

Special Education “Risk Management”

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A Word of Caution

No two legal matters are exactly alike. This material is designed to provide educators with information about certain aspects of the Individual's with Disabilities Education Act. This material does not cover every aspect of the law, and you are strongly encouraged to consult with your district's legal counsel regarding a specific case.

I. Overview

This material focuses on the written prior notice requirement of the Individuals with Disabilities Education Act (“IDEA”), and provides additional information regarding Team meeting minutes and other procedural components of the IDEA. The material also provides information about certain substantive requirements of individualized education programs (IEPs). This material does not cover every aspect of the law, and you are strongly encouraged to consult with your district’s legal counsel regarding a specific case.

II. Written Prior Notice

A. The Legal Framework

Whenever the local educational agency (“LEA”):

- a. proposes to initiate or change; or
- b. refuses to initiate or change

the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education (“FAPE”) to a child, it must provide the child’s parents with a written prior notice. 20 U.S.C. § 1415(b)(3). The Office of Special Education Programming (“OSEP”) has opined that a written prior notice is required whenever the District proposes to change the “type, amount, or location of the special education and related services being provided to a child.” Letter to Lieberman, 52 IDELR 18 (OSEP Aug. 15, 2008).

Graduation with a regular high school diploma is an example of an event that requires written prior notice. See e.g. 34 C.F.R. 300.102(a)(3)(iii) (graduation from high school with a regular high school diploma constitutes a change of placement, requiring written prior notice); Pocono Mountain School District, 111 LRP 77918 (Penn. State Educ. Agency Dec. 12, 2011) (same). In addition, written prior notice is required when a district seeks to conduct a functional behavioral assessment (FBA) to obtain information about the educational and behavioral needs of a specific student. Letter to Anonymous, 59 IDELR 14 (Office of Special Education Programs (OSEP) Apr. 9, 2012) (also noting that written prior notice would not be required when the purpose of the FBA was to assess the effectiveness of behavioral interventions *in the school as a whole*) (emphasis added); see also Letter to Chandler, 59 IDELR 110 (OSEP April 26, 2012) (opining that written prior notice is not required when a student moves from elementary school to middle school when such a change is the normal progression for all students, but noting that written prior notice would be required if the student would be attending a middle school that he/she would not normally attend).

Districts must also provide a written prior notice whenever they are agreeing to a change requested by the parents. Letter to Lieberman, 52 IDELR 18 (OSEP Aug. 15, 2008). Similarly, if a change is discussed during an IEP Team meeting, and the parent agrees with the change, the District must still provide the parent with written prior notice. Id.

Our State Regulations also require that a written prior notice be provided to parents when the LEA receives a written request for an IEP Team meeting from a parent, guardian, or adult student. See Ed 1109.06(b)(3) (if the LEA refuses to convene a Team meeting, it must provide written prior notice detailing why it refuses to convene the IEP Team). The written prior notice must be provided within 21 [calendar] days following the receipt of the written request for the IEP team meeting. Ed 1109.06(c).

The written prior notice must include:

- a. a description of the action proposed or refused by the agency;
- b. an explanation of why the agency proposes or refuses to take the action;
- c. a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- d. a statement that the parents of a child with a disability have protection under the IDEA's procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- e. sources for parents to contact to obtain assistance in understanding the provisions of the IDEA;
- f. a description of other options considered by the IEP Team and the reason why those options were rejected; and
- g. a description of the factors that are relevant to the agency's proposal or refusal.

20 U.S.C. § 1415(c)(1); see also 34 C.F.R. § 300.503(b); Ed 1102.05(p) (defining 'written prior notice' by reference to the above listed requirements).

For example, OSEP has opined that at the time a child is identified under the IDEA, the written prior notice must include the proposed category of disability. See Letter to Atkins-Lieberman, 56 IDELR 141 (OSEP Aug. 5, 2010).

The notice must be written in language “understandable to the general public, and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.” 34 C.F.R. 300.503(c)(1) (emphasis added). If the native language or other mode of communication of the parent is not a written language, the district must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; that the parent understands the content of the notice; and that there is written evidence that these requirements have been met. Id.

The LEA must provide the parents with a written prior notice within a reasonable time, but not less than 14 days, before the LEA proposes to initiate or change, or refuses to initiate or change, the referral, evaluation, determination of eligibility, IEP, or educational placement of the child or the provision of FAPE to the child. Ed 1120.03(a) (emphasis added).

Parents have 14 days from the date the written prior notice was sent to respond to sign documents included with the notice to indicate consent, consent with conditions, or denial of consent. Ed 1120.04(c). This time limit may be extended upon agreement of the LEA and the parents. Ed 1120.04(d).

The LEA must advise parents, in writing, of:

- The necessity of signing documents which describe actions requiring the parent’s consent for the purpose of ensuring the timely provision of appropriate services;
- The parent’s right to access all of the rights and procedures outlined in the IDEA if the parent disagrees; and
- The parent’s right to an extension of the 14-day time limit, provided the parent and the LEA mutually agree to such extension.

Ed 1120.04(e).

The written prior notice must be drafted in the parents’ native language, unless it clearly is not feasible to do so. 20 U.S.C. § 1415(b)(4).

All rights accorded to parents under the IDEA transfer to the student once the student has reached eighteen years of age, unless the student has been adjudicated incompetent. 20 U.S.C. § 1415(m)(1); Ed 1120.01(b). However, any notice required by the IDEA must be provided to both the parent and the

student.¹ 20 U.S.C. § 1415(m)(1)(A); 34 C.F.R. § 300.520(a)(1)(i); Ed 1120.01(b). These notice requirements include: written prior notice; notice of procedural safeguards, and notice of a due process complaint.

The written prior notice should clearly and accurately describe the LEA's proposal, or what the LEA has refused to do, in sufficient detail such that an independent third party (such as a Hearing Officer) could read the notice and understand:

- 1) What the LEA has proposed or refused
- 2) Why the LEA made the proposal or refused to take a requested action.

Frequently, written prior notices contain vague references to the reasons behind the proposals/refusals. For example, the notice may indicate that the reason for the proposal was "team discussion." While it may be true, this description does not explain why the team believed the proposal was appropriate (or why the Team was refusing to take action). In the event that the District team members are making a proposal or refusing to take action in an effort to reach a compromise with the parents, the written prior notice should indicate (at least in part) that the reason for the proposal was to reach a compromise.

If, after the initial provision of special education services, a parent revokes consent in writing for the continued provision of the services, the District must provide a written prior notice before ceasing the provision of special education and related services. Ed 1120.05(e)(2).

B. Recent Decisions

A failure to comply with the written prior notice requirements constitutes a procedural violation of the IDEA. Not all procedural violations rise to the level of a denial of FAPE. A procedural violation may result in a hearing officer finding that a district denied a FAPE to a child when the procedural violation:

- Impeded the child's right to a FAPE;
- Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or

¹ Students and parents must also be notified of the District's duties and obligations under the Rehabilitation Act. 34 C.F.R. § 104.32.

A parent or adult student may authorize an individual to act on their behalf pursuant to a duly executed power of attorney. Ed 1120.01(c).

- Caused a deprivation of educational benefit.

34 C.F.R. 300.513(a)(2).

In Pikes Peak Bd. of Cooperative Educ. Services, 9 ECLPR 15 (Colo. Educ. Agency 2011), the Colorado State Educational Agency found that providing parents with verbal notice as a substitute for written notice did not fulfill the prior written notice requirements of the IDEA, regardless of whether the verbal notice was substantively proper.

Facts: Student was a preschool student (under the age of 5) who was identified as eligible for services under the IDEA due to autism.

On October 5, 2010, the Student's IEP team met and developed an IEP for Student. The IEP provided that the school would provide direct support to Student's program and that student's parents would receive quarterly progress reports regarding student's progress on annual goals and objectives. At the end of the meeting, Parents rejected the placement offered by the Pikes Peak Board of Cooperative Education Services (BOCES) and notified BOCES that Student would continue receiving services at a private facility. Student did not attend school in the BOCES from October 5, 2010 through December 6, 2010, except for 4 days in mid-October while being evaluated.

Student returned to school in the BOCES on December 6, 2010 for a total of 6 days. On December 14, the BOCES convened an IEP meeting. The Parents received advance notice of the meeting and student's mother attended and participated. During the meeting, Student's mother raised some concerns and noted that some IEP goals relating to Student's participation in a peer group could not be implemented because Student had no access to age-appropriate peers in the special education classroom. In response to the student's mother's concerns, the special education director and the special education teacher proposed a trial period in which Student would spend mornings in the general preschool classroom and afternoons in a special education classroom.

The IEP team carefully considered how such a change might be implemented. Following this discussion, the special education teacher asked Student's mother if she would be open to the proposal. Mother agreed. The Team determined that the trial placement would begin after winter break and last for a number of weeks. The team would then reconvene to discuss progress. At the end of the IEP meeting, Student's mother stated that she preferred not to change the IEP. The special education teacher responded: "I just want to make sure, we'll leave it as it is, but we're still OK with starting January 3rd, [Student] spending half the day in the preschool." To which student's mother responded, "yes, that's fine." The IEP meeting did not result in substantial change to the IEP, and the trial placement was not included in the IEP. The BOCES did not prepare a Prior Written Notice reflecting the Trial Placement.

On December 26, 2010, Parents sent a letter to BOCES confirming the outcome of the IEP meeting, including the agreement the student would spend mornings in a general preschool classroom. On January 3, 2010, the BOCES began implementing the trial placement. Student made progress in the general preschool setting and on Student's IEP goals.

