STAYING OUT OF SPECIAL EDUCATION LEGAL TROUBLE: A POTPOURRI OF ISSUES AND PRACTICAL TIPS

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This presentation will provide practical tips for staying out of special education legal trouble with an emphasis on a "potpourri" of issues that commonly arise with respect to the provision of a free appropriate public education (FAPE) to students with disabilities.

I. RELEVANT FEDERAL LAWS FOR TODAY'S DISCUSSION

- Individuals with Disabilities Education Act (IDEA)
- Section 504 of the Rehabilitation Act of 1973 (Section 504)
- Americans with Disabilities Act (ADA)
- Family Educational Rights and Privacy Act (FERPA)
- Every Student Succeeds Act (ESSA, formerly No Child Left Behind Act (NCLB))

II. PRACTICAL TIPS FOR STAYING OUT OF SPECIAL EDUCATION LEGAL TROUBLE

A. Update Everyone on the Legal Standard for the Provision of FAPE to Students with Disabilities

1. The *Rowley* standard for FAPE

In 1982, the U.S. Supreme Court decided what has been called the seminal case of special education law: Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) (hereinafter Rowley). The decision in Rowley is known for first addressing an overall legal standard for determining what constitutes a free appropriate public education (FAPE) under Public Law 94-142 (now known as the "Individuals with Disabilities Education Act" (IDEA)).

In Rowley, the parents of a hearing impaired child argued that the standard for FAPE required school districts to provide an education that would ensure that students with disabilities receive the best education possible or a program that would maximize their potential. However, the *Rowley* Court held that, for a student like Amy Rowley who was performing very well in the regular education classroom with some accommodations and speech therapy, the law required school districts to provide an educational program that would provide "*some educational benefit."* Because she was already doing well educationally, the Court ruled that Amy was not entitled to the one-to-one interpreter that her parents requested.

As years went by and subsequent federal courts came up with various interpretations of the Rowley "some educational benefit standard," there seemed to be disagreement in the decisions across the country. Some courts were saying that the FAPE standard required "meaningful educational benefit," while others seemed to indicate that "some educational benefit" meant "more than trivial educational benefit." Still others seemed to indicate that the FAPE standard required "merely more than *de minimis* educational benefit."

2. *Endrew F.* Clarification

Because of the apparent inconsistency in the circuit court decisions across the country, the U.S. Supreme Court in 2016 agreed to review a case decided by the Tenth Circuit Court of Appeals known

as Endrew F. v. Douglas Co. Sch. Dist., 66 IDELR 31, 798 F.3d 1329 (10th Cir. 2015). In this case involving a student with autism and significant behavioral and social/emotional issues, the Tenth Circuit upheld a lower federal judge's ruling that the school district had afforded the student with FAPE under an interpretation of the FAPE standard that required what the Tenth Circuit referred to as "merely more than *de minimis* benefit."

On March 22, 2017, the Supreme Court unanimously rejected the Tenth Circuit's standard of "merely more than de minimis benefit" as one that set the bar too low and noted that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis´* progress from year to year can hardly be said to have been offered an education at all." Endrew F. v. Douglas Co. Sch. Dist., 19 IDELR 174, 137 S. Ct. 988 (2017). As a result, the Court set forth the following clarification of the FAPE standard:

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

The Court concluded that it would "not attempt to elaborate on what 'appropriate' progress will look like from case to case. It is the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances for whom it was created." Importantly, the Court also noted that "any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal."

The Supreme Court did not decide whether Endrew received FAPE. Rather, the Court vacated and remanded the case back to the lower courts to analyze Endrew's case in accordance with this clarification of the FAPE standard. On February 12, 2018, the federal district court in Colorado re-visited his initial decision in favor of the school district and found that, in light of the Supreme Court's rejection of the "merely more than *de minimis*" standard, the school district had *not* provided Endrew with FAPE. Endrew F. v. Douglas Co. Sch. Dist. RE-1, 71 IDELR 144 (D. Colo. 2018). In essence, the district court found, in re-visiting the evidence, that while the "minimal progress" Endrew made in his educational program provided by the school district may have been sufficient under the Tenth Circuit's former standard, it was clearly not sufficient in light of the Supreme Court's new one. Specifically, the court pointed out that the annual goals in Endrew's IEPs were repeated from year to year and that the school staff waited too long to put in place and implement a formal behavior intervention plan for Endrew.

3. The "Process/Content" Rowley/Endrew standard for examining the appropriateness of an IEP

It is important to note that the Rowley decision was not overruled by the Endrew F. decision. Rather, the "some educational benefit" substantive piece of the FAPE standard was clarified by the Court. A significant piece of the Rowley decision was what I call its "process/content" standard for looking at the appropriateness of an IEP—which the Supreme Court has called the "centerpiece," "primary vehicle" and "modus operandi" of the IDEA's education delivery system for children with disabilities.

In more specifically defining the role of courts in exercising judicial review in FAPE cases brought under the IDEA and in assessing the appropriateness of an IEP, the Rowley Court set forth a two-fold inquiry for courts and IDEA hearing officers to follow. As clarified by the Endrew F. Court, the FAPE analysis and assessment of the appropriateness of an IEP requires that both IEP process and content issues be examined as follows:

> **►First, in the development of an IEP, has the school agency complied with the procedures set forth in the IDEA? (the "process piece");**
>
> **►Second, if so, is the individualized educational program developed through the IDEA's procedures reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances? (the "content piece").**

Educators should always keep these two questions in mind when developing and implementing IEPs for students with disabilities to ensure that IEPs are legally defensible.

B. Conduct Appropriate "Child-Find" Activities

1. "This RtI/MTSS stuff is a waste of time. We know he's going to be in special education anyway!"

