

November 4th, 2021

Ohio School Psychologists
Association Fall Conference
**Mastering Special
Education Compliance for
Students with Autism**

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What We Will Talk About Today

Identifying Autism

Owning IEEs

Fixing Issues with Transfer Students

Handling Demands for ABS, Other Methodologies

Guiding the Discussion about ESY

Understanding the Autism Scholarship

BONUS – Dealing with Difficult Parents

2

Identifying Autism

3

How Do We ID, and How Do We Make a Change?

- By conducting a thorough, multi-factored evaluation (initial or reevaluation)!
- 3301-51-06 (D) - School district must conduct a **reevaluation** if:
 - School determines the child's performance warrants it.
 - Parent/teacher asks for it.
 - Child transitions from preschool to school age.
 - **In order to make a change in disability category.**

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Some Things to Keep in Mind Regarding Eligibility for SPED

- **Recall *Endrew F.*** . . .
 - **Facts:** Student with autism, static IEP, private school (with a pricey tuition) that made miraculous growth happen.
 - **SCOTUS Holding:** The expectations of progress in the IEP **must be appropriate in light of the child's unique circumstances.** This reflects the focus on the individualized needs of the particular child that is at the core of the IDEA. It also reflects States' **responsibility to offer instruction "specially designed" to meet a child's unique needs** through an IEP.
 - Courts should defer to the "**expertise and the exercise of judgment by school authorities**" rather than try to have a bright-line rule for what "appropriate" progress is for each unique child.

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Some Things To Keep in Mind Regarding Eligibility for SPED

- ID is solely and exclusively a team decision (mom & dad don't have veto power).
- The standard for determining whether a student needs special education because of a disability is not whether the disability **can affect** the student's performance, **but whether it does** affect the student's performance.
- Furthermore, a physician has no authority to prescribe special education. Period.

Marshall Joint Sch. Dist. v. C.D. (7th Cir. 2010), 54 IDELR 307.

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Autism ID under IDEA

- **Autism** means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, **generally evident before age three, that adversely affects a child's educational performance.**
- **Other characteristics** often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.
 - Autism **does not apply** if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (B)(10)(d)(v) of this rule.
 - A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (B)(10)(d)(i) of this rule are satisfied.

OAC 3301-51-01 (B)(10)(d)(i)

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Questions Related to *Educational Performance*

01

Does this only include academic performance?

02

How significant must the impact be?

03

What about non-academic achievement?

04

Communication skills?

05

Interaction with Peers?

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Ethics Challenge – Can a School Psychologist Diagnose Autism?

- Diagnosis versus screening – is there a difference?
 - Who should diagnose, and is there a difference between a medical and school diagnosis?
 - Who should screen?
- Do we need a formal diagnosis to ID for autism under IDEA?
- Critical point – take care to select appropriate screening and evaluation tools, and strictly follow testing protocols!
- Question – if we do not have someone qualified to diagnose, can we make a parent pay for an outside assessment?

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Does a Medical Diagnosis Seal the Deal?

- **Facts:** Parents of a kindergarten student with a medical diagnosis of "autism spectrum disorder" and who was receiving speech services demanded an autism ID even though the student displayed no symptoms in the education setting. After screening the student, the district refused and instead found the student eligible under ED with placement in a self-contained class. The parents got an IEE that confirmed autism, then filed due process when the district team again refused to change the ID.
- IHO determination: the IDEA supported the district's decision not to identify autism, and further declared that the district's placement was reasonably calculated to provide FAPE.
- **"Not every child who has difficulties with communication, social interaction, or change will be eligible for IDEA services as a child with autism ..."**

In Re: Student with a Disability (Illinois 2014), 114 LRP 43641.

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Does a Medical Diagnosis Seal the Deal (Take 2)?

- **Facts:** a preschool child with "severe deficits in expressive and receptive language" was diagnosed by a doctor with autism. Mom requested an evaluation. The district evaluated and determined eligibility under developmental delay. The team placed the student in a gen ed class with same age peers, rather than the autism class with younger kids that mom requested. The parent filed due process. Interestingly, she had refused to provide the medical report until after the eligibility meeting.
- **IHO Determination:** the ID of severe developmental delay was supported by the comprehensive evaluation results, and further the parent failed to meet her burden of proving the placement in a gen ed class rather than an autism class was appropriate and less restrictive to boot.

In Re: District of Columbia Public Schools (D.C. 2014), 114 LRP 11710

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Could it be Something Else?

Emotional Disturbance

Intellectual Disability

Multiple Disabilities

Other Health Impairment

Specific Learning Disability

Developmental Delay (for ages 3-5)

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Does the ID Really Even Matter?!?

