FAPE DILEMMA:
COURSE OFFERINGS, SCHEDULES AND OTHER THINGS VERSUS STUDENT NEEDS

June 25-26, 2014

Wyoming Department of Education
Leadership Symposium

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Obviously, the "I" in IEP and IDEA requires that recommendations for special education services and the delivery of FAPE be made by a properly constituted IEP team and be based upon a disabled student's **individual** educational needs, not necessarily course offerings, schedules, services available or "other things." Oftentimes, however, there are these "other things" that may be serving as the driving force behind services that are actually recommended and/or provided to a student with a disability. This session will explore those "other things" and provide educators with some cautionary examples of when such things can lead to special education legal trouble.

I. INTRODUCTION: IMPORTANT IDEA PROVISIONS AND THE "PROCESS AND CONTENT STANDARD" FOR DETERMINING FAPE GENERALLY

A. Relevant IDEA Provisions

1. The definition of FAPE

The IDEA regulations define "free appropriate public education" as special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the SEA; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with an individualized education program (IEP) that meets the IDEA's requirements. 34 C.F.R. § 300.17.

2. The definition of "special education"

The term "special education" is defined, in relevant part, as "specially designed instruction, at no cost to the parents, **to meet the unique needs** of a child with a disability…." 34 C.F.R. § 300.39.

3. The definition of "specially designed instruction"

"Specially designed instruction" means adapting, **as appropriate to the needs** of an eligible child, the content, methodology, or delivery of instruction (a) to address the unique needs of the child that result from the child's disability; and (b) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. § 300.39(b)(3).

B. The "Process and Content Standard" for Determining FAPE

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

Based upon the twofold inquiry in Rowley, some courts and due process hearing officers have found a denial of FAPE based solely on prong one's process or procedural errors. Placement mistakes generally fall within this analysis as errors in process and, therefore, should be avoided as much as possible.

Fortunately, not every procedural mistake constitutes a denial of FAPE, and some placement mistakes are worse than others. Because procedural violations are sometimes unavoidable, the IDEA and its regulations specifically address the impact of procedural violations as follows:

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

See, 34 C.F.R. § 300.513. Many placement mistakes can be (and have been) found to have impeded the parents' opportunity to participate in the decision-making process, constituting a denial of FAPE in and of themselves. Obviously, great care should be taken to avoid all placement and procedural mistakes, but extra care and staff training should occur in order to decrease the chance that fatal placement errors occur. Many of the examples given below are procedural in nature.

In terms of IEP content, Rowley also established the "some" or "meaningful educational benefit" standard. Maximization of potential is not required; nor is the "best possible" or "best" education required. An education that is individually designed to provide the student some or meaningful educational benefit is required. Some of the examples given below are content-oriented or substantive in nature, based upon the *Rowley* "process-content" standard.

II. EXAMPLES OF THOSE "OTHER THINGS" THAT SHOULD NEVER BE THE BASIS FOR ACTION TAKEN OR RECOMMENDATIONS MADE

When decisions are made about the educational services or program implementation for a student with a disability, they must be made by an appropriate IEP Team and must be based upon the individual educational needs of the student **and nothing else.** When services or other IEP provisions are based upon anything other than the individual needs of a student, legal trouble may be imminent.

A. "But that's what the school folks decided at our meeting yesterday!"

Decisions about a disabled student's educational needs outside of the IEP team process can constitute what courts refer to as a "predetermination of placement," which will likely lead to a finding of a denial of FAPE in and of itself. Courts and hearing officers have referred to a "predetermination of placement" as a fatal procedural error under the IDEA, pointing out that sufficient opportunity for parental participation in educational decision-making and proper consideration of a student's individual needs is a fundamental right under the Act.

Spielberg v. Henrico County, 441 IDELR 178, 853 F.2d 256 (4th Cir. 1988). Placement determined prior to the development of the child's IEP and without parental input was a *per se* violation of the Act and sufficient to constitute a denial of FAPE in and of itself.

