2018 Legal Update for Professionals Serving Students Who are Deaf and Hard-of-Hearing

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FREE APPROPRIATE PUBLIC EDUCATION ("FAPE")

1. What should we do to ensure our services are provided appropriately for students with disabilities?

Keep in mind the factors considered by the courts in addressing whether the Individualized Education Program ("IEP") is appropriate.

Cypress Fairbanks ISD v. Michael F., 118 F.3d 245 (5th Cir. 1997)

- Was the educational program individualized on the basis of the student's assessment and performance?
- Was the program administered in the least restrictive environment?
- Were the services provided in a coordinated and collaborative manner by all of the key stakeholders?
- Were positive academic and non-academic benefits demonstrated?

2. Procedural (versus substantive) violation of FAPE:

In matters alleging a procedural violation, a State Education Hearing Officer may find that the child did not receive a FAPE only if the procedural inadequacies (1) impeded the student's right to a substantive FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or (3) caused a deprivation of an educational benefit. IDEA 34 CFR §300.513

Comment: In response to a procedural violation, convene an Admission, Review, and Dismissal ("ARD") Committee meeting to consider whether compensatory services are warranted.

AMERICANS WITH DISABILITIES ACT ("ADA")/SECTION 504

3. We do not have to worry about ADA and Section 504 for young children, right?

R.K. v. Board of Education of Scott County, Kentucky, 67 IDELR 29 (6th Cir. 2016)

The court affirmed summary judgment for the district in a dispute over which elementary school the student should attend. The student had diabetes. During kindergarten and first grade, the school assigned the student to a non-neighborhood school where there was a fulltime nurse. The parents wanted the child at the neighborhood school and produced documentation from the doctor that a nurse was not necessary. However, the school deferred to the judgment of its nurses that the boy should be in a school where a nurse was available. The court held that the parents had failed to produce any evidence of "deliberate indifference" and thus were not entitled to the money damages they sought.

Key Quote:

> This is not a case where a school board ignored a student's request for help. Rather, the student's parents simply disagreed with the school as to whether a nurse was necessary to provide it.

One judge dissented.

4. ***We are hearing more about service animals. We can only imagine what would happen with a young child bringing a service animal to school.***

AP v. Pennsbury School District, 68 IDELR 132 (E.D. Pa. 2016)

This is a case where a service dog bit a student. The school then barred the dog from the school. Parents sought an injunction to get the dog back in the school, but the court refused. There is a good discussion of the literature pertaining to service dogs which emphasizes that a properly trained service dog will not respond aggressively even if provoked to some degree.

5. ***We are seeing more young children with severe behavior challenges. Is there anything we need to know?***

Dear Colleague Letter, 69 IDELR 80 (OCR 2016)

The Office for Civil Rights issued this letter about the use of restraint and seclusion with students. Besides the usual admonitions to avoid any discriminatory treatment, the letter makes the following key points:

1. The need to restrain a student not yet identified under IDEA or 504 may indicate a need to conduct an evaluation. This is particularly true if restraint is done more than once.
2. Students who demonstrate behavioral challenges may have a disability even if they are performing well academically.
3. For students already identified under IDEA or 504, the use of restraints is an indicator that they current array of services are inadequate. Do something about it.
4. Section 504 does not prohibit the use of restraint. It prohibits the discriminatory use of restraint.
5. Use of restraint or seclusion may amount to a denial of FAPE. This is true even if it is just a single instance, if the event has a "traumatic impact on that student."
6. Students who have experienced trauma in the past could be more impacted by restraint than others.

Comment: Please note that in Texas a student may not be placed in seclusion under the Texas Education Code § 37.021(c). Seclusion is defined as follows:

> *"Seclusion" means a behavior management technique in which a student is confined in a locked box, locked closet, or locked room that: (A) is designed solely*

to seclude a person; and (B) contains less than 50 square feet of space. Tex. Educ. Code § 37.021(b)(2).

6. ***Are there any new cases dealing with discrimination on the basis of disability when the parent is disabled and the children are not?***

Todd v. Carstarphen, 69 IDELR 157 (N.D. Ga. 2017)

The blind mother of three non-disabled elementary aged students sought special transportation for the students. The district denied it because the students lived within half a mile of their school and the walking path was not dangerous. The court held that 1) the benefit she sought (public education) was a benefit for her children, not her; 2) nor were the children denied that benefit—many avenues of getting them to school were offered and rejected; 3) neither the ADA nor 504 recognize a cause of action for associational discrimination. Thus the children could not bring a claim based on their association with their disabled mother.

Comment: Many people volunteered to help, but the mother insisted that the district was required to provide transportation with a person she personally approved via her unique screening method:

> *Ms. Todd demands that her Children receive daily transportation from an APS official whom she personally trusts after 'feeling their soul.' She testified that if she did not trust the APS official after screening him, she would demand a substitute official. Even if APS provided a bus, she testified at the evidentiary hearing that she would have to hug the driver to feel his soul, and if she did not trust the driver after conducting this evaluation, she would demand a different bus driver to transport her Children. Ms. Todd's methods for evaluating whether to entrust her Children to another person is not rational.*

BEHAVIOR

7. ***Why is our District trying to reduce the number of suspensions, both in-school suspensions and out-of-school suspensions?***

Dear Colleague Letter, 68 IDELR 76 (OSERS 2016)

This one is about behavioral interventions and student discipline. The letter encourages proactive practices so that removal of students is unnecessary. It points out that research shows that out of school suspensions do not improve student behavior and sets out certain "warning signs" that might indicate that the student is not receiving FAPE. The letter states that if the district utilizes its authority to suspend a student, it may indicate a need to convene an ARDC meeting and consider the need for positive behavioral supports. The letter points out that the IDEA requires consideration of positive behavioral supports when the student's behavior impedes his/her learning or the learning of others. They further note, that this requirement is not contingent on whether the behavior is a manifestation of the student's disability.