- Regardless of what you call it, the IDEA requires that the IEP address **all of the child's disability-related needs.**
- So, is it worth the fight?



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A Case of Substance Over Form

- **Facts:** the parents of a 21-year-old student with a speech impairment and intellectual disability demanded that the district include an autism ID. The parents admitted that they wanted this ID so that they could access services from outside agencies. The district refused and the parent filed for due process.
- **IHO determination:** the district should have included autism in the ID. However, since the student's IEP incorporated autism supports and methodologies, the IEP was ultimately appropriate.
- **Epilogue** – in light of the IHO's agreement about the ID, the parents sought attorney fees as the prevailing party. The district court and 5th Circuit Court of Appeals both denied this, concluding that the parent's technical victory did not confer prevailing party status because FAPE was still provided.

Lauren C. v. Lewisville Indep. Sch. Dist. (E.D. Texas 2017), 70 IDELR 63

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Ethics Challenge – Angry Medical Provider

- Scenario: a student's pediatrician diagnosed autism. You were a member of the team who evaluated the student to determine whether she was eligible for special education. The team ultimately agreed the student was eligible, but under a different ID. The ETR report includes summaries which specifically declare that there were no signs of autism in the school setting. Angry about the decision and team's conclusion, the pediatrician calls you and demands to talk with you.
- Can you talk with the doctor?
- Do you need to do anything else first?

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Practical Tips With IDs



Effective and thorough evaluations are critical.

They help you own your expertise, even in the face of outside rivals. They help provide you with the data you need to offer FAPE.



Be well prepared for meetings.



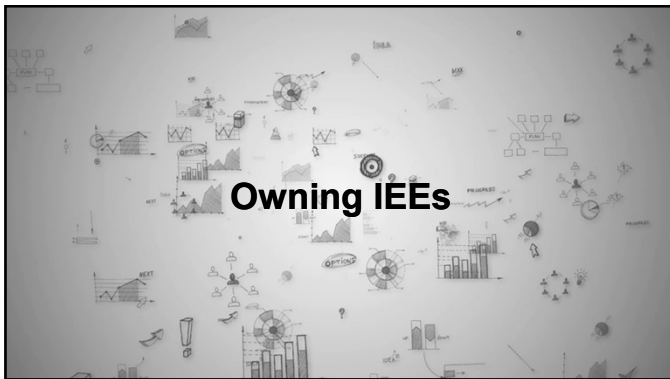
Consider why the parents are seeking the ID (scholarships, outside services, private school placements, insurance coverage, Dr. Google, etc.).



Talk with your directors and friendly neighborhood attorney about how far you take the ID issue.

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Owning IEEs



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Independent Educational Evaluations

- IEE requirements are found under "Procedural Safeguards," not the "evaluation" regulations.
- IEEs are evaluations conducted by qualified examiners who are not employed by the school district.
 - Who pays for it has nothing to do with whether it is an IEE.
 - All IEEs can be required to comply with District criteria.

OAC 3301-51-05(G)

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The IEE Process

- Upon request, a district must provide parents with information about where an IEE may be obtained.
- When a parent requests an IEE at public expense, the district must either:
 - File due process to establish that the school evaluation is "appropriate"; or
 - Ensure the IEE is provided.
- Are there any other options here?!?
- Parents only get **one** publicly funded IEE **per school evaluation (ETR or maybe even FBA)** with which they disagree.
 - Is there a time limit for the parent to declare they disagree?
- If an IEE is obtained (whether at public or parent expense), the team must **consider** the results (I said consider, not agree!).

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May We Request Why They Disagree?

If a parent requests an independent educational evaluation, the school district of residence may ask for the parent's reason why the parent objects to the public evaluation. However, the school district may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

OAC 3301-51-05(G)(2)(d)

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Can a Student Who is Found Not Eligible Seek an IEE?

- **Facts:** A child was evaluated and not found eligible. Parents requested an IEE, and the district agreed to fund it. The IEE suggested that future training in assistive technology would benefit the student (there was no AT component of the District evaluation). Despite this, the district continued to find the child not eligible under IDEA. Parents requested an assistive technology assessment at public expense and offered in the alternative for the district to conduct an AT evaluation. Consent was provided for the district eval, but the district refused and also rejected the request to fund another IEE.
- **ODE Determination:** there is no need to conduct further evaluations or to fund the IEE.

Olentangy Local School District (ODE Complaint 2014), 115 LRP 9484

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Ethics Challenge – Can We Conduct IEEs on the Side?

