



New Jersey
Special Education

ANNUAL SUMMIT

Inclusion, Leadership, and the Law

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Individuals with Disabilities Education Act (IDEA)

- ❖ Federal law that governs special education and related services, and emphasizes the provision of a free, appropriate public education (FAPE). Children with the following disabilities may be eligible for special education and related services through the end of the school year in which they turn 21:
 - ❖ Mental disability;
 - ❖ Hearing impairments (including deafness);
 - ❖ Speech or language impairments;
 - ❖ Visual impairments (including blindness);
 - ❖ Emotional disturbance;
 - ❖ Physical or Orthopedic impairments;
 - ❖ Autism;
 - ❖ Traumatic brain injury;
 - ❖ Multiple disabilities;
 - ❖ Other health impairments (e.g., ADHD, Tourette's, HIV); and
 - ❖ Specific learning disabilities.

Individuals with Disabilities Education Act (IDEA)

The purposes of the IDEA are:

- ❖ To ensure all children ages 3-21 with disabilities have available to them a free appropriate public education (in the least restrictive environment) designed to meet their *unique and individualized* needs.
- ❖ To ensure that the rights of children with disabilities and their parents are protected.
- ❖ To ensure that the Federal government has a supporting role in assisting state and local efforts in educating children with disabilities.

Individuals with Disabilities Education Act (IDEA)

Under IDEA, a child with a disability is entitled to specially designed instruction, at *no cost to the parent*, designed to meet the unique needs of a child with a disability.

- ❖ Includes (1) special classroom instruction; (2) special physical education and (3) special vocational education (depending on the child's needs).
- ❖ If the child cannot attend school, special education may be delivered at home or in the hospital.
- ❖ May also include speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State services.

Individuals with Disabilities Education Act (IDEA)

Free and Appropriate Public Education (FAPE): The Legal Standard

- ❖ An individualized educational program (IEP) must be developed to provide the child an opportunity to derive significant and meaningful educational benefit.
- ❖ However, schools are not required to maximize a student's potential.
- ❖ The IDEA does not countenance "Monday morning quarterbacking." The appropriateness of an IEP must be judged based upon the information available at the time it was developed and offered, without the benefit of hindsight. See Carlisle Area School v. Scott P. By and Through Bess P., 62 F.3d 520, 583, n.8 (3d Cir. 1995).

Individuals with Disabilities Education Act (IDEA)

Free and Appropriate Public Education (FAPE): The Legal Standard

- On March 22, 2017, the Supreme Court decided Endrew F. v. Douglas County School District, which raised the question: what does it mean to provide FAPE?
- The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s unique circumstances.”
- The decision further stated that an IEP must be “appropriately ambitious” given the child’s individual circumstances, and must offer an opportunity to meet “challenging” goals and objectives.”

Individuals with Disabilities Education Act (IDEA)

Free and Appropriate Public Education (FAPE): The Legal Standard

- The Supreme Court also repeatedly stated in the Endrew F. decision that for a student who is educated in the general education environment, a FAPE will be offered if the student's IEP "is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."
- While courts must consider the input of the child's parents in addition to the expertise of school officials, "deference is based on the application of expertise and the exercise of judgment by school authorities."
- Whether FAPE has been provided will likely depend on whether school authorities and special education staff members can offer "a cogent and responsive explanation for their decisions."

Least Restrictive Environment (LRE): The Legal Standard

- New Jersey courts have adopted a balancing approach to determining appropriate inclusion of students with disabilities with their non-disabled peers, using the two-prong test expressed in Oberti v. Clementon Bd. of Educ., 995 F.2d 1204 (3d Cir. 1993).
- Oberti requires a Court to make a primary determination of:
 - “whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily;” and
 - If the child cannot educationally benefit from the regular classroom, then the court must decide “whether the school has mainstreamed the child to the maximum extent appropriate.”