Issue: Whether BOCES violated the IDEA by failing to reflect the trial change of placement in the December 14 IEP, or by failing to provide prior written notice before the implementation of the trial placement?

Held: For parents. Even though the new placement was a trial and Student's parents were in full agreement with the change, the BOCES was required to document the change in the child's IEP or provide the parent with prior written notice.

The state educational agency explained that the IDEA does not carve out different categories of placement. "Whether a new placement is deemed 'temporary,' 'diagnostic' or an 'assessment period,' under the law, it must be reflected in the IEP." Accordingly, the education agency found that the district violated the IDEA by failing to note the change in the document. Further, verbal notice to the mother at the IEP meeting did not satisfy the prior written notice requirement. "The [prior written notice] requirement is unequivocal and recognizes no exceptions for 'personally' notifying parents of the proposed change." Thus, verbal notice at the IEP was not sufficient and amounted to a procedural violation of the IDEA. However, the agency found no evidence that these procedural errors denied Student a FAPE. The educational agency instructed the district to issue a prior written notice and amend the IEP to include the new placement.

In Fulton County School District, 111 LRP 33557 (Georgia Educ. Agency Dec. 12, 2010), the Georgia State Educational Agency held that prior written notice requirements were met where the notice contained the requisite description of the change in placement, reasoning for change, and assessments supporting it.

Facts: On September 2, 2010, and October 1, 2010, the District held IEP meetings at the request of the parents to discuss reports from Student's teacher regarding Student's progress at the beginning of the year. Student's parents attended each meeting, and they received copies of the March 2009 Fulton Parent Rights Document. The District's assessments indicated that Student's IEP needed to be amended.

The IEP Team proposed in both meetings to move her from first grade placement in an interrelated resource room and general education to a self-contained Mildly Intellectually Disabled ("MI") classroom for math, reading,

language arts, science, and social studies. For other portions of the school day, Student would be in general education, including for homeroom, lunch, recess, physical education, music, and art. The proposed placement would require a change in school location, and the team proposed an immediate placement change. Student's parents disagreed. They communicated frequently with the District regarding their right to disagree with the placement change.

On October 4, 2011, Student's father requested IEP documents and evaluations. The District provided them two days later. Parents filed a Complaint, primarily alleging that the District predetermined Student's placement and failed to provide prior written notice as required by the IDEA. After the filing of the Complaint, the District also provided Plaintiffs a letter entitled, "Prior Written Notice Concerning Issues Defined in Complaint/Request for Due Process Hearing."

Issue: Whether District predetermined Student's placement and whether District failed to provide Prior Written Notice?

Held: For District. The administrative law judge (ALJ) found that the undisputed facts did not support either of the parent's arguments. First, the District held two IEP meetings at the request of parents to discuss the parents' concerns regarding Student's progress. In those meetings, the District agreed that Student was not receiving an appropriate education and amended her IEP accordingly. Although Student's parents disagreed with the District's proposed placement, the ALJ stated that "a difference in opinion regarding the resolution does not create a predetermination."

Second, the ALJ found that the IEP documents provided to the father constituted prior written notice where the IEP contained the elements required by 34 C.F.R. § 300.503(b). The ALJ explained that further, even if the IEP documents had failed to provide prior written notice, the school district properly provided Plaintiffs a letter entitled "Prior Written Notice Concerning Issues Defined in Complaint/Request for Due Process Hearing" within 10 days of the Due Process hearing request. The ALJ accordingly found no procedural violations.

In Adams County School District, 55 IDELR 210 (Colo. Educ. Agency Aug. 13, 2010), the Colorado State Educational Agency found that failing to provide written prior notice in a parent's native language results in a procedural violation of the IDEA, because it prevents parents from participating in the decision making process.

Facts: The Student was eligible for special education and related services. Student's mother had lived in the United States for ten years. She could speak and write in English, but her ability to understand English was limited. Student's

father did not speak English. Parents further denied that English was spoken at home except between Student and Student's sibling

Student had an IEP for the 2009-2010 school year, which had been developed a year earlier when Student was enrolled in a preschool setting. The District convened an IEP meeting January 8, 2010. Parent received a copy of the IEP, written in English, on March 16, 2010. Parent was supplied with a Spanish version of the IEP in June 2010, after Parents had filed a complaint against the District.

The Complaint alleged that Student's IEP was implemented incorrectly due to expectations and perceptions of Parent over the course of the school year, and also alleged that Parent did not receive prior written notice because she was not given prior written notice in her native language. Parent alleged that despite her expectations, Student took all classes in English, Student was not given adequate support to enable Student to learn to interact appropriately with other students, Student was ignored and given tasks away from the other students, and Student did not receive therapy despite oral assurances.

Relevant Issue: Whether the District failed to provide Parent with prior written notice where it provided an English copy of Student's IEP two months after the IEP meeting?

Held: For parent. The state complaints officer (SCO) found that the District violated the IDEA's procedural requirements. While an IEP may provide sufficient information to supply a parent with prior written notice, an IEP will not satisfy the prior written notice requirement if it is not in a parent's native language and is not supplied in a timely manner. "The purpose of prior written notice is to ensure that a parent understands the special education and related services which the district is proposing or refusing to provide." Here, the SCO found that the school district did not supply the IEP to Parent until two months following the meeting, and that it failed to provide the parents with a copy of the IEP in their native language. The IEP therefor did not satisfy the prior written notice requirement of the IDEA. The SCO accordingly found that the District denied Student a FAPE because the failure to provide timely notice in their native language prevented Parent from having a meaningful opportunity to participate in decisions regarding Student's education.

In Robbinsdale Independent School District #281, 110 LRP 45546 (Minn. State Educational Agency 2010), the complaint investigator found that the District failed to provide parents with a written prior notice in response to their request for services.

Facts: The student, who was born in November 2007, was found to be eligible for early childhood special education and related services, because she met the eligibility criteria for deaf and hard of hearing. A January 2008 report

from the Children's Hospital indicated that the parents were interested in using, and encouraged to use, sign language with the student.

The District conducted an initial evaluation in February 2008. The child's IFSP team met on February 28, 2008, and the District issued a written prior notice that contained the following proposal: "Services are offered to [Student] as he qualifies due to his hearing loss." The reason for this proposal was "Home visits are offered to provide services in his natural environment." In the other options considered and the reasons why rejected section, the District indicated "Home visits are offered to provide services in his natural environment."

An Individualized Family Services Plan was developed in March 2008. That month, parents informed the District that the Department of Human Services ("DHS") would be providing their family with a deaf mentor.

The student's Team met again in September 2008. During that meeting, the student's parents told the District that they had not yet begun working with the DHS deaf mentor, but that they were going to begin doing such that month.

At parents' request, the student's team met again in December 2008, to discuss the services that were available to the student. After the meeting, the District provided parents with a written prior notice that contained the following proposal:

Services from the Deaf/Hard of Hearing Teacher will be increased to a frequency of 4 sessions per month for 45 minutes direct, 30 minutes indirect. Educational Audiologist time will increase to 60 minutes indirect 1 time per month.

The reason for the proposal was as follows: "Per parent request, services were discussed. The team felt that it is appropriate to increase services due to [Student's] needs as they have changed with his age and concerns with hearing aids." The other options considered were: "Keeping services as they currently [were] was considered and rejected as the team felt that [Student] would respond well to an increase in visits from the D/HH Teacher now that he is older."

In February 2009 and March 2009, parents informed the District that they were interested in ASL assistance for the Student and their family. In March 2009, the District proposed a new IFSP. The written prior notice indicated that the District was making the proposal because "An annual IFSP is due for [Student]." The proposal was based on "team discussion on 3/10/09. A parent/child group has been recommended by the team."

Parents rejected the District's proposal and requested mediation. After several mediation sessions, the parties reached agreement on an amended IFSP, which addressed ASL instruction. The IFSP was amended again in May

2010. DHS stopped funding the ASL mentor in August 2010, and the amendment included ASL services from August 2010 through November 2010. Thereafter, parents filed a complaint with the State.

Issue: Should the District have provided the parents with a written prior notice when it denied the parents' request for American Sign Language ("ASL") services?

Held: For the parents. The District's written prior notices should have addressed ASL services. As early as February 2008, parents had informed the District that they wanted to use ASL with the student. Although the District may have believed that another agency was providing those services to the family, the February 28, 2008 written prior notice should have included a description as to why the District was not proposing to provide ASL training to the family, and how that need would be met.

The District was not obligated to provide parents with the ASL services that they were receiving through DHS (at no cost to the parents); however, the District was obligated to document in the student's IFSP how the family's need for ASL was being addressed and to include information about the provision of ASL as part of its written prior notices that were provided in response to parental request for ASL services.

As a result, the District was required to provide training on written prior notices to its staff. The District was not required to provide compensatory ASL services because a May 2010 "agreement to extend ASL services for the Student's family from August to November 2010 addresses any harm that may have occurred due to the District's lack of notice surrounding the provision of ASL services to the family between March and September 2008."

As the following decision illustrates, districts do not need to provide parents with a written prior notice prior to a team meeting. In re: Student with a Disability, 110 LRP 30639 (Montana State Educational Agency 2010).

Facts: On November 19, 2009, parents wrote to the District, asking it to accept an addendum to their child's IEP. The proposed addendum alleged abuse by the District, requested an evaluation and treatment to be paid by the District, requested that the addendum be attached to the IEP as a "parent addendum," and asked for a current copy of the complete IEP.

