90 TIPS IN 120 MINUTES

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MISSISSIPPI DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION

SPECIAL EDUCATION DIRECTORS QUARTERLY MEETING

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This lightning-fast session will provide attendees with 90 practical tips in 120 minutes on all things legal, from A to Z, in the field of special education. Tips and topics covered will begin with child-find, then move to evaluation, eligibility, IEP/placement, procedural safeguards, discipline and Section 504/ADA and end with some COVID-related tips.

I. CHILD-FIND/IDENTIFICATION TIPS

1. **TRAIN** all school personnel to take the "Problem Solving Team" process seriously and to understand that the role of these Teams is not to "get a student into special ed."

- To prevent disproportionality/overrepresentation based upon race or ethnicity.
- To prevent over-identification of students in special education generally.
- To ensure that students are provided with appropriate instruction prior to consideration for special education services.

2. **TRAIN** all school personnel (including regular education teachers and those who serve on "Problem Solving Teams") on the overall legal requirements applicable to the identification and education of students with disabilities.

- Individuals with Disabilities Education Act (IDEA)
- Americans with Disabilities Act (ADA)
- Section 504 of the Rehabilitation Act of 1973 (Section 504)
- Family Educational Rights and Privacy Act (FERPA)
- Every Student Succeeds Act (ESSA) (formerly No Child Left Behind (NCLB)/ESEA)
- Relevant state law requirements that differ from federal

3. **ENSURE** that if/when developing and implementing an RTI approach to child-find and identification, a parental request for an evaluation is not met with: "I'm sorry, but we can't do an evaluation right now because your child has not completed RTI."

Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011). States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy. The use of RTI strategies cannot be used to delay or deny

the provision of a full and individual evaluation. It would be inconsistent with the evaluation provision of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RTI framework.

4. **REMEMBER** that school personnel cannot require a student to participate in the RTI process prior to conducting an evaluation where the student has been placed in a private school or outside public agency setting and RTI data is not generated or do not otherwise exist.

Letter to Zirkel, 56 IDELR 140 (OSEP 2011). If a private school located within a district's jurisdiction does not use RTI, the district is neither required to implement it with the private school student, nor entitled to deny or delay a referral for an evaluation because the private school did not use RtI. In addition and regardless of whether the private school has used RTI, unless the district believes that there is no reason to suspect that the child is eligible, it must respond to a referral from the private school or parent by conducting an evaluation within 60 days or according to the state-imposed deadline. "If an RTI process is not used in a private school, the group making the eligibility determination for a private school child may need to rely on other information, such as any assessment data collected by the private school that would permit a determination of how well a child responds to appropriate instruction or identify what additional data are needed to determine whether the child has a disability."

Letter to Brekken, 56 IDELR 80 (OSEP 2010). School districts cannot require outside agencies, such as Head Start, to implement RTI before referring a child for an initial evaluation. Once a district receives a child-find referral, it must initiate the evaluation process in accordance with the IDEA. The IDEA neither requires nor encourages districts to monitor a child's progress under RTI prior to referring the child for an evaluation, or as part of an eligibility determination. Rather, it requires states to allow districts to use RTI in the process of determining whether a student has an SLD.

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

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

Spring Branch Indep. Sch. Dist. v. O.W., 961 F.3d 781, 76 IDELR 234 (5th Cir. 2020). School district violated IDEA when it waited 99 days to refer the gifted 5th-grader with ODD for an evaluation. While a district may attempt interventions to address age-typical behaviors prior to conducting an evaluation—for example, for throwing tantrums or failing to follow directions by a young child—other behaviors signal a more urgent need for an evaluation. Here, the student had drawn violent pictures depicting murder, death, and anti-Semitic images; used vulgar language in class; refused to follow directions or remain in class; threw crayons at the teacher; climbed the gym walls; and engaged in other behaviors that resulted in daily removals from class. Based upon the serious nature of these behaviors, it was not reasonable for the district to try intermediate measures, such as "success charts," prior to determining whether a special education evaluation was needed. The district court's ruling that the district violated IDEA's child find duty is affirmed, as well as its ruling that the use of time-out with the student was inappropriate. However, it was not a violation of IDEA for staff to use physical restraint on 8 occasions when he became violent toward them.

6. **WATCH OUT** for "referral red flags."

So, what constitutes sufficient "reason to suspect" or reason to believe" sufficient to trigger the duty to refer a student for an evaluation under IDEA or Section 504? Based upon existing case law and agency opinions, I have developed a running checklist of "referral red flags" that courts/agencies could find, in combination, sufficient to constitute a "reason to suspect" a disability and need for services that would trigger the IDEA's

or 504's child-find duty. I believe it is important for school personnel to be trained to look out for these referral red flags both under Section 504 and IDEA, especially in an "RTI world."

Important Note: When using a list like this, it is very important to remember that not one of these triggers alone (or even several together) would typically be sufficient to trigger the child-find duty under Section 504 or IDEA. However, the more of them that exist in a particular situation, the more likely it is that the duty would be triggered. It is also important to note that it is more likely that the child-find duty will be triggered under Section 504 before it would be under the IDEA, because the definition of disability is much broader and all-encompassing than it is under IDEA. Under the IDEA, it is rare that a court would find it sufficient to trigger the duty to evaluate if there are no referral red flags in the area of academic concerns. However, OCR is likely to find the 504 duty to evaluate has been triggered, even in the absence of any academic or learning concerns. Especially in an RTI world, look out for indicators in these areas and **"when there's debate, evaluate!"**

a. Academic Concerns in School

- Failing or noticeably declining grades
- Retention
- Poor or noticeably declining progress on standardized assessments
- Student negatively "stands out" academically from his/her same-age peers
- Student has been in the Problem Solving/RTI process and progress monitoring data indicate little academic progress or positive response to interventions
- For IDEA child find purposes, student already has a 504 Plan and 504 services or accommodations have provided little academic benefit
- For 504 child find, student has been evaluated under IDEA and found ineligible for special education services.

b. Behavioral/Social/Emotional Concerns in School

- Numerous or increasing disciplinary referrals for violations of the student code of conduct that are of significant concern
- Signs of significant depression, withdrawal, inattention/distraction, organizational issues, anxiety, mental illness or mental health issues, etc.
- Truancy problems, noticeably increased/chronic absences or skipping class
- Student negatively "stands out" behaviorally/socially/emotionally from his/her same-age peers
- Student has been in the Problem Solving/RTI process and progress monitoring data indicate little behavioral/social/emotional progress or positive response to interventions
- For IDEA child find purposes, student already has a 504 Plan and/or BIP and accommodations, interventions/strategies have provided little behavioral/social/emotional benefit
- For 504 child find, student has been evaluated under IDEA and found ineligible for special education services

c. Outside Information Provided

- Information that the student has been hospitalized or received medical treatment (particularly for mental health reasons, chronic health issues, etc.)
- Information that the student has received a DSM-5 diagnosis (ADHD, ODD, OCD, PTSD, etc.)
- Hospital/homebound services have been recommended or provided (may have a disability that should be acknowledged under Section 504 to ensure nondiscrimination or 504 services)
- Information that the student has been exposed to traumatic event(s)
- Information that student has suffered a concussion or traumatic brain injury

- Student has an Individual Health Care Plan (may have a 504 disability that should be acknowledged to ensure nondiscrimination or a need for educational services beyond the IHP to ensure equal access and safety)
- Information that the student is taking medication
- Information that the student is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/other service provider suggests the need for an evaluation or special services

d. Internal Information from School Personnel

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

e. Parent Request for an Evaluation or Services

- Parent requests an evaluation or services and some other listed item(s) above is/are present

7. DO NOT WAIT for parents to initiate the referral for an evaluation when red flags are present.

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

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

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

9. **REMEMBER** to refer a student back to the "Problem Solving Team" process if a determination is made that the student will not be referred for an evaluation and **SEND** prior written notice of any refusal to refer/evaluate.

