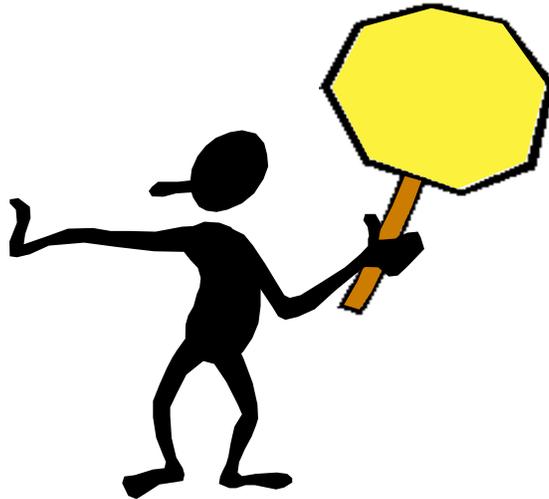


# **Avoiding Special Education Litigation**



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Unfortunately, mistakes can occur in the process of developing and implementing IEPs and special education programs that can lead to parent distrust and anxiety and, worst of all, litigation. This presentation will examine common procedural and substantive mistakes that are made by school personnel that can lead to litigation in the area of special education and will include practical “do’s and don’ts” for all educators to keep in mind as they struggle to avoid special education legal disputes.

The first section of these materials will highlight common due process missteps that can occur in the development, content and implementation of IEPs for students with disabilities that can have significant legal implications. The second section will address some behavioral or attitudinal missteps that should be avoided merely because they create a spirit of mistrust and do not assist a school system in defending its overall position that it has provided a free appropriate public education (FAPE) to a student with a disability.

## **I. IEP DUE PROCESS MISSTEPS**

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 Supreme Court’s two-pronged test for determining whether an IEP is appropriate, due process hearing officers and courts must look to the substantive and procedural components of the IEP. This section will examine common substantive and procedural IEP missteps that can occur during the development of an IEP and how those missteps, particularly those that can lead to a finding that there has been a denial of FAPE, can be avoided.

### **A. Introduction: The “Process and 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 cases brought under the IDEA, the Rowley Court held that a court’s inquiry 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, an ultimate denial of FAPE, based solely on process or procedural errors (the first prong of the Rowley inquiry). The 2004 IDEA Amendments, however, specifically address the issue and impact of 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 (emphasis added).

**B. IEP Missteps: Procedural and Substantive Do's and Don'ts**

**1. DON'T Engage in Action that Appears to be a Predetermination of Placement or Somehow denies Parental Input into Educational Decisionmaking**

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

**Potential Missteps**

- a. School members of the IEP Team meet prior to the IEP meeting, complete and sign the final IEP, and leave it to the special education teacher to present the IEP to the parent for signature later that afternoon.
- b. School personnel arrive together at the annual IEP meeting with the IEP completed in full and ready to be signed by the parents.
  - i. What about preparing draft IEPs before the meeting?
    - (a) 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.
    - (b) E.W. v. Rocklin Unif. Sch. Dist., 46 IDELR 192 (E.D. Cal. 2006). Meeting to prepare draft IEP goals and objectives for student with autism is not an impermissible predetermination of placement. This is particularly the case where the information concerning student's deficits and present level of performance were presented by the parents and the private providers at the IEP meeting.
    - (c) 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.
    - (d) Hudson v. Wilson, 558 EHLR 186 (W.D. Va. 1986). School district that designed proposal for IEP before meeting with student's mother and grandmother, but provided extensive involvement for both at subsequent

IEP meeting, met statutory requirements for IEP development set forth in the Act.

