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**IEP DISASTERS: COMMON PROCEDURAL AND SUBSTANTIVE MISTAKES  
TO AVOID**

**Nebraska/Kansas Regional Special Education Conference**

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The U.S. Supreme Court has referred to the IEP as the “modus operandi” for the provision of FAPE to students with disabilities. In accordance with the Court’s two-pronged test for determining whether an IEP is appropriate, hearing officers and courts must look to the substantive and procedural components of the IEP. This session will examine common substantive and procedural IEP mistakes that can occur during the development of the IEP and how those mistakes, particularly those that can lead to a denial of FAPE, can be avoided.

## **I. THE PROCESS/CONTENT STANDARD FOR DETERMINING FAPE/IEP APPROPRIATENESS GENERALLY**

In 1982, the Supreme Court decided the seminal case of Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982). In defining the role of the courts in exercising judicial review in cases brought under the IDEA, the Rowley Court held that any court's inquiry in suits brought under the Act is twofold: (a) first, has the State complied with the procedures set forth in the Act? (b) second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Since Rowley, many courts have found an IEP to be inappropriate and, therefore, a denial of FAPE, based solely on process or procedural errors. The 2004 IDEA Amendments, however, address such procedural violations as follows:

A decision made by a hearing officer “shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child’s right to a FAPE; 2) **significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of FAPE to the child;** or 3) caused a deprivation of educational benefits. However, nothing shall be construed to preclude a hearing officer from ordering an LEA to comply with the procedural requirements. 34 C.F.R. § 300.513.

## **II. PROCEDURAL DISASTERS TO AVOID**

### **A. Engaging in Action that Appears to Be a Predetermination of Placement or Action that May Appear to Deny Parental Input into Decisionmaking**

A predetermination of placement or making placement decisions without parental input or outside of the IEP/placement process will not only cause a parent to lose trust in school staff, it may very well lead to a finding of a denial of a free appropriate public education (FAPE). “Predetermination of placement” would include action such as fully developing and finalizing an IEP prior to the meeting with the parents and asking them to sign without discussion. Being prepared for an IEP meeting or bringing draft IEPs, however, is not

prohibited. Denial of parental participation/input might also be reflected if sufficient notice is not provided to parents of relevant evaluative information, proposed placement, etc.

### **Possible Scenarios**

1. School staff met prior to the IEP meeting, completed and signed the final IEP, leaving the special education teacher to present the IEP at a later time to the parent.
  - a. What about preparing draft IEPs before the meeting?
    - i. B.B. v. State of Hawaii, Dept. of Educ., 46 IDELR 213 (D. Haw. 2006). Parent was allowed input as to the student's IEP goals, even though they were in draft form. The PLEP and goals were discussed, modified and ultimately agreed upon by the entire IEP team, including the mother.
    - ii. E.W. v. Rocklin Unif. Sch. Dist., 46 IDELR 192 (E.D. Cal. 2006). Meeting to prepare draft goals and objectives for IEP for student with autism is not an impermissible predetermination of placement. This is particularly the case where the information concerning student's deficits and present level of performance were presented by the parents and the private providers at the IEP meeting.
    - iii. G.D. v. Westmoreland, 17 IDELR 751, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation.
    - iv. Hudson v. Wilson, 558 EHLR 186 (W.D. Va. 1986). School district that designed proposal for IEP before meeting with student's mother and grandmother, but provided extensive involvement for both at subsequent IEP meeting, met statutory requirements for development of IEP set forth in the Act.
    - v. Letter to Helmuth, 16 EHLR 503 (OSEP 1990). Prior to an IEP meeting, district may prepare a draft IEP, which does not include all of the required components, but such a document may be used only for purposes of discussion and may not be represented as a completed IEP.
    - vi. Regulatory commentary from the U.S. DOE: A few commenters to the proposed regulations recommended that parents receive draft IEPs prior to the IEP meeting. The US DOE responded that:

With respect to a draft IEP, we encourage public agency staff to come to an IEP Team meeting prepared to discuss evaluation findings and preliminary recommendations. Likewise, parents have the right to bring questions, concerns, and preliminary recommendations to the IEP Team meeting as part of a full discussion of the child's needs and the services to be provided to meet those needs. We do not encourage public agencies to prepare a draft IEP prior to the IEP Team meeting, particularly if doing so would inhibit a full discussion of the child's needs. However, if a public agency develops a draft IEP prior to the IEP Team meeting, the agency should make it clear to the parents at the outset of the meeting that the services proposed by the agency are preliminary recommendations for review and discussion with the parents. The public agency also should provide the parents with a copy of its draft proposals, if the agency has developed them, prior to the IEP Team meeting so as to give the parents an opportunity to review the recommendations of the public agency prior to the IEP Team meeting, and be better able to engage in a full discussion of the proposals for the IEP. It is not permissible for an agency to have the final IEP completed before an IEP Team meeting begins. 71 Fed. Reg. 46678.

2. School personnel arrive at the annual IEP meeting with the IEP completed in full and ready to be signed by the parent.
3. A teacher indicates during the meeting, "well, we've already met on that and decided that the program will be...."
  - a. Spielberg v. Henrico County, 441 IDELR 178, 853 F.2d 256 (4th Cir. 1988). Placement determined prior to the development of the child's IEP and without parental input was a *per se* violation of the Act.
  - b. Sand v. Milwaukee Pub. Schs., 46 IDELR 161 (E.D. Wis. 2006). The IDEA does not bar professionals from preparing for an IEP meeting and the fact that IEP team members spoke in preparation for the meeting did not deny the parents meaningful participation in the process.

- c. IDEA Regulations: The IDEA requires that parents be afforded an opportunity to participate in meetings with respect to-- (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child. However, a meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b)(3). See also, N.L. v. Knox County Schools, 38 IDELR 62, 315 F.3d 688 (6<sup>th</sup> Cir. 2003) (the right of parental participation is *not* violated where teachers or staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made) and Ms. S. v. Vashon Island Sch. Dist., 39 IDELR 154, 337 F.3d 1115 (9<sup>th</sup> Cir. 2003); Burilovich v. Board of Educ., 32 IDELR 85, 208 F.3d 560 (6<sup>th</sup> Cir. 2000); and Doyle v. Arlington County Sch. Bd., 19 IDELR 259, 806 F. Supp. 1253 (E.D. Va. 1992) (school officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind).
4. The principal says during the meeting, “but the Special Education Director already told us that we can only recommend....”
  5. The LEA representative at the meeting introduces the IEP Team members and says, “we are here today to develop an IEP for Billy to attend the self-contained class for LD students.”
  6. The teacher decides not to invite parents to IEP meetings any more because meetings “take too long” when parents attend.

**B. Failing to Share all Relevant Evaluative Information with the Parents**

As a part of the requirement to ensure adequate parental participation in IEP meetings, sharing all relevant evaluative data is important. The failure to do so could be considered a procedural violation sufficient to amount to a denial of FAPE. In the commentary to the 2006 IDEA regulations, the U.S. DOE responded to a recommendation of one commenter that evaluation reports be provided to parents prior to an IEP meeting. In response, the DOE noted that the Act “does not establish a timeline for providing a copy of the evaluation report or the documentation of determination of eligibility to the parents and we do not believe that a specific timeline should be included in the regulations because this is a matter that is best left to State and local discretion. It is, however, important to ensure that parents have the information they need to participate

meaningfully in IEP Team meetings, which may include reviewing their child's records." 71 Fed. Reg. 46645.

Amanda J. v. Clark County Sch. Dist., 35 IDELR 65, 160 F.3d 1106 (9<sup>th</sup> Cir. 2001). Because of the district's "egregious" procedural violations, parents of student with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996, as well as compensation for inappropriate language services during the student's time within the district. Where the district failed to timely disclose student's records to her parents, including records which indicated that student possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process. There is no need to address whether the IEPs proposed by the district were reasonably calculated to enable the student to receive educational benefit because the procedural violations themselves were a denial of FAPE.