II. EVALUATION/REEVALUATION TIPS

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

Shelby S. v. Kathleen T., 45 IDELR 269 (5th Cir. 2006). School district has justifiable reasons for obtaining a medical evaluation of the student over her guardian's refusal to consent. If the parents of a student with a disability want the student to receive special education services under the IDEA, they are obliged to permit the district to conduct an evaluation.

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

11. **SHARE** fully all relevant evaluative and other educational information about the student with the parents.

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

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

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

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

13. **USE** a variety of assessments when evaluating for the existence of a disability and do not use a single assessment to identify a disability.

Draper v. Atlanta Indep. Sch. Sys., 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008). Where the district failed to identify the student's SLD for five years and had determined that he was eligible for services as a mildly intellectually student with a disability based upon just one assessment, the school district denied FAPE. The district court did not abuse its discretion in ordering the school district to pay up to $38,000 per year until 2011 for private placement as a remedy. The relief awarded was not disproportionate to the IDEA violations, as the district failed to identify the student's SLD for five years and transferred him from a self-contained class to a regular education program without considering his severe reading deficiencies. In addition, the district continued to use an ineffective reading program for three years, despite the student's clear lack of progress.

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

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

Z.B. v. District of Columbia, 72 IDELR 27, 888 F.3d 515 (D.C. Cir. 2018). Where it appeared that the district relied only upon the private evaluation report to develop the 2014 IEP for a student diagnosed with ADHD and learning disabilities rather than conducting its own assessments, it is unclear whether additional data were required to develop an appropriate IEP. After the parents provided a private evaluation report diagnosing the child with ADHD and determining that she had "weaknesses" in math and written expression, the district found the student eligible under the IDEA and developed an IEP based on the evaluation. The parents subsequently enrolled the student in private school and filed a due process hearing for reimbursement of private school costs, arguing that the IEPs for 2014 and 2015 were inadequate because they lacked certain goals and adequate specialized instruction. For the 2014 IEP, the district erred by failing to question whether the IEP team needed additional or different metrics of the child's skills before developing her IEP. It was not enough to reason that the IEP accorded with recommendations in the private evaluator's report. "The school may not simply rubber stamp whatever evaluations parents manage to procure or accept as valid whatever information is already at hand." As to the 2015 IEP, the district took an affirmative role in collecting information before developing it, so that IEP offered FAPE. The case is remanded to determine the appropriateness of the 2014 IEP.

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

❖ When there's debate, reevaluate!

Knox v. St. Louis City Sch. Dist., 76 IDELR 286 (E.D. Mo. 2020). District should have reevaluated the elementary school student earlier than it did, when a counselor received an IEE from the student's grandmother in November 2016 following a determination by the district that the student was not eligible under IDEA as an ED student. Under IDEA, a district must evaluate a student when it suspects the student has a disability and needs special education services. Once the IEE was received, the district neither formally reviewed the IEE nor initiated another evaluation of the student to determine his eligibility until the grandmother filed for due process. This was despite the fact that the independent evaluator determined that the student's academic skills were at a kindergarten level and that the student had significant challenges related to hyperactivity, aggression, conduct, depression, attention, and withdrawal. Thus, the IEE, in

combination with the student's academic and disciplinary history, triggered the district's duty to evaluate and the district violated IDEA's child find requirement by waiting until February 2017 to reevaluate the student. The court also affirmed the hearing officer's determination that the district impeded the grandparent's participation in the IEP process. Finally, the court held that the grandparent, having prevailed in the administrative hearing, was entitled to $116,375.95 in attorney's fees and costs.

16. **CONSIDER** results of independent or private evaluations and recommendations of outside professionals that parents present.

Hoover City Bd. of Educ. v. Leventry, 75 IDELR 32 (N.D. Ala. 2019). Where guardian of 10th-grader with PTSD, anxiety and a diagnosis of "conversion disorder" sought special education services, the team's decision that she was not eligible was based upon an inadequate evaluation. Thus, the district is ordered to comply with the hearing officer's decision within 30 days and appropriately evaluate the student to determine eligibility. Under IDEA, districts must use a variety of assessment tools and strategies to gather relevant information about a student to determine whether the student has a disability. Here, however, the district's consulting psychologist only examined paperwork concerning the student, and the team did not consider information from a counselor who had been meeting with the student for months who had experience working with students who had suffered from trauma. Because the student's conversion disorder is rare, the team should have considered the counselor's input. In addition, because of the unique nature and severity of the student's disorder, it was reasonable for the hearing officer to expect the eligibility team to have a psychologist who had personally examined the student as part of the evaluation. Further, in not considering information from the private counselor, the district violated the student's IDEA rights.

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

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

Hopewell v. Township Bd. of Educ., 77 IDELR 20 (D. N.J. 2020) (unpublished). The district's failure to file a due process complaint in response to a parent's request for an IEE is a basis for ordering the district to fund the IEE. The district's argument that the parent's request for an IEE was untimely is rejected. While it is true that the parent waited until May 2018 to express disagreement with a reevaluation the district conducted from April to June 2016, neither the federal nor state regulations governing IEEs set a time limit for disagreement. Rather, the regulations state that the right to a publicly funded IEE is triggered by a parent's disagreement with an evaluation. Because the parent stated her disagreement with the 2016 evaluations in a May 2018 email, she would be entitled to an IEE at public expense unless the district filed

a due process complaint within 20 days, as required by New Jersey law. The district never filed a due process request to challenge the IEE, so the parent is entitled to it.

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

C.P. v. Clifton Bd. of Educ., 77 IDELR 46 (D. N.J. 2020). Where the district's formal policy regarding IEEs provides that it will pay a "reasonable and customary rate" for the type of evaluations (one psychological, one auditory) requested by the parent, the hearing officer's determination that $5,200 for the two IEEs sought by the parent is not reasonable is upheld. The evidence reflects that the district typically pays $900 for independent psychological evaluations of this type and unless the parent can show "extraordinary circumstances" that justify a higher rate, she is not entitled to reimbursement for more than the district's rate cap. Where the district's documentation shows that it paid between $650 and $1350 for IEEs in the previous two years, with an average cost of $900, the maximum reasonable amount for reimbursement to the parent is $1800. The parent has not identified any circumstances that would warrant reimbursement in excess of the district's cap and, therefore is not entitled to recover the full amount sought. Note: The court began its decision by noting that "[t]his is a federal-court litigation, with both parties represented by counsel, over the sum of five thousand dollars--or at least the portion of that amount that may be deemed excessive--or at least the procedures by which the parties argued about it. Though it makes no difference to the result, I observe that the secret headwaters of this flowing stream of issues seem to be underlying disputes about attorney's fees."

