of its students."

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The Court's Response:
 - "The ban is not an arbitrary exercise of power but, rather, is rationally related to the legitimate government purpose of providing an education for a student with a life-threatening allergy to nut products."
 - The student with the allergy eligible under Section 504 has rights that Plaintiff's child does not have, justifying the different treatment by the school.

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- The Court explains why the student with disability gets special treatment.
 - "[T]he Rehabilitation Act is intended to address the needs of individuals with a disability to prevent discrimination against them in the services offered. **Furthermore, the different treatment of such students is rationally related to a legitimate government interest of protecting disabled students.** Plaintiff has not shown that the different treatment afforded to disabled students violates the Equal Protection Clause." (Emphasis added).

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- Why was Plaintiff's daughter's lunch searched?
- The Court's reply was fairly simple: **You wrote a note and said you were sending nuts in her lunch.**
- "Despite plaintiff's claim about her daughter being intimidated by lunchroom staff, plaintiff did not offer any basis for finding that school staff had conducted a search and seizure beyond the removal of banned items observed by school staff or a search of a child's belongings where the school was given advance notice that the ban was being violated."

I Will Decide What to Send in my Student's Lunch.

Liebau v. Romeo Cmty. Schs., 61 IDELR 231 (Mich. Ct. App. 2013, unpublished).

- And why was Plaintiff's daughter's lunch searched?
- "A search and seizure based on either a staff person's actual observation of an item that has the characteristics of a banned item or a noncompliant parent's notification to the school that the policy would be violated will satisfy the lesser reasonable-suspicion standard applicable to school personnel."

Other Parents' Questions are Harassment?

Pacific Grove (CA) Unified Sch. Dist., 47 IDELR 138 (OCR 2006).

- The Facts:
 - A third-grade student with a nut allergy qualified for special education as Other Health Impairment.
 - Keeping the student safe required some changes in the classroom.
 - On a daily basis, the school vacuumed classroom carpet, washed all classroom desks, and required hand-washing by anyone entering the room and maintained the classroom food-free.

Other Parents' Questions are Harassment?

Pacific Grove (CA) Unified Sch. Dist., 47 IDELR 138 (OCR 2006).

- The Facts:
 - Parents and students asked a lot of questions about the accommodations and why things were occurring.
 - Generally, the tone was not hostile, although the parent of the student with allergies reported hostile looks, and "3rd grade parents unnecessarily calling her and being rude."
 - The parent of the allergic student alleged disability harassment.

Other Parents' Questions are Harassment?

Pacific Grove (CA) Unified Sch. Dist., 47 IDELR 138 (OCR 2006).

- OCR: What do you expect?
 - OCR finds no violation — other parents wanting answers is not harassment; it's to be expected.
 - "In order for the classroom program to work effectively and result in a reasonably safe environment for the Student, **the voluntary cooperation of other students and their parents was essential**. Part of this process was an on-going dialogue and informational process." (Emphasis added).

Other Parents' Questions are Harassment?

Pacific Grove (CA) Unified Sch. Dist., 47 IDELR 138 (OCR 2006).

- OCR: What do you expect?
 - "Much of the behavior identified by the complainants represents reasonable inquiries on the part of parents and their children who were participants in the classroom to which Student was assigned."
 - "In many cases, the questioning by parents and students were made to Student's mother and her aide. It appears that this was done to avoid questioning the Student directly, in most cases."

Other Parents' Questions are Harassment?

Pacific Grove (CA) Unified Sch. Dist., 47 IDELR 138 (OCR 2006).

- "The evidence shows that the District took reasonable steps to inform the affected students and their families as to the nature of the modifications to their educational environment and to explain the necessity for the changes."

Other Parents' Questions are Harassment?

Pacific Grove (CA) Unified Sch. Dist., 47 IDELR 138 (OCR 2006).

- **Providing information is essential to cooperation.** "The other participants were being asked to alter their customary behavior in ways that were novel and restrictive of their personal preferences. It is reasonable that, without animus or a discriminatory purpose, they might question the necessity of the procedures they were being asked to follow."
- But what about FERPA confidentiality concerns?
- A lesson from a wise elementary school principal

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The Facts:
 - C.R.S. was diagnosed with a horse dander allergy while on vacation.
- The family moved to horse country in Louisiana where horse breeding is common and kids sometimes arrive at school on horseback.
- Upon enrollment, the parents requested
 - (1) That an EpiPen be available in the nurse's office; and
 - (2) The student be assigned a designated seat on the bus so she could avoid exposure to students who may have been in contact with horses.
- The school provided both of these accommodations for the 2003-04 and 2004-05 school years.

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The Facts:
 - Other than an “itchy welty rash” after an allergy shot in 2003, there is no evidence of an allergic reaction during this time (2003-05).
 - “Apparently in response to two incidents — one in which a library display used horse tack, and the other occurring during Kid’s Week when a horse was brought onto campus — Plaintiffs formally requested accommodations under Section 504.”

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The completed Section 504 Plan included the following accommodations:
 - “Sending a notice to all parents indicating that ‘one or more students at Loranger Elementary School had a life-threatening allergy to horses’ and requesting that parents avoid bringing horses on campus, refrain from using horses or horse equipment as transportation to and from school, and ensure that their child’s clothes and hands were clean and free from horse dander.”

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The completed Section 504 Plan included the following accommodations:
 - Prohibiting horses and horse tack from being brought on campus;
 - “Washing down the public road if a horse passed down it so as to minimize the chance of C.R.S. having an allergic reaction.”
- After the implementation of the 504 Plan, **her only reaction** in 2006 “involved ‘watering eyes’ and a ‘scratchy throat,’” and **does not appear to have occurred at school.**

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The community did not respond favorably to the forced changes in lifestyle.
- The principal “called a deputy in to help and personally stood in the roadway to attempt to stop the horses from proceeding, but that [t]he parents refused to stop and proceeded down the road, and the deputy had to pull [the principal] out of the way.”

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The community did not respond favorably to the changes in lifestyle.
- In response to the campus administration’s decision to cancel their reward to the students for good attendance during test week (both the principal and assistant principal promised to ride their horses to school), a campus parent passed out flyers urging them to reconsider.

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The community did not respond favorably to the changes in lifestyle.
- “Although the flyer did not identify Plaintiffs or any of their children by name, the flyer stated that there was a child allergic to horse hair who threatened cancellation of the event and noted that “[t]his same parent caused our students to miss out on a beautifully decorated Library during Book Fair about 2 years ago, when the theme was western, and saddles, etc. had to be removed for ONE child.”

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The community did not respond favorably to the changes in lifestyle.
- Finally, in support of their allegations that the school retaliated against the parents, C.R.S.'s parents allege the student's home was vandalized and a group of citizens in a car yelled "horse hater" at them.

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The litigation unveiled some interesting facts.
- "During the deposition, Dr. Schneider indicated that... her allergies did not require many of the accommodations Plaintiffs had requested and received as part of the 504 accommodation plan for C.R.S."
- "Specifically, Dr. Schneider stated that it was unnecessary and **'impractical' to ban horses on campus, wash down the road after a horse passed upon it**, and have administrators carry a cell phone or walkie-talkie for C.R.S. alone." (Emphasis added).

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The Court: Only the initial accommodations (those in place *prior* to the 504 Plan) were necessary.
- The court's reference in footnote 13 is interesting. "The efficacy and reasonableness of these accommodations is further evidenced by the fact C.R.S. went years without having a reaction at school with only these accommodations in place."
- *Dave commentary*: What does this finding tell us?

Community Outrage in Horse Country

Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006).

- The Court: This isn't school retaliation.
- "Plaintiffs present no proof that Defendants and Fairburn actively sought or attempted to incite the more serious acts committed by members of the community. In fact, the evidence indicates otherwise. Defendants are not liable for actions not caused by them."
- *Dave commentary*: What outraged the community were limitations imposed on lifestyle that weren't necessary/data-based!

Cases That See This Differently

Hunt v. St. Peter Sch., 26 IDELR 6 (W.D. Mo. 1997).

- A few scattered cases are troubled by the impact of disability laws on nondisabled folks. For example:
 - "There is nothing in the Act to suggest that the non-disabled population was expected to give up or substantially alter their lifestyle. **There is nothing in the Act to suggest that Congress intended the non-disabled population at St. Peter to stop wearing scented products so that one child could avoid the possibility of an allergic reaction.** If Congress did so intend, it will have to say so with greater clarity given the revolutionary quality of such a policy."

Cases That See This Differently

Cascade Sch. Dist., 37 IDELR 300 (SEA OR 2002).

- Hearing Officer rejected a blanket prohibition on parents sending homemade treats to school to protect a student with a severe allergy to nuts.
 - "Such a blanket prohibition on other parents sending homemade treats is unacceptable interference in the individual rights of parents to raise their children as is appropriate for their culture, beliefs, languages, and finances, even if a list of ingredients (label) for homemade treats is included with the treats, and goes beyond the standard applicable here."

Do Section 504 and the ADA require others to change their lifestyles? YES

Nondiscrimination laws inherently require a change in behavior toward an identified class of protected people.

- Civil rights laws are created to protect minority populations from what is often referred to as “the tyranny of the majority.”
- When a group has been subjected to historical discrimination but lacks the numbers to protect itself at the polls, civil rights laws make discriminatory behavior illegal.

Do Section 504 and the ADA require others to change their lifestyles? YES

• In the Rehabilitation Act of 1973 (Section 504), **persons with disability were recognized by Congress as a protected class** and were provided with nondiscrimination protection.

• “No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination **under any program or activity receiving Federal financial assistance**” 29 USC 794(a).

• Note that §504 & ADA prohibitions on disability harassment and retaliation evidence nondiscrimination rules changing the lifestyle of others.

Section 504 Was Required due to Indifference

Alexander v. Choate, 566 F.2d 1373, 469 U.S. 287 (1985).

• “Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of **thoughtlessness and indifference—of benign neglect.**”

• “Thus, Representative Vanik, introducing the predecessor to § 504 in the House, described the **treatment of the handicapped as one of the country’s ‘shameful oversights,’** which caused the handicapped to live among society ‘shunted aside, hidden, and ignored.’”

Section 504 Was Required due to Indifference

Alexander v. Choate, 556 IDELR 293, 469 U.S. 287 (1985).

- “Federal agencies and commentators on the plight of the handicapped similarly have found that **discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.**”
- *A Little Dave Commentary*: Note that neglect sadly appears in much of 504’s history and seems to grow more freely post-pandemic. More on this below.

Some Final Thoughts on Impacting the Lifestyles of Others

- Bans or prohibitions should be as limited as possible while still providing the appropriate level of safety to the student with disability.
 - Data matters.
 - Is the student’s allergy so serious that even trace amounts of nuts will trigger a reaction, or does the student need to consume nuts to trigger it? How serious is the reaction? Has the allergy been triggered at school?
 - What precautions are used in other settings the student frequents?
 - A perfectly safe school environment is not required (next slide).

Some Final Thoughts on Impacting the Lifestyles of Others

- **Level of safety of school environment for a student with an allergy.** *Washington (NC) Montessori Pub. Charter Sch.*, 60 IDELR 79 (OCR 2012); *See also, Saluda (SC) Sch. Dist. One*, 47 IDELR 22 (OCR 2006).
 - “Vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school.”
 - “Section 504 and Title II require that the School provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility.”

Some Final Thoughts on Impacting the Lifestyles of Others

- A ban or limitation should be explained sufficiently to enable nondisabled peers and parents to understand why it is necessary.
- That means getting FERPA consent to disclose details of previous exposures and consequences.
- Neither the school nor the parent should assume that limits on the actions of others will be embraced warmly upon mere announcement.
- *Dave Note:* Best results come from personalizing the need and articulating to others why the action is necessary.

Thoughts on Working with the Parents of the Student with Disability: Interference with FAPE BUT not from hostility.

Thoughts on Working with the Parents of the Student with Disability

- The U.S. Department of Education (ED) in commentary to the IDEA regulations on revocation of consent.
- “Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the IDEA’s emphasis on the role of parents in protecting their child’s rights and the Department’s goal of enhancing parent involvement and choice in their child’s education....” 73 Fed. Reg. No. 231 (Dec. 1, 2008), p. 73009.

Thoughts on Working with the Parents of the Student with Disability

- ED commentary to regs on revocation of consent (cont'd).

“Concerning the comments asserting that parental revocation of consent for special education and related services could be detrimental to the academic future of a child with a disability, **the Act presumes that a parent acts in the best interest of their child.” *Id.***

Thoughts on Working with the Parents of the Student with Disability

Dave thinking: for the presumption to work, parents must:

- Understand the IDEA process
- Understand their role in the IDEA process
- Understand the natural consequences of decisions made in that process.
- WHY? You can't utilize rights you do not understand. You can't effectively advocate for FAPE if you don't know what FAPE looks like.

Thoughts on Working with the Parents of the Student with Disability

How do parents arrive at this understanding?

- With the school's conscious help
- With an advocate or attorney's help (if the school wasn't interested, wasn't trustworthy, or was unhelpful)
- With a lot of "googling" research and networking with other parents
- OR perhaps, the parent never arrives and the child's education suffers

Thoughts on Working with the Parents of the Student with Disability

Does the parent understand IDEA language?

"This is Edspeak—a language so bewildering that even teachers need glossaries to figure out what's being said. In the insular world of education, words morph and multiply almost daily as schools dream up new programs and chase reforms.... Some districts, trying to be helpful, publish glossaries. Los Angeles Unified has one featuring 132 pages of acronyms and terminology—with about 4,000 entries—that could tie the tongue of even the most skilled linguist... *Duke Helfand, "Edspeak' is in a class by itself," LOS ANGELES TIMES WEB EDITION, August 16, 2001.*

Thoughts on Working with the Parents of the Student with Disability

Parents aren't naturally fluent in EdSpeak.

"Educators, of course, haven't cornered the market on fuzzy language. Doctors and lawyers, soldiers and politicians—they all speak in code. But clarity is doubly important in schools, where teachers and parents are supposed to work as a team—and after all, teach children to communicate. The first step, it seems, would be for the adults to speak the same language." *Id.*

Dave Comment: In fairness to Parents, the author has observed that on occasion school folks don't seem to understand each other when they use EdSpeak.

Thoughts on Working with the Parents of the Student with Disability

Some terms can be tricky. *Nicolet (WI) Union High School District, 37 IDELR 98 (OCR 2002).*

- Parent believed that preferential seating meant the student would sit in the front row in front of the teacher's desk. The plan did not define preferential seating.
- The Parent's expectation was based on where the teacher stood during parent orientation, and not on day-to-day classroom activity.
- Instead, the student was placed in the row adjacent to the right-hand chalkboard that the teacher used for class presentations. OCR found no violation.

Thoughts on Working with the Parents of the Student with Disability

Some terms can be tricky.

- *A Little Dave Commentary:* While the result is certainly encouraging, the fact that the school had to respond to an OCR complaint is telling of the relationship with the parent. While there are parents who cannot be satisfied, the author wonders whether a friendly conversation with the teacher or a campus administrator explaining the plan could have prevented the complaint.
- *See also, Meridian (IL) Community Unit School District 101, 42 IDELR 90 (OCR 2004)* ("With respect to the items in the complaint that allegedly were not implemented, the evidence shows that in those instances, the Complainant misinterpreted the scope and extent of the terms of the IEP.")

Thoughts on Working with the Parents of the Student with Disability

Does the parent understand the importance of data in IDEA decision-making?

- Parent or Student Preferences do not dictate plan elements. Desires for particular services need to be analyzed through data.
 - *Lincoln Elementary School District 156, 47 IDELR 57 (SEA IL, 2006)* Demand for special transportation for Student with asthma denied based on no showing of disability related need despite Parent preference for such as it was inconvenient for the Parent to bring the Student to school).

Thoughts on Working with the Parents of the Student with Disability

Does the Parent understand the educational implications of his preferences and demands?

- **Hydration & School avoidance.** *North Lawrence (IN) Community Schools, 38 IDELR 194 (OCR 2002).*
 - Student was diabetic, and Parent was concerned that his needs for water were being disregarded during the school day. Parent requested unlimited water fountain access.
 - The district grew concerned when too frequent water breaks were interrupting the educational process and interfering with the student's ability to stay on task.

Thoughts on Working with the Parents of the Student with Disability

- Does the Parent understand the educational implications of his preferences and demands?
- **Hydration & School avoidance.** *North Lawrence (cont'd)*
 - Parent objected to school's water bottle plan, as Student had been denied access to the water fountain on a variety of occasions despite a parent demand that access be unlimited.
 - After an initial objection for unspecified "hygiene" reasons and logistical concerns about refilling it, the parent agreed to the accommodation, and OCR determined the matter closed.

Thoughts on Working with the Parents of the Student with Disability

- Does the Parent understand the educational implications of his preferences and demands?
- *A Little Dave Commentary:* When preferences, demands, etc., interfere with FAPE, the school needs to explain the problem to the parent and work to overcome the conflict.
- Encourage parents to provide the IEP Team with the reasons a particular service or IEP item is needed, and using data, discuss the reasons, as well as the appropriateness of the proposed solution.

Thoughts on Working with the Parents of the Student with Disability

- Does the parent understand that some things doctors say have more weight than others?
- **Doctors don't determine IDEA eligibility or placement.** *Marshall Joint School District #2 v. C.D.*, 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010). "It was the team's position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team's discretion, governed by applicable rules and regulations. We agree...."

Thoughts on Working with the Parents of the Student with Disability

- Does the parent understand that some things doctors say have more weight than others?
- **Doctors & IDEA eligibility or placement.** *Marshall JSD (cont'd).*
 - “This brings us to a key point in this case: a physician’s diagnosis and input on a child’s medical condition is important and bears on the team’s informed decision on a student’s needs... **But a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]”**

Thoughts on Working with the Parents of the Student with Disability

- **Does the parent know what FAPE looks like?**
 - An example from a very attentive Parent at a presentation on autism
 - If the parent doesn’t trust the school (or understand what the school is saying), and has no idea how to determine for him or herself whether the school is providing FAPE, what do you expect the parent to do?
 - The Parent’s independent ability to recognize the success of the IEP can go a long way to building trust. Of course, that skill is a two-edged sword.

Thoughts on Working with the Parents of the Student with Disability

- Does the parent understand what’s required by the IEP?
 - A lesson from Dave’s first mediation
- Does the School understand the parent’s concerns?
 - A lesson from Monty Python

Thoughts on Working with Nondisabled Students and their Parents

Services for One Student, Objection by Another

- Why do nondisabled peers and their parents object?
 - The competition problem:
 - How can a special education student be valedictorian?
 - I understand that the student may need some help, but THAT MUCH help?
 - Some school opportunities are limited.
 - The result? Allegations of unfair advantage over accommodations, services, and difference in treatment.
 - The following cases also include situations where the school prevented unfair advantage.

Accommodation or Unfair Advantage?

PGA TOUR, INC. v. Martin, 20 NDLR 188 (U.S. 2001).

- The Facts:
 - Martin has a degenerative circulatory disorder resulting in severe pain and atrophy in his right leg.
 - As a professional golfer with a tour card, Martin wanted to participate in tournaments run by the PGA.
 - The problem: PGA rules generally require competitors to walk the course during tournament play.

Accommodation or Unfair Advantage?

PGA TOUR, INC. v. Martin, 20 NDLR 188 (U.S. 2001).

- The Facts:
 - PGA's position: "Walking is a substantive rule of competition, and that waiving it as to **any individual for any reason** would fundamentally alter the nature of the competition." (emphasis added).
 - Due to his condition, Martin was unable to walk the 18-hole course. Walking caused him pain, fatigue, and anxiety.
 - He was at significant risk of hemorrhaging, developing blood clots, and "fracturing his tibia so badly that an amputation might be required."

Accommodation or Unfair Advantage?

PGA TOUR, INC. v. Martin, 20 NDLR 188 (U.S. 2001).

- The Facts:
 - Martin's request to use a golf cart during tournament play was denied by the PGA:
 - Without making any attempt to review the medical evidence provided by Martin in conjunction with his request; and
 - Without any attempt to consider Martin's personal circumstances, and the impact of the walking rule as applied to him.

Accommodation or Unfair Advantage?

PGA TOUR, INC. v. Martin, 20 NDLR 188 (U.S. 2001).

- "Martin presented evidence, and the judge found, that **even with the use of a cart**, Martin must walk over a mile during an 18-hole round, and that **the fatigue he suffers** from coping with his disability is '**undeniably greater**' than the fatigue his able-bodied competitors endure from walking the course."

Accommodation or Unfair Advantage?

PGA TOUR, INC. v. Martin, 20 NDLR 188 (U.S. 2001).

A Little Dave Note: if the reason behind the rule is to equalize stress and fatigue...

- “The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg.”

Accommodation or Unfair Advantage?

PGA TOUR, INC. v. Martin, 20 NDLR 188 (U.S. 2001).

- How important is walking to golf?
- “Arnold Palmer, Jack Nicklaus, and Ken Venturi explained that fatigue can be a critical factor in a tournament, particularly on the last day when **psychological pressure is at a maximum**. Their testimony makes it clear that, in their view, permission to use a cart **might well give some players a competitive advantage** over other players who must walk.”

Accommodation or Unfair Advantage?

PGA TOUR, INC. v. Martin, 20 NDLR 188 (U.S. 2001).

- The Supreme Court: How important is walking to golf?
- **Not very.** The walking rule or “no cart rule” is not an essential attribute of the game of golf.
- The walking rule does not guarantee that each competitor will play under exactly the same conditions.
- Pure chance may have a greater impact on the game than the walking rule.

Accommodation or Unfair Advantage?

PGA TOUR, INC. v. Martin, 20 NDLR 188 (U.S. 2001).

- The Supreme Court: This is not unfair advantage.
 - “A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to ‘fundamentally alter’ the tournament.”
 - “What it can be said to do, on the other hand, is to allow Martin the **chance to qualify for and compete** in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires.”

Services for One Student, Objection by Another

- The underlying argument of unfair advantage lives on as the basis of complaints by both parents of nondisabled students and, sometimes, as justification for noncompliance by school personnel.
 - The argument: The student with disability is not receiving accommodations or appropriate services, but, instead, an unfair advantage.

How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003)

- The Facts:
 - Senior student suffered “substantial fatigue” from an unspecified physical impairment.
 - She was unable to attend school for a full day, and was provided, by IEP, “a hybrid program that allows her to attend morning classes and receive the remainder of her instruction at home.”

How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003)

- The Facts:
 - She took many honors classes with weighted grades and was poised to be the class valedictorian.
 - **Community unrest about her “unfair advantage,”** together with a **new superintendent**, resulted in a proposed **retroactive** policy change under which the school board would have discretion to name multiple valedictorians or could award the honor to someone other than the student with disability.

How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003)

- “Given that this case has generated a firestorm of controversy, it is important to emphasize at the outset what this case is not about. First, it is not about whether plaintiff is disabled; that is undisputed by defendants.”
- “Second, it is not about the appropriateness of the accommodations plaintiff received through her IEP; she was afforded these accommodations by the Board to level the academic playing field for her, and in fact, her achievements are a model example of a successful IDEA program.”

How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003)

- “**They have lost sight of the fact that plaintiff, unlike her peers, suffers from a debilitating medical condition**, which has never been disputed by the Board, and that her accommodations were aimed at putting her on a level playing field with her healthy classmates.”
- **Dave Note: This is the heart of a faux unfair advantage argument.** Ignoring disability means impact of disability can be ignored as well.

How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003)

- The Court is not happy:
 - “This case is about an outstanding student who overcame the hardships of her disability to achieve the best grades in her class, and who is now in danger of having her accomplishments tarnished by her own school’s administrators in the name of rectifying an imagined injustice.”

How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003)

- There is no perfect fairness and equality in education.
 - “As in a professional game of golf, it is impossible to guarantee that a student’s educational abilities will be the sole determinant of academic success in a highly regarded and competitive high school.”
 - Teachers employ different grading standards, even those who teach the same course.

How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003)

- There is no perfect fairness and equality in education.
 - Grading itself is often subjective. The same teacher may grade differently two students in the same class who are performing substantially at the same level.
 - Students have different technological support available to them in their homes or may enjoy the benefit of an older sibling or parent to assist them.

How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003)

- There is no perfect fairness and equality in education.
 - “The permutations are endless; the playing field for students rarely is the same.”
 - “Just as the disabled golfer in *Martin* did not receive an unfair competitive advantage from his accommodation, neither did plaintiff receive an unfair competitive advantage from her accommodation.”

Other Examples of the Competition Problem

Doe v. Haverford Sch., 39 IDELR 266 (E.D. Pa. 2003).

- The Facts
 - Student is an 11th grader with sleep apnea and phase-delayed syndrome (sleep cycle from 3:00 or 4:00 a.m. to noon).
 - Two *more* requests for accommodations are rejected.
 - Promotion to 12th grade, despite failure to meet promotion criteria.
 - Five additional months to complete schoolwork from the third quarter and in excess of two additional months to complete schoolwork from the fourth quarter for four courses.
 - *Dave Note*: This is a private school case utilizing reasonable accommodation analysis.

Other Examples of the Competition Problem

Doe v. Haverford Sch., 39 IDELR 266 (E.D. Pa. 2003).

- The Court:
 - “Allowing the plaintiff to make up quizzes, tests, and exams months after his classmates completed these tasks gives the plaintiff months of preparation that his classmates did not have.”
 - “Although tests are designed to test what a student knows, part of taking the tests and part of the educational process is to prepare to take quizzes, tests, and exams in a timely fashion.”

Other Examples of the Competition Problem

Doe v. Haverford Sch., 39 IDELR 266 (E.D. Pa. 2003).

- The Court:
 - “Haverford’s conclusion that avoiding those parts of its educational requirements lowers its academic standards is a decision for the school to make....”
 - *Dave Note*: This is not a FAPE standard case. BUT aren’t we really just talking about the scaling of an appropriate accommodation to the point it is no longer appropriate? Too much of a good thing can be inappropriate and unfair.

Other Examples of the Competition Problem

K.P. v. City of Chicago Sch. Dist. #299, 65 IDELR 42 (N.D. Ill. 2015).

- The Facts:
 - 8th grade student with a learning disability and an IEP wants to use a hand-held calculator on the MAP test.
 - MAP test is 1/3 of the rubric for students wanting access to the district’s selective enrollment high schools.
 - In this computerized test, an on-screen calculator is available for a portion of the exam and then disappears, requiring students to perform computations on their own.

Other Examples of the Competition Problem

K.P. v. City of Chicago Sch. Dist. #299, 65 IDELR 42 (N.D. Ill. 2015).

- The Facts:
 - Student’s IEP allowed use of a calculator in the classroom and in district and state assessments “with allowable accommodations/modifications that are necessary to measure academic achievement and functional performance.”
 - The school refused to allow the student to use a calculator on the MAP (other than when it was provided in the assessment itself).

Other Examples of the Competition Problem

K.P. v. City of Chicago Sch. Dist. #299, 65 IDELR 42 (N.D. Ill. 2015).

- **The Court: Requested calculator doesn't level this playing field.**

"Quite the contrary. It would permit K.P to replace her allegedly limited computational skills with a mechanical tool of infinite capacity (at least in the context of this case) that likely exceeds the computational capabilities of perhaps all — and certainly most — non-disabled students. That is not a reasonable accommodation but a substitution of artificial intelligence for the very skill the Test seeks to measure."

Other Examples of the Competition Problem

G.B.L. v. Bellevue Sch. Dist. #405, 60 IDELR 186 (W.D. Wash. 2013).

- The Facts:
 - IDEA student with ADHD and sensorineural hearing loss was accepted into the school district's PRISM program, an "accelerated program for highly gifted students with more advanced curriculum and a faster pace."
 - IEP included 48 accommodations & modifications, and 9 special ed services.
 - "The accelerated PRISM program has a critical component of homework and students are expected to develop understanding and comprehension of the material outside of class. The homework is also more difficult than in the regular education program."

Other Examples of the Competition Problem

G.B.L. v. Bellevue Sch. Dist. #405, 60 IDELR 186 (W.D. Wash. 2013).

- Homework was a problem:
 - In his regular education classes the previous year, "which has much less homework than the PRISM program, the Student spent four hours each night doing homework. The PRISM program stresses the importance of keeping up with homework as class lessons are sequential and 'catching up' on homework creates problem."
 - "Both his grades and mood quickly declined over the course of the school year." Parents requested limited homework.

Other Examples of the Competition Problem

G.B.L. v. Bellevue Sch. Dist. #405, 60 IDELR 186 (W.D. Wash. 2013).

- The accommodation request arises from the student's difficulty keeping pace with the required out-of-class work.
 - His "therapist Dr. Kwon suggested a two hour per night limitation on the amount of homework assigned." The therapist also argued that the homework burden was the student's "greatest source of stress."
 - The District denied the request, "finding that this would fundamentally alter the PRISM program curriculum standards, grading standards, and performance expectations."

Other Examples of the Competition Problem

G.B.L. v. Bellevue Sch. Dist. #405, 60 IDELR 186 (W.D. Wash. 2013).

- The ALJ: "Imposing a limitation that merely allowed for the already self-imposed time limit would have made no difference in the Student's ability to continue in the program and learn the course material."
- Both ALJ and district court found the teacher's testimony on the issue persuasive, especially with respect to the finding that completing the required homework was essential to the PRISM program.

Other Examples of the Competition Problem

Fresno Unified School District, 52 IDELR 150 (SEA CA 2009).

- The Facts
 - A 17-year-old student with intellectual disability was served in the magnet high school in general education classes with one-to-one aide support, and a curriculum modified by a resource specialist teacher.
 - Her IEP Team had determined that she was on a "non-diploma track," meaning that she did not need to accumulate credits to graduate with a diploma, and would not need to take the state exit level exam. She would be eligible for a letter of recommendation upon completion of four years of high school.
 - The student had gained enrollment at the magnet school through its lottery system. At the time of enrollment in the magnet school, the student's reading skills were at the second-grade level, with math skills at about the same level.

Other Examples of the Competition Problem

Fresno Unified School District, 52 IDELR 150 (SEA CA 2009).

- The Facts
 - After a year and a half in this placement, an assessment revealed that the student's present levels of performance in math and language arts had not substantially changed, and her goals remained "substantially the same."
 - There appears to be no discussion of progress reports "and the team did not discuss with or mention to mother that student had not progressed in her program at her functional level and abilities."
 - The district proposed moving the student to a comprehensive (apparently non-magnet) high school, with placement in a self-contained mild/moderate life skills class. When the parent refused, the district filed for due process.

Other Examples of the Competition Problem

Fresno Unified School District, 52 IDELR 150 (SEA CA 2009).

