

75 TIPS IN 90 MINUTES

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2018 WAVE Conference Laramie, Wyoming

July 30, 2018

This lightning-fast session will provide participants with 75 practical tips in 90 minutes on all things legal, from A to Z, in the field of special education. Tips and topics covered will begin with child-find, then move to evaluation, eligibility, IEP/placement, procedural safeguards, discipline and Section 504/ADA. In addition and at the end, a few “mental health/attitudinal” tips for educators will be thrown in for good measure!

I. CHILD-FIND/IDENTIFICATION TIPS

1. **TRAIN** all school personnel to take the “Problem Solving Team” process seriously and to understand that the role of these Teams is not to “get a student into special ed.”
 - ❖ To prevent disproportionality/overrepresentation based upon race or ethnicity.
 - ❖ To prevent over-identification of students in special education generally.
 - ❖ To ensure that students are provided with appropriate instruction prior to consideration for special education services.
2. **TRAIN** all school personnel (including, *importantly*, regular education teachers and those who serve on Problem Solving Teams) on the overall legal requirements applicable to the identification and education of students with disabilities.
 - ❖ Individuals with Disabilities Education Act (IDEA)
 - ❖ Americans with Disabilities Act (ADA)
 - ❖ Section 504 of the Rehabilitation Act of 1973 (Section 504)
 - ❖ Family Educational Rights and Privacy Act (FERPA)
 - ❖ Every Student Succeeds Act (ESSA) (formerly No Child Left Behind (NCLB)/ESEA)
 - ❖ Relevant state law requirements that differ from federal
3. **ENSURE** that if/when developing and implementing an RTI approach to child-find and identification, a parental request for an evaluation is not met with: “I’m sorry, but we can’t do an evaluation right now because your child has not completed RTI.”

Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011). States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation. It would be inconsistent with the evaluation provision of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RTI framework.

Artichoker v. Todd Co. Sch. Dist., 69 IDELR 58 (D. S.D. 2016). Where there is reason to suspect that a student is a child with a disability in need of special education and related services, a district must obtain parental consent and conduct an evaluation, regardless of whether the district is also implementing RTI with the student. Here, the student was involved in a number of behavioral incidents during the first month of school and her guardian requested an evaluation for special education services. The district responded by initiating the RTI process, but the behavioral issues persisted. In February, the student was suspended for the remainder of the year after posting a picture of herself on social media at school holding a 4-inch knife with a marijuana leaf on it. The guardian filed for due process on the basis that the district failed to evaluate in a timely manner. The hearing officer's decision in favor of the student is upheld, where the IDEA's discipline provisions provide that a district is deemed to have knowledge that a child has a disability if the parent has requested an evaluation. In addition, the district did not have to wait until its RTI process was completed to conduct an initial evaluation earlier.

Krawietz v. Galveston Indep. Sch. Dist., 69 IDELR 207 (S.D. Tex. 2017). Districts are required to identify, locate and evaluate all children who need special education as a result of a suspected disability. In this case, when the student re-enrolled in the district for the 2013-14 school year, she immediately had behavioral issues, so a 504 Plan was developed to provide for accommodations needed for her PTSD, ADHD and OCD. In addition, her application indicated that she had received special education in the past and that she had never been dismissed from special education services, but since the district could not locate her previous records, it was determined that she had been dismissed. Although the accommodations in the Plan, such as extended time to complete assignments and small group testing, enabled the student to pass ninth grade and resulted in improved behaviors during that school year, her behaviors and academic performance deteriorated the following year. The evidence showed that the student scored below the 20th percentile on standardized tests, failed several classes and engaged in criminal behaviors, such as stealing. In addition, records indicated that the student was hospitalized in September 2014 for disability-related health issues. However, the district failed to refer the student for an evaluation until April 2015, approximately 6 months after it became aware of the student's difficulties. The district's argument that the student's academic success in the 9th grade precluded the need for an evaluation is rejected, as the district's child find duty arose anew in the Fall of 2014 based upon the student's decline, hospitalization and incidents of theft during the semester, taken together. Thus, the hearing officer's award of compensatory education is upheld.

- 4. STRESS** the importance and affirmative nature of IDEA and 504 child-find requirements.

- ❖ The duty to refer a student for an evaluation is triggered when there is “reason to suspect” or “reason to believe” that the student may be a child with a disability and in need of special education services.

Dear Colleague Letter, 68 IDELR 52 (OCR 2016). OCR notes that approximately 1 of 9 OCR complaints received during fiscal years 2011-15 involved allegations of discrimination against students with ADHD. Thus, this DCL and accompanying Resource Guide are issued to explain how districts can meet the requirements of Section 504 and the ADA for students with ADHD. Most problems stem from districts not adequately evaluating students with ADHD for special education or related services in a timely manner. Districts are reminded that 504 and ADA require districts to conduct evaluations when a student needs or is believed to need special education or related services. In addition, districts must ensure that qualified students with disabilities receive appropriate services based on their needs and not costs, stereotypes or generalized misunderstandings about disabilities. In the accompanying Resource Guide, OCR notes that under broadened standards via the ADA Amendments Act of 2008, districts should understand that the definition of “major life activities” is expansive and that the helpful effects of any mitigating measures cannot be considered when determining whether a student with ADHD is disabled. While a student who is identified as eligible under the IDEA is a student with a disability under Section 504, even if the student is found ineligible under the IDEA, districts must still consider whether the student could be covered under Section 504. While students with ADHD may develop coping skills to allow them to achieve academic success, good academic performance does not mean that a student does not have a substantial limitation in a major life activity nor does it eliminate a district’s need to evaluate the student under Section 504. Districts are urged to use evidence-based interventions to address learning and behavior challenges at the earliest opportunity but not to the point of failing to conduct a timely evaluation.

5. **WATCH OUT** for “referral red flags.”

So, what constitutes sufficient “reason to suspect” or reason to believe” sufficient to trigger the duty to refer a student for an evaluation under IDEA or Section 504?

Based upon existing case law and agency opinions, I have developed a running checklist of “referral red flags” that courts/agencies could find, in combination, sufficient to constitute a “reason to suspect” a disability and need for services that would trigger the IDEA’s or 504’s child-find duty. I believe it is important for school personnel to be trained to look out for these referral red flags both under Section 504 and IDEA, especially in an “RTI world.”

Important Note: When using this list, it is very important to remember that not one of these triggers alone (or even several together) would typically be sufficient to trigger the child-find duty under Section 504 or IDEA. However, the more of them that exist in a particular situation, the more likely it is that the duty would be triggered.

It is also important to note that it is more likely that the child-find duty will be triggered under Section 504 before it would be under the IDEA, because the definition of disability is much broader and all-encompassing than it is under IDEA. Under the IDEA, it is rare that a court would find it sufficient to trigger the duty to evaluate if there are no referral red flags in the area

of academic concerns. However, OCR is likely to find the 504 duty to evaluate has been triggered, even in the absence of any academic or learning concerns. Especially in an RTI world, look out for indicators in these areas and “**when there’s debate, evaluate!**”

a. Academic Concerns in School

- Failing or noticeably declining grade or progress reports
- Retention
- Poor or noticeably declining progress on standardized assessments
- Student negatively “stands out” academically from his/her same-age peers
- Student has been in the Problem Solving/RTI process and progress monitoring data indicate little academic progress or positive response to interventions
- For IDEA child-find, student already has a 504 Plan and accommodations have provided little academic benefit

b. Behavioral Concerns in School

- Numerous or noticeably increasing disciplinary referrals for violations of the student code of conduct
- Signs of depression, withdrawal, inattention
- Signs of increased hyperactivity, forgetfulness, organizational problems
- Truancy problems, noticeably increased or chronic absences or skipping class
- Student negatively “stands out” behaviorally from his/her same-age peers
- Student has been in the Problem Solving/RTI process and progress monitoring data indicate little behavioral progress or positive response to interventions
- Student has a behavioral intervention plan that has not been effective
- For IDEA child-find, student already has a 504 Plan and accommodations have provided little behavioral/social/emotional benefit

c. Outside Information Provided

- Information that the child has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)
- Information that the child has received a DSM-5 diagnosis (ADHD, ODD, OCD, etc.)
- Information that the child is taking medication
- Information that the child is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider suggests the need for an evaluation or services

d. Information from School Personnel

- Teacher/other service provider suggests a need for an evaluation under 504 or IDEA or suggests counseling, special education or other services, etc.

e. Parent requests an Evaluation

- 6. DO NOT WAIT** for parents to initiate the referral for an evaluation.

Jana K. v. Annville Cleona Sch. Dist., 63 IDELR 278 (M.D. Pa. 2014). The parent’s failure to notify the district that a physician had diagnosed his daughter with depression did not excuse the district’s failure to conduct an IDEA evaluation. The duty to conduct an evaluation exists regardless of whether a parent requests an evaluation or shares information about a private assessment. Here, the district had sufficient information to suspect that the student had an emotional disturbance and might be in need of special education services. The student had poor relationships with peers and a tendency to report inoffensive conduct as “bullying;” she visited the school nurse on at least 54 occasions for injuries, hunger; anxiety or a need for “moral support;” the student’s grades, which has been poor to average in previous school years, plummeted when she began 7th grade; and the district was aware of at least one on-campus act of self-harm where she swallowed a metal instrument after using it to cut herself. This “mosaic of evidence” clearly portrayed a student who was in need of a special education evaluation.

