WHAT LEA REPRESENTATIVES NEED TO KNOW (AND DO) AS "IEP TEAM MEETING PROCESS LEADERS"

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Julie J. Weatherly, Esq.
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, AL 36695
(251) 607-7377
JJWEsq@aol.com
Website: www.specialresolutions.com

I. INTRODUCTION

This presentation is specifically designed for educators who serve as LEA Representatives at IEP meetings (a/k/a "District Representative"). It has been my long-standing view that "LEA Reps"—including local school-based administrators—are an obvious choice for serving as the "IEP meeting's process leader."

In this session, I will focus on what I believe LEA Reps as "meeting process leaders" need to know and do, including the legal requirements for serving as an LEA Rep and ensuring FAPE via the development of appropriate IEPs to students with disabilities. In addition to the essentials of the legal framework, I will focus on process leadership essentials, including some meeting process suggestions, aids and strategies that will help to increase overall team member participation, meeting organization, and teamwork efficiency which, in turn, will lead to improved IEP content and student outcomes, increased legal compliance, and better relationships with parents and their representatives.[1]

II. THE OVERALL ALIGNMENT OF THIS PRESENTATION AND AN IEP TEAM MEETING: THE OPERATIONAL FRAMEWORKS

To begin, the overall alignment of this presentation is based upon my view of how an IEP meeting should be aligned and how effective LEA Representatives should view their roles and responsibilities. With respect to approaching an IEP meeting generally, LEA Representatives should envision every meeting as a communication activity that operates within two closely-aligned and complementary frameworks:

1. A legal framework (the when, why, what and who of IEP meetings); and

2. A "process leadership" framework (the "how to's" of IEP meetings).

The essentials of both of these frameworks will make up the content of what I suggest LEA Reps need to know and do as they lead the process of IEP meetings.[2]

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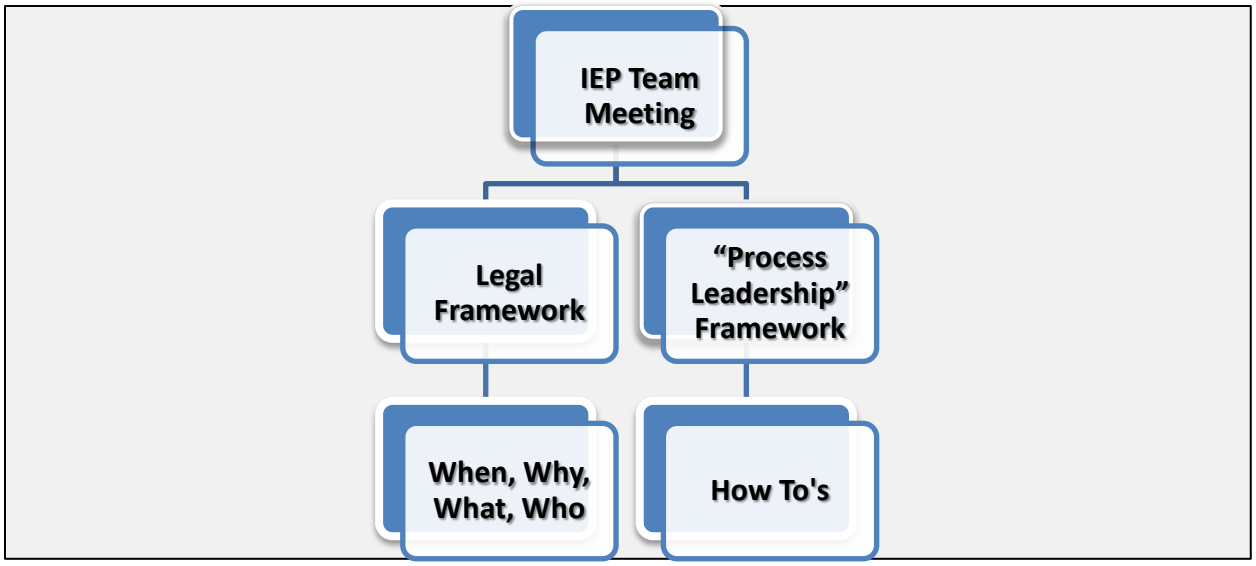
[1] This presentation and its accompanying materials are based upon the "LEArn & LEAd" professional development program that I co-developed with an experienced school administrator and co-trainer in 2014. Though the one-day program was originally designed for school building principals and their designees who frequently serve as LEA Representatives at IEP meetings in Alabama, we have trained a number of different school personnel in many states, regions and districts that serve as LEA Representatives, depending upon state and/or local practice, custom, policy or regulation. In the summer of 2020, we updated and revised the program to provide it in-person or virtually.

[2] In addition to the suggestions contained in this Handout, I have attached some "Suggested Components to Include in IEP Training Sessions for LEA Representatives" derived from the LEArn & LEAd program. These suggestions are offered for possible consideration when districts are developing and providing preparatory training for their LEA Representatives.

The overall alignment of the two operational frameworks in an IEP team meeting:



III. LEGAL FRAMEWORK ESSENTIALS FOR LEA REPRESENTATIVES

A. The Overall Legal Standard for FAPE and Determining IEP Appropriateness

1. The *Rowley* FAPE standard in 1982

In 1982, the U.S. Supreme Court decided what is often referred to as the "seminal" case of special education law: *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (hereinafter *Rowley*). The decision in *Rowley* is known for first attempting to provide a legal standard for determining what constitutes a free appropriate public education (FAPE) under Public Law 94-142 (now known as the "Individuals with Disabilities Education Act" (IDEA)).

In *Rowley*, the parents of a young hearing impaired student argued that the standard for FAPE under federal law requires school districts to provide an education that ensures that students with disabilities receive the best education possible or, in other words, a program that maximizes their potential. However, the *Rowley* Court held that, for a student like Amy Rowley who was performing very well in the regular education classroom with some accommodations and speech therapy, the law requires school districts to provide an educational program that is reasonably calculated to provide "some educational benefit." Because Amy was already doing well educationally, the Court ruled that she was not entitled to the one-to-one interpreter that her parents were requesting for all of her academic classes.

As decades passed and subsequent federal circuit courts of appeal issued various interpretations of the *Rowley* "some educational benefit" standard, there seemed to be a split in the decisions across the country as to what *Rowley* meant by "some educational benefit." For instance, some courts said that the standard required "meaningful educational benefit," while others seemed to indicate that "some

educational benefit" meant "more than trivial educational benefit." Still others indicated that the FAPE standard required "merely more than *de minimis* educational benefit."

2. ***Endrew F.*** **Clarification of the FAPE Standard in 2017**

Because of the apparent split in the federal Circuit Courts across the country, the Supreme Court in 2016 agreed to review a case decided by the Tenth Circuit Court of Appeals known as *Endrew F. v. Douglas Co. Sch. Dist.*, 66 IDELR 31, 798 F.3d 1329 (10th Cir. 2015). In this case involving a student with autism and significant behavioral and social/emotional issues, the Tenth Circuit upheld the ruling of a district court that the school district had afforded FAPE to Endrew under an interpretation of the FAPE standard that required "merely more than *de minimis* benefit."

Upon granting review of the Tenth Circuit's "merely more than *de minimis*" standard, the Supreme Court unanimously rejected it as one that set the bar too low and noted that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*´ progress from year to year can hardly be said to have been offered an education at all." *Endrew F. v. Douglas Co. Sch. Dist.*, 19 IDELR 174, 137 S. Ct. 988 (2017). As a result, the Court set forth the following clarification of the FAPE standard:

> **To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.**

The Court concluded that it would "not attempt to elaborate on what 'appropriate' progress will look like from case to case. Rather, "[i]t is the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances for whom it was created." Importantly, the Court also noted that "any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal."[3]

3. **The "Process/Content"** ***Rowley/Endrew*** **Legal Standard for Examining the Appropriateness of an IEP**

It is important to note that *Endrew* did not overrule *Rowley*. Rather, the "some educational benefit" or substantive piece of the FAPE standard was clarified by *Endrew*. In addition, a significant part of the *Rowley* decision—what I have always called the "process/content legal standard" for examining

[3]The Supreme Court did not decide whether Endrew received FAPE. Rather, the Court vacated and remanded the case back to the lower courts to analyze Endrew's case in accordance with its clarification of the FAPE standard. On February 12, 2018, the federal district court in Colorado re-visited its initial decision in favor of the school district and found that, in light of the Supreme Court's rejection of the "merely more than *de minimis*" standard, the school district had *not* provided Endrew with FAPE. *Endrew F. v. Douglas Co. Sch. Dist. RE-1*, 71 IDELR 144 (D. Colo. 2018). In essence, the district court found, in re-visiting the evidence, that while the "minimal progress" Endrew made in the educational program provided by the school district may have been sufficient under the Tenth Circuit's former standard, it was clearly not sufficient in light of the Supreme Court's clarified one.

the appropriateness of an IEP—was left completely intact by the *Endrew* decision and continues to be used by due process hearing officers and courts today.

Though the appropriateness of Endrew's IEPs was not specifically determined by the Supreme Court, the Court did refer to the IEP generally as the "centerpiece" of the IDEA's education delivery system for students with disabilities. Indeed, many decisions have referred to the IEP as the "vehicle" or "modus operandi" for ensuring the delivery of FAPE to students with disabilities.

In more specifically defining the role of courts in exercising judicial review in FAPE cases and in examining the appropriateness of an IEP, the *Rowley* Court set forth a two-fold inquiry for courts and due process hearing officers to follow. As clarified by the *Endrew* Court, the legal FAPE analysis and assessment of the appropriateness of an IEP requires that both IEP process and content issues be examined by asking and answering the following two questions:

- **First, in the development of an IEP, has the school agency complied with the procedures set forth in the IDEA? (the "process piece");**

- **Second, if so, is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances? (the "content piece").**

4. The Importance of the "Process Piece"

While the *Endrew* decision focused only on the content or substantive piece of the FAPE standard and IEP analysis, the Court referred to the importance of the "process piece" in its decision. Specifically, the Court noted that an IEP must be drafted in compliance with a detailed set of procedures under the IDEA that "emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances."

