Preparation or Predetermination? Case Examples and Practical Strategies

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Origins and Legal Bases of the Predetermination Claim

***IDEA is a law of procedures*—**The cornerstone of special education under the IDEA is the development of annual individualized education plans (IEPs) for each eligible child, developed in accordance with various procedures and requirements contained in the Act, including provisions that afford parents an active and meaningful role in the development of the IEP. 20 U.S.C. §§1401(14), 1414(d); see also *Honig v. Doe*, 484 U.S. 305, 311 (1988). Parents, for example, must be part of the team of decision-makers that develops, reviews, and revises the IEPs. 20 U.S.C. §1414(d)(1)(B)(i). Schools must also ensure that parents are provided an opportunity to participate in each IEP team meeting. 34 C.F.R. §300.322. In turn, a child's placement must be based on the IEP. 34 C.F.R. §300.116(b)(2). Therefore, a school that pre-decides a child's placement or services before IEP team meetings and parental involvement and input violates the requirement to afford parents a meaningful opportunity to participate and commits a procedural violation of the IDEA. See, e.g., *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 767-70 (6th Cir. 2001).

***Procedural violations can constitute denials of FAPE*—**Longstanding caselaw holds that procedural violations of IDEA can rise to the level of denying a child's right to a FAPE in certain circumstances. *Board of Educ. of County of Cabell v. Dienelt*, 843 F.2d 813 (4th Cir. 1988). A serious procedural violation that results in the loss of educational opportunities for the child can represent a denial of FAPE. See, e.g., *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997); *Heather S. v. State of Wisconsin*, 125 F.3d 1045 (7th Cir. 1997).

In addition, a procedural violation that seriously or significantly infringes on the parents' right to participate meaningfully in the development of the IEP or placement decision can also rise to the level of a denial of FAPE. *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v.*

Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990); *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985).

In the last reauthorization of the Act, the Congress added a provision essentially codifying the state of caselaw on this issue. 20 U.S.C. §1415(f)(3)(E)(ii). It states the following:

> Procedural issues—In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—
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> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.

The legal theory for the predetermination claim—If school staff unilaterally pre-decide a child's IEP services or placement prior to actual IEP team meetings that include the parent, and then ignore or prevent parental input at the meeting, there is a procedural violation of the IDEA that seriously infringes a parent's right to meaningfully participate in the IEP process and constitutes a denial of FAPE. The claim has been recognized by federal courts since the late 1980's. See *Spielberg v. Henrico Courty Pub. Schs.*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 18 IDELR 1019 (9th Cir. 1992); *Doyle v. Arlington County Sch. Bd.*, 806 F.Supp. 1253, 19 IDELR 259 (E.D.Va. 1992).

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

Inevitably, the predetermination claim was bound to collide with the advent of disputes seeking reimbursement for unilateral private placements or programs, particularly in the context of applied behavioral analysis (ABA) methodology home-based programs, usually for students with Autism Spectrum Disorders. The *Deal* case, discussed below, re-energized the predetermination claim to the point that it is now raised in a variety of contexts and has begun to show some analytical dysfunction, creating confusion among school systems and federal courts.

In ***Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004)**, a

three-year-old boy with Autism was attending a public preschool program when his parents began teaching him outside of school with an ABA one-on-one program. Convinced that Zachary was making exceptional progress with the ABA program, his parents requested that the public school assume funding of the 40-hour per week program and increase speech therapy services. The school responded with an IEP that included 35 hours per week of special education instruction, physical therapy, and speech therapy. Zachary attended public school only about 16% of the time after the IEP offer. In subsequent meetings, the school agreed to increase mainstreaming time as Zachary could tolerate it, provided a trained classroom assistant familiar with his needs, specific goals and objectives, 150 minutes per week of speech therapy, occupational therapy (OT), and physical therapy (PT). The school also agreed to include one-on-one discrete trial teaching methods as part of the methodologies for implementing the IEP objectives. The parents placed Zachary in a private preschool part-time, with a personal aide paid for by the parents, and continued providing ABA programming at home. He stopped attending public school altogether. Since the parents were concerned that Zachary should spend more time in regular education settings, the school made a new IEP offer that included a placement primarily in a regular Kindergarten class, specific goals and objectives, various support services, pre-teaching and re-teaching sessions, OT, PT, and speech therapy. Zachary attended public school part-time, but his parents continued to insist that the school pay for the private ABA program.

The Hearing Officer's decision—After 27 full days of due process hearing, the administrative law judge (ALJ) held that the school system had an unofficial policy of refusing to consider requests for ABA home programs and thus, predetermined the IEP services and placement that would be set forth in the IEP. He also found that the school failed to include regular education teachers in some IEP meetings, that the procedural violations amounted to a denial of FAPE, and that the school failed to provide a "proven or even describable methodology for educating autistic children." He awarded reimbursement for up to 30 hours per week of private ABA home programming.

The Lower Court—The school appealed to federal district court, where it provided additional evidence (the parents declined to offer additional evidence). The district court reversed the ALJ, finding no procedural or substantive violations, and noting that the ALJ had erred in exalting the parents' preferred methodology above other appropriate methods. The court wrote that the school "could come to IEP meetings with pre-formed opinions regarding the best course of action for Zachary as long as school officials were willing to listen to the Deals, and the Deals had the opportunity to make objections and suggestions… There is nothing in IDEA which requires school systems to accept the parents' point of view, or suffer a procedural violation of the statute."

***The Circuit Court opinion*—**The Sixth Circuit reversed the lower court and found that a school district had an unofficial policy of refusing to provide one-to-one ABA programming for students with Autism because it had previously invested in another educational methodology. The court held that the policy resulted in school personnel not having an open mind about other programs and exhibiting an unwillingness to consider alternatives. Although the school allowed the parents to speak their minds about ABA programming and provide data on Zachary's progress, the school had pre-decided the placement and methodology to be used. Factually, the court noted that school staff had consistently rejected ABA requests, rejected the validity of ABA programming (while embracing its critics), interviewed only teachers and providers that had not provided ABA to the student, refused to accept data tending to show significant progress under private ABA therapy, and refused the parents' offer to help train school staff, among others. The court also noted evidence of staff statements to the effect that they would personally like to provide ABA programming to Zachary but could not do so within the school system's constraints.

> ***Questions for discussion*—**Is the school required to consider a private home-based program if it believes it can offer a FAPE within its schools, within its continuum of placements, and with its own staff? (See cases below addressing the LRE issue).

The Circuit Court felt that the 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." Because the procedural violation effectively deprived the parents of meaningful participation, the violation amounted to a denial of FAPE. Although it recognized that "school officials are permitted to form opinions and compile reports prior to IEP meetings," they must come to meetings with "open minds." The school, it found, "steadfastly refused even to discuss the possibility of providing an ABA program, even in the face of impressive results." The court concluded that "no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services. This is predetermination."

