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AS11: Documentation in Special Education: The When, What, How and Why of Keeping a Record

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Tuesday, April 28, 2015
1:15 p.m. – 2:30 p.m.
Wednesday, April 29, 2015
9:45 a.m. – 11:00 a.m.

Laws That Govern Documentation and Legal Processes That Require Disclosure

- FERPA (Family Education Rights and Privacy Act)
- IDEA
- Discovery/Litigation

The "Rules" of Special Education Documentation

- IEPs and Section 504 plans:
  - Schools must provide a copy of these documents to the parents (or to the student, if an adult).
  - There is no obligation to specify class assignment or school building site.

Common Attacks Against PLEPs

- Update all assessment data.
- Make sure assessment data is comprehensive.
- Be sure to include assessment data provided by the parents.
- Address all areas of suspected disability.

You May Need to Address Bullying in a Child's IEP

- Is bullying adversely affecting the child's educational performance?
- Is bullying causing the child to be truant or school-avoidant?
- Has the school provided anti-bullying strategies and programs in the IEP?

Important IEP Documentation Pointers

- Do not address what a child “might need.”
- Do not specify school or classroom sites.
- Be sure to address significant behavior problems.
- “Canned” IEPs are verboten!

More IEP Documentation Pointers

- Watch out for attempts to “load” the “parent concerns” section with demands for services.

- Be careful when parents demand a particular eligibility label/diagnosis.

Prior Written Notice
34 C.F.R. 300.503(b)

- A description of the action proposed or refused.
- An explanation of the basis for the proposal or refusal.
- A description of each evaluation, record, or report used as a basis for the proposal or refusal.

Prior Written Notice (continued)

- A statement that the parents have procedural rights and the means to obtain a copy.
- Sources for the parent to contact for assistance.
- A description of other options considered.
- A description of other relevant factors.

Documentation of Reasonable Attempts to Secure Parent Attendance

- Use multiple methods.
- Make multiple attempts.
- Do not rely on the child to get the notice home!
- Use email and U.S. mail, with return receipts.

Document Excusal of IEP Team Members

- Documentation must be in writing and signed by the parents.
- The parent must understand that he/she does not have to consent to the excusal.
- The team member must provide written input prior to the IEP meeting if his/her input is relevant to the items to be discussed.

Documenting RtI/MTSS Data

- RtI/MTSS progress reporting must be shared with parents as soon as possible after it becomes available.

- The use of percentages is a reasonable method of measuring progress in some areas.

- Make sure that accurate and complete dates are included.

Documenting IEP Attendance

- Always maintain a list of people attending each IEP meeting (including advocates, attorneys, related services providers, and others).

- The IDEA does not require IEP team members to sign an IEP (but we like to have this).

- Be sure everyone reads and signs any IEP meeting minutes!

Recommended Documentation

- Parental communication via email.
- Therapy notes.
- Classroom supports and services.
- Progress reports.

Optional Documentation

- Transcript of the IEP meeting.
- IEP minutes.
- Audiotape/videotape recordings.
- Note-takers.

"Dangerous" Documentation

- Emails:
  - "Smoking gun" emails.
  - Embarrassing emails.
  - Insulting emails.
  - Insubordinate emails.
- Text messages.
- Facebook posts (and other social media).

More “Dangerous” Documentation

- Videotaping/photographing/audiotaping students in the classroom.
  - Child pornography laws make the creation or possession of child pornography a felony.
- Personal notes by teachers/administrators.

To: Principal Busy
From: Stressed-Out Teacher

"As I have repeatedly told you, I desperately need a classroom assistant to help me. You have continued to deny this request. Therefore, I want to go on record as saying that NONE OF THE CHILDREN IN MY CLASSROOM ARE RECEIVING A FAPE."

To: Hottie
From: Lonesome Dove

"Hey Babe,

Just wondering how you're doing today, sweetie? I bet you need a serious backrub and some TLC to wind down from the day (sorry you won't get that at home ☹). By the way, I need to talk with you about Sarah B., the little girl who stutters and is always dirty. Can we get together sometime tomorrow?"

Facebook is NOT your friend!

Post:

"Well, it's been another wild and crazy day in the life of this school psychologist. I hate it when my district weenies out and pays a fortune to settle a dispute with parents who have no idea how hard we work every day to deal with their little monster. Shouldn't that money be better used to hire more teachers? I need another drink!"

Tweet

"OMG … the Mom-from-Hell is on her way to the school! Everyone hide under your desks or run into the teacher's lounge – LOL!"

- #soreadytokicksomebutt
- #ineedaraisenow

DOCUMENTATION IN SPECIAL EDUCATION:

The When, What, How and Why of Keeping a Record

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I. WHY SHOULD YOU BE CONCERNED?

