Special Education 101: IDEA Eligibility, Child Find and Procedural FAPE

ACSA 2018
Every Child Counts Symposium

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I. IDEA Eligibility and the Need for Special Education
Question: A Student Is Eligible for Special Education If:

(a) Identified by an individualized education program team as a child with a disability; and

(b) __________________________________________________________________________

Ed. Code § 56026.
Answer:

Under IDEA 2004, the term "child with a disability" means

- A child evaluated in accordance with 34 C.F.R. 300.304 through 34 C.F.R. 300.311 as having one or more of the 13 identified disabilities, and

- Who, by reason thereof, needs special education and related services

34 C.F.R. 300.8(a)(1)
The 13 Eligibility Categories

1. Autism
2. Deaf-Blindness
3. Deafness
4. Emotional Disturbance
5. Hearing Impairment
6. Intellectual Disability
7. Multiple Disabilities
8. Orthopedic Impairment
9. Other Health Impairment
10. Specific Learning Disability
11. Speech or Language Impairment
12. Traumatic Brain Injury
13. Visual Impairment, including Blindness
Adverse Effect

The IDEA defines each of the 13 disabilities

- For example, IDEA defines “visual impairment” as “impairment in vision that, even with correction, adversely affects a child’s educational performance”

  **Note:** Most disability definitions also include requirement that the disability have “adverse effect” on “educational performance”

  - Neither term is defined by law
  - Court and ALJs interpret on case-by-case basis

(34 C.F.R. § 300.8; Cal. Code Regs., tit. 5, § 3030)
Adverse Effect

Adverse Effect on Educational Performance Included in Definition:
1. Autism
2. Deaf-Blindness
3. Deafness
4. Emotional Disturbance
5. Hearing Impairment
6. Intellectual Disability
7. Multiple Disabilities
8. Orthopedic Impairment
9. Other Health Impairment
11. Speech or Language Impairment
12. Traumatic Brain Injury
13. Visual impairment, including blindness

Adverse Effect on Educational Performance Implied in Definition:
10. Specific Learning Disability

THINK ABOUT IT...
Adverse Effect

Based on case law, “adverse effect” on educational performance may be found when disability:

- Impacts school attendance
- Causes the student to fail to complete, and/or turn-in, class work and homework
- Results in difficulty with focusing and/or attending that prevents the student from participating in classes
Adverse Effect

- Examine
  - All forms of academic performance (standardized measure, grades, STAR test, district-wide tests)
  - Work completion issues (homework or classwork) and determine why the work is not being completed
  - Truancy issues and absences (why?) and grades
  - Disciplinary issues (why?) and effect of educational performance
  - Inflation of grades through Section 504 Plan
  - Motivation of student
Projected Deficits

- Parent claimed 6-year-old’s impaired social development would “at some point” cause academic difficulties
- ALJ upheld District’s decision that Student was not eligible
- Although Student demonstrated autistic-like behaviors at home, such behaviors did not interfere with his education currently
- “Projected deficits which may manifest in several years” were not relevant in determining present eligibility

Student v. Vista Unified School Dist. (OAH 2013) No. 2012090081
Exceptions

IDEA: Student may not be found eligible if –

- Determinant factor is:
  - Lack of appropriate instruction in reading or math; or
  - Limited English proficiency; and

- Student does not otherwise meet the eligibility criteria under 34 C.F.R. § 300.8(a)

- California Ed Code adds: No eligibility if educational needs are due primarily to temporary physical disabilities; social maladjustment; or environmental, cultural, or economic factors
  - Unless student otherwise meets eligibility requirements

34 C.F.R. § 300.306(b); Ed. Code, § 56026, subd. (e)
Not Eligible If Student Needs Only Related Service

- If a child has one of the disabilities identified in the IDEA, but only needs related services and not special education,
  - The child is not a child with a disability under the IDEA (34 C.F.R. 300.8(a)(2)(i))
  - However, if the related service that the child requires is considered "special education" under state standards, the child will be eligible under the IDEA (34 C.F.R. 300.8(a)(2)(ii))
So What Is Special Education?

