

MOCK IEP ISSUE SPOTTING



STOP SIGN LEGAL ISSUES

- I. Mandated attendance of specific IEP team members: **Are all of the appropriate IEP team members present at the IEP meeting?**
- a. 20 U.S.C. §1414(d)(1)(B); 34 C.F.R. § 300.344(a): The IEP Team:
- i. The **parents** of a child with a disability → (**Rebecca Cortez**)
 - ii. **Not less than one regular education teacher of such child** (if the child is, or may be, participating in the regular education environment). → (**None**)
 - iii. Not less than one special education teacher, or where appropriate, at least one special education provider of such child. → (**Melissa Robinson**)
 - iv. **A representative of the local educational agency who** → (**Stephan O'Doul– Special Education Director**)
 1. Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities.
 2. Is knowledgeable about the general education curriculum.
 3. Is knowledgeable about the availability of resources of the local educational agency.
 - v. An individual who can **interpret the instructional applications of evaluation results**, who may be member of team described in clauses (ii) and (vi). → (**Ophelia Smith – School Psychologist; Natalie Portsmouth – Speech Therapist; Robert Contreras – Occupational Therapist; Phil Little – “Autism Specialist”**)

- vi. At the discretion of the parent or agency, other individuals who have **knowledge or special expertise** regarding the child, including related services personnel as appropriate → **(None)**
 - vii. Whenever appropriate, the **child** with a disability → **(None)**
- b. **HERE:** If there is even a possibility of placement in general education, a regular education teacher would need to be present as part of the IEP team. Since we know that mom requested the IEP to discuss mainstreaming Mark into the general education setting, →
- i. The question is whether the special education director—Mr. O’Doul can assume the dual capacity of a regular education teacher. The regular education teacher who attends the child’s IEP should be a teacher who **“is, or may be, responsible for implementing a portion of the IEP…”** Notice of Interpretation, Appendix A to 34 C.F.R. Part 300, Question 26- Thus, Mr. O’Doul must be not only a regular education teacher, but also one that may actually be responsible for carrying out a portion of Mark’s IEP. Even though Mr. O’Doul has assumed the role of the regular education teacher for purposes of the IEP, would he be the regular education teacher responsible for implementing certain portions of Mark’s IEP? Probably not. It seems as though he assumed the role temporarily, as a result, Mark’s IEP Team is likely incomplete. .

II. **Parent’s rights** – school district must ensure that a **full explanation of procedural safeguards** is provided to parents.

- a. 20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a)-(b) : A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents **only 1 time a year**, except that copy also shall be given to the parents –
 - i. upon **initial referral** or **parental request for evaluation**;
 - ii. upon the first occurrence of the **filing of a complaint** under subsection (b)(6); and
 - iii. upon **request by a parent**.
- b. 20 U.S.C. § 1415(d)(1)(B) – **Internet Websites:** A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.
- c. 20 U.S.C. § 1415(d)(2) – **Contents:** The procedural safeguards notice must include a full explanation of all of the procedural safeguards written in the native language of the parents (unless it is not feasible to do so).

- i. Notice of the time period (**statute of limitations**) within which to “**make a complaint, “ rights about mediation, “stay put,” discipline, reimbursement for private placements, and attorney’s fees.**

d. **HERE:** Mr. O’Doul states that this is the 4th IEP for Mark this year, because we are not specifically told, a copy of the rights may have either been provided to Mom. The law requires that these right be posted on the local educational agency website, or given to Mark’s mom if she: requested an evaluation, or had not received a copy with within a year of this IEP.

III. **Notice of Evaluation Procedures:** Mark’s special day class teacher, Mrs. Robinson talks about an assessment having been conducted, did the District provide written prior notice to Mom and ask for her consent before conducting this assessment?

a. 20 U.S.C. § 1414(b)(1); 34 C.F.R. § 300.502– **Notice:** The local educational agency shall provide notice to parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

b. **HERE:** Mom had no idea Mark would be assessed was not given notice of what kind of assessment would be conducted.

IV. **Parental Consent:** Did the Teacher obtain Mom’s consent, **prior** to conducting Mark’s assessment?

a. 20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.505(a),(b)(c): Each local educational agency shall **obtain informed parental consent**, in accordance with subsection (a)(1)(D), **prior to conducting any reevaluation of a child with a disability**, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child’s parent has failed to respond.

b. **HERE:** The SDC teacher attempted to obtain mom’s consent after the assessment had already been conducted, a clear violation.

V. **Parents are not obligated to consent to the “form”—an assessment plan, and do not have to consent at the time of the IEP meeting:** Melissa Robinson tells mom, “After the IEP, I have a form for you to sign. The form simply says that you approve of the assessment that I did, Okay?”

