60 TIPS IN 75 MINUTES

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This fast-paced session will provide participants with 60 practical tips on all things legal, from A to Z, in the field of special education. Topics covered will include child-find, evaluation, eligibility, IEP development and implementation, procedural safeguards and tips for helping parents understand the IDEA.

I. CHILD-FIND/IDENTIFICATION TIPS

1. **TRAIN** all school personnel to take the "MTSS process" seriously and to understand that the role of problem solving Teams is not to "get a student into ESE."

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

2. **TRAIN** all school personnel (including, *importantly*, regular education teachers and those who serve on problem solving Teams) on the overall legal requirements applicable to the identification and education of students with disabilities.

- ❖ Individuals with Disabilities Education Act (IDEA)
- ❖ Americans with Disabilities Act (ADA)
- ❖ Section 504 of the Rehabilitation Act of 1973 (Section 504)
- ❖ Family Educational Rights and Privacy Act (FERPA)
- ❖ No Child Left Behind (NCLB)/ESEA
- ❖ Relevant State Law Requirements that differ from Federal

3. **ENSURE** that if/when developing and implementing an MTSS/RtI approach to child-find and identification, a parental request for an evaluation is not met with: "I'm sorry, but we can't do an evaluation right now because your child has not completed the MTSS process."

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.

Letter to Ferrara, 60 IDELR 46 (OSEP 2012). While districts cannot use RTI as a reason for failing to evaluate a student, a Texas regulation advising districts to consider RTI before referring a student is not inconsistent with the IDEA's child-find requirement. While it is inconsistent with the IDEA for an LEA to wait until the completion of RTI activities before responding to a parent's request for an initial evaluation by either refusing to conduct it (because it does not suspect that the student has a disability) and providing written notice of the refusal or conducting it in accordance with IDEA's timelines, the Texas regulation does not prohibit a district or a child's parent from referring a child prior to completion of RTI. Rather, it merely states that RTI "should be considered" before referral. If a parent believes that RTI is being used to delay or deny an evaluation, the parent may seek redress through a due process complaint.

4. **REMEMBER** that school personnel cannot require a student to participate in the MTSS/RtI process prior to conducting an evaluation where the student has been placed in a private school setting and MTSS/RtI data do not exist.

Letter to Zirkel, 56 IDELR 140 (OSEP 2011). If a private school located within a district's jurisdiction does not use RtI, the district is neither required to implement it with the private school student, nor entitled to deny or delay a referral for an evaluation because the private school did not use RtI. In addition and regardless of whether the private school has used RtI, unless the district believes that there is no reason to suspect that the child is eligible, it must respond to a referral from the private school or parent by conducting an evaluation within 60 days or according to the state-imposed deadline. "If an RtI process is not used in a private school, the group making the eligibility determination for a private school child may need to rely on other information, such as any assessment data collected by the private school that would permit a determination of how well a child responds to appropriate instruction, or identify what additional data are needed to determine whether the child has a disability."

The same goes for referrals of students in programs operated by an outside agency, such as Head Start. A school district cannot require the outside agency to implement RtI before making a referral for an initial evaluation.

Letter to Brekken, 56 IDELR 80 (OSEP 2010). School districts cannot require outside agencies, such as Head Start, to implement RtI before referring a child for an initial evaluation. Once a district receives a child-find referral, it must initiate the evaluation process in accordance with the IDEA. The IDEA neither requires nor encourages districts to monitor a child's progress under RtI prior to referring the child for an evaluation, or as part of an eligibility determination. Rather, it requires states to allow districts to use RtI in the process of determining whether a student has an SLD.

5. **STRESS** the importance and affirmative nature of IDEA's child-find requirements.

- ❖ Referral for an evaluation is required when there is "reason to suspect" that the student may be a child with a disability.

- ❖ Referral for an evaluation is required when there is "reason to believe" the student is a child in need of special education.

6. **WATCH OUT** for "referral red flags."

Lauren G. v. West Chester Area Sch. Dist., 60 IDELR 4 (E.D. Pa. 2012). Clearly, the school district had reason to believe that the student had a disability and erred in finding the student ineligible for a Section 504 plan and, therefore, is responsible for partial reimbursement for the student's therapeutic residential placement. The denial of FAPE stemmed from the child study team's selective review of evaluation data. Although the team looked at academic records, student meetings and feedback from teachers, it did not consider information about his mental and emotional difficulties. Specifically, the district ignored the student's psychiatric diagnoses, her inpatient and outpatient psychiatric hospitalization, and the fact that she was cutting classes to see the guidance or crisis counselor once or twice per week. In addition, the district informed the parents that it found the student ineligible for a 504 Plan just one day after the guidance counselor requested additional information about the student. Because the student's depression and OCD substantially limited his learning, the district's failure to find him eligible for a 504 Plan amounted to a denial of FAPE.

Long v. District of Columbia, 56 IDELR 122, 2011 WL 1061172 (D. D.C. 2011). Where district did not evaluate student for three years and violated its child-find duty, case is remanded to the hearing officer to determine appropriate compensatory education. In this case, the district's child find duty was triggered when a private psychologist diagnosed a learning disability in 2006. Contrary to the district's assertions and the hearing officer's findings, there was evidence that the district was aware of the evaluation in 2006 but did not conduct an evaluation until 2009. For instance, an IEP team member apologized for the district's delay in following through on the referral process that was "initiated in 2006" when the charter school, for which the district was the LEA, referred the student for the evaluation in 2006. In addition, the district's assertion that the student suffered no harm is rejected, where the IEP team determined that the student was eligible for services when it finally completed the evaluation in 2009. The district's argument that it was not on notice of the suspected SLD until the parent presented a copy of the 2006 evaluation at the 2009 IEP meeting is also rejected, as the district's child-find obligations are triggered "as soon as a child is identified as a potential candidate for services."

E.J. v. San Carlos Elem. Sch. Dist., 56 IDELR 159 (N.D. Cal. 2011). District did not fail to timely identify the student as eligible under IDEA. Rather, the district properly and timely responded to parental concerns by convening a student study team meeting when it learned that a private neuropsychologist had diagnosed the student with Asperger syndrome. In addition, the team made modifications to the student's educational program, including extended time for test taking, the use of relaxation techniques and the use of a sign if the student needed to take a break. Not only did the student complete the 5th grade with A's and B's, she performed well in the 6th grade as well. During the 7th grade, the student study team met twice, after she was diagnosed with anxiety and OCD and adopted additional modifications to instruction. In eighth grade, the district promptly referred her for a special education evaluation in response to her parents' request. Prior to that, the student's teachers had no reason to believe she needed special education services and the evidence supports the conclusion that her parents did not request referral prior to the team meeting in November 2008. Thus, the due process decision in favor of the district is affirmed.

Oxnard (CA) Elem. Sch. Dist., 56 IDELR 274 (OCR 2011). School district discriminated against a first-grader diagnosed with ADHD, a seizure disorder and a mood disorder by delaying his

IDEA evaluation and failing to evaluate for Section 504 services. The district violated 504 by referring the student to its student support team before conducting an evaluation, even when there was reason to suspect a need for special education services. Where the district placed the child on a half-day schedule and later excluded him from summer school due to his disruptive behavior, coupled with the knowledge of the medical diagnoses, there was enough there to have suspected a need for special education services.

7. **REMEMBER** that the concept of "continuous progress monitoring" is applicable--regardless of whether an overall RtI approach for identification is used--in order to ensure that a student's difficulties are not due to an overall lack of "appropriate" (scientific/research/evidence-based) instruction.

