

INS & OUTS OF PROCEDURAL SAFEGUARDS

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A note about these materials: These materials are not intended as a comprehensive review of all case law, rules and regulations arising from the procedural safeguards under IDEA. Instead, these materials are designed to provide practical tips and thoughts on how schools can comply with the law while building positive working relationships with parents to better serve students under the IDEA. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

I. A Brief summary of Procedural Safeguards

A. What are procedural safeguards?

The procedural safeguards are a set of rules found primarily in Subpart E of the IDEA regulations beginning at §300.500 and ending at §300.536. They include the opportunity to examine records and parent participation in meetings (§300.501), the right to independent educational evaluations (§300.502), prior notice and notice of procedural safeguards (§300.503-§300.505), mediation and due process (§300.506-§300.515), the right to appeal, recover attorney’s fees, and stay-put (§300.516-§300.518), surrogate parents and transfer of parental rights at majority (§300.519-§300.520), and discipline procedures (§300.530-§300.537). These provisions are supplemented by rules on unilateral private placement of students (§300.148), parental consent for evaluation and placement (§300.300), and confidentiality of student records (§300.610-§300.625).

By regulation at §300.504, **the school has a legal duty to provide notice of the safeguards to the parent.**

“A copy of the procedural safeguards available to the parents of a student with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents—

- (1) Upon initial referral or parent request for evaluation;
- (2) Upon receipt of the first State complaint... and upon receipt of the first due process complaint... in a school year;
- (3) In accordance with the discipline procedures in §300.530(h) [notice of a disciplinary removal that constitutes a change in placement]; and
- (4) Upon request by a parent.” [Bracketed material added by the author].

Notice language requirements. The notice also must be provide in understandable language, which the regulation describes as “written in language understandable to the general public” and “provided in the native language or other mode of communication used by the parent unless it is clearly not feasible to do so.” §300.503(c)(i)-(ii). If the parent’s native language or mode of communication is not a written language, “the public agency must take steps to ensure” that the notice is “translated orally or by other means” to the parent in the native language or mode and that “the parent understands the content of the notice” and there is written evidence of same. §300.503(c)(i)-(ii).

Electronic delivery. Parents may choose to receive various types of notices, including prior written notice, notice of procedural safeguards and due process complaints via email should the school make that option available. §300.505. The procedural safeguards can also be posted on the district website, §300.504(b), although such posting does not provide for easy documentation of the required provision to a particular parent (especially a parent without internet access).

A little commentary: Note that while the notice is understandable to the general public, it might not be understandable to a particular parent. This distinction, and its impact on parent trust, is discussed below in the section on consent.

What happens when procedural safeguards are not provided correctly? Some procedural violations alone can rise to the level of a denial of a FAPE. “The procedural mandates of the Act are so significant that, in some circumstances, failure to comply with the mandates ‘can itself constitute the denial of a free appropriate education.’” *J. R. v. Sylvan Union Sch. Dist.*, 49 IDELR 253 (E.D.Cal. 2008) citing *Blackman v. Dist. of Columbia*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003). This is true when the procedural violations result in a loss of educational opportunities for the student, or if they seriously infringe on the parents’ right to meaningfully participate in the IEP development process. *See, for example, W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992)(“**procedural inadequacies that result in the loss of an educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.**”); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990)(“Adequate parental involvement and participation in formulating an IEP...[are of] primary concern in requiring that procedures be strictly followed.”); *Adam J. v. Keller ISD*, 328 F.3d 804, 812 (5th Cir. 2003). **For purposes of harm to the parent, the courts look to the whether the parent was denied meaningful input and participation as part of the process of developing the student’s educational program.**

B. Why are these provisions included? What do they add?

The safeguards exist, quite frankly, so that the parents can be active participants in the IEP process, and when necessary, can take action to enforce school compliance with the IDEA. The U.S. Supreme Court in *Schaffer v. Weast*, 44 IDELR 150, 126 S.Ct. 528 (2005) provided this helpful language.

“The core of the statute, however, is the cooperative process that it establishes between parents and schools. (‘Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, ... as it did upon the measurement of the resulting IEP against a substantive standard’)....

Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child under the Act. Parents are included as members of ‘IEP teams.’ They have the right to examine any records relating to their child, and to obtain an ‘independent educational evaluation of the[ir] child.’ They must be given written prior notice of any changes in an IEP, and be notified in writing of the procedural safeguards available to them under the Act[.] If parents believe that an IEP is not appropriate, they may seek an administrative ‘impartial due process hearing.’

School districts have a ‘natural advantage’ in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them.... As noted above, parents have the right to review all records that the school possesses in relation to their child. They also have the right to an ‘independent educational evaluation of the[ir] child.’ *Ibid.* The regulations clarify this entitlement by providing that a ‘parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.’ IDEA thus ensures parents access to an expert who can evaluate all

the materials that the school must make available, and who can give an independent opinion. **They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.**" [Internal citations omitted for easier reading; emphasis added].

IDEA envisions the parent as champion and protector of the student's IDEA rights. The IDEA envisions a system in which schools and parents work jointly in the planning and development of the IEP. Parents are consensus members of the IEP Team— equal participants in the IEP Team process under the law. Parents are entitled to notice of their rights, prior notice of meetings, and the right to inspect records. Parents can refuse consent to evaluation, can demand independent evaluations at the district's expense, and can request IEP Team meetings to discuss concerns. When the parent disagrees with the IEP Team, the parent can seek a due process hearing (that can spawn appeals to federal court), can file complaints with the SEA or OCR, or request mediation. The importance of the parent in the IDEA process was highlighted in commentary to the 2008 final regulations on revocation of consent. Note the presumption at the end of the quotation.

"Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the **IDEA's emphasis on the role of parents in protecting their child's rights** and the Department's goal of enhancing parent involvement and choice in their child's education.... Concerning the comments asserting that parental revocation of consent for special education and related services could be detrimental to the academic future of a child with a disability, **the Act presumes that a parent acts in the best interest of their child.**" 73 Federal Register No. 231 (December 1, 2008), p. 73009 (emphasis added).

A little commentary: In the author's opinion, for the Act's presumption to be valid, the parent must have a basic understanding of the IDEA process and the natural consequences of the decisions made through that process. The most important strategy for improving the school's working relationship with parents aside from faithful compliance with the IDEA is providing parents with these tools. You can't expect to protect or appropriately utilize rights you don't understand, and you can't effectively advocate for your child's FAPE if you have no idea what FAPE looks like.

While all of the provisions within Subpart E are important, these materials will focus on a few of the pieces requiring the understanding and attention of educators (rather than attorneys and advocates). With each safeguard selected, we'll focus on the requirements, what they attempt to cause or create in the parent-school dynamic, and how schools can be both compliant with the rule and improve working relationships with parents.

C. Due Process Hearings as an example....

"§300.507 Filing a due process complaint.

(a) General.

(1) A parent or a public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child)."

Following this general statement, the regulations then proceed to describe the mechanics of the process, required parts of the complaint, timelines, and other elements necessary for the hearing. The dynamics surrounding due process hearings provide an excellent environment for setting the tone for the discussion that follows. The existence of a mechanism to resolve stalemates or intractable disputes with respect to a child's education makes good sense. After all, while the adults argue about services, assessments, etc., the child is getting older and precious time to educate her is lost. While some hearings are inevitable (the parties dispute a matter with no real middle ground, for example, the parents

want residential placement at public expense and the school thinks it can provide FAPE or the parent thinks the student is IDEA-eligible and the school disagrees) many due process filings can be avoided. While the due process provisions exist to govern the hearing, what might be done to prevent the dispute from ever starting?

1. Let's look to evidenced-based practices from the doctor-patient relationship. The dynamics of the school-parent relationship bears a striking resemblance to the doctor-patient dynamic, allowing special educators to look to medical malpractice studies for scientific, research-based insight into building and maintaining trusting relationships with parents. Since the doctors have gone to the trouble of studying how their relationships with patients work (or don't work) and how to improve their system, it makes sense to capitalize on their work, applying by analogy to the schools. **The relationship between school employees and parents is often just as emotionally charged and complex as that of patient-doctor, and communication can be just as important.** Patients and doctors must work together to cure disease. Educators and parents must work cooperatively to educate despite disability. **To understand why due process complaints are filed, we can look by analogy for data on why doctors are sued.**

Why do patients sue doctors? Doctors have spent some time and funded numerous studies to discover why malpractice lawsuits occur. Interestingly, it appears that the level of medical care is not the primary factor in determining who will be sued. In February of 1997, the Levinson study on medical malpractice appeared in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (hereinafter JAMA). The study attempted to determine what factors play into a patient's decision to sue a doctor. **The findings are somewhat startling: the quality of care received was not the determining factor in whether a patient sued his doctor.** Whether the doctor did a bad job as a doctor was not the critical factor in determining who would be sued. This finding is consistent with an earlier study that determined that while 1% of hospitalized patients suffer significant injury due to negligence, "fewer than 2% of those patients initiate a malpractice claim." *Levinson, et. al., Physician-patient communication: The relationship with malpractice claims among primary care physicians and surgeons*, 277 JAMA, 553 (February 19, 1997). Quality of care is certainly a factor (for there must be injury to justify a legitimate claim), but substandard care is not the "trigger" for litigation. Instead, patient dissatisfaction is the likely cause. **"The combination of a bad outcome and patient dissatisfaction is a recipe for litigation."** *Id.*

Quite simply, **"patients and families are more likely to sue if they feel the physician was not caring and compassionate."** *Id.* For example, in an earlier study of patients served by OB/GYN's with a history of malpractice claims, patients "reported feeling rushed, feeling ignored, receiving inadequate explanations or advice, and spending less time during routine visits than patients of physicians with no prior claims." *Id., at 554.* Similarly, when depositions of medical malpractice cases were reviewed in a 1997 study, evidence of communication problems between doctor and patient were found in 70% of the cases. *Id.* Since bad outcomes can occur even with good care, the relationship between doctor and patient can make all the difference when things go wrong.

