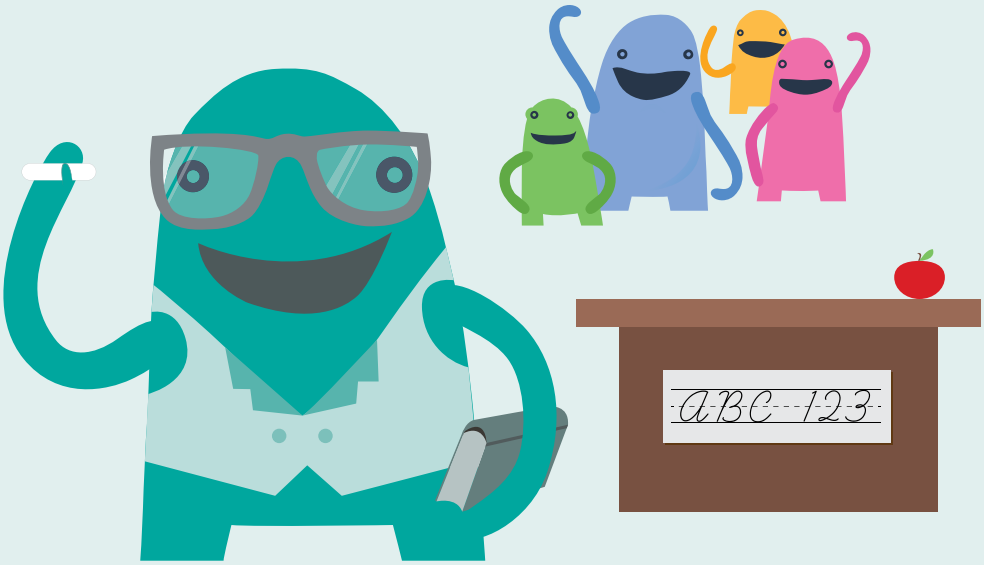
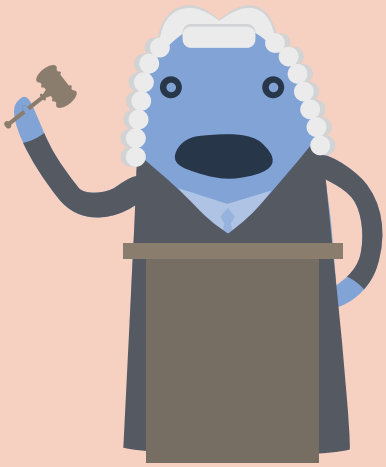


5 Legal Dos and Don'ts for

Staying Out of Due Process in Special Education

As presented by Julie Weatherly Esq.



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Executive Summary

Though due process hearings have been on the decline, innocent mistakes in the development and implementation of individualized educational programs (IEPs) for students with disabilities can quickly turn into costly legal issues for school districts.

For more than twenty-six years, Julie Weatherly, Esq., has provided legal representation and consultative services to school districts and other agencies in the area of educating students with disabilities. This paper, based on a PresenceLearning webinar by Julie Weatherly, covers a number of easily avoidable errors that still occur all too often that can land you in due process.

A must-read for school administrators, special education staff and school-based members of IEP teams, this paper is full of practical advice, real-world cases and sample scenarios that will help you:

- Understand common errors that can lead to litigation
- Differentiate between process and content errors
- Develop strategies to avoid these errors
- Learn about new legal issues and changes affecting special education

—*PresenceLearning*

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One of the seminal cases in special education is Rowley, which established a two-fold standard for determining whether a district has offered FAPE.

Determining FAPE: The IEP is Modus Operandi

In order to provide context for the five legal Dos and Don'ts described in this paper, we must first look at one of the seminal cases in special education law: the 1982 Supreme Court case, the *Board of Education of the Hendrick Hudson Central School District v Rowley*, commonly known as Rowley. It was this case that recognized that the Individualized Education Program (IEP) is the modus operandi as it relates to the provision of free and appropriate public education (FAPE) to students with disabilities.

This case is important for a number of reasons, but the primary reason is that it was in this case that the court established a two-fold standard for determining whether a district has offered FAPE. The two-fold analysis set forth by the court said that two questions must be asked and answered, one regarding process and one regarding content:

1. Has the district or state complied with the procedures set forth under the act we now know as IDEA?
2. Is the IEP developed in accordance with those procedures, and is it reasonably calculated to enable the child to receive educational benefit?

Four of the five Dos and Don'ts in this paper deal with process. Many courts have found the denial of FAPE based solely on a process or procedural error. This has happened so much that in 2004, Congress amended the IDEA because so many courts were finding process violation sufficient to find a denial of FAPE, and did not even look to the content or the quality of the IEP that was developed in accordance with the process. As a result, Congress established a "no harm, no foul" standard.

New language in 2004 said that not every single process or procedural error is in of itself a denial of FAPE, but rather a court or a hearing officer has also defined one of the three things relative to the procedural error that:

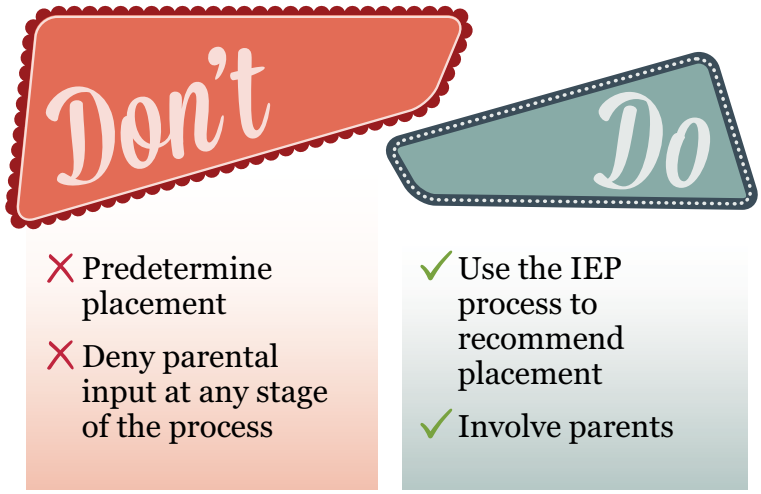
- Impeded the child's right to FAPE
- Significantly impeded the parents' opportunity to participate in the decision making process (most of the procedural errors that constitute a denial of FAPE have been found to deny FAPE because they have impeded the parent's opportunity to participate in the decision-making process)
- Caused a deprivation of educational benefits

Again, Congress was concerned courts were just relying on the procedural prong of the Rowley standard too often; however, it is still very important to focus on process.

Predetermination of placement is anything that looks to the parents that educators have already got everything figured out — that the IEP is ready to roll, that the only thing that needs to be done is for the parents to read and sign it.

1. Predetermination of Placement

The first set of Dos and Don'ts has to do with the number one procedural violation: *predetermination of placement*. Every court that has looked at and found a predetermination of placement has found that predetermination in and of itself constitutes the denial of FAPE — so much so that the court won't even look to the quality of the IEP that was developed, they only look at the fact that there was predetermination of placement. So what does predetermination mean?



First, don't engage in action that appears to be a predetermination of placement. This is a catchphrase in special education law; there is nothing that attorneys representing parents like better than to find that something was done that constitutes a predetermination of placement, or, in other words, that a process violation somehow denied parental input into educational decision making.

Let's explore some sample scenarios that illustrate predetermination of placement.