### C. **Failing to Make Recommendations with Sufficient Clarity and Finality**

All services delineated in an IEP should be set forth in a fashion that is specific enough for parents to have a clear understanding of the level of commitment of services on the part of the school system. This will help to avoid misunderstandings and ensure meaningful participation in the educational decisionmaking process.

#### **Possible scenarios**

1. School personnel offer three options for placement, hoping that the parents will accept one of them, but never make a final offering of one placement.
  - a. Knable v. Bexley City Sch. Dist., 34 IDELR 1, 238 F.3d 755 (6<sup>th</sup> Cir. 2001). Although the district met with the parents on several occasions to review possible placement options for the student, such meetings were not the "equivalent of providing the parents a meaningful role in the process of formulating an IEP." Because the district did not formally offer an IEP/placement prior to placement in a residential program by the parents, parents are entitled to reimbursement. The parents' refusal to agree with the district's placement recommendations did not excuse the district's failure to conduct an IEP conference.
  - b. Glendale Unified Sch. Dist. v. Almasi, 33 IDELR 221, 122 F.Supp.2d 1093 (C.D. Cal. 2000). Where district offered four possible placements to student, three of which were district programs and one was continued placement at private school at parents' expense, offer of several placements was a procedural violation that denied FAPE. District must make a formal, specific offer of placement.

2. “We didn’t have an IEP proposed by the beginning of the school year because the parents left the meeting.”
  - a. Alfonso v. District of Columbia, 45 IDELR 118, 422 F.Supp.2d 1 (D. D.C. 2006). Tuition for private school for student with visual impairment upheld for part of the 2004-05 school year because District did not have IEP completed prior to the beginning of the school year. Even though evaluations were completed in July 2004, it was not until October and November of 2004 that the IEP was finalized, including all of the measurable goals annual goals. Therefore, District is responsible for funding private schooling until such time as the IEP was completed in November.
3. “We recommend that she receive 3 to 5 periods per day of special education services.”
  - a. Letter to Ackron, 17 EHLR 287 (OSEP 1990). While the regulation does not explicitly require an IEP to state the amount of services with respect to the specific number of hours or minutes, the IEP must indicate the amount of services in a manner appropriate to the types of services and in a manner sufficiently clear to all persons involved in developing and implementing the IEP. The use of a range of times would not be sufficient to indicate the school's commitment of resources.
4. “She will receive occupational therapy on an ‘as needed’ basis.”
  - a. Letter to Gregory, 17 EHLR 1180 (OSEP 1991). The amount of time for related services must be stated with sufficient clarity to be understood by all persons involved in the development and implementation of the IEP.
5. “She will receive physical therapy services for 45 hours per year.”

**D. Failing to Make Educational Recommendations/Decisions Based Upon the Individual Needs of the Student**

Sometimes, IEP recommendations are made based upon the availability of programs or services or cost of services, rather than upon the student's individual needs. Under IDEA, the availability of services or their cost should not be determinant factors in making service recommendations. Rather, recommendations for services must be made on the basis of every student’s individual educational needs. Otherwise, this could be considered a form of predetermination of placement, as well as a failure to consider the individual needs of a student.

## Possible Scenarios

1. “Oh, how I wish we could offer \_\_\_\_\_ because he really needs it, but we don’t have that here.”
  - a. LeConte, 211 EHLR 146 (OSEP 1979). Trained personnel “without regard to the availability of services” must write the IEP.
  - b. Deal v. Hamilton County Bd. of Educ., 43 IDELR 109, 392 F.3d 840 (6<sup>th</sup> Cir. 2004). District denied parents of student with autism the opportunity to meaningfully participate in the IEP process when it placed their child in a program without considering his individual needs. Though parents were present at the IEP meetings, their involvement was merely a matter of form and after the fact, because District had, at that point, pre-decided the student's program and services. Thus, District's predetermination violation caused student substantive harm and therefore denied him FAPE. It appeared that District had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant "school system personnel thus did not have open minds and were not willing to consider the provision of such a program," despite the student's demonstrated success under it.
2. “Our preschool program is 4 days per week for ½ day for everyone.”
  - a. A.M v. Fairbanks North Star Borough Sch. Dist., 46 IDELR 191 (D. Alaska 2006). Where district coordinator for intensive preschool services told parents that a full day intensive program “was not developmentally appropriate” for preschoolers, with or without autism, this was not considered a “blanket policy” because there was testimony that if a full-day program had been deemed necessary by the IEP Team, it could have been implemented. The parents withdrew the autistic student from the public school program before IEP discussions could be completed.
3. “But we *always* do it that way.”
  - a. T.H. v. Board of Educ. of Palantine Community Consolidated Sch. Dist., 30 IDELR 764 (N.D. Ill. 1999). School district required to fund an ABA/DTT in-home program after ALJ determined that district recommended placement based upon availability of services, not the child’s needs.
4. “We’ve never done that before and we’re not starting now.”