The warning signs that might indicate the student is not receiving FAPE include:

- No evidence of consideration of positive behavioral supports.
- Parent asked for an ARDC meeting, but not meeting was held. Or, the parent raised behavioral concerns in the ARDC meeting that were not addressed.
- No behavioral supports in the IEP when the committee determined they were needed.
- Supports in the IEP are not working.
- Supports are in the IEP but are not implemented.
- Inappropriate "supports" are implemented that are not in the IEP.

Key Quotes:

> This requirement applies to all IEP Teams, regardless of the child's specific disability, and to the development, review, and revision of IEPs.
>
> We are issuing this guidance to clarify that the failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful education benefit or FAPE.
>
> Schools should be considering "evidence-based" behavioral supports in IEPs.
>
> OSERS frowns on references to the 10-days as 'free days,' and noted [t]his characterization may discourage school personnel from considering whether behavioral supports are needed to address or improve patterns of behavior that impede learning before, during, or after short-term disciplinary removals.

OSERS uses the term "exclusionary disciplinary measures" as a descriptive term to discuss a range of disciplinary actions employed by school districts in response to student behavior and note that these exclusionary disciplinary measures may or may not constitute a disciplinary change of placement but may deny the student a FAPE. OSERS noted:

> These exclusionary disciplinary measures could also include a pattern of office referrals, extended time excluded from instruction (e.g. time out), or extended restrictions in privileges; repeatedly sending children out of school on 'administrative leave' or 'a day off' or other method of sending the child home from school; repeatedly sending children out of school with a condition for return, such as a risk assessment or psychological evaluation; or regularly requiring children to leave the school day early and miss instructional time (e.g., via shortened school days).
>
> We have deliberately omitted from this list of examples any reference to law enforcement authorities due to our recommendation to school, described in the Department's *Guiding Principles: A Resource Guide for Improving School Climate and Discipline* that school resource officer not be involved in routine disciplinary matters.

8. What should we do when a parent demands that we not restrain a child with a disability?

Parrish v. Bentonville School District, 69 IDELR 219 (W.D. Ark. 2017)

This court issued a long, complicated opinion about the use of physical force with students involving multiple plaintiffs and a frustrated federal judge who scolded all of the lawyers. All claims for relief were denied. The court was sympathetic to school officials dealing with a very difficult situation:

> The point in time at which physical force became an issue was the March 13, 2013 meeting where L's mother asked that BSD employees stop putting their hands on L, and when she was told that this would not be possible given her son's aggressive outbursts, L's mother began yelling and stormed out of the meeting.
>
> On the issue of using CPI transports to move L, the Court concludes that BSD had no choice but to use this method. While the Plaintiffs criticize BSD's decision to use this tactic, it is unclear what other alternative BSD had. L was aggressive, posed a threat to other students and staff members, and would sit down on the ground and refuse to move.

9. Are there any requirements related to writing a Behavior Intervention Plan ("BIP")?

Paris School District v. A.H., 69 IDELR 243 (W.D. Ark. 2017)

The court held that the behavior plan for the student was substantively inadequate. The court held that the school lumped all of the student's behaviors into the category of "noncompliance" "completely ignoring the nuances of behaviors that manifest with autism." The parent had provided considerable evaluation material about the student's behaviors when the child was first enrolled in the school. None of that found its way into the BIP. The court also found fault with the fact that the student was assigned to an Alternative Learning Environment with no exit plan for return to the regular school:

> Sending a fifth grader to an ALE program like this one could possibly be "sitting idly….awaiting the time when they were old enough to drop out." *Endrew F. v. Douglas County*.

In addition, the court denied the general accusation that district staff were inadequately trained. People were properly licensed and certified. However, the specific accusation that the staff that served the student in 5th grade were inadequately trained was upheld, largely based on testimony from the coach who was the primary teacher in the Alternative Learning Environment, including this doozy:

> This lack of training manifested itself in the indifference that some of the staff took towards handling A.H.'s disabilities seriously. For example, when asked about accommodations that he made for A.H. while she was in the ALE, Coach Prieur stated "and I mean, I guess, you know, I'll get in trouble for saying this, but I just didn't think she needed some of these accommodations, because she was doing so well on her stuff and so I really didn't make a whole lot of accommodations for her."

Comment: Sentences that begin "I'll get in trouble for saying this" should probably end right there. The ARD committee determines whether accommodations are needed or not.

The court also held that the district improperly took Physical Therapy ("PT") out of the IEP without first evaluating the student's need. The district claimed that the student had physically attacked the PT, but the record did not support this. There was no evaluation to justify the termination of services and the PT did not attend the IEP Team meeting where the decision was made.