On December 4, 2009, the District wrote to the parents, informed them that it did not agree with the proposal and that the proposal would need to be discussed at a Team meeting. The parents declined to meet with the District, and asserted that the District should provide them with a written prior notice prior to a Team meeting. Parents filed a complaint with the State Educational Agency.

Issue: Did the District violate the IDEA by failing to provide the parents with a written prior notice pertaining to their proposed IEP addendum, prior to an IEP Team meeting?

Held: For the District. As of the date the complaint was filed, the District had not proposed or refused to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. Any such action would occur after the Team discussion on the matter. “A proposal or refusal to take certain action is generally agreed upon at an IEP meeting. Then, before it is implemented, the District must issue” a written prior notice. The SEA also quoted the comments of the U.S. DOE:

Providing prior written notice in advance of meetings could suggest, in some circumstances, that the public agency’s proposal was improperly arrived at before the meeting and without parent input.

Id. (quoting Fed. Reg., Vol. 71, No. 156, Aug. 14, 2006, p. 46691).

The case of Buffalo Lake-Hector Independent School District #2159, 110 LRP 44953 (Minn. State Educational Agency 2010) illustrates the importance of providing a detailed explanation of the reason for the proposal or the refusal.

Facts: During an April 14, 2009 meeting the student’s IEP Team discussed ESY and completed an “ESY determination” form. The ESY determination form indicated that the student would receive eight 2-hour sessions of ESY during the summer of 2009. The form indicated that the child required ESY services to “maintain self-sufficiency skills in the area of communication, motor skills, and emerging academic skills.” The District did not send parents a written prior notice.

After the meeting, the parents wrote to the District, indicating that during the prior summer, the student had received a total of 14, two-hour sessions of ESY, and requested that the team meet to discuss additional services, as well as whether the child could receive ESY services in District B.

The child’s team reconvened on May 4, 2009. The IEP team discussed ESY services and the location of services. The District drafted a written prior notice that indicated that ESY services would be provided in District B. Under the explanation section, the District wrote:

The parents requested the goal revision. The team determined that [ESY] should be with peers, as the goals involve social interaction. Since [Student] was did not have other students qualify for [ESY] interaction [sic] similar to [Student’s] age and/or disability, [District B] was the best option for peer interaction [sic].

The written prior notice did not set forth the amount of ESY services to be provided to the Student in District B. In addition, the written prior notice did not address the parents' request for additional ESY services.

After the meeting, parents again requested 14 sessions of ESY, and that the services be provided at District B. On June 15, 2009, the District provided the parents with a written prior notice, which indicated, in part, that:

The District refuses to provide 14 sessions of [ESY]. The district asserts that 8 sessions, two hours each is what the team agreed to on May 4, 2009.

Under the explanation section, the District wrote:

. . . the team had discussed [ESY] and agreed that 8 sessions was the amount reasonably calculated to maintain [Student's] skills throughout the summer based on data regarding progress, data regarding regression over breaks, the student's age, and the student's disability. The district also maintains that [Student] is not entitled to 14 sessions of [ESY] simply because District B is able to provide services for 14 sessions. Services for [ESY] must be determined based on the individual needs of each student to maintain progress throughout the summer.

ESY services began on June 16, 2009. The District provided the student with 8, two-hour sessions of ESY (at District B) during the summer of 2009. Parents filed a complaint with the SEA.

Issue: Did the May 8, 2009 written prior notice provide the parent with an explanation of why it refused to provide the additional ESY services requested by the parent?

Held: For the parent. During the investigation, the SEA found that the District failed to provide the parent with written prior notice after the April 14, 2009 meeting when the Team discussed ESY services, and the district proposed 8 two-hour sessions. The May 4, 2009 written prior notice was deficient because it did not include the number of proposed sessions and hours of ESY services, and what those services would include. "Even if the District believed that the Complainant was in agreement with the amount of ESY services set forth in the ESY Determination form, the prior written notice dated May 4, 2009, should still have included that information to document the proposed action."

The revised written prior notice that the District provided to the parents on June 15, 2009 was sufficient, however it was not provided within 14 days of the proposed action.

As a result, the District was required to provide its case managers with training.

In the case of Millay v. Surry Sch. Dep't, 2010 WL 1634311, 54 IDELR 191 (D. Me. 2010), approving the order in Millay v. Surry Sch. Dep't, 2009 WL 5184388 (D. Me. Dec. 22, 2009), a District's failure to include notice of a proposed placement proved costly.

Facts: YRM is a deaf-blind student. From 1999-2005, she participated in a full-day, special education life skills program at Surry Elementary School. She participated in many mainstream activities. The 2004-05 school year was a difficult one, and YRM's team made plans to refer her to a residential placement at the Perkins School for the Blind, in Massachusetts, for the 2005-06 school year.

YRM did not adjust well to residing at Perkins, and, after several self-injurious behaviors, her parents withdrew her from the school during the spring of 2006. YRM's team determined that she would return to Surry Elementary School. During the period of May 8 through May 16, YRM was to attend Surry for one hour per day, in order to transition back into the school. However, the District failed to make arrangements for YRM, and she was "relegated . . . to a small room where she could be observed by a special education staff member for the one hour that her 'program' entailed." YRM's self-injuring behaviors continued, and her parents removed her from the elementary school.

Although YRM's team reached agreement on ESY, the District did not convene a team to discuss her IEP for the 2006-07 school year. At a September 2006 Team meeting, the District informed the parents that the only placement available was at Surry Elementary School. In the alternative, the District would provide home-based services. The parties did not reach agreement.²

In June 2007, YRM's team met on two occasions. During the second meeting, the District's attorney proposed placement at Perkins; however, Perkins staff were not in attendance at the meeting to address the proposal. Parents rejected the proposal based on YRM's prior difficulties. At the end of the meeting, Surry proposed an IEP that stated "'due to her significant needs with behavior, [YRM] requires specialized instruction and a distraction free environment,' and that YRM 'requires placement in a day treatment program such as Stillwater Academy.'"

The team met again in August. The IEP referenced a "day treatment program," but did not specify a specific program.

² In the meantime, parents filed a complaint with the DOE regarding several alleged issues.

Parents requested due process, alleging that the District failed to provide YRM with a FAPE. The Hearing Officer framed the issue as follows: “Whether the 2007-2008 IEP could be implemented appropriately in the Surry Elementary School or in any of the other placements offered by the school.”

The hearing officer concluded that the “*offer* of placement at Perkins was an appropriate placement *decision*,” and that placement in the public school setting was inappropriate. 2009 WL 5184388 at *12 (italics in original). Parents appealed.

Held: For the parents. Although the District verbally offered to place YRM at Perkins, the IEPs proposed by the District referenced day treatment facilities, and not Perkins. “The hearing officer’s disregard of the placement determination actually specified in Surry’s [IEP] in order to focus on the best possible (albeit most restrictive) educational programming was legally erroneous because it effectively jettisoned the balance between educational benefit and least restrictive environment ostensibly reflected in the written [IEP].” Id. at *22.

The magistrate judge went on to state:

If Surry wished to order a Perkins placement, it was obligated to describe the factors that necessitated that placement. In fact, the notice Surry sent to [parents] can only fairly be read as rejecting a Perkins placement on the ground that [Parents] refused it for medical reasons. The hearing officer should not have permitted Surry to resurrect a proposal rejected in the collaborative process and never properly justified in writing.”

Id. at *23. This decision was affirmed by the court in Millay v. Surry Sch. Dep’t, 2010 WL 1634311, 54 IDELR 191 (April 21, 2010).

In Independent Sch. Dist. No. 281 v. Minnesota Dep’t of Educ., 48 IDELR 222, 2007 WL 2774337 (Minn. Ct. App. Sept. 25, 2007), the Minnesota Court of Appeals held that a school district could not discontinue adapted swimming classes without providing prior written notice.

Facts: The district provided “developmental-adapted-physical-education (DAPE) swimming services to high-school special-education students until the 2005-06 school year.” The instruction was provided during the regular school day at off-campus locations, and was provided in addition to the regular weekly schedule of other DAPE services at the students’ home schools. During the 2004-05 school year, the District retained a consultant who undertook study of the DAPE swimming program and prepared a written report. The report recommended that “because students were removed from ‘general education classes or necessary special education services’ in order to have time for

transportation, changing, and instruction, DAPE swimming services at the high-school level should be discontinued for the 2005-06 school year.”

In March 2005, district staff were informed by the administration that DAPE swimming would no longer be provided to high school students, and would be provided to middle school students as part of general physical education swimming.

In April 2005, the district sent a letter to parents of students who received DAPE swimming and informed them that the district was reviewing the program, and that there would be continued meetings and that “final decisions have not been made.”

The last DAPE swimming class was held in June 2005. In September 2005, during a board meeting, several parents voiced their opposition to the discontinuation of the services. Following that meeting, the district wrote to the parents, indicating that “a decision has been made about changes” about the swimming program, and that a Team meeting would be scheduled to discuss those changes. These meetings were scheduled, and parents were informed that the swimming lessons had been cancelled effective in June 2005.

A parent of a student who received those services filed a complaint with the Department of Education, on behalf of all students who had received the services, alleging that the District violated the IDEA by “unilaterally remov[ing]” the swimming lessons from the high-school students’ IEPs. The Department found in favor of the parent and ordered the district to provide all of the impacted students with one year of compensatory swimming services, and to restore the service to the students’ IEPs. The district appealed.

Held: For the parents. The IDEA requires written notice be provided to parents before a change in a student’s educational program. The notices provided by the district were deficient because they did not specifically inform the parents that the lessons were being discontinued and the same letter was sent to all parents – nothing was individualized for the students impacted by the change.

