

# **What, When, Why?—Legal Issues and Practical Tips on IDEA's Prior Written Notice Requirement**

Presented by

**Jose Martín, Attorney**

Richards Lindsay & Martín, LLP, Austin, Texas

*2017 Tri-State Special Education Law Conference—*

**Omaha, NE**

Copyright 2016, 2017 © Richards Lindsay & Martín, L.L.P.



# Why is PWN required?

- **To help assure parents have a meaningful opportunity to participate in the IEP process**

To do so, parents need clear and accurate notice of Districts' actions or refusals

Really a redundancy feature of IDEA safeguards, as the actions or refusals will have been discussed in IEP meetings...



# When is PWN required?

- **34 C.F.R. 300.503(a)**

**When school proposes, or refuses, action on identification, evaluation, placement, or provision of a FAPE**

Also, in revocation of consent situations  
(see 34 CFR §300.300(b)(4)(i))

And, if IEP Team will implement an IEP with which parents disagree



# When is PWN required?

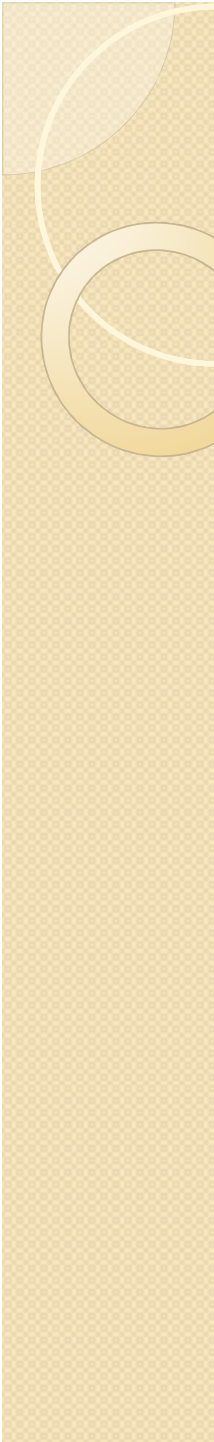
- **“Propose”** means when the IEPT decides to take the action, or refuse to take an action

PWN not required if an option is considered, but not ultimately acted on (see *Grant*—No PWN needed since final decision on reading program had not been reached)



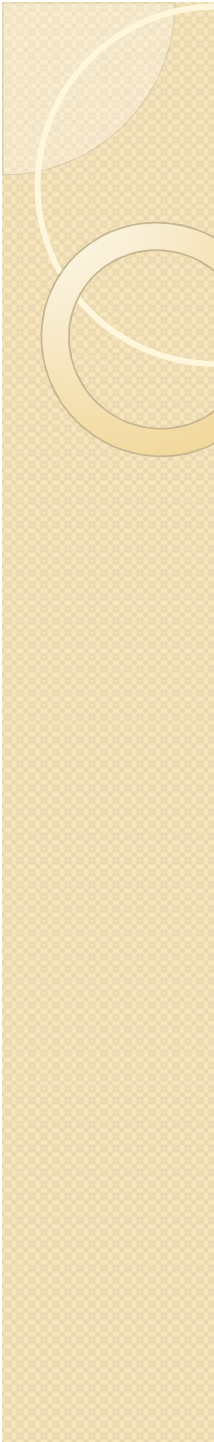
# When is PWN required?

- PWN required for **every** IEP change, no matter who initiates the change (*Weil, Letter to Lieberman*)
- **Placement** changes (or refusals to change placement) always require PWN (*Mesa Co., Constellation*)

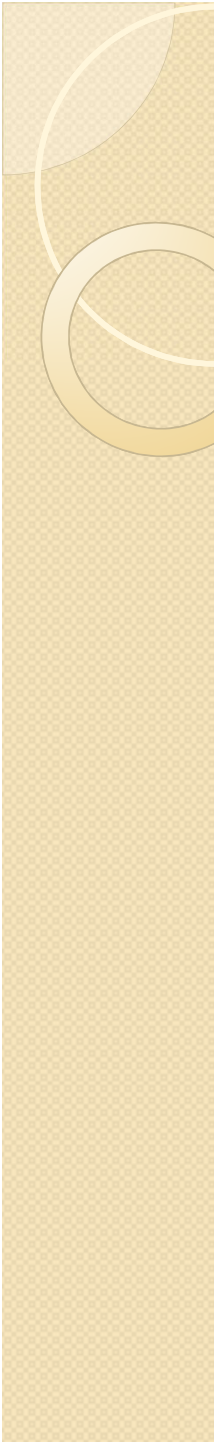
- 
- Proposed **evaluations** or refusals to conduct evaluations trigger PWN (*Columbus*)

