# SUBSTANTIVE & PROCEDURAL ERRORS IN THE IEP PROCESS

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## I. Learning Objectives

A. Participants will learn about commonly made errors in the IEP team process and learn how to avoid those errors.

B. Participants will gain an understanding regarding when procedural errors rise to the level of a denial of a Free Appropriate Public Education (FAPE).

C. Participants will be informed regarding the required members of a student's IEP team, and the role of such members.

D. Participants will learn what constitutes such actions as "consensus," "predetermination" and "meaningful parental participation" in the IEP team process.

## II. Cases and Regulations

A. Legal Standard

1. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), standard—"If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more":

a. Has the State [school district/charter school] complied with the procedures set forth in the Act? and

b. Is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

3. *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

   a. The U.S. Supreme Court further defined the *Rowley* standard: "While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

   b. "This standard [Rowley standard] is markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit. It cannot be the case that the Act [IDEA] typically aims for grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than *de minimis* progress for children who cannot."

   c. "[A] student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. . . It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

   d. The Court did not attempt to establish a bright-line test on what "appropriate" progress will look like as it may differ from case to case. "The adequacy of a given IEP turns on the unique circumstances of the child for whom it is created."

   e. Courts were instructed not to substitute their own notions of sound educational policy, but rather give deference based on the expertise and the exercise of judgment by school authorities, in consultation with parents. A review of an IEP is to determine whether it is reasonable; not whether the Court regards it as ideal.

B. Federal Regulations

1. 34 C.F.R. § 300.513. Procedural violations are a violation of a free appropriate public education (FAPE) only if the procedural inadequacies:

   a. Impeded the child's right to a FAPE;

   b. Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or

   c. Caused a deprivation of educational benefits.

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## III. The IEP Team Process

### A. Ensure Complete IEP/Evaluation Team is in Attendance.

1. School district determines the specific personnel to fill the roles of the required school participants at the IEP team meeting. 71 Fed. Reg. 46674 (Aug. 14, 2006).

2. Required IEP Team Members:

   a. **Parent:** The Parent is always invited—reasonable efforts must be made to encourage parent to attend. If neither parent can attend an IEP team meeting, the school district must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with 34 C.F.R. § 300.328 (related to alternative means of meeting participation) and 34 C.F.R. § 300.322(c). If a parent is unavailable on a particular date, school staff should determine if another mutually agreed upon time and date would work for the parent to attend in person, and the use of a phone conference should only occur "if neither parent can attend an IEP meeting." *Drobnicki v. Poway Unified School District*, 53 IDELR 210 (9th Cir. 2009) (Unpublished).

      (1) In *Doug C. v. State of Hawaii Department of Education*, 61 IDELR 91 (9th Cir. 2013), Hawaii's Department of Education's decision to proceed with a scheduled IEP meeting after receiving word that the parent would be unable to attend due to illness proved to be an expensive mistake.

      (2) The 9th Circuit reversed a District Court decision in the department's favor and remanded the case for consideration of the parent's right to tuition reimbursement. The court rejected the department's argument that it had to hold the IEP meeting as scheduled to meet the student's annual review deadline.

      (3) Because the parent was willing to meet later in the week if he recovered from his illness, the department should have tried to accommodate the parent rather than deciding it could not disrupt other team members' schedules without a firm commitment.

      (4) Further, the department erred in focusing on the annual review deadline rather than the parent's right to participate in IEP development. While the court acknowledged that the department's inability to comply with two distinct procedural requirements created a "difficult situation," it

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should have considered both courses of action and determined which one was less likely to result in a denial of FAPE. "In reviewing [a district's] action in such a scenario, we will allow [the district] reasonable latitude in making that determination." The department could have continued the student's services after the annual review date had passed.