The case of In re Student with a Disability, 110 LRP 54899 (Wy. SEA April 1, 2010) illustrates the need to provide written prior notice for certain changes in class schedules.

Facts: Student was identified as having a cognitive disability under the IDEA. He received the majority of his instruction in a special education resource room and attended general education classes for art, music, or other socialization opportunities. His IEP for the 2009-2010 school year included, among other things, a statement that the student would receive “regular physical education.”

At some point during the school year, student's schedule was changed, and his PE class was replaced with an art class. Parents were not informed of the change. The student handbook indicated that PE was an elective, and not a required course. Parent filed a complaint with the Department of Education, alleging, among other things, that the District violated the IDEA by failing to provide written prior notice of the change from PE to art class.

Held: For the parent. The Student's IEP included PE and he had an IEP goal pertaining to maintenance of gross motor skills. Since he was enrolled in PE, and it was included in his IEP, along with a goal to address gross motor skills, he should not have been removed from the class without a Team meeting and a written prior notice to the parent. At a minimum, the Team should have considered how his gross motor needs would be met without PE, or if supplementary aides and services were necessary to help him participate in PE.

The District was ordered to convene a meeting to make that determination and to provide training to staff regarding IDEA requirements.

A similar issue occurred in St. Paul Public School District # 625, 113 LRP 23562 (Minn. SEA March 28, 2013), where a student's IEP required 330 minutes per day of special education. The District changed the student's schedule, removing him from a special education class and placing him in a general education class, without prior written notice to the parent. Following the change, the student, who had severe behavioral issues, was suspended for assaulting a staff member and throwing a desk. After the suspension, the student was removed to an interim alternative setting for 45 school days. Parent filed a complaint with the DOE, and the complaint was determined to be founded. The DOE found that the district should not have moved the student from special education classes to general education classes without providing parent with written prior notice. The district was ordered to provide staff training and compensatory education services to the student.

In contrast, in Coeur D'Alene Sch. Dist. No. 271, 113 LRP 40219 (Idaho SEA Sept. 25, 2013), the district was not required to provide written prior notice before changing a bus schedule. Although the student's IEP included bus transportation, it did not specifically require that the student be picked up at a certain time, or that the student ride the bus with specific children. Thus, the district could alter the bus schedule without providing parents with written prior notice of the change.

Finally, the case of A.B. v. San Francisco Unified Sch. Dist, 51 IDELR 158, 2008 WL 4773417 (N.D. Ca. Oct. 30, 2008), illustrates the need to respond to parental requests for additional services.

Facts: During the summers of 2004 through 2006, the student qualified for extended school year (ESY) services. During each summer, the team offered

programming in the district, for a specified number of days and hours per week. Each summer, parent informed the district that student would be attending a private camp during the summer. In 2006, parent also informed the district that the student would be receiving Lindamood Bell services and private music therapy, and that she would be seeking reimbursement for those services. During all three summers, the District did not convene a meeting to discuss the parent's unilateral placement.

Parent filed suit against the district, alleging, in part, that the district failed to provide proper written prior notice pertaining to the ESY proposals.

Held: For the parent, in part, and the district, in part. The hearing officer found that although the district did not specifically "reject" the parent's summer camp placement, it provided the parent with sufficient detail and information about its own proposal, to establish that the district had provided the parent with sufficient information about the ESY proposal.

However, the district did commit a procedural violation when it did not issue a written prior notice in response to the parent's statement that she would be providing Lindamood Bell services, and private music therapy during the summer. The district should have discussed whether the additional services provided by the parent were necessary for a FAPE, and issued a written prior notice regarding those services. Ultimately, however, the error was deemed to be "harmless" because it did not deprive the child of educational benefits or impact the parent's right to participate in the process.

III. The Special Education Process, Meeting Minutes, and Deadlines

A. The Special Education Process

As set forth in the New Hampshire regulations, the sequence of the special education process is as follows:

- Referral (see Ed 1106);
- Evaluation (Ed 1107);
- Determination of eligibility (Ed 1108);
- Development and approval of the IEP (Ed 1109-Ed 1110);
- Placement (Ed 1111-Ed 1112);
- Ongoing monitoring of the IEP (Ed 1109); and
- Annual review of the IEP (Ed 1109).

Ed 1104.01.

Parents should be invited to all meetings pertaining to the provision of a free, appropriate public education to a student, with the exception of the following: informal or unscheduled conversations among district staff,

conversations about teaching methodologies, lesson plans, or coordination of service provision, and preparatory activities for the purpose of developing or responding to a proposal that will be discussed at a subsequent meeting. 34 CFR 300.501(b).

A district may conduct an IEP Team meeting without a parent in attendance, however, the district must keep a record of its attempts to arrange a mutually agreed on time and place, such as:

- Detailed records of telephone calls made or attempted and the results of those calls;
- Copies of correspondence sent to the parents and any responses received; and
- Detailed records of visits made to the parent’s home or place of employment and the results of those visits.

34 C.F.R. § 300.322(d); Ed 1103.02(c).

B. Meeting Minutes

Meeting minutes are a record of the Team meetings. Minutes chronicle the IEP Team's discussions, while the IEP records the decisions and programs to be implemented. Although minutes are not required by the IDEA, keeping minutes is a common and recommended practice, and the New Hampshire regulations require meeting minutes be submitted to the Department of Education when a Team seeks approval to implement an IEP at home for more than 45 days. See Ed 1111.05(h)(3) (requiring submission of the “Minutes of the IEP team meeting at which the decision to implement the home instruction was made, including: a. The basis for the decision as set forth in Ed 1111.05(g)(1); and b. A list of the specific documentation reviewed by the team such as physician’s reports, test results, reports of professionals knowledgeable about the child’s disability, [and] pertinent information from any other relevant source”). Minutes ensure that what is agreed to in an IEP meeting is clear among all parties.

At a minimum, minutes should identify the individuals who attended the meeting by name and title (i.e., LEA, teacher, etc.) and contain sufficient detail to provide the reader with a general description of the discussions that occurred at the meeting. Minutes should include the basis for any decision, a description of any disagreements occurring in the meeting, a list of any documents reviewed by the Team, and, if applicable, the current state of student’s progress and how the student’s progress is measured. See e.g., Los Angeles Unified Sch. Dist., 106 LRP 49258 (Cal. Educ. Agency June 2, 2006) (noting that IEP meeting minutes contained an insufficient description of current progress where there was no indication of how student’s “improvement” was measured and merely referred back to the discussion in an IEP three months earlier).

School districts have discretion to adopt policies allowing, requiring, prohibiting, or limiting the use of audio or video recording in IEP meetings. Letter to Anonymous, 40 IDELR 70 (OSEP June 4, 2003). If a district chooses to limit the use of recording equipment, it should apply the policy uniformly and provide exceptions to ensure that a parent understands the IEP process. Id.

Parents have a right to request amendment of education records if they believe the records are “inaccurate or misleading or violate[] the privacy or other rights of the child.” 34 C.F.R. § 300.618.

If a parent requests amendment of education records, including IEP Team meeting minutes, the school must either grant or deny the request within a reasonable period of time. 34 C.F.R. § 300.618. A request to amend IEP meeting minutes can be satisfied by adding an addendum to the minutes. In Houston County (GA) School District, the Office for Civil Rights found that a school district adequately accommodated a parent where the District regularly provided accurate copies of IEP minutes to the parent and offered an opportunity to have any “alleged inaccuracies or discrepancies of related documents considered for revisions and/or have her concerns placed in the Student’s special education file” as an addendum. Houston County (GA) School District, 107 LRP 71556 (OCR Atlanta Aug. 21, 2006).

If a District denies a request to amend the information as requested by the parents, parents must be informed of their right to a hearing. 34 C.F.R. §§ 300.618, 300.619.

C. Deadlines

The IDEA contains numerous deadlines by which various actions must be completed. As a general rule, the word “days” means calendar day, unless otherwise indicated as a business day³ or a school day⁴. 34 C.F.R. 300.11(a); Ed 1102.02(a) (defining “day”). These deadlines include:

- Written notice of a team meeting must be received by parents no fewer than 10 days before an IEP meeting. Ed 1103.02(a). Parents may waive this requirement, in writing. Ed 1103.02(b).

³ “Business day” means “Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day, as in Section 300.403(d)(1)(ii)).” 34 C.F.R. 300.11(b); Ed 1102.01(o).

⁴ “School day” means “any day, including a partial day that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities.” 34 C.F.R. 300.11(c); Ed 1102.05(a).

- If the purpose of the meeting is a manifestation determination, then parents must receive written notice at least 5 days before the meeting. Ed 1103.02(a). Parents may waive this requirement, in writing. Ed 1103.02(b).
 - A manifestation determination must be held within 10 school days of any decision to change placement because of a violation of a code of student conduct. Ed 1102.03(s); Ed 1124.01; 34 C.F.R. 300.530(e).
- 15 days (from the receipt of the referral) to hold a disposition of referral meeting. Ed 1106.01(d).
- 15 days (from the receipt of the referral) to give the parent written prior notice of the disposition of the referral. Ed 1106.01(e).
- 45 days to complete the evaluation process. Ed 1107.01(c). Upon written consent, the time limit may be extended by “no more than 15 days.” Ed 1107.01(d).
- Upon determining that a child is eligible for services, the District has 30 days to meet to develop an initial IEP. Ed 1109.03(a); 34 CFR 300.323(c)(1)-(2).
- A written prior notice must be provided to the parents within a reasonable time, but not less than 14 days, before the LEA proposes to initiate or change, or refuses to initiate or change, the referral, evaluation, determination of eligibility, IEP, or educational placement of the child or the provision of FAPE to the child. Ed 1120.03(a) (emphasis added).
- Parents have 14 days to respond to a written prior notice. Ed 1120.03(a); Ed 1120.04(c). If a parent fails to respond within 14 days after the date that the written prior notice was sent, the LEA “shall implement its proposed changes if the LEA has taken reasonable measures to obtain informed written consent.” Ed 1120.06(a).
 - Reasonable measures include:
 - Documentation of telephone calls to the parent made or attempted and the results of those calls; and
 - Copies of correspondence sent to the parent and any responses received, which correspondence shall be

sent certified mail, return receipt requested. Ed 1120.06(b).