10. We have a student who needs to be in a more restrictive environment. What do we need to consider?

C.M. v. Warren ISD, 69 IDELR 282 (E.D. Tex. 2017)

The court upheld the placement of the student in a restrictive environment due to behavioral issues. There were five physical restraints of the student before Christmas. The first of these was prompted by the student throwing chairs and other objects, and then "repeatedly banging his head on the door and wall." When the teacher intervened, the boy "began hitting, kicking and biting her." It continued that way throughout the school year. The parent requested a special education due process hearing in March of 2016. Hearing Officer Mary Carolyn Carmichael conducted a two-day hearing in May of 2016 and rendered a lengthy decision in favor of the school district. The parent appealed the decision into federal court, which also ruled in favor of the school district.

The district pointed out that the student often refused to participate in the general setting: "When he was not refusing to participate…his behavior and aggressive outbursts….impeded his own learning and the learning of his peers in the general education classrooms."

11. Our district wants to put all children, including young children, through Response to Intervention ("RTI") services prior to determining eligibility. Should we be concerned?

OSEP Memo to State Directors, 67 IDELR 272 (2016)

This memo tells us that OSEP supports RTI efforts, but that the law does not "require, or encourage an LEA or preschool program to use an RTI approach prior to a referral for evaluation or as part of determining whether a 3, 4 or 5-year old is eligible for special education and related services." Here's more:

> Therefore, it would be inconsistent with the evaluation provisions [in the regulations] for an LEA to reject a referral on the basis that a preschool program has not implemented an RTI process with a child and reported the results of that process to the LEA.

However, the memo also notes that the LEA can deny the request for an evaluation with a PWN if it "does not suspect that the child has a disability."

Comment: Clear as mud. This is a good illustration of why there is so much confusion about how RTI and "child find" obligations fit together.

12. When should we evaluate?

Greenwich Board of Education v. G.M., 68 IDELR 8 (D.C. Conn. 2016)

The court held that the district violated IDEA by determining that a child was not eligible without conducting an FIE. The district primarily relied on RTI data to show that the student was making progress, and therefore, could not meet criteria as learning disabled. The court emphasized that the district is required to evaluate a child when it "suspects" a disability. There was ample reason for such suspicion here, including an independent evaluation and some data showing that the student was falling farther behind. The court also emphasized that the standard for progress with RTI is not "some" progress" but rather, "sufficient" progress.

Key Quote:

> The Board's argument that K.M.'s purported progress through SRBI [Scientific Research-Based Intervention] obviated the need for a comprehensive disability evaluation does not conform to the requirements of the IDEA.

Comment: Here is another case illustrating the natural tension that exists between the Child Find mandate and the use of RTI. The school would have been in a stronger position if it had conducted a Full and Individual Evaluation ("FIE") and then based its decision on both the RTI data and the FIE.

13. We seem to be evaluating more. What happened?

Letter to Morath, 68 IDELR 231 (OSERS 2016)

OSERS here responds to a story in the Houston Chronicle accusing the Texas Education Agency of systematically denying eligibility and services to students who need them. The target of the story was the 8.5% standard in the Texas monitoring document. Districts that served more than 8.5% of its students in special education were classified as at a higher level of concern. OSERS demanded a written explanation from the agency, and ordered a discontinuation of the 8.5% indicator unless T.E.A. could demonstrate that this indicator has not resulted in practices that led to districts not referring and/or evaluating students.

In response, **Senate Bill 160 became effective on May 22, 2017**. The Bill prohibits the Commissioner or TEA from adopting or implementing a performance indicator, including the performance-based monitoring analysis system ("PBMAS") that uses a District's or open-enrollment charter school's percentage or number of students enrolled in special education as an indicator. TEA and the Commissioner may still collect and use data to address potential racial or ethnic disproportionality related to identification, placement, and disciplinary actions for students with disabilities.

14. What do we need to do when a student transfers into the district?

Krawietz v. Galveston ISD, 69 IDELR 207 (S.D. Tex. 2017)

The court held that the district failed to evaluate and identify the student in a timely fashion. The student was in the district's special education program until 2008 when the family took her out of public school. She returned to GISD four years later, never having been dismissed

from special education. But GISD did not find the student's records. The district served her under 504, but did not offer to do a FIIE until after the due process hearing was requested.

CONFIDENTIALITY/FERPA

15. What are the notification requirements prior to destroying educational records?

Letter to Zacchini, 69 IDELR 188 (OSEP 2017)

OSEP was asked when districts are required to give parents notice that records are no longer needed, and may be destroyed. The answer: "when the student graduates…or otherwise leaves the public agency." Therefore, it is not necessary to give a second notice when the records retention period has expired and the records are about to be destroyed. The letter goes on suggest that "it would be helpful" if districts reminded parents that these records may be needed, or useful, for other purposes, such as accommodations in higher education, or the workplace, or for insurance.

16. Are draft reports and emails considered to be educational records?

Maybe. Our recommendation is to think before you write anything, because it may be an educational record.

E.D. v. Colonial School District, 69 IDELR 245 (E.D. Pa. 2017)

The court held that a draft report on the student's behavior was a "transitional document and still subject to heavy editing and revision." Thus it was not an "educational record" under FERPA. "It was merely the first incarnation of an evaluation that was in the process of being prepared. Likewise, the court held that staff emails were not "education records."