IDEA definition:
- “Specially designed instruction”
- Provided “at no cost” to parents
- Intended to meet “unique needs” of student

(34 C.F.R. § 300.39(a)(1))
So What Is Special Education?

- Special education can include:
  - Instruction conducted in classroom, home, hospitals and institutions, and other settings
  - Instruction in physical education

(34 C.F.R. § 300.39(a)(1))
“At No Cost” and “Unique Needs”

- “No cost” does not preclude incidental fees normally charged to all students as part of general education program

- “Unique needs” not defined by law
  - 9th Circuit: More than academic subjects; can also include “social and emotional needs that affect academic progress, school behavior and socialization”

(34 C.F.R. § 300.39(b)(1); County of San Diego v. California Special Educ. Hearing Office (9th Cir. 1996) 24 IDELR 756)
And What About “Specially Designed Instruction”?  

- IDEA definition:  
  - Adapting, as appropriate to student’s needs, the content, methodology or delivery of instruction to:  
  - Address student’s unique needs resulting from his/her disability; and  
  - Ensure student’s access to general curriculum so that student can meet educational standards that apply to all students within district  

(34 C.F.R. § 300.39(b)(3))
And What About “Specially Designed Instruction”? (cont’d)

- Adapted or modified **content** = knowledge and skills being taught to student are different from what is being taught to typical same-age peers

- Adapted or modified **methodology** = different instructional approaches are used to teach content to student than are used for typical same-age peers

- Adapted or modified **delivery** = way in which instruction is delivered to student is different than delivery method for typical same-age peers
And What About “Specially Designed Instruction”? (cont’d)

- Distinguish “specially designed instruction” from “accommodations”

- Accommodations
  - Do not change what is being taught
  - Do not alter strategies used to teach content
  - Do not change how instruction is delivered
And What About “Specially Designed Instruction”? (cont’d)

- Determining whether specific intervention is “specially designed instruction” can be difficult
  - “Fuzzy line” between general and special education

- One possible test: “Specially designed instruction” when:
  - Adaptations in content methodology or delivery;
  - Necessary, rather than beneficial, for student;
  - Designed or implemented by certified special education personnel; and
  - Not available regularly in general education
And What About “Specially Designed Instruction”? (cont’d)

- No definition of “specially designed instruction” in California law
- But Ed Code provides:
  - As prerequisite to eligibility, student must need instruction, services, or both, that cannot be provided with modification of the regular school program to ensure provision of FAPE
  - Student may be referred to special education only after resources of the regular education program have been considered and, where appropriate, utilized

(Ed. Code, § 56026, subd. (b); Ed. Code, § 56303)
Is It “Specially Designed Instruction” or “Differentiated Instruction”?

**Case Example:**

- Dispute over OHI eligibility
- Parents claimed assistance that Student received from teacher (reading directions, extra testing time, etc.) was “specially designed instruction”
- District characterized it as “differentiated instruction”
- Court agreed with District
  - Teacher testified she would have made similar changes to assist other students
  - Not a different method of teaching and not “specially designed” for Student; done at teacher’s discretion

The 9th Circuit Says . . .

  - Court applied U.S. Supreme Court’s Rowley “benefit standard” for FAPE to eligibility/need for special education
  - If student is receiving educational benefit in the general education setting, he or she is not entitled to special education

(Hood v. Encinitas Union School Dist. (9th Cir. 2007) 107 LRP 26108)
The 9th Circuit Says . . .

  - **The Facts:**
    - 10-year-old Student performed at grade level or above in her classroom, but had difficulty with completing tasks, turning in homework, and organization.
    - District offered Section 504 plan with various accommodations (preferential seating, homework checks, visual supports, etc.).
    - Parents withdrew Student, placed her in NPS, then filed for due process seeking reimbursement for tuition and assessments.
The 9th Circuit Says . . .