Letter to Zirkel, 50 IDELR 49 (OSEP 2008). When asked to clarify whether an SLD evaluation team must consider continuous progress monitoring, regardless of whether the approach used is RtI, OSEP responded that the eligibility group must consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. "The regulation does not use the term 'continuous progress monitoring.'" "'A critical hallmark of appropriate instruction is that data documenting a child's progress are systematically collected and analyzed and that parents are kept informed of the child's progress.' We believe that this information is necessary to ensure that a child's underachievement is not due to lack of appropriate instruction."

8. **DO NOT WAIT** for parents to initiate a referral for an evaluation.

Compton Unified 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 can not 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).

9. **SERIOUSLY CONSIDER** parent and/or staff referrals or requests for evaluation.

- ❖ When there's debate, evaluate!

Charlotte-Mecklenburg Bd. of Educ. v. B.H., 51 IDELR 71 (W.D. N.C. 2008). District's alleged failure to identify and evaluate a child ultimately found to have a fatal neurological condition is more than a mere FAPE violation. The parents' complaint suggests that the district acted in bad faith or with gross misjudgment when it failed to take any action in response to the kindergarten teacher's IDEA referral and when he was sent to the kindergarten classroom when unable to complete work in first grade. Thus, the parents have sufficiently stated a claim under Section 504.

10. **REFRAIN** from diagnosing medical conditions or suggesting medication without the credentials for doing so.

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. The 2004 IDEA Amendments now provide that the State Educational Agency shall prohibit State and LEA personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services under this title. However, the new Act notes 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.

II. EVALUATION/REEVALUATION TIPS

11. **EXERCISE** the right to conduct independent evaluations, especially in potentially adversarial situations, by professionals/experts of the school system's choosing for purposes of determining eligibility.

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 County 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.

12. **SHARE** all relevant evaluative information about the child and fully share it with the parents.

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

13. **REFRAIN** from suggesting to parents that they are responsible for obtaining educationally-relevant evaluations, including medical evaluations for diagnostic/evaluative purposes.

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.

14. **USE** a variety of assessments when evaluating for the existence of a disability and do not use a single assessment to identify a disability.

Draper v. Atlanta Indep. Sch. Sys., 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008). Where the district failed to identify the student's SLD for five years and had determined that he was eligible for services as a mildly intellectually disabled student based upon just one assessment, the school district denied FAPE. The district court did not abuse its discretion in ordering the school district to pay up to $38,000 per year until 2011 for private placement as a remedy. The relief awarded was not disproportionate to the IDEA violations, as the district failed to identify the student's SLD for five years and transferred him from a self-contained class to a regular education program without considering his severe reading deficiencies. In addition, the district continued to use an ineffective reading program for three years, despite the student's clear lack of progress.

15. **CONDUCT** comprehensive evaluations and evaluate in all suspected areas of need, not just disability.

D.B. v. Bedford County 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 Unified 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.

16. **MAKE** appropriate and thorough decisions regarding the need to conduct reevaluations and presume that a reevaluation is needed rather than presuming that it is not.

- ❖ When there's debate, reevaluate!

17. **CONSIDER** results of independent educational evaluations that parents present.

T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). 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 County, 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.

18. **REMEMBER** that parents have the right to request an Independent Educational Evaluation (IEE) when they disagree with the evaluation completed by and/or obtained by the school system.

P.L. v. Charlotte-Mecklenburg Bd. of Educ., 55 IDELR 46, 2010 WL 2926129 (W.D. N.C. 2010). Where parents obtained an IEE without waiting for the school district to respond and provide a list of approved evaluators, parents are not entitled to reimbursement for their IEE because they failed to follow IDEA's requirement for obtaining a publicly-funded IEE. In addition, the parents were not able to show that the district's response came too late and parents jumped the gun by obtaining and paying for an IEE eight days after mailing their request for an IEE. Although there was disagreement as to when the parents received the district's response that it would pay $800 for an IEE from its approved list of examiners, all of the asserted dates of receipt fell within the 60 days the district had to respond or request due process under North Carolina's statute of limitations.

19. **MAINTAIN** and update a list of qualified independent evaluators and applicable criteria for independent educational evaluations and evaluators.

20. **REMEMBER** the responsibility to conduct a FAPE evaluation, even of a student placed by the parent in a private school located in another jurisdiction.

Letter to Eig, 52 IDELR 136 (OSEP 2009). The home district must evaluate a parentally placed private school student for FAPE upon parental request. If a parent asks the home district to evaluate a private school student's eligibility for IDEA services (rather than eligibility for "equitable services"), the home district cannot refuse to do so on the grounds that the student attends private school in another LEA.

21. **COMPLY** with applicable evaluation timelines and appropriately document compliance with them!

- ❖ days to completion of initial evaluation.
- ❖ days from completion of initial evaluation to eligibility determination.
- ❖ days from eligibility determination to IEP development.

Letter to Weinberg, 55 IDELR 50 (OSEP 2009). While there is no set timeframe for making an eligibility determination under the IDEA, it must occur within a "reasonable period of time" after the initial evaluation. While the IDEA does require an initial evaluation to be conducted within 60 days of receiving parental consent for the evaluation (or within a state's timeframe), the IDEA does not require that a district make an eligibility determination within a specific number of days after a parent requests an evaluation, after the district receives consent for it, or after the evaluation is completed. However, consistent with its child-find duties, a public agency must make an eligibility determination within a reasonable period of time after the evaluation is conducted to ensure the receipt of FAPE without undue delay. In addition, a parent who believes that the district is unreasonably delaying an eligibility decision may address the matter through the IDEA's dispute resolution procedures.

Integrated Design and Electronics Academy Pub. Charter Sch. v. McKinley, 50 IDELR 244 (D. D.C. 2008). District's failure to comply with D.C.'s 120-day timeline for completing an evaluation amounted to a denial of FAPE. The evidence did not support the school's claim that the parent was uncooperative in providing information and scheduling.

III. ELIGIBILITY TIPS

22. **ADHERE** to applicable State eligibility requirements, including definitions, criteria and minimally required evaluations and other data and thoroughly and accurately document such.

23. **CONVENE** an appropriate Eligibility Committee with required participants, including the parent(s), and provide them with an opportunity to fully and meaningfully participate in the eligibility decision.

24. **REMEMBER** that the actual "disability label" should not matter—it's eligibility for services and the provision of FAPE that matter.

Pohorecki v. Anthony Wayne Local Sch. Dist., 53 IDELR 22 (N.D. Ohio 2009). The IDEA does not require children be classified by their disability. Rather, it requires that a child who needs special education and related services be regarded as a child with a disability and receive an appropriate education. The label assigned merely assists in developing the appropriate education provided. In addition, there was ample evidence that the student met the IDEA's definition of ED and that classification was a reasonable one.

Fort Osage R-1 Sch. Dist., 56 IDELR 282, 641 F.3d 996 (8th Cir. 2011). Where the IEP addressed the unique needs of the 10-year-old student, the fact that it did not mention "autism" specifically did not invalidate it. An IEP should not be based upon a student's disability classification. Rather, it should be based upon the student's unique disability-related needs. As such, a parent alleging misclassification must show that the district's failure to properly identify the student's disability resulted in a loss of educational opportunity, and the parents failed to meet this standard. Even if the student did have autism, there was no evidence that the IEP's failure to specify autism as the disability denied FAPE. Clearly, the thirty-one page IEP and accompanying two-page behavior plan detailed the student's educational status, set meaningful goals, and provided a "tremendous" amount of resources to assist the student. Clearly, a change in the student's classification would not have resulted in a material change to the content of the IEP.

