

SPECIAL EDUCATION LEGAL UPDATE

Ohio Association of Pupil Services Administrators

February 28, 2020

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AGENDA

- Changes in Placement
- Mental Health & IDEA
- Extended School Year Services
- Common Compliance Issues & Scenarios
- Q&A



CHANGES IN PLACEMENT

LRE & CHANGES IN PLACEMENT

- In most circumstances, IDEA and Ohio law prevent a district from unilaterally changing a student's educational placement.
- Instead, the district must obtain parent consent via a signed IEP amendment to change a student's placement.
- Even when there is a dispute, the law nevertheless requires the district to keep the student in the most recent placement (the so-called "stay put" provision).
- Thus, where a district wishes to implement a change in placement without parental consent, it must do so through a district-initiated due process complaint.

DISTRICT-INITIATED DUE PROCESS

- Even though the law prohibits districts from unilaterally changing a student's placement, the district may file a due process complaint against the parents for refusing to agree to a change in placement.
- These types of district-initiated due process complaints come in two varieties:
 - **Typical Due Process Complaint:** When the student's current placement is not reasonably calculated to provide FAPE.
 - **Expedited Due Process Complaint:** When the student's current placement is substantially likely to result in injury to himself or others.
- District-initiated due process complaints are rare, but they most often occur under circumstances warranting an expedited due process complaint.

DISTRICT-INITIATED DUE PROCESS

- The steps of a district-initiated due process complaint largely mirror those for a complaint initiated by the parents:
 - The District files the due process complaint on day 1
 - The parents must respond to the due process complaint by day 10
 - A resolution session must be conducted or waived by day 15
 - A hearing must be held and a decision rendered by day 75
- An expedited due process complaint includes the same processes, but the timeline is even shorter.
- As with a parent complaint, the party bringing it (i.e. the district) has the burden of establishing it is entitled to the requested remedy.

TEMPORARY INJUNCTIVE RELIEF

- In its quickest form, an expedited due process complaint will still take about 30 days before the district can implement a change of placement (if awarded).
- If the district feels that a student's behavior is so severe that it requires a more immediate change, it may seek a temporary injunction from a court changing the student's placement while due process is pending.
- To obtain a temporary injunction the district must show that the student's current placement is substantially likely to result in injury to the student or others. *See Honig v. Doe, 484 U.S. 305, 328 (1988)*.
 - This is a difficult standard – must show that the injury is substantially likely during the pendency of the due process complaint.

RECENT CASE LAW:

N.L. v. Springboro Community City School District (S.D. Ohio 2019)

- Throughout 1st and 2nd grade, student (C.L.) exhibited worsening pattern of harmful and dangerous behavior.
- On more than one occasion, other students had to be evacuated from a classroom due to C.L.'s behavior.
- C.L.'s IEP required primary instruction in co-taught classroom, but attend lunch, recess, and specials with typical peers in one of the district's elementary schools.
- Student's behavior progressed to threats and physical violence toward staff members.
- The IEP team proposed a change in C.L.'s educational placement; the parent refused.
- The district filed a due process complaint against the parent.

N.L. v. Springboro Community City School District (S.D. Ohio 2019)

- Previously, the parent had also filed a due process complaint against the district.
 - In that proceeding, the parent specifically sought full-time placement of the student in a separate facility specifically dedicated to teaching students with autism.
 - However, during the pendency of the proceedings, the parent requested that the student remain in a co-taught classroom in one of the district's elementary schools.
 - The independent hearing officer (IHO) denied the parent's request regarding C.L.'s pendency placement and designated a separate specialized facility as C.L.'s interim alternative education setting.
- After the IHO denied the parent's request to place C.L. at the district elementary during the pendency of the due process proceedings, the parent sought an injunction to keep C.L. in the district.

N.L. v. Springboro Community City School District (S.D. Ohio 2019)

- In its decision, the Court examined the requirements of the “stay-put” provision under IDEA, noting:
 - “During the pendency of any proceedings conducted pursuant to this section, unless the state or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child.”
 - Further, “the stay-put provision ‘functions, in essence, as an automatic preliminary injunction.’”
- As such, to invoke the stay-put provision, the moving party must show:
 1. Proceedings under the IDEA are pending; and
 2. Prevention of a change in the “then-current” educational placement of the child is sought.