The Decision:

- Case ultimately reached 9th Circuit, which applied Rowley and found no eligibility under either SLD or OHI categories.
- Reasonable for IHO to conclude that Student’s impairment could be accommodated through District’s Section 504 plan.
- “The law does not entitle [Student] to special education if we find that her discrepancy can be corrected in the regular classroom.”
Now let’s look at a few post-Hood OAH cases . . .
Need for Special Education: Autism

Case Example: Stanislaus USD v. Student

The Facts:

- 7-year-old Student diagnosed with autism at age 2
- Received early intervention services through NPS, including 1:1 “intensive behavioral treatment”
- Attended general ed kindergarten and first grade with 1:1 aide, although District believed aide was no longer necessary
- Behavior analyst had recommended “fading” aide when Student was in kindergarten
- District sought to exit Student from special education
Need for Special Education: Autism

- **Stanislaus USD v. Student** (cont’d)
  - **The Decision:**
    - ALJ backed District’s conclusion that Student no longer needed special ed to succeed in school
    - Evidence of remediation was significant
    - Tutors and aide “did little or nothing” in classroom to support Student and she no longer required those services, nor did she require behavioral goals, supports or specialized instruction
    - Due to Student’s medical diagnosis of autism, ALJ advised District to monitor her closely for any regression

*(Stanislaus Union School Dist. v. Student* (OAH 2013) Case No. 2013050308, 113 LRP 52113)
Need for Special Education: Other Health Impairment

Case Example: Student v. Santa Barbara USD

- The Facts:
  - Student born addicted to heroin and diagnosed with ADHD at age 6; not determined eligible for special ed
  - By seventh grade, Student’s grades and behavior deteriorated
  - Provided with general ed interventions (“intervention pyramid” system) throughout eighth grade, but behavior worsened and he was failing his classes
  - SST team made no special ed recommendation
  - Although District later found Student eligible, Parents claimed he should have been found eligible previously
Need for Special Education: Other Health Impairment

Student v. Santa Barbara USD (cont’d)

The Decision:

- ALJ agreed with Parents
- Intervention pyramid and District’s SST process did not work
- Accumulating evidence of bad behavior and poor grades during seventh grade – and especially during eighth grade – demonstrated need for special education and should have triggered referral
- District ordered to provide Student with 180 hours of compensatory education

(Student v. Santa Barbara Unified School Dist. (OAH 2013) Case No. 2012080468, 113 LRP 1802)
Need for Special Education: Specific Learning Disability

- **Case Example: Salinas Union HSD v. Student**
  - **The Facts:**
    - 14-year-old initially classified as EL
    - Determined eligible as SLD in fifth grade
    - IEP included pull-out instruction by RSP teacher
    - When Student moved to middle school, he received push-in RSP services
    - By end of middle school, Student’s classroom performance had improved so significantly that District sought to exit him from special ed
Need for Special Education: Specific Learning Disability

- **Salinas Union HSD v. Student** (cont’d)
  - **The Decision:**
    - ALJ approved District’s request to exit Student
    - By eighth grade, Student participated in English and reading classes without needing any assistance from RSP teacher
    - Enrolled in Algebra support class by Parents, but did not need it
    - Although Student previously received tutoring at reading clinic, ALJ doubted such tutoring could be considered special ed (and it had been phased out)

(Salinas Union High School Dist. v. Student (OAH 2014) Case No. 2013070582, 63 IDELR 176)
II. Child Find
Introduction . . .

- Identify . . . Locate . . . Evaluate

- **Child find** is one of the most important special education legal obligations for school districts.
- It is a cornerstone of the IDEA – along with IEPs and parental participation – and is the foundation of FAPE.
Legal Standard

- IDEA
  - Affirmative, ongoing duty to identify, locate and evaluate all children with disabilities residing in the state who are in need of special education

- California law
  - Education Code’s child find requirements includes homeless children, wards of the state, children attending private schools
  - Applies regardless of the severity of disabilities

(34 C.F.R. § 300.111; Ed. Code, § 56301)
Two Components to Child Find

- General “public notice” responsibility
  - Inform and educate public about need to locate and identify all children with disabilities

- Obligation to specific child
  - Triggered when district knows – or should know – that student may have a disability
General Responsibilities

- Neither IDEA nor Education Code specifies which general activities are sufficient to meet child find obligations.
- Ed Code obligates each SELPA to establish child find policies and procedures for use by its districts.