- The Facts
 - The school district argued that "there is **no level of supplemental aids or supports that reasonably can permit student to receive academic or nonacademic benefit** from inclusion in general education classes, leading to a conclusion that **a self-contained mild/moderate SDC is a more appropriate placement.**"
 - *A Little Dave Commentary:* Put simply, the school's position was that since the student does not perform at grade level in her core academic classes, she receives no academic benefit from the magnet school and ought to attend elsewhere.

Other Examples of the Competition Problem

Fresno Unified School District, 52 IDELR 150 (SEA CA 2009).

- The Facts
 - The parent's argument was that progress in both academic and nonacademic areas was occurring, but not at grade level. Instead, the progress should be viewed based on the student's abilities. Parent points to student's success in the modified curriculum in Floral Design, Intro to Agricultural Science, Art, and Adaptive P.E.
 - Further, the student made "some progress" toward her IEP goals (at her functional level) in her core math and English courses, although she did not perform at grade level.

Other Examples of the Competition Problem

Fresno Unified School District, 52 IDELR 150 (SEA CA 2009).

- The Student was making some progress toward IEP goals at a functional level in core English and math. School loses.
- Said the ALJ: "a student's failure to perform at grade level is not necessarily indicative of a denial of FAPE, as long as the student is making progress commensurate with his abilities."
- *Dave Thought:* would it have helped the school if the regular ed algebra and English teachers had made more of an effort?

Other Examples of the Competition Problem

Fresno Unified School District, 52 IDELR 150 (SEA CA 2009).

- The English teacher:

"[Teacher] does not consider Student to be 'her student' because Student was not on her attendance roll, Student sits in the back of her classroom with her 'tutor,' she does not provide student's work assignments, and did not grade her work.... [Teacher] did not get involved in the development of her curriculum or her work assignments. She never discussed Student's progress or lack thereof in her class with Mother. She attended the most recent IEP team meeting last semester as a formality."

Other Examples of the Competition Problem

Fresno Unified School District, 52 IDELR 150 (SEA CA 2009).

- The algebra teacher:

"[Teacher] does not believe student belongs in her class because she is not able to do grade level work. [Teacher] does not track Student's progress.... [Teacher] does not believe Student has received non-academic benefits because Student does not interact with the students who are doing grade-level work. [Teacher] has not encouraged social interaction in the classroom. She has not considered making changes in the classroom to foster social interaction or enhance academic benefit to Student."

What Does OCR Say About This?

Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, 108 LRP 69569 (OCR 12/26/07).

- OCR addressed the issue of accommodations and services for IDEA and 504-eligible students in a very limited way in 2007.
- The guidance applies to “accelerated classes.” An accelerated class is OCR-speak for Advanced Placement, Honors, Magnet, Gifted, etc.
- Two conflicting myths persist about accelerated classes and services:
 - Accommodations are not possible in accelerated classes.
 - Students with disabilities are entitled to any accommodation they might need to be successful in accelerated classes.

What Does OCR Say About This?

Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, 108 LRP 69569 (OCR 12/26/07).

- OCR found two problematic approaches utilized by schools.
 - “Specifically, it has been reported that some schools and school districts have refused to allow qualified students with disabilities to participate in such programs.
 - Similarly, we are informed of schools and school districts that, as a condition of participation in such programs, have required qualified students with disabilities to give up the services that have been designed to meet their individual needs.”

What Does OCR Say About This?

Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, 108 LRP 69569 (OCR 12/26/07).

- How does OCR view accelerated programs?
 - “Participation by a student with a disability in an accelerated class or program **generally** would be considered part of the regular education or the regular classes referenced in the Section 504 and the IDEA regulations.”



What Does OCR Say About This?

Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, 108 LRP 69569 (OCR 12/26/07).

- So, what does that mean?
 - “Thus, if a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program.”



What Does OCR Say About This?

Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, 108 LRP 69569 (OCR 12/26/07).

- How about an example?
 - “If a student’s IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program, and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class. The same would be true for other needed related aids and services, such as extended time on tests or the use of a computer to take notes.”



What Does OCR Say About This?

Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, 108 LRP 69569 (OCR 12/26/07).

- What does the guidance tell us?
 - If the student’s IEP or 504 plan calls for something in a regular class or program, he gets it in the accelerated program as well.
 - No trading allowed. Student can’t be asked to give up IEP or 504 plan element to participate in accelerated program.

What Does OCR Say About This?

Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, 108 LRP 69569 (OCR 12/26/07).

- What does the guidance tell us?
 - No requirement for *additional* accommodations or services in accelerated class beyond those already on the IEP or 504 plan?
 - No apparent concern over whether services or accommodations, *when applied to accelerated class*, will be a fundamental alteration (unfair advantage).
 - Unless that's why "generally" is in the explanation...

What Does OCR Say About This?

Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs, 108 LRP 69569 (OCR 12/26/07).

- Some additional thoughts:
 - Fundamental Alteration & The Weighted Grade Problem.
 - Nondiscriminatory entrance criteria can help.
 - The student in *Bellevue* didn't qualify for the program.
 - "Nothing in Section 504 or Title II requires schools to admit into accelerated classes or programs students with disabilities who would not otherwise be qualified for these classes or programs."
Rosemount-Apple Valley-Eagan ISD #196, 112 LRP 56386 (SEA MN 03/22/11).

Nondiscriminatory Entrance Criteria Can Help

Rosemount-Apple Valley-Eagan Indep. Sch. Dist. #196, 112 LRP 56386 (SEA MN 03/22/11).

- The IEP team agreed to the parent's request that the student would take four honors classes (despite reservations "about any student transitioning to 9th grade with that level of rigor and workload without an Academic Prep course").
- There did not seem to be any eligibility requirements for the honors courses in the district.
- The request that student be placed in advanced band, however, was not successful.



Nondiscriminatory Entrance Criteria Can Help

Rosemount-Apple Valley-Eagan Indep. Sch. Dist. #196, 112 LRP 56386 (SEA MN 03/22/11).

Nondiscriminatory gatekeeping. "Nothing in Section 504 or Title II requires schools to admit into accelerated classes or programs students with disabilities who would not otherwise be qualified for these classes or programs."

- "Section 504 and Title II require that qualified students with disabilities be given the same opportunities to compete for and benefit from accelerated programs and classes as are given to students without disabilities." *Id.*



Nondiscriminatory Entrance Criteria Can Help

Rosemount-Apple Valley-Eagan Indep. Sch. Dist. #196, 112 LRP 56386 (SEA MN 03/22/11).

- "If the District has established eligibility requirements or criteria for honors courses, the Student has no identified educational need being met by placement in those courses and should only be admitted to those classes if he meets the same criteria in place for other students in the building."
- "The Student is entitled to the **same opportunities to compete** for and benefit from honors courses, **not a preferential opportunity** based on eligibility for special education and related services."



Nondiscriminatory Entrance Criteria Can Help

Thoughts on NOT employing prerequisites/entrance criteria.

- Without entrance criteria or prerequisites, when the class or program proves inappropriate for the student, the **school loses some leverage** with the argument that the student is ill-equipped to be there (since it allowed the choice).
- Legitimate criteria solve that problem, to some degree, by making sure the students in the program are qualified to be there (**think "otherwise qualified"**). A host of cases provide additional illustration.

Nondiscriminatory Entrance Criteria Can Help

A Quick Summary of Examples

- Importance of commitment in GT class. *New York City Sch. Dist. Bd. of Educ.*, 17 IDELR 87 (SEA NY 1990).
- Mix of eligibility factors is best. *St. Charles (IL) Cmty. Unit Sch. Dist. #303*, 17 IDELR 910 (OCR 1991).
- Single factor eligibility is precarious. *Darien (CT) Bd. of Educ.*, 22 IDELR 900 (OCR 1995).
- 8th-grade writing requirement for HS magnet. *C.O. v. Portland Pub. Schs.*, 58 IDELR 272 (9th Cir. 2012), *cert. denied*, 113 LRP 786, 133 S. Ct. 859 (U.S. 2013).

Nondiscriminatory Entrance Criteria Can Help

A Quick Summary of Examples

- No violation when student's composite scores not high enough. *Bayonne (NJ) Sch. Dist.*, 35 IDELR 36 (OCR 2001).
- No violation when student lacked a required math credit. *Horry County (SC) Sch. Dist.*, 35 IDELR 39 (OCR 2001).
- No violation when student enrolled late, the program was full, and he didn't fill out the application. *Southfield (MI) Pub. Schs.*, 112 LRP 28804 (OCR 04/23/12).
- What about Open Enrollment & Lottery Admissions (space or luck control entry)?

What do OSEP & DOJ Say About This?

- Must IDEA FAPE be provided in *every* class, on *every* campus, for *every* student? No.
- "Even with regard to LEA programs, the IDEA does not require that LEAs make all services needed by all students with disabilities available at all locations." *Letter to Anonymous*, 40 IDELR 236 (OSEP 2003).
- Common services should be commonly available. *In re: Student with a Disability*, 113 LRP 50627 (DOJ 12/09/13).

Some Final Thoughts on the Competition Problem

- The core of unfair-advantage thinking is sometimes the refusal to acknowledge impact of disability and the need for services as a response.
- Too much of a good thing can be a BAD thing.
- Individualized evaluation and appropriate determination of services prevents unfair advantage.
- Be careful with services and accommodations in accelerated classes, especially when they remove the essential elements that make these accelerated classes.

Thoughts on Working with School Employees

School Employees Interfering with FAPE

Can teachers refuse to implement an IEP or 504 Plan due to language in a collective bargaining agreement?

“Implementation of any collective bargaining agreement or of any rules and regulations that have the effect of limiting the participation of children with disabilities in the regular educational environment or of imposing other burdens on children with disabilities or of making the aids, benefits, and services provided by the school district less effective than those provided to other students would constitute a violation of Section 504 and its implementing regulation.” *Letter to Williams*, 21 IDELR 73 (OSEP 1994).

School Employees Interfering with FAPE

How would ED enforce the 504 requirements?

OCR has no enforcement power against the union... **“OCR could, however, find a school district in violation** if it ratified such a collective bargaining agreement and then attempted to use it as a justification for not meeting the LRE requirement or for restricting children with disabilities in obtaining aids, benefits, or services or for providing these children with aids, benefits, and services that are not as effective as those provided to nondisabled children.” *Id.*

School Employees Interfering with FAPE

Modoc County (CA) Office of Education, 24 IDELR 580 (OCR 1996).

Can the principal veto an IEP? *NO.*

- “The complainant, other parents of disabled students, and former staff told OCR that they have observed or directly experienced ongoing manipulation of the IEP process by MCOE officials in an effort to forgo providing services and cutting costs.”
- “Many situations involve MCOE officials controlling IEP team decisions, disapproving requests or suggestions with no explanation, imposing procedural delays, intimidating staff and parents, and instructing staff to generalize IEPs... [These] presented no educational justification for their decisions and accepted no arguments.”

School Employees Interfering with FAPE

Pickens County Sch. Dist., 110 LRP 2301 (SEA Ga. 2009).

Can the school reduce expectations & work less? *NO.*

The district was less than consistent in its provision of IEP services to a student with Rett’s Syndrome and an intellectual disability. Among other lapses,

- Only 25% of required OT services, and 35% of speech services were provided during three months in the fall of 2009.
- While the BIP required data collection, no data was collected from September 2008 to January 2009.
- The student was walked around the school for hours every school day— “no reliable testimony” that instruction was provided during this time.

School Employees Interfering with FAPE

Pickens County Sch. Dist., 110 LRP 2301 (SEA Ga. 2009).

Can the school reduce expectations & work less? NO.

- Of the ten goals, “four were Goals practically the same as the prior year’s Goals, but with lower mastery criteria.” One goal was higher, and two remained the same.
- Parents objected to the reduced expectation, but the school argued that the 2008-’09 goals were “too ambitious.” Parents eventually filed and sought residential placement.
- ALJ: The most significant claim is that the same IEP was used year after year with similar goals and no progress.

School Employees Interfering with FAPE

Pickens County Sch. Dist., 110 LRP 2301 (SEA Ga. 2009).

Can the school reduce expectations & work less? NO.

- The district, aware of the parents’ concerns regarding lack of progress and its own failures to provide required services “chose the easiest method of handling” the student’s lack of progress, i.e., reducing expectations.
- The ALJ was “not provided evidence to indicate that this reduction in expectations will likely result in progress.” Parents were awarded two years of residential placement.

Some folks, despite certification, ought not be teaching students with disabilities.

A lesson from a SWAT team commander.

- Physicians must identify and report medical care providers “who are not technically adequate whether owing to age, substance abuse, carelessness or other impairment.... While this is a difficult obligation to fulfill, especially when it is needed close to home, it is absolutely essential to maintain patient trust.”

Axelrod DA, Goold SD. Maintaining Trust in the Surgeon-Patient Relationship: Challenges for the New Millennium. Arch Surg. 2000;135(1):55-61. doi:10.1001/archsurg.135.1.5

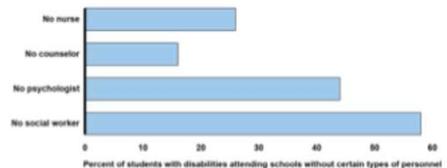
Some folks ought not be teaching students with disabilities: Shrinking Faculty Makes this Harder

- Nearly 9 in 10 public school districts struggled to hire teachers heading into the school year, and many potential hires were deterred by low salaries.”
- “The shortages were most common in subjects that generally have been difficult to fill for years: special education, science and foreign languages.”

Schemele, Z. (2023). Teacher shortages continue to plague US: 86% of public schools struggle to hire educators. *USA Today*. Retrieved from <https://www.usatoday.com/story/news/education/2023/10/17/teacher-shortage-2023-us-schools-struggle-hiring/71208579007/>.

Some folks ought not be teaching students with disabilities: Shrinking Faculty Makes this Harder

Figure 5: Percentage of Public School Students with Disabilities Who Attended a School Without Key Personnel, School Year 2020-21



Special Education: Education Needs School- and District Level Data to Fully Assess Resources Available to Students with Disabilities. GAO - 24-106264 (June 2024) p. 23.

Source: GAO analysis of Department of Education's Civil Rights Data Collection. | GAO-24-106264

Some folks ought not be teaching students with disabilities: Deficits in Professional Development on Disability

- In data from 2019: “Less than 1 in 5 general education teachers feel ‘very well prepared’ to teach students with mild to moderate learning disabilities, including ADHD and dyslexia, according to a new survey from two national advocacy groups.”

Mitchell, C. (2019). Most Classroom Teachers Feel Unprepared to Support Students With Disabilities. *EDWeek*. Retrieved from <https://www.edweek.org/teaching-learning/most-classroom-teachers-feel-unprepared-to-support-students-with-disabilities>

**Some folks ought not be teaching students with disabilities:
Deficits in Professional Development on Disability**

At least one-third of the respondents reported that they have not participated in professional development on serving the students with disabilities in their classrooms." *Id.*

"The survey found that only 30 percent of general education teachers feel 'strongly' that they can successfully teach students with learning disabilities—and only 50 percent believe those students can reach grade-level standards." *Id.*

**Some folks ought not be teaching students with disabilities:
Deficits in Professional Development on Disability**

- In 2019 the Council for Exceptional Children published a survey conducted with 1,500 special educators.
- "Of concern is the fact that very few respondents rated highly the preparation of general education colleagues or paraprofessionals, who are often charged with supporting special education services."

Fowler, Coleman & Bogden, Council for Exceptional Children, *The State of the Special Education Profession Survey Report* (2019) (p. 8).

**Some folks ought not be teaching students with disabilities:
Deficits in Professional Development on Disability**

- Some Dave Thoughts:
 - Anecdotally, major events in the field (e.g., introduction of NCLB, pandemic) have often led to early retirement or career change by special educators leaving schools with comparatively less-seasoned and trained staff.
 - Time & money for professional development on disability issues is tight. Other areas of PD may be prioritized due to state or local needs.
 - Schools that previously engaged in disability law training yearly as part of back-to-school activities now train less regularly.

**Some folks ought not be teaching students with disabilities:
Morale & Readiness**

The GAO reports warns of the snowball effect.

“The obstacles to educating students with disabilities described above are interrelated. For example, the lack of professional development can prevent staff from developing adequate skills, which can increase their stress and lead them to leave the profession, feeding the staffing shortages....

The snowball effect of these combined obstacles may prevent some students with disabilities from receiving the education and services to which they are legally entitled.” *Id.*

**Some folks ought not be teaching students with disabilities:
Morale & Readiness**

Back to the EdWeek Survey and another complication:

“In one of the more surprising findings, a quarter of the survey respondents indicated that they believe ADD/ADHD diagnoses result from poor parenting....”

“The survey is evidence that ‘some teachers express beliefs suggesting they are unaware of scientific findings showing that learning disabilities and ADHD are based on differences in brain structure and function.’” *Id.*

Mitchell, C. (2019). Most Classroom Teachers Feel Unprepared to Support Students With Disabilities. *EDWeek*.

**Some folks ought not be teaching students with disabilities:
Morale & Readiness**

A lesson from service animal regulations

- One reason for the 2010 DOJ regulations on service animals was “the increasing use of wild, exotic or unusual species (many of which are untrained) as service animals[.]” Animals “ranged from pigs and miniature horses to snakes, iguanas, and parrots.”

Dep’t of Justice Service Animal Regulations, 75 Fed. Reg. 56,192 through 75 Fed. Reg. 56,193 (2010).

**Some folks ought not be teaching students with disabilities:
Morale & Readiness**

A lesson from service animal regulations (cont'd)

- The questionable use of wild animals eroded public trust resulting “in reduced access for many individuals with disabilities who used trained service animals that adhere to high behavioral standards.” 75 Fed. Reg. 56,193 (2010).

**Some folks ought not be teaching students with disabilities:
Perception of the Law & Compliance**

“Special education teachers see the individualized education plans as essential documents that play a large role in determining student and teacher success; **their general education colleagues are more likely to view IEPs as mere paperwork.**” *EdWeek, supra.*

“Of the general education teachers who participated... **just 56 percent of teachers believed IEPs provide value to students,** and just 38 percent believe IEPs improve their teaching.” *Id.*

**Some folks ought not be teaching students with disabilities:
Perception of the Law & Compliance**

“Focus groups and teachers surveyed both point to the challenges of remembering accommodations for each child and to the **perception that IEPs and 504 plans often include accommodations or services that are not necessary.**” *Id.*

Some Thoughts on Addressing these Concerns

What to Do? Establish an expectation of compliance on campus

- Admin should make clear: On this campus,
 - 504 Plans and IEPs will be implemented.
 - Employee appraisal includes disability law compliance
 - Accountability for compliance will occur through the employment process

Some Thoughts on Addressing these Concerns

What to do? Write Better IEPs & 504 Plans.

- Adding questionable accommodations or services to an IEP or 504 Plan in the current school environment seriously undermines compliance with the plan.
 - Sometimes the answer to a request is NO. (see previous discussion on Getting to NO).
- Ensure that data supports each element in Plan and support understanding of implementing staff by sharing/explaining rationale and data for decisions.

Some Thoughts on Addressing these Concerns

If employee CAN'T comply: it's a matter of resources, training, modeling, mentoring, etc.

- ASK: Are current staff assignments designed to protect the most vulnerable students with disabilities?
- TRAIN: Do staff understand child find and school's responsibility for FAPE?

Some Thoughts on Addressing these Concerns

If an employee WON'T comply: It's a personnel problem to be addressed by admin.

- Allowing personnel to "opt-out" so others have more students with IEPs and 504 Plans? That's a terrible IDEA.
- Without employment accountability for failure to comply, some folks will not do what is required.

Some Thoughts on Addressing these Concerns

- Seek more Teacher involvement in the IEP, both before and after initial plan creation.
 - Make clear the WHY:
 - What data supports the finding of an impairment?
 - Does data support each piece of the Plan? If no, change the plan.
 - Clarify: changes to IEP require IEP Team action based on data, not self-help.

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PRE-CONFERENCE MINI-COURSE C

**The Nitty-Gritty of IEP Team Procedural
Compliance from Identification to Dismissal**

presented by:

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Attorney at Law

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Austin, TX

sponsored by:



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The Nitty-Gritty of IEP Team Procedural Compliance From Identification to Dismissal

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2025 Pacific Northwest Special Education Law Conference

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Quick Summary of Key IDEA Procedural Safeguards

- 34 CFR §300.321—Parent rights as **members of IEP team**
- §300.322—Parent notice of **IEPT meetings**, mutually agreeable times and places, meetings without parents, interpreters
- §300.324—IEPT must consider **parents' concerns**
- §300.327—Parents also members of team that makes placement decisions (if not the IEPT)

Quick Summary of Key IDEA Procedural Safeguards

- 34 CFR §300.503—**Prior written notice** to parents of school actions or refusals, content of notice
- §300.504—Parent **notice of IDEA rights** and procedural safeguards

IDEA Procedures and Parent Participation

- IDEA is a law heavy with procedures
- Part of FAPE is compliance with procedures (first prong of *Rowley* and *Endrew*) in creating an IEP reasonably calculated to confer educational benefit
- Major part of procedural compliance is affording parents a **meaningful opportunity to participate**

IDEA Procedures and Parent Participation

- **Rowley (USSCt 1982)**—School provides a free appropriate public education (FAPE) if:
 1. IEP is created in accordance with procedural requirements, and
 2. Is reasonably calculated to confer educational benefit

IDEA Procedures and Parent Participation

- **Endrew (USSCt 2017)**—School provides a FAPE if:
 1. IEP is created in accordance with procedural requirements, and
 2. Is reasonably calculated to enable student to make appropriate progress in light of circumstances

IDEA Procedures and Parent Participation

- **Endrew (USSCt 2017)**—School provides a FAPE if:

Appropriate progress in light of circumstances is based on “ambitious goals” commensurate with severity and complexity of child’s disability and other factors that may affect progress

IDEA Procedures and Parent Participation

- According to caselaw and IDEA provisions, **some procedural violations constitute a denial of FAPE**, in and of themselves, if they:

1. Result in a loss of educational opportunities for the child, or
2. Seriously infringe on parents’ right to meaningfully participate

IDEA Procedures and Parent Participation

- See, e.g., **W.G. v. Bd. of Trustees, 18 IDELR 1019 (9th Cir. 1992)** for the 9th Circuit’s agreement to the criteria for “fatal” procedural violations (fatal = tantamount to a denial of FAPE irrespective of student progress)

IEP Team Meetings

- **Notice of IEPT meetings (34 C.F.R. §300.322):**

Early enough to allow parents to attend
(states set their notice timelines)

Purpose

Time and location

Persons who will attend

Info on invitees

IEP Team Meetings

- **Waivers** of meeting notice possible, usually agreed to in writing
- Usual opportunity for providing annual **notice of procedural safeguards**
- **Time limits** for meetings are possible (if reasonable and listed on the meeting notice)

IEP Team Meetings

- **Mutually agreeable times for meetings—**
Can parents ask for after-hours meetings?
Possibly, but USDOE guidance encourages schools and parents to try alternatives.

See **Letter to Thomas, 51 IDELR 224 (OSEP 2008)**(after-hours meetings may be necessary if there is no other option for parent to participate).

But, districts are not prohibited from considering personnel scheduling needs in setting dates and times for meetings. **Letter to Anonymous, 18 IDELR 1303 (OSEP 1992).**

IEP Team Meetings

- **Mutually agreeable times for meetings—**
Alternatives to in-person participation by parents:

Today, the videoconferencing option opens new possibilities for parents to attend meetings during their work lunch hour or from home.

But, phone participation is also an option, including conference calls, or even individual calls. See 34 C.F.R. §300.322(c).

IEP Team Meetings

- **Can parents record IEPT meetings?**

IDEA is silent on this point, so this is a matter of district policy and practice.

Washington appears to require that parents obtain consent prior to audio-recording. W.A.C. 392-172A-05001(5)

Schools do not have to allow **videotaping** (see, e.g., *Pitta v. Medeiros*, 124 LRP 521 (1st Cir. 2024)(no constitutional right to videotape IEP meetings, as meetings are not public)).

IEP Team Meetings

- **What if parent does not seem to want to attend meeting?**

§300.322(d) states that schools can proceed without parents if they document that they were unable to convince the parent to attend (thru calls, letters, visits, for example)

Cases state more is required of schools than simply offering dates (*J.N. v. Dist. of Columbia*, 53 IDELR 326 (D.D.C. 2010))

• **What if parent does not seem to want to attend meeting?**

Some cases say parents cannot delay to the point that timelines are violated (***J.G. v. Briarcliff Manor*, 54 IDELR 20 (S.D.N.Y. 2010)**).

But, 9th Circuit Court said otherwise in ***Doug C. v. Hawaii DOE* (9th Cir. 2013)**—held that schools can only have meetings without the parent if the parent affirmatively states they will not attend the meeting

Court held parent participation is more important than complying with timelines

• **What if parent does not seem to want to attend meeting?**

See, e.g., ***Etiwanda Sch. Dist. v. D.P.*, 124 LRP 1299 (C.D.Cal. 2024)**, where a parent failed to respond to many IEP meeting invitations over a 6-month period.

Nevertheless, the Court held that the fact that the parent also proposed two dates meant she wanted to participate in meetings.

Thus, it was error to proceed to an IEP meeting without the parent, and the Court ordered staff to be trained accordingly.

• **What if parent does not seem to want to attend meeting?**

At times, despite *Doug C.*, holding a meeting without the parents may be appropriate, as in ***Guevara v. Chaffey Joint Union High Sch. Dist.*, 81 IDELR 277 (C.D.Cal. 2022)**.

There, the Court found that the parents' attorney became upset and disconnected the phone connection he and the parents used.

Staff tried to call the attorney back to no avail, and after waiting, continued with the meeting without the parents.

Court found no violation.

• **What if parent participation results in delays in developing the IEP?**

The *Doug C.* concept applies in these situations as well, as in ***J.G. v. Los Angeles Unified Sch. Dist.*, 123 LRP 20855 (C.D.Cal. 2023)**, where developing an IEP took the school 3 months.

Because the delay was so the parents could visit the proposed placement for students with moderate ID, which required a reconvene meeting, the Court found the delay facilitated the parent's participation, which under *Doug C.* was more important than the meeting of an IEP timeline.

• **What if parent participation results in delays in developing the IEP?**

See also, ***T.S. v. Long Beach Unified Sch. Dist.*, 82 IDELR 136 (C.D.Cal. 2022)**, where an annual IEP required 5 meetings, extended time to coordinate schedules, and review of numerous IEEs.

The parents and their attorneys asked questions, raised concerns, and requested various revisions to the IEP goals, "so the additional time ensured and encouraged parental participation in the IEP process" and thus, there was no IDEA violation.

• **Can parent demand a particular district staffperson attend?**

No. School decides which staff will compose the required IEP team membership. See, e.g., ***Letter to Wessels*, 16 IDELR 735 (OSEP 1990)**.

Neither can parent "veto" a staffperson from attending.

See, e.g., ***Brant A. v. Fort Bend ISD (SEA Texas 1995)***(ALJ rejected parent demand that sp ed director and school psychologist be permanently excluded from his IEP meetings).

• **Can parent bring another person with them to assist?**

Yes. See **34 C.F.R. §300.321(a)(6)**. Both the district and the parent, at their discretion, can bring to an IEP meeting “other individuals who have knowledge or special expertise regarding the child.”

• **Must IEPT consider a parent-provided evaluation?**

Yes. See 34 CFR §300.502.

Even if parent shares evaluation report at the end of a meeting (*Marc M. v. Hawaii DOE*)

And, IEPT must review school evaluations sufficiently that parents understand their instructional implications, and can participate in IEP decision-making

• **Must IEPT consider a parent-provided evaluation?**

When reviewing a private related services evaluation, you may have to explain to the parent the difference between assessment from an educational vs. a medical model

Also, that under IDEA the standard is one of facilitating appropriate educational progress, not a maximum progress model

• Do parents have “veto” power over IEPT decisions?

No. If parent disagrees with identification, evaluation, placement, or provision of FAPE, parent can use dispute resolution mechanisms.

But, IDEA confers no right to block IEPT decisions (unless State has decided on a different disagreement procedure)

Are all required IEPT members in attendance?

- **Required Members**—Parents, regular teacher of child, sp. ed. teacher/provider of child, local educational agency (LEA) rep, person who can interpret educational implications of evaluations, child (when appropriate) (34 CFR §300.321)

Watch for state regulations that might require additional members in particular situations...

Are all required IEPT members in attendance?

- **What about related services providers**

Not required under IDEA regulations, but generally, schools may want to include them when related services evaluations are reviewed, in annual IEP meetings to review goals, and in making changes to related services.

Are all required IEPT members in attendance?

• Roles of Members

- Parents provide input, state concern
- Reg ed teachers provide input on classroom performance, accommodations, behavior intervention plan (BIP)
- Sp ed teachers provide input on PLAAFP, annual goals, services
- LEA rep provides input on all areas, knows about resource allocation and teachers

Are all required IEPT members in attendance?

• Roles of Members

- Evaluation staff review evaluations, answer evaluation questions
- Related services providers review progress, contribute to PLAAFP, propose goals, make service recommendations

Are all required IEPT members in attendance?

• Documenting Proper Team Members

IDEA does not require districts to document which individuals attend students' IEP meetings. But, districts may wish to do so in case parents later challenge the composition of the team

See, e.g., *Clarfeld v. Dept. of Educ., State of Hawaii*, 78 IDELR 42 (D. Hawaii 2021), *aff'd*, 80 IDELR 210 (9th Cir. 2022),(individuals shown in Hawaii ED's records were appropriate meeting participants).

Are all required IEPT members in attendance?

- Representatives of transition agencies also must be invited (for students of transition age). See **34 C.F.R. §300.321(b)**.
- What to do if someone is absent? Best to cancel and reschedule.
- Excusing members under IDEA 2004— Possible, under certain circumstances, but still best to reschedule meeting (see 34 C.F.R. §300.321(e)).

Are all required IEPT members in attendance?

Excusing members under IDEA 2004 (34 C.F.R. §300.321(e))

Member can be excused with parent agreement if their area is not being modified or discussed.

Member can be excused with parent agreement if their area will be discussed, but they must submit input in writing.

Practical problems, however, can arise in either situation....

Are all required IEPT members in attendance?

Who is the “boss” of the team?

Regulations identify no member of IEPT who has extra or superior authority, except the parent, who has IDEA safeguards (SEA complaint, due process hearing, mediation, independent educational evaluation (IEE), etc...).

Rather, IDEA envisions a team decision-making approach striving for mutual agreement with parent.

Are all required IEPT members in attendance?

- Failure to include a required member?

M.L. v. Federal Way Sch. Dist., 42 IDELR 57 (9th Cir. 2004)(failure to include regular education teacher for K student with Autism was “critical structural defect” as there was possibility of placement in regular class and IEP might have been different if the teacher had been included).