To determine the impact of communication skills on malpractice claims, the Levinson study examined tape recorded office visits between doctors and patients in 124 physicians' offices, and analyzed the communications skills utilized by doctors who had two or more malpractice claims filed against them during their lifetimes, versus those with no complaints. **The study confirmed that even when the quality of care meets the required standard, certain communication skills will reduce a doctor's malpractice exposure.** Specifically, the physicians with no malpractice claims had a few very effective communication skills.

- The doctors with no malpractice claims used more **statements of orientation** designed to help the patient know what to expect from the visit, what tests would be run, and how the visit would proceed. These statements let the patient know that there would be time to ask

questions and voice concerns. The study notes the benefit of those orienting statements. “Orienting statements help the patient develop appropriate expectations about a medical visit. They may also inform the patient about when during the interview to raise concerns and may help to prevent patients from presenting new problems in the closing moments of the interview.” *Id.*, at 558.

- The doctors with no malpractice claims **laughed and used humor more**. “More laughter and more use of humor by the no-claims primary care physicians indicate a warmer personal relationship and are consistent with our belief that patients want to be personally connected with their physicians. A warm relationship with the physician may make the patient feel that he or she is a real person in the physician’s eyes, rather than a disease.” *Id.*
- The doctors with no malpractice claims used more **facilitative statements**. They asked patients for their opinion about how a treatment was working and asked open-ended questions to get the patients involved. “These comments allow patients to talk and also indicate physician’s interest in their opinions, confirming studies that indicate the importance of allowing patients to talk without interruption. The technique of ‘active listening’ is effective in eliciting important clinical information from the patient and in making them feel that the physician cares for them.” *Id.*
- The most startling finding was that the **doctors with no malpractice claims spent more time with their patients—on average 3.3 minutes more per visit**. The length of visit, by itself, had an independent positive effect, decreasing a patient’s likelihood of suing the doctor. *Id.*

A little commentary: The lesson from the studies, and the message to special educators is simple: **when people trust you and believe you care about them and their student, they are less likely to sue you for your mistakes**. Instead of litigation, and the negative feelings and distrust that attend litigation, the focus of both school and parent will remain on student success and fixing the problem together. After all, why call an advocate or hire a lawyer if you can sit down with someone you trust and discuss the problem? Schools need to build trust into their working relationship with parents, because IDEA is complicated, and mistakes will be made. The data is pretty clear: the school does not want a bad outcome coupled with a lack of trust.

2. Comply with your IDEA Obligations. Note that in the Levinson study both sets of doctors provided quality care. The trigger for a troubled relationship (and litigation) was a bad medical outcome, together with a lack of patient trust. Of course, a really bad mistake will result in trouble (said the surgeon to the nurse, “aren’t we missing a sponge?”), even if the parent trusts you. **The school cannot neglect its legal obligations under IDEA and then be surprised when the parent lacks confidence in the school’s willingness or perhaps, ability, to provide the required IEP services.** The school’s compliance with the law is the foundation to a good working relationship with parents.

a. Unfortunately, there are many ways to do IDEA badly...

Compliance with IDEA requires the cooperation and coordinated efforts of a lot of folks. It requires careful review and understanding of student need, and good decision-making when selecting the special education and related services that will address the need. Once written, that IEP must find its way to implementers who must understand their roles and be willing and able to perform the required tasks. There are *many* ways for the wheels to fall off. Whether it’s the IEP Team’s promise of an evaluation that somehow never occurs, PT services that can’t be provided because the PT moved out of state, or a principal who simply ignores the behavior intervention plan and decides to “wing it,” mistakes are likely.

b. Don't make mistakes. But when you make mistakes, don't let the parents spot them first!

The duty to provide FAPE is a school duty. It's not the parent's legal obligation to keep an eye on the student's program and services and alert the school when services are missing or problems develop. Schools have unsuccessfully tried to make that argument, but the courts have yet to buy in. For example, when a school argued to the Third Circuit that it would have corrected its mistakes earlier if the parent had only told the school about the mistakes, the court was clearly unimpressed. “[A] child’s entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district’s behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child’s teachers, therapists, and administrators—and of the multidisciplinary team that annually evaluates the student’s progress—to ascertain the child’s educational needs, respond to deficiencies, and place him or her accordingly.” *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3rd Cir. 1996), *cert. den’d*, 519 U.S. 866 (1996); *See also, Wissahickon School District*, 35 IDELR 200 (Pa. Review Panel 2001)(“The parent’s incomplete vigilance or sophistication does not negate the district’s reviewing responsibility.”).

Think of this as a logical continuation of child find—district personnel should always be watching for students who, *despite IDEA eligibility and an IEP*, are not making educational progress or have their progress threatened by absences, inappropriate implementation of the IEP, personnel difficulties, etc. The IEP Team cannot have sole responsibility for this supervision. Months may pass between IEP Team meetings, in which time plenty of things can and will go wrong. Each district should have some sort of process in place so that each special education student is accounted for at various points during the semester. Whether it’s a special education supervisor, diagnostician, resource teacher or campus administrator is not really the important issue. What matters is that someone knowledgeable in special education is *accountable and watching* to ensure that the IEP is implemented (OT, PT and speech services, etc., are occurring as required, behavior intervention plans are followed, classroom accommodations or modifications are provided) and that there are no warning signs of trouble (mounting absences, disciplinary removals piling up, work refusal, parent complaints, student not completing or turning in work, etc.) left unaddressed. The earlier a problem is spotted, the better, as the remedy will be proportionately less difficult now than were the district to wait for a parent to notice the issue and invite a Hearing Officer to come up with a remedy.

It is always in the school’s best interests to discover a problem first. Not only will the school have the ability to resolve the issue before there is greater damage, the school will also avoid having to contend with a parent angry about a lack of services AND the school’s lack of attention to the student. When services are not provided, and the parent is forced to point out the problem due to school inattention, the school-parent relationship will suffer. Trust will have to be won back in small increments over time through faithful compliance.

By the way, let’s not commit major errors twice with the same student.... Schools need to understand that having complained or sued the district once, the second time is easier. Further, having suffered through a denial of services once, the parent will likely not be as forgiving the second time, even if some years have passed. Consider this Section 504 decision from 2009. In *Ewing (NJ) Public Schools*, 53 IDELR 166 (OCR 2009), the parent alleged three instances of failure by school staff to implement the student’s §504 Plan, and OCR found the school in violation on two of the three allegations. Several teachers had failed to check or otherwise assist the student in maintaining his agenda, and another teacher failed to properly contact the student’s parent by phone or email with progress reports as required by the plan. To resolve the complaint, the district agreed to monitor plan implementation. What makes this case truly interesting is that the parent had

filed an OCR complaint against the school in 2003. His fourth allegation in the 2009 filing is that the teachers were refusing to comply with the plan in retaliation for his previous filing six years earlier. *If only they had remembered, thinks the school attorney, perhaps they would have made more of an effort knowing that the parent would be watching.* OCR found no retaliation since the current teachers did not know about the previous complaint.

A little commentary: The author is gratified that no retaliation occurred, but wouldn't it be better for current staff to know that the school had blundered previously? When the parent is hyper-vigilant due to previous school mistakes, could that knowledge help "inspire" better school follow-through?

Occasionally review complaints (both formal and informal) about your special education program looking for areas of improvement. Address those needs during in-service days or other communications with staff. Provide staff the understanding and tools they need to comply with the law. If a mistake happens, you (1) want the school to find the mistake before parents see it; (2) want to prevent the school from committing the same mistake repeatedly; and (3) want to avoid making significant mistakes with the same student.

3. Learn from the doctors... It takes both legal compliance and good relationships with parents to decrease due process filings and disputes. Since parents have been provided substantial rights under IDEA, it is incumbent on schools to ensure that parents have the knowledge and tools necessary to understand the IEP work to be done and to recognize when action should be taken. In the remainder of these materials, we'll look at various provisions of the procedural safeguards through the lens of medical malpractice data to provide insight into both legal compliance (letter of the law) and good practice (spirit of the law) that will provide parents the tools they need to work in successful, cooperative, partnership with schools.

II. Examining Records and Participation in IEP Team Meetings

A. Examining Records

The federal regulations provide the following requirements with respect to parental access to records:

“§300.501 Opportunity to examine records; parent participation in meetings.

(a) Opportunity to examine records.

The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.613 through 300.621, an opportunity to inspect and review all education records with respect to—

- (1) The identification, evaluation, and educational placement of the child; and
- (2) The provision of FAPE to the child.”

The school both creates and maintains the student's educational records, causing the Supreme Court in *Shaffer, supra*, to opine that the school has a “natural advantage.” It is an advantage, however, tempered by the parents' right to access records. Note that the right is sufficiently broad to provide access to the types of information that are necessary to do the work of IDEA. When the school denies access, IDEA violations are possible. *See, for example, Amanda J. v. Clark School District*, 35 IDELR 65 (9th Cir. 2001)(School did not share evaluation data with the parent indicating “extreme autism.” The Ninth Circuit found that by “preventing Amanda's parents from fully and effectively participating in the creation of an individualized education program (IEP) for Amanda, the District made it impossible to design an IEP that addressed Amanda's unique needs as an autistic child, thereby denying Amanda a FAPE.”). Further, the act of hiding the possibility that the student had other impairments (and presumably additional needs) is unlikely to create the climate of good will and cooperation necessary for the parent-school relationship to thrive. Put simply, how does the school fix this? How does the school restore trust?

B. Participation in IEP Meetings

Since the work of creating the IEP takes place in the IEP Team meeting, the regulations make the parent a member of the team and provide for an opportunity to participate in IEP Team meetings.

§300.501(b) Parent participation in meetings.

“(1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—

- (i) The identification, evaluation, and educational placement of the child; and
- (ii) The provision of FAPE to the child.

(2) Each public agency must provide notice consistent with §300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.”