> ***Questions for discussion*—**The court is clearly impressed with the progress data derived by the private ABA program. Is it surprising that an intensive private, home-based, one-on-one program yields optimal results? See *A.E. v. Westport Bd. of Educ.*, 463 F.Supp.2d 208, 46 IDELR 277 (D. Conn. 2006)("private schooling is the ideal educational setting to maximize the potential of many children"), discussed below. Is not the

central question, however, whether the public IEP is reasonably calculated to confer meaningful educational benefit?

***The after-effect of* Deal**—Whatever the questions raised by the opinion, the *Deal* case has re-energized the pre-determination argument for disputes over publicly-funded private programming. It has also placed schools in a precarious legal situation in the world of educating students with autism spectrum disorder. If the school district maintains a non-ABA method, and wishes to attempt it in its schools for a child with autism who has been receiving ABA therapy, parents may have a colorable case that the school is "predetermining" that it will not use ABA methodology and thus depriving them of a meaningful opportunity to participate in the IEP decision-making process. Now, the "predetermination" argument is arising in other types of IDEA cases, including some where private placement is not at issue. See, e.g., *Nack v. Orange City Sch. Dist*., 46 IDELR 32 (6th Cir. 2006); *Board of Educ. of Township High Sch. Dist. No 211 v. Ross*, 47 IDELR 241 (7th Cir. 2007).

Questions for schools to ponder—*Deal* has raised challenging questions for schools. How does a school study and invest in an educational methodology for its students with autism without appearing to reject other methods? How do schools implement their chosen methodologies without appearing to be pre-determining the program for students with autism? How do schools prove their "open-mindedness" in making and implementing their selection of methods among the competing methodologies on the table? If the school is shown private program data indicating significant progress, is the school still free to implement its own methods instead? If so, how can the school prevent a potential predetermination claim?

The ironic end to the* Deal *case—The *Deal* panel remanded to the district court below the issues of whether the public school's IEP was reasonably calculated to offer meaningful benefit, and to determine how equitable considerations weighed into the reimbursement award. The district court found that the public school's eclectic (multi-method) IEP was appropriate, and awarded only 50% reimbursement. Somewhat surprisingly, three years after its original decision, the 6th Circuit agreed that the public IEP was appropriate, noting that "different methodologies may be appropriate for treating autism." The Panel noted that the district court found that Zachary's home program was not identical to that received by children in the original Lovaas study, "and it therefore cannot be expected to produce the same results."

A point on remedies—Thus, in *Deal* the public school had to pay significant costs for a private home-based ABA program even though the courts ultimately found the school had proposed an appropriate IEP that

was reasonably calculated to confer FAPE. Thus, the school paid dearly for the procedural violation. It should be noted that other courts have ruled that despite pre-determination, if the school's IEP offered a FAPE, the school met its substantive obligations under the IDEA. See *J.D. v. Kanawha County Bd. of Educ.*, 48 IDELR 159 (S.D. W. Va. 2007), citing *MM v. School Dist. of Greenville County*, 303 F.3d. 523 (4th Cir. 2002).

Review of Modern Post-*Deal* Caselaw

In the wake of *Deal*, the predetermination claim became increasingly popular, and the federal courts have had to address the question in a variety of contexts. The judicial tension appears to lie between acknowledging the potential for true improper predetermination situations and addressing the numerous cases where predetermination is claimed, but without the needed factual predicate. The analysis is awkward because courts also recognize that schools must prepare for IEP meetings, including developing ideas and options for IEP services and placement prior to meetings. But, those acts of preparation are sometimes seen as actual evidence of predetermination. Courts have been forced, moreover, sometimes reluctantly, into the highly subjective "state of mind" inquiry, particularly since it is not uncommon for schools to refuse to accede to a parent's requests for private programs when they believe they are capable of providing a FAPE within their continuum of placements. The following are some notable examples of the modern progeny of *Deal*.

Conduct of School Staff or Administrators

At times, the conduct of school staff provides strong evidence of predetermination. In ***O.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11th Cir. 2014)**, a child with Autism Spectrum Disorder, ADHD, and stomach issues suffered regression, increased obsessive-compulsive behavior, tics, and vomiting when subjected to crowded settings with lots of background noise. For his transition from middle to high school, the District proposed a high school with 3,600 students, more than twice the size of his middle school. The parents expressed concern and wanted a smaller setting, but the District rejected placement at a small magnet school. After starting at the large high school and experiencing serious symptoms, the parents pulled him out of school and developed a one-to-one program with related services on their own. A transcript of an IEP meeting showed that the magnet school was "not an option" for administrative reasons. They flatly stated that "[w]hat our option is, is that he go to his home school." The court noted that while other team members seemed receptive to considering alternative options, a Board representative cut the discussion short, saying that the placement would be the large high school and that the parents would have to pursue mediation if they disagreed. The court

found predetermination, stating that "[t]he absolute dismissal of the parents' views falls far short of what the IDEA demands from states charged with educating children with special needs." If the school had listened, the court found, "[p]erhaps then the IEP team would have gotten to the root of the problem." Thus, the court ordered funding of the parent-developed home-based educational program.

> *Note*—The case illustrates that predetermination can take the form of directives from higher administration to IEP team members that rob the team of its decision-making authority and undermine the parents' right to meaningful participation. Here, the fact that a Board representative cut off discussion when team members expressed a willingness to discuss alternatives demonstrated that predetermination had taken place.

The court in ***H. B. v. Gloucester Township Sch. Dist.*, 55 IDELR 224 (D.N.J. 2010)** held that the District made up its mind about a child's placement before IEP meetings. For three years, the parents' tried to get the team to consider alternative placements to no avail, as the school proposed the same placement for that period of time. The District's director of special education testified that there was no need to discuss other less restrictive placements because the District had already decided that any greater degree of inclusion time was inappropriate. Thus, anytime the parent reasserted such option, the school refused to consider it. Another team member testified that further discussion of placement options was unnecessary because the parties were at "opposing poles." At meetings, therefore, parent-proposed placements were not discussed, and at times, questions asked by the parent were openly ignored. "Sometimes her questions were literally met with only silence." Another team member, asked why she never explained to the parent why the autism program was the best option, answered that the meeting "was a couple of hours and I was tired."

> *Note*—On appeal, the school argued that the IEP team incorporated certain accommodations suggested by the parents and that the parents were involved in choosing the private evaluator for an IEE. The court first noted that selecting the IEE evaluator is a parental right. It then found that incorporation of some parent-suggested accommodations did not mean the school did not predetermine the student's placement. ***H.B. v. Gloucester Township Sch. Dist.*, 59 IDELR 92 (3rd Cir. 2012)**.