N.L. v. Springboro Community City School District (S.D. Ohio 2019)

- While stay-put effectively creates a presumption in favor of the child's current placement, the district can overcome the presumption "by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others." *See Honig.*
- In this case, the first prong was met (i.e. there were pending IDEA due process proceedings)
- The Court likewise concluded that "a prevention of a change in the 'then-current education placement' of the child [was] sought."
- However, even though the Court concluded that stay-put applied, it nevertheless found that the district had met its burden to show that maintaining C.L. in his current placement within the district was substantially likely to result in injury to himself or to others
- As such, the Court concluded that a statutory stay-put injunction was inappropriate because the evidence presented by the district raised "serious concerns" regarding the safety of C.L., the district staff, and potentially other students.

N.L. v. Springboro Community City School District (S.D. Ohio 2019)

Major Takeaway:

- C.L.'s behaviors met the standard of “substantially likely to result in injury to himself or to others.”
- His behaviors included:
 - Kicking, hitting, and punching school staff members.
 - Destroying and throwing school property and furniture.
 - Hitting his head against staff members and walls.
 - Striking himself.
 - Eloping from school grounds into a wooded area, a parking lot, or a driving lane.

IMPORTANT CONSIDERATIONS

- Because the success of a due process complaint and/or a temporary injunction rests on the district's ability to show a *substantial* likelihood of injury, any district considering these remedies should take certain steps:
 - Carefully and specifically document the student's behaviors;
 - Ensure that compliance with the BIP is well documented;
 - Document any injuries or harm inflicted by the student on him/herself, other students, and/or staff members;
 - Obtain a second FBA from a behavioral specialist;
 - Update the student's BIP based on the specialist's conclusions;
 - Inform the parent of their right to an IEE;
 - If necessary, train staff on new BIP procedures; and
 - Document staff use of BIP procedures.

IMPORTANT CONSIDERATIONS

- Crucially, prior to filing a due process complaint, the district must prepare and propose an IEP that includes the district's recommended change in placement.
- Before preparing and proposing the amended IEP, the district must identify a new placement that is reasonably calculated to provide the student with a Free Appropriate Public Education (FAPE) while decreasing the likelihood of injury to himself or others.
- In assessing alternative placements, the district should consider travel time.
 - Courts have opined that a district may deny a student FAPE due to lengthy travel.

DUE PROCESS COMPLAINTS

- Initiating a due process complaint is an expensive endeavor.
- The law prohibits districts from recovering attorney fees, even if they prevail.
- Parents, on the other hand, may seek attorney fees from the district if the parents prevail.
- The district must also pay for the independent hearing officer and the court reporter.
- In addition, the district likely would need to hire an independent expert to provide testimony.
- As a general rule, even in difficult change in placement decisions, districts should only pursue due process as a last resort.