What is a meeting? Of course, not every gathering of folks to discuss the student qualifies as a “meeting.” The regulation excludes from the definition of meeting “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.” §300.501(b)(3). *See, for example, John E. Buser Jr. b/n/f John E. and Virginia Buser v. Corpus Christi ISD*, 51 F.3d 490, (5th Cir. 1995)(A school’s failure to provide notice and an invitation to staff meetings where the student is discussed is not an IDEA violation. “Rather than enhance his right to free appropriate public education, the interpretation urged by the Busers would hamper the efforts of CCISD to provide John E. Buser, Jr. with an appropriate education and the achievement of the goals set forth in his IEP.”).

Is it preparation or predetermination? The main issue to watch for here is the possibility that the preparatory activities are not in fact preparation, but are sessions where final decisions are made without parental participation, a concept now referenced by the term “predetermination.” The regulations are quite clear that the parent must be “a member of any group that makes decisions on the educational placement of the parent’s child.” §300.501(c). Consider this language from the 9th Circuit on when predetermination occurs.

“[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. In such case, regardless of the discussions that may occur at the meeting, the School District's actions would violate the IDEA's procedural requirement that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child.... Thus, "[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. ex rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003).... **Although an educational agency is not required to accede to parents’ desired placement, it must maintain an open mind about placement decisions and be willing to consider a placement proposed by the parents, as well as its own proposed placement.”** [Emphasis added]. *H.B. v. Las Virgenes Unified School District*, 48 IDELR 31 (9th Cir. 2007).

Does the school have to provide notice of the meeting? Yep. The IDEA requires that schools take steps to ensure that at least one parent of the student are present at each IEP Team meeting. §300.322(a). These steps must include notifying parents of each meeting early enough that they will have an opportunity to attend. §300.322(a)(1). State laws or regulations will likely set precise timeframes for the prior written notice of IEP Team meetings. The notice must set forth the following

regarding the meeting: the purpose; the time and location; the persons who will attend; and information on the participation of other persons with knowledge or special expertise. §300.322(b)(1).

When and where can a meeting be scheduled? IDEA regulations require that IEP meetings be set for times and places mutually agreeable to the school and the parents. §300.322(a)(2). Generally, the place tends to be the school where the child is served, since this is where key instructional and administrative staff familiar with the student and the educational program are located. But, nothing prohibits the school and parents from agreeing on an alternate location. **Can a parent demand after-hours IEP team meetings?** Only if there is no other way for the parent to participate. The ED has held that after-hours meetings are appropriate if necessary in order for the parent to participate. *Letter to Thomas*, 51 IDELR 224 (OSEP 2008). But, early morning meetings, teleconference, or lunch-time meetings are other possibilities. Schools can let parents know whether late meetings will cause problems for school staffpersons' schedules. School administrators are not prohibited from considering personnel scheduling needs in setting dates and times for meetings. *Letter to Anonymous*, 18 IDELR 1303 (OSEP 1992). Good faith efforts are the key. For example....

I can only meet after 7:00 and only in my home. Nope. A parent demand that IEP Team meetings be scheduled after work hours (because of his busy schedule) and in the parent's home was rejected by an administrative law judge. Having been unable to get the parent on the phone at home, the district called the parent at work and somehow managed to speak to the parent's employer. The Hearing Officer found that the employer was cooperative, and offered to permit and encourage the parent to attend scheduled meetings during work time. The parent's demand was rejected. *West Orange Board of Education*, 34 IDELR 247 (NJ ALJ 2001).

A little commentary: While the result is certainly interesting, the author is curious as to how the parent's attendance at meetings came up in the district's conversation with the employer without divulging confidential information without parental consent. The fact that the employer completely undermined the parent's excuse probably helped the district survive whatever damage might have occurred to confidentiality.

What happens when the school doesn't make some efforts to find a mutually convenient time? It can be ordered to do something *very* inconvenient. After parents with new jobs told the school that they could not meet during work hours, the school scheduled a meeting during work hours that the parents (surprise) could not attend. "Because the parents were unable to attend, the District was required to use other methods to ensure their participation. If the parents can attend a new IEP conference only on weekends or evenings, those needs are reasonable and must be accommodated by the District." *Jefferson County School District R-1*, 19 IDELR 1112 (SEA CO. 1993). *See also, Mr. & Mrs. M. v. Ridgefield Board of Education*, 47 IDELR 258 (D. CONN. 2007)("To be clear, I do not hold that the regulations require school boards to continue to accommodate an infinite number of parental requests for an alternative time. The duty to take steps to find a mutually agreed on time assumes good faith attempts to agree by both sides. But the record in this case is not one of repeated parental veto of suggested times. Rather, the record reflects no effort at all by the Board to negotiate a mutually agreeable time for the meeting, despite the parents' express and timely request for further discussion.").

A little commentary: In the author's experience, hearing officers and courts are far more likely to look critically at a school's lack of good faith than that of the parent. That a parent refuses to act in good faith does not absolve the school of its duty to do so. Take the high road.

And a quick related point on determining the school's IEP Team members.... IDEA does not give parents the right to veto attendance by particular district employees at IEP Team meetings. While the district is required to take steps to ensure that parents are present at IEP Team meetings, the district is not required to substitute its special education director with "someone more to Ms.

PARENT's liking in order to persuade Ms. PARENT to attend" her daughter's IEP Team meetings. *Enterprise Elementary School District*, 32 IDELR 193 (SEA CA. 2000). *See also, Brant A. v. Fort Bend ISD*, Docket No. 040-SE-995 (SEA TX. 1995)(Hearing Officer found that "Petitioner has no right to remove [IEP Team] members and none must be removed.").

A little commentary: While the legal point is clear, the District ought to carefully consider sending an employee to an IEP Team meeting when that person is likely to inflame the parent, and make decisions more difficult. While the school has the power to determine who attends IEP meetings for the school, that power should be exercised with good sense.

What does an "opportunity to participate" mean? "While the parents are 'equal' participants in the IEP process, the school system has the affirmative obligation for 'crafting the IEP.'" *Letter to Simon*, 211 IDELR 436 (OSEP 1987). An IEP team meeting is to be student-centered, and the student's best interest is to be paramount at the meeting. Therefore, it is in the interest of the parties to work cooperatively in the scheduling of the meeting and the development of the IEP." *Caroline County Public Schools*, 106 LRP 19884 (SEA MD. 2000).

It means active involvement in the process. While the views of parents and their invited attendees must be considered, it is the duty of the LEA to formulate the child's IEP in the event consensus cannot be reached. *See also Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ. of the Commonwealth of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985)(IDEA's "cooperative approach [does] not always produce a consensus between the school officials and the parents"). *Fitzgerald v. Fairfax County School Board*, 556 F. Supp. 2d 543, 50 IDELR 165 (D. VA. 2008). In a 5th Circuit decision, the parents argued that since the ARD Committee refused to do what they wanted (move the student back from a centralized site for hearing impaired students to his neighborhood school) the parent had been denied input. *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003). The 5th Circuit heartily disagreed. "To accept the Whites' view of 'input' would grant parents a veto power over IEP teams' site selection decisions. Congress could have included that power in the IDEA; it did not do so.

The right to meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such." *Id.*, at 380 (*emphasis added*). The court pointed to testimony by the student's mother at hearing that the IEP team discussed at length the issue of returning to the home campus as opposed to continued services at the centralized site. "Absent any evidence of bad faith exclusion of the parents or refusal to listen to or consider the Whites' input, Ascension met IDEA requirements with respect to parent input." *Id.* *See also, Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 656 (8th Cir. 1999)(**Where there is no "serious hampering" of the parent's opportunity to participate in the formulation process, IDEA requirement of meaningful parental input satisfied notwithstanding that parent's desired program not selected**); *Adam J. v. Keller ISD*, 328 F. 3d 804, 812 (5th Cir. 2003)(No denial of parental participation was found as at least one parent, and often both, were in attendance at every IEP meeting, and the parents frequently presented supplemental "parent statements" to voice their concerns and frustrations. The 5th Circuit characterized these facts as "active participation in crafting the IEP.").

What if the parent does not want to attend the meeting? An IEP meeting can be convened without the parent in attendance if the school has been unable to convince the parent to attend despite making efforts to that effect, such as telephone communications, written correspondence, and visits to the parents' home or workplace (although the school does not necessarily have to use every form of contact). §300.322(d). Schools, however, must make more than token efforts to secure parental participation, and must also communicate in good faith with parents about proceeding to a meeting without them. In *Board of Educ. of the Toledo City Sch. Dist. v. Horen*, 55 IDELR 102 (S.D.Ohio 2010), after the parents called to cancel a scheduled IEP meeting, staff in fact met with the parents in

another part of the school but did not let them know that the meeting was in fact proceeding in another location. The court thus held that the school committed a procedural violation of the IDEA. On the other hand, a parent cannot stall the process to the point that the school fails to comply with required timelines for annual meetings. *See, for example, J. G. v. Briarcliff Manor Union Free Sch. Dist.*, 54 IDELR 20 (S.D.N.Y. 2010)(no violation where parents asked to postpone a meeting until after the annual IEP meeting timeline despite school's multiple prior attempts to schedule the meeting in a timely fashion).

In the author's opinion, some parents may not know what to do at an IEP Team meeting. Consequently, the school must educate parents about the IEP Team process (or someone else will do it). Notice that while the safeguards direct the school to provide timely notice of the items to be discussed, schedule the meeting at a mutually-convenient time and provide the parents an opportunity to participate, what happens if the parent doesn't know what to do? The IDEA is complex and difficult for educators to both understand and follow. The law is even more difficult to comprehend for the average parent of a student with a disability. While the Act presumes that the parent acts in the best interests of the child, it is left to the school to ensure that the parent's actions are well-informed. In the author's opinion, you can't expect to protect or appropriately utilize rights you don't understand, and you can't effectively advocate for your child's FAPE if you have no idea what FAPE looks like. Some thoughts....