Scenario 1

A school's staff meets together prior to a scheduled IEP meeting. They complete and sign the IEP, and hand it over later to the special education teacher because she has more time on her hands and she can sit with the parents and go over it with them. After all, all that is really needed is their signature. Or, in the same vein, let's say the school staff all arrive to the IEP meeting together and say, "Hello Mr. and Mrs. Jones, it's so good to see you again. We've got a deal for you. Here is the IEP; it's all ready to go. All we need for you to do is sign it. We'll be up the hall in our rooms, but if you have any questions please let us know."

What the case law says:

- ✓ OK to bring a draft to IEP meeting
- ✓ Drafts are OK for discussion purposes
- ✓ Draft must not be treated as final or complete
- ✓ OK if parent is allowed to have input

Predetermination of placement is anything that looks to the parents that educators have already got everything figured out — that the IEP is ready to roll, that the only thing that needs to be done is for the parents to read and sign it. This creates the perception that the parents were not needed. A few questions come up around this issue:

1. What about preparing draft IEPs before an IEP meeting?

This was litigated for the first time before a US Circuit Court of Appeals. The first circuit dove into this issue in 1991 case *G.D. v Westmoreland*, where the parent attorney argued that, in and of itself, developing and bringing a draft of an IEP to an IEP meeting was legally a procedural violation. The court disagreed. Drafts, many times, are expected. Drafts are for preparation only, but it's all about how that draft is presented to the parents. If the draft is plopped down in front of the parents as a final document and they are told that all they need to do is read and sign it, then that's going to be perceived to be a predetermination of placement. However, giving some thought to things and completing a draft is something most parents would appreciate. Case law has been very clear that drafts are clearly not a violation of the IDEA procedural requirements, in and of themselves.

2. Is there any regulatory commentary from the US DOE?

Regulatory commentary from the US Department of Education was issued in 2006. The US DOE had been asked by some advocates to outlaw drafts and to tell educators that they could no longer ever bring anything in draft form to an IEP meeting. The US DOE decided against that, but it is interesting to note the following US DOE quotation: "We don't encourage public agencies to prepare drafts prior to IEP meetings particularly if doing so is going to inhibit a full discussion of the child's needs with the parent." What they are pointing out is that it's okay to draft things as long as you go through a *process* to ensure that parents are entirely a part of the decision making process. They actually go on further to note that if a school agency does have a policy or procedure of developing drafts such as a draft IEP, draft goals and objectives, or drafts of a student's profile or present levels, then those should be shared with the parents ahead of time to give them even more opportunity to be a full participant in the upcoming meeting.

3. What about the use of computerized IEP programs?

IEPs were once written longhand, and while they were tough to complete, a lot more thought was given to IEPs and the individual needs of children back then. While using computerized means to prepare IEPs is not illegal and helps us to be more efficient, districts must be careful to train staff on how to use these computerized IEP programs such that nothing appears predetermined.

Educators and teachers who develop IEPs with computerized programs need to think outside the box. There have been so many times where I've attended an IEP meeting on behalf of a school district and a parent said, "I'd like for the team to consider this alternative," and the teacher clicked on the program and said, "Oh, I'm sorry that's not an option in our program." The problem is that via the use of the computerized program, something is predetermined.

Computerized IEPs can also lead to a mindless IEP, as the *Roland M. v Concord Sch. Comm.* case called it. Or, in another situation, it happened that the computer-generated IEP contained the name of another child. There is nothing worse in terms of predetermination than when an IEP looks like it was cut and pasted from a computerized IEP program. Also be sure that computerized IEPs don't contain coding or incomprehensible symbols that parents may not understand. It can be argued that the parents really were not a full participant in the process because they did not truely understand what was going into the IEP.

Scenario 2

"But in our meeting yesterday, I thought we decided that he was not going to participate in the regular program?"

In this scenario, here is a general education teacher who attended a pre-IEP staff meeting and is under the impression that a final decision was made with regard to the student's regular education participation. Nothing makes the eyes of a parent attorney light up brighter than to hear that there was another meeting held before the IEP team meeting.

Case in point here is *Speilberg v Henrico County* in 1988. In this case, the school attorney wrote a letter to the parent attorney that said something to the effect, "This is just a reminder that there will be a meeting next Tuesday for that IEP meeting, but before we get there I just want to give you a heads up. The school staff has already met and they have decided the child's program will be X and we will not discuss Y, Z, A, or B. Sincerely yours. See you next week." As a school attorney, you certainly do not want your own letter to be an exhibit for the other side, which is exactly what happened here. In fact, in the court case, the court actually took the letter and reprinted it in the decision and said this was clearly a fatal procedural violation and because of it, it constituted a denial of FAPE sufficient in and of itself to find in favor of the parents in that case.

The court was faced with an argument from the school board attorney who said, "Okay, well if this was a predetermination of placement, that's not what is really is important here. What is important is the quality of program X that was actually proposed for this particular child." The court said, "We don't care about the quality of program X. We have answered the first prong of the Rowley decision, the process question, and we have answered that in the negative. You committed a fatal procedural sin in holding the meeting and your letter is Exhibit 1 for that."

What the case law says:

- ✓ Prior discussion is OK as long as no placement determination is made
- ✓ Keep an open mind not a "blank mind": preparation is OK
- ✓ Include parents in meetings, but not every conversation is a "meeting" requiring their inclusion

In *Doyle v Arlington County Sch. Bd.* in 1992, the court said, "You don't predetermine placement. You can talk about things ahead of time, but school officials must come to the IEP table with an open mind. You don't come with a blank mind." So, courts do acknowledge that educators are going to do some preparation ahead of time, but not to the point where a regular education teacher says, "But I thought we already decided that placement issue before we got here."

In 1999, many educational groups requested that the US DOE better clarify what actually constitutes a meeting to which parents must be invited. This came about because educators were worried that they could not even have water cooler conversations about a student. The US DOE issued a regulatory provision clarifying that a meeting does not include informal or unscheduled conversations involving school personnel, and conversations on issues like teaching methodology, lesson plans, coordinating services and that kind of thing. Also importantly, the regulations go on to say a meeting also doesn't include any preparatory activities that school personnel might engage in to develop a proposal or response to a parent proposal that will be discussed with parents later at a meeting. It is very clear that the regulations contemplate preparatory activities such as preparatory meetings. As a school attorney, I can tell you that nothing is worse than members of IEP teams coming to the IEP meeting unprepared, particularly in a potentially adversarial situation that needs to have a good level of preparation, but not to the point where people are told what they are going to do the next day. Develop agendas, talk about options that might arise, discuss questions that parents might ask and be prepared for those, but leave the final decisions to the IEP team when the parent has the opportunity to participate.

Here are a couple other examples in this category that are self-explanatory. Let's say the principal says this during the meeting, "…but the special education director already told us that we can only recommend X." Or someone says, "The team recommends these services, but these will have to be approved by the principal." You don't want to have someone on the outside who is actually directing what the decision is going to be (in these examples, either the special education director or the principal is indicated as having the final say). The IEP team is to be prepared to make their final recommendation with the parent as to what is going to be in place for a particular student with a disability.

Scenario 3

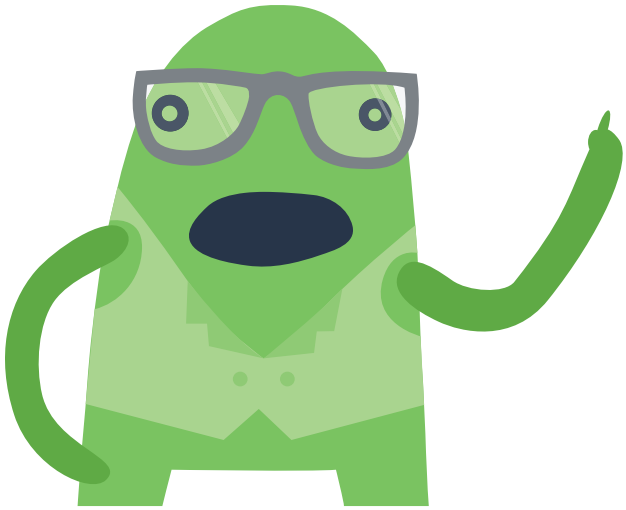
The LEA representative at the meeting introduces the IEP team members, and then goes on to say, "And we are here today to develop an IEP for Billy to go to the self-contained class for LD students and we won't discuss anything else."