19. **REMEMBER** the responsibility to conduct a FAPE evaluation of resident students upon request, even where the student has been placed by the parent in a private school located in another jurisdiction.

Bellflower Unif. Sch. Dist. v. Lua, 77 IDELR 181 (9th Cir. 2020) (unpublished). District's refusal to develop a new IEP for a middle schooler unless and until she left her parochial school and reenrolled in the public school system is a denial of FAPE, and the parents are entitled to reimbursement for the cost of the student's private school placement. Districts are required to make FAPE available to all of their students with disabilities who are residents of the district, even those enrolled in out-of-district private schools, upon parent request. Here, where the student still resided in the district, the district remained responsible for reevaluating her and providing special education services. While the district would not have to make a written offer of FAPE if the parents had clearly stated their intent to continue the student's private placement, these parents wrote a total of three letters in 2015 and 2016 indicating that they were still interested in a public school placement and an updated IEP.

A.B. v. Abington Sch. Dist., 440 F.Supp.3d 428, 76 IDELR 41 (E.D. Pa. 2020), aff'd, 78 IDELR 1 (3d Cir. 2021). While a district must make FAPE available to a parentally placed private school student with autism upon parent request, even if the student has not enrolled in a district school, the parent's general inquiries about the types of services the district has to offer did not qualify as a request for FAPE. To prove an IDEA violation, parents must prove that they specifically asked the district for an evaluation and development of an IEP and the district refused. Here, the student services coordinator at the high school testified that the parent called him and, in a very brief conversation, asked about special education services available in the district. The parent ended the call by thanking him for the information and the coordinator noted that the person on the phone did not ask about an evaluation for her child. In addition, the parent did not request an evaluation or an IEP in her prior emails to the district. Thus, the hearing officer's decision that the district had no obligation to reevaluate the student is upheld.

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

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

III. ELIGIBILITY TIPS

21. **ADHERE** to your applicable State eligibility requirements, including definitions, criteria and minimally required evaluations and other data and thoroughly and accurately **DOCUMENT** adherence to State requirements.

22. **UTILIZE** an appropriate Eligibility Committee or Team process with required participants, including the parent(s).

23. **PROVIDE** the parent (and invitees) an opportunity to meaningfully participate in an eligibility determination and **DO NOT PREDETERMINE** eligibility.

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

24. **REMEMBER** that actual "disability labels" does not matter legally—it's eligibility for services and the provision of FAPE that matter.

Bentonville Sch. Dist. v. Smith, 73 IDELR 203 (W.D. Ark. 2019). Where the special education services in the student's IEP are tailored to address his academic and behavioral needs, FAPE was not denied when the district changed the student's classification from autism to emotional disturbance. The parent's claim that the change in classification was incorrect and, as a result, the district could not appropriately address the student's autism-related behaviors, is rejected. The change in classification had no effect on the special education services set out in the IEP, since the most recent IEP and BIP continued to offer the student positive behavioral interventions, such as frequent breaks, positive reinforcement and encouragement, a highly-structured environment, a separate desk and alternative work options. These interventions were the same ones provided when the student was classified with autism. In addition, the evidence is that the interventions have continued to reduce the student's behavioral issues in class and helped him to improve his overall social skills and academic performance. Thus, the particular disability classification will, "in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs." Thus, the hearing officer's decision in favor of the parent is reversed.

Dear Colleague Letter, 66 IDELR 188 (OSEP 2015). In response to concerns that districts are hesitant to reference or use the terms dyslexia, dyscalculia and dysgraphia in IEPs and other related documents, it is

noted that nothing in the IDEA forbids districts from using such terminology. Using such terms may be helpful for districts at times, even though it is not a legal requirement to do so. In the IDEA regulations, a non-exhaustive list of examples of SLD includes dyslexia, but not dyscalculia or dysgraphia. However, this does not matter, since what is most important is that districts conduct an evaluation to determine whether a child meets the criteria for SLD or any other disability and to determine the need for special education and related services. Information about a student's learning difficulties may be helpful in determining educational needs. In addition, since a child's IEP must be accessible to the regular education teacher or other school personnel responsible for implementation, noting the specific condition involved might be a way for districts to inform personnel of their specific responsibilities related to implementing the IEP. It may also serve as a way for districts to ensure that specific accommodations, modifications and supports are provided in accordance with the IEP. Thus, districts are encouraged to consider situations where it would be appropriate to use specific terms like dyslexia, dyscalculia or dysgraphia to describe a child's unique needs through evaluation, eligibility and IEP documentation.

25. **DO NOT LIMIT** the definition of "educational performance" to academic performance when determining whether there is a condition that adversely affects educational performance (unless you are in the Second Circuit, perhaps).

Independent Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073, 76 IDELR 203 (8th Cir. 2020). District court's ruling that student with depression, anxiety and other conditions is eligible for special education is affirmed. To be eligible for services, the student must have a disability and a disability-related need for special education services. Here, the student qualifies as a student with emotional disturbance where she has suffered for years from a "panoply" of mental health issues that have kept her in her bedroom, socially isolated, and terrified to attend school, which resulted in earning very few course credits. The district's argument that the student's above-average intelligence, above-average standardized test scores and exceptional performance on the rare days she attended school reflect that she does not have a disability-related need for special education is rejected. IDEA does not focus upon a student's innate intelligence; rather, it focuses upon a student's ability to make progress in the general curriculum. Clearly, the record reflects that this student's intellect alone is insufficient for her to progress academically and that she needs special education and related services.

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

William V. v. Copperas Cove Indep. Sch. Dist., 74 IDELR 277 (5th Cir. 2019) (unpublished). The district court's decision is vacated and remanded where the court failed to consider whether the second-grader with dyslexia had an educational need for specialized instruction and related services when finding that the district erred in determining the child was not eligible under IDEA. On remand, the lower court must apply the two-part test for IDEA eligibility and find that the student: 1) has one of the 13 disabilities specifically identified in the statute; and 2) needs special education and related services because of that disability. Thus, the district court erred in finding the student eligible based solely on his dyslexia diagnosis and simply because dyslexia qualifies as a specific learning disability under IDEA. Where the district court never considered whether the accommodations the student received in the regular classroom qualified as special education -- a circumstance that might demonstrate a need for IDEA services -- nor did it discuss whether the student made appropriate progress with those accommodations, this court cannot review the appropriateness of the district's eligibility determination. NOTE: In the remanded case, the district court found that the student was eligible as SLD, but that the original failure to find eligibility was a harmless procedural violation, because the student received the services he needed and made appropriate progress in general education where his reading deficits were addressed in a reading group for students with dyslexia

and he received afterschool tutoring once a week. William V. v. Copperas Cove Indep. Sch. Dist., 75 IDELR 124 (W.D. Tex. 2019), aff'd, 77 IDELR 92 (5th Cir. 2020) (unpublished).