Key Quote:

> Unless Defendant kept copies of e-mails related to E.D. as part of its record filing system with the intention of maintaining them, we cannot reach the conclusion that every e-mail which mentions E.D. is a bona fide education record within the statutory definition. These e-mails appear to be casual discussions, not records maintained by Defendant.

DISCIPLINE

17. What do we need to know about Manifestation Determination Reviews ("MDRs")?

Bristol Township School District v. Z.B., 67 IDELR 9 (E.D. Pa. 2016)

The court ordered the district to re-do the manifestation determination. A district employee filled out the manifestation determination form prior to the meeting, answering the two questions and then asking at the meeting if anyone objected. The court found this to be improper. Also, the Team approached the process "globally" rather than "diving into the specifics." The court:

> This failure to consider the specific circumstances of the incident and the alleged conduct renders the manifestation determination deficient because it precluded any

meaningful discussion of whether Z.B.'s behavior was a manifestation of his disability.

18. Out-of-School suspensions for students under third grade are limited.

The Texas Legislature passed House Bill 674 restricting the use of OSS for students under third grade.

A student enrolled in "a grade level below grade three" may not be placed in out-of-school suspension unless, while on school property or while attending a school-sponsored or school-related activity on or off of school property, the student engages in:

(1) Certain conduct related to weapons (TX Penal Code 46.02 or 46.05);

(2) Conduct that contains the elements of a violent offense (assault, sexual assault, aggravated assault, etc.);

(3) Selling, giving, or delivering to another person or possessing, using, or being under the influence of any amount of:

a. Marijuana or a controlled substance,

b. A dangerous drug; or

c. An alcoholic beverage…

19. Consequences for poor choices a student makes can include the loss of privileges.

Harrington v. Jamesville Dewitt Central School District, 69 IDELR 235 (D.C.N.Y. 2017)

Student was taken out of the lead role in the school play and assigned two days of after school detention due to alleged plagiarism, and alleged a due process violation. The court held that neither of these actions deprived the student of liberty or property. Therefore, process was not due.

Comment: Also, he never served the detention. After meeting with the parents, the principal revoked that assignment.

ELIGIBILITY

20. More private physicians and providers are diagnosing dysgraphia, dyscalculia, and/or dyslexia. Are we missing anything?

Letter to Unnerstall, 68 IDELR 22 (OSEP 2016)

This letter is about the use of the terms "dyslexia, dyscalculia and dysgraphia," and evaluations regarding those conditions. The letter points out 1) IDEA does not require a disability label or diagnosis; 2) parents are not allowed to dictate the specific areas of an evaluation; 3) if it is determined that an evaluation for possible dyslexia is needed, it must be done; and 4) an evaluation for dyslexia could be done by a medical doctor, and if the district decides that such a medical evaluation is needed, it must be at no cost to the parents.

21. When can we dismiss a student from special education?

Devon L. v. Clear Creek ISD, 116 LRP 38829, and 68 IDELR 166 (S.D. Tex. 2016)

The court approved the magistrate's recommendation in favor of the district. This is a lengthy decision outlining a complicated fact situation involving extensive correspondence between the father and the school. The student was in the special education program for a while, but then was dismissed by the ARDC (IEP Team) due to lack of educational need. Based on grades, test scores and teacher reports, the court affirmed that decision.

Key Quote:

> Importantly, the determination of educational need was not for an outside provider to make but was within the judgment of the ARDC…..The observations of teachers who spend time daily with Devon in the educational setting are more reliable regarding educational need than those outside providers who base their opinions on isolated in-school observations and parent-provided information and documentation.

22. What if there is disagreement regarding eligibility?

Joanna S. v. South Kingstown Public School District, 69 IDELR 179 (D.C.R.I. 2017)

This is another case in which the court notes that identifying the student's "label" is usually not significant. The school identified the student as having a Serious Emotional Disturbance ("SED"). The parent preferred the autism label. The court noted that "no qualified expert or educator testified that the District's eligibility determination was wrong." Moreover, "the Parent failed to show how this alleged error impacted her son's educational benefits in any way."

EVALUATIONS

23. Do we have to permit a parent to observe while we are conducting an FIE?

Student R.A. v. West Contra Costa Unified School District, 66 IDELR 36 (N.D. Cal. 2015)

The parents asked to sit in and observe when the school conducted a psychoeducational and behavioral assessment. The school balked, citing concerns that the parents' presence in the room would skew the evaluation. The evaluation was never completed and the parent claimed a denial of FAPE. The hearing officer and the federal court sided with the district on this one.

Key Quote:

> The court finds that parents' condition that they be allowed to see and hear the assessment was unreasonable, and they effectively withdrew their consent by insisting on that condition. The [hearing officer] accurately concluded that the District's failure to complete the required assessments was caused by Parents' interference and denial of consent, and that the request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate.

Comment: It's important to point out that the district refused the parents' request not out of stubbornness or an attitude of "we've never done that before." The district cited legitimate concerns about test integrity and security. The district took a stance because it is the district's responsibility to make sure that evaluation data is gathered properly. All decisions about IEP content and placement of the student must be based on evaluation data. Therefore, evaluation data must be valid and reliable.