- Scenario: mom and dad have a child who is identified with a speech impairment. They insist that the child is autistic and ask for you to "run some tests" on the side to see what you think. They offer to have you test their child at their home and offer to pay you \$200 for your efforts.
- Can you do this?
- Possible issues
 - Conflict of interest
 - Scope of practice
 - Ethics laws applicable to public employees

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Ethics Challenge – What if there are Protocol Violations?

- Scenario: the school district conducts an initial evaluation of a student whose parents are concerned about autism. The district concludes that the student is not eligible for special education. Two weeks later, the parents provide the team with results from a Cincinnati Childrens evaluation that was completed just a month before the team's evaluation and ask the school team to reconsider the decision. Not surprisingly, the results are very different and include an autism diagnosis. You discover that one of the assessments you used in your evaluation was also used in the Childrens evaluation. It is a violation of testing protocols to reassess a student within a year.
- What do you do?
- How can you go forward?

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Some Questions Should We Be Asking...

What areas are the parents asking for an IEE in?

How solid do we believe our evaluations are?

What do we believe is behind their IEE request?

- Is this to build expert opinions for a to-be-filed due process?
- Is this because we have lost trust?
- Have we miscommunicated something to the parents?
- Can we rectify the miscommunication?

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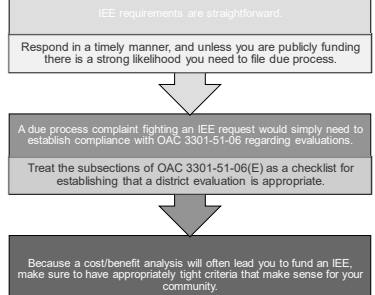
Fighting an IEE Request

- **Facts:** Parent requested an IEE, and the district filed due process to establish the appropriateness of its ETR. Parent focused on failure of the district psychologist to administer all subtests of the Woodcock Johnson III. The district explained this was because of above-average performance on several subtests before the decision to stop WJ-III testing. Parent also contested use of "pattern of strengths and weaknesses" analysis for Specific Learning Disability. The district showed this was sanctioned by the state department of education.
- **Court Decision:** Judge found that District's ETR did not need to be "perfect," but just appropriate as this evaluation was. **Phew!**

E.P. v. Howard County Public School System (4th Cir. 2018 unpublished), 72 IDELR 114

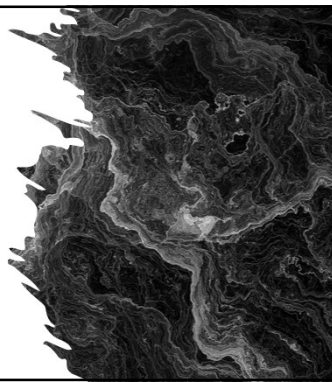
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Practical Tips



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Fixing Issues with Transfer Students



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We Have A Grand Opportunity to Clean Things Up

- When transfer students walk through our doors, we have some unique opportunities . . .
- **We know there are a lot of different approaches** - what other states, areas and districts do for students with autism varies widely.
- We handle things our own way in our district – so take the opportunity to recalibrate!

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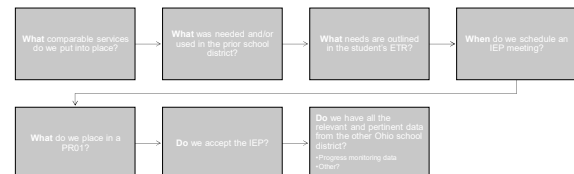
Intrastate Transfer Regulations

- If a student who has an IEP in effect in a **previous Ohio school district** transfers to a new Ohio school district, the new district must provide FAPE – including those services that are comparable to what was offered by the old Ohio school district until the new district either:
 - Adopts the child's IEP in full; or
 - Develops, adopts and implements a new IEP.
- Wait... but what about the ETR? What do the regulations say about the old ETR?

OAC 3301-51-07(K)(5)

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Some Questions We Should Be Asking...



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Interstate Transfer Regulations

- If a student who has an IEP in effect in from an **out-of-state school district** transfers to an Ohio school district, the Ohio school district must provide FAPE – including those services that are comparable to the old school district until the new district:
 - Conducts and evaluation or adopts the current one; **and**
 - Develops, adopts a new IEP, if appropriate.

OAC 3301-51-07(K)(6)

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Some Questions We Should Be Asking...