The Supreme Court has also noted that where the answer to the process question above is "yes," the answer to the content question is also more than likely to be "yes," because good process leads to good content. It is also the case that where the answer to the process question is "no," a court may likely halt its inquiry and find a denial of FAPE based solely upon the procedural violation, without ever addressing the quality of the IEP's content. These "FAPE-fatal" process issues need to be the focus of every IEP team process leader and, therefore, are the kinds of process issues that are our focus today and should be the focus of any training opportunity provided to IEP meeting process leaders.

B. Process Requirements Related to IEP Team Membership

Because many courts over many years have found a denial of FAPE based solely upon a finding of a procedural violation, it has long been my view that the "process piece" of the inquiry is just as important as the "content piece," if not more so in many instances. One of the common procedural issues about which LEA Reps should be aware is the failure to have all of the required members at the IEP meeting.

1. "Mandatory School-based Members" of an IEP team

Under IDEA, a school district must ensure that the IEP team for every meeting includes, at a minimum, the following school-based members:

a. Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
b. Not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child;
c. A qualified LEA Representative; and
d. An individual who can interpret the instructional implications of evaluation results, who may be one of the school members described above.

34 C.F.R. § 300.321(2)-(5). From a legal perspective, these are the "mandatory" school-based IEP team members who must be present at every meeting for procedural compliance under federal law, and state or local guidelines may require additional members in certain situations. It is important for a team's process leader to ensure that these school-based IEP team members understand that their presence is required for the entire meeting unless they are properly excused.[4]

In some cases, courts have found that the district's failure to have the required school-based IEP team members present at an IEP meetings was sufficient, in and of itself, to constitute a denial of FAPE:

> *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.
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> *M.L. v. Federal Way Sch. Dist.*, 387 F.3d 1101 (9th 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

[4] Since 2004, the IDEA has provided for the formal excusal of a "mandatory member" of the IEP team from attending the meeting, in whole or in part, if the parent of a child with a disability and the school district 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 school district 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 or consent to any excusal must be in writing.

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.

West-Linn Wilsonville Sch. Dist. v. Student, 63 IDELR 251 (D. Ore. 2014). While it was not harmful when a regular education teacher did not attend one particular IEP meeting, in a subsequent meeting, the absence of a regular education teacher was significant enough to constitute a denial of FAPE. At the time of this meeting, the student was more involved in the regular education environment and there were general education teachers that could have provided meaningful input. In particular, the parent wanted the music teacher there and had questions about music, but the music teacher was not present. The parent had signed the form excusing the music teacher, but the teacher did not submit written input to the IEP team prior to the meeting, as required.

But see:

R.B. v. Napa Valley Unif. Sch. Dist., 48 IDELR 60, 496 F.3d 932 (9th 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 in the first place, the omission of a special education teacher or provider from the IEP Team was harmless error.

2. Legal Criteria for Serving as the LEA Representative

As an important process consideration, all who are designated to serve as an LEA Rep at an IEP meeting should be trained and keenly aware of the criteria applicable for serving in that capacity. To begin, it is important to understand that "LEA" is an acronym for "local education agency" and that there are specific criteria that apply in terms of who can serve as the LEA Representative at an IEP meeting.

Under IDEA, the LEA Representative is defined as a representative of the local education agency who is:

a. qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
b. knowledgeable about the general education curriculum; and
c. knowledgeable about the availability of resources of the public agency.

34 C.F.R. § 300.321(a)(4). In informal commentary issued by the U.S. Department of Education (U.S. DOE), it has also been suggested that the LEA Representative must have the authority to commit district resources and is able to ensure that the IEP will be implemented. 71 Fed. Reg. 46,670 (2006). Some states, including Idaho, and/or local school agencies have incorporated this informal guidance into their own requirements for LEA Representatives and others may have additional criteria that apply.

No matter who is designated to serve in the position of the LEA Representative at an IEP meeting, the criteria for serving must be met by that person or someone else must serve in that role. Indeed, the failure to have someone in place who meets all of the qualifications of the LEA Representative at an IEP meeting can, in and of itself, lead to a finding of a denial of FAPE:

> *Pitchford v. Salem-Keizer Sch. Dist. No. 24J,* 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.'s skills in the development of her second grade IEP."
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> *Tamalpais Union High Sch. Dist.*, 115 LRP 39394 (SEA Cal. 2015). Where school-team members indicated that they did not have the authority to do anything with the parents' request to fund a transition program, this was a procedural violation that denied FAPE because it interfered with the parents' right to participate in the IEP process by limiting the parents' request for additional services they desired. The ability to commit resources is inherent in the role of a district representative who has the ability to make financial decisions on the district's behalf.

3. Making the Case for the LEA Representative to Serve as the Meeting's "Process Leader"

Based upon the *Rowley/Endrew* "process/content" standard, I see IEP teams made up of what I call "process people" and "content people." With respect to the typical roles and responsibilities of the mandatory members outlined in IDEA, it seems to me that three of them are primarily "content people"—the teachers, other service providers, and those that interpret the instructional implications of evaluation results. The LEA Rep, on the other hand, seems to be the member who is more suited to be a "process person" who guides the team in the process of the meeting, including the process of reaching consensus in decision-making, so that the "content people" can focus upon ensuring that the IEP's content is appropriate.[5]

[5] All too often, I have been to IEP meetings where the student's special education teacher is struggling to manage all of the meeting's process and content issues. Truth be known, this responsibility overload often leads to what I have found to be "not so good IEP process" and "not so good IEP content." LEA Reps need to recognize this and be trained to understand their role primarily as a supportive "process leader," so that the "content people," particularly the student's special education teacher, can successfully get their jobs done.

The U.S. DOE has supported the notion of the LEA Representative being the IEP team's ultimate process leader when answering whether an LEA Rep can override the consensus of an IEP team. *Letter to Richards*, 55 IDELR 107 (OSEP 2010). Notably, OSEP described an IEP meeting as a "communication vehicle between parents and school personnel" which enables them to "make joint informed decisions regarding the services that are necessary to meet the unique needs of the child." While the IEP team is to work toward a "general agreement," U.S. DOE noted that the public agency is ultimately responsible for ensuring that the IEP offers FAPE. "If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice...." Thus, it seems that the public agency Rep should be primarily focused on guiding the team in the process of reaching consensus, but if consensus cannot be reached, must make the decision as to what the district's proposal for FAPE will be, based upon the data presented by the content experts at the meeting.

4. Who Can Serve as an LEA Representative: Making the Case for School Building Administrators Doing So More Often

Other than the above qualification requirements and criteria, there are no IDEA limits on who can serve as an LEA Rep, though many states and/or local school agencies maintain additional requirements or practices regarding who is qualified and who can serve as the LEA Rep. Under IDEA, possible designees technically could include superintendents, assistant superintendents, local school principals or assistant principals, special education administrators or other central office staff, or even school psychologists, guidance counselors, or special education teachers or other service providers. In fact, it should be noted that IDEA permits another of the listed mandatory school-based team members (i.e., the general education teacher, the special education teacher, or the individual who can interpret the instructional implications of evaluation results) to also fill the position of LEA Rep, provided that the designated team member also meets the legal criteria for serving as the LEA Rep. 34 C.F.R. § 300.321(d).

While IDEA does contemplate that a school could designate the special education teacher of the student to also serve as the LEA Rep, many school districts prefer (as I do) that "content people" like teachers or other service providers not be the ones to also serve as LEA Representatives at IEP meetings for their own students. Indeed, it is my preference that local school administrators who presumably are skilled in overall meeting process leadership, should be trained and serving more often as LEA Representatives in a process leadership role for several reasons, including:

- Many states already require (or highly suggest as best practice) that building administrators serve as LEAs and some actually require LEA Reps to have certification in school administration or special education (or both);

- From purely a "PR" perspective, parents are often pleased when the school's building leaders show a professional interest and investment in the success of their children; and

- Special education teachers across the country have recently indicated that having administrators who are supportive of the IEP process is one of the top three issues most important to their success.[6]

IV. SOME COMBINED LEGAL AND PROCESS LEADERSHIP FRAMEWORK TIPS FOR LEA REPRESENTATIVES TO CONSIDER

As discussed previously, the legal framework for IEP meetings should operate in alignment with its process leadership framework—before, during and after the meetings. No matter who serves in the role of the LEA Rep, the following complementary legal and meeting process leadership tips should be considered by all of them. For obvious reasons, these tips for LEA Reps focus on IEP process-type concerns and do not focus on IEP content or necessarily require special education content expertise.

Before presenting these tips, it is important to begin by emphasizing that good IEP process not only leads to good IEP content and increased legal compliance but can also lead to less potential for conflict with parents. Good LEA Representatives realize that parents—even the most educated and savvy ones—are already anxious about their child's well-being when they receive the first communication from the school about their child's suspected or substantiated disability.

Add to the above considerations that, as acknowledged by the U.S. Supreme Court, school districts have a "natural advantage" as it relates to evaluative information and educational expertise. *See*, *Schaffer v. Weast*, 44 IDELR 150, 126 S. Ct. 528 (2005). As a result, LEA Reps and other IEP team members should often view the IEP meeting process from the parents' perspective and remember that they are attending an event that is, to many parents, very intimidating and confusing. These circumstances are also likely to provoke feelings of anxiety and distrust that can leave parents with the feeling that they need to contact an advocate or an attorney for assistance.

