

Avoiding Procedural Errors in the IEP Process

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2016 Conference on Behavior Issues for School Leaders
MSLBD

The Essence of Special Education: To provide a special education that confers a free appropriate public education (FAPE)

What is a FAPE?

- Special education & related services that are:
 - Provided at public expense
 - Meet the standards of the SEA
 - Includes preschool, elementary, or secondary education,
 - Are provided in conformity with the individualized education program (IEP)

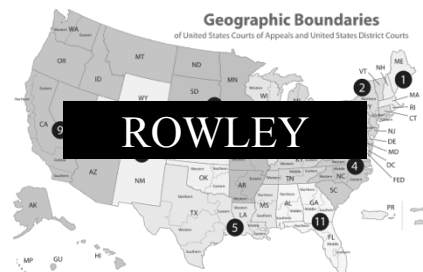
FAPE issues account for 85% to 90% of all special education litigation

Gerl, 2014

Amy Rowley



Circuit Court Boundaries



Procedural Compliance

- “Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every step as it did upon the measurement of the resulting IEP” (Rowley, p. 191)

Free Appropriate Public Education

“We hold that the state satisfies the FAPE requirement by providing personalized instruction with sufficient support services to permit the child to **benefit educationally** from that instruction”

- Rowley p. 203-204

Educational Benefit

- “We do not hold today that every handicapped child who is advancing from grade to grade is automatically receiving a “free appropriate public education.” (Rowley, p. 203)

Educational Benefit

- “the education to which access is provided must be sufficient to confer some educational benefit...It would do little good for Congress to spend millions of dollars in providing access to public education only to have the child receive no benefit from the instruction. We therefore conclude that the “basic floor of opportunity”...consists of access to specialized instruction and related services which are individually designed to provide educational benefit (Rowley, p. 190).

Board of Education v. Rowley 1982

- *Rowley** two-part test: The test requires states to comply with both the procedures and the substance set forth in the IDEA.
- Has the state complied with the procedures set forth in the law?
- Is the resulting IEP reasonably calculated to enable the student to receive educational benefit?

*Board of Education of Hendrick Hudson Central School District v. Rowley, 1982 (458 U.S. 176)

Important Concepts

- **The Procedural:** Knowing what procedures the law requires and ensuring that those procedures are followed (e.g., prior written notice, involving parents from evaluation through the IEP, identification & assessment, placement in an appropriate LRE). Weatherly refers to these as “**process errors**”
- **The Substantive:** Developing an IEP that confers “meaningful” educational benefit to a student (e.g., IEP based on a student’s needs, includes measurable and meaningful annual goals, a student’s progress is monitored, reported, & acting on). Weatherly refers to these as “**content errors**”

“A decision made by a hearing officer shall be made on *substantive* grounds based on a determination of whether a child received a free appropriate public education” (IDEA, 20 U.S.C. § 1415(f)(3)(E)(I))

Process Errors

- Procedural requirements are important and must be followed, however, failure to do so will not always result in a finding against a school district.
 - Harmless error doctrine
- Procedural violations will only result in a ruling that FAPE was denied if:
 - The violations impeded a student’s right to FAPE
 - Caused a deprivation of educational benefits
 - Significantly impeded parents’ rights to participate**

Two Part Process Error Test

1. Did the school district violate one or more of the procedural requirements of the IDEA?
 - Process standard-May or may not be a FAPE violation
2. Did this procedural violation impede the student’s right to a FAPE or did it significantly impede the parents’ opportunity to participate in the decision making process?

Thus, there are:

- **Procedural Errors** (not good, but unlikely to be a violation of FAPE)
- **Bad Procedural Errors** (likely to be a violation of FAPE)
- **Really Bad Procedural Errors** (Per se or automatic violation of FAPE)
- **Content Errors** (will almost certainly violate IDEA)

Example: Process Error

- *Ridley School District v. M.R. & J.R. ex rel. E.R.* (3rd Cir. 2012)
 - E.R.’s parents put their child in a private school because they did not believe the school provided FAPE because their school’s program lacked a research based reading program
 - PRR (Project Read) v PRR (Wilson Reading)
 - Due process hearing (for parents)
 - U.S. District Court for the Eastern District of PA (school district)
 - U.S. Court of Appeals for the 3rd Circuit

58 IDELR 271

Ruling in Ridley

- The 3rd Circuit found for the school district, ruling that
 - a) Schools should strive to base programs on peer-reviewed research to the maximum extent possible
 - b) The IEP team retains flexibility to devise an appropriate program in light of available research
 - c) Courts must accord deference to choices made by school districts.
 - d) The IDEA does not require the school district to choose the program supported by the optimal level of research as long as the program is calculated to enable a student to receive meaningful educational benefit

Ruling in Ridley

We will not set forth any bright-line rule as to what constitutes an adequately peer-reviewed special education program; hearing officers and reviewing courts must continue to assess the appropriateness of an IEP on a case-by-case basis, taking into account the available research. We recognize that there may be cases in which the specially designed instruction proposed by a school district is so at odds with current research that it constitutes a denial of a FAPE (p. 13).

