General Education Teachers and Special Education

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TIMING OF THE IEP DEVELOPMENT

1. When must the IEP be "in effect" for implementation?

The federal regulations provide that "at the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP" as defined in the law. 34 C.F.R. 300.323(a).

2. What if we don't meet that obligation?

It depends. The failure to have an IEP in place at the beginning of the year may result in the denial of a student's right to a free appropriate public education.

M.M. v. School Dist. of Greenville County, 37 IDELR 183 (4th Cir. 2002)

> It is clear that, under the IDEA, the failure of a school district to have a final IEP in place at the beginning of a school year is a procedural defect. When such a procedural defect exists, we are obliged to assess whether it resulted in the loss of an educational opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA…

It is undisputed that the proposed 1996-97 IEP for MM was never signed or completed. It is also undisputed that MM's parents attended two IEP Team meetings regarding the Proposed 1996-97 IEP, and that they cancelled a scheduled third meeting. The District then requested notification from the parents when they were ready to reconvene the IEP Team. The parents provided no such notification, however, nor did they ever respond to the written notice from the District that a space was being held open for MM for the 1996-97 school year…

Unlike the factual underpinnings of [earlier cases], the administrative decision makers in this case, and the district court as well, found that the District was willing to offer MM a FAPE, and that it had attempted to do so. They also found that her parents had a full opportunity to participate in the development of the Proposed 1996-97 IEP. The court's analysis emphasized that the parents had been afforded a full and fair involvement in the process. *Spielberg v. Henrico County Pub. Sch.,* 853 F.2d 256, 259 (4th Cir. 1988). Indeed, the court properly concluded that "it would be improper to hold [the] School District liable for the procedural violation of failing to have the IEP completed and signed, when that failure was the result of [the parents'] lack of cooperation."

It is significant that there is no evidence that MM's parents would have accepted any FAPE offered by the District that did not include reimbursement for the Lovaas program. As we have noted, the District is not obligated by the IDEA to provide a disabled child with an optimal education; it is only obliged to provide a FAPE. *Rowley,* 458 U.S. at 192. In these circumstances, MM suffered no prejudice from the District's failure to agree to her parents' demands. Because this procedural defect did not result in any lost educational opportunity for MM, the proposed 1996-97 IEP did not contravene the IDEA.

3. What if we don't have an IEP ready at the beginning of the school year because the parents refuse to cooperate in its development?

C.H. v. Cape Henlopen Sch. Dist., 54 IDELR 212 (3d Cir. 2010)

The District here demonstrated consistent willingness to evaluate C.H. and to develop an IEP for the 2006-2007 school year. Despite some initial delays in finalizing the authorization, C.H. was evaluated by a District psychologist a month before the start of school and an IEP team convened shortly thereafter to develop his educational program. Although the IEP was not completed in the first meeting, it was the Parents and not the District who delayed the continuation of that meeting until after the start of classes, and ultimately

terminated the process by filing a due process request. Like the court in *Greenville,* we decline to hold that a school district is liable for procedural violations that are thrust upon it by uncooperative parents.

4. What about transfer students? When must IEPs be in effect for them?

Students Transferring In-State:

"If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either:

1. Adopts the child's IEP from the previous public agency; or
2. Develops, adopts, and implements a new IEP that meets the applicable requirements in 34 CFR 300.320 through 34 CFR 300.324."

34 CFR 300.323(e).

Students Coming from Out of State:

"If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency:

1. Conducts an evaluation pursuant to [34 CFR 300.304 through 34 CFR 300.306] (if determined to be necessary by the new public agency); and
2. Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in 34 CFR 300.320 through 34 CFR 300.324."

34 CFR 300.323(f).

TIMING OF THE IEP IMPLEMENTATION

5. How soon after the IEP Team meeting should we implement the IEP?

The school district must ensure that "[a]s soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. 300.323(c)(2).

Keep in mind, however, that the school is required to provide Prior Written Notice to the parent or adult student with a disability a reasonable time before the school proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." 34 C.F.R. 300.503(a).

6. What does "as soon as possible" mean?

It doesn't necessarily mean immediately. Board of Educ. of Montgomery County v. Brett Y. , 28 IDELR 460 (4th Cir. 1998) (30 days per Maryland state law was consistent with federal requirement).