Tip #1: Maintain Good Meeting Invitation and Parent Participation Processes

IDEA requires that school districts afford parents with a meaningful opportunity to participate in all meetings with respect to the identification, evaluation, placement and provision of FAPE to their child. In order to ensure parent participation in meetings, school districts are required, among other things, to provide written notice of meetings to ensure that one or both of the parents are present at each meeting or are afforded the opportunity to participate, including: (1) notifying them early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place. 34 C.F.R. § 300.322(a).

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[6] *See* "The State of the Special Education Profession Survey Report," Council for Exceptional Children (2019): This report can be found at: https://exceptionalchildren.org/sites/default/files/2020-07/Special_Education_State_of_the_Profession_A_CEC_Report.pdf

Specific suggestions to consider:

a. Consider contacting (or designating someone to contact) the parent(s) for available dates prior to sending out the written notice of or invitation to the IEP meeting.

Allowing parents to have input into the scheduling of IEP meetings will increase the chance that they feel more like "meaningful participants" from the beginning of the IEP meeting process, rather than feeling like the meeting is the school team's "show" or "party" to which they have merely been invited.

b. Consider whether the written IEP meeting notice and other such notices could be made to look more "parent friendly" or even "fun."

c. Agree to reasonable and legitimate parent requests to reschedule an IEP meeting, even if they agreed to the originally scheduled date.

A.L. v. Jackson Co. Sch. Bd., 66 IDELR 271 (11th Cir. 2015) (unpublished). Parent's complaint that the district held an IEP meeting without her in violation of the IDEA is rejected. While the IDEA requires districts to ensure that parents have a meaningful opportunity to participate in each IEP meeting, if the parent refuses to attend, the district may hold the meeting without the parent. Here, the mother's actions were tantamount to a refusal to attend where for several months prior to the IEP meeting held in November 2010, the district tried to accommodate the mother's schedule and offered to include her via telephone if she was physically unable to attend. Despite these efforts, the mother either missed or refused to consent to attending four separately scheduled meetings, including the last one that was finally held. While parent participation is important, the student's specific educational goals "stagnated" because of the mother's "seemingly endless" requests for continuances.

D.B. v. Santa Monica-Malibu Unif. Sch. Dist., 65 IDELR 224 (9th Cir. 2015). District's exclusion of parents from an IEP meeting constituted a denial of FAPE to the deaf teenager. The unavailability of certain IEP team members during the summer did not justify the district's decision to go ahead with the meeting in the parents' absence and after they had asked for it to be rescheduled for a date when they would be available. An agency can make a decision without the parents only if it is unable to obtain their participation, which was not the case here. Where the district claimed that it needed to hold the meeting because the current school year was ending, the IDEA only requires the district to have an IEP in effect at the start of the school year. Thus, the failure to review and revise the student's IEP before the beginning of summer break would not cause the district to run afoul of another procedural requirement. The parents' attendance at the meeting takes priority over the attendance of other team members.

Doug C. v. Hawaii Dept. of Educ., 61 IDELR 91, 720 F.3d 1038 (9th Cir. 2013). Education Department's failure to reschedule an IEP meeting when requested by the parent amounts to a denial of FAPE to the student. Thus, the case is remanded to the district court to determine the parent's right to private school tuition reimbursement. Where the ED argued

that it had to hold the IEP meeting as scheduled to meet the student's annual review deadline, the argument is rejected because the father was willing to meet later in the week if he recovered from his illness and the ED should have tried to accommodate the parent rather than deciding it could not disrupt the schedules of other team members without a firm commitment from the parent. In addition, the ED erred in focusing on the annual review deadline rather than the parent's right to participate in IEP development. While it is acknowledged that the ED's inability to comply with two distinct procedural requirements was a "difficult situation," the ED should have considered both courses of action and determined which was less likely to result in a denial of FAPE. Here, the ED could have continued the student's services after the annual review date had passed and the parent did not refuse to participate in the IEP process. Given the importance of parent participation in the IEP process, the ED's decision to proceed without the parent "was not clearly reasonable" under the circumstances.

Board of Educ. of the Toledo City Sch. Dist. v. Horen, 55 IDELR 102, 2010 WL 3522373 (N.D. Ohio 2010). The district denied FAPE when it seriously infringed on the parents' opportunity to participate in the decision-making process by proceeding with an IEP meeting in their absence. Although the parents called to cancel the meeting indicating that they would re-schedule but never did so, the district should have taken additional steps to reschedule an IEP meeting with them. A parent request to reschedule an IEP meeting is not the same as a refusal to meet. The district should have attempted to identify another date or, at the very least, should have informed the parents that it intended to proceed with the meeting. This is especially the case where school staff met with the parents earlier on the same day as the IEP meeting (and in the same school building) and should have asked them if they intended to stay for the IEP meeting, notwithstanding the parents' earlier indication that they could not attend.

J.N. v. District of Columbia, 53 IDELR 326 (D. D.C. 2010). Where the parties never agreed to a final IEP meeting date and there was no evidence that, had the district contacted the parent, it could not have persuaded her to attend the third scheduled meeting, a denial of FAPE occurred when the district proceeded with the IEP meeting in the parent's absence. After receiving no response to two notices for meeting provided to the parent, the district sent a third notice that explained that the meeting would be held three days later. On each of the following three days, the parent called the district to propose alternative dates, but the district did not respond and held the meeting without her.

d. Have someone keep detailed records/logs of meeting notices sent, contacts made and results of and/or responses to those attempts to provide parents the opportunity to participate in meetings.

Documentation is always useful for demonstrating reasonable efforts on the part of the school district to ensure the parents have been given the opportunity to meaningfully participate in meetings and for defending against any claim that the district inappropriately went forward with a meeting without them.

T.S. v. Weast, 54 IDELR 249 (D. Md. 2010). District's decision to hold an IEP meeting without the parents in attendance did not deny their child FAPE. After the district made several documented but unsuccessful attempts to include the parents, the district was entitled to convene the IEP team. The parents left meetings, refused to attend or postponed several meetings during the summer for various reasons and, because the school year was about to begin, the team met in mid-August. A district may meet without a parent if it is unable to convince the parents that they should attend. Here, the parents had the opportunity to participate but chose not to do so and acted unreasonably by declining to attend any of the summer meetings.

e. Where parents indicate that they want to participate but cannot be physically present at the meeting or will have difficulty doing so, do not forget the requirement to make alternative ways of participation available—e.g., telephone or video conferencing.

Drobnicki v. Poway Unif. Sch. Dist., 109 LRP 73255 (9th Cir. 2009) (unpublished). Where the district scheduled an IEP meeting without first asking the parents about their availability and did not contact them to arrange an alternative date when the parents informed the district that they were unavailable on the scheduled date, the district denied FAPE. Though the district offered to let the parents participate by speakerphone, the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time and place. "The use of [a phone conference] to ensure parent participation is available only 'if neither parent can attend an IEP meeting.'" Further, the fact that the student's mother asked the district to reschedule the meeting undermined claims that the parents affirmatively refused to participate--a circumstance that would allow the district to proceed in the parents' absence. Although the mother attended two other IEP meetings that year, the student's IEP was developed in the parents' absence. As such, the district's procedural violation deprived the parents of the opportunity to participate in the IEP process and, therefore, denied the student FAPE.

J.G. v. Briarcliff Manor Union Free Sch. Dist., 54 IDELR 20 (S.D. N.Y. 2010). Parents were not denied opportunity to participate in August IEP meeting when the district contacted the parents to schedule an IEP meeting as soon as it learned that they were dissatisfied with an IEP developed earlier in the summer. Although the parents indicated that they were available, they later asked that the meeting be postponed until after Labor Day and the parents declined to participate by phone. Because the district was required to have an IEP in place by the beginning of the school year, it was not unreasonable for the district to proceed with the meeting in the parents' absence. In addition, the parents committed to a private placement before the August 9th meeting. In fact, the father told the special education director that he did not "see any sense in being there" because "his daughter is not coming."

f. When parents don't attend meetings, don't stop with just providing them with copies of meeting documentation and prior written notices after the meetings!

It cannot be emphasized enough how important it is to consider reaching out to parents who do not attend IEP meetings with calls or other forms of contact, encouraging them to participate and

emphasizing how important their participation is to the team's decision-making process. It would also be important to find out why they did not attend, if possible, and to inquire as to whether they have any suggestions for action that the school might take to improve their attendance or make the meetings more comfortable.

Tip #2: Prepare Adequately for IEP Meetings

Although the law does not require IEP meeting preparation, I have learned from experience that it is vital. In fact, nothing is worse or less impressive than school team members appearing unprepared for an IEP meeting. Lack of good preparation for an IEP meeting can lead to the potential for conflict and ultimately a legal dispute, because parents are more likely to see an unprepared group as uncaring, disinterested or even incompetent.

In my view, LEA Representatives should adhere to the following mantra:

Time spent in preparation is a trade-off for time spent in lengthy meetings and in conflict with parents!

Specific suggestions to consider:

a. Develop and use a "IEP Meeting Preparation Checklist" that will assist and guide team members, including parents, to prepare adequately for an upcoming meeting (including virtual meetings), and designate someone to be primarily responsible for planning/preparing for the meeting.

The following things, among others, should be considered for inclusion in such a Checklist:

- ✓ Obtaining parent input/concerns prior to the meeting
- ✓ Locating and reserving appropriate meeting space if in-person meeting will occur
- ✓ Locating and ensuring technology needed during the meeting is reserved, working and available in the meeting room
- ✓ Contacting IT Department to address all potential issues if meeting will be virtual
- ✓ Preparing parents for in-person or virtual meeting processes
- ✓ Preparing school team members for in-person or virtual meeting processes and their roles & responsibilities (provide each with list of items to have available at the meeting, including current student data)
- ✓ Preparing meeting visual aids and copies- (e.g., Agenda, Meeting Norms, Current Student Achievement and Progress Data)
- ✓ Ensuring other meeting necessities are available (water, tissues, pens, markers, post-it notes)

b. Don't forget to train and prepare all team members, including general education teachers, regarding their roles/responsibilities as mandatory IEP team members and the importance of their presence at and participation in IEP meetings.