Including FBAs (*Letter to Anonymous*)

- PWN required even if parent agrees to action or requests the action (*Letter to Lieberman*)
- **IEP amendments** without meetings also require PWN (since they change the IEP)

- 
- **Graduations** with regular diplomas are a change in placement (34 CFR §300.102(a)(3)(iii)) and also require PWN
  - **Removal of aide assistance** requires PWN (*R.Y. v. New York DOE*)
  - Must PWNs for changes in placement specify the **exact school location?**

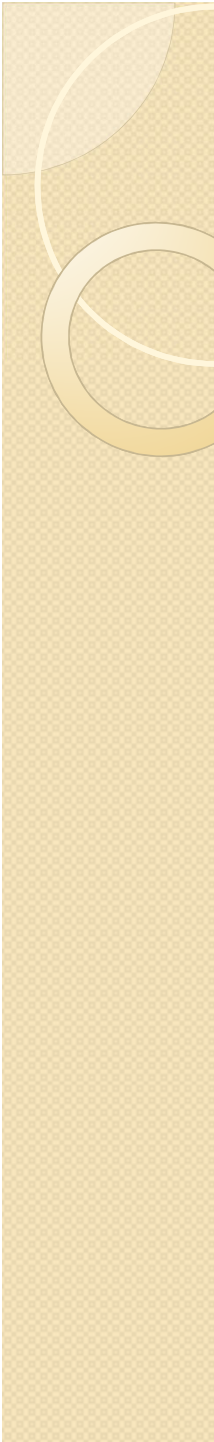
Courts are split on this point (see 4<sup>th</sup> and 2<sup>nd</sup> Circuit's disparate opinions, USDOE commentary to 2006 regs)

- 
- **Temporary** changes in program (10 days or less) do not trigger PWN—*Washoe Co.* (student out of music class for a few days because she damaged her violin)
  - Changes in **educational methodology** generally do not trigger PWN

Unless the methodology is specified in the IEP

But IEPs do not have to specify methods (*Alaska Gateway*, USDOE commentary to 2006 regs)



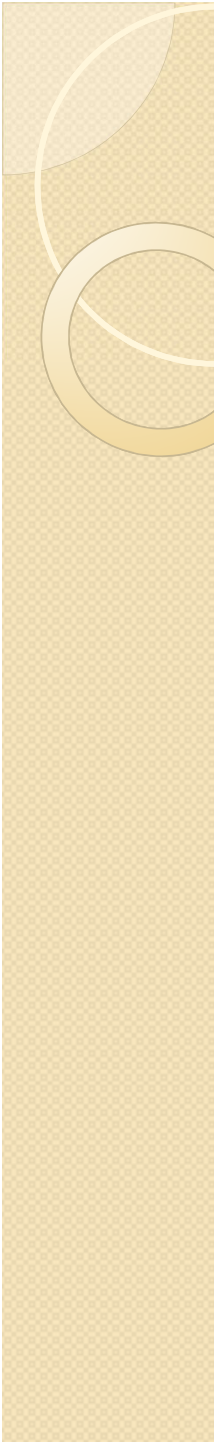
- 
- Thus, the mention of a reading program that was not in the IEP did *not* mean that the school was required to implement that program (**O.M. v. Falmouth Sch. Dept.** (1<sup>st</sup> Cir. 2017))

***Tip***—Schools should not mention any methodology in the PWN, unless the IEP commits to it (which is not required anyway)

- 
- Thus, changes to **details** of a program that are not in the IEP also do not trigger PWN

*Coeur D'Alene* (change to transportation pick-up and drop-off details that were not in IEP do not require PWN)

*Owen J. Roberts* (removal of bus aide that was not in the IEP did not trigger PWN)

- 
- PWN for **initial identification** of a student under IDEA requires stating the proposed disability category of eligibility (*Letter to Atkins-Lieberman*)

- **Timeline for PWN**

A “reasonable” time before the action is implemented, but after the decision

So parents have “a reasonable time to fully consider the change and respond to the action before it is implemented.”