Least Restrictive Environment (LRE): The Legal Standard

- In analyzing the Oberti factors, a Court must consider:
 - The steps the school has taken to include the child in the regular classroom;
 - The educational benefits the child will receive in the regular classroom (with supplementary aids and services), as compared with the benefits the child will receive from the special education classroom; and
 - The possible negative effect the child's inclusion may have on the education of other children in the regular classroom.

N.J.A.C. 6A:14-4.3 Program Options

- All students shall be considered for placement in the general education class with supplementary aids and services including, but not limited to, the following:
 - Curricular or instructional modifications or specialized instructional strategies;
 - Assistive technology devices and services as defined in N.J.A.C. 6A:14-1.3;
 - Teacher aides;
 - Related services;
 - Integrated therapies;
 - Consultation services; and
 - In-class resource programs.

IDEA Legal Remedies

The following types of relief may be awarded by a court and/or Administrative Law Judge in order to remedy proven violations of the IDEA :

- Injunctions
- Compensatory education
- Reimbursement for private tuition, educational services and/or evaluations
- Legal fees
- Monetary damages

Due Process – Building A Better Defense

- Avoiding Due Process may not be possible and you may not even see it coming
- The best defense to a Due Process Petition is built before the Petition is filed
- Consider the following:

Avoid Common Pitfalls

- **Student Records**

- Defined broadly as “information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information that is maintained for the purpose of second party review is considered a student record.”
- Individual notes, not shared with others, not a student record.
- Parents are entitled to access all student records.

Avoid Common Pitfalls (Cont'd)

- Document, Document, Document!
- Sometimes giving parents/students what they want does not work out. If a program, service or modification is provided against the recommendation of the district, but given to placate the parent, it should be noted in the IEP.
- Three strikes and you're out is okay, one is not enough. This applies to services, meeting schedules and most other parent or student interactions

Foster Trust Whenever Possible

- Parents who do not trust the district staff are much more likely to challenge a program (or any IEP team decision) even when that program/decision is clearly valid
- Ex. – ALJ denied parental request for independent evaluations where the parent “attributed nefarious motives to every action of the District” and the parent “did not afford herself the opportunity to get the District’s explanation of the test result, because of her suspicions.”

Writing Defensible IEPs

- IEPs must include –
 - Present levels of academic achievement & functional performance, how the disability impacts progress in general education, and summaries of evaluations
 - A statement of special education, related services and supplementary aids & services to be provided
 - Measurable annual goals & short term objectives with a description of how they will be measured and when progress reports will be provided, including frequency, location and duration of services.

Writing Defensible IEPs (Cont'd)

- **Present Levels of Academic Achievement and Functional Performance**
- This section should serve as the basis for the development of student's programming needs, related services & placement.
- Basically summarize the student:
 - Discuss strengths & weaknesses
 - Explain modifications currently needed in the general curriculum
 - Describe the student's behavior, performance relative to typical peers, performance relative to IEP goals & objectives
 - Delete/Remove out of date information!
 - When summarizing evaluations, remember that the summaries will remain in the IEP for three years

Writing Defensible IEPs (Cont'd)

- Goals and Objectives
 - Academic and Functional goals related to the core curriculum content standards that are **SMART** – **S**pecific, **M**easurable, use **A**ction words, are **R**ealistic and **T**ime-limited.
- Reasonable expectations of what a student can and should accomplish in school during one year based upon present ability level & ultimate goals
- Remember to:
 - Use the student's name
 - Avoid repetition of goals and objectives from one year to the next
 - Individualize content, to the extent possible
 - Include the setting, standard and evaluation tool
 - Use measurable terms
 - Include goals and objectives for area of need

Writing Defensible IEPs (Cont'd)

- Goals and Objectives (Cont'd)
 - Make sure to include goals and objectives for each area in which the student is deficient
 - If the student has behavior issues, there should be goals to address same, not just a behavior intervention plan (BIP)
 - There is no magic number of goals and objectives in an IEP - more is *not* always better
 - Think about mastery criteria for each goal and objective, do not reflexively default to 80% all of the time

