Communication with Families: Parent Engagement

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History of IDEA

PL 94-142 EHA

- Education of All Handicapped Children Act of l975 Strengthened educational rights specified in PL 93-380 Fed gov't committed financial contributions Permanent legislation with no expiration Children 3-21 FAPE IEP and LRE

Based on Congress' Spending Power

- If State accepts the federal money, then the state is required to comply with IDEA and provide a Free Appropriate Public Education to ALL children with disabilities.
- All states now accept IDEA money.

EAHCA - Findings

- Congress made significant findings when it enacted EAHCA in 1975.
- Section 1400(c)(2) includes the statements that the needs of children with disabilities were not being fully met, and that 1 million children with disabilities were being excluded from public schools.
- Emphasized ACCESS to education.

IDEA – Purposes, 1400(d)

- Provide FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. IDEIA added to prepare for further education.
- Protect rights of children and parents.
- Assist States and local agencies in providing education.
- Assist States in providing early intervention services for infants and toddlers.
- Improve educational results for children with disabilities.
- Assess and ensure effectiveness of education.

IEPs

Individualized Education Program (IEP)

- A written statement for a child with a disability that is developed, reviewed, and revised in a meeting.

20 U.S.C. 1414; 34 C.F.R. 300.320

IEP In Effect

- IEP must be in effect at the beginning of each school year.
- IEP must be in effect before special education and related services are provided to an eligible student.

20 U.S.C. 1412; 34 C.F.R. 300.342

Content of IEP cont'd

- An explanation of the extent, if any, to which the student will not participate with non-disabled students in the regular class.
- A statement of any individual modification in the administration of State or district-wide assessments of student achievement that are needed in order for the student to participate in such assessments.

Content of IEP cont'd

- Progress statement –
  - A statement of how the student's progress toward annual goals will be measured and
  - A statement of how the student's parents will be regularly informed of the student's progress toward annual goals and the extent to which progress is sufficient to enable the student to achieve the goals by the end of the year,

Supplementary Aids and Services 34 C.F.R. 300.42

- Aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.

IEP Implementation

- Must be implemented “as soon as possible” following IEP meetings.
- Must be accessible to each regular education teacher, special education teacher, service provider, and other providers who are responsible for implementation.

IEP Team
34 C.F.R. 300.321

- Local school system must ensure that
  1. All necessary individuals participate.
  2. The IEP team reviews the student's IEP at least annually.
  3. The IEP team revises the IEP as appropriate to address any lack of expected progress toward the annual goals or the general curriculum.
- Parents are equal participants

Role of IEP Team Members

- To bring information to the team regarding the student's:
  - strengths and needs
  - learning style
  - interests and motivations
  - interactions with peers
  - successful strategies and supports

Role of Regular Education Teacher 34 C.F.R. 300.324

- Participate in the development, review, and revision of student's IEP
- Assist in determination of appropriate positive behavior interventions & strategies
- Assist in determination of supplementary aids and services, program modifications, and supports for school personnel

IEP Team Meeting Functions

- Communication vehicle
- Opportunity for informed joint decisions
  - Needs
  - Goals
  - Involvement in general curriculum
  - Participation in regular education environment
  - Supportive services

Parental Notice
34 C.F.R. 300.322

- Early enough to allow attendance.
- Mutually convenient time and place.
- Early prior notice may be waived by the parents to allow an emergency meeting.

Written Notice to Parents

- Written notice must contain
  - Purpose of meeting
  - Date, time, and location
  - Persons Invited (along with their titles)
  - Parent's right to invite persons with knowledge or expertise
  - Availability of accommodations

An IEP Meeting Agenda

- Opening remarks, purpose, introductions
- Procedural safeguards
- Review assessments and evaluations
- Review progress on current IEP goals
- Determine strengths and needs
- Determine present level of performance
- Discuss IDEA required considerations

An IEP Meeting Agenda cont'd

- Develop and/or review draft goals and objectives
- Approve goals and objectives
- Determine special education and related services
- Determine appropriate supplementary aids and services

An IEP Meeting Agenda cont'd

- Determine placement
- Determine eligibility for extended school year (ESY) services
- Transition planning
- Assign responsibility for tasks and follow-up
- Schedule review

•A parent's right to participate in decisions about his child's placement does not include the right to decide the specific school the child will attend. *See, e.g., Luo v. Baldwin Union Free Sch. Dist.*, 69 IDELR 88 (2d Cir. 2017, *unpublished*) (A New York district did not violate the IDEA when it denied a father's request to place a student with autism in an out-of-state private school that used "natural methods" to educate children with developmental delays.).

•To ensure that the IEP team considers the parent's input, a district may need to provide accommodations the parent requires to fully, meaningfully participate in the IEP meeting and provide input. *See, e.g., Manteca Unified Sch. Dist.*, 12 ECLPR 79 (SEA CA 2014), *aff'd, J.L. v. Manteca Unified Sch. Dist*., 68 IDELR 17 (E.D. Cal. 2016) (Providing a Spanish interpreter and answering a parent's questions about IEPs and evaluations before the IEP meeting helped secure meaningful participation from the parent); *Belvidere Cmty. Unit Sch. Dist. No. 100*, 112 LRP 12955 (SEA IL 02/27/12) (Hiring an advocate to take detailed notes and explain the IEP team's discussions was an appropriate accommodation for a mother with ADHD and dyslexia); and *E.H. v. Tirozzi*, 16 IDELR 787 (D. Conn. 1990) (Allowing a parent with limited English proficiency to tape record an IEP meeting so that she could later review it with her dictionary was necessary to provide her an opportunity to meaningfully participate.).

- Districts must make substantial efforts to secure parent attendance at the IEP meeting. This includes participation through alternative means, such as by videoconferencing or telephone conference calls. 34 CFR 300.322 (c). *See also J.G. v. Briarcliff Manor Union Free Sch. Dist.*, 54 IDELR 20 (S.D.N.Y. 2010).