- a. When consent is required under IDEA, it must be "fully informed" to be valid. [34 C.F.R. 300.500](#) (b)(1), [34 C.F.R. 300.500](#) (b). In order to be informed, the consent must meet the following requirements:
 - i. Parents must be informed of **all information relevant to the activity** at issue in their native language or other mode of communication. [34 C.F.R. 300.500](#) (b)(1).
 - ii. Parents must sign a **written consent** form that describes with **specificity the agreed activity**, for example, evaluation of specific placement that is to be carried out. [34 C.F.R. 300.500](#) (b)(2).
 - iii. The school district must **make the parent aware that the granting of consent is voluntary and may be revoked** at any time. [34 C.F.R. 300.500](#) (b)(3).
- b. HERE: The District appears to be pressuring Mom into signing this assessment plan (after the fact) and without informing her that she can reject it, consent to all, or consent to parts. Mom did not know the assessment had even been conducted, and is being put on the spot, by explaining: "The paperwork's a formality Mrs. Cortez. I'd hate to tie Mrs. Robinson's hands waiting for paperwork to start her testing. You see?"

VI. **Copies of Reports provided in advance of IEP:** Did mom receive a copy of this assessment prior to the IEP meeting?

- a. 34 C.F.R. § 300.562: Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to §§300.507 and 300.521-300.528, and in no case more than 45 days after the request has been made.
- b. 34 Code of Federal Regulations § 300.534:
 - i. Upon completing the administration of tests and other evaluation materials –
 - 1. A group of qualified professionals and the parent of the child must determine whether the child is a child with a disability, as defined in §300.7; and
 - 2. The **public agency must provide a copy of the evaluation report** and the documentation of determination of eligibility to the parent.

- c. **HERE:** Your State may have its own statute requiring school districts and other public agencies to provide copies of assessments and records to parents in advance of IEPs. For example, in California, a parent has the right and opportunity to examine all school records of the child and to receive copies within 5 days after such request is made, either orally or in writing. Keep in mind that it is always a good idea to request that the school district provide you copies of any assessments or other documentation (such as draft goals and objectives) the school district prepares for an upcoming IEP, a reasonable period of time in advance of the meeting. In this case, the report was completed before the IEP, but since mom did not know of its existence, she wouldn't have known to request a copy.

VII. **School district's obligation to assess in all areas of suspected need:** The behavioral report is mostly observations because she "did some data collection and some **informal** testing..."

- a. 34 C.F.R. § 300.24(b)(4): The district has the responsibility for assessment in **all areas related to the suspected disability**. If there is no district person competent to carry out certain kinds of evaluations, the district may contract out for the service or may use the results of any available independent assessment.
- b. 20 U.S.C. § 1414 (b)(3)(C); 34 C.F.R. §. 300.532(d)(e)(f), (b), (d): Tests must be validated for the specific purpose used and be given by trained personnel. Tests must accurately measure a child's aptitude or achievement and assess specific areas of educational need rather than providing a single IQ and/or reflecting the child's impaired sensory, manual, or speaking skills. No single procedure or test is to be used for determining an appropriate educational program. The child must be assessed in **all areas of suspected disability**.
- c. **HERE:** When Melissa Robinson says that she did "some data collection and some informal testing," and this data collection only took place over the course of one school day. It is questionable whether she really comprehensively assessed Mark. Although federal law does not require formal evaluations, any testing done must provide parents and the IEP Team an "accurate" measure of the child's strengths and weaknesses. If we don't get an accurate picture of the child's present levels of performance then it is relatively impossible to develop appropriate annual goals and incremental objectives for the child. In this case, the observation was only conducted over a time period of one day. In addition, the observation was conducted by the classroom aide and not school psychologist or SDC teacher, so it is questionable whether such an aide was qualified or "competent to carry out this kind of evaluation."

- VIII. **Independent Educational Evaluation (“IEE”)**: If mom disagrees with the district evaluation, she has the right to an IEE conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question at public expense.
- a. 34 C.F.R. Sec. 300.502; 20 U.S.C. § 1415(b)(1):
 - i. Parents have a right to an IEE at public expense if they disagree with an evaluation obtained by the district.
 - ii. Even though many school districts attempt to restrict a parent’s choice of evaluators to a list of approved evaluators selected by the school, parents have a right to choose their own independent evaluator.
 - iii. The district must provide parents with notice of right to IEE.
 - iv. If a parent makes a request for an IEE, the **district has two options**:
 1. Say yes and provide IEE at public expense.
 2. File for Due Process
 - a. The IEE is deemed at public expense unless the district assessment is determined to be appropriate at the due process hearing.
 - v. If the IEE meets district criteria, it must be considered in any decision made with respect to the provision of FAPE to a child.
 - b. **HERE**: If mom decides that the district assessment is inadequate, or disagrees with it, she can request an IEE and the district would either have to pay for it, or file for Due Process Hearing.
- IX. **Least Restrictive Environment (LRE) issue**: Can the special education director prevent Mark from being mainstreamed on the basis of Mark’s behavioral “issues?”
- a. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550: To the **maximum extent appropriate**, children with disabilities, including children in public or private institutions or other care facilities, are **educated with children who are not disabled**, and **special classes, separate schooling, or other removal of children with disabilities** from the regular educational environment occurs **only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily**.