This scenatio is similar to the case *Berry v Las Virgenes Unif. Sch. Dist.*, where the assistant superintendent made an introductory statement to the IEP meeting essentially proclaiming that "This is what we are going to do, and this is going to be the placement." If I am attending a meeting such as this, and believe you me I have, I might serve as a facilitator myself and actually facilitate the school folks out of that situation by saying, "Well, don't you mean that's just one option we are going to talk about when we get to placement during this meeting. We have a whole lot of work to do."

I do want to point out the case *R.L. v Miami-Dade Co. Sch. Bd.* It's a brand new case out of the 11th Circuit, which is where I practice in the Florida, Georgia, and Alabama area. In this case, an LEA resentative showed up at a meeting and essentially cut the parents off as they tried to talk about options, and because of that, the court said that clearly there was a predetermination of placement, again, a fatal procedural sin.

What the case law says:

- Prior discussion is OK as long as no placement determination is made
- Keep an open mind not a "blank mind": preparation is OK
- Include parents in meetings, but not every conversation is a "meeting" requiring their inclusion



Scenario 4

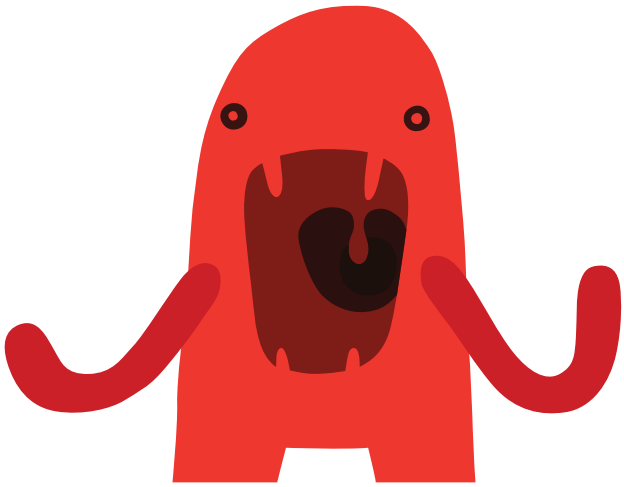
Taking the private evaluation report that the parents brought to the meeting and shaking it in the air, the school psychologist says, "…but you gotta be kidding me, this guy is a quack and we're not even going to consider this report."

I actually was in a meeting once where the school psychologist ripped a private report in half and said, "I don't read anything this fellow writes." And I think I recall asking for someone to go and get us some tape so we could tape it back together and consider it. That is the important part: *considering*. It is part of parent participation. What parents bring to the table must be considered — not necessarily incorporated into the recommendations of the ultimate team decision or into the IEP itself — but considered.

For instance, in the *DiBuo v Board of Educ. of Worcester County*, the 4th Circuit case in 2002, the special education director slid the private evaluation reports that the parents had brought to the meeting across the table to the parents and said, "We are not even going to consider these." Everybody needs to be trained to give full consideration to any input that parents bring to the table, even though we know that we don't necessarily have to incorporate that input into the ultimate IEP.

What the case law says:

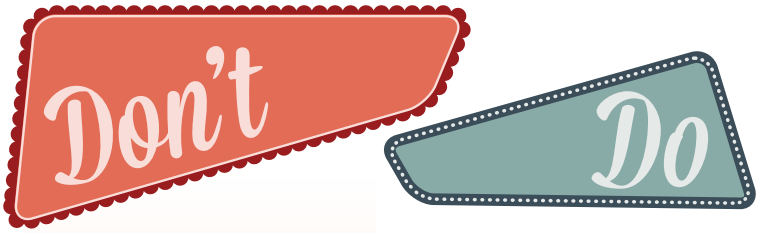
- ☑ Consider IEEs
- ☑ District not required to incorporate IEE recommendations
- ☑ Provision of FAPE is key



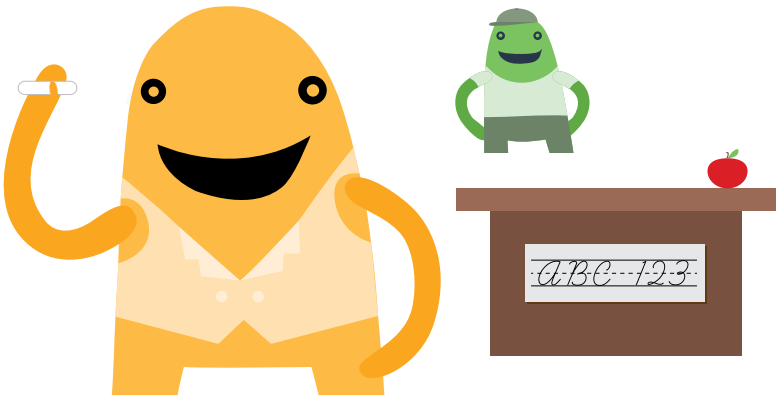
The "I" in the IEP and the "I" in the IDEA stands for the individual.

2. The "I" in IEP

Do make educational recommendations and decisions based upon the individual needs of the student, and nothing else. The "I" in the IEP and the "I" in the IDEA stands for the *individual*. To some extent, this is a form of predetermination, but here there is a different angle. If a court sees something that looks as if the educators did not make a recommendation or decision based upon the individual needs of the student and that something else was the driving force, that in and of itself can constitute a denial of FAPE.



Don't	Do
✗ Consider anything else	✓ Make decisions based ONLY on the student's individual needs



Scenario 1

"Well ma'am he might need that, but I'll be honest with you, we just don't have that here."

The parent's attorney is going to love a statement like the one in the scenario above that because it looks as if the educator has admitted the student might need something, but he won't get it because the school does not have it.

The US DOE has said, "The longstanding position is that school personnel must write an IEP and make recommendations without regard to the availability services in the school district." The theory is essentially "If the student needs it, we must build it and they will come." The most well-known case for this proposition is *Deal v Hamilton County Board of Education*. It's very well known. In this case, the 6th Circuit Court of Appeals focused on taped transcripts of IEP meetings. The court took sound bites out of the tape recorded sessions to find quotes on the part of school administrators and other IEP attendees from the school's perspective who said things such as "We don't do LOVAAS here," "The powers that be have told us we could never offer the LOVAAS program," and "If taxpayers would pay their taxes in this county, we could afford to provide the LOVAAS program." The court ultimately concluded that all of those sound bites together constituted a denial of FAPE because they reflected the school's intent not to consider the individual needs of this particular student with autism. What if the student actually needed the LOVAAS program? Everyone had already said they would never do it and based on those sound bites from taped transcripts, the court ruled that it was a denial of FAPE because the school people came to the meeting with closed minds with respect to what the parents really wanted for their child.