FAPE

Special Education
34 C.F.R. 300.39(a)

- "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability"

Specially Designed Instruction
34 C.F.R. 300.39(b)

"Specially designed instruction means adapting, as appropriate to the needs of an eligible child … the content, methodology, or delivery of instruction to address the unique needs of this child that result from that child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards … that apply to all children."

Endrew F. v. Douglas County School District. RE-1, 580 U.S. 386 (2017)

- Input of the child's parents is just as important as school district personnel's
- IDEA's requirements as a mere procedural checklist. It is through the requirements in the statute and regulations that a school district delivers a FAPE. These are substantive requirements and include evaluations sufficiently comprehensive to identify all educational needs and assessing progress and making corrections/adjustments to the programming in the face of a lack of progress.

Dispute Resolution

Strategies for getting consensus

- Listen to parent concerns
- Provide all the information the team is considering
- No surprises at the IEP team meeting
- Anticipate parental questions so the team is prepared
- Adjourn and come back another day if the meeting gets heated
- Provide data to the parents with an explanation

Dispute Resolution

- Facilitated IEP meeting
- Mediation
- State complaints (parents can file) and school team can address

Smith v. Cheyenne Mt. Sch. Dist. 12, 2017 U.S. Dist. LEXIS 100475, *17 (D. Colo. May 11, 2017).

- a 10th circuit case explained that the failure to object to IEP team decisions until nearly two years after the IEP meeting concluded constitutes a waiver or a forfeiture of claims.

- Emotions are always high for a parent; this meeting is about their child and can be legitimately difficult.

- Encourage the parent to ask questions.
- Encourage them to bring someone with them for support

Inadequate effort to get parents to attend

Not giving parents enough notice, options. School districts are obligated to schedule IEP team meetings at a mutually agreed-upon time and place. 34 CFR 300.322(a)(2).

Not offering to meet virtually. Parents should be given the opportunity to attend a virtual IEP meeting if they are unable to attend in person.

Failing to document communication attempts.

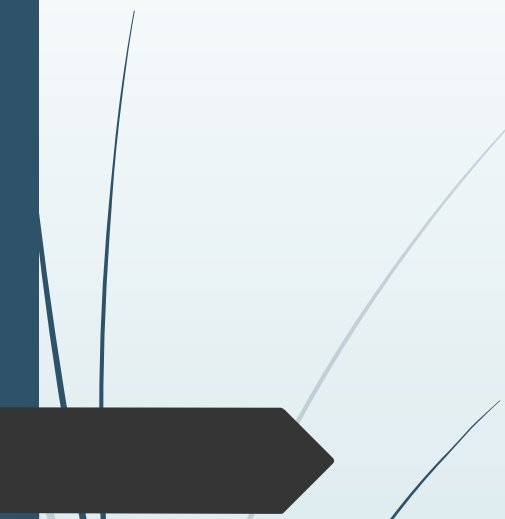
The failure to provide for meaningful participation by parents in the IEP process may result in a denial of FAPE. *See Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004)

- Be mindful that it is overwhelming to be presented with info at the meeting
- Prepare before hand with drafts if possible so parents can digest the information and ask questions before the meeting and during the meeting

- A collaborative partnership between parents and educators fosters a more comprehensive approach to a child's education. It allows for the sharing of strategies, insights, and resources that can enhance the child's learning experience. This can help bridge any gaps between school and home and provide continuity of care/learning experience.

- Inform the parents of the child's teachers' preferred mode of communication and conference time. Most teachers cannot check e-mail during the day when working with students. Their ability to make phone calls or meet for a conference is usually limited to a conference period or before or after school.
- Encourage use of preferred communication method
- Listen actively
- Establish a communication plan in the IEP or 504 Plan

- 'Do you have any questions?' say, 'Is there any aspect of this you want me to clarify?'"
- Encourage parent training as a related service on the IEP.
- Sometimes acknowledging the mistake goes a long way to maintain the relationship with the family.



Questions?

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I. Introduction

The Supreme Court has made clear that children with disabilities eligible under IDEA are entitled to an Individualized Education Program (IEP) that is "appropriately ambitious" to enable them to make meaningful progress. *Endrew F. v. Douglas County School District. RE-1*, 580 U.S. 386, 388 (2017). The Supreme Court held that IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," and programs that provided merely "some" progress were inadequate. *Id.* at 402-03. Instead, the Court explained that children with disabilities (regardless of the severity of their disability) are entitled to an IEP that considers their present levels of achievement, disability, and potential for growth to develop appropriately ambitious goals. *Id.* at 400. If progressing smoothly through the general education curriculum is not a reasonable prospect for a child, the "IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Id.* at 402.

To ensure appropriately ambitious programming with challenging objectives is developed, IDEA relies on procedures for developing a child's IEP set forth in the statute, including robust parental participation. When a school district denies meaningful parental

participation by predetermining programming decisions without considering parental input, it commits an actionable procedural violation.

II. History of IDEA

In the 1970s, Congress held hearings investigating the quality of educational instruction provided to children with disabilities. These hearings established that public school districts throughout the county had wholly excluded millions of children with a multitude of disabilities or placed those children in programs where they received no educational benefit. *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare,* 93d Cong., 1st Sess. (1973-74). At that time, statistics showed that "only 55 percent of the school-aged [disabled] children and 22 percent of the pre-school-aged [disabled] children [were] receiving special educational services." Senator Randolph, *Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 94th Cong., 1st Sess. 1 (1975). Parents and educators discussed the widespread failure of states to provide the extent of supportive services necessary to meet the needs of children with varying degrees and forms of disabilities. Statistics compiled for Congress by the Office of Education at that time revealed that children of all ages and with a range of disabilities were affected. For example, pupils excluded or receiving inappropriate education included 82% of "emotionally disturbed" children; 82% of "hard-of-hearing" children; 67% of "deaf-blind" and "other multi-handicapped" children; and 88% of those classified "learning disabled." S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975) *reprinted in* 1976 U.S.C.C.A.N., 1425, 1429-32; H.R. Rep. No. 332, 94th Cong., 1st Sess. 11-12 (1975).