Failing to devise a special education program based on peer-reviewed research violates the process standard and is clearly a “process error,” but if a student receives meaningful educational benefit that error, in and of itself, is unlikely to be a violation of the IDEA

Example: Bad Process Error

- *M.L. v. Federal Way School District*, (9th Cir. 2004)
 - A school district convened an IEP meeting for M.L., a 6 year old boy with autism. The parents and all required IEP team members, except a general education teacher, attended the meeting.
 - Due Process hearing (for school district)
 - U.S. District Court of Western District of Washington (for school district)
 - Failing to include the regular education teacher was a procedural error which did not constitute a violation of FAPE
 - U.S. Court of Appeals of the 9th Circuit.

Ruling in M.L.

- The 9th Circuit found for the parents, concluding that the school district had violated the IDEA.
 - a) Parents appealed contenting that the failure to include a general education teacher on the IEP team was a significant procedural error that rendered the IEP invalid.
 - b) The IDEA requires the participation of a general education teacher is mandatory, not discretionary. The district court’s finding that the IEP team was properly constituted was clearly erroneous
 - c) By failing to include a general education teacher on the IEP team, the school district significantly deviated from the procedural requirements of the IDEA. This “critical structural defect” violates FAPE

Developing a special education program without a required member of the IEP team in attendance is a process error and a “bad process error.” In such cases the harmless error test may be applied, but the error likely will be a violation of the IDEA because it may also result in an inappropriate IEP

Example: Really Bad Process Error

- *D.B. v. Gloucester Township School District* (3rd Cir. 2012)
 - The parents of H.B. alleged that two years of IEPs developed for their daughter denied FAPE because they were not involved in IEP development.
 - Due process hearing (for the school district)
 - U.S. District Court for the District of New Jersey, 2010 (for the parents)
 - U.S. Court of Appeals for the 3rd Circuit

489 F. App’x 564

Ruling in D.B.

- The 3rd Circuit Court ruled in favor of the parents because the court found that the Gloucester School District has come to definite conclusions regarding H.B.'s placement without parental input, failed to incorporate any suggestions of the parents or discuss with the parents the prospective placements, and in some instances even failed to listen to the concerns of the parents. It is clear to the court that the IEPs were predetermined
- A school district's violation of IDEA's procedural requirements may constitute a failure to provide FAPE.
- The court determined that such a violation occurred so there was no need to consider the merits of the IEPs

“Really bad process errors” are process errors that are so serious that when school districts make them, a court may not even consider whether the IEP conferred meaningful educational benefit. In such cases really bad procedural errors will be a violation of the IDEA.

Example: Content Errors

- *Kirby v. Cabell County Board of Education*, (D.WV. 2006)
 - The parents of Robert Kirby, a 11th grade student with autism spectrum disorder. Robert's parents filed a due process hearing alleging that the Cabell School District has failed to provide FAPE.
 - According to the district court “the court must examine the IEP to determine whether it was reasonably calculated to provide benefit in academic areas and non-traditional areas to the child's education.”
 - Due process hearing (for school district, despite the IEP deficiency)
 - U.S. District Court for West Virginia (for parent)

Ruling in Kirby

- The court found that the Cabell school district had developed an IEP that failed to confer FAPE and, thus violated the IDEA.
- “If the IEP fails to assess the child's present levels of academic achievement and functional performance the IEP does not comply with the (IDEA). This deficiency goes to the heart of the IEP; the child's level of academic achievement and functional performance is the foundation on which the IEP must be built. Without a clear identification of Robert's present levels, the IEP team cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed”

“Content Errors” are errors that are so serious that when school districts make them, they will very likely be a denial of FAPE and violation of the IDEA. Even the most perfect procedural IEP will not overcome a serious content errors

The Role of the IEP

- The IEP is the “modus operandi” of the law

Burlington v. Department of Education of Massachusetts,
1985

- “The IEP is the central part of this Act as we wrote it and intended it to be carried out.”

Senator Robert T. Stafford, 1978

The Promise of the IEP

- The IEP is the instrument developed to ensure FAPE
- The IEP must be reasonably calculated to provide meaningful educational benefit
- There are similarities to contractual obligations
 - LEA promises, in writing to provide certain services & good faith efforts, but it is not a guarantee of success
- The IEP promises access to a meaningful educational program of special education; it is not a guarantee of performance

Procedurally Defective IEPs

- A procedural defective will not automatically result in the denial of FAPE
- Hearing officers and judges will consider the affect of the procedural defect on a student's IEP
- According to Rowley, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every step as it did upon the measurement of the resulting IEP"

Significant Process Errors

Common Procedural Problems

- Failing to provide prior written notice
- Failing to ensure parents meaningful involvement
- Predetermining services & placement
- Improper IEP membership
- Failing to ensure a continuum of alternative placements
- Determining placement prior to programming ("shoehorning")
- Failing to address transition needs & services

Error: Failing to Provide Prior Written Notice

Notice Requirements

- Notification means that LEAs must inform parents prior to taking the following actions:
 - Prior to initiating or changing the identification, evaluation, educational placement, or provision of a FAPE to a student
 - Prior to refusing to take such actions

**Error: Failing to ensure
parents meaningful
participation in the IEP
process**

IDEA & Parental Rights

- The most basic of all the requirements of the IDEA is that parents are full and equal participants with the school district personnel in the development of their child's IEP.
- According to Rowley, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every step as it did upon the measurement of the resulting IEP"
- Parental participation is central in all decisions regarding the child's program and placement and when full and equal parent participation is abridged or denied, a denial of a student's right to a FAPE will most likely be found (Bateman, 2011).