J.M. v. Summit City Bd. of Educ., 77 IDELR 224 (D. N.J. 2020). District did not violate its child find duty when finding that the student with autism was not eligible under IDEA during the 2016-17 school year. Though the parent submitted an independent educational evaluation stating that the student presented behaviors that suggested ADHD and autism, the district properly considered the evaluation in conjunction with the results of its own assessments and other data collected during the RTI process. While the student was subsequently diagnosed officially with autism the following school year by a private practitioner, the district developed an IEP for him and its later classification does not render its earlier determination inadequate. This is so, where the district had a reasonable basis for determining that the student did not need special education services earlier because the student had improved in reading, writing and communication skills with academic and behavioral interventions available in the general education setting through RTI. Thus, the hearing officer's dismissal of the parent's IDEA claims is upheld.

27. DISTINGUISH between SED and BAD but be careful and thorough in doing so!

H.M. v. Weakley Co. Bd. of Educ., 65 IDELR 68 (W.D. Tenn. 2015). An ALJ's ruling that the frequently truant high schooler was "socially maladjusted" did not mean that the student was not IDEA-eligible. The student's lengthy history of severe major depression coexists with her bad conduct and qualifies her as an ED child. Social maladjustment does not in itself make a student ineligible under the IDEA. Rather, the IDEA regulations provide that the term "emotional disturbance" does not apply to children with social maladjustment unless they also meet one of the five criteria for ED. Since age 9, this student has been diagnosed with severe major depression and later medical and educational evaluations stated that she had post-traumatic stress disorder in addition to a recurrent pattern of disruptive and negative attention-seeking behaviors. Further, the depression was marked, had lasted a long time and affected her performance at school. Thus, it is "more likely than not" that her major depression, not just misconduct and manipulation, underlie her difficulties at school. Thus, the hearing officer's decision finding her ineligible under the IDEA is reversed.

28. DON'T rely solely on medical diagnoses or recommendations for determining eligibility!

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

M.G. v. Williamson Co. Schs., 71 IDELR 102 (6th Cir. 2018) (unpublished). District's decision that the student did not need OT and PT was supported. Although the parents challenged the school's conclusions by pointing to the child's doctor's prescription for OT and PT, "a physician cannot simply prescribe special education." IDEA does not require schools to provide PT or OT to all students who might benefit from or

need those services outside the educational context; rather, IDEA only requires schools to provide those services to students who require them in order to receive the benefit of special education instruction. Thus, the educators' numerous assessments are a better indicator of her need for special education services than the child's doctor's prescription.

IV. IEP DEVELOPMENT AND FAPE TIPS

29. **BE AWARE** that the IEP is considered to be the "centerpiece" of the IDEA's education delivery system for students with disabilities; in other words, it is the *modus operandi* for getting the FAPE job done.

Endrew F. v. Douglas Co. Sch. Dist. RE-1, 69 IDELR 174, 137 S. Ct. 988 (2017). The Tenth Circuit's "merely more than *de minimis*" standard sets the bar too low when assessing whether a student with a disability has been provided with FAPE. From a substantive perspective, schools are to offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Thus, the Tenth Circuit's finding that the district provided FAPE is vacated and remanded for further proceedings.

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

A predetermination of placement or making placement decisions without parental input or outside of the IEP/placement process will not only cause a parent to lose trust in school staff, it is very likely that it will also lead to a finding of a denial of FAPE. "Predetermination of placement" includes action such as fully developing and finalizing an IEP prior to the meeting with the parents and asking them to sign without discussion. Being prepared for an IEP meeting or bringing draft IEPs, however, is not prohibited. Denial of parental participation/input might also be reflected if sufficient notice is not provided to parents of relevant evaluative information, proposed placement, etc.

The 2004 IDEA Amendments address such procedural violations as follows:

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

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

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

A.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.

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

32. **PREPARE** adequately for IEP meetings, while avoiding predetermination.

IDEA Regulations: A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b)(3).

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

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

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.

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

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

The IDEA provides that a member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA **agree** that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the meeting." When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and LEA **consent** to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent to any excusal must be in writing.
Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.'s skills in the development of her second grade IEP."

Z.R. v. Oak Park Unif. Sch. Dist., 66 IDELR 213 (9th Cir. 2015) (unpublished). Assistant Principal who also taught a general education Spanish class could serve in the role of the regular education teacher at a student's IEP team meeting. The AP was a general education teacher "who is or may be" responsible for

implementing a portion of the student's IEP. Thus, his presence at the meeting satisfied the requirement that the team contain at least one regular education teacher of the child. In addition, any procedural effort was harmless based upon the parents' participation in the development of the IEP and the student's program.

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

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

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

36. **IDENTIFY** everyone that the parent has invited to participate at the meeting, particularly if they are participating by phone or video conference.

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

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

Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ., 68 IDELR 33 (6th Cir. 2016) (unpublished). The district's failure to timely conduct transition assessments, in addition to its failure to consider the student's preferences and needs denied FAPE. The district's failure to invite the student to an IEP meeting for

postsecondary transition planning was a harmless procedural violation, because even if the student had attended the confrontational meetings—a decision that would have exposed her to yelling, slamming doors and general animosity—she would not have been able to articulate her wishes. However, the failure to assess the student's transition needs resulted in a loss of educational opportunity, where the district's evaluation largely consisted of observing her performing assigned tasks, such as wiping tables and shredding documents, which offered little insight into her preferences and interests. In addition, a third-party vocational assessment conducted when the student was 19 recommended further evaluation of her interests, stamina and ability to improve with repetition, which was not done. Thus, the district failed to develop an appropriate transition plan. If the student had received additional training and assessments, she could have worked in a supported setting rather than attending a non-vocational program as suggested by the district.

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

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

Deal v. Hamilton Co. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004). District denied parents of student with autism the opportunity to meaningfully participate in the IEP process when it placed their child in a program without considering his individual needs. Though parents were present at the IEP meetings, their involvement was merely a matter of form and after the fact, because District had, at that point, pre-decided the student's program and services. Thus, District's predetermination violation caused student substantive harm and therefore denied him FAPE. It appeared that District had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant "school system personnel thus did not have open minds and were not willing to consider the provision of such a program," despite the student's demonstrated success under it.

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

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

39. **AVOID** making IEP recommendations/decisions based solely upon cost of services.

Letter to Anonymous, 30 IDELR 705 (OSEP 1998). Lack of sufficient resources and personnel is not a

proper justification for the failure to provide FAPE.

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

40. **USE** a proper process for determining what is the Least Restrictive Environment (LRE) where the student can make appropriate progress.

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

E.B. v. Baldwin Park Unif. Sch. Dist., 77 IDELR 164 (C.D. Cal. 2020). District's proposal to move a 7-year-old student with an intellectual disability from a special day class for students with mild to moderate disabilities to a more restrictive setting is appropriate. The evidence indicates that the student has gained minimal academic and social benefits in the special day class. To determine whether a student has been placed in the LRE, courts in the 9th Circuit consider: 1) the educational benefits of the less restrictive setting; 2) the nonacademic benefits of that setting; 3) the effect the student had on the teacher and other students in the less restrictive setting; and 4) the costs of educating the student in the less restrictive setting. Here, the student's teacher testified that the student was not able or refused to participate in most classroom activities in the mild/moderate SDC, even with modifications and a one-to-one aide. In addition, the teacher testified that the student preferred to play alone and "blew raspberries" at or said "no" to students who tried to interact with him. Finally, the teacher asserted that the student negatively impacted his classmates by taking up an inordinate amount of her time. Because the student received little benefit and negatively impacted the learning of his peers, the LRE is a more structured setting for the student as proposed by the district.