(Ed. Code, § 56301)
General Responsibilities (cont’d)

- U.S. Department of Education guidance:
  - Child find generally includes, but is not limited to, activities such as:
    - Widely distributing informational brochures
    - Providing regular public service announcements
    - Staffing exhibits at health fairs and other community events
    - Creating direct liaisons with private schools

General Responsibilities (cont’d)

- Case law
  - Reasonable procedures must be in place to make parents aware of availability of services
  - District met obligations when it:
    - Published annual notices in newspapers with special ed contact information
    - Provided pamphlets to hospitals and business
    - Maintained website
    - Conducted regular meetings with health care providers

(L.S. v. Tustin Unified School Dist. (C.D. Cal. 2007) 109 LRP 45311)
General Responsibilities (cont’d)

- **Staff Training**
  - Essential component of continuous child find responsibilities
  - **Student v. Santa Barbara USD** decision:
    - OAH scolded District for lack of general training for staff on child find
    - Continuing failure to meet child find obligations deemed “egregious”
    - ALJ ordered six hours of mandatory training

(Student v. Santa Barbara Unified School Dist. (OAH 2013) No. 2012080468, 113 LRP 1802)
Obligation to Individual Students

- Triggered when district has knowledge of – or reason to suspect – student has disability
  - Threshold for suspicion is “relatively low”
  - Appropriate inquiry: Whether student should be referred, not whether he or she will qualify
  - Child find violated if district overlooks clear signs of disability and offers no rational justification for not evaluating
  - But child find does not guarantee eligibility

Obligation to Individual Students

- Affirmative obligation to act
  - Not dependent on parent request for evaluation
  - Child find not excused even when parent interferes with process
  - Passive approach – deciding not to “push” or to “wait and see” – equates to active and willful refusal to take action

(Compton Unified School Dist. v. Addison (9th Cir. 2010) 54 IDELR 71)
Violations of Child Find

- Issue of whether district had reason to suspect disability must be viewed based on what information it possessed at relevant time
  - “Snapshot” – not a retrospective

- Violation of child find duty is “procedural” violation and amounts to denial of FAPE only if:
  - Impedes right of student to a FAPE;
  - Significantly impedes opportunity of parents to participate in decision-making; or
  - Causes deprivation of educational benefits

(34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f))
Child Find Responsibilities

Practice Pointer

- To avoid confusion over child find process and staff responsibilities
  - Ensure everyone has copy of – and understands – SELPA’s child find policies and procedures
  - Conduct child find training – with periodic review – that includes all relevant staff
What Triggers Child Find Duty?

Could be any one of numerous indicators, including:

- Declining academic performance
- Problematic behavior issues
- Bullying (either target or perpetrator)
- Extended illness
- Medical diagnosis of recognized disability
- Nonattendance, school refusal or anxiety
- Psychiatric hospitalization and/or attempted suicide
- Parental request for assessment

Also unique child find issues arise regarding:

- English learners
- RTI process
Let’s look at some cases!
Academic Performance

- Child find duty extends to students who are advancing from grade to grade; but poor or declining grades, without more, do not necessarily establish violation

- **Case Example: Student v. Capistrano USD**
  - Student’s grades began declining in ninth grade – GPA slipped from 3.17 to 1.20; isolated disciplinary incidents
  - Late in school year, Student sold codeine pills (and was eventually expelled)
  - Reacted violently when father attempted to punish him, resulting in hospitalization and Parents’ decision to place him in residential facility
  - Parents alleged decline in grades (with other factors) should have caused District to suspect disability
Academic Performance

- Student v. Capistrano USD (cont’d)
  - ALJ found no child find violation
  - Credited District’s expert witness’s explanation that ninth-graders often experience drop in grades
  - Drastic grade decline resulted, in part, from expulsion and failure to complete work
  - Other factors: Discipline incidents were minor, “selling drugs does not equal disability” and District was not aware of hospitalization

(Student v. Capistrano Unified School Dist. (OAH 2011) No. 2011040869, 111 LRP 75100)
Behavior

- On the other hand, disruptive behaviors occurring exclusively at home typically will not trigger child find