N.L. v. Knox County Schools, 38 IDELR 62, 315 F.3d 688 (6th Cir. 2003) The placement process and 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 County Sch. Bd., 19 IDELR 259, 806 F. Supp. 1253 (E.D. Va. 1992). School officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind.

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).

Sand v. Milwaukee Pub. Schs., 46 IDELR 161 (E.D. Wis. 2006). The IDEA does not bar professionals from preparing for an IEP meeting and the fact that IEP team members spoke in preparation for the meeting did not deny the parents meaningful participation in the process.

B. "We've already drafted the IEP and here it is. Could you go ahead and sign it for us?"

Presenting an IEP as if it is final before the appropriate team has properly identified and addressed the needs of the child could appear to be a "predetermination of placement." It all depends upon how a draft is presented.

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.

Hudson v. Wilson, 558 EHLR 186 (W.D. Va. 1986). School district that designed proposal for IEP before meeting with student's mother and grandmother, but provided extensive involvement for both at subsequent IEP meeting, met statutory requirements for IEP development set forth in the Act.

Letter to Helmuth, 16 EHLR 503 (OSEP 1990). Prior to an IEP meeting, district may prepare a draft IEP, which does not include all of the required components, but such a document may be used only for purposes of discussion and may not be represented as a completed IEP.

Regulatory commentary from the U.S. DOE in 2006: A few commenters to the proposed regulations recommended that the final regulations should require that parents receive draft IEPs prior to the IEP meeting. The US DOE responded that:

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

71 Fed. Reg. 46678.

C. <u>"But our IEP software program won't let us consider that option for services. It's not in the drop-down box!"</u>

Restricting options for services or recommendations based upon what the "drop box" provides could signal that an IEP team is not addressing the individual needs of the student.

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.

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.

D. <u>"He might need that, but the Special Education Director already told us that we can't offer it."</u>

The IEP Team determines the needs and appropriate services – not the special education director, not the school board, not the superintendent, not the school psychologist and not the principal. Only an IEP Team makes recommendations regarding what the student needs to receive FAPE.

E. <u>"It is so good to have everyone here at the meeting today. Before we get started, I want to explain that we are here to develop an IEP for Susie to attend the special day class for ED students."</u>

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 had properly found that the district determined the student's placement prior to the meeting and without regard to consideration of her needs.

F. **"But the Parent wouldn't agree to what we proposed, so we did what they wanted, even though we knew those services didn't meet his needs."**

Providing services based upon what the parent wants, rather than the actual needs of the child, is the classic example of "no good deed goes unpunished."

A.E. v. Westport Bd. of Educ., 46 IDELR 277 (D. Conn. 2006). Nothing in IDEA requires the parents' consent to finalize an IEP. Instead, IDEA only requires that parents have an opportunity to participate in the drafting process. In addition, the parents participated extensively in the placement, attending all IEP meetings and being represented by a qualified parent advocate. They submitted letters, recommendations and proposed IEPs. It is important to note that, aside from the proposed placement in the district's chosen program, the parents' proposed IEP was substantially similar to the IEP that was revised and many of the parents' suggestions were adopted. As the hearing officer pointed out regarding predetermination of placement, there is a difference between being "open-minded" and "blank-minded." While a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement.

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

G. "**Our evaluation results seem to indicate characteristics of autism. But, if we bring that up at the meeting, the parents will be furious."**

As part of the requirement to ensure adequate parental participation in placement decisions and ensuring that a team addresses all educational needs of a child, sharing all relevant evaluative and other educational data is important. The failure to do so could be considered a procedural violation sufficient to amount to a denial of FAPE. Determining the needs is based, in part, upon proper consideration of all evaluative information.

Amanda J. v. Clark County Sch. Dist., 35 IDELR 65, 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.

H. "I didn't do an evaluation of his behavior, because his suspected disability is a learning disability!"

The IDEA regulations specifically provide that with respect to evaluations, they must be "sufficiently comprehensive to identify all of the child's special education and related service **needs**, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. § 300.304(b)(6).