Wishard v. Waynesboro Area Sch. Dist., 77 IDELR 65 (M.D. Pa. 2020). Where fifth grader with autism made little progress in the general education setting despite receiving extensive accommodations, modifications and supports, the district's offer of a part-time placement in a special education classroom is appropriate and the hearing officer's decision is upheld. The Third Circuit applies a two-part test when determining whether a district has taken sufficient steps to educate a student with a disability with his nondisabled peers. First, the court considers whether the student can be educated satisfactorily in the general education setting with the use of supplementary aids and services. If the answer to that question is "no," the court then considers whether the district mainstreamed the student to the maximum extent appropriate. Here, the student could not receive a satisfactory education in the general education classroom and continued to fall farther behind, even though the district provided numerous accommodations, curriculum modifications and supplementary aids and services to the student over the years. In addition, evidence in the record suggests that the student's presence in the regular education classroom resulted in greater distraction for both him and other students. With respect to the district's efforts to mainstream the student to the maximum extent appropriate, the student would receive 60 minutes of instruction each day in the general education classroom and would participate in specials, lunch and recess with his classmates in the district's proposed program. Thus, the district's proposal would mainstream the student to the maximum extent appropriate.

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

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

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

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

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

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

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

Bend Lapine Sch. Dist. v. K.H., 43 IDELR 191 (D. Ore. 2005). Failure to consider or discuss eligibility for Extended Year Services is an IDEA violation that amounts to a denial of FAPE.

43. **ADDRESS** behavioral strategies/interventions when appropriate.

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

Elizabeth B. v. El Paso Co. Sch. Dist. 11, 120 LRP 39596 (10th Cir. 2020). The district court's decision in favor of the district is affirmed where the 6-year-old autistic student's IEP offered FAPE. The fact that a BIP was not developed for the student as part of the IEP did not amount to a denial of FAPE where IDEA requires only that districts consider the use of positive behavioral interventions and supports when a student's behavior is found to impede her learning or that of others. Here, the district did consider them but found them unnecessary where district witnesses testified that the student's noncompliant self-injurious and self-stimulating behaviors occurred only during unstructured activities, such as recess and other unstructured time and quickly subsided once learning commenced. These witnesses consistently stated that the child's behaviors did not interfere with her ability to learn or interact with others. In addition, while the district did not create a formal BIP, it did begin to draft a "tip sheet" for the child's teachers to help them identify and respond to any negative behaviors. In addition, the district was not required to include ABA therapy in the child's IEP where the parent's preferred label of ABA is not required and the IEP included strategies consistent with ABA.

Enterprise City Bd. of Educ. v. S.S., 76 IDELR 295 (M.D. Ala. 2020). Hearing officer's ruling that the district's program failed to appropriately address the behaviors of a middle schooler with autism, CP and Chiari malformation is upheld. Here, the student frequently presented dangerous behaviors that interfered with his receipt of services, such as hitting, biting, pulling hair, pica, eloping and self-harm. The evidence reflected that his behaviors escalated to the point where his one-to-one aide requested assistance and subsequently resigned. However, the district did not incorporate into the student's IEP any positive

interventions or develop a BIP, which resulted in the student's regression in both academic skills and behavior over the course of two school years. The district's position that IDEA only requires development of a BIP when the district seeks to discipline a student is rejected. Clearly, IDEA requires an IEP team to consider positive behavioral interventions and strategies where the student's behaviors are found to interfere with his learning or that of others. Thus, the district is ordered to conduct an FBA, develop an IEP, assign a BCBA, and provide counseling to the student.

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

45. **INCLUDE** appropriate statements of present levels of performance or otherwise ensure that adequate "baseline data" exist for measuring and generating data reflecting progress or lack thereof.

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

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

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

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

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

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

Services and the amount of services offered should be set forth in the IEP in a fashion that is specific enough for parents to have a clear understanding of the level of commitment of services on the part of the school system. This will help to avoid misunderstandings or a finding that parents were not informed decision-makers.

Montgomery Co. Intermed. Unit No. 23 v. A.F., 120 LRP 38706 (E.D. Pa. 2020). School district is ordered to reimburse the parents of a preschool child with autism for private schooling at a school for students with disabilities. This is so because the district failed to explain to the parents why it did not continue behavioral supports for the child that had been included in his initial IEP. This failure denied the child FAPE when it impeded the parents' participation in the IEP process and left them without the information they needed in order to make a formal decision about the district's proposed educational program for their child. Removal of the behavioral supports from the IEP without informing them that those supports would be part of the classroom-based autism program the parents had requested deprived them of the ability to determine whether the education offered to their child was appropriate. While the hearing officer's decision on this point is upheld, the hearing officer's finding that the proposed IEP would have met the child's needs is rejected, because it was inadequate as written.

N.W. v. District of Columbia, 70 IDELR 10, 253 F.Supp.3d 5 (D. D.C. 2017). In the development of an IEP, a district must ensure that it clearly specifies the nature and type of services that the student will receive. In this case, the autistic student's IEP team determined that the student needed special education services on a full-time basis, including during lunch and recess. According to IEP meeting notes, the student needed supports during recess and lunch in order to enhance his social interaction with nondisabled peers. However, the district did not include a provision in the IEP document calling for social supports during lunch and recess, although the district argued that it verbally promised the parents that it would deliver the necessary supports. There was no way for the district to guarantee the receipt of these supports at lunch and recess, however, without explicitly included them in the student's IEP. One of the purposes of the IEP is to ensure that services provided are formalized in a written document that can be assessed by parents and challenged if necessary. Thus, the parents are granted partial summary judgment finding that the student's IEP is inappropriate.

S.H. v. Mount Diablo Unif. Sch. Dist., 263 F.Supp.3d 746, 70 IDELR 98 (N.D. Cal. 2017). Where the district's interim IEP did not clearly state the setting in which speech/language services would be provided to the student—either individually or in a group setting—it denied FAPE. The services offered were not sufficiently clear and specific enough to permit the parent to make an intelligent decision as to whether to agree, disagree or seek relief through a due process hearing regarding the district's offer of services. Because the parent had requested speech and language services in both individual and group settings, but the district only offered one session without indicating the setting, the parent's ability to meaningfully participate in the development of her child's IEP was impaired. This is especially significant where the independent evaluator recommended services in both settings, but the parent was not provided sufficient information to evaluate the school district's offer of services in light of the evaluator's recommendations. Thus, the district is ordered to convene the full IEP team to develop an appropriate program and is ordered to provide compensatory speech/language services, as well as reasonable attorney's fees to the parent.

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

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

parents are entitled to reimbursement. The parents' refusal to agree with the district's placement recommendations did not excuse the district's failure to conduct an IEP conference.

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

V. IEP IMPLEMENTATION TIPS

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

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

50. **REMEMBER** to inform all service providers of any responsibility they have to implement the IEP and **REMIND** them of potential consequences for failing to implement.

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

In some cases, courts have suggested that the intentional failure to implement an IEP or 504 Plan could be actionable under 504/ADA for money damages relief.