- Case Example: Student v. Ventura USD
  - When Student began 10th grade (2009-2010), his home behavior problems escalated – as did his marijuana use
  - However, no behavior incidents occurred at school
  - Parents moved Student to charter school for 11th grade (2010-2011), where attendance problems developed and Student continued oppositional conduct at home
  - Student returned to District for brief period, but violent incident at home forced involuntary hospitalization and subsequent residential placement
Behavior

- **Student v. Ventura USD (cont’d)**
  - ALJ found no child find violation for 2009-2010
  - Student’s grades improved after Student Assistance Team’s intervention and he had no behavior problems
  - Parents never reported severity of behavior issues at home and those issues did not impact Student at school
  - ALJ also found no child find violation for 2010-2011
  - Parents did not inform District about Student’s charter school truancy, increased marijuana use, medication or hospitalization

(Student v. Ventura Unified School Dist. (OAH 2012) No. 2011080552, 112 LRP 21671)
Academic Performance and Behavior Issues

Practice Pointer

- Involve the Student Study Team or intervention personnel at first sign of a problem so that interventions can be implemented, progress monitored and a referral made if interventions are not succeeding
English Learners

- When an EL student struggles with classwork, it is often difficult to distinguish between learning difference (language) or possible learning disability

- **Case Example: Student v. Los Angeles USD**
  - Parent expressed language concerns when Student was enrolled in Head Start, but never informed District when Student enrolled in kindergarten
  - Parent requested language and speech assessment during kindergarten year, but, after screening, District pathologist concluded that language difficulties were related to Student’s EL status
  - Student ultimately was assessed during first grade and found not to be eligible for special ed
English Learners

- **Student v. Los Angeles USD (cont’d)**
  - ALJ found no child find violation prior to Student’s enrollment in kindergarten since Parent did not advise District of Head Start concerns
  - Also no duty to assess when Student began kindergarten because EL status, without more, did not trigger child find
  - However, District failed in child find later in Student’s kindergarten year
  - Student’s language deficits could not be reconciled with EL status given primary language delays
  - No denial of FAPE because no proof Student required special ed to access kindergarten curriculum

(Student v. Los Angeles Unified School Dist. (OAH 2013) Nos. 2012090211 and 2013010694, 113 LRP 28915)
It is a myth that districts must wait until student has received EL services for at least five years before making special ed referral.

Skilled assessors can determine if student has a disability (vs. a language difference) even if student has not yet fully acquired English.
Nonattendance/School Refusal

- When significant absences affect educational performance and there is suspicion of underlying emotional or medical condition, districts generally will owe duty to evaluate.

- **Case Example: Student v. Berkeley USD**
  - In October of first-grade, Student began demonstrating anxiety and refused to go to school.
  - In January, teacher contacted Parent about Student’s numerous absences.
  - In February, Parent notified teacher that Student was seeing therapist and asked for meeting to share concerns.
  - In May, District convened Student Study Team.
  - Student assessed the following fall; found not eligible.
Nonattendance/School Refusal

- **Student v. Berkeley USD** (cont’d)
  - District’s knowledge of excess absences – combined with Parent’s report to teacher of anxiety and school refusal – triggered child find duty by March
  - By that time, Student had missed 51 days of school
  - Child find obligation was not dependent on first finding source of Student’s anxiety about attending
  - However, child find violation did not deny FAPE as Student ultimately found not to be eligible for services

Nonattendance

Practice Pointer

- On some occasions, it may be apparent that chronic nonattendance is not school-related and may not require an assessment
- But prompt investigation of reason for chronic absence – and then addressing its cause – is essential in helping to avoid subsequent child find claim
Private School Student: Responsibility for Child Find Activities

- Child find rules apply equally for public school students and student placed by their parents in private school
  - General child find activities must be similar and completed in comparable time period

(34 C.F.R. § 300.131; Ed. Code, § 56301)
Responsibility for Child Find Activities

- Purpose of child find for private school students is to ensure accurate count in order to determine IDEA equitable services obligation.

- Therefore, responsibility for child find lies with the district where the private school is located.

  (Letter to Eig (OSEP 2009) 52 IDELR 136; 34 C.F.R. § 300.131; Ed. Code, § 56171)
But . . .

- Even if Student is attending private school within jurisdiction of another district, district of residence still has ongoing general child find obligation.