Do not allow anyone to be a "token" IEP team member. No one should sit in silence and everyone must be prepared for and have a job to do at an IEP meeting!

Tip #3: **Take steps to ensure that "content people" are prepared to attend IEP meetings with sufficient and current evaluative data in hand.**

Evaluations must be up-to-date, thorough and adequate before appropriate IEPs can be developed based upon them. In some cases, a school district may lose a case based solely upon its failure to appropriately evaluate a student prior to making educational recommendations and developing IEPs. *See, e.g., Babb v. Knox Co. Sch. Sys.,* 965 F.2d 104 (6th Cir. 1992) [failure to appropriately evaluate and obtain all relevant evaluative data is a denial of a free appropriate public education in and of itself]. It is important to seek to obtain *all* records and to demand current evaluations or insist upon the right to conduct current evaluations before an IEP is developed.

When there's debate, seek to evaluate!

Specific suggestions to consider:

a. **Prior to an IEP meetings, be sure that staff has obtained all *updated* achievement and/or other evaluative data (formal and informal) necessary to define present levels of performance/baseline data (remember the IEP meeting preparation checklist suggestion earlier).**

b. **Prepare for IEP meetings by asking all service providers (and parents) whether they believe that any evaluations might need to be suggested and considered at the upcoming IEP meeting, particularly if the student is not progressing as expected, needs have changed, other conditions may warrant reevaluation, etc.**

When there's debate, reevaluate!

S.D. v. Portland Pub. Schs., 64 IDELR 74 (D. Me. 2014). School district must fund private school tuition for a 6th grader with a variety of reading and anxiety disorders based upon its failure to reevaluate the student. When the student's IEP team drafted his IEP, it was with the understanding that he was reading at level 7 in the Wilson Reading System. However, the student's new Wilson-certified instruction discovered early in the school year that the student was actually reading at a level 2. This discovery should have triggered a reevaluation of the student's IEP, rather than simply to continue instruction at a lower level. The district's failure to determine whether the student's decline stemmed from his previous teacher's failure to follow the Wilson program, a memory retention deficit, flawed proficiency assessments or some other reason amounted to a denial of FAPE.

Phyllene W. v. Huntsville City Bd. of Educ., 66 IDELR 179 (11th Cir. 2015) (unpublished). Case is reversed and remanded to the district court to determine an appropriate remedy where school district did not reevaluate an SLD student when it clearly had reason to suspect that the student might have a hearing impairment. The district was aware that the student had undergone 7 ear surgeries, was being fitted for a hearing aid and had

difficulty communicating with others. Although the parent did not ask the district to evaluate the student's hearing, the IDEA does not require parents to ask for evaluations of suspected disabilities. Rather, districts have a continuing obligation to evaluate all students suspected of needing IDEA services and there was good reason to suspect that this student might have a hearing impairment. Notification by the parent that the student was being fitted for a hearing aid alone should have raised a red flag that an evaluation was necessary to determine whether she had a hearing impairment necessitating further services.

West-Linn Wilsonville Sch. Dist. v. Student, 63 IDELR 251 (D. Ore. 2014). School district should have re-evaluated a student's behavioral needs and convene an IEP meeting before changing his educational placement. When the student began punching, shoving and using threatening gestures during his third-grade year, the district should have evaluated the student rather than discontinuing his participation in a mainstream music class, removing him from an inclusion PE class with others in his self-contained autism program and delivering his one-to-one instruction in a room next to the principal's office. Clearly, the district had notice of the need for a reevaluation by April 6, 2011, when the principal informed the director of student services that the special education teacher felt unsafe around the child. Although the district argued that it was merely implementing short-term solutions to accommodate the child until the end of the school year, its response "essentially turned the reevaluation process on its head." Thus, the district is ordered to reevaluate the student, convene an IEP meeting and identify an appropriate placement for the upcoming school year.

c. If sufficient and current evaluative data are not available, guide the team to ask for or insist upon the district's right to conduct evaluations/re-evaluations or to collect more data. If the parents refuse to allow an evaluation or reevaluation, be sure that the refusal is documented.

G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012). Parents did not show a denial of FAPE to their child with autism and a brain injury based upon a failure to reevaluate his special education needs during his kindergarten year. Here, the parents effectively denied consent for the district's proposed reevaluation when they imposed significant conditions upon their consent for reevaluation. Rather than signing the consent form the district provided, the parents wrote a seven-point addendum which stated that the district would use the parents' chosen evaluator, that the parents would have the right to discuss the assessment with the evaluator prior to its consideration by the IEP team, and that the evaluation results would be confidential. The district court was correct when it held that the parents effectively withheld their consent for the reevaluation. Clearly, the parents' conditions "vitiated any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district." In addition, the lack of an underlying evaluation prevented the parents from obtaining an IEE at public expense.

M.L. v. El Paso Indep. Sch. Dist., 52 IDELR 159, 610 F.Supp.2d 582 (W.D. Tex. 2009). While the IDEA permits a reevaluation only one time per year unless the parties agree otherwise, this does not restrict a hearing officer or reviewing court from overriding lack of parental consent to a reevaluation. Under the circumstances and where the parent wants the child to continue to receive special education services, the district is entitled, indeed obligated, to conduct a reevaluation, because it has determined that the student warrants one. Plaintiff may not continue to assert that the student is entitled to special education services while simultaneously refusing to allow the district to evaluate A.L. to determine what those services may be.

Independent Sch. Dist. No. 701 v. J.T., 2006 WL 517648, 45 IDELR 92 (D.C. Minn. 2006). Where district agreed to use former district's evaluation when it prepared IEP, when parent asked for IEE and was able to prove former district's evaluation was inappropriate, new district is required to fund the IEE.

Shelby S. v. Kathleen T., 45 IDELR 269, 454 F.3d 450 (5th 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.

M.T.V. v. DeKalb Co. Sch. Dist., 45 IDELR 177, 446 F.3d 1153 (11th Cir. 2006). Where there is question about continued eligibility and parent asserts claims against District, District has right to conduct reevaluation by expert of its choosing.

Tip #4: While Meeting Preparation is Key, Avoid the Appearance of and Redirect Action or Statements that Reflect "Predetermination of Placement"

While good preparation for meetings is vital, over-preparation for meetings can be FAPE-fatal if a "predetermination of placement" occurs. In other words, avoid or re-direct action that could be perceived to deprive the parents of meaningful input into the decision-making process. A "predetermination of placement" or making placement decisions without parent input or outside of the IEP/placement process can not only cause a parent to lose trust in school staff but is highly likely to be a procedural violation that could lead to a finding of a denial of FAPE, in and of itself.

"Predetermination of placement" includes action such as fully developing and finalizing an IEP prior to the meeting with the parents and asking them to sign without discussion. Denial of parent participation/input might also be reflected if sufficient notice is not provided to parents of relevant evaluative information, proposed placement, etc. or if no consideration is given to information that parents bring to the meeting or have provided to staff prior to the meeting.

Specific suggestions to consider:

a. Be prepared to redirect or rectify statements or action taken during meetings by school staff to avoid claims that predetermination occurred.

b. If a draft IEP or other important documentation is prepared ahead of time, be sure that it is shared with the parents before the meeting, where possible, making it clear that it is in draft form and is for discussion and preparatory purposes only.

The US DOE has indicated that school agencies "should" share all drafts of IEPs and other documentation that is available prior to the meeting as part of ensuring an opportunity for meaningful participation. It is also important for LEA Representatives to consider encouraging school staff to keep drafts in some cases, if needed to show what changes were made during the meeting based upon parent input and participation.

Regulatory commentary from the U.S. DOE: A few commenters to the proposed regulations recommended that the final regulations should require that drafts be prepared and shared 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. 46,678 (2006). There are also many cases addressing the issue of preparing draft documents prior to IEP meetings:

> *Price v. Commonwealth Charter Academy-Cyber Sch.*, 75 IDELR 35 (E.D. Pa. 2019). Parent who refused to attend IEP meetings after the charter school sent her draft IEPs for two teenagers with disabilities did not show that the school denied her the opportunity to participate in the IEP decision-making process. Where the parent rejected the school's efforts to seek her input, there is no evidence of an IDEA violation. It appears that the parent misinterpreted the draft IEPs as evidence that the school had finalized the students' programs in her absence. However, the draft IEPs were accompanied by instructions stating that they were the "starting point" for working as a team. These instructions clearly reflected the school's intent to include the parent in the IEP process, and the school made multiple attempts to seek parental input. For example, the school contacted the parent when scheduling the IEP meetings and also attempted to have her participate in those meetings by phone after she failed to attend the meetings as scheduled. It is undisputed

that the parent chose not to participate in the IEP meetings, despite the efforts made by the school to include her in the decision-making process. Thus, the decision of the hearing officer is upheld in favor of the school.

J.S. v. New York City Dept. of Educ., 69 IDELR 153 (S.D. N.Y. 2017). Where district prepared for an IEP meeting by drafting and circulating a proposed IEP for a 6 year-old student with autism, this did not amount to a predetermination of placement under the IDEA sufficient to constitute a denial of FAPE. The district demonstrated that the final IEP took into consideration the comments and concerns expressed by one of the parents during the IEP meeting. Indeed, the parents conceded that they were provided with a copy of the draft and that the final product reflected their comments and concerns. While parents have the right to provide input into the IEP process, they do not "have the right to veto decisions with which they disagree." In addition, the parents failed to provide any "non-speculative" evidence that the proposed placement would be unable to implement the IEP as written. Thus, the parents' claim for tuition reimbursement for private school is denied.

