Preparation or Predetermination? Case Examples and Practical Strategies

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The Legal Source of the Predetermination Claim

Fundamental IDEA Requirements

- Annual development of IEPs
- Meaningful parental opportunity to participate in development of IEP as an IEPT member
- Placement must be based on IEP

- Thus, if LEA pre-decides placement/services/IEP before an IEPT meeting and parental input, it has committed a procedural violation of IDEA

- Caselaw (and IDEA 04) holds that procedural violations can amount to denials of FAPE if they:

    1. Result in loss of educational opportunities, or
    2. **seriously infringe on parents' right to participate meaningfully**

- Thus we have a predetermination claim alleging denial of FAPE (and accessing denial-of-FAPE remedies)
- Certainly, if LEA unilaterally decides placement/program before IEP meeting, then ignores or prevents parental input by refusing to consider alternatives, there is a procedural violation that seriously infringes on a parent's right to participate meaningfully
- Not that new of a concept (see precursor cases in materials from the 1980's)

The Main Modern Predetermination Case—*Deal v. Hamilton*

- Predetermination theory collides with ABA advocacy
- ***Deal v. Hamilton* (6th Cir. 2004)**

  3-year-old with Autism in preschool

  Parents begin private 1:1 ABA

  Parents see progress, request full funding

Parents want 40 hrs/wk, more speech

School responds with 35 hrs/wk of sp. ed. Instruction, more speech, PT

Zach begins attending school less and less…

School agrees to increase mainstreaming, trained aide, 2.5 hrs/wk speech, OT, PT, and incorporation of DTT 1:1 method to help implement IEP

Parents place Zach in private preschool, continue with private ABA at home, stop sending him to school altogether

School again revises offer, more mainstreaming, lots of other services

Parents still want funding for home ABA program, Zach attends school very little

Parents request hearing (**takes 27 days!!!**)

- HO finds school has unofficial policy of refusing ABA home programs and pre-determined that it would provide a school-based IEP
- HO awards 30 hrs/wk home ABA
- District court hears more evidence, reverses HO, finds IEP was OK, finds HO substituted parent's preferred methodology

- 6th Circuit reverses D.Ct., finds predetermination, policy of refusing ABA due to investment in other methods
- Personnel did not have "open minds" (unwilling to consider alternatives)
- Although parents participated, staff's minds were made up ahead of time
- Court found staff always rejected ABA, touted other methods, criticized ABA, ignored parents data on progress, and refused training by parents providers

- School had "pre-decided not to offer Zachary intensive ABA services regardless of any evidence concerning Zachary's individual needs and the effectiveness of his private program"

- Schools can have opinions and pre-meeting reports and proposals, but they must have "open minds"

Questions

- Is it surprising that a private, highly-intensive, highly-restrictive, homebased program would yield impressive results? Would it not for any student?...

- If staff can come to meetings with opinions and proposals, what's the *mens rea* (mental state) for "open mind"? If schools reject a parent's option, is there always a potential claim?...

- **Implications in the world of ASD methodology**

  Under *Deal*, parents have arguable claim anytime a school maintains non-ABA methods and wishes to attempt them when parents have already begun ABA programming and have progress data

  Challenge for Schools—How do they exercise their discretion to choose methods per *Rowley* but avoid predetermination? Implement them? Show "openness of minds"?...

A last word on *Deal*…

- 6th Cir. remanded to lower court on equitable issues, and on whether public IEP was OK
- Lower court (again) finds IEP appropriate, despite eclectic methods, awards 50% reimb.
- 6th Cir. Upholds decision! Home program not identical to optimal ABA (home program not "so superior" after all)
- Notice ultimate result for school—It had an appropriate program in place all along, but pays the ultimate cost in litigation for the procedural violation

The Aftermath of *Deal*—Recent Caselaw

- Unsurprisingly, the claim is now frequent (very common in method or placement disputes, but appears now in other contexts)
- Courts try to skirt the touchy *mens rea* issue
- Not many significant post-*Deal* cases finding predetermination, but the issue is dealt with frequently by the courts, and the remedies for predetermination tend to be significant

Conduct of School Staff/Administrators

- ***O.L. v. Miami-Dade CSB* (11th Cir. 2014)**

  Student with ASD and stomach issues exhibited symptoms in large settings

  School proposed transition from middle school to high school twice its size

  Administration flatly denied looking at alternatives or magnet program

  They cut off team discussion, when other members appeared receptive to other options