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

51. **ENGAGE** in continuous progress monitoring on IEP goals, **REVISE** IEPs when expected progress is not being made or goals have been achieved early in the year and **BE CAREFUL** about recycling or repeating annual goals.

Particularly in light of the Supreme Court's clarified FAPE standard, this is more important than ever!

Endrew F. v. Douglas Co. Sch. Dist. RE 1, 71 IDELR 144 (D. Colo. 2018). On remand, it is found that the IEP proposed by the school district at the time the parents withdrew their child with autism from public school and placed him in a private school for students with autism was not reasonably calculated to enable him to make progress appropriate in light of his circumstances. Specifically, the IEP proposed for the fifth grade in April 2010 contained the same annual goals as those IEPs for the second, third and fourth grades, with only minor changes to the short-term objectives. In addition, the district had not conducted a functional behavioral assessment or developed a formal BIP for the student. The district's inability to

develop a formal plan or properly address the student's behaviors that, in turn, negatively impacted his ability to make progress on his educational and functional goals "cuts against the reasonableness of the April 2010 IEP." While the proposed IEP may have been appropriate under the 10th Circuit's previous "merely more than de minimis" standard, under the Supreme Court's FAPE standard, the proposed IEP denied FAPE. Thus, on remand from the 10th Circuit, the administrative law judge's decision denying the request for reimbursement of private school tuition and transportation costs is reversed. [NOTE: It has been reported that the school district settled the case for $1.3 million. The case has been dismissed and is over: 69 IDELR 174 (D. Colo. 2018)].

Downingtown Area Sch. Dist. v. G.W., 77 IDELR 155 (E.D. Pa. 2020). Where the student's progress was stagnant during the second part of the 2016-17 school year, so was the district's approach to addressing his needs and providing FAPE. Thus, the hearing officer's decision that the district denied FAPE to the student with autism is upheld, particularly where many of his IEP goals were repeated, the district failed to substantially change his programming and failed to reevaluate him before developing a new IEP in February 2017. Here, a significant portion of the IEP goals were repeated from the student's March 2016 IEP because the student had not mastered them. Five of the 11 goals were repeated, with only slight changes in phraseology. In addition, the student's special education services remained largely the same from February 2017 to the end of the school year, despite the student's stagnation in progress. Finally, the hearing officer appropriately relied upon the district's failure to reevaluate the student prior to developing the February IEP as a basis for finding a denial of FAPE, particularly given the student's lack of progress. Thus, it was reasonable for the hearing officer to find that the district did not ascertain the student's educational needs, respond to his deficiencies, or place him accordingly from February 2017 to the end of that school year. Thus, the compensatory education award is appropriate.

52. **COLLECT** appropriate data for reporting and demonstrating student progress.

Again, in light of the Supreme Court's clarification of the FAPE standard, progress data has become extremely important and courts rely upon it in decision-making.

A.A. v. Northside Indep. Sch. Dist., 76 IDELR 61, 951 F.3d 678 (5th Cir. 2020). Parent's argument that the district court applied incorrect FAPE standard when finding that the district made FAPE available to a 4th-grader with ED is rejected. While the district court cited to *Rowley* rather than *Endrew F.*, it applied the 5th Circuit's four-factor test in determining whether FAPE was provided by the district, which was not changed by *Endrew F.* Progress reports and teacher testimony support that the student made notable progress in academics and social skills, despite having missed all but 46 days of the 2016-17 school year due to hospitalizations. Specifically, the student's IEP team revised the annual goals to address the student's progress in reading and math. In addition, evidence reflected that the student made friends and made progress in fine motor skills. "We reiterate today that a student's IEP 'need not be the best possible one, nor one that will maximize the child's educational potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction." Here, the student's IEP sufficiently does that where the record demonstrates that the student benefited academically and non-academically from the services and subsequent modifications to his IEP. "From our vantage point, *Endrew F.* does not guarantee that an IEP sufficient under the IDEA would be perfect nor does it insulate a child from experiencing hardships while being subject to the IEP. We are satisfied that NISD took the necessary steps to ensure that Student was being properly serviced under his IEP, despite his absences, and, at bottom, that is all the law requires. In sum, we conclude that there is no substantive violation of the IDEA."

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

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

VI. SPECIFIC PROCEDURAL SAFEGUARDS TIPS

55. **PROVIDE** parents with a copy of their IDEA rights at least once per school year.

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.

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

Letter to Mills, 74 IDELR 205 (OSEP 2019). In response to a parental request for an evaluation and regardless of whether the district chooses to screen a child to determine whether an evaluation is needed, the district must notify the parent that it is, or is not, going to evaluate the student and why pursuant to IDEA's prior written notice (PWN) requirements. Here, the question stems from the parent's request for a functional vision assessment by an optometrist for a child diagnosed with a visual disability. The district proposed in response to conduct a "screening" in the same area of suspected disability but with different personnel. When a district responds to a parent's evaluation request, however, it must provide the parent PWN regardless of whether it decides to proceed with the evaluation. If the district believes the evaluation is not necessary, it must explain why in the PWN. While IDEA does not prohibit districts from screening a child to determine whether there is a suspicion of a disability, districts may not use screening procedures to delay or deny an IDEA evaluation. Thus, referring a child for a screening after a request for an evaluation has been made does not replace the evaluation or alleviate the district's responsibility to issue a PWN.

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

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

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

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

34 C.F.R. § 300.506.

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

34 C.F.R. § 300.510.

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

61. **DON'T FORGET** the IDEA's stay-put provision but **REMEMBER** that school site is not necessarily "placement" for purposes of stay-put (unless your state regulations or applicable authority in your jurisdiction provide otherwise).

Rachel H. v. Department of Educ., 70 IDELR 169, 868 F.3d 1085 (9th Cir. 2017). While an IEP must include the location of a student's proposed services, "location" does not mean the specific school the student will attend necessarily. Here, the Education Department interprets "location" to mean the type of environment as opposed to a particular school, which is consistent with the legislative history of the IDEA. Thus, the failure to identify a specific school in a student's IEP does not, in itself, establish an IDEA violation.

Luo v. Baldwin Union Free Sch. Dist., 69 IDELR 88 (2d Cir. 2017) (unpublished). It is well-settled that the IDEA does not entitle parents to determine the "bricks and mortar" of the specific school site. Here, the district did not violate the IDEA when it denied the father's request to place the student with autism in an out-of-state school using "natural methods" to educate children with developmental delays. The father participated in the decision-making process, and "educational placement" refers only to the type of program that the student will receive as opposed to specific school site. In answering the key question of whether the parent had the opportunity to participate in the placement decision, it is noted that the parent attended the student's IEP meetings and shared his belief that the student required placement in the special school. Although the district members disagreed with him, the parent could not show that the team disregarded his input.

62. **REMEMBER** that parents are entitled to an explanation of their procedural safeguards, but this does not mean that the explanation must be provided immediately or during an IEP meeting.

VII. DISCIPLINE TIPS

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

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

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

Under 42 U.S.C. § 1983, there is a good deal of judicial authority that a school district/governmental entity can be held liable for damages if there is a "custom or policy" on the part of the school district of failing to ensure that school disciplinarians are trained properly to address disciplinary infractions committed by students with disabilities. In addition, there is significant judicial authority to support money damages remedies under Section 504/the Americans with Disabilities Act for intentional discrimination, "deliberate indifference to" or "reckless disregard for" discriminatory activity in the context of discipline of students with disabilities.