(*Letter to Chandler*)



- **Timeline for PWN**

Parents can waive the timeline, if they want immediate implementation (use a form to document waiver of PWN)

There should be a form for timeline waiver...

**Tip**—This procedure is most advisable in situations of parent agreement to IEP changes



# Potential Impact of Lapses in PWN

- A failure to provide PWN when needed is a procedural violation of IDEA
- Not all procedural violations are “fatal” (i.e., rise to level of denial of FAPE)

If procedural violation results in loss of educational opportunities to the student, or seriously infringes on parents’ meaningful participation, then a denial of FAPE



# Potential Impact of Lapses in PWN

- Some cases indicate that a PWN violation can, in certain situations, amount to a denial of FAPE (*El Paso Co., R.Y. v. New York*)
- If there is ample evidence of parental participation and presentation of school offers and positions, PWN failure **may** be excused (see, e.g., *Tustin USD* (9<sup>th</sup> Cir. 2015), *B.P. v. Regional Sch. Unit 75* (D.Me. 2015))



# Contents of PWN

- **Seven elements:**

1. Description of change made or refused
2. Explanation of reason for action/refusal
3. Data bases for action/refusal
4. Statement of receipt of IDEA safeguards
5. Sources of info for parents on IDEA
6. Options considered and why rejected
7. Other relevant factors considered



# Contents of PWN

- **How much detail?**

Sufficient to allow parents to participate in the decision-making process in an informed way (*Smith*)

Parents should not have to decipher or “read between the lines” (*Fern Ridge*)

In native language, if feasible (or orally communicated and documented)—See 34 CFR 300.503(c)





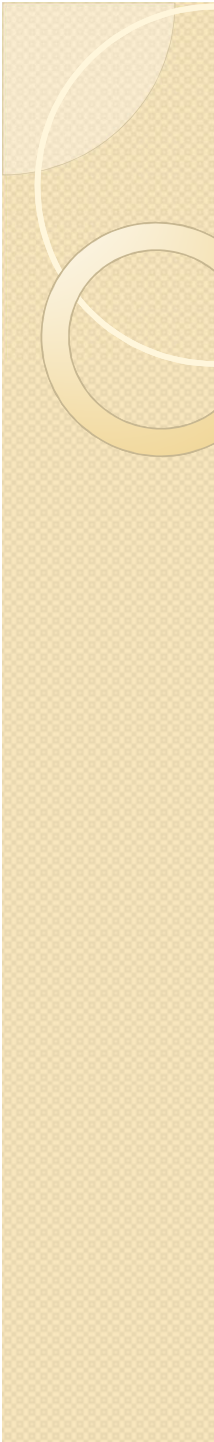
- **Example of deficient PWN:**

*Cincinnati Pub. Schs.*—Very vague and general description of annual review

Description of action—“Annual review”

Options Considered—“No other options were considered, annual review required by law”

No indication of what changes were made to the IEP or why...

- 
- **Verbal notice** tends to be found insufficient, even if it includes all required content (*Union SD, Pikes Peak*)
  - What about using the **IEP as the PWN?**

Possible, if the IEP contains all the 7 required elements of the PWN (see commentary to 2006 regs)

A separate PWN in its own form, and referring back to IEPT decisions, is a better practice



- **Practical Guidance**

PWVN can be drafted in the IEP meeting, or soon thereafter

The drafters of the PWVN should be staff that were in the IEP meeting (to ensure PWVN matches IEPT decisions)

Complex meetings with multiple actions and refusals mean complex PWVNs

A bullet point format can help separate multiple actions/refusals (and allows for concise wording)



# PWVN Forms

- **Most forms are fine**

May want to include date of draft, date PWVN provided to parent, and method of transmittal

See attached simple model form



# Identification PWN Scenario

- Student currently eligible as ID, SI
- Parent submits private eval diagnosing ASD
- Parent wants IEP Team to replace current categories with AU instead
- At IEP meeting, team notes recent FIE addressed possibility of ASD, but testing did not support diagnosis
- Team also notes private eval lacking in AU testing (pediatrician diagnosed ASD)



# Identification Scenario

- Team offers new psych eval, after review of private eval (parent accepts offer)
- Team asks for consent to speak to Dr (parent declines)
- Team notes good progress on IEP objectives and speech



# Identification Scenario

1. What is action proposed?
2. Why is action being refused?
3. What options were considered?
4. Bases for refusal?
5. Other factors?