J.D. v. Crown Point Sch. Corp., 58 IDELR 125 (N.D. Ind. 2012). Deaf student's receipt of FAPE was not contingent on his disability label. Rather, his IEP addressed his unique needs and conferred meaningful educational benefit, even though the IEPs did not contemplate whether the student also was SLD. Failing to properly label a student's disability in his IEP will not deprive him of FAPE, as long as the student receives an appropriate education, his parents receive an opportunity to participate in the IEP process, and he is not deprived of educational benefits. Here, the district received extensive notice of the student's cognitive deficits from his teachers and parents, which served to ensure that the district crafted IEPs that were tailored to address those deficits. In addition, records showed that in response to teacher and parent concerns, the district developed IEP goals and appropriate benchmarks and provided services geared toward increasing the student's reading fluency. Though the district ultimately determined that the student was not eligible as SLD, it increased the special education services he received when the parents provided private evaluation results indicating that the student was dyslexic. Importantly, the student made steady progress with reading pursuant to the district's attention to his cognitive deficiencies. In addition, the increase in his standardized test scores from second to fourth grade proved that his IEPs likely conferred meaningful benefit.

25. **DON'T RELY** solely on test scores when determining eligibility/ineligibility.

Jaffess v. Council Rock Sch. Dist., 46 IDELR 246 (E.D. Pa. 2006). In a dispute as to whether a 16 year-old student diagnosed as LD continued to need specially designed instruction (SDI), it is clear that the student did not. Expert witness testimony submitted by the parents relied heavily on test scores, but neither expert observed the student's in-class performance, which unequivocally demonstrated that the student did not need SDI. In addition, all of the student's teachers and district staff universally agreed that he did not require SDI to meaningfully benefit from his educational program. This conclusion was based upon data collected by classroom teachers, evaluation reports, reports regarding student's writing ability prepared by the State, report card grades, interim reports from teachers and conversations with all team members. In addition, student's chemistry, study skills, French, geometry, English and American Studies teachers all testified that he did not need SDI to succeed in their classrooms.

K.S. v. Fremont Unif. Sch. Dist., 56 IDELR 190, 2011 WL 1362467 (9th Cir. 2011) (unpublished). An IQ score is not a "legal prerequisite" for determining that a student has an intellectual disability. Where the student's distractibility and limited ability to maintain social interaction prevented the district from relying upon an IQ test to assess her cognitive ability, other evidence reflected that she had an intellectual disability, including expert testimony, results on alternative cognitive tests, the student's IEPs and her progress reports from school. Given the nature and severity of her disabilities, the district court's finding that the student's progress was meaningful and significant is affirmed. In addition, the district had no obligation to use an ABA-based teaching methodology when the student could benefit from an eclectic approach.

26. **DO NOT LIMIT** the definition of "educational performance" to academic performance only when determining whether there is a condition that adversely affects educational performance (unless you are in the Second Circuit, perhaps).

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.

Board of Educ. of Montgomery County v. S.G., 47 IDELR 285, 230 Fed. Appx. 330 (4th Cir. 2007). 15-year-old student with schizophrenia is eligible for special education services because her emotional disturbance adversely affected her educational performance in a regular classroom. Therefore, school district must fund S.G.'s attendance at a therapeutic school.

C.B. v. Department of Educ. of the City of New York, 52 IDELR 121 (2d Cir. 2009). Though there is no dispute that the student has co-morbid bipolar disorder and ADHD, the conditions do not make her eligible as an OHI student because they do not adversely affect her educational performance. The student's grades and test results demonstrate that she continuously performed well both in public school before she was diagnosed, and at the private school thereafter. Relevant evaluations indicate that she tested above grade-level and do not find that her educational performance has suffered. Thus, the evidence is insufficient to show that she has suffered an adverse impact on her educational performance.

Williamson County Bd. of Educ. v. C.K., 52 IDELR 40 (M.D. Tenn. 2009). Gifted student with ADHD should have been made eligible for special education services as Other Health Impaired.

"Under the law, it is not enough that C. managed to earn average to above average grades overall by the end of each school year in order to advance to the next grade level. Each state 'must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.'"

A.J. v. Board of Educ. of East Islip Union Free Sch. Dist., 53 IDELR 327 (E.D. N.Y. 2010), (unpublished). Where New York law does not define "educational performance" and "adverse effect," applicable authority provides that "educational performance" must be assessed by reference to academic performance "which appears to be the principal, if not only, guiding factor." Where the kindergartner with Asperger Syndrome was performing at average to above-average levels and was making academic progress in the classroom, there was no adverse effect on educational performance for purposes of IDEA eligibility.

Maus v. Wappingers Cent. Sch. Dist., 54 IDELR 10 (S.D. N.Y. 2010). While neither the IDEA nor New York law define the term "adverse effect on educational performance," the Second Circuit has indicated that "educational performance" refers only to academics. Thus, where 7th grader with social and emotional difficulties as a result of ADHD, Asperger syndrome and generalized anxiety disorder consistently earned above-average grades in all of her classes and performed at an 8th grade level in reading and written expression and a 12th grade level in math, she is not disabled. While her conditions might impede her social and emotional functioning, they do not impede her ability to obtain an educational benefit.

G.D. v. Wissahickon Sch. Dist., 56 IDELR 294, 2011 WL 2411098 (E.D. Pa. 2011). School district's evaluation process was flawed when it found the child ineligible for IDEA services because IDEA eligibility does not turn on academic ability alone. Rather, the Third Circuit has held that a child's progress must be measured in light of his potential. The school psychologist's evaluation report focused solely on the child's superior academic performance and did not discuss the results of two private ADHD diagnoses, parent and teacher rating scales, and input from the kindergarten teacher. In addition, the evaluation report did not include the psychologist's own classroom observations of the student and the psychologist's statement to the parents that she "didn't do IEPs for students who have good skills" highlighted the flaws in the evaluation process. The district has an obligation to look beyond a child's cognitive potential or academic progress and address attentional issues and behaviors that a teacher has identified as impeding the student's progress. Thus, the district's evaluation was flawed and an award of compensatory education is warranted.

27. **REMEMBER** the third prong for determining eligibility: whether the student's condition adversely affects educational performance *to the degree that the student needs special education and related services.*

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, but 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."

H.M. v. Haddon Heights Bd. of Educ., 57 IDELR 186, 2011 WL 4499253 (D. N.J. 2011). District did not err in finding that student was no longer eligible as an SLD student because she did not need special education services. The notion that the student's weakness in oral reading demonstrated LD in the area of reading fluency is rejected. According to the student's teachers, the student was able to read and comprehend what she read and the student's oral reading skills were average to above-average for a 5th grader. While one evaluation rated the student's oral reading skills at the 2nd grade level, the data as a whole, including her above-average grades, showed that she functioned at or near grade level. Thus, the student's weakness in oral reading fluency does not adversely impact her educational performance to the extent that she requires special education services.

Loch v. Edwardsville Sch. Dist. No. 7, 52 IDELR 244 (7th Cir. 2009). Student's claim that her anxiety prevented her from attending classes at a public high school and that she was, therefore, disabled under the IDEA is rejected, as there is no evidence that the student required special education or related services. The student was not taking medication for her anxiety and had not seen her psychiatrist or her therapist in the previous six months. Moreover, the student received satisfactory grades until she stopped attending class in her sophomore year. There was no medical evidence that the student's anxiety or diabetes had progressed to the point that she was unable to attend school. "Indeed, [the student's] doctors reported that when she was not attending classes, her health was good and should not have interfered with her school attendance." In addition, the student left high school to enroll in community college courses, where she received A's and B's. Given the student's performance at the community college, she could not demonstrate that she needed special education services at the high school level to receive an educational benefit.

