

**STAYING OUT OF DEEP DUE DUE PROCESS:
AVOIDING CONFLICT WITH PARENTS WHILE SIMULTAENOUSLY
MEETING IEP COMPLIANCE OBLIGATIONS**

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**A Special Education Legal Forum
Break-out Session**

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I. INTRODUCTION

Developing the IEP is a collaborative process among many participants—administrators, staff and parents. With so many people weighing in on complex special education issues, it is easy for the meetings to become contentious and for details to slip through the cracks. In this session, we will explore ways to avoid process mistakes that lead to conflict and IDEA non-compliance. Tips will be provided for using a parent-friendly approach to communication, and we will review some real-life cases, what went wrong in these cases, and what other options the school district had. In addition, we will discuss the benefits of adopting a facilitated approach to IEP meetings, including training LEA Representatives as “meeting process leaders.” Not only will this lead to compliant IEPs and satisfy the IDEA’s procedural requirements, but will also help to maintain good relationships with parents that will keep them from feeling the need to contact an attorney.

II. TIPS FOR AVOIDING CONFLICT AND ENSURING IEP COMPLIANCE

In considering these tips, it is important to begin generally by emphasizing that parents--even the most educated and savvy ones—are already anxious about their child’s well-being when they receive the first communication from the school about their child’s suspected or substantiated disability. Add to that the fact, as acknowledged by the U.S. Supreme Court, that school districts have a “natural advantage” as it relates to evaluative information and educational expertise. *See, Schaffer v. Weast*, 44 IDELR 150, 126 S. Ct. 528 (2005). As a result, educators should be sure to view things from the parents’ perspective and to remember that they are preparing for a meeting that is, to most, an event that can be very scary and confusing and is most certain to provoke feelings of anxiety and distrust.

A. Tips for Action Prior to Meetings

Tip #1: Remember that the Parent-School Special Education Relationship Formally Begins with the First Invitation to a Meeting

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

The meeting notice must indicate the “purpose, time and location of the meeting and who will be in attendance” and inform them of their rights relating to the participation of other individuals on the IEP Team who have “knowledge or special expertise about the child,” as well as participation, as appropriate, by someone from the Part C (early intervention) program if the IEP meeting is an initial placement meeting for a student who was previously served in a Part C program. 34 C.F.R. § 300.322(b).

Specific suggestions to consider:

- a. Consider contacting the parent for available dates prior to sending out a written notice. That way, parents will feel more like “meaningful participants” from the beginning of the meeting process.
- b. Consider whether the written notice could be made to look more “parent friendly” and “fun.”
- c. Agree to reasonable and legitimate parental requests to reschedule an IEP meeting, even if they agreed to the original date.

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

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

Doug C. v. Hawaii Dept. of Educ., 61 IDELR 91, 720 F.3d 1038 (9th Cir. 2013). Education Department's failure to reschedule an IEP meeting when requested by the parent amounts to a denial of FAPE to the student. Thus, the case is remanded to the district court to determine the parent's right to private school tuition reimbursement. Where the ED argued that it had to hold the IEP meeting as scheduled to meet the student's annual review deadline, the argument is rejected because the father was willing to meet later in the week if he recovered from his illness and the ED should have tried to accommodate the parent rather than deciding it could not disrupt the schedules of other team members without a firm commitment from the parent. In addition, the ED erred in focusing on the annual review deadline rather than the parent's right to participate in IEP development. While it is acknowledged that the ED's inability to comply with two distinct procedural requirements was a "difficult situation," the ED should have considered both courses of action and determined which was less likely to result in a denial of FAPE. Here, the ED could have continued the student's services after the annual review date had passed and the parent did not refuse to participate in the IEP process. Given the importance of parent participation in the IEP process, the ED's decision to proceed without the parent "was not clearly reasonable" under the circumstances.

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

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

B.H. v. Joliet Sch. Dist. No. 86, 54 IDELR 121 (N.D. Ill. 2010). Although it may have been more convenient for the parent of a teenager with ADD to attend an evening IEP meeting, district's refusal to convene after school hours was no basis for a discrimination claim under Section 504. Clearly, there was no allegation that the student was excluded from any program because of her disability; nor was there evidence that the district acted in bad faith or with gross misjudgment. Thus, the parent failed to establish a valid 504 discrimination claim because she did not allege the student was wrongfully excluded from any educational programs. Although the district conceded that it refused to schedule an after-hours IEP meeting, "this refusal simply does not fall within the bounds of acts prohibited by Section 504, even if it may have been unfair or inconvenient to Plaintiffs in some sense."