- ☒ What comparable services do we put into place?
- ☐ When do we schedule an IEP meeting?
- ☐ What do we place in a PR01?
- ☐ Do we need to accept the ETR and IEP from the other state? If we accept the IEP, which one do we accept?
- ☐ Do we have all the relevant and pertinent data from the out-of-state school district? Progress monitoring data
Behavior records
Discipline records

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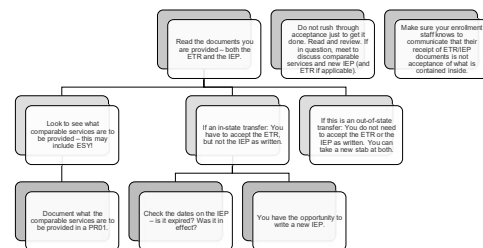
Transfer Student With a Newly Drafted IEP

- **Facts:** 11-year-old student from a virtual charter school sought to enroll in a district. The student had multiple "severe" disabilities and was never educated in a general education setting because he attended school virtually. Upon enrollment, the district reviewed the recently developed IEP from the virtual school which called for a general education placement. However, given the severity of the student's needs, the district placed the student on home instruction pending an evaluation and IEP meeting.
- **Court Decision:** The IDEA did not require the student's new district to place him in a mainstream setting. The district only had to provide services comparable to those in the last-implemented IEP, and the court upheld the student's interim placement on home study.
- **Good Point:** The court noted that the state education code was modeled on the IDEA, which refers to the IEP "in effect" at the time of the student's transfer: "providing services in accordance with the previously implemented IEP effectuates the statute's purpose of minimizing disruption to the student while the parents and the receiving school resolve disagreements about proper placement." Since the charter school never implemented the IEP, the district did not err in continuing the student's in-home instruction until it could evaluate his needs.

A.M. v. Monrovia Unified School District (9th Cir. 2010), 55 IDELR 215

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Practical Tips



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Handling Demands for ABA Therapy & Other Methodologies



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Applied Behavior Analysis

- Basic intervention method- can serve as the foundation for a successful education program for students with autism.
- Focuses on teaching new skill acquisition in a discrete trial teaching method:
 - Requires teaching one sub-skill at a time.
 - Allows for repeated practice in a concentrated period.
 - Useful when teaching new skills at the acquisition level.
- Then fluency training based on instruction, maintenance tasks, and generalization of skills.
 - Should take place outside of normal learning routines.
 - Requires students to demonstrate the skills/knowledge they have already mastered.
 - Fluency methods promote generalization of skills across settings while keeping those skills fresh and sharp.

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Are You Required to Provide ABA?

- ABA is **only one** form of treatment methodology for autism.
- The IDEA permits a district to use any educational methodology that allows a student with a disability to receive FAPE **unless** the student's IEP **calls for the use of a particular methodology**.
 - And why on earth would it?!
- The Centers for Medicare and Medicaid Services issued a statement indicating they are not requiring any particular treatment modality for autism.
- OSEP instructs districts to provide an array of services that an individual child needs—not just ABA therapists but speech pathologists and other appropriate professionals.
- On the one hand, you could be violating IDEA and/or Section 504 by only providing ABA and not other methodologies, **especially if evidence indicates the method is not effective**.
- On the other hand, you could be violating the same laws by failing to **consider** it as an option, **especially when the parents request it**.

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Demands for Other Types of Methodologies and Programs

- How does this concept apply to other teaching methods and techniques?
- Answer: it's the same thing!
- Team has broad discretion in selecting programs, techniques and methods that **meet child's unique needs**.

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Ethical Challenge – Can We Prescribe a Methodology?

- You have conducted an initial evaluation of a student and have determined that the results are consistent with an autism ID. Mom and Dad read about the wonders of ABA therapy, and demand you prescribe it for their child.
- Can you do this?
- What does this even mean?!

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Can a Parent Demand?

- **Facts:** Parents demanded reimbursement for 1:1 home based ABA therapy to the parent of a child with autism and pica. The district provided elements of ABA therapy techniques to students in the classroom setting, but also used other methods to address behavior needs.
- **IHO Determination:** the district did not deny FAPE by offering an "eclectic approach" in the student's classroom. The IHO indicated in the decision that parents **cannot force** a district to use a particular methodology. Rather, a district is **free to use** one or more methodologies **as long as** they are **reasonably calculated to confer meaningful benefit based on the child's unique needs**.

Wilson County Bd. of Educ. (SEA TN 2010), 54 IDELR 268

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Be Careful About Categorically Rejecting Requests

- Sixth Circuit concluded that a district's informal policy of categorically declining to provide 1:1 ABA programs when parents requested ABA because it had selected another methodology violated IDEA.
- Court stated that this amounted to predetermination, a procedural violation which in this case denied FAPE to a kindergarten student with autism who had demonstrated success in an ABA therapy model.
- The court emphasized that a district must consider the individual needs of a student **before** selecting a methodology or program, and also has an obligation to **"keep an open mind"** about programs proposed by parents.

