

# DEVELOPING IEPs THAT PROVIDE FAPE AND ARE LEGALLY COMPLIANT

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## LET'S LOOK AT SOME CASES ABOUT FAPE:

Ringwood Board of Education v. K.H.J., 49 IDELR 63 (3<sup>rd</sup> Cir. 2007)

In an unpublished decision, the 3<sup>rd</sup> Circuit ruled that the district failed to provide FAPE to the student. This was largely based on fact findings of the IHO who issued a 51-page decision after a seven day hearing in favor of the parents. The district court ruled for the school but the Circuit Court held that the district court failed to provide appropriate deference to the fact findings of the IHO. The court noted that a district court must explain why it disregards IHO findings, and must cite to the record to justify its decision. That did not happen here. The district court had held that the boy received an “appropriate” albeit not optimal education. The Circuit Court disagreed:

We have previously stated that “[w]hen students display considerable intellectual potential, IDEA requires ‘a great deal more than a negligible benefit.’” ....Because K.J. had only made “negligible progress” during the 2001-02 school year and was still one to two years behind grade level after the 2002-03 school year, we find that the ALJ properly concluded that the Board failed to provide K.J. with an appropriate education under the IDEA.

J.P. v. County School Board of Hanover County, Virginia, 49 IDELR 150; 516 F.3d 254 (4<sup>th</sup> Cir. 2008)

This case is similar to the Ringwood case. Again, the Circuit Court chastises the district court for its reversal of the IHO decision. The district court gave little weight to the IHO decision because

it concluded that the fact findings were not “regularly made” and should, therefore, be disregarded. The Circuit Court disagreed:

In this case, there is nothing in the record suggesting that the hearing officer’s process in resolving the case was anything other than ordinary. That is, the hearing officer conducted a proper hearing, allowing the parents and the School Board to present evidence and make arguments, and the hearing officer by all indications resolved the factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case.

The court noted that there were no specific requirements for how detailed the IHO decision must be, or for a detailed explanation of reasoning. Incidentally, the IHO decision was 25 pages long, so it obviously contained some details. The court vacated the district court’s order, including the award of attorney’s fees of \$180,000.

Draper v. Atlanta Independent School System, 49 IDELR 211; 518 F.3d 1275 (11<sup>th</sup> Cir. 2008)

The hearing officer ruled that the school district failed to provide FAPE to a student with dyslexia who had been misidentified as having a cognitive disability. The federal court upheld that ruling and the Circuit Court affirmed. J.D. tested at an IQ of 63 in third grade. Several years later, J.D. was enrolled by his mother in a private tutoring program where his reading level increased by two grades. This prompted the family to request that their son be further evaluated. The school complied, and though the student again tested at about an IQ level of 60, some discrepancies in the test scores caused the school psychologist to recommend further testing. That further testing showed that the student had an IQ 20 points higher than previously found, and as a result, he was reclassified as having a learning disability. The school district did not, however, provide the reading services promised in the IEP and a mediated agreement, and they did not change the student’s reading program even though it produced no gains over three years. The hearing officer found that the district not only misdiagnosed the student as having mental retardation, it then made no effort to further evaluate him for five years in violation of clearly established law. Both the hearing officer and federal court held that the parent’s claim was not barred by the two-year statute of limitations because the family did not have reason to know the student had been injured by his placement until the later IQ testing. Key Quotes (from the *district court* decision, which is at 47 IDELR 260; 480 F.Supp.2d 1331):

As for the 2002-03 school year, J.D.’s IEPs were not based on accurate, up-to-date information as APS contends because they were based on the 1998 evaluation.

Despite the fact that his reading skills decreased, APS continued to use the Lexia reading program, and by the time of the hearing he was still reading at the 3rd grade level. Based on a preponderance of the evidence, the Court agrees with the ALJ’s conclusion that APS failed to provide J.D. a FAPE by providing him essentially the same services that had failed him for three years in reading.

Finally, APS failed to design J.D.'s IEPs for the 2003-04 and 2004-05 school years to meet his individualized needs by failing to review and assess whether he had mastered his goals and objectives from the previous year and by failing to revise J.D.'s IEPs in certain areas from one year to the next.