5. “My schedule won’t allow for that.”
6. “My class doesn’t have those services.”
7. “But all of our middle/high school students get \_\_\_\_\_.”
8. “I’m sorry, but that would just be too expensive.”
  - a. Letter to Anonymous, 30 IDELR 705 (OSEP 1998). Lack of sufficient resources and personnel is not a proper justification for the failure to provide FAPE.
  - b. Cedar Rapids Community Sch. Dist. v. Garret F., 29 IDELR 966, 526 U.S. 66 (1999). Twelve year-old student who was quadriplegic after a motorcycle accident is entitled to one-to-one nursing care to perform urinary bladder catheterization, tracheotomy suctioning, ventilator setting checks, ambu bag administrations, blood pressure monitoring, observations to determine respiratory distress or autonomic hyperreflexia and disimpation in the event of autonomic hyperreflexia as a related service, because the services of a physician were not necessary.
9. “That would be taking money away from the other students.”
10. “Do you know how much that would cost if we did that for all of our students?”

**E. Failing to Notify Parents of Their Rights**

The 2004 IDEA Amendments provide that a copy of the procedural safeguards shall be given to the parents only 1 time per year, except that a copy must be provided upon initial referral or parental request for evaluation; upon the first occurrence of filing of a complaint for due process; and upon request by a parent. The final regulations clarify further that a copy of the procedural safeguards must be given to the parents only one time a school year, except that a copy also must be given to the parents--

- (1) Upon initial referral or parent request for evaluation;
- (2) Upon receipt of the first State complaint; and upon receipt of the first due process complaint in a school year;
- (3) In accordance with the discipline procedures in §300.530(h) (when a change in placement is recommended); and
- (4) Upon request by a parent.

34 C.F.R. §300.504. In addition, an LEA may place a current copy of the procedural safeguards notice on its Internet website if such website exists. The law also provides that

a parent may elect to receive notices by electronic mail (e-mail) communication, if the agency makes such option available.

### **Possible Scenario**

The parents obviously do not agree with the school system's program but have not been given a copy of their parent rights and are not aware of their right to challenge the program.

Jaynes v. Newport News, 35 IDELR 1, 2001 WL 788643 (4<sup>th</sup> Cir. 2001). Parents entitled to reimbursement for Lovaas program due to district's repeated failure to notify them of their right to a due process hearing. Where the failure to comply with IDEA's notice requirements led to a finding of denial of FAPE, court may award reimbursement for substantial educational expenses incurred by parents because they were not notified of their right to challenge the appropriateness of the district's program.

### **F. Failing to Have Required School Staff in Attendance**

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

Staff attending IEP meetings must ensure that all required school personnel are there to participate. Often, school systems fail to ensure that the appropriate "LEA representative" of the school system attends the IEP meeting. This person may often be someone *in addition to* the child's teachers. However, the federal regulations indicate that the LEA representative can be one of the other agency members listed as long as that person also meets the qualifications of an LEA representative. In addition, a regular education teacher of the child must participate in IEP development and review/revision when the student is or may be participating in the regular education environment.

The 2004 IDEA now provides that a member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA **agree** that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the

meeting.” When the meeting involves a modification to or discussion of the member’s area of the curriculum or related services, the member may be excused if the parent and LEA **consent** to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent to any excusal must be in writing.