Deal v. Hamilton County Bd. of Edu. (6th Cir. 2004), 392 F.3d 840.

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Ineffective Programming Can Get You into Trouble

- **Facts:** A mother requested ABA therapist for her 9-year-old daughter with autism, and the school denied her request to have the therapist at school. The therapist was "prescribed" by her pediatrician and funded by the mother's insurance. Mother filed for due process, alleging the district violated Section 504 and ADA Title II by denying the accommodation to the student. The mother alleged that w/o ABA therapy, the student wandered off during school trips, took another student's medication, and came home with bruises and severe sunburn.
- **Court Decision:** The court agreed with the mother and felt this issue was at least compelling enough to go to trial. Additionally, because she removed her child from school (for lack of ABA), the court agreed that the child was denied the benefit of the curriculum and other opportunities equal to her peers.

K.M. by Markham v. Tehachapi Unified Sch. Dist. (U.S. Dist. CA, 2019), 1:18-cv-00303

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Practical Tips

Ensure	Consider	Refer Back	Be Cautious
Ensure that the appropriate service providers are involved in the evaluation and IEP development process in order to make appropriate determinations regarding the services to be provided to a child with autism.	While school districts have broad discretion in this area, make sure you consider parent input and preferences (note that I said "consider", not "adopt").	Refer back to IDEA requirements for treatment methodologies when determining a child's services- they are based on the child's unique needs!	Be cautious referencing a specific methodology in the IEP. Relying on a single type of provider, i.e. ABA therapists, is may violate IDEA's FAPE requirements. • Plus, you may be in a tough spot if trained staff leave!

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When Do We Provide ESY?

- Each public agency *must* provide ESY services if the child's IEP Team determines it is necessary for the provision of FAPE **based on the unique needs of the child**.
- What is ESY? It is special ed and related services provided to a child with a disability:
 - Beyond the normal school year of the public agency;
 - In accordance with the child's IEP;
 - At no cost to the parents of the child;
 - Meets the standards set out by ODE.

34 CFR 300.106

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It is All About Regression and Recoupment Here!

- There is no established national standard for determining whether a child needs ESY.
- In the Sixth Circuit and several places elsewhere, it is typically reviewed through a regression-recoupment analysis.
- If the child experiences **significant regression** from IEP during a break from school and the time it will take to relearn the skills is **excessive**, ESY should be provided.
 - And this means what exactly?!?
- Other "tests" used: significantly jeopardized, substantial regression, additional factors analysis.

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It is All About Regression and Recoupment Here!

- Facts:** Ohio case brought by parents of a 15-year-old boy with severe developmental delays and "autistic like behavior." The district provided ESY services for three years through an agreement with the parents. ESY was not formally a part of the IEP.
- Court Decision:** The court held that a test of regression and recoupment was appropriate to determine if ESY services were needed. The court further stated that in this case, there was no evidence the student would have regressed without the summer services he received.
 - Both parties and all amici agree that under the standard in *Rettig*, a child must prove his need for ESY empirically, based on evidence of prior regression and slow recoupment without summer programming.
- AND**, also held that ESY was not a part of "stay put" because it was not in the IEP!
- BTW** – this decision came well before Endrew F.

Cordrey v. Evergreen Bd. of Edu. (6th Cir. 1990), 917 F.2d 1460

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What This Looks Like Elsewhere

- Facts:** Parents of a disabled 8-year-old requested ESY and the district denied the request. The district was affirmed in admin proceedings and federal district court; parents appealed.
- Court Decision:** The parents appeal was granted in part because both admin proceedings and district court relied on insufficient information to determine whether the child needed ESY; district court reversed summary judgment in favor of the district. The record only contained information on the child's *past* regression and recoupment problems. The court determined that other factors must be considered as part of the process (Additional Factors Analysis).

Johnson v. Independent School Dist. (10th Cir. 1990), 17 IDELR 170

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What This Looks Like Elsewhere

- While not our circuit's decision, other factors are helpful in discussion . . .
- Identified a range of factors to be considered for ESY services:
 - The degree of regression suffered in the past.
 - The exact time of past regression.
 - The ability of the parents to provide educational structure at home.
 - The child's rate of progress.
 - The child's behavioral and physical problems.
 - The availability of alternative resources.
 - The ability of child to interact with nondisabled children.
 - The areas of the curriculum that need continuous attention.
 - The child's vocational needs.
- Whether the requested services are "extraordinary" for the child's condition as opposed to an integral part of a program for populations of students with the same disabling condition.