Joshua A. v. Rocklin Unified School District, 52 IDELR 64 (9<sup>th</sup> Cir. 2009), unpublished

This is the first reported case to address the requirement to base an IEP on “peer reviewed research” to the extent practicable. The case involved a child with autism. The district court found for the school district and the circuit court affirmed. Key Quotes:

Student also argues that District’s program violates the IDEA because it is not based on peer-reviewed research. However, both Adams and Deal (on remand) ultimately found that an eclectic approach similar to the one proposed by District met the IDEA’s substantive requirements. See Adams, 195 F.3d at 1145. This eclectic approach, while not itself peer-reviewed, was based on “peer-reviewed research to the extent practicable.”

M.W. v. Clarke County School District, 51 IDELR 63 (M.D.Ga. 2008); Motion to Reconsider denied at 51 IDELR 156

The court held that the three-year old student with autism received FAPE in the LRE, and that the parents had failed to prove the appropriateness of their private placement. The district served the student in a more restrictive setting than the setting sought by the parents, but the court concluded that this was necessary to provide the student with the services he needed. The court also rejected arguments about evaluations in native language, and the necessity for certain related services. Key Quotes:

*With regard to testing in the native language....*

The Court concludes that it was not feasible to administer a Mandarin Chinese ABLLS to M.W. because no such instrument existed and that testing in Mandarin Chinese would not have provided M.W.’s instructors with the information they needed to construct an English-language curriculum.

*With regard to certain related services...*

It is clear, however, that such additional services [parent training and a behavioral plan for the home] are only required to the extent necessary to allow the child’s progress in the classroom.....Because it is apparent from the record, however, that M.W. was making adequate progress in the classroom, the IDEA did not obligate Defendant to provide at-home services.

D.S. v. Bayonne Board of Education, 54 IDELR 141 (3<sup>rd</sup> Cir. 2010).

The District Court found that the student's good grades established a receipt of FAPE. The Third Circuit disagreed, stating "Our reading of *Rowley* leads us to believe that when ... high grades are achieved in classes with only special education students set apart from the regular classes of a public school system, the grades are of less significance than grades obtained in regular classrooms." Despite the good grades, the student performed well below grade level in reading, writing and math. Achievement tests indicated borderline to low-average cognitive functioning. In finding that the IEP was inadequate, the Court also gave weight to the fact that the student had difficulty processing information that his teachers presented orally, and the fact that the Individual Education Program ("IEP") did not incorporate specific remedial techniques recommended by several evaluators. Key Quote:

Overall, we think that it is clear that a court should not place conclusive significance on special education classroom scores, a conclusion that we believe is reinforced by the circumstances that, as here, there may be a disconnect between a school's assessment of a student in a special education setting and his achievements in that setting and the student's achievements in standardized testing. When there is such a disconnect we think that there should be an especially close examination of the appropriateness of the student's education.

Blake C. v. DOE Hawaii, 51 IDELR 239; 593 F.Supp.2d 1199 (D.C.Ha. 2009)

The court reversed a hearing officer's decision, holding that the IHO used the wrong standard to determine if FAPE was provided. The hearing officer specifically rejected a "meaningful educational benefit" standard in favor of "some benefit." The court ruled that this was erroneous in light of N.B. v. Hellgate Elementary School District, 541 F.3d 1202 (9<sup>th</sup> Cir. 2008).

Letter to Frank, 52 IDELR 16 (OSEP 2009)

Key Quote: "Accordingly, States and LEAs may expend Part B funds for preschool, elementary school and secondary school education and may not expend Part B funds for postsecondary education."

T.H. v. District of Columbia, 52 IDELR 216; 620 F.Supp.2d 86 (D.C. 2009)

The court upheld the hearing officer's ruling that the IEP was reasonably calculated to provide FAPE even though the student made little progress. The court observed that failure to make progress may be due to numerous factors, and is not necessarily evidence that the IEP was flawed. Key Quotes:

The law has always found the reasoning of "post hoc propter hoc" fallacious. It is therefore fallacious to reason that the IEP caused this regression because T.H. regressed after its creation, when there were other equally valid reasons for its regression.

While academic success may be an important factor and may even be the most important factor, it is not the only one. In other words, even though plaintiffs argue that some evidence of academic progression is necessary in order for a Hearing Officer and a reviewing court to conclude that a student's IEP was adequate, the bottom line is that this is not mandated by the statute. Rather, as articulated recently by the 4<sup>th</sup> Circuit, "progress, or the lack thereof, while important, is not dispositive." *Simchick v. Fairfax County School Board*, 553 F.3d 315 (4<sup>th</sup> Cir. 2009).