### **Possible Scenarios**

1. “Yes, I am the LEA Rep., but I don’t *do* special education. You’ll have to ask someone else, because I really know nothing about it.”

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 35 IDELR 126, 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was “qualified to provide or supervise the provision of special education” services. The absence of the district representative forced the student’s parents to accept whatever information was given to them by the student’s teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child’s program, including the teacher’s style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student “was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.’s skills in the development of her second grade IEP.”

2. “Sorry I’m an hour late, but the principal just told me I needed to be here because I’m the only regular education teacher in the building. I’m not really sure what help I can give, since I don’t teach special education. So, can I go now?”

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

- b. M.L. v. Federal Way Sch. Dist., 42 IDELR 57, 387 F.3d 1101 (9<sup>th</sup> Cir. 2004). The failure of the school district to have a regular education teacher at the IEP meeting for an autistic and intellectually impaired student was sufficient to find a denial of

FAPE. The District's omission was a "critical structural defect" because there was a possibility of placement in an integrated classroom and the IEP recommended might have been different had the general education teacher been involved. When the general education teacher was unable to attend, District should have cancelled the meeting and not proceeded without the benefit of input from the general education teacher regarding curriculum and environment there.

#### **G. Failing to Allow for Participation of Persons Brought By Parents**

Parents are entitled to bring to the meeting with them "other individuals who have knowledge or special expertise regarding the child." 34 C.F.R. § 300.321. Generally, unless confidentiality is violated, school staff should allow such persons to attend under the IDEA. However, it should be remembered that the IEP process is not a "voting" process. Rather, it is a process by which the entire IEP Team, with the parent, are to attempt to reach a consensus as to the components of a student's IEP and program.

#### **Possible Scenarios**

1. "You can't bring your attorney with you to the meeting."
2. "Sure, your next door neighbor can come but cannot participate."
  - a. Tokarz, 211 EHLR 316 (OSEP 1983). Individuals who are involved in IEP meeting at discretion of child's parents are participants in meeting and are permitted to actively take part in proceedings.
3. "We don't consider a member of the press a knowledgeable person."
  - a. Chicago Bd. of Educ., 257 EHLR 308 (OCR 1981). School district was justified in terminating IEP meeting where newspaper reporter, present at parents' request, refused to leave conference, as there was insufficient evidence that reporter had special knowledge which would have made his presence necessary.
4. "Sorry, you're going to have to leave because we weren't notified that you were coming."
  - a. Monroe Co. Sch. Dist., 352 EHLR 168 (OCR 1985). Parents are entitled to have other persons present at IEP meeting at their discretion and district that asked parents' guest to leave because parents failed to give advance notice of her participation violated IDEA requirements.

5. “Okay, since everyone is still here, let’s just take this to a vote since we can’t seem to agree.”
  - a. Sackets Harbor Cent. Sch. Dist. v. Munoz, 34 IDELR 227, 725 N.Y.S.2d 119 (N.Y. App. Div. 2001). Where the IEP committee chair allowed IEP decision to be “taken to a vote,” the court upheld decision requiring a re-vote where child’s aide and therapists’ votes were not counted.

### **III. SUBSTANTIVE DISASTERS TO AVOID**

#### **A. Failing to Make Recommendations Based Upon Adequate Evaluations**

Evaluations must be up-to-date, thorough and adequate before appropriate IEPs can be developed and services offered. In some cases, a school system may lose a case based solely upon its failure to appropriately evaluate a student prior to making educational recommendations. It is important to obtain *all* records and to demand current evaluations or to insist upon the right to conduct current evaluations prior to making decisions regarding appropriate services. Current case law clearly provides authority for a school system to conduct evaluations in response to parental demands and to have the evaluations conducted by the evaluator of the school system’s choosing. *See, e.g., Shelby S. v. Kathleen T.*, 45 IDELR 269, 454 F.3d 450 (5<sup>th</sup> Cir. 2006) [school district has justifiable reasons for obtaining a medical evaluation of the student over her guardian’s refusal to consent. If the parents of a student with a disability want the student to receive special education services under the IDEA, they are obliged to permit the district to conduct an evaluation] and *M.T.V. v. DeKalb County Sch. Dist.*, 45 IDELR 177, 446 F.3d 1153 (11<sup>th</sup> Cir. 2006). Where there is question about continued eligibility and parent asserts claims against District, District has right to conduct re-evaluation by expert of its choosing.