What the case law says:

- IEPs must be written by trained personnel "without regard to availability of services"
- Beware of unwritten or unofficial policies
- Adoption of single programs or methodologies can deny students FAPE

Scenario 2

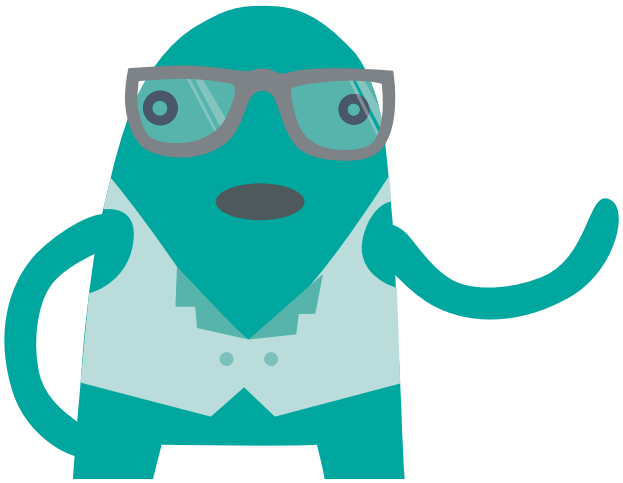
"Our preschool program is four days a week for a half-day for everyone. That's really all these young kids can handle."

There was a case in Alaska where a special education director actually said the above quote to a parent in terms of a full day program never being developmentally appropriate for preschool-aged children. I have also heard this quite frequently in terms of preschool programs for students with disabilities. It might be because preschool programs were not mandatory under IDEA until 1991, and the thought was that preschool-aged kids, because of where they are developmentally, might not be able to handle a full day program. In my experience, what happened was that school systems developed half-day or half a.m./p.m. sessions for preschool-aged children with disabilities and this became quite cookie cutter.

Be very careful that whatever you have as the overall blueprint for your preschool program meets the needs of the child and provides the child with meaningful educational benefit. This is the standard and it is important to train school staff, particularly the LEA representative, to facilitate the meeting back to the discussion of the individual needs of the child. For example, "We are recommending a preschool program for four days a week for a half day because we believe that is what your child needs to receive meaningful educational benefit." Not "That's all we have and this is a blanket policy," or "But we always do it that way," or "We have never done that and we are not starting now."

What the case law says:

- ☑ Avoid "blanket policies" and cookie cutter programs
- ☑ Use other resources if not available in school
- ☑ An IEP must be "individualized"



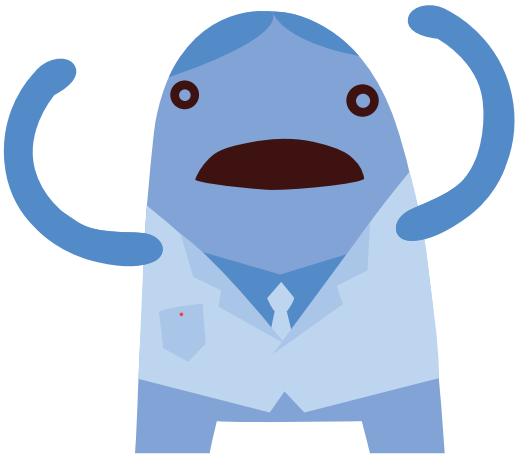
Scenario 3

"But my schedule won't allow for that."

What the case law says:

- Avoid "blanket policies" and cookie cutter programs
- Use other resources if not available in school
- An IEP must be "individualized"

This is one of my favorites — now whose needs are we talking about? I often hear from educators that their caseloads won't allow them to do X. That is not the question. The question is, does the child need X in order to receive meaningful educational benefit? To facilitate out of this trouble spot, the LEA representative might say, "Well we understand the demands of your schedule, but in terms of what you are offering, does that meet the individual needs of this child?" Will it afford this child meaningful educational benefit rather than making it look like the recommendation is based on someone's schedule? Proceeding on, "My class doesn't have those services, but all of our students with autism get X, Y and Z." Anything that is cookie cutter is going to be very, very dangerous and it will be a quote that comes up later in due process should you have the unfortunate opportunity to be there.



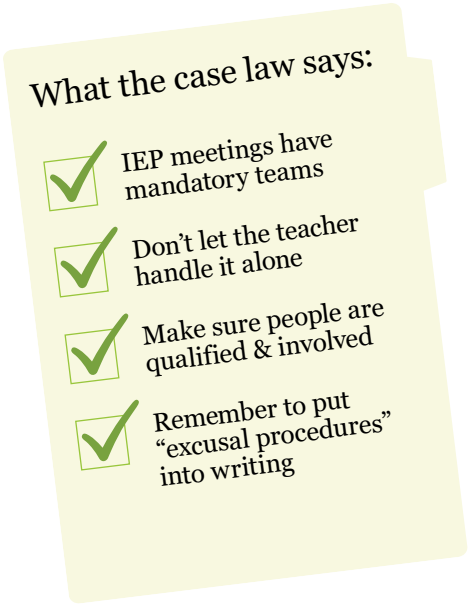
It is very, very important that if we are going to excuse someone early or they come in late, that we be prepared to follow the excusal procedure and document that we did so.

3. IEP Meeting Attendees

Not ensuring that required school staff are present at IEP meetings is a procedural violation that I unfortunately see as a school attorney more often than I would like, and I often feel frustrated with it because I think it's one of the easier ones to avoid. Dos and Don'ts such as predetermination and focusing on individual needs and saying things that have legal implications aren't as clear to educators, but this one is pretty clear. We know who we need to have at IEP meetings and we need to do the best we can to not create an unnecessary red herring by having the wrong people go.

Under the IDEA, school districts must ensure that the IEP team for each child with a disability includes the following members (bolded members are mandatory):

1. The parents of the child
2. **Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment)**
3. **Not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child**
4. **A representative of the public agency who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; and (iii) is knowledgeable about the availability of resources of the public agency (the LEA representative)**



The excusal procedure:
In 2004, the IDEA was amended to provide that a mandatory member of the IEP Team (members 2-5 above) is not required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA agree that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the meeting." When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and LEA consent to the excusal and the member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting. Parental consent or agreement to an excusal must be in writing.

5. **An individual who can interpret the instructional implications of evaluation results, who may be a member of the team already described**
6. At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate
7. If appropriate, the child

Can a mandatory member be excused? Yes, but it is complicated in that you are required to get written parental consent or parental agreement, and those are differently defined, depending on who you are asking to excuse. It is also important to note that the excusal procedure applies whether you are excusing one of these mandatory members from the whole meeting or just part of the meeting. So if someone should come in late — let's say the regular education teacher — there must be an excusal process that follows the law in terms of obtaining parental consent or parental agreement in writing. This should be done prior to the meeting, particularly if that person's area of the curriculum or provision of services is going to be addressed at the meeting.

When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and LEA consent to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent or agreement to an excusal must be in writing. It's very complicated. The excusal procedure is riddled with its own internal and procedural landmines, so much so that most of my clients and many educators that I talk with and work with across the country have decided that they just don't use the excusal procedure. Many would prefer to adjourn the IEP meeting if one of the mandatory members cannot be there and reschedule it. However, I do see a problem with that on some occasions, for example if the parent is there and says, "I'm prepared to go forward without Mrs. Jones. It took me two weeks to get off work today to even be here, I would like to proceed." For this reason, I advise that school districts at least have some sort of excusal procedure and documentation ready should the parent desire to go forward without one of those mandatory members. It is very, very important that if we are going to excuse someone early or they come in late, that we be prepared to follow the excusal procedure and document that we did so.

Scenario 1

"Yes, I am the LEA representative, but I don't do Special Ed. You will have to ask someone else because I really don't know anything about it."