Compton Unif. Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9th Cir. 2010), cert. denied, (2012). Where failing 10th grade student was referred by the school to a mental health counselor (who ultimately recommended an evaluation), her teachers indicated that her work was “gibberish and incomprehensible,” she played with dolls in class and urinated on herself, district cannot avoid a child-find claim based upon an argument that it did not take any affirmative action in response to high schooler’s academic and emotional difficulties because the parent did not request an evaluation. Where the district argued that the IDEA’s written notice requirement applies only to proposals or refusals to initiate a change in a student’s identification, evaluation or placement and its decision to do nothing did not qualify as an affirmative refusal to act, the argument is rejected. The Court will not interpret a statute in a manner that produces “absurd” results and the IDEA’s provision addressing the right to file a due process complaint is separate from the written notice requirement. “Section 1415(b)(6)(A) states that a party may present a complaint ‘with respect to any matter relating to the identification, evaluation, or educational placement of the child,’” and the IDEA’s written notice requirement does not limit the scope of the due process complaint provision. By alleging that the district failed to take any action with regard to the student’s disabilities, the parent pleaded a viable IDEA claim. (Note: The dissent in this case noted that determining that a “refusal” to identify or evaluate requires purposeful action by the district and the parent did not have the right to bring a child find claim without a request and a “refusal” on the part of the district).

7. **REMEMBER** that the concept of “continuous progress monitoring” is always applicable--regardless of whether an overall RTI approach for identification is used--in order to ensure that a student’s difficulties are not due to an overall lack of “appropriate” (scientific/research/evidence-based) instruction.

Letter to Zirkel, 50 IDELR 49 (OSEP 2008). When asked to clarify whether an SLD evaluation team must consider continuous progress monitoring, regardless of whether the approach used is RtI, OSEP responded that the eligibility group must consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child’s parents, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. “The regulation does not use the term ‘continuous progress monitoring.’” “A critical hallmark of appropriate instruction is that data documenting a child’s

progress are systematically collected and analyzed and that parents are kept informed of the child's progress.' We believe that this information is necessary to ensure that a child's underachievement is not due to lack of appropriate instruction."

8. **REFRAIN** from diagnosing medical conditions or suggesting medication without the credentials for doing so.

Unfortunately, there have been cases where teachers or other school personnel have made their own diagnosis of a particular medical condition without being qualified to do so. A proper referral for an evaluation must be made rather than statements to parents as to what school personnel believe to be a disability. The IDEA provides that the State Educational Agency shall prohibit State and LEA personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services under this title. However, the law notes further that nothing in this paragraph "shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services...."

Letter to Hoekstra, 34 IDELR 204 (OSERS 2000). It is not the role of educators to diagnose ADD or ADHD or to make recommendations for treatment. That responsibility belongs to physicians and family. School officials may provide input at parents' request and with their consent about a student's behavior that may aid medical professionals in making diagnosis.

II. **EVALUATION/REEVALUATION TIPS**

9. **EXERCISE** the right to conduct independent evaluations, particularly in potentially adversarial situations, by professionals/experts of the school system's choosing, for purposes of determining eligibility.

Independent Sch. Dist. No. 701 v. J.T., 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 required to fund IEE.

Shelby S. v. Kathleen T., 45 IDELR 269 (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.

10. **SHARE** fully all relevant evaluative and other educational information about the child with the parents.

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.”

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.

11. **REFRAIN** from suggesting to parents that they are responsible for obtaining educationally-relevant evaluations, including medical evaluations for diagnostic and evaluative purposes.

N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had once been privately diagnosed with autism, but school district staff suggested that the parents arrange for an autism evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.

12. **CONDUCT** comprehensive evaluations and evaluate in all suspected areas of need, not just disability.

The IDEA regulations require, among other things that “[i]n evaluating each child with a disability, the district must ensure that the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304 (emphasis added).

Timothy O. v. Paso Robles Unif. Sch. Dist., 822 F.3d 1105, 67 IDELR 227 (9th Cir. 2016). When a district has reason to suspect that a child has a disability, it must conduct a full and individual initial evaluation that ensures the child is assessed in all areas of suspected disability using a variety of reliable and technically sound instruments. Here, the district was aware that

the student displayed signs of autistic behavior at the time of the initial evaluation. However, the district chose not to formally assess him for autism because a psychologist, who observed the student for 30 to 40 minutes, concluded that the student merely had an expressive language delay and that he could not diagnose the student with autism “off the top of my head.” As a result, the district was unable to design an IEP that addressed the student’s needs and, therefore, denied FAPE to the student. The district’s fundamental procedural violations in this regard deprived the IEP team of critical evaluative information about the student’s developmental disabilities as a child with autism and it was impossible for the team to consider and recommend appropriate services necessary to address his individual needs. Thus, the district deprived the student of critical educational opportunities and substantially impaired his parents’ ability to fully participate in the IEP process.

A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D. Pa. 2015). District’s delay in comprehensively evaluating teenager with an anxiety disorder is a denial of FAPE and entitles the student to compensatory education. The IDEA requires districts to conduct a “full and individual” initial evaluation of a student who is suspected of having a disability and districts must use a variety of assessment tools and strategies to gather relevant information about the student’s functional, developmental and academic needs. Here, the district sought parental consent only to conduct a psychiatric evaluation of the student. The evaluation information did not include information from which the district could develop a positive behavior plan or IEP goals or to rule out SLD. From the outset, the district knew that the psychiatric evaluation would not address educational matters and should have known that it would need to conduct additional assessments to determine the full scope of the student’s needs. In addition, the district did not convene the IEP team until 13 months after it first had reason to suspect that the student had a qualifying disability and the student went without appropriate services in the interim.

D.B. v. Bedford Co. 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 Unif. 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.

13. **MAKE** appropriate and thorough decisions regarding the need to conduct reevaluations, and presume that a reevaluation is needed rather than presuming that it is not.

❖ **When there's debate, reevaluate!**

Horne v. Potomac Preparatory Charter Sch., 68 IDELR 38 (D. D.C. 2016). Even though the charter school evaluated the 6 year-old boy and found him ineligible two months earlier, the school should have reconsidered eligibility after multiple incidents of inappropriate and violent behavior. When the school psychologist evaluated the student in November 2013, she expressly noted that an increase in his behavioral problems would warrant a reevaluation. However, the school did not reevaluate him after he attempted to kill himself by jumping out of a school window, telling school staff that he “wanted to die.” The suicide attempt in itself amounted to inappropriate behavior under normal circumstances that, coupled with subsequent violence against teachers and classmates, should have prompted the school to reevaluate the child and reconsider eligibility for special education and related services.

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.

Student R.A. v. West Contra Costa Unif. Sch. Dist., 66 IDELR 36 (N.D. Cal. 2015). District made numerous attempts to schedule reevaluation of 11 year-old with autism and it had no obligation to accept the mother's demand for an evaluation location to be identified with a one-way mirror that would allow her to see and hear the assessments. In addition, the parent failed to respond to an email from the district stating that it would interpret the mother's lack of contact as a refusal to make the student available for reevaluation. The mother's request to observe the assessment was unreasonable, given the district's longstanding policy of precluding parental observations in an effort to prevent an alteration of the testing environment that might skew results. In addition, neither the IDEA nor its regulations give parents the right to observe an evaluation.

Brock v. New York City Dept. of Educ., 65 IDELR 135 (S.D. N.Y. 2015). Existing evaluative data did not support the IEP team's recommendation that the student be placed in a public 12:1+1 public school program. The failure to conduct a reevaluation in the previous six years resulted in substantive harm, as the district's reliance upon information from the student's private school was misplaced. Not only did the student's progress reports use broad grading criteria and “rudimentary grading differentials,” the private school's data did not include any educational

testing or standardized assessments that supported the district's proposed change in placement. Thus, these were insufficient substitutes for the mandatory triennial reevaluation where the existing data did not indicate how the student might perform in a public school setting. Where the district did not challenge the appropriateness of the private placement or argue that the equities in the case would preclude reimbursement for the private placement, the district is ordered to reimburse the mother and grandmother for private school tuition costs.

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. The ALJ's award of tuition reimbursement, however, is denied based upon the parents' failure to provide the 10-day notice of private school placement to the district and their lack of cooperation with the district's efforts to develop an IEP for the child's 4th grade year.

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 instructor 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.

14. CONSIDER results of independent or private evaluations that parents present.

Marc M. v. Department of Educ., 56 IDELR 9 (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.

15. REMEMBER that parents have the right to request an Independent Educational Evaluation at public expense (IEE) when they disagree with the evaluation completed by and/or obtained by the school system and **RESPOND** appropriately to such requests.

Letter to Baus, 65 IDELR 81 (OSEP 2015). If a parent disagrees with a district's evaluation based upon the district's failure to assess the child in a specific area of need, the parent has the right to request an IEE at public expense in that area to determine whether the child has a disability and the nature and extent of the special education and related services the child needs. At that point, the district is required to either request a due process hearing to show that its evaluation is appropriate or provide the requested IEE at its expense.