Dates, Frequency, and Location of Services

- N.J.A.C. 6A:14-3.7(e)(8)
- Always include:
 - When services will begin
 - How often services will be provided
 - Where services will be provided
 - How long services will last
- Extended School Year Services must also include clear and concise dates, frequency, duration and location of services

Supports In General Education

- Supplementary aids and services which the student needs in order to enable access to instruction and progress in the general education curriculum, in the general education class.
- Program modifications the student needs to enable access to instruction and progress in the general education curriculum.
- Supports for school personnel that are needed to enable the student to access instruction and progress in the general education curriculum.

The Implementation of Legally Compliant IEPs

LEGAL STANDARD

- The Supreme Court has not specifically addressed the appropriate standard for evaluating whether a school district's failure to implement a provision of a student's IEP violates a student's right to a free appropriate public education. This is mainly because the majority of case law addresses the appropriateness of the IEP proposed, as opposed to the failure of implementation.
- The growing trend is towards requiring a failure to be substantive before it can be cognizable as a violation of IDEA.
 - For example, courts are beginning to use words like "substantial," "significant," and "essential" relative to portions of IEP that were not implemented.
 - Also, courts are examining: 1) the reason for the failure; 2) whether the student received an educational benefit despite the failure; and 3) requiring the failure to be more than *de minimis*.

Helpful Strategies

- Make sure that general and special education teachers and staff are aware of which students have IEPs, have personally reviewed those IEPs, and are making a good faith effort to implement those IEPs as written.
- Maintain documentation, as necessary, that demonstrates implementation of specific instruction required by IEPs, e.g., ABA data
- Address services, modifications and accommodations that the student is not using, or are not appropriate, in a timely manner

Due Process Litigation

Oftentimes, there is a great deal of delay between the filing of a dispute and the hearing. The hearing process is as follows:

- Petition is filed w/OSEP
- Petition is referred to mediation, typically scheduled 3 to 4 weeks after filing (within 30 days unless extension granted)
- If mediation fails, the matter is referred by OSEP to the Office of Administrative Law (“OAL”), and a “hearing” is scheduled 2-4 weeks later
- First “hearing” is a settlement conference. The administrative law judge (“ALJ”) then schedules an actual hearing date, likely months later
- First real hearing date is typically adjourned (i.e., delayed) at least once
- First day proceeds without much testimony, additional dates required, scheduled to take place months later
- Do not forget that parents can challenge IEPs written two years prior!

Put Your Best Foot Forward!

- Although the IEP team may have an in-depth and thorough understanding of a student's needs and progress, the ALJ's decision is based solely on the documents and testimony presented.
- IDEA requires evaluation of the IEP actually offered, not one which could have been developed/offered.
- Ex. – “Here, the District personnel had a proposed IEP which they characterized as a working document. Under the circumstances, the District personnel could have revised the proposed IEP to reflect the discussion at the IEP meeting. The revised version would have been the IEP developed in accordance with [regulation]. However, the District personnel made no changes, and there is no IEP other than the one presented to petitioners at the [IEP] meeting.”

The Importance of Documentation

- Frequent complaint of parent litigants (and their attorneys) is that there is not enough documentation of progress or a proposed program
- The burden of proof and persuasion is on the school district
- Written correspondence helps to eliminate he-said, she-said allegations and arguments
- Witness testimony becomes easier when ample records are available

Communication Is Key!

- Parents often file for due process when they feel, whether right or wrong, that school staff are not listening to their concerns or are otherwise refusing to communicate with them
- Strongly consider communicating with parents regularly (preferably in writing), including before IEP meetings
- Document the need/possibility for any change in program/placement/services as far ahead of time as possible

Parental Accountability

- One of the most frequent aspects of a due process hearing that an ALJ will focus on is the question of who made the most effort to reach out and which party severed the lines of communication
- Ex. – ALJ denied parents’ claim for compensatory education, finding that “there was no attempt to negotiate a better or ‘more suitable’ IEP...The parents’ failure to disclose certain reports and to further communicate with the [district] was deemed “unreasonable and suspect.”