- ***O.L. v. Miami-Dade CSB* (11th Cir. 2014)**

  Administrator said parents would have to pursue mediation if they did not agree

  Court—"Absolute dismissal" of parents concerns and administrative override of team members constituted predetermination

  Court ordered funding of home-based program

  Discussion Point—Managing opinions from administrators outside IEP team so that influence does not result in predetermination

- ***D.B. v. Gloucester TSD* (D.N.J. 2010)**

  Court found PD—district proposed same program for 3 years, despite parents' attempts to consider less restrictive alternatives

  Director said talk of options not needed, as team had concluded more inclusion was inappropriate

  At meetings, parents proposals were not considered, questions sometimes were ignored (team member did not explain autism program because meeting was "a couple of hours and I was tired")

- ***D.B. v. Gloucester TSD* (D.N.J. 2010)**

  On appeal, school pointed to some accommodations that were included at the request of the parents, and parents' choice of IEE evaluator

  Court found this insufficient (it is the parents' right as a matter of law to choose IEE evaluator, and placement was predetermined)

- ***S.S. v. Hawaii DOE* (D.Hawaii 2014)**

  DOE sent letters to parents of DOE-placed private school students

  Letter stated: "if you wish to have your child receive [a FAPE] in a public school, contact the principal at the phone number listed above."

  Parent perceived letter as predetermining public school placement, refused to contact school

  Court disagreed, letter was intended to elicit meetings and full discussion of all options

- ***S.S. v. Hawaii DOE* (D.Hawaii 2014)**

  Practical Lesson—Advise schools to be careful in wording of form letters to parents regarding IEP process, decision-making, placement options

  Best to have such communications reviewed by counsel to avoid misunderstandings

- ***L.M.P. v. Broward County* (S.D.Fla. 2014)**

  Triplets with ASD were getting private ABA

  When parents approached school, staffperson at meeting plainly stated school did not do ABA

  Staffperson testified her statement reflected school policy (another administrator testified if parents wanted a different "curriculum," such request would not be considered)

  Court found evidence could support deliberate indifference for the damages claim

- ***L.M.P. v. Broward County* (S.D.Fla. 2014)**

  On appeal, the parents argued only that the District rejected ABA as a matter of local policy

  The Court, however, noted that the triplets' IEPs contained ABA-based PECS services, refuting the notion of a no-ABA local policy (see p. 10)

- ***J.R. v. Smith* (S.Md. 2017)**

  Parents wanted private placement

  Over the phone, a District placement specialist told parents that although team would consider the option, they should be "ready for a fight"

  Parents thus argued PD

  Court held statement was opinion of one person, not shared with others

- ***J.R. v. Smith* (S.Md. 2017)**

  In the same phone call, staffmember emphasized decision was up to IEP team

  Record revealed "robust discussion" of all options, and opinion was made by majority, with not over-influence of placement specialist

  Thus, no PD

- ***Sam K. v. Hawaii DOE* (D.Hawaii 2013)**

  Teen with multiple disabilities in private school under a settlement agreement

  After IEP meetings, staff gave parents a signed IEP calling for placement in a public program for students with behavioral issues that included juvenile offenders—no other options discussed

  Staff handwritten note indicated DOE had decided on the placement prior to IEP proposal

- ***Sam K. v. Hawaii DOE* (D.Hawaii 2013)**

  See also, *P.C. v. Milford Exempted Village Schs.* (S.D.Ohio 2013) for impact of problematic staff notes and damaging statements

  Practical Idea—Train staff on language of pre-IEP notes, emails, reports, drafts

- ***A.B. v. Franklin Township CSC* (S.D.Ind. 2012)**

  Not every expressed of heartfelt opinion prior to IEP meetings constitutes predetermination

  After agreement for private placement ended, LEA expressed desire to serve ASD student in its schools

  Advocate abruptly terminated meeting

  Court—Statement was only evidence; advocate truncated parental participation, not school

  Staff statements should be **tempered**…

- Cf., see ***Berry v. Las Virgenes*** **(9th Cir. 2010)**

  LEA wants to bring a child back from private school after settlement, has transition plan

  9th Cir. holds desire to return child to LEA and belief plan is OK is not itself predetermination

  Remand for "state of mind" fact-finding

  On remand, statement by Asst Supt at start of meeting is evidence of predetermination

  Lack of parent participation due to "futility"

Private to Public School Transitions

- ***L.M. v. Downingtown ASD* (E.D.Pa. 2015)**

  Staff expressed in e-mail that they would like to "try" to return teen with OHI to public schools

  Court—Intent "not unreasonable given considerations of LRE coupled with fiscal responsibility in expending public funds."