- d. Keep detailed records/logs of meeting notices sent, telephone calls made and results and/or responses of/to those attempts, including any attempts to visit the parents' home or office to discuss the importance of their attendance at meetings.

Documentation is always useful for demonstrating reasonable efforts on the part of the school district to ensure the parents have been given the opportunity to meaningfully participate in meetings and for defending claims that the district inappropriately went forward with a meeting in the parents' absence.

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

- e. When parents don't attend meetings, don't stop with just providing them with copies of meeting documentation and prior written notices! Reach out to them with calls or follow-up letters, encouraging them to participate and emphasizing how important their participation is to the decision-making process.

- f. Where parents indicate that they absolutely cannot be physically present at the meeting or will have difficulty doing so, do not forget to appropriately offer to make alternative ways of participation available; e.g., telephone or video conferencing, as contemplated by IDEA.

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

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

Tip #2: Prepare Adequately for Meetings

Nothing is worse or less impressive than school team members appearing unprepared for an IEP meeting! In addition, lack of good preparation for an IEP meeting can lead to conflict and the potential for a legal dispute, because parents are more likely to see an unprepared group as uncaring and disinterested. Time spent in preparation is a trade-off for time spent in lengthy meetings and in conflict with parents!

Specific suggestions to consider:

- a. Develop a "Meeting Preparation Checklist" for all meeting process leaders to use that will assist all team members, including parents, to prepare adequately for an upcoming meeting. The following things should be considered for inclusion:

- Meeting room/space: Is it large enough to accommodate the invitees? Is it available and reserved? Is it sufficient to ensure that conversations are not heard by others who are not participants?
- The participants: Has everyone been notified of the meeting date, time and location? Are there going to be any time constraints for a team member that will need to be addressed? Have all participants been advised of the purpose of the meeting and prepared to discuss student strengths, challenges and needs?
- Parent survey/questionnaire: Has the parent been contacted or asked to complete and return (if in writing) a survey or questionnaire seeking their input regarding things like concerns they may have that they would like to be addressed at the meeting; view of the child's progress or lack thereof; services/supports they may be seeking; additional data they may have that they wish to be considered at the meeting; identification of any invitees they may be bringing to the meeting, etc.?
- Greeters: Who will greet the parents and escort them to the meeting room? Will the front office be prepared to address the parents when they arrive?
- Seating arrangements: Where will the meeting participants sit and next to whom? Are there any personality conflicts to take into consideration?
- Meeting visuals: Are all participants prepared to have all necessary forms and student data ready and available for the meeting?
- Technology: Will any technology (i.e., tape recorder, laptop computer, projector, conference phone, computer equipment, printer, etc.) be needed during the meeting and, if so, has that been arranged and set up in the meeting room?
- Meeting Agenda and Norms: Has a draft agenda been prepared to be proposed, agreed upon and posted, along with meeting norms/ground rules?
- Meeting necessities: Are other resources available for the meeting (i.e., water, tissues, pens, markers, post-it notes)?

b. Be sure to invite the mandatory school participants to attend the meeting.

Under the IDEA, a school system must ensure that the IEP team for each child 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. Members (2) through (5) above are the mandatory school team

members who must be present at every meeting and for the entire meeting, unless properly excused.

Note: The IDEA does contemplate that a mandatory member of the IEP Team may be excused from attending the meeting, in whole or in part, if the parent of a child with a disability and the school district agree that the attendance of such member is not necessary “because the member’s area of the curriculum or related services is not being modified or discussed in the meeting.” When the meeting involves a modification to or discussion of the member’s area of the curriculum or related services, the member may be excused if the parent and school district consent to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent or agreement to any excusal must be in writing.

- c. Ensure that the person designated to serve as the LEA Representative has been trained on the criteria applicable to serving as the LEA Representative and is aware of his/her important meeting role as the meeting’s “process leader.” Seriously consider not having “content people” serving in this role.

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.”

- d. Train and prepare regular education teachers regarding their roles/responsibilities as mandatory IEP team members and the importance of their presence at IEP meetings. Do not allow them to be “token” IEP team members!

