

MASTERING THE CRITICAL ROLE OF THE LEA REP

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THE IMPORTANCE OF THE LEA REPRESENTATIVE

What are the criteria for serving as LEA rep?

Let's quote the federal regulation on that. 34 CFR 300.321 spells out the members of the IEP Team, and says that it must include:

A representative of the public agency who—

- (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
- (ii) is knowledgeable about the general education curriculum; and
- (iii) is knowledgeable about the availability of resources of the public agency. 34 CFR 300.321(a)(4).

Doesn't the LEA rep also have to be able to commit the district's resources?

Yes, but the regulation does not say that specifically. However, in the comment to the regulations, the Department of Education noted:

A public agency may determine which specific staff member will serve as the agency representative in a particular IEP Team meeting, so long as the individual meets these requirements. It is important, however, that the agency representative have the authority to commit agency resources and be able to ensure that whatever services are described in the IEP will actually be provided. 71 Federal Register 46670.

What are the practical implications of all that?

Here's our list of the BASICS for the LEA rep:

1. Qualified to serve—you can either provide special education instruction or supervise those who do.
2. Knowledgeable—you know the general curriculum requirements for the grade level of the student.
3. Resourceful—you know how to tap into related services, transportation, extracurricular activities, funding, etc. You are the Go To Guy/Gal.
4. Authorized—you are the one who must make sure that the IEP is actually implemented as written. If the parent has a complaint three months down the road that the IEP is not being implemented, the parent should know that you are the person to talk to. And you are the person who will 1) look into that; and 2) take corrective action if necessary.

Those are the BASICS, but we think there are some other very important attributes the IEP Team leader should demonstrate.

Such as?

1. Gracious—you should be the genial host. This is your party.
2. Listening first; committing second—see below for discussion of how important it is for all perspectives to be heard.
3. Organized—be prepared to lead the meeting.
4. Courageous—have the courage to do the right thing.

What do you mean it's my party? Doesn't feel that way. I thought this was the student's meeting.

It's your meeting. It is about the student and the focus should be on the student, but it is your meeting. We know this because federal law imposes on school districts the responsibility to initiate and conduct these meetings. You are the official LEA rep. It's your party. So be a gracious host/hostess and be prepared to provide LEADERSHIP.

What happens when we have two people at the meeting, either one of whom could serve as LEA representative? For example, suppose we have both the principal and the director of special education.

One of them should be designated as the LEA representative. If the two of them cannot agree on who will serve as LEA representative there are a number of alternatives available to them. They can draw straws, flip a coin or arm wrestle over the privilege, but we think the better route is to let a higher authority decide. This could be the superintendent or an assistant superintendent with authority over both special education and the principal.

DISAGREEMENTS

So what should the IEP Team leader do when it appears that the school members of the Team are not in agreement with each other?

First of all, it should be taken seriously. The LEA rep should make every reasonable effort to get the school staff into a position of internal consensus. Schools should not go into a due process hearing unless they can answer YES to these three questions:

1. Is this something worth fighting over?
2. Are we legally defensible?
3. ARE WE UNITED?

When there is a lack of internal consensus, you are not united, which means you are not in a strong position if it should come to a due process hearing. Therefore, the LEA rep should be much attuned to the voices of IEP Team members who disagree with the direction.

The first thing you may want to do is to discuss it privately with the IEP Team member, or even in a group of school people.

Can we do that without inviting the parent to attend?

Yes. Remember that federal law allows school personnel to meet privately for the purpose of developing a proposal, or a response to a parent proposal, that will be later discussed with the parents. 34 CFR 300.501(b)(3). So a caucus of teachers, support personnel and administrators may be helpful in ensuring that they are in consensus. The administrative representative is then able to truly “speak for the school” and thus present a proposal to the parent that school staff genuinely support.

I thought we were required to invite parents every time we have a meeting.

You are required to invite parents every time you have an IEP Team meeting. The regulations say that parents are to be invited to any “meetings” with respect to “(1) the identification, evaluation, and educational placement of the child; and (2) the provision of FAPE to the child.” 34 CFR 300.501(b). It is the IEP Team that deals with those issues, and so it is the IEP Team meeting that the parent has a right to participate in.