Smith v. James C. Hormel School of the Virginia Institute of Autism, 53 IDELR 261 (W.D.Va. 2009); magistrate report accepted at 54 IDELR 75

The student was residentially placed by the school district at a private program for students with autism. That program discharged the student in December, 2007, due to behavioral issues. Parents later sued the school district for allegedly failing to provide FAPE after the discharge. But the court ruled for the school district, noting its prompt efforts to provide appropriate services. Key Quote:

Indeed, it is clear from the record that Greene County made great efforts to provide Johnnie with a suitable education. It placed him at VIA at public expense pursuant to an appropriate IEP; Johnnie's discharge from VIA was not something Greene County took lightly. Greene County was, at all times, ready and willing to provide educational services to Johnnie and/or find him an alternative placement.

K.S. v. Fremont Unified School District, 53 IDELR 287 (N.D. Cal. 2009)

The ALJ ruled in favor of the school district and the district court upheld that decision. The parents of K.S., an 11-year-old child with autism spectrum disorder, contended that K.S. was capable of making educational progress beyond what the IEP permitted her to achieve. The ALJ found that K.S. was making "progress that was reasonably to be expected in light of the nature and extent of her disabilities." The district court agreed. Key Quote:

Slow progress...is not necessarily indicative that plaintiff did not receive a FAPE, especially in light of the substantial evidence in the record concerning plaintiff's autism and cognitive impairments. Indeed, the fact that the plaintiff achieved but did not surpass the majority of her goals tends to show that the IEPs were designed appropriately.

Huffman v. North Lyon County School District, 53 IDELR 147 (D. Kan. 2009)

Applying the "some benefit" standard to the student's IEP, a hearing officer ruled in favor of the school district and the district court upheld the decision. In this case the mother of C.H., a child with autism and other attendant disabilities, was found not to be entitled to tuition reimbursement. The parent argued that not having an autism specialist present at the IEP meetings was a violation of federal and state regulations. She also contended that the court

applied an incorrect standard of FAPE. However, C.H.'s substantial progress indicated that the IEP provided "some educational benefit" as evidenced by the student's progress reports. The court observed that the parent's complaint stemmed not from a lack of progress, but from the district's "failure" to ensure greater success. Key Quotes:

Although it is understandable that parents would advocate for their children to receive services best calculated to produce maximum benefits, this is simply not the standard this court applies when addressing alleged violations of the [IDEA].

The hearing officer found that defendants did not commit procedural violations by failing to administer tests to C.H. that were designed specifically for students with autism and by failing to staff the IEP team with educational professionals who had autism-specific training or by providing an autism specialist or consultant to aid in the development of the IEPs.

Certainly, it would be preferable for an individual with extensive experience with a student's particular disability to take part in formulating that student's IEP, but the IDEA simply does not require this much.

Jaccari J. v. Board of Education of the City of Chicago, 54 IDELR 53 (N.D. Ill. 2010)

The hearing officer ruled in favor of the school district and the district court upheld that decision. The issue presented in this case was whether a child's poor performance on standardized tests indicated the District failed to provide the student with a FAPE. Teacher testimony and various progress reports indicated that the student was exceeding expectations both academically and behaviorally. The court found that standardized test scores are not the sole measure of a student's progress. Key Quote:

Given his cognitive impairment and emotional disturbances, it is unclear what [the student] should be scoring on standardized tests and how much of a yearly increase in his scores should be expected...other indicators suggest that [the student] is making progress.