What the case law says:

- Meeting attendees must include a LEA representative who is qualified to provide or supervise the provision of SPED services

The LEA (local education agency) representative must be trained and comfortable with his or her responsibilities. The LEA representative is required to meet certain qualifications, including:

- The ability to provide or supervise the provision of specially designed instruction to children with disabilities
- Knowledgeable about the general curriculum
- Knowledgeable about the availability of resources in the school system (and some school systems say that this person should be able to commit those resources)

The fact that the sample LEA representative in the scenario has said, "I don't do Special Ed, you will have to ask someone else, I don't know anything about it," reveals that they don't meet the criteria of an LEA.

I remember a case of mine where the parent attorney's first witness, the assistant principal, was the person who signed a pivotal IEP as the LEA representative. The questioning went something like this:

PARENT ATTORNEY:
So, is this your signature as the LEA representative?
ASSISTANT PRINCIPAL:
Yes, it is.
PARENT ATTORNEY:
Are you qualified to provide or supervise the provision of specially designed instruction for children with disabilities?
ASSISTANT PRINCIPAL:
Absolutely not!

Ultimately, this was not the worst part of that case, so we settled. There were a lot of procedural violations, but one thing that was made clear was that we needed to do a little bit of LEA representative training in that district so this would not happen again.

Scenario 2

"Sorry I'm an hour late, but the principal just told me I needed to be here because I'm the only regular education teacher left in the building. I'm not really sure what help I can give, since I don't teach special education. So, can I go now?"

What the case law says:

- ✓ Cancel & reschedule if necessary
- ✓ Attendance by phone/online is OK
- ✓ IDEA prefers main-streaming so general ed must be included

After going to their first IEP meeting, a lot of regular education teachers ask, "Why in the world did I have to be here?" I like to remind them that regular education teachers were added as mandatory members of the IEP team. I think the Congress and the US DOE were making a statement that regular education teachers are important to the process by making them a member of the IEP meeting team right after parents. From a historical perspective, teacher union groups actually lobbied Congress to have regular education teachers added to the team membership. This happened so much so really that Congress was responding to the demands of teacher union groups who were lobbying to have regular ed teachers added to the team membership. As of July 1, 1998, any IEP developed on that date or after had to include the participation of a regular education teacher if the student is or may be participating in regular education.

Looking back at the sample scenario quote, some people refer to this type of statement as the "sign and go" or the "drive-by" IEP team member, basically someone who just pops their head in and says, "Hey, how's it going with everybody? If you need me for anything, you know, I'm just a regular education teacher, I can't really help out here, so can I sign and go?" This is very, very dangerous, particularly if the issue at hand is the level and extent to which the child's participation is appropriate in the regular classroom. You have to be very, very careful to bring regular education teachers into this process and train them. Having a regular education teacher who does not know why they are there or what they are supposed to be doing at the meeting does not meet the spirit of the law, and also can really upset a parent who feels the teacher is completely disinterested.

In the case *Arlington Cent. Sch. Dist. v D.K. and K.K.*, a federal judge in New York basically said that the absence of the general education teacher at the IEP meeting denied FAPE in and of itself and awarded tuition reimbursement for private schooling to the

parents. They had decided to place the child in a private school and the failure to have a regular education teacher at the meeting was enough for the court to say that under prong one of Rowley, there was "a procedural violation in and of itself that constituted the denial of free appropriate public education."

A very similar situation occurred in *M.L. v Federal Way Sch. Dist.*, where the 9th Circuit Court of Appeals called the failure to have a regular education teacher present a "critical, structural defect" in the IEP team process sufficient in and of itself to constitute a denial of FAPE. Another case, *DiRocco v Board of Educ. of Beacon City Sch. Dist.*, made clear that what is important is the language in the law itself that says, "A regular education teacher of the child." In other words, not just any regular education teacher.

I remember when this provision, the 1997 law, became effective in 1998. Many of the special education administrators that I work with said, "There's no way we are going to be able to get regular education teachers to meetings and make it mandatory so I think I'll just hire someone with a regular education certification and it will be their job to attend IEP meetings as a regular ed teachers." And I said, "Hate to burst your bubble there, but the law says it has to be a teacher of the child."

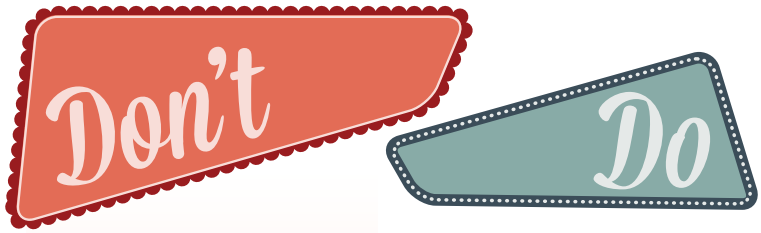
There has been so much litigation on this that the US DOE actually provided some clarification years ago with respect to the regular education teacher and which regular ed teacher of the child needs to attend. They say, "Well it doesn't need to be all of them, but it does need to be someone who has served as a regular ed teacher for the child in the past or may potentially be the regular ed teacher for the child in the future under that IEP."

In the DiRocco case, the regular education teacher was a math teacher who had taught 10th, 11th, and 12th grade math, but the IEP meeting was being held to develop a program for a student who was entering high school as a freshman. So there was no way that was the right regular ed teacher to be present at that meeting. However, not every procedural violation in and of itself is a denial of FAPE. In the DiRocco case, it was considered a "no harm, no foul" scenario. But from a school attorney's perspective particularly, I just assume we not have these errors because they become red herrings. While the school board did not lose this case, it is still was an awfully expensive lesson to learn to have the right math teacher there at that meeting.

The IEP process is not a voting procedure. The team works collaboratively in an effort to meet consensus.

4. Parent Invitees

Number four is a Don't. Don't prevent meeting participation by individuals brought to IEP meetings by parents. Parent invitees are another angle on parent participation, and very important in terms of making sure that parents feel like they are part of the process. If parents bring individuals with them, we, as educators, should provide sufficient opportunity for input.



✗ Prevent the parents from bringing "other individuals" to meetings

✓ Allow parent invitees with knowledge or expertise to attend meetings

From the parents' perspective, these discretionary individuals are supposed to be people *who have knowledge or special expertise regarding the child*. Who determines when an individual has knowledge or special expertise about the child? The US DOE says that whoever invites the person has decided that the person has knowledge or special expertise regarding the child.

There are not many occasions where a school can block a parent from bringing someone based on the fact that they don't think that person has knowledge or special expertise. So who might these parent invitees be? What kind of invitees might we see parents bringing to IEP meetings? We will discuss this in more detail in this section, but I will share as an example that there were no fewer than 36 people at the first IEP meeting I attended, so the sky is rather the limit in terms of the people that both the parents and the school can invite as discretionary members of the IEP team.

Scenario 1

"No, you can't bring your attorney with you to the meeting."

What the case law says:

- "Other individuals" must have knowledge or expertise regarding the child
- Attorney attendance is discouraged – their participation in the meetings can create an adversarial atmosphere that is not in the child's best interest

Can attorneys be invited to IEP meetings? As a school attorney, I do not feel like attorneys have any business at IEP meetings, though parent attorneys often disagree with me. In fact, I will not attend an IEP meeting typically unless the parent has insisted on bringing their attorney to the meeting. That's kind of my standard practice: I don't attend unless I need to be there because the parent has insisted on bringing an attorney to the meeting.