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

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

71 Fed. Reg. 46678.

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

- (b) Roland M. v. Concord Sch. Comm., 1989 WL 141688 (D. Mass. 1989), aff'd, 910 F.2d 983 (1<sup>st</sup> Cir. 1990). Although procedural violations were not sufficient to find a denial of FAPE, the use of a computer generated IEP resulted in a “mindless” IEP.
  - (c) Rockford (IL) Sch. Dist. #205, 352 IDELR 465 (OCR 1987). Computer generated IEPs lacking clear statements of current levels of educational performance, annual goals, or short-term objectives violated the IDEA, as the IEP was not “readily comprehensible” to the parents. Parents interviewed indicated that they did not fully understand the symbols, codes and other markings in the children’s IEPs and did not consider themselves sufficiently informed to ask questions.
- c. During the IEP meeting, the regular education teacher exclaims “but in our meeting yesterday, we decided that regular education participation is not appropriate.”
- i. 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 and sufficient to constitute a denial of FAPE in and of itself.
  - ii. 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.
  - iii. 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.
  - iv. IDEA Regulatory clarification: 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).

- v. 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.
- vi. A.E. v. Westport Bd. of Educ., 46 IDELR 277 (D. Conn. 2006). Nothing in IDEA requires the parents' consent to finalize an IEP. Instead, IDEA only requires that parents have an opportunity to participate in the drafting process. In addition, the parents participated extensively in the placement, attending all IEP meetings and being represented by a qualified parent advocate. They submitted letters, recommendations and proposed IEPs. It is important to note that, aside from the proposed placement in the district's chosen program, the parents' proposed IEP was substantially similar to the IEP that was revised and many of the parents' suggestions were adopted. As the hearing officer pointed out regarding predetermination of placement, there is a difference between being "open-minded" and "blank-minded." While a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement.
- d. The principal says during the IEP meeting, "but the Special Education Director already told us that we can only recommend...."
- e. The IEP Chairperson begins the meeting by saying, "we are here today to develop an IEP for Billy to attend the self-contained class for LD students."
- f. The teacher simply decides not to invite parents to IEP meetings any more because meetings "take way too long" when parents attend.

## **2. DON'T Fail to Share all Relevant Educational Information with the Parents**

As a part of the requirement to ensure adequate parental participation in IEP meetings, sharing all relevant evaluative and other educational 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 the 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.

### **Potential Misstep:**

A couple of evaluations indicate some “characteristics of autism,” but the evaluators believe it would be best that it not be discussed at this juncture.

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.

### **3. DO Present Clear Recommendations for Placement**

All services recommended and ultimately 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 and exactly what is being offered. This will help to avoid misunderstandings and ensure that parents have indeed been provided with meaningful participation in the educational decisionmaking process and sufficient opportunity to consider a single and final proposal from the school system for services.

#### **Potential Missteps:**

- a. School personnel have held meetings with the parents but they weren’t pleasant, so there’s no need to have another meeting, since they’ll never accept anything the school system offers anyway.

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. “Ok, so you don’t like the school’s first offer. Let’s discuss three other options for you to consider.”

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.

- c. "It is the Team's recommendation that she be provided with three to five periods per day of special education services."

Letter to Ackron, 17 EHLR 287 (OSEP 1990). While the regulations do 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.

- d. "She will receive these supports on an 'as needed' basis."

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.

- e. "We are recommending that she attend a private school, we just don't know where that will be."

A.K. v. Alexandria City Sch. Bd., 47 IDELR 245, 484 F.3d 672 (4<sup>th</sup> Cir.), reh'g denied, 107 LRP 42702 (4<sup>th</sup> Cir. 2007). As a matter of law, the school district's proposed IEP was not reasonably calculated to enable A.K. to receive educational benefit because the IEP failed to identify a particular private day school. Failing to identify the specific school amounted to a denial of FAPE.

#### **4. DO Have a Final IEP Proposed by the Beginning of the School Year**

One of the most significant procedural mistakes that can be made is the failure to follow the IDEA's requirement that an IEP be in place at the beginning of every school year, even where the parent has sabotaged the school's efforts to conduct IEP meetings or simply left the meeting altogether before the IEP was completed.

##### **Potential Missteps:**

- a. "We didn't have an IEP in place by the beginning of the school year because all of our evaluations were not completed yet."

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 annual goals. Therefore, district is responsible for funding private schooling until such time as the IEP was completed in November.