# Identification Scenario

## I. **What is action proposed/refused?**

Parent proposes to replace ID and SI eligibility categories with AU, based on private pediatrician's diagnosis.

District proposes psychological evaluation specifically addressing AU (refuses to substitute AU code at this time)





# Identification Scenario

## **2. Reasons why action refused/proposed?**

- Current FIE addressed ASD possibility
- FIE testing did not support ASD finding
- Private diagnosis does not include testing data
- FIE data supports current eligibility
- In light of private diagnoses of ASD, District psychological eval warranted



# Identification Scenario

## **3. Other options considered?**

- Exchange of info with pediatrician
- No further evaluation



# Identification Scenario

## 4. Bases for refusal/action?

- District FIE, including ASD testing
- Lack of testing in Dr's diagnosis
- District offer of additional eval
- Data showing good progress with present IEP
- Bases for District psych is private diagnosis



# Identification Scenario

## **5. Other factors?**

- Parent declined exchange of info with Dr.
- Student shows good progress



# Evaluation PWN Scenario

- 2<sup>nd</sup>-grade student is in a tiered reading intervention program, not doing too well
- Now is struggling more in classes, although not failing, but mom is concerned
- Staff discuss further reading interventions, but remind parent she has right to request sp ed evaluation
- Parent indicates she wants sp ed evaluation
- Staff agree to proceed with evaluation



# Evaluation Scenario

## I. **What is action proposed?**

District proposes to proceed to initial evaluation at parent request



# Evaluation Scenario

## **2. Reasons why action proposed**

- Parent requested evaluation
- Limited response to intervention



# Evaluation Scenario

## **3. Other options considered**

- Continue with interventions
- Continue interventions during evaluation
- Rejection of evaluation request





# Evaluation Scenario

## **4. Bases for action**

- Parent request
- Intervention program data
- Classroom grades



# Evaluation Scenario

## **5. Other factors**

- Parent will consider continuing interventions while evaluation proceeds
- Intervention data can be used in initial evaluation



# Placement Scenario

- 8<sup>th</sup> grader with ED, OHI (ADHD)
- In resource and general ed classes
- Behavior has deteriorated in last 2 years
- Increasing aggression, leaving class, disruption, wandering halls, confronts staff
- FBA/BIP has been reviewed and revised multiple times, behavior specialist has consulted, update psych evals, trial 1:1 aide, teacher inservices
- Staff feel there is need for behavior unit



# Placement Scenario

- Parents oppose behavior unit placement (feel student will model more bad behavior, afraid placement will be permanent, concerned military will reject student due to placement)
- Teachers indicate he is not modeling appropriate behavior, not making behavioral or academic progress, and impeding others from learning
- Staff explained level system of unit, and reiterated confidential nature of records



# Placement Scenario

## I. **What is action proposed?**

District proposes to change student's placement to self-contained behavior unit, but parents want him to remain in present settings



# Placement Scenario

## 2. Reasons for action proposed

- Student's IEP can no longer be successfully implemented in present settings
- Efforts at a variety of aids, services, and interventions have been unsuccessful
- Behavior deteriorating significantly
- Student needs more structured setting with low staff/student ratio, constant behavior intervention, level system to LRE



# Placement Scenario

## **3. Options considered**

- Continue current placement
- Attempt additional support services
- Customized level system for return to regular classes
- Transfer to another campus



# Placement Scenario

## **4. Bases for action**

- Documentation of behavior incidents
- Summary of attempted support services
- Psych eval (indicates need for highly structured setting)
- Classroom grades/progress reports





# Placement Scenario

## 5. Other factors

- Need to address behavioral and academic deterioration outweighs potential negative modeling from other behavior unit students
- Level system allows for gradual re-transition to regular settings
- Placement documents remain confidential
- Secure setting needed to avoid potentially serious confrontation with staff or security