In light of these gross disparities regarding access to educational programming for students with disabilities, Congress enacted Public Law 94-142, the Education for All Handicapped Children Act in 1975, which, following various amendments, is now known as IDEA. IDEA requires that state and local public education agencies enact policies and procedures to ensure that all students with disabilities receive a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

In enacting these laws, Congress did not merely require access to education. Congress mandated that children with disabilities receive a free appropriate public education. IDEA's goal is to provide a "full educational opportunity to all handicapped children." *Id.* § 1412(2)(A) (2012). Legislative history repeatedly reflects this goal. The Senate Report says that the Act "guarantee[s] that handicapped children are provided equal educational opportunity." *S.Rep.No.94-168*, at. 9 (1975), reprinted in 1975 U.S.Code Cong. & Admin.News, at 1433. Numerous drafters of the legislation expressed the same aspiration. *See* 121 Cong.Rec. 19482-19483 (1975) (remarks of Sen. Randolph); *id.*, at 19504 (Sen. Humphrey); *id.*, at 19505 (Sen Beall); *id.*, at 23704 (Rep. Brademas); *id.*, at 25538 (Rep. Cornell); *id.*, at 25540 (Rep. Grassley); *id.*, at 37025 (Rep. Perkins); *id.*, at *214 37030 (Rep. Mink); *id.*, at 37412 (Sen. Taft); *id.*, at 37413 (Sen. Williams); *id.*, at 37418-37419 (Sen. Cranston); *id.*, at 37419-37420 (Sen. Beall)..

Seven years after passage of the EHA, the Supreme Court held that IDEA requires "personalized instruction . . . with sufficient supportive services to permit the child to benefit from the instruction," provided that the instruction and services (i) are "provided at public

expense and under public supervision;" (ii) "meet the State's educational standards;" (iii) "approximate the grade levels used in the State's regular education;" and (iv) "comport with the child's IEP." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 189 (1982); *see also* 20 U.S.C. § 1401(8).

While this definition has been called "cryptic," *Rowley,* 458 U.S at 188 the test of free appropriate public education is whether the student is likely to receive educational benefit. As the *Rowley* majority held:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S., at 200-201.

Importantly, in footnote 23, the Court sets forth independence and self-sufficiency as the goals of the free appropriate public education:

> This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:
>
> "The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through

> such services, would increase their independence, thus reducing their dependence on society."
>
> The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children.

458 U.S., at 201 [citations omitted].

III. IEPs and FAPE

To receive federal funds under IDEA, states must provide FAPE to all eligible children. *Endrew F.*, 580 U.S. at 390 (citing 20 U.S.C. § 1412(a)(1)). "A focus on the particular child is at the core of the IDEA. The instruction offered must be '*specially* designed' to meet a child's '*unique* needs' through an '[*i*]*ndividualized* education program.'" *Id.* at 400 (quoting 20 U.S.C. §§ 1401(29) & (14)) (emphasis in original); *see also Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1078-79 (8th Cir. 2020). Thus, the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Endrew F.*, 580 U.S. at 404.

In *Endrew F.*, the Supreme Court announced a clear standard for the level of educational benefit IDEA requires for the receipt of a FAPE as well as addressing the importance of IDEA's procedural requirements in developing the child's IEP. In so doing, the Court rejected the Tenth Circuit's low standard for a FAPE: that "merely . . . more than *de minimis*" educational benefit was sufficient. *Id.* at 991. The Supreme Court instead held that: "The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 399; *E.M.D.H.*, 960 F.3d at 1082. The Court emphasized that the IEP must be "appropriately ambitious," and the objectives must be "challenging." *Id.* at 402.

Further, the Supreme Court emphasized the importance of compliance with IDEA's procedures as a means to develop an appropriate IEP. The Supreme Court rejected the argument

that such provisions governing the IEPs required components "impose only procedural requirements – a checklist of items the IEP must address – not a substantive standard enforceable in court." *Id*. at 401-02. As the Supreme Court explained, the "procedures are there for a reason" and provide insight into what it means to meet the unique needs of a child with a disability. *See D.T. v. Cherry Creek Sch. Dist. No. 5*, 55 F.4th 1268 (10th Cir. 2022)("The basic vehicle to achieve FAPE is the development of an individualized education plan (IEP) for all eligible students. IDEA requires an IEP for each child with a recognized disability.").

As the Supreme Court recognized, the IEP is the roadmap to the child's academic and functional advancement, "constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Id.* at 400 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I) -(IV), (d)(3)(A)(i)-(iv)). The IEP must be drafted in compliance with a detailed set of procedures, which emphasize collaboration among parents and educators and careful consideration of the child's individual circumstances. *See id.* at 391.

Every IEP must include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be measured. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(III). The IEP also must describe the "special education and related services . . . that will be provided: so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). *See also; G.W. v. Boulder Valley Sch. Dist.*, Civil Action No. 16-cv-00374-PAB-SKC, 2019 U.S. Dist. LEXIS 159007 (D. Colo. Sep. 18, 2019)(" …the

central mechanism for ensuring delivery of a FAPE in the least restrictive environment is the individualized education program ("IEP"), a "written statement for each child with a disability" that identifies the child's present level of performance, the child's short- and long-term goals, objective criteria for measuring the child's progress, and the supplementary aids and services necessary to meet the child's educational needs.")(citations omitted); *Murray by and through Murray v. Montrose Cty. Sch. Dist.*, 51 F.3d 921, 925 (10th Cir. 1995) ("The IEP is the basic mechanism through which th[e] goal of [providing a FAPE] is achieved for each disabled child.").

On December 7, 2017, the U.S. Department of Education released a helpful resource for parents, advocates, and attorneys in its Questions and Answers (Q&A) on *Endrew F. v. Douglas County School District RE-1*, https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf. As the Q&A acknowledged, the Court's clarification of a school's substantive obligation under IDEA, "reinforced the requirement that 'every child should have the chance to meet challenging objectives.'" (Q&A No. 3). The guidance also makes clear that decisions made by the IEP Team must be made with collaboration and input with the child's parents, who are important and required members of the IEP Team. *See* Q&A Nos. 10-12, 15.