A. FERPA (Family Education Rights and Privacy Act) – 34 C.F.R. 99.1 *et seq.*

FERPA is a federal law that prohibits the disclosure of "personally identifiable information" from "education records" that are maintained by public school districts to unauthorized person(s) or organizations.

B. IDEA – 20 U.S.C. 1400 *et seq*; 34 C.F.R. 300.1 *et seq*.

The IDEA incorporates by reference all of the disclosure prohibitions of FERPA with regard to students with disabilities. In addition, the IDEA provides parents of students with disabilities procedural safeguards that allow them to "inspect, review, and copy" confidential information from their child's education records.

C. Discovery/Litigation

In many states, the due process hearing procedures allow for the use of "discovery" in preparing for the hearing. This means that school districts may be asked to turn over to the parents ALL education records pertaining

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[1]***Note: This presentation is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the presenter is not engaged in rendering legal counsel. If legal advice is required, the services of a competent professional should be sought. Melinda Jacobs is licensed to practice law in Tennessee. Ms. Jacobs makes no representation that she is licensed to practice law in any other state.***

to the child, as well as emails, text messages, social media posts, personal notes, and other information that has been created by teachers, administrators, and other staff.

II. THE "RULES" OF SPECIAL EDUCATION DOCUMENTATION

A. IEPs (and Section 504 Plans)

a. Schools must provide a copy of the IEP/504 plan to the parents of a minor child, or to the student if an adult.

The IDEA requires school districts to provide "a copy" of the child's IEP "at no cost" to the parents. 34 C.F.R. 300.322(f). Section 504 incorporates by reference all of the procedural safeguards of the IDEA.

b. There is no obligation to specify classroom assignment in an IEP/504 plan.

M.A. v. Jersey City Bd. of Educ., 64 IDELR 196 (3d Cir. 2014, *unpublished*). The school district complied with the IDEA by including the parent of a boy with autism in an IEP meeting where it was agreed that the child would be placed in a public school program. The district was not required to include the father in its follow-up discussions regarding specific classroom assignment. The court found that the IDEA only requires IEPs to describe the general type of program that a student will attend, not to identify the specific classroom.

c. Be sure to prevent common attacks against your PLEPs.

i. Update assessment data.

ii. Make sure that IEP goals match PLEP data.

iii. Address all areas of suspected disability.

iv. Incorporate assessment information supplied by parent(s).

d. You may need to address bullying in a child's IEP.

T.K. and S.K. v. New York City Dep't of Educ., 63 IDELR 256 (E.D.N.Y. 2014). Testimony that a third-grader with a language-based learning disability became emotionally withdrawn, gained 13 pounds, and frequently arrived late to school due to her fear of ostracism by classmates helped convince a District Court that a New York district's response to peer bullying was inadequate. The court held that the district's failure to address peer harassment in the student's IEP or BIP amounted to a denial of FAPE. U.S. District Judge Jack B. Weinstein explained that a district denies FAPE when it is deliberately indifferent to or fails to take reasonable steps to prevent bullying that substantially restricts the educational opportunities of a child with a disability. If an IEP team has a legitimate concern that bullying will significantly restrict a student's education, the court observed, it must consider evidence of bullying and include an anti-bullying program in the student's IEP. The district in this case failed to meet that standard. Judge Weinstein noted that while the parents attempted to discuss bullying during a June 2008 IEP meeting, the district members of the IEP team told them that it was not an appropriate topic for discussion. Furthermore, the IEP focused on changing behaviors that made the student susceptible to bullying rather than ensuring that peer harassment did not significantly impede her education. "The record suggests that [the student] was deemed, by her IEP team, to be herself responsible for the bullying by others and for its continuation," Judge Weinstein wrote. The court also rejected the district's claim that classroom bullying did not interfere with the student's education. Not only did the student begin bringing dolls to school for comfort, the court observed, but she gained a "fair amount" of weight and had 46 absences or tardies in a single school year. Furthermore, special education itinerant teachers who worked with the student in her collaborative team-teaching classroom testified that classmates treated the student like a "pariah" and laughed at her for trying to participate in class. The court held that the district's inadequate response, coupled with the impact on the student's learning, entitled the parents to recover the student's private school costs.

Important Points:

- *Failure to address peer harassment/bullying in a student's IEP may result in a denial of FAPE.*

- *IEP teams must consider the effects of bullying on a student's educational performance and address the problem in the IEP by providing anti-bullying strategies and programs in the IEP.*

e. IEPs are drafted based on what a student "does need," not on what the student "may need."