Arlington Cent. Sch. Dist. v. D.K. and K.K., 37 IDELR 277 (S.D. N.Y. 2002). The absence of a general education teacher at an IEP meeting for LD student denied him FAPE and supported award of tuition reimbursement for private placement. The presence of the teacher at the meeting might have illuminated the extent to which visual instruction was offered as a part of the district’s mainstream curriculum and the likelihood that he could ever be integrated successfully into its general education program.

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.

Tip #3: Train Meeting Process Leaders in the Use of Preventions and Interventions during Meetings

A good meeting process leader will use various techniques, strategies and tools as both preventions and interventions that will help to make meetings more efficient and to ensure that all participants, especially parents, feel like true meeting participants. In addition, the use of preventions and interventions will serve to decrease the chance that conflict will arise during a meeting or to diffuse it if it should.

Based upon good training and preparation for meetings, the team's process leader may plan for the use of certain prevention and intervention tools and strategies and, as a meeting progresses, use others with the goal of reaching consensus amongst all team members and making them all feel like valued members of the decision-making team. General preventions and interventions include things such as physical prompts (i.e., use of positive body language, eye contact, leaning in); reminders of previous agreements made; making process suggestions; using open-ended and clarifying questions; stating the obvious; apologizing; deflecting/ignoring attacks; watching out for non-verbal cues; suggesting or recognizing the need for breaks, etc.

Specific suggestions to consider:

- a. Use visual tools as preventions and interventions, such as an agreed-upon and posted Agenda and Meeting Norms.
- b. Use a "parking lot" for documenting areas of concern on the part of the parents or other team member that are not in line for discussion at that particular time on the Agenda, but will be discussed later and prior to the end of the meeting. This lets the concerned team member know that they have been heard and will not be ignored.
- c. Use an "action plan" to list recommendations/actions that may need to be taken outside of or after the meeting, because they are not a part of the current team's responsibility to address or included in the purpose of the meeting. For instance, if the parent has a complaint about a particular teacher, an "action plan" item could include scheduling a time for the parent to meet with the school principal about that issue. It lets the parent or other concerned person know that the issue will be addressed and will not be ignored.

- d. Use effective communication strategies, such as active listening, questioning techniques, acknowledgement of speakers, completion of conversations, etc.

B. Tips for Action During Meetings

Tip #4: Provide Parents their Rights and Offer an Explanation of Them

The IDEA regulations clarify that a copy of IDEA procedural safeguards must be given to the parents one time per school year and --

- (1) Upon initial referral or parent request for evaluation;
- (2) Upon receipt of the first State complaint; and upon receipt of the first due process complaint in a school year;
- (3) In accordance with the discipline procedures in §300.530(h) (when a disciplinary change of placement is contemplated); and
- (4) Upon request by a parent.

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

Specific suggestions to consider:

- a. In addition to sending them by mail (if that is done), provide the rights at the beginning of meetings, document the date that they were provided, and consider keeping a copy of a dated first page of the rights in the file.

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

Jaynes v. Newport News, 35 IDELR 1, 2001 WL 788643 (4th Cir. 2001). Parents entitled to reimbursement for Lovaas program due to district's repeated failure to notify them of their right to a due process hearing. Where the failure to comply with IDEA's notice requirements led to a finding of denial of FAPE, court may award reimbursement for substantial educational expenses incurred by parents because they were not notified of their right to challenge the appropriateness of the district's program.

- b. Check for understanding on the part of the parents that the document presented is a copy of their parent rights and procedural protections.
- c. Consider the development of a “parent friendly” version of the rights/safeguards to go along with the formal, not-parent-friendly and somewhat scary version. Be sure to remind parents to ask for explanations if they do not understand their rights. (Note: The explanation does not have to occur at the IEP meeting).
- d. Make sure that contact information for district staff is made readily available on the school district’s website or to parents upon request. Make it clear that expression of parental concerns is welcomed.

Tip #5: While Preparation is Key, Avoid “Predetermination of Placement”

While good preparation for meetings is vital, over-preparation for meetings can be fatal if a “predetermination of placement” occurs or action is taken that can be perceived to deprive the parents of meaningful input into the decision-making process. A “predetermination of placement” or making placement decisions without parental input or outside of the IEP/placement process can not only cause a parent to lose trust in school staff, it is highly likely to lead to a finding of a denial of a free appropriate public education (FAPE) in and of itself. “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. Denial of parental participation/input might also be reflected if sufficient notice is not provided to parents of relevant evaluative information, proposed placement, etc. or if no consideration is given to information brought to the meeting by the parents.