IV. Parental Participation

Parents are key members of the IEP Team. 20 U.S.C. § 1414(d)(1)(b); 34 C.F.R. § 300.321(a)(1). And as the U.S. Supreme Court has repeatedly emphasized, parental participation in the IEP decision-making process is essential to safeguarding the educational rights of children with disabilities that Congress sought to protect under IDEA. The statute's "procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances." *Endrew F.*, 580 U.S. at 391. "Congress repeatedly emphasized

throughout the Act the importance and indeed necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." *Honig v. Doe*, 484 U.S. 305, 311 (1988).

IDEA contemplates that the fact-intensive exercise of developing an IEP that is reasonably calculated to result in educational benefit "will be informed not only by the expertise of school officials, but also by the input of the child's parents." *Endrew F.*, 580 U.S. at 399. "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). Thus, school districts are responsible for initiating IEP meetings and ensuring that parents are given a meaningful opportunity to attend the IEP meeting and participate as full members of the IEP Team. *See* 34 C.F.R. § 300.322. In addition, after participating in the development of their child's IEP at the meeting, parents must also be involved in their child's placement decision. 20 U.S.C. § 1414(e); 34 C.F.R. § 300.327; 34 C.F.R. § 300.501(c).

The "nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. *Endrew F.*, 580 U.S. at 404. Parental involvement in the IEP process far exceeds mere physical attendance at meetings. *See, e.g.*, *O v. Glastonbury Bd. of Educ.,* No. 3:20-cv-00690, 2021 U.S. Dist. LEXIS 247211, at *25 (D. Conn. Dec. 29, 2021); *see* 20 U.S.C. § 1414(d)(1)(B); *Notice of Interpretation,* Appendix A to 34 CFR Part 300, Question 5 (1999 regulations); *see also Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004) ("[Parental] [p]articipation must be more than a mere form; it

must be meaningful.") (citations omitted). Specifically, parents are afforded the opportunity to participate in meetings with respect to the identification, evaluation, educational placement, and the provision of FAPE to the child (including IEP meetings);[1] be part of the IEP team that determine what additional data are needed as part of an evaluation of their child;[2] assist in determining their child's eligibility;[3] have their concerns and the information they provide regarding their child considered in developing and reviewing their child's IEP's;[4] and be regularly informed of their child's progress.[5] Challenges to the adequacy of an IEP can be either procedural or substantive. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996);

See also; G.W. v. Boulder Valley Sch. Dist. at *18-19.

As active and equal participants on the team, parents are in the unique position to offer valuable information on their children's strengths, to describe the need for services, and to share specific concerns with the entire IEP team. *See* 34 CFR Part 300, App. A, Quest. 5; *see also Doug C. v. Haw. Dep't of Educ.,* 720 F.3d 1038, 1044 (9th Cir. 2013) ("Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.") (quoting *Amanda J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001)). The collaborative and conversant decisions regarding placement and services anticipated by the IDEA occur when parental input equips the IEP team with the best available information specific to the individual child.

[1] 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.322; 34 C.F.R. §300.501(b).
[2] 20 U.S.C. § 1414(b)(1)-(2), (c)(i).
[3] 20 U.S.C. § 1414(b).
[4] 20 U.S.C. § 1415 (d)(3)(A)(ii), (4)(A)(ii)(III).
[5] 20 U.S.C. § 1414(d)(1)(A)(i)(bb)(III).

The Supreme Court has held that procedural violations are just as important as the Act's substantive requirement that students be appropriately educated, holding that procedural protections for parents and students are at the "core of the statute," necessary for parents to be able to protect the substantive rights provided to their children. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (internal citation omitted); *Honig*, 484 U.S. at 311; 20 U.S.C.A. § 1415. These procedural requirements are designed to "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate.'" *Buser by Buser v. Corpus Christi Indep. Sch.*, 51 F.3d 490, 493 (5th Cir. 1995) (quoting *Honig,* 484 U.S. at 311-12 (1988)); *see also*: *G.W. v. Boulder Valley Sch. Dist.*, *Id.*

Indeed, "[o]ne of the central innovations of the special education law, and a key to its success, is that it empowers parents to participate in designing programs for their children and to challenge school district decisions about educational services and placement." Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 65 Ohio St. L.J. 357, 369 (2004).

IDEA specifically recognized the crucial importance of parental participation by explicitly providing that denial of that right alone may result in a finding that a child did not receive FAPE if the procedural violation "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child." 20 U.S.C. § 1415(f)(3)(E)(ii)(II). Accordingly, courts have found that procedural violations that deprive parents of critical information that impedes their ability to participate in the decision-making process cause a deprivation of FAPE. *See, e.g., M.C. v. Antelope Valley Union High Sch. Dist.,* 858 F.3d 1189, 1197-98 (9th Cir. 2017) (school

district's unilateral revision to IEP after meeting violated right of parental participation); *Doug C.,* 720 F.3d at 1047 (failure to include parent in IEP meeting clearly infringed on his ability to participate in the IEP formulation process, so that student was denied a FAPE); *Indep. Sch. Dist. No. 413 v. H.M.J.*, 123 F. Supp. 3d 1100, 1111 (D. Minn. 2015) (by simply indicating that student did not qualify for special education without fully considering Other Health Disabilities criteria, school district deprived parents of meaningful participation, resulting in substantive violation); *C.P. v. N.J. Dep't of Educ.*, No. 19-12807, 2022 U.S. Dist. LEXIS 158147, at *33 (D.N.J. Sept. 1, 2022) (significant delays in due process hearing system deprived parents of the right to take part in the decision-making process regarding the provision of FAPE to their children thereby denying substantive right of participation); *Knox v. St. Louis City Sch. Dist.*, No. 18-cv-216, 2020 U.S. Dist. LEXIS 114445, at *31 (E.D. Mo. June 30, 2020) (failure to consider eligibility under "Other Health Impairment" deprived grandmother full participation in the IDEA process); *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34, 46-47 (D.D.C. 2016) (failure to provide required information about restraints and to produce relevant staff people at MDT meeting impeded parental participation and deprived student of FAPE); *Bell v. Bd. of Educ. of the Albuquerque Pub. Schs*, No. CIV 06-1137 JB/ACT, 2008 U.S. Dist. LEXIS 108748, at *87-88 (D.N.M. Nov. 28, 2008) (D. N. Mex. Nov. 28, 2008) (holding school district failure to provide correct diagnosis to parent was a denial of FAPE because it was "a lack of reliable information on which to rely on in advocating for [the student] and meaningfully participate in the IEP process.").