Letter to Carroll, 68 IDELR 279 (OSEP 2016). The question posed to OSEP was whether, once a district's evaluation is complete and the parent then communicates a desire for a child to be assessed in a particular area in which the parent has not previously expressed concern, would the district have the opportunity to conduct an evaluation in the given area before a parent invokes the right to an IEE? A parent has the right to invoke the right to an IEE even if the reason for the parent's disagreement is that the district did not assess the child in all areas related to the child's disability. Once a parent requests an IEE, a district must either defend its evaluation in a due process hearing or fund an IEE (assuming the IEE meets agency criteria). There is no third option that allows the district to simply conduct the missing assessments. Thus, it would be inconsistent with IDEA to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either grating the parents' request for an IEE or filing a due process complaint to show that its evaluation was appropriate.

- 16. MAINTAIN** and update a district list of qualified independent evaluators and applicable criteria for independent evaluators, including reasonable costs.

Seth B. v. Orleans Parish Sch. Bd., 67 IDELR 2 (5th Cir. 2016). In a case of first impression, a “substantial compliance” standard applies to the question of whether parents are entitled to reimbursement for an IEE. While the IDEA provides that a district is not required to pay for an IEE if it can demonstrate at a hearing that it does not “meet agency criteria,” it does not define this phrase. Since a “substantial compliance” standard as already been applied in other FAPE disputes, such as those involving IEP implementation, it should apply to IEE instances as well. The adoption of such a standard would safeguard parental rights to participate in the IEP process, especially in states that have adopted complex evaluation criteria. If districts are allowed to deny reimbursement based upon ambiguities or inconsequential nonconformities with such criteria, they will be effectively able to treat the parental right to an IEE as a privilege to be granted at their discretion. While the district’s concern that some judges or hearing officers might adopt an “unreasonably low standard” for substantial compliance is recognized, that risk is acceptable given the strong interest in preserving the parental right to an IEE. Thus, the case is remanded to the district court for a determination of whether the parents’ privately-obtained IEE substantially complied with Louisiana’s evaluation requirements. However, the possible amount of reimbursement is limited to \$3,000, based upon the parents’ failure to request an exemption from the district’s reasonable cost criteria. (Note: The dissenting opinion notes that the substantial compliance standard usurps regulatory authority and invites courts and hearing officers to participate in arbitrary decision-making).

M.V. v. Shenendehowa Cent. Sch. Dist., 60 IDELR 213 (N.D. N.Y. 2013). As an initial matter, the parent does not have the right to an IEE at public expense, because she did not disagree with the district’s evaluation. Rather, she requested an IEE because she was dissatisfied with the IEP proposed for her son. Even if she had the right to an IEE, however, she failed to show that the district’s \$1,800 cap on IEEs was unreasonable. Between July 14, 2010 and August 18, 2010, at least 6 public and private clinics in the parent’s geographic area were willing to conduct an IEE for \$1,800. Although the district was willing to exceed the \$1,800 cap if the parent demonstrated the need for an exception, the parent’s wish to use a particular neuropsychologist did not amount to “unique circumstances” that would warrant the excess cost. Parent’s failure to contact any of the psychologists or neuropsychologists on the list of qualified evaluators supplied by the school district defeated her challenge to the \$1,800 cap.

- 17. COMPLY** with applicable evaluation timelines and appropriately document compliance with them!

- ❖ days to completion of initial evaluation.
- ❖ days from completion of initial evaluation to eligibility determination.
- ❖ days from eligibility determination to IEP development.

Letter to Weinberg, 55 IDELR 50 (OSEP 2009). While there is no set timeframe for making an eligibility determination under the IDEA, it must occur within a “reasonable period of time” after the initial evaluation. While the IDEA does require an initial evaluation to be conducted within 60 days of receiving parental consent for the evaluation (or within a state’s timeframe), the IDEA

does not require that a district make an eligibility determination within a specific number of days after a parent requests an evaluation, after the district receives consent for it, or after the evaluation is completed. However, consistent with its child-find duties, a public agency must make an eligibility determination within a reasonable period of time after the evaluation is conducted to ensure the receipt of FAPE without undue delay. In addition, a parent who believes that the district is unreasonably delaying an eligibility decision may address the matter through the IDEA's dispute resolution procedures.

III. ELIGIBILITY TIPS

- 18.** Thoroughly and accurately **DOCUMENT** adherence to State criteria and required evaluations for monitoring purposes.
- 19.** **PROVIDE** the parent (and invitees) an opportunity to fully and meaningfully participate in the eligibility decision.

Shafer v. Whitehall Dist. Schs., 61 IDELR 20 (W.D. Mich. 2013). District staff committed a procedural error by deciding, prior to the eligibility meeting, that the student's IEP would classify him primarily as SLD and secondarily as OHI and speech-language impaired and that he would not be classified as autistic. However, a procedural error constitutes a denial of FAPE only if it impedes the child's right to FAPE, significantly impedes the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or causes a deprivation of educational benefits. The ALJ was correct in distinguishing between predetermination of a student's classification and predetermination of an IEP and correctly concluded that the procedural misstep was not fatal because the IEP nevertheless put the student in other eligibility categories and provided him with appropriate services. In addition, the evidence reflected that the parent fully participated in the development of the IEP and the team considered the relevant data, creating an IEP that addressed the student's unique needs. Thus, the failure to classify the student as autistic did not amount to a denial of FAPE.

- 20.** **REMEMBER** that actual "disability labels" should not matter—it's eligibility for services and the provision of FAPE that matter.

Dear Colleague Letter, 66 IDELR 188 (OSEP 2015). In response to concerns that districts are hesitant to reference or use the terms dyslexia, dyscalculia and dysgraphia in IEPs and other related documents, it is noted that nothing in the IDEA forbids districts from using such terminology. Using such terms may be helpful for districts at times, even though it is not a legal requirement to do so. In the IDEA regulations, a non-exhaustive list of examples of SLD includes dyslexia, but not dyscalculia or dysgraphia. However, this does not matter, since what is most important is that districts conduct an evaluation to determine whether a child meets the criteria for SLD or any other disability and to determine the need for special education and related services. Information about a student's learning difficulties may be helpful in determining educational needs. In addition, since a child's IEP must be accessible to the regular education teacher or other school personnel responsible for implementation, noting the specific condition involved might be a way for districts to inform personnel of their specific responsibilities related to implementing the IEP. It may also serve as a way for districts to

ensure that specific accommodations, modifications and supports are provided in accordance with the IEP. Thus, districts are encouraged to consider situations where it would be appropriate to use specific terms like dyslexia, dyscalculia or dysgraphia to describe a child's unique needs through evaluation, eligibility and IEP documentation.

W.W. v. New York City Dept. of Educ., 63 IDELR 66 (S.D. N.Y. 2014). The failure to explicitly mention a diagnosis of dyslexia in the IEP goals for an LD student is not fatal to the IEP because the IEP goals were adequately designed to address the student's learning challenges, which include not only dyslexia, but also dyscalculia and dysgraphia.

Torda v. Fairfax Co. Sch. Bd., 61 IDELR 4 (4th Cir. 2013) (unpublished), cert. denied, (3/24/14). 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.

21. DO NOT LIMIT the definition of "educational performance" to academic performance when determining whether there is a condition that adversely affects educational performance.

Mr. I v. Maine Sch. Admin. Dist. No. 55, 47 IDELR 121, 480 F.3d 1 (1st Cir. 2007). In Maine, "educational performance" is more than just academics and there is nothing in IDEA or its legislative history that supports the conclusion that "educational performance" is limited only to performance that is graded. In addition, "adversely affects" does not have any qualifier such as "substantial," "significant," or "marked." Thus, district court's holding that *any* negative impact on educational performance is sufficient is upheld. Student with Asperger's Syndrome who generally had strong grades, had difficulty in "communication," which is an area of educational performance listed in Maine's law. That makes her eligible for special education services.

22. REMEMBER the third prong for determining eligibility: whether the student's condition adversely affects educational performance *to the degree that the student needs special education and related services*.

D.A. v. Meridian Jt. Sch. Dist. No. 2, 65 IDELR 286 (9th Cir. 2015) (unpublished). The district did not err in finding that the student was not eligible for services under the IDEA. High schooler's Asperger syndrome does not have an adverse effect on his educational performance (which in Idaho includes academic areas such as reading, math and communication, as well as

nonacademic areas such as daily living skills, mobility and social skills). Although the parents allege that the district focused too much on academic performance, the hearing officer and district court noted that the student had done well in classes that emphasized pre-vocational and life skills.

In the Matter of P.T., 65 IDELR 273 (N.Y. 2015) (unpublished). Even if a 5th grader developed an emotional disturbance based upon peer bullying, the lack of impact on the student's academic performance supports the district's determination that the student is not eligible under the IDEA. Having an emotional disturbance, such as anxiety or depression, will not in itself qualify a child for IDEA services. Parents must also show that the condition has an adverse impact on educational performance. Here, the student consistently earned good grades and received average to above-average scores on intelligence tests. Assuming that the student's mental and emotional state did rise to the level of emotional disturbance, the SRO was correct to find that it did not affect the student's educational performance. Thus, the parents are not entitled to reimbursement for a parochial school placement.

Q.W. v. Board of Educ. of Fayette Co., 64 IDELR 308 (E.D. Ky. 2015), aff'd, 66 IDELR 212 (6th Cir. 2015) (unpublished). District's finding that the student no longer requires IDEA services is upheld. The student's alleged difficulties at home do not require the district to continue providing special education services. Under the IDEA, a student with autism is not eligible for special education and related services, unless his disability adversely affects his educational performance. The ordinary meaning of "educational performance" requires courts and hearing officers to focus on school-based evaluation. Here, the student did not appear to exhibit any academic, behavioral or social difficulties at school. Rather, his teachers testified that he earned good grades, participated in class, exhibited the same level of emotion as his peers and was "a joy" to have in class. While "educational performance" may extend beyond grades to the classroom experience as a whole, it does not include behaviors exhibited solely in the home. "Social and behavioral deficits will be considered only insofar as they interfere with a student's education."

