

## FIXING THE IDEA MISTAKE

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**A note about these materials:** These materials are not intended as a comprehensive review of all case law or rules on these IDEA issues, but as a summary of some of the problems (and solutions) available as IEP Teams seek to correct special education mistakes. Many of the cases cited are extremely complex, with numerous fact-findings and conclusions of law. The summaries provided do not attempt to address every argument made, nor every argument that could have been made, etc. The cases are selected to illustrate a particular point or dynamic. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. These materials focus on damage control through building goodwill with parents prior to a mistake, early detection of the mistake, quickly correcting the mistake once found, and taking appropriate steps to rebuild the trust of the parent while preventing recurrence of the mistake.

### I. Identifying the Damage

#### A. Someone on the Campus Should Always be Looking for Trouble

The duty to provide FAPE is a school duty. It's not the parent's job to keep an eye on the student's program and services and alert the school when services are missing or problems develop. Schools have unsuccessfully tried to make that argument, but the courts have yet to buy in. For example, when a school argued to the 3<sup>rd</sup> Circuit that it would have corrected its mistakes earlier if the parent had only told the school about the mistakes, the 3<sup>rd</sup> Circuit was clearly unimpressed. "[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child's teachers, therapists, and administrators—and of the multidisciplinary team that annually evaluates the student's progress—to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly." *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3<sup>rd</sup> Cir. 1996), *cert. den'd*, 519 U.S. 866 (1996); *See also, Wissahickon School District*, 35 IDELR 200 (Pa. Review Panel 2001) ("The parent's incomplete vigilance or sophistication does not negate the district's reviewing responsibility.").

Think of this as a logical continuation of child find—district personnel should always be watching for students who, *despite IDEA eligibility and an IEP*, are not making educational progress or have their progress threatened by absences, inappropriate implementation of the IEP, personnel difficulties, etc. The IEP Team cannot have sole responsibility for this supervision. Months may pass between IEP Team meetings, in which time plenty of things can and will go wrong. Each district should have some sort of process in place so that each special education student is accounted for at various points during the semester. Whether it's a special education supervisor, diagnostician, resource teacher or campus administrator is not really the important issue. What matters is that someone knowledgeable in special education is *accountable and watching* to ensure that the IEP is implemented (OT, PT and speech services, etc., are occurring as required, behavior intervention plans are followed, classroom accommodations or modifications are provided) and that there are no warning signs of trouble (mounting absences, disciplinary removals piling up, work refusal, parent complaints, student not completing or turning in work, etc.) left unaddressed. The earlier a problem is spotted, the better, as the remedy will be proportionately less difficult now than were the district to wait for a parent to notice the issue and invite a hearing officer to come up with a remedy.

It is always in the school's best interests to discover a problem first. Not only will the school have the ability to resolve the issue before there is greater damage, the school will also avoid having to contend

with a parent angry about a lack of services AND the school's lack of attention to the student. Special education is a complicated law, and schools will make mistakes.

### **B. Surveying the Damage**

IDEA mistakes come in many sizes from small procedural mistakes to more serious denials of FAPE. To remedy the mistake (or to control the damage), the District must be able to identify the error committed as well as the extent of the damage. Was the parent denied meaningful participation? Did the student miss out on required IEP services? Did the student lose credits needed for graduation? An error can cause damage to a single student or, in the case of a widespread system failure, affect many students. What you need to do depends, in large part, on what you did. For example, assume that a parent complains that her student did not receive the IEP-required four 30-minute sessions of OT this month. A successful damage survey starts with what was required by the IEP, looks at whether the sessions occurred, and if they did not, why the sessions were not provided. Was the IEP delivered to all implementing personnel? Did the OT fail to schedule the services? Was the student sent to AEP and the school never bothered to tell special education where he went? Were OT services removed in the last IEP and the parent didn't know about the change having missed the IEP Team meeting? Did the IEP Team mark the PT box instead of OT on the IEP form? With each answer comes information about whether this is an isolated problem, or there are system failures that may impact other students as well.

### **C. Talk with your attorney.**

Of course, this is why we all have phones. Seriously, having identified a mistake, a quick conversation with your special education attorney can help you identify other concerns that may arise from what you've discovered, as well as provide an opportunity to discuss not only how to fix the mistake, but how to prevent it from recurring. While the author provides some general discussion of these tasks below, nothing beats fact-specific advice from your special education attorney together with the school's best efforts at IDEA compliance.

### **D. Can't we just let a hearing officer fix this?**

Yes, but frankly hearing officers can only fix the IDEA damage, and the hearing officer may not see things the way you do. Further, hearings are an expensive fix, and will not address the very serious impact that the mistake may have had on your school's relationship with the student's parent. In fact, the pressure and testimony at the hearing may well compound the lack of trust the parent has in the school's on-going ability to provide FAPE for the student. Whether to solve the problem now or wait until there is a filing (or hope no one will notice) are good questions to ask your attorney, case-by-case. For purposes of these materials, the author will assume the school wants to fix things without waiting for due process, and that the school is working closely with its special education attorney to develop appropriate strategies to identify and rectify the damage.

## **II. Fixing the IDEA Damage Suffered by the Student**

Since the FAPE duty lies with the school, leaving the problem or mistake unresolved only makes its resolution that much more difficult. The point of early detection is that it allows for early resolution. Depending on the mistake, there may be damage to more than just FAPE. Recognize that the school's relationship with the parent may also be jeopardized when a mistake occurs, and that relationship must be healed as well.

### **A. Have an IEP Team Meeting**

Some errors, especially procedural errors regarding notice, can be solved simply with an old-fashioned do-over: have an IEP Team Meeting. *See for example, Rutherford County Schools*, 47 IDELR 279 (SEA Tenn. 2006)(IEP Team meeting was held without the parents, despite the parent's notice to the

school that the dates offered were inconvenient. The IEP was developed without parent participation. The ALJ ordered the school to hold a new IEP Team meeting with the parent to develop the IEP); *Irshad J v. El Paso ISD*, Docket No. 095-SE-1100 (February 2001)(2-hour time limit for an IEP Team meeting was not unreasonable, but district violated IDEA by not providing written notice of time limit prior to meeting. Any harm was cured by an offer of a subsequent IEP Team meeting); *Gloria Justice M. v. Houston ISD*, Docket No. 120-SE-1202 (SEA TEX. 2003)(IEP Team failed to afford serious consideration to the parent's request for aide support as a supplementary aide or service.). Likewise, should more significant fixes be necessary, for example, compensatory services where FAPE was denied, the amount and type of services should be discussed in an IEP Team meeting and documented in the IEP (see discussion below).

**Recognize that an IEP Team meeting held to correct an error by the school is a sensitive meeting.**

The school should expect a disappointed or angry parent, and to some degree, the school needs to let the parent vent and express that disappointment or anger. The school should be prepared not only to offer a solution to the mistake, but to seriously consider alternative and additional concerns raised by the parent. The key to this meeting is getting through the emotion, agreeing on a solution, and moving forward. If the school can't determine the extent of damage, how to fix the mistake, or the parent believes that the damage is different or greater than that measured by the school, consider an assessment to get some help. If the parent is reluctant to consent, consider agreeing to an independent evaluation up front.

To the extent that the school has (or will) change its practices, forms, or training as a result of the mistake, the school should consider sharing that information with the parent as an assurance that there will not be a recurrence of the problem. These assurances will be especially helpful in solving procedural mistakes where FAPE was not denied, and restoring the parent's trust in the school.

*A little commentary:* IDEA does not give parents the right to veto attendance by particular district employees at IEP Team meetings. While the district is required to take steps to ensure that parents are present at IEP Team meetings, the district is not required to substitute its special education director with "someone more to Ms. PARENT's liking in order to persuade Ms. PARENT to attend" her daughter's IEP Team meetings. *Enterprise Elementary School District*, 32 IDELR 193 (SEA Ca. 2000). *See also, Brant A. v. Fort Bend ISD*, Docket No. 040-SE-995 (SEA Tex. 1995)(Hearing Officer found that "Petitioner has no right to remove [IEP Team] members and none must be removed."). While the legal point is clear, the District ought to carefully consider sending an employee to a "mistake correction" IEP Team meeting who is likely to inflame the parent, and make IEP Team decisions more difficult. Remember that the school is in damage control mode, and that means the school should make reasonable efforts to restore what was lost and peacefully move on.