Districts must use care in wording communications with parents, as illustrated in the case of ***S.S. v. State of Hawaii, Dept. of Educ.*, 64 IDELR 163 (D.Hawaii 2014)**. The District there routinely sent letters to parents of privately-placed students to invite them to IEP meetings to discuss a full range of placement options. The letter stated: "[i]f you wish to have your child receive [a

FAPE] in a public school, contact the principal at the phone number listed above." The parent took the letter to mean that the school had predetermined that the student would be placed in a public school. The court found that the District sent these letters to all parents of students placed by the District in private schools when their annual IEPs were set to expire. Staff testified that a response from a parent would lead to IEP team meetings where a full range of placement options would be discussed, including continued private placement. The court also found that the parents' subjective interpretation of the letter was the sole evidence of predetermination produced by the parent. "Had Plaintiff responded to the DOE's correspondence, as she was invited to do, the DOE would have proceeded with and IEP for S.S., and Plaintiff would have been free to express her opinion as to the best placement for S.S." Moreover, the parents' failure to participate in the IEP team process meant that the concern over predetermination was not present—the parent was not precluded from meaningful participation in the IEP process.

> *Note*—School attorneys may want to advise schools to have mass communications about IDEA students reviewed by counsel before transmittal to avoid such letters or emails begin misconstrued.

A District flirted with disaster in ***Cooper v. District of Columbia*, 64 IDELR 271 (D.D.C. 2014)**, where the school was found to have determined the placement of a high schooler with SLDs and ADHD before finalizing his IEP. The decision-making involved the student's possible transition from private to public school. Despite the violation, the court found that the parent meaningfully and actively engaged in the IEP process. The parent's effective participation in previous placement discussions rendered the procedural violation harmless.

> *Note*—The DC courts do not appear as receptive to predetermination claims as other courts. See also, *A.M. v. District of Columbia*, 61 IDELR 49 (D.D.C. 2012)(identifying a particular school prior to placement of ten-year-old with speech deficits prior to the final IEP meeting in a series of meetings was not predetermination, since parents participated fully, with attorneys and a representative from the private school).

Imprudent staff statements can cause real harm in predetermination cases, as in ***L.M.P. v. School Bd. of Broward County*, 64 IDELR 66 (S.D.Fla. 2014)**. The case involved triplets with Autism for whom the parents provided private ABA services. When they approached the public school about placement options, a staffperson at the IEP meeting plainly stated that the District did not provide ABA therapy as a special education intervention or service. The parents filed a damages action under Section 504. The staffperson in question specifically testified that, to her knowledge, the policy of the District was to never approve

ABA therapy. Another staffperson also testified that if parents wanted a different curriculum than that offered by the school, the request would not be considered. The court found that the evidence of an unofficial anti-ABA policy could support a claim that the District was deliberately indifferent to the triplets' needs, and therefore, the matter should proceed to trial.

Similarly, the comment of a school's placement specialist to the parent to the effect that she should be "ready for a fight" caused the parents to take legal action to argue that the team had predetermined they would not consider the private placement the parents sought. ***J.R. v. Smith*, 70 IDELR 2017 (D.Md. 2017)**. But, although the statement made clear the opinion of one school staffperson, the court held that her opinion was neither shared with other staffpersons, nor contaminated the decision-making process. Moreover, the staffperson in question reiterated to the parents, in the same phone conversation, that "no decision was made outside the IEP team." Ultimately, there was a "robust discussion" of all placement options, including the private option, and the decision was made by a majority of the team, not just the staffmember who had made the phone remarks.

Careless notes written by staff can also lead to adverse results for school districts in predetermination cases, like in ***Sam K. v. Department of Educ., State of Hawaii*, 60 IDELR 190 (D.Hawaii 2013)**. In that case, a teen with SLDs, anxiety, depression, speech and language issues, social issues, and a central auditory processing disorder had attended a private school at District expense pursuant to a settlement agreement. After six IEP meetings, the District gave the parents a signed IEP calling for placement at a public program for students with behavioral/emotional disorders that included juvenile offenders. The court noted that the public program's director was the only program director from a potential placement to attend IEP meetings. "No other potential placements are mentioned." In addition, the court focused note handwritten by a staffperson prior to the date of the placement proposal that indicated that the District had decided to place the student in the particular public program. Parents were not given the opportunity to visit or examine the program or raise concerns prior to the decision. Thus, the court agreed with the hearing officer below that the District improperly predetermined the placement and denied the student a FAPE.

> **Practical Note**—School staff and IEP team members should be trained to avoid writing any note, e-mail, or letter even implying that the District has reached a decision on IEP or placement prior to the IEP meeting. All communications should be written from the perspective of unformed final decision-making.

Similarly, in ***P.C. v. Milford Exempted Village Schs.*, 60 IDELR 129 (S.D.Ohio 2013)**, notes came back to haunt the school in litigation. In the case, the parents of a middle-school child with multiple disabilities (cognitive, motor, visual, attention, language, executive function) claimed the District predetermined his 7th grade placement. The student had previously received reading services in a private Lindamood-Bell program. The District proposed providing reading services at the student's home school. The court found that notes from a pre-planning meeting demonstrated that staff had made a decision to withdraw the student from his private program and place him in his home school well before the IEP team meeting. A teacher testified that the District was prepared "to go the whole distance this year which means the [parents] will be forced into due process." That teacher had prior conversations with other staff recommending that the student be pulled from his private program before any meeting took place. The court found predetermination.

> *Note*—Curiously, it was the District that filed a request for due process hearing to assert that the student should be placed at his home school. Is such a strategy generally advisable?

An injunction action shows that the danger of rigid program or methodology policies can arise even after the lesson of the *Deal* case. In ***Young v. State of Ohio*, 113 LRP 2036 (S.D.Ohio 2013)**, an early intervention agency allegedly told the parents of a child with autism that it did not provide ABA therapy. At a subsequent hearing, the agency's attorney corroborated that fact, indicating that approved ABA providers were not available in the county. "At this stage of the proceedings, [the parents] have established based on this circumstantial evidence that the decision not to provide ABA therapy or approve ABA providers was a predetermination," wrote the court. It noted that the child was likely to suffer irreparable injury if he did not immediately receive early intervention services, including the recommended ABA therapy. The state, however, would not suffer irreparable harm from having to provide ABA services. Concluding that the public interest also weighed in favor of delivering appropriate early intervention services as soon as possible, the court directed the state to either provide the recommended ABA services directly or reimburse the parents for privately obtained ABA therapy.