- Upon request from parents, the LEA must provide access to test results and other relevant educational materials 5 days prior to a Team meeting. Ed 1107.04(d).
 - The regulations do not define “other relevant educational materials.” The determination of which documents are “relevant” should relate to the purpose of the meeting.
- Upon receipt of a written request for an IEP Team meeting, the LEA has 21 days to either schedule a meeting, convene a meeting, or provide a written prior notice detailing why it refuses to convene the IEP Team. Ed 1109.06(c).
- Parents must be permitted to review their child’s educational records within 45 days of the date the request was received. Ed 1119.02(a).

These deadlines are procedural requirements. Failure to comply with these deadlines, as with the IDEA’s other procedural requirements, may constitute a substantive denial of FAPE if:

- The failure to comply with the deadline(s) impeded the child’s right to a FAPE;
- Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or
- Caused a deprivation of educational benefit.

34 C.F.R. 300.513(a)(2).

The case of Salem-Keizer School District, 52 IDELR 149 (Oregon State Educational Agency 2009) illustrates the requirement for the 10-day notice of a team meeting. In that case, the parents alleged that the District violated the IDEA by failing to provide them with a written notice of a team meeting.

The SEA found that the parents enrolled their child in the District on January 5, 2009 and requested that the District convene a team meeting before the student started school. The District contacted the parents by telephone on January 8, 2009 and again on January 9, 2009. They agreed to convene a team meeting on January 15, 2009. The District confirmed the meeting over the phone with the parents on January 12, and again on January 14, 2009. During the

January 14, 2009 conversation, the District provided the parents with the names of the meeting attendees.

The District provided the parents with a written notice of team meeting on January 15, 2009. Parents and the district disagreed as to whether it was provided at parental request; however, they agreed that the District offered to re-schedule the meeting. Parents declined so as to avoid delaying the student's enrollment.

The SEA found that the District failed to comply with the requirement that it provide the parents with 10 days written notice of a team meeting. However, the District's failure did not impact the parents' ability to participate in the meeting. Parents were aware of the meeting, attended and participated in the meeting, and could have rescheduled the meeting to obtain prior written notice. "However, the [SEA] finds that the Parent's actual participation in the meeting does not abrogate the District's obligation to provide written notice of the meeting in advance." As a result, the District was required to review and, if needed, revise its policies and procedures concerning its obligation to provide written prior notice of Team meetings.

See also Baltimore City Public Schools, 7 ECLPR 93 (Md. State Educational Agency 2009) (finding that the District failed to comply with the IDEA by failing to include the District's attorney on the list of individuals invited to the Team meeting, but holding that the violation did not impact the parent's right to participate in the meeting because, at the beginning of the meeting, the team postponed its discussion of the parent's request for compensatory services and the attorney immediately left).

IV. Individualized Education Programs ("IEP")

The IEP is "a written statement for a child with a disability that is developed, reviewed, and revised in accordance with" the IDEA. Ed 1102.03(h); 34 CFR 300.22.

The IDEA contains numerous requirements – procedural and substantive - pertaining to IEP development, review, and revision, including, but not limited to, the following:

- Parental participation;
- Contents (described in Ed 1109.01); and,
- Timing and duration of the IEP.

These requirements are described in detail in the State regulations. See e.g. Ed 1109.

As a checklist for adequacy under the IDEA, school districts must ensure that instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's Individualized Educational Program ("IEP").

Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

A court's inquiry in suits brought under the IDEA is twofold. First, has the School District complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? The Court's inquiry is really no different than the inquiry that every teacher should make when providing instruction to a student who has been identified as having an educational disability: **Is what I'm doing reasonably calculated to enable this student to make educational progress?**

In *D.B. v. Esposito, et al.*, 58 IDELR 181, 2012 U.S. App. LEXIS 6099 (1st Cir. March 23, 2012), the First Circuit discussed the standard of review for determining whether a school district has offered FAPE.

Facts: D.B. is a disabled child who lives with his parents in Sutton, Massachusetts. From 1999 until 2005, D.B. was a student enrolled in the Sutton public school system. In 2005, dissatisfied with the educational services D.B. was receiving, his parents removed him from the Sutton public schools and enrolled him in the Lindamood-Bell Learning Center. The Sutton schools responded by seeking a determination from the independent hearing officer of the Massachusetts Bureau of Special Education Appeals that it had complied with the IDEA. D.B. and his parents sought reimbursement for the costs of D.B.'s private education.

The hearing officer ruled for the Sutton school system and the parents filed a law suit in Massachusetts State Court which was later removed to the United States District Court. The District Court upheld the hearing officer's decision on summary judgment and the parents appealed to the First Circuit Court of Appeals.

D.B. has a significant disability which affects not only his speech, but his expressive and receptive communication, reading focus and overall cognition. D.B. received early intervention services from infancy until he entered the Sutton public school system in the fall of 1999, whereupon he received his first annual IEP. The progress made by D.B. was slow and despite making some

developmental progress, as the court indicated “D.B. still lagged far behind his classmates in important ways. The areas of deficit included toileting skills and the inability to cultivate foreign language skills, comparable to those of his classmates. Subsequent evaluations of D.B. produced recommendations that he “was a good candidate for a multi-sensory, structured learning program . . .” It was against this backdrop that the First Circuit Court of Appeal heard this case.

Held: For the district. The First Circuit’s decision addresses two major areas of the law. First, it discusses the First Circuit standard for FAPE. Second, it addresses the circumstances under which a parent may maintain a Section 504 claim for money damages.

The court’s opinion opens by addressing the legal issue as to how one should assess the educational benefit of a child’s IEP. The court’s analysis endorses the Third Circuit’s position that “[t]he educational benefit of a child’s IEP ‘must be gauged in relation to the child’s potential.’” The court affirms the Third Circuit’s general statement of the law, but goes on to note that “Developmental disability takes many forms, however. It is not always feasible to determine a disabled child’s potential for learning and self-sufficiency with any precision, particularly where the child’s disability significantly impairs his or her capacity for communication.”

The court observes that, “[i]n that situation, even without a complete understanding of the upper limits of the child’s abilities, there can still be an assessment of the likelihood that the IEP will confer a meaningful educational benefit by measurably advancing the child toward the goal of increased learning and independence. If an IEP is reasonably calculated to confer such a benefit, it complies with the IDEA.”

The court next discusses the circumstance where a child’s potential might be unknowable, observing, “[f]or example, if a child’s potential is unknowable, his or her IEP still could be reasonably calculated to confer a meaningful educational benefit if it is closely modeled on a previous IEP pursuant to which the child made appreciable progress.” In its analysis, the court suggests that while a child’s needs change over time, “if the two IEPs are substantially similar in design, that similarity provides a reasonable basis for assessing the likelihood of future progress.”

After discussing the legal question of determining meaningful educational benefit, the court addresses the factual question of whether the District Court erred in finding that D.B.’s potential was “unknowable.” The First Circuit finds sufficient evidence from expert evaluators such that “It was very difficult. . .to gauge [D.B.’s] potential in terms of his language skills,” as indicators that the District Court did err in reaching the finding.

Finally, the court looks to the mixed question of law and fact as to whether or not the 2005 IEP complied with the IDEA because it was reasonably calculated to confer a meaningful educational benefit. The court affirms the process whereby “The District Court also looked to D.B.’s progress under his previous IEPs and ‘agree[d] with the IHO that this progress, even if less than optimal, was likely to continue under the new IEP and would have been sufficient to satisfy the IDEA.”

A. Generalization of Goals and Objectives

Doe v. Hampden-Wilbraham Regional School District, 54 IDELR 214, 715 F.Supp. 2d 185 (D.Mass. May 25, 2010), involved an allegation that the proposed IEP was not appropriate because (among other things) it failed to address behavior that occurred at home.

Facts: Joseph Doe, a twelve year old with autism, attended the District’s public schools from 2002 through June 2007. Joseph’s 2006-07 IEP expired in March 2007; the District scheduled an IEP meeting for March 21. Prior to the meeting, parents received a written evaluation from the District, which showed that Joseph had not progressed as much as parents hoped. After receiving an evaluation that indicated that the Student had not progressed as much as expected, Parents cancelled the Team meeting approximately 10 minutes before it was scheduled to start, and they did not attend a second meeting scheduled for May 23, 2007.

In June 2007, parents requested an emergency Team meeting to discuss Joseph’s educational services and his IEP for the 2007-08 school year. The District was not able to schedule a meeting in June. On June 28, parents rejected the District’s summer services and unilaterally placed Joseph at a private day school. During the time period between March 2007 and June 2007, the District continued to implement the 2006-07 IEP (which had expired in March).

Throughout the summer, the District and the parents attempted to schedule an IEP meeting, but were unable to agree on a date. Parents filed a request for due process on August 3. The District continued to attempt to schedule an IEP team meeting, but was not able to reach agreement on a date. Ultimately, it scheduled a meeting for September 17. The parents contacted the District on September 12 and told them not to hold the meeting. The District encouraged parents to attend, but they did not. Thus, the meeting was cancelled.