**B. Consider an offer of Compensatory Services.**

OSEP (the Office of Special Education Programs) provides this simple explanation of compensatory services. "Compensatory education is an appropriate means for providing a free appropriate public education [FAPE] to a child with disabilities who has previously been denied FAPE." *Letter to Anonymous*, 21 IDELR 1061 (OSEP 1994). By definition, compensatory services are provided after a denial of FAPE has occurred, in order to restore FAPE that was lost. When the school's mistake causes a denial of FAPE, compensatory services are typically part of damage control. In the 5<sup>th</sup> Circuit, denial of FAPE is required for an award of compensatory services. *See, for example, Jackson v. Franklin County School Board*, 806 F.2d 623 (5<sup>th</sup> Cir. 1986). That does not mean that every lapse in IEP implementation or mistake is a violation of FAPE. The 5<sup>th</sup> Circuit has provided a more sensible standard. In *Houston ISD v. Bobby R. (Cauis)*, the court dealt with the issue of whether failing to provide a few required services violates FAPE if despite the failures, the student nevertheless receives educational benefit. *Houston ISD v. Bobby R. (Cauis)*, 200 F.3d 341, 31 IDELR 185 (5<sup>th</sup> Cir. 2000). **The court concluded that "a local education agency's failure to provide all the services and modifications outlined in an IEP does not constitute a *per se* violation of the IDEA."** As long as significant portions of the IEP are followed and the child receives educational benefit, there is no

violation for a missed service or modification. (See also, *Gillette v. Fairland Bd. Of Education*, 725 F.Supp. 343 (S.D. Ohio 1989), *rev'd on other grounds*, 932 F.2d 551 (6<sup>th</sup> Cir. 1991)). **The proper analysis is not looking at or counting the “trees” of individual services and modifications to determine violations, but to look at the forest, and decide if overall there has been educational benefit.** According to the district, the student did in fact benefit from the school’s program. He had received passing grades and had advanced from grade to grade with his peers (which according to the Supreme Court in *Rowley* is good evidence of educational benefit) and had shown improvement on the Woodcock-Johnson as well. The 5<sup>th</sup> Circuit agreed, and the school prevailed.

**1. So, what kinds of mistakes require compensatory education?** The following is a small sampling of some of the more interesting mistakes resulting in denial of FAPE.

- **The bus was late a lot.** When a bus driver decided, all by himself, to change the bus route, a thirteen-year-old student with a disability arrived thirty-minutes late to his private school placement sixty-eight times. The parent sought the entire thirty-four hours of education missed in compensatory services, but was only granted seventeen hours by the hearing officer. A review panel gave the parent all thirty-four. *Southeast Delco School District*, 34 IDELR 108 (Pa. Review Panel 2001). See also, *Treutlen County (GA) Schools*, 33 IDELR 218 (SEA Ga. 2000)(School ordered to provide compensatory education due to school bus’ late arrival and early departure. The student at issue was hearing-impaired, and due to the bus ride, arrived twenty-five minutes after the tardy bell and left *an hour and fifteen minutes* prior to the end of the school day).
- **The school was too hot.** The district agreed to compensatory education for a student denied forty hours of IEP services when school days were cut short throughout the Spring and Fall of 1998 because of excessive heat in an un-air conditioned school. *Memphis (TN) City Schools*, 4 LRP 9804 (OCR 1999).
- **The school failed to assess and messed up discipline.** A fourteen-year-old eighth grader with increasingly disruptive behaviors (truancy, oppositional behaviors, school failure, drug abuse, elopement) was referred to special education, but suspended for the remainder of the year for assaulting a teacher before the referral could even be completed. The assault itself should have given everyone pause. “This slightly built 5’2” girl was able to overpower and injure a 6’2” athletically-built ex-marine who ‘had to pick her up and carry her the last 20-30 feet.’ The principal testified that she had never seen another event like this in her years as an educator.” The referral to special education and request for evaluation predated the incident by over one month, yet the removal occurred without the required manifestation determination. The hearing officer ordered, *inter alia*, that the IEP Team should consider compensatory education to assist the student to complete and get credit for her eighth grade year. *Maine School Administrative District 49*, 35 IDELR 174 (SEA Me. 2001); See also, *Camden Fairview (AR) Public Schools*, 35 IDELR 95 (OCR 2000)(As voluntary corrective action, the district agreed to identify students with disabilities suspended without proper procedural protections and evaluate the need for compensatory education for each).
- **An IEP Team meeting was unreasonably delayed.** A senior with ADHD qualified as OHI, but the IEP Team determined he did not need services. The Team decided to meet again in a few weeks to consider services when the first half of the grading period was completed. The meeting did not occur as scheduled on October 26, but was held on December 6, at which time the student was provided an IEP. The parents pursued due process to receive fourteen days of compensatory services due to the lost time resulting from the meeting delay. The student was granted eighty-four hours of comp ed, representing six hours a day for fourteen days. *Northern Lebanon School District*, 34 IDELR 215 (Pa. Review Panel 2001).
- **The student got services in a trailer (not in the school) and from an aide (not a teacher).** Despite the absence of evidence that a student with a disability had to be educated outside the

mainstream classroom, the district provided services in a trailer on school grounds. Services were provided by an aide—the student had no apparent access to a teacher or other children. To resolve the complaint, the District agreed to try a regular education placement for the student, and to compensate her for the loss of benefit during the time she was not in the mainstream classroom. The comp ed agreed to by the district and accepted by OCR was seven hours per week of homebound instruction during the summer. *Leeton (MO) R-X School District*, 34 IDELR 100 (OCR 2000).

- **Personnel shortage.** Students whose IEPs required resource instruction in English and math were not provided the service as required until an appropriately certified teacher was assigned to the class in November (several months into the school year). Up to sixty-five hours of services were denied to various students. The district agreed to provide individualized summer programs to compensate for the lost time, and for those students unavailable during the summer, comp ed would be provided in the next school year. *Los Angeles (CA) Unified School District*, 34 IDELR 240 (SEA Ca. 2000); *See also, Greenwich (CT) Public Schools*, 34 IDELR 69 (OCR 2000)(The district agreed to provide appropriate compensatory services to students who missed OT, PT, or other services during the summer 2000 ESY program due to staff shortages).
- **The student was inappropriately dismissed from special education.** A nineteen-year-old student with a seizure disorder was dismissed from special education with no current medical information, no current evaluation data, no explanation as to the dismissal, and no notice to the parent. The school likewise graduated the student without following appropriate procedures. An ALJ awarded two hundred hours of compensatory education to address the loss of almost a full-year of services. Interestingly, the ALJ ordered the parties to agree on a structure for the comp ed, and if no agreement were possible, the ALJ would issue an additional order. *Independent School District #281*, 33 IDELR 265 (SEA Minn. 2000).
- **The student was making passing grades?** In this failure to identify case, the district argued that a sixteen-year-old student with ADD was earning passing grades and on track for graduation, and thus did not need special education in ninth or tenth grade. The parent and hearing officer disagreed, as this student's passing grades were not a good indicator of the student's actual performance. Her academic achievement tests showed significant weaknesses in reading and math, and she had not passed the reading portion of the statewide assessment since seventh grade. Because of the delay in assessment and services, the hearing officer ordered compensatory education that must include one-on-one tutoring in reading. Other details (length of services and other types of services required) were left to the IEP Team to hash out. *Corpus Christi (TX) ISD*, 33 IDELR 141 (SEA Tex. 1999).

**2. How much comp ed should the school offer?** Since compensatory education is an equitable remedy designed to provide an eligible student with the benefit she should have received already, a logical starting place for determining the amount of compensatory education to provide is an understanding of what was lost.

**1-1 replacement of time lost.** Some cases stop the analysis at identifying what was lost, and simply provide for the same amount of lost services in the future. *Rio Hondo ISD*, 27 IDELR 623 (SEA Tex. 1997)(school ordered to provide as comp ed all speech services missed during 1996-97 school year); *Pine Bluff School District*, 20 IDELR 215 (SEA Ark. 1993)(school agreed to provide twenty-five days of comp ed for twenty-five day deprivation of educational services during the hearing process); *Ridgewood Board of Education v. Stokley*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)(“a disabled child is entitled to compensatory education for a period equal to the deprivation.”). While this simple analysis may be appropriate in some situations (example: the OT moved, the student missed eight 30-minute sessions, the school owes eight thirty-minute sessions as compensatory services), other situations are not as susceptible to such simple math.