1. Does the parent know how to participate at the IEP Team Meeting?

First, a data-based lesson from the doctors: the most satisfying doctor visits involve consensus. "Studies have shown that increasing patient involvement in care via negotiation and consensus-seeking improves patient satisfaction and outcomes. Specifically, visits in which the physician uses a participatory decision-making style are associated with higher levels of patient satisfaction. Recent studies in physician-patient communication in primary care show the highest levels of patient satisfaction and the lowest malpractice claims with the psychosocial pattern, which is characterized by psychosocial exchange and an almost equal distribution of patient and physician talk." *Cooper-Patrick, et. al., Race, gender, and partnership in the patient-physician relationship*, 282 JAMA 583, 584 (August 11, 1999).

But does the patient know he has a role? An important element of informed decision-making ought to be discussion of the patient's role in decision-making. "The need for this new element arises because many patients may be unclear about their role in decision making and hence, adopt a passive or non-participatory style. Consequently, in certain decisions, particularly complex ones, the patient may need an explicit invitation to participate in the decision making process." *Braddock, et. al., Informed decision making in outpatient practice: Time to get back to basics*, 282 JAMA 2313, 2315 (December 22/29, 1999). In short, shared decision-making is difficult if one of the parties doesn't know he needs to share, or is unsure about when or how the sharing is to occur.

IEP Meeting dynamics. Consider the typical IEP meeting from the parent perspective. The participants from the school may already be in the meeting room when the parents arrive. They have met in a staffing and generally understand what will be discussed. The school members are well-educated, professionally attired, and may refer to each other as "Dr." They have been trained in compliance with IDEA and are familiar with the paperwork. The parent arrives, and even with an advocate or spouse, is outnumbered by well-dressed, well-educated people who use terms that are unfamiliar and may even speak a language that the parent does not understand well. Some parents will simply not respond cooperatively in this environment that seems to highlight the rather stark differences between the educators and the parents. Even though meaningful participation is desired, parents may not understand how or when to participate without some gentle prompting.

Remember when you closed on your home? One parent attorney compares the parents'

perception of the IEP Team meeting to a first-time homebuyer's experience closing on a home. The title company is in a hurry to get the buyers' signatures on a mountain of documents that the buyers have never seen so that it can move on to the next closing. Faced with the pressures of a huge, first-time purchase, the homebuyer has questions, which slow down the title company's work and are met with irritation and few intelligible answers.

Change the IEP Team Meeting dynamic to make parents comfortable. A parent's confusion or lack of knowledge may manifest itself in frustration, confusion, anger, or even a total lack of participation. Changing the dynamic can help. Consider these thoughts. Prior to the meeting, consider sharing complex evaluation data with the parents to encourage questions and to make understanding easier to gauge. A parent is more likely to express concern or ask for understanding one-on-one rather than in front of a room filled with strangers. Modeling good doctor behavior can help as well. An expert on doctor-patient relationships "urges doctors to build rapport with their patients by greeting them warmly by name, asking briefly about important events in their lives, maintaining eye contact, focusing on the patient without interruptions, and displaying empathy through words and body language." *Brody, supra*.

How about showing some interest in the parent's concerns? "Physicians also vary widely in their interest in and ability to elicit relevant information from their patients." One study found that "patients disclose significantly more information about their emotional and social functioning when their physician has a positive attitude toward the psychosocial aspects of patient care." *Detmar, et. al., Patient-physician communication during outpatient palliative treatment visits: An observational study*, 285 JAMA 1351, 1352 (March 14, 2001).

Having someone attend with the parent can help. The doctors have discovered that "It is also helpful to take along a relative or friend or who can take notes and ask relevant questions. One study found that when patients had someone to help them talk with their doctor, they were more satisfied with the information they got and with the doctor's interpersonal skills." *Brody, Well-Chosen Words in the Doctor's Office, THE NEW YORK TIMES*, June 8, 2009.

What happens when parents are comfortable in the IEP process? Consider this language from a malpractice study. "Even more compelling is recent research showing that, **if patients are comfortable with their physicians, they are more likely to heed their advice and get well.** In one study, researchers discovered that the main thing affecting whether patients with headaches found relief—more important than the kind of tests or drugs they received—was whether the patients had felt their doctor spent a lot of time talking with them about their problem." *Empathy with patients pays, doctors learn, AUSTIN AMERICAN-STATESMAN, A-1, A-9, (October 5, 1998)(reprinted from an article by Amy Goldman in the WASHINGTON POST)(emphasis added)*. By analogy, when parents are comfortable with the IEP Team process, there is better buy-in and parent support of the school's efforts.

A practical strategy: Statements of orientation help the parent understand how the IEP Team will function and the parent's role. Timely and gentle reminders or cues can assist a parent who is unsure how or when to express concerns or ask questions. Remember, a parent who, without an advocate or attorney, feels free to share concerns, and then sees those concerns addressed in the IEP meeting will have less motivation to go get an advocate or attorney.

An important note on consistency in the IDEA process when the parent is an employee. Compliance with a complex law requires that tasks be done in a way that consistently meets the school's legal obligations. Consequently, schools develop processes for distributing IEPs following meetings, systems for tracking timelines and other protocols or methods to reduce errors and make the provision of services efficient. Interestingly, those processes are likely to break down when one factor is added to the traditional parent-school relationship: the parent of the student with a disability

is also an employee of the district or special education co-op. The doctors recognize a similar problem when the doctor is the patient.

“Allegedly, ‘doctors make the worst patients.’ Anxiety greater than that found in nonmedical patients seems a primary cause.... Anxiety may lead to considerable delay in seeking medical attention, usually by denial of symptoms or their meaning. The history may be influenced significantly by anxiety, with important portions omitted or minimized to avoid serious conclusions or actions by the consulted physician.” *Schneck, “Doctoring” doctors and their families*, 280 JAMA 2039 (December 16, 1998).

The treating physician also tends to act differently. “Some treating physicians, perhaps to deal with their own anxiety, may limit meetings with physician-patients, may provide only brief and dogmatic explanations, and may assume incorrectly that physician patients possess sufficient medical knowledge to fill in information gaps. This behavior offers little opportunity to develop an empathetic relationship and unsatisfactory care may result.” *Schneck, at 2040*. Informality breeds bad results. A related problem is that when the doctor is a patient, both the patient and the physician may do things informally (skipping procedures, forms, etc) for the sake of convenience. **“Modifying routines to save the patient time, trouble, and money may result in poor medical care. Nonstandard practice may be a major contributor to the common belief that when physicians or their family members are treated, things are more likely to go wrong than with nonmedical patients.”** *Schneck, at 2041*.

A practical strategy: Procedures and systems help schools comply with a complicated law. Don’t let the fact that the parent is also an employee distract you from the good practices that ensure legal compliance and effective services. Shortcuts and informality create lapses in compliance.

2. Does the parent understand the language of IDEA?

Like any complex system of rules, IDEA has its own language and acronyms. While folks familiar with special education “speak the language,” that discussion can be impenetrable to folks who are new to the process, making IEP meeting participation uncomfortable and understanding unlikely.

Educators speak their own language. “This is Edspeak—a language so bewildering that even teachers need glossaries to figure out what’s being said. In the insular world of education, words morph and multiply almost daily as schools dream up new programs and chase reforms.... Some districts, trying to be helpful, publish glossaries. Los Angeles Unified has one featuring 132 pages of acronyms and terminology—with about 4,000 entries—that could tie the tongue of even the most skilled linguist... Educators, of course, haven’t cornered the market on fuzzy language. Doctors and lawyers, soldiers and politicians—they all speak in code. But clarity is doubly important in schools, where teachers and parents are supposed to work as a team—and after all, teach children to communicate. The first step, it seems, would be for the adults to speak the same language.” *Duke Helfand, “‘Edspeak’ is in a class by itself,” LOS ANGELES TIMES WEB EDITION, August 16, 2001.*

Do the parents understand what’s in the IEP? Sometimes the school and parent have different interpretations of plan language. In a complaint from Wisconsin, the parent alleges that the plan did not define preferential seating, and that the teacher failed to provide positive written comments, despite a modification requiring positive feedback. The parent believed that preferential seating meant in the front row in front of the teacher’s desk. Instead, the student was placed in the row adjacent to the right hand chalkboard that the teacher used for class presentations. The parent’s expectation was based on where the teacher stood during parent orientation, and not on day-to-day classroom activity. On the issue of motivational strategies, the teacher made positive verbal statements to the student as required, as well as discrete notes on weekly tests. OCR found no violation for the failure to be more

specific and determined that the District had acted consistently with the plan. Parent loses. *Nicolet (WI) Union High School District*, 37 IDELR 98 (OCR 2002).

A little commentary: While the result is certainly encouraging, the fact that the school had to respond to an OCR complaint is telling of the relationship with the parent. While there are parents who cannot be satisfied, the author wonders whether a friendly conversation with the teacher or a campus administrator explaining the plan could have prevented the complaint. *See also, Meridian (IL) Community Unit School District 101*, 42 IDELR 90 (OCR 2004) (“With respect to the items in the complaint that allegedly were not implemented, the evidence shows that in those instances, the Complainant misinterpreted the scope and extent of the terms of the IEP.”).

Looking for answers in all the wrong places. While most of us are aware that the old adage “don’t believe everything you see in the newspaper” should apply to the Internet, some folks have yet to understand that message. A study on the effects of digital information found “evidence suggesting that patients are trying to use information on the Internet as a supplement for physicians and that teledvice might be overused by chronically ill and frustrated patients looking desperately for additional information.” *Eysenbach & Diepgen, Patients looking for information on the internet and seeking teledvice*, 135 ARCHIVES OF DERMATOLOGY 151 (February 1999). Eysenbach & Diepgen determined a variety of reasons for patients to look elsewhere (to sources other than the treating doctor) for information. In a study of unsolicited e-mails sent to a prominent hospital, they found a likely reason in the **“causal relationship between chronic and incurable disease, frustration (about failed treatments), feeling of helplessness, and a subsequent information-seeking behavior to compensate the feeling of helplessness.”** *Eysenbach & Diepgen, at 154*. That pattern becomes quite frightening in that it opens up the patient to believing less than credible sources of information. “A lack of trust in one’s own physician or health care provider can be observed especially if therapies fail.... The hope to find something ‘new’ on the Internet (new or alternative therapies, new research findings) not yet known to the treating physician may also play a role, as 12% of the patients were asking for new therapies.” *Id.* Another factor that may explain the patient’s seeking medical advice from an unknown physician is the desire to remain anonymous. Although unable to determine the reason for the desire to remain anonymous, the study authors speculate, rather sensibly, that **fear of asking a stupid question or the patient’s having been told and forgotten, or having been ill-informed by the treating physician may cause the patient to look elsewhere for answers.** *Id.*

A practical strategy: Compliance requires proper use of IDEA notices and boilerplate language, but schools should not assume that mere compliance with legal notice requirements and the sharing of records will result in parent understanding. What schools should seek is parent understanding sufficient to *independently* verify that the school is doing what it should. That requires conversations, real give-and-take, using language parents understand, even if that means no IDEA acronyms are involved. When parents understand, they tend not to look to third parties (advocates, friends, OCR, hearing officers) to assure them that the school’s actions are appropriate and tend not to look for answers in the wrong places.