D.D. v. New York City Bd. of Educ., 46 IDELR 181 (2d Cir. 2006)

> …we conclude that § 300.342(b)(1)(ii) means what it says: States must implement a student's IEP "as soon as possible" after it has been developed. In other words, Plaintiffs' right to a free appropriate public education requires that their IEPs be implemented as soon as possible. "As soon as possible" is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay. Factors to be considered include, but are not limited to: (1) the length of the delay, (2) the reasons for the delay, including the availability of the mandated educational services, and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP. Nonetheless, just because the as-soon-as-possible-requirement is flexible does not mean it lacks a breaking point.

But a delay can result in a denial of FAPE when the student is denied a significant portion of the services outlined in the IEP. See Wilson v. District of Columbia, 56 IDELR 125 (D.D.C. 2011)(failure to provide transportation for three out of the four weeks of ESY services resulted in denial of FAPE).

7. Can we implement special education services before an IEP is developed?

Generally, a student must be identified as eligible for special education services and an IEP developed before a school district provides services to the child. However, some courts have found that providing services prior to the development of the IEP was appropriate, even though the District committed a procedural violation in doing so.

Doe v. Alabama State Dept. of Educ., 17 IDELR 41 (11th Cir. 1990)

> The district court found that John did in fact receive services in the spring of 1987 without the benefit of an IEP. The court noted, however, that during this time the school was in frequent contact with the Does, attempting to work out an IEP that would be acceptable to them. The district court found that the delay in formalizing an IEP for John was the result of the Does' active participation in the IEP process. Our review of the record persuades us that the district court was not clearly erroneous in concluding that the delay in formulating the IEP was caused by the Does and does not constitute a violation of the procedural requirements of the EHA.

8. Is it appropriate to draft an "interim" IEP before the normal process is completed?

Letter to Saperstone, 21 IDELR 1127 (OSEP 1994)

> Under Part B, a meeting to develop a child's IEP must take place not later than 30 days from the date of the initial eligibility determination. 34 CFR § 300.343. Under certain circumstances it may be necessary to temporarily place an eligible child with a disability in a program as part of the evaluation process---before the IEP is finalized---to aid in determining the most appropriate placement for the child. In such a situation, an "interim IEP" must be developed for the child. *See* 34 CFR Part 300, Appendix C, Question 5. Any "interim IEP" that is developed must: (a) set out the specific conditions and timelines for the trial placement; (b) ensure that the parents agree to the interim placement before it is carried out, and that they are involved throughout the process of developing, reviewing, and revising the child's IEP; (c) set a specific timeline (e.g., 30 days) for completing the evaluation and making judgments about the most appropriate placement for the child; and (d) conduct an IEP meeting at the end of the trial period in order to finalize the child's IEP. *See* 34 CFR Part 300, Appendix C, Question 5.

ACCOMMODATIONS AND THE LEAST RESTRICTIVE ENVIRONMENT

9. Why do we have to implement accommodations in the general education classroom?

The District shall ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes

with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114(a)(2).

10. How do we know if we are meeting the LRE requirement?

The Fifth Circuit's Five Factors for Determining Least Restrictive Environment (LRE): Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989)

1. Has the district taken steps to accommodate the disabled child in regular education?
2. Are the efforts sufficient or token?
3. Will the child receive an educational benefit from regular education?
4. What will be the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education?
5. What effect does the disabled child's presence have on the regular classroom environment?

11. Does the teacher have discretion with regard to which accommodations should be implemented?

Once the accommodations are adopted through the IEP Team, they must be fully implemented. Failure to do so can result in school district liability.

Christopher G. v. Mansfield ISD, Dkt. No. 406-SE-697 (SEA TX 1997)

> In an effort to limit very lengthy ARD meetings, the ARD Committee elected to simply go along with Mrs. G. and place far too many modifications in Christopher's IEP. The only reason that the Hearing Officer can conclude this is because most of the witnesses at the hearing, including his teachers and school experts, testified that the modifications were unnecessary. Once these bloated IEP's were written, however, it is not clear how much of the modifications were actually adopted. The Hearing Officer concludes that Christopher's IEP was not completely implemented as it was written.

Antioch (CA) Unified Sch. Dist., 110 LRP 49063 (OCR 2010)

OCR found "a pattern and practice of individual staff members unilaterally changing, altering, reducing, or deleting accommodations or services from IEPs that have already been written without authorization and doing so without notice to the parent or the team of persons who made and documented the placement decision. This practice has significantly diminished procedural safeguards and parental input into the evaluation and placement process."