(5) Furthermore, the parent did not affirmatively refuse to participate in the IEP process; he merely asked to delay the meeting until he had recovered from his illness. Given the importance of parent participation in the IEP process, the 9th Circuit determined the decision to proceed without the parent "was clearly not reasonable" under the circumstances.

b. A district may conduct an IEP meeting without a parent only if it is unable to convince the parents that they should attend. Review whether a parent is refusing to attend or requesting a different meeting date. The school district must keep a record of its attempts to arrange a mutually agreed on time and place, such as:

(1) Detailed records of telephone calls made or attempted, and the results of the calls;

(2) Copies of correspondence sent to the parent and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment, and the results of those visits. 34 C.F.R. § 300.322(d).

c. **Student:** Child invited when appropriate—the parent determines when the child's attendance is appropriate, since only the parent has the authority to make educational decisions for the child, including whether the child should attend an IEP team meeting. 71 Fed. Reg. 46671 (Aug. 14, 2006).

d. **Regular Education Teacher:** Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment).

(1) No requirement to have all the student's teachers in attendance—can rotate teachers into the meeting.

(2) In *M.L. v. Federal Way Sch. Dist*., 387 F.3d 1001 (9th Cir. 2004), the court found that failure to have the regular education teacher created a "critical structural defect"

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because a possibility existed that the student would be placed in integrated kindergarten classroom.

e. **Special Education Teacher:** Not less than one special education teacher or, when appropriate, not less than one special education provider of the child. The regular education and special education teachers do not necessarily have to be the student's current teachers but must have provided services to the student. *R.B. v. Napa Valley Unified Sch. Dist*., 48 IDELR 60 (9th Cir. 2007).

f. **District Representative:** School or district determines who the district representative will be—the designated individual must meet all 5 criteria:

(1) Be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(2) Be knowledgeable about the general education curriculum;

(3) Be knowledgeable about the availability of resources of the school district;

(4) Have the authority to commit district resources; and

(5) Be able to ensure that whatever services are described in the IEP will actually be provided. 34 C.F.R. § 300.321(a)(4); 71 Fed. Reg. 46670 (Aug. 14, 2006).

g. **Interpreter of Evaluation Results:** An individual who can interpret the instructional implications of evaluation results, who may be another member of the team—a team member can wear several hats.

h. **Individuals with Knowledge:** At the discretion of the parent or school district, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate.

(1) The determination that certain individuals have knowledge or special expertise is made by the party extending the invitation. 34 C.F.R. § 300.321(c).

(2) Individuals with knowledge or special expertise do not include union representatives, the media, or board members. Such attendance at IEP meetings would be due to self-serving motives or interest, rather than to meet the

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needs of the student. *Letter to Anonymous*, 18 IDELR 969 (OSEP 1992).

3. Special Circumstances: Additional IEP team individuals.

a. **Postsecondary transition planning**:

(1) When the purpose of an IEP meeting will include consideration of postsecondary transition services for the child, the district should invite the student to attend the IEP meeting. 34 CFR 300.321(b)(1). If the student does not attend the IEP team meeting, the district must take other steps to ensure that the student's preferences and interests are considered. 34 CFR 300.321(b)(2).

(2) If an IEP meeting will address postsecondary goals or transition services, the district must, with the parent's consent and to the extent appropriate, invite a representative from a public agency likely to be responsible for providing or funding those transition services. 34 CFR 300.321(b)(3).

(3) While the IDEA does not give districts the authority to compel other agencies to participate in transition planning, the district should "take steps to obtain the participation of other agencies in the planning of transition services." 71 Fed. Reg. 46,672 (2006).

(4) A district's duty to prevent the disclosure of personally identifiable information also affects its ability to invite representatives of outside agencies to IEP meetings on transition services. Noting that each IEP meeting involves a discussion of confidential information, OSEP has stated that districts must seek consent every time they wish to invite an agency representative to an IEP meeting. *Letter to Gray*, 50 IDELR 198 (OSEP 2008).

**b. Transition to Part B:**

(1) When a child who previously received IDEA Part C services becomes eligible for Part B services at age 3, the district must convene an IEP team meeting. An invitation to the initial IEP meeting for a child previously served under Part C must, at the request of the parents, be sent to the Part C services coordinator or other representatives of the Part C system to assist with the smooth transition of services. 34 CFR 300.321(f).

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(2) OSEP indicated that if a parent wants the Part C services coordinator or another representative of the Part C system to attend the child's initial IEP meeting, the district is responsible for inviting that individual. *OSEP Early Childhood Transition FAQs*, 53 IDELR 301 (OSEP 2009).