> *Note*—A rigid program policy, whether written or unwritten, that precludes the possibility of ABA services in any circumstance risks legal liability under predetermination theory, as it is squarely on point with the *Deal* facts. This is why many districts have been investigating how to incorporate ABA techniques in the context of instruction in public school settings, including training staff, hiring consultants, and aligning the data collection process of ABA therapy with the IEP progress measurement

model.

Outside influences—As discussed above with respect to the *O.L. v. Miami-Dade County Sch. Bd.* case, a problematic dynamic in the IEP process involves administrators outside the IEP team members exerting undue influence in the team's decision-making. While higher administrators can offer direction and guidance, they should emphasize that they respect the authority of the IEP team and leave the ultimate decisions to the team. This can prove challenging in high-profile cases, as central office administrators will want to provide input into the issues involved in the case. School attorneys must advise administrators about avoiding predetermination of final decision-making and respecting the authority of the IEP team.

Evidence that a school is not opposed to a particular methodology preferred by a parent can be helpful in a predetermination claim, as in the case of ***L.M.P. v. School Bd. of Broward County, Fla.*, 71 IDELR 101 (11th Cir. 2018)**. There, the parents of triplets with Autism focused their predetermination claim on the argument that the District refused to offer or implement ABA services as a matter of policy. The school, however, showed that it included ABA-based intervention strategies in each child's IEP, namely the PECS (Picture Exchange Communication System) communication method. The Court held that the inclusion of ABA-based services in the IEPs fully refuted the parents' claim that the District had a policy of rejecting all ABA services, which was their sole predetermination argument on appeal.

Note—Schools can study and apply aspects of ABA services and methods that may be beneficial and capable of implementation in a group setting in school campuses. Aside from the substantive benefit of such practices, they can show that a school is not opposed to ABA as a matter of policy.

Not every expression of heartfelt opinion prior to IEP meetings, however, constitutes predetermination. In ***A.B. v. Franklin Township Comm. Sch. Corp.*, 59 IDELR 278 (S.D.Ind. 2012)**, the District had agreed to private placement as part of a settlement agreement, which was set to expire. At the beginning of an IEP meeting, the Special Education Director expressed a desire to serve a student with Autism and genetic disorders in the public school, and reminded the team that the private placement was a result of a settlement agreement. The parent took that statement as predetermination of public school placement, but the court found that was the sole piece of evidence of predetermination to which the parents could point. The court noted the school was obligated to observe IDEA's LRE requirement. The parents' advocate terminated the meeting abruptly, indicating the student would remain in private school. The court found it was

the parents and their advocate that truncated their participation in the IEP process, not the school.

But, at times, even a pro-LRE statement indicating a desire to return a child to public school can prove costly. In ***H. Berry v. Las Virgenes Unified Sch. Dist.*, 54 IDELR 73 (9th Cir. 2010)**, the 9th Circuit was faced with a situation where a school proposed moving a child with Autism from his private school to a one of the District's public school classrooms for students with Autism. The school had a plan to transition the child to the public schools. The parents, however, adamantly opposed their child's return to public school. To the lower court, this meant that pre-determination had occurred. The 9th Circuit Panel initially heard the case, but since neither the hearing officer nor the district court made findings on the schools "state of mind," the Panel remanded the case to the court to determine whether "the School District was, in fact, willing to consider alternative placements…, even though it believed that its proposed placement provided the student with a free appropriate public education." After remand, the case returned to the Circuit Panel, which ruled that based on the testimony regarding the "state of mind" issue, the school had predetermined that the student would be transferred from his private placement to a District placement before the IEP meeting was held. An assistant superintendent's initial statement at the beginning of the meeting that the purpose of the meeting was to discuss transitioning the student back to the District was crucial to the courts' findings. The court found the school's testimony that it was open to the possibility of alternative placements "incredible." Although the school argued that the parent failed to provide any input at the meeting, the court agreed that "her minimal participation was due to futility."

> ***Comments and Questions*—**The court was not concerned that the parent failed to participate in the IEP meeting, although the predetermination claim is entirely focused on protecting meaningful participation by parents in the IEP process. Does this mean that it may be a good tactic for a parent to actually withhold providing input at an IEP meeting?
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> ***Another case of an offhand comment*—**In *Ka. D. v. Solana Beach Sch. Dist.*, 54 IDELR 310 (S.D.Cal. 2010), a parent argued that the special education director's offhand comment prior to the meeting about her concerns whether the team could reach agreement with the parents did not amount to predetermination of the placement decision. Meeting notes showed that the team discussed the conflicting recommendations at length, including the private placement in which the child currently was served. There was no evidence, moreover, of any formal or informal District policy against private placement, or of any stifling of discussion about private school placement.

Evidence that the school "spent an inordinate amount of time and manpower to accommodate the Parents and their representatives' positions" served to overcome a predetermination claim in ***Fort Osage R-I Sch. Dist. v. Sims*, 55 IDELR 127 (W.D.Mo. 2010)**. The court ruled that the parents and their consultants actively participated in IEP meetings, and the District incorporated many of their suggestions in the IEP for a student with Down's Syndrome and Autism. Neither the fact that one team member failed to state her disagreement with some areas of the proposed program, nor that another failed to express her belief that the parents' disciplinary tactics were inadequate, prevented the parent from meaningfully participating in the IEP process.

> *Note*—In the above case, the parents' attorney attempted to use the fact that some of the team members did not fully state their opinions as evidence of withholding of information to undermine the parents' right to participate. For example, one team member chose to not state her opinion that the parents' exhibited a lack of follow-through with behavioral interventions. She testified she had a good relationship with the parents and did not want to antagonize them on this point. The court, however, noted that such opinion was not central to the issue of the IEP and placement. Certainly, one can understand why the staffperson chose not to air her particular opinion at that time. The IEP team process is not meant to be a deposition in which every staffperson must disgorge their every thought about the student and the parent, and the court wisely steers away from such a result.

Private School to Public School Transition

Decisions on transition from private school to public school can result in predeterminations claims, as in ***L.M. v. Downingtown Area Sch. Dist.*, 65 IDELR 124 (E.D.Pa. 2015)**. There, District staff expressed in an e-mail that they would like to "try" to return a teen with an OHI to public schools. The court denied the predetermination and reimbursement claim, finding that the District's stated intent "was not unreasonable given considerations of LRE coupled with fiscal responsibility in expending public funds." Having ideas and option proposals prior to meetings is not inappropriate as long as a meaningful IEP meeting is conducted. The court found that the parents were provided opportunities to review and comment on the draft IEP, as well as articulate concerns and suggest changes to the draft. At litigation, moreover, the parents raised concerns about the proposed IEP that had not been raised in the IEP process. "[T]he District cannot be faulted for failing to incorporate plaintiffs' alleged concerns into the IEP, when said concerns were not communicated to the District." The court found no predetermination on the school's part, instead finding that the parents

had engaged in parental predetermination, as it found no credible evidence that they seriously entertained any option of public school placement. Although the court noted that the predetermination claim was not a "two-way street," the parents' conduct was equitably adverse to their case. The court also faulted the parents for filing a due process hearing request prior to learning of any program placement proposal.