Thus, when a school district designs a program and placement without considering the student's actual needs and parental input, it violates IDEA. *M.S. v. L.A. Unified Sch. Dist.*, 913 F.3d 1119, 1137 (9th Cir. 2019); *Indep. Sch. Dist. No. 413 v. H.M.J.*, 123 F. Supp. 3d 1100, 1112

(D. Minn. 2015) (egregious procedural violations seriously infringed on parental participation rights). In *Deal*, for example, the Sixth Court of Appeals upheld a finding of a denial of FAPE when the school district refused to consider provision of Applied Behavior Analysis programming because of a policy mandating denial regardless of the student's demonstrated individual needs. 392 F.3d at 855; *see also W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (9th Cir. 1992); *B.H. v. W. Clermont Bd. of Educ.*, 788 F. Supp. 2d 682, 693-94 (S.D. Ohio 2011) (predetermined decision to deny speech and occupational therapy services resulted in substantive denial of FAPE). The failure to make a timely offer of an IEP has a substantive impact on the student if the student's education within the school district "would have been different if school officials had fulfilled their statutory responsibilities on time." *Leggett v. District of Columbia*, 793 F.3d 59, 68 (D.C. Cir. 2015).

V. Evaluations

In 2004 Congress found expanded on the purpose for the Act and asserted that the IDEA also existed "to ensure that the rights of children with disabilities and parents of such children are protected," 20 U.S.C. § 1400(d)(1)(A)(2004), and "to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities." *Id.,* § 1400(d)(3)(2004). Along these lines, Congress clarified that the procedures set out in the law were not perfunctory but were set out because Congress intended that all evaluations would be genuinely considered in the planning process, *id.,* as would the concerns of the parent. *Id.*

Intrinsic to the provision of FAPE to children is the accumulation of information concerning the child and his levels of functioning, behavior and disability. District evaluations are the universal cornerstone in this area, and are, accordingly, specifically regulated. *See* 20 U.S.C. § 1414 (2004); 34 C.F.R. § 300.122, 300.300-300.311(2006).

For example, all districts must ensure that, beyond assessment in areas of known disability, "the child is [also] assessed in all areas of suspected disability." 20 U.S.C. § 1414(b)(3)(2004); *see also* 20 U.S.C. § 1412(a)(6)(B)(2004); 34 C.F.R. § 300.304(c)(1)-(7)(2006). Additionally, "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. . . ." *Id*. In doing so, District evaluations require a wide-range of assessments to address eligibility and "the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum…." 20 U.S.C. § 1414 (b)(2)(2004); *see also* 34 C.F.R. § 300.304(b)(1)-(3)(2006). An Office for Civil Rights (OCR) investigation in 2008 found a violation of a student's rights under 504 for failure to evaluate the student after frequent absences from school due to illness. *Laramie County (WY) School District #1,* 51 IDELR 169 (OCR 2008)(Although the district developed a Section 504 plan for the student, the plan was not based on any evaluations or developed by persons knowledgeable about the student.); *See also; Goshen (WY) Schools*, 70 IDELR 135 (OCR 2017)(student's discipline record spanned more than a decade and the frequency and severity of those incidents, along with the student's below-average grades, should have prompted the district to refer the student for an evaluation.). Of interest as well is an OCR investigation on failure to evaluate for dyslexia. OCR found no violation after a student was evaluated during COVID 19 closures rather than waiting for school to resume in person. *Teton County (WY) School District*, 78 IDELR 78 (November 10, 2020).

A significant number of students with disabilities present with challenging behaviors that interfere with their ability to learn. For these students, *Endrew F.* mandates that their IEPs be appropriately ambitious and address their challenging behaviors with challenging goals designed

to reduce the interfering behaviors. Thus, these students required Behavior Intervention Plans based on scientifically valid educational programs.

Because a student's interfering behaviors serve a function for that student, it is important to identify the purpose of the behavior. Once the function of the behavior is understood, a function-based intervention can be designed to decrease the interfering behavior and instead increase appropriate behavior.[6] A Functional Behavior Assessment (FBA) is a specialized evaluation in which specific environmental factors are manipulated systematically to develop a hypothesis regarding the function the behavior serves, analyzing the occurrence of the problem behavior and environmental factors.

When a child's "behavior impedes the child's learning or that of others," the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). FBAs are an evaluation under the IDEA that become necessary in certain circumstances where an IEP team and, or, parents need information to better understand a student's educational needs and how those needs are impacted by a student's behavior. *See Harris v. District of Columbia*, 561 F. Supp. 2d 63, 67–68 (D.D.C. 2008); *see also Letter to Gallo*, 61 IDELR 173 (April 2, 2013) ("FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability.") Failure to conduct an FBA can constitute a substantive denial of FAPE if fundamental aspects of a student's presentation are not assessed, *see Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016), but it can also constitute a procedural failure when the failure interferes with the parent's ability to participate in the IEP

[6] *See* Brittany Pennington, Elizabeth Pokorski, Skip. Kumm, & Brittany I. Sterrett, Practice Guide: School Based Functional Analysis at 4 (US. Dep't of Educ., Office of Special Educational Programs 2017), https://files.eric.ed.gov/fulltext/ED578082.pdf.

process, *see E.S. v. Conejo Valley Unified Sch. Dist.*, No. CV 17-2629 SS, 2018 WL 3630297, at *14 (C.D. Cal. July 27, 2018).