D.B. v. Bedford County Sch. Bd., 54 IDELR 190 (W.D. Va. 2010). Student with ADHD and found eligible for services as OHI was denied FAPE where district did not properly consider and evaluate for possible SLD. Despite the fact that the evidence strongly suggested the student was SLD, the IEP team failed to assess for SLD or even discuss SLD. In addition and contrary to the hearing officer's finding, the student's services might well have changed had he been fully evaluated in *all areas of suspected disability*. "Although the [hearing officer] observed that [student] was promoted a grade every year…this token advancement documents, at best, a sad case of social promotion" where, after four years, the student is unable to read near grade level. Thus, the parents are entitled to reimbursement for private schooling.

Compton Unified Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010). Where student displayed violent and disruptive behaviors and his grandparents requested a functional analysis assessment (FAA), FAPE was denied when the district failed to assess the 6-year-old in all areas of suspected disability. While the school psychologist completed an initial psychoeducational assessment, the district's failure to conduct an FAA prevented the IEP team from developing an appropriate IEP and making an offer of placement that provided FAPE. An FAA would have enabled the Team to consider strategies to address the behavioral issues that impeded the student's learning.

I. "But he is not autistic, so he can't get those services."

While a "label" may be important for determining eligibility for services generally, the label does not automatically dictate needs or drive placement decisions! As a matter of law, the needs of the student are what matters and those are to be determined and served, notwithstanding what the student's disability label may be.

Torda v. Fairfax Co. Sch. Bd., 61 IDELR 4 (4th Cir. 2013) (unpublished). The district did not deny FAPE to a teenager with Down syndrome based on its failure to list auditory processing disorder as his secondary disability in his IEP. This is so, because the IEP addressed all of the student's needs, regardless of his classifications. Teachers gave detailed testimony on how they simplified lessons, paired visual material with oral instruction and checked for comprehension. Thus, there is no reason to disturb the district court's decision that the student received FAPE.

G.I. v. Lewisville Indep. Sch. Dist., 61 IDELR 298 (E.D. Pa. 2013) (unpublished). Although the district did not label the autistic student with ADHD, the 6th grader with autism still received FAPE. The district's program addressed the child's difficulty of

staying on task and paying attention through a variety of accommodations and by placing him in a 1:1 setting for instruction of new material and a 1:2 setting for reteaching. Given that the IEP was tailored to address the needs of the student, the absence of the ADHD label did not constitute a denial of FAPE.

R.C. v. Keller Indep. Sch. Dist., 61 IDELR 221 (N.D. Tex. 2013). Where the district developed IEPs that addressed all of the ED student's disability-related needs, regardless of whether the student met the criteria for autism or not, a violation of IDEA did not occur. The IDEA does not confer a specific right to be classified under a particular disability category. "The fact that [student] believes he was mislabeled does not automatically mean that he was denied FAPE." Although the parent argued that an "autism" label would have meant that the student was entitled to receive additional services under Texas law, the district provided most of those services.

J.D. v. Crown Point Sch. Corp., 58 IDELR 125 (N.D. Ind. 2012). Deaf student's receipt of FAPE was not contingent on his disability label. Rather, his IEP addressed his unique needs and conferred meaningful educational benefit, even though the IEPs did not contemplate whether the student also was SLD. Failing to properly label a student's disability in his IEP will not deprive him of FAPE, as long as the student receives an appropriate education, his parents receive an opportunity to participate in the IEP process, and he is not deprived of educational benefits. Here, the district received extensive notice of the student's cognitive deficits from his teachers and parents, which served to ensure that the district crafted IEPs that were tailored to address those deficits. In addition, records showed that in response to teacher and parent concerns, the district developed IEP goals and appropriate benchmarks and provided services geared toward increasing the student's reading fluency. Though the district ultimately determined that the student was not eligible as SLD, it increased the special education services he received when the parents provided private evaluation results indicating that the student was dyslexic. Importantly, the student made steady progress with reading pursuant to the district's attention to his cognitive deficiencies. In addition, the increase in his standardized test scores from second to fourth grade proved that his IEPs likely conferred meaningful benefit.