64. **AVOID** making unilateral "changes in placement" through the use of suspension or other removal for disciplinary reasons.

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

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

65. **DEVELOP** alternatives to suspension that do not constitute a "change of placement," including ISS.

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

66. **BE CAREFUL** when considering whether transportation is a "related service" for a student with a disability, as this will be important in the area of discipline.

In the commentary issued with the 2006 regulations, the U.S. Department of Education commented that "[w]hether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation were a part of the child's IEP, a bus suspension would be treated as a suspension…unless the public agency provides the bus service in some other way." US DOE goes on to note that where the bus transportation is not a part of the child's IEP, it is not a suspension. "In those cases, the child and the child's parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether behavior on the bus is similar to behavior in the classroom that is addressed in an IEP and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child." 71 Fed. Reg. 46715.

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

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

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

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

68. **MAKE** appropriate manifestation determinations.

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

Jay F. v. William S. Hart Union High Sch. Dist., 74 IDELR 188 (9th Cir. 2019) (unpublished). Where there was extensive documentation that the student engaged in disability-related threats for many years, the district court's decision that the behavior at issue was a manifestation of the ED student's disability is affirmed. The district relied too heavily upon the school psychologist's opinion that the student's threat to retaliate against two classmates was not a manifestation of his disability. In January of 2015, the ED student threatened retaliation against two classmates who had reported a substance abuse violation on his part. At the MDR, the school psychologist opined that the threats were not consistent with the manner in which the student's ED typically manifested itself, which was through depression or inappropriate feelings. On that basis, the team found that the conduct was not a manifestation and placed the student on disciplinary probation after he signed an agreement suspending his expulsion. Several months later, the student violated the agreement when he decapitated a lizard in front of other students and the district sought to reimpose the expulsion. The district court did not clearly err when it found the January incident was a manifestation of the student's ED, given the student's history of threatening behavior stemming from the ED. Indeed, the ALJ found that the district failed to thoroughly and carefully analyze whether the psychologist's determination could be reconciled with the student's extensive history, which was documented in school records. Thus, the district court's order that the student's expulsion and suspended expulsion agreement be expunged from the record is affirmed, as well as its award of dialectical behavioral therapy and attorneys' fees.

Boutelle v. Board of Educ. of Las Cruces Pub. Schs., 74 IDELR 130 (D. N.M. 2019). Giving "due weight" to the hearing officer's decision, the court finds that the school district did not violate IDEA when it placed the middle schooler with ED and ADHD on long-term suspension. Based upon an investigation into the incident, which included interviews with witnesses, collecting statements and completing a police report, the principal correctly concluded that the student had intentionally thrown rocks at two other students and injured them. Parent's assertion that the student's behavior was a manifestation of his Tourette syndrome is rejected, where the student struck a student with four rocks and then hit a second student with a rock. Before hitting the second student, the student asked a peer something like, "Do you think I can hit him with a rock?" This certainly suggests intentional rather than involuntary conduct based upon a complex motor tic as suggested by the parent. Thus, the school team did not err when it found that the student's rock throwing behaviors were not a manifestation of disability.

69. **REMEMBER** that restraint and seclusion are NOT disciplinary techniques!

70. **LOOK OUT** for those regular education students who can claim the district *should have known* the student was a student with a disability prior to a long-term suspension/expulsion.

Jackson v. Northwest Local Sch. Dist., 55 IDELR 104, 2010 WL 3452333 (S.D. Ohio 2010). The failure to conduct an MD review prior to suspending and ultimately expelling a student for threatening behavior violated the IDEA's procedural safeguards. Clearly, the district should have known that the student had a disability at the time it expelled her because it had provided her with RTI services for approximately two years, but she had made few gains. In addition, there were behavioral concerns expressed by her teacher and others that resulted in a referral to an outside mental health agency for an evaluation.

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

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

Perhaps the most common mistake that is made lies within a common misunderstanding that when a student is involved in one of the "special circumstances" (weapon, drug or serious bodily injury), the only action that the school district can take is removal of that student to an alternative setting for up to 45 school days. This is clearly not the case, however. This provision of the law was intended to provide school personnel, in cases involving these special circumstances, up to 45 school days to appropriately address the infraction that occurred. In the meantime, a *unilateral* removal, without regard to manifestation, can be made. However, an IEP Team can convene during that time and propose a more permanent change of placement via the IEP Team process. The 45-day removal provision, therefore, imposes a limitation upon what an *individual disciplinarian* can do alone, but does not limit what an *IEP Team* can determine is appropriate.

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

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

73. **REMEMBER** that truancy is a behavioral issue and should be addressed properly by a student's IEP team.

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

VIII. SECTION 504/ADA TIPS

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

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

Dear Colleague Letter, 58 IDELR 79 (OCR 2012). The Office for Civil Rights issued this updated FAQ document to further address changes made by the 2008 ADA Amendments Act. OCR reiterates that students who did not qualify as disabled under Section 504 prior to January 1, 2009, may be disabled under the ADAAA under its expansive definition of disability. Extensive Section 504 evaluation or analysis is not necessarily required to determine whether a disability exists. In addition, a student with a disability under Section 504 may only need a related service, even if not eligible for special education services. Although school districts may no longer consider the ameliorative effects of mitigating measures in making a disability determination, those can be considered in evaluating the needs of a student with a disability for services, including the need for a 504 Plan. Continuing a student on a health plan may not be sufficient under 504 if the student needs or is believed to need special education or related services because of a disability.

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

76. **UNDERSTAND** that a student can be found to have a disability under Section 504 but found not to be in need of a 504 Plan because his/her educational needs are met as adequately as the educational needs of non-disabled students. That student would be protected from discrimination but not necessarily in need of services.

77. **REMEMBER** that there are special rules of discipline that apply to students with disabilities under Section 504 only.

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

J.M. v. Liberty Union High Sch. Dist., 70 IDELR 4 (N.D. Cal. 2017). District's expulsion of a high school student with ADHD and 504 services is upheld and the student's discrimination suit is dismissed. Under 504, a district must evaluate a student prior to imposing a significant change of placement, including disciplinary removals. When the student here was involved in a "threatening confrontation" with a classmate, the district convened a team and concluded that the student's misconduct did not have "a direct or substantial relationship" to his disability. The student's claim that the district should have assessed whether his conduct merely "bore a relationship" to his ADHD is rejected where 504 does not include guidelines for making manifestation determinations but does provide that a district's compliance with the procedural safeguards of the IDEA is one means of meeting Section 504's evaluation requirement. Here, the evidence showed that the district appropriately followed its evaluation procedures, which mirrored the

procedural safeguards outlined in the IDEA regulations.