24. What is the scope of an FIE?

Phyllene W. v. Huntsville City Board of Education, 66 IDELR 179 (11th Cir. 2015)

The court held that the district failed to evaluate the student in all areas of suspected disability, and therefore, failed to provide FAPE. The student was identified as having a learning disability, but the court faulted the district for not evaluating for a hearing impairment. The district was on notice that the student had had seven ear surgeries and was being fitted for a hearing aid. This, combined with subpar performance by the student, imposed a duty on the district to seek a hearing evaluation.

Key Quote:

> While it is certainly true that Ms. W. did not request an evaluation of her daughter's hearing, the fact that she did not do so did not absolve the Board of its independent responsibility to evaluate a student suspected of a disability, regardless of whether the parent seeks an evaluation.

Comment: The court noted that school district witnesses testified that they had no reason to suspect a hearing impairment. However, "the objective record flatly contradicts the Board's witnesses." That record was largely notes from IEP meetings and other meetings with the parent.

25. How can we improve our evaluations?

Brandywine Heights Area School District v. B.M., 69 IDELR 212 (E.D. Pa. 2017)

The district delayed in getting a reevaluation done, and failed to provide an adequate behavior plan for a student the district knew had significant behavior issues. As a result, the court held that the district owed compensatory education for most of the student's kindergarten year. After February of that year, the district had completed an FBA and started implementing a BIP that showed progress, so the parent's request for additional compensatory educational services was denied.

26. Assess in all areas of need to ensure the IEP addresses all areas of need.

S.P. v. East Whittier City Sch. Dist., 118 LRP 24041 (9th Cir. 2018, unpublished)

In a decision issued on June 1, 2018, the 9th Circuit reversed and remanded a ruling by the District court that the California school district's action in serving a student who had a hearing impairment under the eligibility category of speech impairment was not a denial of FAPE. The District court deemed the classification error as harmless. The 9th Circuit stated that the California school district failed to evaluate the four-year-old student in all areas of suspected

disability when it did not evaluate her hearing loss. "While members of the IEP team were familiar with [the child's] degree of hearing loss, the assessments were heavily focused on her speech and language disability. While the parent provided a copy of an audiogram, the school district had an obligation to evaluate fully the student's hearing. The auditory skills assessment included an observation and a records review which the Court deemed insufficient.

Blount County Board of Education v. Bowens, 60 IDELR 218 (N.D.Ala. 2013)

Prior to the child turning three, the parent took the child to a clinic which diagnosed the child as autistic and called for a structured, fulltime preschool for at least 25 hours per week. The district "accepted" this evaluation and concluded that no further evaluation was needed. The parent placed the student in a private program consistent with the private evaluation. The district never put a specific IEP on the table and only offered a program for two to three days a week. Later the parent asked for reimbursement for the private school tuition and she got it.

Key Quote:

> As a threshold matter, the evidence is undisputed that Blount County accepted the Sparks Clinic's evaluation. Consequently, Blount County had an obligation to provide a FAPE consistent with the Sparks Clinic's determination that J.B. required a minimum of twenty-five hours of intensive instruction per week and that J.B. "attend a structured preschool on a full-time basis." Therefore, Blount County's offer for J.B. to attend the Multi-Needs Center for two to three days per week fell significantly short of satisfying J.B.'s "unique needs" as outlined by the Sparks Clinic.

Comment: This is a good illustration of how dangerous it is for the school not to conduct its own evaluation. The court basically points out that the only evaluation data that existed called for a fulltime structured program. The district had no basis to deny that. On another point, the court did not make anything of it but it probably did not help the school's cause that two people signed the IEP paperwork and later admitted that they were not present for the meeting.

27. Whether all the student's needs are addressed in the IEP is key in eligibility disputes.

R.C. v. Keller ISD, 61 IDELR 221 (N.D. Tex. 2013)

The court held that the identification of needs was more important than the disability label attached to the student, and thus the fact that the student was not identified as autistic was not legally significant. Plaintiff argued that Texas law would have required a student with autism to receive the services outlined in Texas regulations, but the court noted that "the record reflects that [the district] considered such services and strategies, implemented many of them, and asked the parents specifically which additional services they wanted that [the district] was not providing." Applying the four-part FAPE test, the court also concluded that the student received FAPE.

Comment: Consider reviewing the autism strategies in the ARDC meeting when disputes regarding autism eligibility arise.

28. How do we respond when a parent wants us to use an electronic Assistive Technology ("AT") device?

E.F. v. Newport Mesa Unified Sch. Dist., 69 IDELR 206 (9th Cir. 2017) (Unpublished)

The district provided a non-electronic AT device non-verbal kindergarten student with autism instead of the high-tech electronic device requested by the parents. The student had difficulty using the low-tech AT, leading the district to believe he was not ready for high-tech devices. Even with those difficulties, while using the low-tech non-electronic device, the student made progress toward his speech and language goals and improved in communication. Based on these facts, the Ninth Circuit found that the IEP enabled the student to make appropriate progress, given his circumstances. The Court affirmed the lower court finding that the district did not deny the student a FAPE.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

29. When a school district refused to permit the student's service animal to attend school, did the parents need to request a due process hearing under the IDEA before seeking money damages in federal court?