- b. 20 U.S.C. § 1414(d)(1)(A)(i)(IV): **LRE Creates a presumption in favor of inclusion in areas of:**
1. **The regular curriculum**
 2. **Extracurricular** activities
 3. Other **non-academic** activities such as lunch, recess, and other social activities.
- c. 20 U.S.C. § 1414(d)(1)(A)(i)(V): In making a determination of placement, LRE requires an **explanation** of the extent, if any, to which the **child will not participate with nondisabled children in the regular class** and in **nonacademic** activities.
- d. 34 C.F.R. § 300.552(d): In selecting the LRE, consideration is given to **any potential harmful effect on the child** or on the **quality of services that he or she needs**.
- e. There are **three main tests** that courts will apply in deciding whether a child has been placed in the LRE:
- i. Board of Education v. Holland, 14 F.3d 1398 (9th Cir. 1994):
 1. The **educational benefits** available to the student in a **regular classroom**, supplemented with appropriate aids and services, as **compared** with the educational benefits of a **special education** classroom;
 2. The **non-academic benefits of interaction** with **children** who were **not disabled**.
 3. The **effect** of the **student's presence** on the teacher and **other children** in the classroom.
 4. The **cost of mainstreaming** the student in a regular classroom.
 - ii. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983): (Followed by **4th and 8th** Circuits)
 1. "In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would **not** be appropriate under the act."

2. This test recognizes that some children would not benefit from mainstreaming because:
 - a. The marginal benefits of mainstreaming are outweighed by the benefits that could not feasibly be provided in a non-segregated setting.
 - b. The child is a disruptive force in the non-segregated setting.
3. Mainstreaming cost is a factor, but would not be a defense if the district failed to use its funds to provide a **proper continuum** of alternative placements for handicapped children.

iii. Daniel RR v. State Board of Education, 874 F.2d 1036 (5th Cir.1989) (Followed by 3rd and 11th Circuits)

1. Can education in the regular classroom, with the use of supplementary aids and services be achieved satisfactorily for a given child?
 2. If not, and the school intends to provide special education or remove the child from regular education, has the school mainstreamed the child to the maximum extent possible?
The main factors include:
 - a. Will the child receive an educational benefit from regular education?
 - i. Balance the benefits of regular and special education for each individual child.
 - b. Is regular education detrimental to the child?
 - c. Effect of the child's presence on other students and teachers in the regular educational classroom.
- f. **HERE**: According to the special education director, the only concern that seems to be at issue here is the effect of Mark's behavior on his teachers and the other students. The SDC teacher claims that Mark's behaviors are disruptive, but can be held in check in a SDC setting. On the other hand, mom feels that Mark primary issue is attention to task as opposed to disruptive behaviors. What will be determinative, is whether the "nature or severity" of Mark's disability is such that **education in a regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily**. If an aide can help with redirection and alleviate Mark's alleged "disruptive" behaviors, the district's argument against mainstreaming will be less than persuasive.

- X. **The District must give prior written notice if they refuse to initiate or change placement or services:** Mom requested an aide at the last 3 IEP meetings and never got an answer.
- a. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a): **Written prior notice** to the parent of the child, in accordance with subsection (c)(1), whenever the local educational agency –
 - i. **Proposes to initiate or change**; or
 - ii. **Refuses to initiate or change, the identification, evaluation, or educational placement of the child**, or the provisions of a free appropriate public education to the child.
 - b. 20 U.S.C. § 1415(c); 34 C.F.R. § 300.503 (b): **Content of Prior Written Notice**: SEE ABOVE
 - i. **HERE**: Mom requested an aide at the last 3 IEP meetings, and never got an answer. If the district refuses, they must provide written notice about their refusal. The written notice must describe what they refused to do and their alternate proposal, if any. The notice must explain their rationale and must describe each evaluation procedure, assessment, record, or report used as the basis of their refusal. The notice must also provide a description of all other options the IEP team considered and the reasons why the team rejected these options. Finally, the notice must describe any other factors that are relevant to their proposal or refusal.
- XI. The child's unique needs trump availability of space, budget concerns, or administrative convenience: The special education director tells mom that he would need district approval for the aide, and also cites budgetary concerns.
- a. 34 C.F.R. Part 300, Appendix A, Q.1; 64 Fed. Reg. 12471 (3/12/99): In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs, and not solely on factors such as category of disability, significance of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.
 - b. Federal Policy Letter on LRE, Education for the Handicapped Law Reporter (EHLR) page 211:384, March 21, 1986: Federal and state policy specifically forbid selecting a placement in a segregated setting over placement on a regular school site if the placement decision is based on **administrative factors** and not on the students' needs.
 - c. 34 C.F.R. § 300.344(a)(4): The public agency shall ensure that the IEP team for each child with a disability includes a representative of the public