Farmington ISD #192, 107 LRP 60675 (SEA MN 2007)

District found to have violated IDEA and state law by failing to implement IEP accommodations as developed by the IEP Team and by not developing accommodations with specificity in the IEP that would allow teachers to understand clearly what was required.

12. Is a student really harmed by the failure to implement an accommodation?

It depends. See Houston ISD v. Douglas J., 170 F.3d 184, (5th Cir. 1999).

Quote from the District Court:

> The denial of the single modification of highlighted texts is not enough as a matter of law to deny Reed a FAPE unless the Defendants can also show that this amounted to an overall denial of an educational benefit…The teachers that observed Reed provide the best means for measuring whether he reached his IEP goals and objectives…Because the denial of highlighted texts did not prevent Reed from receiving more than "trivial" academic progress, his IEPs were reasonably calculated to provide him an educational benefit.

IEP DISTRIBUTION & STAFF NOTIFICATION OF RESPONSIBILITIES

13. Should all teachers of the student receive a copy of the IEP?

The school district must "ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation." 34 C.F.R. 300.323(d)(1).

Practice pointer: Provide copies of the IEP to each teacher and provider responsible for implementation, along with a notice of confidentiality. Seek the teacher or provider's signature to evidence receipt of the IEP on the identified date of distribution.

14. Do we have to tell 'em to implement the IEP?

The federal regs require the school district to ensure that "[e]ach teacher and provider…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 IEP." 34 C.F.R. 300.323(d)(2).

Additionally, school districts must ensure that teachers are trained in IEP implementation. See Damian J. v. School Dist. of Philadelphia, 49 IDELR 161 (E.D. Pa. 2008).

> Damian's emotional support classroom teacher, lacked the qualifications to be teaching an emotional support classroom and received little training or instruction on implementing Damian's IEP. She was left to teach based on her own "instinct." Yet, Jones was responsible for implementing Damian's IEP. Consequently, substantial provisions of Damian's IEP were not implemented.
>
> …Jones, with no prior experience teaching a special education or emotional support classroom, no degree in education, and no teaching certifications, licenses, or emergency permits to teach in Pennsylvania or any other state, was an emotional support classroom teacher at Longstreth from February, 2005, through December, 2005.
>
> In addition, in spite of Jones lacking qualification to teach an emotional support classroom, she received little training at Longstreth. It was left to Jones to structure the classroom and establish a behavior management system. At the beginning of the 2005-2006 school year, Jones asked for "additional support" in her classroom because she had not been given any; she had been "just put into a situation" and left to "feed off [her] own instinct."
>
> …Training on implementing IEPs was scant. Jones testified she had heard of the Individuals with Disabilities Education Act, but did not know what it meant. Jones's training on implementing IEPs consisted of receiving books on how to write IEPs and observing the writing of an IEP over two 45-minute sessions. Jones testified when she was given a copy of Damian's initial IEP before he started at Longstreth, she received no instructions on its implementation. She simply read through the IEP. Jones testified no one reviewed Damian's IEP with her and no one told her what the requirements were for Damian in terms of how to keep progress on his IEP.
>
> With little training and no teaching qualifications, Jones's management of Damian's classroom and the implementation of his IEP suffered. The Hearing Officer noted Jones "had difficulty with organization and consistency in following a classroom management system. The District's special education case manager met with her to assist her and also met with the Community Council supervisory personnel regarding [her difficulties]"…Jones "had been on a corrective action plan and did not meet the expectations." There had been concerns regarding Jones's classroom management and instruction because of a failure to engage all

students, an increase in "behavioral health episodes," and discipline concerns in the classroom…

As to implementing Damian's IEP, Jones testified she had not been instructed to send progress reports home on the goals and objectives of his IEP. Although she knew she had to write a daily journal on Damian, she viewed this as unfair as it was not done for the other children. There is no evidence of any notes, daily journals, or any kind of progress reporting prepared by Jones in the record. Jones testified she had sat in on only one IEP meeting for Damian…

Jones's only method of keeping data on Damian's progress was to put his tests and class work into a folder. She never met with Damian's mother to discuss the IEP she was implementing. Even after the November 10, 2005 IEP, which named Jones as IEP Coordinator, was developed, Jones was still using the prior August 25, 2005 IEP for Damian. Jones was eventually terminated in December, 2005, because of concerns regarding her classroom management and instruction arising from an increase in discipline issues and behavioral health episodes in the classroom…

I find by a preponderance of the evidence the school failed to implement substantial provisions of Damian's IEP, such that he was denied a meaningful educational benefit, during the first half of the 2005-2006 school year…The additional evidence demonstrates Jones's lack of qualification and scant training impacted implementation of Damian's IEP. Consequently, Damian did not receive the benefit of substantial provisions of his IEP while his classroom was taught by Jones…The School District's failure to implement substantial provisions of his IEP resulted in the denial of a meaningful educational benefit for Damian.

