

64TH CONFERENCE ON EXCEPTIONAL CHILDREN

WORKING TOGETHER TO ACHIEVE STUDENT SUCCESS

Special Education 101

A primer for new EC Directors

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PUBLIC SCHOOLS OF NORTH CAROLINA
The State of Education | Department of Public Instruction

NOVEMBER 3-5, 2014

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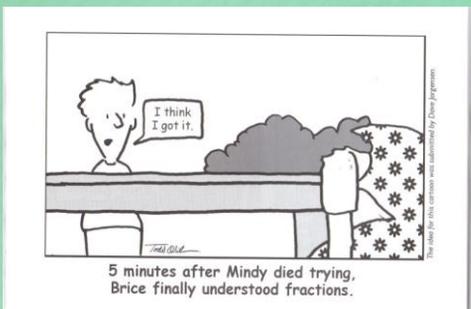
WORKING TOGETHER TO ACHIEVE STUDENT SUCCESS

- Progress Monitoring
- Who is a parent?
- When to evaluate/when to refer
- The role of the IEP team
- Meaningful Participation
- A word about educational records

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5 minutes after Mindy died trying, Brice finally understood fractions.

The comic by David Coverly was commissioned by Diverse Perspectives.

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PROGRESS MONITORING AND DATA COLLECTION



KEEP CALM AND FOLLOW THROUGH

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Soundness/Basis of the IEP Team's Decisions

- **Defending decisions/explaining decisions to parents can best be achieved through solid documentation and articulation by competent staff.**
 - Significant data collection and documentation at the school level:
 - shows progress (or lack of progress);
 - gives the IEP team a foundation for its decisions;
 - keeps parties working off of facts and not emotions or assumptions;
 - evidences work on goals; and
 - is your evidence in a due process hearing.

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Poor Data/Records Collection or Maintenance

- **To a parent:**
 - **sloppy paperwork suggests sloppy services; and**
 - **sparse paperwork suggests sparse work on goals.**

Preparation

- Carefully select your progress monitoring in advance.
- Testing data may be insufficient as stand-alone evidence of progress.



What do you think?

- *J.M. v. Morris School Dist.*, 58 IDELR 48 (D.C. N.J. 2011)
 - 4th grader with learning disability, with daily resource period for reading, daily inclusion for math, and specific goals in language arts, reading and math.
 - The parents challenged the students progress, and the district contended that the child's progress on various standardized assessments showed he received FAPE.

Holding: for the parent

- The Diagnostic Reading Assessment results were inconclusive because it was designed for children up to 3rd grade, and the evaluator did not strictly adhere to testing protocols
- The NJ Assessment of Skills and Knowledge was rejected because she received a number of accommodations that unnaturally inflated her performance
- The Gray Oral Reading Test was rejected because it was not completed in its entirety.
- Progress reports available showed greater progress, but were inconsistent with the above testing, so were also unpersuasive.



Monitoring – closely align your data with the student’s IEP goals

- In re Student with a Disability, 110 LRP 31562 (MA 2010)
 - Dispute was over which reading program to use
 - While the district has sole authority to select the program, parents still an challenge the effectiveness of the program, or whether the child made appropriate gains.
 - In this instance, the court looked beyond the progress monitoring built into the selected reading program, but also considered other evidence:



Monitoring: Closely align your data with the student’s IEP goals

- His teachers saws improvement in his ability to attend to tasks, a decrease in reading anxiety, and a positive response to the behavioral plan put in place during the reading program to help measure if it was appropriate for the student
- In contrast, the court was unwilling to find the child made progress in his outside reading program, where success was measured solely in the running records, with no evidence of generalization, or that gains were the result of other influences quite apart from the reading program itself.

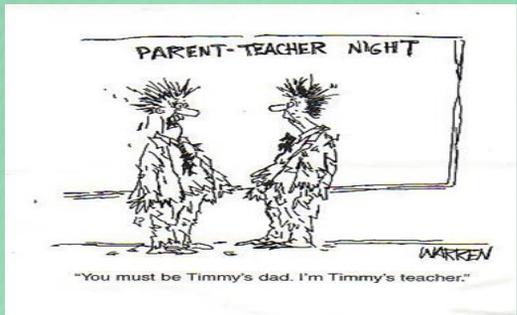


Align BIP strategies with data

- Appoquinimink School Dist., 61 IDELR 178 (Del. 2013)
 - The court rejected the parent’s contention that their child’s IEP placement was inappropriately changed by excessive removals as a behavior management strategy.
 - The court was heavily influenced by the behavioral data produced by the district
 - “Removals from the general education environment were used consistent with the Positive Behavior Support Plan.”
 - The plan was reviewed and updated throughout the year with input from staff and parents
 - Data gathered by the team indicated difficulty during unstructured times of the day, so removals during those periods increased success during that time and led to the student being able to remain in nondisabled peers for the majority of his day.