agency who is **qualified to provide, or supervise the provision of,** specially designed instruction to meet the unique needs of children with disabilities.

Notice of Interpretation, Appendix C to 34 C.F.R. Part 300, Question 22: Who can serve as the representative of the public agency at an IEP meeting? Each public agency may determine which specific staff member will serve as the agency representative in a particular IEP meeting, so long as the individual meets these requirements. It is important, however, that **the agency representative have the authority to commit agency resources and be able to ensure that whatever services are set out in the IEP will actually be provided.**

- d. HERE: The special education director cannot use budgetary concerns and administrative convenience (“I’d have to get district approval”) to deny Mark the services that he is entitled to. Further, as a special education director, district approval of the services would not seem like much of an obstacle.

XII. **Mark’s unique needs must be met:** The special education director had told mom that Mark had serious behavioral issues that prevented him from being mainstreamed in the LRE. Mom claims that she spent over \$150,000 for an in-home behavior intervention program.

- a. 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2): Development of the IEP: Consideration of Special Factors must be part of the development of the IEP by the team.
 - i. In the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;
- b. (PBIS) 20 U.S.C. § 1414(d)(3)(b)(i); 34 C.F.R. § 300.346(a)(2)(i): Positive Behavioral Interventions and Supports
 - i. Systems Change
 - ii. Environmental Alterations
 - iii. Skills Instruction
 - iv. Behavioral Consequences
 - v. Social interaction, and individual choice. Positive behavior interventions do not include pain or trauma.
- c. Deal v. Hamilton County Bd. Of Educ., 42 IDELR 109 (6th Cir. 2004): “The facts of this case strongly suggest that the school system had an

unofficial policy of refusing to provide one-on-one ABA programs and that school system personnel thus did not have open minds and were not willing to consider the provision of such a program... The clear implication is that no matter how strong the evidence presented by the Deals, the school system would still have refused to provide the services. This is **predetermination**... There is a point at which the **difference in outcomes** between two methods can be so great that provision of the lesser program could **amount to denial of FAPE.**”

- d. HERE: The district has the responsibility for assessment in all areas related to the suspected disability: 34 C.F.R. § 300.24(b)(4). Mark’s unique needs must be met with an appropriate program. Moreover, the district is the party that acknowledges Mark’s behavioral concerns. Once they realized that this was an issue, the district should have instituted some type of behavioral intervention program to ameliorate this concern. Since the district has not made this offer, and has instead sought SDC placement as a remedy, mom may want to request an IEE and schedule a new IEP meeting to discuss whether an ABA program would be appropriate for Mark. It is important to note that mom must first receive and then disagree with the district’s behavioral assessment, before requesting an IEE at public expense. Alternatively, mom could initiate an IEE at her own expense, in which case **the results of the evaluation** →
- e. 34 C.F.R. § 300.502(c):
 - i. **Must** be considered by the district, if it meets agency criteria, in any decision made with respect to the provision of FAPE to Mark;
and
 - ii. May be presented as evidence at a due process hearing.

XIII. Parent has the right to participate equally in development of the IEP:

- Mom wants Mark to be mainstreamed in Math and Reading, two subjects where he is currently performing at grade level.
- a. 34 C.F.R. § 3000.5333(a)(1); 34 C.F.R. § Part 300, App. A C, Q. 5: Parent has the right to **present information** to the IEP team and **participate equally** in the development of the IEP.
 - b. 20 U.S.C. §1400(c)(5)(B); (d)(1)(B): The Congressional findings and purposes relative to the IDEA conclude a finding that: “Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by...strengthening the role of parents and ensuring that families of such children have **meaningful opportunities to participate** in the education of their children at school and at home.”