Parental Participation in Meetings

- Parental participation in the special education decision-making process is so important that it is one of two procedural grounds for finding that an LEA has denied a student a free appropriate public education (IDEA Regulations, 34 C.F.R. § 300.513(a)(2)).

"Meaningful Participation"

- Parent input is based on an understanding what will be discussed at the IEP meeting, what is going on during the meeting, and what is or will be proposed.
- The opinions and suggestions made by a student's parents are given serious consideration by the IEP team

Parents Role in the IEP

- One or both of a child's parents should be present at a child's IEP meeting (unless documented efforts at securing parent involvement have been unsuccessful)
- Parents must be notified early enough to ensure they have an opportunity to attend
- The IEP meeting must be scheduled at a mutually agreed-upon time and place
- In situations in which divorced parents have joint legal custody, the parents have the same legal rights

Proceeding Without Parents

- A meeting may be held without a student's parents but only when the LEA is unable to convince the parent to attend
- In such situations, the LEA must keep a record of its attempts to arrange a mutually agreed upon time and place (at 2 attempts using at least 2 different methods)

Doug C v. Hawaii
Department of Education (9th Cir. 2013)

- “Procedural inadequacies that...seriously infringe the parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE.”
- The failure to include Doug C. in the IEP meeting infringed on his ability to participate in the IEP formulation process. That reason alone is cause to conclude that Spencer C. was denied a FAPE.

Strategies to Ensure Compliance

- Be flexible in scheduling meetings
- Encourage parental participation
- Keep careful written notes at the IEP meeting, including parental contributions & team’s consideration-Review with parents at end of meeting or use PWNs
- If an IEP team elects to meet without parents in attendance be ready to defend the action with thorough documentation

**Error: Improper
IEP team membership**

**“An IEP prepared by an
invalidly composed IEP team
is a nullity.”**

Board of Ed of Monroe-Woodbury SD , 31 IDELR 121 (SEA NY 1999)

Participants in the IEP

- Parents
 - A representative of the LEA
- General education teacher “of such child”
- Special education teacher “of such child”
- Person knowledgeable about evaluation
 - Others at request of IEP participants*
 - Whenever appropriate, the child

Excusing IEP Team Members

- Excusal of IEP team members if
 - (a) the LEA and parents agree that the member’s attendance is not required because the area is not being discussed or modified or
 - (b) the member’s area is being discussed, but the member submits a written report prior to the meeting
- Parents must give “informed” consent to excusal

Strategies to Ensure Compliance

- Allow parents to bring persons who have knowledge or special expertise regarding their child
- Include related service providers and other who will be involved in a child's programming
- Avoid routine use of the excusal process
- When transition services are discussed ensure that the student is on the IEP team

Error: Failing to Ensure a Student is Educated in the Least Restrictive Environment

The LRE Requirement of the IDEA

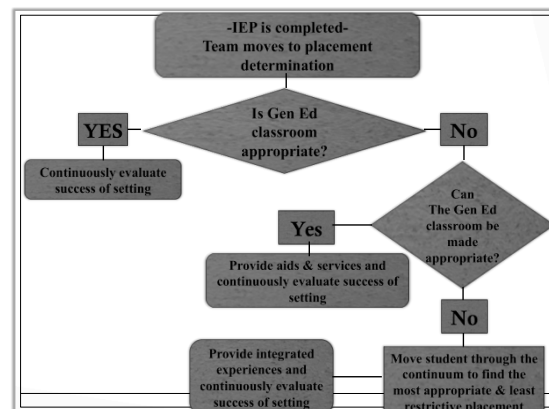
- To the maximum extent appropriate, students with disabilities should be educated with children who are nondisabled
- Special classes, special schooling, or other removal of children with disabilities from the general education environment should occur only if the nature or severity of the disability is such that education in the general education classroom with the use of supplementary aids and services cannot be achieved satisfactorily

The Continuum of Alternative Placements

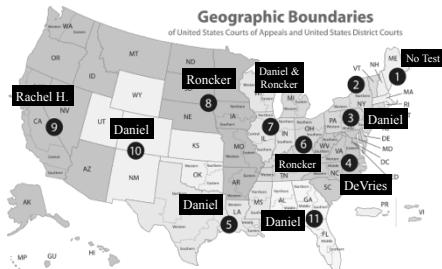
- Each local education agency (LEAs) must ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education services
- The continuum must include
 - General education classes
 - Special classes
 - Special schools
 - Home instruction
 - Instruction in hospitals and institutions
- LEAs must make provision for supplementary services (e.g., resource room, itinerant instruction) be provided in conjunction with general education placement