MENTAL HEALTH & IDEA

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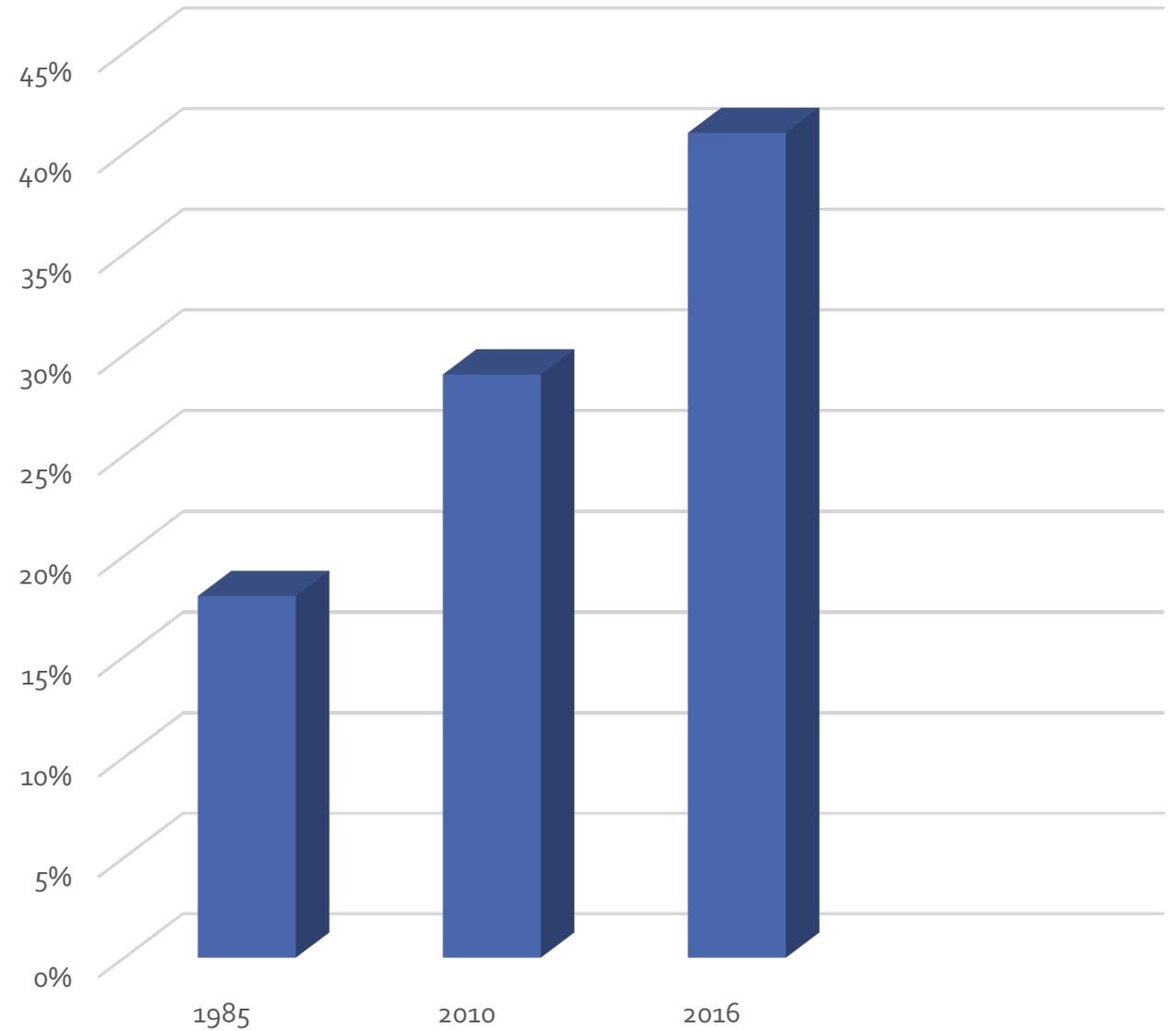
IDENTIFYING THE ISSUE

“The number of children and adolescents admitted to children’s hospitals for thoughts of suicide or self-harm more than doubled during the last decade, according to new research presented at the 2017 Pediatric Academic Societies Meeting in San Francisco.”

-American Academy of Pediatrics, May 4, 2017

Higher Education Research Institute at U.C.L.A.

Percentage of incoming freshmen who responded that they “felt overwhelmed by all I had to do” during the previous year.



Denizet-Lewis, Benoit, "Why Are More American Teenagers Than Ever Suffering From Severe Anxiety." New York Times, Oct. 11, 2017.

"We've always had kids who didn't want to come in the door or who were worried about things,' says Laurie Farkas, who was until recently director of student services for the Northampton public schools in Massachusetts. 'But there's just been a steady increase of severely anxious students.'"

PARENTS' ATTORNEY CHALLENGING CHILD FIND

Jordan was admitted to an inpatient treatment facility from January 3, 2017 through February 15, 2017 for anxiety and depression. Upon her return, no one initiated a meeting to discuss her diagnosis or an ETR, despite the District's knowledge that Jordan was a child with a suspected disability.