- c. The public agency is only responsible for implementing decisions, whether written or oral, that reflect the recommendations of the placement team as a whole and are formally adopted by the placement team, and the agency is not required to give effect to the opinions of individual team members. See *Letter to Anonymous*, [25 IDELR 529](#) (OSEP 1996). **While parental preference may be one factor that is considered in determining the overall outcome with respect to placement, it is not the predominant or overriding force in making a final placement decision or deciding any matters that individually comprise placement.** *Letter to Bina*, [18 IDELR 582](#) (OSERS 1991). It is reasonable to allow the majority recommendations to constitute the IEP. *Letter to Coleman*, [211 IDELR 269](#) (OSEP 1981). Thus, it is possible for school personnel to make determinations on these issues without the agreement of parents, providing they reflect a consensus of the multidisciplinary team, however, parental CONSENT must be obtained BEFORE implement the IEP.
- d. *Letter to Bina*, [18 IDELR 582](#) (OSERS 1991). Accord *Letter to Vergason*, [17 IDELR 471](#) (OSERS 1991): Some states offer parental choice options, which allow parents to select their child's placement. While such state laws are generally consistent with federal law, school districts should be certain that parents select an appropriate placement giving full consideration to all the legal requirements surrounding placement under the special education laws.
- e. **Counterproductive Placements:** Placement decisions should not be made in the face of overt parental opposition that rises to the level of hostility, **the result of which prevents students from learning and achieving an educational benefit in a particular placement.** When faced with such compelling facts, some courts have, in rare cases, ordered school districts to defer to parents' preferred placement. See *Board of Educ. of Community Consol. Sch. Dist. No. 21 v. Illinois State Bd. of Educ.*, 938 F.2d 712 (7th Cir. 1991); *Greenbush Sch. Comm. v. Mr. and Mrs. K.*, 949 F.Supp. 934 (D. Me. 1996); and *Metropolitan Gov't. of Nashville/Davidson County v. Guest*, [28 IDELR 290](#) ; 900 F. Supp. 905 (M.D. Tenn. 1995). The same has been true under Section 504. See also *South Royalton Sch. Dist.*, [27 IDELR 920](#) (SEA VT 1998). Every educational dispute has the potential to create ill will between parents and school districts. Many a parent has attempted to use this "poison well" theory to challenge placement and has failed.
- f. 20 U.S.C. § 1414(d)(3)(B)(i): In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

g. HERE: It is very important that Mrs. Cortez asks questions and participates in the development of her child's IEP. She is of the opinion that Mark's behavioral "issues" are under control, and that he should be mainstreamed in subjects where he is performing at grade level. Although the school psychologist is correct that placement is an IEP **team** decision, mom still has a right to voice her concerns and provide input.

XIV. **LRE Issue**: Mark should not be immersed in an environment that prevents him from learning and attaining an educational benefit. If he is performing at grade level in certain subjects, he should be mainstreamed to the fullest extent possible. After all, LRE favors inclusion, and a child's educational growth would be stagnated if he or she is placed in a remedial setting. **Children can receive one-to-one or small group instruction outside of regular classes if this is necessary for them to learn.**

XV. **School district's obligation to assess in all areas of suspected need**: Again, the "autism specialist" report seems to be comprised of mostly "quick observations." Was a comprehensive assessment needed?

a. 20 U.S.C. § 1414 (b)(3)(C); 34 C.F.R. §. 300.532(d)(e)(f), (b), (d): Tests must be validated for the specific purpose used and be given by trained personnel. Tests must accurately measure a child's aptitude or achievement and assess specific areas of educational need rather than providing a single IQ and/or reflecting the child's impaired sensory, manual, or speaking skills. No single procedure or test is to be used for determining an appropriate educational program. The child must be assessed **in all areas of suspected disability**.

b. HERE: According to the autism specialist, Mark was "reading simple stories to the rest of the class." What about his present levels of performance? Without an accurate measure, the IEP team would be hard pressed to develop appropriate annual goals and incremental objectives.

XVI. A licensed or credential may not be required if the student would derive an education benefit: Is Phil Little professionally qualified to make a determination of appropriate placement?