Fry v. Napoleon Community Schools, 69 IDELR 116 (U.S. 2017)

The parents of a little girl in Michigan wanted to have Wonder, a hybrid golden doodle to serve as her service animal at school. The little girl had significant disabilities, and Wonder was trained to assist her. However, the school district was already providing a human being as an aide for the little girl, and thus deemed Wonder unnecessary for a FAPE. The school turned down the request.

The parents filed suit, even though they had moved their little girl to another district which welcomed Wonder. They sued the original district, alleging that its refusal to allow Wonder to help out was illegal. They sought money damages, among other things, for the violation of their daughter's rights. The Ninth Circuit tossed the case out, due to the failure of the parents to "exhaust administrative remedies." The parents appealed to the United States Supreme Court.

The Supreme Court vacated the decision holding "that exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee"–what the Act calls a "free appropriate public education."

30. Is exhaustion of administrative remedies required when parents are alleging an injury to the child due to failure to implement the BIP?

K.G. v. Sergeant Bluff-Luton Community School District, 69 IDELR 216 (N.D. Iowa 2017)

This is one of the first cases dealing with exhaustion after *Fry v. Napoleon Community Schools.* The case was based on allegations that the teacher forcibly dragged a student across the floor, resulting in serious carpet burns. The court held that exhaustion was not required. The suit alleged that the district failed to comply with the student's BIP, but this was not an effort to

prove a denial of FAPE, but rather, an indicator of how the incident illustrated improper use of excessive force.

31. How should we address recommendations from an outside evaluator?

T.M. v. Quakertown Community School District, 69 IDELR 276 (E.D. Pa. 2017)

The court upheld an administrative decision in favor of the district, in a case involving a student with autism whose parents sought more extensive data collection and a "strict ABA" program with 20 hours of direct one-to-one service. The court held that the school staff was more credible than the parent's BCBA. This was based on a comparison of credentials and time spent with the student. As to credentials, the school staff held multiple masters and doctoral degrees. The BCBA did not have a college degree. The school staff spent 1,440 hours with the student over a two year period; the BCBA spent 16 hours on two days. The testimony of the BCBA as to academic, behavioral and speech goals was discounted because she "does not possess the requisite educational background to opine on those topics."

Comment: This case is an excellent example of how to deal with an outside report. The district reviewed the recommendations, adopted some and had a good explanation for rejecting others. The district comes across as very professional.

32. What is appropriate progress?

E.D. v. Colonial Sch. Dist, 117 LRP 12348 (E.D. Pa. 2017).

The court upheld the decision of the hearing officer that the district provided the student a FAPE, finding that her progress was appropriate in light of her circumstances. The student was first identified as a student with a speech impairment in Kindergarten, and received speech therapy services. Due to her ongoing difficulties in academic skills and behavior, after several months, the district revised her IEP to address her various academic and behavioral needs as well. The evidence showed that the student made progress and advanced to first grade. Her teacher testified regarding her specific progress in all academic areas, although she was not performing on enrolled grade level. Based on her report card, the student made progress in some areas and not in others. The hearing officer ruled in favor of the district, prior to the *Endrew F.* decision. The parents appealed, and the *Endrew F.* decision was published. The court ruled in favor of the district, noting that the hearing officer applied a FAPE standard consistent with the standard from *Endrew F.*

Key Quotes:

> The Hearing Officer also concluded that [student] was not denied a FAPE…because the evidence showed that she 'made significant progress…we are satisfied that [student] made sufficient progress…and that as a result, was not denied a FAPE.
>
> The Hearing Officer noted that although [student] was not at the levels expected of a typical student at the end of Kindergarten in terms of standardized assessments of achievement and that despite the severity of her language disability and the significant needs resulting from it, [student] did in fact show progress.

> Plaintiffs invite the Court to conclude that simply because Plaintiff did not progress in all categories on her Kindergarten Report Car, or because she was not proficient in reading, then she was denied a FAPE. This is not consistent with the standard adopted by the Third Circuit or by the Supreme Court in *Endrew F.* For [student], who was fully integrated into the regular classroom, an IEP typically should be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.' There was no question that [student] made progress, and that she advances to the First Grade. While it is true that [student] did not make progress in all categories, this does not mean that she was denied a FAPE.

IEP DEVELOPMENT

33. What can we find in an evaluation report that will help us document FAPE?

Evaluations should include recommendations for the ARD Committee to consider in the development of the student's IEP.

34 C.F.R. § 300.304(b) requires the school district to:

> (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
> (i) Whether the child is a child is a with a disability…; and
> (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

Comment: Evaluation data (formal and informal, including present levels data) should clearly drive the development of the IEP. Exercise logic in an ARD Committee meeting. Decisions should be logically linked to evaluation data. Document consideration of the evaluation recommendations in the ARDC meeting deliberations.

34. What statement of present levels must be included in the IEP?

The regulations provide:

> As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§300.320 through 300.324, and that must include—
>
> i) A statement of the child's present levels of academic achievement and functional performance, including—
> (1) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or

(2) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities.
34 C.F.R. §300.320(a)(1).

A.G. v. Paso Robles Joint USD, 63 IDELR 2 (9th Cir. 2014)

The IEP must have measurable goals, but this does not mean that it must have a statement of quantifiable baselines. Rather, it requires a "statement of the child's present levels." Here, the IEP contained mushy language in the "present levels" such as "often" and "has some difficulty." This did not render the IEP inappropriate.