The Team finally met on October 11 and 24 to develop a new IEP for the 2007-08 school year. Parents rejected the IEP in January 2008. Parents believed that the IEP should have contained: 1) specific behavioral recommendations (due to the nature and severity of the Student’s interfering

behaviors at home and at school); 2) plans for generalization of skills to different settings; 3) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable.

The hearing, which had been postponed by agreement of the parties, occurred over nine days from January 2008 through July 2008. The hearing officer issued a decision in September 2008, in which he found (in part) that the 2007-08 IEP was appropriate and the parents were not entitled to reimbursement for their unilateral placement. Parents appealed.

Issue: Whether the 2007-2008 IEP was reasonably calculated to provide the Student with a FAPE.

Holding: For the District. There was ample evidence in the record to support the hearing officer's findings that the IEP addressed Joseph's special education needs by proposing to utilize numerous teaching methodologies and different teaching systems, and provided him with the opportunity to interact with his peers.

The IEP also included "steps the district must take to decrease Joseph's interfering behaviors and keep him on task and productive. The IEP lists accommodations necessary to ensure Joseph stays on school tasks, including clear and consistent routines and expectations, preferential seating near the teacher and away from distractions, directed, supported play opportunities, guided support through transition periods, behavior plan for time on tasks and engagement in activities, and positive reinforcement during the day." The IEP also contained a behavior goal.

Although the IEP did not address how to deal with behaviors that occurred at home, the IEP focused "on what can be done in the environment that the school district can control – school itself. In setting goals for how to minimize Joseph's disruptive behavior at school, it would be reasonable to expect that this work would translate into better behavior at home as well."

The IEP also contained statements of the special education and related services and supplementary aids and services that the District would provide to the student. Those included: "language-based curriculum, multi-model approach, pairing visualized with auditory instruction, 1:1 teaching, reinforcement of mastered items, discrete trial format, direct instruction, intensive instruction based on applied behavior analysis, small groups, models, prompts, guided support, sensory diet, modified fourth grade curriculum, direct 1:1 speech/language therapy each day, and a 1:1 assistant in all settings."

Finally, the IEP included plans for generalizing skills to different settings. Among other things, it called for the Student to work on gross motor skills during

PE and recess, and to work on learning to participate appropriately during classes, assemblies, and meetings.

In contrast, in New Milford Board of Education v. C.R., 54 IDELR 294, 2010 U.S. Dist. LEXIS 61895, 2010 WL 2571343 (D.N.J. June 22, 2010), the court held that the District was obligated to reimburse parents for an in-home program that they provided to their child, T.R.

Facts: In 2004, the Parents filed due process; the District entered into a settlement agreement with the parents of T.R., a child diagnosed with autism. Pursuant to the agreement, T.R.'s parents provided him with in-home education, which the District partially reimbursed until October 31, 2006. At that time, the parents continued providing the in-home services at their own expense.

The student's 2006-07 IEP placed him in public school, with one home visit per week from a school staff member. Parents agreed with this IEP, and continued funding the in-home services.

Parents disagreed with the 2007-08 IEP, which provided for (among other things) two monthly home visits. The Team continued to meet and the District offered additional home programming hours, but parents continued to disagree and request home education in the form of the private program that T.R. had previously received (and that the parents continued to provide).

Parents filed for due process, alleging that T.R.'s 2006-07 and 2007-08 IEPs did not provide him with a FAPE. Parents requested reimbursement for the in-home services that they had provided since November 1, 2006. Parents argued that T.R. required substantial in-home instruction "to curb his aggression and self-stimulation." Parents agreed with the placement at the public school during school hours, but wanted the District to fund two hours per day of after-school, in-home instruction.

During the hearing, the parents' expert testified that "T.R.'s ability to learn at [school] requires a home program." The hearing officer found in favor of the parents, on the basis that the school was unable to provide adequate behavioral intervention and the in-home program provided the student with behavioral and communication benefits that allowed the student to benefit from school. The district appealed that decision.

Issue: Whether the District denied the student a FAPE by failing to include the after-school, in-home program in the student's IEP.

Holding: For the parents. The district's placement did not "sufficiently address T.R.'s behavioral issues." The in-home program provided by the parents "complements the academic instruction delivered at [school] and is necessary to provide T.R. with a meaningful education," and was necessary for the student to

receive a FAPE. The IEP proposed by the District did not sufficiently address the student's behavioral issues. Without the after-school, in-home program, the student would not make sufficient educational progress at school.

Practice Pointer: Generally, when a student makes educational progress in the school setting, it will not be necessary for a district to show that the student can demonstrate the same level of progress in other settings, such as the home. However, if the student's IEP goals and objectives are drafted in such a way as to suggest that the student should be demonstrating the same level of progress over a variety of settings, the student's failure to do such could result in a finding that the student is not making sufficient progress. Moreover, if a student's out of school behaviors are such that they interfere with his/her ability to learn, it may be necessary for the District to address those behaviors.

B. Accommodations and Modifications

The New Hampshire regulations define accommodation as "any change in instruction or evaluation determined necessary by the IEP team that does not impact the rigor and/or validity of the subject matter being taught or assessed." Ed 1102.01(b).

In other words, accommodations are "outside the body," that is, physical or environmental changes around the student. Teachers usually refer to accommodations as good teaching strategies. *See To Accommodate, To Modify*, and to Know the Difference: Determining Placement of a Child in Special Education or 504, Hayes, Nakonia, <http://education.jhu.edu/PD/newhorizons/Exceptional%20Learners/Law/hayes.htm> (accessed Aug. 5, 2014).

Examples of accommodations include the following:

- **Pacing:** extending/adjusting time; allowing frequent breaks; varying activity often; omitting assignments that require timed situations.
- **Environment:** leaving class for academic assistance; preferential seating; altering physical room arrangement; defining limits (physical/behavioral); reducing/minimizing distractions (visual, auditory, both); cooling off period; sign language interpreter.
- **Presentation of Material:** emphasizing teaching approach (visual, auditory, tactile, multi); individual/small group instruction; taping lectures for replay; demonstrating/modeling; using manipulatives/hands-on activities; pre-teaching vocabulary; utilizing advance organizers; providing visual cues.

- **Materials and Equipment/Assistive Technology:** taping texts; highlighting material; supplementing material/laminating material; note taking assistance/copies from others; typing teacher's material rather than using handwriting on board; color overlays; using calculator, computer, word processor; using Braille text; using large print books; using decoder for television and film; having access to any special equipment.
- **Grading:** giving credit for projects; giving credit for class participation.
- **Assignments:** giving directions in small, distinct steps; allowing copying from paper/book; using written back-up for oral directions; adjusting length of assignment; changing format of assignment (matching, multiple choice, fill-in-blank, etc.); breaking assignment into series of smaller assignments; reducing paper/pencil tasks; reading directions/assignments to students; giving oral/visual cues or prompts; allowing recording/dictated/typed answers; maintaining assignment notebook; avoiding penalizing for spelling errors on every paper.
- **Reinforcement and Follow-Through:** using positive reinforcement; using concrete reinforcement; checking often for understanding/review; providing peer tutoring; requesting parent reinforcement; having student repeat/explain the directions; making/using vocabulary files; teaching study skills; using study sheets/guides; reinforcing long-term assignment timelines; repeating review/drill; using behavioral contracts/check cards; giving weekly progress reports; providing before and/or after school tutoring; conferring with student (daily, bi-weekly, weekly, etc.).
- **Testing Adaptations:** reading tests verbatim to the student (in person or recorded); shortening length of test; changing test format (essay vs. fill-in blank vs. multiple choice, etc.); adjusting time for test completion; permitting oral answers; scribing test answers for student; permitting open book/notes exams; permitting testing in isolated/different location.

To *Accommodate*, To *Modify*, and to Know the Difference: Determining Placement of a Child in Special Education or 504, Hayes, Nakonia, <http://education.jhu.edu/newhorizons/Exceptional%20Learners/Law/hayes.htm> (accessed Aug. 5, 2014).

A modification is “any change in instruction or evaluation determined necessary by the IEP team that impacts the rigor and validity or rigor or validity, of the subject matter being taught or assessed.” Ed 1102.03(v) (emphasis added).

A student with a disability who requires classroom accommodations, and not specialized instruction, would likely not qualify under Section 504 rather than the IDEA. See Brado v. Weast, 110 LRP 6647 (D. Md. Jan. 26, 2010) (student with severe, widespread pain who required accommodations such as frequent breaks, alternative test scheduling, personalized instruction, and adjusted workloads, did not qualify for special education services under the IDEA).

1. Case Studies

Moody v. New York City Department of Education, 60 IDELR 211, 2013 U.S. App. LEXIS 4870 (2d Cir. March 12, 2013).

Facts: An 11-year-old boy with diabetes preferred to eat hot lunches at school. His mother would pack lunches with the expectation that the school cafeteria workers would heat the lunch for the boy. The school’s cafeteria offered a selection of hot and cold foods that the student could eat. The District indicated that it was not willing to heat up the lunches packed by the parent, and the mother filed suit.

The District Court ruled in favor of the school, and the mother appealed, arguing that the court erred in determining that heating student’s food was not necessary because the student would not eat if his food was not heated.