How much is too much?

- Douglas County Sch. Dist., IDELR 119 (2013)
 - The Colorado Department of Education rejected a claim filed by the parents of a non-verbal student with multiple medical issues in which parents complained of the amount of communication and information that was shared each day.
 - The ED found that the IDEA does not require the district to provide the parents with the depth and detail of progress reporting they desired.



Defining the parent

- A **biological or adoptive parent** of a child
- A **foster parent**, unless state law ... prohibit[s] a foster parent from acting as a parent
- A **guardian** generally authorized to act as the child's parent, or authorized to make educational decisions for the child (**but not the State if the child is a ward of the State**);
- An **individual acting in the place of a biological or adoptive parent** (including a grandparent, stepparent, or other relative) **with whom the child lives**, or an individual who is legally responsible for the child's welfare; or
- A **surrogate parent** who has been appointed in accordance with 34 C.F.R. 300.519 or 20 USC 1439(a)(5)

The importance of the biological parent

- “.....[T]he biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, **must be presumed to be the parent** for purposes of this section **unless** the biological or adoptive parent does not have legal authority to make educational decisions for the child.”
- 34 CFR 300.30(b)(1)

Biological parents

- **Facts:**
 - Biological parents are married and live in the same house as the student.
 - Mother comes to the IEP meeting and signs for consent to test
 - Father drops a hand-written letter off the next day, stating the district is not permitted to test his child.
- **Question:** *Can you proceed with testing?*

Biological parents

- **Facts:**
 - Biological parents are married and live in the same house as the student.
 - Both parents come to IEP meeting; the father agrees with the proposed change in placement to a self-contained classroom, while the mother disagrees.
- **Questions:**
 - Can the mother bring due process?
 - If yes, would “stay put” apply?
 - If mother brings due process, can father demand the placement be changed to the self-contained classroom?

Divorced parents

- When parents divorce, their rights under the IDEA continue to apply to both parents, unless a court order or other state law specifies otherwise.
- 71 Fed. Reg. 46, 568 (2006).

The noncustodial parent

- **Facts:**
 - Father files due process challenging suspension
 - Father enters into an agreement with the district and is on the verge of withdrawal of the petition
 - Mother intervenes, seeking full-party status
 - There is a previous custody order that states the father has full authority to make educational decisions.
- **Question:** *Can the mother intervene to keep this case alive and prohibit the dismissal pursuant to the settlement agreement?*
- *Needham and Newton Pub. Schools*, 35 IDELR 33 (SEA MA 2000)

Divorced Parents with Joint Custody

- What does the custody agreement state?
 - Courts will defer to the Custody Agreement or Divorce Decree to determine who has the right to make educational decisions on behalf of the student
 - *Rockaway Twp. Bd. of Educ.*, 43 IDELR 80 (SEA NJ 2005)
 - Mother consented to placement in a self-contained classroom
 - Hearing officer ordered the child be returned to the mainstream classes, because under the divorce decree, both parents had to agree to the special education program and placement for their child

Divorced Parents with Joint Legal Custody

- **Facts:**
 - Father brings due process petition, challenging the educational program;
 - Mother appears as parent, asserting she is satisfied with the program and does not want the hearing to proceed
 - Divorce decree states that they jointly share legal custody, but awards primary physical custody to the mother, who resides with the child in the district, while the father resides outside the district

Divorced Parents with Joint Legal Custody

- **Question: How should this turn out?**
 - A. Case should be dismissed. Father lives elsewhere and has no physical custody
 - B. Case should be dismissed. While the custody agreement says both make decisions, when parents don't agree, physical custody can tip the balance.
 - C. Case should be allowed to continue. Both parents share legal custody. If the mother likes the current program, she can intervene as an interested party, but dad has the right to challenge it as a parent.
- *Westside Union Sch. Dist., 35 IDELR 88 (SEA CA 2001)*

Foster Parents

- Foster parents may qualify as a parent under the IDEA, unless state law, regulations, or contractual obligations with a state or local entity prohibit a foster parent from acting as a parent.
- NC Regulations: Under North Carolina law, therapeutic foster parents do not qualify as a "parent" under the IDEA and do not have authority to make decisions under the IDEA. State law would prohibit them from acting in this capacity.
 - NC 1500-2.24(2)