The regulations clarify this by adding:

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 provisions. *A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.* 34 CFR 300.501(b)(3), emphasis added.

So it is OK to discuss the matter privately in advance of the IEP Team meeting.

What else should the LEA representative do?

We think there are four key steps you (the LEA rep) should take, especially when there is discontent:

1. Create a climate of openness
2. Listen analytically

3. Ask the right questions
4. Synthesize and lead.

What do you mean by a “climate of openness”?

The LEA rep should foster an environment where professional educators are empowered to express their opinions, free of fear of reprisal or suppression. It's a worthy goal. Teachers who are afraid to disagree with the principal may be compliant in the short run, but serious problems usually surface. The principal bears primary responsibility for fostering the climate on the campus and among the staff. This is done on a daily basis, in every single interaction.

This is more than good leadership theory—it has legal consequences. We know from the case law that schools are routinely accused of “predetermination.” Courts have clarified that preparation for the IEP Team meeting is good, while “predetermination” is not. The difference lies in open mindedness. Courts that have ruled against schools when they perceive that the school was “closed minded.” This usually flows from the top—the principal. So the principal should be “open minded” and do what s/he can to foster a climate of openness among school staff.

If we create this “climate of openness” there is just no telling what things people are going to say at the IEP Team meeting. What do we do when someone says something completely out of line?

The school is not bound by every comment made at the meeting. As a matter of law, the school is bound by what is written in the IEP. However, an inappropriate remark by a staff member can create a big problem for the school district. The LEA rep should step in at such a time and make sure the parent understands the distinction between what someone just said and where the school district stands.

For example, the teacher who says “there is no way we can serve this child. This little bitty district just doesn't have the resources. We need to find a private program that will take this child.”

The LEA rep should quickly remind everyone that the decision about whether or not the district can serve the child will be made by the group—not just one individual. The teacher's opinion is important, but does not represent the final position of the school district.

Moreover, it is a good idea for the LEA rep to remember the STANDARD ANSWER to “out of left field” questions or comments.

I didn't know there was a STANDARD ANSWER.

Well, there is. It should incorporate a reference to 1) evaluation data; 2) the IEP Team; 3) the concept of "need"; and 4) the requirement to provide FAPE.

Give me an example.

Consider the above hypothetical. Parent asks for something and a teacher responds with "NO WAY! We can't afford that!"

LEA Rep: "Well, it may be an expensive item, but we're not going to rule it out on that basis. No, what we are going to do is to review the EVALUATION DATA to determine if your child NEEDS that device in order to receive a FAPE. If the IEP Team determines that your child NEEDS it, then we will figure out a way to make it happen."

You say we should listen "analytically." What does that mean?

Creating the climate for teachers to speak freely is only part of the answer. The LEA rep, as the leader of the IEP Team, must listen carefully and skillfully to what is being proposed and why. By listening "analytically" we mean that you are sorting out where the teacher's input belongs. Is the disagreement about eligibility? Goals and objectives? Expectations for the student? Placement? Behavioral issues? It is important to pinpoint the nature of the concern.

It is best to seek consensus with the parent in bite sized pieces. Don't wait until the end of the meeting and ask the parent "do you agree?" There are too many parts to that question. Therefore, it is best to close out each portion of the meeting by assessing whether or not the team is in consensus. As you proceed from eligibility, to present levels, to goals and objectives, to services, to placement—seek consensus and assess consensus each step of the way. That way, if you have a disagreement, you will know what it is about.

You should also take into account the area of expertise of the staff member you are dealing with. If we are discussing speech therapy, the opinions of the speech therapist should carry more weight than the classroom teacher. If we are concerned about math, we listen more closely to the input of the math teacher. If we are discussing eligibility based on a full individual evaluation, the informed opinions of your evaluation experts (school psychologist or diagnostician in most cases) should be emphasized. All members of the team participate in all decisions—but people are on the IEP Team for a reason. Each member brings a particular perspective based on their experience, training and position. Therefore, we should be especially attuned to the opinions of people in their particular field.