15. Can a teacher be held accountable for failure to implement the IEP?

Yes. The failure to implement the IEP may constitute grounds for the nonrenewal of a teacher's term contract. See Sharon Watson v. Campbell ISD, Dkt. No. 239-R1-897 (Commissioner Dec'n, Sept. 1997).

Reason for nonrenewal: (1) "Petitioner failed to perform her duties as a teacher with regard to special education students in the 1996-97 school year after having performance problems in this area in the previous year. She was uncooperative and confrontational in ARD Committee meetings with other professionals and challenged district personnel concerning their right to require her attendance as a teacher of the child. She also failed to maintain an effective working relationship with parents, the community or colleagues." (2) "In September 1996, Petitioner failed to allow special education students to proceed to

content mastery in violation of their individual education plans, thus violating the district's policies and failing to fulfill Petitioner's duties." (3) "Petitioner discussed the context of special education litigation involving another student with her class in November of 1996, subjecting the student to disparagement in violation of the Code of Ethics and Standard Practices for Educators, and violated the federal Family Educational Rights and Privacy Act, the federal Individuals with Disabilities Education Act, and board policies."

Discussion: "A reasonable conclusion from the record is that Petitioner is a teacher who does not wish to be bothered with planning the educational services for special education students in her care and in the care of the district. Such an attitude permeated Petitioner's actions and relationships with her colleagues and other students is not acceptable under federal and state law and local policy."

16. How do we respond when the student's teacher asks for a copy of the IEP?

Ensure that the teacher receives a copy of the IEP, and BIP or behavioral component.

CONSEQUENCES FOR FAILURE TO IMPLEMENT THE IEP

17. Can the failure to implement the IEP impact the discipline of a special education student?

Yes. In carrying out a manifestation determination review, the IEP Team must determine that the behavior of the child was a manifestation of the child's disability if: 1) the conduct in question was caused by, or had a direct and substantial relationship to the child's disability; OR 2**)** if the conduct in question was the direct result of the district's failure to implement the IEP. 34 C.F.R. 300.530(e)(1).

The conduct must be determined to be a manifestation of the child's disability if the IEP Team determines that either of the above conditions is met. If the conduct in question is found to be a direct result of the school's failure to implement the IEP, the school "must take immediate steps to remedy those deficiencies." 34 C.F.R. 300.530(e)(2), (3).

18. What are some other possible consequences of failing to implement the IEP?

- Grades are challenged
- A disruptive student cannot be moved to a more restrictive educational environment because the school has not completely, and in good faith, attempted to make the general education classroom work
- Teachers receive lower evaluation scores
- Teachers get sued for damages

- Parents file ethics complaints against teachers and administrators

19. Give us an example of how grades can be challenged for failing to implement the IEP in the general education setting.

Here's an oldie but a goodie:

Student v. Campbell ISD, Dkt. No. 403-SE-896 (SEA TX 1997).

> In ninth grade, [Student]'s Home Economics teacher, a regular education teacher, did not use the classroom modifications on an assignment....and [Student] received a 50 on the paper from her teacher. As a result of the failing grade, [Student] missed two basketball games and the opportunity to wear her cheerleading uniform. She was embarrassed at being told to change from her uniform in light of her failing grade in the presence of a group of her peers…
>
> An ARD Committee was convened on January 8, 1996 and continued to January 10, 1996 to discuss [Student]'s concerns regarding the Home Economics assignment and grade. At the meeting, the ARD Committee determined that the assignment as it was given was not in accordance with [Student]'s classroom accommodations, that Student was not given clear definition or direction on the assignment, and that Student did not understand the assignment. The ARD Committee concluded that Student should not have received a failing grade. The ARD Committee agreed that Student's grade would be revised to indicate that, allowing for the modifications included in Student's IEP, Student had passed Home Economics.

The outcome: The Hearing Officer concluded that the failure to implement modifications in the Home Economics class was resolved by the ARD Committee.

> Respondent agrees with Petitioner's position regarding the Home Economics class and took appropriate steps, agreed to by Petitioner in an ARD Committee meeting, to address Petitioner's concerns. All relief sought by Petitioner is DENIED.