- b. “But the parents and their attorney wouldn’t come to a meeting so that we could develop the IEP.”
  - i. Justin G. v. Board of Educ. of Montgomery County, 148 F.Supp.2d 576 (D. Md. 2001). Where no IEP is developed prior to the beginning of the school year, even where the school district contends it was the parents’ fault, such a violation goes to the heart of the district’s ability to provide FAPE and, therefore, resulted in a denial of FAPE.
  - ii. E.P. v. San Ramon Valley Unif. Sch. Dist., 48 IDELR 66, 2007 WL 1795747 (N.D. Cal. 2007). Where the district had the choice of finalizing the IEP without the parents present or violating its duty to have an IEP in effect for the child on the first day of school, the district did not violate the IDEA by proceeding with the meeting, particularly after it was clear that the parents and their attorney would not cooperate in the process and agree to a meeting time.
  - iii. Mr. G. v. Timberlane Regional Sch. Dist., 47 IDELR 5, 2007 WL 54819 (D. N.H. 2007). Although parents have a right to participate in the IEP process, a district may conduct IEP meetings without parental participation if it is unable to convince the parents to attend and has made reasonable attempts to obtain parental participation. Where these parents time after time neglected to attend team meetings of which they were informed and to which they were invited and, when they did attend, often made sweeping and unqualified declarations as to the student’s needs, refused to engage in a dialogue with the district and withdrew from the meetings and threatened immediate due process, district made all reasonable efforts to secure parents’ participation and reasonably proceeded without the parents in the best interests of the student.
  - iv. Mr. and Mrs. M. v. Ridgefield Bd. of Educ., 47 IDELR 258, 2007 WL 987483 (D. Conn. 2007). The IEP for the 2004-05 school year denied FAPE because the school district went ahead with the IEP meeting but did not make sufficient effort to negotiate an agreeable time for the meeting, despite the parents’ express and timely request for further discussion as to an alternative date.
  - v. Michael J. v. Derry Township Sch. Dist., 2006 WL 148882, 45 IDELR 36 (M.D. Pa. 2006). District’s failure to offer an IEP for the 2002-03 school year is not a violation of the IDEA where parents advised district on multiple occasions that they did not want special education services from the district that year. Thus, reimbursement for private tuition is not warranted, as there is no entitlement to FAPE for children whose parents

have unilaterally placed them in private school and made it clear they want nothing from the school district.

- vi. Garcia v. Board of Educ. of Albuquerque Pub. Schs., 49 IDELR 241, 520 F.3d 1116 (10<sup>th</sup> Cir. 2008). Although the school district committed some procedural violations, including failing to have and implement a current IEP at the beginning of the 2003 school year, student was not denied access to FAPE because the record failed to show that the irregularities would have made any difference to, or imposed any harm on, the student. This is because she was significantly truant from school, often skipped classes and used drugs and alcohol.

#### **5. DON'T Fail to Hold an IEP Meeting at Least Annually**

Even when a student's placement is being litigated, the student's current IEP is the "stay-put" IEP, and the parents have placed their child in a private school, the obligation to hold annual IEP review meetings is not eliminated, according to the U.S. DOE.

Letter to Watson, 48 IDELR 284 (OSEP 2007). School districts must timely review all IEPs even though they are being challenged in administrative or judicial proceedings. Nothing in the IDEA relieves districts of the duty to convene an IEP team "not less than annually" and to revise the IEP as needed, including review and revision of the child's present levels and modification of annual goals, if appropriate.

#### **6. DO Make Educational Recommendations or Decisions Based Upon the Individual Needs of the Student**

Sometimes, IEP recommendations are made based upon the availability of programs or services, rather than upon the student's individual needs. Under IDEA, availability of services should never appear to be the determinant factor in making service recommendations. Rather, recommendations for services must be made on the basis of each student's individual educational needs. Otherwise, this could be considered a form of predetermination of placement, as well as a failure to consider the individual needs of a student, as required by the IDEA.

#### **Potential Missteps:**

- a. "Well, it may be true that he needs that, but "I'll be honest with you--we just don't have that here."
  - i. LeConte, 211 EHLR 146 (OSEP 1979). School personnel "without regard to the availability of services" must write the IEP.
  - ii. 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.