> *Note*—On this point, see also *C.G. v. Sheehan*, 56 IDELR 17 (D.R.I. 2010), where the court held that a parent "predetermined" that her daughter in private school before the IEP team process. After making a demand for private placement in an IEP meeting, she cancelled a follow-up meeting. In addition, the court found that the parent engaged in manipulation of the IEP process by bringing in numerous private school representatives to the meeting and calling for majority "vote."

Another case involving a private school student whose parents sought continued private placement is ***J.G. v. State of Hawaii, Dept. of Educ.*, 72 IDELR 219 (2018)**. There, the parents of a child with Autism sought continuation of his placement in a private autism program. Although the parents argued the IEP team predetermined a public school option, the Court noted that the team followed an LRE worksheet that required team members to discuss each placement option on the continuum of placements. Since the team concluded that a public option would offer the student his needed services and give him opportunities to interact with nondisabled peers, it did not need to consider more restrictive options, even if the student had attended the private program the previous seven years. The Court also rejected an argument that a staffmember's scouting visit to the proposed public program was evidence that the placement was being predetermined. Moreover, the team attempted to discuss a plan to transition the student to the public program, but the parents were unavailable to discuss such planning due to travel. The IEP team met five times to discuss IEP and placement, and the parents attended all meetings and participated fully.

In ***A.V. v. Lemon Grove Sch. Dist.*, 69 IDELR 155 (S.D.Cal. 2017)**, the parents of a student with dyslexia argued that the IEP team had predetermined that it would not agree to the parents' preferred private placement. After reviewing the record, however, the court found that the IEP team discussed the parents' preferred program in two IEP meetings and investigated whether the private school would address the child's needs before making its decision. The evidence also indicated that the parents' discussion was in no way hindered during the meetings. And, staff made changes to the IEP and placement after the parents' advocate raised concerns about the district program.

In the matter of ***D.G. v. City Sch. Dist. of New York*, 65 IDELR 43 (S.D.N.Y. 2015)**, the parents of a seven-year-old with SLDs argued that the District predetermined a proposed placement in a special education school. To the contrary, the court found that the District proposed the specialized placement in response to parental concerns about the child's ability to work in large groups, as well as her delays in reading and writing. The parent participated actively in three meetings that they specifically had convened. She was allowed to consult with a colleague on the language of the IEP goals, which the IEP team discussed "piece by piece." Moreover, the IEP team considered the results of private evaluations, as well as the parent's preferred private placement. The court therefore denied reimbursement for private school placement.

Another case of transition from private to public school is the matter of ***Anthony C. v. Department of Education, State of Hawaii*, 63 IDELR 257 (D.Hawaii 2014)**. There, the parents of a teen with Autism claimed predetermination in the school's proposal to place him in a public high school, among other claims. The court noted that the record showed that the IEP team discussed the pros and cons of a general education setting, special education settings, and combinations thereof. The vice-principal testified that there had been no determination of placement prior to the meeting. The court agreed stating that "[i]ndeed, if placement had already been determined prior to May 9, 2012, there would have been no reason for the IEP team to discuss the various LRE placement options set forth above." Other than the parents' perceptions, the court held, there was no evidence that the placement was predetermined. The parents were vocal in expressing their concerns, which were addressed by the team, including with ideas to mitigate difficulties in the student's transition to public high school as part of a transition plan.

> **Practical Note**—This case demonstrates the importance of reviewing and considering various placement options in making a final placement decision. Subjecting the options to the discussion of relative pros and cons, and documenting such consideration, can help avoid predetermination claims. See, e.g., *J.P. v. City of New York Dept. of Educ.*, 71 IDELR 77 (2nd Cir. 2017)(record demonstrated that the IEP team addressed parents' placement concerns, considered their submitted materials, convened a second meeting to address placement, and allowed for full parental participation); *D.B. v. New York City Dept. of Educ.*, 67 IDELR 241 (S.D.N.Y. 2016)(district considered multiple options and parent concerns before making its decision, and did not categorically reject the parents' preferred program).

When a student with Autism that had not attended public schools for three years explored public placement, the District proposed to place him in a

small group setting under 30-day interim IEP. ***C.B. v. Garden Grove Unified Sch. Dist.*, 63 IDELR 122 (9th Cir. 2014)**. The parents claimed the proposal constituted predetermination. The court found, however, that District staff proposed the placement after listening to the student's private providers, and that it collaborated with the providers in developing the IEP goals. Given his part experience with one-to-one instruction, proposing a small group setting was reasonable as an interim program, and the development of the IEP was a collaborative process, not predetermination.

Heeding the input of a student's private providers in developing a public school program also saved the school in the matter of ***B.W. v. Rye City Sch. Dist.*, 62 IDELR 254 (2nd Cir. 2014)**. The parents of a child with speech-language impairments and ADHD claimed the District predetermined the public placement when it did not physically include the student's private providers in IEP meetings. But, the court noted, the team considered the private providers' input offered by telephone during the meetings. Private school staff participated in both meetings that developed the IEP, and their input was in fact incorporated into the IEP. The private school teacher helped draft the IEP goals, and the team added ESY services given the private school staff's concerns about regression. The court thus found no predetermination and denied reimbursement for private school.

> **Practical Ideas**—When confronting a situation of transition from private to public school, it can be helpful to incorporate private school staff input on several levels. On one, it can assist the IEP team in understanding the student's needs and the services and interventions that have proven effective. On another, it can help show meaningful parental participation and lack of predetermination should the IEP team decide that, with the received input, the district can provide a FAPE in the LRE.

A New York court declined to award tuition reimbursement to the parents of a child with Autism in ***E. G. v. Fair Lawn Bd. of Educ.*, 57 IDELR 18 (D.N.J. 2011)**. Although the court was "troubled" that there was some evidence that school staff had decided not to transfer the child to the parents' selected private inclusion program prior to the IEP team meeting, the school listened to the parents and considered their concerns. The parents were concerned about the restrictiveness of the District's proposed placement, but the school believed the child was not ready for extensive interaction with typical peers. It agreed, however, to monitor the child with an aim to consider less restrictive options. The parents placed the child unilaterally in the private facility and sought reimbursement. The court held that the parents were "intimately involved" in the collaborative IEP process. "If the standard for measuring meaningful parental participation was that the parents always prevailed, there would be no process at

all. The standard must not be based on the outcome, but on the extent to which the parents were allowed to advocate for their child."

