"THE TOP 10 (or so) PARENT COMPLAINTS"

A PARENT/STUDENT'S LAWYER'S PERSPECTIVE

Deborah A. Mattison, Esq.
Wiggins, Childs, Pantazis, Fisher & Goldfarb, LLC
The Kress Building
301 19th Street North
Birmingham, Alabama 35203
(205) 314-0561
dmattison@wigginschilds.com

I. INTRODUCTION–SOME GENERAL GUIDANCE WHEN WORKING WITH PARENTS.

This workshop will examine some of the main reasons parents contact an advocate/attorney, at least in our experience. Please note that the list is not exhaustive; and the reasons parents contact an attorney/advocate are not in any particular order. We will discuss some common areas of vulnerability for districts, as well as some suggestions regarding how better to work with parents.

II. PARENT COMPLAINTS INVOLVING WORKING WITH DISTRICTS.

I have tried to work with the school; but they won't listen to me or return my calls/emails.

When we go to meetings, they bring everyone and talk over me.

I have tried to call the principal and superintendent but they do nothing or just defend the school.

1. **Parents may not know how to ask for what they really want.** They also are not always fully aware of their legal entitlements, which can be more expansive than they (or district staff) realize. Parents typically contact an attorney as an absolute last resort.

2. **Use active listening strategies to fully understand a parent's concern. Try to listen more than you talk.** And, rephrase what you think the parent is saying. Requests for an aide or complaints that a child's IEP is not being implemented can mean that the parents believe that their child has not progressed and/or that the program is not sufficiently rigorous.

3. **Avoid overwhelming parents at IEP meetings. If there is a need for several participants, call the parent before the meeting and explain who will attend the meeting and why.**

4. **Be diligent in making sure that staff act professional in meetings, even if the parents become upset or argumentative.** Absolutely no rolling of eyes, "knowing looks", side comments, writing or taking notes. Nothing breaks a relationship down faster than such behavior. **Try not to take criticism or questions personally.** Do not make any "dispute" be about district staff's conduct.

5. It is also critical to investigate complaints involving any alleged injury to the child or alleged verbal or physical "abuse" committed by district staff. Try not to get hung up on the term "abuse". Instead, ask the parent to describe in detail what allegedly occurred. Inform the parent of the district's findings.

6. Privacy issues have become common. Avoid providing any information about a child, the child's parent, including the fact that a parent has secured an "advocate", to persons with "no legitimate reason to know". This especially includes information about a child's diagnosis, mental health treatment, or prescriptive medicine provided to the child.

7. Parental concerns about retaliation and a lack of communication with parents if the parents secure an advocate/attorney are common. This includes teachers making inappropriate comments in front of their children, like discussing a request for a due process hearing in front of the child or saying that a child is receiving some type of undeserved benefit as a result of a "pushy" parent. Tell staff to **avoid taking any action that could be interpreted as retaliation**, such as prohibiting parent observations and having staff discontinue communication with a parent after he/she has retained an advocate/attorney.

8. **Remember that IDEA generally concerns a student's entitlements. Making the parent "happy" does not necessarily equate to compliance with IDEA.**

9. Put things in writing. **Be careful what you write.**

III. COMPLAINTS ABOUT CHILD FIND AND ELIGIBILITY–FAILING TO UNDERSTAND THE BREATH OF CHILD FIND

They won't test my child because she is not failing.

They say that before they test my child they have to wait for at least a month to observe him and/or to first try other strategies.

They say my child is too young to test.

They say I don't want my child labeled.

They won't listen to my child's therapist/doctor.

My child's 504 plan is not working.

A. **IDEA requires each district to identify and evaluate all students with disabilities** regardless of the severity of their disabilities, including students who are advancing from grade to grade, those who attend private schools or schools in another district and those who are homeless. This duty, which is commonly called "Child Find", **applies regardless of whether the student has ever attended a public school**. *Letter to Breecher*, 18 IDELR 216 (OSEP 1991); 20 U.S.C. 1412(a); 34 CFR 300.111.

B. The breath of Child Find is substantial and the thresh hold for suspicion is low. The standard is whether there is reason to suspect that a child has a disability, as that term is defined under IDEA.