**c. Private school placement by a school district:**

(1) Before a district places a child in a private school or facility, it must hold a meeting to develop an IEP and ensure that a representative of the private school or facility attends that meeting. If the representative cannot attend, the district must use other methods to ensure participation by the private school, including individual or conference telephone calls. 34 CFR 300.325(a).

(2) Subsequent to the child's placement, the district may authorize the private school to initiate and conduct IEP meetings. 34 CFR 300.325(b)(1); and 71 Fed. Reg. 46,687 (2006). However, the district ultimately remains responsible for the provision of FAPE. 34 CFR 300.325(c). Furthermore, the district must ensure that the parents and a district representative are involved in any decision about the child's IEP and agree to any proposed changes in that IEP before the changes are implemented. 34 CFR 300.325(b)(2).

4. **Excused IEP team members.**

a. Excusing an IEP member "in whole or in part" requires a written agreement with the parent. 34 C.F.R. § 300.321(e). Make sure the case manager receives a signature from the parent on the written agreement before the IEP team meeting begins. If the parent refuses to sign a written agreement to excuse a required IEP team member the meeting must be cancelled and rescheduled when a full team can meet.

b. A written summary of input prior to the IEP meeting is required to be provided to the parent when an excused IEP team member's area of the curriculum or related services will be modified or discussed at the IEP meeting. 34 C.F.R. § 300.321(e)(2).

B. **Ensure Proper Special Education Referrals and Evaluations Occur.**

1. Failure to "find" the child who should be evaluated could result in compensatory education, including private school placement. *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 50 IDELR 1 (9th Cir. 2008), *aff'd* 109 LRP 36046 (Sup. Ct. 2009) (The IDEA authorizes reimbursement for

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private special education services regardless of whether the child previously received special education services from a public school.)

a. A school district could not avoid a child find claim by pointing out that it did not take any affirmative action in response to a high school student's academic and emotional difficulty. The 9th Circuit held that a school district's decision to ignore a student's disability amount to a child find violation. *Compton Unified School District v. Addison*, 54 IDELR 71 (9th Cir. 2010), *cert. denied*, 112 LRP 1321 (U.S. 01/09/12)(No. 10-886).

2. An evaluation must be timely—"Regardless of compliance with a state regulatory requirement, [the] IDEA requires that districts act within a reasonable time to evaluate [children suspected of having disabilities]." *J.G. v. Douglas County Sch. Dist.*, 51 IDELR 119 (9th Cir. 2008).

3. Parent request to evaluate—need to timely perform evaluation or provide written notice of refusal. 34 C.F.R. § 300.503(a)(2). A district could not fulfill its duty to evaluate a preschooler with autism by referring parents to a child development center. *N.B. and C.B. v. Hellgate Elementary School District*, 50 IDELR 241 (9th Cir. 2008).

4. A functional behavioral assessment (FBA) is considered an evaluation; written consent is needed. *Letter to Christiansen*, 48 IDELR 161 (OSEP, Feb. 9, 2007).

5. Carefully "consider" all relevant information, evaluations, and/or assessments provided by parents. "Consider" does not mean "acquiesce." The IDEA does not require districts "simply to accede to parents' demands without considering any suitable alternatives." *Blackmon v. Springfield R-XII Sch. Dis.*, 31 IDELR 132 (8th Cir. 1999), *rehearing denied*, 110 LRP 65933 (8th Cir. 2000).

6. Screening for instructional purposes is not an evaluation. "The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services." 34 C.F.R. § 300.302.

7. Ensure all evaluations are provided to the parent.

a. *Amanda J. v. Clark County Sch. Dist*., 267 F.3d 877, 103 LRP 33278 (9th Cir. 2001):

(1) The school district's failure to give Amanda's parents copies of the evaluations which indicated the possibility of autism and the need for further psychiatric evaluations when the district learned of the possible diagnosis violated

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the procedural requirements of the IDEA and was held by the 9th Circuit to be an "egregious" procedural error.

(2) "By preventing Amanda's parents from fully and effectively participating in the creating of an individualized education program ("IEP") for Amanda, the District made it impossible to design an IEP that addressed Amanda's unique needs as an autistic child, thereby denying Amanda a FAPE."