I see attorneys at meetings less and less, but in terms of whether or not they can be present, the US DOE commented back in 1999 that while it is the parents' decision whether the attorney has special knowledge or expertise about the child, they strongly discourage attorney attendance because it could create a potentially adversarial atmosphere:

"[The IDEA] authorizes the addition to the IEP team of other individuals at the discretion of the parent or the public agency only if those other individuals have knowledge or special expertise regarding the child. The determination of whether an attorney possesses knowledge or special expertise regarding the child would have to be made on a case-by-case basis by the parent or public agency inviting the attorney to be a member of the team.
The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at the IEP meeting. Even if the attorney possessed knowledge or special expertise regarding the child, an attorney's presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child. Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged."

— 64 Fed. Reg. 12478 (1999).

In fact, the regulations today actually say that if a parent prevails under the IDEA in a proceeding, they will not get their attorney's fees reimbursed for any time an attorney sat in an IEP meeting. When the law was changed in 2006 in that regard, a lot of attorneys basically decided that, "Well, we just will no longer go, we will just prepare." In some states and in some areas, I still attend IEP meetings because the parent attorneys are still there as well.

One of the most common questions that I get from schools is, "What if an attorney shows up that we didn't know was coming? The parents didn't tell us and all of the sudden we arrived and their attorney showed up and announced, 'I'm an attorney, here's my card,' and we were all intimidated. Do we have to continue when this happens?" My position as a school attorney — and there are other opinions, and there is no law on this — is that, in general, I believe that school folks have the right to be represented particularly if they were not notified ahead of time by the parents that they were bringing their attorney to the meeting. In my view, I think the school staff in attendance has the right to adjourn that meeting and reschedule it when the school attorney can be present if feel they have the need to do so. This is my rule of thumb because my view is if a parent brings an attorney to an IEP meeting, something's up.

I find many times the parent attorney is merely doing what I call "discovery" to determine whether there are some good points in the case, and maybe set up the school people to say some of the things that we have discussed in this paper already, perhaps something about predetermination of placement, so I just view the school attorney as essential most of the time if the parent attorney is there. However, in large, large school districts there can be a lot of parent attorneys at meetings and the school board attorneys can't possibly attend all IEP meetings, so some rules have to be developed in that regard. My general rule of thumb is if that the school people feel uncomfortable proceeding in any way, they can adjourn that meeting until such a time that their school attorney can be brought in as an IEP team participant.

Scenario 2

"Sure, your next door neighbor can come, but can't participate today."

If a parent brings someone to an IEP meeting, he or she obviously brought that person in as a participant. I encourage school folks to find out who these people are, whether it's a next door neighbor, Sunday school teacher, or a private physician. Private physicians rarely have the time to come to IEP meetings, but they certainly do like to give their input, so I will see them even write on a prescription pad, "I hereby prescribe an IEP for this child," or "I prescribe a one-to-one aide for this child," or "I prescribe a 504 plan," or whatever else they might suggest. This input has to be considered, even if the physician is not present. At any rate, the bottom line is for school people to find out who parents are bringing to an IEP meeting.

In a recent case, there weren't lawyers at the IEP meeting, but the mother brought some consultants with her. After the meeting, I was debriefing with the special education administrator and she told me that a woman was sitting at the meeting the whole time. When I asked who the woman was, the administrator did not know. Always ask:

- Who attendees are
- How they plan to participate
- What role they have in the child's life
- What they know about the child that will help the team make good decisions

It could be a paralegal sitting in and attending on behalf of a law firm without identifying himself or herself — I have seen this happen. I've even had a situation where an attorney showed up and did not reveal that he was an attorney. So if there is any suspicion, I encourage school participants at the IEP team table to make sure they are fully aware of anyone a parent has brought in to participate. Not only do we have a duty to do that, but a right to do it because we are talking about confidential information during a child's IEP meeting. Smile at the people parents bring, welcome them, and offer them the equal opportunity to participate knowing, however, that the relationship remains between the parent and the school people.

What the case law says:

- ☑ Individuals who are at the meeting can be active participants
- ☑ Find out who the parents' invitees are and how they are involved with the child

Another thing to consider: make sure to check in with parents and find out how they feel about what their invitee may be saying. I had one situation where an advocate had not prepared herself to attend the IEP meeting with the family, and she was taking positions that were clearly counter to what the parent thought the child needed. In fact, the body language was so palpable that the school people noticed it. Anytime that happens, you should always turn to the parent and ask, "Are you in complete agreement with that? I see that your body language is telling me that you don't agree with what was just said. We need to work with you in terms of getting your input, in terms of our ultimate recommendations for services for your child."

Scenario 3

"We don't consider a member of the press a knowledgeable person."

What the case law says:

- District is justified in terminating the IEP meeting because there was sufficient evidence that the reporter (invited by the parents) had no special expertise or knowledge
- Protect the child's confidentiality

In general, we open our arms to all of the various people that parents may bring with them to an IEP team meeting, but I will draw the line if the person who the parent brings along has an action news camera on his or her shoulder so that they can show the IEP meeting on the evening news. In my view, I can't envision a member of the press as person who is knowledgeable about the child and is there to help the IEP team come up with an appropriate program for a child with disability. There is an OCR decision noting that a school district was justified in terminating the IEP meeting when a newspaper reporter showed up at the request of the parent and refused to leave the conference, as there was insufficient evidence that the reporter had special knowledge that would have made his presence necessary.

In my view, a reporter clearly is not a knowledgeable person at an IEP meeting. That person is there merely to report on TV or in the paper what happened at the IEP team meeting, which to me is highly inappropriate. I don't believe that Congress ever envisioned an IEP meeting as a media circus, and because of the confidential nature of the information that is presented during an IEP meeting, I would advise school folks to clearly adjourn that meeting and refuse to proceed. To me, it would take an order from a due process hearing officer or a court that we must proceed.

It can get sticky here because I have had a couple of cases where the parent himself or herself was actually a newsperson, but they were not there in their role as a newsperson or a member of the press. They were there as a parent. As an aside, I have also had parents who had law degrees. I leave it to the discretion of the school team whether or not to proceed based on how they are feeling and how comfortable they are. If the parent hat falls off and the attorney hat comes on, then it might be within the discretion of the team to adjourn, and same goes with the reporter parent as well. Is that person acting in the capacity of a parent or does this person have a microphone in someone's face trying to film them or record them for the morning radio program? Hopefully school systems won't encounter these situations very often, but it is important to think about them.

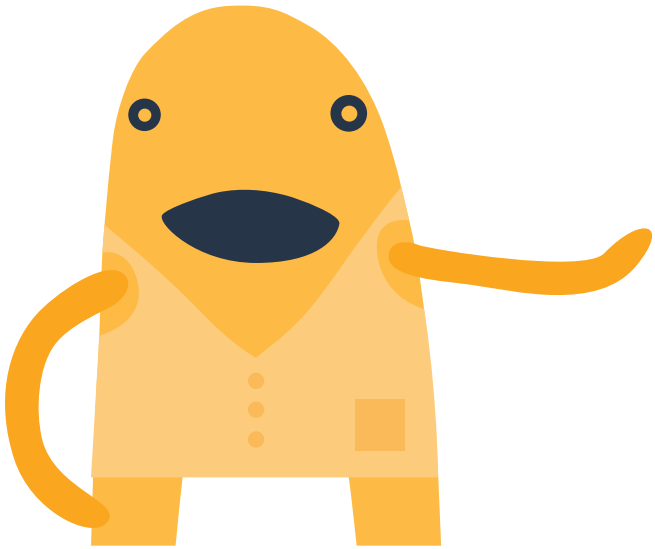
Scenario 4

"Sorry, you are going to have to leave because we weren't notified ahead of time that you were coming."