A.P. v. New York City Dept. of Educ., 66 IDELR 13 (S.D. N.Y. 2015). District gave meaningful consideration to the parents' concerns during an IEP meeting. The draft IEP that was distributed at the beginning of the meeting did not identify a placement for the student. In addition, the father testified that the team had a "heated discussion" about the student's ability to perform in the general education setting, and the final IEP developed documented the father's concern that the proposed integrated co-teaching class would not provide sufficient support. While the parents argued that the district refused to consider alternative placements, the district's documentation showed otherwise, stating that other programs, both 12:1:1 and 12:1 special education classes, were considered but were ultimately rejected because they were overly restrictive for the student. Thus, the records of the team's discussions, along with the substantial differences between the draft and final IEPs, prevented a finding that the district predetermined the student's placement in an integrated co-teaching class.

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.

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.

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 in and of itself.

c. Adequately prepare for IEP meetings, but if preparatory staff meetings or other activities occur, make sure that everyone who attends or participates understands

that no final determinations regarding identification, evaluation, placement or the provision of FAPE are to be made prior to the meeting with the parents.

Spielberg v. Henrico Co., 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.

N.L. v. Knox Co. Schs., 38 IDELR 62, 315 F.3d 688 (6th 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.

Doyle v. Arlington Co. 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.

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).

d. Remind IEP "content people" that they cannot be inappropriately bound or restricted by computerized or web-based IEP programs in the process of developing the content of an IEP.

Elmhurst Sch. Dist. 205, 46 IDELR 25 (SEA Ill. 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.

Roland M. v. Concord Sch. Comm., 1989 WL 141688 (D. Mass. 1989), *aff'd*, 910 F.2d 983 (1st 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.

e. Be sure to have someone explain the meaning of any "coded" items on IEPs, as well as educational jargon and acronyms. In fact, train IEP team members to avoid "ed speak" as much as possible.

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.

f. Document that the school members of the team thoroughly considered and discussed parent requests and concerns, even those that may seem "bizarre" or "ridiculous."

Often, the LEA Rep will (or may be required to by state or local law or procedure) ensure that someone is designated to take contemporaneous "meeting minutes" or to maintain a conference record of some sort that contains the key points of discussion that occurred at an IEP meeting (some even use Prior Written Notice as a template for taking notes or minutes). Often, too, agreements that were made or specific details that are in need of documentation may be included in the meeting notes. Well-done notes reflecting parent participation and discussion have been recognized by courts in support of a finding that appropriate meeting processes occurred and that predetermination did not.

> *D.N. v. New York City Dept. of Educ.*, 65 IDELR 34 (S.D. N.Y. 2015). Parent's claim that the district predetermined placement is rejected. The IEP meeting minutes, along with testimony from district team members reflect that the district properly considered parental input during the IEP meeting. A parent cannot prevail on a predetermination claim when the record shows that she had a meaningful opportunity to participate in educational decision-making. Here, the testimony by the school psychologist reflected that the parent actively contributed to the development of the IEP and that the team modified some provisions of it in response to her input. For example, the parent had expressed concerns that her child required a 12-month program with greater support than a 6:1:1 staffing ratio. In response, the team included a recommendation for a 12-month program in a 6:1:1 class with the extra support of a one-to-one paraprofessional in the student's IEP. Further, the IEP meeting minutes expressly state that the parent was "asked explicitly" if she agreed with the proposed IEP goals or wanted to add any provisions to the IEP.

g. Be careful not to overstate the purpose of a meeting when opening it. In other words, be general.

Obviously, opening up an IEP meeting is a critical process skill that can be performed by an LEA Representative. In so doing, LEA Reps should exercise caution and ensure that the purpose of the meeting is not stated in a way that could be construed as a placement decision. For example, opening up with a statement, such as "we are here today to review and possibly revise Susie's IEP" would be much better than "we are here today to develop an IEP for Susie to attend the separate day class for EBD students."

> *Berry v. Las Virgenes Unif. Sch. Dist.*, 54 IDELR 73 (9th Cir. 2010) (unpublished). District court's determination that district personnel predetermined placement is affirmed. Based upon the assistant superintendent's statement at the start of the IEP meeting that the team would discuss the student's transition back to public school, the district court properly found that the district determined the student's placement prior to the meeting.

h. Make sure that the "content people" share, in a way that is understandable to parents, <u>all</u> relevant evaluative information and data about the student—good, bad or ugly—and do not assume that the parents "don't want to hear it."

Amanda J. v. Clark Co. Sch. Dist., 160 F.3d 1106 (9th 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.

M.M. v. Lafayette Sch. Dist., 64 IDELR 31 (9th Cir. 2014). District committed a procedural violation that denied FAPE when it did not share over a year's worth of RTI data with the child's parents during the eligibility meeting, even though it does not use the RTI model for determining LD eligibility. The duty to share RTI data does not apply only when a district uses an RTI model to determine a student's IDEA eligibility. This procedural violation was not harmless where the other members of the IEP team were familiar with the RTI data, but the parents were not and, therefore, did not have complete information about their child's needs. "Without the RTI data, the parents were struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the [initial offer of special education services], and thus unable to properly advocate for changes to his IEP."

<u>Tip #5:</u> <u>Use Effective and Efficient Communication Aids and Strategies when Conducting IEP Meetings</u>

The use of effective communication aids and strategies at IEP meetings can, among other things, promote meeting organization and efficiency; keep the focus on the individual needs of the student; set expectations for participants; provide visual cues and reminders; and help to prevent and manage conflict in IEP meetings. In addition and as an "extra bonus," the use of visual aids can help in the avoidance of FAPE-fatal procedural errors, such as predetermination of placement.

<u>Specific suggestions to consider:</u>

a. As with any meeting, use visual aids during IEP meetings, such as an agreed-upon and posted Agenda and Meeting Norms/Standards.

Of the common visual aids that are used generally by meeting process leaders, LEA Reps should view the use of an Agenda and Meeting Norms as "standard operating procedure" at IEP meetings. Typically, the LEA Rep will be the one to introduce and direct the use of the aid and many times, will ask other team members to assist in monitoring the use of a visual aid during the IEP meeting.

Steps for using an Agenda and Meeting Norms include:

- Presenting the aid to the team (the order of which will depend on the meeting content and other circumstances)
- Asking team members whether they need clarification and/or revision of Agenda items and/or the Norms
- Obtaining agreement from all team members with the items on the Agenda and Norms and any edits made to them

b. Encourage (and in some cases require) IEP team members to display visual depictions of Student Data.

It should also be "SOP" for team members to have visual displays of student data available, where possible, to serve as an important communication aid at IEP meetings and assist in understanding on the part of all team members, not just parents. Now, more than ever and in light of *Endrew*, being able to explain "cogently and responsively" to parents (and to courts) the meaning of data and how it forms the basis of service recommendations and assessment of student progress is vital!

c. Consider the use of a "parking lot" for documenting stated areas of concern on the part of parents or other team members that are not on the IEP meeting's Agenda or need to be "parked" for discussion at a later time during or after the meeting.

Use of a "parking lot" serves as an important acknowledgement and lets the concerned team member know that he/she has been heard and that the issue/concern will not be ignored. It also serves as a reminder to team members that the issue needs to be addressed at some point later during the IEP meeting or at a later time at another meeting and will not be forgotten.

d. Overall, use effective communication strategies and interventions in all IEP meetings and practice using them to support prevention and management of potential conflict.

During preparation for IEP meetings, LEA Reps should plan for the use of certain communication strategies and interventions and, as a meeting progresses, the use of others, as appropriate to the situation. The goal in any IEP meeting is to reach consensus amongst all team members who have been made to feel like valued participants in the decision-making process.

There are many examples of effective interventions and other strategies that are commonly suggested for use in all kinds of meetings that can also be effective when used during IEP meetings. Such conflict prevention and management strategies include things, such as:

- Acknowledging a speaker
- Actively or intentionally listening
- Asking for advice or expertise
- Building (and celebrating) small agreements
- Charting advantages and disadvantages of considered options
- Clarifying and restating
- Deflecting/ignoring attacks

- Examining perceptions and assumptions through questioning
- Making process suggestions
- Physically prompting
- Problem-solving using open-ended questions
- Providing for "timed venting"
- Reminding of agreements reached
- Stating the obvious
- Summarizing prior to moving on to the next topic or issue

Tip #6: Ensure that Parents Have Received their Rights and Been Offered an Explanation of Them

A process requirement of significant importance is that of providing Parent Rights/Notice of Procedural Safeguards to parents. The IDEA regulations clarify that a copy of IDEA procedural safeguards must be given to the parents one time per school year and –

(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 disciplinary change of placement is contemplated); and
(4) Upon request by a parent.

34 C.F.R. §300.504. In addition, a district may place a current copy of the procedural safeguards notice on its Internet website if such website exists. A parent may also elect to receive notices by electronic mail (e-mail) communication, if the district makes such option available.

Specific suggestions to consider:

a. In addition to sending them by mail (or email, if that is done), be sure that Parent Rights are given (or receipt is discussed) at the beginning of meetings and that the parent's receipt of the Rights is documented.

Conway v. Board of Educ. of Northport-East Northport Sch. Dist., 67 IDELR 16 (E.D. N.Y. 2016). In a failure to exhaust administrative remedies case, the parent could not claim that she never received notice of her right to file for a due process hearing where the evidence showed that the district provided such notice. Indeed, the district documented each instance in which it provided the parent a copy of her procedural safeguards under the IDEA. The first notice accompanied a prior written notice form regarding a referral for an evaluation and request for consent, and another was provided along with April 2013 IEP team findings regarding the student's eligibility for services. Because the parent had adequate notice of her rights, her argument that exhaustion of administrative remedies would be futile is rejected.