Foster Parents

- **Scenario:**
 - Child enters your school when she begins residing with a non-therapeutic foster parent who lives in your district.
 - Biological parent remains in contact with the student. You are told they reside in a neighboring county, and reasonable efforts on your part would lead to their contact information.
- **Who is a the qualifying parent under the IDEA?**
 - A. The foster parent because it is a non-therapeutic foster parent
 - B. The biological parent, because the foster parent does not qualify in North Carolina as a parent
 - C. The biological parent, because the biological parent can be located.
 - D. Neither the biological parent nor the foster parent. The district must appoint a surrogate.

A guardian of the child

- When can a guardian be designated a “parent” under the IDEA?**
- When the guardian is generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
 - Does a DSS case manager qualify?
 - Does a Guardian ad Litem qualify?
 - How do you know if a person who calls themselves a guardian is “generally authorized to act as the child’s parent?”

Someone acting in the place of a parent

- This category includes a grandparent, stepparent, or other relative with whom the child lives
- This category also includes any individual who is legally responsible for the child’s welfare

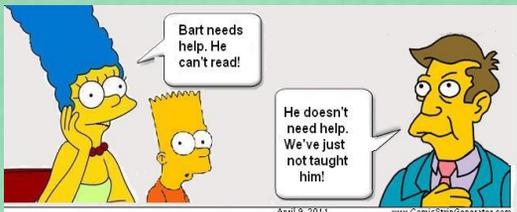
When grandparent wants to act as parent...

- Facts:
 - Child lives with mother, who suffers from depression and anger issues
 - Grandmother often attended IEP meetings with her daughter for support and as an advocate
 - On occasion, grandmother tried to attend without her daughter, providing a note from her giving her authority to make decisions on her behalf

Holding

- Argument that daughter was not always able to attend the meetings due to her depression was inconsequential
- Grandmother was not a parent and could not act as a parent
- If mother was not engaged and stopped coming, the LEA should appoint a surrogate.
 - Baltimore City Public Schools, 102 LRP 12080 (SEA MD 2000)

When to evaluate/when to refer



April 9, 2011 www.comicstripgenerator.com

Things to ask as an administrator:

- When are we currently making an EC referral?
- How are we responding to concerns raised by the parents?
- Do we explain to parents the process of making requests for evaluations in writing?
- How engaged are regular education teachers in the intervention process, including progress monitoring?

The critical role of regular education teachers

- Intervention and Evaluation Referral is a multi-disciplinary approach
- How engaged are regular education teachers in the intervention process, including progress monitoring?
- What about your other experts in your district? What is their level of engagement?



Teamwork doesn't end with RtI

- Let's talk about referrals for possible Special Education evaluation
 - Beware of informal "decision" or "predeterminations that a child is not disabled"
 - Advise your staff to make decisions in the context of a formal meeting and documented with the paperwork
 - Staff can be both responsive to parents as well as diligent in referring to a meeting when appropriate.

Consider this ...

- **Third-grade, average student:**
 - Benchmarking is typical relative to peers; maintaining grade level work.
 - Student struggles some with reading and writing, but she seems to be managing them in the classroom; some informal accommodations being used by regular ed teacher, as she would for any student;
- **Parents:**
 - Very focused on performance; reports school anxiety and excessive time to complete homework
 - Outside tutoring for the past three months.
 - Concern of possible dyslexia; older sister struggles with dyslexia; want "proper supports" to be in place prior to middle school.
 - They never mention IDEA, but they do ask what the process is for getting accommodations on the EOG.
- **QUESTION: How do you respond?**

How about this...

- You are a member of a Student Support/Intervention team
- Parents of the child previously described comes to the first meeting of the team.
- The team has come prepared to begin the intervention process
- The parents request an evaluation.
- What are your options?

Choosing not to evaluate..

- You cannot use the Rtl process as a mechanism for delaying an evaluation requested by a parent, or as a prerequisite for eligibility.



If the IEP team decides not to evaluate...

- That decision cannot be based on the rationale that the team is pursuing interventions instead.
 - If that is in your DEC5, we need to work on those DEC5s.
- The decision MUST be documented in a DEC5.
 - The intervention team cannot just decide not to test and not refer to an IEP meeting for consideration.