Johnson v. Independent School Dist. (10th Cir. 1990), 17 IDELR 170

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Offering ESY Services Isn't Always Enough to Ensure FAPE

- **Facts:** Parents of a teen with autism proposed an alternate ESY program that was provided by a private provider. The district waited months to respond. They also failed to have an in-depth discussion about how to best address the teen's needs and goals for ESY. Parents enrolled the student in the private program then filed due process, seeking reimbursement.
- **IHO Determination:** denial of meaningful parental participation denied FAPE, even though the district's offer of ESY was appropriate. The IHO awarded compensatory education to remedy the teen's exclusion of parents in the decision-making process (but not tuition reimbursement).

School District of Philadelphia /Pennsylvania State Educational Agency Administrative Hearing (PA 2014), 115 LRP 2750

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Practical Tips

Collect	Ensure	Make Aware	Provide
Collect regression-recoupment data over holiday breaks • You need to track data to make comparisons and draw conclusions about regression and recoupment after prolonged breaks from daily instruction.	Ensure parents participate in ESY decision-making conversations. • It is part of the IEP process. If you don't involve the parents, it could result in a denial of FAPE.	Make sure teams are aware of what they do and do not need to provide during ESY programming (recall that ESY does NOT need to be equivalent to a full school day).	Make sure you provide accommodations that the student is entitled to during ESY programming.

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Purpose and Eligibility for the Scholarship

- *The purpose of the scholarship is to permit the parent of a qualified special education child the choice to send the child to a special education program, instead of the one operated by or for the school district in which the child is entitled to attend school, to receive the services prescribed in the child's IEP once the IEP is finalized.*
- Requirements
 - DOR has identified the child as a child with autism or PDD-NOS.
 - School district has developed an IEP.
 - Child aged 3-21 who was enrolled or is eligible to enroll in pre-k to 12.
- Schools must provide notice about the scholarship each time they evaluate, and when they develop/review/revise IEPs.

OAC 3301-103-01 & 3301-103-02

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Other Scholarship Fun Facts

- Schools are not required to make FAPE available, but are required to conduct evaluations/re-evaluations.
- Also required to create IEPs, and both district as well as parent must be in agreement (at least initially).
- Parent of scholarship student has a right to file a complaint or due process against a DOR alleging violations of IDEA, but may not allege district failed to implement IEP or provide FAPE.

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Interesting FAQs

- *Can I use the Autism Scholarship Program to supplement my child's public education?* No. If a child is approved and accepted for the scholarship, the public school district is no longer responsible for providing a Free Appropriate Public Education (FAPE).
- *What services are covered by the scholarship?* The scholarship allows funding for special education and related services through an Autism provider. The cost of education services (tuition) may also be funded through the scholarship if the provider is a non-public school and if funding remains after any special education services have been paid for.
- *What service(s) is/are my public-school district responsible for providing?* By accepting the scholarship, you have relinquished your right to FAPE. Your district must renew your child's IEP annually and conduct required evaluations.

<http://education.ohio.gov/Topics/Other-Resources/Scholarships/Autism-Scholarship-Program/Autism-Scholarship-Program-Check-Your-Eligibility/Parent-FAQs>

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Interesting FAQs

- *If my child is on scholarship, are they eligible for transportation?* Transportation may be obtained from a participating provider qualified to provide transportation services. If a child is parentally placed in a nonpublic school and is in grades K-8, the child may be entitled to transportation through the district. A child parentally placed in nonpublic school and in grades 9-12 may be offered transportation by their district of residence. However, the child is not entitled to transportation.
- *What happens if my child is reevaluated mid-year and no longer qualifies for the Autism Scholarship?* Children who have been re-evaluated and no longer meet the criteria for Autism on the ETR will be able to continue in the program for the remainder of the scholarship award period. The scholarship will not be eligible for renewal the following year.

<http://education.ohio.gov/Topics/Other-Resources/Scholarships/Autism-Scholarship-Program/Autism-Scholarship-Program-Check-Your-Eligibility/Parent-FAQs>

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Practical Tips: The Art of Crafting a Scholarship IEP

ALWAYS draft the IEP as if the student attends school in the district.

- Why??? Because there is a good chance the student will come back, and you must be able to implement the IEP as written!

This means that the team should be strong with insisting on what is and is not appropriate.

Remember that you hold some power here – at least with the initial IEP.

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BONUS Dealing with Difficult Parents



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What Words Best Describe Your Most Challenging Parents?

Angry Aggressive
Confused Assertive
Spirited Overwhelmed
Resolute Strong-willed
Unpleasant Irrational

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Who is a Parent Anyway?