Educators need to ensure that they are adequately aware of and trained to take the "Problem Solving Team"/RtI process seriously and to understand that the role of these Teams is not to "get a student into special education." Rather, the process is just the opposite: it's the way to never get there in the first place, hopefully. In addition, there are many legally-relevant reasons that such a process be in place and properly implemented:

- To prevent disproportionality/overrepresentation based upon race or ethnicity.
- To prevent over-identification of students in special education generally.
- To ensure that students are provided with appropriate instruction prior to consideration for special education services.

2. "Let's just put him on a 504 Plan. It's so much easier!"

Good training at the local school level is essential in ensuring that those who serve on Problem Solving Teams understand what 504 is and what it is not; who it covers and who it does not; and what it provides and what it does not. Section 504 should not be used to hand out the "consolation prize" of a 504 Plan to anyone who wants or asks for one!

3. "I'm sorry, but we can't do an evaluation right now because your child hasn't completed our RtI process."

The child-find duty to refer a student with a disability is triggered when there is "reason to believe" or "reason to suspect" that a child is a child with a disability and is in need of special services under IDEA or Section 504. This duty to evaluate does not depend upon whether the student has been "in the RtI process" or how many tiers of interventions have been implemented.

Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011). States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RtI strategy. The use of RtI strategies cannot be used to delay or deny the provision of a full and individual evaluation. It would be inconsistent with the evaluation provision of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RtI framework.

4. "Well, Mom never gave us anything to show that he has a disability! As a matter of fact, she never even requested a special ed. or 504 evaluation!"

"Referral Red Flags"

So, what does it take for there to be sufficient "reason to suspect" or "reason to believe" that a student is disabled and in need of special services either under IDEA or Section 504 sufficient to trigger the duty to refer a student for an evaluation? Based upon existing case law and agency rulings, I have developed a running checklist of "referral red flags" that could be, in combination, sufficient to constitute a legal "reason to suspect a disability" and need for special services that would trigger the IDEA's or 504's child-find duty.

Important Note: When using this checklist, I caution educators to remember that not one of these triggers alone (or even several together) would typically be sufficient to trigger the law's child-find duty to refer and conduct an evaluation under Section 504 or IDEA. In addition, these "referral red flags" do not equate to eligibility under the IDEA or 504. However, the more of them that exist in a particular situation, the more likely it is that the duty to conduct an evaluation would be triggered and parental consent for an evaluation under Section 504 or IDEA should be sought.

It is also important to note that it is more likely that the child-find duty will be triggered under Section 504 before it would be under the IDEA because the definition of disability is much broader and all-encompassing than it is under IDEA, and OCR's interpretations are extremely liberal in this regard. Under the IDEA, it is rare that a court would find it sufficient to trigger the duty to evaluate if there are no referral red flags in the area of academic concerns. However, OCR is likely to find the 504 duty to evaluate has been triggered in light of certain "referral red flags," even in the absence of any academic concerns.

Especially in an RtI/MTSS world, school personnel should be on the "look out" for indicators in these areas and **"when there's debate, evaluate (and re-evaluate too)!"**

a. Academic Concerns in School

- Failing or noticeably declining grade or progress reports
- Retention
- Poor or noticeably declining progress on standardized assessments
- Student negatively "stands out" academically from his/her same-age peers
- Student has been in the Problem Solving/RtI process and progress monitoring data indicate little academic progress or positive response to interventions

- For IDEA child-find, student already has a 504 Plan and accommodations have provided little academic benefit

b. Behavioral/Social/Emotional Concerns in School

- Numerous or noticeably increasing disciplinary referrals for violations of the student code of conduct
- Signs of depression, withdrawal, inattention/distraction
- Signs of increased hyperactivity, forgetfulness, organizational problems
- Knowledge that student has been exposed to a traumatic event
- Knowledge that student has suffered a head injury/concussion
- Truancy problems, noticeably increased or chronic absences or skipping class
- Student negatively "stands out" behaviorally from his/her same-age peers
- Student has been in the Problem Solving/RtI process and progress monitoring data indicate little behavioral progress or positive response to interventions
- Student has a behavioral intervention plan that has not been effective
- For IDEA child-find, student already has a 504 Plan and accommodations have provided little behavioral/social/emotional benefit

c. Outside Information Provided

- Information that the student has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)
- Information that the student has received a DSM-5 diagnosis (ADHD, ODD, OCD, etc.)
- Information that the student is taking medication
- Information that the student is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider suggests the need for an evaluation or special services

d. Internal Information from School Personnel

- Teacher/other service provider suggests a need for an evaluation under 504 or IDEA or suggests counseling, special education or other services, etc.

e. Parent Request for Evaluation or Services

- Parent requests an evaluation or services and some other listed item(s) above are present.

Jana K. v. Annville Cleona Sch. Dist., 63 IDELR 278 (M.D. Pa. 2014). The parent's failure to notify the district that a physician had diagnosed his daughter with depression did not excuse the district's failure to conduct an IDEA evaluation. The duty to conduct an evaluation exists regardless of whether a parent requests an evaluation or shares information about a private assessment. Here, the district had sufficient information to suspect that the student had an emotional disturbance and might be in need of special education services. The student had poor relationships with peers and a tendency to report inoffensive conduct as "bullying;" she visited the

school nurse on at least 54 occasions for injuries, hunger; anxiety or a need for "moral support;" the student's grades, which has been poor to average in previous school years, plummeted when she began 7th grade; and the district was aware of at least one on-campus act of self-harm where she swallowed a metal instrument after using it to cut herself. This "mosaic of evidence" clearly portrayed a student who was in need of a special education evaluation.