Are we reviewing or ordering any assessments?

- The art of reviewing assessments

Staff have a duty to conveying the instructional implications of evaluation data sufficiently to afford the parents an opportunity to participate meaningfully in the IEP process.

Are we reviewing or ordering any assessments?

- A good emerging practice is to send evals to parents prior to IEP meetings
- What if parents disagree with eval? Discuss areas of disagreement, go over right to independent educational evaluation (IEE)
- Ordering new assessments? Set due dates

Are we reviewing or ordering any assessments?

- **Speech-language and related services IEEs**—inform parents that private sector providers evaluate children from a medical model perspective rather than an educational perspective, which reduces the value of the IEE for the IEP team.

And, while IEP teams must review and consider IEEs, they are not required to follow them.

Are we reviewing or ordering any assessments?

- **Documenting “child’s circumstances” under *Endrew* in evaluation reports**

If student presents conditions that will impact progress in speech-language or related services (low IQ, ADHD, behavior problems), staff may want to so indicate in the report to moderate expectations for progress.

Are we reviewing or ordering any assessments?

- **Must IEPT review and consider parent-provided evaluations?**

Yes. See 34 CFR §300.502.

Even if parent shares evaluation report at the end of a meeting (*Marc M. v. Hawaii DOE, 56 IDELR 9 (D.Hawaii 2011)*), although the team could request a few days to re-adjourn the meeting so staff can review the report.

Are we reviewing or ordering any assessments?

- Failure to provide evaluation data or reports to parents

Amanda J. v. Clark County Sch. Dist., 35 IDELR 65 (9th Cir. 2001)(failure to provide parents speech assessment and reports from psychologist prevented parents from meaningfully participating and denied FAPE).

C.M. v. Lafayette Sch. Dist., 64 IDELR 31 (9th Cir. 2014 (9th Cir. 2014))(failure to provide parents RTI data likewise denied FAPE).

Does the child qualify?

- Main issue in initial IEP meetings
- Can also arise when new disability categories are added after evaluation
- What if parents disagree with eligibility at initial IEP meeting? At a later meeting? Can parent make IEPT “unqualify” a child?

Does the child qualify?

- Parents can refuse consent to sp ed placement at initial IEP meeting
- If parents consent to placement, they can later revoke consent to placement (in writing), and student must be removed from sp ed (34 CFR §§300.300(b)(4), 300.9)

In such situations, school must provide prior written notice to parents explaining the implications of revocation of consent (i.e., loss of IEP and its services)

Are we ready to start developing the IEP?

- First comes the baseline performance data—the present levels of academic achievement and functional performance (PLAAFP). 34 C.F.R. §300.321(a)(1).
- Crucial, because PLAAPF are the bases for the annual IEP goals.
- Should be based on various sources of data—observation, class testing, statewide assessment scores, goal trials, etc....

Are we ready to start developing the IEP?

- PLAAFP from year to year should reveal progressing competencies.
- If PLAAPFs stay the same from one year to another, something is amiss...

If the skills have not improved at all, the services may be insufficient or were not implemented properly

Or, staff have simply failed to do the homework of compiling new PLAAFP data

Are we ready to start developing the IEP?

- The problem is not always “fatal,” as in *J.L.N. v. Grossmont Union High Sch. Dist.*, 75 IDELR 101 (S.D.Cal. 2019), where the IEP team failed to update the student’s PLAAFP.

Although the parent argued this prevented her from meaningfully participating, the Court found she was well aware of her child’s current competencies, participated actively in the IEP meeting (assisted by an expert advocate), and was not impeded in her participation (the IEP was apparently otherwise appropriate).

Are we ready to start developing the IEP?

- **Annual IEP Goals**—Must be measurable, include academic and functional goals (as appropriate). 34 C.F.R. §300.320(a)(2).
- **Purpose**—Meet the child’s disability-related educational needs to enable the child to participate and progress in general curriculum.
- **Developing the Goals**—Start with PLAAFP, review past year’s goals, develop the new goals.

Some Practical Tips for Sp Ed Teachers, SLPs, OTs, PTs

- Make sure the PLAAFP (present levels of academic achievement and functional performance) you prepared make sense in light of the goals you are proposing
- When drafting IEP goals, ask yourself: if I was a parent, would I know when this goal is met?
- Think measurability in drafting goals
- Short-term objectives can help measurability of goals (i.e., “...as shown by mastery of 3 of the following 4 objectives”

Some Practical Tips for Sp Ed Teachers, SLPs, OTs, and PTs

- It’s OK for goals and objectives to be written technically, but you should explain them in plain language to the parent

Some Practical Tips for Parents

- Prior to annual IEP meetings, collect and review last year's PLAAFP (to compare to current)
- Review last year's goals to compare to new
- Look for a progression of competencies in both PLAAFPs and goals (appropriate level of progress in light of disability and other circumstances)
- It's OK to ask for a specific goal to be added (if relevant and appropriate)

Some Practical Tips for Parents

- The goals are not the entirety of what the child will be taught—they are akin to “buoys” in the ocean helping to steer the ship toward appropriate progress (i.e., indicators of a correct direction)
- Make sure the goals make sense in relation to the PLAAFP
- We should not care if staff use either goal software or AI, as long as the goals are appropriate and individualized

Are we ready to start developing the IEP?

- **Do we need to discuss classroom accommodations?** Yes, if the student will receive services in regular classes

Aim for a concise set of key accommodations that will be implemented consistently, as opposed to a large set of accommodations that is likely to be implemented less consistently

- Other supplementary aids or services?

What State Test will student take?

- Keep current on changing state education agency (SEA) guidance on accommodations available in State assessment
- Minimize below-grade-level instruction (leads to need to test below level, which is generally not allowed)
- Currently, on-level State test is required, except for students with “severe cognitive impairments,” who get an alternative test

Have LRE assurances been completed?

- What is the least restrictive environment (LRE)?

The setting where the student can receive FAPE with maximum exposure to nondisabled peers

- What is a “continuum” of placements?

A variety of educational settings

- Shouldn't even severely-disabled students have some mainstreaming?... Yes

Do we have a complete schedule of services?

- Perhaps most important page of IEP team meeting report
- Must be as complete and specific as possible
- Staff might verify this page out loud
- Include inclusion support and all other services with specificity (time per course per day/week, mode, location)

Do we have a complete schedule of services?

- IEP must also specify exactly how much time the student will not be in regular education.

See, e.g., *Bellflower Unified Sch. Dist.*, 78 IDELR 106 (C.D.Cal. 2021), where the Court found that the IEP's failure to specify the time the student would spend in sp ed (and the type of counseling the student would receive) added to other procedural violations to amount to a denial of FAPE.

Will student need related services?

- Services needed for student to benefit from sp ed services (assessment-based)— 34 CFR §300.34
- Be highly specific (how much direct, how much consult, is direct one-to-one?)
- State frequency, location, modality, amount
- Parent must have exact understanding of the services proposed

Will student need related services?

- In *E.E. v. Norris Sch. Dist.*, 83 IDELR 68 (E.D.Cal. 2023), for example, the IEP did not describe the frequency or location of OT services to be provided.

Thus, found the Court, the parent had no way to verify that the District was implementing the IEP.

(The parent also would have not been able to determine if the OT services were appropriate in the first place).

Will student need related services?

- Careful with decisions to reduce or dismiss from services, as they are often scrutinized closely (in case it is a resource-based decision).
- Best to support reduction or dismissal decisions with formal evaluations (lots of cases demonstrate this point), although it is not necessarily required.

What is our consensus on placement?

- Proper placement is the LRE where the IEP can be implemented (might not be home campus, but should be next closest to the home)—34 CFR §300.116
- Preferred “default” placement is home campus, unless IEP cannot be implemented there (34 CFR §300.116(c)), in which case we go to the next campus closest to home that can implement the IEP.

What is our consensus on placement?

- IEPT must consider potential “harmful effects” in selecting any placement (34 CFR §300.116(d))
- Consider pros and cons of any placement decision
- Can be a dispute issue, since it can be of crucial importance to a parent...

What is our consensus on placement?

- The placement offer cannot be unduly vague, as in *E.M. v. Poway Unified Sch. Dist.*, 75 IDELR 244 (S.D.Cal. 2020), where the IEP team identified two non-public schools as placement options.

But, the team only provided info it found online about the schools and did not even know if it accepted sp ed students or had space.

The Court found the offer to be so vague that the parents could not have understood it.

What is our consensus on placement?

- Does the placement offer have to specify the setting or the particular school?

Some disparity of opinion on this point....

See, e.g., *Rachel H. v. Dept. of Educ., State of Hawaii*, 70 IDELR 169 (9th Cir. 2017) (Congress intended "location" to mean educational setting on the LRE continuum) vs. *William S. Hart Sch. Dist. v. Antillon*, 79 IDELR 73 (C.D.Cal. 2021)(9th Cir. has yet to address issue, but rules school must identify specific school).

What is our consensus on placement?

- Does the placement offer have to specify the setting or the particular school?

On this issue, districts in 9th Circuit should obtain local legal advice on whether to include the specific school in the IEP placement offer.

What is our consensus on placement?

• Dismissals from Special Education

Determinations that the child is no longer a child with a disability require a prior re-evaluation, unless the student is graduating with a regular diploma or is aging out of IDEA eligibility. 34 C.F.R. §300.305(e).

Regular graduation and aging-out students get a “summary of academic achievement and functional performance” with recommendations on meeting their postsecondary goals.

What is our consensus on placement?

• Dismissals from Special Education

Dismissals due to non-regular graduation routes prior to aging out must be based on accomplishment of transition objectives (i.e., employability skills, college admission, linkages to transition agency services, etc).

Are there other supplements to attach?

- Extended School Year (ESY) supplement (failure to consider ESY in situations where there are reasonable grounds to suspect significant regression can result in legal liability for district)
- This applies to competencies addressed in related services.
- Can also apply to behavior and social skills

Are we ready to pass signature page?

- Required IEPT members express agreement or disagreement to IEP per procedures of state law, rules, or regulations
- If required by state, signatures mostly required to document participation—not like signatures on a contract
- What if parents decline to sign? Safest to assume they are in disagreement and proceed accordingly.

Are we ready to pass signature page?

- Signatures, however, are not required by IDEA. See, e.g., 71 Fed. Reg. 46,682 (2006)(USDOE commentary indicated a federal requirement for IEP team members' signatures "would be overly burdensome").

Are we ready to read the minutes/meeting notes?

- Not required legally, but important for both parents and districts
- Minutes or deliberations can provide context and additional detail important to understanding IEPT decisions
- Also help understand the IEPT's thinking and logic
- Not a verbatim transcript of the meeting; rather, a summary of key discussion and decision points.

What to Look for in Minutes

- Conciseness and clarity in summarizing the discussion of the IEPT
- Accuracy—terms must match those in the IEP
- Completeness—must cover all major areas of IEPT discussion without key gaps
- But, not a transcript of the discussion...
- They reveal an “ear” for important statements

Ideas for Minutes

- Some schools have a form that aligns to the major areas of IEP development, which is helpful
- Start by listing all participants (don't rely on signature page for identification)
- Less detail is OK when there is little question, debate, or discussion between parents and staff
- More detail needed if issue is controversial

Ideas for Minutes

- If student is experiencing problems, notes must summarize team's discussion and ideas on the issue
- Notes on review of goals should at least list the areas in which the team will include goals
- PLAAFP review should list areas, some key and weakness areas
- Notes must address team's discussion of sp ed services

Ideas for Note-Taking

- Specific parent requests must be documented, as well as team’s response
- Document any misbehavior on part of parents, advocates, or attorneys
- Note team members’ requests for parental input
- Minor requests for corrections by parents usually OK
- Note-takers should look over notes to themselves briefly, then read them aloud

Ideas for Note-Taking

- If parent or advocate want major changes to notes, offer them the opportunity to write a separate dissenting statement that will be added to document

The notes are a district document, so district determines what goes into notes, although parents can provide input

Post-Meeting Arrangements

- After parents leave, no staff leaves until it’s clear who’s going to do what by what timeframe (in a prepared list of tasks).
- Why? Remember that failures to do as promised means parents lose trust in IEPT process, as well as exposure to liability for failure to implement.

Now Comes the Prior Written Notice—Why a PWN?

- A redundancy-oriented procedural safeguard.
- Aside from participating in the decision-making, PWN provides parents a summary in writing of the bottom-line IEP team decisions (i.e., proposals, refusals) to assist in their understanding of the decision and its bases, so they can know whether to agree or disagree.
- Congress likely understood that parents faced with the complexities of the IEP team process need all the help they can get in understanding what is going on and why.

When to Provide PWN?

- **34 C.F.R. §300.503—PWN required:**

When school proposes, or refuses, to initiate or change identification, evaluation, placement, or provision of FAPE.

Also, in revocation of consent situations.

And, if IEP Team will implement an IEP with which parents disagree.

When to Provide PWN?

“Propose” means when the IEPT decides to take action, or refuses to take an action.

PWN not required if an option is considered or discussed, but not ultimately acted on (e.g., *Grant v. Independent Sch. Dist. No. 11*, 43 IDELR 219 (D.Minn. 2005)(no PWN duty prior to final decision on appropriateness of 1:1 reading instruction)).

When to Provide PWN?

PWN required for every IEP change, no matter who initiates it (*Letter to Lieberman*, 52 IDELR 18 (OSEP 2008)).

Changes in placement always require PWN, as do material changes to composition of the IEP. *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008)).

PWN required when parents request evaluations (*Columbus City Sch. Dist.*, 116 LRP 13808 (SEA Ohio 2016))

Or, for district proposals of evaluations, including proposals to conduct FBAs. (*Letter to Anonymous*, 59 IDELR 14 (OSEP 2012)).

When to Provide PWN?

PWN required in response to parent request for evaluation regardless of whether district normally conducts screenings to determine whether there is suspicion of disability or plans to undertake such screenings (*Letter to Mills*, 74 IDELR 205 (OSEP 2019)).

PWN required even if parent agrees to action (*Letter to Lieberman*, 52 IDELR 18 (OSEP 2008)).

Also, for amendments to IEPs without meetings.

And, prior to graduation, as it is a change in placement “requiring prior written notice” (see 34 CFR §300.102(a)(3)(iii)).

More PWN Issues

- **What about temporary program changes?**

Short changes, such as when a student with ASD was pulled four days from her music class while her violin was being repaired after she damaged it, do not require PWN (*Washoe Co. SD, 55 IDELR 115 (SEA NV 2010)*).

Changes of 10 school days or less are probably OK without PWN.

- **What about changes in educational methodology?**

No PWN needed, unless IEP happens to set forth a specific methodology, which is not generally required, unless specific instructional methods are necessary for FAPE.

Commentary to 2006 Regulations—"There is nothing in the Act that requires an IEP to include specific instructional methodologies. The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. 71 Fed. Reg. 46,665 (August 14, 2006).

- **Is there a timeline between PWN and implementation?**

Timeline between PWN notice and prior to implementation of action is set by States.

Must be a "reasonable" time before the district implements the action or refusal, but *after* the decision is made (a source of endless confusion)—*Letter to Helmuth, 16 IDELR 550 (OSEP 1990)*).

This is so parents have "a reasonable time to fully consider the change and respond to action before it is implemented." (*Letter to Chandler, 59 IDELR 110 (OSEP 2012)*).

• **Is there a timeline for providing PWN?**

Parents can elect to waive the PWN-to-implementation timeline, so action can go into effect immediately upon the team's decision (a form should be available to document a parent's agreement to waiving the PWN timeline).

PWN sequence—Decision>>PWN>>PWN timeline >>implementation of decision.

Notice of IEP meeting is different than PWN—PWN takes place *after* ARDC decision, *prior* to implementation.

• **What if the PWN contains an incorrect statement?**

In *J.B. v. Kyrene Elem. Sch. Dist. No. 28, 124 LRP 30919 (9th Cir. 2024)*, the PWN incorrectly stated that the school did not have to hold an IEP meeting because the student was enrolled in a private school.

Although that was incorrect, there was a valid reason to not hold a meeting: the parent refused consent for reevaluations, rejected the District's offer of FAPE, and intended to continue her unilateral private placement.

Thus, the defect in the PWN was harmless error.

• **What if the PWN contains an incorrect statement?**

Note—By the way, with similar thinking, the 9th Circuit recently ruled that a District's failure to timely re-evaluate or develop a new IEP for a student was a harmless procedural violation because the parents intended to continue his private placement anyway (they had already put down a deposit). *Newport-Mesa Unified Sch. Dist., 124 LRP 10386 (9th Cir. 2024)*.

See also, *L.B. v. San Diego Unified Sch. Dist., 124 LRP 30637 (S.D.Cal. 2024)* (delay in evaluation was harmless error as student was in a South Carolina boarding school).

Content of PWN—34 C.F.R. §300.503(b)

- Description of the **action** proposed or refused
- Explanation **why** the school proposed or refused the action
- Description of the evaluation procedure, assessment, record, or report used as a **basis** for the proposed or refused action
- Statement that parents have the protection of **IDEA procedural safeguards** and how they can obtain a copy thereof

Content of PWN—34 C.F.R. §300.503(b)

- **Sources** for parents to contact for help in understanding IDEA provisions
- Description of **other options** the IEP team considered and the reasons why those options were rejected
- Description of **other factors** relevant to the school's proposal or refusal.

Placement Scenario

- 8th grader with ED, OHI (ADHD), in resource and reg ed classes
- Behavior has deteriorated in last 2 years
- Increasing aggression, leaving class, class disruption, wandering halls, confronting staff (could lead to confrontation with SROs)
- FBA/BIP reviewed and revised multiple time, behavior specialist has consulted, update psych evals, trial 1:1 aide, teacher training
- Staff feel there is need for self-contained behavior unit

Placement Scenario

- Parents oppose behavior unit placement (feel student will model more bad behavior, afraid placement will be permanent, concerned military will reject student due to placement)
- Teachers indicate he is not modeling appropriate behavior in classes, that he is not making behavioral or academic progress, and that he is impeding others from learning
- Staff explained level system of unit, reiterated confidential nature of records

Placement Scenario

What is action proposed?

Placement Scenario

What is action proposed?

District proposes to change student's placement to self-contained behavior unit, but parents want him to remain in present settings

Reasons for action proposed

Reasons for action proposed

- IEP can no longer be successfully implemented in present settings
- A variety of supplementary aids and services have been unsuccessful
- Behavior significantly deteriorating
- Student needs highly structured setting with low staff/student ratio, constant behavioral intervention, level system to LRE

Options considered

Options considered

- Continue current placement
- Attempt additional support services
- Customized level system for return to regular classes
- Transfer to another campus

Bases for action

Bases for action

- Documentation of behavior incidents
- Summary of attempted support services
- Psych eval (indicates need for highly structured setting)
- Classroom grades/progress reports

Other factors

Other factors

- Need to address deterioration of behavior and academics outweighs potential negative modeling from other unit students
- Level system allows for gradual retransition to regular settings
- Placement documents remain confidential
- Secure setting needed to avoid potentially serious confrontation with staff or security

Parent Participation and Predetermination

- The claim of predetermination became more frequent after the *Deal v. Hamilton*, 42 IDELR 109 (6th Cir. 2004) case.

Facts involved student with Autism spectrum disorder; parent desire for Applied Behavior Analysis (ABA) programming.

Court held school predetermined it would not provide ABA programming, no matter what parents said or what data was provided.

Parent Participation and Predetermination

- The claim of predetermination became more frequent after the *Deal v. Hamilton* case.

Administrators' emails appeared to support notion that District would not agree to ABA under any circumstance.

Parents were awarded private ABA program.

Parent Participation and Predetermination

- If staff "pre-decide" a child's program, services, or placement before the parent provides input at the IEPT meeting, school commits a procedural violation of IDEA.

Parental participation is rendered meaningless

And, violation seriously infringes on parental opportunity to meaningfully participate

Parent Participation and Predetermination

Staff can have opinions and ideas prior to meeting but must have an "open mind" to other options and parent suggestions.

Challenge: How do schools *show* they are of an "open mind" at the meetings?

Parent Participation and Predetermination

Cases can be difficult, because while preparation for meetings is necessary, those efforts can be cast as evidence of predetermination.

Parent Participation and Predetermination

At times, staff statements are argued to constitute evidence of predetermination.

Berry v. Las Virgenes USD, 54 IDELR 73 (9th Cir. 2010) (Asst. Superintendent opened IEP meeting by stating purpose was to discuss transitioning the student from private school back to public school showed school was not open to other options).

Parent Participation and Predetermination

At times, staff statements are argued to constitute evidence of predetermination.

But, a special education director's offhand comment to parents that she was concerned whether the IEP team could reach agreement did not amount to predetermination of the placement decision. **Ka.D. v. Solana Beach Sch. Dist., 54 IDELR (S.D.Cal. 2010).**

Parent Participation and Predetermination

Generally, staff preparations are not seen as evidence of predetermination

***T.P. v. Mamaroneck*, 51 IDELR 176 (2nd Cir. 2009)**—Chart outlining the recommendations of behavioral consultant was not predetermination.

***Brown v. Bartholomew Cons. Sch. Corp.*, 45 IDELR 147 (7th Cir. 2006)**—pre-meeting staff notes and memos were valid preparation

Parent Participation and Predetermination

Ultimately, both schools and parents may prepare for IEP meetings.

“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 CFR §300.501(b)(3))

Parent Participation and Predetermination

The key for school staff is understanding that the final deliberation and decision-making occurs at the meeting, after considering parental input and all available information.

Meaning, the IEP meeting is the “decision point” for determinations of IEP and placement—the point at which the parent participates in the IEP process.

Parent Participation and Predetermination

Documentation of IEP team process should demonstrate active consideration of parental proposals, input, and ideas

Documentation should also reveal consideration of pros and cons of both parent proposals and school proposals

Preparation documents should be prominently marked "DRAFT ONLY"

Parent Participation and Predetermination

- Staff can, and should come to meetings with opinions, but also an open mind to parents' positions, input, and suggestions.
- Disagreement may take place, but all ideas are subject to the "marketplace" where their pros and cons are deliberated upon.
- Parent concerns and positions must be addressed, including benefits and drawbacks.

Parent Participation and Predetermination

- ***J.G. v. State of Hawaii, DOE, 74 IDELR 190 (9th Cir. 2019)***

When the IEP team considered moving the student from private school to a public one, the parent claimed school predetermined the student's return to public school.

School principal, however, explained that less restrictive options had to be discussed first.

Parent Participation and Predetermination

• **J.G. v. State of Hawaii, DOE, 74 IDELR 190 (9th Cir. 2019)**

The Court found that such procedure was sound, and that the team carefully laid out the potential benefits and drawbacks of each type of setting.

The use of an “LRE Worksheet,” moreover, was not inappropriate.

The Court thus found no predetermination.

Parent Participation and Predetermination

• **R.A. v. West Contra USD, 70 IDELR 88 (9th Cir. 2017)**

Parents of a child with Autism claimed the District predetermined that the student would be placed at a private sp ed school.

But, the team discussed multiple placement options in at least two IEP meetings.

Although a private school rep was not at a meeting, the Court found no harm.

Parent Participation and Predetermination

• **R.A. v. West Contra USD, 70 IDELR 88 (9th Cir. 2017)**

“Here, the District did not present the Anova school placement as a ‘take it or leave it’ option....”

The Court thus found no predetermination.

Parent Participation and Predetermination

- **S.A.S. v. Dept. of Educ., State of Hawaii, 70 IDELR 60 (9th Cir. 2017)**

Although the school sent a letter to the parents stating that they could request an IEP meeting if they wished their child to receive FAPE in a “public school,” the Court found no predetermination.

Court found that the school demonstrated a willingness to consider the private school option.

Parent Participation and Predetermination

- **S.A.S. v. Dept. of Educ., State of Hawaii, 70 IDELR 60 (9th Cir. 2017)**

Ultimately, the Court held that while “somewhat troubling,” the letter was less important than the intent and conduct of the school staff at the meeting.

Predetermination by Single Staffperson

- No school official can “veto” or “overrule” an IEP committee decision (a sort of unlawful “post-determination”).
- Similarly, one school official cannot overrule the decision-making of the IEP team to impose their position and opinion.
- LEA representatives and central office administrators must respect the authority of the IEP team, although as a member, they can influence the decision-making with reasoning and data.

Predetermination by Single Staffperson

O.L. v. Miami-Dade Co. SB, 63 IDELR 182 (11th Cir. 2014)

Child with ASD and severe stomach issues (vomiting when in crowds or noise).

For transition to high school, LEA wanted a campus with 3,600 kids (2X the size of the middle school).

Parents gave it a try, but student struggled.

O.L. v. Miami-Dade Co. SB (11th Cir. 2014)

Parents pulled the child out to a 1:1 program of their own

Parents wanted a magnet campus, which was a smaller setting

At a meeting, a board representative said the magnet campus was “not an option,” although other staff were willing to consider it

O.L. v. Miami-Dade Co. SB (11th Cir. 2014)

Board representative told parents they’d have to go to mediation if they disagreed

The parents sued instead, and the court found unlawful predetermination (an “absolute dismissal of the parents’ views”)

Court ordered funding for the parent-developed program

Note—See also ***K.O. v. San Dieguito Union High Sch. Dist.***, 124 LRP 13134 (S.D.Cal. 2024), where a case manager insisted on placing a 13-year-old girl with anxiety in a non-public program for students with behavior problems, despite other IEP team members’ opinion that such program was inappropriate for her.

Court found the action constituted unlawful predetermination and ordered the school to pay for private placement in a different school.

Note—Similarly, if staff make changes to a student’s educational program outside of the IEP team process, there may be a “fatal” procedural violation.

See, e.g., ***M.C. v. Antelope Valley Union High Sch. Dist.***, 117 LRP 21748 (9th Cir. 2017)(four-fold increase in VI services for blind high school student took place outside IEP process and deprived parent of opportunity to participate in decision-making).

Parent Participation and Predetermination Takeaways

- Staff preparations for IEP meetings are not predetermination, but draft documents should be marked “DRAFT ONLY” and staff should be clear the IEP meeting is the decision-making point.
- At meetings, all should be open to opposing viewpoints, and submit them to a pros and cons objective analysis.
- In placement discussions, various options should be discussed with LRE requirements in mind

Parent Participation and Predetermination Takeaways

- Parents must insist that staffpersons honestly consider their proposals and opinions (although honest consideration does not mean they will always be followed).
- School officials must respect the authority of the IEP team and promote free expression of professional opinion among its members.

Handling the Meeting

- **Time limits**—Can be a good idea, but need to be reasonable in light of the issues to be addressed, and it must be indicated on the meeting notice
- **Staff fear of saying “something wrong”**—If you work with the child, and it’s your opinion, it can’t be “wrong,” but it must be stated professionally and compassionately

Handling the Meeting

- **Staff must acknowledge the need for compromise**—The collaborative IEPT process requires reasonable compromise among staff and between staff and parents
- **A word about school mistakes** and technical issues (acknowledge, apologize, and fix)

• **Dealing with Difficult Personalities in IEP Meetings**

Set positive tone open to opposing views
Frustration can lead to dispute
Don't allow tactics to derail process
To what degree are *you* part of problem?
Set and review ground rules for meetings
No overreacting, lecturing, bad posture
Respond to agitation with calm
Cancel meeting, if all else fails
At next meeting, discuss problem, reset

• **Leon County Sch. Bd., 124 LRP 30682 (SEA Florida 2024)**

Parents alleged that the District denied their child (Autism, Speech/Language Impairment) a FAPE by failing to properly monitor progress and denying them a meaningful opportunity to participate.

In fact, the IEP team was unable to even discuss present levels of performance because the parents challenged every single data point.

The ALJ found that the parent's points, however, were unfounded.

• **Leon County Sch. Bd., 124 LRP 30682 (SEA Florida 2024)**

ALJ found evidence of multiple lengthy meetings, "an enormous volume of emails," and many parent demands, all of which received a "polite response."

The parents showed "a hyper focus on procedure and process," but also puzzling decisions, such as filing state complaints while also demanding immediate action (sometimes complaints were filed although the school complied with a request).

• **Leon County Sch. Bd., 124 LRP 30682 (SEA Florida 2024)**

Parents would agree on IEP meeting dates, only to cancel at the last minute, allege that staff were engaged in “fraud,” demanded prior written notices when none were required (sometimes demands for prior written notice were made even before the IEP team made a decision).

They also never consented to evaluations.

• **Leon County Sch. Bd., 124 LRP 30682 (SEA Florida 2024)**

“The parents disagreed or took issue with virtually every bit of data, even after a full explanation was given by the staff.”

An allegation that a parent heard an unidentified voice in a virtual meeting persisted for months and stalled the IEP process.

Although there were no psychological evaluations to consider, parents insisted that a school psychologist was needed in order to proceed with the IEP.

• **Leon County Sch. Bd., 124 LRP 30682 (SEA Florida 2024)**

Although the parent demanded ESY, they refused to allow the request to be addressed before summer started.

They also insisted that a meeting could not end unless they consented to it ending.

The ALJ found “overwhelming evidence” that the parents were given every opportunity to meaningfully participate in the IEP process despite their “deep misunderstanding of the IDEA.”

• **Leon County Sch. Bd., 124 LRP 30682 (SEA Florida 2024)**

ALJ also found that the lack of ESY services, which the team intended to provide, was caused by the parents' unwillingness to allow the team to address the issue.

• **Difficult moments—They will happen...**

- Don't allow meeting to deteriorate
- Take a break to recoup
- Remind everybody of need for collaboration
- Redirect meeting to problem-solving
- Identify the real "deal-breaker"
- Bring in additional staff (with parent OK)
- How about evaluations, then review?
- Is there one person setting off parent?
- Stay patient

• **Helpful Questions**

- What does the committee think about _____?
- What data should we look at?
- Does data supports that position?
- What are the pros and cons of ___?
- Are there other ways of _____?
- Have we thought about _____?
- What do the teachers think about ___?
- What does the evaluation say about ___?