What are “the right questions”?

To ask the right question, you have to first have listened analytically so that you know what part of the IEP you are dealing with. That way you can focus your questions. Let's give some examples:

Eligibility: do you disagree about the existence of a disability? Or about educational need? Both? What data supports your view?

Present levels: do you think our proposed statement of present level is too high or too low? What data supports your view?

Goals and objectives: do you think our goals are not measurable? How so? How would you fix that problem? Do you think our goals are too high or too low? What data supports your view?

Services: do you think the services we have proposed will enable the student to achieve meaningful educational progress? If not, why not? What would you do differently?

Placement: do you think the proposed placement is too restrictive or not restrictive enough? What data supports your view?

What do you mean by “synthesize and lead”?

We mean that the IEP Team has to come to a decision, so someone has to ultimately say: *this is where the school district stands*. That person should be the LEA representative. But we hope we have convinced you that before the LEA representative speaks for the district he or she has thoughtfully and carefully taken into account all of the opinions expressed by members of the team. If the LEA representative takes the team in a direction that the other members cannot or do not support, then the district is not united and the district is vulnerable to legal challenge.

Some people say that if the LEA rep and the parent are in agreement, then you have a consensus IEP Team meeting, even if every other member of the school staff disagrees with the decision.

The reason that people say that is because other members of the Team have no authority to request a due process hearing. Hearings to challenge decisions of the IEP Team can only be requested by the parent or the school. The school acts through the LEA representative. So as a practical matter, if the LEA rep and the parent are in agreement about the decisions made at the meeting, there is no one who can challenge those decisions through a due process hearing.

But can't the other members of the Team file a state complaint with the state agency?

Yes. Anyone can file a complaint, alleging a violation of law. So other members can file a complaint, but such complaints should not be based only on disagreements-they should be based on allegations of a violation of law.

The most important thing for school administrators to remember about this is that there should be no retaliation against a staff member who, in good faith, files a complaint with the state agency.

What happens when the LEA rep is out of sync with the rest of the school staff?

As noted above, if the LEA representative and the parent are in agreement *and stay that way*, then there is no one who can and will request a due process hearing. However, a parent can check the "agree" box and then change their mind and request a due process hearing. If the parent thereby aligns with the rest of the IEP Team, we think the LEA is in a pretty awkward position.

DISCIPLINE

What about on disciplinary cases? We often run into a big disagreement over a manifestation determination. What then?

This is one area where the LEA can request a due process hearing to seek to override the decision of the Team. The LEA's request is not really based on the manifestation, but rather, safety. 34 CFR 300.532 provides that the LEA can request a due process hearing if the "LEA believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others."

How exactly does that work?

Let's assume that a student has committed an offense that would call for removal to an interim alternative educational program. The IEP Team and parent agree that the behavior is a manifestation of the child's disability, and the case does NOT involve the "special circumstances" offenses of drugs, weapons or the infliction of serious bodily injury. In such a case, the law requires that the school "return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan." 34 CFR 300.530(f)(2).

So you have (1) a serious offense; (2) a decision by the IEP Team and parent that the behavior is a manifestation of disability; (3) no “special circumstances” to rely on; (4) no agreement with the parent to move the student to an alternative setting; and (5) a belief by the LEA that returning the child to the original placement presents a substantial likelihood that someone will get hurt.

In such a case, the LEA can request an expedited hearing and ask the hearing officer to order the removal of the student to an interim alternative educational setting.

How should LEA representatives handle a situation like that?

The LEA rep should be clear about the real concern here. Ask yourself: do I really think that the behavior is not a manifestation? Or am I trying to reach that result because I am worried about safety if the student is sent back to the original placement? If all of the data and the input of direct service staff is that the behavior is a manifestation of disability, and the real concern is about safety, the LEA rep should remember that there are alternatives. First, if drugs, weapons or serious bodily injury is involved, then the 45-day “special circumstances” rule comes into play. Second, if the parents are in agreement with a move to an interim setting, it can be done. Third, the school can request a due process hearing to seek removal of the student.