The FBA reveals information about the antecedents, consequences, and frequency of challenging behavior. *See Neosho R V Sch. Dist. v. Clark*, 315 F.3d 1022, 1026 (8th Cir. 2003). FBAs also help to identify any co-occurring variables. Conducting proper FBAs doubles the success rate of an intervention. With this information, IEP teams are able to develop appropriate plans for how to target and eliminate negative behaviors, and how to build appropriate replacement behaviors.

An FBA is a process for analyzing the cause and purpose of a specific behavior exhibited by a student. Its purpose is to determine the reasons for the student's behavior and to develop a comprehensive treatment plan to manage and reduce the behavior.[7] There are four main functions for behavior: "attention, escape, tangible reimbursement, and sensor/automatic enforcement."[8] Some behaviors may "have a single function, but in others, challenging behaviors have multiple functions."[9] Thus, a student who gets sent to the office when he kicks or hits during class is able to escape an undesired task by that behavior.[10] Knowing that the behavior serves the purpose of escape, a BIP can be designed to teach the student a socially appropriate method of escaping the undesired task, such as requesting a break, and also figure out a method of keeping the student engaged in educational tasks. The only codified rules regarding FBAs are when an IEP team has determined that certain conduct is a manifestation of a student's disability. *See* 34 C.F.R. § 300.530 (e-f). However, this approach is reactive and is an

[7] Mary M. Quinn et al., *Center for Effective Collaboration & Practice, Amer. Inst. for Research, Addressing Student Problem Behavior: An IEP Team's Introduction to Functional Behavior Assessment & Behavior Intervention Plan, Center for Effective Collaboration & Practice 3* (1998).
[8] Pennington, supra n. 2 at 4.
[9] *Id.* at 4
[10] *Id.* at 11 Table 1.

outlier from the IDEA's otherwise proactive approach to educational planning. As such, states across the country have clarified FBA provisions at the state level and exceeded the requirements of the IDEA in either statute or state regulation.[11]

The person(s) conducting the FBA should be highly trained in collecting data and conducting this type of assessment.[12] The evaluator identifies the target behavior that is the focus of the FBA evaluation.[13] The evaluator should review information from a variety of sources, such as questionnaires, behavior charts, and interviews with the student, parents and his/her teachers. The evaluator must observe the events leading up to the behavior (antecedents), the setting and the results of the behavior (consequences). These observations should occur in various settings. The evaluator also must record and collect systematic data to show the characteristics of the environment that may contribute to the occurrence of a behavior. The student's IEP Team must then review the information gathered during the FBA and develop a hypothesis as to the function or functions of the student's behavior.

The BIP and FBA must be incorporated into the IEP, which in turn must be provided to the child's parents in advance of the commencement of the school year. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). An IEP's failure to provide an FBA and BIP to address behaviors impeding learning may itself constitute the denial of a FAPE. *See Danielle G. v. N.Y. City Dep't of Educ.*, No. 06-CV-2152 (CBA), 2008 U.S. Dist. LEXIS 60192 (E.D.N.Y. Aug. 7, 2008), at *29-31 (reversing findings of IHO and SRO and holding that IEP's failure to include an FBA and BIP, among other deficiencies, deprived student of a FAPE); *Lauren P. v. Wissahickon Sch. Dist*., No. 05-5196, 2007 U.S. Dist. LEXIS 44945, at *28-29 (E.D. Pa. June 20, 2007) (ordering

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[11] *Id.*
[12] Quinn, *supra* note 3.
[13] Pennington, supra n. 2 at 5. Note that Functional Analysis is the term for a Functional Behavior Assessment used amongst behaviorists.

reimbursement of tuition where failure to create a BIP constituted denial of a FAPE), *aff'd in part, rev'd in part on other grounds,* 310 F. App'x 552 (3d Cir. 2009). This principle is supported by the official commentary to the federal regulations, which expressly states, "a failure to ... consider and address [behaviors impeding learning] in developing and implementing the child's IEP would constitute a denial of [a] FAPE to the child." 34 C.F.R. Part 300, Appendix A, Notice of Interpretation, Section IV, Question 38.

A hearing decision from 2017, *Fremont County School District #25*, 71 IDELR 224 (October 4, 2017), found:

> A district should implement fidelity checks routinely to ensure that behavioral intervention plans of students are not disregarded. This student's BIP called for redirecting the student to the least restrictive intervention and allowing the student to request a break to avoid escalation of a negative behavior. By failing to follow that plan when the student's behaviors escalated, the district could not later find that the teen's threatening conduct was a manifestation of this disability at an MDR.

The student was returned to school and the behavior was deemed a manifestation of his disability (Other Health Impaired).

VI. Independent Educational Evaluations (IEEs)

The entirety of 20 U.S.C. § 1414 makes clear that appropriate and timely district evaluations are one of the driving forces behind the promise of the IDEA. Appropriate, timely, and parentally understood assessment is so critical that Congress set out procedures for remedying when parents and IEP teams were denied the critical information to which they were entitled to under the act. See 20 U.S.C. § 1414(a-c). Under the IDEA, if a parent disagrees with a district's evaluation(s), they have the right to seek a publicly independent educational

evaluation of their child. 20 U.S.C. § 1415(b)(1)(2004); 34 C.F.R. § 300.502(b)(1) and (2)(2006).[14] Federal law provides:

> (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.
>
> (2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.
>
> (3) …
>
> > (ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.103.

34 C.F.R. § 300.502(a).[15] In essence, the IEE functions as a publicly funded "second opinion" for when there are concerns with any district evaluation or there is a failure to fully or timely evaluate "all areas of need." 20 U.S.C. § 1414(b)(3)(B)(2004). This procedure was created so as to, again, ensure that IEP teams have all of the assessment and data that they need in order to be enabled to develop appropriate educational programs for students.