- **Case Example: Student v. Capistrano USD**
  - District found Student eligible as TBI, SLD and OHI in 2013
  - In 2014, Parent returned Student to private school outside of District boundaries
  - Parent sought IEP from District in 2016
  - Alleged child find violation
General Child Find Obligation to Private School Students

- **Student v. Capistrano USD (cont’d)**
  - ALJ ruled for Parents
  - District should have made inquiries during two-year period when Student was attending private school
  - Breach of general child find obligation to “search and seek” denied FAPE

(Student v. Capistrano Unified School Dist. (OAH 2017) Case No. 2016110441)
Responsibilities for Assessment and for Provision of FAPE

- Once student is identified, district where private school is located also is responsible for assessment to determine eligibility.

- If student is determined to be eligible for services, and resides in different district than where private school is located, district where student resides is responsible for convening IEP meeting and offering FAPE:
  - If parent intends to keep student enrolled in private school, FAPE obligation is discharged.

Private School Students

Practice Pointer

- Remember to instruct staff that in cases where student resides within district boundaries they cannot refuse parental request for assessment on grounds that student is currently attending private school in another district.
III. Procedural FAPE
FAPE Equation

Substantive + Procedural = FAPE
WHAT IS “FAPE”?  

- **TWO PRONGS:**  
  - **Procedural FAPE**  
    - Has the school district complied with the procedures set forth in the IDEA? (Rowley)
  - **Substantive FAPE**  
    - Is the IEP reasonably calculated to enable the student to make progress appropriate in light on the student’s circumstances? (Endrew F.)
Procedural FAPE

Over 800 possible procedural violations:

• *Failing to Meet Timelines*
• *Predetermination*
  • (“We don’t need Parent’s input!”)
  • (“We only have an hour, let’s just get through the process”))
• *Failing to Share Information With Parents*
  • (“We only do quarterly progress reports!”)
• *Failing to Make a Clear and Specific Offer*
• *Failing to Obtain Consent*
• *Failing to Have All Required Members at the IEP Team Meeting*
Procedural Prong

- Procedural flaws in the IEP process do not always amount to the denial of a FAPE
- Procedural inadequacies may result in the denial of a FAPE if:
  - 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 a FAPE, or
  - Caused a deprivation of educational benefit

(W.G. v. Board of Trustees of Target Range School Dist. (9th Cir. 1992); subsequently codified in IDEA and regs at 34 C.F.R. § 300.513(a)(2))
Procedural FAPE: Avoiding Missteps

- Know and comply with your timelines
  - Keep calendars, keep reminders and keep in communication with case managers and your team
- Ask questions and keep discussion open
- Provide Parents with Notice of Procedural Rights and Safeguards (and review them yourself)
Let’s discuss one of the most common procedural FAPE issues arising at due process hearings . . .

Predetermination
Predetermination

- Procedural violation of FAPE that occurs when districts decide on IEP content/issues prior to IEP meeting precluding meaningful parental participation

- Allegations of predetermination frequently arise with respect to:
  - Preparatory meetings
  - Draft IEPs
  - (Lack of) meaningful discussion at IEP meeting
Predetermination – Preparatory Meetings

- Districts may engage in preparatory activities to develop a proposal or response to Parent proposal that will be discussed at a later meeting
  - Example: Staff may review assessment recommendations or placement options in advance of meeting, but must discuss those options with Parents and make decisions at the IEP meeting

- Difference between preparation and predetermination is sometimes hazy
  
  (34 C.F.R. § 300.501(b))
Predetermination – Draft IEPs

- Permissible to develop draft IEP
  - Share with Parents before or during meeting
  - Must be used for discussion purposes only
  - Cannot be presented as completed document

- U.S. Dep’t of Education: If draft IEP is developed, District should:
  - Make clear to Parents at outset of meeting that it is preliminary recommendation for review and discussion
  - Provide Parents with copy

Case Example: Changes In Draft Document Refute Predetermination Claim

- District staff brought to meeting a draft IEP developed by special ed teacher with proposed goals suggested by other team members
- Parents claimed predetermination
- ALJ disagreed, noting that draft underwent significant changes during meeting based on input from Parents, service providers and IEEs shared by Parents
- Draft goals for home-based program not used