Mr. I. v. Maine Sch. Admin. Dist. #55, 47 IDELR 121 (1st Cir. 2007). Whether a student is eligible for services under IDEA is dependent upon whether the student's condition has an adverse effect on educational performance. No **significant** adverse effect is required. And the term "educational" often encompasses more than academics.

Robertson County School System v. King, 24 IDELR 1036 (6th Cir. 1996). A parent who is a "neophyte" to special education cannot be expected to appear and say 'My child is eligible for special education services under IDEA and I am here to refer my child for an individual assessment.' **A request for a special education evaluation and services is implied when a parent informs a district that the child may have special needs.** Since the district failed to evaluate a student with disabilities within its jurisdiction, it was responsible for private school tuition reimbursement.

Hicks v. Purchase Line School District, 251 F. Supp. 2d. 1250, 39 IDELR 92 (W.D. PA 2003). A parent does not have a duty to identify, locate or evaluate the student pursuant to IDEA. This obligation falls squarely upon the district. The Court of Appeals has clearly held that **"[a] child's entitlement to special education should not depend upon the vigilance of parents (who may not be sufficiently sophisticated to comprehend the problem)."**

Moorestown Twp. Bd. of Educ. v. S.D. and C.D. ex rel. M.D., 111 LRP 61414 (D. NJ 2011). District denied FAPE to a student when it required him to re-enroll in the district before it would reevaluate him. **The district was prohibited from the requiring, as a condition to reevaluation with student's re-enrollment in the** district.

C.C. Jr. v. Beaumont Indep. Sch. Dist., 65 IDELR 109 (E.D. TX. 2015). *(Unpublished)* A

district violated IDEA when it failed to timely evaluate a three year old child with articulation difficulties, and also because it conditioned the assessment on whether the child enrolled in school. **An informal communication between the parents and staff put the district on notice of the child's need for evaluation.** The district maintained that it had no reason to evaluate the child until his mother requested the evaluation. The district court held that the Child Find obligation was triggered at least two months earlier.

Hogan v. Fairfax County School Board, 53 IDELR 14 (E.D. VA 2009). Court found that a **parent's failure to respond to phone calls from the district concerning potential placements or evaluations did not nullify the district's** liability for a private placement. The district had an obligation to go forward with evaluating the student and providing an appropriate program.

C. Neither the **statute nor its implementing regulations** identify the criteria which would put districts on notice of their duty to evaluate. **Instead, case law and guidance from the Department of Education have identified some of the types of factors which should put the district on notice of the need to evaluate.**

Thus, **A district would do well to diligently train ALL district staff (including *office staff,* principals and regular education staff) about the wide breath of the district's Child Find obligations.** A parent's request for help may take many forms. When in doubt is may be prudent to evaluate.

Common areas include the following.

1. **Academic performance.**

Krawietz v. Galveston Indep. Sch. Dist. 69 IDELR 207 (S.D. TX 2017). A district violated Child Find when it failed to evaluate a student. **The fact that the district placed the student on a Section 504 plan did not excuse its failure. The boy performed poorly academically, with failing grades and severely declining standardized test scores; and he continued to decline after the provision of the 504 plan.** Even after it became aware of all of these circumstances, the district still took 6 months to evaluate the child.

Davis v. District of Columbia, 69 IDELR 218 (D. D.C. 2017). A charter **school violated Child Find when it ignored a 5th grade student's need for an occupational therapy and auditory processing evaluation.** The parents provided the school with two independent education evaluations. The parents requested a referral for special education and shared the two evaluations with the school. The child's grades also fell drastically to "Cs and Ds". The **court rejected the school's defense that it had exited the child from special education the previous year.**

Greenwich Board of Edu. v. G.M., 116 LRP 27276 (D.C. CN 2016). **District violated Child Find when it ignored a elementary student's diagnosis of learning disability and her academic difficulties.** The parents had requested a referral and they gave the district an evaluation finding that the child had a reading disability disorder and anxiety. The district should have–but did not– conduct its own evaluation to either confirm or disprove the results of the evaluation.

2. **Behavior or mental health issues**.

S*cruggs v. Meriden Bd. of Educ.*, 48 IDELR 158 (D. CT 2007). A district **violated IDEA when it failed to refer a student for special education services, due to the student's difficulty with behavior and attendance.** Parents could proceed with their claim for damages under 42 USC § 1983, as the child committed suicide after a series of bullying incidents.