• **Statements school staff should avoid at meetings**

We've never done that
We have to get approval for that
We don't have the resources for that
There are other kids in the class
That would take too much time
That's the standard amount of service
This type of student gets _____

- **Conduct meetings as a team**—Everybody gets to talk
- **Keep the meeting “moving”** from topic to topic
- **Closing the meeting** on a good note (even if there's been nothing but disagreement)
- **Post-meeting management**—Crucial to implement all the agreed-upon action items
- **What if the parent leaves before the meeting is concluded?**—Document why, finish meeting, send copy to parent, offer another meeting

• **Tips for Parents in Dispute Meetings**

Propose middle-ground options
Point out unreasonable positions
Point out flaws in team reasoning
Know the data being discussed
Insist that decisions be based on the data
Understand your procedural options

- **What if a parent files a hearing request in the midst of negotiating an IEP?**

Cupertino Union Sch. Dist. v. K.A., 64 IDELR 200 (N.D.Cal. 2014)—Court agreed that school had the right to finalize IEP with existing information, even if the parent refused to attend

Note—Still, team must try to convince the parent to attend, and document it

- **What if a parent withdraws the student from school?**

Attempt to convene an IEP meeting to make an IEP offer of FAPE (if one is not already on the table)

If no response, and good IEP is on table, letter to parent indicating that you assume the student is privately placed, homeschooled, or in another district (and that otherwise, truancy proceedings may be started)

IEP Development—Special Factors (34 CFR §300.324)

- **Positive behavior supports, interventions, and strategies, if the student’s behavior impedes their learning or that of others**

Functional Behavioral Assessments (FBAs) require prior parental consent, just like other evaluations, even if informal (*Letter to Christiansen*, 48 IDELR 161 (OSEP 2007)).

• **Positive behavior supports, interventions, and strategies, if the student's behavior impedes their learning or that of others**

Should be addressed whether behavior is related to disability or not, as long as behavior impedes learning

A key area for a wide range of students (Autism, EBD, ADHD, InD, and others)

Best if BIP is wedded to behavior goals

• **Positive behavior supports, interventions, and strategies, if the student's behavior impedes their learning or that of others**

With some students, initial evaluation may need to include FBA, if evaluation identified significant behavior needs

IDEA does not specify requirements for FBAs or BIPs—best practice issues

Difficult cases require extra-level FBAs and BIPs

• **Positive behavior supports, interventions, and strategies, if the student's behavior impedes their learning or that of others**

Complex BIPs may require initial staff training/briefing or preliminary data collection after a set period of implementation

Consistency and fidelity of implementation may be more important than nature of interventions

• **Positive behavior supports, interventions, and strategies, if the student's behavior impedes their learning or that of others**

In some difficult cases, there may need to be frequent revision of BIP, repeated FBAs

For students whose primary problem is behavior, this part of IEP is most crucial to FAPE, will be most scrutinized in litigation

• **For LEP students, language needs must be considered**

Language surveys are key

Also an important consideration in conducting evaluations

Is there a need for ESL/Bilingual or other form of English Learners (EL) instruction, aside from sp ed?

What about language issues in speech or related services sessions?...

• **Communication needs, opportunities for communication with language peers (AI), child's preferred mode**

For deaf/hard of hearing students, law requires respect for child and family's preference of communication mode

Current issues with ADA requirements with respect to effective communication (*Tustin* case, DOE letter, parental preference as primary consideration)

• **Assistive technology devices (ATDs) and services**

IEP team should determine whether ATD evaluation is needed

Eval data dictates choice of ATD

Explain process to parents—ATD eval, trials, decision, purchase process, training

Incorporate use of ATD into IEP goals (including goals on improving student's use of ATDs)

• **Assistive technology devices and services**

SLPs and related services providers should take the lead in helping the IEP team identify the ATDs that may be necessary in classroom.

Issues with voice output devices, standers, positioning chairs might require a stand-alone AT evaluation.

42nd Annual
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October 27-29, 2025

Hilton Bellevue | Bellevue, Washington

PRE-CONFERENCE MINI-COURSE D

**Student-Centered Manifestation
Determination Reviews**

presented by:

Mandy Favaloro

Attorney at Law

A2Z Educational Advocates

Santa Monica, CA

sponsored by:



COLLEGE OF EDUCATION

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and

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STUDENT-CENTERED MANIFESTATION DETERMINATION REVIEWS

MANDY FAVALORO
PACIFIC NORTHWEST INSTITUTE ON SPECIAL EDUCATION AND THE LAW 2025

MANDY FAVALORO, ESQ.

- I'm an attorney who has exclusively practiced special education law in California for 20 years. I represent families at IEP meetings, MDRs, mediations, due process hearings and in federal court.
- I am on the Board of Directors for the Council of Parent Attorneys and Advocates and serve as Co-Chair of the Conference Committee.
- Previously taught the Special Education Advocacy Training ("SEAT") course for five years.



LEGAL FRAMEWORK FOR MANIFESTATION DETERMINATION REVIEWS

DISCUSSION QUESTION

Do we think children with disabilities are disproportionately disciplined over general education students?

DISCIPLINE OF STUDENTS UNDER IDEA AND SECTION 504

According to the Office of Civil Rights Data Collection, during the 2020-2021 school year students with disabilities served were overrepresented in discipline outcomes.

-Office of Civil Rights, Civil Rights Data Collection 2020-2021

DISCIPLINE OF STUDENTS UNDER IDEA AND SECTION 504

While these students represented only 17% of total K-12 student enrollment, they represented 24% of students who received one or more in-school suspensions, 29% of those who received one or more out-of-school suspensions, and 21% of those who received expulsions.

Office of Civil Rights, Civil Rights Data Collection 2020-2021

MANIFESTATION DETERMINATIONS

- An MDR is an evaluation of a child's misconduct to determine whether that conduct is a manifestation of the child's disability and must be held when a district proposes disciplinary measures that result in a change in placement for a child with a disability. 34 C.F.R. 300.530(e)

WHO HAS PROTECTION?

- A student eligible for an IEP under IDEA
- Section 504
 - MDRs are not part of the regulatory framework of Section 504 but OCR has interpreted Section 504 as requiring an MDR in connection with disciplinary actions that constitute a significant change in placement. See *Dunkin (MO) R-V Sch. Dist.*, 52 IDELR 138 (OCR 2009).
- Students not yet eligible
 - If a student does not have a disability and is not eligible for an IEP, in some cases, the student is entitled to an MDR if the District is deemed to have known the child was a student with a disability before the behavioral incident occurred. 34 CFR 300.534 (b).

WHO IS NOT PROTECTED?

- A LEA is deemed to NOT have knowledge that student has a disability if:
 - The parent has not permitted the child to be evaluated or refused services; or
 - The child has been evaluated and found not to be a child with a disability
- 34 CFR §300.534(c)

MANIFESTATION DETERMINATIONS

- What may trigger an MDR?
 - A. Any disciplinary action by District staff.
 - B. Suspension.
 - C. Expulsion.
 - D. All of the above

MANIFESTATION DETERMINATIONS

- A "change in placement" includes suspensions totaling 10 school days, expulsion or removal to an Interim Alternative Educational Setting (IAES)
- Under the law a change in placement occurs when (1) the removal is more than 10 consecutive school days in a school year; or (2) The child has been subjected to a series of removals that constitute a pattern. 34 CFR 300.536

CHANGE IN PLACEMENT

- A change in placement occurs when:
 - The removal is for more than 10 consecutive school days; or
 - The child has been subjected to a series of removals that constitute a pattern:
 - Because the series of removals totals more than 10 school days in a school year;
 - Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 CFR 300.536

BEHAVIORS AS MANIFESTATION OF DISABILITY

- Conduct must be found to be a manifestation of the child's disability if:
 - The conduct in question was caused by or had a direct and substantial relationship to the child's disability; or
 - The conduct in question was the direct result of the district's failure to implement the IEP.

COUNTING DAYS

- The MDR should happen *before*
 - The 10th day of removal
 - An Expulsion Hearing
 - A removal to an Interim Alternative Educational Setting
- What counts as a day?
 - Partial school days?
 - In school suspensions?



COUNTING DAYS

- Partial School Days
 - The U.S. Department of Education has stated that "portions of a school day that a child has been suspended may be considered a removal in determining whether there is a pattern of removals." 71 Fed. Reg. 46,715 (2006). However, there is no guidance as to how to calculate a partial day -- whether it is to be "rounded up" to a full day.

COUNTING DAYS

- Informal Removals
 - A student is removed for part or all of the school day or even an indefinite period of time without the LEA invoking disciplinary procedures. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSEP 2022)

COUNTING DAYS

- In School Suspensions (ISS)
 - In-school suspensions don't need to be counted as removal days for purposes of triggering an MDR if the district affords the student the opportunity to continue to: 1) appropriately participate in the general curriculum; 2) receive the services specified on the child's IEP; and 3) participate with nondisabled children to the same extent. *Dear Colleague Letter*, 68 IDELR 76 (OSEP/OSERS 2016); and 71 Fed. Reg. 46,715 (2006).

COUNTING DAYS

- During the current school year, an IDEA eligible student has been suspended three times for three days each time and the District wants to suspend for another three days following a similar incident? Is the District obligated to hold an MDR? If so, when?
 - What if all the suspensions were ISS?
- An IDEA eligible student has been suspended for five days last school year, four days this school year and the District wants to suspend for another four days. Is the District obligated to hold an MDR? If so, when?

CONDUCTING A MANIFESTATION DETERMINATION REVIEW

MDR TEAM MEMBERS



- MDR Team Members
 - The District
 - Parent
 - Relevant members of the IEP team – as determined by the parent and the District. 34 CFR 300.530(e)
- Parents have the right to invite additional participants to the MDR, they do not have the right to veto a district's choice of team members. *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D.Va. 2008).
- Under Section 504 the MDR Team must include people knowledgeable about the student, the meaning of the evaluation data, and the placement options. *OCR Staff Memorandum 16 IDELR 491 (OCR 1989)*; 34 CFR 104.3(c).

MDR TEAM MEMBERS

- Can the student be an MDR team member?
 - No legal guidance
 - Parents can invite the student as an additional participant
- What are some pros to having the student attend?

REVIEWING RELEVANT INFORMATION

The MDR must involve a review of “all the relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents.” 34 C.F.R. 300.530(e)

REVIEWING RELEVANT INFORMATION

- Useful Documents
 - The most recent IEP or 504 plan
 - Evaluations done for the IEP or 504 that relate to the behavior being discussed
 - Information about the incident that led to the suspension or classroom removal
 - Documents that show the student’s behavior or discipline in school, such as evaluations, progress reports, classroom observations, prior suspension documents,
 - Functional Behavioral Assessments (FBAs), and Behavior Intervention Plans (BIPs)
 - Any MDR meeting notes/worksheets from earlier incidents.
 - Reports and letters from the child’s providers, such as therapists, counselors, and doctors

REVIEWING RELEVANT INFORMATION

- Take note of the information in the student’s records, including:
 - How the student behaves
 - What leads to the problem behavior
 - What the student needs to help prevent and manage the behavior
 - How the behavior keeps the student from learning
 - How the behavior is related to his or her disability.

REVIEWING RELEVANT INFORMATION

- Gather information about the student's behavior and disability from other sources such as parents, the student's services providers, therapists, etc.
- Research the disability and gather information about what the manifestations of the disability are from reputable sources
 - DSM-V
 - Disability specific organizations
 - Outside providers/experts

CENTERING THE STUDENT AT THE MDR

- Start by making sure that everyone agrees about the child's disability.
- The team should review all the relevant documents including those by outside providers and parents
- After the documents are reviewed, the MDR team should review the student's disability and how it affects his or her behavior
 - If there is a list of behavioral manifestations from a reputable source review the behaviors with the team
- Review the behavior in question from the school reports.

CENTERING THE STUDENT AT THE MDR

- Make sure the MDR team considers information about the student even if it does not seem to be related to the student's special education "classification" or "eligibility."
- The school can find behavior to be a manifestation of the student's disability no matter what eligibility the student has.
- Most importantly, the school needs to look at how the student's behavior is impacted by his or her disability.

TEAM MEMBERS POV

- Parents – concerned about a school removal and how the student will be educated
- Teacher– might not want student to return to their classroom
- Admin – ensuring that everyone is heard
- Attorneys/Advocates – makes sure the team reviews info and follows the process.
- Student – taking ownership of the behavior
- Whole Team – finding collaborative solutions to develop a plan to address student's needs

TEAM INPUT

- Let each team member who wants to participate speak
- Poll each team member about whether they believe the disability was directly related to the student's disability

CAUSAL CONNECTION

- The MDR team then needs to determine if there is a connection between the behavior that led to the incident and the "disability-related behaviors" or if the removal happened because the school was not implementing the IEP or BIP.
- This is where the connection between the student's past behaviors and the current incident is made.

DISTRICT'S FAILURE TO IMPLEMENT

- If the incident happened because the LEA was not implementing the IEP or the BIP
 - The team should review the IEP and BIP (if the student has one) and highlight the services, accommodations, interventions, etc. that the school should be providing to student
 - Get input from the team – teachers, parents, student – about how often services are being provided. Make sure the team reviews details about frequency, days of the week, how the service is provided (group, pull-out, etc).
 - If the team isn't implementing what parents agreed to then the LEA can't follow through with the removal due to failure to implement the IEP.

SPECIAL CIRCUMSTANCES

- There are certain circumstances where the school district may remove a student to an IAES for not more than 45 school days even if the behavior was determined to be a manifestation of the child's disability. The team can remove the child if the child:
 - Carries a weapon to or possesses a weapon at school, on school premises, or to a school function;
 - Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function; or
 - Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.

34 CFR §300.530(g).

YOU BE THE JUDGE



- Student is an 8th grader eligible for special education under the eligibility of SLD. Student was stopped by school security and during a search, the security guard found Student to be in possession of marijuana, a controlled substance and tobacco. District held a manifestation determination review within statutory timelines. Student argued that frustration with schoolwork prompted him to bring marijuana and tobacco to school.

YOU BE THE JUDGE



- At the MDR the school psychologist, who had conducted testing two years earlier, reported to the team that his behavior was not a result of Student's SLD because this disability did not impact his ability to understand and follow school rules. The MDR found that Student's disability was not a manifestation of his disability. The IEP team recommended independent study for the last two weeks of the school year with 1:1 support from Student's SDC teacher pending expulsion proceedings.
- Did the behavior have a direct or substantial relationship to the Student's disability?
- *Lancaster Elem. Sch. Dist., 49 IDELR 53 (SEA CA 2007)*

YOU BE THE JUDGE

- Student was hospitalized due to a brain hemorrhage and had part of her brain permanently damaged. The part of the brain that was damaged was partly responsible for executive functioning and impulse control. Student was found eligible for special education under the category of TBI. Student suffered from PTSD and depression due a sexual assault, and was treated by a psychiatrist. Following the assault, Student had been disciplined for two incidents at school where she behaved in a sexually inappropriate manner. A BSP was developed as part of her IEP to address the sexually inappropriate behaviors but was not agreed to.

YOU BE THE JUDGE

- Student kicked a boy in the groin. The boy had been sexually harassing Student prior to the incident. However, prior to kicking the boy, Student warned him that she was having a bad day and that he should leave her alone. The boy was not seriously injured. However, Student was arrested and subsequently suspended. Thereafter, the District initiated expulsion proceedings and Student's guardian filed for due process.
- Did the behavior have a direct or substantial relationship to the Student's disability?
- *Manteca Unified Sch. Dist., 50 IDELR 298 (SEA CA 2008)*

YOU BE THE JUDGE

- Student has previously been found ineligible for special education but was found eligible for a Section 504 Plan. She has a history of social and emotional issues, started performing poorly in all her classes, was excessively absent, and exhibited constant poor behavior. The evaluation found the student has average intellectual functioning but academic deficits in math. The evaluator also diagnosed the student with Mood Disorder, and a Mathematics Disorder and a "Rule out" diagnosis for a number of other clinical disorders. The team then concluded that the student's misconduct and attempted arson was not a manifestation of her suspected disability and imposed a long-term suspension in a different educational facility. The parents disagreed and requested a due process hearing.
- Did the behavior have a direct or substantial relationship to the Student's disability?
- *District of Columbia Pub. Schs., 114 LRP 3336 (SEA DC 12/19/13)*

YOU BE THE JUDGE

- Student was eligible for special education due to ADHD. Student's IEP called for a one-to-one assistant as part of his BIP following a number of behavioral incidents due to impulsive behaviors. The District failed for a number of months to provide for the assistant. Student brought an air gun to school, after an altercation with another Student, which was in his backpack. He had a verbal argument with another student and told him he was going to use the air gun to hurt him. When confronted by staff he admitted he had the air gun. The school recommended expulsion proceedings.
- Is the behavior a manifestation of the student's disability?

AFTER THE MANIFESTATION DETERMINATION REVIEW

AFTER THE MDR

- If the team decides that the Student's behavior WAS a manifestation of his or her disability:
 - The student has the right to return to school immediately.
 - The school must conduct a Functional Behavioral Assessment (FBA) to identify what might be causing the problem behavior.
 - The school must create a Behavior Intervention Plan (BIP) to give the student the supports in school to address the behavior.
 - If the student already had a BIP that the school was not following or that was not effective, it must be properly followed or changed to address the behavior.
- 34 CFR 300.530

AFTER THE MDR

- If the team decides that the student's behavior WAS NOT a manifestation of his or her disability:
 - The student's suspension or classroom removal will continue until the end of the suspension or removal period.
 - During the student's removal, he or she must be given appropriate special education services. This means that the student must get services that allow him or her to make progress toward his or her IEP goals in a general education setting.
 - Even if the behavior is found to not be a manifestation, you may request that the school conduct an FBA and create a BIP to provide support for your child's behaviors.

FUNCTIONAL BEHAVIOR ASSESSMENT

- The IDEA does not define an FBA or explain what steps are required to complete one. Instead, FBA requirements are left to state law or local policy.
- An FBA is generally understood to include these steps:
 - 1) defining the problem behavior;
 - 2) collecting data about the antecedents and consequences of the behavior; and
 - 3) developing a hypothesis about the function of the behavior.

FUNCTIONAL BEHAVIOR ASSESSMENT

- The IDEA does not specify who is qualified to conduct FBAs.
- States or even districts must determine who conducts the assessments.
- LEA responsible for making sure that the assessor is trained.
- Hearing officers often rely on whether the assessor was qualified when determining if an FBA is appropriate

CONDUCT BEHAVIOR AND TRAUMA

- More than two-thirds of children in the United States report having experienced at least one traumatic event by the age of 16 years old.
 - Copeland, W.E., et. al., *Traumatic Events and Posttraumatic Stress in Childhood*, Archives of General Psychiatry, 64(5):577-84 (2007).
- According to the Substance Abuse and Mental Health Services Administration, "individual trauma results from an event, series of event or set of circumstances experienced by an individual physically or emotionally harmful or life-threatening with lasting adverse effects on the individual's functioning and mental, physical, social emotional or spiritual well-being."

CONDUCT BEHAVIOR AND TRAUMA

- Adverse childhood experiences, or ACEs, are potentially traumatic events that occur in childhood.
 - Experiencing violence or abuse - sexual abuse, physical abuse, emotional abuse
 - Witnessing violence in the home or community
 - Having a family member attempt or die by suicide
 - Growing up in a household with substance abuse, mental health problems, instability due to parental separation, or household members being incarcerated
 - Trauma from school-related incidents - restraints, seclusion, school violence

CONDUCT BEHAVIORS AND TRAUMA

- Children develop “survivor behaviors” meant to help the child survive extreme psychological stress in a hostile environment
 - Fighting
 - Running Away
 - Substance Abuse
 - Spacing Out
 - Self-injurious behaviors
 - Eating Disorders
- In a non-threatening environment, such as the school setting, a child will exhibit these behaviors to deal with uncomfortableness and anxiety!

Source: *Trauma Informed Approaches to Classroom Management*, Brenda Ingram, EdD, LCSW, Director of Clinical Services, **Peace Over Violence**

DISCUSSION QUESTION

How do these behaviors manifest in the school setting?



BEHAVIOR INTERVENTION PLANS

- The IDEA is silent on the specific contents of BIPs but generally:
 - Part of Student’s IEP
 - Address (1) behaviors that interfere with the child’s learning or that others and (2) behaviors that are inconsistent with school expectations
 - Should include: targeted behaviors, expected behaviors, positive behavioral interventions, strategies and supports to address the targeted behaviors, and consequences for targeted behaviors.

BEHAVIOR INTERVENTION PLANS

- Only required when an MDR finds a behavior is a manifestation of a child's disability
- Otherwise included at discretion of IEP team when required for a FAPE
- Specific to student and individualized

BIP AND TRAUMA

- Trauma Informed Interventions with Trauma-Impacted Students
 - Teach stress management/relaxation skills
 - Adults should be calm and quiet - use a lower pitch, simple sentences
 - Teach and model self-calming techniques
 - Teach positive self-talk and have the student practice before it is needed
- Create a Safe Environment in the Classroom
 - Predictable environment with clear expectations for behavior
 - Structure during the class day
 - Establish a quiet, safe place in the classroom for students to go when they are feeling overwhelmed
 - Sensory materials
 - Incorporate music, exercise and stretching into the daily schedule

Source: *Trauma Informed Approaches to Classroom Management*, Brenda Ingram, EdD, LCSW, Director of Clinical Services, Peace Over Violence

BIP AND TRAUMA

- Behavioral Strategies for Trauma-Impacted Students
 - Active listening with students
 - Demonstrate empathy
 - Use of specific praise
 - 10:1 ratio of positive to negative comments
 - Active ignoring of negative behavior
 - Consistent expectations
 - Reward systems
 - Collaborative problem-solving

Source: *Trauma Informed Approaches to Classroom Management*, Brenda Ingram, EdD, LCSW, Director of Clinical Services, Peace Over Violence

BIP AND TRAUMA

- Trauma Informed Interventions for Trauma-Impacted Students
 - Teach to identify and label emotions and feelings
 - Use a "thermometer" to rate emotion intensity
 - Identify coping skills to help decrease emotional intensity
 - Connect students to friends, peers, or supportive adults
 - Involve parents/caregivers in the educational process
 - Help student identify safe people and places
 - Teach student how to ask for help until someone responds via role play

Sources: *Trauma Informed Approaches to Classroom Management*, Brenda Ingram, EdD, LCSW, Director of Clinical Services, Peace Over Violence

EXPEDITED DUE PROCESS

- Parents can't veto an MDR determination
- Parents can appeal a manifestation determination by filing a due process complaint
- The hearing must take place within 20 school days of the date the complaint was filed and the hearing officer or ALJ must make a determination within 10 school days of the hearing
- 34 CFR 300.532

CASE SCENARIO

- Student has an eligibility of OHI due to a diagnosis of ADHD and has an IEP.
- Student has a history of minor discipline removals for a fight, class disruption, and non-compliance with teacher directions. The total out of class time is equivalent to six days.
- On the day of the incident in question, Student was calling out answers in class. When the teacher asked him to stop, he got agitated and stomped to the back of the class. He continued to be disruptive by ripping paper and pacing in the back of the class. When the principal came to the door the Student pushed the door and hit him in the face.
- The school wants to suspend Student for five days

CASE SCENARIO

- Relevant Information
 - Student's last IEP included a goal that Student would raise his hand to answer questions in class
 - Student's IEP does not have a BIP but does provide for weekly check-ins by the school psychologist "as needed"
 - Parent asked, after the previous suspension for two days, if there were any other assessments that could be done to address the behaviors, but the school psychologist told Parent that the team could discuss assessments at student's next IEP to determine if it was necessary
 - Student sees a psychiatrist every three months for medication management for the ADHD.

CASE SCENARIO

- DSM-5 Criteria for ADHD
- People with ADHD show a persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development:

CASE SCENARIO

- Inattention: Six or more symptoms of inattention for children up to age 16 years, or five or more for adolescents age 17 years and older and adults; symptoms of inattention have been present for at least 6 months, and they are inappropriate for developmental level:
 - Often fails to give close attention to details or makes careless mistakes in schoolwork, at work, or with other activities.
 - Often has trouble holding attention on tasks or play activities.
 - Often does not seem to listen when spoken to directly.
 - Often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the workplace (e.g., loses focus, side-tracked).
 - Often has trouble organizing tasks and activities.
 - Often avoids, dislikes, or is reluctant to do tasks that require mental effort over a long period of time (such as schoolwork or homework).
 - Often loses things necessary for tasks and activities (e.g. school materials, pencils, books, tools, wallets, keys, paperwork, eyeglasses, mobile telephones).
 - Is often easily distracted
 - Is often forgetful in daily activities.

CASE SCENARIO

- **Hyperactivity and Impulsivity:** Six or more symptoms of hyperactivity-impulsivity for children up to age 16 years, or five or more for adolescents age 17 years and older and adults; symptoms of hyperactivity-impulsivity have been present for at least 6 months to an extent that is disruptive and inappropriate for the person's developmental level:

- Often fidgets with or taps hands or feet, or squirms in seat.
- Often leaves seat in situations when remaining seated is expected.
- Often runs about or climbs in situations where it is not appropriate (adolescents or adults may be limited to feeling restless).
- Often unable to play or take part in leisure activities quietly.
- Is often "on the go" acting as if "driven by a motor".
- Often talks excessively.
- Often blurts out an answer before a question has been completed.
- Often has trouble waiting their turn.
- Often interrupts or intrudes on others (e.g., butts into conversations or game).

CASE SCENARIO

- During the MDR the general education teacher shares that she was never provided with a copy of the IEP.
- The school psychologist indicates that Student wrote an apology note to the principal, as part of the schoolwide behavior program, and since he admitted to shoving the door in the face of the principal the behavior was purposeful it was not a manifestation of the disability.

CASE SCENARIO

- **QUESTION #1:** The team needs to determine whether there is a connection between the Student's behavior that led to the suspension or classroom removal and the student's disability.
- **QUESTION # 2:** The team needs to decide whether the school actually followed all parts of the Student's IEP (or BIP). If the school has not been following everything on Student's IEP (or BIP), the team must decide whether your child's behavior happened because the school was not following all parts of your child's IEP (or BIP).

CONCLUSION

- Any further questions?



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October 27-29, 2025

Hilton Bellevue | Bellevue, Washington

PRE-CONFERENCE MINI-COURSE E

**Ethics and Professional Responsibility in the
Practice of Special Education Law**

presented by:

Garrett Williams

Attorney at Law
Stevens Clay, P.S.
Spokane, WA

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Ethics and Professional Responsibility in the Practice of Special Education Law

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Attendance

- Who's in the room today?
 - Parents?
 - School District Staff?
 - Parent Attorneys?
 - School Attorneys?
 - Advocates?
- When was the last time you called the WSBA Ethics Hotline?
- What about the Council of Administrators of Special Education?



Agenda

- Ethical Implications of AI
 - ABA Formal Opinion 512
- [Informed Consent \(RPC 1.0\)](#)
 - Parental Consent ([WAC 392-172A-03000](#))
- [Conflicts of Interest \(RPC 1.7\)](#)
 - Organization as a Client ([RPC 1.13](#))
 - Duties to Former Clients ([1.9](#))
- [Confidentiality \(RPC 1.6\)](#)
 - Advisory Opinion
- [Safeguarding Property \(RPC 1.15\)](#)
 - Disciplinary Actions



Ethical Implications of AI

Considerations for lawyers



Briefs Without Brains

"If I only had a brain..." - Scarecrow (after drafting a brief).

Behind his big curtain of legal technology, Attorney Oz uses Scarecrow (ChatGPT) to draft a due process hearing brief. Toto (the paralegal pup) pastes it into the final file, complete with fake citations and Dorothy's full name.



Made using OpenAI (2025).

Ethical Issues?



ABA Guidance on Using Generative AI

- Takeaways from ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 512 (2024).
 - "To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide **competent** legal representation, to **protect client information**, to **communicate** with clients, to **supervise** their employees and agents, to advance only **meritorious claims** and contentions, to ensure **candor towards the tribunal**, and to charge **reasonable fees**."
 - Informed client consent is required before inputting confidential or case-related information into an AI tool that might retain or use data.
 - Risk assessments must be fact-specific.
 - Evaluate the sensitivity of the information, the capabilities of the AI tool, and the likelihood of disclosure.
 - Understanding the AI tool's terms of service is essential.
 - Always review privacy policies and data handling practices before using AI with client matters.



Duty of Competence

- [RPC 1.1](#)
 - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- [Comment 8](#)
 - To maintain requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which a lawyer is subject.



Confidentiality of Information

- [RPC 1.6](#)
 - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
 - (b) ... prevent death or harm; ... prevent commission of crime; ... prevent fraud; ... seek counsel on ethical duties; ... court orders; ... establish a claim against the client.
 - (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- [Comment 2](#)
 - A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.



Communication with Clients

- [RPC 1.4](#)
 - (a) A lawyer shall:
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (b) A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.
- ABA Formal Opinion 512 advises that lawyers consider whether specific circumstances necessitate consulting clients about using AI tools, taking into account the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved.



Supervising Others Who Use ChatGPT

- [RPC 5.1](#)
 - (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
 - (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- [RPC 5.3](#)
 - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.



Meritorious Claims and Candor Toward Tribunal

- [RPC 3.1: Meritorious Claims and Contentions](#)
 - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
- [RPC 3.3: Candor Toward the Tribunal](#)
 - (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.
- ABA Formal Opinion 512 emphasizes that information generated by a GAI must be thoroughly reviewed to ensure that any assertions made to the court are accurate.



Reasonable Fees

- [RPC 1.5](#)
 - (a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.
- According to ABA Formal Opinion 512, a lawyer must explain the basis for any charges related to the use of AI tools or services before billing a client, ideally in writing. Lawyers are prohibited from charging unreasonable fees for using GAI. Additionally, lawyers cannot bill clients for the time spent learning how to use GAI tools or services.



What Kind of Generative AI (GAI) Should I Use?

- Open AI:
 - Uses your data to train future uses of the model.
 - May not have constraints restraining outputs to legitimate sources, so it may hallucinate cases.
 - Open AI (e.g. ChatGPT) does not have access to resources like Westlaw, LexisNexis, or Bloomberg Law
 - The output is guided by providing you with a satisfying answer, not a correct one.
 - Could potentially be trained on information that is out of date.
- **Remember: Always check the privacy policy of the AI before deciding whether or not to use it!**



What Kind of GAI Should I Use?

- Closed AI:
 - Proprietary systems are restricted to either an organization or its subscribers.
 - Trained on specific data to perform specific functions.
 - Not necessarily continually updating behavior based on user interaction.
 - Works within specific rules and guidelines, using certain behaviors and information to function effectively.
 - Examples: Lexis+ by LexisNexis; CoCounsel by Thomson Reuters; Vincent AI from vLex.
- **Remember: Always check the privacy policy of the AI before deciding whether or not to use it!**



GAI Tricks and Tips

- Maintain client confidentiality by:
 - Avoiding input of confidential or identifying information into public AI tools.
 - Using closed, secure versions of AI tools when available.
 - Requesting and retaining the AI tool's privacy policies.
- Ensure competence in technology by:
 - Understanding how AI tools work, including their limitations and potential biases.
 - Staying informed about updates, capabilities, and ethical implications.
 - Evaluating AI-generated work product, consider whether it is defensible, consistent, and coherent.
 - Seeking training or support when needed.