E.M. v. Pajaro Valley Unif. Sch. Dist., 53 IDELR 41 (N.D. Cal. 2009). Where the student performed very well in class with the use of general education interventions, the district's determination that he is not SLD is upheld and the administrative decision in the district's favor is upheld. The student's performance showed that he did not require specialized instruction to receive an educational benefit. Though the student was distractible and failed to complete homework assignments, his performance improved when his teacher used interventions, such as small group settings. "When viewed as a whole, the observational and anecdotal evidence describes a student who was distracted easily but who also responded to various forms of classroom intervention."

Alvin Indep. Sch. Dist. v. A.D., 48 IDELR 240 (5th Cir. 2007). Student with ADHD is not a student with a disability because he does not need special education and related services. The "adversely affects a child's educational performance" standard is a subpart of the definition of "other health impairment" under the IDEA, but the student does not meet the second prong required to be eligible for special education—that is, "by reason thereof, needs special education and related services." The determination of ineligibility was not just based upon academic success and the district court considered a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social, and cultural background.

Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099 (9th Cir. 2007). Parents' reimbursement claim for placement at a private school for LD students is denied because student is not eligible for special education services. Prior to the student's removal from public school, she was consistently receiving average or above-average grades and she did not, therefore, need special education services to obtain a meaningful educational benefit. The student's 504 Plan (based upon a seizure disorder) included preferential seating, use of a graphic organizer and Alpha Smart keyboard, one-step directions, visual support for instruction and concepts, etc. Because any severe discrepancy reflected in testing could be corrected within the regular instructional program, she was not eligible as SLD or OHI.

M.P. v. North East Indep. Sch. Dist., 49 IDELR 37 (W.D. Tex. 2007). Student with undeniable ADHD is not a child with a disability under the IDEA because student could not prove that he has an educational need for special education services caused by the ADHD. Rather, student's behaviors were voluntary and, as several of his teachers testified, he could control his behavior when he wanted to.

Ashli and Gordon C. v. State of Hawaii, 47 IDELR 65 (D. Haw. 2007). School district's decision that student with ADHD was not eligible for services is upheld. Parent's argument that the school should have considered the effects of ADHD on student's educational performance without taking into consideration the fact that the classroom teacher provided differentiated instruction is rejected. Without a definition of "adversely affects" in state law, it refers to the ability to perform in a regular classroom designed for non-disabled students and if a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services. Adverse means "causing harm" and where a student is able to learn and function at an average level in the regular classroom and experiences only a slight impact on his educational performance, it can not be said that the student is harmed.

28. **DISTINGUISH** between SED and BAD, but be careful!

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.

Hansen v. Republic R-III Sch. Dist., 56 IDELR 2, 632 F.3d 1024 (8th Cir. 2011). Ninth grader diagnosed with conduct disorder, bipolar disorder and ADHD is eligible as emotionally disturbed and OHI. Where the district chose not to put on any evidence at the hearing and the hearing panel made no findings, the court is free to review the administrative record and draw its own conclusions. This student had multiple disciplinary referrals over the previous four years for threatening students and teachers, fighting with other students and disrespecting teachers and peers. In addition, he struggled to pass his classes and failed a standardized test required to advance to seventh grade. He also exhibited hyperactive, impulsive and inattentive behavior as a result of his ADHD and these behaviors interfered with learning. "Although [the district] correctly states that a diagnosis of ADHD alone does not entitle [the student] to special education services, it fails to cite any evidence in the record supporting the conclusion that ADHD does not adversely affect [the student's] educational performance."

29. **DON'T** rely solely on medical diagnoses or recommendations for determining eligibility!

S. v. Wissahickon Sch. Dist., 50 IDELR 216 (E.D. Pa. 2008). Although the student was diagnosed with ADHD in the second grade, he earned As and Bs throughout elementary school. Though his grades slipped when he entered middle school, his teachers testified that he was attentive in class and performed well on quizzes and tests and that his poor performance stemmed from a lack of motivation rather than ADHD. Importantly, the court observed that the district devised strategies to help the student, which included the use of progress reports, an agenda book, and parent conferences.

M.P. v. Santa Monica-Malibu Unif. Sch. Dist., 50 IDELR 220, 2008 WL 2783194 (C.D. Cal. 2008). Where everyone agreed that the student could perform well academically when motivated, the "Court agrees that the evidence shows that M.P. is capable of completing independent school work when motivated, but the evidence also shows that because of his ADHD he is not capable, without help, of being motivated. This is the very definition of a discrepancy between ability and achievement." Therefore, the student has demonstrated the requisite severe discrepancy in ability and achievement to become eligible for services as an SLD student.

Strock v. Independent Sch. Dist. No. 281, 49 IDELR 273, 2008 WL 782346 (D. Minn. 2008). The mere existence of ADHD does not demand special education services. When the student actually completed required work, he received average or above-average grades. "Children having ADHD who graduate with no special education or any §504 accommodation are commonplace." The fact that the student was required to take remedial courses when beginning at the community college is "neither unusual or evidence of 'unsuccessful transition,' an entirely undefined term."

Brendan K. v. Easton Area Sch. Dist., 47 IDELR 249, 2007 WL 1160377 (E.D. Pa. 2007). Evidence supports determination that student diagnosed with, among other things, ADHD is not eligible for special education services. "Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education."

P.R. v. Woodmore Local Sch. Dist., 46 IDELR 134 (N.D. Ohio 2006). Student diagnosed with ADHD is not eligible as a student with a disability or OHI under IDEA. Student's doctor based her conclusions that student was OHI on the mother's observations and never interviewed any of the student's teachers, the student's guidance counselor, or any of the school's special education personnel. District personnel's determination that his difficulties in school were no different than those of many boys in their junior year of high school is upheld.

30. **REMEMBER** that a student who needs only related services is not a "child with a disability" eligible for ESE services under the IDEA.

34 C.F.R. §300.8(a)(2)(i).

IV. IEP DEVELOPMENT TIPS

31. **REFRAIN** from action that appears to reflect a "predetermination of placement" or appears to deny parental input into educational decision-making.

A predetermination of placement or making placement decisions without parental input or outside of the IEP/placement process will not only cause a parent to lose trust in school staff, it may very well lead to a finding of a denial of a free appropriate public education (FAPE). "Predetermination of placement" would include action such as fully developing and finalizing an IEP prior to the meeting with the parents and asking them to sign without discussion. Being prepared for an IEP meeting or bringing draft IEPs, however, is not prohibited. Denial of parental participation/input might also be reflected if sufficient notice is not provided to parents of relevant evaluative information, proposed placement, etc.

The 2004 IDEA Amendments address such procedural violations as follows:

> A decision made by a hearing officer "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child's right to a FAPE; 2) **significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child**; or 3) caused a deprivation of educational benefits. However, nothing shall be construed to preclude a hearing officer from ordering an LEA to comply with the procedural requirements.

G.D. v. Westmoreland, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation as long as it is made clear to the parents that drafts are presented for discussion purposes only.

Louisiana Dept. of Educ., 213 EHLR 230 (OSEP 1989). It is permissible for a member of the IEP team to prepare a draft IEP before an IEP meeting as a preliminary assessment of appropriate services for the child, but district must ensure that parents take part in a full discussion of all aspects of the IEP before it is finalized.

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 development of IEP 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.

Spielberg v. Henrico County, 853 F.2d 256 (4th Cir. 1988). Placement determined prior to the development of the child's IEP and without parental input was a *per se* violation of the Act.