Horne ex rel. R. P. v. Potomac Preparatory Public Charter School, 68 IDELR 38 (D.D.C. 2016). **Even though a district had just evaluated a child and found him ineligible, the child's attempt to kill himself on school grounds should have prompted a reevaluation.**

3. **Attendance.**

M.M. and I.F. ex rel L.F. v. New York City Department of Education, 63 IDELR 56 (S.D. NY 2014.) **When a child's anxiety/depression adversely effectively renders them unable to attend school regularly, the conditions have an adverse impact** and the child should be evaluated.

D**istrict was responsible for evaluating students who are chronically absent.** *West Lyon Cmty. Sch. Dist.*, 48 IDELR 232 (SEA IA 2007); *Great Falls Public School District*, 48 IDELR 200 (OCR 2006).

*Los Banos (CA) Unified School District ,*114 LRP 45126 (OCR 2014). **Child had difficulty getting to school in the morning, (i.e., waking up).** Also discusses § 504 requirements regarding evaluations and Child Find.

4. **Documentation of a history of receiving special education, or that the child has a disability/diagnosis, and/or placement in a psychiatric hospital.**

Newman-Crows v. Landing Unified School District 6, ECLPR 24 (SEA CA 2008). **District should have evaluated a five year old when a parent noted on the kindergarten enrollment form that the child had cerebral palsy,** toileting difficulties and was susceptible to respiratory infections. No academic difficulties were noted.

D. **The relationship between response to intervention, pre-referral strategies and Child Find.**

Scott v. District of Columbia, 45 IDELR (D. D.C. 2006). **While it is permissible to attempt pre-intervention strategies – do so only for a reasonable time. Likewise, a district cannot avoid complying with Child Find based on the fact that the student has had success with modifications.** Those modifications may well be the "special education" for which the student is eligible.

Memorandum to State Directors of Special Ed., 56 IDELR 50 (OSEP 2011). **The use of RTI does not diminish a district's obligation to obtain parental consent and evaluate a child in a timely manner.** IDEA's Child Find provisions applies regardless of whether the district intends to use, or is utilizing, RTI strategies.

N.G. v. The District of Columbia, 50 IDELR 7 (D. D.C. 2008). **The fact that child has success in school with accommodations does not defeat the parent's Child Find claim.**

Letter to Chambers, 112 LRP 37475 (OSEP 2012). Regardless of whether the instruction the student needs is due to his disability is already part of the district's general education program, it does not negate an idea to provide the student with an IEP. **Just because the specialized instruction is already part of the general curriculum does not automatically mean that the student does not need an IEP.**

Central School District v. K.C., 61 IDELR 125 (E.D. PA 2013). **Dispute that a student received "extraordinary" accommodations for two years. However, he continued to struggle academically. Child Find required that the district have evaluated the student.**

Letter to Zirkel, 113 LRP 38320 (OSEP 2013). OSEP identified elements regarding the RTI process. However, it emphasized that **RTI cannot be used to delay or deny an initial evaluation of a student who may be eligible for special education.** *Memorandum to State Directors of Special Ed,* 67 IDELR 272 (OSEP 2016). The provision of **RTI services cannot delay a district's Child Find requirements applies to pre-school children.**

E. **What about students with Section 504 plans or those who have already been**

evaluated and determined to be ineligible?

Peacock v. Little Rock School District, 46 IDELR 284 (E.D. AR 2006). In granting attorney's fees to the father as the prevailing party, the court adopted language from the hearing officer's final order which characterized the district as attempting to "circumvent the IDEA due process requirements by not identifying the child as eligible for special education services." The child's psychological evaluation and diagnosis, history of failing grades, history of attendance problems and history of disciplinary actions, along with the fact that **the school itself described the child as having a disability when it provided him with services under Section 504**, should have put the district on notice of the need to evaluate.

D.G. by B.G. v. Flour Bluff Independent School District, 56 IDELR 255 (S.D. TX 2011.) **District violated Child Find when it took more than a year to evaluate a high school student with ADHD and serious behavior problems. The district had insisted that the Section 504 accommodations, which had already been proven inadequate, shielded it from liability.** The district had placed the child in an alternative school for 100 days due to his behavior problems.