Compton Unif. Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9th Cir. 2010), cert. denied, (2012). Where failing 10th grade student was referred by the school to a mental health counselor (who ultimately recommended an evaluation), her teachers indicated that her work was "gibberish and incomprehensible," she played with dolls in class and urinated on herself, district cannot avoid a child-find claim based upon an argument that it did not take any affirmative action in response to high schooler's academic and emotional difficulties because the parent did not request an evaluation. Where the district argued that the IDEA's written notice requirement applies only to proposals or refusals to initiate a change in a student's identification, evaluation or placement and its decision to do nothing did not qualify as an affirmative refusal to act, the argument is rejected. The Court will not interpret a statute in a manner that produces "absurd" results and the IDEA's provision addressing the right to file a due process complaint is separate from the written notice requirement. "Section 1415(b)(6)(A) states that a party may present a complaint 'with respect to any matter relating to the identification, evaluation, or educational placement of the child,'" and the IDEA's written notice requirement does not limit the scope of the due process complaint provision. By alleging that the district failed to take any action with regard to the student's disabilities, the parent pleaded a viable IDEA claim. (Note: The dissent in this case noted that determining that a "refusal" to identify or evaluate requires purposeful action by the district and the parent did not have the right to bring a child find claim without a request and a "refusal" on the part of the district).

C. Gather All Relevant Current and Comprehensive Data and Conduct Appropriate Evaluations and Re-evaluations before Making Educational Recommendations

The law requires full and comprehensive evaluations to be conducted before making recommendations about whether a student is eligible for or needs an IEP or 504 Plan. Only a full eligibility team can make decisions based upon all relevant current and comprehensive evaluative information. It is also important to remember that the duty to conduct evaluations is that of the school district, not the parents.

1. "Well, if you ask me, it seems like based on all the accommodations he's getting, he needs an IEP rather than a 504 Plan."

2. "We can refer, but I just don't think he's going to qualify."

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

School personnel should remember that schools have the right to conduct independent evaluations by experts of their choosing when a parent is demanding services. This is particularly the case in potentially adversarial situations and school personnel should request evaluations by

professionals/experts of the school system's choosing, for purposes of determining eligibility and services.

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

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

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

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

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

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

5. "I know he has some behavioral issues, but we are evaluating in the area of SLD, not behavior."

D.B. v. Bedford Co. Sch. Bd., 54 IDELR 190 (W.D. Va. 2010). Student with ADHD and found eligible for services as OHI was denied FAPE where district did not properly consider and evaluate for possible SLD. Despite the fact that the evidence strongly suggested the student was SLD, the IEP team failed to assess for SLD or even discuss SLD. In addition and contrary to the hearing officer's finding, the student's services might well have changed had he been fully evaluated in *all areas of suspected disability*. "Although the [hearing officer] observed that [student] was promoted a grade every year…this token advancement documents, at best, a sad case of social promotion" where, after four years, the student is unable to read near grade level. Thus, the parents are entitled to reimbursement for private schooling.

Compton Unif. Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010). Where student displayed violent and disruptive behaviors and his grandparents requested a functional analysis assessment (FAA), FAPE was denied when the district failed to assess the 6-year-old in all areas of suspected disability. While the school psychologist completed an initial psychoeducational assessment, the district's failure to conduct an FAA prevented the IEP team from developing an appropriate IEP and making an offer of placement that provided FAPE. An FAA would have enabled the Team to consider strategies to address the behavioral issues that impeded the student's learning.

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

Unfortunately, there have been cases where teachers or other school personnel have made their own diagnosis of a particular medical condition without being qualified to do so. A proper referral for an evaluation must be made rather than statements to parents as to what school personnel believe to be a disability.

In 2004, the IDEA was amended to require State Educational Agencies to prohibit State and LEA personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services under this title. However, the law noted further that nothing in this paragraph "shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services…."

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995). An action for damages can be brought under IDEA, Section 504 or Section 1983 for failure to timely identify a student as disabled. But see, Barnes v. Gorman, 122 S. Ct. 2097 (2002)(overturning Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001)). Because punitive damages may not be awarded in private suits brought under Title VI of the Civil Rights Act of 1964, such damages are not available under the ADA or Section 504. Title VI and other constitutional Spending Clause legislation (such as ADA and Section 504) is "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." [Note: The Third Circuit revised its position on damages for violations of the IDEA and aligned with other circuit courts in finding that money damages are not available for IDEA claims. See, Chambers v. School Dist. of Philadelphia Bd. of Educ., 53 IDELR 139, 587 F.3d 176 (3d Cir. 2009).

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

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

❖ When there's debate, re-evaluate!

Phyllene W. v. Huntsville City Bd. of Educ., 66 IDELR 179 (11th Cir. 2015) (unpublished). Case is reversed and remanded to the district court to determine an appropriate remedy where school district did not reevaluate an SLD student when it clearly had reason to suspect that the student might have a hearing impairment. The district was aware that the student had undergone 7 ear surgeries, was being fitted for a hearing aid and had difficulty communicating with others. Although the parent did not ask the district to evaluate the student's hearing, the IDEA does not require parents to ask for evaluations of suspected disabilities. Rather, districts have a continuing obligation to evaluate all students suspected of needing IDEA services and there was good reason to suspect that this student might have a hearing impairment. Notification by the parent that the student was being fitted for a hearing aid alone should have raised a red flag that an evaluation was necessary to determine whether she had a hearing impairment necessitating further services.

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

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

memory retention deficit, flawed proficiency assessments or some other reason amounted to a denial of FAPE.

D. Make Appropriate Eligibility Decisions

Sometimes, disputes arise over the actual label of the student. Legally, however, courts have ruled that label generally does not matter. What is important is that the school district has gathered and reviewed sufficient evaluative information and made decisions based upon that information.

1. "So, the parents agree that he needs special ed. services, but they want us to label him autistic. I think we need to go with EBD."

D.B. v. Ithaca City Sch. Dist., 70 IDELR 1(2d Cir. 2017). Parent's contention that the district's proposed IEP was not appropriate because it did not recognize the student's disability specifically as a "nonverbal learning disorder" is rejected. NVLD is not formally recognized as a psychiatric diagnosis by medical literature or by the state of New York. Accordingly, the district's failure to specifically identify the disability in the IEP does not compel a finding that the district does not understand the nature of the student's disability or the extent of her needs. Thus, the lower court's dismissal of the parent's private residential school reimbursement claim is affirmed.