Understand the LRE Requirement

- The IDEA prefers educating students in the "mainstream" but LEAs must be careful that their attempts to comply with LRE do not result in predetermination
- "Remember that program appropriateness is the primary IDEA mandate, and LRE is secondary (Bateman & Linden, 2012)
- A student's placement must be an individualized placement based on his/her IEP



Circuit Court Boundaries



Daniel Test

- Can education in the general education classroom with supplementary aides and services be achieved satisfactorily?
- Were steps taken to accommodate the students?
- Will the student benefit?
- Effect on education of others?
- If a student is placed in a more restrictive setting, is the student integrated to the maximum extent appropriate?

Why Did LEAs Prevail?

- ◆ THE LEA made good faith attempts at included the student in regular education
- ◆ Parents were involved in the process
- ◆ LEA maintained excellent documentation
- ◆ Students were education in integrated settings whenever appropriate

Why Did LEAs Lose?

- ◆ LEAs failed to make good faith efforts to provide accommodations to keep the student in the regular education classroom
- ◆ LEAs failed to consider the full continuum of placements
- ◆ LEAs did not maintain sufficient documentation of their efforts

Strategies for Compliance

- Individualization-A student's needs and program drive the placement consideration (including use of supplementary aids & Services)
- Appropriateness-A student's special education must be provided in the LRE in which a student can receive an appropriate education
- Justify-When a student is placed out of the general education setting, the team must justify the placement in the student's IEP
- Continuum of Placements-Don't confuse LRE with inclusion
- Integration-When a more restrictive setting is used, integrate when possible

Error: Predetermining IEP services & placement

Predetermination

School personnel must not engage in any action that appears to make a decision on a student's program or placement prior to the student's IEP meeting

Predetermination

- ◆ Predetermination occurs when a student's placement or program is decided by his or her IEP team prior to the IEP meeting and without parental participation
- ◆ Excluded parents from the placement decision may constitute a denial of free appropriate public education (FAPE)
- ◆ Definitive statements about a student's placement (e.g., "We always..."; "We never...") made before or during the meeting could constitute predetermination

H.B. v. Las Virgenes (9th Cir. 2007)

"Predetermination occurs when an educational agency *has made its determination prior to the IEP meeting*, including when it presents *one placement option* at a meeting and is *unwilling to consider other alternatives*."

Deal v. Hamilton (6th Cir. 2008)

"The facts of this case strongly suggest that the school system has had an *unofficial policy of refusing* to provide one-on-one ABA programs and that the school system personnel thus *did not have open minds* and *were not willing to consider* the provision of such a program."

Mistakes

- An IEP team member or members "pre-select" a program or placement prior to the IEP meeting.
- Members of the IEP team meet prior to the IEP meeting to finalize the IEP so the actual IEP meeting becomes a signing ceremony
- Refusing to consider programming that is suggested by a student's parents (e. g., ESY, ABA)

Preparation v Predetermination

Preparation for an IEP meeting by school district personnel would not result in a finding of predetermination when school personnel *are committed to allowing a student's parents* an opportunity to meaningfully participate in the process.

T.P. v. Mamaroneck S.D.

(2nd Cir. 2009)

- Even if there was such discussion, this does not mean the parents were denied meaningful participation at the IEP meeting. IDEA regulations allow school districts to engage in preparatory activities

Doyle v. Arlington

(E.D.VA 1992)

“School officials must come to the IEP table with an open mind. But this does not mean that they should come...with a blank mind”

U.S. Dept. of Education,

(72 Fed. Reg. 46678)

- If a public agency develops a draft IEP prior to the IEP meeting, the agency should make to the parents at the onset of the meeting that the services proposed by the agency are preliminary recommendations for review and discussion with the parents.
- The agency should also provide the parents with a copy of the draft proposals.

Draft IEPs are Ok but...

- Prepare but don't predetermine; informal, or preparatory activities are not meetings
- The IEP team may develop a draft IEP but this could increase the risk of predetermination unless certain precautions are taken
- Make it clear at the start of the meeting that the purpose of the meeting is to determine the ~~student's program and placement~~

Good Documentation

- Documentation=Notes taken at the IEP meeting (suggested by Slater, Weatherly, & Walsh) or Prior Written Notice of IEP team decisions
- Ask yourself the following question: If a due process hearing officer were to review the documentation of the IEP meeting would that person be able to tell, solely from the documentation, that school district personnel kept an open mind and provided the opportunity for parents to meaningfully participate in IEP development (Walsh, 2011).

Examples of Statements from Good Documentation (J. Walsh)

- The purpose of today's meeting is to discuss the related services for _____
- The team discussed _____'s possible placements and the pros and cons of each
- The chair asked the parents what alternatives they would like the IEP team to consider
- In response to parental input, the IEP team agreed...
- The team has reviewed, discussed, and considered the IEE and have decided...