Fort Osage R-1 Sch. Dist., 56 IDELR 282, 641 F.3d 996 (8th Cir. 2011). Where the IEP addressed the unique needs of the 10-year-old student, the fact that it did not mention "autism" specifically did not invalidate it. An IEP should not be based upon a student's disability classification. Rather, it should be based upon the student's unique disability-related needs. As such, a parent alleging misclassification must show that the district's failure to properly identify the student's disability resulted in a loss of educational opportunity, and the parents failed to meet this standard. Even if the student did have autism, there was no evidence that the IEP's failure to specify autism as the disability denied FAPE. Clearly, the thirty-one page IEP and accompanying two-page behavior plan detailed the student's educational status, set meaningful goals, and provided a "tremendous" amount of resources to assist the student. Clearly, a change in the student's classification would not have resulted in a material change to the content of the IEP.

J. "So, we now have three program options that we have offered. Can't you just pick one that you think is best for your child?"

An IEP team must determine the needs of the child and offer a specific program to meet those needs. Having too many offers on the table could signal that the student's needs are not being considered and may not provide the clarity that a parent needs to make an informed decision.

Glendale Unified Sch. Dist. v. Almasi, 33 IDELR 221, 122 F.Supp.2d 1093 (C.D. Cal. 2000). Where district offered four possible placements to student, three of which were district programs and one was continued placement at private school at parents' expense, offer of several placements was a procedural violation that denied FAPE. District must make a formal, specific offer of placement.

K. <u>"We know that he needs that, but I'll be honest. We just don't have that here."</u>

Whether a particular service is available within a district is not the relevant consideration. If it is determined that a student needs a particular service in order to receive meaningful educational benefit, it must be included in the child's IEP and provided.

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

Deal v. Hamilton County Bd. of Educ., 43 IDELR 109, 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 student substantive harm and therefore denied him FAPE. It appeared that district had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant "school system personnel thus did not have open minds and were not willing to consider the provision of such a program," despite the student's demonstrated success under it.

L. <u>"Our preschool program for kiddos with disabilities is provided for four days a week from 9 to 12, Monday through Thursday."</u>

Recommendations that appear to be based upon "blanket policy" versus the needs of the student are dangerous under the IDEA. Clearly, they signal that recommendations are being made based upon district policy or practice, rather than the unique educational needs of the student at issue.

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.

M. "But that's what we always recommend for autistic students in our school."

Again, "cookie cutter" recommendations signal that the district has not considered the individual needs of the student.

T.H. v. Board of Educ. of Palantine Community Consolidated Sch. Dist., 30 IDELR 764 (N.D. Ill. 1999). School district required to fund an ABA/DTT in-home program after ALJ determined that district recommended placement based upon availability of services, not the child's needs.

N. "We've never provided that before and we're not starting now."

Ditto.

O. "But bus scheduling issues require us to dismiss the special education classes a little early in the afternoon."

Here we are talking about the needs of the transportation department; not the individual needs of the students.

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

P. "My schedule won't allow me to see her for speech three times per week!"

Now whose needs are we talking about? While the schedules of service providers are important, the district must still determine how to work within such schedules and, at the same time, meet the needs of the student so that meaningful educational benefit is provided.

Q. "The child's services will change when the school schedule is finalized."

Did the student's needs change? Or is it the school schedule that changed? In such situations, IEP teams must convene to determine whether a service change due to a change in school schedule still meets the needs of an affected student and affords that

student FAPE. If changes to the IEP are needed to reflect was services are actually being provided, that must also be done.

R. "He decided he didn't like P.E., so we let him go to the Art class instead."

Depending upon whether the services or goals in an IEP are linked to a particular course (and, thus, the needs of the child), IEP teams may be required to meet to reflect the change in needs and the change in services/course, etc.

In re: Student with a Disability, 110 LRP 54899 (SEA WY 2010). The Wyoming State Department found a violation of the IDEA when it allowed a student with a cognitive disability to transfer from PE to art without first notifying his parents or holding an IEP team meeting. The district's failure to consider the impact of the transfer on the student's ability to achieve his IEP goals deprived him of FAPE. The IDEA requires districts to give prior written notice to parents any time they propose to change the educational placement of a student with a disability. Although students generally have the option of which elective class to enroll in, electives are not interchangeable where a student's IEP goals are tied to his attendance in a particular course. Here, the student's IEP called for the provision of regular physical education, which corresponded to a goal that the student would maintain gross motor skills. At a minimum, the IEP team should have determined how the student's gross motor needs would be met without P.E. class, or if any supplementary aids and services could have been provided to the student in order to be successful in P.E. class.