Specific suggestions to consider:

- a. Train meeting process leaders to be prepared to rectify statements or action taken during meetings by school staff to avoid claims that predetermination has occurred.
- b. If draft IEP or other important documentation is prepared, share it with the parents before the meeting, making it clear that it is a draft for discussion and preparatory purposes only. (Hint: Consider keeping copies of those drafts too).

A.G. v. State of Hawaii, 65 IDELR 267 (D. Haw. 2015). Parents’ argument that the district’s reference to the workplace-readiness program in the 14-year-old’s draft IEP reflected predetermination of placement is rejected. Rather, the parents had the opportunity to express their concerns at the IEP meeting, including their desire for the student to spend part of the school day with nondisabled peers and to attend college. The district members of the IEP team reviewed the results of a recent assessment indicating that the student performed well below average academically and scored in the first percentile for cognitive functioning. In addition, the team modified the draft IEP in response to the parents’ input, adding speech-language objectives and progress-

monitoring requirements. There was no dispute that the IEP team discussed placement in the workplace-readiness program and attempted to address parental concerns at the IEP meeting. Further, the evaluative data supports the recommended placement in that program.

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

B.B. v. State of Hawaii, Dept. of Educ., 46 IDELR 213 (D. Haw. 2006). Parent was allowed input as to the student's IEP goals, even though they were in draft form. The PLEP and goals were discussed, modified and ultimately agreed upon by the entire IEP team, including the mother.

E.W. v. Rocklin Unif. Sch. Dist., 46 IDELR 192 (E.D. Cal. 2006). Meeting to prepare draft IEP goals and objectives for student with autism is not an impermissible predetermination of placement. This is particularly the case where the information concerning student's deficits and present level of performance were presented by the parents and the private providers at the IEP meeting.

G.D. v. Westmoreland, 17 IDELR 751, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation.

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

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

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

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

71 Fed. Reg. 46678.

- c. Adequately prepare for meetings, but if preparatory staff meetings or other activities occur, make sure that everyone who attends or participates understands that no final determinations regarding identification, evaluation, placement or the provision of FAPE are going to be made prior to the meeting with the parents.

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

N.L. v. Knox Co. Schs., 38 IDELR 62, 315 F.3d 688 (6th Cir. 2003). The right of parental participation is *not* violated where teachers or staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made.

Doyle v. Arlington Co. Sch. Bd., 19 IDELR 259, 806 F. Supp. 1253 (E.D. Va. 1992). School officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind.

IDEA Regulatory clarification: The IDEA requires that parents be afforded an opportunity to participate in meetings with respect to-- (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child. However, a meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include

preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b) (3).

- d. Train and remind staff that they cannot be inappropriately bound or restricted by a computerized or web-based IEP program in the process of developing the content of an IEP.

Elmhurst Sch. Dist. 205, 46 IDELR 25 (SEA Ill. 2006). District predetermined placement based upon team's lack of discussion of placement options, unwillingness to consider the home-based ABA program already in place for the student, and a computer-generated IEP with another student's name included on several pages.

Roland M. v. Concord Sch. Comm., 1989 WL 141688 (D. Mass. 1989), aff'd, 910 F.2d 983 (1st Cir. 1990). Although procedural violations were not sufficient to find a denial of FAPE, the use of a computer generated IEP resulted in a "mindless" IEP.

- e. Be sure to explain the meaning of any "coded" items on IEPs, such as codes with annual goals, internal school codes, etc., as well as educational jargon and acronyms.

Rockford (IL) Sch. Dist. #205, 352 IDELR 465 (OCR 1987). Computer generated IEPs lacking clear statements of current levels of educational performance, annual goals, or short-term objectives violated the IDEA, as the IEP was not "readily comprehensible" to the parents. Parents interviewed indicated that they did not fully understand the symbols, codes and other markings in the children's IEPs and did not consider themselves sufficiently informed to ask questions.

- f. Document that the school members of the team have thoroughly considered/discussed parental placement requests, even those that may seem "bizarre" or "ridiculous."

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."

- g. Be careful not to overstate the purpose of a meeting when opening it. In other words, be general. For example, "we are here today to review and possibly revise Susie's IEP," not "we are here today to develop an IEP for Susie to attend the self-contained class for LD students."

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

- h. Share all evaluative information about the student with the parents—good, bad or ugly—and do not assume that they “don't want to hear it.”