J.L. v. Mercer Island School District, 52 IDELR 241 (9<sup>th</sup> Cir. 2009)

In overturning a District Court ruling in a reimbursement action, the 9th Circuit confirmed that IDEA 1997 did not raise the *Rowley* basic floor of opportunity standard for determining if an IEP provided FAPE. The court soundly refuted the lower courts reasoning for holding that IDEA 1997 raised the bar in regards to FAPE. The District Court had ruled that by its description of transition services as intending to foster independent living and economic self-sufficiency IDEA 1997 had adopted a new standard of FAPE. The Circuit Court concluded that if Congress wanted to change the FAPE standard it would have done so by directly changing the definition of FAPE. Key Quote:

We conclude that the district court misinterpreted Congress' intent. Had Congress sought to change the free appropriate public education "educational benefit"

standard -- a standard that courts have followed vis-à-vis Rowley since 1982 -- it would have expressed a clear intent to do so. Instead, three omissions suggest that Congress intended to keep Rowley intact. First, Congress did not change the definition of a free appropriate public education in any material respect. If Congress desired to change the free appropriate public education standard, the most logical way to do so would have been to amend the free appropriate public education definition itself. Second, Congress did not indicate in its definition of "transition services," or elsewhere, that a disabled student could not receive a free appropriate public education absent the attainment of transition goals. Third, Congress did not express disagreement with the "educational benefit" standard or indicate that it sought to supersede Rowley. In fact, Congress did not even mention Rowley.

Houston Independent School District v. V.P., 53 IDELR 1 (5th Cir. 2009)

The district court affirmed the hearing officer's determination that HISD failed to provide a FAPE. The court declared the student's IEP to be inadequate and insufficiently individualized to meet the student's auditory needs. On appeal, the court upheld the district court's ruling, but ordered an additional year's worth of tuition to be paid to the parents for the time the appeal was pending. While many issues were presented in this case, the court found passing grades and advancement could not prove a meaningful educational benefit of an IEP when grades are the product of unapproved deviations from the IEP. Key Quote:

Passing grades and yearly advancement were not found to be adequate measures because ... [it] resulted from modifications the special education director unilaterally imposed. The IEP Committee ... never evaluated the changes...

The court also held that while the District placed the student in a regular education classroom, the student was not able to effectively interact with peers. In short, the IEP failed to provide the student with the least restrictive environment for her condition. Key Quote:

Though HISD tried to accommodate [the student] in a regular education classroom, the district court concluded that [the student] was not receiving a meaningful educational benefit from such a placement.

A.B. v. Clarke County School District, 110 LRP 21410 (11<sup>th</sup> Cir. 2010) (unpublished)

Another student sexually assaulted the Petitioner when they attended the same elementary school. However, the Court rejected the parents' claim that the other student's enrollment in their son's middle school would cause their son to regress. The parents wanted access to the other student's educational records in order to prove their case. The Court noted that it was "sheer speculation" to suggest that a review of the classmate's records would prove that his presence was harmful.

David G. v. Council Rock School District, 52 IDELR 160 (E.D. Pa. 2009)

A hearing officer ruled in favor of the parents and a district court upheld that decision. At issue was whether the district deprived a student of FAPE by failing to provide him with individualized reading instruction in the 9<sup>th</sup> and 10<sup>th</sup> grades. While the student had a specific reading disability, he received reading instruction only in his English class. The court reasoned the district failed to address his unique reading needs and required the district to fund the former student's enrollment in a year-long adult literacy program and to reimburse him for his mileage and parking expenses. Key Quote:

...by not offering David a discrete period of remedial reading the School District failed to deliver FAPE in this area.

Quatroche v. East Lyme Board of Education, 52 IDELR 96 (D. Conn. 2009)

A district court held that the school district did not violate a deaf student's First Amendment rights by failing to provide closed-captioning on the high school's closed-circuit news program. The student argued that the schools' Morning Show is a forum provided for student discourse and was one of the primary ways in which students received information regarding the school. The issue in this case was the scope of the student's right to receive this information. The court found the school's Morning Show is a nonpublic forum; therefore, the restrictions on speech need only be reasonable and viewpoint neutral.

Pohorecki v. Anthony Wayne Local School District, 53 IDELR 22 (N.D. Ohio 2009)

The hearing officer determined that an incorrect classification under IDEA did not deny a student FAPE and the district court agreed. The issue in this case was whether a school district was required to reclassify a student's disability in order to provide an appropriate FAPE. The student was diagnosed with ADHD, OCD, and ODD and was classified in second grade as a child with "emotional disturbance." The student displayed difficulty with relationships, inappropriate behavior, and depression. The student was subsequently diagnosed with Asperger's Syndrome. An IEP team met to discuss his eligibility classification of an "emotional disturbance" and determined that the student still qualified under the ED category. The parents argued that the incorrect classification was a denial of a FAPE. The court reasoned the student's disability was complex, properly classified, and not a denial of FAPE in and of itself. Key Quote:

The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.