M.P. v. Aransas Pass Indep. Sch. Dist., 67 IDELR 58 (S.D. Tex. 2016). Where student was diagnosed privately with ADHD and a mood disorder, an impairment alone will not qualify a student for special education. A parent must also show that the student needs special education services to receive educational benefit. Prior services provided pursuant to a 504 Plan and diagnosis of Asperger's appeared to be roughly the same as the efforts made for the general student population and the student was abundantly successful. Without evidence that the student needs specialized instruction, the student is not eligible under the IDEA.

23. DISTINGUISH between SED and BAD, but be careful!

H.M. v. Weakley Co. Bd. of Educ., 65 IDELR 68 (W.D. Tenn. 2015). An ALJ's ruling that the frequently truant high schooler was "socially maladjusted" did not mean that the student was not IDEA-eligible. The student's lengthy history of severe major depression coexists with her bad conduct and qualifies her as an ED child. Social maladjustment does not in itself make a student ineligible under the IDEA. Rather, the IDEA regulations provide that the term "emotional disturbance" does not apply to children with social maladjustment unless they also meet one of

the five criteria for ED. Since age 9, this student has been diagnosed with severe major depression and later medical and educational evaluations stated that she had post-traumatic stress disorder in addition to a recurrent pattern of disruptive and negative attention-seeking behaviors. Further, the depression was marked, had lasted a long time and affected her performance at school. Thus, it is “more likely than not” that her major depression, not just misconduct and manipulation, underlie her difficulties at school. Thus, the hearing officer’s decision finding her ineligible under the IDEA is reversed.

24. DON’T rely solely on medical diagnoses or recommendations for determining eligibility!

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.

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.”

IV. IEP DEVELOPMENT AND FAPE TIPS

25. BE AWARE that the IEP is the “centerpiece” of the IDEA’s education delivery system for disabled children; in other words, it is the modus operandi for getting the FAPE job done.

On March 22, 2017, the Supreme Court clarified the FAPE standard originally set forth by the Court in 1982 and unanimously rejected the Tenth Circuit Court of Appeal’s standard of “merely more than de minimis benefit” as one that set the bar too low. Rather, the Court 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.” Andrew F. v. Douglas Co. Sch. Dist., 69 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. It 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.”

The Court vacated and remanded the case to the lower courts for further proceedings to analyze Andrew’s case in accordance with this clarification of the FAPE standard, and the lower court ruled in the second case that Andrew did not receive FAPE:

Andrew 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 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)].

26. REFRAIN from action that appears to reflect a “predetermination of placement” or, in other words, appears to deny parental input into educational decision-making when developing the IEP.

A predetermination of placement or making placement decisions without parental input or outside of the IEP/placement process will not only cause a parent to lose trust in school staff, it may very well lead to a finding of a denial of a free appropriate public education (FAPE). “Predetermination of placement” would include action such as fully developing and finalizing an IEP prior to the meeting with the parents and asking them to sign without discussion. Being prepared for an IEP meeting or bringing draft IEPs, however, is not prohibited. Denial of

parental participation/input might also be reflected if sufficient notice is not provided to parents of relevant evaluative information, proposed placement, etc.

The 2004 IDEA Amendments address such procedural violations as follows:

A decision made by a hearing officer “shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child’s right to a FAPE; 2) **significantly impeded the parents’ opportunity to participate in the decision-making 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.

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.”

P.C. v. Milford Exempted Village Schs., 60 IDELR 129 (S.D. Oh. 2013). District predetermined placement prior to the IEP meeting and, therefore, denied FAPE to the student. The district’s preplanning notes show that its staff members were “firmly wedded” to a decision to withdraw the student from a private Lindamood-Bell program and return him to his home school to receive reading services. Most troubling was the student’s teacher’s testimony that the district was prepared to “go the whole distance this year” and force the parents into due process. Clearly, school officials went beyond merely forming opinions and, instead, became impermissibly and “deeply wedded” to a single course of action that the student not continue at the private school. In addition, they made their decision before determining what reading methodology would be used in the public school program and failed to discuss that issue with the parents. In this case, the type of methodology used could mean the difference in whether the student obtained educational benefit and, therefore, it was essential for the parents to participate in a conversation about it.

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 found that the district determined the student’s placement prior to the meeting.

G.D. v. Westmoreland, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation as long as it is made clear to the parents that drafts are presented for discussion purposes only.

Spielberg v. Henrico Co., 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.

27. CONSIDER keeping drafts of IEPs and/or meeting notes that reflect changes that were made to the IEP based upon parental input at the IEP team meeting.

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.

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.

P.C. v. Rye City Sch. Dist., 69 IDELR 122 (S.D. N.Y. 2017). Where meeting notes indicate that the 5th grader's IEP team discussed counseling and speech and language therapy goals, the goals accidental omission was harmless. While the omission constituted a procedural violation, it was a technical error and not actionable where it did not significantly impede the parents' participation in the decision-making process. Rather, the notes reflect that the team discussed the student's counseling and speech goals and the IEP developed at a May 2012 meeting included speech and language therapy and counseling services based on those goals. In addition, the parents did not seem to rely on that omission when they opted to continue their son's unilateral private placement for a third year and during a July 2012 meeting, they made no mention of the fact that the IEP team had left out those goals previously, further suggesting that the omission

did not interfere with or otherwise affect their decision to place the student in the private school. Thus, the review officer's decision is upheld and the parents are denied tuition reimbursement.

28. PREPARE adequately for IEP meetings, while avoiding predetermination.

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.

IDEA Regulations: 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).

See also, N.L. v. Knox Co. Schs., 315 F.3d 688, 38 IDELR 62 (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) and Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115 (9th Cir. 2003); Burilovich v. Board of Educ., 208 F.3d 560 (6th Cir. 2000); and Doyle v. Arlington Co. Sch. Bd., 806 F. Supp. 1253, 19 IDELR 259 (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].

29. BE SURE to act reasonably in response to parental requests to reschedule IEP meetings, particularly if a request to reschedule is for legitimate reasons.

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.

30. ENSURE proper attendance of required school personnel at IEP meetings.

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

The 2004 IDEA now provides that a member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA **agree** that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the meeting." When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and LEA **consent** to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent to any excusal must be in writing.

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.”

Z.R. v. Oak Park Unif. Sch. Dist., 66 IDELR 213 (9th Cir. 2015) (unpublished). Assistant Principal who also taught a general education Spanish class could serve in the role of the regular education teacher at a student’s IEP team meeting. The AP was a general education teacher “who is, or may be” responsible for implementing a portion of the student’s IEP. Thus, his presence at the meeting satisfied the requirement that the team contain at least one regular education teacher of the child. In addition, any procedural effort was harmless based upon the parents’ participation in the development of the IEP and the student’s program.

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 it general education program.

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 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.

31. ALLOW parents to bring invitees to the meeting and afford them the opportunity to participate (including attorneys).

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.”

32. REMEMBER that beginning not later than the IEP in effect when a student turns 16 (or younger in some states), the IEP must contain appropriate *measurable* postsecondary goals that are based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills. If the student does not attend the meeting **ENSURE** that the student's transition needs and preferences are adequately assessed.

34 C.F.R. § 300.320(b).

Letter to Cernosia, 19 IDELR 933 (OSEP 1993). Transition services are defined as a coordinated set of activities in the areas of instruction, community experiences, development of employment and post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation. If the IEP team determines that services are not needed in one or more of those areas, the IEP must include a statement to that effect and the basis upon which the determination is made.

Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ., 68 IDELR 33 (6th Cir. 2016) (unpublished). The district's failure to timely conduct transition assessments, in addition to its failure to consider the student's preferences and needs denied FAPE. The district's failure to invite the student to an IEP meeting for postsecondary transition planning was a harmless procedural violation, because even if the student had attended the confrontational meetings—a decision that would have exposed her to yelling, slamming doors and general animosity—she would not have been able to articulate her wishes. However, the failure to assess the student's transition needs resulted in a loss of educational opportunity, where the district's evaluation largely consisted of observing her performing assigned tasks, such as wiping tables and shredding documents, which offered little insight into her preferences and interests. In addition, a third-party vocational assessment conducted when the student was 19 recommended further evaluation of her interests, stamina and ability to improve with repetition, which was not done. Thus, the district failed to develop an appropriate transition plan. If the student had received additional training and assessments, she could have worked in a supported setting rather than attending a non-vocational program as suggested by the district.

33. MAKE IEP recommendations/decisions based upon the *individual needs and circumstances of the child* and nothing else.

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 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.

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.

L.M.P. v. School Bd. of Broward Co., 64 IDELR 66 (S.D. Fla. 2014). A school district employee's statement at a meeting over 10 years ago that the school district did not provide ABA therapy as an intervention service suggests that the district predetermined IEPs that were proposed for 3-year-old triplets with autism. Thus, the parents' action seeking money damages under Section 504 may proceed where an inference could be made that it was aware of its obligations but acted with "deliberate indifference to the appropriateness of the education a child will receive as a result of the IEP process when no consideration is given to the options other than predetermined ones." In addition, the parents' IDEA claims may proceed, as the court needs more information about the nature of ABA therapy.