35. The IEP must include measurable annual goals:

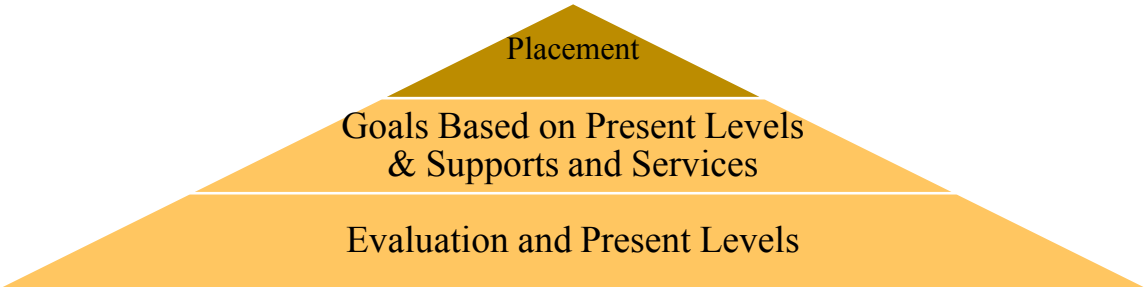
The IEP must include:

> (i) A statement of measurable annual goals, including academic and functional goals designed to — (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) Meet each of the child's other educational needs that result from the child's disability; (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives." 34 C.F.R. §300.320(a)(2).

- Annual academic goals should be built from the statement of present levels and be TEKS-based.
- Annual functional goals should be built from the statement of present non-academic levels and address needs which arise from the disability and impact the child's education (e.g., social skills, organizational skills, behavior, motor skills, transition).
- Both the academic and functional goals should reflect what the ARD Committee reasonably believes the student can achieve in one year.

36. Follow an ARDC Meeting Agenda.

A written agenda for the ARD meeting is a simple method of making sure the team makes decisions in the correct order. The ARD pyramid illustrates how a legally sound ARD/IEP is built for a child:



IEEs

37. What do we need to know about the Review of Existing Evaluation Data ("REED") process?

F.C. v. Montgomery County Public Schools, 68 IDELR 6 (D.C. Md. 2016)

The parties conducted a review of existing evaluation data (REED) and concluded that no further evaluation was needed. Several months later, the parents requested an IEE. In response, the district offered to conduct a full individual evaluation. The parents filed for due process, seeking an IEE. The court ruled in favor of the district, noting that the district had not yet conducted an evaluation with which the parents disagreed. The REED process did not constitute an "evaluation."

Comment: This is a very well-reasoned decision, strongly supporting the idea that a school can respond to an IEE request by offering to do its own evaluation. The court pointed out that if the parents would have allowed the school to do that, and then disagreed with the evaluation, then they would have been entitled to an IEE. Also interesting to note that the court refused to comply with a Department of Education ("DOE") letter that says that a REED "may constitute the reevaluation." The court noted that DOE letters are not legally binding.

Avila v. Spokane School District 81, 69 IDELR 204 (9th Cir. 2017)

The court held that the reevaluation of the student was properly done and thus the district was not required to pay for an IEE. The district evaluated in all areas of suspected disability, including specific learning disability, even though it did not refer to reading disorders as "dyslexia" or "dysgraphia."

38. Can the district have cost criteria for IEEs?

A.A. v. Goleta Union School District, 69 IDELR 156 (C.D. Cal. 2017)

The court upheld the decision of the district not to pay for the IEE which exceeded the district's cost criteria. The court found that the cost criteria were reasonable, and the parent failed to produce evidence of unique circumstances that would warrant a higher fee.

Comment: The district based its criteria on its survey of evaluators in the area, rejecting the highest and lowest. The court discussed two OSEP letters that address whether or not a district, in a case like this, must pay an amount up to its cap. However, the court held that the issue was not properly before it. The letters are Letter to Thorne, 16 IDELR 606 (1990) and Letter to Petska, 35 IDELR 191(2001).

IEPs

39. What do we need to know about drafting goals and objectives?

Damarcus S. v. District of Columbia, 67 IDELR 239 (D.C.D.C. 2016)

The court rejected most of the parent's challenges to the IEP, but held that the district denied FAPE by repeating IEP goals and objectives year after year, despite lack of progress, and reducing services.

Key Quotes:

> The wholesale repetition of goals and objectives across multiple IEPs is of far greater concern, however, as it indicates an ongoing failure to respond to Damarcus's difficulties.
>
> Here, an alarming number of goals and objectives were simply cut-and-pasted (typos and all) from one IEP to the next.
>
> The IEP Team was therefore required to "revise[ ] the IEP as appropriate to address….[that] lack of expected progress toward the annual goals." But there is scant evidence that this occurred, at least in 2013 and 2014. Rather than raising an alarm and working to devise a new approach….it appears that the District persisted in following the same ineffectual path.
>
> Even worse, with regard to speech-language pathology, the District actually decreased Damarcus's monthly services from four hours to two in 2013, then again from two hours to thirty minutes in 2014.
>
> The District weakly attempts to argue that because Damarcus made no progress when receiving four hours of instruction per month, plaintiffs cannot show that the decrease in services harmed him in any way…By the District's logic, it would be entitled to sit a failing student alone in a quiet room for six hours a day, because he would be no worse off there than receiving ineffectual instruction.