Parents can seek an IEE if they just disagree with a school's evaluation, or they may be concerned with the tests used and their appropriateness, or that it fails to answer necessary questions. Parents may object to a limited scope of school assessments or that the district staff did not focus on critical questions. Though parents disagree they are not required to define that disagreement or their objection. 34 C.F.R. § 300.502(b)(4)(2006). Parents are not required to provide prior notice of their intent to seek an evaluation. That being said, a parent's request for an IEE does not automatically entitle the student to one. For example, once school districts

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[14] The IDEA requires that private evaluations must be considered by the IEP team and by the ALJ. *See* 34 C.F.R. § 300.502(c)(2006).

[15] The ALJ may independently order an IEE. 34 C.F.R. § 300.502(d).

demonstrate that their assessors followed proper procedures and adhered to the requirements of 20 U.S.C. § 1414, students are rarely awarded an IEE at public expense.[16]

The Supreme Court has explained the importance of this safeguard:

> [P]arents … play a significant role in the IEP process. . . . They also have the right to an 'independent educational evaluation of the[ir] child.' . . . The regulations clarify this entitlement by providing that a 'parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.' . . . IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Schaffer, 546 U.S. at 60-61. In an 11th Circuit case, rejecting a challenge to the requirement that IEEs be publicly funded, underscored the necessity of this parental right:

> The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. . . . Without public financing of an IEE, a class of parents would be unable to afford an IEE and their children would not receive, as the IDEA intended, "a free and appropriate public education" as the result of a cooperative process that protects the rights of parents.

Phillip C. v Jefferson Cty. Bd. of Educ., 701 F.3d 691, 698 (11th Cir. 2012) (internal citations omitted).

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[16] In 2003 a study was done of the available IEE cases and OSEP policy statements. Etscheidt, Susan, "Ascertaining the Adequacy, Scope, and Utility of District Evaluations," Exceptional Children, Vol. 69, No. 2, pp. 227-247 (Council for Exceptional Children 2003)("Etscheidt"). It shows a system that works as the ALJs and courts concentrated on three identified factors: (1) whether the district had complied with the IDEA technical requirements for evaluations; (2) whether the scope of the evaluation was sufficient; and (3) the utility of the evaluation in development of the IEP. *Id.* The "comparison served both to validate the [IDEA] criteria and to highlight the consistency of evaluation recommendations from various professional organizations." *Id.* at 239. The "legal standards uncovered in the case analysis mirror the professional standards." *Id.* Etscheidt found that courts sustained district evaluations when they were properly done under both legal and ethical standards and were adequate for designing the child's program, and in turn, allowed public IEEs for evaluations which failed to address the child's needs or IDEA's mandates, or were limited in scope.

Though "[t]he criteria under which the [IEE at public expense] is obtained, including the location of the evaluation and the qualifications of the evaluator, must be the same as the criteria the public agency uses when it initiates an evaluation. . . ," 34 C.F.R. § 300.502(e)(1), school districts are prohibited from imposing other conditions on the IEE. *Id.* at § 300.502(e)(2).

In 1997-1999, the broadest change in the IEE process in thirty-seven years clarified that the burden for seeking a hearing on a denial of public payment rested on the school. The IEE right remained in 20 U.S.C. § 1415(b) but the federal regulations were clarified to streamline the process and prevent stale-mate situations where school districts did nothing in response to the family's request. Instead, the most recent IEE changes require that school districts file a hearing request to dispute a parent's entitlement to an IEE thereby ensuring that the burden of pleading and proof at hearing with regard to appropriateness of district assessments rests on the district. This was to protect children and avoid unnecessary litigation while the child often sat unevaluated. It now provides:

> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
>
> > (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
> >
> > (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant … that the evaluation obtained by the parent did not meet agency criteria.

34 C.F.R. § 300.502(b)(2006).

The regulatory history went further and explicitly addresses the type of situation that arose below:

> The purpose of requiring the public agency to either initiate a due process hearing if it wishes to challenge a parent's request for an IEE, or otherwise provide an IEE at public expense, is to require public agencies to respond to the IEE requests and to ensure parents are able to obtain an IEE as set forth in section 615(b)(1) of the Act. ***There is no corresponding need to specify that a parent also has the right to initiate a due process hearing since <u>if a public agency does not do so it must provide the IEE at public expense</u>***.

64 Fed. Reg. 12607 (March 12, 1999)(explaining regulation in final version) (emphasis supplied).

It is clear that "[u]nless a public agency chooses to initiate a due process hearing in accordance with paragraph (b) of this section, the agency must respond to the parent's request by insuring an independent educational evaluation is provided at public expense in a timely manner." 62 Fed. Reg. 55098 (Oct. 22, 1997)(comments with <u>proposed</u> rule change). Thus "[a] parent's right to a publicly-funded IEE is subject only to the agency's right to request a due process hearing to show that its evaluation is appropriate."[17] Further, this limited course of action school districts have upon a parental request for an IEE must be acted upon quickly. *See Phillip C. ex rel A.C. v. Jefferson Cnty Bd. of Ed.*, 701 F.3d 691, 697 (11th Cir. 2012) (Noting, in reference to the state's Notice of Procedural Safeguards, that the an IEE is to be publicly funded unless the District seeks due process "without unnecessary delay".).

Under IDEA and state law, though school districts may seek due process, *see* 20 U.S.C. § 1415(b)(2004), there simply is no provision which allows the District to just say no to IEE funding, or just tell the parents it concluded that it has a defense to funding: the school district here had to either fund the IEE or file to defend its assessments.

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[17] The IEE provision was initially added in 45 C.F.R. § 121a.503(1977). It was later re-codified at 34 C.F.R. § 300.503(1980). *See* 45 Fed. Reg. 30803 (May 9, 1980) and 45 Fed. Reg. 86301 (Dec. 30, 1980) establishing nomenclature changes for the Department of Education). In earlier iterations, §300.503(b) stated that the agency "may" seek a hearing, but this phrasing led to situations wherein many school districts simply did nothing in response to the open-ended language. This led to unfortunate delay which frustrated the overall process of IEP development, and prompted the most recent updates to the law replacing "may" with "must."