Lauren C. v. Lewisville Indep. Sch. Dist., 70 IDELR 63 (E.D. Tex. 2017), aff'd, 72 IDELR 262, 904 F.3d 363 (5th Cir. 2018). District's refusal to add autism eligibility to the student's IEP did not deny FAPE. Reportedly, the parents wanted autism added to the IEP because it would help them obtain services from outside agencies. While the district knew in 2002 that the student's physician diagnosed her with autism, the district evaluated the student within a reasonable time after learning of that diagnosis and found her not eligible as a child with autism. The fact that the district did not classify her with autism did not mean that it violated its child find duty. To the contrary, the multiple evaluations that it conducted demonstrate compliance with child find requirements. Further, the IDEA does not require districts to affix a student with a particular label. Rather, the question is whether the district offered an IEP that is sufficiently individualized to address the student's needs and to provide meaningful educational benefit to the student. The district has met that standard by providing the student with ABA and other services that have resulted in academic, social and behavioral progress.

Dear Colleague Letter, 66 IDELR 188 (OSEP 2015). In response to concerns that districts are hesitant to reference or use the terms dyslexia, dyscalculia and dysgraphia in IEPs and other related documents, it is noted that nothing in the IDEA forbids districts from using such terminology. Using such terms may be helpful for districts at times, even though it is not a legal requirement to do so. In the IDEA regulations, a non-exhaustive list of examples of SLD includes dyslexia, but not dyscalculia or dysgraphia. However, this does not matter, since what is most important is that districts conduct an evaluation to determine whether a child meets the criteria for SLD or any other disability and to determine the need for special education and related services. Information about a student's learning difficulties may be helpful in determining educational needs. In addition, since a child's IEP must be accessible to the regular education teacher or other school personnel responsible for implementation, noting the specific condition involved might be a way for districts to inform personnel of their specific responsibilities related to implementing the IEP. It may also

serve as a way for districts to ensure that specific accommodations, modifications and supports are provided in accordance with the IEP. Thus, districts are encouraged to consider situations where it would be appropriate to use specific terms like dyslexia, dyscalculia or dysgraphia to describe a child's unique needs through evaluation, eligibility and IEP documentation.

W.W. v. New York City Dept. of Educ., 63 IDELR 66 (S.D. N.Y. 2014). The failure to explicitly mention a diagnosis of dyslexia in the IEP goals for an LD student is not fatal to the IEP because the IEP goals were adequately designed to address the student's learning challenges, which include not only dyslexia, but also dyscalculia and dysgraphia.

2. "But he's doing fine academically, so I don't see how he could be eligible for services."

It is important to remember that the definition of "educational performance" under the IDEA is not limited to academic performance when determining special education eligibility and whether there is a condition that adversely affects educational performance. In addition, a student could be "disabled" under Section 504, even though there is no physical or mental impairment that substantially limits the major life activity of "learning." The analysis under Section 504 is not limited to "learning."

Mr. I v. Maine Sch. Admin. Dist. No. 55, 47 IDELR 121, 480 F.3d 1 (1st Cir. 2007). In Maine, "educational performance" is more than just academics and there is nothing in IDEA or its legislative history that supports the conclusion that "educational performance" is limited only to performance that is graded. In addition, "adversely affects" does not have any qualifier such as "substantial," "significant," or "marked." Thus, district court's holding that *any* negative impact on educational performance is sufficient is upheld. Student with Asperger's Syndrome who generally had strong grades, had difficulty in "communication," which is an area of educational performance listed in Maine's law. That makes her eligible for special education services.

A.A. v. District of Columbia, 70 IDELR 21 (D. D.C. 2017). District's argument that the fifth-grader's good grades disqualified her from IDEA eligibility is rejected. Clearly, this child's anxiety, mood disorder and inability to regulate her emotions that resulted in her removal to the kindergarten classroom for approximately 20 days during the school year, caused her to fall behind in classroom instruction. As such, her parents demonstrated that her disability impeded her educational performance. Based upon the fact that the child tried to jump out of her second-floor bedroom at least two times while saying she wanted to kill herself surely meets the criteria of "a general pervasive mood of unhappiness or depression" or "inappropriate types of behavior or feelings under normal circumstances" sufficient to meet eligibility for ED.

3. "For special ed. or 504 services, all you need is a doctor's prescription or a DSM diagnosis!"

To be considered a child with a disability under the IDEA, much more than a doctor's prescription or DSM diagnosis is needed. Evaluations as required under federal and state law must be conducted and a team determines whether 1) a condition exists; 2) that adversely affects educational performance; 3) to the degree that the child needs special education services.

Similarly, to be an "individual with a disability" under Section 504, more than a doctor's diagnosis is required. Based upon evaluative and other relevant data, a team must find that a student has a physical or mental impairment that substantially limits a major life activity before it is determined that the student is "disabled." In addition, if the student is determined disabled under 504, the 504 Team needs to determine whether the student needs services ("accommodations") in order to have his/her educational needs met as adequately as those of nondisabled students.

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

M.P. v. Aransas Pass Indep. Sch. Dist., 67 IDELR 58 (S.D. Tex. 2016). Where student was diagnosed privately with ADHD and a mood disorder, an impairment alone will not qualify a student for special education. A parent must also show that the student needs special education services to receive educational benefit. Prior services provided pursuant to a 504 Plan and diagnosis of Asperger's appeared to be roughly the same as the efforts made for the general student population and the student was abundantly successful. Without evidence that the student needs specialized instruction, the student is not eligible under the IDEA.

D.A. v. Meridian Jt. Sch. Dist. No. 2, 65 IDELR 286 (9th Cir. 2015) (unpublished). The district did not err in finding that the student was not eligible for services under the IDEA. High schooler's Asperger syndrome does not have an adverse effect on his educational performance (which in Idaho includes academic areas such as reading, math and communication, as well as nonacademic areas such as daily living skills, mobility and social skills). Although the parents allege that the district focused too much on academic performance, the hearing officer and district court noted that the student had done well in classes that emphasized pre-vocational and life skills.