Avoid the Following:

- Saying “We never...” or “We always...”
- Sending emails regarding sensitive issues involving a student’s IEP
- Telling parents that “the powers that be” will not allow a service
- Not being able to address a service because “I’ll have to talk to the director and get back to you.”

Strategies for Compliance

- Keep an open mind at the meeting
- Use an agenda to guide the IEP meeting
- Discuss and carefully consider proposals made by a student’s parents
- Don’t automatically discount any recommendations made by a student’s parents or their experts
- Keep good documentation

Error: Placing a student prior to determining programming

Placement

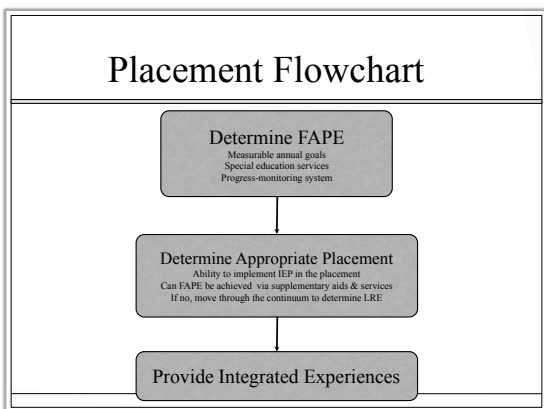
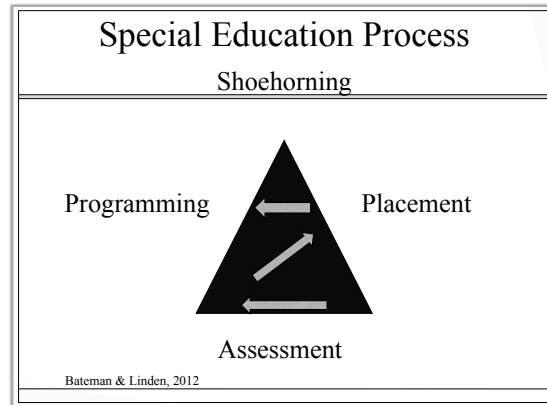
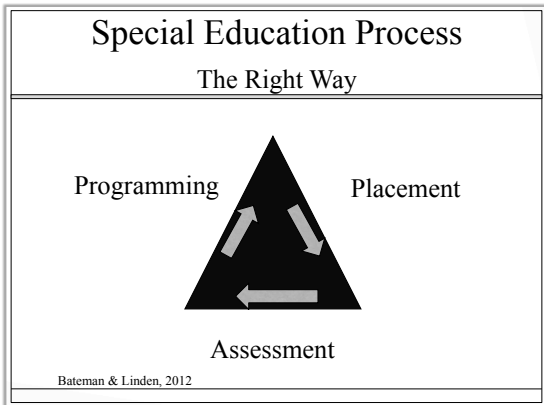
- The IDEA presumes that students will participate with nondisabled students in general education settings
 - When students are educated in more restrictive settings, the IEP must include an explanation of why
- The IEP must be developed before placement decision
- Include supplementary aids & supports, program modifications, positive behavioral supports & interventions in general education settings

Avoid Shoehorning

- ◆ Shoehorning: Deciding placement prior to determining annual goals and special education services, thus shaping a student’s IEP to fit a particular placement
- ◆ A student’s educational placement must be “based on the child’s IEP” (34 C.F.R. § 300.116(b)(2))
- ◆ Avoid shoehorning by not considering placement issues until the goals & services section of the IEP has been completed

Spielberg v. Henrico County (4th Cir. 1991)

“Placement determined prior to the development of the child’s IEP and without parental input was a *per se* violation of the Act and sufficient to constitute a denial of FAPE in and of itself”



- ### Placement Cautions
- Placement decisions can only be made after a student's goals are developed
 - Ask which if the goals or services can be met in a general education classroom with modifications & supports
 - Start with the general classroom and move toward more restrictive environments
 - Avoid "shoehorning"

- ### Strategies for Compliance
- The placement decision must be made by a knowledgeable group of persons
 - The placement must be determined individually for a student after the programming decisions were made
 - If the student was removed from the regular class placement, supplementary aids and services must be made available to to maintain the student in the general education classroom

Error: Failing to address transition needs & services

School District Errors

- Failing to address transition at all
- Failing to conduct transition assessments
- Failing to inform parents about transition planning
- Failing to include measurable postsecondary goals

Strategies for Compliance

- Begin the transition planning process with the 1st IEP after a student turns 13 years old
 - Include the student in transition planning
 - Identify the student's post-school goals using age-appropriate transition assessments
- Inform parents about the goals of transition planning and their essential role
 - Discuss and document transition planning
 - Beware generic transition plans!