F.O. and E.O. v. New York City Dep't of Educ., 62 IDELR 51 (S.D.N.Y. 2013). Evidence that a grade school student's most pressing academic needs stemmed from his autism rather than his muscle weakness and fatigue undermined a New York district's claim that the child's proposed IEP was appropriate. Determining that neither the IEP nor the proposed placement was appropriate, the District Court ordered the district to pay $92,100 for the child's private placement. The court noted that while the child's muscle disorder could physically impact his speech and writing, the social and academic effects of his autism were far more significant. According to the parent's expert and the district psychologist, the child needed a small class that used an intensive, highly structured approach. The child's treating physician also submitted a report stating that the child required a program that specifically addressed autism. Nonetheless, the IEP team placed the child in a 12:1+4 class for students with physical disabilities. The court criticized the SRO's reliance on retrospective testimony that the teacher of the child's proposed class "would have" used a picture exchange communication system, sign language, auditory and tactile stimulation, and an individualized schedule — none of which were mentioned in the IEP — to address the child's autism-related needs. It also rejected the district's claim that the parents were "fixated" on getting a classroom with an autism label. "The difference between the 12:1:4 classroom proposed in the IEP and a smaller classroom with a program more tailored to [the child's] autism is not trivial," U.S. District Judge Deborah A. Batts wrote. "Instead, the distinction goes to the heart of [the child's] right to a free appropriate public education." Deferring to the IHO's finding that the district denied the child FAPE, the court reversed an administrative decision in the district's favor.

Important Points:

- *Districts cannot rely on what "would have been" provided in a class – it's about what the IEP actually requires.*

- *The school district's criticism of the parents' "fixation" on getting an autism label for their son overshadowed the need to provide services focused on the student's deficits in communication and socialization.*

f. IEPs do not have to identify specific school building sites.

M.A. v. Jersey City Bd. of Educ., 63 IDELR 9 (D.N.J. 2014), *aff'd*, 64 IDELR 196 (3d Cir. 2014, *unpublished*). A New Jersey district did not violate the IDEA by failing to include the parents of a grade school student with autism in discussions about the student's proposed school and classroom. Noting that the student's father actively participated in discussions about the student's placement on the LRE continuum, the District Court denied the parents' request for relief. The court observed that while parents have the right to participate in decisions about their child's "educational placement," that term does not refer to the specific location of the student's services. Rather, it refers to the type of placement and services the district is offering. The court pointed out that the student's father attended an IEP meeting in June 2012. Based on discussions of the student's progress, the IEP team decided to transition the student from a private special education school to a public school class for children with autism. "No additional meeting was required under the IDEA prior to the district's proposal that the specific location of [the student's] placement would be in [a specific teacher's] classroom," U.S. District Judge William J. Martini wrote. Furthermore, the court noted that the student had remained in his private school during the pendency of his parents' claim in accordance with the IDEA's stay-put decision. Thus, even if the district's failure to include the parents in discussions about the specific location of services amounted to a procedural violation of the IDEA, the error did not result in educational harm to the student.

Important Points:

- *Parents do not have a right to participate in decision-making about placement in specific school building sites.*
- *Specific classroom assignments are not an appropriate topic for an IEP meeting.*
- *Parents cannot demand assignment of specific personnel.*

g. It is important to address significant behavior problems in a student's IEP.

M.L. and B.L. v. New York City Dep't of Educ., 63 IDELR 67 (S.D.N.Y. 2014). The parents of a 10-year-old girl with autism and other disabilities could not use a New York district's failure to conduct an FBA as grounds for recovering their daughter's private school tuition. Noting that the student's IEP identified all of her interfering behaviors and included appropriate behavioral strategies and goals, the District Court denied the parents' request for relief.

U.S. District Judge Andrew L. Carter Jr. explained that the failure to conduct an FBA does not result in a denial of FAPE if the IEP adequately addresses the child's interfering behaviors. Although the district committed a procedural violation by failing to conduct its own FBA as required by state regulations, the court held that a recent FBA conducted by the student's private school provided the IEP team with sufficient information. The court observed that the private school FBA, conducted just one month before the IEP meeting, identified all factors that contributed to the student's interfering behaviors and offered theories about the causes of those behaviors. "In fact, [the district psychologist] testified that it was one of the 'more extensive' FBAs he has reviewed," Judge Carter wrote. The court further noted that the IEP identified all of the student's interfering behaviors. In addition, the IEP included many of the behavioral goals and strategies that the private school had used for the student. Determining the district's failure to conduct an FBA did not result in a denial of FAPE, the court upheld an administrative decision in the district's favor.