  Equity point—Although predetermination not a "two-way street," parent predetermined private placement, filed DPH prior to proposals (see also *C.G. v. Sheehan* (D.R.I. 2010))

- ***A.V. v. Lemon Grove SD* (S.D.Cal. 2017)**

  Parents of student with dyslexia wanted continuation of private school placement

  Court noted IEP team had two meetings, discussed the private option, investigated the private program

  Parents had full opportunity to participate, IEP team made changes to proposal to address advocate's concerns

  No PD

- ***D.G. v. CSD of New York* (S.D.N.Y. 2015)**

  District proposed specialized public placement (since parents expressed concern about large groups) for 7-year-old student with SLDs

  Parent allowed to consult colleague on goal language, team reviewed private evals, team considered continuation of private school

  Court found no predetermination

  Practical Ideas—Note team allowed private input, considered pros and cons of private school vs. public program

- ***Anthony C. v. Hawaii DOE* (D.Hawaii 2014)**

  Parents of a teen with ASD claimed predetermination in school proposal to place him in a public high school

  Record showed that team discussed pros and cons of general education, special education settings, and combinations thereof (vice-principal testified placement was not determined before meeting)

  Court—discussion of all settings would not have been needed if there was predetermination

- ***B.W. v. Rye City SD* (2nd Cir. 2014)**

  Parents of a child with speech impairments and ADHD claimed District predetermined public placement when it did not *physically* include the student's private providers in IEP meetings

  But, they participated extensively by phone (input was incorporated, private teacher helped draft goals, ESY added based on private school's concerns over regression)

  Practical Idea—Considering input from private school? A win-win for schools

- ***Hjortness v. Neenah JSD* (E.D.Wis. 2006), *aff'd* (7th Cir. 2007)**

  Parents of a child with various psych diagnoses placed him in a residential facility

  At IEP meeting, parents stated issue was payment of residential program, resisted discussion of IEP goals

  Court—"District had no obligation to consider placing Joel at [the residential placement] unless and until it concluded that he could not receive a FAPE in district schools."

- ***Hjortness v. Neenah JSD* (E.D.Wis. 2006), *aff'd* (7th Cir. 2007)**

  Appeal Court—"IDEA actually required that the school district assume public placement…."

  Parents had opportunity to participate, but "chose not to avail themselves of it" so school was forced to devise a plan without their input

  Compare—9th Cir.'s position in *Las Virgenes* and lack of LRE analysis in *Deal*

  Practical—Teams may *still* want to consider private placement as an option

- ***Hjortness v. Neenah JSD* (E.D.Wis. 2006), aff'd (7th Cir. 2007)**

  In agreement with this rationale, see **M.B. v. New York City DOE (S.D.N.Y. 2017)**(see p. 16)

  Practical—Teams must explain (and insist) that discussion of IEP goals and services must be completed prior to placement discussion

  It's what the law envisions, and it can help with placement issue…

Staff Preparations

- ***S.P. v. Scottsdale USD No. 48* (D.Az. 2013)**

  Parents of 1st grader (SLD, SI) want private school

  Team met prior to meeting (meetings were preparatory, for staff to discuss program options, staffing patterns, makeup of students in programs, not for placement decisions)

  E-mail stating a particular placement was "approved only showed it was available

- ***S.P. v. Scottsdale USD No. 48* (D.Az. 2013)**

  Regulation—34 C.F.R. §300.501(b)(3) envisions staff pre-meeting preparations:

  "a meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting."