Fort Osage R-I Sch. Dist. v. Sims, 55 IDELR 127, 2010 WL 3942002 (W.D. Mo. 2010). Parents were not denied meaningful participation in the development of their child's IEPs where they, their experts and advocate were actively involved in numerous IEP meetings. In addition, their input resulted in changes to IEP goals, modifications, and present levels of performance.

S.A. v. Exeter Union Sch. Dist., 110 LRP 69145 (E.D. Cal. 2010). Parent of autistic student was not able to show that the district predetermined behavioral services when the district cancelled its contract with a private provider and proposed using a district and county employee instead. Though a district is required to allow for a parent to participate in developing a student's IEP, it is not required to grant the parent any veto power over any specific IEP provision. The fact that the parent did not agree to the behavioral services provision did not establish that the district's offer was a "take it or leave it" proposal. Rather, the evidence showed that the parent's concerns were considered and addressed, e.g., where the district agreed to her suggestion that data collection be increased. In addition, the district agreed to include one of the behavioral providers at the IEP meeting so the parent and her attorney could question her.

T.P. v. Mamaroneck Union Free Sch. Dist., 51 IDELR 176, 554 F.3d 247 (2d Cir. 2009). There was insufficient evidence of a "predetermination of placement" where the parents failed to show that the school district did not have an open mind as to the content of the autistic student's IEP. There was no pre-meeting agreement to adopt the recommendations of the consultant to the school district and there was evidence that the parents meaningfully participated in the IEP meeting, where the Committee adopted some of the recommendations of the parents.

32. **PREPARE** adequately for IEP meetings, while avoiding predetermination.

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

IDEA Regulations: A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will

be discussed at a later meeting. 34 C.F.R. § 300.501(b)(3). See also, N.L. v. Knox County Schools, 315 F.3d 688, 38 IDELR 62 (6th Cir. 2003) (the right of parental participation is ***not*** violated where teachers or staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made) and Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115 (9th Cir. 2003); Burilovich v. Board of Educ., 208 F.3d 560 (6th Cir. 2000); and Doyle v. Arlington County Sch. Bd., 806 F. Supp. 1253, 19 IDELR 259 (E.D. Va. 1992) (school officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind).

33. **AVOID** making IEP recommendations/decisions based solely upon cost.

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 Community Sch. Dist. v. Garret F., 526 U.S. 66 (29 IDELR 966)(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.

Manalapan-Englishtown Regional Board of Education, 107 LRP 27925 (SEA NJ 2007).In a case from New Jersey, the student's doctor reported that an EpiPen had to be administered "expeditiously" following the student's exposure to peanut protein (whether ingested, touched or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the EpiPen, "there is absolutely no way" he would survive. The Administrative Law Judge ordered an aide be placed on the bus, further finding that

> "Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen. Therefore, a nurse, aide or other trained adult is required for those purposes."

What the student needed, found the Hearing Officer, was not necessarily a nurse, but someone who could address the student's need for supervision and administration of an EpiPen in case of exposure. The need for services could be met by any one of the three appropriate alternatives, even if the parents preferred that a nurse, the most expensive alternative, be provided on the bus.

34. **USE** a proper process for determining the Least Restrictive Environment (LRE).

Courts and federal agencies are clear that IEPs and/or other relevant documentation should clearly and specifically document options considered on the continuum of alternative placements and why less restrictive options were rejected. This rationale must be clearly and appropriately stated.

Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991), withdrawn, 956 F.2d 1025 (11th Cir. 1992), reinstated, 967 F.2d 470 (11th Cir. 1992). The IEP did not reflect sufficient consideration of less restrictive options than self-contained classroom.

St. Louis Co. Special Sch. Dist., 352 EHLR 156 (OCR 1986). Failure to state in IEPs why students could not be educated in the regular education environment with the use of supplementary aids and services denied them a free appropriate public education.

Brazo Sport Indep. Sch. Dist., 352 EHLR 531 (OCR 1987). Placement at separate facility was not justified and IEPs of all students should bear evidence of individual consideration of ability to benefit from regular education, not identical language for all students in the separate facility.

35. **ADDRESS** appropriately and annually the issue of Extended School Year (ESY) services.

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

Under the regulations, each public agency must ensure that extended school year services are available as necessary to provide FAPE and extended school year services must be provided only if a child's IEP team determines, on an individual basis that the services are necessary for the provision of FAPE to the child. In implementing these requirements, a public agency may not—

(i) Limit extended school year services to particular categories of disability; or
(ii) Unilaterally limit the type, amount, or duration of those services.

The regulations define "extended school year services" as special education and related services that—

(1) Are provided to a child with a disability--
(i) Beyond the normal school year of the public agency;
(ii) In accordance with the child's IEP; and
(iii) At no cost to the parents of the child; and
(2) Meet the standards of the SEA.

Bend Lapine Sch. Dist. v. K.H., 43 IDELR 191 (D. Ore. 2005). Failure to consider or discuss eligibility for Extended Year Services is an IDEA violation that amounts to a denial of FAPE.

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

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

McQueen v. Colorado Springs Sch. Dist. No. 11, 45 IDELR 157, 419 F.Supp.2d 1303 (D. Colo. 2006), rev'd on other grounds, 47 IDELR 283, 488 F.3d 868 (10th Cir. 2007). School district's policy, based upon Colorado Department of Education guidelines, that requires that ESY services address only maintenance and retention of skills already mastered, rather than acquisition of new skills, is not in violation of the IDEA. Clearly, the relevant case law and OSEP guidance support endorsing the "significant jeopardy" standard as the basis for the content of ESY services.

36. **ENSURE** proper attendance of required school personnel at IEP meetings.

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.

The 2004 IDEA now 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 consent to any excusal must be in writing.

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 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, 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."

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 it general education program.

M.L. v. Federal Way Sch. Dist., 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.

37. **IDENTIFY** everyone that the parent has invited to participate at the meeting, particularly if they are participating by phone or video conference.

38. **REMEMBER** that beginning not later than the IEP in effect when a student turns 16 (or younger in some states), the IEP must contain appropriate *measurable* postsecondary goals that are based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills.

34 C.F.R. § 300.320(b).

Letter to Cernosia, 19 IDELR 933 (OSEP 1993). Transition services are defined as a coordinated set of activities in the areas of instruction, community experiences, development of employment and post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation. If the IEP team determines that services are not needed in one or more of those areas, the IEP must include a statement to that effect and the basis upon which the determination is made.

39. **ADDRESS** behavioral strategies/interventions when appropriate.

If a student has behavioral issues that are disruptive to that student's education or that of others, then the IEP team is required to address positive behavioral strategies and interventions for that student. If the student needs a behavior management program, it should be discussed as a support service or intervention at the IEP 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.

40. **SEEK** the assistance of and/or contract with behavioral experts (or BCBAs) when previous efforts to address behaviors, including FBAs and BIPs, have not been effective.

41. **INCLUDE** appropriate statements of present levels of performance or otherwise ensure that adequate "baseline data" exist for measuring and showing progress.

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

evaluation because they had the evaluation done before the hearing officer determined whether the district's evaluation was appropriate.

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

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

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

42. **INCLUDE** measurable goals in IEPs that are linked to present levels of performance and identified challenges.

Quite often, IEPs are attacked because of the lack of measurability of the annual goals (and short-term objectives/benchmarks, if appropriate). School staff should be trained to write appropriate and measurable annual goals.

43. **STATE** services or amount of services with sufficient clarity in the IEP.