8. School district has right to conduct its own evaluations. *P.S. v. The Brookfield Board of Education,* 42 IDELR 204 (D. Ct. Conn. 2005).

9. Response to intervention does not override evaluation obligation:

   a. The Office of Special Education and Rehabilitative Services (OSERS) has cautioned that response to intervention (RTI) is not intended to be a replacement for a comprehensive special education evaluation. *Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS),* 47 IDELR 196 (OSERS 2007).

   b. Failure to evaluate could result in a violation of child find obligations. *El Paso Indept. Sch. Dist. v. R.R.*, 50 IDELR 256 (W.D. Tex. 2008).

10. A school district has an obligation to evaluate a student if it has reason to suspect that the student has a disability that will require special education and related services. 34 C.F.R. § 300.301.

11. A school district can request due process hearing if parent denies permission to evaluate (34 C.F.R. § 300.300(b)(3)), but no right to override parent refusal for initial placement in special education exists. (34 C.F.R. § 300.300(c)(1)(ii)).

C. **Allow for Meaningful Parent Participation.**

1. An IEP may not be changed unilaterally by a school district. "An IEP, like a contract, may not be changed unilaterally. It embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP." *M.C. v. Antelope Valley Union High School Dist.*, 858 F.3d 1189 (9th Cir. 2017) amended decision.

2. Allowing parent to dictate program vs. meaningful parent participation.

   a. The IDEA does not require school districts "simply to accede to parents' demands without considering any suitable alternatives."

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*Blackman v. Springfield R-XII Sch. Dist*., 31 IDELR 132 (8th Cir. 1999).

b. So long as a school district provides a student FAPE, it is under no obligation to provide a specific methodology to the student. Once the requirements of the IDEA have been met, the methodology a school should use is an issue of state law. *Carlson v. San Diego Unified School District*, 54 IDELR 213 (9th Cir. 2010) (unpublished).

c. *K.M. v. Tustin Unified School District*, 725 F.3d 1088, 61 IDELR 182 (9th Cir. 2013). In a case of first impression dealing with "real-time computer-aided transcription services," the 9th Circuit held a school district's compliance with the IDEA does not necessarily establish compliance with its "effective communication" obligations under the ADA.

(1) While the IDEA requires districts to provide a "basic floor of opportunity" to students with disabilities, Title II of the ADA requires district to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others.

(2) When developing a deaf or hard-of-hearing child's IEP, the IEP team is required to consider, among other factors, "the child's language and communication *needs," "opportunities* for direct communication with peers and professional personnel in the child's language and communication mode," and "whether the child *needs* assistive technology devices and services." [Emphasis original.]

(3) "But the ADA adds another variable: In determining how it will meet the child's needs, the ADA regulations require that the public entity 'give primary consideration to the r*equests* of the individual with disabilities.'"

3. The IDEA contemplates that parents are equal participants in developing, reviewing, and revising their child's IEP. "Equal participant" does not mean the parent has the right to oversee their child's educational program in the school setting. "Equal participant" means:

a. Participating in the discussion of the child's need for special education and related services.

b. Joining with the other IEP team members to decide what services provide FAPE. *Notice of Interpretation,* Appendix A to 34 C.F.R. part 300, Question 5 (1999 regulations).

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4. A school district is under no obligation to defer to the parent's preference regarding personnel. Absent evidence that school personnel assigned to work with a student are unqualified, a parent will have a difficult time establishing an IDEA violation. *Blanchard v. Morton School District*, 54 IDELR 277 (9th Cir. 2010).

5. IEP teams should consider utilizing pre-team planning meetings. An IEP team meeting "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(a)(30).

6. Parent opting to leave IEP meeting before meeting is finished—is continuing the meeting an option?

    a. Staff has an option of terminating the meeting and rescheduling;

    b. Staff has option of informing parent meeting will continue, parent input is valuable and hope parent will decide to stay.