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

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

- c. "But we *always* do it that way for our autistic students."

i. 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.

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

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

- e. "My schedule won't allow for that."

- f. "My class doesn't have those services."

7. **DON'T Make Decisions Based Solely Upon Cost**

While it is true that the provision of special education services can be costly, cost is generally not a defense for the failure to offer services that are required to meet a student's educational needs and to provide FAPE.

**Potential Missteps:**

- a. "I'm sorry, but that would just be too expensive and we just experienced severe budget cuts for special education services."
  - i. 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.
  - ii. 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.
- b. "That would be taking money away from the other students."
- c. "Can you imagine how much that would cost if we did that for all of our students?"

**8. DON'T Fail to Notify Parents of Their Rights or Giving Them Prior Written Notice**

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, a school system 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.

In addition, to the provision of procedural safeguards, a particularly important procedural safeguard available to parents is the receipt of prior written notice. Generally, school personnel remember to send the written notice required when the school system proposes to initiate a change in the identification, evaluation or placement of a student. However, this notice is sometimes forgotten upon refusal to initiate a change in identification, evaluation, placement or the provision of FAPE to the student.

**Potential Missteps:**

- a. The parents obviously do not agree with the school system’s program but have not been given a copy of their parent rights and, therefore, were not aware of their right to sue and 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.

- b. The parent asks the special education teacher if her child could be evaluated for speech services. The teacher replies, “forget it, she’ll never qualify.”

- c. Parents indicate to the Principal that they want a change in placement for their child to a private school and they want the school system to pay for it. The Principal responds, “there’s no way the school system is going to pay for your child to attend that private school. I wouldn’t even bother asking.”

Myles S. v. Montgomery Co. Bd. of Educ., 824 F. Supp. 1549 (M.D. Ala. 1993). IDEA requires notice of the district's refusal to change a child's IEP, even if the parents have previously consented to the IEP. The notice must be written and must include an explanation of why the district refuses to make the proposed change. Oral notification of the refusal is not sufficient.

## 9. DO Have Required School Staff in Attendance at IEP Meetings

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

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

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 agreement and consent to any excusal must be in writing.

### Potential Missteps:

- a. “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, the 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was “qualified to provide or supervise the provision of special education” services. The absence of the district representative forced the student’s parents to accept whatever information was given to them by the student’s teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child’s program, including the teacher’s style of teaching and

his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student “was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.’s skills in the development of her second grade IEP.”

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

i. 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.

ii. 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.

c. “Because this child has been in private school, there is no teacher of the child to invite to the meeting.”

S.B. v. Pomona Unified Sch. Dist., 50 IDELR 72, 2008 WL 1766953 (C.D. Cal. 2008). The district’s failure to include the student’s private preschool teacher or any regular education teacher of the student was a procedural violation that resulted in a loss of educational opportunity for the student. Had the teacher been at the important IEP meeting, she could have shared her observations of the student’s abilities and special needs from the year that the student was in her classroom. “At the very least, she could have elaborated on what she had told the transdisciplinary assessment team.” A preponderance of the evidence shows that the teacher’s participation at the November 2004 IEP meeting, as mandated by the IDEA, “would have assisted the IEP team in devising a program that was better tailored to Student’s abilities and special needs. Accordingly, the District’s

procedural violation of the IDEA resulted in Student's loss of an educational opportunity and his denial of FAPE."

- d. "Though Johnny's special education teacher couldn't be here today, that's okay because I'm sitting in and I am the special education director."

R.B. v. Napa Valley Unified Sch. Dist., 48 IDELR 60, 496 F.3d 932 (9<sup>th</sup> Cir. 2007). The IDEA is interpreted to require a special education teacher who has actually taught the student. Thus, having the special education director at the IEP meeting, who was also a special education teacher but who did not teach the student, was a procedural violation. However, a procedural violation does not constitute a denial of FAPE if the violation fails to result in a loss of educational opportunity. Where the evidence indicated that the student was not eligible under IDEA as an SED student, the omission of a special education teacher or provider from the IEP Team was harmless error.