Important Points:

- *The IDEA does not require FBAs unless the student has been removed from his/her educational program for disciplinary purposes for more than 10 school days per school year.*

- *The IEP may address a student's misbehavior or inappropriate behavior problems via goals/objectives, behavior management strategies, or other services rather than by a formal FBA/BIP.*

h. Remember that "canned" IEPs are a no-no!

Jefferson County Bd. of Educ. v. Lolita S., 62 IDELR 2 (N.D. Ala. 2013), *aff'd*, 64 IDELR 34 (11th Cir. 2014, *unpublished)*. A special education case manager's testimony that the IEP developed for a teen with an SLD included "the ninth grade goal" for reading helped convince a federal court that the program was not tailored to the student's individual needs. Furthermore, the team members handwrote the student's name on the document after crossing out the typewritten name of another student. Finally, the court was distressed that the student was reading six years below grade level and obviously needed individualized and measurable goals in order to close the gap.

i. Watch out for parents who try to load the "parent concerns" section with demands for services or eligibility.

- "Mia has severe allergies to gluten, corn, dairy, and tree nuts that require her to be educated in a completely allergy-free environment."

- "Roberto cannot learn without the provision of a full time 1:1 male aide who is trained in ABA and has at least 5 years' experience working with children with autism."

j. Insisting on a particular diagnostic label/diagnosis on the IEP.

W.W. v. New York City Dep't of Educ., 63 IDELR 66 (S.D.N.Y. 2014). A New York district did not violate the IDEA when it developed IEP goals for a grade school student with a learning disability that did not reference her private diagnosis of dyslexia. Determining the goals addressed all of the child's dyslexia-related difficulties, the District Court held that the district had no obligation to pay for the child's private school tuition. U.S. District Judge Analisa Torres deferred to the SRO's decision that the goals were consistent with the child's needs. Although district psychologists "made confusing statements" about the significance of the student's diagnosis, most notably suggesting that the terms "dyslexia" and "learning disability" were interchangeable, the District Court observed that districts have no obligation to classify students in a particular disability category. "The absence of an explicit mention of dyslexia in the goals is not fatal to the IEP because, as explained by the SRO and the [district] psychologists, the goals were adequately designed to address [the child's] learning challenges, which include not only dyslexia but also dyscalculia and dysgraphia ... and the Court is not qualified to second-guess these educational experts' opinions," Judge Torres wrote. The court also deferred to the SRO's determination that the proposed collaborative team-teaching classroom was appropriate. However, noting that the IHO did not address the parent's allegations regarding IEP team composition and the size of the proposed school, the court remanded the case to the IHO for further hearing on those issues.

B. Prior Written Notice

a. School districts must provide "prior written notice" within a reasonable time before either proposing or refusing to initiate or change the identification, evaluation, or placement of a child, or the provision of FAPE to the child. 34 C.F.R. 300.503(a).

b. The PWN must contain:

i. A description of the action proposed or refused by the LEA;

ii. An explanation of why the LEA proposes or refuses to take the action;

iii. A description of each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused action;

iv. A statement that the parents of a child with a disability have protection under the procedural safeguards of the IDEA and the means by which a copy of the procedural safeguards can be obtained (if not provided);

v. Sources for the parent to contact to obtain assistance in understanding the provisions of the IDEA;

vi. A description of other options that the IEP team considered and the reasons why those options were rejected; and

vii. A description of other factors that are relevant to the LEA's proposal or refusal. 34 C.F.R. 300.503(b)(7).

C. Reasonable Efforts to Secure Parental Attendance at IEP Meeting

a. *A.L. v. Jackson County Sch. Bd.*, 64 IDELR 173 (N.D. Fla. 2014). The school district convened an IEP meeting without the participation of the parent, after scheduling the meeting multiple times to accommodate her and informing her of the meeting by multiple methods. Importantly, the district also offered to conduct the meeting by telephone conference so that the parent could attend. The court held that the school district complied with the procedural safeguards of the IDEA and did not violate the Act by convening the IEP meeting without the participation of the parent.

b. *Cupertino Union Sch. Dist. v. K.A.*, 64 IDELR 200 (N.D. Cal. 2014). The parents of a student with disabilities attended the annual review IEP meeting for their child, but refused to attend any further meetings to review the results of new evaluative data. The parents filed a request for due process hearing six days after the annual review meeting, despite being on notice that the district intended to reconvene the IEP team to review the evaluations. The district convened the follow-up IEP meeting without the parents in

attendance. The court held that this did not constitute predetermination or a violation of the parent's rights.

D. Excusal of IEP Team Members

a. An IEP team member may be excused from attending all or part of an IEP meeting if the parent and the LEA agree, in writing, that attendance of the team member is not necessary because that member's area of curriculum or related services is not being modified or discussed in the meeting. 34 C.F.R. 300.321(e)(1).

b. An IEP team member may be excused from attending all or part of an IEP meeting if the parent and the LEA agree, in writing, that the meeting involves a modification to or discussion of the member's area of the curriculum or related services and the member submits, in writing, input into the development of the IEP prior to the meeting. 34 C.F.R. 300.321(e)(2).