WHAT THE COURTS HAVE SAID

Is there any legal authority on non-consensus meetings?

There is some, but not a whole lot. The 9th Circuit delved into the details of this issue in the case of Doe v. Maher, 557 IDELR 353 (9th Cir. 1986). The Doe case primarily addressed the discipline of students with disabilities. The 9th Circuit’s ruling with regard to the “stay put” rule was appealed to the U.S. Supreme Court under the name of Honig v. Doe, 559 IDELR 231 (1988). None of the other issues in the case were taken to the Supreme Court, though, so the 9th Circuit’s discussion about IEP Team decision-making remains the highest judicial authority we have on this narrow issue.

What did the court say?

In its decision, the 9th Circuit first rejected the notion that IEP Team decision-making should be based on majority vote. As the court observed, a head count does not make much sense unless there are a fixed number of heads at each meeting. Since IEP Team membership, and numbers, may vary from meeting to meeting, using the majority vote concept would simply encourage the parties to “stack the deck.” “It is inconceivable,” the court wrote, “that Congress intended such a result.” The court was right about that. In fact, in 1999, the Department of Education addressed this issue directly through federal regulations. The Appendix said pointblank: “It is not appropriate to

make IEP decisions based upon a majority vote.” 34 C.F.R. 300, Appendix A, Question 9. Although the current regulations no longer include this, we still think it reflects the thinking of the Department of Education.

The 9th Circuit interpreted the law to call for a decision by consensus, but it immediately noted the inherent problems with that approach: “Decision by consensus has little utility with respect to issues whose intensely emotional nature makes reconciliation impossible.”

So what is to be done when consensus simply cannot be achieved? The court laid it out plainly: “If [consensus is not achieved], the agency has the duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan.”

In 1996, a U.S. District Court in Indiana followed the logic of the Doe case when it dealt with a similar situation. The court pointed out that the local school district was the entity obligated to provide FAPE, and also obligated to develop an IEP in the event of non-consensus. Parents, at that point, have the option of pursuing a complaint, seeking mediation, or invoking the due process hearing process. Hawes v. Bates, 24 IDELR 1018 (N.D. Ind. 1996).

The analysis of the 9th Circuit makes sense. Although there are often many *people* involved in an IEP Team meeting, there are really just two *parties*: the parent (or adult student) and the school. When there is a disagreement, one party must take the lead, and the other must respond.

WHAT ARE THE MOST IMPORTANT “TAKEAWAYS” FROM THIS PRESENTATION?

1. If you are the LEA rep, the IEP Team meeting is your party! Be the gracious host and clear eyed leader.
2. Disagreement at IEP Team meetings is a sign of health. The law specifies the people who must attend these meetings for a reason—to bring a broad variety of perspectives to bear on the issues. So different perspectives and opinions are to be expected and are a sign of strength, not weakness.
3. Listen first. Then lead.
4. The online dictionary tells us that “consensus” means “general agreement” or “group solidarity in sentiment and belief.” It is not perfect agreement. A consensus decision does not need to reflect everyone’s perfect choice, or first choice.

5. It is OK for school officials to meet privately to prepare for the meeting, so long as the school enters the meeting with an open mind about the decisions to be made. Preparation is not the same as “predetermination.”
6. LEA reps need to always remember the three key questions to ask before allowing a meeting to end in non-consensus: 1) is it worth fighting over? 2) are we legally defensible? 3) are we united?
7. The school is not bound by every remark made by every staff member at a meeting. The school is bound by what is written in the IEP. But the LEA rep should make that clear if inappropriate things are said at the meeting.
8. Ultimately, there are two parties at the meeting—the school and the parent or adult student. The most functional meetings are those where both parties speak with a united voice.
9. Discipline cases have some special rules in anticipation of disagreements.
10. Be particularly attentive to the needs of the parent who lacks the skills, knowledge or temperament to participate as effectively as some other parents.

The information in this handout was created by Walsh, Anderson, Brown, Gallegos and Green, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.