GAI Supervision Tips

- Supervising staff or AI outputs by:
 - Reviewing all AI-generated content for accuracy and legal sufficiency.
 - Training staff on proper use of AI in the legal context.
 - Documenting review processes to ensure ethical compliance.



What Should Have Attorney Oz Done?

- Oz should have verified all AI-generated content before filing.
- He should have checked the privacy policy of the AI system before inputting any information.
 - Further redact any confidential information depending on the system.
- Oz should have properly supervised his staff.
 - Oz can ensure this by implementing an AI policy for use, supervision, and/or training.
- Oz should consider whether he should disclose the use of AI to his client.



Informed Consent

Communicating with parents and children



Sign Here, My Pretty!



Made using OpenAI (2025).

Aunt Em receives a magical consent form from the Munchkinland School District, proposing an initial special education evaluation and related services for Dorothy. The form looks straightforward - but buried deep in the fine print is a clause about "transportation rights" that includes Flying Monkeys to move Dorothy wherever the school decides.

Aunt Em meets with the district attorney to review a form. Overwhelmed by the legal jargon, she quickly signs it, trusting the words are harmless. Dorothy is not included in the discussion.

Ethical issues?



What is Informed Consent?

- [RPC 1.0 Terminology:](#)
 - o (E): "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.



Parental Consent

- [WAC 392-172A-03000](#)
 - o (1)(a) A school district proposing to conduct an initial evaluation to determine if a student is eligible for special education services must provide prior written notice consistent with WAC 392-172A-05010 and obtain informed consent from the parent before conducting the evaluation.
 - o (b) Parental consent for an initial evaluation must not be construed as consent for initial provision of special education and related services.
 - o (c) The school district must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the student is eligible for special education services.



Special Education Informed Consent

- Informed consent is a process in which the scope of evaluation or provision of proposed services is fully explained to the parent or adult student.
- Informed means the individual providing consent has a clear and complete understanding of the activity before voluntarily agreeing to it in writing.
 - The parent need not have an **in-depth understanding** of the services a child's IEP might provide or every aspect of a proposed evaluation. Instead, for consent to be "informed," the parent must have a **general understanding** of the activity for which he is providing consent.
- It is the legal and ethical responsibility of the professional obtaining consent to ensure the parent or adult student has been provided all information relevant to the action proposed.



Communication with Clients

- [RPC 1.4](#)
 - (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
 - (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Ethical Issues at Wicked Witch School District

- What Aunt Em was told does not meet the informed consent threshold.
 - Information was not adequately explained for her to understand
- Transportation is a related service to be included in a child's IEP under the IDEA.
 - The District cannot dictate transportation without parental consent.
- Possibly involving Dorothy in the IEP building process.
 - The IDEA suggests that if the child is younger than 14, there would be no issues involving them.
 - If the child is older than 14, and it is appropriate, then the IEP team should consider including the child in the IEP process.



Conflicts of Interest

Where conflicts can arise in SPED cases



No Place Like Home

Aunt Em retains Attorney Henry to represent her and her niece Dorothy, who has a learning disability. Aunt Em wants Dorothy to pursue a particular IEP placement that is less restrictive and more cost-effective for the District. Dorothy strongly disagrees and wants to attend a specialized residential program far from home in the Emerald City.



Made using OpenAI (2025).

Henry learns that Aunt Em and Dorothy have conflicting education goals. Aunt Em demands he follow her strategy, while Dorothy wants to pursue the residential program.

Ethical issues?



What is the Concurrent Conflict?

- [RPC 1.7](#)
 - (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).



Does RPC 1.14 Apply?

- [RPC 1.14](#)
 - (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
 - (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.



Does RPC 1.14 Apply?

- [Comment 1](#)
 - The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.
 - When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects...
 - Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.



How Can Henry Avoid a Conflict of Interest?

- Clarify who the client is.
 - Aunt Em?
 - Dorothy?
 - Family as a unit?
- Avoid dual representation.
 - Identify the conflict: Aunt Em and Dorothy have opposing educational goals.
 - Determine if the conflict is waivable:
 - If yes, obtain informed written consent from both.
 - If no, withdraw from representing one or both clients.
- If Henry represents Dorothy as the primary client, treat Dorothy's relationship as normal unless there is some form of diminished capacity.



Munchkinland Mix-Up



Made using OpenAI (2025).

Now, Attorney Henry is representing the Munchkinland School District. Superintendent Glinda is accused of violating district policies and possibly mismanaging funds. The school board asks Henry to investigate and advise on disciplinary measures.

At the same time, Superintendent Glinda contacts Henry privately, seeking legal advice and requesting confidentiality about the allegations.

Ethical issues?



Organization as a Client

- [RPC 1.13](#)
 - o (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
 - o (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
 - o (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.
 - If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.



Organization as a Client

- [RPC 1.13, Comment 10](#)
 - o There are times when the organization's interest may be or become adverse to those of one or more of its constituents.
 - o In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.
 - o Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.



What if a Conflict of Interest Arises?

- [RPC 1.7, Comment 4](#)
 - If a conflict arises after representation has been undertaken, the lawyer ordinarily **must withdraw** from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16.
- [Comment 6](#)
 - Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.
 - The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.



What Should Henry do?

- Henry must communicate who the client is.
 - He represents the District and not Superintendent Glinda individually.
- Henry knows or reasonably should know that Glinda's interests are adverse to the District.
 - He cannot give Glinda legal advice, except to tell her to obtain her own counsel.
- Henry does not have to withdraw just because Superintendent Glinda approached him for advice, so long as he:
 - Makes it clear that he cannot and does not represent her,
 - Does not give Glinda legal advice,
 - And does not receive confidential information under a mistaken belief of representation.



Not in Kansas Anymore

Suppose Attorney Henry represented Aunt Em and Dorothy 10 months before he began representing the Munchkinland School District. Now, Aunt Em is filing a due process claim against the District. The District has asked Henry to defend its position and to cross-examine Dorothy.

Henry recognizes that some of Dorothy's past disclosures and private details could assist the District in challenging the credibility of her current placement request.

Ethical issues?



Made using OpenAI (2025).



Duties to Former Clients

- [RPC 1.9](#)

- o (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the **same or a substantially related matter** in which that person's interests are **materially adverse** to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- o (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; *unless the former client gives informed consent, confirmed in writing.*



Duties to Former Clients

- [RPC 1.9](#)

- o (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.



Imputation of Conflicts of Interest

- [RPC 1.10](#)

- o (a) except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
- o . . . (1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;



What Can Henry Do?

- Henry should disclose his conflict of interest to the District.
- He cannot represent the District in this matter.
 - He previously represented Dorothy and Aunt Em.
 - The due process matter is substantially related to that representation.
 - The District's position is materially adverse to Dorothy and Aunt Em.
 - He has no written consent from Aunt Em or Dorothy.
- Henry cannot use confidential information to the disadvantage of a former client.



Is Henry Required to Withdraw?

- Henry must withdraw from representing the District in this matter, unless informed consent from the district and superintendent is obtained.
 - What if Henry doesn't withdraw?
- If Attorney Henry doesn't withdraw, he risks:
 - Bar complaint or discipline.
 - Loss of client trust.
 - Breach of confidentiality.
- Call the WSBA Ethics Line! **(206) 727-8284**



Confidentiality

New advisory opinion and its application to special education



Confidentiality in SPED contexts

- Family Educational Rights and Protections Act (FERPA)
 - Protects the privacy of student education records and requires schools to obtain written parental consent before disclosing personally identifiable information.
- Individuals with Disabilities Education Act (IDEA) Confidentiality Rules
 - In addition to the FERPA requirements, IDEA protects the information of students with disabilities, requiring schools to actively protect and manage access to special education records and data.
- Attorney confidentiality/privilege.



Washington 2025 Advisory Opinion

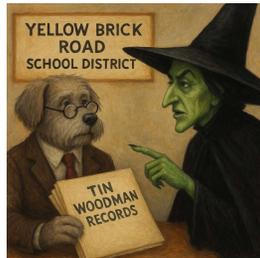
- *Certified Guardianship, Confidentiality and Conflict Issues*, Washington State Bar Association, Op. 202501 (2025).
- Essentially, this advisory opinion addresses whether a lawyer for a long-term care facility can ethically:
 - Disclose a resident's private information to a proposed guardian or a conservator before they are appointed; and
 - Simultaneously represent the facility and the appointed guardian or conservator.
- The opinion concluded that:
 - Dual representation is ethically fraught and rarely permissible because guardians owe broad fiduciary duties to the resident, which could conflict with the facility's interests, and are often not waivable, especially if issues about resident care or institutional practices arise.



The Guardianship of Oz

Attorney Toto represents the Yellow Brick Road School District. Student Tin Woodman is an 18-year-old student with significant cognitive disabilities. The Wicked Witch of the East has a petition pending in County Superior Court to become Tin's legal guardian.

While the guardianship is pending, the Wicked Witch requests Tin's complete records from Toto to prepare for her role. After the appointment, she asks Toto to continue advising her in IEP meetings and legal strategy, with the District supporting his involvement.



Made using OpenAI (2025).

Ethical issues?



Advisory Opinion

- Confidentiality:
 - A lawyer must not disclose client (or protected party) information unless permitted by law or consented to.
 - A proposed guardian has no legal authority over the individual until formally appointed by the court.
- Conflict of Interest:
 - Representing the institution (e.g., care facility) and the guardian creates conflicts of interest that are usually not waivable.
 - Guardians have fiduciary duties to the individual, which can easily conflict with the institution's goals.



Attorney Toto's Ethical Duties

- Tin Woodman's records are confidential under FERPA and Rule 1.6.
 - While the guardianship is pending, no records can be shared unless consent is obtained.
- After guardianship is granted, Toto may not represent both the District and the Wicked Witch.
 - Their interests may diverge, especially if she challenges IEP decisions.
- Bottom line: Toto must represent the District only.



Safeguarding Property

Current trend of Bar Association violations



Monkey Business in the Trust Account

- In *Matter of Rosenberg*, 2013 NY Slip Op 05597, 109 AD3d 225, October 2, 2013, (Slip Opinion), an education attorney in New York was audited after a few checks bounced from his trust account.
 - The attorney specifically practiced special education law, working with parents of children with special educational needs who sought tuition and/or tuition reimbursement from government entities such as the New York City Department of Education.



Monkey Business in the Trust Account

- In *Matter of Rosenberg*, 2013 NY Slip Op 05597, 109 AD3d 225, October 2, 2013, (Slip Opinion), an education attorney in New York was audited after a few checks bounced from his trust account.
 - The audit revealed that the attorney had over-disbursed funds to himself and his clients, causing trust account shortfalls. To cover these shortfalls, he deposited his personal funds into the account, which was improper commingling.
 - The bar committee did not find his violation of venal intent but found it to be negligence. He received a public censure due to his remorseful corrective action and ongoing pro bono service.



Safeguarding Property

- [RPC 1.15](#)
 - (a) This rule applies to... property of clients or third persons in a lawyer's possession in connection with a representation.
 - (b) A lawyer must not use, convert, borrow, or pledge client or third person property for the lawyer's own use.
 - (c) A lawyer must hold property of clients and third persons separate from the lawyer's own property.
 - (c)(3) A lawyer must identify, label, and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt, and the location of safekeeping.
- [Comment 1](#)
 - A lawyer should hold property of others with the care required of a professional fiduciary.



Disciplinary Trend in Washington



- In the last year, at least 18 Washington attorneys have been disciplined via disbarment or suspension for violating 1.15.
- In the last 10 years, 172 Washington attorneys have been disciplined for violating 1.15.



Safeguarding Property Reminders

- Hold property separately.
- Use designated trust account (IOLTA).
 - Always verify that the funds clear the IOLTA account before dispersing funds to clients.
- Maintain complete records of the accounts.
- Keep property safe.
- Promptly notify the client after receiving funds on their behalf.
 - Ex: settlement funds.
- Deliver such funds to the rightful owner.



Follow the Yellow-Brick Road. . .

- Know who your client is.
- Clarify roles clearly: avoid dual representation.
- Supervise AI and new technology use.
- Protect confidentiality – especially student records.
- Handle client funds with care.
- When in doubt, call the WSBA Ethics Hotline: **(206) 727-8284**.



What concerns or questions do you have?



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PRE-CONFERENCE MINI-COURSE F

Costs of Special Education Litigation

presented by:

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Costs of Special Education Litigation

Why is Litigation So Expensive?

- School's attorney charges \$300/hr
- Lifespan of special education litigation

Why is Litigation So Expensive?

- | | |
|------------------------|-----------------------------------|
| 1. Complaint | 9. Appeal to federal court |
| 2. Discovery | 10. Briefing |
| 3. Mediation | 11. Preparation for oral argument |
| 4. Witness preparation | 12. Attendance at oral argument |
| 5. Organize exhibits | |
| 6. Multi-day hearing | |
| 7. Post-hearing brief | |
| 8. Decision review | |

Why is Litigation So Expensive?

- If a school loses a case, it pays its own attorney in addition to parent's attorney's fees
- If a parent loses a case, parent is either
 - Out the money they paid to attorney, or
 - Attorney worked the entire case on contingency

How to End Litigation – Resolution Session

- After a due process filing, school must convene resolution meeting within 15 days. 34 C.F.R. § 300.510.
- Meeting includes parents, school officials, and relevant members of the IEP team who have specific knowledge of the facts identified in the complaint. 34 C.F.R. § 300.510.
- Must also include a district representative who has decision-making authority on behalf of the school. 34 C.F.R. § 300.510.

How to End Litigation – Resolution Session

- What if the proposed resolution requires board authority?
 - *J.Y. v. Dothan City Bd. of Educ.* (Alabama Federal Court, 2014)
 - Superintendent participated in resolution session
 - School said board could ratify agreement
 - Court said failure to include board was a procedural violation
 - How to avoid this?
 - Waive resolution session
 - Notice a board meeting
 - Accept the procedural violation

How to End Litigation – Resolution Session

- School can't include attorney unless parent brings attorney.
- An agreement must be
 1. Signed by both the parent and a district representative who has the authority to bind the district; and
 2. Enforceable in a state court or District Court, or by the state educational agency if the state has other mechanisms or procedures that allow parties to seek enforcement of resolution agreements.
- Either party may void the agreement within three business days of the agreement's execution.

How to End Litigation – Resolution Session

- The district does not have to convene a resolution meeting if:
 1. The parent and the district agree in writing to waive the meeting; or
 2. The parent and the district agree to mediate the dispute.
- If the school is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made the school may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

How to End Litigation – Mediation

- Voluntary process
- The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.
- The SEA must select mediators on a random, rotational, or other impartial basis.
- The State must bear the cost of the mediation process
- Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute

How to End Litigation – Mediation

- If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that
 1. States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and
 2. Is signed by both the parent and a representative of the agency who has the authority to bind such agency.

How to End Litigation – Mediation

- Parties can resolve a case whenever they reach an agreement.
- If the parties do not reach agreement, they proceed to hearing unless the case is otherwise dismissed

Attorney’s Fees for Parents

- Tennessee SEHO ordered 888 hours of compensatory dyslexia in July 2023
- Affirmed in May 2024 by District Court
- Affirmed on February 3, 2025, by Sixth Circuit
- Sixth Circuit noted parent’s attorney was seeking \$266,967 in fees

Attorney's Fees for Parents

- Attorney's fees awards in Texas
 - \$29,622 in July 2024
 - \$145,804 in August 2021 (administrative hearing through Fifth Circuit)
 - \$75,936 in March 2019 (in addition to \$70,839 previously awarded in March 2017)

Attorney's Fees for Parents

- Attorney's fees awards in PNW
 - *Bellflower Unif. Sch. Dist. v. Lua* (CA 2024): \$96,743
 - *C.Y. v. Chaffey Jr. Union High Sch. Dist.* (CA 2023): \$136,413
 - *S.C. v. Lincoln Cty. Sch. Dist.* (OR 2022): \$355,994

Attorney's Fees for Parents

- Important for Schools to Understand Attorney's Fees
 1. Calculate and estimate the overall costs of defense
 2. Appreciate the risk to the school
- Important for Parents to Understand Attorney's Fees
 1. Critically look at case and determine if it's worth moving forward to hearing

Attorney's Fees for Parents

• In any action or proceeding . . . the court, in its discretion, may award reasonable attorneys' fees as part of the costs to—(i) The prevailing party who is the parent of a child with a disability;

20 U.S.C. § 1415(i)(3)(B)(i)(I)

Attorney's Fees for Parents

1. Is the parent a "prevailing party"?
2. Calculation of hours and rate – "Lodestar"
3. Is there a reason the award should be reduced?

Attorney's Fees for Parents

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Attorney’s Fees for Parents – Prevailing Party

- A prevailing party is one who “succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.” *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 825 (9th Cir. 2007)).
- To be considered a “prevailing party,” the complaining party must achieve a “material alteration of the legal relationship of the parties” and “that alteration must be judicially sanctioned.” *P.N. v. Seattle School Dist.*, 474 F.3d 1165, 1172 (9th Cir. 2007)

Attorney’s Fees for Parents – Prevailing Party

- *P.N. v. Seattle School Dist.*, (9th Cir. 2007)
 - Parties entered into a settlement agreement
 - The settlement agreement expressly reserved “any issue of attorneys’ fees and costs.”
 - Parent requested dismissal of the due process hearing.
 - Parent filed in federal court seeking \$13,653 in attorney’s fees
 - Court said although there was a material alteration, the settlement agreement did not receive any judicial imprimatur.
 - Settlement agreement does not contemplate any judicial enforcement

Attorney’s Fees for Parents – Prevailing Party

- *J.S. v. Eugene Sch. Dist.* 4J, (D. Ore. 2025)
 - Parent filed a due process hearing alleging IDEA and Section 504 violations
 - School won on all issues
 - Parent raised issue of whether parents were entitled to a transcription of the hearing at no cost
 - Hearing officer ordered parent to pay 25 percent of transcript costs

Attorney's Fees for Parents – Prevailing Party

• *J.S. v. Eugene Sch. Dist. 4J*, (D. Ore. 2025)

- Court said parent was a prevailing party for three reasons:
 1. Parent recovered a monetary award and Ninth Circuit even nominal damages supports prevailing party status
 2. Specific relief sought by parent which the ALJ denied
 3. Decision required school to refund the parent the portion of the transcript fee that was paid

Attorney's Fees for Parents – Calculation

• Lodestar amount

- Number of hours reasonably spent on the litigation multiplied by a reasonable hourly rate. *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009).
- Should exclude hours that are excessive, redundant, or otherwise unnecessary. *Id.*
- Courts can cut line-by-line or percentage across the board

Attorney's Fees for Parents – Calculation

• Lodestar amount

- Oregon, and other states, caution against block billing and providing vague or otherwise inadequate descriptions of tasks because these practices hinder a court's ability to assess the reasonableness of the time expended.
- Oregon courts may excuse block billing if no more than three hours. *Udike v. Multnomah County*, 2020 WL 4736461 (D. Or. Aug. 14, 2020)
- For block-billing periods in excess of three hours, however, the Court has reduced each applicable entry by fifty percent. See, e.g., *Fathers & Daughters Nevada, LLC v. Lingfu Zhang*, 2018 WL 3023089 (D. Or. June 18, 2018).

Attorney's Fees for Parents – Calculation

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Attorney's Fees for Parents – Hourly Rate

- Proving a Reasonable Hourly Rate
 - Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits. *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010)
 - Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate.
 - State bar billing rate surveys

Attorney's Fees for Parents – Hourly Rate

- Proving a Reasonable Hourly Rate
 - *Woldemariam v. Seattle Sch. Dist.*, (W.D. Wash. 2019)
 - Parent prevailed in a DPH and sought \$108,982
 - Parent's attorney sought an hourly rate of \$425 with a supporting affidavit
 - School:
 1. Said affidavit provides only a broad opinion, and no experience litigating special education
 2. Provided affidavits stating rate was between \$175 and \$300
 3. Cited three cases where rates were \$180-375.
 - Court reduced rate from \$425 to \$300.
 - Overall award was \$69,510

Attorney's Fees for Parents – Hourly Rate

- Proving a Reasonable Hourly Rate
 - *S.C. v. Lincoln Cty. Sch. Dist.*, (D. Ore. 2022)
 - Parent prevailed in a DPH and appeal through 9th Cir. and sought \$694,905
 - Parent's attorney sought an hourly rate of \$400 for one attorney (Gall) and \$560 for two other attorneys (Larose and Nelson)
 - School raised several arguments

Attorney's Fees for Parents – Hourly Rate

- Proving a Reasonable Hourly Rate
 - *S.C. v. Lincoln Cty. Sch. Dist.*, (D. Ore. 2022)
 - Argument 1: Parent attorney rates are higher than school attorney rates
 - Many circuits recognize that "private attorneys often charge lower rates to the government because of counterbalancing benefits such as repeat business." *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996)
 - Argument 2: Attorney's experience doesn't match rate
 - Parent attorney submitted declarations from two more experienced attorneys
 - Court noted those attorneys' rates ranged from \$285-\$325
 - Court reduced Gall from \$400 to \$250 and Larose from \$560 to \$325

Attorney's Fees for Parents – Hourly Rate

- Proving a Reasonable Hourly Rate
 - *Hood River Cty. Sch. Dist. v. Student.*, (D. Ore. 2022)
 - Parent requested an hourly rate of \$285 and moving to \$325 on Jan. 1, 2021
 - Parent did not submit declarations or affidavits
 - Court looked at the OSB survey noting that attorneys in private practice with 21-30 years experience, noting the \$285-\$325 was within range
 - Court cautioned that evidence must be submitted to justify a reasonable rate

Attorney's Fees for Parents – Hours

- In determining the number of hours reasonably expended, a court should exclude hours that are not adequately documented, or that are excessive, redundant, or otherwise unnecessary. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986)

Attorney's Fees for Parents – Hours

- Excessive Hours
 - *B. and E.F. Maldonado v. Morgan Hill Unif. Sch. Dist.* (N.D. Cal. 2022)
 - Parent dismissed the first filing voluntarily, but argued the hearing officer should not have dismissed the case. Court excluded 7.5 hours from the award calculation.
 - Parent claims 5.5 hours for preparation of subpoenas. School pointed out the subpoenas were just model forms and Plaintiffs did not call any of the witnesses during the hearing. Court excluded the 5.5 hours.

Attorney's Fees for Parents – Hours

- Excessive Hours
 - *Los Angeles Unif. Sch. Dist. v. A.O.* (C.D. Cal. 2025)
 - School sought reduction because parent attorney spent 7.5 hours on a pre-hearing statement, while school attorney spent 4.8 hours.
 - Here, as in many other respects, the Court will “defer to the winning lawyer’s professional judgment as to how much time he was required to spend on the case; after all, he won, *and might not have, had he been more of a slacker.*”

Attorney's Fees for Parents – Hours

• Excessive Hours

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Attorney's fees cannot be recovered related to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action. 20 U.S.C. § 1415(i)(3)(D)(ii).
 - Almost all the time entries parent submitted before the due process complaint appear to relate to the attorney's participation in IEP Team meetings.

Attorney's Fees for Parents – Hours

• Excessive Hours

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Most of the remaining entries prior to the due process hearing do not contain sufficient detail to allow the Court to conclude that the attorney performed the work in preparation for filing the due process complaint (or for other litigation tasks) rather than for participating in IEP Team meetings.
 - The sole entry predating March 8, 2021 that references the due process hearing is an entry for 16 hours spent drafting the due process hearing request
 - The Court found that this sole entry predating the filing of the due process complaint is compensable as preparation for the due process hearing but that the remaining entries were not.
 - Reduced bill by about \$125,000

Attorney's Fees for Parents – Reduction

1. Degree of success
2. Settlement offer

Reducing Fees – Degree of Success

- *Capistrano Unif. Sch. Dist. v. B.W.*, (9th Cir. 2023)
 - Parent prevailed in a due process hearing
 - Case was appealed and went to the 9th Circuit, which ruled in favor of parents
 - Parent requested \$422,807 in attorney’s fees

Reducing Fees – Degree of Success

- *Capistrano Unif. Sch. Dist. v. B.W.*, (9th Cir. 2023)
 - A prevailing party is not entitled to fees on unsuccessful claims, and “the most critical factor is the degree of success obtained.”
 - To determine the proper fee award, the court must consider whether a party prevailed on claims that are related or unrelated to her unsuccessful claims.
 - To determine whether the claims are related, the court must consider whether they “involve a common core of facts or are based on related legal theories.”

Reducing Fees – Degree of Success

- *Capistrano Unif. Sch. Dist. v. B.W.*, (9th Cir. 2023)
 - Issues:
 1. Failing to convene an annual IEP
 2. IEP in place prior to 2018-19
 3. First grade IEPs inadequate
 4. Denial of FAPE in first grade
 5. Whether parent had to file for due process to defend the first grade IEP
 - Parent only prevailed on issue four
 - Court ordered 50 percent reduction

Reducing Fees – Degree of Success

- *Gaines v. Douglas Cty. Sch. Dist.* (D. Nev. 2009)
 - Parents prevailed on two procedural issues
 - Hearing officer ordered school to pay \$1,861 for independent evaluations
 - Affirmed by Ninth Circuit
 - Parent sought \$243,832

Reducing Fees – Degree of Success

- *Gaines v. Douglas Cty. Sch. Dist.* (D. Nev. 2009)
 - Issues in which parent was unsuccessful:
 1. Costs incurred for placing students in private education center
 2. Compensatory education
 3. New IEPs
 4. Order specifying requirements of an appropriate placement

Reducing Fees – Degree of Success

- *Gaines v. Douglas Cty. Sch. Dist.* (D. Nev. 2009)
 - Court reduced fees by 80 percent
 - \$48,766

Reducing Fees – Degree of Success

- *J.S. v. Eugene Sch. Dist. 4J*, (D. Ore. 2025)
 - Parent filed a due process hearing alleging IDEA and Section 504 violations
 - School won on all issues
 - Parent raised issue of whether parents were entitled to a transcription of the hearing at no cost
 - Hearing officer ordered parent to pay 25 percent of transcript costs

Reducing Fees – Degree of Success

- *J.S. v. Eugene Sch. Dist. 4J*, (D. Ore. 2025)
 - Parent appealed and District Court agreed with hearing officer
 - Ninth Circuit ruled with parent on the transcript issue
 - Parent attorney went back to District Court to seek \$53,839 in fees

Reducing Fees – Degree of Success

- *J.S. v. Eugene Sch. Dist. 4J*, (D. Ore. 2025)
 - First, the court asks whether the claims upon which the plaintiff failed to prevail were related to the plaintiff's successful claims. If unrelated, the final fee award may not include time expended on the unsuccessful claims.
 - If the unsuccessful and successful claims are related, then the court must apply the second part of the analysis, in which the court evaluates the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."

Reducing Fees – Degree of Success

- *J.S. v. Eugene Sch. Dist. 4J*, (D. Ore. 2025)
 - Parent’s successful claim unrelated to unsuccessful claims
 - Court awarded:
 - \$9992 in merits fees
 - \$3204 in appeal fees
 - \$1,540 in costs

Reducing Fees - 10-Day Settlement Offer

- Attorneys’ fees may not be awarded . . . for services performed subsequent to . . . a written offer of settlement to a parent if:
 - The offer is made . . . any time more than 10 days before the proceeding begins;
 - The offer is not accepted within 10 days; and
 - The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

20 U.S.C. § 1415(i)(3)(B)

Reducing Fees - 10-Day Settlement Offer

- Court must determine:
 1. Whether the relief was more favorable than the settlement offer
 2. If relief was not more favorable, were the parents substantially justified in rejecting the offer

Reducing Fees – 10-Day Settlement Offer

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Parent filed a due process hearing on March 8, 2021
 - April 30, 2021, school made a written settlement offer

Reducing Fees – 10-Day Settlement Offer

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Due process hearing filed on March 8, 2021
 - School made a written settlement offer on April 30, 2021

Reducing Fees – 10-Day Settlement Offer

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Settlement Offer
 1. 160 hours of compensatory services at hourly rate of \$140
 2. 40 hours of vision therapy services at hourly rate of \$135 and five progress evaluations
 3. Reimbursement for a vision test in the amount of \$1,824
 4. Reimbursement of \$159 for copayments and out-of-pocket expenses
 5. Attorney's fees (unknown)

Reducing Fees – 10-Day Settlement Offer

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Parent rejected the offer
 - Nine-day hearing in May 2021
 - Hearing officer ruled for Student on one of eight issues
 - Awarded Student 120 hours of compensatory education
 - District court affirmed the hearing officer’s decision
 - Parent’s attorney sought \$356,987 in fees
 - Fees already reduced by roughly \$125,000 for pre-filing work

Reducing Fees – 10-Day Settlement Offer

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Was the offer more favorable?
 - School sought to reduce the \$126,537 for due process hearing work
 - Court said the 120 hours of compensatory education awarded was less favorable than the 160 hours of compensatory education offered, in addition to evaluations and reimbursements

Reducing Fees – 10-Day Settlement Offer

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Was the parent substantially justified in rejecting the offer?
 - Parent argued that the settlement offer’s attorneys’ fee provision was ambiguous and unreasonable because it did not offer a sum certain and gave the District the sole power to review the fees claimed.
 - But the provision did “not waive the rights of the Parties to dispute whether the amount of fees claimed is reasonable and compensable.”
 - Court said the settlement offer prevented fees incurred after the date of the offer (roughly \$80,000)

Reducing Fees – 10-Day Settlement Offer

- *J.B. v. Bonita Unif. Sch. Dist.* (C.D. Cal. 2023)
 - Court further reduced the award because parent prevailed on one of eight issues
 - School sought a reduction of 87.5 percent
 - Based on overlap of issues and “the substantial reductions in Plaintiffs’ claimed attorneys’ fees” the Court finds that allowing Plaintiffs to recover 50 percent of their eligible attorneys’ fees would be reasonable and appropriate.