Though there are exceptions that can justify school district delay in response to a parental request for an IEE, there is a universally accepted need for haste and certainty for children in whether they will receive an IEE to assist in the IEP planning process, and failures to act without delay have been interpreted as waiving a school district's right to challenge a student's right to an IEE. *See, e.g., Los Angeles Unified Sch. Dist.,* 111 LRP 48178 (SEA CA 2011)(holding that a 90-day delay in denying parents' request for publicly funded IEE was unreasonable given district's failure to communicate with the parents during that time or explain the reason for the delay)*; Los Angeles Unified Sch. Dist.,* 57 IDELR 55 (SEA CA 2011) (holding that a request just one week before the 24-day winter break meant the district was entitled to take time after the break to review its assessments and determine whether to grant the parents' request)*; and Los Angeles Unified Sch. Dist.,* 48 IDELR 293 (SEA CA 2007) (holding that the district erred in waiting for the parents to file a due process complaint rather than funding or filing)

Where there are delays or where the district does not seek a hearing, courts have routinely held that this waived its defenses and have often ordered reimbursement or payment for IEEs. This was the case in the Eleventh Circuit which held this in *Jefferson Cnty Bd. of Educ. v. Lolita S.*, 581 Fed. App'x 760 (11th Cir. Sept. 11, 2014). There, because the school board failed to timely file due process, the 11th Circuit held that "it cannot now defend its evaluation or challenge the IEE." *Id.* at *4. The Court found that the school board had "waived its opposition to the reimbursement claim by choosing not to file its own due process request." *Id.* at *2. The Eleventh Circuit also upheld this concept that failure to file to defend a school district assessment rendered the school district liable for reimbursement of IEE expenses incurred by a family in the absence of school district funding. *Jefferson Cnty Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d. 1091, 1277 (N.D. Ala. 2013)("The procedure was to file, without unnecessary delay, its own

request for a due process hearing . . . As the hearing officer correctly found [] because the Board 'chose not to file its own due process request to [] to demonstrate that the neuropsychologist did not follow the agency criteria,' the Board 'shall reimburse the parent for that evaluation.'"). Similarly, in *Pajaro Valley Unified School District v. J.S.*, the court found that the school district's unexplained and unnecessary delay in filing for due process waived the school district's right to contest the student's request for an IEE and warranted a judgment in favor of student. No. C06-0380 PVT, 2006 WL 3734289, at *3 (N.D. Cal. Dec. 15, 2006) (holding a three month delay was unacceptable). *See also Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824, 830 (8th Cir. 1988)(reimbursement ordered because the LEA "never initiated a hearing as required by [IDEA]"); *Bd. of Educ. of Murphysboro Cnty. Unit Sch. Dist. 186 v. Ill. of St. Bd. of Educ.*, 41 F.3d 1162, 1169 (7th Cir. 1994)(dicta) ("the school district could have contested this independent evaluation … but it did not"); *Hudson v Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987)(holding the school district could contest the parent's evaluation if "it convinces the administrative reviewers and the district court that its initial evaluation was correct.").

But since many families with children with disabilities simply do not have the means to pay for their own evaluation, there are legal distinctions in whether a school district fails to respond to a request for an IEE and does not file or whether the school district fails to respond to a request for an IEE and then responds inappropriately to a family's demand for reimbursement for an IEE. Clearly delays in acting in response to a parent's request for an IEE are discouraged—particularly where the delay impacts the student's ability to obtain the assessment itself, as opposed to reimbursement for such an independent assessment. See *Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 972 (5th Cir. 2016) (holding that a delay of

three or four months before taking action to reimburse an IEE is different than one relating to the obtaining of an IEE because "such a delay does not have the same effect (or even any effect) on a child's educational plan as failing to take action on an initial request for an IEE does.").

VII. Disagreements and Dispute Resolution

If the parents of the child are dissatisfied with the IEP, or with the manner in which the IEP is developed or implemented, they "may turn to dispute resolution procedures established by the IDEA. The parties may resolve their differences informally, through a 'preliminary meeting,' or, somewhat more formally, through mediation. If these measures fail to produce accord, the parties may proceed to what the Act calls a 'due process hearing' before a state or local educational agency. And at the conclusion of the administrative process, the losing party may seek redress in state or federal court." *Endrew F.*, 580 U.S. at 391 (cleaned up). The court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C).

However, a 10th circuit case explained that the failure to object to IEP team decisions until nearly two years after the IEP meeting concluded constitutes a waiver or a forfeiture of claims. *Smith v. Cheyenne Mt. Sch. Dist. 12,* 2017 U.S. Dist. LEXIS 100475, *17 (D. Colo. May 11, 2017).

> Regardless that the statute of limitations for the claim is two years, failing to raise this procedural flaw for two years (actually, one year and 363 days) constitutes either waiver or forfeiture. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (waiver is the intentional relinquishment of a known right); *United States v. Griffin*, 294 F. App'x 393, 395 (10th Cir. 2008) ("forfeiture is the failure to make the timely assertion of a right"); *Carroll v. Lawton Indep. Sch. Dist. No. 8*, 805 F.3d 1222, 1230 n.4 (10th Cir. 2015) (recognizing that an IDEA defendant can waive or forfeit a defense). In

the analogous situation where a school district develops an IEP with the parent's participation and the parent objects only after its expiration, "hearing officers are precluded from revisiting or re-opening accepted IEPs .... [A]llowing parents to second guess IEP decisions after it has expired would only undermine the process of providing students with the educational services they need." *Doe ex rel. Doe v. Hampden-Wilbraham Reg'l Sch. Dist.*, 715 F. Supp. 2d 185, 194-95 (D. Mass. 2010).

see also, *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont.*, 960 F.2d 1479, 1484-85 (9th Cir. 1992) (parents' decision to leave IEP meeting and not file a dissent to the team's conclusion did not result in "assumption of the risk" of an inadequate IEP).