S. "That's just too expensive. Sorry."

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

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., 29 IDELR 966, 526 U.S. 66 (1999). Twelve year-old student who was quadriplegic after a motorcycle accident is entitled to one-to-one nursing care to perform urinary bladder catheterization, tracheotomy suctioning, ventilator setting checks, ambu bag administrations, blood pressure monitoring, observations to determine respiratory distress or autonomic hyperreflexia and disimpation in the event of autonomic hyperreflexia as a related service, because the services of a physician were not necessary. Cost is not the driving factor.

T. "But the doctor has written here on the prescription pad that he has ADHD and ODD and needs special education services."

Again, only an IEP team can determine what a student's unique needs require and recommend services based upon those needs. Just because "the doctor says so," does not

make it so. However, it *is* important (and required) that an IEP team "consider" the recommendations of outside service providers, including doctors, as part of its decision-making. It is also important to note that DSM-5 diagnoses do not determine the educational needs of a child.

Marshall Joint Sch. Dist. No. 2 v. Brian and Traci D., 54 IDELR 307 (7th Cir. 2010). Where the ALJ's decision that the student continued to be eligible for special education under the IDEA focused solely on the student's need for adapted PE, the district court's decision affirming it is reversed. The ALJ's finding that the student's educational performance *could* be affected if he experienced pain or fatigue at school is "an incorrect formulation of the [eligibility] test." "It is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does.*" The evidence showed that the student's physician based her opinion that he needed adapted PE on information entirely from his mother and upon an evaluation that lasted only 15 minutes with no testing or observation of the student's actual performance. In contrast, the student's PE teacher testified that he successfully participated in PE with modifications. "A physician cannot simply prescribe special education; rather, the [IDEA] dictates a full review by an IEP team" and while the team was required to consider the physician's opinion, it was not required to defer to her view as to whether the student needed special education. Further, the student's need for PT and OT did not make him eligible for special education under the IDEA, as those services do not amount to specialized instruction.

S. v. Wissahickon Sch. Dist., 50 IDELR 216 (E.D. Pa. 2008). Although the student was diagnosed with ADHD in the second grade, he earned As and Bs throughout elementary school. Though his grades slipped when he entered middle school, his teachers testified that he was attentive in class and performed well on quizzes and tests and that his poor performance stemmed from a lack of motivation rather than ADHD. Importantly, the court observed that the district devised strategies to help the student, which included the use of progress reports, an agenda book, and parent conferences.

Strock v. Independent Sch. Dist. No. 281, 49 IDELR 273, 2008 WL 782346 (D. Minn. 2008). The mere existence of ADHD does not demand special education services. When the student actually completed required work, he received average or above-average grades. "Children having ADHD who graduate with no special education or any §504 accommodation are commonplace." The fact that the student was required to take remedial courses when beginning at the community college is "neither unusual or evidence of 'unsuccessful transition,' an entirely undefined term."

Brendan K. v. Easton Area Sch. Dist., 47 IDELR 249, 2007 WL 1160377 (E.D. Pa. 2007). Evidence supports determination that student diagnosed with, among other things, ADHD is not eligible for special education services. Rather, "[t]eenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance

would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education."

P.R. v. Woodmore Local Sch. Dist., 46 IDELR 134 (N.D. Ohio 2006). Student diagnosed with ADHD is not eligible as a student with a disability or OHI under IDEA. Student's doctor based her conclusions that student was OHI on the mother's observations and never interviewed any of the student's teachers, the student's guidance counselor, or any of the school's special education personnel. District personnel's determination that his difficulties in school were no different than those of many boys in their junior year of high school is upheld.

U. "Well, the doctor says she is medically unable to come to school and needs homebound services. Who are we to question that?"