What the case law says:

- Parents are entitled to have other individuals present at the IEP meeting regardless of notifying the district
- "Other individuals" must have knowledge or expertise regarding the child
- Inform parents of their right and ask them to let the district know in advance

The real question in this scenario is whether parents have to notify the school that they are bringing someone. Does the law require them to notify school folks ahead of time with respect to whom they might be bringing? The answer is no, the law does not require it. Parents can invite all kinds of folks and do not have to give notice to the school folks that they are bringing their own attendees. However, you can always ask them to tell you ahead of time. In 1999, the regulations were updated to provide a change in the invitation to the IEP meeting. The invitation to the IEP meeting not only has to invite the parent and give a date, time, location and purpose of the meeting, but also has to notify parents that they have the right to bring people with knowledge or special expertise to the meeting with them. I have advised in working on form development and revision with clients that this is the perfect place to say, "Oh, if you are bringing somebody, could you please let us know ahead of time so that we can make proper arrangements and room arrangements and those kinds of things for people you may be bringing. Please let us know ahead of time." It's a great place to ask.



Scenario 5

"Okay, since everyone is still here, let's just take this to a vote since we can't seem to agree."

What the case law says:

- The IEP is a "consensus building" process
- The IEP is not a voting procedure – it doesn't matter how many people each side brings

This scenario touches on a different perspective in terms of invitees, but it's important. A lot of times, parents think that if they bring more people than the school will have, then they will "win" the IEP. In the same way, I know of a school principal who said, "I am going to stack the deck, I'm going to bring the nine people that support my position and when we vote on this thing, I will win the IEP." Well that isn't how the IEP process works. The US DOE has specifically said that *the IEP team decision making process is not a voting procedure, but rather it is a consensus building process*. By consensus, we are talking about unanimity. We are trying to work toward unanimity on all aspects of the decision making process during an IEP meeting with respect to all of the present levels, the student profile, goals and objectives, services, least restrictive environment — we work toward consensus in all those kinds of things. But at the end of the day, the school staff at the meeting is going to be ultimately responsible for proposing the IEP and what they believe is necessary to provide FAPE to the child. The parent can consider the proposal and decide whether to challenge it.

There are some states that don't allow a school district to proceed if a parent does not agree without requesting a due process hearing on a certain issue, putting the onus on the school district to request due process, but the federal regulation puts the onus on the parent to request a hearing challenging what the school system is proposing to do after receiving reasonable notice of a proposed IEP. It's important to keep this in mind, but at the end of the day, it is never a voting procedure.

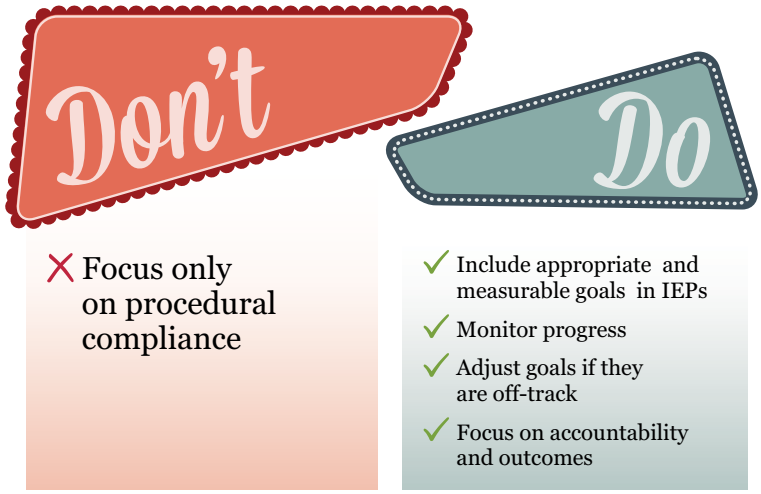
In the New York case *Sackets Harbor Cent. Sch. Dist. v Munoz*, the special education director at the IEP meeting actually took things to a vote when they couldn't agree on services to be provided to a particular child with autism. When the people raised their hands during the voting process, the director refused to count the votes of the people that the parent had brought to the meeting. When the parent filed her lawsuit, the court made it very clear that the IEP process is not a voting procedure; however, since the special education director took it there and took it to a vote, the court sent it back for a re-vote because the votes of the child's aide and therapist were not counted.

The IEP process is not a voting procedure. The team works collaboratively in an effort to meet consensus.

It is vital that school personnel are trained to develop appropriate and measurable annual goals and be prepared to explain why they are measurable and how progress is measured.

5. Content, Accountability and Outcomes

Our final Do is a content Do. While my practice is very process oriented, it is becoming more content oriented as the whole field of special education is moving toward a stronger focus on accountability and away from process. While process is always going to be vital, there has been a huge shift with Results-Driven Accountability (RDA) to look at outcomes for students with disabilities.



So, what are the Dos? Do:

1. Include appropriate and measurable goals in IEPs.
2. Be sure to measure them and change them if expected progress is absent.
3. Focus on accountabillity and outcomes.

There are a lot of other content Dos and Don'ts, but this one is at the top of my list when I am working to defend a particular district's proposed IEP in a FAPE case. IEP content is often challenged because of the lack of appropriate and measurable annual goals (and short-term objectives/ benchmarks, if included) and the inadequacy of the student's present levels of educational performance. It is vital that school personnel are trained to develop appropriate and measurable annual goals and be prepared to explain why they are measurable and how progress is measured. Similarly important is ensuring a process whereby progress on the goals is continuously monitored and whereby the IEP is revisited when progress is not on track.

Scenario 1

"I am not really sure where the student is functioning right now in this particular area in this particular domain, but I've got to write a goal for it so I'll just take a guess."

What the case law says:

- ✓ IEPs must document present levels of performance (evaluative data)
- ✓ Present levels of performance are needed to set appropriate goals and determine needed services

School attorneys don't have a very good record of defending things that are based on guesses. And I can tell you that courts do not feel comfortable deciding special education cases generally. I find that courts are always looking toward expert assistance. They are looking for solid data that indicates that a child is actually progressing. If I am going to demonstrate that second prong of Rowley whether the child is receiving meaningful educational benefit as this IEP is reasonably calculated to enable the child to do so, I'm certainly going to need to get ready with hard data with respect to the progress the child has been making in the program that I am defending. If I don't have that data, I am in poor shape to be able to defend that we have been providing FAPE to a particular student with a disability.

As an attorney, I believe I am not necessarily an expert in quality control in terms of writing good present levels of performance, which are vital to demonstrating that a child is making meaningful educational progress. Essentially what the courts say is that if you don't know where the child started in this particular domain with respect to this critical skill area, if you can't articulate the present level when you develop the IEP, how are you going to demonstrate to the parents that the child has progressed? Equally as important, how are you going to demonstrate that to a hearing officer or to a judge in a litigious situation? Present levels to me are the starting point for developing the measurable goals, short term objectives and benchmarks that are appropriate in a student's IEP. You need to do really, really good training for special education teachers and other service providers with respect to:

- The importance and role of present levels
- The need to articulate where the child is
- Having good, solid, updated evaluative and other data upon which the present level of educational performance is based

Present levels are not based on a guess. They are not based on informal observation or feelings from the teacher based on his or her experience. We need to have data to support the development of present levels in the critical skill areas and/or domains identified by the IEP team as important for the child.

Scenario 2

"He is making progress on these goals, I just know it."

If I could put witnesses on the stand and they could turn to the judge and say, "It is so because I know it," I would probably win every case, but unfortunately that's not the way it goes. Judges are very uncomfortable making decisions about the educational needs of students with disabilities in particular. You have to show them the data.