**10. DON'T Fail to Allow for Participation of "Discretionary" Members Invited By Parents**

Parents are entitled to bring with them to the IEP meeting "other individuals who have knowledge or special expertise regarding the child." 34 C.F.R. § 300.321. Generally, unless confidentiality is violated, school personnel should allow such persons to attend and participate in the meeting. 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, is to attempt to reach "consensus" as to the components of a student's IEP and program.

**Potential Missteps:**

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

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

[The IDEA] authorizes the addition to the IEP team of other individuals at the discretion of the parent or the public agency only if those other individuals have knowledge or special expertise regarding the child. The determination of whether an attorney possesses knowledge or special expertise regarding the child would have to be made on a case-by-case basis by the parent or public agency inviting the attorney to be a member of the team.

The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at the IEP meeting. Even if the attorney possessed

knowledge or special expertise regarding the child, an attorney's presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child. Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged.

64 Fed. Reg. 12478 (1999).

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

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

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

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

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

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

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

Sackets Harbor Cent. Sch. Dist. v. Munoz, 34 IDELR 227, 725 N.Y.S.2d 119 (N.Y. App. Div. 2001). Where the IEP committee chair allowed 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.

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

- i. B.B. v. State of Hawaii, Dept. of Educ., 46 IDELR 213 (D. Haw. 2006). IDEA does not explicitly vest within parents the power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. When a parent's suggestions are not accepted and incorporated into the IEP, that does not necessarily constitute an IDEA violation. Here, the mother meaningfully participated in the IEP meeting and provided input. She provided

information regarding student's medical condition, letters from his doctors and results from educational diagnostic tests. In addition, she was allowed input as to the student's goals, even though they were in draft form. The PLEPS and goals were discussed, modified and ultimately agreed upon by the entire IEP team, including the mother.

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

## **11. DON'T Fail 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 a question about continued eligibility and parent asserts claims against district, district has right to conduct re-evaluation by expert of its choosing].

### **Potential Missteps:**

- a. "We understand, Mom, that you think he may be disabled, but let's just wait and see how he does before we obtain those records."

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

- b. "I called the records custodian from the former district but haven't heard back

about the records that I requested.”

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.

**12. DO 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 due process hearing to show that its evaluation is appropriate or pay for the IEE. 34 C.F.R. § 300.502. If the question comes up at an IEP meeting, the Team should refer the parent to the appropriate school district administrator for a response and an explanation of the procedures for requesting an IEE.

**Potential Missteps:**

- a. “Sorry, the School System has already done an evaluation and that’s final.”
- b. “I’m not saying that we won’t pay for it, but I’m not saying that we will either.”

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.

**13. DO Include Measurable Goals in the IEP and Measure Them!**

Quite often, IEPs are attacked because of the lack of measurability of the annual goals (and short-term objectives/benchmarks, if included) and the inadequacy of the student’s present levels of educational performance. It is vital that school personnel are trained to develop appropriate and measurable annual goals and be prepared to explain why they are measurable and how progress is measured.

- a. 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.

- b. 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. "This is a serious omission."
- c. 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."
- d. 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."

**14. DON'T Make Vague or 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. In addition, school personnel must be prepared to justify the removal of a student from the regular education environment or a move to a more restrictive environment.

**Potential Missteps:**

- a. The school team begins its consideration of placement in a self-contained environment first and moves backward along the continuum.
- b. The school team moves too quickly along the continuum in making its determination, skipping less restrictive options in its consideration.

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.

- c. The IEP states that a separate school was chosen because “the parent wants it” or “the student’s needs are too severe to be met outside of a special school.”
  - i. 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.
  - ii. 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.
- d. The IEP Team writes that the student needs to be in a separate class for students with disabilities because it would be “best” or “better” for the student.