Q.W. v. Board of Educ. of Fayette Co., 64 IDELR 308 (E.D. Ky. 2015), aff'd, 66 IDELR 212 (6th Cir. 2015) (unpublished), cert. denied, (4/25/16). District's finding that the student no longer requires IDEA services is upheld. The student's alleged difficulties at home do not require the district to continue providing special education services. Under the IDEA, a student with autism is not eligible for special education and related services, unless his disability adversely affects his educational performance. The ordinary meaning of "educational performance" requires courts and hearing officers to focus on school-based evaluation. Here, the student did not appear to exhibit

any academic, behavioral or social difficulties at school. Rather, his teachers testified that he earned good grades, participated in class, exhibited the same level of emotion as his peers and was "a joy" to have in class. While "educational performance" may extend beyond grades to the classroom experience as a whole, it does not include behaviors exhibited solely in the home. "Social and behavioral deficits will be considered only insofar as they interfere with a student's education."

C.M. v. Department of Educ., 58 IDELR 151 (9th Cir. 2012) (unpublished). District court's decision that the student with CAPD and ADHD is not a child with a disability and eligible for services under the IDEA is upheld. Based upon the student's performance in her regular education classes, with accommodations and modifications, she was able to benefit from her general education classes without special education services. The parent's argument that the Read 180 program, pre-algebra course and math lab amounted to "specialized instruction" is rejected. Students who can benefit from general education classes with accommodations and modifications do not have a need for special education. The court agrees with the district court that substantial evidence supported the hearings officer's conclusion that the reading and math classes were not "special education" classes. Rather, they were regular education classes with small enrollments designed to provide additional support and were open to many types of students who needed additional help. In addition, the department evaluated the student in all areas of suspected disability and the student did not qualify for services under the category of SLD or OHI, since the department could meet the student's needs with a Section 504 plan.

Mowery v. Board of Educ. of the Sch. Dist. of Springfield R-12, 56 IDELR 126 (W.D. Mo. 2011). District's determination that student is not eligible because he is not in need of special education and related services to receive an educational benefit is upheld. Although a private psychiatrist diagnosed student with a pervasive developmental disorder, Asperger syndrome, generalized anxiety disorder, obsessive compulsive disorder, oppositional defiant disorder, these impairments did not adversely affect his education, as the student performed reasonably well in his classes despite having missed 43 days of school in 4th grade. In addition to earning A's, B's and C's, he participated in a gifted program and scored at the 5th grade level on standardized tests. The student's behavior also improved when he changed medication and, while his teachers expressed some concern about personal and social development, the teachers still graded his performance as "satisfactory."

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

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

T.S. v. Ridgefield Bd. of Educ., 20 IDELR 889, 10 F.3d 87 (2d Cir. 1993). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district

psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

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

Marc M. v. Department of Educ., 56 IDELR 9, 762 F. Supp.2d 1235 (D. Haw. 2011). Although parents of a teenager with ADHD waited until the very last moment of an IEP meeting to provide the team with a private school progress report, that was no basis for the team to disregard it. The Education Department procedurally violated the IDEA and denied FAPE when it declined to review the private report because it contained vital information about the student's present levels of academic achievement and functional performance. The document, which showed that the student had progressed in his current private school, contradicted the information placed in the IEP, but the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. Where the new IEP proposed that the student attend public school for the upcoming school year, the parents reenrolled the student in private school and sought reimbursement. Where the IDEA requires districts to consider private evaluations presented by parents in any decision with respect to the provision of FAPE, the coordinator's contention that because the document was provided at the end of the meeting, the team could not have considered and incorporated it into the new IEP is rejected. As a result of failing to consider the private report, the IEP contained inaccurate information about the student's current levels of performance, such that these procedural errors "were sufficiently grave" to support a finding that the student was denied FAPE.

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

5. "All kids with really bad behavior are SED and covered by IDEA!"

Clearly, that is not the case. However, be careful with this one, as it is sometimes very difficult to tease out "social maladjustment" from SED/EBD!

H.M. v. Weakley Co. Bd. of Educ., 65 IDELR 68 (W.D. Tenn. 2015). An ALJ's ruling that the frequently truant high schooler was "socially maladjusted" did not mean that the student was not IDEA-eligible. The student's lengthy history of severe major depression coexists with her bad conduct and qualifies her as an ED child. Social maladjustment does not in itself make a student ineligible under the IDEA. Rather, the IDEA regulations provide that the term "emotional disturbance" does not apply to children with social maladjustment unless they also meet one of the five criteria for ED. Since age 9, this student has been diagnosed with severe major depression and later medical and educational evaluations stated that she had post-traumatic stress disorder in

addition to a recurrent pattern of disruptive and negative attention-seeking behaviors. Further, the depression was marked, had lasted a long time and affected her performance at school. Thus, it is "more likely than not" that her major depression, not just misconduct and manipulation, underlie her difficulties at school. Thus, the hearing officer's decision finding her ineligible under the IDEA is reversed.

Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist., 51 IDELR 149, 300 F. App'x 11 (2d Cir. 2008). Determination that student was not eligible as an SED student is affirmed. Student's inappropriate behavior fell short of qualifying him as SED, as an expert saw his drug use as the root of the student's problems in school. This conclusion is "more consistent with social maladjustment than with emotional disturbance." Parents did not produce enough evidence of an "accompanying emotional disturbance beyond the bad conduct."

Eschenasy v. New York City Dept. of Educ., 52 IDELR 66 (S.D. N.Y. 2009). Teenager diagnosed with mood disorder, conduct disorder, trichotillomania, borderline personality features and expressive language disorder should have been found eligible for special education services as an SED student. Clearly, the student exhibits inappropriate types of behavior or feelings under normal circumstances and has a generally pervasive mood of unhappiness or depression. Her symptoms clearly adversely affect her educational performance, as she had failing grades, repeated expulsions and suspensions and a need for tutors and summer school. The school district's assertion that her inappropriate behavior is just bad behavior is rejected. While it is undisputed that the student repeatedly misbehaved in school by cutting class, taking drugs and stealing, she also engages in hair pulling and cutting herself, was diagnosed with a mood disorder, diagnosed with personality disorder and attempted to commit suicide. Thus, it is more likely than not that all of the student's problems, not just her misconduct, underlie her erratic grades, expulsions and need for tutoring and summer school. Thus, parents are entitled to reimbursement for placement at the Elan School, which was appropriate for her.