**A more thoughtful approach: look at the impact on benefit.** In a 9<sup>th</sup> Circuit case, a student missed approximately ninety days of services over the course of two years, during which time the school lost track of his special education status due to transfers in and out of the district. His parents sought a year and a half of comp ed. While the district had made mistakes, the 9<sup>th</sup> Circuit noted that parents had contributed to the problem. Writing on how to measure comp ed, the Court provided this helpful advice: **“There is no obligation to provide day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.”** Interestingly, the student graduated from high school prior to his twenty-first birthday with nothing more than the services provided in his IEP. Said the Court, “The IDEA promises him no more.” “[C]ompensatory education is not a contractual remedy, but an equitable remedy, part of the court’s resources in crafting ‘appropriate relief.’ There was no showing that a general award of unspecified one and a half years of compensatory education was appropriate.” *Parents of Student W v. Puyallup School District #3*, 31 F.3d 489 (9<sup>th</sup> Cir. 1994). **The focus, wrote the Court, should be on replacing lost benefit rather than lost services.** Consequently, where the impact of lost or missing services is *de minimis* (does not prevent educational benefit), it does not create an *entitlement* to compensatory education. *See, for example, Causis, supra*. Of course, the lack of entitlement does not mean that a parent will be thrilled with the news that the student didn’t need the services anyway, so there’s really no problem. The school needs to consider the non-FAPE impact of its mistakes as well (see discussion on the school’s relationship with parents, below).

**Optimum Time—Are some days more valuable than others?** An 8<sup>th</sup> Circuit case recognized that missing developmental windows could mean that skills take longer to teach if taught later. In *Lauren S. v. Missouri State Bd. of Education*, 210 F.3d 954, 959 (8<sup>th</sup> Cir. 2000), the 8<sup>th</sup> Circuit recognized that 1-1 replacement of services missed may be too little. The student had profound deafness, and had been denied FAPE for 8 years. Said the court: “With this history, we think that the determination of a remedy of a year of lost education should properly lie with a state administrative panel in the first instance. However, we note that Lauren may be entitled to more than just one year of compensatory education because, as the resolution conference acknowledged, ‘the optimum time for language acquisition is at a younger age than Lauren’s present age.’” Accordingly, the 8<sup>th</sup> Circuit remanded to the district court with instructions to refer the case back to the state administrative panel for an appropriate remedy.

**Does the school’s speedy response impact the amount of comp ed owed?** Yes, says the 3<sup>rd</sup> Circuit. When the school stops providing educational benefit (due to failure to implement the IEP, etc.), the right to comp ed arises. “It seems clear, therefore, that the right to compensatory education should accrue from the point that the school district knows or should know of the school’s failure.” Once the school knows or should have known of the failure, it has a chance (and some time) to correct the error. By providing compensatory education “for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem” the Court sought to harmonize both the student with disability’s need for services and the district’s interests in avoiding unnecessary costs under the IDEA. *M.C. v. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), *cert. den’d*, 519 U.S. 866 (1996).

**Does the way the comp is provided matter?** Sure. For example, assume the student was denied appropriate resource class instruction for four weeks (having been told to sit outside the classroom because the student was disruptive). Resource room instruction is provided by a teacher, with no aide. Nine other students attend the class. Twenty days of resource instruction at 55 minutes per day was denied the student. When the school looks to provide comp ed, can it offer one-to-one comp ed from a special education teacher for fewer hours than the roughly twenty that were lost since the services will be provided at a staff-student ratio of 1-1 versus 1-10? Probably, as long as the number of hours is reasonable, and the school can articulate how the number of hours was determined.

**What about the timing of the comp ed?** Without question, time is of the essence in the IDEA, as educational years are valuable. The 1<sup>st</sup> Circuit looked at time in this way: “While parents and school officials dithered and debated, a disabled child with special educational needs lost day after irreplaceable day of educational opportunity mandated by law.” The key element here is that lost time really cannot be “made up.” *Murphy v. Timberlane Regional School District*, 22 F.3d 1186, 1193-4 (1<sup>st</sup> Cir. 1994). Put together with the 8<sup>th</sup> Circuit’s concern in *Lauren S.*, compensatory services should be provided so as to minimize the negative impact of the initial FAPE deprivation. **The sooner the better?** This author thinks so. The problem is that there are only so many hours in the school day and days in the school year. If that time is already full because of the demands for current FAPE services, there may be precious little time to add back (through comp ed) what was lost. Where the services cannot fit within the school day, districts should consider services during the summer, inter-sessions (where possible) and adding services to the end of eligibility. The author’s preference is to provide the services as soon as possible, recognizing that curriculum builds on prior knowledge as does skill acquisition. Lack of exposure to curriculum or lack of skills now means less progress and less opportunity for growth. Think “time value of education.”

**What should it entail and how does the school document the offer?** The school’s offer of compensatory services should be calculated to restore lost FAPE, and include those services in sufficient amounts to get that job done. The offer will, of course, be very fact-specific. Since the offer is a commitment of district resources to the student, the offer should be: (1) discussed in detail at an IEP Team meeting (discussion should include impact of the mistake, services to be provided, duration of services); (2) adapted and changed pursuant to IEP Team discussion; (3) determined by the IEP Team to be an appropriate response to the error; and (4) documented in the IEP as compensatory services. Of course, the offer can also be made through mediation, or in any other manner approved by your special ed attorney. The IEP Team offer is fast and inexpensive damage control.

*An important reminder:* The district has an on-going duty to provide FAPE to the student. Comp ed is in addition to hours necessary to comply with the current FAPE duty (since comp hours are due to denial of FAPE in the past). Be careful in the IEP to appropriately distinguish between services necessary for current FAPE, and those that are compensatory.

### C. When Grades, Credits, and Graduation are impacted by the mistake

**As a general rule, campuses and districts set grading policy, but teachers determine grades.** District and campus policies create guidelines on how teachers are to determine grades (grades should reflect student achievement, a sufficient number of grades should be taken to support the grade average assigned, include a balance of data—daily grades, test grades, benchmarks, etc.). The determination of the grade itself is a classroom teacher duty. (*See, for example*, Texas school board policy EIA and EAI (Local)). Texas law provides that when the policy is followed, “An examination or course grade issued by a classroom teacher is final and may not be changed unless the grade is arbitrary, erroneous, or not consistent with the school district grading policy applicable to the grade, as determined by the board of trustees of the school district in which the teacher is employed.” TEX. EDUC. CODE §28.021(a). The decision by the board may not be appealed, except as it relates to a student’s eligibility to participate in extracurricular activities. TEX. EDUC. CODE §28.021(b).

**If a school’s failure to implement the IEP impacts grades, credits or graduation,** the IEP Team needs to investigate and assist in correcting the problem, as discussed in the following cases.

**Retake tests with appropriate accommodations.** The IEP for a special education student with autism and ADHD required as a testing accommodation that the student be provided “recognition rather than essay tests.” The accommodation was not provided in the English class, apparently resulting in failing grades in English. As a remedy, a Minnesota ALJ ordered that the student’s case manager work with teachers to determine how to appropriately adapt essay tests for the student and that the student must be given the opportunity to retake the English *Antigone* essay test in an

appropriate format. *Fillmore Central ISD #2198*, 107 LRP 28076 (SEA Minn. 2006). *See also, Seattle School District*, 102 LRP 2674 (SEA WA. 2000) (“To the extent the student received failing grades or was considered to have failed to complete classes due to absences or failure to complete assignments, these courses should be reviewed with the involved teacher, the student and advocate and the student allowed to complete work where appropriate to change [his] grade or obtain class completion.”).

**Services for loss of credit/graduation delay.** The unfortunate result of budget cuts appears to be a deprivation of services to two students as special education positions were cut across the district. The two students at issue were denied thousands of minutes of direct resource services (1,900 minutes for one student and almost 5,000 minutes for the other) over the course of the 2003-4 school year. Both suffered a drop in grades. Further, no progress reports were sent, no assignments were shortened, and no consultation occurred between resource teachers and regular education as required by their IEPs. As a remedy, the ALJ required the district to provide both students the opportunity to make up any classes the students failed or did not complete. Further, the district was required to review the students’ credits for graduation, and put together a plan for the students to both graduate in a timely manner, including the provision of additional resource time to make-up or complete classes. *Cloquet ISD #094*, 106 LRP 14319 (SEA Minn. 2004).