Jefferson Co. Bd. of Educ. v. Lolita S., 64 IDELR 34 (11th Cir. 2014) (unpublished). District court's decision that the school district's use of "stock" goals and services with respect to reading and postsecondary transition planning constituted a denial of FAPE is upheld. Given that the LD teenager was reading at a first-grade level when he entered the 9th grade, a reading goal based on the state standard for 9th-graders failed to address the student's unique needs. Clearly, the IEP team had no evidence that the student's reading comprehension had increased by 8 grade levels since the prior school year. Nor did the district offer any services to address the gap between the student's performance and 9th grade standards. In addition, the student's name had been handwritten on several pages of the IEP above the name of another student, which had been crossed out. This was an "apparent use of boilerplate IEPs," which was to blame for the inappropriate goal. In addition, the district failed to conduct transition assessments and, instead, developed a transition plan with a goal calling for the student to participate in postsecondary education, which did not account for his placement on an occupational diploma track.

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 Comm. 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 disimpaction in the event of autonomic hyperreflexia as a related service, because the services of a physician were not necessary.

- 34. USE** a proper process for determining what is the Least Restrictive Environment (LRE) where the child can make progress.

Courts and federal agencies are clear that IEPs and/or other relevant documentation should clearly and specifically document options considered on the continuum of alternative placements and why less restrictive options were rejected. This rationale must be clearly and appropriately stated.

Hannah L. v. Downingtown Area Sch. Dist., 63 IDELR 254 (E.D. Pa. 2014), aff'd, 65 IDELR 223 (3d Cir. 2015) (unpublished). In determining whether a school district can educate a student with a disability in a mainstream setting, the placement team must specifically consider whether it can meet the child's special education needs there with the use of supplementary aids and services. Here, the notice of proposed placement vaguely stated that the team rejected a general education placement with supplementary aids and services because it would not meet the student's need for specially designed instruction at this time. The team failed to document specific reasons underlying that decision, such as the types of supplementary aids and services that it considered and rejected, as well as an explanation of why they would not allow the student to make progress in her general education class. Thus, the court cannot hold that the district offered FAPE in the LRE to the student.

Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991), withdrawn, 956 F.2d 1025 (11th Cir. 1992), reinstated, 967 F.2d 470 (11th Cir. 1992). The IEP did not reflect sufficient consideration of less restrictive options than 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 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.

- 35. AVOID** being overly specific and including unnecessary details or "promises" in IEPs.

Virginia Dept. of Educ., 257 EHLR 658 (OCR 1985). IEPs are not expected to be so detailed as to be substitutes for lesson plans.

Paoella v. District of Columbia, 46 IDELR 271 (D.C. Cir. 2006). There is no requirement that the student's precise daily schedule be developed when determining an appropriate placement

Letter to Hall, 21 IDELR 58 (OSERS 1994). Part B does not expressly mandate a particular teacher, materials to be used, or instructional methods to be used in the student's IEP.

Lachman v. Illinois St. Bd. of Educ., 852 F.2d 290 (7th Cir. 1988). Parents, no matter how well-motivated, do not have the right to choose a particular methodology to be used.

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

36. ADDRESS appropriately and annually the issue of Extended School Year (ESY) services for every child with a disability.

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 IDEA regulations specifically provide for the consideration of the provision of ESY services to all children with disabilities. 34 C.F.R. § 300.106.

Grants Pass Sch. Dist., 65 IDELR 207 (D. Ore. 2015). ALJ’s order that the district provide 360 minutes per day of ESY services to a 15 year-old student with autism is reversed. The district’s regression and recoupment data justified the IEP team’s decision that the student did not need ESY services in order to receive FAPE. The ALJ’s reliance on the parents’ expert testimony was misplaced, because the collection and analysis of educational data is a question of methodology and the district was free to use any method that allowed the student to receive FAPE. While the data collection and analysis methods proposed by the parents’ experts might have been better than those used by the district, there is no authority requiring the district to use those methods. The parents did not produce any evidence that the district’s data collection methods were inadequate. Further, the data that the district collected before and after the winter and spring breaks supported the team’s decision that the student did not require ESY services to prevent “undue” regression—the standard set forth in Oregon’s special education rules.

Annette K. v. State of Hawaii, 60 IDELR 278 (D. Haw. 2013). In Hawaii, ESY is considered necessary for FAPE where the benefits the student gains during the regular school year would be significantly jeopardized if he were not provided an educational program over the summer. In this case, it was clear that the student with severe dyslexia lost ground quickly every time there was a break in instruction. Indeed, the principal noted that the student was able to make progress in his reading, but “hours, days, weeks later, it’s like you’re starting fresh.” In addition, the student’s private reading tutor echoed the same concern, indicating that when she saw him less than 3-5 times per week, she had to spend significant time backtracking.

Bend Lapine Sch. Dist. v. K.H., 43 IDELR 191 (D. Ore. 2005). Failure to consider or discuss

eligibility for Extended Year Services is an IDEA violation that amounts to a denial of FAPE.

Reinholdson v. School Bd. of Indep. Sch. Dist. No. 11, 46 IDELR 63 (8th Cir. 2006). District court's decision that the school district fully complied with procedural requirements regarding ESY services is upheld. The purpose of ESY services is to prevent regression and recoupment problems, rather than advance the educational goals outlined in the student's IEP. As a result, the services in the ESY program may differ from those provided during the school year. The IEP team's decision in December to defer until spring the specifics of the ESY services necessary to help the Student maintain the skills he learned during the school year was reasonable under the circumstances.

Casey K. v. St. Anne Community High Sch. Dist. No. 302, 46 IDELR 102 (C.D. Ill. 2006). District's proposed ESY program is appropriate. ESY services have "a limited purpose, which is to prevent regression in the summer, not produce significant educational gains."

McQueen v. Colorado Springs Sch. Dist. No. 11, 45 IDELR 157, 419 F.Supp.2d 1303 (D. Colo. 2006), rev'd on other grounds, 47 IDELR 283, 488 F.3d 868 (10th Cir. 2007). School district's policy, based upon Colorado Department of Education guidelines, that requires that ESY services address only maintenance and retention of skills already mastered, rather than acquisition of new skills, is not in violation of the IDEA. Clearly, the relevant case law and OSEP guidance support endorsing the "significant jeopardy" standard as the basis for the content of ESY services.

37. ADDRESS behavioral strategies/interventions when appropriate, and **SEEK** the assistance of and/or contract with behavioral experts (i.e., BCBAs) when previous efforts to address behaviors, FBAs and BIPs have not been effective in enabling the child to make progress.

If a student has behavioral issues that impede the student's education or that of others, then the IEP team is required to address positive behavioral strategies and interventions for that student. If it is determined that a functional behavior assessment should be done and/or the student needs a behavior management program, it should be discussed as a support service or intervention at the IEP meeting.

38. INCLUDE appropriate statements of present levels of performance or otherwise ensure that adequate "baseline data" exist for measuring and showing progress.

Kirby v. Cabell County Bd. of Educ., 46 IDELR 156 (S.D. W.V. 2006). Hearing officer's decision that IEP was appropriate where it did not document present levels of performance is reversed. "Without a clear identification of [the student's] present levels, the IEP cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed." However, the parents are not entitled to reimbursement for a private evaluation because they had the evaluation done before the hearing officer determined whether the district's evaluation was appropriate.

Aaron P. v. Dept. of Educ., 59 IDELR 236 (D. Haw. 2012). The IEP proposed for the 4-year-old nonverbal autistic child is fatally flawed because it neither describes the behavior that the student will learn to control nor does it establish a route for the student to reach that goal. An IEP must include a statement of the student's present levels of academic achievement and functional performance. While an outside assessment relied upon by the ED described the student's behavioral challenges in detail (including the fact that she had "temper tantrums" when confronted with any change or demand), the IEP's PLEPs did not mention these behaviors. In addition, even the ED's own assessments noted behaviors including frustration when presented with a task, occasional crying, pushing test materials off the table, falling to the floor, and attempting to bang her head on the floor. While the IEP contained a health goal calling for the student to demonstrate increased physical and emotional regulation, this goal was not sufficient, because the PLEPs did not describe the student's aggressive/self-injurious behaviors and the goal does not explain how the goal will be accomplished. Because the proposed IEP was fatally flawed, the parents are entitled to private school tuition reimbursement.

Ravenswood City Sch. Dist. v. J.S., 59 IDELR 77, 870 F.Supp.2d 780 (N.D. Cal. 2012). District denied FAPE where it drafted an IEP for an LD student without identifying present levels of performance as a baseline to measure future progress. An IEP begins by measuring a student's present level of performance, which provides a benchmark for measuring progress toward stated IEP goals. Concise and clearly understandable baseline data should have been included in the student's IEP so that his progress could have been evaluated. Instead, the district did not base the goals on reasoned criteria and produced goals that were too vague. Thus, it owes the child compensatory education services for denying him access to meaningful educational benefit.