20. Teachers can be sued individually—really?

Potential for Individual Liability:

Section 1983 Liability

Under 42 U.S.C. §1983, when a school employee, acting under color of state law, causes the violation of a well-settled federal right of which a reasonable person would have known, he or she may be personally liable for damages, and if there is proof that the violation was undertaken with a malicious or oppressive intent or due to a callous indifference to the federal right then punitive damages may be awarded.

Qualified Immunity Defense

Qualified immunity is a defense available for public officials when they perform a discretionary act, if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 815-17, 102 S.Ct. 2727, 2736-37 (1982).

"Clearly established" means that the contours of the rights were so clear at the time the official acted that a reasonable official would have understood that what he was doing violated that right. Harlow v. Fitzgerald.

This broad definition protects all "but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 106 S.Ct. 1092, 1096 (1986).

Plainly Incompetent? Or Did He Knowingly Violate the Law?

Doe v. Withers, 20 IDELR 422 (West Virginia Circuit Court, Taylor County, 1993). A West Virginia jury ordered a regular education History teacher to pay $5,000 in compensatory damages and $10,000 in punitive damages for his refusal to implement the modifications called for in a learning disabled student's IEP.

Background Facts: At the beginning of the year, the student's parents met with all of his teachers, and reminded them of the importance of the IEP, and specifically, of its provision that testing be done orally in the resource room. The parents alleged that all teachers but Mr. Withers agreed to comply with this requirement in the IEP. The parents further alleged that Mr. Withers refused to comply with a written directive from the high school special education coordinator. After receipt of the directive, Mr. Withers administered nine more written tests in History, most of which Douglas failed. The student failed history for the semester and was prohibited from participating in extra-curricular activities.

SOME RECENT CASES

G.N. v. Board of Education of the Township of Livingston, 52 IDELR 2; 309 F.App'x 542 (3rd Cir. 2009) (Unpublished)

The district court observed: "It is clear from the face of the finalized IEP that no goals and objectives were included." Despite this procedural error by the school district, the court concluded that the student received FAPE. Key Quote:

> The failure to include goals and objectives violates IDEA. However, to elevate this failing to a denial of FAPE would be elevating form over substance.

The court concluded that the parents had meaningful participation and the student made progress. The 3rd Circuit affirmed. The district court's decision is at 48 IDELR 160.

J.P. v. Enid Public Schools, 53 IDELR 112 (W.D.Okla. 2009)

The court held that the student received FAPE because he received appropriate services, even though the IEP did not identify all of the services needed. Key Quote:

> As plaintiffs point out, the IEP documents themselves are, unfortunately, quite sparse. The evidence of the IEPs as implemented, however, demonstrates that the District's efforts were reasonably calculated to provide J.P. with some educational benefit. Many of the services that plaintiffs point to as lacking from the IEP document were actually provided by the District.

The court also concluded that the student did not require residential placement and that even if he did, the parents failed to provide the proper notice.

Comment: Some courts take the written IEP document more seriously than others. This is a case where the hearing officer and the court looked more to what actually happened rather than what was written in the IEP. There are hearing officers and courts who would have ruled against the district on the basis of the "sparse" nature of the IEP as written.

Doe v. Hampden-Wilbraham Regional School District, 54 IDELR 214 (D.C.Mass. 2010)

The court affirmed a ruling in favor of the school district involving a 12-year old student with autism. Although there was no IEP in place at the start of the school year, the hearing officer and court concluded that this was due to the parents' failure to attend several IEP Team meetings that had been scheduled. The court found that the IEP was not completely implemented, particularly with regard to data collection. However, the IEP was sufficiently

implemented to enable the student to make progress. Thus the partial failure to implement did not deny FAPE to the student. The court also affirmed the behavioral portion of the IEP even though it did not specifically address behaviors away from school. Key Quote:

> While there is no specific reference in the IEP about how to deal with the interfering behaviors at home and [the private school where the parents placed him] the IEP does focus on what can be done in the environment that the school district can control—school itself. In setting goals for how to minimize Joseph's disruptive behavior at school, it would be reasonable to expect that this would translate into better behavior at home as well.

Dumont Board of Education v. J.T., 54 IDELR 231 (D.C.N.J. 2010)

The court affirmed an administrative ruling in favor of the parents, ordering the district to reimburse the parents for the costs of a private program. In part, this was based on the district's failure to specify services that the hearing officer concluded the student needed.