#### **Possible Scenarios**

1. “We understand that you think he may be disabled, but let’s just wait and see how he does.”

Babb v. Knox County Sch. Sys., 18 IDELR 1030, 965 F.2d 104 (6<sup>th</sup> Cir. 1992). Failure to appropriately evaluate student lead to conclusion that there was a denial of a free appropriate public education.

2. “I called the records custodian from the former district but haven’t heard back about the records.”

To facilitate transition of transfer students, the 2004 IDEA provides that the new school in which the child enrolls shall take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special

education and related services to the child, from the previous school in which the child was enrolled, pursuant to FERPA regulations. In addition, the previous school in which the child was enrolled shall take “reasonable steps to promptly respond to such request from the new school.”

**B. Failing to Appropriately and Timely Respond to Requests for an Independent Educational Evaluation (IEE)**

Under IDEA, parents have the right to obtain an independent educational evaluation (IEE), at public expense, if they disagree with an evaluation conducted by the public school agency. In response to such a request, the school agency must initiate its own hearing to show that its evaluation is appropriate or pay for the IEE. 34 C.F.R. § 300.502.

**Possible Scenarios**

1. “Sorry, the School System has already done an evaluation and that’s final.”
2. “I’m not saying that we won’t pay for it, but I’m not saying that we will either.”
  - a. Pajaro Valley Unified Sch. Dist. v. J.S., 47 IDELR 12 (N.D. Cal. 2006). The school district’s unexplained and unnecessary delay in filing for a due process hearing waived its right to contest the parent’s request for an independent educational evaluation at public expense. Waiting three months to request a hearing was enough by itself to enter judgment in favor of the student and his parents.

**C. Failing to Include Measurable Goals in the IEP**

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

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

2. Penn Trafford Sch. Dist. v. C.F., 45 IDELR 156 (W.D. Penn. 2006). Compensatory education award upheld based upon finding that the IEP’s short-term instructional objectives were not sufficiently specific and that the IEP did not provide measurable annual goals. In addition, the IEP failed to provide for a behavior management plan even though the record reflected that the student has behavioral issues. “This is a serious omission.”
3. W.S. v. Rye City Sch. Dist., 46 IDELR 285, 454 F.Supp.2d 134 (S.D. N.Y. 2006). Though the hearing officers found that the goals in the IEP were overly broad, court upheld determination that the objectives were quite specific regarding what the child needed to be able to do and when she needed to be able to do it. “It is, frankly, difficult for the court to imagine how much more specific the District could be concerning its goals and objectives for the student’s continued educational progress.”
4. Leticia H. v. Ysleta Indep. Sch. Dist., 47 IDELR 13 (W.D. Tex. 2006). “While one may believe that [the student’s] annual goals could have been written with greater clarity, a thorough review of the administrative record indicates that [the parent] was able to participate in the IEP process and that [the student] received educational benefit, despite the procedural irregularities in his IEP.”

**D. Making Vague/Generalized Recommendations Regarding Least Restrictive Environment (LRE)**

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

**Possible Scenarios**

1. The school team begins its consideration of placement in a self-contained environment first and moves backward along the continuum.
2. The school team moves too quickly along the continuum in making its consideration, skipping less restrictive options in its consideration.
  - a. Greer v. Rome City Sch. Dist., 18 IDELR 412, 950 F.2d 688 (11th Cir. 1991), withdrawn, 18 IDELR 830, 956 F.2d 1025 (11th Cir. 1992), reinstated, 19 IDELR 100, 967 F.2d 470 (11th Cir. 1992). The IEP did not reflect sufficient consideration of less restrictive options than self-contained classroom.
3. The IEP states that a separate school was chosen because “the parent

requested it” or “the student’s needs are too severe to be met outside of special school.”