*A little commentary:* It is interesting to note the following paragraph from the decision with respect to the link between the lack of services and failing or incomplete class work. “It is reasonable to conclude both Student A and Student B suffered educational harm as a result of the District’s failure to timely provide the Students resource services and adaptations as provided for in the Students’ IEPs. This is evidenced, in part, by both Students’ cumulative grade point averages being lowered as a result of Term 1 and Term 2 grades.” Note that there is no effort to screen out other factors that may have contributed to the slide in grades and incomplete work. Instead, the ALJ seems content to assume a direct connection between the failure to provide services and the impact. Why? One theory: the services were so blatantly neglected, why give the school benefit of the doubt?

Another interesting bit of language addressed the school’s argument that the students could have gone to the resource room on their own during their open lunch or study time but did not voluntarily take advantage of the opportunity. Said the ALJ: The students’ not availing themselves of resource during their free time “does not negate the District’s obligation to provide Student A and Student B services in accordance with their IEPs.”

**But remember, it’s an IEP Team decision!** A business education class (BEC) teacher failed to implement a portion of the student’s IEP that called for extended time on tests and other assignments. Specifically, the teacher refused to implement the provision with respect to computer keyboarding tests. “The BEC teacher explained that proficiency on the computer keyboard necessarily involves testing for speed and accuracy and that to allow extended time for testing in this situation would have defeated the test’s stated purpose.” While the hearing officer was sympathetic to the teacher’s concerns, the self-help response was not appropriate. Instead of the teacher refusing to implement the provision, the IEP Team should have addressed the issue. Similarly, the teacher unilaterally denied the student the opportunity to earn a letter grade, and instead, applied a pass/fail standard. “The complainant contended that the student should have been able to earn a letter grade in the BEC. The BEC teacher contends, however, that had she offered the student a letter grade, the student would have failed the course due to the student’s inability to master essential keyboarding skills, which is an essential element of the course. This dispute regarding what grading system to use should have been resolved through the IEP meeting with attendant procedural safeguards.” *Ann Arbor (MI) Public School District*, 30 IDELR 405 (SEA MI. 1998).

*A little commentary:* It is not uncommon for regular education teachers to take issue with IEP teams on the issue of class grades where the special education student is not only receiving significant

accommodations, but is also not responsible for all of the class curriculum—and is to be graded like everyone else. The Michigan teacher took matters into her own hands (and had her hands slapped). The better result is to discuss as an IEP Team how this particular student's performance in the regular classroom should be graded where there are significant modifications to the curriculum (as opposed to differences in the delivery of instruction or classroom environment, but not changes to the curriculum itself), and make the decision part of the IEP.

**IDEA services do not replace student effort—No such thing as a free diploma.** The parent of a twenty-year-old high school drop-out alleged violations of the IDEA relating back to his entire school career. As relief, the court is asked to order the school to issue the student a diploma. Noting that the purpose of IDEA is to provide appropriate education so that qualifying students with disabilities can have their unique educational needs met and be prepared “for further education, employment and independent living,” the court has some trouble with the requested relief. **“He is not asking the court to order that he be allowed to return to school in order to earn a diploma under a revised IEP. In fact, the plaintiff's testimony reveals that he voluntarily quit school mid way through his Senior year because he ‘just got sick of it. I didn't want to go. I hated it.’** He also stated that school was not ‘fun’ anymore. The records reveal that he had excessive absences even before he quit. The fact that he simply desires his grades changed and to be given a diploma is not a remedy available under the IDEA.” *Hills v. Lamar County School District*, 49 IDELR 188 (S.D. Miss. 2008)(emphasis added).

*A little commentary:* The IDEA is sometimes asked to do things it was not designed to do, like granting a diploma that was not earned. Even assuming that there were a violation of IDEA, note that the court was not inclined to simply order graduation, but to return the student to school to receive appropriate services and allow the student to do the work necessary to get the diploma. Put simply, even if IDEA were violated, that violation does not mean a free diploma.

**Some additional thoughts on remedies.** Resist the urge to simply replace the teacher's grade in the situation where an accommodation or service has not occurred as required, and the student has suffered a decline in grades. Unless the correct grade can be easily ascertained by applying the accommodation or modification after the mistake (for example: no deductions for spelling mistakes were allowed, and 15 points were deducted on the essay test for spelling) replacing the incorrect grade with a speculative grade is hardly good policy. The most accurate process (consistent with the state law requirement that teachers issue grades) is for the classroom teacher to re-test or re-grade with the IEP accommodations, modifications and services in place. Where the student will be prejudiced by the passage of time, re-teaching and other support services may also be appropriate prior to a retest situation. The preferred result would be for the IEP Team to inform the teacher of the problem, and for the teacher to make the change. Of course, if the teacher is unwilling, administrative intervention or school board action may be required to fix the mistake.

#### **D. Some common mistakes in correcting mistakes**

When the parent is aware that an error occurred and the school wants to resolve the situation without a hearing, parent leverage may result in unreasonable demands that may be entirely unrelated to the school's mistake. While parent preference for a service or accommodation should be discussed and carefully considered by the IEP Team, care should be taken to ensure that services, modifications and accommodations do not undermine student progress or make educational benefit more difficult to convey. Special education services should not only be appropriate, they should make educational sense based on the student's needs and her unique personality, work habits, etc. A simple example of an accommodation makes the point. In *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. While not a "response to error case," *North Lawrence* illustrates the need for IEP-required accommodations, modifications and services to make educational sense, even in the context of a strong parent preference,

Note that this dynamic is not limited to resolutions outside of due process hearings. It is not uncommon for hearing officers and even OCR, while resolving disputes, to require things that seem inconsistent with the student's needs. *See, for example, Leeton, supra*, (OCR fixes mainstreaming problem by allowing summer homebound as comp education. There appears to be no discussion about providing the compensatory services in a less-restrictive environment); *See also, Livingston Township Bd of Educ*, 40 IDELR 111 (NJ SEA 2003)(The student had a physical disability substantially limiting his use of his arms and upper body, making note taking difficult for the student. According to the ALJ note-taking skills are "very valuable and important for all students to master in the higher grades as well as to prepare for college." The ALJ determined that despite the passing grades (B+ average at the time of the hearing, straight A's the year before), the student was denied adequate note-taking assistance. In her order the ALJ required that access to student notes or a scribe must be provided in every substantive class.).

*A little commentary:* The student denied access to the mainstream, taught in the trailer by herself is now taught at home by herself (at least for the summer), and the student who needs to learn note-taking skills now has a scribe to do it for him. Neither solution seems calculated to solve the problem in a manner consistent with good educational practices.

### **III. Did the school learn anything from the mistake?**

IDEA is a complicated law and mistakes will be made. Nevertheless, the law's complexity does not give the district license to commit the same mistakes over and over again. As part of damage control, districts need to do a self-assessment to determine what policies, practices, or thinking needs to change to prevent a recurrence. The following are areas where schools can focus to improve compliance after a mistake.

#### **A. Sharing the pain.**

Natural consequences are a wonderful motivator. Unfortunately, in the special education due process context, the natural consequences of a campus mistake are often not suffered by the campus (which may be responsible for some if not all of the troubles giving rise to the hearing), but by the special educators called in to clean-up afterward. When a campus is, in essence, immunized from its mistakes with respect to special education, and the costs and most of the stress of solving the problem do not involve campus personnel, it is less-likely that the campus will make needed changes to its policies and practices. This is especially true if the campus' error-prone behavior is fueled by a strong (and valid) motivator like concerns over statewide assessment scores, student safety or maintenance of an ordered learning environment.

#### **B. Process Issues.**

Every school district has an Achilles heal of some kind—a weakness in its special education process of identification, evaluation and placement. When a special education mistake occurs, part of the school's focus should be on the effect of the school's policies and procedures as contributing factors. For example, *See, for example, Brian G. v. Jacksonville ISD*, Docket No. 270-SE-0403 (SEA TEX. 2003)(No violation found despite a variety of problems with delivery of IEP paperwork to the parent, including the provision of the wrong IEP, wrong BIP, and a delay of several weeks before delivery of the documents from another IEP Team meeting. The Hearing Officer encouraged the school to more accurately and quickly deliver the documents, but found no violation as the student made progress and

“his parents have participated actively, diligently, and consistently in the development of Brian’s IEP.”). The damage here is to the parents’ perception of school compliance and frustration at not getting requested records in a timely way. Correction of school practices, reassurance that the delays will not recur, and consistent follow-through on these assurances will be necessary to mend the rift and restore goodwill. See the discussion of school relationships with parents at Section IV.