3. Does the parent understand the importance of data in IDEA decision-making?

A common misconception is that IDEA eligibility makes available all of the special education and related service resources of the district, regardless of the student’s needs. Schools should help parents understand the importance of tailoring services to individual students, especially when service demands seemed to arise from “wanting” a service as opposed to “needing” a service. A couple of cases are instructive.

Consider this hearing officer’s response to a request for transportation as a related service. “It is clear that it is inconvenient for the parent to bring the student to school. However, no testimony indicated that he had a medical or other disability which would require transportation.” The student lives within six blocks of the school, thus not qualifying for regular transportation available pursuant to school policy for students outside a 1.5 mile radius from the school. His IEP team at the March 21, 2006 meeting determined that transportation would not be needed as a related service. The parent did not bring any testimony indicating otherwise. While the student “has a nebulizer at school for asthma, however, he only used it at the request of the parent during a short period. He was never observed having difficulty breathing, even after strenuous activity.” No transportation was required as a related service. *Lincoln Elementary School District 156*, 47 IDELR 57 (SEA IL. 2006).

Consider this hearing officer’s identification of a variety of appropriate solutions. In a case from New Jersey, the student’s doctor reported that an EpiPen had to be administered “expeditiously” following the student’s exposure to peanut protein (whether ingested, touched or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the EpiPen, “there is absolutely no way” he would survive. The Administrative Law Judge ordered an aide be placed on the bus, further finding that

“Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen. Therefore, a nurse, aide or other trained adult is required for those purposes.” *Manalapan-Englishtown Regional Board of Education*, 107 LRP 27925 (SEA NJ 2007).

What the student needed, found the Hearing Officer, was not necessarily a nurse, but someone who could address the student’s need for supervision and administration of an EpiPen in case of exposure. The need for services could be met by any one of the three appropriate alternatives, even if the parents preferred that a nurse be provided on the bus.

A practical strategy: Any number of motivations may give rise to a parent’s request for a particular service or accommodation. IEP Teams run into trouble when they simply respond with a “no” to what they think is an inappropriate or unnecessary request. Instead, the IEP Team should focus on data with respect to student need. A better response to the parent is “why do you think your student needs that service?” Encourage the parent to list the reasons why the student needs the requested service. The Team then analyzes the reasons in light of evaluation data to determine if there is in fact need. Once the needs are determined, then the question becomes “how can we meet the identified need?” The Team then identifies the possible appropriate alternatives and makes a choice from among the appropriate options. This approach changes the meeting dynamic from “I want this, no you can’t have it” to a much healthier, and less emotional, “what does the student need?”

4. Does the parent understand the educational implications of his preferences or demands?

While parents will likely understand how the student’s disability impacts him at home and in the community, parents may not have a grasp on the educational implications of the impairment. Further, unless they have a background in education, they may not understand the educational implications of their preferences for services or parenting skills. IEP TEam discussion must help parents understand

that what may make sense to address the impact of the impairment can undermine the goal of educating the student. A handful of examples make the point.

Should hydration facilitate school avoidance? In *North Lawrence (IN) Community Schools*, 38 IDELR 194 (OCR 2002), the student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions despite a parent demand that the student have unlimited access to the water fountain. The district was apparently concerned that too frequent water breaks were interrupting the educational process and interfering with the student's ability to stay on task. To provide proper hydration while maintaining the student's presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. After an initial objection for unspecified "hygiene" reasons and logistical concerns about refilling it, the parent agreed to the accommodation, and OCR determined the matter closed.

Should an ATD deny access to grade level curriculum? A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student's teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student's parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student's teachers were convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. "It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor." The TI-92 is inappropriate because "it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts." The court concluded that the student's failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student's lack of effort. "The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. **If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires.**" The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts. *Sherman v. Mamaroneck Union Free School District*, 340 F.3d 87 (2nd Cir. 2003)(emphasis added).

Maybe there are some reasons he's not progressing as quickly as parents would like... Parents of an IDEA-eligible student complained that the student was making inadequate progress. In reviewing the complaint, the district court judge noted that the student was taking more classes than the recommended level, two honors classes, a foreign language (which is generally not recommended for students at his grade level), and participating in the school's ski team causing him to be absent from school far more often than was probably appropriate for a special needs student." Finding that the student made progress (although not the level of progress desired by the parents), the court noted that the school's efforts were complicated by "the parents' resistance to assuming an active role at home in monitoring Michael's school work and prompting him to do his homework." In fact, "the evidence shows that the Parents demanded that they not be meaningful participants in enforcing homework production efforts... The parents request that the struggles and frustrations accompanying Michael's work are to be kept between him and the school. The family is to be provided information but is not to be put in the middle." *Michael D.M. v. Pemi-Baker Regional School District*, 41 IDELR 267 (D.C. N.H. 2004).

A little commentary: The student's academic accomplishments were not shabby, and the school (according to the district court) was very involved and attentive to its duties (although not perfect). The court surmised that the parent's confrontational approach was perhaps motivated by his desire that Michael be placed in a private school at public expense. The private school, Waterville Valley Academy, was described as "a well-known ski school that provides students with tutoring on academic subjects while stressing advancement in skiing skills."

I'm not responsible for my son's attendance. That's between the school and my 9-year-old son. In *Boston Public Schools*, 38 IDELR 90 (SEA MASS 2003), a nine-year-old student with an autism spectrum disorder missed a "great deal of school over the years" and despite the parent's agreement with the services, the parent was unwilling or unable to ensure the student's attendance.

"Mother testified that if the Student does not want to go to school she could not force him to go... She stated that she does not think Boston should hold her, as Student's parent, responsible for Student's attendance. She thinks Boston should convince Student to attend. She said she has done all she can to help. She said she could only do her best to convince Student to go to school but cannot 'tie him and drag him.' She told Boston she would try her best to send him, but he does not want to go."

On matters of discipline, the Hearing Officer found that "When the Student has acted inappropriately at school, various school staff members have disciplined Student. Each time Student was disciplined, he went home and reported the incident to his Mother and she stopped sending him to school. **Student appears to have gotten the message that if he acts out at school and tells his Mother that school staff mistreated him he will be able to stay home instead of going to school.** Mother must stop removing Student from school."

Clearly concerned over the parent's attitude, the Hearing Officer advised "Mother is clearly very concerned for her son. She is protective of him and wants him to be happy. However, Student's educational needs cannot be met if he does not consistently attend a school program... **Mother may require training to address her belief that she cannot force the Student to attend school and that Boston should pursue the matter of his lack of attendance with the Student instead of with her.** If Mother remains unable to ensure that Student attend School Boston will have no choice but to initiate proceedings in another forum to ensure that Student will attend school." Despite finding that the placement was appropriate, the Hearing Officer ordered the IEP Team "to consider what services can be offered to the Mother to assist her in understanding her son's disability and teaching her how to support Student's educational and behavioral needs." The Team was also ordered to consider whether family counseling with a bilingual counselor would be helpful. And finally, this foreboding bit of language: "Boston shall take all necessary steps to ensure Student's attendance at this program including taking any appropriate action with another agency or a judicial forum."

A practical strategy: Where the parent's preferences, decisions or parenting techniques interfere with FAPE, the school has to take action. Parents can't be expected to recognize the educational implications of what they do without some help—that's where educators need to provide some guidance in a gentle, private, and appropriate way. The author's preference is for some one-to-one time between the parent and a campus employee trusted by the parent (an employee with some years of experience both parenting and educating would be best) who could explain the problem and suggest how the student could benefit from a different approach. Should the problem continue, the IEP Team should discuss the issue, and its impact on FAPE. Further, the IEP Team should consider providing services directly to the parent to address the situation, such as a parent mentor, parent training, or parent or family counseling.

5. Does the parent understand that some things doctors say have more weight than others?

While doctors can and do provide important medical information and direction to IEP Teams, parents can sometimes demand that undue weight be given to a doctor's opinion on an issue where the doctor is not due such deference. The Seventh Circuit provides the illustration in *Marshall Joint School District #2 v. C.D.*, 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010). A student with Ehlers-Danlos Syndrome, a genetic disorder that causes hypermobility, suffered from "poor upper body strength and poor postural and trunk stability." He had previously required adaptive P.E. due to these physical issues, but now only requires slight modifications for his medical and safety needs. As adaptive P.E. was the only "special education" required by the student, the school sought to dismiss him from special education since he no longer needed special education. The Administrative Law Judge (ALJ) ruled that the student could not be dismissed, relying in large part on evidence from the student's doctor that "the EDS causes him pain and fatigue and when he experiences that 'it can affect his educational performance.'" The Seventh Circuit rejected the ALJ's finding with some excellent analysis.