The important issue is whether the goals and objectives are appropriate for the student, regardless of the classification...the District was not required to classify [the student] as autistic...so long as the District recognized the disability and provided services necessary to ensure FAPE.

Bougades v. Pine Plains Central School District, 53 IDELR 42 (S.D.N.Y 2009)

The court reversed administrative decisions and held that the district denied a FAPE. In this case, a sixth grade learning disabled student did not make satisfactory progress toward any of his 27 IEP goals relating to reading and writing. Additionally, his progress in reading showed regression on a standardized test, and his writing continued to be a critical area of concern. The student failed two core classes and was not promoted to the seventh grade-largely due to an inability to complete homework assignments. Despite these concerns, the district did not offer any services or modifications in the IEP. The court held that the IEP failed to address the student's difficulties in writing and in completing his homework, ruling that the parent's were entitled to tuition reimbursement.

### **LET'S LOOK AT SOME CASES INVOLVING IEPs:**

Van Duyn v. Baker School District 5J, 107 LRP 51958; 502 F.3d 811 (9<sup>th</sup> Cir. 2007)

The 9<sup>th</sup> Circuit joined other Circuit Court in ruling that a failure to implement the IEP is a denial of FAPE only if it is a material failure. Key Quote:

We hold that when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.

The court rejected the argument that the failure to implement the IEP was equivalent to changing the IEP:

If accepted, this proposition would convert all IEP implementation failures into procedural violations of the IDEA, but there is no indication that a conflation of this sort is intended or permitted by the statute.

The court also rejected the argument that the IEP is a contract:

First, the IEP is entirely a federal statutory creation, and courts have rejected efforts to frame challenges to IEPs as breach-of-contract claims.

The court concluded that the discrepancies in this case between what the IEP called for and what was provided were minor and not material. However, the court ordered the district to pay some of the parents' attorney's fees due to a partial victory at the administrative level. The parent was not entitled to fees for the services of the parent who was also an attorney.

A.K. v. Alexandria City School Board, 47 IDELR 245; 484 F.3d 672 (4<sup>th</sup> Cir. 2007)

The Circuit Court ruled that the district denied FAPE because the IEP did not specify a particular school at which the student would be served. The IEP called for the student to be served at a

private day school, but did not specify a school. The chair of the meeting mentioned two schools that might work, but neither was identified in the IEP. Key Quote:

We emphasize that we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided. There is no reason for us to frame the issue so broadly. But, certainly, in a case in which the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes, the IEP must identify such a school to offer a FAPE.

The district court had ruled for the school district, in part, because the IEP Team chair had mentioned two schools that might work. Neither was identified in the IEP itself. The Circuit Court called this an error:

In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. Expanding the scope of a district's offer to include a comment made during the IEP development process would undermine the important policies served by the requirement of a formal written offer....

*Comment: Upon remand, the district court zapped the district for tuition reimbursement for another two years due to the same problem—the failure to identify a specific school for placement. It's at 50 IDELR 13.*

T.P. v. Mamaroneck Union Free School District, 51 IDELR 176; 554 F.3d 247; (2<sup>nd</sup> Cir. 2009)

The Circuit Court ruled for the school district, thus reversing the district court in a case alleging “predetermination.” Prior to the IEP Team meeting, the school's expert on autism reviewed the independent evaluation obtained by the parents and prepared a chart comparing the IEE recommendations with her own. There was at least some discussion about the matter between the expert and the chair of the IEP Team. The parents alleged, and the district court found, that this was “predetermination.” The circuit court disagreed. Key Quotes:

Even if there was such discussion, [referring to the meeting between the expert and the Team chair before the meeting] this does not mean the parents were denied meaningful participation at the meeting. IDEA regulations allow school districts to engage in “preparatory activities....to develop a proposal or response to a parent proposal that will be discussed at a later meeting” without affording the parents an opportunity to participate. See 34 CFR 300.501(b)(1) and (b)(3). Mamaroneck's conduct was consistent with these regulations.