### C. Staff Training.

**1. On the student’s impairment and needs.** A parent who has been assured by the school that staff is appropriately trained to address the emergency medical needs of her child would likely be concerned when confronted with staff that don’t seem sure about what to do. Staff training should be calculated not only to provide familiarity with symptoms that mark an emergency, and the materials or medications used in an emergency, but should also provide some appropriate level of hands-on response practice so that appropriate staff, in the context of a relaxed training, can discover for themselves where the gaps in their knowledge lie, and can resolve those issues in the training, rather than guess during an emergency. *See, for example, Hamilton Heights (IN) School Corporation, 37 IDLER 130 (OCR 2002)* where despite a requirement in the plan that the student’s teachers be trained to properly use and administer glucose gel/tablets, the parent alleged that two PE teachers appeared to lack the required knowledge— while they knew the gel was to be placed in the student’s mouth, they were unsure exactly where in the mouth to place it. The case was resolved with instruction from the parent on where to place the tablets.

*A little commentary:* Clearly in this situation, staff had been told how to do it (but had not tried the procedure) and were not confident in their ability to respond in an emergency. Note further that the procedure at issue was not terribly complex, and both PE teachers signed a document indicating they had been present at the training. Practical, hands-on training may be required for staff to perform tasks appropriately.

**Who does the training? How complex should the training be?** The parent may express a preference for a medical doctor or someone similar to provide staff training on the disability. While the parent request should be considered, a medical degree may not be required to get the job done. As in other areas of the placement decision, the qualifications of the trainer and intensity or detail of the training are matters for the IEP Team to determine. The school should seriously consider inviting the parent to participate in the training. Not only will the parent’s presence allow the parent to see the instruction and staff response, the parent will probably also appreciate the opportunity to provide additional unique details with respect to the disability and its impact on her child.

**2. On the school’s procedures and legal compliance in general.** A common precursor to special education questions from school employees is the phrase “in my old district, we did it like this...” followed by a concern that the new district’s approach is wrong. While the IDEA, the federal regulations, state law and regulations created pursuant to IDEA apply to all districts within a state, and thereby create some patterns in compliance, each district has unique processes, strategies and unwritten rules that govern the provision of special education in the district. From time to time, mistakes will expose an unwritten rule that ought not be a rule. Whether it’s the position that only students with autism can get parent training, everyone gets four hours of homebound, or that “we don’t do special education counseling,” these “unwritten rules” will persist until folks know better. When looking into a special education mistake, filing or complaint, staff should be looking for the underlying cause, and educate about it at the earliest opportunity. A quick memo to affected staff, with a follow-up in more detail at an in-service may be sufficient to stop the same mistake from happening again.

### D. Assignment of Personnel.

As a rule, folks ought to have sufficient training and certification to perform their jobs. Unfortunately, when school budgets are stretched and positions need to be filled, mistakes happen. Consider the following case from Pennsylvania. In *Damian J. v. School District of Philadelphia*, 49 IDELR 161

(E.D. Pa. 2008), the District court concluded that a 12-year-old student with a learning disability and emotional disturbance did not receive FAPE for a four-month period due to the lack of training and qualifications of his teacher. **The teacher, assigned to an emotional support classroom, had no prior experience, no degree in education, and no teaching certifications, licenses or emergency permits. Despite her requests for additional support, several months passed before a behavioral specialist visited her classroom to offer assistance.** The teacher testified that she received no instruction on IEP implementation, and while she had read the student's IEP, no one reviewed the IEP with her, nor told her what the requirements were for documenting progress. As the court noted elegantly, "substantial provisions of Damian's IEP were not implemented." The teacher "was eventually terminated in December, 2005, because of concerns regarding her classroom management and instruction arising from an increase in discipline issues and behavioral health episodes in the classroom."

**The same rule applies to aides and other support personnel.** For example, a six-year-old student with ADHD and an emotional disturbance had a history of serious behaviors including suicide threats and aggression toward peers. The ALJ was critical of the lack of evaluation data (no FBA had been conducted and there were no behavioral objectives nor identified behavioral interventions). In that context, the ALJ reviewed the assignment of an aide. "As of May 8, 2008, the IEP team determined that Student required a one-on-one aide and provided Student a one-on-one aide. This aide turned out to be untrained and unprofessional and only worked with Student a few weeks. In the June 12, 2008 IEP, District offered an AAA assigned to the SDC placement. District did not offer Student a one-on-one aide trained in behavior interventions. District's offer of a general classroom aide untrained in behavior interventions was inappropriate." *Compton Unified School District*, 108 LRP 69430 (SEA Ca. 2008).

*A little commentary:* While the school retains the right to assign personnel to provide the services necessary for FAPE, that discretion is of little help when the folks assigned to a difficult position are ill-equipped to get the job done. Further, having fired the teacher for ineffectiveness, it's difficult, when faced with allegations of denial of FAPE, to argue that the teacher was great. While resources sometimes must be stretched due to budget and personnel limitations, the FAPE duty endures and IDEA expectations of appropriate IEPs and implementation do not change.

**Parent confidence and demands for service providers.** It is not uncommon for parents of students with serious medical conditions to be concerned about the school district's ability to care for their child. That concern may be misplaced or unsupported, but the concern will not simply evaporate. It can be manifested as a demand for services beyond those medically necessary. For example, in a Tennessee case, the parent removed a student with asthma from the school and threatened not to return the student until a nurse was present on the campus. The district refused to provide a nurse, but did contact the doctor in an effort to better understand the student's medical needs. Specifically, the school wrote a letter to the doctor asking if a nurse was required to be present at school. The doctor responded by letter that "he was not aware of any acute medical indication for keeping the Student home from school, and that it is reasonable to provide *nonmedical* personnel with appropriate training in the administration of her medications." *Murfreesboro (TN) City School District*, 34 IDELR 299 (OCR 2000).

*A little commentary:* An important distinction when determining appropriate services is "Parent-desired" vs. "Doctor-required." Evaluation data is the key to resolving these types of issues. The legal duty arises from the impairment, and the data (here, input from the doctor) helped the school to determine what the disability required as opposed to what the parent wanted (which was clearly much more than what the disability actually required). Note that the demand is likely based on the parent's fear of harm to the child. That concern must be addressed in some way by the IEP Team, as it will persist as long as the parent is not comfortable. The school's assignment of a properly credentialed employee to provide the service, together with appropriate training, as described above, and the passage of time with no mistakes in student care will improve the parent's confidence in the school's ability to care for the child.

**Adverse Personnel Action.** In the author's experience, a campus' willingness to comply with disability laws can often be tracked directly to the principal. When the instructional leader of the campus is

concerned about legal compliance with IDEA, her staff is concerned as well. Typically, this dynamic arises from the principal sharing expectations that IEPs will be implemented and students served appropriately. When implementation does not occur, the principal takes employment action necessary to resolve the issue, through a quick word, reprimand, growth plan or more serious action. An employee's refusal to implement an IEP is an employment matter. Every public school employee in the state who has signed a contract with a school district has agreed to obey federal law, state law and local policy. The employee's failure to comply with IDEA violates the contract, and should be documented in employee evaluations and treated as the serious matter that it is. Until the campus principal takes this position, special education mistakes may be difficult to correct on that campus.