Red Clay Consol. Sch. Dist. v. T.S., 59 IDELR 287 (D. Del. 2012). Parents' claim that it was impossible to track the seventh-grader's progress on his 6th and 7th-grade IEPs is rejected. The hearing panel's conclusion that the district's omission of baseline historical data rendered the student's IEP defective is contrary to law. While the Third Circuit has yet to address this issue, the Sixth and Eighth Circuits have both held that there is no strict requirement that IEPs include historical baseline data. Moreover, the district was still able to effectively measure the student's progress under each IEP where they contained goals based on his present levels of educational progress. For example, his 6th grade IEP referenced the fact that he could identify only 6 out of 50 sight words at the start of his 6th grade year and mentioned that he could count in 1 out of 10 trials with a number line at the start of that year. By the end of the school year, evaluations revealed that he had progressed to being able to identify 44 of 50 sight words and could count in 6 out of 10 trials with a number line. Thus, the student's present level evaluations offered a form of baseline data with which to measure progress.

39. INCLUDE measurable goals in IEPs that are linked to present levels of performance and identified challenges.

Quite often, IEPs are attacked because of the lack of measurability of the annual goals (and short-term objectives/benchmarks, if appropriate). School staff should be trained to write appropriate and measurable annual goals and to continuously monitor progress on those goals!

40. STATE services or amount of services with sufficient clarity in the IEP.

Services and the amount of services offered should be set forth in the IEP in a fashion that is specific enough for parents to have a clear understanding of the level of commitment of services on the part of the school system. This will help to avoid misunderstandings.

N.S. v. District of Columbia, 54 IDELR 188 (D. D.C. 2010). Where the district's proposed IEP did not contain present levels of performance or supplementary aids and services that would be provided in the regular setting and failed to provide for pull-out instruction, the student was denied FAPE and funding for private schooling is warranted. Although district witnesses testified that pull-out services would have been provided if needed, neither the IEP nor the IEP Team meeting notes reflected that this was discussed and no clear offer of services was made. Thus, the parents are entitled to reimbursement for the cost of a unilateral private placement.

Letter to Ackron, 17 EHLR 287 (OSEP 1990). While the regulation does not explicitly require an IEP to state the amount of services with respect to the specific number of hours or minutes, the IEP must indicate the amount of services in a manner appropriate to the types of services and in a manner sufficiently clear to all persons involved in developing and implementing the IEP. The use of a range of times would not be sufficient to indicate the school's commitment of resources.

Letter to Gregory, 17 EHLR 1180 (OSEP 1991). The amount of time for related services must be stated with sufficient clarity to be understood by all persons involved in the development and implementation of the IEP.

41. **FINALIZE** placement recommendations (particularly by the beginning of the school year)!

Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001). Although the district met with the parents on several occasions to review possible placement options for the student, such meetings were not the "equivalent of providing the parents a meaningful role in the process of formulating an IEP." Because the district did not formally offer an IEP/placement prior to placement in a residential program by the parents, parents are entitled to reimbursement. The parents' refusal to agree with the district's placement recommendations did not excuse the district's failure to conduct an IEP conference.

Glendale Unified Sch. Dist. v. Almasi, 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.

V. **IEP IMPLEMENTATION TIPS**

42. **DEVELOP** an "Action Plan" to ensure proper implementation of an IEP.

Obviously, the failure to implement a student's IEP is the most serious substantive mistake that can occur. Frequently, failure to implement the IEP results from the IEP Team's failure to appropriately prepare an "action plan" for getting services provided in a timely and appropriate fashion.

- 43. REMEMBER** to inform all service providers of any responsibility they have to implement the IEP and document that this was done.

In the IDEA regulations, § 300.323(d) requires public agencies to ensure that each regular teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of a child's IEP, is informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the child's IEP.

- 44. ENGAGE** in continuous and documented progress monitoring on IEP goals and revise IEPs when expected progress is not being made or goals have been achieved early in the year. **DO NOT RECYCLE** annual goals upon which the child has made limited or no progress.

Particularly in light of the Supreme Court's clarified standard for the provision of FAPE, this is more important than ever! The IEP progress reports and other progress monitoring data will certainly take on a new level of significance.

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.

J. P. v. County Sch. Bd. of Hanover Co., 46 IDELR 133, 447 F.Supp.2d 553 (E.D. VA. 2006). A district's therapy notes were sporadic and not sufficiently detailed, meaning that the district was unable to demonstrate that the student received FAPE.

- 45. AVOID** over-reliance upon grades to demonstrate progress.

Pocono Mountain Sch. Dist. v. J.W., 70 IDELR 200 (M.D. Pa. 2017). The district cannot rely on the student's passing grades to prove that he made appropriate academic progress during 6th and 7th grade. While the hearing officer considered the student's 6th grade report card that reflected that the student had earned at least a C in all academic classes a sign of progress, other evidence reflected that the student was not making adequate gains and making minimal progress toward

his IEP goals. The student's failure to progress academically at "more than a snail's pace" carried far more weight, and the student's progress was so incremental that there was no reasonable basis to believe that the student could reach or accomplish IEP goals within a yearly term. In addition, the student had scored "below basic" on a statewide assessment of reading and writing skills despite receiving higher scores in previous years. This, along with the student's ongoing academic and behavioral struggles indicates that the district denied FAPE. Thus, the hearing officer's award of compensatory education is affirmed.

York Sch. Dept. v. S.Z., 65 IDELR 39 (D. Me. 2015). The district's failure to provide more intensive language-based instruction denied SLD student FAPE and entitles parents to recover tuition for two years of placement at a private special education boarding school. Although the student earned passing grades in all of his classes while in the public school program, his math teacher admitted that the student's class participation grade offset his poor performance on quizzes and tests. In addition, the special education director testified that she was unfamiliar with teacher grading procedures and was unaware of whether they modified grades for students with IEPs. This supports a finding that the district lacks "hard-and-fast" standards for assigning grades and, therefore, undercuts their evidentiary significance. An independent psychoeducational evaluation identifies the student's need for small classes and language-based learning instruction, and the district's SLP's classroom observations showed that the student was unable to process information, had significant organizational difficulties and was not engaged. Thus, the district's offer to continue the existing level of services is a denial of FAPE.

46. **CONVENE** an IEP meeting if there is any doubt about the appropriateness of or ability to implement the provisions of an IEP.

VI. SPECIFIC PROCEDURAL SAFEGUARDS TIPS

47. **PROVIDE** parents with a copy of their IDEA rights at least once per school year, and **REMEMBER** that parents are entitled to an explanation of their procedural safeguards, but this does not mean that the explanation must be provided immediately or during an IEP meeting.

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.

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.

48. **GIVE** prior written notice with respect to any proposal or refusal to initiate or change the identification, evaluation, placement or provision of FAPE to a child with a disability.

Letter to Chandler, 112 LRP 27623 (OSEP 2012). Prior written notice (PWN) of a proposal or refusal to take action regarding identification, evaluation, placement or the provision of FAPE to a student must be given after an IEP team meeting, but before implementing the action. Sending PWN before the IEP team meeting could suggest that the district's proposal or refusal was predetermined.

49. **TIMELY RESPOND** to parental requests to examine education records.

34 C.F.R. § 300.501(a) and §§ 300.613-621.

50. **CONSIDER** using the IDEA's mediation procedures to resolve complaints prior to the filing, by either party, of a due process complaint.

34 C.F.R. § 300.506.

51. **CONVENE** a resolution session within 15 days of the receipt of a due process hearing complaint from a parent in an effort to informally resolve the complaint.

34 C.F.R. § 300.510.

52. **GATHER** *any and all* school records of the student when a due process hearing has been initiated.

VII. **DISCIPLINE TIPS**

53. **MAINTAIN** clear and compliant discipline procedures applicable to students with disabilities (under IDEA and 504) and adequately **TRAIN** disciplinarians on the procedures.

First and foremost and with respect to discipline, school districts should have clear procedures in place that direct school disciplinarians as to how to handle disciplinary infractions committed by students with disabilities. These should be as clear and concise as possible, so that there is not a lot of room for discretion in terms of the actions that are to be taken.

Assuming good procedures are in place, school disciplinarians must be trained with respect to those procedures. The failure to train can not only leave the disciplinarian in potential legal trouble, but has the strong potential for landing the entire school district in legal hot water.

Under 42 U.S.C. § 1983, there is a good deal of judicial authority that a school district/governmental entity can be held liable for damages if there is a "custom or policy" on the

part of the school district of failing to ensure that school disciplinarians are trained properly to address disciplinary infractions committed by students with disabilities. In addition, there is significant judicial authority to support money damages remedies under Section 504/the Americans with Disabilities Act for intentional discrimination, “deliberate indifference to” or “reckless disregard for” discriminatory activity in the context of discipline of students with disabilities.

- 54. AVOID** making unilateral “changes in placement” through the use of suspension or other removal for disciplinary reasons.

Suspensions over ten (10) days at a time and, generally, suspensions for more than ten (10) days cumulatively are considered to constitute a “change in placement” for a student with a disability. The IDEA requires that prior to changing the placement of a student with a disability through the use of disciplinary action, the following must occur: (1) a manifestation determination must be made by the student’s IEP Team; (2) the IEP Team must plan a functional behavior assessment of behavior and then use assessment results to develop a behavioral intervention plan; and (3) the IEP Team must determine what services are to be provided to the child, for any removal period beyond ten (10) days in a school year, in order that the child may continue to participate in the general curriculum and advance toward achieving his/her IEP goals. Local school districts typically incorporate protections in their procedures so that illegal “changes in placement” do not occur.

School personnel must also keep in mind that action taken that might not be officially **called** a “short-term suspension” still may be counted toward the 10-day change in placement analysis.

- 55. DEVELOP** alternatives to suspension that do not constitute a “change of placement,” including ISS.