**15. DON’T Be Overly Specific and Include Unnecessary Additions, Details or “Promises” in IEPs**

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

**Potential Missteps:**

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

- i. Letter to Hall, 21 IDELR 58 (OSERS 1994). IDEA does not expressly mandate a particular teacher, materials to be used, or instructional methods to be used in the student's IEP.
  - ii. 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.
  - iii. Slama v. Indep. Sch. Dist. No. 2580, 39 IDELR 3, 259 F.Supp.2d 880 (D. Minn. 2003). Change from parent's chosen personal care attendant (PCA) to school district-employed aide did not constitute a change in placement by the district for which notice to the parent was required.
- c. The IEP Team complies with the parent advocate's request to write into the IEP that Michael will be on the Varsity Football Team in order to address his socialization and communication goals.

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

## **16. DO Appropriately Address the Need for Extended School Year Services (ESY)**

Although many federal circuit courts (including the Eleventh Circuit) had recognized entitlement for some students to extended year services prior to 1999, not all of them had done so. However, the 1999 IDEA regulations, for the first time, specifically provided 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 trained to maintain appropriate data to support recommendations regarding ESY eligibility. In addition, they should be trained to fully understand the standard for determining whether a student needs ESY services.

**Potential Missteps:**

- a. “Of course we provide ESY here, since anyone can participate in summer school.”
- b. “Our ESY program begins on June 16 and ends on July 19 this summer.”
- c. “Sorry, we no longer have ESY services because our school board cut the summer school program.”

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.

- d. “But all of our LD students get ESY in the form of home packets.”
- e. “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.”
- f. “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.”
  - i. Reinholdson v. School Bd. of Indep. Sch. Dist. No. 11, 46 IDELR 63 (8<sup>th</sup> Cir. 2006). 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 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.

- ii. 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.”
- iii. 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.

## **17. DON’T Fail to Address Transition Activities**

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.

### **Potential Missteps:**

- a. “Since the folks from Voc. Rehab. didn’t show up today, I guess we can’t address transition services.”
- b. “Where is the separate transition plan?”

Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist., 49 IDELR 180, 518 F.3d 18 (1<sup>st</sup> Cir. 2008). The IDEA does not necessarily require a stand-alone transition plan as part of an IEP. Rather, it requires that IEPs contain statements of transition services “under the applicable components of the child’s IEP.” The transition services were integrated throughout the IEP’s various components.

- c. “Thank goodness we don’t have to worry with transition services any more, since she’s only fourteen.”

## **18. DON’T Refuse to “Consider” Independent Evaluative Information Brought in by the Parents**

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

### **Potential Missteps:**

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

- a. 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.
- b. 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.
- c. 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.

#### **19. DO Address Behavioral Strategies or 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.

#### **Potential Misstep:**

“Since she’s not behaviorally or emotionally disabled, we don’t need to address behavioral strategies for her as part of the IEP.”

#### **20. DON’T Inappropriately Change the Placement of a Student through the Use of Suspension/Expulsion/Other Disciplinary Removal**

Suspensions over ten (10) days at a time and, generally, suspensions for more than ten (10) days cumulatively are considered to constitute a “change in placement” for a student with a disability. The IDEA requires that prior to changing the placement of a student with a disability through the use of disciplinary action, the following must occur: (1) a manifestation determination must be made by the student’s IEP Team; (2) the IEP Team must plan a functional behavior assessment of behavior and then use assessment results to develop a behavioral intervention plan; and (3) the IEP Team must determine what services are to be provided to the child, for any removal period beyond ten (10) days in a school year, in order that the child may continue to participate in the general curriculum

and advance toward achieving his/her IEP goals. Local school districts typically incorporate protections in their procedures so that illegal “changes in placement” do not occur.

School personnel must also keep in mind that action taken that might not be officially **called** a “short-term suspension” still may be counted toward the 10-day change in placement analysis. This would include any unilateral teacher removal that may be allowed under state law but not contemplated under federal law.

**Potential Missteps:**

- a. “This is not a suspension...just keep her home for five days for a ‘cool-off’ period.”
- b. “This is not a suspension, you just can’t come back without your Ritalin.”
- c. “Don’t come back without a psychiatric evaluation.”