a. 34 C.F.R. Sec. § 300.23; 20 U.S.C. § 1412(a)(14)(A): **Personnel Qualifications:**

i. The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

- b. 20 U.S.C. § 1412(a)(14)(B): Related Services Personnel and Paraprofessionals. The qualifications under subparagraph (A) include qualifications for related services and paraprofessionals that:
- i. Are consistent with any State-approved or State-recognized **certification, licensing, registration, or other comparable requirements** that apply to the professional discipline in which those personnel are providing special education or related services.
 - ii. Ensure that **related services personnel** who deliver services in their discipline or profession meet the requirements of clause (i) and have **not had certification or licensure requirements waived** on an emergency, temporary, or provisional basis.
- c. 20 U.S.C. § 1412(a)(14)(D): In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State **take measurable steps to recruit, hire, train, and retain highly qualified personnel** to provide special education and **related services** under this part to children with disabilities.
- d. In *Brevard County Sch. Bd.*, [41 IDELR 288](#) (SEA FL 2004), a Florida district offered an appropriate IEP to a 4-year-old student with a cochlear implant even though it did not offer her a certified auditory-verbal therapist. The proposed therapist was trained in auditory-verbal therapy and had over 30 years of experience. The ALJ determined there was no applicable state or federal law that required an AV therapist to be certified in AVT techniques.
- e. **What it means:** Recognizing the IDEA does not require a district to accede to a parent's educational preferences, the ALJ determined that an uncertified but **very experienced** AV therapist still provided FAPE because the student would derive "**some educational benefit**" from the therapy. The therapist met both the IDEA definition of "**qualified personnel**" and **state licensure** requirements.
- f. HERE: In Phil Little's character description, we are told that he went through a "crash course" on Autism and related disorders. What kind of training did that entail? Were his licensing and certification credentials legitimate and do they qualify him as an "Autism Specialist"? On the other hand, the law appears to say that even if the specialist is not licensed or credentialed, but is "**very experienced**," and Mark is able to derive "**some educational benefit**," the District has met their requirements. This issue is complex because so much of it is based on State requirements. If you experience a similar situation, research your state's laws about credentials and licensing. If the District's employee does not meet those state-mandated requirements, insist on someone who is qualified assessing or providing services for your child, or alternatively, request an IEE.

- XVII. **Under IDEA, the IEP program should be individualized to meet each child's needs:** Is Mark's speech program individually tailored to meet his unique needs if his sessions are expanded to include the entire SDC class?
- a. A **“free and appropriate public education” (FAPE)** is defined in [34 C.F.R. 300.13](#) of the IDEA as special education and related services that are provided:
 - i. At public expense, under public supervision and direction and without charge.
 - ii. To meet standards of the state educational agency.
 - iii. To include preschool, elementary school or secondary school education in the state involved.
 - iv. In conformity with an IEP that meets the requirements of [34 C.F.R. 300.340](#).
 - b. [34 C.F.R. 300.26](#): The services must address **all** of the child's identified special education and related service needs, and the services and placement must be based on the child's **unique needs** and not on his/her disability.
 - c. In 1982, the U.S. Supreme Court issued a decision in *Board of Education v. Rowley*, 458 U.S. 176, declaring that under federal law an **“appropriate”** educational program and placement is one that provides services to the disabled student sufficient for her to obtain **“educational benefit.”**
 - d. HERE: Is the District's speech program really individualized to meet Mark's unique needs or is Ms. Williams simply recommending the school district's speech program because it's convenient for the district and an efficient use of available staff? By changing Mark's services to encompass all of the students in the SDC class, it seems as though the “individualization” component has been excised.
- XVIII. A licensed or credential may not be required if the student would derive an education benefit: Mark's speech therapy was not provided directly by the speech therapist, Natalie Portsmouth. Was the speech assistant Andrea Thomas properly certified and licensed by a State-approved or State-recognized agency? If so, why isn't Mrs. Thomas at the IEP meeting to provide input?
- XIX. Methodology and type of instruction must be addressed by the IEP team even if the school district doesn't “typically” do it that way: The speech therapist,

Natalie Portsmouth, believes that very few students need individual speech therapy to benefit from their education.

- a. 34 C.F.R. § 300.26 (b)(3): Federal regulations define **special education services** as “**specially-designed instruction...to meet the unique needs of a child with a disability.**” Specially-designed instructions means **Adapting**, as appropriate to the needs of an eligible child...**the content, methodology**, or delivery of instruction” to address the unique needs of the child and to ensure his access to the general curriculum, so that he can meet the educational standards that apply to all students.
- b. County of San Diego v. California Special Education Hearing Office, 24 IDELR 756 , 760 (9th Cir. 1996): **Unique Needs**: The unique needs of a student with a disability encompass **more than a mastery of academic subjects**. Unique needs should be broadly construed to include academic, **social**, health, emotional, physical and vocational needs, all as relating to the provision of preschool, elementary and secondary education services.
- c. Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L., 23 IDELR 36 (N.D. Ill. 1995): Generally, parents may not require a school district to educate their child using a certain, specific educational methodology. As the Supreme Court recognized in *Rowley*, "once a court determines that the requirements of (IDEA) have been met, questions of methodology are for resolution by the States." Still, there are cases where one cannot distinguish issues of methodology from issues of appropriateness, and in such instances methodology is an appropriate topic of discussion at IEP meetings.
- d. 64 Fed. Reg. 12552 (3-12-99): “In all cases, whether methodology would be addressed in an IEP would be an **IEP team decision.**”
- e. Gill v. Columbia 93 School District, 32 IDELR 254 (8th Cir. 2000): “Parents who believe that their children would benefit from a particular type of therapy **are entitled to represent their views at meeting of their child’s IEP team**, to bring along experts in support, and to seek administrative review. The statute set up this interactive process for the child’s benefit but it does not empower the parents to make unilateral decisions about programs (from) public funds.”
- f. Adams v. State of Oregon, 31 IDELR 130 (9th Cir. 1999): “Neither the parties nor the hearing officer dispute the fact that the Lovaas program which the [parents] desired is an excellent program...Nevertheless, there are many available programs which effectively help develop autistic children. [cite omitted] IDEA and case law interpreting the status do not require potential maximizing services.”