#### **E. Future Vigilance.**

Having erred and caused harm, the first response should be to fix the damage as outlined above. The second response should be to ensure that the error does not recur. If the error was a system failure, the system needs to be corrected (changes to forms, policies, instructions to staff, training, etc.). The student harmed by the mistake should receive additional vigilance to ensure that the solutions crafted by the IEP Team fix the damage, and prevent a second mistake. Schools need to understand that having complained or sued the district once, the second time is easier. Having suffered through a denial of services once, for example, the parent will likely not be as forgiving the second time, even if some years have passed. Consider this Section 504 decision from 2009. In *Ewing (NJ) Public Schools*, 53 IDELR 166 (OCR 2009), the parent alleged three types of failure by school staff to implement the student's §504 Plan, and OCR found the school in violation on two of the three allegations. Several teachers had failed to check or otherwise assist the student in maintaining his agenda, and another teacher failed to properly contact the student's parent by phone or email with progress reports as required by the plan. To resolve the complaint, the district agreed to monitor plan implementation. What makes this case truly interesting is that the parent had filed an OCR complaint against the school in the Fall of 2003. His fourth allegation in this filing is that the teachers were refusing to comply with the plan in retaliation for his previous filing six years earlier. *If only they had remembered, thinks the school attorney, perhaps they would have made more of an effort knowing that the parent would be watching.* Compliance is a school duty, not the duty of the parent. It does not good to identify, evaluate, and create a plan for the student if the plan will not be implemented. OCR found no retaliation.

### **IV. The Importance of Trust: Build it before a mistake, and mend it afterward.**

Damage control following an IDEA mistake must include the restoration of parent trust. If there was no trust before the incident, now would be a really good time to build some. The district must recognize that having made a mistake with this particular child, the dynamic has now changed. A parent who once was easy-going and trustful may now be more insistent and demanding at IEP Team meetings, asking more questions about compliance and student progress. The school will need to build (or, hopefully, restore) goodwill and trust for the relationship to continue successfully. Interestingly, the school-parent relationship bears a striking resemblance to the doctor-patient relationship, allowing special educators to look to medical malpractice studies for scientific, research-based insight into building and maintaining trusting relationships with parents.

#### **A. Lessons from the Doctors: Patient Trust & Goodwill Matters (it's the same with Parents)**

With close to 800,000 licensed physicians around the country making life and death decisions, and being sued for their mistakes, it should not surprise anyone that doctors have spent some time trying to discover why malpractice lawsuits occur. *U.S. Census Bureau, Statistical Abstract of the United States: 2000. Interestingly, it appears that the level of medical care is not the primary factor in determining who will be sued.* In February of 1997, the Levinson study on medical malpractice appeared in the *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION* (hereinafter *JAMA*). The study attempted to determine what factors play into a patient's decision to sue a doctor. The findings are somewhat startling: the quality of care received was not the determining factor in whether a patient sued

his doctor. **Whether the doctor did a bad job as a doctor was not the critical factor in determining who would be sued.**

This finding is consistent with an earlier study that determined that while 1% of hospitalized patients suffer significant injury due to negligence, “fewer than 2% of those patients initiate a malpractice claim.” *Levinson, et. al., Physician-patient communication: The relationship with malpractice claims among primary care physicians and surgeons*, 277 JAMA, 553 (February 19, 1997). Quality of care is certainly a factor (for there must be injury to justify a legitimate claim), but substandard care is not the “trigger” for litigation. Instead, patient dissatisfaction is the likely cause. **“The combination of a bad outcome and patient dissatisfaction is a recipe for litigation.”** *Id.*

Quite simply, “patients and families are more likely to sue if they feel the physician was not caring and compassionate.” *Id.* For example, in an earlier study of patients served by OB/GYN’s with a history of malpractice claims, patients “reported feeling rushed, feeling ignored, receiving inadequate explanations or advice, and spending less time during routine visits than patients of physicians with no prior claims.” *Id.*, at 554. Similarly, when depositions of medical malpractice cases were reviewed in a 1997 study, evidence of communication problems between doctor and patient were found in 70% of the cases. *Id.*

To determine the impact of communication skills on malpractice claims, the Levinson study examined tape recorded office visits between doctors and patients in 124 physicians offices, and analyzed the communications skills utilized by doctors who had two or more malpractice claims filed against them during their lifetimes, versus those with no complaints. The study confirmed that even when the quality of care meets the required standard, certain communication skills will reduce a doctor’s malpractice exposure. Specifically, the physicians with no malpractice claims had a few very effective communication skills.

1. The doctors with no malpractice claims used more **statements of orientation** designed to help the patient know what to expect from the visit, what tests would be run, and how the visit would proceed. These statements let the patient know that there would be time to ask questions and voice concerns. The study notes the benefit of those orienting statements. “Orienting statements help the patient develop appropriate expectations about a medical visit. They may also inform the patient about when during the interview to raise concerns and may help to prevent patients from presenting new problems in the closing moments of the interview.” *Id.*, at 558.

2. The doctors with no malpractice claims **laughed and used humor more.** “More laughter and more use of humor by the no-claims primary care physicians indicate a warmer personal relationship and are consistent with our belief that patients want to be personally connected with their physicians. A warm relationship with the physician may make the patient feel that he or she is a real person in the physician’s eyes, rather than a disease.” *Id.*

3. The doctors with no malpractice claims used more **facilitative statements.** They asked patients for their opinion about how a treatment was working and asked open-ended questions to get the patients involved. “These comments allow patients to talk and also indicate physician’s interest in their opinions, confirming studies that indicate the importance of allowing patients to talk without interruption. The technique of ‘active listening’ is effective in eliciting important clinical information from the patient and in making them feel that the physician cares for them.” *Id.*

4. The most startling finding was that the **doctors with no malpractice claims spent more time with their patients—on average 3.3 minutes more per visit.** The length of visit, by itself, had an independent positive effect, decreasing a patient’s likelihood of suing the doctor. *Id.*

**The lesson from the studies, and the message to special educators is simple: when people trust you and believe you care about them and their student, they are less likely to sue you for your mistakes.** After all, why hire a lawyer if you can sit down with someone and discuss the problem?

**Special Educators need to build trust with parents.** Like education, health care has taken some criticism in recent years. “In 1994 opinion polls, 75% of Americans said that our health care system required fundamental change, and 84% said there was a crisis in health care.” *Kenagy, et. al., Service quality in health care*, 281 JAMA 661 (February 17, 1999). Since the doctors have gone to the trouble of studying how their relationships with patients work (or don’t work) and how to improve their system, it makes sense to capitalize on their work, applying by analogy to the schools. **The relationship between school employees and parents is often just as emotionally charged and complex as that of patient-doctor, and communication can be just as important.** While the analogy is certainly not perfect (poor special education instruction in math rarely causes death) the intense emotions tied up with raising children, especially children with disabilities, are well-mirrored by the pressures of health care decisions. Similarly, just as patients and doctors must work together to cure disease, so too must educators and parents work cooperatively to educate despite disability.

**Compliance with IDEA.** The disability laws that govern the education of disabled students create standards that must be met and procedures that must be followed. What is sometimes forgotten in the push for compliance is the need for good communication between parents and educators. That is not to say that a cheerful, happy disposition and receptive demeanor can replace legal compliance. **The suggestions offered here are not intended as a substitute for legal compliance with the IDEA, but instead as an added component of compliance efforts.** Just as bad doctors will be sued for malpractice, educators who refuse to do what the law requires will subject their schools to litigation. Despite a school’s best efforts to comply with the procedural requirements of the IDEA, mistakes will be made. It is in that context that a trusting relationship with parents and a bank of goodwill stored up by the school will be valuable assets. This outline is designed to help identify the factors in creating that type of a relationship.

## **B. The Parent in the Special Education Process**

Regardless of our level of education, common-sense and good judgment, we have each done things as parents that as professionals we would simply not do. Advocacy as a parent for a child creates a unique dynamic, especially when the child shares some of our own bad habits or personality traits. Some general characteristics found among parents of school-aged children are as follows:

- Parents will sometimes lash out at your actions *even if they know the child is wrong and the school’s response is appropriate.*
- Parents want respect for themselves and their kids.
- Administrative convenience is usually not perceived by parents as a good reason for anything.
- Some parents are intimidated by teachers, principals and other educators, and are reluctant to raise issues directly with school personnel. They are not reluctant to have attorneys raise the issue for them.
- Parents sometimes want what they think is best for the child, *not what’s fair or right.*
- Some* parents may never realize that their view of their child is incorrect. Nothing you can do or say will change that.
- Parents want to see your concern for their kids.
- Parents vote for board members, patronize businesses owned by board members, and complain directly to board members even when they know they shouldn’t.