(Temecula Valley Unified School Dist. v. Student (OAH 2009) 2009050048, 109 LRP 74851)
Predetermination – Draft IEPs

Practice Pointer

- Consider the following to avoid any appearance of predetermination when using a draft IEP:
  - Stamp or write “DRAFT” on each page
  - Ask for Parent feedback throughout the meeting
  - Keep detailed notes and handwrite changes on draft
  - Do not complete the FAPE offer portion of the draft IEP prior to the meeting
  - Consider saving the draft with handwritten notations to allow comparisons with final IEP
Predetermination – Meaningful Discussion

- Parents’ presence at meeting is not enough
  - Must have opportunity to voice concerns
  - Must have their input considered by the team
  - Must have opportunity to ask questions and be provided with meaningful answers

- “Take it or leave it approach” evidences predetermination
  - Frequent topic of litigation as the following case examples illustrate . . .
Predetermination – Meaningful Discussion

Case Example: Parent’s Disagreement Does Not Mean “Take It Or Leave It” Proposal

- IEP team agreed that Student required NPS placement
- After discussing various options, team decided on NPS that differed from NPS preferred by Parents
- Parents claimed District gave them “take it or leave it” offer
- Court found no evidence of predetermination
- District’s offer of placement was made after meeting where other options were considered, including Parents’ preference
- Subsequent meeting convened to address Parents’ concerns

Predetermination – Meaningful Discussion

Practice Pointer

- Tips to Ensure Meaningful Parent Participation:
  - Explain purpose and reason behind preparatory meetings
  - Be careful of statements at IEP meeting suggesting “Here’s what we decided”
  - When option is proposed, seek Parents’ input/response
  - Give Parents enough information about all possible placement so that they can take part in discussions
  - Ensure enough time for questions
Another common procedural FAPE issue arising at due process hearings

IEP Team Composition
Building Your IEP Team

IEP Team *Must* Include:

- Parent(s) or a representative of parent(s)
- At least one regular education teacher
- At least one special education teacher or, if appropriate, a special education provider
- A representative of the district
- An individual who conducted an assessment or is knowledgeable about the assessment procedures and qualified to interpret the results

(Ed. Code, § 56341; 34 C.F.R. § 300.321)
Building Your IEP Team

IEP Team *SHOULD* Also Include:

- Student, if appropriate
- Agencies providing transition services (with parent consent)
- NPA staff
- Student’s private school teacher, or provider, if appropriate
- *(Optional)* Other individuals who have knowledge or special expertise of student
The Administrator’s Role

Qualified to:

- Provide or supervise the provision of specially designed instruction
- Knowledgeable about the general education curriculum
- Knowledgeable about the availability of resources of the public agency
- What about authority?
Which Teachers Are Key?

- The District is required to have at least one special and one general education teacher at a student’s IEP meeting. But, just selecting any one special or general education teacher may not suffice . . .

- Invite a teacher who has taught the student and is the best source of knowledge regarding the student, or a teacher who will work with the child in the future
The General Education Teacher

M.L. v. Federal Way School District
(9th Cir. 2004)

Facts:
- Kindergarten student with autism, mental retardation and macrocephaly. Student had been mainstreamed with a 1:1 aide, but District recommended SDC
- No regular education teacher participated in the IEP meeting. District argued it was unlikely Student would participate in general education.
Continued...

M.L. v. Federal Way School District
(9th Cir. 2004)

Holding:
- If student may be participating in a regular classroom, regular education teacher’s presence is mandatory.
- Otherwise, the IEP team is deprived of “important expertise regarding the general curriculum and the general education environment.”
- District violated the IDEA, denying student a FAPE.
May an IEP Team Member be Excused from Attendance?

Excusal from all or part of an IEP team meeting may be granted for the following IEP team members:

- Special education teacher;
- General education teacher;
- Administrator; and
- Assessor.

DOCUMENT PARENTAL AGREEMENT!
Meetings Without a Parent In Attendance

- Parents are mandatory members of an IEP meeting.
- If neither parent can attend an IEP meeting, the school district must use other methods to ensure parent participation, including individual or conference telephone calls.
Meetings Without a Parent In Attendance

- A valid IEP meeting can be held without a parent, but only if the school is able to prove that it was unable to convince the parents that they should attend.