E. In the Development of an IEP, Avoid Action that Appears to be a "Predetermination of Placement" or Somehow Denies Parental Input into Educational Decision-making

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

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

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

    a. What about preparing draft IEPs before the meeting?

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

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

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

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

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

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

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

71 Fed. Reg. 46678.

b. What about the use of computerized/web-based IEP programs?

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

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

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

3. During the IEP meeting, the regular education teacher exclaims, "but in our staff meeting yesterday, I thought we decided that she wouldn't be in the regular ed. class!"

4. The Principal says during the IEP meeting, "but the Special Ed. Director already told us that we can only recommend…."

5. The Team recommends services, "but these will have to be approved by the Principal."

6. The Case Manager begins the meeting by saying, "we are here today to develop an IEP for Billy to attend the self-contained class for LD students."

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

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

8. Dad calls the day before the IEP meeting indicating that he has medical issues and wants to reschedule the meeting for the next week. The IEP "due date" will expire by then, so the Team goes ahead and has the meeting without the parent.

Doug C. v. Hawaii Dept. of Educ., 61 IDELR 91 (9th Cir. 2013). Education Department's failure to reschedule an IEP meeting when requested by the parent amounts to a denial of FAPE to the student. Thus, the case is remanded to the district court to determine the parent's right to private school tuition reimbursement. Where the ED argued that it had to hold the IEP meeting as scheduled to meet the student's annual review deadline, the argument is rejected because the father was willing to meet later in the week if he recovered from his illness and the ED should have tried to accommodate the parent rather than deciding it could not disrupt the schedules of other team

members without a firm commitment from the parent. In addition, the ED erred in focusing on the annual review deadline rather than the parent's right to participate in IEP development. While it is acknowledged that the ED's inability to comply with two distinct procedural requirements was a "difficult situation," the ED should have considered both courses of action and determined which was less likely to result in a denial of FAPE. Here, the ED could have continued the student's services after the annual review date had passed and the parent did not refuse to participate in the IEP process. Given the importance of parent participation in the IEP process, the ED's decision to proceed without the parent "was not clearly reasonable" under the circumstances.

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

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

F. Make Educational Recommendations and Decisions based upon the Individual Needs of the Student and Nothing Else

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

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

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

Deal v. Hamilton Co. Bd. of Educ., 43 IDELR 109, 392 F.3d 840 (6th Cir. 2004). District denied parents of student with autism the opportunity to meaningfully participate in the IEP process when it placed their child in a program without considering his individual needs. Though parents were present at the IEP meetings, their involvement was merely a matter of form and after the fact, because district had, at that point, pre-decided the student's program and services. Thus, district's predetermination violation caused student substantive harm and therefore denied him FAPE. It appeared that district had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant "school

system personnel thus did not have open minds and were not willing to consider the provision of such a program," despite the student's demonstrated success under it.

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

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

3. "But we *always* do it that way for our students with autism."

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

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

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

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

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

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

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

7. "We just don't have the staff available to do that and we have a hiring freeze going on right now."

8. "I don't have time to rewrite all these IEPs for next year. These goals and services from last year are perfectly fine."

Endrew F. v. Douglas Co. Sch. Dist. RE 1, 71 IDELR 144 (D. Colo. 2018). On remand, it is found that the IEP proposed by the school district at the time the parents withdrew their child with autism from public school and placed him in a private school for students with autism was not reasonably calculated to enable him to make progress appropriate in light of his circumstances. Specifically, the IEP proposed for the fifth grade in April 2010 contained the same annual goals as those IEPs for the second, third and fourth grades, with only minor changes to the short-term objectives. In addition, the district had not conducted a functional behavioral assessment or developed a formal BIP for the student. The district's inability to develop a formal plan or properly address the student's behaviors that, in turn, negatively impacted his ability to make progress on his educational and functional goals "cuts against the reasonableness of the April 2010 IEP." While the proposed IEP may have been appropriate under the 10th Circuit's previous "merely more than de minimis" standard, under the Supreme Court's FAPE standard, the proposed IEP denied FAPE. Thus, on remand from the 10th Circuit, the administrative law judge's decision denying the request for reimbursement of private school tuition and transportation costs is reversed. [NOTE: It has been reported that the school district settled the case for $1.3 million. The case has been dismissed and is over: 69 IDELR 174 (D. Colo. 2018)].

Damarcus S. v. District of Columbia, 67 IDELR 239, 190 F.Supp.3d 35 (D. D.C. 2016). District denied FAPE to intellectually impaired student when it failed to address the student's lack of progress through his IEPs. An IEP must be designed to produce meaningful educational benefit, but there were two major flaws in this student's IEPs. First, annual goals were repeated in a wholesale fashion across multiple IEPs, and "an alarming number of goals and objectives were simply cut-and-pasted (typos and all) from one IEP to the next." Having the same goals year after year not only caused the student anxiety and frustration but was also a sign that the IEPs needed to be revised. However, rather than raising an alarm and working to devise a new approach—such as one that accounted for the student's noted weaknesses in processing and working memory—it appears that the district persisted in following the same ineffectual path. The second flaw in the IEPs is that, despite the student's lack of progress, the IEPs dramatically decreased his monthly SLP services. It appeared that the IEP team, relying solely on the student's IQ, made that decision based on its view that the student had "plateaued," when there was evidence that the student was capable of improving his skills, according to statements of the SLP.