Held: For the District. Schools are not required to provide the student’s preferred accommodation. The district only has to ensure that the student had meaningful access to school lunch and other district programs. The district accommodated the student by providing him with options for hot lunch and monitoring his blood glucose level. Even if the student sometimes skipped lunch and disliked the food on the school menu, that did not warrant a further accommodation in addition to what the district had already provided.

G.B.L. v. Bellevue Sch. Dist. #405, 60 IDELR 186, 2013 U.S. Dist. LEXIS 21490 (W.D. Wash. Feb. 15, 2013).

Facts: Plaintiff G.B.L. (“Student”) was a minor child who attended school in the Bellevue School District (“District”) for the 2010-2011 school year. In January 2010, Student was diagnosed with ADHD and sensorineural hearing loss and therefore qualified for special education services. He was given an IEP that went into effect for the remainder of the 2009-2010 school year.

For the 2010-2011 school year, Student was accepted into the district’s gifted program, even though his entrance score was one point below the

requirement. In August 2010, the IEP team met to create a new IEP that would go into effect when the student began the gifted program.

Student's performance in the gifted program began satisfactorily, but both his grades and his mood quickly declined over the course of the school year. The homework load was much more time intensive in the gifted program. During his sixth grade year in regular education, which has much less homework than the gifted program, the student spent four hours each night doing homework. In the gifted program, the student couldn't keep up with the homework and his therapist suggested a two hour per night limitation on the amount of homework assigned. The district denied this request, finding that this would fundamentally alter the gifted program curriculum standards, grading standards, and performance expectations.

Parent filed suit, alleging that the district denied Student a FAPE by failing to limit his homework to 2 hour per day. The hearing officer found in favor of the district, and parents appealed.

Issue: Whether the district discriminated against a student with ADHD by denying his request to complete a lesser amount of homework each night than the amount that was required of the other students in this fast-paced gifted program.

Held: For the district. The court found no evidence that the district failed to accommodate the student or otherwise denied him access to the gifted program on the basis of disability. The court noted that the assigned homework was an "essential component" of the coursework in the gifted program, and that the student would be unable to keep up in class discussions if he completed only two hours of homework each night.

Morris (NJ) School District, 111LRP 70051. (OCR, Sept 9, 2011).

Facts: Parent filed a complaint with OCR, alleging that during 2010-2011 school year, the District discriminated against her son (Student) on the basis of his disability, when it failed to provide:

1) Weekly emails - the Section 504 Plan indicated that the student was to receive weekly emails documenting his missing assignments, class progress with assignments and decorum in class, and that the student was to "answer and save each of these emails and that parents and supervisors will always be included on the cc: line.";

2) Written copies of homework assignments – the Section 504 plan required that teachers provide written copies of homework assignments and utilize proximity techniques to refocus Student;

3) Copies of class lecture notes – the Section 504 plan required that teachers provide copies of class notes and handouts “when possible”; and

4) A review and update of the Student’s school contract – the Section 504 plan indicated that Student would meet with his teachers at various times throughout the year, and that the Student agreed to maintain a minimum grade of B+ in each of his courses. If he failed to do such, he would suffer a consequence.

Held:

- 1) OCR found that the District failed to provide the Student and the complainant with weekly emails despite their providing him with regular emails. OCR found that the teachers provided regular, but not weekly, email correspondence; however, the Section 504 plan required weekly emails. Thus, the district failed to follow the plan.
- 2) OCR found that, despite the District’s assertion that class notes were sometimes posted on “Moodle”, an online system that the District used to provide all students with homework assignments and course information, the District staff did not consistently provide written copies of homework assignments to the Student. Although the District had provided the student with a Netbook and an iPad for use in class, and he could have accessed “Moodle” from either device, that was not a substitute for the terms of the plan, which required written copies of homework assignments.
- 3) The “Moodle” system contains syllabi for courses and teachers posted information to the system for students to use as study guides. However, the district did not provide hard copies of class notes to the student; thus, it violated the Section 504 plan.
- 4) OCR found that the District failed to review and update the Student’s school contract.

As a result, the District agreed to enter into a voluntary corrective action plan, pursuant to which it agreed to provide training to teachers on the implementation of Section 504 plans.

In Grove City (PA) Area School District, 55 IDELR 109 (OCR 2010), OCR found that the district violated Section 504 by failing to follow the evaluation procedures after a parent requested that the student’s IEP be amended to indicate that a district policy did not apply to the student:

Facts: Student was in eleventh grade at the district’s high school; he had been diagnosed with Asperger’s Syndrome, pervasive developmental disorder, ADHD, and oppositional defiant disorder, and had an IEP and behavior plan.

The District had a “Zero Tolerance Policy,” which required that students involved in fights be referred to law enforcement authorities. State law required all districts to report weapons offenses to local law enforcement; to that end, the policy was more expansive than the state law, because the district was required to contact law enforcement for all fights, regardless of whether a weapon was involved.

In January 2008, student was suspected of being involved in a fight with another student; in accord with the policy, the police were called. Ultimately, both students were charged with disorderly conduct. The student pled guilty to the offense and he was fined; the other student’s case was dismissed.

Parent asserted that the incident arose as a result of the student’s disability, because he had difficulty controlling his impulses. The district believed that the student was able to control his behavior, indicating that this incident was the only fight that the student was in at school.

Subsequently, in May 2008, the student was involved in another incident, which occurred in the school parking lot. A third student kicked the student after the student verbally provoked the other individual. The student then hit the third student. The district and the parents of the third student called the police, and both students were charged with disorderly conduct. Student pled guilty and was fined; the other student was found not guilty.

On May 29, 2009, student’s IEP team met to discuss the student’s use of profanity and his class schedule for the 2009-2010 school year. During the meeting, the parent asked whether the district would consider including an accommodation in the student’s IEP waiving the Zero Tolerance Policy. The parent had previously made similar requests in March 2008 and in June 2008. The district team members indicated that waiving the policy requirements for the student would violate the rights of all other students.

Subsequently, parent filed a complaint with OCR, alleging that during the May 29, 2009 IEP Team meeting, the Student’s IEP Team refused to consider the parent’s request to revise the student’s IEP to modify the district’s Zero Tolerance policy to accommodate the student’s disability.

Issue: Whether the student’s IEP team followed proper procedures when it failed to consider the parent’s request to modify the district’s Zero Tolerance policy.

Finding: For the parent. The evidence supported a finding of discrimination on the basis of disability; the district should have considered the parent’s request to revise the IEP to include a waiver of the Zero Tolerance policy.

Parent informed the Team that he believed that the student required a waiver of the policy requirements in order to receive a FAPE; thus, under Section 504, the Team was obligated to consider whether the student required a modification of the policy requirements by conducting an individualized evaluation that met the Section 504 requirements. The district was also obligated to notify the parents of the Team's determination and their right to contest the determination through the Section 504 procedural safeguards.

The district asserted that it decided not to grant the request for a waiver of the policy because it believed that a waiver was not necessary. However, OCR found that the Team did not consider the parent's request. OCR also found that the district's assertion that it could not waive the policy requirements without violating the rights of other students was an incorrect statement. The district violated Section 504 by failing to conduct an individualized evaluation of the student's need for a modification of the policy, and to provide the parent with notice of procedural safeguards.

As a result, the district was required to enter into a resolution agreement, pursuant to which it was required to convene a Team meeting to consider whether the student required a modification of the policy in order to receive a FAPE. If the Team determined that the student required a modification of the policy, the district was required to reimburse the parent for any fines and/or court costs imposed on the student (and resulting from referrals to the police in accord with the policy) during the period of May 29, 2009 until the IEP was amended.

Practice Pointer: A request to waive a policy requirement, such as the requirements of the Zero Tolerance policy, may be appropriate if the conduct that necessitates the waiver is a manifestation of the student's disability.

Students may also require accommodations for extra-curricular activities. In Elgin Local Schs., 113 LRP 39041 (SEA OH July 26, 2013), a parent filed a complaint alleging that the district violated the IDEA by refusing to include accommodations and modifications necessary to enable the student to participate in cheerleading tryouts.

Student's Team discussed whether cheerleading was "required" to provide student with a FAPE, and the Team determined that she was making educational progress without the program. The Team believed that parents wanted cheerleading to be included in the student's IEP so that she would be able to participate without being chosen through the tryout process. The Team discussed the accommodations that the student would receive during the tryouts and agreed to provide her with: 1) a videotape of the routines to be done at tryout; 2) programming the communication device to speak the cheers; 3) a communication device to use during tryouts; 4) visual cues such as modeling; and 5) the words in the cheers prior to tryouts.

The district indicated that it would reconvene if the student was selected for the cheerleading team, to determine what accommodations she would require during the cheerleading season.

C. IEP Implementation: Case Studies

Districts have an absolute duty to maintain contemporaneous written documentation that the services, accommodations, and modifications contained in a child's IEP are delivered to the Student. Letter to Brousaides, 56 IDELR 108 (OSEP June 9, 2010); see also Ed 1109.06(a) (The LEA is responsible for developing and implementing procedures designed to monitor that all IEPs are implemented).

As the following cases illustrate, it is the failure on the part of a District to implement its own plan that frequently causes the most problems.

Berkshire Hills Regional Sch. Dist., 38 IDELR 282 (SEA Mass. 2003)

Facts: The parents of an autistic first-grader agreed to an IEP that provided that the student be placed in a separate small class (6-8 students) for first grade, with inclusive settings for lunch, recess and specials. The District could only place three children in the class, including the student. The parents and the District agreed to a new IEP, which opened the small class to second graders. However, the parents and district did not agree whether the classroom would be comprised of the same group of students. Parents believed that the class would be comprised of a consistent group of children, while the District believed that the group did not need to be comprised of the same students each day. Parents requested due process, alleging denial of FAPE.