Davis v. District of Columbia, 69 IDELR 218 (D. D.C. 2017) . **A charter school violated a child's Child Find rights after it stopped providing her special education and then failed to evaluate her later after she developed two additional independent disabilities.** The child had been eligible due to her developmental delays and learning disabilities. After she was decertified, two independent evaluations diagnosed her with auditory processing and visual motor processing deficits. The district refused the parents' request to evaluate, stating that it had previously determined her to be ineligible for service. The court noted that the district's receipt of an independent evaluations was "... more than what most courts require for creating a suspicion of a disability and academic impact."

F. **What about virtual schools?** *Dear Colleague Letter*, 68 IDELR 108 (OSERS 2016). Even though many students in virtual schools do not have much contact with school officials, **IDEA's Child Find requirements apply with equal force.** This means that district likely will need to develop strategies for identifying potentially eligible students. Such may include conducting screening and questionnaires for parents to help identify which children may have disabilities under IDEA. Districts should review their policies relating to virtual schools so as to include methods for identifying which children may need to be evaluated.

G. **Timely and comprehensive--**While IDEA does not have a time line for seeking parental consent for an initial evaluation, districts must "act in a timely manner" to comply with their Child Find evaluation. *See Letter to Anonymous,* 50 IDELR 258 (OSEP 2008).

An evaluation which was not comprehensive and instead, piecemeal, unreasonably delayed eligibility. *A. W. by H. W. and A.W. v. Middletown Area School District*, 115 LRP 4105 (M.D. PA 2015). Child had an anxiety disorder and **it took the district 13 months to evaluate the student** and develop an IEP. Here the district waited for the results of one evaluation before conducting other assessments.

T. B. v. Eugene School District, 67 IDELR 185 (D. OR 2016). District **failed to evaluate a child with depression and autism for more than a year, and thus owed the student substantial compensatory education (**570 hours).

G.D. ex rel. G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 465-67 (E.D. PA 2011). A district's **evaluation of a child with behavior academic problems was inadequate because it overly focused on the student's academic successes and essential neglected to assess his behavior problems.**

H. While a district can choose not to evaluate because it believes there is no reason to suspect that the child is eligible, the **district is still required to comply with IDEA's notice and due process procedures.**

I. **If a parent says he or she does not want special education, clarify what the parent is actually saying.** Does the parent want to avoid having the child receive *any* services under IDEA; or does the parent object to placing the child in a special education class room?

That said, **if the district believes that the student needs an evaluation, it should conduct a referral meeting and propose an evaluation of the child.** Remember the district's duty is to the child.

J. **Parents are entitled to have the district seriously consider their outside evaluations and opinions of a treating professional considered seriously.** And any such consideration should be documented. Consider meeting with the student's treating professional, at district expense. The goal is to be open and secure as much information as possible.

K. **If the parties continue to dispute whether a student is eligible for services under IDEA, consider securing an independent educational evaluation** at district expense, preferably by someone who is mutually agreeable. **This also applies to disputes about the provision of FAPE.**

IV. GENERAL COMPLAINTS INVOLVING FAPE–**FAILING TO DETERMINE AND COMMUNICATE PROGRESS, FAILING TO REEVALUATE** AND **OVERLY**

LIMITED IEPS WHICH DO NOT MEET IDEA'S REQUIREMENTS.

They aren't implementing the accommodations in my child's IEP.

My child is not progressing and they are doing the same thing over and over.

I don't know what these goals mean. And, she can already perform the task identified in the goal.

I don't know why there are no goals to address her other needs.

They said that he can perform when he tries; but he has a bad attitude and/or has problems with focusing.

A. More than anything, **parents want evidence that their child has made measurable progress.** Be honest about whether a student has progressed and **have the data to back up staff opinions on this issue. Avoid relying on generalized, overly subjective and/or self serving statements.**

> *J.D. ex rel. A.P. v. New York City Dep't of Educ.,* 69 IDELR 87, (2d Cir 2017) (*Unpublished*). **District failed to demonstrate that the IEP was appropriate because it offered only conclusive versus objective evidence regarding the appropriateness of the child's IEP.** An independent evaluation recommended 90 minutes 4-5 times a week of a reading program and the district offered about half of that. The Court stated as follows: "It may well be that A.P. would have continued progressing with sessions of shorter duration or in larger groups than recommended in the Evaluation. We do not know, because there is no support for that hypothesis in the record. Neither the state administrators nor the DOE witnesses discussed why the intensity of the SETSS sessions was adequate."