Jaynes v. Newport News, 35 IDELR 1, 2001 WL 788643 (4th 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. Check for understanding on the part of the parents that the document presented is a copy of their Parent Rights/Notice of Procedural Safeguards.

c. Consider the development of a "parent friendly" version of the Parent Rights/Safeguards to go along with the formal, not-parent-friendly and somewhat scary version, and be sure to remind parents to ask for explanations if they do not understand their Rights. (Note: The explanation does not have to occur at the IEP meeting).

d. Make sure that contact information for district and school staff is made readily available on the school district's or local school's website or to parents upon request. Make it clear that expression of parent concerns and questions are welcomed.

Tip #7: Allow for and Guide Appropriate Participation of Parent "Invitees"

Parents are entitled to invite and bring "other individuals who have knowledge or special expertise regarding the child" to an IEP meeting. 34 C.F.R. § 300.321. Generally, unless confidentiality is violated, the school must allow parent "invitees" to attend and be allowed to participate in decision-making under the IDEA. In the same vein, however, it should also be emphasized that the IEP decision-making process is a process by which the entire IEP team, with the parents and their invitees, is to attempt to reach consensus as to the components of a student's IEP and program.

Specific suggestions to consider:

a. If a pre-meeting survey/interview/parent input form is not used or the parent does not complete it, contact (or have someone contact) the parents personally to ask them to inform the school ahead of time as to who, if anyone, they intend to bring with them to the meeting, in order that the school has adequate meeting space available, etc.

b. Be sure to ascertain the identity of and the role that the invitee wishes to play and afford the invitee an appropriate level of participation.

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

c. Consider inviting the school attorney to the IEP meeting should the parents indicate that they are bringing one.

Letter to Andel, 67 IDELR 156 (OSEP 2016). While the school district must inform parents in advance of an IEP meeting as to who will be in attendance, there is no similar

requirement for the parent to inform the school district, in advance, if he/she intends to be accompanied by an individual with knowledge or special expertise regarding the child, including an attorney. "We believe in the spirit of cooperation and working together as partners in the child's education, a parent should provide advance notice to the public agency if he or she intends to bring an attorney to the IEP meeting. However, there is nothing in the IDEA or its implementing regulations that would permit the public agency to conduct the IEP meeting on the condition that the parent's attorney not participate, and to do so would interfere with the parent's right…." It would be, however, permissible for the public agency to reschedule the meeting to another date and time "if the parent agrees so long as the postponement does not result in a delay or denial of a free appropriate public education to the child."

Tip #8: Ensure that the Team Properly "Considers" Recommendations of Private/Outside Evaluators

While parents and/or their meeting "invitees" are not provided any sort of "veto power" over the decision-making process, it is important that parent input, including outside information, be "considered" in the process of developing the IEP and decision-making.

Specific suggestions to consider:

a. When parents mention that they are taking or have taken their child for a private evaluation, train school staff to ask for a copy of any evaluative report so that it can be considered in IEP development and programming for the student.

b. Any time that a parent provides a private evaluation report to the IEP team, make sure it is properly considered. If it is made available outside of the IEP process, train school personnel to immediately review the report and strongly consider convening an IEP team meeting so that its recommendations may be considered by the team.

Marc M. v. Department of Educ., 56 IDELR 9, 762 F.Supp.2d 1235 (D. Haw. 2011). Although parents of a teenager with ADHD waited until the very last moment of an IEP meeting to provide the team with a private school progress report, that was no basis for the team to disregard it. The Education Department procedurally violated the IDEA and denied FAPE when it declined to review the private report because it contained vital information about the student's present levels of academic achievement and functional performance. The document, which showed that the student had progressed in his current private school, contradicted the information placed in the IEP, but the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. Where the new IEP proposed that the student attend public school for the upcoming school year, the parents reenrolled the student in private school and sought reimbursement. Where the IDEA requires districts to consider private evaluations presented by parents in any decision with respect to the provision of FAPE, the coordinator's contention that because the document was provided at the end of the meeting, the team could not have considered and incorporated it into the new IEP is rejected. As a result of failing to consider the private report, the IEP contained inaccurate information

about the student's current levels of performance, such that these procedural errors "were sufficiently grave" to support a finding that the student was denied FAPE.

T.S. v. Ridgefield Bd. of Educ., 808 F.Supp. 926 (D. Conn. 1992). 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.

DiBuo v. Board of Educ. of Worcester Co., 309 F.3d 184 (4th 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.

Watson v. Kingston City Sch. Dist., 43 IDELR 244 (2d Cir. 2005). Lower court's ruling that district was not required to incorporate recommendations of private evaluator is upheld. In addition, district's failure to update goals and objectives from student's prior year IEP was insufficient to find a violation of IDEA, as this was a minor procedural error.

Tip #9: Keep all IEP Team Members Focused on the "I" in IEP and IDEA in all IEP Meetings

It is particularly important, as a procedural consideration, that LEA Reps keep meeting discussions on track and focused on the needs of the individual student at issue and nothing else.

Specific suggestions to consider:

a. Be prepared to appropriately rectify or redirect statements or actions taken during meetings that are not student-focused.

School team members must always respond to parental requests for services based upon what the student needs to receive educational benefit, rather than what the school district has, what it always does, or what it has never done before. For example, "it is our belief that the relevant data reflects that this is what Mary needs to make educational progress," **not** "I'm sorry, we just don't have that here," "we've never done that before for a student with autism," "my schedule won't allow for that" or "we don't have the staff to do that."

The controlling question to be used by LEA Representatives (and other team members) that forms the basis of decision-making and recommendations for services should be:

"What do the school's data tell us is needed for this student to make progress appropriate in light of his/her circumstances?"

Nothing else should be considered.

LeConte, 211 EHLR 146 (OSEP 1979). Trained personnel "without regard to the availability of services" must write the IEP.

Deal v. Hamilton Co. Bd. of Educ., 392 F.3d 840 (6th 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 the student substantive harm and 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. This policy meant that "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 need for it and success under it.

Kalliope v. New York State Dept. of Educ., 54 IDELR 253, 2010 WL 2243278 (E.D. N.Y. 2010). Where it is alleged that the New York DOE instructed IEP teams to stop placing students in 12:2:2 classes, plaintiffs may be able to establish that the State violated the IDEA's procedural protections by predetermining placement. Further, the plaintiffs alleged that the DOE directed IEP teams to deny 12:2:2 placements to students who needed them to progress. "These allegations state a plausible claim that NYSED's interference with the IEP process has hampered the progress of the individual plaintiffs' children…." Thus, this case will not be dismissed.

b. Avoid and redirect statements or program development activities that sound or look like a "one-size fits all" program is being recommended.

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

T.H. v. Board of Educ. of Palantine Comm. Consol. Sch. Dist., 30 IDELR 764 (N.D. Ill. 1999). School district must fund an ABA/DTT in-home program after ALJ determined that district recommended placement based upon availability of services and what was provided to other autistic students, not the child's individual needs.

c. Train staff to avoid mentioning availability or cost of services as a basis for denying them.

Lack of staff and/or resources are not embraced by courts and enforcement agencies as a defensible reason for the failure to provide FAPE to a student with a disability. Rather, the rationale for refusing a particular service must always be that "the school's data do not show that the student

needs those services in order to make progress" rather than "the school district could never afford or provide that!"

> *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.

> *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66, 29 IDELR 966 (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. Although costly, this is required to ensure FAPE.

Tip #10: Look out for Signs of Inappropriate IEP Goals

While the LEA Representative may not be an expert in special education content or services, the meeting's process leader can recognize clear patterns or signs that IEP goals may be inappropriate or subject to challenge. In light of the *Endrew* decision and now more than ever, it is important that annual IEP goals are appropriate and measurable in terms of demonstrating progress made toward achieving the goal. Where an IEP contains goals that are not appropriate and measurable, it will be very difficult--if not impossible--to demonstrate that a student has made appropriate progress on the goals or has been offered FAPE.

Specific suggestions to consider:

a. Encourage content experts to consider asking themselves when drafting goals, "what can this student do now and what do we reasonably expect for her to be able to do a school year from now?"

b. Encourage content people to consider when drafting goals to give considerable thought to how progress on the annual goal should and will be evaluated.

Checking "teacher observation" (or any other option) regularly or in every IEP is not appropriate. Guide content experts to think about data collection alternatives, including those that exist within a particular program that is being used (reading program, behavioral program, etc.) and what data will be needed to complete required Annual Goal Progress Reports. Every service provider should be able to articulate, if/when asked, what data they will collect and analyze when measuring and reporting student progress on IEP goals.

> *K.E. v. Independent Sch. Dist. No. 15*, 54 IDELR 215 (D. Minn. 2010). Where the student's progress reports reflected that she made meaningful educational academic progress in reading, spelling and math, her lack of progress on her IEP writing goal and the fact that she failed to achieve her behavioral goals did not nullify the progress she made in other areas. "Despite the severity of her mental illness and the changes in her medical treatment, [she] made [academic] progress, received passing grades in her classes, advanced from

grade to grade, and demonstrated growth on standardized tests." A district satisfies the requirement to provide FAPE when it offers individualized instruction and services tailored to provide the student with some educational benefit.

Jaccari v. Board of Educ. of the City of Chicago, 54 IDELR 53, 690 F.Supp.2d 687 (N.D. Ill. 2010). Where progress reports detailed student's improvement in reading, math and classroom behavior, student was not denied FAPE. This is so, even though the student's standardized test scores slipped from the kindergarten-first grade level in May 2006 to below kindergarten level February 2008, as those test scores are not dispositive. "Given his cognitive impairment and emotional disturbances, it is unclear what [the student] should be scoring on standardized tests and how much of a yearly increase in his scores should be expected." The real question is whether the student's IEPs were reasonably calculated to provide educational benefits. Clearly, they were designed to provide more than trivial progress.

c. Guide content people not to recycle IEP goals, especially those that have not proved successful for the student.