Comment: The IEP at issue involved the student's first year in a preschool program. The district expressed its willingness to adjust and change as they learned more about the child. In particular, the district argued that a behavioral plan should not be put in place for a 3-year old first entering school without an evaluation period. But the hearing officer—after 16 days of testimony—disagreed, and the court affirmed.

A.M. v. Monrovia USD, 55 IDELR 215 (9th Cir. 2010)

The court affirmed a decision in favor of the school district involving a student who transferred within the state. The original LEA, a charter school, developed an IEP that it could not implement because it did not have any general education classrooms, which is what the IEP called for. This IEP was agreed to, but never implemented. Then the parents enrolled the child in Monrovia USD and sought to have the "agree to" IEP implemented. The new district declined to do so, and instead served the student through an independent study/home school arrangement in accordance with the last IEP that had actually been implemented. Moreover, due in part to the winter break, the new school did not re-evaluate the student within 30 days of enrollment as required by law. However, the court held that the new district was only required to provide services comparable to the services in the last IEP that was implemented—not the one that was agreed to. Furthermore, the delay in evaluation was a harmless error.

Comment: Another interesting wrinkle in this case: the student died during the litigation. The school district argued that the case then became moot, and therefore, the parents' attorney should have to reimburse the district for the attorneys' fees expended by the school district (almost $50,000) after the date of death. The district court agreed with this, but the Circuit

Court vacated the attorneys' fees award, noting that the parents were seeking reimbursement for expenses along with damages, and thus the case was not moot.

Dept. of Educ., State of Hawaii v. T.F., 57 IDELR 197 (D.C. Haw. 2011)

It is well-established that not every failure to provide services according to a student's IEP amounts to an IDEA violation. The standard for assessing whether there was a failure to implement an IEP in violation of the IDEA was announced in *Van Duyn. See Shaun M. ex rel. Kookie W. v. Hamamoto,* Civ. No. 09-00075 DAE-BMK, 2009 WL 3415308 (D. Haw. Oct. 22, 2009). In *Van Duyn,* the Ninth Circuit…announced a new standard: "a material failure to implement an IEP violates the IDEA." The Ninth Circuit explained that a "material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." The Ninth Circuit noted that "the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." The Ninth Circuit, however, noted that "the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided."

Williams v. Ascension Parish Sch. Bd., 56 IDELR 263 (D.C.—M.D. La. 2011).

"Plaintiffs allege that Jarek Williams qualified for special education services in the Ascension Parish School Board System, and an Individual Accommodation Plan and Behavioral Intervention Plan were provided. According to the complaint, however, Gonzales Middle School and other defendants 'ignored' the plans and Jarek was subjected to 'bullying, harassment, beatings and humiliation, including some incidences at the hands of school staff. This treatment included, but was not limited to being urinated on.'" However, because the Plaintiffs failed to exhaust administrative remedies, the case was dismissed.

Sumter Co. Sch. Dist. 17 v. Heffernan, 56 IDELR 186 (4th Cir. 2011)

"While there is evidence showing that T.H. made some gains in certain skill areas tested in the spring of 2006, these gains were not so significant as to require a conclusion that T.H. received some non-trivial educational benefit from the 2005-06 IEP as implemented by the District. When the evidence of T.H.'s small improvements in a few tested areas is considered against the District's conceded failure to provide the 15 hours of ABA therapy required by the IEP, the evidence that the lead teacher and aides (other than Painter) did not understand or use proper ABA techniques, and the evidence that it took Painter months of working with T.H. to correct the problems caused by the improper implementation of ABA techniques, we cannot say that the district court erred, much less clearly erred, by concluding that the District's failure to properly implement material portions of the IEP denied T.H. a FAPE for the 2005-06 school year."

SUMMING UP

- ✓ **Make sure that the IEP is in place and ready for implementation at the beginning of each school year.**
- ✓ **Notify all staff members who will be responsible for implementation of the IEP/BIP—including teachers, related services providers, and auxiliary staff (such as bus drivers).**
- ✓ **Document the provision of the IEP/BIP requirements to all staff members.**
- ✓ **Ensure that all staff members are properly trained to implement the IEP.**
- ✓ **Understand the possible consequences for failure to implement the IEP, including complaints against the teacher, lower appraisal ratings, possible litigation, and individual challenge.**
- ✓ **Offer compensatory services to make up for material failures to implement a student's IEP**
- ✓ **Document implementation of IEP accommodations and supports**