Services and the amount of services offered should be set forth in the IEP in a fashion that is specific enough for parents to have a clear understanding of the level of commitment of services on the part of the school system. This will help to avoid misunderstandings.

N.S. v. District of Columbia, 54 IDELR 188 (D. D.C. 2010). Where the district's proposed IEP did not contain present levels of performance or supplementary aids and services that would be provided in the regular setting and failed to provide for pull-out instruction, the student was denied FAPE and funding for private schooling is warranted. Although district witnesses testified that pull-out services would have been provided if needed, neither the IEP nor the IEP Team meeting notes reflected that this was discussed and no clear offer of services was made. Thus, the parents are entitled to reimbursement for the cost of a unilateral private placement.

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

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

44. **FINALIZE** placement recommendations (particularly by the beginning of the school year)!

Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001). Although the district met with the parents on several occasions to review possible placement options for the student, such meetings were not the "equivalent of providing the parents a meaningful role in the process of formulating an IEP." Because the district did not formally offer an IEP/placement prior to placement in a residential program by the parents, parents are entitled to reimbursement. The parents' refusal to agree with the district's placement recommendations did not excuse the district's failure to conduct an IEP conference.

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

V. IEP IMPLEMENTATION TIPS

45. **DEVELOP** an Action Plan for the implementation of an IEP.

Obviously, the failure to implement a student's IEP is the most serious substantive mistake that can occur. Frequently, failure to implement the IEP results from the IEP Team's failure to appropriately prepare an "action plan" for getting services provided in a timely and appropriate fashion. In the new IDEA regulations, § 300.323(d) was revised to retain 1999 regulation 300.342(b)'s provision to require public agencies to ensure that each regular teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of a child's IEP, is informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the child's IEP.

46. **REMEMBER** to inform all service providers of any responsibility they have to implement the IEP and document this process.

47. **ENGAGE** in continuous progress monitoring on IEP goals and revise IEPs when expected progress is not being made or goals have been achieved.

48. **COLLECT** appropriate data with respect to the implementation of the IEP and student progress on IEP goals.

J. P. v. County Sch. Bd. of Hanover County, 46 IDELR 133 (E.D. VA. 2006). A district's therapy notes were sporadic and not sufficiently detailed, meaning that the district was unable to demonstrate that a student received a FAPE.

49. **AVOID** over-reliance upon grades to demonstrate progress.

Independent School District No. 701 v. J.T., 45 IDELR (D.C. Minn. 2006). A student's "minimal increase" in his English score from 64 to 67% did not constitute academic progress. The student's goals were also too vague.

T.W. by McCulla, 43 IDELR 187 (10th Cir. 1995). Even though a student with a learning disability was passing from year to year, such did not constitute a FAPE.

Winwood Bd. of Educ. v. K.H.G., 49 IDELR 63 (3d Cir. 2007). Student with an above-average IQ made negligible progress in reading, given that he was still one to two years behind his class. Further, since his IEP goals were lowered in subsequent IEPs, it appears as if he regressed. The district's program did not convey "meaningful benefit." The above-average IQ demonstrated that he should have performed at least average in the area of reading.

50. **CONVENE** an IEP meeting if there is any doubt about the appropriateness of or ability to implement the provisions of an IEP.

VI. HELPING PARENTS UNDERSTAND THE IDEA

51. **RECOGNIZE** the IDEA's presumption with respect to parents.

Ever wonder why the procedural safeguards exist? It appears that parents are given significant rights in IDEA, so that the parents can be active participants in the IEP process, and when necessary, take action to enforce school compliance with the IDEA. The U.S. Supreme Court in *Schaffer v. Weast,* 44 IDELR 150, 126 S. Ct. 528 (2005) provided this helpful language.

> "The core of the statute, however, is the cooperative process that it establishes between parents and schools. ('Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, ... as it did upon the measurement of the resulting IEP against a substantive standard')….
>
> Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child under the Act. Parents are included as members of 'IEP teams.' They have the right to examine any records relating to their child, and to obtain an 'independent educational evaluation of the[ir] child.' They must be given written prior notice of any changes in an IEP, and be notified in writing of the procedural safeguards available to them

under the Act[.] If parents believe that an IEP is not appropriate, they may seek an administrative 'impartial due process hearing.'

School districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them…. As noted above, parents have the right to review all records that the school possesses in relation to their child. They also have the right to an 'independent educational evaluation of the[ir] child.' *Ibid.* The regulations clarify this entitlement by providing that a 'parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.' IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. **They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition."** [Internal citations omitted for easier reading; emphasis added].

IDEA envisions the parent as champion and protector of the student's IDEA rights. The IDEA envisions a system in which schools and parents work jointly in the planning and development of the IEP. Parents are consensus members of the IEP Team– equal participants in the IEP Team process under the law. Parents are entitled to notice of their rights, prior notice of meetings, and the right to inspect records. Parents can refuse consent to evaluation, can demand independent evaluations at the district's expense, and can request IEP Team meetings to discuss concerns. When the parent disagrees with the IEP Team, the parent can seek a due process hearing (that can spawn appeals to federal court), can file complaints with the SEA or OCR, or request mediation. The importance of the parent in the IDEA process was highlighted in commentary to the 2008 final regulations on revocation of consent. Note the presumption at the end of the quotation.

"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…. 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."** 73 Federal Register No. 231 (December 1, 2008), p. 73009 (emphasis added).

A little commentary: In Dave's opinion, for the Act's presumption to be valid, the parent must have a basic understanding of the IDEA process and the natural consequences of the decisions made through that process. The most important strategy for improving the school's working relationship with parents aside from faithful compliance with the IDEA is providing parents with these tools. You can't expect to protect or appropriately utilize rights you don't understand, and you can't effectively advocate for your child's FAPE if you have no idea what FAPE looks like.

52. **TEACH** the parent how to participate in the IEP Team Meeting.

Consider the typical IEP meeting from the parent perspective. The participants from the school may already be in the meeting room when the parents arrive. They have met in a staffing and generally understand what will be discussed. The school members are well-educated, professionally attired, and may refer to each other as "Dr." They have been trained in compliance with IDEA and are familiar with the paperwork. The parent arrives, and even with an advocate or spouse, is outnumbered by well-dressed, well-educated people who use terms that are unfamiliar and may

even speak a language that the parent does not understand well. Some parents will simply not respond cooperatively in this environment that seems to highlight the rather stark differences between the educators and the parents. Even though meaningful participation is desired, parents may not understand how or when to participate without some gentle prompting.

Remember when you closed on your home? One parent attorney compares the parents' perception of the IEP Team meeting to a first-time homebuyer's experience closing on a home. The title company is in a hurry to get the buyers' signatures on a mountain of documents that the buyers have never seen so that it can move on to the next closing. Faced with the pressures of a huge, first-time purchase, the homebuyer has questions, which slow down the title company's work and are met with irritation and few intelligible answers.

Change the IEP Team Meeting dynamic to make parents comfortable. A parent's confusion or lack of knowledge may manifest itself in frustration, confusion, anger, or even a total lack of participation. Changing the dynamic can help. Consider these thoughts. Prior to the meeting, consider sharing complex evaluation data with the parents to encourage questions and to make understanding easier to gauge. A parent is more likely to express concern or ask for understanding one-on-one rather than in front of a room filled with strangers. Modeling good doctor behavior can help as well. An expert on doctor-patient relationships "urges doctors to build rapport with their patients by greeting them warmly by name, asking briefly about important events in their lives, maintaining eye contact, focusing on the patient without interruptions, and displaying empathy through words and body language." *Brody, Well-Chosen Words in the Doctor's Office, THE NEW YORK TIMES,* June 8, 2009.