*Comment: It helped the school's case that the Team made changes at the meeting in response to the parents' input. This is perhaps the strongest evidence a school can offer to show that it has not “predetermined” the outcome. In a predetermination case the parents have the burden of proving that the school approached the IEP Team meeting with a closed mind, not even*

*considering other ideas and possibilities. When the Team adopts some parental recommendations that argument loses steam.*

Bend-Lapine School District v. K.H., 48 IDELR 33; 234 F.App'x. 508 (9<sup>th</sup> Cir. 2007)

The court summarily concluded that the lower court's ruling in this case was not clearly erroneous, and therefore, would be affirmed. That ruling, at 43 IDELR 191, held that the IEP denied FAPE due to a lack of baseline data, measurable goals and a description of services to be provided.

Avjian v. Weast, 48 IDELR 61; 242 F.App'x. 77 (4<sup>th</sup> Cir. 2007)

The court held that the school district was not responsible for the residential placement costs of the student (\$571/day) when the IEP clearly called for a private day school placement. When the parents expressed interest in a residential placement during the IEP Team meeting, the Team told the parents about a facility to which they could apply. But the IEP document called for a private day program, and the parents signed the IEP, indicating their agreement. The court held that the written document dictated the outcome, rather than the comments of Team members:

This Court has found that when evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. See A.K. ex rel. J.K. v. Alexandria City School Board, 484 F.3d 672, 2007 WL 1218204 (4<sup>th</sup> Cir. 2007). Expanding the scope of the offer to include comments made during the IEP process undermines the important policies served by requiring a formal written IEP.

G.N. v. Board of Education of the Township of Livingston, 52 IDELR 2; 309 F.App'x 542 (3<sup>rd</sup> Cir. 2009) Unpublished

The district court observed: "It is clear from the face of the finalized IEP that no goals and objectives were included." Despite this procedural error by the school district, the court concluded that the student received FAPE. Key Quote:

The failure to include goals and objectives violates IDEA. However, to elevate this failing to a denial of FAPE would be elevating form over substance.

The court concluded that the parents had meaningful participation and the student made progress. The 3<sup>rd</sup> Circuit affirmed. The district court's decision is at 48 IDELR 160.

Termine v. William S. Hart High School District, 48 IDELR 272; 249 F.App'x. 583 (9<sup>th</sup> Cir. 2007)

In an unpublished decision, the 9<sup>th</sup> Circuit ordered the district to reimburse the parents for half of the expenses incurred at a private school due to the district's material failure to implement the IEP. This arose in the context of a transfer to the district. The court concluded that the new district failed to implement the previous IEP "to the extent possible within existing resources" as

required by state law. The court also found fault with the district's failure to conduct an IEP Team meeting, noting that the district "was under this obligation whether or not [the student's] mother chose to participate." Equitable considerations reduced the parent's recovery to half of the expenses.

Lessard v. Wilton-Lyndeborough Cooperative School District, 49 IDELR 180; 518 F.3d 18 (1<sup>st</sup> Cir. 2008)

The student did not have an IEP in place at the start of the school year, but the court concluded that this did not deprive the student of FAPE.

The IEP Team met seven times, normally for between two and three hours, and produced a 60-page IEP, to which the parents did not agree. The parents could not, or would not, identify specifically what they disagreed with. The district offered to pay for a lawyer for the parents to participate in mediation, if the parents would identify what they disagreed with. The parent refused to testify at the hearing.

The Circuit Court held that 1) IDEA does not require a "stand-alone transition plan"; 2) IDEA requires a behavioral plan only when certain disciplinary actions are taken, and not simply because the child has behaviors that impede learning—in those cases, the team is merely required to "consider, when appropriate" formulating such plans; 3) a school does not violate IDEA simply because the parent has refused to sign the IEP before the start of the school year; and 4) the 1997 amendments to IDEA did not change the Rowley standard with regard to transition plans. Key Quotes:

Many judges are parents too, and we can admire the determination with which the appellants have pursued the best possible education for their profoundly disabled daughter. That is as it should be. [Cite omitted]. But determination must be tempered by an understanding that school districts, like parents and children, have legal rights with respect to special education. In demanding more than the IDEA requires, the appellants frustrated the operation of a collaborative process and put the School District in an untenable position.