> *Independent School District No. 701 v. J.T. by C.L.*, 45 IDELR 92 (D. Minn. 2006). A student's "minimal increase" in his English score from 64 to 67% did not constitute academic progress.

B. **While grades are important, parents know that a grade is not necessarily an accurate measure of progress.** And, good grades do not excuse an IEP's failure to address a child's needs. On the other hand, **if a child is receiving consistently poor grades without reviewing the IEP or taking other remedial steps, such can be evidence of a denial of FAPE.** 34 C.F.R. 300.324(b).

D.S. and A.S. ex rel. D.S. v. Bayonne Board of Education, 110 LRP 23793 (3d. Cir. 2010). **The fact that a student with cognitive disabilities ended his 9th grade year with a 92 average, did not establish that he had received a FAPE.** The student's IEP lacked specific remedial services and he scored well below his grade level on achievement tests.

C. Remember that IDEA requires that a student's IEP address the student's academic, **developmenta**l and **functional** disability related skill deficits. 34 C.F.R. 300.324. Too many IEPs are too limited in their scope and have an over reliance on state standards which are not individualized. **Accommodations vs. remediation.**

Jefferson County Bd. of Educ. v. Lolita S., 2014 U.S. App. LEXIS 17548 (11th Cir. 2014) (UNPUBLISHED). See also *Jefferson County Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d 1091 (N.D. Ala. 2013). Although the court found in favor of the district regarding some issues, the court found that the district's **reliance on state standards, which had not been individualized to meet the student's needs, denied him a FAPE.**

1. Speech or Language Impairment as an eligibility category, as opposed to a related service.

2. Goals associated with the provision of related services, such as OT?

D. If a parent claims the district is not implementing her son's IEP, observe what is actually happening in the classroom. Don't forget to periodically review service providers' progress notes.

S. B. ex rel. N. J. B. v. Murfreesboro City Schools, 67 IDELR 117 (M.D. TN 2016). A district **failed to provide a FAPE when it failed to assure that a substitute teacher had the expertise needed to implement the student's IEP.** The IEP required that the student receive a full time special education behavior management teacher. However, the student's teacher was on maternity leave.

Sumter County School District 17 v. Hefferman ex rel. T.H., 111 LRP 30393 (4th Cir. 2011.) Although a child made some gains, such did not demonstrate that the child received a more than trivial educational benefit. Further, the district's failure to implement the student's IEP amounted to a material failure. **The district provided the student with 7.5 to 10 hours of ABA therapy each week, as opposed to the 15 hours stated in his IEP.**

J.T. by Harvell v. Missouri State Board of Education, 51 IDELR 270 (E.D. MO 2009).

Allegations that the District failed to implement a student's IEP allowed parent to pursue a request for AV surveillance.

E. **The importance of re-evaluations.**

1. A student who is eligible for IDEA services must be reevaluated at least once every three years, **or more often if conditions warrant.** 42 U.S.C. 1414(a)(2). The term "reevaluation" generally means a comprehensive evaluation which is analogous to initial evaluation under IDEA. *See Letter to Tinsley*, 26 IDELR 1076 (OSEP 1990). Reevaluations are necessary to demonstrate progress, even if they are criterion referenced evaluations.

E.H. ex rel. M. K. v. New York City Dep't. of Educ., 67 IDELR 61 (S.D. NY 2016).**District denied FAPE to a student when it developed goals which were based on old data contained in the student's progress reports.** The data appeared to be a few years old and the child had already accomplished several of the goals. Further, the district used a methodology which would make completion of the goals difficult.

The fact that a parent has consented to bypass the three year evaluation does not excuse a district from its continuing duty to comprehensively evaluate a student. *Phyllene W. v. Huntsville City Board of Education*, No. 15-10123 (11th Cir. Oct. 30, 2015) (Unpublished).