E. RtI Data

a. *M.M. and E.M. v. Lafayette Sch. Dist.*, 64 IDELR 31 (9th Cir. 2014). The Ninth Circuit Court of Appeals recently held that a school district's failure to provide RtI data to the parents of an elementary school student with a phonological processing disorder denied them the right to "meaningful participation" in their child's IEP meeting.

b. *Bridges v. Spartanburg County Sch. Dist. Two*, 57 IDELR 128 (D.S.C. 2011). Just because a student's IEP goals measured his proficiency in terms of percentages didn't mean that his IEP was procedurally or substantively deficient. Concluding that a South Carolina district offered the student FAPE, the District Court held that the parents were not entitled to reimbursement for two private reading programs. The court explained that the use of percentages as a measurement of progress does not automatically invalidate an IEP goal. If the percentage is tied to a discrete task, such as writing essays with defined parts or calculating the surface area of three-dimensional objects, the district can determine whether the student is achieving the goal. The court pointed out that the percentages in the student's goals referred to specific tasks. For example, the student's eighth-grade IEP required him to achieve at least 70-percent accuracy at a fifth-grade level in tasks that included writing essays, identifying figurative language in a reading passage, and answering detailed questions about a reading passage. The student's ninth-grade IEP required him to master the general education

curriculum with at least 80-percent mastery. The court rejected the parents' claim that the goals were immeasurable. "While the goals were not expressed in the manner that [the parents] consider to be the optimal manner, the goals were sufficiently measurable to reasonably gauge [the student's] progress," U.S. District Judge J. Michelle Childs wrote. Even if the goals were inappropriate, the court observed that the student's dramatic improvement in reading showed he received FAPE. The court thus denied the parents' reimbursement request.

F. Persons Attending the IEP Meeting

a. School districts should ensure that an accurate list of persons attending the IEP meeting is maintained in the student's education records. The IDEA requires the school district to ensure that all statutorily required team members are present. 34 C.F.R. 300.321.

b. Interestingly, there is nothing in the IDEA requiring IEP team members or parents to sign an IEP. In fact, the USDOE expressly rejected an attempt to add such a requirement to the 2006 final regulations, stating, "it would be overly burdensome to impose such a requirement." 71 Fed. Reg. 46,682 (2006).

c. The requirement that a parent "consent" to a child's initial IEP is frequently misinterpreted to mean that the parent must "sign" the child's IEP. In reality, the IDEA merely requires the school district to obtain a parent's "informed consent" for the provision of services. 34 C.F.R. 300.300(b).

III. RECOMMENDED, (BUT NOT REQUIRED) DOCUMENTATION

A. Parental Communication via Email

a. *Letter to Breton*, 63 IDELR 111 (OSEP 2014). As long as they ensure that steps are being taken to secure the information, states may allow LEAs to distribute IEPs and progress reports via electronic mail where parents agree to email delivery, OSEP informed the Maine ED. OSEP noted that the IDEA provides that parents may elect to receive prior written notices, procedural safeguards notices, and due process complaint notices by email, if the public agency makes that option available. 34 CFR 300.505.

Moreover, although the IDEA does not explicitly address the use of email to deliver IEPs, OSEP pointed out that it previously stated in its *Analysis of Comments and Changes to the 2006 IDEA Part B Regulations* that public agencies may use email for carrying out administrative matters under the IDEA as long as the parent and district agree. 71 Fed. Reg. 46,540 (2006). Moreover, OSEP previously stated that SEAs may use electronic or digital signatures for consent if they take steps to ensure the integrity of the process. 71 Fed. Reg. 46,629 (2006). Finally, with regard to issuing progress reports, OSEP noted that it has opined that the manner and format of reporting progress is within the discretion of state and local officials. 71 Fed. Reg. 46,664 (2006). "Therefore, in light of the IDEA statute and regulations, as well as OSEP's prior guidance, States may permit the use of electronic mail to distribute IEPs and related documents, such as progress reports, to parents, provided that the parents and the school district agree to use the electronic mail option, and the States take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process," OSEP Director Melody Musgrove wrote.

Important Points:

- *School districts can communicate with parents via electronic mail (distributing copies of IEPs, progress reports, discipline referrals, etc.) so long as the parents agree.*

- *School districts may obtain parental consent via "electronic signatures" if they take steps to secure the integrity of the process.*

- *School districts have discretion in the manner and format of reporting progress.*

B. Therapy Notes

a. It is important for all related services providers to keep and maintain detailed service logs to document the provision of therapies to students.