An older case takes a more direct approach to the pre-determination question, with reference to the LRE mandate of the IDEA. In ***Hjortness v. Neenah Joint Sch. Dist.*, 46 IDELR 13 (E.D.Wis. 2006)**, an exceptionally bright child with a variety of diagnoses, including OCD, Tourette's, ADHD, ODD, anxiety disorder, and deficits in social communication, was withdrawn from public school and placed him in a private school, and later in a residential treatment program in Chicago. School staff visited and observed the student in the residential setting and conducted testing. At an IEP team meeting, the parents stated that the issue on the table was whether the District was going to pay for him to be at the residential program, and skirted discussion of IEP goals and objectives. To the court, the LRE requirement meant the District had to ensure that the student would be educated in the school he would attend if non-disabled, unless the IEP required some other arrangement. "In other words, the District had no obligation to consider placing Joel at [the residential placement] unless and until it concluded that he could not receive a free and appropriate public education in district schools." If an appropriate public program is available, the court's position was that the school need not consider private placement.

On appeal, the Seventh Circuit agreed with the district court, writing that "we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school did not need to consider private placement once it determined that public placement was appropriate." ***Hjortness v. Neenah Joint Sch. Dist.*, 107 LRP 65900 (7th Cir. 2007)**. Moreover, the Circuit Court felt the issue was not that the parents were denied the opportunity to actively and meaningfully participate, "it was that the chose not to avail themselves of it. … The Hjortnesses refused to talk about anything other than "[whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be. As a result, the school district was left with no other choice but to devise a plan without the meaningful input of Joel's parents."

> ***Comments and Questions*—**To the *Hjortness* courts, since the IDEA establishes a preference for placement in neighborhood schools (and in public schools' continuum of placements), it is not improper for schools to arrive to IEP meetings with preconceptions that a student should be educated in the public schools. Indeed, they are *required* to start with this presumption, and such presumption cannot be pre-determination. Contrast this analysis with that of the Sixth Circuit in *Deal*—there the Panel never addressed the LRE issue (although the parent was seeking funding for a highly restrictive home-based one-on-one program) and its

fundamental balancing of educational interests.

On point with *Hjortness*, the court in ***M.B. v. New York City Dept. of Educ.*, 69 IDELR 132 (S.D.N.Y. 2017)**, held that once an IEP team for a 3rd grader with cerebral palsy had determined that it could meet the child's needs in a public school program, it did not have to consider an alternative placement in a private school that the parents preferred. The parents argued that the team should have deferred to the recommendations of their doctors, but the court disagreed, noting that IDEA does not require that private evaluation recommendations be followed. The District "is not required to consider non-public placements after it determines that a public placement is available that has the ability to implement the [IEP]."

Practical Note—There is an obvious split of authorities on the question of whether a school must consider private placement options if it believes it can provide a FAPE in its public schools. Therefore, caution would warrant that schools might want to consider a private program requested by the parents as part of the placement options on the table. Schools can research the program, talk to private school staff, and ascertain the pros and cons of the placement, to inform the consideration and deliberation.

Practical Note—In IEP team meetings schools must develop IEP goals and objectives prior to discussion of placement, since placement must be based on the goals and objectives of the IEP. Schools should explain this sequence to parents and follow it. The school should ask for parental input on the IEP goals and objectives, document the request for input, and note the input (or lack thereof).

Staff Preparations for IEP Meetings

School staff's preparations for IEP meetings can sometimes be misinterpreted as predetermination, as in ***S.P. v. Scottsdale Unified Sch. Dist. No. 48*, 62 IDELR 86 (D.Az. 2013)**. In that case, the parents of a 1st-grader with SLDs and a speech-language impairment alleged that the school predetermined his placement in a public school. Although the parents preferred a private school, the IEP team explored various programs and placements in the District, including setting up site visits for the parents. The parents' preferred private school was also discussed as part of a two-hour discussion of placement, and the IEP meeting included a District representative with authority to effect a private school placement. While staff met prior to the IEP team meeting, the record showed such meetings are preparatory in nature, in order for staff to discuss program options, staffing patterns, and the makeup of students in each

programs, but not to reach placement decisions. An email from staff to staff indicated that the student had been "approved" for a particular school placement. Although the parents interpreted that wording as evidence of predetermination, the testimony indicated that the email only intended to communicate that there was space available in the placement for IEP team consideration, and it could thus be proposed to the parent. The court found no predetermination and denied reimbursement for private placement.

> ***Comment on applicable regulation*—**An IDEA regulation specifically envisions staff discussions and meetings to prepare for IEP meetings. The regulation addresses a parent's right to participate in IEP meetings, but indicates that "a meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." 34 C.F.R. §300.501(b)(3). See also, *T. P. v. Mamaroneck Union Free Sch. Dist.*, 51 IDELR 176 (2nd Cir. 2009)(chart developed by District's behavioral consultant based on her recommendations did not constitute predetermination as there was no pre-agreement to adopt her recommendations).

Evidence that a finalized IEP was significantly different that a draft IEP produced by staff helped a District survive a predetermination claim in ***A.P. v. New York City Dept. of Educ.*, 66 IDELR 13 (S.D.N.Y. 2015)**. The parents there opposed placement of their child with speech impairments, ADHD, and sensory integration disorder in an integrated co-teaching (ICT) classroom and claimed that the District staff just "went through the motions" of an IEP team meeting. First, the court noted that the draft IEP did not identify a staff-preferred placement. Then, it found that contrary to the parent's assertions, alternative placement options were in fact discussed and considered, but rejected as unduly restrictive. Staff reviewed the IEP section by section, and added notes amending the draft IEP based on parental concerns. The court held that staff bringing a draft IEP to the meeting "suggests preparation, not predetermination."

Similarly, n the case of ***John S. v. New York City Dept. of Educ.*, 69 IDELR 153 (S.D.N.Y. 2017)**, school staff had circulated a draft IEP prior to the IEP meeting on a 6-year-old with Autism, but the court refused to find that the practice amounted to predetermination. "Although the IEP was drafted before the meeting, the Parents concede that they were provided that draft and the final IEP reflects comments and concerns expressed by R.S. at the CSE meeting." The evidence showed, moreover, that the team considered various placement alternatives.

> **Practical Note—**Documenting how a draft IEP was modified after considering parental input can help show the school did not engage in

predetermination. Advise staff to be open to making changes to draft IEP documents rather than trying to avoid making changes to the document. Also note that the court in *John S*. approved of the school's practice of sending the draft IEP to the parents prior to the IEP meeting.