Error: Failing to address problem behavior (or the other 5 factors)

5 “Special Factors”

- Behavior
- Limited English Proficiency
- Blind/Visually Impaired
- Deaf/Hearing Impaired
- Assistive Technology

Behavior

- IDEA provides that a student's IEP team must consider positive behavior interventions, strategies, and supports in the case of a child whose behavior impedes his or her learning or the learning of others

Assistive Technology

- IEP teams must consider whether a student needs assistive technology devices & services
- Assistive technology can be a special education service, related service, or supplementary aid or service needed for a student to receive a FAPE

Strategies for Compliance

- Ensure that the IEP team specifically reviews the five special factors as part of the IEP process, with parental input
- Ensure the IEP team, in the case of a student whose behavior impedes learning, consider positive behavioral supports & strategies to address that behavior
- The IEP should include a member with behavioral expertise, assistive technology expertise, etc.

Avoiding Substantive Errors in the IEP Process

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**2016 Conference on Behavior Issues for School Leaders
MSLBD**

Significant Content Errors

Error: Failing to develop educationally meaningful programs

What is Meaningful Educational Benefit?

- It is not a program that confers maximum benefit
- It is not a program that delivers the “best possible education”
- It is not a program that produces minimal or trivial benefit
- Benefit can be determined by ensuring that goals are meaningful and assessing students’ progress toward their IEP goals

Doe v. Board of Education of the Tullahoma City School (6th Cir. 1993)

- “The act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet...Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for the appellant’s use...Be that as it may, we hold that the school system is not required to provide a Cadillac”

Ambitious, but Reasonable

Not a Cadillac



But a Serviceable
Chevy



But Certainly Not...



Educational Benefit

- The educational benefit a student receives must be more than *de minimus*—there must be some tangible gain in abilities
- The problem with Rowley
- Additionally FAPE interpretations by courts

Circuit Courts & FAPE

- *Polk v. Central Susquehanna Unit 16* (3rd Cir. 1988) – “Congress did not write a blank check, neither did it anticipate that states would engage in the idle gesture of providing special education designed to confer any trivial benefit...Congress intended to afford children with special needs an education that will confer meaningful benefit.”
- “What constitutes a meaningful education can only be determined in light of a student’s potential.”

Hall v. Vance County County Board of Education (4th Cir. 1985)

- The due process hearing officer and U.S. District for NC ruled against the Vance School District because the district had failed to provide James Hall with an education that conferred educational benefits
- The school district appealed to the 4th circuit court alleging that the district court had erred by disregarding Rowley’s rule that the law does not require schools to provide an education that maximizes potential.

Hall v. Vance County County Board of Education (4th Cir. 1985)

- “Rowley recognized that no single substantive standard can describe how much educational benefit is sufficient to satisfy the Act. Instead, the Supreme Court left that matter to the courts for case-by-case determination.”
- “The school district contented that James’ academic progress, as measured by his grade promotions and test scores, evinces educational benefit and under Rowley requires that the district court’s ruling be overturned”.
- “We disagree”

Hall v. Vance County Board of Education
(4th Cir. 1985)

- “Although Rowley considered Amy Rowley’s promotions in determining that she had been afforded FAPE, the Court limited its analysis to that one case and recognized that promotions were a fallible measure of educational benefit.”
- “Rowley recognized that FAPE must be tailored to the individual child’s capabilities.”
- “Clearly, Congress did not intend that a school system could discharge its duty under the (IDEA) by produces that produces some minimal academic advancement, no matter how trivial.”

Carter v. Florence School District #4
(1993)



Opinion-Justice Houck

- In applying the two part Rowley test, the court found that
- “While there is considerable dispute as to what actually took place...the court concludes that there has been no serious procedural non-compliance on the part of the school district”
- “Turning now to Rowley’s second inquiry, it should be noted that there exists no single substantive standard describing exactly how much educational benefit is sufficient to satisfy the EHA. Each case must be determined on a case-by-case basis”

Opinion-Justice Houck

- “The IEP prepared on May 1, 1985, did not provide Shannon with a free appropriate public education as required by the Act. Even if all of the goals of the document had been met, Shannon would continue to fall behind her classmates at an alarming rate. The stated progress of only four months in her reading and math skills over an entire school year ensured the program’s inadequacy from its inception”.

Opinion-Justice Houck

- “In light of conflicting testimony as to the appropriateness of Trident, the court’s appointed expert, Dr. Richard Nagle, tested Shannon in the spring of 1988. His tests revealed that Shannon made significant progress at Trident. Based on these tests, Dr. Nagle concluded that Trident had done a good job of meeting the individualized needs of Shannon.
- The court agrees with Dr. Nagles’ assessment ...that the education offered at Trident Academy has been an appropriate special education for Shannon.

Important Points in Carter

- The IDEA is a substantive, not merely a procedural law
- “Although [Trident Academy] did not comply with all of the procedures outlined in the [law], the school provided Shannon an excellent education in substantial compliance with the IDEA.”