- a. St. Louis Co. Special Sch. Dist., 352 EHLR 156 (OCR 1986). Failure to state in IEPs why students could not be educated in the regular education environment with the use of supplementary aids and services denied them a free appropriate public education.
  - b. Brazo Sport Indep. Sch. Dist., 352 EHLR 531 (OCR 1987). Placement at separate facility was not justified and IEPs of all students should bear evidence of individual consideration of ability to benefit from regular education, not identical language for all students in the separate facility.
4. IEP Team writes that student needs to be in self-contained environment because it would be “best” for the student.

**E. Being Overly Specific and Including Unnecessary Details or “Promises” in IEPs**

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

**Possible Scenarios**

1. The school team is convinced by the parent’s advocate that the teacher’s day-to-day activities must be written into the IEP.
  - a. Virginia Dept. of Educ., 257 EHLR 658 (OCR 1985). IEPs are not expected to be so detailed as to be substitutes for lesson plans.
  - b. Paoella v. District of Columbia, 46 IDELR 271 (D.C. Cir. 2006). There is no requirement that, when determining an appropriate placement in a school, the student’s precise daily schedule must be developed. Rather, a daily schedule is to be developed by a special education team at the school based on the IEP.
2. The school team complies with the attorney’s request to write in the IEP that Barbara Smith will be the student’s teacher and that all teachers will use the Orton-Gillingham method for instruction in reading.

- a. Letter to Hall, 21 IDELR 58 (OSERS 1994). Part B does not expressly mandate a particular teacher, materials to be used, or instructional methods to be used in the student's IEP.
  - a. Lachman v. Illinois St. Bd. of Educ., 441 IDELR 156, 852 F.2d 290 (7th Cir. 1988). Parents, no matter how well-motivated, do not have the right to choose a particular methodology to be used.
  - b. Slama v. Indep. Sch. Dist. No. 2580, 39 IDELR 3, 259 F.Supp.2d 880 (D. Minn. 2003). Change from parents chosen personal care attendant (PCA) to school district-employed aide did not constitute a change in placement by the district for which notice to the parent was required.
3. IEP Team complies with the parent advocate's request to write into the IEP that Sally will be on the Varsity Basketball Team in order to receive FAPE.
- a. Kling v. Mentor Pub. Sch. Dist., 136 F.Supp.2d 744 (N.D. Ohio 2001). Interscholastic sports or other extracurricular activities may be related services under the IDEA, even though not expressly included within the definition of "recreation." District ordered to revise student's IEP to contain an interscholastic sports component and to place him on the high school track and cross country teams, even though district contended it would risk sanctions from the state athletic association because the 19-year old hearing impaired student with CP was too old. The local and state hearing officers had ruled that it was necessary for the student to participate for the development of his communication skills and to address his social and psychological needs.

**F. Failing to Appropriately Address the Need for Extended School Year Services (ESY)**

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

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

- (i) Limit extended school year services to particular categories of disability; or

- (ii) Unilaterally limit the type, amount, or duration of those services.

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

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

School personnel should be made aware of the school system’s ESY policies and procedures and have appropriate data to support recommendations regarding ESY eligibility. In addition, they should be trained to fully understand the standard for providing ESY services.

### **Possible Scenarios**

1. “Of course we provide ESY. Anyone can participate in summer school.”
2. “Our ESY program runs from June 16 until July 19 for everyone.”
3. “Sorry, we no longer have ESY services because our school board cut the summer school program.”
  - a. Bend Lapine Sch. Dist. v. K.H., 43 IDELR 191 (D. Ore. 2005). Failure to consider or discuss eligibility for Extended Year Services is an IDEA violation that amounts to a denial of FAPE.
4. “But all of our LD students get ESY in the form of home packets.”
5. “Because your child is only mildly LD, we know he won’t qualify for ESY, so we don’t need to address it. Only our severe and profound students get ESY.”
  - a. Baugh, 211 EHLR 481 (OSERS 1987). When extended school year is an issue for a student, school personnel must determine a student’s eligibility for the services at an IEP meeting.
6. “It is clear that he needs ESY services in order to continue to progress over the summer or at least to maintain the skills he has right now.”
  - a. Reinholdson v. School Bd. of Indep. Sch. Dist. No. 11, 46 IDELR 63 (8<sup>th</sup> Cir. 2006). District court’s decision that the school district fully complied with procedural requirements regarding ESY services is upheld. The purpose of ESY services is to prevent