D. **Understand the Definition of "Consensus."**

1. Consensus is a generally accepted opinion or decision among a group of people.

2. The IDEA does not contemplate voting at IEP meetings -- the goal is to reach consensus. "It is not appropriate to make IEP decisions based upon a majority 'vote.' If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing." *Notice of Interpretation*, Appendix A to 34 C.F.R. Part 300, Question 9 (1999 regulations); *see also, Letter to Richards*, 55 IDELR 107 (OSEP 2010).

E. **Use of the Common Core Standards.**

1. *Letter to Anonymous*, 60 IDELR 47 (OSEP 2012) (Informal guidance and not legally binding):

    a. Question presented: Does the use of Common Core Standards mean that school districts need only provide students with high cognition access to the general education curriculum?

    b. Response provided: A district's obligation to provide special education to children with disabilities, including those with high cognition, does not change simply because a state adopts common core standards.

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c. OSEP explained that districts do not comply with their duty to make FAPE available to all children with disabilities in their jurisdiction solely by making the general education curriculum accessible to them.

d. The IDEA also requires districts to address each child's unique needs that arise from the child's disability -- needs which may go beyond academics to include social skills and classroom behavior. 34 CFR 300.39(b)(3).

e. In addition, districts' obligation to provide FAPE does not end simply because a child meets the state's academic achievement standards or demonstrates strong cognitive abilities.

f. "[R]egardless of their level of cognition, when children with disabilities have been determined eligible for special education, specially designed instruction must be provided at no cost to the parents."

F. **Ensure Each Year's IEP Accurately Addresses the Student's Educational Needs.**

1. Each IEP team needs to address any lack of suspected progress toward the annual goals and in the general education curriculum. 34 C.F.R. § 300.324(b).

2. Don't wait until the IEP annual review to address lack of progress. If a student fails to make progress within a reasonable period of time, the district must convene an IEP meeting to address the student's lack of progress. 34 C.F.R. § 324(b)(2)(A).

3. A district's continuation of inadequate services can be determined to constitute a denial of FAPE.

4. Failure to individualize IEPs and behavioral intervention plans (BIPs) can constitute a denial of FAPE.

5. Failure to have measurable goals. An IEP that adequately describes the student's present levels of performance, including appropriate measurable goals and objectives, and provides for a specific education program should satisfy the "basic floor of opportunity" standard set forth in *Rowley, Derek B. by Lester B. and Lisa B. v. Donegal Sch. Dist.*, 47 IDELR 34 (E.D. Pa. 2007).

6. Failure to evaluate social/emotional needs, as well as academic needs can result in a denial of FAPE. 34 C.F.R. § 300.304(c)(4).

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7. Remedies include possibility of compensatory education award against school district, or payment for private school tuition.

8. Possibility of attorney fees to parents. 34 C.F.R. § 300.517.

G. **Ensure Transitions Services Are Adequately Addressed.**

1. First IEP to be in effect when the child turns 16, or younger if determined appropriate by IEP team. 34 C.F.R. § 300.320(b).

2. A statement in IDEA 1997 that defined transition services as an "outcome-oriented process" did not alter the standard of FAPE established in *Rowley*. *J.L. v. Mercer Island School District*, 53 IDELR 280 (9th Cir. 2010).

3. Transition services are updated at least annually and must include:

   a. Appropriate measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

   b. The transition services (including courses of study) needed to assist the child in reaching those goals. 34 C.F.R. § 300.320(b).

4. Invite a representative of transition agency that is likely to be responsible for providing or paying for transition services. Need written permission from the parent or adult student. 34 C.F.R. § 300.321(b)(3).

5. Make sure the student is invited. "If the child does not attend the IEP team meeting, the school district must take other steps to ensure that the child's preferences and interests are considered." 34 C.F.R. § 300.321(b)(2).

6. Transition services can also come into play whenever a child with a disability is transitioning from one type of environment to another. *See R.E.B v. State of Hawaii, Dept. of Education*, 870 F.3d 1025 (9th Cir. 2017) (A child's IEP team should have discussed services a student would need to benefit from a larger public school kindergarten class after attending a small private school for children with autism for more than two years.)

H. **Do not Predetermine Services or Placement.**

1. "A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. *K.D. ex rel. C.L. v. Dept. of Education, State of Hawaii*, 665 F.3d 1110 (9th Cir. 2011).