Staff preparations in researching various placement options and selecting one to propose to the parents prior to an IEP meeting were not held to be predetermination in the case of ***M.C.E. v. Board of Educ. of Frederick County*, 57 IDELR 44 (D.Md. 2011)**. At the meeting, the court noted that the team discussed several placement options for a girl with ADHD and anxiety disorder, and that her parents and representatives were given an opportunity to provide meaningful input. "While a school system must not finalize its placement decision before an IEP meeting, it can and should have given some thought to that placement." The court held that while the school came to the meeting prepared to recommend a particular placement, they "had not predetermined where she would go."

Note—Similarly, in ***M.L. v. Federal Way Sch. Dist.*, 39 IDELR 236 (9th Cir. 2003)**, the court rejected the parents' arguments that by including special education teachers from a proposed school in the IEP meeting constituted predetermination. The cases illustrate the difficulties inherent in treading this area of law. While staff can canvass several placement options, think about a particular placement, reach a collective determination that it is the appropriate placement, and then recommend such placement at the IEP team meeting, the decision must not be finalized until the meeting itself. Admittedly, the line is difficult to draw, as "smoking gun" evidence of bonafide predetermination is likely to be quite rare.

The fact that the IEP team sought assessments and teacher input to address the parents' request for real-time captioning undermined their contention that the team predetermined that it would refuse to provide the service. ***K. M. v. Tustin Unified Sch. Dist.*, 57 IDELR 8 (C.D.Cal. 2011)**. The court noted that the child's mother "was actively involved throughout the process—even when she was vigorously opposing the District's proposals or refusing consent to implementation of services." It thus found no predetermination violation.

Note—Various cases have underscored the point that schools are well-advised to prepare for IEP team meetings and develop ideas, suggestions, and options for IEP services and placements. "School officials must come to the IEP table with an open mind. But this does not mean that they should come to the IEP table with a blank mind." *Doyle v. Arlington County Sch. Bd.*, 19 IDELR 259 (E.D.Va. 1992). "Thus, while a school

system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement." See also, *M.L. v. Federal Way Sch. Dist.*, 39 IDELR 236 (9th Cir. 2003)(fact that teachers from school's proposed placement were invited to meeting did not equate to pre-determination, citing *Doyle* "open mind, not blank mind" reference); *Nack v. Orange City Sch. Dist.*, 46 IDELR 32 (6th Cir. 2006)("predetermination is not synonymous with preparation"); *J.D. v. Kanawha County Bd. of Educ.*, 48 IDELR 159 (E.D.W.Va. 2007)(existence of draft IEP did not prevent collaborative IEP process with meaningful parental participation).

Practical Note—Refusal to make even reasonable changes to the IEP that are suggested by parents may be indicative of predetermination. Schools, thus, may want to consider making appropriate changes to the IEP based on parental input, document the source of the changes, and take time to review parental information in detail, such as by taking breaks to review the information in detail. It is especially important to track the IEP proposals back to assessment data and review of assessment data, including private assessments.

Practical Note—Schools might want to clearly mark draft IEPs as "DRAFT ONLY," "Draft Subject to IEP Team Decision," or some other notation to reemphasize the nature of the draft as a work in progress subject to IEP team deliberations that involve the parent's concerns and input. Of course, such markings are only valuable if there truly is consideration of parental input on the draft IEP goals and objectives. If school staff clearly foreclose any meaningful consideration of parental input and concerns, then the "DRAFT" stampings will hold little weight.

Practical Note—Consider adding language to schools' special education policies/operational guidelines, such as the following:

"*Prior to IEP meetings, staff may engage in activities, such as researching placement and services options, preparing draft IEP documents, writing reports, creating charts, and comparing student makeup of various program settings, in preparation for IEP team meetings. Actual IEP and placement decisions, however, are not made until parental concerns and input are considered in the actual IEP meeting. Although staff may have formed opinions about various IEP and placement options, no final decision is made before full consideration of data and parental input at the IEP team meeting. The District has no policies, formal or informal, conclusively against any particular service, program, or placement option.*"

Predetermination Claims in Other Contexts

The predetermination claim has also been applied to decisions regarding graduation plans, as in ***M.G. v. State of Hawaii Dept. of Educ.*, 65 IDELR 267 (D.Hawaii 2015)**. There, the parents of a 14-year-old with ID objected to the school's proposal for a workplace readiness graduation track. District staff attempted to explain to the parents the differences between the vocational certificate program and the diploma-based program. The court found that there was specific discussion in response to parent concerns, with staff citing to a recent reevaluation. It also noted that the student had been in the same program previously, without objection. "It is difficult to imaging a predetermination of placement claim where a student is placed in a program under a previous IEP to which the parents did not object, and then is placed in that same program during the next IEP cycle." The court found that the parents simply disagreed with the District, but did not rebut assessment findings of the student's very low academic skills. Lastly, the fact that a draft IEP was developed did not mean there was predetermination.

The case of ***Dixon v. District of Columbia*, 65 IDELR 67 (D.D.C. 2015)** addresses whether predetermination must cause substantive harm to the student in order to be legally actionable. The parent there argued that their 9th-grader with an OHI was "shoehorned" into a specific high school program. The IEP team informed the parent that the student's specialized instruction would have to be reduced from 27.5 hours per week to 15 hours per week so he could attend high school on a diploma track. Although the parent had not taken care to ensure that the issue was presented and ruled on at the hearing below, the court found that the predetermination argument fell short. The court found that she had not sufficiently showed that her participation was *seriously* impeded, and she had not shown that the reduction in special education hours resulted in substantive harm to the student.

> *Note*—Graduation track decisions, like other decisions impacting the IEP, should be made at IEP team meetings with full and open discussion with parents. In some states, decisions about need for modified curriculum instruction impact whether the student will receive a diploma or not. That result must be discussed with parents as part of the decision. It is also key that the IEP team's decision on this point be supported by current evaluation data.

The predetermination claim has also been applied to eligibility determinations, as demonstrated in ***Shafer v. Whitehall Dist. Schs.*, 61 IDELR 20 (W.D.Mich. 2013)**. There, school staff decided to classify the student as having a SLD, OHI, and speech impaired, but not as having Autism, prior to the IEP

meeting. While the court agreed with the hearing officer that this was a procedural violation, it found the lapse resulted in no harm to the student or the parent's ability to meaningfully participate. The court distinguished cases where there is predetermination of IEP or placement, which almost always results in denial of FAPE, and predetermination of classification, which might not. Here, there was no predetermination of services, IEP, or placement. Thus, relief was denied.

> *Note*—Despite the outcome in the case, the obvious lesson for schools is to avoid predetermining *any* area of IEP team decision-making, including identification, evaluation, placement, or provision of FAPE.