  Or, preparation of charts (*T.P. v. Mamaroneck UFSD* (2nd Cir. 2009))

- ***John S. v. New York City DOE* (S.D.N.Y. 2017)**

  School staff circulated IEP draft prior to meeting, leading parents of 6-year-old with Autism to claim PD

  Parents conceded, however, that they received copy of draft prior to meeting

  Final IEP reflected parent comments and concerns, consideration of various alternatives, so no PD

- ***A.P. v. New York City DOE* (S.D.N.Y. 2015)**

  Finalized IEP was significantly different than draft produced prior to meeting

  And, draft IEP did not specify a placement

  Parents' assertion that team just "went through the motions" was not supported by evidence

  Court—Bringing a draft IEP to the meeting "suggests preparation, not predetermination."

  Note practical implications on IEP drafts…

- **Preparation vs. Predetermination (PD)**

  Researching placement options not PD, even if staff indicate preference for one option (*M.C.E. v. BOE of Frederick County* (D.Md. 2011))

  What about inviting staff from one placement? (cases vary—*M.L. v. Federal Way SD* (9th Cir. 2003)(OK) vs. *Sam K. v. Hawaii DOE* (D.Hawaii 2013)(Not OK))

  "Open mind, not blank mind"—*Doyle v. Arlington CSB* (E.D.Va. 1992).

- **Preparation vs. Predetermination (PD)**

  Refusal to make reasonable changes to IEP is not a good fact in litigation

  Draft documents should be clearly marked "DRAFT," "FOR DISCUSSION ONLY"—But those markings won't help if staff conduct doesn't reflect the language

  Practical Idea—Draft language for Sp Ed policies or operational guidelines that indicates staff will engage in preparatory activities, but not make any final decisions (see sample)

PD Claims in Other Contexts

- ***M.G. v. Hawaii DOE* (D.Hawaii 2015)—Graduation Track Decisions**

  Parents of 14-year-old with ID opposed workplace readiness track (certificate only…)

  Court—Parents had not previously objected to similar program, draft IEP was not PD

  Parents did not rebut eval findings, which showed very limited academic skills

- ***Dixon v. District of Columbia* (D.D.C. 2015)—Graduation Track Decisions**

  Parent argued OHI 9th-grader was "shoehorned" into a specific high school program

  Team reduced sp ed instruction hours for student to qualify for diploma track

  Court found team's conduct did not *seriously impede* parent's participation

- ***Shafer v. Whitehall DS* (W.D.Mich. 2013)—Eligibility Category Decisions**

  Staff decided to classify the student as SLD, OHI, SI, but not AU, prior to the IEP meeting

  Court distinguished cases of PD of IEP and placement, and found no harm to student or parents' opportunity to participate

  A close call for the school…

- ***Z.F. v. Ripon USD* (E.D.Cal. 2013)—Staff Provider Decisions**

  School terminated contract with a behavioral services provider, parent claimed PD

  Parent participated in discussions on change, staff pointed out that the student had had 10 different aides since K, including four in the previous school year alone.

  See also, *S.A. v. Exeter USD* (E.D.Cal. 2010)(change from contract to district providers of behavior services was not PD)

- ***Bryant v New York State ED* (2nd Cir. 2012)—State Regulations or Laws**

  Parent claimed State regulation severely limiting aversives constituted PD

  Court found regulation passed after reasoned judgment, reg comports with IDEA

  Otherwise, states would be unduly limited in adopting statewide policy

  Reg did not foreclose consideration of various options, just one

Parent Conduct

- **Parents that fail to voice concerns or questions might not be able to claim PD in staff failing to address them**

  G.N. v. New York DOE (S.D.N.Y. 2015)

  Alloway Township BOE v. C.Q. (D.N.J. 2014)

  Practical Note—Team should actively ask parents if they have any objections or input (and document response or non-responsiveness)

Preparing for IEPT Meetings

- Advise refraining from rigid policies and practices on IEPs, services, placements
- Schools should be careful with communications, stray notes, emails, or offhand statements
- Train staff on IEP team authority, avoiding PD
- Carefully document consideration of various sources of data, including parental input
- Advise staff to be willing to incorporate reasonable parent, private provider suggestion
- Document healthy give-and-take discussion

Preparing for IEPT Meetings

- Advise staff to prepare for meetings, but avoid signs of PD, final placement decisions
- Advise schools to avoid large investment on single programs for a category of students
- Research and consider parent-preferred methods and placements
- Advise higher administrators on IEP team's authority, PD dangers, nuanced communications with parents