- g. **HERE:** It does not matter that Natalie Portsmouth does not believe in individual speech therapy as her character description states. If individual speech therapy is necessary to provide Mark with an educational benefit, then the District must provide the service, or find an alternative placement or provider who offers the service. The District will probably argue that group therapy will provide Mark with “some educational benefit.” However, as the case law above suggests, a determination of methodology is an IEP **team** decision. Further, if mom believes that Mark would benefit from individual therapy, she is entitled to present this view to the IEP team, including any reports from an independent assessor. This appears to be one of the cases where one cannot distinguish issues of methodology from issues of appropriateness, so is an important issue to discuss. This issue is fact-specific to every case, and depends on the unique needs of the child and how they can be met.

XX. **Parent initiated evaluations:** Mom tells the IEP team that Mark’s private speech therapist continues to recommend individual, as opposed to group speech therapy.

- a. 34 C.F.R. § 300.502(c): Parent-initiated evaluations → If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:
- i. **Must** be considered by the district, if it meets district criteria, **in any decision made with respect to the provision of FAPE to a child.**
 - b. **HERE:** Natalie Portsmouth gives little, if any weight to the recommendations that Mark’s private speech therapist has continually made. Remember, methodology and type of instruction must be addressed by the IEP team even if the school district does not “typically” do it that way. Specially-designed instruction means Adapting, as appropriate to the needs of an eligible child, the content methodology, or delivery of instruction to address his individual needs, and ensure his access to the general curriculum. If Mrs. Portsmouth believes in group speech therapy for all students, she in effect takes the “I” out of individualization. It is also important to note that placement decisions must be individually determined on the basis of each child’s abilities and needs, and **not solely on factors such as availability of special education and related services or administrative convenience.**

XXI. **Districts must provide a full continuum of alternative placements to meet a child’s unique needs:** Natalie Portsmouth tells mom that there is a shortage of speech therapists, and that the district does not have enough speech therapists to provide one-to-one service to Mark.

- a. 34 C.F.R. §. 300.551; The law requires school districts to provide a **full continuum of alternative placements** to ensure that students receive services in the Least Restrictive Environment. The full continuum must include the following:
- Regular class placement
 - Regular class with resource or itinerant instructional services
 - Regular class with special education related services
 - Special class or special schools (either of which often also involve the provision of related services)
 - Nonpublic schools
 - State schools for students with low incidence disabilities
 - Instruction in settings other than classrooms (such as homes or hospitals)
- b. **HERE:** Natalie Portsmouth told mom that “Even if we wanted to, the district simply doesn’t have enough speech therapists to provide one-to-one service to Mark.” Assuming this is true, the District **must** provide an alternative option, if the public school system cannot provide Mark with an appropriate placement such as contracting with a private speech therapist for the service. Again, the placement must be specifically designed to meet Mark’s unique needs and place him in the LRE-- allowing him to interact with his non-disabled peers.

XXII. **The District must ensure that all services specified in a child’s IEP are provided:** Since Mark was receiving speech therapy services, is the District obligated to seek outside therapists in order to ensure proper implementation of services specified in the IEP?

- a. Notice of Interpretation, Appendix A to 34 C.F.R. Part 300, Question 31: A public agency must ensure that all services set forth in the child’s IEP are provided, consistent with the child’s needs as identified in the IEP. The agency may provide each of those services directly, through its own staff resources; **indirectly, by contracting with another public or private agency; or through other arrangements.**
- b. 34 C.F.R. § 300.301: FAPE methods and payments:
- i. In providing the services, the agency may use **whatever** State, local, Federal, and **private** sources of support available for those purposes.
 - ii. The services must be at no cost to the parents, and the public agency remains responsible for ensuring that the IEP services are provided in a manner that appropriately meets the students’ needs as specified in the IEP. **The SEA and responsible public agency may not allow the failure of another agency to provide services in the child’s IEP to deny or delay the provision of FAPE to a child.**

- c. **HERE:** Natalie Portsmouth's contention that the district does not use outside therapists is not a valid reason for denying Mark the speech services that may be specified in an IEP. If Mark's IEP Team decides that Mark's needs individual speech therapy then individual speech therapy must be provided regardless of district staff availability.