How about showing some interest in the parent's concerns? "Physicians also vary widely in their interest in and ability to elicit relevant information from their patients." One study found that "patients disclose significantly more information about their emotional and social functioning when their physician has a positive attitude toward the psychosocial aspects of patient care." *Detmar, et. al., Patient-physician communication during outpatient palliative treatment visits: An observational study,* 285 JAMA 1351, 1352 (March 14, 2001).

Having someone attend with the parent can help. The doctors have discovered that "It is also helpful to take along a relative or friend or who can take notes and ask relevant questions. One study found that when patients had someone to help them talk with their doctor, they were more satisfied with the information they got and with the doctor's interpersonal skills." *Brody, Well-Chosen Words in the Doctor's Office, THE NEW YORK TIMES,* June 8, 2009.

What happens when parents are comfortable in the IEP process? Consider this language from a malpractice study. "Even more compelling is recent research showing that, **if patients are comfortable with their physicians, they are more likely to heed their advice and get well.** In one study, researchers discovered that the main thing affecting whether patients with headaches found relief–more important than the kind of tests or drugs they received–was whether the patients had felt their doctor spent a lot of time talking with them about their problem." *Empathy with patients pays, doctors learn, AUSTIN AMERICAN-STATESMAN, A-1, A-9, (October 5, 1998)(reprinted from an article by Amy Goldman in the WASHINGTON POST)(emphasis added).* By analogy, when parents are comfortable with the IEP Team process, there is better buy-in and parent support of the school's efforts.

A couple of practical strategies: Statements of orientation help the parent understand how the IEP Team will function and the parent's role. Timely and gentle reminders or cues can assist a parent who is unsure how or when to express concerns or ask questions. Remember, a parent who, without

an advocate or attorney, feels free to share concerns, and then sees those concerns addressed in the IEP meeting will have less motivation to go get an advocate or attorney. Second, procedures and systems help schools comply with a complicated law. Don't let the fact that the parent is also an employee distract you from the good practices that ensure legal compliance and effective services. Shortcuts and informality create lapses in compliance.

53. **HELP** the Parents understand the language of the IDEA.

Like any complex system of rules, IDEA has its own language and acronyms. While folks familiar with special education "speak the language," that discussion can be impenetrable to folks who are new to the process, making IEP meeting participation uncomfortable and understanding unlikely. For better or worse, educators speak their own 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... 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." *Duke Helfand, "'Edspeak' is in a class by itself," LOS ANGELES TIMES WEB EDITION, August 16, 2001.*

Do the Parents understand what's in the IEP? Sometimes the school and parent have different interpretations of plan language. In a complaint from Wisconsin, the parent alleges that the plan did not define preferential seating, and that the teacher failed to provide positive written comments, despite a modification requiring positive feedback. The parent believed that preferential seating meant in the front row in front of the teacher's desk. Instead, the student was placed in the row adjacent to the right hand chalkboard that the teacher used for class presentations. The parent's expectation was based on where the teacher stood during parent orientation, and not on day-to-day classroom activity. On the issue of motivational strategies, the teacher made positive verbal statements to the student as required, as well as discrete notes on weekly tests. OCR found no violation for the failure to be more specific and determined that the District had acted consistently with the plan. Parent loses. *Nicolet (WI) Union High School District,* 37 IDELR 98 (OCR 2002).

A little 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.").

A practical strategy: Compliance requires proper use of IDEA notices and boilerplate language, but schools should not assume that mere compliance with legal notice requirements and the sharing of records will result in parent understanding. What schools should seek is parent understanding sufficient to *independently* verify that the school is doing what it should. That requires conversations, real give-and-take, using language parents understand, even if that means no IDEA acronyms are involved. When parents understand, they tend not to look to third parties (advocates, friends, OCR, hearing officers) to assure them that the school's actions are appropriate and tend not to look for answers in the wrong places.

54. **HELP** the Parents understand the importance of data in IDEA decision-making.

A common misconception is that IDEA eligibility makes available all of the special education and related service resources of the district, regardless of the student's needs. Schools should help parents understand the importance of tailoring services to individual students, especially when service demands seemed to arise from "wanting" a service as opposed to "needing" a service. A couple of cases are instructive.

Lincoln Elementary School District 156, 47 IDELR 57 (SEA IL. 2006). Consider this hearing officer's response to a request for transportation as a related service. "It is clear that it is inconvenient for the parent to bring the student to school. However, no testimony indicated that he had a medical or other disability which would require transportation." The student lives within six blocks of the school, thus not qualifying for regular transportation available pursuant to school policy for students outside a 1.5 mile radius from the school. His IEP team at the March 21, 2006 meeting determined that transportation would not be needed as a related service. The parent did not bring any testimony indicating otherwise. While the student "has a nebulizer at school for asthma, however, he only used it at the request of the parent during a short period. He was never observed having difficulty breathing, even after strenuous activity." No transportation was required as a related service.

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. The parents withdrew the autistic student from the public school program before IEP discussions could be completed.

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

A practical strategy: Any number of motivations may give rise to a parent's request for a particular service or accommodation. IEP Teams run into trouble when they simply respond with a "no" to what they think is an inappropriate or unnecessary request. Instead, the IEP Team should focus on data with respect to student need. A better response to the parent is "why do you think your student needs that service?" Encourage the parent to list the reasons why the student needs the requested service. The Team then analyzes the reasons in light of evaluation data to determine if there is in fact need. Once the needs are determined, then the question becomes "how can we meet the identified need?" The Team then identifies the possible appropriate alternatives and makes a choice from among the appropriate options. This approach changes the meeting dynamic from "I want this, no you can't have it" to a much healthier, and less emotional, "what does the student need?"

55. **HELP** the Parents understand the educational implications of their preferences and demands.

While parents will likely understand how the student's disability impacts him at home and in the community, parents may not have a grasp on the educational implications of the impairment. Further, unless they have a background in education, they may not understand the educational implications of their preferences for services or parenting skills. IEP Team discussion must help parents understand that what may make sense to address the impact of the impairment can undermine the goal of educating the student. A handful of examples make the point.

North Lawrence (IN) Community Schools, 38 IDELR 194 (OCR 2002). The student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions despite a parent demand that the student have unlimited access to the water fountain. The district was apparently concerned that too frequent water breaks were interrupting the educational process and interfering with the student's ability to stay on task. To provide proper hydration while maintaining the student's presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. 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.

Sherman v. Mamaroneck Union Free School District, 340 F.3d 87 (2nd Cir. 2003). A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student's teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student's parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student's teachers were convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. "It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor." The TI-92 is inappropriate because "it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts." The court concluded that the student's failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student's lack of effort. "The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. **If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires."** (Emphasis added). The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts.

Boston Public Schools, 38 IDELR 90 (SEA MASS 2003), a nine-year-old student with an autism spectrum disorder missed a "great deal of school over the years" and despite the parent's agreement with the services, the parent was unwilling or unable to ensure the student's attendance.

> "Mother testified that if the Student does not want to go to school she could not force him to go.... She stated that she does not think Boston should hold her, as Student's parent, responsible for Student's attendance. She thinks Boston should convince Student to attend. She said she has done all she can to help. She said she could only do her best to convince Student to go to school but cannot 'tie him and drag him.' She told Boston she would try her best to send him, but he does not want to go."