3301-51-01(44)

• "Parent" means:

- Biological or adoptive parent
- Guardian authorized to act as the child's parent/make educational decisions
- Individual acting in the place of a biological or adoptive parent with whom the child lives, or an individual legally responsible for the child's welfare
- Surrogate parent who has been appointed in accordance with the regs
- Rule declares that a biological or adoptive parent who is attempting to fulfill the role wins against anyone else unless they have no legal authority to make educational decisions
- Person identified in a judicial decree or order identifying them to act as parents or make educational decisions

- Definition was drafted to exclude foster parents

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The Case of A Parent No More

- **Facts:** The father of a student who had recently been identified as emotionally disturbed filed due process against Solon City School District to challenge the student's identification. After he lost the due process and state level review appeal, he filed a challenge in a federal district court. Before the district court case was filed, the mother was granted sole custody of the child.
- **Prior Decisions:** Both the IHO and SLRO held in favor of the school on substantive grounds. The district court ruled that father did not have standing to sue on behalf of his child (non-lawyers may not assert the rights of another person in federal court) and that he did not have standing to sue on behalf of himself, because he was not a "parent" as that term is defined in the IDEA and its accompanying regulations.
- **Sixth Circuit Decision:** The Sixth Circuit likewise dismissed the case on grounds that the father no longer had standing under IDEA. In declining to hear the case on November 9, 2020, the U.S. Supreme Court effectively confirmed the 6th Circuit's decision.
- **Hint:** Pay close attention to custody for all students, including those with disabilities.

Chukwuani v. Solon City School District (6 Cir. 2019), Case No. 19-3574.

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What About the Parent Posse?

- Parents often bring support people to meetings who may or may not have knowledge of the child's special needs.
- What role do these folks have in the IEP process?
- Can a parent "stack the deck" by inviting their posse to the meeting to bolster their position? Does this mean they get more votes?!?
 - Wait, is there voting at IEP meetings?

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Does the Student Have a Say?

3301-51-05(D) Transfer of Parental Rights at Age of Majority

- 1) Beginning no later than one year before a child with a disability (except for a child with a disability who has been determined to be incompetent under Ohio law) reaches the age of majority under Ohio law (eighteen years of age), the IEP must include a statement that the child and parent have been informed of the child's rights that will transfer to the child upon reaching the age of majority.
- 2) When a child with a disability reaches the age of majority under Ohio law (eighteen years of age) that applies to all children (except for a child with a disability who has been determined to be incompetent under Ohio law):
 - a) All rights accorded to parents under Part B of the IDEA and Chapter 3323 of the Revised Code transfer to the child;
 - b) All rights accorded to parents under Part B of the IDEA and Chapter 3323 of the Revised Code transfer to children who are incarcerated in an adult or juvenile, state or local correctional institution; and
 - c) The school district of residence must provide the notice required by this rule to notify both the child and the parents of the transfer of rights.

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Scenario – Demanding Identity or Information about Another Student

You are holding a student's annual IEP review meeting. Just as you start to review the IEP, Dad interrupts and says he wants to talk about a recent incident in the cafeteria involving his disabled daughter and declares he will not talk about anything else until this is addressed. He demands to know the names of the two classmates were throwing food at his daughter and calling her names in front of other classmates. He also says he has a right to know whether they were suspended or expelled, and for how many days, as well as whether they have criminal histories. Finally, he asks if they have disabilities as well. He adamantly refuses to review anything else until he gets answers.

What do you do?

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Parent DEMANDS To Know – Some Legal Snags

- FERPA, IDEA and state confidentiality laws are still a thing
 - There may be policies which require certain LIMITED exceptions, but step very carefully – violations could equate to criminal offenses, liability for discrimination, loss of federal funding
 - Whatever you do, be consistent
- Remember even directory information may be restricted based on student opt outs
- **Question:** what if parents of both/all students agree to meet together? Should we facilitate this?

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Scenario – The Disruptive Parent

After several very contentious IEP meetings, a parent becomes verbally combative. You ask her to leave the building repeatedly. Sometimes when she is really disruptive, you have had to call the SRO to escort her out. The next day and every day thereafter, the parent shouts out offensive and scandalous comments to the principal and other dismissal staff as she picks her kindergarten child up after school. This becomes such an entertaining spectacle, that other parents begin to line up early just to hear/see what she says. This creates a bottleneck and the buses are not able to leave on time.

What do you do?