IEP Team Accountability

- Although parents are responsible for communicating with the IEP team, it is the district that is responsible for providing FAPE. An IEP team is not absolved from providing an appropriate IEP simply because the parents are difficult.
- Ex. – “The breakdown in communication between [the parent] and [the district] does not absolve [the district] of its duty to provide appropriate educational services to [the student]. On the contrary, once it became aware of the family’s crisis and the need to provide daily care for [the student], it should have redirected its energy and resources to revisiting his IEP and adjusting it accordingly.”

The Good, Bad, and Absurd

- “The district failed to ask any affirmative questions to the parents or aggressively approach educational goals with parents at the IEP meeting. Rather, the district ... took the absurd position that the parents had to be proactive and that they were not proactive enough. The district and the CST possess the expertise and they should be the ones aggressively seeking answers from the parents, not the other way around.”
- Parents continuously refuse to accept IEP despite requesting and receiving numerous modifications on several occasions. IEP team found to be “cooperative and eager” to negotiate the terms of the IEP. Although the IEP team did not accept all of the parents’ private expert reports, the district “more than adequately addressed the educational needs” of the student.
- Parent’s due process petition denied where the bulk of his dispute with the district was based on his frustration with having to walk his daughter to the curb in order to have her get on the bus.

Sometimes Due Process Litigation is Unavoidable

“There is an oddity in this case worth reporting. The District actually has no serious opposition to IEP amendments along lines suggested by petitioner, as there is no programmatic aspect to the debate. That revelation would normally lead to a settlement. The difficulty, however, is that the District sees petitioner as intractable and it will not volunteer for a new round of open-ended IEP meetings.

As it happens the hearing provided an example. Just prior to reconvening after a break, I asked [the district supervisor] whether he would be amenable to having petitioner draft the changes she thought necessary and then have these reviewed by the IEP team. He responded affirmatively, but petitioner stated that she was ‘too busy to do the District’s work.’

I explained that even if she were to prevail at hearing, the order would only direct an IEP meeting to work on amendments. She understood and preferred that course. Thus, given the option of a more direct and conciliatory course, petitioner chose the litigation.”

The Consequences of Inaction

- The IEP team is not required to act upon every parental request, but it should always be open to improving the student's IEP
- Ex. – “In this matter, there is no question that the school district was aware of the parents' dissatisfaction with the program offered for [the student] as a result of letters sent ... The school district did not respond to those letters and did nothing to modify the draft IEP that they initially proposed and was to be reconsidered when they received the observation report of petitioners' expert. I FIND that the school district had every opportunity during the summer ... to modify the IEP or determine if the proposed private placement was appropriate. It chose not to do either.”

The Consequences of Inaction (Cont'd)

The parents of an autistic child move into a new district in July and immediately placed their child into a private ESY program.

The district did not schedule or hold an IEP meeting until September, leading the parents to seek compensation for their private ESY placement.

In granting the parents' petition for compensation, the ALJ held that the district "seemed to be of the opinion that regardless of what program may have been offered for the balance of the summer ESY, it would have been unlikely that [the] parents would have been receptive to it. Though that perception may be accurate, there was no program offered to [the student]. The lack of inquisitiveness on the part of the District as to who would be bearing the burden of the expense of that program cannot now be interposed as a basis for not paying."

When in Doubt, Draft an IEP

“What is striking is that the child study team has had the information for one year that it now says constitutes a basis for it to conclude [that the student] is eligible for special education and related services, but has yet to offer a FAPE to [the student] based on her identified needs.

Neither the resumption of litigation nor a summer recess can justify the passage of one year for a child study team to convene an individual education program meeting to develop and implement a plan to meet the needs of a youngster it determines is in need of special education.”

Questions?

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