C. Classroom Supports and Services

a. When parents demand specific "Relevant Medical Information" language:

i. Insisting that the IEP contain statements taken from physicians' letters or scripts (e.g., Javonte suffers from seizure activity that affects all daily life activities" or "Megan requires occupational and physical therapy at school").

ii. Insisting that the IEP contain statements taken out of context from psychologists' evaluation reports (e.g., "Jennifer has a relative weakness in math fluency").

D. Tests

a. Teachers and service providers should maintain a student-specific folder containing examples of tests, worksheets, and other documentation of IEP compliance and student performance.

E. Progress Reports

a. Challenging methods of assessing student performance.

Bridges v. Spartanburg County Sch. Dist. Two, 57 IDELR 128 (D.S.C. 2011). The court held that the use of percentages in an IEP to measure a student's progress does not automatically invalidate an IEP goal. The use of percentages is appropriate if it is directly related to the accomplishment of a specific IEP goal or objective. In this case, the student's IEP goal provided that he would complete tasks such as writing essays, identifying figurative language in a reading passage, and answering detailed comprehension questions with at least 70-percent accuracy. The court rejected the parent's claim that the IEP goal was not measurable. "While the goals were not expressed in the manner that [the parents] consider to be the optimal manner, the goals were sufficiently measurable to reasonably gauge [the student's] progress," U.S. District Judge J. Michelle Childs wrote. The court also found that the student's dramatic improvement in reading showed he received FAPE. The court thus denied the parents' reimbursement request.

IV. DOCUMENTATION THAT IS NOT REQUIRED (BUT MAY BE HELPFUL)

A. Transcript of the IEP Meeting

a. School districts are not required to make a verbatim recording of an IEP meeting. See, e.g., *Jefferson County Sch. Dist. R-1*, 104 LRP 30613 (SEA CO 04/13/04).

B. IEP Minutes

a. The IDEA does not require IEP minutes to be taken. However, some states have regulations requiring minutes to be taken during IEP meetings.

b. Either party may introduce IEP minutes during a due process hearing. *See, e.g.*, *Antelope Valley Union High Sch. Dist.*, 106 LRP 8323 (SEA CA 10/19/05); and *DeKalb County Sch. Dist*., 21 IDELR 426 (SEA GA 1994).

c. IEP minutes can either "save you" or "kill you."

i. Assign a staff member to take notes who has no other role in the IEP meeting.

ii. Train the person taking IEP minutes to document the main topic(s) of discussion, any agreements or disagreements, and identify the speaker(s).

iii. Do no interject personal opinions into the IEP minutes.

iv. If necessary, make sure to quote comments accurately.

v. Have someone read the minutes aloud at the end of the IEP meeting and ask all team members to sign and date the minutes.

vi. The minutes become part of the student's "education record." Provide a copy of the IEP minutes to the parents, and maintain a copy in the student's file.

C. Audiotape/Videotape Recordings

a. The IDEA does not require school districts to videotape or audiotape IEP meetings, unless necessary to ensure that the parent understands the proceedings. 34 C.F.R. 300.322(e).

b. OSEP advises that either SEAs or LEAs may require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings, so long as the exception to ensure parents understand the proceedings exists. *Letter to Anonymous*, 40 IDELR 70 (OSEP 2003).

c. The courts have rendered conflicting and confusing decisions on the issue of whether parents have a right to record IEP meetings. *See*, *E.H. v. Tirozzi*, 16 IDELR 787 (D. Conn. 1990) (parent with limited English-speaking proficiency was entitled to audiotape an IEP meeting to ensure her understanding). *But see, Norwood Pub. Schs*., 44 IDELR 104 (SEA MA 2005) (parent who was not a native English speaker was not entitled to tape-record an IEP meeting).

d. *Belvidere Cmty. Unit Sch. Dist. No. 100*, 112 LRP 12955 (SEA IL 02/27/12). An Illinois district did not have to allow a parent to record IEP meetings just because she was previously diagnosed with ADHD and dyslexia. Finding that the district offered her an accommodation that would have enabled her to actively participate in the meetings, the IHO concluded that the district was entitled to reject her request. The IHO noted that generally it's up to districts to determine whether IEP meetings may be recorded. As OSEP stated in *Letter to Anonymous*, 40 IDELR 70 (OSEP 2003), districts have the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings. However, when a parent has a disability, the IDEA's requirement that a district not impede parent participation may arise as well. In this case, the parent reportedly had disabilities that made it challenging for her to follow along with IEP team discussions and understand them. The district pointed out that the parent never reported her disabilities until she obtained an advocate for her child. Nevertheless, the district met its obligations by offering to pay for an advocate for the parent who could take extensive notes for her, explain IEP team members' discussions, and answer her questions.