D.B. v. Bedford County School Board, 54 IDELR 190 (W.D. VA 2010). District failed to comprehensively evaluate child with a medical diagnosis of ADHD. **The child was found eligible under IDEA, under the category of OHI. When the child failed to progress, the district failed to consider whether the child was a LD student,** even though the evidence strongly suggested that the student had this impairment. The student's reading goal was repeated and he made minimal progress year after year.

2. The definition of related services states that a district is responsible for **a medical evaluation** to determine the existence of a disability and the need for a special education program. 34 C.F.R. 300.34(a).

Boardman (OH) Local Schools, 115 LRP 49819 (OCR 2015). After a father informed the district that his child had Crohn's disease, it was still the district's obligation to assure the evaluation of the child. The fact that the father failed to follow through on bringing medical documentation was not a defense.

F. **Review the student's IEP as if you had a limited education background and use**

a common sense approach. Are there glaring inconsistencies in the document? Are there functional/developmental skill deficits which are either common for the disability, mentioned in district records or evaluations of the student–but not addressed in the student's IEP? Don't forget to address basic skill deficits in math, reading or writing, especially when the IEP includes a goal which requires a higher level of skill. Do the goals have present levels of performance and are they measurable?

> *E.H. ex rel. M. K. v. New York City Dep't of Education*, 67 IDELR 61 (S.D. NY 2016). **District denied FAPE to a student when it developed goals which were based on old data contained in the student's progress reports.** The data appeared to be a few years old and the child had already accomplished several of the goals. Further, the district used a methodology which would make completion of the goals difficult.

> *Cleveland Heights v. Boss,* 144 F.3d 391 (6th Cir. 1998). **The District's IEP did not provide appropriate objective criteria for measuring Sommer's progress; and, thus, violated IDEA.** Such constituted more than a technical violation. The case also deals with predetermination.

G. **Most parents want to help their child learn – including in the area of developing socialization and adaptive behavior skills; and would welcome suggestions regarding how to work with the school to accomplish this task.** Help the parent feel like an important team member with common goals.

H. Avoid automatically concluding that a child does not need assistive technology, **especially when the child does not use oral language** or has a learning disability.

V. COMPLAINTS INVOLVING FAPE–READING

My child is in the 6th grade and still reads on a 1st grade level.

They say they don't have to evaluate for dyslexia.

A. **Many reading issues arise due to either a failure to understand the etiology of the reading disability and/or the failure to address reading literacy and/or the failure to use a reading program which meets the student's needs.** Also, do not equate a student's reading comprehension skills with her ability to listen and comprehend material read to her.

B. Evaluating a child's language skills and conducting a functional reading assessment

can prove invaluable. Ar**eas often overlooked** are comprehensive **language assessments for children with learning disabilities, occupational therapy evaluations which focus on visual perception, visual integration and visual motor.**

C. Avoid continuing to use a program which has proven ineffective. And, make sure staff are adequately trained to deliver any reading program with fidelity.

Draper v. Atlanta Ind. Sch. System, 49 IDELR 211 (11th Cir. 2008). A district's **insistence on using a particular reading program which had not resulted in even a minimal educational benefit for three years, did not satisfy the requirements of IDEA.** The court held that an appropriate education allows a student to make "measurable and adequate gains in the classroom." *See also J.S.K.* 941 F.2d 1573. Further, the district's **IEPs were not based on evaluations which were approximately four years old.** The student's goals and objectives were repeated on several IEPs, demonstrating lack of mastery of the skills. The court ordered the district to pay for the student's private placement.

I.S. by Sepiol v. School Town of Munster, 64 IDELR 40 (N.D. Ind. 2014). A child with dyslexia was not making educational progress while utilizing the reading methodology used by the district. **However, the district failed to utilize a different type of reading program.** In this case, the district used a program called "Read 180"; and that program did not adequately address the student's deficits in decoding and encoding. The district was ordered to use an Orton-Gillingham based reading program.

Straube v. Florida Union Free School District, 801 F. Supp. 1164 (S.D. N.Y. 1992). A **District denied a FAPE to a student by implementing an IEP similar to those in previous years,** when the child continued to read significantly below his grade level.

Winwood Board of Education v. K.H.G., 49 IDELR 63 (3d Cir. 2007). Student with an above-average IQ made negligible progress in reading, given that he was still one to two years behind his class. **Further, since his IEP goals were lowered in subsequent IEPs, it appears as if he regressed.** The district's program did not convey "meaningful benefit." The above-average IQ demonstrated that he should have performed at least average in the area of reading.