Important Points in Carter

- Educational benefits need to be substantial, not trivial.
- Trident Academy provided Shannon with an education that was meaningful when compared to the public school's education, which was deemed inadequate

Cypress-Fairbanks ISD v. Michael F. (5th Cir. 1997)

1. Four Part test to determine educational benefit
 1. Was the IEP individualized on the basis of a student's assessment and performance?
 2. Was the program delivered in the least restrictive environment appropriate to the child's needs?
 3. Were the services provided in an accurate, coordinated, and collaborative manner?
 4. Were positive academic and nonacademic benefits demonstrated?

Common Content Problems

- Failing to conduct a comprehensive, individualized & relevant assessment
- Failing to address all needs in the PLAAFP
- Failing to link assessment, goals, & programming
- Failing to write measurable annual goals
- Failing to collect data to monitor student progress and make instructional changes when needed

**Error: Failing to conduct
a comprehensive,
individualized & relevant
assessment**

Assessment

- A relevant assessment is the first step in program development
- A relevant assessment is the path to meaningful special education programming
- Assessment depends on everyone's input

Assessments must address all areas of a student's needs (regardless of a student's disability label). School districts have lost cases based solely on a failure to properly assess a student prior to making educational recommendations (Weatherly, 2015)

Assessment CAUTIONS

- ✓ Too often the IEP team focuses on tests to determine eligibility without doing assessments that relate meaningfully to instruction
- ✓ Parents must be included in the assessment process
- ✓ Request assessments that you believe are important (for goals & related services)
- ✓ Assessments should not be first presented to parents at an IEP meeting

Error: Failing to address all of a student's needs in the Present Levels of Academic Achievement and Functional Performance

Bateman & Linden, 2012

- The IEP is like a house. The assessment is the foundation upon which the house is built. Neither a house nor a student's IEP can stand on a faulty foundation. If a student's assessment, the foundation of the IEP, is faulty, the IEP will not stand.

Strategies for Compliance

- Address all needs identified in the assessment
- Two components to the PLAAFP:
 - The need
 - The impact statement

Error: Failing to link assessment, goals & programming

Appendix C IDEA Regulations (1997)

- "There should be a direct relationship between the present levels of performance and the other components of the IEP. Thus, if the statement describes a problem with a child's reading level and points to a deficiency in reading skills, the problem should be addressed under both (1) goals and (2) specific special education and related services provided to the child." (Question 36)

Error: Failing to write measurable annual goals

Measurable Annual Goals

- The purpose of a measurable annual goal is to estimate what a student may accomplish in a year's time and then to evaluate the success of a student's special education program.
- Goals should include academic and functional areas if needed
- Goals should be directed at meeting a student's needs related to the disability so he/she may be involved in and progress in the general curriculum

Characteristics of Goals

- ✓ The essential characteristics of IEP goals are that they must be **measurable** and be **measured**
- ✓ If a goal is not measurable it violates the IDEA and may result in the denial of FAPE (Bateman & Linden, 2012)
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Goal Requirements in the IEP

- ✓ The IEP must describe how students' progress toward the annual goals will be measured
- ✓ The IEP must include schedule for reporting progress to students' parents as often as students in general education get report cards

WRITING A MEASURABLE ANNUAL GOAL

- Three components of a measurable goal
 - 1) **Target behavior (What we want to change)**
 - 2) **Stimulus material or conditions (How we will measure change)**
 - 3) **Criterion for acceptable performance (How we will know if the goal has been achieved)**

Example of an Annual Goal: Academics

- **In 32 weeks, when presented with a passage from the 2nd grade reading text, Jeremy will read aloud 48 words per minute with less than 2 errors**

Goal Cautions

- Are the goals measurable (3 components)?
 - Are the goals too broad or vague?
 - Do the goals misuse percentages?
 - Are the goals ambitious, but realistic?
- Do the goals align with the PLAAFPs/Services?

Strategies for Compliance

- Goals must be linked to the assessment and the PLAAFP statements?
- Goals must be specific, clear, & measurable
- The goal section of the IEP must contain information on how the student's progress will be measured
- The goal section must contain of the IEP information on how progress will be communicated to the student's parents?
- Can the student's progress toward the goals must be measured?

Error: Failing to Specify the Special Education & Related Services that will be provided

Service Statements

- Service statements answer the question: What will we do in response to the student's needs?
 - Special education services
 - Related services
 - Services to allow involvement in the general curriculum (e.g., point system)
 - General education classroom modifications (e.g., crises management plan)
 - Special factors (e.g., Assistive technology)

Requirements

- IEPs must specify all special education and related services to be provided to a student as well as any supplementary aids and services and program modification, in their entirety
- All providers must be informed of their duties under an IEP, understand them, and implement them
- Frequency, duration, and location of services must be specified
- Terms such as "may," "and/or," and "as needed," "when necessary" are are to vague and leave the delivery of services up to a teacher or provider's subjective interpretation (*Emily Charter School #4012, 2009; Shakopee ISD, 2009*)

PEER-REVIEWED RESEARCH

IEPs must include a **statement of special education services** and supplementary aids and services based on peer reviewed research to the extent practicable.