Comment: Do you remember the slogan: All Children Can Learn? This case shows how some courts put some legal power into that slogan. The parent's attorney made many technical arguments about the IEPs lack of specificity and reliance on research. The court rejected all of that, but ruled in favor of the parent on the basis of the perception that the school had concluded that this student had "plateaued" and was not going to progress any further. That slogan, All Children Can Learn, is not just a slogan. It's a critical feature of IDEA.

40. What should we know about peer-reviewed research?

L.M.H. v. Arizona DOE, 68 IDELR 41 (D. Ariz. 2016)

This is a rare case that relies on the "peer reviewed research" requirement to conclude that the district denied FAPE. After rejecting numerous procedural complaints by the parent, and complaints about ESY, the court held that the district denied FAPE by failing to consider any

peer-reviewed research. Whether the student made progress or not was deemed irrelevant, as the IEP would be judged as of the time of its development, not afterward. The parent had provided ASHA recommendations regarding speech therapy. The court held that the district did not have to comply with the ASHA recommendations, but had to consider them or some other "peer-reviewed" research.

Comment: This is all based on a portion of the federal regulation that outlines the requirements for an IEP: "A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable…." 34 CFR 300.320(a)(4).

41. Is there anything new concerning progress reports?

S.G.W. v. Eugene School District, 69 IDELR 181 (D.C. Ore. 2017)

This is one of the rare cases that discusses progress reports. The court held that the frequency and timing of reports to the parent was adequate, but the content was not:

> The ALJ erred to the extent she found that the grade reports' frequency and timing rendered them inadequate. The IDEA does not specify how often progress reports must be provided…..But I agree with the ALJ that the grade reports' contents failed to accomplish the goals of progress reports under the IEP, which were to inform parents of student's progress on IEP goals specifically, not of student's academic progress generally.

Comment: The court characterizes this error as a substantive, rather than procedural error. Therefore, parent did not have to prove that the error caused harm. The "progress reports" sound like report cards—letter grades about overall academic progress in each class.

IEP TEAM MEETINGS

42. Is there any recent case law regarding documentation?

J.S. v. NYC DOE, 69 IDELR 153 (S.D.N.Y. 2017)

The court was not bothered by the fact that a draft of the IEP was circulated prior to the IEP Team meeting, noting that the parent received a copy of the draft, and participated in the meeting. Nor was it a problem that the school recommended the same placement for several years in a row. The record showed that other alternatives were also considered.

43. How do we ensure that we are not engaging in predetermination?

S.H. v. Tustin USD, 69 IDELR 176 (9th Cir. 2017)

This is a case where the parents allege that the district predetermined placement and denied them meaningful participation in the process. The context was a change of placement proposed by the school after six IEP Team meetings. The court ruled for the district.

Key Quote:

> The record clearly shows that Appellants were provided adequate—and arguably extraordinary—opportunities to participate in the placement decision. Appellants visited the proposed placement multiple times, before and after the placement decision. And at least one of the Appellants attended and participated in every IEP meeting, effecting many changes to the plan.

Comment: As seems typical, the "denial of meaningful participation" here was made by parents deeply involved in the process.

B.G. v. City of Chicago School District, 69 IDELR 177 (N.D. Ill. 2017)

The court noted that the parent was present, with counsel, at the IEP Team meeting, did not object to, or express disagreement with any of the evaluation reports presented at the meeting. Parent also did not object when district professional staff spoke to her about their evaluations prior to the meeting. Then this:

> While a parent's failure to object to an IEP does not waive their right to challenge, it "casts significant doubt on their contention that the IEP was legally inappropriate."

TRULY MISCELLANEOUS BUT INTERESTING

44. How do we provide reasonable accommodations for extracurricular activities?

Meares v. Rim of the World School District, 69 IDELR 38 (C.D. Cal. 2016)

In its initial ruling, the court held that the district was not obligated to provide a one-to-one aide who was capable of keeping pace with the student on the mountain biking team. This was neither a failure to implement the IEP, a denial of FAPE nor a breach of contract.

Key Quote:

> The Court questions how far Plaintiffs' logic might be extended; if Madison was the preeminent mountain biker in Southern California, would the District be required to somehow locate a biking aide to keep pace? 66 IDELR 39 (C.D. Cal. 2015)

In a later ruling, the court held that the district was obligated to provide a male aide who was capable of keeping up with the student on the team. In an interesting and novel decision, the court held that this was not necessary for the provision of FAPE, but was necessary to afford the student an equal opportunity to participate in extracurricular activities. In support of this, the court cited 34 CFR 300.117.

Key Quote:

> The provision of an aide for Plaintiff so that he can apply to be on the team does not mean, as counsel for the district argued, that just anyone could walk on to [the] team, regardless of their interest or capabilities. Rather, as Plaintiff's counsel noted,

an equal opportunity only guarantees that everyone can seek to apply for the team; participants must still be able to have a minimally sufficient speed and aptitude for the activity, but can't be denied that equal opportunity solely by reason of their disability.

Comment: The court noted that cost might be a relevant factor in a case where the requested service was not necessary for FAPE, but only for "equal opportunity." However, the costs were not significant here. The court also noted that it was feasible for the district to find an aide who could keep up with the student as he was not an "Olympic-grade biker."