On matters of discipline, the Hearing Officer found that "When the Student has acted inappropriately at school, various school staff members have disciplined Student. Each time Student was disciplined, he went home and reported the incident to his Mother and she stopped sending him to school. **Student appears to have gotten the message that if he acts out at school and tells his Mother that school staff mistreated him he will be able to stay home instead of going to school.** Mother must stop removing Student from school." (Emphasis added).

Clearly concerned over the parent's attitude, the Hearing Officer advised "Mother is clearly very concerned for her son. She is protective of him and wants him to be happy. However, Student's educational needs cannot be met if he does not consistently attend a school program... **Mother may require training to address her belief that she cannot force the Student to attend school and that Boston should pursue the matter of his lack of attendance with the Student instead of with her.** If Mother remains unable to ensure that Student attend School Boston will have no choice but to initiate proceedings in another forum to ensure that Student will attend school." (Emphasis added). Despite finding that the placement was appropriate, the Hearing Officer ordered the IEP Team "to consider what services can be offered to the Mother to assist her in understanding her son's disability and teaching her how to support Student's educational and behavioral needs." The Team was also ordered to consider whether family counseling with a bilingual counselor would be helpful. And finally, this foreboding bit of language: "Boston shall take all necessary steps to ensure Student's attendance at this program including taking any appropriate action with another agency or a judicial forum."

A practical strategy: Where the parent's preferences, decisions or parenting techniques interfere with FAPE, the school has to take action. Parents can't be expected to recognize the educational implications of what they do without some help—that's where educators need to provide some guidance in a gentle, private, and appropriate way. The author's preference is for some one-to-one time between the parent and a campus employee trusted by the parent (an employee with some years of experience both parenting and educating would be best) who could explain the problem and suggest how the student could benefit from a different approach. Should the problem continue, the IEP Team should discuss the issue, and its impact on FAPE. Further, the IEP Team should consider providing services directly to the parent to address the situation, such as a parent mentor, parent training, or parent or family counseling.

56. **HELP** the Parents understand that some things doctors say have more weight than others.

While doctors can and do provide important medical information and direction to IEP Teams, parents can sometimes demand that undue weight be given to a doctor's opinion on an issue where the doctor is not due such deference. The Seventh Circuit provides the illustration in *Marshall Joint School District #2 v. C.D.*, 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010). A student with Ehlers-Danlos Syndrome, a genetic disorder that causes hypermobility, suffered from "poor upper body strength and poor postural and trunk stability." He had previously required adaptive P.E. due to these physical issues, but now only requires slight modifications for his medical and safety needs. As adaptive P.E. was the only "special education" required by the student, the school sought to dismiss him from special education since he no longer needed special education. The Administrative Law Judge (ALJ) ruled that the student could not be dismissed, relying in large part on evidence from the student's doctor that "the EDS causes him pain and fatigue and when he experiences that 'it can affect his educational performance.'" The Seventh Circuit rejected the ALJ's finding with some excellent analysis.

> "Dr. Trapane was the main source of evidence cited for the proposition that the EDS adversely affects C.D.'s educational performance. And the sole basis of her information was C.D.'s mother. Dr. Trapane evaluated C.D. for 15 minutes; she did not do any testing or observation of C.D. and his educational performance. **In fact, 'Dr. Trapane admitted that she had no experience or training in special education and never observed C.D. in the classroom. Her only familiarity with the curriculum was with her own children.** Such a cursory and conclusory pronouncement does not constitute substantial evidence to support the ALJ's finding.… The cursory examination aside, Dr. Trapane is not a trained educational professional and had no

knowledge of the subtle distinctions that affect classifications under the Act and warrant the designation of a child with a disability." *Emphasis added.*

Further, the doctor's pronouncement indicated that the EDS *could* affect performance. Said the court, there was no substantial evidence that it actually *had* such an affect. **For evidence on the student's need for services, the court looked not to the doctor, but to the adaptive P.E. teacher.**

"Because the reason for designating special education for C.D. was his need for special training and protection in gym class, Pingel was the key individual in the process. She was among those responsible for formulating C.D.'s prior IEPs, and she was the most important person in implementing them: she was his adaptive P.E. teacher. As such, she was the one who could testify best concerning whether he needed special education to participate in the gym curriculum and meet the goal for children in his grade level."

A little commentary: This case is best known for a couple of snippets of language you're likely to hear a lot at law conferences.

"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…. 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[.]"** (Emphasis added).

That's great language from the Seventh Circuit, and it makes the point nicely. Unfortunately, some parents persist in the belief that if the doctor writes that the student is eligible or needs this or that accommodation or service, the IEP Team or Section 504 Committee must defer. Not so. The doctor provides a single source of data, and eligibility and placement decisions are made by the IEP Team, not individuals. Bottom line: the ALJ's decision is reversed. The student does not qualify for special education any longer.

57. **HELP** the Parents to identify FAPE.

Schools spend a lot of time planning for the IEP and providing the required services. Educators can look at progress data and feel confident that a FAPE has been provided. While that's a great start, recognize how little the school's confidence matters if the parent is unsure about the progress. **A common reason for both the parent's hiring of advocates/lawyers and the filing of complaints is a parent desire for someone other than the school to verify that FAPE is indeed happening.**

A little commentary: Where schools thoughtfully and accurately explain their legal duties under IDEA to parents, and help parents understand student achievement and progress monitoring data, parents will have the tools necessary to come to their own realization that the school has provided FAPE. The same is true for other areas of IDEA compliance.

VII. MENTAL HEALTH/ATTITUDINAL TIPS

58. **SEE** no evil; hear no evil; speak no evil (and be careful of emailing)!

According to Wikipedia, there are differing explanations of the meaning of "see no evil, hear no evil, speak no evil." Whichever explanation or interpretation you choose, all of them apply when defining behavioral missteps to avoid in the process of educating students with disabilities.

In Japan, the proverb is simply regarded as a Japanese "Golden Rule."

Some simply take the proverb as a reminder not to be snoopy, nosy and gossipy. (Amen!)

Early associations of the three monkeys with the fearsome six-armed deity Vajrakilaya link the proverb to the teaching of Buddhism that if we do not hear, see or talk evil, we ourselves shall be spared all evil. This may be considered similar to the English proverb "Speak of the Devil - and the devil appears."

Others believe the message is that a person who is not exposed to evil (through sight or sound) will not reflect that evil in their own speech and actions.

Today "See no evil, hear no evil, speak no evil" is commonly used to describe someone who doesn't want to be involved in a situation, or someone turning a willful blind eye to the immorality (or illegality) of an act in which they are involved.

59. **AVOID** the temptation to unleash your inner attorney, **DITTO** with your inner judge.

Judges are entitled to render judgments and, oftentimes, those opinions are final and binding. In the legal system, however, it is contemplated that such judgments are made on the presentation and proof of sufficient facts to support those judgments. Too often, school personnel make statements that are not supported by facts actually known to the one making the statement. This is particularly dangerous when reporting information about a student's educational performance or status to parents when the information is based upon a person's judgment or opinion. Educators, particularly teachers, should report only what they have actually observed or personally know to be true.

60. **ACCEPT** it: "No Good Deed Goes Unpunished."

There will be times that no matter how often you accede to parental demands, litigation will be initiated in any event, particularly when the school system says "no" for the first time.

Remember, though, it can be dangerous to accede to parental demands, particularly if what they are asking be done is not appropriate for the student or is actually illegal.

Goleta Union Elem. Sch. Dist. v. Ordway, 38 IDELR 64 (C.D. Cal. 2002). The district Director of Student Services is liable under Section 1983 for failing to investigate the appropriateness of a junior high school placement for a student with SLD before unilaterally deciding, at the request of the parent, to transfer him there.