*Comment: The same parties battled over the next year's IEP also, with the 1<sup>st</sup> Circuit again upholding the school's actions. See Lessard v. Wilton-Lyndeborough Cooperative School District, 53 IDELR 279; 592 F.3d 267. The proposed IEP in this case was 77 pages and was developed through six IEP Team meetings, but it was never agreed to by the parent.*

Letter to Boswell, 49 IDELR 196 (2007)

"There is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated." However, the letter goes on to point out that schools must give parents full information, in the native language, of all information relevant to activities for which consent is sought.

Tarlowe v. New York City Board of Education, 50 IDELR 186 (S.D.N.Y. 2008)

The court affirmed the administrative decision that the parents were not entitled to reimbursement. Four key rulings: First, the court determined that the IEP Team did not need to include a general education teacher because there was no indication that the student might be “participating in the regular education environment.” The IEP stated that the student could participate in lunch, assemblies, trips and other school activities with non-disabled students, but this court found that “regular education environment” is a term referring to the place where regular education instruction takes place—not extracurricular activities. Moreover, there was no evidence of harm associated with the absence of the general education teacher. Second, the court found the goals to be measurable because they incorporated objectives that were measurable. Third, the school erred by failing to check the box indicating that the student had behavioral issues, but this was harmless because the IEP addressed those issues. Fourth, the offer of placement at a specific site was timely since it was done prior to the start of the school year. The IEP developed at the IEP Team meeting did not specify a particular school, but the court held that notice to the parents prior to the start of the next school year was still timely.

Fisher v. Stafford Township Board of Education, 50 IDELR 272; 289 F.App’x. 520 (3<sup>rd</sup> Cir. 2008)

The court agreed with the hearing officer and the district court that the parent was not entitled to reimbursement for the supplemental payments she made to teacher aides employed by the district. The parent claimed that without her payments the district would not have been able to employ Lovaas-trained aides, which is what the IEP required. The court concluded that this was “pure speculation.” Furthermore, the parent failed to give written notice to the school that she was seeking such reimbursement. On another issue, the court held that occasional failures to have the proper aides at school did not amount to a material failure to implement the IEP. The court noted that when one of the student’s two aides resigned the district had no prior notice that this was going to happen and “it does not seem unreasonable that it might take a few weeks to find a suitable replacement.” The school was still providing an aide three out of five days a week. The student would not have an aide for ten days over a five week period. Dissatisfied with this, the parent pulled the student out of school altogether for those five weeks.

R.S. v. Placentia-Yorba Linda USD, 51 IDELR 237 (9<sup>th</sup> Cir. 2009) Unpublished

The court upheld decisions in favor of the school district, concluding that the district offered FAPE in the LRE for the two years in question. The court pointed out that an IEP is not to be judged in hindsight by progress made, but rather: “the court looks to the IEP’s goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer a meaningful benefit on the student.” As to LRE, the court noted the tension between the preference for mainstreaming as opposed to “the primary objective” of providing an appropriate education.

J.P. v. Enid Public Schools, 53 IDELR 112 (W.D.Okla. 2009)

The court held that the student received FAPE because he received appropriate services, even though the IEP did not identify all of the services needed. Key Quote:

As plaintiffs point out, the IEP documents themselves are, unfortunately, quite sparse. The evidence of the IEPs as implemented, however, demonstrates that the District's efforts were reasonably calculated to provide J.P. with some educational benefit. Many of the services that plaintiffs point to as lacking from the IEP document were actually provided by the District.

The court also concluded that the student did not require residential placement and that even if he did, the parents failed to provide the proper notice.

*Comment: Some courts take the written IEP document more seriously than others. This is a case where the hearing officer and the court looked more to what actually happened rather than what was written in the IEP. There are hearing officers and courts who would have ruled against the district on the basis of the "sparse" nature of the IEP as written.*

Souderton Area Sch. Dist. v. J. H., 53 IDELR 179 (3<sup>rd</sup> Cir. 2009) (unpublished).

The school district determined the student's present writing level based on three sources: progress reports, Woodcock Johnson III, and a rubric-based writing sample. The court stated that "while the PSSA writing rubric may be insufficient when given alone, 'when considered in conjunction with an unquestionably objective measure of achievement [like the WJ III], the rubric may prove to be more effective.'" Subsequent to the district's development of the student's IEP, the parents obtained a private OT report that recommended OT. The district immediately offered to conduct an OT evaluation and requested parental consent for the evaluation. The court found that after evaluation by the district it may become clear that the student requires OT; however the privately-secured OT report alone is not enough to demonstrate that the district's IEP is inappropriate. Key Quote:

When the issue of OT needs surfaced, the School District reasonably offered to re-evaluate J.H. for those needs within thirty days upon his return to public school, which has not yet occurred.