Jefferson Co. Bd. of Educ. v. Lolita S., 64 IDELR 34 (11th Cir. 2014) (unpublished). District court's decision that the school district's use of "stock" goals and services with respect to reading and postsecondary transition planning constituted a denial of FAPE is upheld. Given that the LD teenager was reading at a first-grade level when he entered the 9th grade, a reading goal based on the state standard for 9th-graders failed to address the student's unique needs. Clearly, the IEP team had no evidence that the student's reading comprehension had increased by 8 grade levels since the prior school year. Nor did the district offer any services to address the gap between the student's performance and 9th grade standards. In addition, the student's name had been handwritten on several pages of the IEP above the name of another student, which had been crossed out. This was an "apparent use of boilerplate IEPs," which was to blame for the inappropriate goal. In addition, the district failed to conduct transition assessments and, instead, developed a

transition plan with a goal calling for the student to participate in postsecondary education, which did not account for his placement on an occupational diploma track.

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

Under the IDEA, the public agency shall ensure that the IEP team for each child with a disability includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child; (4) a representative of the public agency who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; and (iii) is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team already described; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) if appropriate, the child.

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

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

Under Section 504, a "knowledgeable group" of persons are to make decisions about placement. While the 504 regulations do not require parents to be invited, it has become best practice to do so. In terms of other "relevant" and "knowledgeable" attendees, that is within the discretion of the school system to decide.

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

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 35 IDELR 126, 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, the 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified

to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.'s skills in the development of her second grade IEP."

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

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

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

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

Under the IDEA, parents are entitled to bring with them to the IEP meeting "other individuals who have knowledge or special expertise regarding the child." 34 C.F.R. § 300.321. Generally, school personnel must allow such persons to attend and participate in the meeting, and the IDEA regulations provide that the party that invites other individuals is the one who determines whether that individual has "knowledge or special expertise."

With the possibility of a number of people attending IEP meetings, educators should remember that the IEP process is not a "voting" process. Rather, it is a process by which the entire IEP Team, with the parent and his/her invitees, is to attempt to reach "consensus" as to the components of a student's IEP and program.

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

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

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

64 Fed. Reg. 12478 (1999).

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

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

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

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

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

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

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

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

6. "Since we can't agree, I guess we can't move forward."

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

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

I. Avoid Being Overly Specific and Including Unnecessary Additions, Details or "Promises" in IEPs and 504 Plans

Although IEPs are required to contain educational goals and specially designed services to assist a student with a disability to achieve those goals, it is not expected that IEPs be so detailed as to serve as a substitute for a daily lesson plan. Parents are not entitled to choose the specific teacher, curriculum, methodology or school site and it is not required that IEPs contain such details. In addition, things like extracurricular and nonacademic activities should not be listed specifically on an IEP or 504 Plan. Rather, support services necessary for an otherwise qualified student to participate in a particular activity should be indicated.

1. School personnel are convinced by the parent's advocate that the teacher's daily schedule must be written into the IEP.

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

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

2. School personnel comply with the attorney's request to write in the IEP that Barbara Smith will be the student's teacher and that all teachers will use the Orton-Gillingham method for instruction in reading.

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

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

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

3. The IEP Team complies with the parent advocate's request to write into the IEP that Michael will be on the Varsity Football Team in order to address his socialization and communication goals.

Kling v. Mentor Pub. Sch. Dist., 136 F.Supp.2d 744 (N.D. Ohio 2001). Interscholastic sports or other extracurricular activities may be related services under the IDEA, even though not expressly included within the definition of "recreation." District ordered to revise student's IEP to contain an interscholastic sports component and to place him on the high school track and cross country teams, even though district contended it would risk sanctions from the state athletic association because the 19-year old hearing impaired student with CP was too old. The local and state hearing officers had ruled that it was necessary for the student to participate for the development of his communication skills and to address his social and psychological needs.

J. Ensure that IEPs are Being Implemented and that Continuous Progress Monitoring is Occurring

Now more than ever and in light of the Endrew F. decision, implementation of IEPs is key as well as ensuring that progress monitoring with respect to IEP goals is occurring. If it is found that a student's IEP is not being implemented or that the student is not making expected progress on his/her annual IEP goals, the issue should be addressed immediately. Failure to implement an IEP can lead potentially to money damages or an order of compensatory education against the school district and/or individual school personnel.

1. "I don't *do* special education. I teach regular ed."

Doe v. Withers, 20 IDELR 422 (W. Va. Cir. Ct. 1993). A jury returned a verdict in favor of the parents of an LD student against a high school teacher for $5,000.00 in compensatory damages and $10,000.00 in punitive damages for teacher's refusal to provide their son with oral testing as required by IEP.

2. "There's no one else to cover this class, so I need the special ed. teacher to do it."

K. Address Behavioral Strategies or Interventions as Part of the IEP/504 Meeting

If a student needs a behavior management program, it should be discussed as a support service or intervention at the IEP/504 meeting. The IDEA requires that any time a student exhibits behavior that impedes his or her learning or that of others, the IEP Team must consider appropriate

strategies, including positive behavioral interventions, strategies and supports to address the behavior.

1. "Since she's not EBD, we don't need to address behavioral strategies for her."

L. Avoid Inappropriate "Changes of Placement" Through the Use of Disciplinary Removals

Under the IDEA and Section 504, the Rules of Discipline are generally the same. Suspensions over ten (10) days at a time and, generally, suspensions for more than ten (10) days cumulatively in the same school year are considered to be a "change of placement" for a student with a disability that triggers procedural requirements. The IDEA (and 504 as interpreted by OCR) requires that prior to changing the placement of a student with a disability through the use of disciplinary action, the following must occur: (1) a manifestation determination must be made by the student's IEP Team; (2) the IEP Team must plan a functional behavior assessment of behavior and then use assessment results to develop a behavioral intervention plan; and (3) the IEP Team must determine what services are to be provided to the child, for any removal period beyond ten (10) days in a school year, in order that the child may continue to participate in the general curriculum and advance toward achieving his/her IEP goals. Local school districts typically incorporate protections in their procedures so that illegal "changes of placement" do not occur.