Reducing Fees – 10-Day Settlement Offer

- *Wright v. Tehachapi Unif. Sch. Dist.* (9th Cir. 2018)
 - Student with autism, elopement and aggressive behavior
 - Parent hired an attorney to address unsafe behaviors, ABA support in school
 - Before the filing, school made a settlement offer

Reducing Fees – 10-Day Settlement Offer

- *Wright v. Tehachapi Unif. Sch. Dist.* (9th Cir. 2018)
 - Settlement Offer #1:
 1. Aide support
 2. Independent evaluations
 3. \$11,000 in compensatory education
 - Parents rejected the offer and filed for a DPH

Reducing Fees – 10-Day Settlement Offer

- *Wright v. Tehachapi Unif. Sch. Dist.* (9th Cir. 2018)
 - Settlement Offer #2:
 1. Independent Education Evaluations
 2. Compensatory education up to \$11,000 through August 2018
 3. Functional behavior analysis
 4. Teachers and aides receive ABA training
 - Parents “rejected” the offer (dispute about whether it was accepted)

Reducing Fees – 10-Day Settlement Offer

- *Wright v. Tehachapi Unif. Sch. Dist.* (9th Cir. 2018)
 - Hearing officer order
 1. IEP meeting to adopt interim behavior plan
 2. FBA within 21 days of returning to school, and review within 45 days
 3. One-on-one ABA-trained aide with supervision by a BCBA for two hours a week until FBA is reviewed
 4. 34 hours of compensatory education by a certified special education teacher
 - Parent sought roughly \$150,000 for administrative hearing and district court work

Reducing Fees – 10-Day Settlement Offer

- *Wright v. Tehachapi Unif. Sch. Dist.* (9th Cir. 2018)
 - Compensatory hours offered were greater than what was ordered
 - While the school offered to train the teachers and aide with ABA techniques, there was no offer to have the aide supervised by the Board-Certified Behavior Analyst.
 - The hearing officer directed actions to be taken in a much more immediate time-frame, such as directing the District to hold an IEP meeting within ten days of the decision “to adopt an interim behavior plan” and hold an IEP meeting following a functional behavior assessment within forty-five days, rather than the sixty days offered by the District.

Reducing Fees – 10-Day Settlement Offer

- *A.U.R.U. v. Washoe Cty. Sch. Dist.* (D. Nev. 2025)
 - Parent filed a due process hearing
 - School sent a settlement proposal
 - School admitted liability on the merits of the case
 - Hearing officer ordered evaluations, compensatory education, staff training

Reducing Fees – 10-Day Settlement Offer

- *A.U.R.U. v. Washoe Cty. Sch. Dist.* (D. Nev. 2025)
 - Evaluations and IEP Meetings
 - Settlement offer said completion within 45 school days and convene meeting within 15 calendar days
 - Hearing officer said completion within 30 calendar days and convene meeting within 15 calendar days
 - "Plaintiffs are correct that the HO award's timeline is faster by approximately six weeks, but this is counterbalanced by the fact that the HO's decision came approximately six weeks after the District's settlement offer. The District's overall timeline of 60 school days translates to 88 calendar days but was offered 44 calendar days before the HO decision, making it almost identical to the award's 45-calendar-day timeline. As such, the faster timeline, offered later in time, does not make the award more favorable to parents."
 - Comparable when viewed from parent's perspective

Reducing Fees – 10-Day Settlement Offer

- *A.U.R.U. v. Washoe Cty. Sch. Dist.* (D. Nev. 2025)
 - Compensatory Education
 - The settlement offer provided for 36 hours of academic tutoring, 72 hours of speech therapy service, and reimbursement for two weeks enrollment at a summer program. The offer notes that the payment and reimbursement "must follow the District's payment and reimbursement procedures to be fully detailed in a settlement agreement upon acceptance of this Offer."
 - The hearing officer award provides for 15 hours of academic tutoring and 20 hours of speech and language therapy and does not mention a payment method. Instead, the order states that the student "shall be given" the specified hours of tutoring services.
 - Lack of reimbursement provisions make the award more favorable from the parent's perspective

Reducing Fees – 10-Day Settlement Offer

• *A.U.R.U. v. Washoe Cty. Sch. Dist.* (D. Nev. 2025)

• Training

- The hearing officer award orders “targeted training on the specific conceded issues of the denial of FAPE to all school staff who directly work with the Student in the academic setting.”
- There is no provision in the settlement offer regarding staff training.
- The District appears to argue that this was because Plaintiffs did not request such training, but the initial due process complaint specifically requested staff training as one of its seven proposed resolutions.
- The Court agrees with parents that this additional provision makes the hearing officer award more favorable from the parent’s perspective.

Reducing Fees – 10-Day Settlement Offer

• *A.U.R.U. v. Washoe Cty. Sch. Dist.* (D. Nev. 2025)

• School-Home Communication

- The settlement offer provides that the school would “work with the parent to instruct the parent on receiving notifications in the District’s Infinite Campus System as well as the District’s Teams system so that the parent is aware of [A.U.R.U.’s] academic progress and attendance, as well as what notes are uploaded for A.U.R.U. as part of his IEP supplementary aides and services.”
- The HO award requires the District to “provide a bi-weekly status report informing parent of any testing accommodations to the Student” and to provide transportation records to the parent on a weekly basis. The award also provides that, if the evaluations result in a behavior intervention plan the District will train the parent on the BIP as applied to the home setting.
- Although these provisions seem relatively similar in substance, it does appear that the HO award provides for more active communication between the school and parent than the settlement offer.

Reducing Fees – 10-Day Settlement Offer

• *A.U.R.U. v. Washoe Cty. Sch. Dist.* (D. Nev. 2025)

• Attorney’s Fees

- The school argues that the hearing officer award is less favorable because it did not include attorneys’ fees.
- However, the settlement offer itself notes that “attorney fees are not within the jurisdiction of the administrative hearing officer.”

Reducing Fees – 10-Day Settlement Offer

- *A.U.R.U. v. Washoe Cty. Sch. Dist.* (D. Nev. 2025)
 - Conclusion
 - Hearing officer award was more favorable

Reducing Fees – 10-Day Settlement Offer

- *N.H. v. Gateway College & Career Academy* (C.D. Cal. 2024)
 - Parent argued she was substantially justified in rejecting the offer because it contained a broad waiver of claims
 - The language of the waiver includes standard terms for settlement, and it limited its scope only to those claims that were raised or could have been raised in relation to the allegations made in the underlying administrative complaint.
 - Could have raised this issue with the school or could have counter offered by striking the undesirable language from the waiver.
 - Only entitled to \$18,842 in fees

Reducing Fees – 10-Day Settlement Offer

- *N.H. v. Gateway College & Career Academy* (C.D. Cal. 2024)
 - Court further reduced fees due to winning two out of four issues
 - Reduction of 20 percent, bringing fees to \$15,074

Reducing Fees – Parent Protraction

- Court must reduce a parent’s fee award if the parent or the parent’s attorney engaged in conduct during the course of the action or proceeding that unreasonably protracted the final resolution of the controversy. 34 C.F.R. § 300.517(c)(4)(i).

Reducing Fees – Parent Protraction

- *T.B. v. Eugene Sch. Dist.*, (D. Ore. 2016)
 - Parent prevailed after successfully appealing an adverse decision
 - During the DPH process the parent’s attorney failed to engage in discussions regarding settlement, and failed to respond to school’s attorney regarding settlement
 - “Plaintiffs’ refusal to respond to the District’s settlement offers, as discussed above, led to unnecessary time spent on this matter. Good-faith negotiations and conferral before the hearing would have streamlined the process.”
 - Court reduced the fees by 10 percent

Reducing Fees – Parent Protraction

- *Hood River Cty. Sch. Dist. v. Student* (D. Ore. 2022)
 - School argued the refusal to accept the offer of settlement when the only material difference between the District’s offer and Student’s counteroffer was a few thousand dollars in reimbursement to parents and the amount of attorney’s fees was unreasonable.
 - School’s settlement offer included \$5,000 for attorney’s fees. Student’s counteroffer included \$30,000 for attorney’s fees, as well as some additional funds to compensate the parents for educational costs.
 - The parents in this case engaged in negotiations and timely and actively worked with the District before filing the due process complaint and during the administrative proceedings.

Reducing Fees – Parent Protraction

- *A.P. v. Pasadena Unif. Sch. Dist.* (C.D. Cal. 2021)
 - Parent proved a Child Find violation
 - Court found that student “essentially lost her entire ninth-grade year”
 - Parents sought \$231,831 in attorney’s fees

Reducing Fees – Parent Protraction

- *A.P. v. Pasadena Unif. Sch. Dist.* (C.D. Cal. 2021)
 - Settlement offer
 - School offered \$63,000 in tuition and reasonable attorney’s fees
 - Prospective waiver of rights to FAPE unless Student suffered a catastrophic change and became gravely injured
 - Because the court did not offer tuition reimbursement, the offer was more favorable
 - “If Plaintiffs had accepted the Offer, Student would no longer be entitled to a FAPE under the IDEA, and she would not be assessed for or receive IEP services in the future.”

Reducing Fees – Parent Protraction

- *A.P. v. Pasadena Unif. Sch. Dist.* (C.D. Cal. 2021)
 - Hourly Rates
 - Parent submitted evidence their attorney’s rates are reasonable
 - School didn’t submit evidence so court accepted the rate of \$450
 - Degree of Success
 - Parent succeeded in showing Child Find violation and receiving some financial reimbursement
 - IEP was appropriate
 - Hours expended were not proportional to the win
 - “Substantial reduction” in fees is warranted

Reducing Fees – Parent Protraction

- *A.P. v. Pasadena Unif. Sch. Dist.* (C.D. Cal. 2021)

- Protracted Litigation
 - “The Court also agrees with the District that Plaintiffs or their attorneys unreasonably protracted the litigation by demanding a higher settlement amount after the administrative hearing concluded and Plaintiffs had lost on all issues. It does not appear that Plaintiffs had any basis to demand more than two times the Offer amount after failing to prevail on a single issue in front of the ALJ.”

Reducing Fees – Parent Protraction

- *A.P. v. Pasadena Unif. Sch. Dist.* (C.D. Cal. 2021)

- Protracted Litigation
 - “The Court also agrees with the District that Plaintiffs or their attorneys unreasonably protracted the litigation by demanding a higher settlement amount after the administrative hearing concluded and Plaintiffs had lost on all issues. It does not appear that Plaintiffs had any basis to demand more than two times the Offer amount after failing to prevail on a single issue in front of the ALJ.”
 - Plaintiff’s counsel should have engaged in robust settlement negotiations after the administrative hearing.
 - Did the opposite by making a settlement offer that doubled the school’s offer prior to hearing
- Court reduced fees by 50 percent

Reducing Fees – School Protraction

- Courts reduces attorney’s fees if the court finds:

1. The parent, or the parent’s attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
2. The amount of the attorneys’ fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;
3. The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
4. The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice

- These four reductions are not mandatory if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding.

Attorney's Fees for Parents

- *I.W. v. Hardin-Jefferson I.S.D.*
 - Struggles in K-1st
 - Parent requested dyslexia testing, which didn't happen
 - Private dyslexia tutoring
 - Private evaluation indicated dyslexia
 - RTI services



Attorney's Fees for Parents

- *I.W. v. Hardin-Jefferson I.S.D.*
 - HJISD made three written settlement offers to parent which were not accepted
 - The SEHO found HJISD violated the IDEA



Attorney's Fees for Parents

- *I.W. v. Hardin-Jefferson I.S.D.*
 - SEHO ordered IDEA eligibility, an evaluation, implementation of an IEP, reimbursement for private evaluation and tutoring, and updated training to campus staff



Attorney's Fees for Parents

- *I.W. v. Hardin-Jefferson I.S.D.*
 - Parents filed a complaint in federal court seeking reimbursement of attorney's fees
 - \$101,843.44



Attorney's Fees for Parents

- *I.W. v. Hardin-Jefferson I.S.D.*
 - Capped by the 10-day settlement offer
 - Limited success
 - Unreasonable fees
 - Excessive time



Relief More Favorable Than Offer?

1. Classification of I.W. and Evaluation

Offer

- Eligible under IDEA
- Conduct an FIE
- Grant an IEE
- Peer-reviewed reading program for three years

Order

- Eligible under IDEA
- Conduct an FIE
- Implement an IEP

Relief More Favorable Than Offer?

2. Services to Be Provided

Offer

- Certified master reading teacher develop and oversee program, evaluate student
- Three years, even if no longer eligible

Order

- Some findings on the reading program, including addressing spelling needs
- Relief guaranteed for current school year

Relief More Favorable Than Offer?

3. Staff Training and Dyslexia Information

Offer

- Train all professional staff on Child Find and dyslexia
- Communication to all parents regarding dyslexia program

Order

- Updated training to elementary school professional staff on Child Find and dyslexia
- Update information on website regarding dyslexia

Relief More Favorable Than Offer?

4. Reimbursement

Offer

- \$5,000 (private evaluations, tutoring, attendance at camp)

Order

- \$1,400 (one evaluation and tutoring)

Relief More Favorable Than Offer?

5. Attorney's Fees

Offer

- \$10,000, with invitation to counteroffer

Order

- District court noted there was no counteroffer
- Invoices amounted to \$7,626 as of the date of the offer

Relief More Favorable Than Offer?

- Court said overall the SEHO's decision was not more favorable than the HJISD offer
- Parents could only recover attorneys' fees accrued subsequent to the offer if they were "substantially justified" in rejecting the offer

Substantially Justified?

- Parents argued:
 1. Referenced prior mediation
 2. Limits services ordered by the SEHO
 3. Contained vague terms
 4. Had no effect because it provided no further relief than what was required
 5. Included onerous terms related to release of claims

Substantially Justified?

- Release Language
 - Settlement offer required execution of a “full and final release”
 - Court said it is common sense any settlement would require a release
 - Confidentiality provisions are common in settlement agreements

Substantially Justified?

- Parents could not recover fees incurred after rejection.



Unreasonable Protraction

- HJISD argued parent not entitled to pre-offer fees due to unreasonable protraction
 - Parent’s refusal to consent to FIE
 - Refusal to accept settlement offer

Unreasonable Protraction

- [W]henever the court finds that—
 - The parent, or the parent’s attorney . . . unreasonably protracted the final resolution of the controversy;
 - The amount of the attorneys’ fees . . . unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys . . . ;
 - The time spent and legal services furnished were excessive; or
 - The attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint . . . ;
- The court shall reduce, accordingly, the amount of the attorneys’ fees awarded under this section.

Unreasonable Protraction

- **Failing to settle can potentially constitute unreasonable protraction**
 - *El Paso I.S.D. v. Richard R.*, 591 F.3d 417 (5th Cir. 2009)
 - EPISD agreed to provide all requested relief, including attorney’s fees
 - Parent attorney never provided fee amount, and never made a counteroffer
 - *Jason D.W. v. Houston I.S.D.*, 158 F.3d 205 (5th Cir. 1998)
 - Rejection of fees of \$10,000 which was higher than accrued fees

Amount of Reasonable Fees

- HJISD argued the fees prior to offer were unreasonable.
 - Rate was \$295/hour
- Parent submitted affidavits of other attorneys stating \$295 was reasonable
- HJISD countered
 - Rate of co-counsel was lower
 - HJISD’s expert relied on State Bar of Texas Hourly Fact Sheet

Amount of Reasonable Fees

- Court said relevant market for purposes of determining rate is the community in which district court sits
- Court used the State Bar rate sheet to assign a rate of \$250/hour

Limited Success

- After determining the reasonable hourly rate and time expended, court may adjust rate up or down based on the following factors

- | | |
|-----------------------------------|--|
| 1. Time and labor | 6. Time limitations imposed by client |
| 2. Novelty and difficulty | 7. Amount involved and result obtained |
| 3. Skill required | 8. Experience, reputation, and ability |
| 4. Preclusion of other employment | 9. Undesirability of the case |
| 5. Customary fee | 10. Nature/length of the relationship |
| | 11. Awards in similar cases |

Limited Success

- Court in *I.W.* did not reduce award on this factor because parent prevailed on most relief

Total Fees

- Parent initially requested \$101,843
- HJISD cut the award through
 - 10-day settlement offer
 - Reducing hourly rate
- Court awarded \$6,500



Attorney's Fees for Schools

- Different standard depending on party
 - Parent attorney
 - Complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or
 - Continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation
 - Parent attorney or parent
 - Request for a DPH or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Attorney's Fees for Schools

- Parent attorney
 - *El Paso v. Berry*, 400 F.App'x 947 (5th Cir. 2010)
 - Never challenged the ARD committee's findings that the student no longer qualified for compensatory speech services
 - Advised client not to accept full offers of relief
 - Refused to allow school to reevaluate student
 - "Attorney repeatedly prolonging litigation and stonewalling efforts to conclude it to the detriment of his client."
 - Court awarded \$10,000 to the school

Attorney's Fees for Schools

- Parent attorney
 - School filed claim against parent attorney after prevailing at DPH
 - School pointed to many cases where attorney and advocate were involved in denying consent for evaluation
 - Resolution session lasted 30 seconds because advocate refused to participate
 - Parent attorney never responded to settlement proposals

Attorney's Fees for Schools

- Parent attorney
 - District court cited *I.W.* noting that it wouldn't fault the parent for wanting to bypass the evaluation process in favor of hearing officer determination
 - District court also said parent requested members of ARD committee be present for the resolution session, so their minimal attendance was justified
 - Other cases are irrelevant to attorney's conduct in this case

Attorney's Fees for Schools

- *R.P. v. Prescott Unif. Sch. Dist.* (9th Cir. 2011)
 - Dist. Ct. awarded \$129,951 to school against parents and their attorney
 - Didn't incur any out-of-pocket expenses so not entitled to reimbursement
 - Anger was the improper purpose
 - 9th Circuit overturned
 - If FAPE was denied court could have developed an appropriate remedy
 - Just because parents did not prevail does not mean the case was without justification
 - So long as the claim raised is not frivolous, and the litigation is not being pursued in order to achieve an illegitimate objective (such as harassment, delay or imposing unnecessary costs on the opposing party), an award of fees is not justified.

Attorney's Fees for Schools

- *C.W. v. Capistrano Unif. Sch. Dist.* (9th Cir. 2015)
 - C.W. is eligible for IDEA due to OHI, cerebral palsy, heart issues
 - School conducted reevaluation that recommended continued eligibility, OT recommendations
 - Parent responded it was "stupid" and requested an IEE
 - School denied request for an IEE and filed a due process hearing
 - ALJ said OT evaluation was not appropriate and granted an IEE
 - Parent appealed
 - District court overturned the decision and awarded school \$94,000

Attorney's Fees for Schools

- *C.W. v. Capistrano Unif. Sch. Dist.* (9th Cir. 2015)
 - Were the claims frivolous?
 - In considering what constitutes a claim that is frivolous, unreasonable or groundless, "it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."
 - Only when the claims are wholly without merit

Attorney's Fees for Schools

- *C.W. v. Capistrano Unif. Sch. Dist.* (9th Cir. 2015)
 - Were the claims frivolous?
 1. The school filed the DPH, not the parent
 2. The ALJ conducted a thorough review of the parents claims. ALJ's careful analysis, findings of fact, and conclusions of law indicate the seriousness of the claims
 - Claims were poorly plead and argued but does not mean the claims were frivolous
 - There was *some* basis for believing the OT assessment was inappropriate

Attorney's Fees for Schools

- *C.W. v. Capistrano Unif. Sch. Dist.* (9th Cir. 2015)
 - Improper Purpose?
 - Extreme result that not even the school sought
 - "It's therefore harder for a school district to collect attorney's fees against parents than against their lawyers: Collecting against parents requires a showing of both frivolousness and an improper purpose, while collecting against their attorneys requires only a showing of frivolousness. This makes sense, since parents are not usually in the position to assess whether a claim is frivolous."
 - Non-frivolous claim is never filed for an improper purpose
 - From the start parent was only seeking a proper OT assessment

Attorney's Fees for Schools

- *Lower Kuskukwin Sch. Dist. v. Maxie* (D.C. Alaska 2020)
 - Student had number of behavioral issues and suspensions, family issues
 - Family hired an attorney who requested an evaluation
 - First due process hearing alleged failure to comply with Child Find, during which school expelled student
 - Second due process hearing challenged the discipline
 - Hearing officer dismissed DPH #2 and ruled against the parent on DPH #1
 - LKSD filed a lawsuit against Maxie and attorney seeking fees

Attorney's Fees for Schools

- *Lower Kuskukwin Sch. Dist. v. Maxie* (D.C. Alaska 2020)
 - DPH #1
 - There was at least some factual basis, even if tenuous, to support claim that he suffered from an emotional disturbance that impacted his education.
 - Noticeable increase in aggressive incidents and related suspensions starting in 2016, which then resulted in student missing school.
 - The missed school, predictably, was accompanied by a noticeable increase in the number of failing grades
 - Undisputed that student also began making comments at school about suicide and teachers expressed concern to LKSD administrators about these statements.

Attorney's Fees for Schools

- *Lower Kuskukwin Sch. Dist. v. Maxie* (D.C. Alaska 2020)
 - DPH #1
 - While the SEHO stated there was “no evidence” that the student suffered from a disability, the hearing officer’s lengthy opinion does in fact acknowledge student’s behavioral problems and suicidal ideation, and discusses evidence showing some academic decline.

Attorney's Fees for Schools

- *Lower Kuskukwin Sch. Dist. v. Maxie* (D.C. Alaska 2020)
 - DPH #2
 - There are cases where a court has refused to dismiss a claim that alleged a district violated IDEA protections by expelling a student where the claim relied only on allegations that the district had a basis of knowledge.

Attorney's Fees for Schools

- *Student v. Snowline Joint Unif. Sch. Dist.* (CA DPH 2024)
 - Parties signed a settlement agreement releasing claims through October 11, 2022.
 - Parent filed a due process hearing related to a September 2022 IEP
 - Hearing officer said the settlement agreement unambiguously waived all claims, a fact known to attorneys at the time of the hearing.
 - Hearing officer said claims were frivolous, unreasonable, and without foundation.
 - Court records indicate school did not pursue claim of attorney fees

Attorney's Fees for Schools

- *J.M. v. Oakland Unif. Sch. Dist.* (N.D. Cal. 2020)
 - School sought attorney's fees against parent and attorney
 - School said there was minimal authority in briefing
 - Court said although parent lost her ultimate issue, parent was successful in obtaining a change in educational placement

Attorney's Fees for Schools

- *Held v. Northshore Sch. Dist.* (W.D. Wash. 2015)
 - School sought attorney fees in defending a Section 504 claim
 - Court found Plaintiffs had presented evidence that showed the school may have been negligent in supervising student's Section 504 plan and that school may not have responded to parent's concerns

Attorney's Fees for Schools

- *Ashland Sch. Dist.* (Ore. Complaint Investigation 2014)
 - ODE found that the school clearly attempted to schedule an IEP meeting at a mutually agreed time and place.
 - The school sent the initial meeting notice 18 days prior to the suggested meeting date, and the Parents responded to the request 10 days later.
 - The school made many attempts to ensure parent participation once the District learned that the parents could not attend the IEP meeting
 - The school attempted to include the parents in the annual IEP meeting, as the record illustrates the District made many attempts to ensure parent participation at the IEP meeting prior to the pending annual deadline.
 - There was an express threat to the school with filing a Due Process complaint against the school, if the school held the IEP meeting as originally scheduled.

Attorney's Fees for Schools

- *Ashland Sch. Dist. (Ore. Complaint Investigation 2014)*
 - ODE said in a footnote:
 - "Additionally, the parties should note that attorney fees may be available to local education agencies and paid by parents, if a District prevails in an IDEA action that the court determines is frivolous, unreasonable, or without foundation."

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**Transitions, Transitions, and More
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presented by:

Jonathan Read

Attorney at Law

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Transitions, Transitions and More Transitions

2025 PNW Institute

Presented by: Jonathan P. Read

The Shifting Focus of FAPE

- **Early preschool** -> providing services in typical age-appropriate environment with parental involvement
- **Late preschool** -> kindergarten readiness
- **Kindergarten through beginning of high school** -> progress in the classroom
- **High school through graduation** -> post-secondary preparedness

What We'll Cover . . .

- From Early Childhood (Part C) Services to Preschool (Part B)
- From Preschool to Elementary School
- From Elementary School to Middle School or High School
- From High School to Postsecondary Activities
- Other Transitions
 - Private or nonpublic school to public school
 - Transition to new campus
 - Transition to new service provider
 - Transition from home or virtual program to school-based program
 - Transition out of or into residential placement

Ensuring a smooth transition to a new environment, whether by specific statutory obligations or otherwise as part of a school district's duty to provide FAPE, focuses on early planning, open communication, and creating a supportive environment

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Transition from Early Childhood (Part C) Services to Preschool (Part B)

According to the IDEA 2004 Joint Conference Committee Report

Smooth transition is "vital" for a child's educational success

Initial IEP team meeting should include discussion of IFSP services

Changes must be explained

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Part C Obligations Related to Smooth Transition

- Responsibility of lead agency service coordinator under Part C
- With parent consent, includes convening a conference with family and school district 90 days to 6 months before transition to preschool

(20 U.S.C. § 1437(a)(9).)

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Part B Obligations Related to Smooth Transition

- States required to have policies in place to ensure a “smooth and effective transition”
- Districts must participate in transition planning conferences arranged by Part C lead agency

(34 C.F.R. § 300.124)

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Transition Planning Overview

- Six months before third birthday, service coordinator:
 - Notifies parents that transition planning will occur
 - Notifies district of transition IFSP
 - Within 30 days, IFSP meeting scheduled
 - Must occur by two years, nine months

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Transition Planning

- IFSP documents parent communications regarding:
 - Transition to special education
 - Steps to prepare toddler for service delivery change
 - Community resources, if toddler ineligible at 3
 - Projected date of final IEP
 - Information to be provided to parents, with consent
 - Needed assessments and timelines
 - Procedure for referral to District

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Transition Plan and Transition Conference

- The lead agency must establish a transition plan in the IFSP no fewer than 90 days -- and, at the discretion of all parties, not more than nine months -- before the child's third birthday
- If the child might be eligible for preschool services under Part B, the lead agency, with the approval of the family, must also convene a conference, among the lead agency, the family, and the LEA not fewer than 90 days -- and, at the discretion of all parties, not more than nine months -- before the child's third birthday to discuss any services the toddler may receive under Part B
- The IDEA requires the district's participation in the conference

(34 C.F.R. § 303.209; 34 C.F.R. § 300.124; [Letter to Nix](#) (OSEP 2023) 83 IDELR 46)

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Notification of Pending Eligibility

- If the lead agency determines that the child is eligible for early intervention services more than 45 but less than 90 days before the child's third birthday and if the child may be eligible for preschool services under Part B, the lead agency, as soon as possible after determining the child's eligibility, must notify the SEA and LEA that the child on the child's third birthday will reach the age of eligibility for Part B services

(34 C.F.R. § 303.209)

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Evaluation

- OSEP encourages use of Part C assessments
- However, not required under the IDEA
- Disclosure of Part C assessment reports requires parent consent

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Evaluation

- Conducted within 60 days from parent consent
- Planned to meet requirement that an IEP is in place by student's third birthday

(34 C.F.R. § 300.101(b)(1).)

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Development of IEP

- If an evaluation indicates that the child is eligible for services, the district must develop an IEP before the child's third birthday
- If child's third birthday occurs during the summer, the IEP team determines the date when services will begin
- Part C service coordinator must be invited to initial IEP team meeting on parent's request
- IEP team must consider IFSP when developing IEP

(34 C.F.R. § 300.101(b)(3), 300.321, 300.323, 303-211.)

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Development of IEP

- Part C regulations allow states to develop policies under which parents of children who are eligible for Part B services may elect to continue Part C IFSP services after the child turns 3 until the child enters, or is eligible under state law to enter, kindergarten or elementary school
 - Consistent with State policy
 - Agreed to by district and parent
 - Parents provided with detailed description of differences
 - Written informed consent from parent
 - Developed in accordance with IEP procedures

(34 C.F.R. § 300.101(b)(1).)

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Conditions for Adoption of IFSP as IEP

- IFSP contains IFSP content (may include methodology)
- Includes “natural environments” statement
- Includes educational component that promotes school readiness
- Incorporates pre-literacy, language, and numeracy skills

(34 C.F.R. § 300.323(b))

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Cases on Transition to Preschool

- The reported cases in this area typically involve school districts’ alleged failure to develop IEP or provide appropriate services by child’s third birthday
- Absent lack of cooperation by parents, districts are provided very little leeway when IEP and/or services are late

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Case Example

Facts and Decision

- Child received developmental therapy, occupational therapy, and speech therapy in an early intervention program
- Child turned 3 years old on September 8
- On the day of the scheduled evaluation, district learned that student would be undergoing ear surgery and encouraged parents to delay the evaluation until after surgery
- As a result, the district didn't complete its evaluation until late September, developed the IEP on October 20, and set an implementation date of October 31, almost two months after child's third birthday
- Delay violated IDEA and the district was ordered to provide compensatory services to make up for educational opportunity the student lost

(Portage Township Schs., (SEA IN 2017) 117 LRP 52413)

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Case Example

Facts and Decision

- District completed IEP for child with developmental delays shortly before his third birthday
- But district began providing services one month later, or 26 days after Part C services terminated
- Parent claimed denial of FAPE
- District court reversed IHO's ruling in favor of district
- District's failure to provide any services to the child until 26 days after the termination of his Part C services amounted to a material implementation failure
- Failure was not a minor discrepancy under 9th Circuit's standard as set forth in Van Duyn v. Baker School District

(Shaun M. v. Hamamoto (D. Hawai'i 2009) 53 IDELR 185)

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Practical Pointers for School Staff

- Attend transitional IFSP meeting convened by lead agency
- Communicate with parents about differences between early intervention and preschool services
- Convene IEP meeting as early as possible, even if lead agency never scheduled transition meeting
- Include appropriate team members – general ed teacher, Part C personnel, as appropriate
- Make sure to discuss all necessary steps to ensure smooth transition to preschool
- Meet all timelines!