Important Points:

- *Generally, school districts may choose whether or not to permit tape-recording of IEP meetings.*

- *Parents with disabilities have a right to an accommodation if their disability impedes their ability to effectively participate in the meetings.*

- *When accommodating parents with disabilities, school districts may select the type of accommodation so long as it enables the parent to effectively participate. In this case, the district could choose to hire a note-taker for the parent rather than allow her to tape-record the meeting.*

D. Note-Takers

a. The IDEA does not require school districts to provide a note-taker to record an IEP meeting. However, this may be offered as an accommodation to a parent with limited English-speaking proficiency or a disability.

V. "DANGEROUS" DOCUMENTATION

A. Emails

a. *Washoe County Sch. Dist*., 114 LRP 25728, 17 FAB 38 (SEA NV 2014). Emails are not "education records" within the definition of FERPA or the IDEA unless they are "kept in a filing cabinet in a records room at the school, saved on a permanent secure database," or "printed and placed in a student's file." Therefore, the parent of a student with a disability could not demand disclosure of the emails under either FERPA or the IDEA.

b. Staff emails may be subject to disclosure as part of a lawsuit. Any document, including an email that may lead to the discovery of "relevant" information may be subpoenaed.

i. The "smoking gun" email.

ii. The embarrassing email.

iii. The insulting email.

iv. The insubordinate email.

B. Text Messages

a. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). Cyber-bullying can include offensive text messages, emails, rumors, or embarrassing photos posted on social networking sites, or fake online profiles.

b. *Oxford (PA) Area High Sch. (reported by SpecialEdConnection®, July 18, 2012)* – A high school principal was removed from duties involving special education students and ordered to undergo a psychological evaluation and drug test after sending offensive text messages about a student with disabilities during an IEP meeting. An advocate sitting next to the principal during the IEP meeting saw him sending a text message about the student with bipolar disorder describing him as a "manipulator" and using an obscenity. The advocate reported the offensive text and submitted a FERPA request for the principal's text messages and emails. This request uncovered a number of derogatory and offensive messages about this student and other special education students. Specifically, the principal referred to the student with bipolar disorder as a "psychopath" who could be another "Hinckley, Booth [or] Oswald." The principal also emailed a teacher stating that the student was "a psychopath who has more rights than the kids he stalks or the teachers/administrators that have to deal with him."

c. *G.C. v. Owensboro Pub. Schs.*, 60 IDELR 272 (6th Cir. 2013). Teachers and staff did not have "reasonable suspicion" of any criminal act or intent to justify reading a student's text messages after his teacher confiscated his cellphone during class.

C. Facebook Posts (And Other Social Media)

a. Cyberbullying.

Layshock v. Hermitage Sch. Dist., 111 LRP 40385, 650 F.3d 205 (3d Cir. 2011) *cert. denied*, 112 LRP 3125, 132 S. Ct. 1097 (2012). A 17-year-old high school student used his grandmother's computer to create a fake MySpace "parody profile" of his principal. The profile provided bogus answers to questions about the principal's favorite shoes, fears, etc. All of the answers were based on a theme of "big," owing to the fact that the principal is a large man. For example:

"Birthday: too drunk to remember"
"Are you a health freak: big steroid freak"
"In the past month have you smoked: big blunt"
"In the past month have you been on pills: big pills"
"In the past month have you gone Skinny Dipping: big lake, not big dick"
"In the past month have you Stolen Anything: big keg"
"Ever been drunk: big number of times"
"Ever been called a Tease: big whore"
"Ever been Beaten up: big fag"
"Ever Shoplifted: big bag of kmart"
"Number of Drugs I have taken: big"
Under "Interests": Transgender, Appreciators of Alcoholic Beverages"

The principal was able to limit other students' access to the website at school. The student's parents "grounded" him, and the student apologized to the principal for creating the offensive page. He was then suspended for 10 days, placed at the alternative education program for the remainder of the school year, banned from all extracurricular activities (including academic games and foreign-language tutoring), and barred from participating in graduation ceremonies. The student sued alleging violation of his First Amendment rights, and the court agreed. The school district admitted that the fake MySpace page did not cause a severe disruption in the school, but argued that the student's use of the school district website to procure the photo of the principal entitled it to impose discipline. The court held that the student's use of the district's website to procure a digital photo of the principal did not constitute "entering the school." Therefore, the school could not punish the student for engaging in free speech outside of the schoolhouse.