**The parent of a student with a disability will have additional concerns.** In response to the Council of Educators for Students with Disabilities (CESD) website at [www.504idea.org](http://www.504idea.org), we frequently receive unsolicited email from parents of students with disabilities seeking help and advice. The vast majority of those communications contain evidence of anger and frustration because the parent feels alone in a battle to fight for the student’s welfare. A common parent perception is that the student’s needs are being addressed *only because of the parent’s efforts*. It is not uncommon for parents to complain that promises made by districts are not being kept and that classroom teachers are not implementing IEPs. Some additional factors may also complicate the relationship:

**Additional demands and expenses.** While little imagination is required to see how a child with autism could change the dynamics of a family, disabilities often characterized as “less disabling” can also increase the normal pressures of parenthood. For example, in January of 2000, a study appeared in JAMA comparing the use and costs of medical care for children with ADD/ADHD and those without. The study determined that parents of children with ADD/ADHD were significantly more likely to visit the emergency room, and would spend twice as much for medical care than they would for non-ADD/ADHD children. *Leibson, et. al., Use and costs of medical care for children and adolescents with and without attention- deficit/hyperactivity disorder*, 285 JAMA 60, 62-64 (January 3, 2001). Significantly, that figure did not take into consideration outpatient medicines that would further widen the gap. Individuals in the study exhibited more chronic health conditions and adverse medical outcomes (e.g., substance abuse, automobile collisions, poisoning, fractures) than nondisabled peers. *Leibson, at 65*. The study suggests that “the burden of ADHD extends beyond the recognized social, behavioral, and academic outcomes to include markedly increase use of medical care.” *Leibson at 66*. Frustrations over the cost and added supervision of a child with a disability are sometimes transferred to the school.

**Grieving Cycle.** It is not uncommon for the parents of students with disabilities to follow the grieving cycle (denial, anger, bargaining, etc) that we typically associate with the passing of a loved one. As the child reaches milestones in his or her life (first day of school, sixteenth birthday, etc,) the parents are again reminded how different their child is from other children and the cycle begins again.

**IEP Team Meeting dynamics.** Consider the typical IEP Team 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 differences between the educators and the parents.

**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.

**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.*

**Does the parent understand her/his role?** Prior to the IEP Team meeting, school members have typically talked about how the meeting will progress and who will lead particular portions of the discussion. The parent, having read the meeting notice, may have an idea about what will occur, but likely will not understand the process as well as the educators. That confusion or lack of knowledge (in the context of a meeting that may emphasize a parent’s feeling of being out of place) may manifest itself in frustration, confusion, anger, or even a total lack of participation.

**Good communication = parent cooperation with the IEP.** “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).*

**What if the parent is also an employee?** The doctors have examined a similar situation where the doctor becomes the patient. “Allegedly, ‘doctors make the worst patients.’ Anxiety greater than that found in nonmedical patients seems a primary cause.... Anxiety may lead to considerable delay in seeking medical attention, usually by denial of symptoms or their meaning. The history may be influenced significantly by anxiety, with important portions omitted or minimized to avoid serious conclusions or actions by the consulted physician.” *Schneck, “Doctoring” doctors and their families, 280 JAMA 2039 (December 16, 1998).* The treating physician also tends to act differently. “Some treating physicians, perhaps to deal with their own anxiety, may limit meetings with physician-patients, may provide only brief and dogmatic explanations, and may assume incorrectly that physician patients possess sufficient medical knowledge to fill in information gaps. This behavior offers little opportunity to develop an empathetic relationship and unsatisfactory care may result.” *Schneck, at 2040.* **Informality breeds bad results.** A related problem is that when the doctor is a patient, both the patient and the physician may do things informally (skipping procedures, forms, etc) for the sake of convenience. “Modifying routines to save the patient time, trouble, and money may result in poor medical care. Nonstandard practice may be a major contributor to the common belief that when physicians or their family members are treated, things are more likely to go wrong than with nonmedical patients.” *Schneck, at 2041.*

### C. What factors affect communication between Doctor & Patient (School & Parent)?

Based on the notion that communication must be effective for doctors to have a good working relationship with their patients, doctors have attempted to examine what helps and what hurts good communication. In addition to the factors previously discussed (statements of orientation, use of humor, facilitative statements, and time), the following factors can have impact as well.

**Doctor interest.** “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).*

**Doctor’s approach to information: Informed consent vs. understanding.** “For too long, informed consent in clinical practice has been influenced by an interpretation of informed decision-making as a legal obligation in which the emphasis is on full disclosure, rather than an ethical obligation toward mutual decision making by fostering understanding.... Promotion of the patient’s understanding, thereby fostering informed participation, is the essence of informed decision making.” *Braddock, et. al., Informed decision making in outpatient practice: Time to get back to basics, 282 JAMA 2313, 2319-20 (December 22/29, 1999).* Braddock’s study determined that **the physician explored whether the patient understood the medical decision that had presumably been made jointly with the patient less than 7% of the time.** *Braddock, at 2317. See also, Chen, Treating Patients as Partners, by Way of Informed Consent, THE NEW YORK TIMES, July 30, 2009 (“There has been so much attention paid to the consent documents... But the documents are at best props in the theater of informed consent. It’s the process itself that is really important.’...Patients must feel they have a certain degree of trust in their doctors before they can give consent, and that trust is built, in part, from the kind of difficult conversations that can arise. ‘The process of informed consent forces you to address things both parties don’t necessarily want to address.... It’s like making out your will. People don’t want to do*

it, but its an important transaction in life.”)(emphasis added).

**Empathy & Doctor recognition of patient clues.** “Patients often present clues (direct or indirect comments about personal aspects of their lives or their emotions) during conversations with their physicians. These clues represent opportunities for physicians to demonstrate understanding and empathy and thus, to deepen the therapeutic alliance that is at the heart of clinical care.” *Levinson, et. al., A study of patient clues and physician responses in primary care and surgical settings*, 285 JAMA 1021 (August 23/30, 2000). Another Levinson study determined that clues about patient worries occurred in more than half of all routine office visits. Despite the importance of the clues, and the number of opportunities for relationship building that they provide, doctors failed to act on or pursue the clues most of the time. *Id., at 1026*. Even when they did notice the clues, physicians often failed “to explore the deeper feelings behind the clue.” *Id.* **Did the doctors not pursue the clues because they didn’t care?** No, it’s more complex than that. The authors of the study surmised that some “physicians may feel uncomfortable responding because they may perceive that they do not have the ability to fix or cure the patient’s emotions.” *Id.* Interestingly, the authors also suspected that some physicians were concerned that dealing with a patient’s feelings would greatly lengthen the office visit. The study found, however, that “visits in which a physician responded positively to a patient clue tended to be shorter than those in which the physician missed the opportunity.” *Id.*

**Sharing of conversation and decision-making.** “The quality of interpersonal care is important to patients. Studies have shown that increasing patient involvement in care via negotiation and consensus-seeking improves patient satisfaction and outcomes. Specifically, visits in which the physician uses a participatory decision-making style are associated with higher levels of patient satisfaction. Recent studies in physician-patient communication in primary care show the highest levels of patient satisfaction and the lowest malpractice claims with the psychosocial pattern, which is characterized by psychosocial exchange and an almost equal distribution of patient and physician talk.” *Detmar, at 584*. **Does the patient know he has a role?** An important element of informed decision-making ought to be discussion of the patient’s role in decision-making. “The need for this new element arises because many patients may be unclear about their role in decision making and hence, adopt a passive or non-participatory style. Consequently, in certain decisions, particularly complex ones, the patient may need an explicit invitation to participate in the decision making process.” *Braddock, at 2315*.

**Gender.** “Studies investigating the influence of patient gender on communication in the medical visit show that female patients generally receive more information, ask more questions, and have more partnership- building with physicians than male patients. Less is known about the communication style of female physicians. A few recent studies have shown that female physicians exhibit more empathy and engage in more positive talk, partnership-building, question-asking, and information-giving compared with their male counterparts.” *Cooper-Patrick, et. al., Race, gender, and partnership in the patient-physician relationship*, 282 JAMA 583, 584 (August 11, 1999).