In looking at whether a "change of placement" has occurred in the context of discipline, educators should be sure to consider the "constructive eviction" suspension situation as well. For example:

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

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

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

4. "If you keep him home, we won't file charges or take him before the Board for expulsion."

Letter to Mason, 72 IDELR 192 (OSEP 2018). Shortened school days that are imposed repeatedly as a disciplinary measure could count in creating a "pattern" of removals that are a change of placement that would trigger the IDEA's procedural protections, including a manifestation determination. For a student who was subjected to an administratively shortened day to address his behavior and it was done outside the IEP team process, those shortened days may count in determining whether a pattern of removals constituting a change of placement occurred. It is up to a district to determine on a case-by-case basis whether a pattern or removal exists that would trigger a manifestation determination.

M. Avoid Creating Unnecessary Educational Records

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

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

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

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

N. Remember the 504/ADA Prohibition against Retaliation When Dealing with Difficult School Staff or Parents

Section 504 and the ADA prevent retaliation in the form of adverse action taken against someone because they are advocating on behalf of the rights of a student with a disability. This includes parents, family advocates and school teachers or other service providers. However, schools may take reasonable steps to address parental behavior that is unacceptable.

Settlegoode v. Portland Pub. Schs., 371 F.3d 503 (9th Cir. 2004). Where a jury found for the plaintiff special education teacher on all claims and awarded her $500,000 in non-economic damages, $402,000 in economic damages and $50,000 in punitive damages against both the special education director and school principal under Section 1983, the verdict is upheld. The jury was more than reasonable in finding that the interests served by allowing the teacher to express herself outweighed any minor workplace disruption that resulted from her speech. Furthermore, it is well-settled that a teacher's public employment cannot be conditioned on her refraining from speaking out on school matters.

L.F. v. Lake Washington Sch. Dist., 72 IDELR 152 (W.D. Wash. 2018). Judgment is granted for the district on the father's 504 unlawful retaliation claim where there is evidence that he has a history of angry, aggressive and hostile encounters with district employees. Based upon such encounters, a communications protocol was put in place that limited the father's communications with school staff by holding biweekly meetings to address his concerns about his children's education. The parent failed to show that the district implemented this plan because of his advocacy. In fact, the record demonstrates that the district imposed the plan in response to the parent's history of burdensome, intimidating and unproductive communication with district staff and was completely unrelated to any attempts by the father to pursue a Section 504 action.

Camfield v. Board of Trustees of Redondo Beach Unif. Sch. Dist., 70 IDELR 126 (C.D. Cal. 2017). District's motion for summary judgment is granted where repeated episodes of disruptive conduct, not just advocacy on behalf of a child with a disability, caused the district to restrict a parent's presence on her child's elementary school campus. While the district conceded that the restrictions on the mother's access to campus were placed upon her close to the time she was expressing disagreement over where her child would be placed, it was undisputed that school administrators

found the mother's use of profanity, raising her voice and showing up on campus unannounced unacceptable. This is a sufficient non-retaliatory basis for restricting her presence on campus.

H.C. v. Fleming Co. Bd. of Educ., 70 IDELR 224 (E.D. Ky. 2017), aff'd, 72 IDELR 144 (6th Cir. 2018). Parent's retaliation claim under Section 504 is dismissed where the district showed that it had a legitimate, nondiscriminatory reason for restricting her access to school grounds. The district's documentation of evidence of unpleasant encounters between the parent and school personnel is sufficient to overcome the parent's retaliation claim. In addition, there were letters from other parents about a particular incident of bullying that further supported that the district was not retaliating for the parent's request for a 504 hearing. Although the superintendent barred her from visiting school property without prior approval just after the parent filed for a hearing, this action was taken based upon her previous behavior toward district staff. In addition, two suspensions of her son after she filed for a hearing were because of his bad behavior, including hitting a classmate with an oversized pencil and threatening to shoot a schoolmate. Where the parent failed to show that the district's justifications for its actions were false, she could not prove unlawful retaliation.

McKnight v. Lyon Co. Sch. Dist., 70 IDELR 181 (D. Nev. 2017). Parent's argument that district retaliated against her when it denied her request to participate in an IEP meeting via email is rejected and parent's ADA claim against the district is dismissed. Where a parent sufficiently alleges retaliation, the burden shifts to the district to explain why its actions were not retaliatory. Here, the parent sufficiently pled a claim for retaliation by alleging that the district denied her request after she filed due process complaints against it. However, the district articulated a legitimate reason for denying the parent's request to attend an IEP meeting via email, noting that email-only participation would limit collaboration by IEP team members. In addition, the parent did not show that the district had a different reason for denying her request. Therefore, the parent has not met her burden of proof and is not entitled to relief under the ADA. In addition, the district did not retaliate when it failed to provide her with copies of a specific test that her child had taken. Not only did the district explain that copying the test would violate the testing company's terms of use and subject the district to copyright litigation, but it offered to allow the parent to examine the actual test.

Lagervall v. Missoula Co. Pub. Schs., 71 IDELR 40 (D. Mont. 2017). Magistrate Judge's Report is adopted and father's ADA claims are dismissed. While the parent argued that the district excluded him from the grounds of the high school based upon a disability that caused him to speak at a loud volume, the parent had a documented history of yelling at school employees, disrupting meetings with staff members, walking out of meetings because he was angry, and acting in an aggressive and intimidating manner. More than one school employee had reported the parent's behavior to the principal and several expressed concern for their own safety and welfare and were anxious about the father arriving at school in a state of escalated anger. In addition, the principal did not prohibit the father from visiting the school entirely. Rather, the principal informed him that he would need to provide notice and get permission before arriving at the school, which was intended to allow school personnel that were familiar with the father to meet with him at a designated time. In addition, the principal testified that the father was allowed to come to the school every time he properly sought permission to do so. Thus, the restrictions on school visits were not based upon a disability or unreasonably restrictive.