**21. DON’T Fail to Develop a Plan to Ensure 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 ensuring that services are provided in a timely and appropriate fashion. The IDEA regulations 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. In addition, services are to be provided as soon as possible after the development of the IEP.

**Potential Missteps:**

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

**22. DON’T Create Unnecessary Educational Records**

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

**Potential Missteps:**

- a. "I didn't know that the parent was entitled to see my personal file."
- b. "I forgot to mention that the parent and I have been emailing each other for years."

## **II. BEHAVIORAL MISSTEPS**

### **1. See No Evil, Hear No Evil, Speak No Evil**

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

- a. In Japan, the proverb is simply regarded as a Japanese "Golden Rule."
- b. Some simply take the proverb as a reminder not to be snoopy, nosy and gossipy. (Amen!)
- c. Early associations of the three monkeys with the fearsome six-armed deity Vajrakilaya link the proverb to the teaching of Buddhism that if we do not hear, see or talk evil, we ourselves shall be spared all evil. This may be considered similar to the English proverb "Speak of the Devil - and the devil appears."
- d. Others believe the message is that a person who is not exposed to evil (through sight or sound) will not reflect that evil in their own speech and actions.
- e. Today "See no evil, hear no evil, speak no evil" is commonly used to describe someone who doesn't want to be involved in a situation, or someone turning a willful blind eye to the immorality (or illegality) of an act in which they are involved.

### **2. Avoid the Temptation to Unleash Your Inner Attorney**

- a. "I beg to differ. I have my copy of the regulations right here and they say...."
- b. "The law requires that all we must offer is a serviceable Chevrolet. The Cadillac is not required."

### **3. Ditto With Your Inner Physician**

Unfortunately, there have been cases where school personnel have taken it upon themselves to render their own diagnosis of a particular medical condition without being qualified to do so. If it is suspected that a condition exists that is adversely affecting educational performance, a proper referral for an evaluation must be made rather than statements to parents as to what school personnel believe to be a particular student's medical condition.

### **Potential Missteps:**

- a. “Well, if you ask me, it seems obvious that your child has ADD, ODD and OCD. I would suggest that you take him to the doctor so that we can develop a plan for him and he can be put on medication. In fact, here’s the card of someone I know who can do the evaluation.”
  - i. W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995). An action for damages can be brought under IDEA, Section 504 or Section 1983 for failure to timely identify a student as disabled. [Note: In 2007, the Third Circuit reversed its position that damages are available under IDEA but the question of damages under Section 504 is still open in the courts]. Also see, Barnes v. Gorman, 122 S. Ct. 2097 (2002)(overturning Gorman v. Easley, 257 F.3d 738 (8<sup>th</sup> Cir. 2001)). [Because punitive damages may not be awarded in private suits brought under Title VI of the Civil Rights Act of 1964, such damages are not available under the ADA or Section 504. Title VI and other constitutional Spending Clause legislation (such as ADA and Section 504) is “much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions”].
  - ii. Letter to Hoekstra, 34 IDELR 204 (OSERS 2000). It is not the role of educators to diagnose ADD or ADHD or to make recommendations for treatment. That responsibility belongs to physicians and family. School officials may provide input at parents’ request and with their consent about a student’s behavior that may aid medical professionals in making a diagnosis.

### **4. Ditto With Your Inner Judge**

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

### **Potential Missteps:**

- a. “It is my feeling that....”
- b. “It seems to me that....”

c. “I just don’t think he can do that.”

**5. Just Breathe!**

As human beings, we are inclined to defend ourselves and respond to everything! In many situations, it is prudent to sit back, breathe and decide that no response is more often than not the best response.

**Potential Misstep:**

“Susie’s Mom wrote this ten-page letter and it’s full of false accusations and information. I need to respond with my own twenty-page letter to straighten this out!”

**6. Just Accept It: “No Good Deed Goes Unpunished”**

There will be times that no matter how often you accede to parental demands, litigation will be initiated in any event, particularly when the school system says “no” for the first time. Remember, though, it can be dangerous to accede to parental demands, particularly if what they are asking be done is not appropriate for the student or is actually illegal.

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