The Role of the IEP team



All IEP team members

- The parents;
- Not less than 1 regular education teacher
- Not less than 1 special education teacher
- An LEA representative
- Someone who can interpret the instructional implications of evaluation results;
- Anyone with knowledge or special expertise regarding the child (ie., related services providers)
- The child, as appropriate
- An attorney or advocate for the parent

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School Administrators and the IEP Team

- Question: Is a school administrator a mandatory member of the IEP team?
- Question: What is the role of the school administrator on an IEP team?
- Question: You are a sole administrator at your school. You cannot possibly attend all IEP meetings. What is your role/responsibilities toward:
 - Those children on whose IEP teams you serve
 - Those children on whose IEP teams you do *not* serve
 - Is your role different? Does it matter?

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Parents as IEP team members

- *E.P. v. San Ramon Valley Sch. Dist.*, 48 IDELR 66 (N.D.Cal. 2007)
 - District held meeting without the involvement of the parents, over the insistence by the parents' attorney that they could not attend an IEP meeting before the start of the school year.
 - If the IEP meeting was delayed, the child would have started the year without an IEP and would have been out of compliance
 - HOLDING: The district did not violate the IDEA by proceeding with the meeting without the parents.

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The role of regular education

- **The regular education teachers:**
 - teachers who are, or who may be, responsible for implementing the child's IEP.
 - Only one regular education teacher is **required**.
 - Should be prepared to speak to the requirements of the Common Core and appropriate accommodations and modifications.
 - If interventions have been in place, should be prepared to present the data in regard to those interventions and how they impacted the child's ability to access/progress on the Common Core.

A special education teacher/provider

- The IEP team must include at least one special education teacher of the child, or where appropriate, not less than one special education provider of the child.
 - NC 1503-4.2(a)(3).

Consider this

- At age 3, enters preschool program
 - Student is diagnosed with ADHD, Reactive Attachment Disorder, and PTSD.
- In 1st grade, student is exited and moved to a 504 Plan
 - BIP is developed under 504 Plan
 - District's decision is supported by an independent psychological evaluation.

Continued...

- Grade School:
 - Serious behaviors continued through grade school, while at the same time she excelled academically.
 - In July after her 5th grade year, parents gave 10-day notice of placement in PRTF
- Filed due process
 - District psychologist traveled to PRTF within 3 weeks, did evaluation, and concluded she did not qualify for services.
 - IEP meeting was held with following members: parents; EC Director; 2 school psychologists; current school principal (and student's former regular education teacher from kindergarten); attorneys. Team found her ineligible for services.

Continued...

- Held: The district failed to hold a properly constituted IEP team
 - While the EC Director was special education teacher, she never taught the student nor did she ever provide special education services to the student. This was a procedural violation of the IDEA and could amount to a denial of FAPE
 - *R.B. v. Napa Valley Unified Sch. Dist.*, 48 IDELR 60 (9th Cir. 2007).

The role of the LEA representative at the IEP meeting

- Qualifications of the LEA:
 - Must be qualified to provide or supervise the provision of special education to the student
 - Must be knowledgeable about both the general curriculum and district resources
 - Must be authorized to make decisions on behalf of the district and the authority to commit the district to those resources.

The role of the LEA representative at the IEP meeting

- The LEA representative is a mandatory member of the IEP team
- The parent cannot agree to waive the presence of the LEA representative, for all or part of any IEP meeting.
- What this means practically: -- The LEA representative is not authorized to leave the meeting for any reason, unless the meeting is put into recess while the LEA steps out.

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Meaningful Participation



PARENTS

AS PARTNERS

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The use of teleconferencing

- Drobnicki v. Poway Unified School Dist., 53 IDELR 210 (9th Cir. 2009)
 - Parents received an Invitation to Conference, but could not meet at the scheduled time
 - All agreed the parents would participate via speakerphone
 - In a later due process claim, parents claimed they were denied their opportunity to meaningfully participate because they were not present for the meeting

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Holding...

- The court agreed with the parents, finding that the school made no effort to reschedule the meeting to a time when one or both of the parents could be available before relying on teleconferencing.

The Invitation to Conference

- Salem-Keizer Sch. Dist., 52 IDELR 149 (SEA OR 2009)
 - After the parent requested an IEP meeting, administrators called the parent four times in an attempt to schedule the meeting, and over the telephone, got agreement to attend, and told the parent who would be attending. However, the actual invitation to conference was not provided to the parent until the start of the IEP meeting.

Holding...

- The parents were denied their right to meaningfully participate in the meeting. Notice requires more than simply knowing the time and place of the meeting. It also includes being told what is to be discussed at the meeting.