Endrew F. v. Douglas Co. Sch. Dist. RE 1, 71 IDELR 144 (D. Colo. 2018). On remand, it is found that the IEP proposed by the school district at the time the parents withdrew their child with autism from public school and placed him in a private school for students with autism was not reasonably calculated to enable him to make progress appropriate in light of his circumstances. Specifically, the IEP proposed for the fifth grade in April 2010 contained the same annual goals as those IEPs for the second, third and fourth grades, with only minor changes to the short-term objectives. In addition, the district had not conducted a functional behavioral assessment or developed a formal BIP for the student. The district's inability to develop a formal plan or properly address the student's behaviors that, in turn, negatively impacted his ability to make progress on his educational and functional goals "cuts against the reasonableness of the April 2010 IEP." While the proposed IEP may have been appropriate under the 10th Circuit's previous "merely more than de minimis" standard, under the Supreme Court's FAPE standard, the proposed IEP denied FAPE. Thus, on remand from the 10th Circuit, the administrative law judge's decision denying the request for reimbursement of private school tuition and transportation costs is reversed. [NOTE: It has been reported that the school district settled the case for $1.3 million. The case has been dismissed and is over: 69 IDELR 174 (D. Colo. 2018)].

E.S. v. Katonah-Lewisboro Sch. Dist., 55 IDELR 130 (S.D. N.Y. 2010). Parents are entitled to tuition reimbursement for private schooling where the school district basically recycled the teenaged student's last IEP and the IEP goals and objectives were not based upon the student's current levels of performance, which had improved substantially. The repetition of the goals and objectives from the prior year's IEP is "troubling" and the IEP team should have designed a new program to take into account the objectives that the student had already met, as well as the objectives that continued to be a challenge to him, rather than repeating the former IEP. Clearly, the IEP team had available the private school teachers' progress reports showing substantial improvement in reading, writing, math and

history during the past year. District erred in simply reprinting the unedited IEP from the prior year.

Damarcus S. v. District of Columbia, 67 IDELR 239, 190 F.Supp.3d 35 (D. D.C. 2016). District denied FAPE to intellectually impaired student when it failed to address the student's lack of progress through his IEPs. An IEP must be designed to produce meaningful educational benefit, but there were two major flaws in this student's IEPs. First, annual goals were repeated in a wholesale fashion across multiple IEPs, and "an alarming number of goals and objectives were simply cut-and-pasted (typos and all) from one IEP to the next." Having the same goals year after year not only caused the student anxiety and frustration but was also a sign that the IEPs needed to be revised. However, rather than raising an alarm and working to devise a new approach—such as one that accounted for the student's noted weaknesses in processing and working memory—it appears that the district persisted in following the same ineffectual path. The second flaw in the IEPs is that, despite the student's lack of progress, the IEPs dramatically decreased his monthly SLP services. It appeared that the IEP team, relying solely on the student's IQ, made that decision based on its view that the student had "plateaued," when there was evidence that the student was capable of improving his skills, according to statements of the SLP.

Tip #11: Use a "Consensus-building" Approach to Help the Team Make Decisions

As referenced previously, OSEP has referred to the IEP team decision-making process as one of working to "reach consensus" described by OSEP as a "general agreement." Clearly, no one person's opinion at the IEP team meeting "outweighs" another but, if push comes to shove, the LEA Representative, who represents the school district, has the ultimate duty, when unable to obtain that "general agreement," to set forth the proposal of the school district for the parents' consideration and ensure that the district's recommendation is based upon data that support that the proposal is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances.

Specific suggestions to consider:

a. Do not allow IEP team members, including parents, to think of the IEP process as a "voting" process.

In *Letter to Richards*, 55 IDELR 107 (OSEP 2010), the US DOE noted that IEP decisions are not to be made based upon a "majority vote." Rather, the process used by IEP team leaders is to work toward building consensus and reaching a "general agreement."

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 the IEP decision to be "taken to a vote," the court upheld the hearing officer's decision requiring a re-vote where the student's aide and therapists' votes were not counted.

b. Build small agreements on important issues and parts of the IEP during the meeting rather than waiting to reach consensus on everything at the end of it.

It is important to break an IEP meeting discussion down into small, workable conversations and gain consensus on each decision made. Gaining consensus and completing discussion on each topic before moving to the next is vital.

c. Remember that "consensus" does not necessarily mean that every team member is 100% on board. You may have to work hard to reach that "general agreement" referenced by OSEP.

As the meeting's process leader, the LEA Representative may be required to assist the team or particular members of the team in making the overall decision to "generally agree" to try a particular proposal or commit to implementing it for a period of time. Suggested phrases to use might include:

"Can you commit to implementing this plan for Johnny?"
"Can you support this IEP for Susie?"
"Can you live with trying this plan for 6 months and coming back to the table to review the data?"
"Are you willing to allow us to try these recommendations for a period of time?"

d. When placement (such as LRE or appropriate services is at issue), consider guiding the team to "negotiate the stay-put" in order to implement a "trial" placement that will not alter the "stay-put" because the parties have "otherwise agreed" to what the stay-put will be should a dispute arise.

Under IDEA, the law provides that should a legal dispute arise about which a party has requested a due process hearing, the student's placement will "stay-put" until all proceedings have concluded. For that reason, parents and school district personnel may be hesitant to agree to any changes in an IEP for fear that stay-put will keep them in place. The meeting's process leader should consider "negotiating" the stay-put by encouraging the parties to agree to what the "stay-put" placement will be should a future dispute arise and a hearing is initiated.

e. When consensus just cannot be reached, appropriately summarize the district's proposal and bring the meeting to closure.

Notwithstanding the use of a process leadership approach to an IEP meeting, it is sometimes the case that an LEA Rep will not be able to guide a team to consensus. At that point, the LEA Rep will need to ensure that appropriate summarization of the meeting occurs and that the meeting is brought to closure in an appropriate fashion.

After summarizing the recommendations of the school district for providing FAPE to the student at issue, an appropriate closing statement should be made by the LEA Representative. For example:

"I'm sorry that we were not able to reach a general agreement on this and we are going to have to agree to disagree. Please understand that we believe that what we are proposing will enable Michael to make appropriate progress."

An example of how ***not*** to end a meeting occurred in the following case:

> *R.L. v. Miami-Dade Co. Sch. Bd.*, 63 IDELR 182, 757 F.3d 1173 (11th Cir. 2014). To avoid a finding of predetermination of placement, a school district must show that it came to the IEP meeting with an open mind and that it was "receptive and responsive" to the parents' position at all stages. While some district team members seemed ready to discuss a small setting within the public high school as requested by the parents, the LEA Representative running the meeting "cut this conversation short" and told the parents that they would have to pursue mediation if they disagreed with the district's placement offer at the Senior High School. "This absolute dismissal of the parents' views falls short of what the IDEA demands from states charged with educating children with special needs."

Tip #12: Use an Action Plan or Meeting Minutes to Document Agreements Made Regarding Things "To Do" After the IEP Meeting

Even the best IEP process and content will not save the day if an IEP is not implemented or agreements to do things after the meeting are not honored!

Specific suggestions to consider:

a. If the parent has a complaint or concern about something unrelated to the IEP meeting discussions, include addressing it after the meeting on the Action Plan.

Like the "parking lot," the creation of and later use of an IEP meeting "action plan" or "to do" list can summarize agreements made at IEP meetings to do things after the meeting. For instance, if the parent has a complaint about an issue with a particular teacher, an "action plan" item could include scheduling a time for the parent to meet at some other time with the school principal to discuss that issue. In addition, an "action plan" can acknowledge and serve as a reminder for actions that were agreed to at the meeting but not necessarily deemed to be necessary for FAPE—i.e., discussing a concern with someone who is not a member of the meeting or checking into something for the parent or other team member. This lets the parent or other concerned person know that the issue will be addressed and has not been ignored.

b. Be sure to include tying up "loose ends" or a list of "things to do" to ensure implementation of the IEP after the meeting.

One of OSEP's stated responsibilities of the LEA Representative is to ensure implementation of an IEP. Thus, an Action Plan may also include "things to do" to ensure the implementation of the IEP, such as contacting the transportation department about a transportation issue or specifically informing all service providers of their duties related to implementation of the IEP if they were not present at the IEP team meeting. Clearly, IDEA regulations require districts to ensure that each regular teacher, special education teacher, related service 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. 34 CFR § 300.323(d).

It would also be appropriate for the Action Plan to include the development of a specific plan and schedule for the LEA Rep and service providers to share data regarding IEP implementation and student progress (or lack thereof) in preparation for progress reporting and IEP meetings.

c. Train team members to understand the potential for liability if an IEP is not implemented.

Particularly noticeable in the last several years have been cases brought where parents are seeking money damages under Section 504/ADA for the failure on the part of school personnel to implement educational plans, such as IEPs, 504 Plans and Behavioral Intervention Plans. Courts are entertaining the possibility of such relief.

> *Doe v. Withers*, 20 IDELR 422 (W. Va. Cir. Ct. 1993). A jury returned a verdict in favor of the parents of a student with a learning disability against a regular education high school American History teacher for $5,000.00 in compensatory damages and $10,000.00 in punitive damages. The jury found that the teacher intentionally refused to provide the student with oral testing as required by IEP.
>
> *Beam v. Western Wayne Sch. Dist.*, 73 IDELR 147 (M.D. Pa. 2018). Because the district was aware of a student's suicidal thoughts and their connection to his academic difficulties, the district may have acted with deliberate indifference when it failed to inform the parent of the student's failing grades in accordance with his 504 Plan. Thus, the parent's case will proceed under Section 504/ADA, based upon the student's suicide and the district's failure to implement his 504 Plan. In cases where a parent is seeking compensatory damages for 504/ADA alleged violations, the parent must show that the district discriminated against the student intentionally or acted with deliberate indifference. Here, the district repeatedly failed to provide the student with appropriate services and communicate with the parent regarding the student's deteriorating grades. In addition, the evidence shows that at the student's 504 meeting, the parent informed the district that the student had suicidal ideations and that those thoughts concerned his failing grades. She also reported that she never received email notifications about the student's academic issues, even though such communication was required by the student's 504 Plan. Though the district revised the Plan to include additional services, including locker checks, acceptance of late assignments and bimonthly progress reports, the student ultimately failed three courses and killed himself on the last day of the school year. However, the parent never received any communication from the teachers about his failing grades, except for standard-form report cards and failure notices mailed home at the end of each marking period. Because there is a genuine dispute as to whether the district acted with deliberate indifference, the district's motion for summary judgment is denied and the parent's claims will go to a jury.