The fact that the student received speech services at the private school did not convince the Court that the student required those services. The private school provides large-group speech therapy to all of its students. Thus, the student's participation in this therapy does not reveal anything about his individual needs. Furthermore, the fact that he also received small-group therapy does not, in itself, prove the need for services.

District of Columbia v. Bryant-James, 53 IDELR 290; 675 F.Supp.2d 115 (D.C. 2009)

The court upheld the hearing officer's finding that the IEP denied FAPE, largely due to a disconnect between the recommendations in an evaluation and the placement. The evaluation

called for the student to be in a quiet, highly structured, distraction-free environment. The student was placed in a small class setting (11 students) with preferential seating, but the hearing officer and the court concluded that this did not adequately fulfill the recommendations in the evaluation.

S.T. v. Weast, 54 IDELR 83 (D.C.Md. 2010)

At an IEP Team meeting in May, 2007, the IEP was developed that called for the student to receive 30 hours of self-contained special education instruction, which would mean that the student was fully self contained with no mainstreaming. The Team concluded the meeting by referring the matter to a “central IEP meeting” scheduled for July. At the July meeting, the school proposed changing the mix to 22.5 hours in self contained classrooms and 7.5 hours of mainstreaming for lunch and electives. The parents alleged that this amounted to “predetermination” by the school, by changing the IEP to fit a predetermined public school placement. The parents placed the child in a private school and sought reimbursement. The ALJ concluded that the notations on the May IEP were “misleading and a mistake.” The ALJ also concluded, based on the testimony, that the July meeting was a continuation of the May meeting, and thus the May IEP was only a draft and not the final product. The court affirmed the ALJ decision. Key Quotes:

Lastly, the ALJ appears to have been persuaded by the testimony of Ms. Angel that the thirty hours of self-contained special education listed on the May IEP was written at the instruction of the Brooke Grove principal who ‘ran out of willingness to listen to [the team] go over and over’ about it.

Although the Court agrees with Plaintiffs that the school district has an obligation to develop clearly written IEPs, the IEP does not become complete until it identifies a placement for where the child will receive special education services.

T.Y. v. New York City Department of Education, Region 4, 53 IDELR 69 (2<sup>nd</sup> Cir. 2009).

The District has a policy of not specifying a particular school in an IEP. A child’s placement is determined by a “citywide placement officer who looks at which school would be the most appropriate.” The parents argued that the district’s policy deprived them of their right to meaningful participation in the development of the IEP. The term “educational placement” in the regulations refers only to the general type of education program in which a child is placed. The requirement that an IEP specify the “location” does not mean that the IEP must specify a specific school site. “We conclude that because there is no requirement in the IDEA that the IEP name a specific school location, T.Y.’s IEP was not procedurally deficient for that reason.”

## **WHAT CAN WE MAKE OF ALL THAT?**

- 1.** Decisions of the IHO or ALJ carry a lot of weight.
- 2.** Make sure that the IEP and placement are aligned with and supported by the evaluation data.
- 3.** If what you are doing is not producing good results, do something different.
- 4.** Grades in a mainstream classroom carry more weight than grades in a special education setting.
- 5.** If the student is not making progress, be ready to explain why.
- 6.** Add RWA to your acronym vocabulary: Ready, Willing and Able.
- 7.** Rowley rules.
- 8.** Grades, standardized tests, testimony: often hard to tell which is going to be the most important to the judge.
- 9.** Kids with autism seem to end up in litigation more than kids with other disabilities.
- 10.** Failure to implement claims are common. When the parent makes this complaint look into it; take corrective action if called for; report back to the parent.
- 11.** What is written in the IEP is what carries legal significance as far as FAPE being provided. What is said in the meeting may bear on “meaningful parent participation.”
- 12.** Preparation is OK. Predetermination is not.
- 13.** Be sure your baseline data is accurate and objectively measurable.
- 14.** Some courts take procedures and paperwork more seriously than others.
- 15.** Unspoken issue in special ed litigation: who is being reasonable? Who is being unreasonable?