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Parents Continue to Cause a Scene

- You have a right to prevent disruptions to your educational system, and also to ensure safety
- R.C. 2911.21 provides board of education the absolute right to order unruly people from school property
- Our tool: we draft a “stay away” letter to prohibit someone from campus
- Those that fail to comply may be charged with criminal trespass and/or removed by police

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Possible Communications for Unruly Parents

*It has come to our attention that you have repeatedly engaged in **inappropriate, confrontational and disruptive behavior** towards the School District staff, including building personnel. Your behavior is unacceptable, inappropriate, and disruptive to the school learning environment. It is also incredibly demeaning to school staff. As a result, this letter is to put you on notice that you are not permitted to enter property owned by the School District Board of Education or to attend any school events which occur on or off Board property without my express written permission. This “stay away” directive remains in effect until further notice.*

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Be Careful Not to Retaliate!

- Unlawful retaliation occurs when a school district takes adverse action against someone as a result of or to deter them from engaging in advocacy to enforce/protect legal rights.
- Cases of retaliation involve the following analysis:
 - Did the school know about a complainant engaging in protected activity, or believe they might do so?
 - Did the school engage in an adverse action?
 - Is there a causal connection between the adverse action and protected activity?

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Be Careful Not to Retaliate!

- OCR found that an Arizona district did not unlawfully retaliate against a parent by banning her from school after the mom repeatedly engaged in threatening and harassing behavior, although OCR concluded it did fail to properly implement 504 accommodations.
- The parent got in a verbal shouting match with a health assistant on campus after accusing the district of failing to accommodate her diabetic child. The parent repeatedly used inappropriate language, threatened to sue the school and get the assistant fired. Students and staff overheard the conflict, and the parent was banned from campus. A judge also approved a restraining order against the parent.
- Mad about the ban, the parent filed a complaint with OCR. OCR did not find retaliation here but took it upon themselves to review the 504 plan and found issues with the 504 accommodations provided.

Legacy Traditional Schs. (Arizona 2020), 77 IDELR 140

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The Parent Rebuttal

- After issuing a Prior Written Notice from a mildly contentious meeting, Parent demands that you re-write the notice to clear up what she calls “lies, fabrications and inconsistent statements.” Do you owe her this?
- She also insists on drafting a rebuttal and demands that you attach it to the PR-01. What do you do?

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The Prior Written Notice

- Ohio regulations and IDEA require schools to provide parents with written notice a reasonable time before the school proposes or refuses to initiate or change the identification, evaluation, educational placement of the child, or the provision of a FAPE to the child.
- The PWN provides a record for the child, parent, and school of the decisions that have been made, the basis for those decisions, and the actions that will or will not be taken as a result of those decisions.
- There is no requirement in state or federal law for co-authorship of a prior written notice.

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Scenario – the Parent Over-Communicator

A parent of a student with severe disabilities sends emails frequently throughout the day to multiple staff members. She also calls staff often, demanding that staff send records, answer questions, etc. Sometimes the language in the communications are inappropriate and sometimes hostile. She has even threatened to sue staff members and the district. Staff spend hours each week trying to do all the things that the parent asks, and still can't keep up. The demands continue to increase in number and breadth. What do you do?

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Consider a Communication Protocol

- Communication protocol directs parent to communicate with only named staff.
 - *NOTE:* you need to be careful with when you use this and what you say to avoid claims that you are being retaliatory.
- Even if parent does not cooperate, make sure staff do.
- This can be included in a stay away letter.

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Reasonable Limits are OK!

- **Facts:** The father of a student with disabilities sent frequent emails to staff. The district established a communication plan that limited discussions about his daughter's need for a 504 plan to biweekly in-person meetings with administrators. The plan did not prohibit the father from contacting other staff, but rather indicated they were directed not respond to substantive communications. The father claimed the district violated his First Amendment rights.
 - **HELD:** Plan did not restrict the father's right to advocate for his child and was reasonable in light of his behavior. The school is not a forum for public expression, and as such the district could set reasonable limits on **time, place and manner** of communications.
 - **Bottom line:** A school can place **reasonable limits** on parents when communications are excessive, hostile, or intimidating.
- L.F. v. Lake Washington Sch. Dist. #414, 75 IDELR 239 (9th Cir. 2020)*

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Practical Tips for Working with Difficult Parents



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Helpful Resources on Autism (Thanks ODE!)

- OCALI - Ohio's Parent Guide to Autism Spectrum Disorder
https://www.ocali.org/project/ohio_parent_guide_to_ASD
- OCALI Autism Center - <https://www.ocali.org/center/autism>
- Autism Society of Ohio - <https://autismohio.org/>
- ODE's Interagency Work Group on Autism (IWGA) - <https://iwg-autism.org/>

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Thank you!

The information in this handout and presentation was prepared by Ennis Britton Co., LPA. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, please consult an attorney.



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