J.S. v. Blue Mountain Sch. Dist., 111 LRP 40374, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 112 LRP 3125, 132 S. Ct. 1097 (2012). The 3d Circuit held that a Pennsylvania principal violated a middle-schooler's First Amendment free speech rights when he suspended the student for creating an embarrassing and defamatory online profile of the administrator. Using her home computer, the eighth-grade girl created an "imposter" Internet profile for her principal, including his picture and statements that portrayed the principal as a pedophile and a sex addict. It didn't take long for other students and their parents to become aware of the profile. The profile was traced to the girl and she admitted creating the Web page. As a result, she was suspended for two weeks. The student's parents filed a lawsuit challenging her suspension, alleging that the suspension violated the student's First Amendment right to free speech. The student argued that the district had no right to

punish her for creating the Internet profile because it was “not profane” and it did not cause a substantial disruption at school, as contemplated by the U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District*, 107 LRP 7137, 393 U.S. 503 (1969). Reasoning that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," the District Court dismissed the First Amendment claim. The court, relying on the rationale used in *Bethel School District No. 403 v. Fraser*, 103 LRP 22719, 478 U.S. 675 (1986), held that there was no First Amendment protection for "lewd, vulgar, indecent and plainly offensive speech" in school. On appeal, the 3d Circuit applied the *Tinker* standard and concluded that the online profile, "though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did." The court noted "the integral events ... case occurred outside the school, during non-school hours." The court was also persuaded by the fact that the profile was made “private” and access was limited to the girl’s friends. The appellate court held that the girl could not be punished for the use of profane language outside of school, during non-school hours.

Kowalski v. Berkeley County Schs., 111 LRP 51060, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 112 LRP 3081, 132 S. Ct. 1095 (2012). Kara, a high school student, was suspended for five days for creating a fake MySpace page called “S.A.S.H.,” which stood for “Students Against Sluts Herpes.” This site was largely dedicated to ridiculing a fellow student and encouraging other classmates to post offensive and harassing commentary about the girl. After creating the fake page, Kara invited 100 people to join the group and post and respond to text, comments, and photos. Approximately two dozen classmates joined the group, and several uploaded photos of the targeted girl accompanied by offensive and demeaning comments about her. The principal investigated, interviewed the students, and concluded the Web page was a "hate website" that violated school policy. The district suspended the senior for five days and imposed a 90-day social suspension. Kara sued the school district alleging a violation of her First Amendment right to free speech. The court upheld a grant of summary judgment to the school district, holding that the school officials acted properly by punishing Kara’s behavior. The court noted, “Public school officials have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.”

The 4th Circuit had to decide if the senior's activity fell within the boundaries of the district's legitimate interest in maintaining order and

protecting the well-being and educational rights of students. The Supreme Court in *Tinker v. Des Moines Independent Community School District,* 107 LRP 7137, 393 U.S. 503 (1969), held that a district may regulate a student's free speech rights if exercising those rights "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." Here, the court held, the senior's speech caused the interference and disruption described in *Tinker* as being immune from protection. The Web page was a direct verbal attack on a classmate. Administrators must be able to prevent and punish such harassment and bullying to provide a safe environment conducive to learning. The court explained that while the senior "pushed her computer's keys in her home," she had to realize that the response would be "published beyond her home and could reasonably be expected to reach the school or impact the school environment." She also knew the group would include other students, and the repercussions of her speech would be felt at school. Next, the court held the district complied with due process. The senior had sufficient notice from the school handbook and code of conduct that the district prohibited harassment and bullying. She also had an opportunity to be heard when she met with the principal.

b. Invasions of privacy/FERPA violations.

i. School psychologist sued by parents.

D. Videotaping/Photographing/Audiotaping Students

a. Child pornography laws. In most states, the creation and/or possession of child pornography is a felony. Teachers must realize that videotaping a child engaging in inappropriate sexual activity (e.g., masturbation) could result in being charged with a crime and arrested/prosecuted.

E. Personal Notes from Teachers/Administrators

a. *P.C. v. Milford Exempted Vill. Schs.*, 60 IDELR 129 (S.D. Ohio 2013). An Ohio school district was guilty of "predetermination" when it came to an IEP meeting already "firmly wedded" to moving a student into a public school reading program. The district's preplanning notes convinced the court that the staff members had come to the IEP meeting with their minds made up. The court's opinion shows that there is a difference between coming to an IEP meeting with pre-formed "opinions" and coming with an unalterable determination to force a particular placement or program. One of the

problems for the district was the testimony of teachers that the district was going "to go the whole distance this year which means the [parents] will be forced into due process." In addition, the district was unprepared to discuss the type of reading methodology that would be used in its proposed placement. In this case, the type of reading methodology was crucial to making a decision about the appropriateness of the program for the student.