Parents of students accustomed to a certain paraprofessional have used the predetermination argument to challenge decisions to change the provider, as in ***Z.F. v. Ripon Unified Sch. Dist.*, 60 IDELR 137 (E.D.Cal. 2013)**. There, the school terminated its contract with a behavioral services provider, which meant that the student would have a new behavioral aide. The parents claimed predetermination, arguing the termination of the contract excluded them from the IEP process. The court found that the contract termination did not mean the District was unwilling to consider parent input and concerns. The parent participated in discussions about the change, and staff pointed out that the student had had 10 different aides since Kindergarten, including four in the previous school year alone. Thus, he was used to transitioning to new aides.

> *Note*—See also *S. A. v. Exeter Union Sch. Dist.*, 110 LRP 69145 (E.D.Cal. 2010), where a California District cancelled its contract with a private provider of behavioral services, and the parents of a child with Autism claimed that the school predetermined that the services would now be provided through a District employee instead. The court denied relief, noting that evidence that the school considered the parents' opinion and acceded to certain requests, such as increased levels of data collection and including private providers at an IEP meeting. That the District chose not to renew its contract with the private provider did not mean its alternative offer of behavior services was a "take it or leave it" offer, as significant discussion was had on details of transitioning to the new services.

Curiously, a New York regulation severely limiting the use of aversives led to a claim that the regulation violated IDEA by requiring predeterminations that aversives could not be used as part of IEPs for profoundly impaired students in a public residential program. ***Bryant v New York State Education Dept.*, 59 IDELR 151 (2nd Cir. 2012)**. The parents sought injunctive relief against enforcement of the regulation, which would prohibit use of electric shocks that were used, as a last resort, to decrease severe behaviors. The court distinguished

the case from regular predetermination cases, which normally involve a challenge to an improper unofficial school policy, such as in the *Deal* case. The parents interpretation of the IDEA "would effectively strip state governments of the ability to adopt statewide policy because it is impossible to consider each student's circumstances before adopting statewide policy." Moreover the court held that the State's regulation "represents a considered judgment; one that conforms to the IDEA's preference for positive behavioral interventions." The court also found that the regulation did not predetermine course of education, prevent individualized decision-making, or preclude consideration of a wide variety of possible intervention options. It only foreclosed one "single method of treatment."

Rhode Island parents of a child with Autism were unable to maintain their argument that the school predetermined the degree of aide assistance their child needed in ***Hazen v. South Kingstown Sch. Dept.*, 56 IDELR 16 (D.R.I. 2011)**. Although the parents missed one IEP meeting due to the school's failure to provide notice, the court noted that the parents and their experts took part in discussions regarding reducing the aide's hours and the school responded by agreeing to increase the number of aide hours beyond what it had proposed. The school also agreed to additional data collection.

Parent Conduct

Similarly, whether the parents voiced objections during the IEP development process became an issue in ***G.N. v. New York Dept. of Educ.*, 65 IDELR 34 (S.D.N.Y. 2015)**. The parent of a grade schooler with Autism claimed that the District predetermined his placement in a 6:1:1 (six students, one teacher, one aide) special education setting. The court found, however, that the school considered the parent's concerns and input. For example, when the parent expressed concern that the level of support was too low, the team added the extra assistance of a 1:1 aide for the student (in addition to the existing classroom aide). The team also modified IEP goals based on parental input, and considered other placement options that were deemed to not provide sufficient support. Lastly, the parent was explicitly asked if she agreed with the goals and whether she had anything to add to the IEP, and she indicated agreement with the goals and that she had no other objection. The court thus denied reimbursement.

In ***Alloway Township Bd. of Educ. v. C.Q.*, 63 IDELR 12 (D.N.J. 2014)**, the District gave the parents of a 5th-grader with severe developmental and behavioral problems multiple opportunities to visit proposed out-of-district placement options. The parents expressed that they were not interested in any out-of-district options, and did not visit any of the programs. They instead filed a predetermination claim, which was initially successful at the administrative

level. The court, however, reversed the hearing officer, finding that the IEP explained why the student could not be educated in-district. The court found no evidence that the school impeded the parents' opportunity to participate. The uncontradicted record indicated that the parents declined to actively participate, and failed at IEP meetings to voice the questions that were later asked in litigation. "These questions could have been addressed at the IEP process stage had there been active participation, which the District did not deter." And, the parents failed to even visit the proposed options, which could have answered further questions the parents raised. The court thus denied the claim and remanded for consideration of whether proposed out-of-district placements represented the LRE for the student.

> *Note*—The above cases stand for the proposition that parents are expected to use their opportunity to participate to raise objections, voice concerns, and ask questions. Attorneys defending a predetermination claim should carefully examine whether concerns raised in litigation were raised in the IEP meeting process. If not, then the school cannot be faulted for not addressing the concerns in IEP meetings, and failure to do so cannot be evidence of predetermination.

Summary of Practical Strategies

- Schools must refrain from policies *and practices* that even could be interpreted as pre-determining placement or refusing certain placements. Written policies should reflect that the school makes decisions based on assessment data, individual student need, parental input, and staff input, in accordance with IDEA.

- Schools should be careful with internal communications, stray notes, emails, or offhand statements that may be interpreted as pre-judging or conclusively ruling out particular programs or placements.

- Train staff on the authority of IEP teams and how to properly address requests for private placements or programs.

- The best way to show an "open mind" is by having an open mind to parental input, other alternatives, and new ideas, particularly evidenced by a willingness to explore a variety of methodologies for ASD students.

- Many cases turn on staff documentation of consideration of all sources of information in reaching a decision. Carefully document consideration of all sources of data, with special care to document consideration of parental input.

- Be willing to incorporate appropriate suggestions made by parents regarding the IEP goals and objectives, services, and placement. Document compromises reached, and IEP changes made, as a result of parental input.

- Schools must do their best to answer parents' questions, listen to their concerns, consider their viewpoints, and document a healthy give-and-take of opinions, even if they are highly disparate.

- Schools should not be afraid to staff and discuss the student prior to IEP meetings. Parents should be informed of these efforts and told that those steps are to prepare for the meeting and be able to fully consider all options carefully, not to reach a pre-conceived conclusion prior to receiving parental input. Although discussion of placement options is permissible, it is best to avoid deciding on a preferred placement proposal until the meeting proper.

- Think twice before investing fully in a single method or program for a category of students. Investment in programs and methods that widen the service and placement options, not narrow them, is probably a wiser course.

- If a parent proposes an educational methodology that is not well-known to the District, research it to ascertain its strengths and weaknesses and use the research to self-evaluate the school's own program. And, if the research leads the school to attempt to incorporate the new method, find a neutral consultant to assist the school in incorporating the method in the context of the public school program.

- Train higher school administrators on the primacy of the IEP team process, as well as the nuance of expressing opinions without unduly influencing or undermining the IEP team's authority.