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2. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified Sch. Dist*., 48 IDELR 31 (9th Cir. 2007).

3. Draft IEP to discuss at IEP meeting.

   a. Draft is truly a draft—identify on the draft through stamp or watermark that it is a draft.

   b. Inform parent that draft IEP will be changed as appropriate following discussion.

   c. Keep copy of draft with handwritten notes and changes in student's file.

   d. District staff must show willingness to consider revisions to both draft IEP and placement at IEP meetings and in discussions with parents.

      (1) An assistant superintendent's statement at the start of an IEP meeting that the team would discuss the student's transition back to public school resulted in a finding that the district predetermined the student's placement before the meeting. *Berry v. Las Virgenes Unified School District,* 54 IDELR 73 (9th Cir. 2010).

      (2) A handwritten note on a district document dated 3 months before the final IEP meeting indicated that the department intended to place a student in a particular behavioral program. The court concluded that the department predetermined the student's placement in a program that was unable to meet the student's needs, resulting in a denial of FAPE. *Sam K. v. Department of Education, State of Hawaii*, 60 IDELR 190 (D. HA 2013).

   e. Placement is always the last decision made in the IEP process.

4. Public agencies are prohibited from making placement options "based on a public agency's need or available resources, including budgetary considerations and the ability of the public agency to hire or recruit qualified staff." 71 Fed. Reg. 46587 (Aug. 14, 2006).

## I. Ensure Each Student's IEP and BIP is Fully Implemented.

1. An IEP is a legally-binding document for the provision of services to a student; it is not a list of suggestions that may or may not be followed.

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*Avjian v. Weast*, 48 IDELR 61 (4th Cir. 2007) (courts generally must limit their consideration to the terms of the IEP).

2. Ensure that parents have meaningful participation and that they are informed of district actions by providing Written Notice and receive the parent right statement as required. 34 C.F.R. §§ 300.503 and 300.504.

3. Obligation to consider positive behavioral supports—"In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2)(i).

4. Informing appropriate staff regarding their obligations under the IEP/BIP, including transportation, in-school suspension personnel, classroom teacher, playground duties, etc.

5. Providing too much detail in IEP takes away staff discretion:

    a. Such as methodology, specific staff member, extracurricular activities.

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

    c. A school district is "entitled to deference in deciding what programming is appropriate as a matter of educational policy." *J.L. v. Mercer Island Sch. Dist.*, 109 LRP 48649 (9th Cir. 2009).

    c. Discipline:

        (1) Second question asked in a manifestation determination: Whether the conduct in question was the direct result of the LEA's failure to implement the IEP?

        (2) Failure to look at all disabilities a child has when conducting a manifestation determination, (MD), could result in a deficient MD.

    d. Possibility of compensatory education.

    e. Need to keep appropriate documentation of services provided/progress made.

    f. Keep minutes of IEP team meetings.

    g. Hold pre-team planning meetings, when necessary. 34 C.F.R. § 300.501(a)(3).

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J. **Ensure Related Services are Provided.**

1. The inability to find a service provider to provide the related services on a student's IEP is not typically an excuse that can be used successfully for failure to provide the identified related services. *Globe (AZ) Unified Sch. Dist.*, 55 IDELR 54 (OCR 2009).

2. If the related services are being provided by a private provider, ensure staff has received all necessary releases so information can be shared.

3. Ensure all necessary information is provided to the service provider so that the appropriate related services are provided.

4. Ensure there is appropriate documentation by the service provider that the identified services have been provided as specified on the IEP.

5. Identify when related services need to be made up: service provider absent versus student absent.

6. Ensure a substitute provider is available in order to provide the services and/or provide compensatory services and is properly certified/licensed. *Letter to Anonymous*, 49 IDELR 44 (OSEP 2007).

7. Possibility of compensatory education exists when related services have not been provided as identified on the IEP.

K. **Ensure Written Notices are Provided.**

1. A district must provide parents with "prior written notice" whenever it proposes or refuses "to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child." 34 C.F.R. § 300.503(a)(1) through (2).