This means that goals need to be measurable. As a school attorney, I'm very concerned about being able to demonstrate the progress on the goal. More importantly, I am also concerned about whether the goal is measurable.

One thing that worried me in the last three authorizations of IDEA is the elimination of the requirement to include short term objectives and benchmarks to support the measurable goals in all IEPs. My understanding was that this was done to eliminate the paperwork burden and additional burdens for school teachers. I found this uncanny because I had never had teachers complain to me that this was part of their burdens. In fact, I am knowledgeable enough about some of the case law out there to know that many times the short term objectives and benchmarks saved the day when the goal was attacked for not being measurable.

The court would say, "Well, yeah, I don't think the team articulated that goal very well and on its face value, it doesn't look measurable. But I am looking here to these short term objectives and I am looking to these benchmarks that are being measured by the teacher and those make the annual goal measurable." So, I was somewhat dismayed when Congress decided to eliminate the requirement for short term objectives and benchmarks. Interestingly enough, I have a couple of clients who have held on to that requirement from the school system's perspective and I know that there are some states that actually held on that requirement as well, which I think is advisable based on any number of cases from 2006 to 2014 where the goals were upheld although vague because there were short term objectives and benchmarks that were being used to measure progress on those goals.

What the case law says:

- Having no measurable annual goals is "a serious omission"
- IEPs need specific short-term instructional objectives or benchmarks
- Goals should be "designed to meet" a child's needs

Bottom line: did child receive "educational benefit?"

Conversely, there are also cases that didn't contain appropriate goals at all and this in and of itself constituted an inappropriate IEP and therefore a denial of FAPE for the child. Note also that it's one thing to have a good, appropriate and measurable goal in an IEP, but if it's not actually measured, that is a problem (thus my emphasis here in terms of why progress reports important).

I was glad to see a requirement for progress reports that track progress on the goals for a student during the year. I was very glad to see that added to the law in 1999 because I felt like too many times it was too late when looking at a child's progress at the end of the year or at the annual review to say, "Oh well, look, all year he has not been making the progress that we hoped he would make," when we had a whole year that we should have been looking at that and reconvening to address the lack of progress.

Scenario 3

"So, we are supposed to be writing standards-based goals now. Well here is our state's curriculum guide. Let's just pick some grade-level goals from it and put it in this IEP."

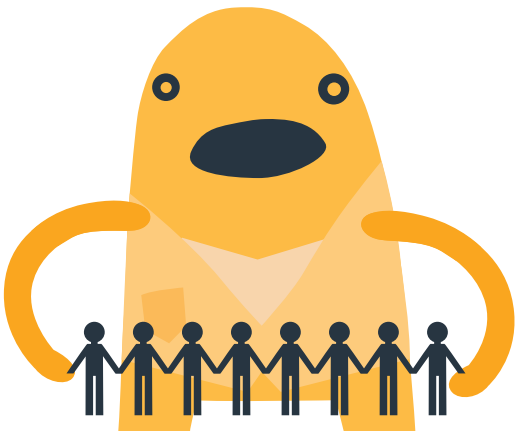
What the case law says:

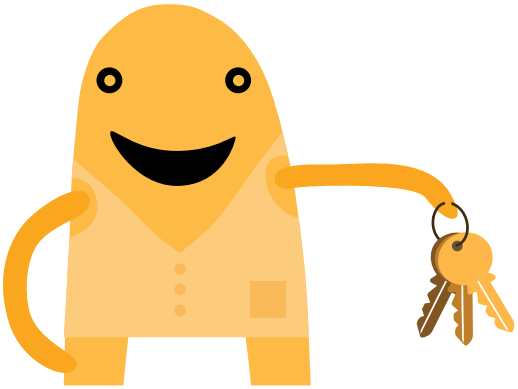
- ✓ "Stock goals" may result in denial of FAPE
- ✓ Non-individualized goals "fly in the face" of IDEA
- ✓ Individualization is key

Standards-based goals do not mean it is okay to have a cookie cutter IEP from the perspective of content. "Oh let's just pick some sort of grade-level goal from here; so he should be in the 9th grade from a pure grade perspective so let's pick a reading goal from 9th grade and put it in his IEP." This is not what is intended.

In *Jefferson Co. Bd. of Educ. v Lolita S.* in Alabama, the federal judge was very irritated by the district's use in the student's IEP of what the court called stock goals and services that looked like the school took a 9th grade reading goal because the student was chronologically supposed to be a 9th grader and planted it in his IEP. Unfortunately, the evaluative data reflected that the student read at a 3rd grade level. The court said this in and of itself clearly constitutes a denial of FAPE. It didn't help in this particular case that the court noted that the school team had also used another child's name in the IEP.

I am seeing a little bit of the mandate to write standard-based goals leading to unrealistic goals for students with disabilities and things that really are not meaningful for them because there is too much focus on and misinterpretation of the requirement to rely on and focus on standards in creating IEPs.





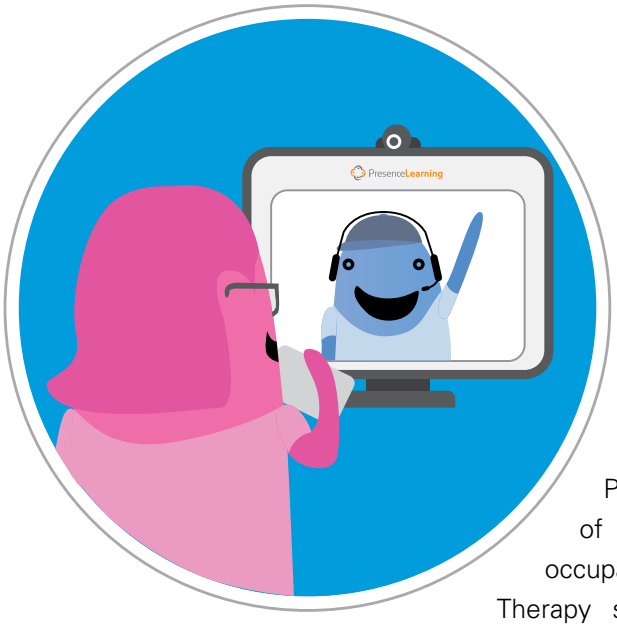
Three Key Takeaways

To ensure that a school district has offered FAPE to a child with a disability:

1. Avoid IEP process errors that deny parent decision-making, inputs or participation in the IEP process. Regardless of the quality of the IEP, such errors can be fatal.
2. Keep the "I" in IEP.
3. Assess present levels, set measurable goals and then measure progress. Review and revise goals as appropriate.

About Julie Weatherly, Esq.

Julie J. Weatherly, Esq. is the owner of Resolutions in Special Education, Inc. with attorneys in Birmingham and Mobile, Alabama. Julie is a member of the State Bars of Alabama and Georgia, and for more than twenty-six years, she has provided legal representation and consultative services to school districts and other agencies in the area of educating students with disabilities. In June of 1996, Julie appeared with Leslie Stahl on CBS news program "60 Minutes" to discuss the cost of meeting the legal requirements of the IDEA. She has been a member of the faculty for many national and state legal institutes and is a frequent speaker at special education law conferences. Julie has developed a number of videotape training series on special education law and has been published nationally as a part of her trainings, workshops and seminars. She is the author of the legal update article for the National CASE quarterly newsletter and is a member of LRP's Special Education Attorneys Advisory Council. In 1998, Julie was honored by Georgia's Council for Exceptional Children as Georgia's Individual who had Contributed Most to Students with Disabilities and, in April 2012, Julie received the National Council of Administrators of Special Education (CASE) Award for Outstanding Service.



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