Whether a student with a disability needs homebound services is also a team decision; not a doctor's decision. A home placement is the most restrictive environment on the continuum and must be considered carefully. Additional evaluations or other services may be required to determine the need for homebound for FAPE purposes.

A.K. v. Gwinnett Co. Sch. Dist., 62 IDELR 253 (11th Cir. 2014). While home instruction is an available placement on the continuum of alternative placements, it is not the LRE for this 11 year-old autistic student. Her strict diet was not prescribed by a medical doctor, she does not have a life-threatening condition, and she is not under the regular care of a medical doctor. Further, the parents did not show that the district was unable to provide the nutritional supplements to the student during the school day. Thus, the LRE for her is the public school SDC where should would have opportunities to interact with peers and to develop social skills.

Bellingham Pub. Schs., 41 IDELR 74 (SEA Mass. 2004). Home tutoring is not appropriate for multiply-disabled high school student. The district has the obligation to provide educational services to the student in the LRE and there is not sufficient evidence to demonstrate the student was in need of homebound services. On the physician's statement in support of homebound services, the physician listed the diagnoses and stated that the student could return to school when he achieved grade-level work, but did not explain how the student's diagnoses affected his ability to "leave the home and receive educational services at a school." Thus, the letter is not sufficient to support home tutoring. In addition, the student socialized outside the home and, obviously, was not confined to his home. Further, homebound tutoring would not facilitate the student's need for a structured, supervised and discipline learning environment where he could work on learning better pragmatic language skills. If the student attended school, his IEP services would likely result in "meaningful and effective progress," but the district should evaluate the student for possible additional counseling services and propose an appropriate placement.

V. "If he's too sick to come to school, he's too sick to go to the prom."

The IDEA regulations require that districts, in providing or arranging for the provision of nonacademic and extracurricular services and activities, must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. 34 C.F.R. § 300.117. Thus, IEP teams need to make individualized decisions, based upon the needs of the student, about participation in nonacademic and extracurricular activities too!

Mowery v. Logan Co. Bd. of Educ., 58 IDELR 192 (S.D. W.Va. 2012). Homebound high school student with a hereditary metabolic disorder stated valid claims for disability discrimination and disparate treatment under Section 1983, 504 and ADA based upon the district's refusal to allow him to attend a senior class dance and other events because he was "too sick" to attend school. Based upon the allegation that he was often told, "if you're too sick to come to school, you're too sick to attend these events," it appeared that the district treated him differently than other high schoolers on the basis of disability. In addition, student's claims dating back to his freshman year may proceed, because the student's alleged exclusion from senior class events could be viewed as part of a pattern of exclusion for discrimination and Section 1983 purposes.

W. "We moved her to the special education class because it's safer for her there. These middle school bullies are mean to her."

The U.S. Department of Education has recently indicated that where a child with a disability is subjected to bullying, the child's IEP team should consider whether the bullying is impacting on the student's needs or ability to receive FAPE. OSEP has cautioned that moving the child to a more restrictive environment may not meet the student's needs and may be a violation of the IDEA for that child.

Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013). Consistent with prior DCL's published by the Department, bullying of a student with a disability that results in the student's failure to receive meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied. Whether or not the bullying is related to the student's disability, any bullying of a student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA. Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his/her IEP, and the school should, as part of its appropriate response to bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If this is the case, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's needs and revise the IEP accordingly. The Team should exercise caution, however, when considering a change of placement or

location of services and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. Certain changes to the educational program (e.g., placement in a more restrictive "protected" setting to avoid bullying) may constitute a denial or the IDEA's requirement to provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. In addition, if the bully is a student with a disability, the IEP Team should review that student's IEP to determine if additional supports and services are needed to address the bullying behavior. (Attached to this DCL is an enclosure entitled "Effective Evidence-based Practices for Preventing and Addressing Bullying").