2. "The Supreme Court in *Rowley* established the importance of procedure and articulated how form and substance are part and parcel of the same goal—achieving an appropriate education for the student." *Mewborn v. Government of District of Columbia*, 43 IDELR 34 (D.D.C. 2005). An IEP team must provide parents with appropriate written notice; handwritten notes from an IEP team meeting did not constitute a valid revision to an IEP, nor provide sufficient written notice to the parent. *Id.*

3. When in doubt, provide written notice.

4. Don't allow staff to leave any blanks in filling out the school district's written notice form; insert same or similar language in several areas of the written notice, if appropriate.

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5. At times it may be appropriate to draft a "super" Written Notice setting forth the procedural history of the interactions between the parents and staff to clearly show the efforts made by staff to work with the parents and offer an appropriate educational program to the student.

L. **Ensure Effective and Accurate Reporting of Achievement.**

1. **Reporting of Progress:** The IDEA requires the provision of written information to parents about students' progress toward IEP goals and objectives and establishes the parental right to receive regular reports about their child's progress in special education. 34 CFR 300.320 (a)(3).

**2.** **Progress reports** Among the required disclosures that must be contained in the IEP is a description of when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 34 CFR 300.320 (a)(3)(ii).

3. **Report cards:** The primary purpose of report cards is to provide school performance information to parents about their child. It is not a violation of FERPA, the IDEA, or Section 504 to indicate on a report card that the student has a disability or is otherwise receiving special education or related services. Districts can use asterisks on report cards to denote a student's participation in special education classes or accommodations in general education classes. *In re: Report Cards and Transcripts for Students with Disabilities*, 51 IDELR 50 (OCR 2008).

4. **Transcripts:** While report cards can disclose information about a student's disability, transcripts cannot. This is because the fundamental purpose of a transcript is to inform postsecondary schools and employers about the student's credentials and school achievements. Placing information on a transcript indicating that a student has a disability or receives special education services or accommodations is not permitted. It is considered discriminatory; some schools of higher education or prospective employers may base their impressions of the student on his condition rather than on his achievement and other school performance indicators. *In re: Report Cards and Transcripts for Students with Disabilities*, 51 IDELR 50 (OCR 2008).

a. **Sharing transcripts with 3rd parties:** FERPA requires school districts to obtain the permission of the parent or eligible student before sharing the student's transcript with a third party, such as a prospective employer. 34 C.F.R. §99.31.

b. **Sharing transcripts with other schools:** FERPA permits the release of a student's transcript to "officials of another school, school system, or institution of postsecondary education where the

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student seeks or intends to enroll" without prior consent if the district makes a reasonable attempt to notify the student or parent, unless 1) the parent or eligible student initiated the disclosure; or 2) the district's annual notice indicates that the district forwards a student's education records to any school where the student seeks or intends to enroll. 34 C.F.R. §99.31.

5. **Modifications in reporting progress:** Report cards and progress reports are not the only means of communicating with parents. Other methods can also be used to keep parents informed on their child's academic achievement, such as parent-teacher conferences, 504 meetings, phone conferences, and email.

M. **Ensure continual professionalism by school staff.**

1. School personnel must remain professional, even in those situations when it appears they are being personally attacked.

2. School personnel must remain professional in their communications with others, including staff, parents, outside providers, etc.

3. School personnel may never be able to satisfy the parent—but that isn't the issue—issue is whether FAPE in LRE is being provided. School staff must be able to defend the educational program developed for each student with a disability.

4. Whenever a parent challenges or requests the qualifications of staff, that information should be provided.

5. A due process hearing cannot be requested regarding failure to have a highly qualified teacher. 34 C.F.R. §§ 300.18(f) and 300.15(e).

6. Failure to have a highly qualified teacher could result in a due process hearing on the issue of whether FAPE was provided to the student.

7. Failure to follow IDEA mandates could result in individual liability. *Sanders v. Issaquah School Dist*., 117 LRP 48968 (W.D. WA 2017).

**NOTE: This outline is intended to provide interpretations of law and a summary of selected cases. In using this outline, the presenter is not rendering legal advice. The services of a licensed attorney should be sought in responding to individual situations in a school district or charter school.**

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