regression and recoupment problems, rather than advance the educational goals outlined in the student's IEP. Letter to Myers, 16 EHLR 290 (OSEP Dec. 18, 1989). As a result, the services in the ESY may differ from those provided during the school year. The IEP team's decision in December to defer until spring the specifics of the ESY services necessary to help the Student maintain the skills he learned during the school year was reasonable under the circumstances.

- b. Casey K. v. St. Anne Community High Sch. Dist. No. 302, 46 IDELR 102 (C.D. Ill. 2006). District's proposed ESY program is appropriate. ESY services have "a limited purpose, which is to prevent regression in the summer, not produce significant educational gains."
- c. McQueen v. Colorado Springs Sch. Dist. No. 11, 45 IDELR 157, 419 F.Supp.2d 1303 (D. Colo. 2006). School district's policy, based upon Colorado Department of Education guidelines, that requires that ESY services address only maintenance and retention of skills already mastered, rather than acquisition of new skills, is not in violation of the IDEA. Clearly, the relevant case law and OSEP guidance support endorsing the "significant jeopardy" standard as the basis for the content of ESY services.

**G. Failing to Address Transition Activities and Providing an Appropriate Summary of Performance**

Beginning not later than the first IEP to be in effect when a student is 16, and updated annually thereafter, an IEP must contain "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills" and the transition services (including courses of study) needed by the child to reach those goals.

**Possible Scenarios**

- 1. "Well, since the folks from Voc. Rehab. didn't show up today, I guess we can't address transition."
- 2. The IEP states "N/A" in the transition section of the IEP.
  - a. Letter to Cernosia, 19 IDELR 933 (OSEP 1993). Transition services are defined as a coordinated set of activities in the areas of instruction, community experiences, development of employment and post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation. If the IEP team determines that services are not needed

in one or more of those areas, the IEP must include a statement to that effect and the basis upon which the determination is made.

#### **H. Refusing to “Consider” Independent Evaluative Information Brought in by the Parents**

The regulations require that school staff consider the results of independent educational evaluations obtained by parents. Thus, if the parents bring an outside evaluation to the meeting, appropriate "consideration" must be given to it.

#### **Possible Scenario**

“This guy is a ‘quack’ and we’re not going to even consider this report.”

1. T.S. v. Ridgefield Bd. of Educ., 20 IDELR 889, 10 F.3d 87 (2d Cir. 1993). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.
2. DiBuo v. Board of Educ. of Worcester County, 37 IDELR 271, 309 F.3d 184 (4<sup>th</sup> Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child’s physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ’s finding that the student did not need ESY in order to receive FAPE.
3. Watson v. Kingston City Sch. Dist., 43 IDELR 244, 2005 WL 1791553 (2d Cir. 2005). Lower court’s ruling that District was not required to incorporate recommendations of private evaluator is upheld. In addition, District’s failure to update goals and objectives from student’s prior year IEP was insufficient to find a violation of IDEA, as this was a minor procedural error.

#### **I. Failing to Address Behavioral Strategies/Interventions as Part of the IEP**

If a student needs a behavior management program, it should be discussed as a support service or intervention at the IEP meeting. The IDEA requires that any time a student exhibits behavior that impedes his or her learning or that of others, the IEP Team must consider appropriate strategies, including positive behavioral interventions, strategies and supports to address the behavior.

### **Possible Scenario**

“Since she’s not behaviorally or emotionally disturbed, we don’t need to address behavioral strategies for her.”

### **J. Failing to Develop a Plan for the Provision of Services in the IEP**

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

### **Possible Scenarios**

1. “Oh, I didn’t even know she was a special education student.”
2. “Nobody told us that she needed transportation on Monday morning.”
3. “She has a behavior management plan?”