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Transition from Preschool to Elementary School

Kindergarten Readiness

- As the child gets ready to move from late preschool years (whether in a public or private preschool) to kindergarten, the focus of FAPE shifts to readiness to participate in the elementary school setting
- For example, California law states that “as the preschool child approaches the age to enter an elementary school environment, the child’s preparation is to be geared toward a readiness for kindergarten and later school success”
- Properly addressing school readiness needs can be important for IEP teams
- Many states have laws requiring that the child be reassessed to determine need for continuing special education

(See e.g. Cal. Ed. Code, § 56441.1)

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Case Example

Facts

- Child with autism had initially enrolled in district’s preschool, but then enrolled in private setting where she received 40 hours per week of ABA services
- Parent claimed district denied the child FAPE by offering only two hours of one-to-one ABA therapy per week, rather than the 40 hours recommended by the child’s private ABA provider
- Parent believed that her daughter needed significant supports if she was going to successfully transition to kindergarten, entering public school for the first time

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Case Example

Decision

- State ED denied the parent's claim
- District took several significant steps to facilitate the student's smooth transition into a public school classroom
- District developed an IEP that placed the student in a significant needs classroom for the majority of her day to help her develop school readiness skills
- District also worked with the child's private ABA provider and agreed to allow her to provide the child's ABA services at school for two hours per week
- IEP team also added several accommodations to the IEP after hearing the parent's concerns, including personal care services, availability of calming spaces, use of picture schedules, and use of social stories

(Adams 12 Five Star Sch., (SEA CO 2025) 125 LRP 7954)

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Practical Pointers for School Staff

- Consider structure of kindergarten (including TK) and grade level standards
- Assess as required by state law and/or consider whether additional assessments are needed to plan for kindergarten
- Discuss placement and service levels appropriate for kindergarten
- Evaluate any specific transition needs (e.g., consistent implementation of BIP, health plan, toileting plan, etc.)
- Ensure that IEP provides for monitoring progress related to placement
- Consider whether exit from special education is appropriate

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Transition from Elementary School to Middle School

Moving On from Elementary School

- As the student progresses through elementary school, the focus of FAPE shifts to progress in the classroom
- Be sensitive to changing needs relative to peers
- When the student is matriculating from the student's elementary school, it often is to a bigger campus with more students, accompanied by class changes and other challenges
- Students with behavioral, emotional or other challenges may need assistance to aid with this transition

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Case Example

Facts

- Parents requested a one-to-one aide to accompany student with autism throughout the school day for the first three months of middle school
- Parents provided the district with letters from two of the student's doctors, each expressing concern about the student's transition and recommending one-to-one support
- District's IEP offered three months of a shared aide for six hours per day to support the student's transition from elementary school to middle school
- Parents challenged the district's proposed IEP

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Case Example

Decision

- IHO found in favor of district
- District staff credibly detailed global transition opportunities for all students during the transition to middle school, as well as what would be done specifically for this student
- Student-specific transition opportunities with a shared aide were sufficient to meet the student's needs
- Parents and the student's doctors did not provide any specific support for the need for a one-to-one aide, which the IHO noted was a more restrictive level of service
- Also, district's informal, unwritten global plan included meetings with the school counselor and teachers, dividing students into teams with shared support, lunch on campus, social and team-building events, and tours of the school

(In re: Student with a Disability (SEA NH 2024) 124 LRP 15436)

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Practical Pointers

- Convene IEP team to discuss transition when warranted
- Invited representatives from new school where student will be attending
- To determine if student requires transition plan, consider impact of larger campus, increased difficulty of curriculum, social skills needs, safety concerns
- Consider whether student should meet staff prior to starting school
- Consider whether to reconvene within a certain amount of time after commencement of the new school year

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Transition from Elementary School District to High School District

A small number of states, including California, Arizona, Illinois, Montana and New Jersey, allow for separate elementary school districts (typically K-8) to operate independently from high school districts (typically 9-12) within the same geographic region

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Transition from Elementary School District to High School District

- Some of those states have rules governing students transitioning from an elementary school district to a high school district. For example, California requires:
 - Elementary school district must invite high school district personnel to collaborate in determining appropriate high school district placement
 - If high school district representative does not participate in collaborative IEP, elementary school district must notify high school district that student has needs requiring special education
 - For each special education student who enrolls in high school district, high school district must make interim placement or immediately convene an IEP team meeting

(Cal. Code Regs., tit. 5, § 3024)

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Transition from High School to Postsecondary Services

A Little History

- **IDEA 1990** required planning for post-school transition
- **IDEA 1997** was intended to prepare students with disabilities for employment and independent living
- **IDEA 2004** is intended to ensure that all children with disabilities have available to them a FAPE that prepares them for further education, employment, and independent living

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Applicability and Timelines

- Students who will turn 16 during the time period covered by their IEP
- Transition goals, planning and/or services may be discussed for students younger than 16 when appropriate
- Individualized transition plan (ITP) must appear in IEP not later than first IEP to be in effect when Student turns 16 (or earlier, under state law) and updated annually thereafter

(34 C.F.R. § 300.320)

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Substantive Requirements

- ITP must include
 - Measurable postsecondary goals based on age-appropriate transition assessments related to
 - Training
 - Education
 - Employment
 - Independent living skills, where appropriate
 - Transition services needed to assist the student in reaching those goals

(34 C.F.R. § 300.320)

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Substantive Requirements: Assessments

- As with all other assessments, districts cannot rely on single test or assessment instrument to identify student's transition needs
- Assessments may include transition and personality inventories, interest surveys, aptitude evaluations, and student interviews
- Other current assessment data also may be relevant
- OSEP: Parental consent may not be required in all cases prior to conducting assessment to develop postsecondary goals

(Letter to Olex (OSEP 2019) 74 IDELR 22)

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Substantive Requirements: Goals

- Transition goals are different from annual goals in that they must reflect student's desires and plans, whereas annual goals set forth standards to be met while at school in upcoming year
- Transition goals also can address performance after graduation, which will not be measured by secondary school
 - Remember that IEP must include measurable postsecondary goals in areas of training, education, employment, and, where appropriate, independent living skills

(34 C.F.R. § 300.320)

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Substantive Requirements: Services

- Transition services = Coordinated set of activities that:
 - Is designed within *results-oriented* process focused on improving academic and functional achievement to facilitate movement from school to post-school activities
 - Is based on student's individual needs, taking into account strengths, preferences and interests
 - Includes instruction, related services, community experiences, development of employment and other post-school adult living objectives

(34 C.F.R. § 300.43)

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Substantive Requirements: Services

- May include special education or related services
- IEP must identify:
 - Date student will begin receiving service(s)
 - Frequency that service(s) will be provided
 - Location where service(s) will be provided
 - Length of time that service(s) will continue

(34 C.F.R. § 300.320)

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Procedural Requirements

- Invite student to IEP meeting; if student does not attend, ensure preferences and interests are considered
- Invite representative of participating agency responsible for providing/paying for services; parents must consent in writing
- IEP meeting notice to parents must:
 - Include a statement that the purpose of the meeting is to consider postsecondary goals and transition services
 - Indicate that student will be invited
 - Identify agency (where applicable) that will be invited to send representative

(34 C.F.R. § 300.321; 34 C.F.R. § 300.322)

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Cases

Although a few cases address procedural issues of transition planning and services (e.g., failure to invite student to IEP meeting), most focus on substantive adequacy of district's transition planning . . .

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Case Example #1

Facts

- IEP for student with autism and significant behavioral challenges provided that the student would engage in work experiences at school and in the community to achieve his goal of obtaining employment after graduation
- District hiring a behavioral consulting company that worked with the student 22 hours per week
- District also sought to provide the student with work experiences in the cafeteria
- When the student's behavior made doing so impracticable, the district gave the student work tasks in his classroom, such as cleaning his own desk
- Parents alleged district materially failed to implement student's IEP

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Case Example #1

Decision

- State Board of Education rejected parents' claim
- Despite the district's significant efforts to address the student's eloping and other behavioral concerns, those behaviors continued to stand in the way of the student working in community settings
- "Despite the District's significant efforts, the Student has not progressed in [a] manner that will guarantee his success in communities outside of his classroom; however, the District did work to ensure the Student had access to these experiences and could work on his goal, but at the school/in the school setting"

(Central Kitsap Sch. Dist., (SEA WA 2023) 123 LRP 17959)

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Case Example #2

Facts:

- District conducted transition assessment in November 2021 for 15-year-old student with chromosomal abnormality
 - Student expressed interest in career in digital media arts, particularly career in anime production
- In February 2022, IEP team developed annual IEP and ITP
 - ITP contained two postsecondary goals (researching careers in the digital media industry and working on interviewing skills) that were based on assessment and linked to annual IEP goal in area of career interest
- February 2023 ITP was similar to that of February 2022 with slight modifications in postsecondary goals

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Case Example #2

Decision:

- ALJ rejected parent's challenges to ITPs and to IEP career interest goal
 - Annual IEP goal in career interest was measurable, appropriate and achievable in 12-month period, requiring student to understand qualifications, duties, education, market outlook, and salaries of careers in digital media industry
 - ITPs were based on student's career interests, developed with Student's participation, and properly aligned with annual career interest goal in IEP
 - ITP also offered student sufficient time and services to work on her postsecondary goals under teacher supervision
 - Testimony of parent's expert who objected to ITPs was "disjointed and confusing" and was not based on legally mandated requisites for ITPs

(Student v. Perris Union High School Dist., (SEA CA 2024) 124 LRP 7255)

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Case Example #3

Facts:

- High school student with severe autism was unable to read or use a computer independently
- Student also was unable to recognize street signs or grocery signs, count change, or tell time independently
- District's transition assessments provided the student with pictures of various occupations and job-related tasks
- IEP team developed postsecondary goals that called for student to explore requirements for two different vocational programs, research job duties for maintenance workers, and research assisted living facilities
- Parent claimed transition plan denied student FAPE

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Case Example #3

Decision:

- Court found denial of FAPE
- Court questioned whether transition assessments accurately identified the student's interests and career goals
- Even if the assessments were appropriate, the resulting transition plans fell short of IDEA requirements
- It was unclear how the student could begin exploring vocational programs or researching job duties with only the one-hour lesson in computer skills that his transition plan offered
- "Surely a goal or service cannot be 'appropriate' when a student wholly lacks the skills necessary to even begin using that service or making progress toward that goal"

(T.F.v. District of Columbia (D.D.C. 2025) 125 LRP 9183)

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Case Example #4

Facts

- District appropriately postponed the high school graduation of student with autism and ADHD due to concerns about deficits in his independent living skills
- To address the student's deficits, the district conducted multiple transition assessments, considered an independent educational evaluation, and ultimately revised the student's transition services
- During the following school year (2022-2023), the district provided the student additional services to improve his self-advocacy, hygiene, self-regulation, executive functioning, and communication skills; and the student also participated in job counseling, job training, and a paid internship
- Parents claimed district's transition services were insufficient

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Case Example #4

Decision

- IHO found in favor of the district
- By the spring of 2023, the student was receiving good grades in his college courses, was independently navigating his college campuses, and was succeeding in his paid internship
- The student also began demonstrating more appropriate self-regulation and communication skills and had mastered all but one transition goal
- The student's significant progress, along with his completion of all local graduation requirements, demonstrated that the district developed an appropriate IEP and appropriate transition planning/programming
- IHO declined to extend the student's IDEA eligibility for another year

(Boston Pub. Schs. (SEA MA 2024) 124 LRP 36293)

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Case Example #5

Facts

- IEP for student with multiple disabilities, including cognitive and orthopedic impairments, included transition goals focused on employment skills and vocational rehabilitation services, which were to begin when the student turned 16
- IEP also specified goals for money handling, kitchen safety, and food preparation skills aligned with the student's interest in restaurant work
- The district, however, failed to initiate vocational rehabilitation services after the student's 16th birthday and its staff did not discover this oversight until several months later, when preparing for the next IEP meeting
- Though the district made late attempts to coordinate with the Division of Rehabilitation Services (DRS), no services were provided during the school year

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Case Example #5

Decision

- State ED determined district's inaction with respect to student's transition services resulted in a denial of FAPE
- District should have followed up when services did not begin and should have understood DRS's qualification process timing
- District maintained responsibility for ensuring implementation of transition services, despite DRS staffing changes
- District's failure to coordinate services or arrange alternatives amounted to a substantive FAPE violation
- State ED ordered mandatory staff training on transition requirements and a determination as to whether compensatory education was necessary

(In re: Student with a Disability (SEA SD 2024) 125 LRP 2163)

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Practical Pointers for School Staff

- Timely consider development of ITP; it must be in effect when student turns 16
- Don't forget: Student must be invited to IEP meeting at which transition is to be discussed
- Encourage and foster parental participation and help families sort through available agencies and options
- ITP must account for the student's strengths, preferences and interests

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Practical Pointers (cont'd)

- Identify specific transition needs (e.g., driver license, job application, college application; pay bills, etc.) and design a statement accurately summarizing those needs
- State transition goals completely and carefully, but realistically, and describe progress student has made toward achieving his/her goals
- Design clear and concise statement of transition services

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Other Transitions

Other Transitions

Even in absence of statute or regulation imposing affirmative duty to create transition plan, student's unique needs might require IEP team to address transitioning in certain other circumstances . . .

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Transition from Private School to Public School

- If district has placed student in private or nonpublic school, some states require that IEP team must meet annually to consider whether student should be transitioned back to public school
- Any plan addressing transition back to public school should be part of student's IEP
- Generally, any such transition plan should include description of activities provided to integrate student back into public school's program (indicate nature of each activity and time spent on activity each day or week)

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Transition from Private School to Public School

Practical Pointers:

- When discussing transition from private on nonpublic school to a public school general education environment, consider student's needs for:
 - Social integration and supports (Are there general education activities that can assist with transition?)
 - Academic integration and supports (Did NPS use different curriculum? Does student require support to access new curriculum?)
 - Medical support (Will school nurse or other staff need to be assigned to address student's medical needs?)

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Transition to New Campus Within District

Practical Pointers:

- Consider:
 - Staff and campus familiarity to student
 - Safety issues
 - Appropriateness of behavior plan in new setting
 - Increasing difficulty of curriculum
 - Peer pressure issues (larger campus with older students)
 - Increasing opportunities for problem behavior to arise

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Transition to New Service Provider

Practical Pointers:

- Consider:
 - Student's difficulty generalizing
 - Is overlap period between providers appropriate?
 - Is consultation from former provider appropriate?
 - Does change in providers mean a change in locations?
 - If student receives group services, will peer group change when provider changes?

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Transition from Home or Virtual Program to School-Based Program

Practical Pointers:

- Consider:
 - Length of transition and who should be involved to facilitate it
 - Student's ability to independently navigate campus
 - Student's familiarity with school rules (potential behavior issues)
 - Safety concerns
 - Transportation issues

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Transition Out Of or Into Residential Placement

Practical Pointers:

- Consider:
 - Does student have skills to be successful in new environment?
 - Does student require a step down placement
 - Are staff members familiar with student's behavior plan and how to implement it?
 - Does student require social or emotional supports
 - What system is in place for monitoring student's transition into new educational setting?

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Take Aways . . .

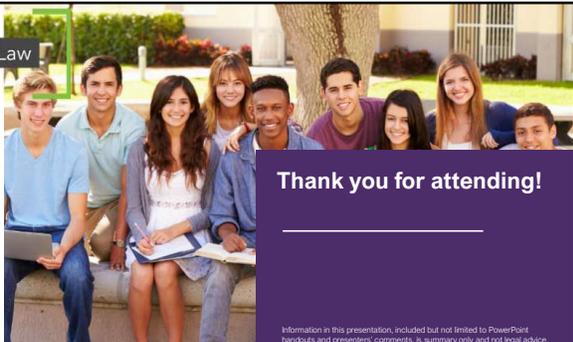
- There are numerous types of transitions and different laws applicable to each, but sometimes there are not explicit applicable laws
- Addressing and solving transition problems early is essential because student's success in a new environment depends on appropriate and properly implemented IEP
- Need for transition planning depends not only on legal requirements, but on each student's unique needs

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Questions?

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Thank you for attending!

Information in this presentation, included but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.



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PRE-CONFERENCE MINI-COURSE H

**ABA Therapy and Medical Support and
Parent Training, Oh My! Understanding
Related Services Under IDEA**

presented by:

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Salem, OR

sponsored by:



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Understanding Related Services
Under the IDEA

ABA Therapy and Medical Support and Parent Training, Oh My!

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October 27, 2025



ghrlawyers.com



Understanding Related Services

Topics for Today:

- ▶ What are related services?
- ▶ Medical Support
- ▶ Parent Training
- ▶ ABA Therapy (and other specialized therapies)
- ▶ Transportation
- ▶ Recreation
- ▶ How to respond to atypical related services requests




What are related services?



- 34 CFR 300.34
- (a) General. Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.



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Specifically Described Related Services

- Some related services are specifically listed and defined in the definition
- They are:
 - Transportation
 - Speech-language pathology
 - Audiology
 - Interpreting services
 - Psychological services
 - Physical therapy
 - Occupational therapy
 - Recreation, including therapeutic recreation
 - Counseling services
 - Orientation and mobility services
 - Medical services for diagnostic or evaluation purposes
 - School health services
 - School nurse services
 - Social work services in schools
 - Parent counseling and training



Understanding Related Services

Where we will focus today:

- **Transportation**
- Speech-language pathology
- Audiology
- Interpreting services
- Psychological services
- Physical therapy
- Occupational therapy
- **Recreation, including therapeutic recreation**
- Counseling services
- Orientation and mobility services
- **Medical services for diagnostic or evaluation purposes**
- **School health services**
- **School nurse services**
- **Social work services in schools**
- **Parent counseling and training**
- **And...Other atypical requests for related services ("developmental, corrective, and other supportive services")**

What related services are NOT: 

- 34 CFR 300.34
- (b) Exceptions; services that apply to children with surgically implanted devices, including cochlear implants
 - (1) Does not include the device itself if surgically implanted, the optimization of said device's functioning, maintenance of the device, or replacement of the device
 - (2) Nothing limits:
 - The right of a child with a surgically implanted device to receive necessary related services
 - The responsibility of the public agency to appropriately monitor and maintain medical devices needed for child's health and safety while child is transported to or from school or is at school; or
 - Routine checking of the external component of a surgically implanted device to ensure it is functioning properly

Medical Services and Support 

Medical Services and Support 

- 34 CFR 300.34(5): Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services
- 34 CFR 300.34(13): School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP.
 - School nurse services are services provided by a qualified school nurse.
 - School health services are services that may be provided by either a qualified school nurse or other qualified person.



Background Cases Medical Services and Support

- *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984).
- *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66 (1999).



Tatro Revisited

- 8-year-old girl with spina bifida
- Required catheterization every 3-4 hours via clean intermittent catheterization (CIC)
- Federal District Court – Northern District of TX denied parents' request for an injunction requiring CIC at school
- Fifth Circuit Court of Appeals reversed – held CIC is a “related service” and not subject to exclusion as a “medical service”
- District appealed to SCOTUS



Tatro Revisited

- CIC involved insertion of a catheter into the urethra to drain the bladder
- Described by the Court as “a simple [procedure] that may be performed in a few minutes by a layperson with less than an hour’s training”
- Student’s parents, babysitter, and teenage brother were all qualified to administer CIC
- Student would eventually be able to perform the procedure herself

Tatro Revisited



- Two questions before the Court:
 - Is CIC a “supportive service ... required to assist [student] to benefit from special education”
 - Without CIC services available during the school day, student could not attend school and thereby “benefit from special education”
 - Court affirmed that CIC “fall[s] squarely within the definition of ‘supportive service’”
 - Whether CIC is excluded from the definition as “medical service” serving purposes other than diagnosis or evaluation
 - Second question was the more difficult question

Tatro Revisited



- Whether CIC is excluded from the definition as “medical service” serving purposes other than diagnosis or evaluation
- Medical services are defined as “services provided by a licensed physician.” Services of a school nurse are not subject to exclusion as a “medical service” because explicitly listed as a related service, but services of a physician are excludable as such
- A procedure that is in accordance with a physician’s order does not automatically exclude it as a medical service.
- Only those services necessary to aid a student with disabilities to benefit from special education must be provided, regardless how easily a school nurse or layperson could provide them
- School nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician
- District was not asked to provide equipment, only the services of a qualified person at the school
- CIC is not excludable and should be included as a related service

Garret F. Revisited



- Student paralyzed from the neck down
- Depended on a ventilator for life support
- Parent asked district to pay for the health care services the student needed to attend school
- District argued that 1:1 nursing was not required under the definition of related services
- ALJ held that continuous nursing services were required
- District Court and 8th Circuit Court of Appeals (Iowa) both held that services can be provided by a nurse or qualified layperson and are not subject to medical services exclusion
- District appealed to SCOTUS

Garret F. Revisited



- SCOTUS held district required to provide nursing services necessary for student to remain in school – affirming *Tatro*
- Text of “related services” definition was broad and encompassed any support services that “may be required to assist a child with a disability to benefit from special education”
- Student’s necessary in-school care
 - Did not demand training, knowledge, and judgment of a licensed physician
 - Was no more medical than the care sought in *Tatro*
- A rule limiting the medical services exclusion to physician services was unquestionably reasonable and generally workable
- IDEA required schools to hire specially trained personnel to meet disabled student needs

Garret F. Revisited



- SCOTUS explicitly endorsed the bright-line rule between services requiring to be provided by physician and other services
- “[M]edical services’ ... does not embrace all forms of care that might loosely be described as ‘medical’ in other contexts.”
- “While more extensive, the in-school services Garret needs are no more ‘medical’ than was the care sought in *Tatro*”
- Drawing the line at services that must be provided by a physician is more reasonable and workable than a multi-factor test proposed by the district
- Declined to adopt any cost-based standard as the sole test for determining scope of medical services

What qualifies as a medical service?



- **And when do you have to include a medical service in the IEP?**
- *In re: Student with a Disability*, 123 LRP 27295 (SEA ND, Aug. 30, 2023)
- Middle schooler with primary disability of VI
- Medical dx of ASD, ODD, OCD
- Student was able to navigate the school to get to all classes as well as lunch and before/after school times
- VI teacher was student’s main support
- Was performing well in classes, and in at least one class, was ahead of the rest of the class in points
- Student was a good self-advocate and at times refused support



What qualifies as a medical service?

SEA ND – 8.30.23

- Student had Aniridia, congenital cataracts, and glaucoma
- Took daily steroid eye drops for glaucoma
- Also used an OTC eye drop for dry eyes, because they did not produce their own tears
- September 15, 2022 IEP notes the student was using 6-8 eye drops per day and "will leave two more bottles of eye drops to keep in the resource room ... and will keep another bottle in [student's] locker or backpack or both"
- Parent had asked if student could keep a few bottles of eye drops on hand to have ready access to them at school
- No other mention of eye drops in the IEP



What qualifies as a medical service?

SEA ND – 8.30.23

- IEP team understood student would self-administer the OTC eye drops as necessary
- No doctor's recommendation or instructions regarding the eye drops was provided to the school team
- IEP team was told that student knew when to use them and the parent would replace the eye drops in the student's backpack
- VI teacher and special education teacher would often check in with the student about whether they should be using the eye drops and the student would often say they didn't need them or had already taken them



What qualifies as a medical service?

SEA ND – 8.30.23

- March 31, 2023 – after parent found full bottles of eye drops in the student's backpack, the parent was upset that student had not been routinely using the eye drops at school
- School instituted school's medication administration policy and student was required to present to the school secretary at the appointed time to ensure the student used eye drops
- School staff put procedures in place to ensure student would report to the office to take eye drops
- Student didn't like being called to the office and was upset by the change
- Parent ultimately filed a state complaint



What qualifies as a medical service?

SEA ND – 8.30.23

- "If a student must take medication during the school day in order to participate effectively in the educational program, the administration of medication is a related service under the IDEA"
 - Practically – where does this live?
 - Does a Health Management Plan count as inclusion as a "related service" under the IDEA?
- Determination of whether student requires eye drops during the school day in order to benefit from education and whether school staff must administer eye drops is made by the IEP team
- IEP does not provide for supervised administration of eye drops and no school staff had the understanding that they were to do anything with administering the eye drops
- Found no denial of FAPE for failure to provide services that were not in the IEP
- No denial of FAPE for failing to include the eye drop administration as a related service because it was understood by all that the student would self-administer the eye drops
- NOW: The school is on notice of the student's struggles with self-administering consistently and must convene an IEP meeting to consider and document any health-related needs requiring staff to assist with administration of eye drops



Who is qualified to provide a medical service?

- *Snoqualmie Valley Sch. Dist.*, 123 LRP 17949 (SEA WA, Mar. 22, 2023)
- Addresses two questions:
 - Who gets to decide the qualified persons to perform a necessary medical service?
 - What do you do when you can't fill a position with an ideal candidate?



Who is qualified to provide a medical service?

Snoqualmie Valley – 3.22.23

- Student needed a variety of medical services throughout the day, including two-person lifts, multiple changes, and planned venting sessions over the course of a full day
- Associate director of student services had confirmed that the student needed a "medical assistant"
- Services were typically completed by combination of four staff – the special education teacher, two paraeducators, and the nurse
- Parent questioned the staffing in the classroom and whether the student was receiving her services
- Teacher confirmed via email that "someone is always with her or her small group" and noted they should discuss health needs and planning with the nurse



Snoqualmie Valley – 3.22.23

Who is qualified to provide a medical service?

- Parent individually and through attorney requested 1:1 support for the student
- Parents proposed to amend the IEP to require a “1:1 nurse or medically trained paraeducator”
- Note from doctor included: “Please consider providing [the Student] with 1:1 support in the school setting to ensure her continued safety and access to the appropriate medical care for her various conditions. If possible, the ... office would like to advocate that her 1:1 staff be either a nurse or someone with medical training who can assess her throughout the day”
- October 4, 2022: District agreed with the proposal to require a “1:1 medical professional” throughout the school day



Snoqualmie Valley – 3.22.23

Who is qualified to provide a medical service?

- Parent’s attorney emailed that “the parent would prefer a nurse or medical assistant, or anyone who can take vitals ... and interpret them as needed ...It sounds like that is the intent.”
- District’s attorney responded: “The District is attempting to staff the 1:1 as indicated previously. The ‘medically trained’ individual may be a licensed individual or a trained [instructional assistant] who can do whatever does not require a nursing license, including taking vitals. Anything that cannot be delegated will be done by a nurse, either the School Nurse, or a nurse hired by the District as the 1:1.”
- District continued to have staffing issues for the position but could clearly document ongoing efforts to fill the position from May 2022 to February 2023
 - Included internal emails, recruiting staff, and how to utilize existing staff
 - Included communications with a staffing agency
 - Included information on candidate who filled the position but ultimately resigned



Snoqualmie Valley – 3.22.23

Who is qualified to provide a medical service?

- February 7, 2023 – met for annual IEP
- Did not change the “1:1 medically trained professional” support in the IEP
- Parent filed a complaint for lack of a specifically medically trained professional
- District stated that, “despite difficulties in contracting a medically trained staff member, the Student’s 1:1 services have been provided by the school nurse, case manager, and trained programmatic paraeducators.”
- The District also stated that the Student’s health plans have been fully implemented and that “all staff that work 1:1 with Student have been trained by the school nurse and/or Student’s physical therapist.”
- District provided
 - Documentation of Student’s schedule, which included her SDI and health services
 - A log detailing notes and services provided by the nurse
- District contracted with an outside agency to ensure the student’s classroom was fully staffed and student’s 1:1 needs were met



Snoqualmie Valley – 3.22.23

Who is qualified to provide a medical service?

- SEA found the IEP was not implemented entirely as written as it relates to the provision of a “medical professional”
- Question becomes: whether there was material impact on the Student’s access to a FAPE
- District staff and contracted agency staff worked together to ensure 1:1 support and health related services were implemented
- At least some of the 1:1 support was by the school nurse, even if not 100% of the time
- Progress reporting indicated Student made sufficient progress on several goals, mastered two goals, and made limited progress on one math goal
- Other related services were provided in accordance with the IEP



Snoqualmie Valley – 3.22.23

Who is qualified to provide a medical service?

- “While [SEA] understands the Parent’s position that the IEP was specifically amended to include a “medical professional”, here, taken together, it appears the Student’s access to FAPE was not negatively impacted despite the IEP not being implemented as written.”
- “The Student was largely able to access her specially designed instruction and related services, received services from the nurse, and made progress.”
- “Given this, OSPI finds no denial of FAPE and that no Student specific corrective actions are warranted.”
- “The District will be required to continue its efforts to hire for the position and provide [SEA] a monthly update documenting its diligent efforts to hire.”



Who is qualified to provide a medical service?

- Takeaways:
 - Documentation is key
 - Clarity of language in the IEP
 - Ultimately, the parent was not the only voice saying who could provide the services – it was up to the IEP team all along
- Q: Now that we know the student has been provided a FAPE without the medical professional 1:1 all the time, do they really need it?

What level of care is necessary?



- Even when the parties agree that medical support is necessary, what level of care is required?
 - Registered Nurse?
 - Medical Assistant?
 - Staff trained by delegation?
- And who decides what level of care is required?
- *San Francisco Unified Sch. Dist., 125 LRP 4084 (SEA CA, Jan. 16, 2025)*

What level of care is necessary?



San Francisco
- 1.16.25

- 9-year-old third-grade student with congenital central hypoventilation syndrome (CCHS)
- Student had a tracheostomy and required ventilation and CO2 and oxygenation monitoring during the school day
- When congested, also required tracheostomy suctioning
- Neither party disputed student's need for nursing services in the IEP
- Dispute was over the level of care required:
 - Parent believed an RN was required
 - District believed LPN was sufficient

What level of care is necessary?



San Francisco
- 1.16.25

- District provided an LPN to ensure all medical services were implemented as dictated by the IEP
- Importantly, all nurses assigned to student's care were practicing within the licensed scope
- Student's expert at hearing did not distinguish between licensure training or requirements for LPN v RN
 - Instead described what might be ideal, i.e., experience changing a tracheostomy on a live patient
 - But also not required by the state's licensure rules for an LPN to perform the procedure
 - Student had never required a live tracheostomy change during the school day
 - Played soccer and video games with his peers
- Student failed to establish a higher standard was required than what is appropriate for licensure under state law



What level of care is necessary?

San Francisco

- 1.16.25

- Student also argued he was denied a FAPE when his nurse took breaks during the day and he was left unattended
 - And other times when the nurse was absent and no substitute nurses were available to allow Student to attend school
- Assigned nurse left Student unattended during the day to eat lunch. Student was observed sitting alone during an outdoor activity due to nurse's absence
- Result: Yes, this was a failure to implement the Student's IEP when nurse left student unattended or was absent without a substitute
- Takeaway: If a student has this need, ensure adequate staffing or plan delegation (if possible) for times when you have to provide necessary breaks to staff



What level of care is necessary?

San Francisco

- 1.16.25

- One more interesting holding:
- Parents claimed they were denied meaningful participation by never receiving a copy of the implemented nursing guidelines related to Student's health care services
- Because parents had expressed their concerns about the level of care for Student and this was a central disagreement between the parties, the ALJ held that failure to provide those guidelines impeded Parents' abilities to fully participate in development of IEP
- Takeaway: Provide as much information as possible to parents if they disagree with the type or level of services to be provided



Parent Counseling and Training

Parent Training and Counseling



- 34 CFR 300.34(8)
 - (i) Parent counseling and training means assisting parents in understanding the special needs of their child;
 - (ii) Providing parents with information about child development; and
 - (iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP

When is parent counseling or training required?



- *Folsom-Cordova Unified Sch. Dist., 125 LRP 7239 (SEA CA, Feb. 18, 2025)*
- Student alleged they did not receive a FAPE because parents were not trained in behavior and speech and language
- Student claimed she had toileting, crying, and repetitive motions that required behavior intervention services
- Also claimed that parents needed training to respond to Student's crying and difficulty with expression to enable parents to "better help her with her schooling"

When is parent counseling or training required?