- Required documentation:
  - Detailed records of telephone calls;
  - Copies of correspondence; and
  - Detailed records of visits made to the parents’ home or work.
Other Parent Procedural Rights Re: IEP Development

- Documenting Parent Concerns and Objections
  - IDEA requires team to consider concerns for enhancing education of Student
  - Team should specifically ask Parent about concerns and indicate on the IEP document that it has done so

- Right to Copy of IEP Document
  - IDEA requires District to provide IEP copy at no cost
  - California requires free copy in Parents’ primary language

(34 C.F.R. § 300.324(a)(2); 34 C.F.R. § 300.322(f); 5 C.C.R. § 3040(b))
Other Parent Procedural Rights Re: IEP Development

Right to Be Informed of Student’s Progress

☐ Each IEP must include a description of how and when Parents will be informed of progress Student is making toward meeting annual goals (such as through use of quarterly or other periodic reports, concurrent with the issuance of report cards)

(34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3))
Other Parent Procedural Rights Re: IEP Development

Right to Have IEP Team Consider IEE

- IEP team has duty to consider any IEE shared by Parents, if IEE meets District criteria
- Duty to consider does not equate to duty to accept recommendations
- No IDEA or state law provision setting parameters for what it means to “consider”

(34 C.F.R. § 300.502(c); Ed. Code, § 56329, subd. (c))
Obtaining Parent’s Consent to IEP

- Consent means that Parent:
  - Has been fully informed of relevant information
  - Understands and agrees in writing to the carrying out of the activity for which consent is sought
  - Understands that granting consent is voluntary and may be revoked at any time

(34 C.F.R. § 300.9; Ed. Code, § 56021.1)
Obtaining Parent’s Consent to IEP

Consent to Initial Services
- District must obtain informed consent before initial provision of services outlined in IEP
- If Parent refuses to consent or fails to respond, District should not provide services
- Cannot attempt to override lack of consent to services by filing for due process
- District does not violate FAPE obligation and is not required to develop IEP if no consent obtained

(34 C.F.R. § 300.300(b)(2); Ed. Code, § 56346, subd. (a)-(c))
Obtaining Parent’s Consent to IEP

Revocation of Consent

- District must cease providing services
- May not seek due process to override revocation
- No longer has obligation to develop IEP
- No limit on number of times Parent may revoke consent and then request reinstatement
- Revocation by one Parent is sufficient, even if other Parent disagrees

(34 C.F.R. § 300.300(b)(4); Ed. Code, § 56346, subd. (d))
Obtaining Parent’s Consent to IEP

- Consent Withheld to Some Services
  - If Parent consents to some IEP services, but not to all components of program, District must implement those components to which Parent has consented.
  - If District determines proposed components to which Parent has not consented is essential to providing FAPE, then it must initiate due process.

(Ed. Code, § 56346, subd. (e)-(f))
Due Process Filing Obligation
I.R. v. Los Angeles Unified School Dist. (9th Cir. 2015)

Facts:

- Parent agreed to portions of various IEPs, but did not agree to placement outside of general education classroom.
- District provided services to which Parent consented, but did not implement portions of IEPs to which she did not consent.
  - As a result, Student remained in general education classroom from November 2010 until February 2012.
- Parent ultimately filed for due process.
- Court addressed issue of whether District violated Ed. Code section 56346, which requires Districts to file for due process if any portion of IEP to which Parent does not consent is necessary to provide FAPE.
Due Process Filing Obligation
I.R. v. Los Angeles Unified School Dist. (9th Cir. 2015)

Decision:

- Court rejected District’s argument that it did not unreasonably delay filing for due process because it was still attempting to use IEP meeting process to resolve issues with Parents.
- Delay of more than one year was unreasonable.
- District must act with “reasonable promptness” to minimize duration of any denial of FAPE if it cannot reach agreement with Parents.
- Hoping that an agreement will be reached at some point in time is not enough to justify putting off the obligation imposed by section 56346.
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