(Individuals with Disabilities Education Improvement Act of 2004)

Strategies for Compliance

- ✓ Programming decisions individualized, based on the needs of the student and not the availability of services
- ✓ Supplementary aids, supports, & program modifications must be considered that will allow the student to participate in general education
- ✓ All necessary services in the IEP must be delivered as specified
- ✓ Fill in the open text boxes-Be specific about services, accommodations, and instructional delivery

Error: Failing to collect data to show progress

Legal Requirements

- Measure a student's progress toward his/her goal (formative evaluation)
- Report a student's progress to his/her parents (reporting schedule)
- Revising the special education program if a student is not making progress
- Continue to monitor progress

Caution: Vague Measurement Criteria

"The student's annual goals and objectives in each IEP simply do not contain objective criteria which permit measurement of Student's progress. . . . A goal of 'increasing' reading comprehension skills or 'improving decoding skills' is not a measurable goal Even if [present levels of performance] were clearly stated, an open-ended statement that the student will 'improve' does not meet the requirement . . . for a 'measurable' goal" (p.563).

-- Rio Rancho Pub. Schools
40 IDELR 140 (SEA N.M. 2003)

Caution: Teacher Observation

- *Board of Education of the Rhinebeck Central School District* (39 IDELR 148, 2003)
- "Although subjective teacher observation provides valuable information, teacher observation is not an adequate method of monitoring student progress."
- "Without supporting data, teacher observation is opinion which cannot be verified."
- A review of published decisions showed that it is much more likely that an IEP will be deemed inadequate when a judge or hearing officer characterizes the monitoring criteria as "vague."

Bateman (2011)

- "Too few IEP team members and special education teachers know how to write measurable goals and too few goals are actually measured, which makes IEP goals meaningless and useless"

Progress Monitored Cautions

- A data-based method for monitoring student progress is essential to ensure that a student receives meaningful educational benefit
- How will the child's progress will be monitored?
- What data collection method will be used?
- How and when will the parents be informed of their child's progress

Strategies for Compliance

- The student's progress toward each of his or her goals measured *at least* as often as students in general education get report cards
- The student's progress toward the goals reported to his or her student's parents *at least* as often as students in general education get report cards?
- The method of monitoring progress and the schedule/format for reporting a student's progress to his or her parents must be included in the IEP?
- The progress monitoring method must collect real data.
- If the data show that a student may not meet his or her goals, needed instructional changes made to the student's program and did the teacher continue to monitor progress?

Error: Failing to Implement the IEP as Written

Implementing the IEP

- After a student's IEP is written and an appropriate placement is determined, the LEA must provide the student with the special education and related services in the IEP (including all supplementary services and program modifications)
- Depending of a student's program, special education and general education teachers, related service providers, counselor, school nurses, school psychologists, and others are responsible for implementing a student's IEP

Strategies for Compliance

- Consider the services in the IEP to be a contract an LEA has written with a student's parents
- All educators and related service providers must make good faith efforts at implementing the IEP as written
- Develop a delivery mechanism to ensure that all involved school staff understand their responsibilities under the IDEA-Ignorance is no excuse!

Bullet-Proofing Your IEPs

Provide Professional Development

“Professional development activities...will be derived from scientifically based research (34 C.F.R.§ 300.226(b((1))).

Ensure Meaningful Parental Participation

“The IDEA expressly contemplates that parents will act as advocates for their children at every stage” (of the special education process).

Maroni v. Pemi-Baker Regional School District, 1st Cir. 2003

Conduct Relevant Assessments

Perhaps the most far-reaching change in (assessment) has been an increased emphasis on linking assessment and intervention, so that information from the assessment process leads directly to intervention strategies rather than just to a diagnostic label and alternative placement for the student.

Deno, 1986

Write Measurable Annual Goals

The purpose of goals and objectives is to help determine whether a student is making educational progress and if the special education program is appropriate for meeting educational needs. Correctly written goals enable the teachers and parents to monitor a student's progress in a special education program and make educational adjustments to the program when a student is not making adequate progress (Deno, 1992).

Monitor Student Progress

“Progress monitoring is a scientifically based practice that is used to assess students' academic and functional performance and evaluate the effectiveness of instruction.”

OSEP Center on Progress Monitoring

Checklist: Bullet Proofing the IEP & Avoiding Process Errors

- Provide thorough training in procedural requirements to all involved staff
- Don't miss the basics (PWNs, consent, parent rights)
- Use an agenda to guide the meeting
- Involve a students' parents in a meaningful way in special education decision-making
- Don't engage in predetermination or shoehorning
- Take good notes at an IEP meeting (not LEA rep or Sped teacher)

Checklist: Bullet Proofing the IEP & Avoiding Content Errors

- Provide thorough training in substantive requirements to all involved staff
- Fill in the open text boxes in the IEP form
- Perform meaningful and relevant assessments of all of a student's unique needs
- Write individualized PLAAFP statements and connect to measurable goals and services
- Monitor students' progress and make changes when needed
- Implement the IEP as written