XXIII. Related services are services the child needs to benefit from special education: Is the district required to pay for those items relating to the sensory diet activities?

- a. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.24: In sum, related services are any services that are necessary to help a student benefit from his special education program. To benefit from special education has generally been interpreted to mean making meaningful progress toward meeting IEP goals and objectives. *County of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458 (9th Cir. 1996), 24 IDELR 756; *Taylor v. Honig*, 910 F.2d 627 (9th Cir. 1990), 16 EHLR 1138.
- b. A non-exhaustive list of related services includes:
- i. Audiology
 - ii. Counseling Services
 - iii. Early Identification and assessment of disabilities of children
 - iv. Medical Services
 - v. Occupational Therapy
 - vi. Orientation and Mobility Services
 - vii. Parent Counseling and Training
 - viii. Physical Therapy
 - ix. Psychological Services
 - x. Recreation
 - xi. Rehabilitation Services
 - xii. School Health Services
 - xiii. Social Work Services in Schools
 - xiv. Speech Pathology
 - xv. Transportation and Related Costs
- c. **HERE:** The Occupational Therapist does not specify what exactly it is that mom needs to "purchase" for Mark in order for him to benefit from the sensory diet activities that are recommended. However, it is undisputed that these items are necessary for him to benefit from the program that is being suggested therefore it is the district's responsibility to purchase these items, even if they are intended for use in Mark's home.

XXIV. All required components of the IEP were not discussed:

- a. **20 U.S.C. § 1414(d)(3)(A) In General.** In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider:
 - i. The **strengths of the child**
 - ii. **The concerns of the parents** for enhancing the education of their child;
 - iii. The results of the initial evaluation **or most recent evaluation** of the child; and
 - iv. The **academic, developmental, and functional needs** of the child.
- b. **20 U.S.C. § 1414(d)(1)(A): Content of the IEP:**
 - i. A statement of the **student's present levels** of educational performance, including how the student's disability affects the child's involvement, and progress in general curriculum;
 - ii. A statement of **measurable annual goals, including benchmarks or short-term objectives**, related to (a) meeting the student's needs that result from his or her disability to enable the student to be involved in and progress in the general curriculum, and (b) meeting the student's other educational needs that result from the disability;
 - iii. A statement of (a) the **specific special education and related services** and (b) supplementary aids and services to be provided to, or on behalf of, the student and the program modifications or supports for school personnel that will be provided for the child;
 - iv. An explanation of the **extent, if any, to which the child will not participate with non-disabled children** in general education and other general curriculum activities.
 - v. A statement of any **individual modifications in the administration of state and district-wide assessments of student achievement**, or if the IEP team determines that the student will not participate in a particular assessment or part of an assessment, a statement of why the assessment is not appropriate for the student and how the student will be assessed;
 - vi. The **projected dates from beginning the listed services and modifications** and the anticipated frequency, location, and duration of those services and modifications;
 - vii. **A statement of:**

1. How the child's progress toward the annual goals described in clause (ii) will be measured; and
2. How the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their non-disabled children's progress, of –
 - a. Their child's progress toward the annual goals described in clause (ii) and
 - b. The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.
- c. **HERE:** The district is required to discuss all of the above areas, which must be determined as appropriate based on Mark's age, performance level, and unique needs. As mentioned previously, mom needs to be provided with a meaningful opportunity to participate in the education of her child. A determination of placement is a **team** decision, and in this case, only two members of the team ("autism specialist" and school psychologist) provided input in the decision making process. Mom was never asked for input, and the other team members in essence "rubber-stamped" the recommendations of two aforementioned team members, whose qualifications may be at issue.

XXV. **Parents are not obligated to consent to the entire IEP and do not have to consent at the time of the IEP meeting:** The special education director tells mom that the district needs her signed assessment back within a week's time. He also tells her to sign Mrs. Robinson's assessment of which she had no prior knowledge. As mentioned previously, mom does not have to sign or consent to anything. She can reject the entire IEP, consent to all, or consent to parts. Also, when the special education director tells mom that signing the consent form is just a formality, this is inaccurate. Unless mom revokes consent, her agreement would be binding. 34 C.F.R. § 300.500(b)(1)(i-iii)