D. **A student who reads poorly likely has poor written expression skills.** What is the district doing to address this skills?

VI. COMPLAINTS INVOLVING FAPE– AUTISM

They aren't doing anything for her autism.

A. "Autism" is defined as being a "developmental disability that **significantly affects verbal and nonverbal communication and social interaction generally**. . . . " It often includes repetitive behavior and sensory issues. Ala Code 290.8.9.03(1)(a).

B. Thus, it is relevant to ask **whether the district has evaluated these areas** and whether there is **anything contained in the student's IEP to address his autism?**

> *The Board of Education of the County of Kanawha v. Michael M.*, 95 F. Supp.2d 600 (S.D. W. Va. 2000). **District had failed to demonstrate, either through the literature or expert testimony, that the student with autism had made reasonable progress.** It also failed to demonstrate its "methodology" was generally accepted in the educational community.

> *T.H. v. Bd. of Educ. of Palatine Community Consolidated School District 15,* 55 F.Supp.2d 830 (N.D. Ill. 1999). Student denied FAPE where **District was unable to describe what its proposed methodology was for a five-year old with autism.**

> *Blount County Bd. Of Educ v. Bowens*, 762 F. 3d 1242 (11th Cir. 2014). **A court looked at what was actually offered in a student's IEP and awarded tuition reimbursement for a child with autism.**

C. Common problems include a failure to assess/address the student's adaptive behavior, behavior, language skills and sensory issues.

VII. COMPLAINTS INVOLVING PRESCHOOL SERVICES

They say that speech and language and OT a few hours a week is all they have to offer.

A. Once a child turns 3 years old, she is entitled to all Part B services, as well as services in the LRE.

B. While some children do not need a full day of educational services, those with more significant disabilities, like autism and a cognitive disability, may need an aggressive full time preschool program.

Jennifer B. v. Chilton County Board of Education, 891 F. Supp. 2d. 1313 (2012), remanded; *Chilton County Board of Education*, 114 LRP 31151 (SEA Ala. 2013). A **preschool student who attended an integrated preschool program, but was not offered the same number of hours at the program as were his typical peers was denied a FAPE in the least restrictive environment.** The parent was entitled to "replacement costs".

C. Be careful of automatically limiting the time of children with disabilities spend in a preschool program, while allowing children without disabilities to have full time access to the program.

D. Head Start–opportunities and challenges.

VIII. COMPLAINTS INVOLVING BEHAVIOR/DISCIPLINE

My son has been suspended again and they said that the next step is alternative school.

They are harassing my son and the principal has it out for him.

They keep calling me to come and get her. They are the school. Aren't they the experts? I'm going to lose my job (or just got fired) because they keep calling.

They want me to keep my child home. They cannot handle my child for any longer than a few hours a day.

A. Do not underestimate the fact that modifying behavior can be an extremely difficult process. Likewise, **do not overrate a special education staff person's ability to modify a student's behavior.** Remember that developing and implementing positive behavior management strategies typically requires a background not possessed by special education staff or school counselors. **For students with chronic behavior difficulties, secure outside training and/or assistance if necessary.**

B. **Do not rely on "consequences" to shape behavior without assuring that there is not a program in place to teach the student strategies for replacement behavior.** Simply telling a student that his actions are wrong is generally ineffective. Avoid "one size fits all" behavior management plans, over relying on classroom rules, having a student sign a behavior contract that the student had no part in designing or cannot read. Learn the components of a valid FBA and BIP.

C. Remember that calling a parent to retrieve a student very well may factor into the "10 day" change of placement definition.

D. Don't limit "behavior which interferes with the child's learning of the learning of others, as requiring that the child have disciplinary issues**. If a child cannot stay on task or does not pay attention, this is behavior which interferes with the child's learning;**

E. **Students with disabilities are entitled to an equal number of hours of instruction as compared to students without disabilities, unless the disability**–*as opposed to the district's failure to appropriately respond to the behavior*– **results in the need for a reduced number of hours.** This includes programs in alternative settings and students who ride "special education" busses.