When parents behave poorly

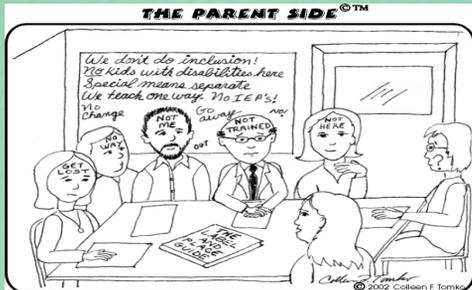
- Lake Oswego Sch. Dist., 112 LRP 145681 (SEA OR 2012).
 - When 2 parents arrived at the school for an IEP meeting, things get heated with one parent and the director. The conversation turns confrontational, the parent displays extreme displays of emotion, and the director asks the parent to leave, and tells someone else to call the police. The parent then tells the director the IEP meeting cannot proceed. The director tells the parent the meeting will continue and they will forward them the paperwork. Both parents then leave, and the parents allege they were denied meaningful participation in a later petition.

Holding...

- While the director was justified in asking the parent to leave, she was not justified in continuing the meeting. Other steps:
 - Attempt to get the participation of the one parent behaving well
 - Attempt to reschedule the meeting
 - If parents are insistent, tell them the meeting will continue, but a subsequent meeting will be called to review decisions made and get their input
 - **Don't** continue the meeting without considering if other options are available.

When attorneys are involved

- Soquel Union Elem. Sch. Dist., 22 IDELR 64 (SEA CA 1995). In this instance, a district made written offers for placement and programming through its attorney, rather than through the IEP team.
- "Parents are necessary and important participants in the IEP process and have the right to present information to the team and to participate in decisions regarding special education programs and services for their children."



Even though school staff is not "supposed to" discuss placement before the IEP is complete... Mrs. Smith could read their faces and the writing on the wall.

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Predetermination

- Parents have a right to participate in meetings regarding the identification, evaluation, placement, and provision of FAPE to their child. A “meeting” does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A “meeting” also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.
 - --34 CFR 300.501(b)

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Avoiding a claim of predetermination

- Avoid language in advance of a meeting that seems to indicate decisions have already been made:
 - We have decided
 - The speech pathologist can't handle another student on her caseload
 - I am going to do this when I work with Johnny
 - At the meeting, we'll be discussing services to be provided when Johnny is on homebound.
 - We don't offer one-on-one reading instruction
 - Our pre-K program is only half-day for our students. ESY runs for four weeks, three hours each day.

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The special case of “placement” decisions

- Parents have a particular right to meaningfully participate in all placement decisions.
- Placement decisions cannot be “predetermined” by the district.
- Parents must be a member of any group that makes decisions on the educational placement of the child
- If the parent cannot attend a meeting on placement, the district should attempt to arrange teleconferencing or video conferencing
 - NC 1504-1.2(c).

School Placement

- *K.D. v. Dept. of Educ., State of Hawaii*, 58 IDELR 2 (9th Cir. 2011)
 - The parents argued that the district chose a school placement three weeks in advance of the IEP meeting, violating their right to meaningfully participate in placement decisions.
 - Held: “Scouting out” possible placements is not predetermination when other options were considered, including the placement preferred by the parents, at the IEP meeting.

Consider this...

- *M.B. v. Hamilton Southeastern Schs.*, 58 IDELR 92 (7th Cir. 2011).
 - Parents of a kindergartener with a traumatic brain injury request a full-day kindergarten program. The district proposed a half-day program. This was rejected by the parents, who put him in a full-day program and sought reimbursement for the private program, pointing to the child’s need for repetition. They also alleged that the district had predetermined his program prior to meeting with the parents.

Continued...

- Held: No evidence of predetermination
 - School was willing to make adjustments to the IEP at the IEP meeting based on input from the parents
 - The team relied on the private evaluation to develop many of the student’s goals and objectives



Predetermining Accommodations

- K.M. by Bright v. Tustin Unified Sch. Dist., 725 f.3D 1088 (9TH Cir. 2013).
 - Student with a cochlear implant relied on lip reading, and was provided closed-captioning for videos, preferential seating, copies of notes, and repetition of student comments.
 - Approximately once a day, she struggled with following teacher statements, and she frequently struggled to hear conversations.
 - The parent requested CART services (Communication Access Real-Time Translation)
 - The parent brought due process, alleging the district predetermined its denial of her request.