"Dr. Trapane was the main source of evidence cited for the proposition that the EDS adversely affects C.D.'s educational performance. And the sole basis of her information was C.D.'s mother. Dr. Trapane evaluated C.D. for 15 minutes; she did not do any testing or observation of C.D. and his educational performance. **In fact, 'Dr. Trapane admitted that she had no experience or training in special education and never observed C.D. in the classroom. Her only familiarity with the curriculum was with her own children.** Such a cursory and conclusory pronouncement does not constitute substantial evidence to support the ALJ's finding.... The cursory examination aside, Dr. Trapane is not a trained educational professional and had no knowledge of the subtle distinctions that affect classifications under the Act and warrant the designation of a child with a disability." *Emphasis added.*

Further, the doctor's pronouncement indicated that the EDS *could* affect performance. Said the court, there was no substantial evidence that it actually *had* such an affect. **For evidence on the student's need for services, the court looked not to the doctor, but to the adaptive P.E. teacher.**

"Because the reason for designating special education for C.D. was his need for special training and protection in gym class, Pingel was the key individual in the process. She was among those responsible for formulating C.D.'s prior IEPs, and she was the most important person in implementing them: she was his adaptive P.E. teacher. As such, she was the one who could testify best concerning whether he needed special education to participate in the gym curriculum and meet the goal for children in his grade level."

A little commentary: This case is best known for a couple of snippets of language you're likely to hear a lot at law conferences.

"It was the team's position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team's discretion, governed by applicable rules and regulations. We agree.... This brings us to a key point in this case: a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs.... **But a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]"**

That's great language from the Seventh Circuit, and it makes the point nicely. Unfortunately, some parents persist in the belief that if the doctor writes that the student is eligible or needs this or that accommodation or service, the IEP Team or Section 504 Committee must defer. Not so. The doctor

provides a single source of data, and eligibility and placement decisions are made by the IEP Team, not individuals. Bottom line: the ALJ's decision is reversed. The student does not qualify for special education any longer.

6. Does the parents know what FAPE looks like?

Schools spend a lot of time planning for the IEP and providing the required services. Educators can look at progress data and feel confident that a FAPE has been provided. While that's a great start, recognize how little the school's confidence matters if the parent is unsure about the progress. **A common reason for both the parent's hiring of advocates/lawyers and the filing of complaints is a parent desire for someone other than the school to verify that FAPE is indeed happening.**

A little commentary: Where schools thoughtfully and accurately explain their legal duties under IDEA to parents, and help parents understand student achievement and progress monitoring data, parents will have the tools necessary to come to their own realization that the school has provided FAPE. The same is true for other areas of IDEA compliance.

III. Informed Consent & Revocation of Consent

A. What is informed consent?

Faced with a variety of seemingly similar terms ("consent," "informed consent," "agree," and "agree in writing") peppering the proposed regulations, various commenters asked whether all the terms have the same meaning. In response, ED moved some language from the procedural safeguard requirements of the old regulations at former 300.500(b)(1) to the definitions section of the 2006 regs. In the definitions section of the regulations at §300.9, ED provides the following definition:

"Consent means that—

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.
- (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked)."

A little commentary: While the language is fairly easy to follow, what the parent is required to understand is not. Note that the parent's agreement in writing and attestation that all is understood, while legally sufficient, is not the same as the parent having reached a comfort level with his or her ability to marshal the information relevant to the activity and express concerns or offer another perspective. **It is this comfort level that the school ought to seek, as the parent who can independently determine that the school has met its legal obligations is the parent who trusts the school.** If a parent doesn't understand the school's explanation, uncertainty and distrust can develop, especially if the school used unfamiliar terms, was hasty in its description, or disrespectful of parent concerns.

"Consent" clearly contemplates more than just "agreement." "The definition of *consent* requires a parent to be fully informed of all information relevant to the activity for which consent is sought. The definition also requires a parent to agree in writing to an activity for which consent is sought. **Therefore, whenever *consent* is used in these regulations, it means that the consent is both informed and in writing.**" 71 *Federal Register*, No. 156, (August 14, 2006), p. 46,551 (emphasis

added).

What about those other similar words? ED further notes that these phrases are used in the regulations consistently with their usage in the statute, and that “agree” and “agreement” refer “to an understanding between the parent and the public agency about a particular question or issue, which may be in writing, depending on the context” and do not require “consent.” *Federal Register*, p. 46,551. Some of these situations are addressed in Section IV (cleverly titled “Examples of IDEA Situations Not Requiring Consent.”). Finally, the regulations seem to use the terms “consent” and “informed consent” interchangeably, and without explanation.

Does “consent” require the parent to be fully informed of the reasons why a public agency selected one activity over another? Apparently. Responds ED: “We do not believe it is necessary to include the additional requirement recommended by the commenter. The definition of *consent* already requires that the parent be fully informed of all the information relevant to the activity for which consent is sought.” *Federal Digest*, at 46,551.

A little commentary: While at first blush this duty may seem a bit onerous, consider that the school, by involving the parent in IEP Team discussions with respect to services, assessments, etc, will likely be sharing these alternatives (and the reasons they were not chosen by the IEP Team) as a natural result of the discussion.

B. When is informed consent required?

1. Initial Evaluations

§300.300 Parental consent.

(a) Parental consent for initial evaluation.

(1)(i) The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must, after providing notice consistent with §§ 300.503 and 300.504, obtain informed consent, consistent with § 300.9, from the parent of the child before conducting the evaluation.

(ii) Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

(iii) The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

(2) For initial evaluations only, if the child is a ward of the State and is not residing with the child’s parent, the public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if—

(i) Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child;

(ii) The rights of the parents of the child have been terminated in accordance with State law; or

(iii) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(3) (i) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.

(ii) The public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation.

The traditional requirement of parental consent prior to initial evaluation remains unchanged in IDEA 2004 and the regulations, with a few wrinkles on what constitutes “consent,” and the availability of due process to override a parent’s refusal to consent.

What information must be shared to constitute “consent?” The information that must be provided to a parent in order to obtain consent consists of the §300.504 procedural safeguards, the §300.503 prior notice, and the “general information about the special education and related services that are available to eligible children with disabilities and inform the parent that the public agency’s evaluation is provided at no cost.” *Federal Register*, p. 46,633. In addition to the general information about special education and related services, and the parent rights handbook (300.504), what does §300.503 on prior notice add? The commentary to the regulations provides a good summary.

“[P]rior notice must be given to the parents when a public agency proposes to evaluate a child and would explain why the public agency believes the child needs an evaluation to determine whether the child is a child with a disability under the Act; describe each evaluation procedure, assessment, record, or report the agency used as a basis for proposing that the child needs an evaluation; explain that the parents have protection under the Act’s procedural safeguards; provide sources for parents to contact to obtain assistance in understanding the provisions of the Act; and describe other factors that are relevant to the agency’s proposal to conduct the evaluation of the child.... [T]he prior written notice and the procedural safeguards notice, respectively, must be written in language understandable to the general public and be 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.” *Federal Register*, at 46,632-3

Does that include notice of evaluator credentials? No. ED is satisfied that evaluator credentials need not be disclosed to constitute consent for evaluation as both the statute and regulations require the school to ensure that the evaluation is conducted by trained and knowledgeable personnel. *Federal Register*, at 46,633.

What are “reasonable efforts” to obtain informed consent? Part of that “reasonable efforts” requirement is to document the school’s efforts to obtain consent. §300.300(a)(5). The district’s options here are those in the section on encouraging parent attendance at IEP team meetings. “We also agree with the commenters that a public agency should document and make the same reasonable efforts to obtain consent for an initial evaluation from a parent, including a parent of a child who is a ward of the State, that are required when a public agency attempts to arrange a mutually convenient time and place for an IEP Team meeting (e.g., detailed records of telephone calls, any correspondence sent to the parents, visits made to the parent’s home or place of employment)[.]” *Federal Register*, p. 46,631. ED confirms in the commentary that while the statute uses both “reasonable measures” and “reasonable efforts,” the terms have the same meaning in this context. *Id.*

Consent for evaluation is not consent for initial placement. Should the parent provide consent, the LEA proceeds to evaluation. As in the previous law, the parent’s consent for initial evaluation cannot be construed as consent for initial placement. §614(a)(1)(D)(i)(I); §300.300(a)(ii). That language is even more crucial now, in light of the prohibition on schools’ use of due process to override a parent’s refusal to consent to initial placement (discussed below).

Override is available if the parent refuses to consent to the initial evaluation. Where consent is not provided, or there is no response, LEAs have the option to proceed to due process to override a parent’s failure to consent [614(a)(1)(D)(ii)(I); 300.300(a)(3)(I)], but are not required to do so. §300.300(a)(3)(I). Further, should the SEA desire, it could limit or prohibit the use of the override remedy. *Id.*

Is the school required to inform parents of the consequences of withholding consent? No. Since the parents have already been provided their notice of rights and the information required by prior notice, ED does “not believe that additional regulations are necessary to require public agencies to inform parents of the consequences of withholding consent for an initial evaluation or to provide parents with copies of the Act.” *Federal Register*, at 46,630.

A little commentary: But where the natural consequences of withholding consent are explained to the parent, i.e., that the school believes eligibility and services will prevent academic troubles, or decrease behavioral or emotional trouble, it might be wise for the school to take the extra step.

2. Re-evaluations

§300.300(c) *Parental consent for reevaluations.*

- (1) Subject to paragraph (c)(2) of this section, each public agency—
 - (i) Must obtain informed parental consent, in accordance with § 300.300(a)(1), prior to conducting any reevaluation of a child with a disability.
 - (ii) If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section.
 - (iii) The public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.
- (2) The informed parental consent described in paragraph (c)(1) of this section need not be obtained if the public agency can demonstrate that—
 - (i) It made reasonable efforts to obtain such consent; and
 - (ii) The child’s parent has failed to respond.

What is a reevaluation? In the commentary, ED differentiates between initial evaluations and reevaluation with this simple explanation. “Once a child has been fully evaluated, a decision has been rendered that a child is eligible for services under the Act, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation.” *Federal Register*, p. 46,640.