South Bend Comm. Sch. Corp., 114 LRP 646 (SEA Ind. 2013). Indiana DOE finds district must take corrective action because student's IEP team failed to consider the special education and related services a middle school student might need in light of ongoing verbal and physical bullying. While the district developed an anti-bullying plan that identified employees the student could talk to when he felt bullied and required staff members to speak to the bullies, the student's IEP team failed to address the unique ways in which the bullying affected the student academically, socially, and psychologically. Despite a private psychologist's report that the student's anxiety and off-task behaviors were related to the bullying and despite the fact that the student missed 14 days of school because of it, the IEP team failed to revise the IEP to meet the student's unique bullying-related needs.

X. "So, we are supposed to be writing standards-based goals. Here's the Curriculum Guide. Let's pick some goals from it to put in this IEP."

The definition of an IEP includes a written statement for each child that is developed, reviewed and revised in a meeting of the IEP Team. It must include, among other things, a statement of measurable annual goals, including academic and functional goals designed to "meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum" and "meet each of the child's other educational needs that result from the child's disability." 34 C.F.R. § 300.320(a)(2). IEP goals must be individualized, just like services must be. Even standards-based goals must be based upon the individual needs of the child and the child's present levels of performance.

Jefferson Co. Bd. of Educ. v. Lolita S., 62 IDELR 2 (N.D. Ala. 2013). The district's use of "stock" goals and services with respect to reading and postsecondary transition planning in the student's IEP constituted a denial of FAPE. Not only did the IEP team handwrite the student's name on the document after crossing out the typewritten name of another student, the case manager testified at the due process hearing that the student's reading goal, which required him to comprehend grade-level materials, was the standard goal for all 9th grade students. "Such a practice flies in the face of the purpose and goals of the IDEA, which require the district to develop an *individualized* program with *measurable* goals." Where the student performed 6 years below grade level in reading,

the reading goal in his IEP was unrealistic. In addition, the district failed to conduct transition assessments and, instead, developed a transition plan calling for the student to improve his communication skills and participate in a note-taking class that was open to all freshmen.

Y. "Sure, we have ESY available for your child. Our summer program starts on June 16th and ends on July 20th."

Extended School Year services (ESY) are not the same as summer school. Rather, they are considered an extension of FAPE to ensure that any break in instruction (e.g., over the summer) will not result in "severe regression" in critical skills areas such that a FAPE has been denied to the student. Whether a student is in need of ESY services (and how much) is a highly individualized decision based upon the needs of the student.

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

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

(i) Limit extended school year services to particular categories of disability; or
(ii) Unilaterally limit the type, amount, or duration of those services.

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

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

School personnel should be made aware of the school system's ESY policies and procedures and trained to maintain appropriate data to support recommendations regarding ESY eligibility. In addition, they should be trained to fully understand the standard for determining whether a student needs ESY services.

Z. "It would be better for her to be in the special class. Her needs are just too severe to be met in the regular classroom and her IQ is in the low 40's."

Courts and federal agencies are clear that IEPs and/or other relevant documentation should clearly and specifically document the placement decision and options considered on the continuum of alternative placements and why less restrictive options were

rejected, based upon the individual needs of each student. The rationale for a separate class or separate school placement must be clearly and appropriately stated for each individual child. In addition, school personnel must be prepared to justify the removal of a student from the regular education environment or a move to a more restrictive environment based upon the student's needs and ability to receive FAPE.

Greer v. Rome City Sch. Dist., 18 IDELR 412, 950 F.2d 688 (11th Cir. 1991), *withdrawn*, 18 IDELR 830, 956 F.2d 1025 (11th Cir. 1992), *reinstated*, 19 IDELR 100, 967 F.2d 470 (11th Cir. 1992). The IEP did not reflect sufficient consideration of options less restrictive than the self-contained classroom.

St. Louis Co. Special Sch. Dist., 352 EHLR 156 (OCR 1986). Failure to state in IEPs why students could not be educated in the regular education environment with the use of supplementary aids and services based upon their individual needs denied them a free appropriate public education.

Brazo Sport Indep. Sch. Dist., 352 EHLR 531 (OCR 1987). Placement at separate facility was not justified and IEPs of all students should bear evidence of individual consideration of ability to benefit from regular education, not identical language for all students in the separate facility.