Holding

- The court disagreed with the parent, finding that after the parent made her request, the IEP team sought assessments and teacher input
 - The court also made note that even if there had been a procedural violation, the parent failed to demonstrate the child needed CART services
 - The child was receiving average to above-average grades
 - Teachers spoke highly of her performance
 - Her notes from class suggest she fully comprehended classroom discussions and had no difficulty taking notes
 - "Repeated classroom observations of her performance in class depict a student thriving despite the obstacles."



Holding

- However...meeting all requirements of the IDEA does not mean you have met all burdens under the Americans with Disabilities Act
 - Title II requires districts to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others, and requires districts to provide appropriate auxiliary aids and services including CART services, when necessary to provide individuals with disabilities an equal opportunity to participate in district programs and activities
 - In some circumstances, it is possible that districts will be required to provide certain services to the deaf or hard-of-hearing students under the ADA that are not required under the IDEA.



Private placement determinations

- Deer Valley Unified School Dist., 58 IDELR 84 (SEA AZ 2011)
 - After the completion of a comprehensive evaluation, the IEP team met, and at the meeting, the parents of a student with autism proposed to private schools for possible placement. The team rejected both proposals during the meeting
 - After the meeting, the district sent a prior written notice to the parent identifying a third school where the child will be placed. This placement was rejected as inappropriate.
 - The district then met in an IEP meeting, and the team selected this third placement.



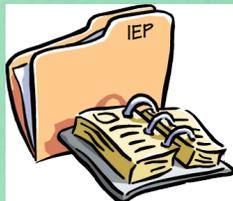
Holding

- The court found the district erred by excluding the parent from the initial determination of the proposed placement, and did not include the parent in any discussions until they objected to it.
- Apart from the predetermination, the hearing officer also found the proposed placement selected by the district as inadequate to meet the student's needs.



A word about educational records

- Unreasonable delay in producing records can cause frustration and distrust.
- Remember: Parents have a right to have the full records **in advance of any upcoming IEP meeting.**



Access to educational records

- The LEA must permit parents to inspect and review all education records related to the child's identification, evaluation, and educational placement of the child, and the provision of FAPE to the child, that are maintained or used by the district
- The LEA must comply with any request without unnecessary delay and before any meeting regarding an IEP, but in no case more than 45 days
 - 34 CFR 300.613

What is an educational record?

- In order to be an "educational record" it must be maintained by the district
 - Owasso Indep. Sch. Dist. v. Falvo, 36 IDELR 62 (U.S. 2002); see also Board of Educ. of the Toledo City Sch. Dist. v. Horen, 55 IDELR 102 (N.D. Ohio 2010); and K.C. v. Fulton County Sch. Dist., 46 IDELR 39 (N.D. Ga. 2006) (holding that writing samples, daily work, pretests, and personal notes were not considered educational records as defined by FERPA).

What about emails?

- Emails that you send to parents or others about a student are generally deemed education records
- But See Brownsburg Cmty. Sch. Corp., 59 IDELR 146 (SEA IN 2012), holding that email correspondence that briefly referenced the child was merely a communication tool, and there was no evidence that the district maintained such correspondence as part of student's education records.

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Think twice before you type

- Parent writes: "[John] will not be in school on Friday...He's scheduled to an interview at a boarding school in Virginia..."
- Teacher responds: "[John] has been doing virtually no work in my class. He has not gotten caught up from the last time we talked. The due dates have already passed on two major assignments...I refuse to except [sic] anymore [sic] of them. I also am tired to telling [John] what he owes me when he does nothing but wonder [sic] around during class. I honestly want nothing to do with him. He doesn't seem to care to neither do I...I suppose my whole point is that you wrote that letter to all of his teachers and I'm not sure if it really matters if he misses tomorrow or not since he does virtually nothing in my class anyway...PS. I hope he has a better time and is more successful at the board school."
 - Beauford County Board of Educ., 103 LRP 36798 (S.C. SEA, January 27, 2003).

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Testing Protocols

- Woods v. Northport Pub. Schl., 59 IDELR 64 (6th Cir. 2012)
 - The district denied the parents' right to meaningfully participate in the development of their child's IEP, which constituted a substantive violation of FAPE, by refusing to provide copies of their child's testing protocols to the parents in advance of their child's IEP meeting.

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Regardless of how a record is classified...

- Documents that are not "education records" may still need to be produced in a subsequent due process hearing.
 - Just because a particular document does not qualify as an education record does not mean it is immune from production in any subsequent due process hearing. Records may need to be produced if requested or if ordered by the hearing officer.



Legal Questions?

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