Override of parent refusal to consent to reevaluation is possible. While parental consent is required to perform a reevaluation, the rules differ slightly from initial evaluations. Should a parent refuse consent to the reevaluation, the school may seek to override the refusal to consent through due process, but is not required to do so. §300.300(c)(1). As was the case with initial evaluations for students placed in a private or home school, the override procedures are unavailable to the LEA when the parent refuses to consent to reevaluation. §300.300(d)(4). **And a different rule for consent when the parent fails to respond to a request for consent.** The other difference between initial evaluation and reevaluation consent arises in the context of the parent who does not respond to the request. The regulations provide that the school may proceed to reevaluation without informed parental consent if it can demonstrate that (1) “it made reasonable efforts to obtain such consent,” and (2) “the child’s parent refused to respond.” §300.300(c)(2)(i)&(ii). The language requiring “reasonable efforts” is discussed previously in the context of consent to initial evaluation.

3. Initial provision of special education services

§300.300(b) *Parental consent for services.*

- (1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(2) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

(3) If the parent of a child fails to respond or refuses to consent to services under paragraph (b)(1) of this section, the public agency may not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child.

(4) If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency—

(i) Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and

(ii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

Can the parent reject special education services without appropriate consequences? Not anymore. In 2001, prior to reauthorization of IDEA, ED took the position that if a parent refused consent for initial placement, the school could not utilize the special education hearing process to override the refusal. *Letter to Cox*, 36 IDELR 66 (OSEP 2001). The policy change caused considerable trouble, especially where students were in serious need of special education services that their parents refused. Since the letter included no promise of protection to schools for the resulting FAPE violations (the IEP Team had determined that special education and related services were required, and the school was not providing the necessary services pursuant to the refusal to consent), there was always the possibility of compensatory services based on the school's choice not to proceed to override consent. Some hearing officers faced with *Letter to Cox* and a parent who refused necessary services ignored the letter and overrode the lack of consent. Others rejected the school pleas for an override, based on the Letter, and created uncertainty about the applicability of the due process provision and uncertainty about schools' legal duties to the student who, while eligible, would not be served.

A statutory solution. IDEA 2004 resolved the problem by providing that a refusal to consent to services not only prohibits the school's provision of special education and related services, it also absolves the school of subsequent repercussions from the parent's choice. If the parent either refuses to consent to services or fails to respond to a request to provide such consent, the school is not required to convene an IEP Team meeting, does not have to develop an IEP, and is not considered to be in violation of the requirement to provide a free appropriate public education. 614(a)(1)(D)(ii)(III); 300.330(b)(3).

The parents accept or reject special education *without* seeing a proposed IEP? Yes. A strict reading of this provision produces a result where the parent is given the option to consent (or not) to special education and related services without ever seeing a proposed IEP for the student. The statute clearly indicates that absent consent for services the LEA "shall not be required to convene an IEP meeting, or develop an IEP[.]" This reading seems consistent with Congress' desire to decrease the number of IEP meetings and paperwork. Clearly, requiring the parent to consent before an IEP Team meeting happens or an IEP is developed would cut down on both. Had Congress desired the parent to see a proposed IEP and make the consent decision based on knowledge of that IEP's contents, Congress could have so required. From this strict reading of the language, it appears that once the evaluation is complete, the school requests parental consent to provide services. It does not move to develop an IEP or even have an IEP Team meeting until the parent agrees to consent to special education services.

But remember that consent means more than agreement... Note that Congressional concern over the involvement of parents in the IEP process cannot be ignored in reading this language. It would be an incredible break from tradition were schools not required to provide some level of information about potential services available to the parent so that the consent or refusal to consent to services is informed. In fact, *Letter to Cox* provides some guidance. “Consent means that the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication.” While this does not mean an IEP is on the table, it does seem to imply that some description of special education and related services is provided to the parent prior to requesting consent. ED makes this point in the regulations and commentary.

“We understand the commenters’ concern that a parent of a child with a disability who refuses to consent to the provision of special education and related services may not fully understand the extent of the special education and related services their child would receive without the development of an IEP for their child. However, we do not view the consent provisions of the Act as creating the right of parents to consent to each specific special education and related service that their child receives. Instead, we believe that parents have the right to consent to the initial provision of special education and related services. ‘Fully informed,’ in this context, means that a parent has been given an explanation of what special education and related services are and the types of services that might be found to be needed for their child, rather than the exact program of services that would be included in an IEP.” *Federal Register*, p. 46,634.

Can the school put together a proposed IEP prior to consent? Sure, if the school wants to do so. The commentary clearly recognizes that some schools will not be comfortable with this new provision and will want to provide an IEP for the parents to review. USDE advises that while the statute and regulation do not require creation of an IEP prior to the parents’ consent to services, they do not “prevent a public agency from convening an IEP team meeting and developing an IEP for a child as a means of informing the parent about the services that would be provided with the parent’s consent.” *Federal Register*, p. 46,634.

What happens if the parents consent to initial placement? Once the parent agrees to the provision of special education and related services, the IEP Team will meet and create an IEP. If at that time the parent disagrees with the services offered, the parent has due process rights available and can argue that the IEP offered is inappropriate.

What happens if the parents refuse to consent to initial placement? If the parent rejects initial placement, however, the school no longer has a duty to provide a FAPE, an IEP Team meeting, and an IEP. These provisions provide protection or immunity from parent complaint since services were rejected. The duty to convene an IEP Team, develop an IEP and provide a FAPE is waived by the parent’s refusal to consent for services.

This consent rule only applies to the initial provision of special education services. The commentary makes clear that the intent of this section is to apply to initial services only, and does not require consent “every time a particular service is provided to a child.” *Federal Register* at 46,630.

4. Revocation of consent for continued special education services

Sec. 300.300(b) Parental consent (Revised Federal Regulation as of December 1, 2008).

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency—

- (i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with Sec. 300.503 before ceasing the provision of special education and related services;
- (ii) May not use the procedures in subpart E of this part (including the mediation procedures under Sec. 300.506 or the due process procedures under Sec. Sec. 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;
- (iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and
- (iv) Is not required to convene an IEP Team meeting or develop an IEP under Sec. Sec. 300.320 and 300.324 for the child for further provision of special education and related services.

Was parent participation in the decision-making process intended to go so far as to unilaterally cease provision of a FAPE? Yes. “We agree with the commenters that the IEP Team (defined in Sec. 300.23, which includes the child's parents) plays an important role in the special education decision-making process. For example, through the development, review and revision of the child's IEP, the IEP Team determines how to make FAPE available to a child with a disability. However, the IEP Team does not have the authority to consent to the provision of special education and related services to a child. That authority is given exclusively to the parent under section 614(a)(1)(D)(i)(II) of the Act. The Secretary strongly believes that a parent also has the authority to revoke that consent, thereby ending the provision of special education and related services to their child. **Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the IDEA’s emphasis on the role of parents in protecting their child’s rights and the Department’s goal of enhancing parent involvement and choice in their child’s education.**” 73 Fed. Reg. 73,009 (December 1, 2008) [*hereinafter*, “*Fed. Reg.*”].

Will not cessation of needed special education and related services be inherently detrimental to the children with disabilities? What if parents realize they were mistaken in revoking consent? “If a child experiences academic difficulties after a parent revokes consent to the continued provision of special education and related services, nothing in the Act or the implementing regulations would prevent a parent from requesting an evaluation to determine if the child is eligible, at that time, for special education and related services.” 73 Fed. Reg. 73,009-010.

Do schools bear any legal liability for potential educational losses caused by improper cessation of needed IDEA services? “Revocation of parental consent releases the LEA from liability for providing FAPE from the time the parent revokes consent for special education and related services until the time, if any, that the child is evaluated and deemed eligible, once again, for special education and related services.” 73 Fed. Reg. 73,010.

Will parents be able to pull students out of special education, only to later request that services be reinitiated, and so on? “Section 300.300(b)(4) clarifies that parents have the right to withdraw their child from special education and related services. After revoking consent for his or her child, a parent always maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services. Nothing in the Act or the implementing regulations prevents a parent from requesting an evaluation when their child has a discipline issue or is at risk of not succeeding in school. This is because, consistent with Sec. 300.101, the public agency has an affirmative obligation to make FAPE available to a child with a disability. The child's right to have FAPE available does not cease to exist upon the revocation of consent. Therefore, a parent may consider discipline and graduation requirements when determining whether to request special education and related services for their child.” 73 Fed. Reg. 73,014.

A little commentary: Notice that in ED’s view, a parent that revokes consent and later seeks to have

services reinitiated must request an initial evaluation first. Why would this be required if there is current evaluation data already supporting special education eligibility? ED addresses this concern in the commentary, stating that “depending on the data available, a new evaluation may not always be required. An initial evaluation, under Sec. 300.305, requires a review of existing evaluation data that includes classroom based, local, or State assessments, and classroom based observations by teachers and related services providers. On the basis of that review and input from the child’s parents, the IEP Team and other qualified professionals must identify what additional data, if any, are needed to determine whether the child is a child with a disability, as defined in Sec. 300.8, and the educational needs of the child.” 73 Fed. Reg. 73,014. So, ostensibly, if data is current and there is consensus that additional new data is not necessary, services could resume based on existing evaluation information.

Could a parent undertake a series of revocations and re-initiations, without limit? Would that not be highly disruptive to a child’s education? To the commenter that raised the question, ED responded that “we do not agree with the commenter that the Department should limit how frequently a parent may revoke consent and then subsequently request reinstatement in special education services because retaining flexibility to address the unique and individualized circumstances surrounding each child's education is important. A public agency will not be considered in violation of the obligation to make FAPE available to the child for failure to provide the child with further special education services following a parent's revocation of consent. We understand the commenter's concern that placing a child in and out of special education services may affect the provision of FAPE; however, a public agency is only responsible for providing FAPE during the time period that the parent has provided consent for special education and related services.” 73 Fed. Reg. 73,014.