Folsom-Cordova
- 2.18.25

- At no point had parents requested training
- Parents also did not specify any aspect of Student's speech or language on which they needed training
- Although Student had claimed her crying, toileting, and behavioral needs rose to the level of impeding her education, Student was unable to provide sufficient evidence to provide that her behaviors were of such frequency or intensity to meet that standard
- Student's behavior needs were supported or accommodated appropriately through other means
- Without these problem behaviors, no behavior necessitated parent training
- Student's progress in speech and language goals despite parents not being trained helped prove that no training for parents was required

When is parent counseling or training required?



- *Perris Union High Sch. Dist.*, 125 LRP 4086 (SEA CA, Jan. 3, 2025)
- Student claimed denial of FAPE for failure to offer parent training in autism, communication skills, or behavior
- No evidence to show what training parents needed or why it was necessary
- Parents never requested training
- Parents did not attend any of the parent trainings offered 4x per year by the student's nonpublic school for autism
- Parents' decision not to attend or request training, along with the fact that no one on the IEP team ever recommended training, demonstrated that parents did not require training in order for student to receive a FAPE

When is parent counseling or training required?



- *Santa Fe Pub. Sch.*, 125 LRP 7778 (SEA NM, Nov. 12, 2024)
- Student with OHI, ADHD, disruptive impulse-control disorder, and sensory processing delay
- Also identified as gifted
- Experienced escalating behavior problems culminating in suspension after disruptive and aggressive incidents
- An IEP for the student required ABA therapy (coming up soon!)
 - Started in summer 2022
- Part of the student's ABA therapy included BCBA parent training
- BCBA met with the parent for approximately 1 hour per week to discuss student's behaviors, answer parent's questions about behaviors, and recommend behavior strategies to use with the student
- Parent training stopped in the spring of 2023 until new BIP was developed
- But after new BIP was updated, the IEP and BIP did not provide for parent training

When is parent counseling or training required?



Santa Fe – 11.12.24

- District was found to have denied Student a FAPE for a variety of reasons
- ALJ ordered parent counseling and training specifically to be offered "during non-work hours by qualified School District staff disciplined in behavior, consistent with parent schedules"
- District argued that the parent had engaged in "obstructionism"
 - ALJ first found that the parents had not engaged in obstructionist behavior
 - Then found that the district's argument demonstrated why parent training was necessary if parent's activities did, indeed, contribute to the student's misbehavior at school
- Takeaways:
 - Follow through on plans to engage in a service after another plan is created or implemented (in this case, parent training after the new BIP)
 - Be careful with pointing fingers at the parents as obstructionist – ensure you can back that up with objective evidence, not subjective testimony only



What level of parent counseling or training is sufficient?

- Does parent have power to determine what parent training is necessary?
- Springfield Sch. Dist. 19, 125 LRP 22497 (SEA OR, Jul. 7, 2025)
- Student attended long-term care and treatment program located in the District
- Parent alleged violations of the IDEA, including failure to provide necessary behavioral interventions, as well as sufficient parent training
- Center's Intensive Treatment Services (ITS) Assistant Director emailed parent a list of recommendations, including collaborating on home behavior plans, presenting a unified front, following through on consequences or rewards, using natural consequences, accepting program expectations, and adhering to medical recommendations
- ITS AD also discussed the family's "consistent pushback, disrespect, and disbelief of reports" and how that negatively impacted Student's progress and trust
- Family agreed to adjust their behavior and collaborate with staff



What level of parent counseling or training is sufficient?

Springfield – 7.1.25

- Family agreed to adjust their behavior and collaborate with staff
- Strategies and recommendations were shared with the family
- When student was discharged from the Center, in-home support and services were offered while developing a referral plan
- Department found that "while the Parent's desired format of family therapy might not have been fully met, the District did engage in consistent communication, provided recommendations, and offered support, including crisis resources and, later, in-home services"
- Parent training and resources found sufficient despite not meeting parent's expectations



Types of Situations in which Parent Training Might be Needed

- Augmentative communication devices
 - Or other assistive technology needs
- Family therapy
- Any time that it is imperative that all team members, including parents, implement the same tools with the student, across environments
- Other requests you have received?



ABA Therapy



ABA Therapy

- What is ABA Therapy?
 - Applied Behavior Analysis Therapy
 - Usually administered by a Registered Behavior Technician (RBT) under the supervision and direction of a Board Certified Behavior Analyst (BCBA)
 - "Techniques involving teaching individuals more effective ways of behavior through positive reinforcement and working to change the social consequences of existing behavior"
 - <https://www.bacb.com/about-behavior-analysis>
- This presentation will not delve into any debates regarding the appropriateness of ABA therapy and will only look at how courts, ALJs, and educational agencies have analyzed its necessity to provide a FAPE



ABA Therapy

- *Fremont Union High Sch. Dist.*, 125 LRP 13475 (SEA CA, Apr., 30, 2025)
- Student alleged they needed 1:1 instruction and ABA therapy to receive a FAPE
- District contended that ABA was one of many behavior methodologies and school has discretion to choose which method to use
- ABA strategies were one of the strategies used by the school

Fremont Union – 4.30.25 **ABA Therapy** 

- The only expert evidence testimony provided for the student was the lay opinion of the parent who had received ABA training
- Districts are not required to place students in the program preferred by their parents, even if that program would result in greater educational benefit to the student
- Parent’s training was not enough to make them an expert on the need for ABA

Fremont Union – 4.30.25 **ABA Therapy** 

- IEP is not required to include “specific instructional methodologies”
- Discretion is left to the school so long as the methods are designed to meet a child’s unique needs
- 9th Circuit has recognized that “teachers nee[d] flexibility in teaching methodologies because there was not a single methodology that would always be effective”
- While it may occasionally be necessary to specify a teaching methodology for some students, the 9th Circuit has not given specific instruction on when this must be done
- But courts have typically agreed that a specific methodology is only necessary when “the record shows IEP team member consensus on the issue”

ABA Therapy 

- *Lodi Unified Sch. Dist.*, 125 LRP 799 (SEA CA, Dec. 23, 2024)
- Student claimed a need for ABA therapy because of ASD dx and “demonstrated ... need for behavioral services to make meaningful behavioral, social, and emotional progress”
- Student’s behavior was excellent – no discipline record
- Student was “consistently respectful and courteous to adults and peers”
- Student was responsible regarding his academic assignments
- No evidence student needed ABA, behavior therapy, or clinical meetings
- Student did not offer any evidence to explain what ABA was or how it would benefit student



ABA Therapy (Combining two issues)

- More from *Lodi Unified Sch. Dist.*
- Student also claimed district should have offered him parent training
- Alleged he needed parent training so parents could appropriately support student at home, specifically with regard to ABA data collection, curriculum, techniques, practices, routines, or other needs
- Parents were both experienced public school general education teachers
- Mother testified that she did not need training in any areas to support Student's progress at school
- No evidence that student needed parent training to support Student's access at school



Transportation



Transportation

- *San Diego Unified Sch. Dist.*, 125 LRP 16320 (SEA CA, May 2, 2025)
- When is transportation required as a related service?
- What type of transportation is required?
- Facts:
 - IEP team determined student needed to attend a special program at a different school
 - The bus ride to the new program would take approximately one (1) hour
 - In reality, the bus picked up the student nearly two (2) hours before class began



San Diego Unified Transportation
- 5.2.25

- Parents asked if the student could have a bus ride of less than a half hour or if an aide could accompany the student on the bus
- The school declined both and asked the parents to transport the child in the interim before an IEP meeting could be convened to discuss
- Parent continued to advocate for a shorter bus route or bus route change
- Parent forwarded info about a third-party transportation service to the school, but district did not use the information



San Diego Unified Transportation
- 5.2.25

- Parent continued to transport the student to school when they could
- But when parent took child to school, child was typically late because parent had other children to drop off at schools and therapies
- The student missed early morning routines that would have benefitted them
- Student's ABA therapist and neurologist both wrote letters saying the student needed a shorter bus ride
- District did nothing to remedy the situation



San Diego Unified Transportation
- 5.2.25

- ALJ found denial of FAPE because of lack of appropriate transportation provided by the district
- Special education and related services, including transportation services, must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances
- The IDEA doesn't speak to the maximum acceptable length of time of a student's bus ride
- Where there is a disability-related reason to require a shorter bus ride, not shortening the commute may deny the student FAPE by failing to provide an appropriate related service
- The ALJ noted that the IEP team didn't discuss the need for a shorter bus ride and only offered workarounds.
- It simply proposed an alternative that shifted the burden of providing the service, and FAPE, to the parent, he reasoned.
- The appropriate response was to meet the need, not to work afterwards to remedy the consequences of failing to address it



Transportation

- How far does the obligation to provide transportation go?
- *Pierre-Noel v. Bridges Public Charter Sch.*, 113 F.4th 970, 124 LRP 32461 (D.C. Cir. 2024)
- Student with multiple disabilities
- Dependent on wheelchair and other medical devices
- After attending school remotely, KN was set to join 1st grade in person
- Lived in an apartment building that lacked wheelchair accessibility
 - Getting KN to a vehicle required transporting him across one or more sets of stairs
- District denied parents' request to help get the student from door of the apartment to the bus



Bridges Public Charter - 2024

Transportation

- District cited its policy that staff retrieve students only from the outermost door of the apartment building
- District also stated that in no event would it physically lift or carry students
 - Home-care nurses used to carry the student down the back stairs to get to the school bus
 - Student was heavier now and could not be lifted as easily, even by the parent
- Circuit Court of Appeals ruled that the IDEA requires district to move KN between apartment door and vehicle to get to school
- "Such door-to-door assistance is encompassed by the District's obligation to provide transportation services."



Bridges Public Charter - 2024

Transportation

- IDEA does not stop at saying that districts must provide "transportation"
- Statute obligates states to provide transportation as a related services to enable students to "benefit from special education"
- Transportation is grouped with services of a kind with "developmental, corrective, and other supportive services" – linked with services like speech, counseling, and PT
- Congress intended transportation services to likely be comprehensive in nature – not limited to "vehicular" nature



Transportation Takeaways

- Related services cannot be limited by District policies or procedures
- Districts have discretion in determining *how* to deliver required services but do not have discretion to decline to provide required services in the first place"



Recreation



Recreation

- 34 CFR 300.34(11)
- Recreation includes—
 - Assessment of leisure function;
 - Therapeutic recreation services;
 - Recreation programs in schools and community agencies; and
 - Leisure education

Recreation Therapy



- When is recreation therapy necessary to provide a FAPE?
- *J.K. v. Metro. Sch. Dist.*, No. 1:04:CV-293-TS (N.D. Ind. Sep. 27, 2005)
- Parents of a student with autism claimed the student needed recreational therapy in the form of tae kwon do and swimming instruction
- The district did provide the student with swimming lessons and extended the student's services hours to accommodate school therapies
- Board of Special Education Appeals found district was not required to provide recreational therapy because parents failed to demonstrate why student needed it

Recreation Therapy



- So, again, when does a student actually need recreational therapy?
- Most common scenarios I have seen (not an exhaustive list):
 - Transition services for student with significant cognitive or developmental delays
 - Students whose disabilities are in transition and will change over time for less functionality:
 - Examples: Student with Stargardt disease – degenerative condition that can lead to blindness – needed to be assessed for areas of interest and possible recreation as they lost their sight
 - Similar example: Student experienced sudden and permanent hearing loss and had to relearn activities they enjoyed after losing their hearing
 - Variations of social skills?
- Key is identifying the disability-related need and showing why it is necessary for the student to make appropriate progress

How to handle atypical related services requests?



- Note: This applies to both parents and district staff. This process is helpful whether you are making a request or whether you are responding to a request
- Most important: **Listen and discuss**
 - Ask questions
 - Have an open mind
- **Research and prepare** for conversations
 - If surprised by a request at an IEP meeting, ask for more information
 - Set a future date to discuss with the IEP team
 - Do your research in the meantime
- Consider **what information you need** to make an educated decision
 - Do you have the data?
 - Do you need new assessment data or information?
- Present **data** and information **at an IEP meeting**
- Ultimately, ensure there is **documentation** to back up whatever decision is made

Questions?



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PRE-CONFERENCE MINI-COURSE I

Virtual Instruction and the IDEA

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Virtual Instruction and the IDEA

THE IDEA AND TECHNOLOGY, A BACKGROUND

When considering how the Individuals with Disabilities Education Act (“the IDEA”) applies to virtual programming and instruction, it can be helpful to remember that many of the technologies that are currently used in public schools did not exist – or were at least not widely available – when the IDEA was first passed.

The IDEA was first passed in 1975, and was then-called the Education for All Handicapped Children Act (“the EHA Act”). This was just two years after the first handheld cell phone had been invented (although the first commercially available cell phone would not be released for another eight years, in 1983). Just a year earlier, in 1974, Vint Cerf and Bob Khan published their research a “network of networks,” but the internet as we now understand not really become available until 1983. In 1975, Google was still 23 years away from existing. Facebook was 29 years away. Zoom: 36 years away. And TikTok was 41 years away.

In other words, many of the technologies we now use on a daily basis, including those we use for the purposes of complying with the IDEA (e.g., making referrals for evaluations, communicating with parents, holding IEP meetings, and even providing instruction), did not exist when the IDEA was written. Even when the EHA Act became the IDEA during its first reauthorization in 1990, many now-common technologies were still relatively new (e.g., in 1990, less than 20% of households had a computer).

Although technology has changed significantly over the last half-a-century, the IDEA has changed relatively little. So, how do we now apply a law that was written before Congress could fully envision what today’s educational landscape would look like? When the IDEA requires schools to send out meeting notices in advance of IEP meetings, is email sufficient? Does a school district meet its obligation to provide a parent a copy of the procedural safeguards when the school district merely provides a hyperlink, or does providing the web address to a webpage on the state department of education’s website where that document can be found sufficient?

Because those answers are not contained in the IDEA itself, we often need to look to guidance documents from our federal and state departments of education or case law from about the country to provide insight. But, even the guidance and case law often moves slower than the realities of technology.

One example of this are recent cases related to whether or not emails are considered an education record, by law, which may hinge on whether or not the email has been printed off and placed in a file cabinet.

The Family Educational Rights and Privacy Act (“FERPA”) defines an education record as those records that are (1) directly related to a student; and (2) maintained by an education agency or institution or by a party acting for the agency or institution. 34 CFR 99.3 *See also* 34 CFR 300.611(b) (IDEA incorporating FERPA’s definition of “education records”). Education records may be recorded in any manner, including but not limited to handwriting, print, computer media, video or audio tape, film, microfilm, or microfiche. 34 CFR 99.3.

Recently, the matter of whether emails sent between and among staff about a specific student – with staff using their district-owned email addresses – came before the Oregon Department of Education in an IDEA complaint investigation. Citing a 2018 case out of California, the Oregon Department of Education found that only those emails that had been printed out and/or added to the student’s file would meet the definition of what constitutes an education record:

“Public records must be distinguished from education records. Education records are those documents and records regarding the identification, evaluation, and educational placement of a child. A district must comply with the parent’s request to inspect and review records without unnecessary delay. OAR 581-015-2300. The Family Educational Rights and Privacy Act (FERPA) defines education records as those records that contain information directed related to a student, and which are maintained by an educational agency or institution. 20 U.S.C. § 1232g(a)(4)(A). Education records are those that are maintained ‘in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled.’ *Owasso Indep. Sch. Dist. No I-011 v. Falvo*, 534 U.S. 426, 432-33 (2002). Emails in the possession of a district may only be considered part of a student’s educational record when they are printed and/or added to a student’s file. *Burnett v. San Mateo-Foster City School District*, 739 F. App’x 870 (2018). A similar reasoning extends to other dispersed records in the possession of a district but not maintained in a student’s permanent file. *Saddleback Valley Unified Sch. Dist.*, 57 IDELR 298 (SEA CA 2011).”

In the Matter of Eugene School District 4J, Case No. 22-054-035 (SEA OR Dec. 9, 2022).

In other words, whereas teachers and families are exchanging written communications countless times per day and most records are stored digitally, on a cloud service of some kind, courts are still looking to which documents are kept in filing cabinets.

VIRTUAL SCHOOLS AND ONLINE LEARNING DEFINED

In 2016, the Offices of Special Education Programs (“OSEP”) and Special Education and Rehabilitative Services (“OSERS”) issued a “Dear Colleague Letter” addressing the growing phenomena of “virtual schools,” which the U.S. Department of Education defined as

“a public school that offers only virtual courses: instruction in which children and teachers are separated by time and/or location. In addition, interaction occurs via computers and/or telecommunications technologies, and the school generally does not have a physical facility that allows children to attend classes on-site.”

Dear Colleague Letter, 68 IDELR 108 (OSERS/OSEP 2016).

A virtual school is different from the broader term “online learning,” which can apply to both virtual schools and individual online classes (e.g., online classes offered to a student who attends some of her classes at a brick-and-mortar building and some of her classes online). The U.S. Dep’t of Education as defined the term “online learning” as “education in which instruction, content, knowledge, and skill acquisition are mediated primarily by network technologies such as the Internet.” *The Foundation of Online Learning for Students with Disabilities: Access for All Students* (07/01/2012). So, whereas some students might attend a traditional high school and take one or two of their courses online (i.e., receive “online learning” as a part of their educational programming), a “virtual school” is one that offers only virtual instruction.¹

OSERS/OSEP noted that “[m]any virtual schools are also public charter schools.” But, at least in Oregon, more school districts have been opening their own virtual schools. This has increased since the pandemic, when many school districts invested in ways to educate students in a virtual setting. That, coupled with declining enrollment numbers, have encouraged public school districts to offer new ways to reach out to and serve students (e.g., offering virtual programming in addition to in-person instruction).

VIRTUAL SCHOOLS AND FAPE RESPONSIBILITY

In its 2016 *Dear Colleague Letter*, the U.S. Dep’t of Education not only defined virtual schools, but also clarified that the right to receive a free and appropriate public education (“FAPE”) equally applies to virtual schools as it does more traditional, in-person schools, stating, “The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016). This includes the obligation for public school districts to undertake Child Find activities to locate and identify children with disabilities. *Id.*²

Similarly, courts from around the country have found that rights under the IDEA apply with equal force in the virtual setting/for virtual schools. For instance, in *Eley v. District of Columbia*, 47 F. Supp. 3d 1 (D.D.C. 2014), a federal district court judge from the U.S. District Court for the District of Columbia ruled that the “Stay Put” provision of the IDEA applied to a school district’s proposed placement change from a virtual school to a brick-and-mortar school, reasoning that because such a change would constitute a “placement” changed under the IDEA, “Stay Put” applied:

¹ As discussed below, many virtual schools now contain in-person enrichment or other opportunities for in-person interaction with teachers and/or peers.

² Although not the focus of this presentation, it should be noted that the rights under Section 504 also apply in situations where a school district has placed a student at a virtual school. *See, e.g., Wadsworth (OH) City Sch. Dist.*, 122 LRP 16371 (OCR 02/23/22) (finding that a district may have violated Section 504 and Title II when it failed to reevaluate a student with a disability who was receiving failing grades in its virtual program).

“The next necessary determination is whether a shift from TLCIS to High Road Academy is, in fact, a change in educational placement. That it is such a change is clear from the defendant's characterization of the two schools. The defendant notes that TLCIS, which has been found appropriate by previous HODs and this Court [...] is ‘an interne[t] school with ... no campus or physical classroom [and] no access to other peers in the educational setting.’ High Road Academy, on the other hand, ‘is a specialized school for students with learning disabilities ... [that] offers a small-group setting, one-on-one instruction [where a]ll classes are led by a certified teacher and a teaching assistant with a reading specialist who works closely with the teachers,’ (first alteration in original). Clearly, shifting from what is essentially a completely individualized instructional setting separate from other students to a more traditional school setting does constitute a change in the plaintiff's ‘then-current educational placement,’ as defined *supra*, such that the plaintiff is entitled to the stay-put provision's presumption of automatic injunctive relief.”

(internal citations omitted).³

Who is responsible for FAPE will ultimately hinge on who is considered the Local Educational Agency (“LEA”) for IDEA purposes, which is an issue that is generally established by state law. For instance, if the virtual school is a public school of an LEA, the LEA will be immediately responsible for FAPE requirements for students attending the virtual program. If, alternatively, the virtual school is a public charter that operates as its own LEA (and receives IDEA funds from the State Educational Agency (“SEA”)), the virtual charter school will be responsible for FAPE unless some state law assigns this responsibility to another entity. Similarly, if the student attends a virtual school in a jurisdiction other than the jurisdiction of the resident district, the question of who is responsible for FAPE is left to the discretion of the state.⁴ *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

For instance, in *Dutkevitch v. Pennsylvania Cyber Charter Sch.*, 439 F. App’x 177 (3d Cr. 2011, *unpublished*), *cert. denied*, 132 S. Ct. 1750 (2012), the Third Circuit ruled that the parents could not sue the public school district for 504 or IDEA claims because the Pennsylvania Cyber Charter School where the student was enrolled was, itself, the LEA for IDEA purposes:

“The District Court correctly concluded that the Dutkevitches failed to state a claim for disability discrimination because ‘neither [Pittston] nor [West Side] owed any legal obligation to Vincent during any relevant time of this case.’ Vincent was enrolled with the Pennsylvania Cyber Charter School, which operated as Vincent’s Local Education Agency (‘LEA’) under the Individuals with Disabilities Education Act (‘IDEA’). Therefore, the Charter School was tasked with providing Vincent with a free appropriate public education and Defendants were not permitted to intervene.

³ But, *see also*, *In re: Student with a Disability*, 122 LRP 45233 (SEA MT 05/26/22) (noting that if district continues to provide the same special education services to the student, along with opportunities for peer interaction, likely no change of placement occurred).

⁴ In Florida, for example, a virtual school is itself responsible for FAPE. In South Carolina, state policy assigns responsibility to the home district.

The Dutkevitches argue that ‘both the [RA] and the ADA impose an affirmative duty not to discriminate that is distinct from any duties a school district may owe to a student under the IDEA.’ We disagree. The lack of a duty to Vincent under the IDEA on the part of Pittston and West Side bears directly on whether Defendants violated their obligations not to discriminate against Vincent.”

(internal citations omitted).

LEAST RESTRICTIVE ENVIRONMENT (“LRE”) AND VIRTUAL SCHOOLS/INSTRUCTION

Whether a virtual school – or a lesser degree of online learning – is appropriate for a student with a disability must be made on a case-by-case basis. If the student’s specific needs demonstrate that a virtual school is not reasonably calculated to confer a meaningful benefit, then a school district may have an obligation to find an alternative placement for the student (even over parent objection).

For instance, in *J.D. v. Pennsylvania Virtual Charter Sch.*, 77 IDELR 287 (E.D. Pa. 2020), a district court judge upheld an LEA’s proposal to change a student’s placement away from a virtual program. In reaching that decision, the district court judge noted that the administrative record demonstrated that the student was not making appropriate progress in the LEA’s virtual programming (i.e., the program that the parent wished to continue), that the student did not have any peer interactions in that setting, and that the in-home service providers had expressed concerns about the student’s escalating behavioral problems since being in the virtual program. By contrast, the LEA’s proposed placement could implement all of the student’s special education services.

Similarly, if a school district is considering IDEA placement in a virtual school – as opposed to a student’s neighborhood school – then the school district should be prepared to provide evidence that it has first considered/tried a less-restrictive placement. For instance, in another case out of Pennsylvania – *S.P. v. Fairview Sch. Dist.*, 64 IDELR 99 (W.D. Pa. 2014), a district court upheld a school district’s placement offer in a virtual school, but only after the school district had shown evidence that the district had attempted to make an in-person schooling work first.

In *Fairview*, the student at issue had refractory migraine headaches at school, which resulted in frequent absences and a documented need to remain in a quiet, dark room for 12-16 hours when he had migraine. Prior to proposing a virtual school, the school district had attempted to reduce academic expectations and modified the student’s schedule several times to help him complete his coursework. The school district allowed the student to arrive later in the day, work from a resource room as needed, complete some classes online, and receive help from teachers outside of school hours. But, the student’s medical condition got to the point where he could not attend school for even part of the day. Thus, the district court judge found that a virtual school became or reasonable offer of FAPE:

“None of the accommodations offered by the School District can reasonably be characterized as ‘token gestures.’ In-home cyber-school is certainly the most restrictive

option, but the record establishes that it is the least restrictive appropriate educational environment for S.P., which is all that is required under either the IDEA or Section 504.”

(internal citations omitted).

And, when a student does attend a virtual school, the student’s special education services cannot be restricted unless it would fundamentally change the nature of the program. For instance, in *Quillayute Valley (WA) Sch. Dist. No. 402*, 49 IDELR 293 (OCR 2007), a Washington school district was required by OCR to take remedial steps related to a public online high school with whom it was connected. In its applied written criteria for the 2006-07 school year, the high school noted that it would not provide the following accommodations/modifications to disabled students: a modified curriculum; counseling or therapy to address behavior goals; translator support; para-educator support; more than 40 minutes of SDI per week; certain assistive/adaptative technology; extended time beyond six weeks past school closing to complete courses; or tutoring.

But, when does a request for specific accommodations fundamentally alter the nature of the virtual environment? For instance, what if a parent requests some amount of in-person services for their child to be able to participate in the virtual school? Does it make a difference whether the parent is requesting 15-minutes of organizational support versus in-person academic specially designed instruction (“SDI”) that equates to half-of the school day? What about a parent declining consent for virtual speech services, and requesting in-person speech services? Can a virtual school deny all requests for any in-person services? And, does that change for schools who offer, for instance, one day per week of in-person enrichment?

ADDITIONAL QUESTIONS FOR DISCUSSION

With the question of whether the IDEA’s rights – such as Child Find and LRE – apply to virtual schools answered, we can then look to other procedural safeguards and how those would interplay with virtual schools. For instance, the matter of disciplinary removal and manifestation determination reviews. *See* 34 CFR § 300.530.

Recognizing that LEAs have specific obligations for when a student has been removed from school for more than ten days in a year, LEAs must understand what constitutes a “removal” in a virtual setting? Generally, courts will look to whether the student’s absence from a day of instruction constitutes a “removal” will hinge on whether the student’s absence from a day of instruction is voluntary or mandatory. But, how does that extend – or does it – to non-mandatory activities, such as in-person field trips? Similarly, what is a virtual school’s obligation to provide support for non-virtual components of the school, such as field trips and extracurricular activities?

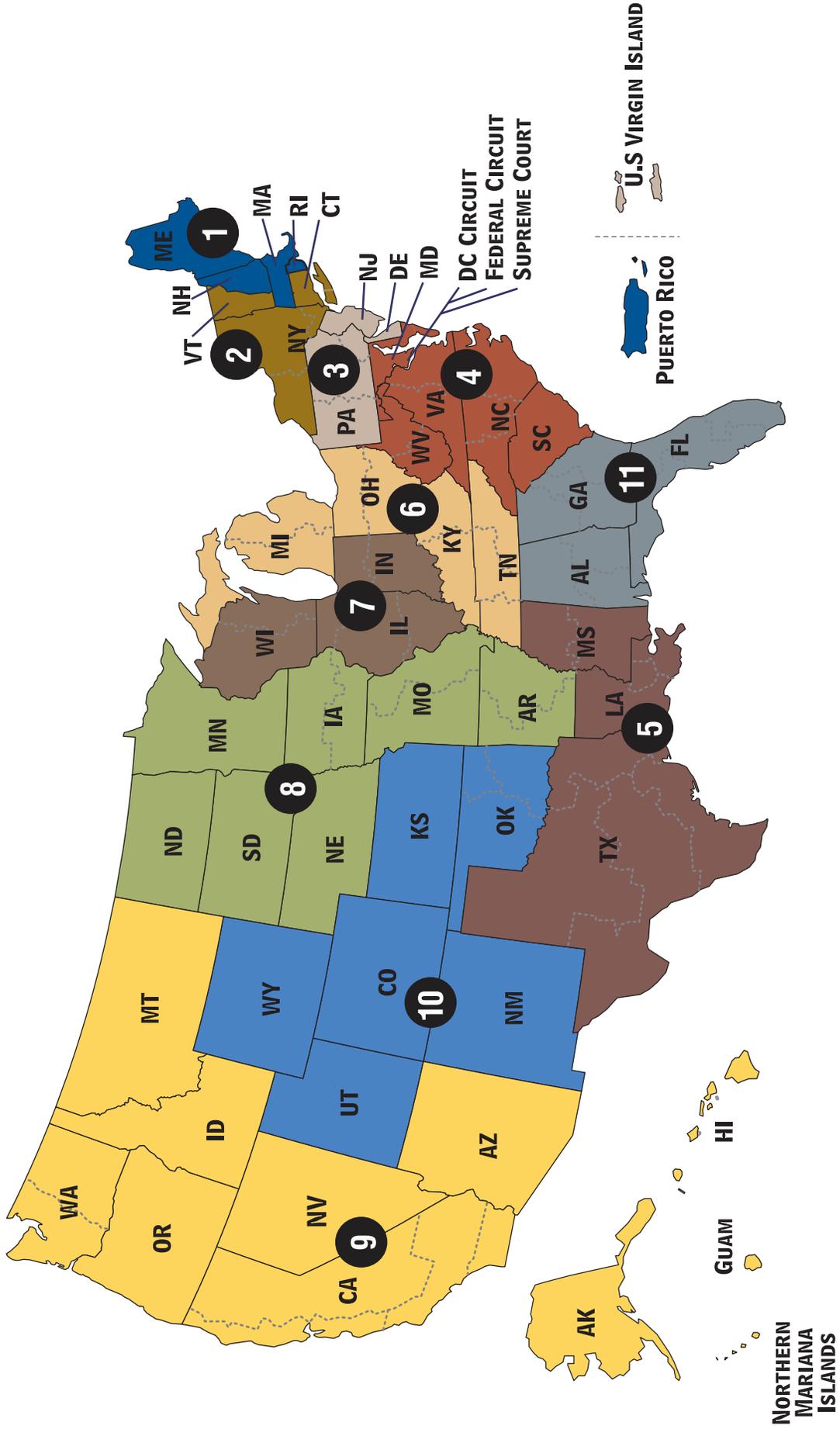
CONCLUSIONS

As technology evolves, so will the questions about how the IDEA interplays with those technological advances. What requirements or best practices exist regarding the use of artificial intelligence to write IEP goals? What should IEP teams keep in mind when using auto-recording and/or transcription services for virtual IEP team meetings? Can school districts require that all IEP meetings occur virtually at this point? Even without regular revisions to the IDEA itself,

educators and parents will need to be flexible in their understanding of how the IDEA interplays with these ongoing technological changes.

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



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