**Race & Culture.** “Studies have shown that African Americans and other minority patients often receive differential and less optimal technical health care than white Americans.” *Cooper-Patrick, at 583*. In this study, published in 1999, an attempt was made to determine whether minority patients experienced more participatory visits with doctors of the same race. The study concluded “African American patients had significantly less participatory visits with white physicians than white patients.... Patients in race-concordant relationships with their physicians rated their physicians as significantly more participatory than patients in race- discordant relationships.” *Cooper-Patrick, at 587*. The study authors suggested a variety of reasons for this result. For example, “physicians may unintentionally incorporate racial biases, such as racial and ethnic stereotypes” into their relationships with patients. They may also experience differences in their expectations about the doctor’s visit, or in the way they look at the illness. “Factors such as language barriers, low health literacy and educational status, and lack of self-efficacy regarding one’s health may be more prevalent among ethnic minority patients.” *Cooper-Patrick, at 588*. As a result, when doctor and patient are of the same race or ethnic group, they “are more likely to share cultural beliefs, values, and experiences in the society, allowing them to communicate more effectively and to feel more comfortable with one another.” *Id.*

“Problems in communication due to cultural differences between patients and physicians often contribute to a disparity in understanding that patients and physicians have regarding the cause of disease and the effectiveness of available treatments.” *Cooper-Patrick, at 583*. While racism is a concern in studies on differing medical outcomes among races, typically the cause is a lack of cultural sensitivity instead.

“The problem, said the author, Dr. Thomas D. Sequist, an assistant professor of health care policy at Harvard Medical School, may be that physicians do not discriminate in the way they counsel patients. ‘It isn’t that providers are doing different things for different patients’ Dr. Sequist said. ‘It’s that we’re doing the same thing for every patient and not accounting for individual needs. Our one-size-fits-all approach may leave minority patients with needs that aren’t being met. For instance, he said, counseling black or Latino patients with diabetes to lower their carbohydrate intake by cutting rice from their diets may not be a realistic strategy if rice is a family staple. ‘We may be listing fruits and vegetables that are part of one person’s culture but not another,’ Dr. Sequist said. ‘We’re not really giving them information they can use.’” *Sack, “Doctors Miss Cultural Needs, Study Says,” The NEW YORK TIMES, June 10, 2008*.

**Education/Knowledge.** Patients who are highly-educated tend to ask more questions and receive more information than those who are less well-educated. *Detmar, at 1352*. An editorial in the NEW ENGLAND JOURNAL OF MEDICINE focused on the impact of media on the relationship. “Patients are more knowledgeable and sophisticated about health and want to discuss with their doctors what they have seen in the news media, in drug advertisements directed at consumers, and on the Internet. Everyone knows of the many capabilities of modern medicine, and patients’ expectations are high.” *Editorial, Edward W. Campion, M.D., A Symptom of Discontent, 344 NEW ENGLAND JOURNAL OF MEDICINE 223, 224 (January 18, 2001)*.

**Looking for information in the wrong place.** While most of us are aware that the old adage “don’t believe everything you see in the newspaper” should apply to the internet, some folks have yet to understand that message. A study on the effects of information on the world-wide web found “evidence suggesting that patients are trying to use information on the Internet as a supplement for physicians and that teleadvice might be overused by chronically ill and frustrated patients looking desperately for additional information.” *Eysenbach & Diepgen, Patients looking for information on the internet and seeking teleadvice, 135 ARCHIVES OF DERMATOLOGY 151 (February 1999)*.

**Why look on the internet? Why not ask your doctor?** Eysenbach & Diepgen determined a variety of reasons for patients to look elsewhere (to sources other than the treating doctor) for information. In a study of unsolicited e-mails sent to a prominent hospital, they found a likely reason in the “causal relationship between chronic and incurable disease, frustration (about failed treatments), feeling of helplessness, and a subsequent information-seeking behavior to compensate the feeling of helplessness.” 31 *Eysenbach & Diepgen, at 154*. That pattern becomes quite frightening in that it opens up the patient to believing less than credible sources of information. “A lack of trust in one’s own physician or health care provider can be observed especially if therapies fail.... The hope to find something ‘new’ on the Internet (new or alternative therapies, new research findings) not yet known to the treating physician may also play a role, as 12% of the patients were asking for new therapies.” *Id.* Another factor that may explain the patient’s seeking medical advice from an unknown physician is the desire to remain anonymous. Although unable to determine the reason for the desire to remain anonymous, the study authors speculate, rather sensibly, that **fear of asking a stupid question or the patient’s having been told and forgotten, or having been ill-informed by the treating physician may cause the patient to look elsewhere for answers.** *Id.*

#### **D. What can schools learn from the doctors to build trust and avoid litigation when the school makes a mistake?**

**1. Legal Compliance Matters.** One of the central factors in the studies on communication and lawsuits against doctors was the lack of difference in the quality of care exercised by those sued and

those not sued. In other words, the doctors sued for malpractice and those not sued were equally good doctors. In the school setting, not complying with IDEA is asking for trouble— much like leaving a sponge in a patient or a surgeon taking out the wrong lung— even if you use good communication skills.

**Everybody complies.** It does little good to have a superb IEP drafted after an excellent evaluation if the behavior management is never implemented. In fact, the parent who sees the care taken in the IEP Team Meeting to create the plan may be even more incensed to see the failure or refusal of educators to implement it. Each campus principal must create the climate of compliance on the campus through the use of the employee appraisal. An employee's failure to comply with the IEP is a violation of state law, federal law, and local policy and ought to be reflected as such on the appraisal instrument. An occasional lapse may be forgiven but an employee unwilling to comply is difficult to explain to an angry parent. The doctors recognized this problem as well, and refer to the physician's duty to identify and report medical care providers "who are not technically adequate whether owing to age, substance abuse, carelessness or other impairment.... While this is a difficult obligation to fulfill, especially when it is needed close to home, it is absolutely essential to maintain patient trust." *Axelrod, Maintaining trust in the surgeon-patient relationship*, 135 ARCHIVES OF SURGERY 55, 60 (January 2000).

**2. Build relationships of trust and respect with parents.** The doctors recognize that the "foundation of a strong surgeon-patient relationship is the surgeon's ability to elicit and enhance patient trust. Excellent communication skills, strong clinical and technical abilities, and sound ethical judgment are the crucial elements in facilitating the transfer of trust from patient to surgeon." *Axelrod, at 60*. A school's relationship with a parent of a student with a disability can last many years. During that time, if the school is careful and attentive, it can be banking goodwill in case storm clouds gather later in the relationship. Once legal compliance has been achieved, good communication skills are key to developing that trust. Some simple advice from the doctors on gaining trust and relationship building

1. It is not always easy to leave work in the middle of the day and go to the school. When a parent makes that effort, respect the effort and the message. Listen carefully, even if the concern is wacky.
2. Be approachable/accessible. Parents may not employ an attorney if they believe that they can talk to you and resolve things fairly. The research tells doctors to build rapport with 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*.
3. If you can't solve the problem, help the parent get in contact with someone who can solve it. Take the parent to their office or make a call in the parent's presence to introduce the two. If the problem cannot be solved, listen anyway, acknowledge the problem and be empathetic.
4. Listen as much as you talk.
5. Try not to appear hurried. You may not discover the real problem until you have listened for a while. Remember, the doctors never sued for malpractice spent more time with their patients (three minutes and twenty seconds made a world of difference).
6. Don't let required procedure distract you from humanity. The lesson of the doctors is rather pointed. "Surgeons may have contributed to the decreasing level of trust from patients by emphasizing technical procedures over interpersonal relationships." *Axelrod, at 58*.
7. Avoid technical language wherever possible as it may not be understood by the parent and may be perceived as an attempt to talk over the parent's head. Your desire is to communicate the information to the parent, not simply to utter magic words to comply with a legal requirement to

inform.

8. To ensure participation and input, ask open-ended questions of the parent and do not interrupt the answer. Listen for verbal clues about possible concerns and follow up with additional questions. The more information you can elicit, the more involved the parent and the more likely the parent will support the ultimate decision or plan.

9. Use humor appropriately as a way to connect with parents and break the ice.

**3. Continually educate parents about the disability law process and their role.** In IEP Team Meetings and other conferences with the parent, use statements of orientation so that the parent knows what to expect and how the meeting will progress. If the parent seems confused or uncertain about what to do, provide some simple reminders about the parent's role in the meeting. Be accurate about the school district's legal duties and the law's requirements. Lying will only destroy trust and encourage the parent to seek other, perhaps adversarial, sources of information. Educating the parent early in the relationship pays dividends later, as the parent is more likely to see you as a source of correct information and to find less need to consult sources that may be inaccurate or confusing.