In the commentary to the 2006 regulations, US DOE also reiterated its “long term policy” that an in-school suspension would not be considered a part of the days of suspension toward a change in placement “as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.” 71 Fed. Reg. 46715.

- 56. BE CAREFUL** when considering whether transportation is a “related service” for a student with a disability. It will be important in the area of discipline.

In the commentary issued with the 2006 regulations, the U.S. Department of Education commented that “[w]hether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child’s IEP. If the bus transportation were a part of the child’s IEP, a bus suspension would be treated as a suspension...unless the public agency provides the bus service in some other way.” US DOE goes on to note that where the bus transportation is not a part of the child’s IEP, it is not a suspension. “In those cases, the child and the child’s parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should

consider whether behavior on the bus is similar to behavior in the classroom that is addressed in an IEP and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child." 71 Fed. Reg. 46715.

Letter to Sarzynski, 59 IDELR 141 (OSEP 2012). A bus suspension must be treated as a disciplinary removal and all of the IDEA's discipline procedures applicable to children with disabilities apply if transportation is listed on the IEP. If a student is suspended from transportation included in the IEP for more than 10 consecutive school days, that suspension constitutes a change of placement. Such a change of placement triggers the requirement for a manifestation determination. The fact that a family member voluntarily transports the student to and from school does not change the analysis. "Generally, a school district is not relieved of its obligation to provide special education and related services at no cost to the parent and consistent with the discipline procedures just because the child's parent voluntarily chooses to provide transportation to his or her child during a period of suspension from that related service."

57. KEEP appropriate and accurate data with respect to the use of suspension or other disciplinary removals from school.

For several reasons, keeping appropriate data with respect to the use of suspension with students with disabilities is vital. First, school districts are required to monitor the extent to which suspension is used with students with disabilities to ensure that school districts are not over-suspending disabled students generally and are not suspending students disproportionately in accordance with race or other discriminatory indicators. That data must be tracked and reported accurately.

Another reason for keeping and tracking appropriate data with respect to the number of suspensions to which a student is subjected is to ensure that illegal "changes of placement" have not occurred. Procedures must be in place for "red-flagging" instances where students are coming close to a "change of placement" due to the use of unilateral suspensions/removals from school for disciplinary reasons.

58. MAKE appropriate manifestation determinations.

Perhaps some mistakes that occur in the process of making manifestation determinations can be explained by the fact that some educators do not understand the purpose of the manifestation determination or the standard for making it. Ensure that everyone is trained in this regard.

Bristol Township Sch. Dist. v. Z.B., 67 IDELR 9 (E.D. Pa. 2016). Determination that teenager's ADHD did not play any role in the alleged physical assault of a teacher is inappropriate and the hearing officer's order of compensatory education for one day for each day after 10 days the student was removed is affirmed. The manifestation team did not discuss whether the student actually assaulted the teacher or whether his alleged misconduct had a direct and substantial relationship to his disability. In fact, the special education supervisor testified that the team looked at it "more from a global picture," and did not look at what occurred during the specific incident. According to the supervisor, the team only considered whether ADHD generally has a connection to aggressive behavior. In addition, the team's failure to consider the student's horseplay in the school hallway and refusal to follow teacher's direction, both of which came

before the alleged assault, made the manifestation decision deficient. Further, the supervisor's decision to complete the MDR report prior to the team's discussion was ill-advised, even though she gave team members an opportunity to object to it, which was not an appropriate substitute for meaningful discussion.

Z.H. v. Lewisville Indep. Sch. Dist., 65 IDELR 147 (E.D. Tex. 2015). The district's determination that the student's creation of a list of schoolmates he wanted to shoot was not a manifestation of his disability is upheld. While the district had evaluated the student for Asperger's the previous school year at his parents' request, the school psychologist determined that no further assessment was necessary based upon the student's extremely sociable nature and good sense of humor. The MDR team did discuss a PDD-NOS diagnosis by the student's pediatrician issued five days after the discovery of the shooting list and offered to complete an autism evaluation, but the parents would not consent to it. After the school psychologist explained why further autism testing had not been done the previous year, the team limited its review to the student's ADHD and depression. While the student's ADHD caused him to act impulsively, the shooting list was developed over several days and was not the result of his ADHD. In addition, the parents could not identify any evidence in the record linking the creation of the list to the student's depression. Thus, the district's determination that the behavior was not a manifestation of disability is upheld.

59. **REMEMBER** that restraint and seclusion are NOT disciplinary techniques!
60. **LOOK OUT** for those regular education students who can claim the district *should have known* the student was a student with a disability prior to a long-term suspension/expulsion.

Jackson v. Northwest Local Sch. Dist., 55 IDELR 104 (S.D. Ohio 2010). The failure to conduct an MD review prior to suspending and ultimately expelling a student for threatening behavior violated the IDEA's procedural safeguards. Clearly, the district should have known that the student had a disability at the time it expelled her because it had provided her with RTI services for approximately two years but she had made few gains. In addition, there were behavioral concerns expressed by her teacher and others that resulted in a referral to an outside mental health agency for an evaluation.

61. **USE** the 45-day "special circumstances" removal provision correctly.

The 45-day "special circumstance" removal provision in the IDEA is a commonly misunderstood one. Not only do many educators incorrectly interpret the 45-day removal provision as an absolute bar to what can be done, there is much misinterpretation of the circumstances to which it is to be applied. Make sure that there is adequate understanding of this provision.

Perhaps the most common mistake that is made lies within a common misunderstanding that when a student is involved in one of the "special circumstances" (weapon, drug or serious bodily injury), the only action that the school district can take is removal of that student to an alternative setting for up to 45 school days. This is clearly not the case, however. This provision of the law was intended to provide school personnel, in cases involving these special circumstances, up to

45 school days to appropriately address the infraction that occurred. In the meantime, a *unilateral* removal, without regard to manifestation, can be made. However, an IEP Team can convene during that time and propose a more permanent change of placement via the IEP Team process. The 45-day removal provision, therefore, imposes a limitation upon what an *individual disciplinarian* can do alone, but does not limit what an *IEP Team* can determine is appropriate.

Another common mistake made is with respect to an over-interpretation of the special circumstances to which the 45-day removal provision applies. Specifically, the definition of “serious bodily injury” under the IDEA references the definition contained in 18 U.S.C. § 1365(3)(h). There, the term “serious bodily injury” means bodily injury which involves: (a) a **substantial risk of death**; (b) **extreme** physical pain; (c) **protracted and obvious disfigurement**; or (d) **protracted loss or impairment** of the function of a bodily member, organ, or mental faculty. While this language may be somewhat unclear, school personnel should interpret this provision to include only the worst of situations that clearly fall within the restrictive definition. When there is serious question, the school should convene an IEP Team meeting and properly seek a change of placement for the student via the IEP Team process.

62. REMEMBER that the IDEA does not prohibit school personnel from reporting criminal behavior of a disabled student if they would do so for a non-disabled student under similar circumstances.

63. REMEMBER that truancy is a behavioral issue and should be addressed properly by a student’s IEP team.

Springfield Sch. Comm. v. Doe, 53 IDELR 158, 623 F. Supp. 2d 150 (D. Mass. 2009). District denied FAPE to student where IEP team failed to promptly address the frequent truancy of a 16-year-old student with cognitive, attention and behavioral difficulties. Given that the student was truant for 32 days during a two-month period and his IEP goals included managing school responsibilities, the district should have reconvened the IEP team to address the need for reevaluation. Once the truancy became excessive, the district had an affirmative duty to respond.

VIII. SECTION 504/ADA TIPS

64. APPOINT and **TRAIN** a good, knowledgeable district 504 Coordinator for purposes of answering questions that arise as to educational responsibilities under Section 504 and the ADA.

65. HAVE good and updated Section 504 procedures in place and **TRAIN** school personnel on them.

Dear Colleague Letter, 58 IDELR 79 (OCR 2012). The Office for Civil Rights issued this updated FAQ document to further address changes made by the 2008 ADA Amendments Act. OCR reiterates that students who did not qualify as disabled under Section 504 prior to January 1, 2009, may be disabled under the ADAAA under its expansive definition of disability. Extensive Section 504 evaluation or analysis is not necessarily required to determine whether a disability exists. In addition, a disabled student under Section 504 may only need a related

service, even if not eligible for special education services. Although school districts may no longer consider the ameliorative effects of mitigating measures in making a disability determination, those can be considered in evaluating the needs of a disabled student for services, including the need for a 504 Plan. Continuing a student on a health plan may not be sufficient under 504 if the student needs or is believed to need special education or related services because of a disability.

Section 504 is misunderstood in terms of its application, its scope and its requirements. In addition to ensuring that your Section 504 procedures are compliant with ADA, be sure to train all school personnel so that they understand the legal requirements of Section 504 as they relate to the education of children with disabilities.

66. **UNDERSTAND** that a student can be found to be “disabled” under Section 504 but not in need of a 504 Plan because his/her educational needs are met as adequately as the educational needs of nondisabled students. That child would be protected from discrimination but not necessarily in need of services.
67. **REMEMBER** that there are special rules of discipline that apply to students who are disabled only under Section 504.

Essentially, the bulk of the IDEA rules for disciplining students with disabilities have their “roots” in Section 504. This is so because Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability. Thus, in terms of discipline, the general notion is that students with disabilities should not be deprived of educational services if the conduct for which they are being disciplined is “based upon” (a/k/a :a manifestation of”) their disabilities. For the most part, the Office for Civil Rights (OCR) applies the same rules of discipline for students under Section 504 that exist for those students who are also disabled under the IDEA, particularly the requirement for making manifestation determinations when a disciplinary change of placement occurs.