C. Lessons from medical studies on informed consent vs. understanding. “For too long, informed consent in clinical practice has been influenced by an interpretation of informed decision-making as a legal obligation in which **the emphasis is on full disclosure, rather than an ethical obligation toward mutual decision making by fostering understanding....** Promotion of the patient’s understanding, thereby fostering informed participation, is the essence of informed decision making.” *Braddock, et. al., Informed decision making in outpatient practice: Time to get back to basics*, 282 JAMA 2313, 2319-20 (December 22/29, 1999)(emphasis added). Braddock’s study determined that the physician explored whether the patient understood the medical decision that had presumably been made jointly with the patient less than 7% of the time. *Braddock, at 2317. See also, Chen, Treating Patients as Partners, by Way of Informed Consent, THE NEW YORK TIMES, July 30, 2009* (“There has been so much attention paid to the consent documents... **But the documents are at best props in the theater of informed consent. It’s the process itself that is really important.**”).

The lesson here is quite plain. The documents of IDEA are important for legal compliance, but don’t necessarily convey to parents the understanding necessary to meaningfully participate or to gain an independent realization that the school is meeting its legal obligations to the student. **When the parent can’t understand the IEP or prior written notice or any other document, the fact that the document was provided in a timely way and is legally compliant does not make the parent feel any better about the process.** “Patients must feel they have a certain degree of trust in their doctors before they can give consent, and that trust is built, in part, from the kind of difficult conversations that can arise.” *Chen, supra*. Where the document is expected to speak for itself, and there is no conversation, when is the trust built?

Some additional commentary: In any situation where consent is refused or revoked, there is likely an underlying reason for the parent’s action. While the parent’s decision must be respected, the district ought to give some thought to why the refusal or revocation is occurring. If the school is unaware of the underlying reason, it can hardly address the concern with the parent. The parent’s rationale is unlikely to be revealed in an IEP Team meeting in front of a group of strangers (especially if the reason is very personal), but may be more prone to revelation during one-to-one communications between the

parent and a staff member with whom the parent is familiar. By understanding the reasons for the decision, the school can better approach the parent with solutions that will both address the concern and allow for the provision of appropriate service to the student.

IV. Prior Written Notice

Written notice must be provided to parents a reasonable time before the school proposes or refuses to initiate or change the identification, evaluation, placement, or provision of a FAPE to a student. §300.503(a).

The notice must contain the following elements:

1. Description of the action proposed or refused;
2. Explanation why the school proposed or refused the action;
3. Description of the evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action;
4. Statement that parents have the protection of the IDEA procedural safeguards and how they can obtain a copy thereof;
5. Sources for parents to contact for help in understanding IDEA provisions;
6. Description of other options the IEP team considered and the reasons why those options were rejected;
7. Description of other factors relevant to the school's proposal or refusal. 34 C.F.R. §300.503(b).

Keep in mind that “propose,” for purposes of PWN, means when the IEP Team decides to take an action, not merely when it is discussing an option that it ultimately decides not to adopt. Thus, PWN is not required when the Team suggests an option, but opts to not go through with it.

Is PWN needed when parents agree to the IEP Team's decisions or actions? IEP teams must understand that the prior written notice requirement applies whether the parent has agreed to an action or not. *See, Letter to Lieberman, 52 IDELR 18 (OSEP 2008)*. The trigger for PWN is the taking of actions involving identification, evaluation, placement, or provision of a FAPE, or the refusal to take any such actions.

See guidance from your SEA as states vary in their interpretation of these requirements.

V. Some final thoughts on the “spirit” of the procedural safeguards and building relationships of trust with parents.

A. The need to listen between the lines

“Patients often present clues (direct or indirect comments about personal aspects of their lives or their emotions) during conversations with their physicians. These clues represent opportunities for physicians to demonstrate understanding and empathy and thus, to deepen the therapeutic alliance that is at the heart of clinical care.” *Levinson, et. al., A study of patient clues and physician responses in primary care and surgical settings, 285 JAMA 1021 (August 23/30, 2000)*. A Levinson study determined that clues about patient worries occurred in more than half of all routine office visits. Despite the importance of the clues, and the number of opportunities for relationship building that they provide, doctors failed to act on or pursue the clues most of the time. *Id., at 1026*. Even when they did notice the clues, physicians often failed “to explore the deeper feelings behind the clue.” *Id.*

Did the doctors not pursue the clues because they didn't care? No, it's more complex than that.

The authors of the study surmised that some “physicians may feel uncomfortable responding because they may perceive that they do not have the ability to fix or cure the patient’s emotions.” *Id.* Interestingly, the authors also suspected that some physicians were concerned that dealing with a patient’s feelings would greatly lengthen the office visit. The study found, however, that “visits in which a physician responded positively to a patient clue tended to be shorter than those in which the physician missed the opportunity.” *Id.*

Parent confidence and demands for service providers. It is not uncommon for parents of students with serious medical conditions to be concerned about the school district’s ability to care for their child. That concern may be misplaced or unsupported, but the concern will not simply evaporate. It can be manifested as a demand for services beyond those medically necessary. For example, in a Tennessee case, the parent removed a student with asthma from the school and threatened not to return the student until a nurse was present on the campus. The district refused to provide a nurse, but did contact the doctor in an effort to better understand the student’s medical needs. Specifically, the school wrote a letter to the doctor asking if a nurse was required to be present at school. The doctor responded by letter that “he was not aware of any acute medical indication for keeping the Student home from school, and that it is reasonable to provide *nonmedical* personnel with appropriate training in the administration of her medications.” *Murfreesboro (TN) City School District*, 34 IDELR 299 (OCR 2000).

A little commentary: Evaluation data is the key to resolving these types of issues. The legal duty arises from the impairment, and the data (here, input from the doctor) helped the school to determine what the disability required as opposed to what the parent wanted (which was clearly much more than what the disability actually required). Note that the demand is likely based on the parent’s fear of harm to the child. That concern must be addressed in some way by the IEP Team, as it will persist as long as the parent is not comfortable. The school’s assignment of a properly credentialed employee to provide the service, together with appropriate training, and the passage of time with no mistakes in student care will improve the parent’s confidence in the school’s ability to care for the child.

A practical strategy: Don’t ignore the motivation behind parent requests. Very often, understanding that motivation can help the IEP Team better serve the student, and satisfy the parent’s concern.

B. Some final thoughts & takeaways on schools and parents

1. Legal Compliance Matters.

One of the central factors in the studies on communication and lawsuits against doctors was the lack of difference in the quality of care exercised by those sued and those not sued. In other words, the doctors sued for malpractice and those not sued were equally good doctors. Of course, big mistakes will strain even the best relationship. In the school setting, not complying with IDEA is asking for trouble— much like leaving a sponge in a patient or a surgeon taking out the wrong lung— even if you use good communication skills.

Everybody complies. It does little good to have a superb IEP drafted after an excellent evaluation if behavior management is never implemented. In fact, the parent who sees the care taken in the IEP Team meeting to create the plan may be even more incensed to see the failure or refusal of educators to implement it. Each campus principal must create the climate of compliance on the campus through the use of the employee appraisal. An employee’s failure to comply with the IEP is a violation of state law, federal law, and local policy and ought to be reflected as such on the appraisal instrument. An occasional lapse may be forgiven but an employee unwilling to comply is difficult to explain to an angry parent. The doctors recognized this problem as well, and refer to the physician’s duty to identify and report medical care providers “who are not technically adequate whether owing to age, substance abuse, carelessness or other impairment.... While this is a difficult obligation to fulfill, especially when it is needed close to home, it is absolutely essential to maintain patient trust.” *Axelrod, Maintaining trust in the surgeon-patient relationship*, 135 ARCHIVES OF SURGERY 55, 60 (January 2000).

2. Build relationships of trust and respect with parents.

The doctors recognize that the “foundation of a strong surgeon-patient relationship is the surgeon’s ability to elicit and enhance patient trust. Excellent communication skills, strong clinical and technical abilities, and sound ethical judgment are the crucial elements in facilitating the transfer of trust from patient to surgeon.” *Axelrod, at 60*. A school’s relationship with a parent of a student with a disability can last many years. During that time, if the school is careful and attentive, it can be banking goodwill in case storm clouds gather later in the relationship. Once legal compliance has been achieved, good communication skills are key to developing that trust. Some simple advice from the doctors on gaining trust and relationship building

1. It is not always easy to leave work in the middle of the day and go to the school. When a parent makes that effort, respect the effort and the message.
2. Be approachable/accessible. Parents may not employ an advocate or attorney if they believe that they can talk to you and resolve things fairly.
3. If you can’t solve the problem, help the parent get in contact with someone who can solve it. Take the parent to their office or make a call in the parent’s presence to introduce the two. If the problem cannot be solved, listen anyway, acknowledge the problem and be empathetic.
4. Listen as much as you talk.
5. Try not to appear hurried. You may not discover the real problem until you have listened for a while. Remember, the doctors never sued for malpractice spent more time with their patients (three minutes and twenty seconds made a world of difference).
6. Don’t let required procedure distract you from humanity. The lesson of the doctors is rather pointed. “Surgeons may have contributed to the decreasing level of trust from patients by emphasizing technical procedures over interpersonal relationships.” *Axelrod, at 58*.
7. Avoid technical language wherever possible as it may not be understood by the parent and may be perceived as an attempt to talk over the parent’s head. Your desire is to communicate the information to the parent, not simply to utter magic words to comply with a legal requirement to inform.
8. To ensure participation and input, ask open-ended questions of the parent and do not interrupt the answer. Listen for verbal clues about possible concerns and follow up with additional questions. The more information you can elicit, the more involved the parent and the more likely the parent will support the ultimate decision or plan.
9. Use humor appropriately as a way to connect with parents and break the ice.

3. Continually educate parents about the disability law process and their role. In IEP Team Meetings and other conferences with the parent, use statements of orientation so that the parent knows what to expect and how the meeting will progress. If the parent seems confused or uncertain about what to do, provide some simple reminders about the parent’s role in the meeting. Be accurate about the school district’s legal duties and the law’s requirements. Lying will only destroy trust and encourage the parent to seek other, perhaps adversarial, sources of information. Educating the parent early in the relationship pays dividends later, as the parent is more likely to see you as a source of correct information and to find less need to consult sources that may be inaccurate or confusing.