Ruling: The hearing officer found that by only having 3 students in the classroom, the District failed to fully implement the first IEP. However, the hearing officer was not able to determine the educational implications, if any, of the district's failure to provide the student with a classroom without the number of students required by the IEP. The hearing officer found that the second IEP was ambiguous and therefore could not make a finding as to whether the district complied with that IEP.

Key Concepts:

- The District must implement the special education program and related services required each IEP.
- This case also illustrates the importance of communication with parents during the creation and modification of IEPs.

Plymouth Educational Center Charter School, 113 LRP 16077 (Mich. SEA, March 28, 2013).

Facts: Student was enrolled in the sixth grade and was eligible for special education services due to a Specific Learning Disability (“SLD”) in the areas of written expression, basic reading skill, reading comprehension, reading fluency, and mathematics calculation.

In October 2012, an IEP Team meeting was held with several general and special education teachers. Parents received notice of the meeting, but did not attend. At the meeting, the Team developed an IEP that stated that the Student’s present levels of academic and functional performance were below age and grade level and that his progress towards IEP goals was slow in all areas. The IEP included accommodations, and special education services. In addition, Student’s English Teacher made tutoring available to all students for 1 hour every morning prior to the start of the school day. Student never took advantage of this tutoring.

Student failed English and math for the first quarter primarily because he failed to turn in assignments.

Parents requested due process, alleging that Student was denied a FAPE and that the school did not implement any of the modifications or accommodations listed in the IEP.

Issue: Whether the charter school failed to implement the modifications and accommodations in the Student’s IEP and therefore denied Student a FAPE.

Held: For the charter school. The hearing officer determined that all of the evidence indicates that each teacher provided the required accommodations or modifications listed in the IEP, and therefore, Student was not denied a FAPE. The Hearing Officer acknowledged that the Student “failed his core classes during the first semester,” but found that “the grades were not the result of the” school’s “failure to implement the IEP but of Student’s failure to turn in schoolwork. Student must do his part as well.”

The Maine Department of Education recently investigated a complaint that alleged, in part, that the District violated the IDEA by failing to provide a student with a 1:1 aide in accord with his IEP, and by attempting to amend the student’s IEP outside of the Team process. Regional School Unit #23, 54 IDELR 179 (Maine SEA Jan. 14, 2010).

The student’s IEP provided for “100% Ed Tech support one-on-one assistance [sic] 100% of the time.” The DOE found that there were periods of

time where the aide responsible for providing 1:1 assistance had “also been given responsibility for providing support to another student at the same time.”

In particular, the DOE found that there were two other students in the Student’s class who had 1:1 aides during portions of the school day. One of those other students only required a 1:1 while at recess because he required occasional reminders not to engage in rough play. That student frequently played with the Student who was the subject of the complaint; thus, at the beginning of the school year, the District decided that it was not necessary to have a 1:1 aide for the other student and that the Student’s 1:1 aide could supervise both students. Both students have always been in the Student’s 1:1 aide’s line of sight. The District asserted that “so long as the support needed by the other student [was] minor, and so long as the Student’s needs were being met, [that] arrangement [was] not inconsistent with the notion of ‘one-on-one.’”

The Maine DOE first noted that the Maine Special Education regulations did not define or reference “one-on-one” support,⁵ but that the dictionary defined “one-on-one” as “a meeting or confrontation between *two* persons” (emphasis added by Maine DOE). The DOE found that “[h]aving issued an IEP containing [the] term [one-on-one], the District was obligated to honor it unless and until the IEP was amended. When it appeared to District personnel that the Student no longer needed the undivided attention of an educational technician, they could have convened an IEP team meeting to consider making that change. They could not, however, simply change the practice of the educational technicians without changing the provisions of the IEP.”⁶ By assigning the aide to work with another student, the District failed to fully implement the child’s IEP, in violation of the IDEA.

The Maine DOE also investigated whether the District violated the IDEA by failing to obtain parental permission to amend the Student’s IEP without convening an IEP team meeting. The DOE found that the Student’s IEP team met in November 2009. The parents “walked out” of that meeting because they were displeased with the team’s recommendations regarding the level of support to be provided to the Student.

Shortly thereafter, the Special Education Director invited the parents to meet with her to further discuss the issues. That meeting lasted for approximately three hours, and would have restored the 1:1 support that the parents wanted, as well as set in motion a process for further assessing the student’s needs with regard to the 1:1 aide and for developing a program for increasing independence. At the end of the meeting, the Special Education

⁵ Similarly, this term was left undefined in the N.H. regulations.

⁶ The DOE acknowledged that it was not saying “an educational technician assigned to a student could not, on a given occasion, lend assistance to another student when doing so would not jeopardize the student to whom the educational technician was assigned.” It noted, however, that would be “very different . . . from assigning that educational technician with the ongoing responsibility to support another designated student.”

Director believed that she and the parents were in agreement. However, the Student's mother had decided not to accept what the Director had offered.

Three days later, the Student's mother emailed the Director, and informed her that the parents were not in agreement with the proposals discussed at their meeting. The next day, the District sent the parents a Written Prior Notice containing an addendum setting forth the proposed IEP amendments with which the parents were not in agreement.

A few days later, the District sent the parents an amended IEP that had been developed in accord with the parents' discussions with the Director, rather than with the discussions that occurred during the Team meeting. The DOE found that the District violated the IDEA by attempting to amend the IEP without receiving permission from the parents to do so outside of the Team process.

In Somerset County Public Schools, the parents of student with a disability filed a complaint with the state, alleging that the district violated the IDEA by failing to provide physical therapy services required by their daughter's IEP. 48 IDELR 27 (MD SEA Jan. 26, 2007). The Maryland SEA investigated, and found that the district had failed to provide PT services because it was unable to locate a physical therapist to deliver the required services. The district was making ongoing efforts to hire a part-time physical therapist, but had been unsuccessful. In October 2006, the district contracted with a private PT provider and in November 2006, the student began receiving services. The SEA found that the district's failure to provide PT during the period of September 2006 through November 2006 violated the IDEA and the district was instructed to provide compensatory PT services.

See also Chambers v. Sch. Dist. of Philadelphia Bd. of Education, 62 IDELR 1 (3d Cir. 2013) (district's inability to confirm that it provided speech and OT services was sufficient to allow parents to proceed with a claim for compensatory damages under Section 504 and the ADA. The court found that a "reasonable jury could interpret the district's prolonged failure to provide those services as deliberative indifference to the student's special education needs"); Charlestown County (SC) Sch. Dist., 54 IDELR 330 (OCR 2009) (district was required to provide 530 hours of compensatory speech services because it could not document that the student received 90 minutes of speech therapy per week. The speech therapist's service log noted that the student "regularly missed speech therapy due to schoolwide testing and events, absences or tardiness, or the therapists unavailability," including maternity leave. The IEP did not specify how staff would make up missed sessions, and there were no district-wide policies or procedures pertaining to continuity of services in the event of conflicts).

In Morgan County (WV) Schools, 54 IDELR 104 (OCR July 16, 2009), the District was penalized for discontinuing a behavioral intervention program at parent request and outside of the Team process.

Facts: During the 2008-2009 school year, the Student was a third grader at Warm Springs Intermediate School. He had been diagnosed with ADHD, and a Section 504 Plan was developed on September 19, 2008. The Plan provided that the student's "seat work be reduced and that his assignments be broken up into smaller units or chunks." In addition, it required the use of a "behavior chart with rewards/consequences." OCR found that "no specific behavior system or chart was listed on the Section 504 Plan or discussed at the Section 504 Plan meeting." However, the student would receive a "laminated red card" that she was required to bring home when she behaved badly.

In late October, the parent contacted the principal about the "card intervention program," which the District described as "a system for giving students rewards and consequences to help them learn responsibility." At the parent's request, on October 29, 2008, the principal told all of the student's teachers to stop using the card system for the student.

The parent alleged that the student's math and language arts/spelling teachers failed to implement these provisions of the Plan.

Findings: OCR found, and the student's math teacher confirmed, that the math teacher was unaware of the provisions of the 504 Plan. However, OCR found that the math teacher reduced seat work and "chunked" assignments for all students, including the student, as part of her normal teaching process. The language arts/spelling teacher also indicated that she fully implemented the seat work and chunking requirements, consistent with the 504 Plan. Thus, OCR found that there was insufficient evidence to establish that the teachers failed to implement that aspect of the Plan.⁷

With regard to the use of a behavior chart, OCR found that the "card intervention program" would have met the requirement of that provision, because it utilized rewards and consequences. However, OCR found that the math teacher failed to implement that provision from October 29, 2008 to November 7, 2008. "The fact that the discontinuation of the card system was based on a request by the Complainant did not relieve the District of its responsibility to comply with the provision. In this case, one means of meeting the objective would have been to utilize an alternative behavior chart that met the requirements of the Section 504 Plan." OCR also found that the language arts/spelling teacher failed to implement the provision from September 19, 2008 to November 7, 2008. OCR found that "[t]he teacher's contention that the Student's behavior was rarely an issue and that the Student did not want to be singled out from the other students, did not entitle

⁷ OCR did require that the District implement a plan to require that all teachers received copies of 504 Plans.

the language arts/spelling teacher to disregard the requirements of the Student's Section 504 Plan.”

V. Conclusion

Compliance with the procedural requirements of the IDEA assists in ensuring that parents have the opportunity to meaningfully participate in their child's education, and reduces the likelihood that your district will be involved in an adversarial proceeding with parents.

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