Doe v. Osseo Area Sch. Dist., 71 IDELR 35 (D. Minn. 2017). District did not discriminate when it made its decision as to whether the student's ADHD, PTSD and Major Depressive Disorder caused him to write racist graffiti on the inside of a stall door and on a toilet paper dispenser in the boys' bathroom. The parents' argument that the manifestation determination should have considered whether there was any connection to his disabilities since it was made under Section 504 is rejected. Section 504 does not establish specific requirements for making manifestation determinations. Rather, 504 regulations require a district to adopt and implement a system of procedural safeguards that can be satisfied by using the same procedural safeguards that would apply in cases with IDEA-eligible students, which is what the district here chose to do. Where the IDEA requires a team to consider whether the student's misconduct was caused by or had a substantial relationship to his disability, the parents' lesser standard is rejected. The parents do not cite any Section 504 student discipline cases that use the standard that they argue the school district should have applied. In addition, OCR applies a causation standard as well; thus, the parents could not show that the district should have applied a lesser standard in its review of the student's conduct.

78. **AVOID** improper exclusions of otherwise qualified students with disabilities from extracurricular and nonacademic activities, including athletics.

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

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

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

Dear Colleague Letter, 60 IDELR 167 (OCR 2013). Because extracurricular athletics offer benefits such as socialization, fitness, and teamwork and leadership skills, districts must make more of an effort to ensure that students with disabilities have an equal opportunity to participate in athletic programs. Districts should not act on the basis of generalizations and stereotypes about a particular disability. While students with disabilities do not have a right to join a particular team or play in every game, decisions about participation must be based on the same nondiscriminatory criteria applied to all prospective players. In addition, districts have the obligation to offer reasonable modifications so that students with disabilities may participate. If a particular modification is necessary, the district must offer it unless doing so would

fundamentally alter the nature of the activity or give the student with a disability an unfair advantage. For example, using a visual cue to signal the start of the 200-meter dash would not fundamentally alter a track meet or give a student with a hearing impairment an unfair advantage over other runners. If a district does determine that a requested modification is unreasonable, it must consider whether the student could participate with a different modification or accommodation. While some students might be unable to participate in traditional athletic activities, even with modifications and supports, districts should offer athletic opportunities that are separate or different from those offered to non-disabled students in these instances. Such opportunities might include disability-specific team sports, such as wheelchair basketball, or teams that allow students with disabilities to play alongside nondisabled peers. Districts should be flexible and creative when developing alternative programs for students with disabilities.

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

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

80. **REMEMBER** that "learning" is not the only "major life activity" to consider when determining whether a student has a disability under Section 504.

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

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

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

82. **RECOGNIZE** the potential for Section 504/ADA or First Amendment-based lawsuits alleging retaliation.

Encompassed in this prohibition are retaliatory acts against persons (disabled on nondisabled) who complain of unlawful discrimination on behalf of a disabled individual or who otherwise advocate for such rights.

Settlegoode v. Portland Pub. Schs., 371 F.3d 503 (9th Cir.), cert. denied, 125 S. Ct. 478 (2004). Verdict of jury is upheld, where it found that the school district had violated Section 504 and the state's whistleblower statute and held for itinerant special education teacher on all claims. The jury's award of $500,000 in non-economic damages, $402,000 in economic damages and $50,000 in punitive damages against both the special education director and school principal under Section 1983 is upheld. The jury was more than reasonable in finding that the interests served by allowing the teacher to express herself outweighed any minor workplace disruption that resulted from her speech. Furthermore, it is well-settled that a teacher's public employment cannot be conditioned on her refraining from speaking out on school matters.

L.F. v. Lake Washington Sch. Dist. #414, 75 IDELR 239, 947 F.3d 621 (9th Cir. 2020). Parent cannot show that the district violated his First Amendment rights when he was barred from communicating with school staff after he challenged a team's decision that his daughter did not need a Section 504 plan. Thus, the district court's decision that the communication plan was reasonable is upheld. While the First Amendment prohibits school districts from infringing on the right to free speech, the communication plan here did not do so, as it only advised him that school employees would no longer respond to substantive communications about his daughter's educational services, regulating the district's conduct, not the parent's. Even if the plan did restrict the parent's right to free speech, it did not violate the First Amendment because a school is not a forum for public expression. Thus, the district could set reasonable limitations on time, place and manner of parent communications. Here, the plan allowed the parent to have biweekly in-person meetings with district administrators to discuss the student's Section 504 needs and addressed the manner in which the parent communicated with the district—not the content of his speech or any viewpoints that he wished to convey. Thus, the plan was a reasonable effort to manage the parent's communication with staff, including his pattern of incessant emails accusing staff of wrongdoing, making presumptuous demands and leveling demeaning insults, as well as aggressive, hostile and intimidating interactions face-to-face.

IX. COVID-RELATED TIPS

83. **UNDERSTAND** that all of these tips continued to apply in the challenging times of COVID, and there were no IDEA Part B waivers or flexibilities granted by Congress or the US DOE.

84. **FOCUS** on the top ways to avoid legal disputes with parents regarding any COVID-related services (including "compensatory services"): Always be mindful of the "Four C's:" Customer Service, Communication, Collaboration and Creativity!

85. **ENSURE** your seat at every planning table when district plans for reopening schools and providing COVID "learning recovery services" are underway and **DO NOT ALLOW** plans for students with disabilities to be an afterthought.

X. MISCELLANEOUS CLOSING TIPS

86. **AVOID** the temptation to unleash your inner attorney and **ALLOW** your school attorney to engage in legal arguments and battles.

87. **AVOID** unleashing your inner judge and **DO NOT MAKE** decisions based upon inaccurate assumptions.

Judges are entitled to render judgments and, oftentimes, those opinions are final and binding. In the legal system, however, it is contemplated that such judgments are made on the presentation and proof of sufficient facts and data to support those judgments. Too often, school personnel make statements or reach conclusions that are not supported by facts actually known to the one making the statement. This is particularly dangerous when reporting information about a student's educational performance or status to parents when the information is based upon a person's judgment or opinion. Educators should rely only what they have actually observed or personally know to be true.

88. **REMEMBER**: "Just Breathe"!

As human beings, we are inclined to defend ourselves and respond to everything! In many situations, it is prudent to sit back, breathe and decide that no response is most often the best response.

89. **ACCEPT** it: "No Good Deed Goes Unpunished."

There will be times that no matter how often you accede to parental demands, litigation will be initiated in any event, particularly when the school system says "no" for the first time. Remember, though, it can be dangerous to accede to parental demands, particularly if what they are asking to be done is not appropriate for the student or is actually illegal.

Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 74 IDELR 124 (5th Cir. 2019). District violated IDEA when it found that the 4th-grader with ADHD and dysgraphia had no need for special education services just weeks after it found that he was eligible. The fact that the student made A's and B's in all subjects after the district changed its mind about his need for special services has no bearing on the appropriateness of the district's eligibility determinations. The district's revised position about eligibility was not based upon any new evaluative data. Where the IEP team (which included 9 district members) found the student eligible for services in January 2016 following a three-hour review of hundreds of pages of evaluative data and then convened a staff meeting and determined the student was not eligible in February 2016 after the parents rejected the proposed IEP, the district court's decision that a violation of IDEA occurred is affirmed. The hearing record reflected various reliable indicators of the student's struggles in the general education setting in January 2016, including failed benchmarks in reading, writing and math and teachers noting attentional difficulties and trouble producing written work.

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

90. **TAKE** good care of yourself always. Your district cannot do this without you and your students will not educationally survive!