68. **AVOID** exclusions of otherwise qualified disabled students from extracurricular and nonacademic activities, including athletics.

Under Section 504, disabled students must be provided an equal opportunity to participate in extracurricular activities. 34 CFR 104.37(a)(1). However, as a general rule, such students must still comply with the behavioral, academic, and performance standards of non-disabled students.

S.S. v. Whitesboro Cent. Sch. Dist., 58 IDELR 99 (N.D. N.Y. 2012). Parents’ ADA and 504 damages claims on behalf of their daughter are dismissed, as the parents’ request that the student be allowed to leave the pool during swim practices and competitions to calm her nerves whenever she suffered a panic attack is unreasonable. The parents’ allegation that the district should have allowed their daughter to leave the pool for intermediate periods of time, and on unannounced occasions, without being dismissed from the team is rejected. “There is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions.” The ability to enter and stay in the pool is an essential requirement of being a

swim team member and allowing the student to do otherwise would have fundamentally altered the nature of the swim team program.

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.

Dear Colleague Letter, 60 IDELR 167 (OCR 2013). Because extracurricular athletics offer benefits such as socialization, fitness, and teamwork and leadership skills, districts must make more of an effort to ensure that students with disabilities have an equal opportunity to participate in athletic programs. Districts should not act on the basis of generalizations and stereotypes about a particular disability. While students with disabilities do not have a right to join a particular team or play in every game, decisions about participation must be based on the same nondiscriminatory criteria applied to all prospective players. In addition, districts have the obligation to offer reasonable modifications so that students with disabilities may participate. If a particular modification is necessary, the district must offer it unless doing so would fundamentally alter the nature of the activity or give the student with a disability an unfair advantage. For example, using a visual cue to signal the start of the 200-meter dash would not fundamentally alter a track meet or give a student with a hearing impairment an unfair advantage over other runners. If a district does determine that a requested modification is unreasonable, it must consider whether the student could participate with a different modification or accommodation. While some students might be unable to participate in traditional athletic activities, even with modifications and supports, districts should offer athletic opportunities that are separate or different from those offered to nondisabled students in these instances. Such opportunities might include disability-specific team sports, such as wheelchair basketball, or teams that allow students with disabilities to play alongside nondisabled peers. Districts should be flexible and creative when developing alternative programs for students with disabilities.

69. BE AWARE that developing an individual health//nursing care plan may not suffice, by itself, for purposes of determining disability and providing services under Section 504.

North Royalton (OH) City Sch. Dist., 52 IDELR 203 (OCR 2009). School district denied Section 504 eligibility to a student with an anxiety disorder and life-threatening peanut allergies in part because the student's disability based needs were being adequately met by his health care plan. OCR concluded that the district's actions were in violation of Section 504 as health care plans are mitigating measures which school districts cannot consider in making their Section 504 eligibility determinations.

70. REMEMBER that "learning" is not the only "major life activity" to consider when

determining whether a student is disabled under Section 504.

Oxnard (CA) Union High Sch. Dist., 55 IDELR 21 (OCR 2009). School district denied Section 504 eligibility to a student with a gastrointestinal disorder due to student earning passing grades. The student had missed 35 school days during the previous school year as a result of the gastrointestinal disorder. The evaluation data indicated that as a result of the medical condition the student required accommodations such as excusal of tardiness and a reasonable period to make up missed assignments. OCR concluded that the district had erred by failing to consider other “major life impairments” other than learning in making its eligibility determination. OCR noted that major life activities for purposes of Section 504 include major bodily functions such as digestive and bowel functions.

71. RECOGNIZE that bullying of a student with a disability could constitute a form of discrimination—disability harassment—under Section 504 and schools are responsible for maintaining adequate procedures to address it; also **REMEMBER** that bullying can impact on FAPE.

T.K. v. New York City Dept. of Educ., 67 IDELR 1 (2d Cir. 2016). The district’s denial of the parents’ request for their daughter’s IEP team to discuss peer bullying is a denial of FAPE. This refusal significantly impeded the parents’ participation in the IEP process and the denial of the opportunity to discuss bullying during the creation of the IEP not only potentially impaired the substance of the IEP, but also prevented the parents from assessing the adequacy of it. Thus, the district court’s decision that the parents could recover the cost of private school placement is affirmed. The parents had good reason to believe that peer harassment was interfering with their daughter’s ability to make educational progress. According to the student’s one-to-one special education instructors, she had difficulty concentrating and staying on task based upon her classmates’ verbal and physical harassment. Three of the instructors testified that the constant peer teasing and exclusion created a hostile environment, and additional evidence showed that the student dreaded going to school, was frequently tardy and began to carry dolls for emotional support.

Ten and one-half years after an initial Dear Colleague Letter in 2000, OCR issued another Dear Colleague Letter, 55 IDELR 174 (OCR 2010). This letter was designed to remind educational agencies that some incidents of bullying may also constitute disability harassment or other forms of discrimination under federal law and will require a response that goes beyond a school district’s usual approach to peer teasing, taunting, or hazing. According to OCR, districts must now identify whether a reported incident, no matter how it is labeled, amounts to unlawful discrimination and, if so, respond in a manner that accords with Section 504, Title II, Title VI (which prohibits discrimination on the basis of race, color, or national origin), or Title IX (which prohibits gender discrimination).

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").

Dear Colleague Letter, 64 IDELR 115 (OCR 2014). If an alleged victim of bullying is receiving services under Section 504 or the IDEA, the school's response to bullying allegations should include determining whether the bullying impacted the student's receipt of FAPE and, if so, convening the student's IEP or 504 team to address that impact. The obligation to address a bullying victim's ongoing ability to receive FAPE exists regardless of whether or not the student is being bullied based on a disability. In addition, it exists whether the student is receiving services under the IDEA or under Section 504. Changes that might trigger the obligation to convene the team and amend a student's IEP or 504 plan might include a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral outbursts, or a rise in missed classes or sessions of Section 504 services. "Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice, promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: 1) the student's educational needs have changed; 2) the bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and 3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly."

72. RECOGNIZE the potential for Section 504-based lawsuits alleging retaliation.

Section 504 and the ADA expressly prohibit anyone from attempting to thwart the exercise of rights granted by the law to individuals with disabilities. Also, encompassed in this prohibition are retaliatory acts against persons (disabled or nondisabled) who complain of unlawful discrimination on behalf of a disabled individual or who otherwise advocate for such rights.

Settlegoode v. Portland Pub. Schs., 371 F.3d 503 (9th Cir.), cert. denied, 125 S. Ct. 478 (2004). Verdict of jury is upheld, where it found that the school district had violated Section 504 and the state's whistleblower statute and held for itinerant special education teacher on all claims. The

jury's award of \$500,000 in non-economic damages, \$402,000 in economic damages and \$50,000 in punitive damages against both the special education director and school principal under Section 1983 is upheld. The jury was more than reasonable in finding that the interests served by allowing the teacher to express herself outweighed any minor workplace disruption that resulted from her speech. Furthermore, it is well-settled that a teacher's public employment cannot be conditioned on her refraining from speaking out on school matters.

Pollack v. Regional Sch. Unit 75, 67 IDELR 40 (D. Me. 2016). Superintendent's motion for qualified immunity on the First Amendment claim and district's motion for judgment on 504 and ADA claims are denied where the district allegedly provided the parents with copies of hundreds of staff emails about their student before they filed for due process. After they filed for due process, the Superintendent requested \$2,600 for the production of certain emails, which could have been considered retaliatory. The question of the Superintendent's intent is a matter for a jury to decide.

Wenk v. O'Reilly, 65 IDELR 121, 783 F.3d 585 (6th Cir. 2015). Case will not be dismissed on the basis of qualified immunity against Director of Pupil Services alleging retaliation under the First Amendment based upon the parent's advocacy on behalf of his daughter. A report of child abuse, as was made in this case, qualifies as retaliation under the First Amendment if the parent's advocacy plays any role in the decision to report. Critical comments that the Director made about the father in emails she sent to other district employees after IEP meetings suggest that she harbored "animus" toward him. In addition, teachers whose statements allegedly formed the basis of the child abuse report denied telling the Director about the most shocking charges against the parent. Although the Director's report contained some true allegations, the facts taken in the light most favorable to the parent suggest that she embellished or fabricated other allegations, including those that most clearly suggested sexual abuse. The Director's claim that she would have filed the same report whether the father advocated for his daughter or not is rejected, as the Director had the information underlying her report for 3 weeks before she filed it and she made the report 3 weeks after the Ohio DOE contacted her about parent concerns. A reasonable official in the Director's position would have known that such conduct was retaliatory. Thus, the district court's denial of qualified immunity is affirmed.

IX. MENTAL HEALTH/ATTITUDINAL TIPS

- 73. AVOID** the temptation to unleash your inner attorney.
- 74. REMEMBER** to "Just Breathe"!

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

- 75. ACCEPT** it: "No Good Deed Goes Unpunished."

There will be times that no matter how often you accede to parental demands, litigation will be initiated in any event, particularly when the school system says "no" for the first time.

Remember, though, it can be dangerous to accede to parental demands, particularly if what they are asking be done is not appropriate for the student or is actually illegal.

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