Amanda J. v. Clark Co. Sch. Dist., 160 F.3d 1106 (9th Cir. 2001). Because of the district's “egregious” procedural violations, parents of student with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996, as well as compensation for inappropriate language services during the student's time within the district. Where the district failed to timely disclose student's records to her parents, including records which indicated that student possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process. There is no need to address whether the IEPs proposed by the district were reasonably calculated to enable the student to receive educational benefit because the procedural violations themselves were a denial of FAPE.

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

Tip #6: Allow for Appropriate Participation of Parent “Invitees”

Parents are entitled to invite and bring “other individuals who have knowledge or special expertise regarding the child” to an IEP meeting. 34 C.F.R. § 300.321. Generally, unless confidentiality is violated, school staff should allow such persons to attend under the IDEA. However, it should be remembered that the IEP process is a process by which the entire IEP Team, with the parent and his/her invitees, is to attempt to reach consensus as to the components of a student's IEP and program.

Specific suggestions to consider:

- a. If a pre-meeting survey is not used or the parent does not complete it, contact the parents personally to ask them to inform the school ahead of time as to who, if anyone, they intend to bring with them to the meeting, in order that the school has adequate meeting space available, etc.
- b. Be sure to ascertain the identity of and the role that the invitee wishes to play and afford an appropriate level of participation.

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

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

Letter to Andel, 67 IDELR 156 (OSEP 2016). While the school district must inform parents in advance of an IEP meeting as to who will be in attendance, there is no similar requirement for the parent to inform the school district, in advance, if he/she intends to be accompanied by an individual with knowledge or special expertise regarding the child, including an attorney. "We believe in the spirit of cooperation and working together as partners in the child's education, a parent should provide advance notice to the public agency if he or she intends to bring an attorney to the IEP meeting. However, there is nothing in the IDEA or its implementing regulations that would permit the public agency to conduct the IEP meeting on the condition that the parent's attorney not participate, and to do so would interfere with the parent's right...." It would be, however, permissible for the public agency to reschedule the meeting to another date and time "if the parent agrees so long as the postponement does not result in a delay or denial of a free appropriate public education to the child."

Tip #7: Consider Recommendations of Private Evaluators

While parents are not provided any sort of "veto power" over the decision-making process, it is important that parental input be "considered" in the process of that decision-making. One way to show that their input was considered is to properly consider and discuss any recommendations of private evaluators.

Specific suggestions to consider:

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

- b. If a parent should provide a copy of a private evaluation report to the school or to school personnel, immediately review the report and strongly consider convening an IEP team meeting so that its recommendations may be considered by the team.

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

T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

DiBuo v. Board of Educ. of Worcester Co., 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child's physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

Watson v. Kingston City Sch. Dist., 43 IDELR 244, 2005 WL 1791553 (2d Cir. 2005). Lower court's ruling that district was not required to incorporate recommendations of private evaluator is upheld. In addition, district's failure to update goals and objectives from student's prior year IEP was insufficient to find a violation of IDEA, as this was a minor procedural error.

Tip #8: Remember the “I” in IEP and IDEA

Remember that team meeting discussions are always to be focused on the child and what the child needs in order to receive educational benefit.

Specific suggestions to consider:

- a. Train meeting process leaders to be prepared to rectify statements or action taken during meetings to avoid claims that the individual student’s needs were ignored in making recommendations.

School team members must always respond to parental requests for services based upon what the student needs to receive educational benefit, rather than what the school district has, what it always does, or what it has never done before. For example, “it is our belief that our data reflects that this is what the student needs to benefit from her educational program,” not “I’m sorry, we just don’t have that here,” “we’ve never done that before for an autistic student,” or “my schedule won’t allow for that.” The controlling question for determination is “what does the school’s data reflect is needed for this student to receive educational benefit?” 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 the student substantive harm and denied him FAPE. It appeared that district had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology. This policy meant that “school system personnel thus did not have open minds and were not willing to consider the provision of such a program,” despite the student’s demonstrated need for it and success under it.

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 more than 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.

- b. Avoid statements or program development that sound like a “one-size fits all” program is being recommended.

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

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

- c. Avoid mentioning cost of services as a basis for denying them. Rather, the justification should always be that “the school’s data does not show that the student needs those services in order to receive educational benefit.”

Letter to Anonymous, 30 IDELR 705 (OSEP 1998). Lack of sufficient resources and personnel is not a proper justification for the failure to provide FAPE.

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