> *Belmont Public Schools,* 49 IDELR 209 (SEA MA 2007). Hearing officer found that a district violated IDEA when it developed a BIP which required a fifth grader to "earn his way" back into his mainstream placement. The plan was overly restrictive and failed to include parental input. Hearing officer also found that the **student would not learn to make progress on his behavior while isolated at home or in a restrictive setting.**

> *Damian J. v. School District of Philadelphia,* 49 IDELR 161 (E.D. PA 2008). A district disregarded IDEA's "highly qualified" teacher requirement when it used a teacher who was unqualified to manage student's behavior. The teacher had no experience in special education, no degree in education and no teaching certificate. In spite of her lack of qualifications, she received little training at the district.

F. **As a rule, the behavior plan "trumps" the school code of conduct**. For a student who requires a behavior plan, don't identify the code of conduct as the plan.

G. **Many school counselors are not qualified to provide clinically based counseling.**

H. **Don't forget about the availability of "parent training."** Many parents will welcome the assistance if offered in a positive manner.

I. **Carefully examine the provision of FAPE in an alternative setting.** Does it comply with IDEA? Just saying that the student's IEP is being implemented in the alternative setting doesn't make it true.

J. Don't ignore self injurious behavior.

IX. COMPLAINTS ABOUT HARASSMENT/BULLYING.

A. **It is important to properly respond to all complaints of harassment. Failure to do so can impose financial liability on a district.**

1. **Understand what is required to address/investigate allegations of harassment.** *Dear Colleague,* 55 IDELR 174 (OCR 2010). Discusses bullying and when it amounts to harassment.

Doe v. Torrington Board of Education, 116 LRP 12575 (D. Conn. 2016). Student could not pursue Section 504 or Title II claims regarding the school's alleged failure to respond to harassment by football teammates because the bullying was not based on the student's disability. Districts still, however, have the obligation to address any harassment obligations. See *Dear Colleague Letter,* 61 IDELR 263 (OSERS/OSEP 2013).

2. **Upon receiving a complaint of harassment/bullying, a district may have a duty to revisit the student's IEP.**

T.K. and S.K. ex rel. L.K. v. New York City Dep't of Educ., 63 IDELR 256 (E.D. NY 2014). **District denied FAPE when it failed to appropriately respond to incidents of peer harassment by failing to include anti-bullying measures in the student's IEP. Consequently, the district was liable for a private placement.** The child here had a language based learning disability and she became emotionally withdrawn, gained weight, and frequently arrived late at school due to her fear of harassment. Parents had concerns about peer harassment on their child's ability to learn. This case was recently affirmed by the Second Circuit. *T.K. and S.K. ex rel. L.K. v. New York City Dep't of Educ.,* 116 LRP 2393 (2d Cir. 2016). **The Second Circuit held that a school district's refusal to discuss the bullying during the IEP meeting amounted to a procedural denial of FAPE.**

K.R. v. School Dist. of Penn., 548 IDELR 216 (E.D. PA 2007). Court allowed a lawsuit to proceed involving harassment allegations involving a nine year-old girl with autism. Parent alleged district knew about student's assault on student and attempted to cover it up. Bad faith or gross misjudgment was not required.

Fairfield-Fuisain Unified Sch. Dist., 51 IDELR 139 (OCR 2008). **School district erred when it treated the disability harassment as an ordinary dispute between students.**

Student identified several witnesses to an alleged incident of verbal harassment and the district failed to interview any students. The district's acceptance of the harassment because it involved mutual derogatory name-calling was also inappropriate.

M*elrose Pub. Sch.,* 51 IDELR 285 (OCR 2008). OCR found that a d**istrict violated Section 504 by failing to notify parent in writing regarding the results of the harassment investigation,** although the principal shared the results of this investigation with the parent during a telephone conversation.

J.G. and P.G. ex rel J.G.III v. Card, 109 LRP 59081 (S.D. NY 2009). Parents were allowed to pursue Section 1983 claims against the school principal who failed to protect children with autism from serious abuse allegations. The principal allegedly knew of the teacher's mistreatment.

V*icky M. and Darin M. v. Northeastern Educational and Intermediate Unit*, 109 LRP 58985 (M.D. PA 2009). **District's disregard of allegations of abuse, including—but not limited to--restraining a child in a Rifton Chair, supported parent's 1983 claim.**

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