Whooley v. Tamalpais Union High Sch. Dist., 74 IDELR 258 (N.D. Cal. 2019). Parent is allowed to pursue her negligence claim against the district based upon its alleged failure to implement her high achieving teenager's 504 Plan and to claim that the implementation failure caused the student to commit suicide. The district could be liable for the student's death if its alleged negligence caused the student to suffer an "uncontrollable impulse" to take his life and if the district's prolonged failure to implement the student's 504 Plan caused the student to suffer from a mental condition that prevented him from controlling his suicidal impulses. The parent's complaint alleges that the repeated negligence of the district's employees in accommodating the student's learning disability, anxiety and medical condition caused him extreme anxiety and mental harm and it can be "reasonably inferred" that this anxiety and mental anguish created an uncontrollable impulse to commit suicide. The parent's claim that the student's academic-related stress increased significantly after the district failed to ensure that he received agreed-upon accommodations for Advanced Placement and college entrance exams may proceed.

B.D. v. Fairfax Co. Sch. Bd., 73 IDELR 261 (E.D. Va. 2019). The district's motion to dismiss the parents' 504/ADA claims for disability discrimination is denied at this early stage of the litigation. The student's sudden academic deterioration indicates that the district could have acted in bad faith when it allegedly denied FAPE to the 18-year-old high school student. Here, the parent must show that the district acted in bad faith or with gross misjudgment and, based upon the parent's allegations, a reasonable juror could conclude that the district discriminated against the student. This is based upon the allegation that the student's teachers denied him appropriate services when they disagreed with and ignored the goals and services in the student's IEP and instead chose to work on other goals and allowed him to watch videos on YouTube during instructional time. In addition, when the student's academic performance deteriorated, the district began to propose new IEPs that did not require as much rigor. Further, the district removed the student from general education classes without parent consent and prevented him from taking courses that were required for graduation, even though his IEP team determined that he was on track to graduate with a regular high school diploma. Because it appears that the district may have intentionally failed to implement the student's IEP appropriately, the motion to dismiss 504/ADA claims is denied.

Piotrowski v. Rocky Point Union Free Sch. Dist., 76 IDELR 209 (E.D. N.Y. 2020). District's failure to distribute the IEP for a teenager with Type I diabetes could support the parent's claim for money damages under Section 504/ADA. Not only did the parent claim that the district failed to accommodate the student's diabetes, but she also alleged that administrators acted in bad faith or with gross misjudgment when the student was repeatedly punished for using his cell phone in class to check glucose levels and going to the nurse's office to do the same. In addition, the parent alleged that administrators were aware of the student's disability-related accommodations, despite the district's failure to provide his high school with a copy of his IEP. Finally, because the parent is not seeking relief for a denial of FAPE, she is not required to first exhaust administrative remedies before bringing 504/ADA claims in federal court.

R.D. v. Lake Washington Sch. Dist., 78 IDELR 61 (9th Cir. 2021) (unpublished). The lower court's granting of summary judgment on the parents' ADA/504 disability discrimination claims is reversed where issues of material fact remain and recess is considered a part of FAPE for this student with a medical condition. A plaintiff bringing a lawsuit under ADA/504 must show 1) she is a qualified individual with a disability; 2) she was denied a reasonable accommodation that she needs in order to enjoy meaningful access to the benefits of public services; and 3) the program providing the benefit receives federal financial assistance. Here, plaintiff must show that the school denied her services that she needed to enjoy meaningful access to the benefits of public education and that were available as reasonable accommodations or by showing that the program denied her meaningful access to public education through another means, such as by violating a 504 regulation. Here, the student's 504 Plan provided, among other things, that she was to stay inside, due to her medical condition, when it is damp or raining and when the high temperature of the day is below 60 degrees. In addition, the Plan provides that she should have adult-supervised inside recess that includes a variety of activities, including gross motor. However, it is alleged that gross motor activities were not provided. The parents have offered evidence that recess is a part of FAPE and includes gross motor activity and supervision and there are disputes over whether the student was supervised to ensure she stayed inside when it was unsafe for her to be outside and whether she was provided gross motor activities when inside. As to the damages claims, the plaintiff has established the potential for deliberate indifference on the part of the district, based upon the school's knowledge that she needed the accommodations, especially where the 504 Plan explicitly provided for them.

S.C. v. Round Rock Indep. Sch. Dist., 78 IDELR 40 (W.D. Tex. 2021). School district's motion for judgment in its favor on the parents' 504/ADA discrimination claims on behalf of their daughter with Anorexia Nervosa is denied. Since the parents are seeking money damages, they must show that the district intentionally discriminated against the student on the basis of her disability, and they can meet that requirement by demonstrating that the district refused to provide the student with reasonable accommodations. The journalism teacher's sworn affidavit could support a finding of intentional discrimination, where it indicates that the teacher was a member of the student's 504 team and was well aware of its provision barring staff members from discussing dieting, body image or related topics in the student's presence. Despite the plan's provision, the teacher stated that when yearbook editors asked if she knew anyone with an eating disorder, she approached the student about being interviewed and photographed for a yearbook story and did not ask her parents for permission to do so. This clearly creates an issue of fact as to whether the teacher intentionally discriminated against the student by knowingly denying the accommodations set out in her 504 plan. As noted in a previous order, the district is liable for any discriminatory actions of its employees.

Suggested Components to Include in IEP Meeting Training Sessions for LEA Representatives

Julie J. Weatherly, Esq.
Resolutions in Special Education, Inc. (RISE, Inc.)

No one should be assigned to serve as an LEA Representative ("LEA Rep") at an IEP meeting without sufficient knowledge and training regarding his/her role and responsibilities as the LEA Rep, and there are essential legal and process leadership concepts applicable to IEP meetings about which every LEA Rep should be aware. Below is an outline of the LEArn & LEAd program's suggested LEA Rep training components that should be considered when developing and providing this preparatory training. [1]

IEP Meetings: Legal Framework Training Suggestions

- The overall legal standard for the provision of FAPE (*Rowley* and *Endrew* decisions);
- The "process/content" legal standard for determining the appropriateness of an IEP and the importance of distinguishing between process and content legal concerns;
- The legal significance of the procedural aspects of an IEP meeting;
- The law's requirements applicable to serving as an LEA Representative:
    - Legal criteria (federal and state qualifications and other requirements) for who can serve as the LEA Rep
    - Any additional local practices/requirements for who can serve;
- The law's requirements related to IEP meeting processes:
    - Appropriate IEP meeting preparatory activities and processes
    - Process of scheduling IEP meetings
    - Meeting Notice of/Invitation to parents and all processes related thereto
    - Other mandatory school team members, their roles and responsibilities and ensuring their attendance and participation and/or their excusal from the meeting (if necessary)
    - Discretionary/other parent-invited participants, their roles and responsibilities and ensuring appropriate participation;

[1] LEArn & LEAd is a one-day professional development training program offered by RISE, Inc. that was developed in 2014 specifically for LEA Representatives, including school building principals and their designees. The purpose of this training is to increase the legal and practical knowledge of LEA Representatives in the legal and process leadership frameworks that apply to IEP meetings and to increase their knowledge, confidence and skills as LEA Reps overall. For further information, visit www.specialresolutions.com.

- IEP development processes and "FAPE-fatal" procedural violations:

    - Avoiding and addressing issues of "predetermination of placement" (in other words, the failure to provide parents sufficient opportunity to participate in the IEP team decision-making process);
    - Avoiding or redirecting failure to focus on student's individual needs in the IEP development process;

- Defining consensus and required processes when consensus cannot be reached

IEP Meetings: Process Leadership Framework Training Suggestions

- The importance of the LEA Representative's use of an overall Process Leadership Framework as the IEP meeting's "process leader" or facilitator;
- Development of an effective team through well-defined roles and responsibilities and the implementation of effective IEP team characteristics;
- Development of IEP meeting preparatory aids and strategies, including:

    - Meeting preparatory checklists or "to-do" lists;
    - Defining effective member "roles and responsibilities;"
    - Brainstorming aids to identify potential issues, positions, concerns and to identify options for team consideration;
    - Preparation of visual aids to be used during meetings (proposed Agenda; proposed/finalized meeting Norms/Standards; student data; parking lot; action plan, etc.)

- The use of visual communication and organizational aids during IEP meetings and the processes for using them (Agenda, Norms/Standards, student data, etc.);

- Avoiding/preventing and managing conflict through the use of appropriate communication strategies and aids at IEP meetings:

    - The importance of nonverbal communication – gestures, body language, etc.
    - Identifying and using appropriate communication strategies;

- Strategies and steps for effective IEP team consensus-building and decision-making;

- Action planning processes and ensuring IEP implementation after the meeting;

- Demonstration of the use of the aids and strategies that can lead to an efficient, organized IEP meeting process (via a previously-recorded video, vignettes, etc.)

Training Evaluation/Data Summaries

It is also important to obtain evaluative information and data from trainees regarding their view of the effectiveness of the training and any suggestions they may have for improvement (e.g., pre- and post-training surveys measuring knowledge and skills before and after the training; overall evaluations and input from participants; etc.)