PARENTS' ATTORNEY CHALLENGING SERVICES

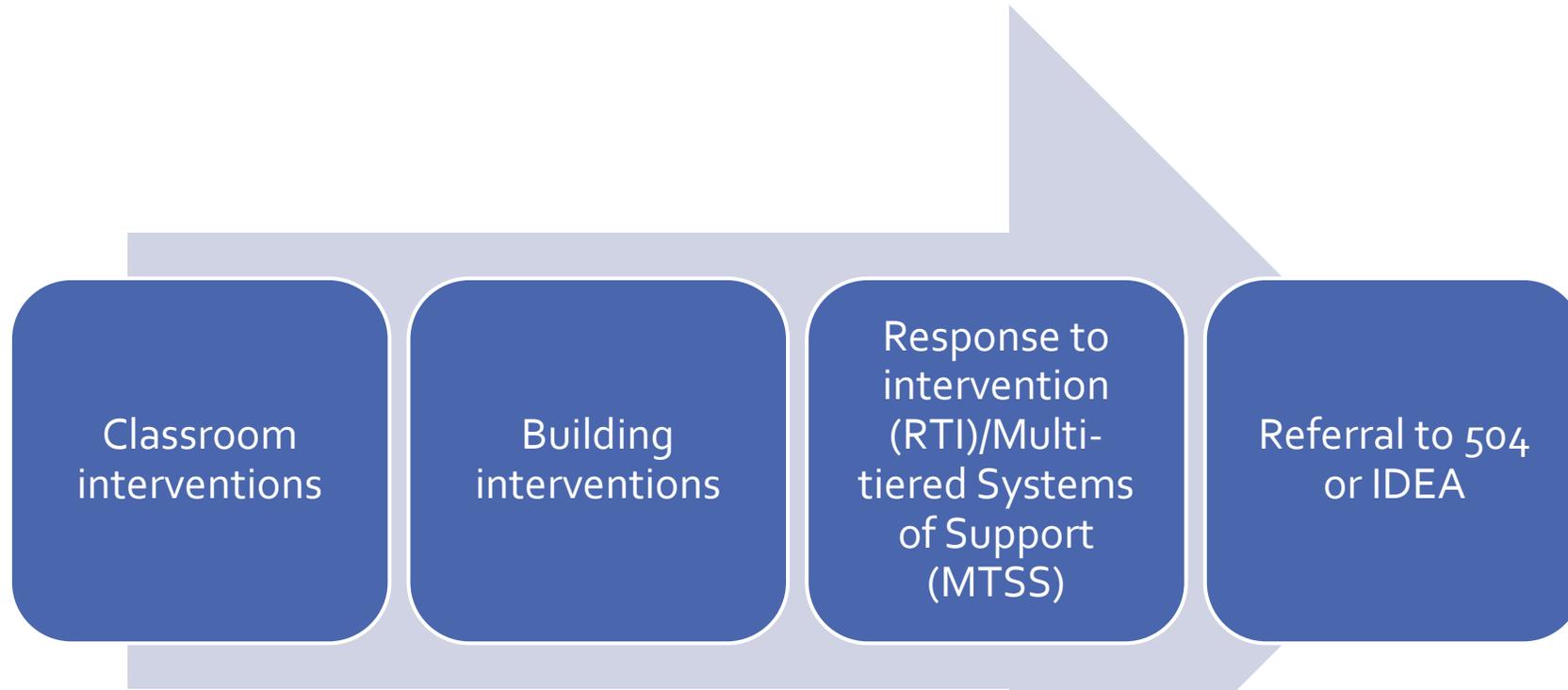
Ed's IEP does not offer appropriate instruction by trained staff to enable him to make reasonable progress in the areas of behavior (including attendance and school avoidance), student-teacher socialization and emotional regulation . He requires intensive emotional and behavioral supports and no functional behavior assessment was conducted nor was an appropriate behavior plan developed. Ed made no academic or behavioral progress last year.

Abington School District, 44 IDELR 289 (PA SEA 2005)

- The district did not offer a free appropriate public education to a ninth grade student who was formerly provided with gifted services, but developed severe anxiety disorder, performance anxiety and obsessive compulsive disorder.
- The parents paid for evaluations and support services and cooperated in all respects with the district.
- The district's proposed placement ignored the recommendations that the student should not return to the school setting.
- The district was ordered to pay for the child's private placement.

CHILD FIND AND EVALUATION

INTERVENTION SERVICES



But, Don't Delay!

CHILD FIND—DISTRICT OBLIGATION

- District must identify, locate and evaluate (i.e., FIND) children who are disabled under Section 504 and IDEA.
- Affirmative obligation on the District--not an excuse that the parent never asked for an evaluation.
- School counselors may be first to know of developing mental health issues.

POTENTIAL “NOTICE” OF SUSPECTED DISABILITY

- Short-term hospitalization(s).
- Student “in crisis.”
- Communication from private mental health provider.
- Marked decrease in attendance.
- Marked decline in grades, participation.
- Records requests from private school or parent.
- Notification that private evaluation is being sought.
- Attorney/advocate attending meeting.

Canon-McMillan Sch. Dist., 114 LRP 39912 (PA SEA 2014).

- Student's mother repeatedly told the district that the student was not attending school due to school-based social/emotional/anxiety issues. The district failed to respond.
- While the student could maintain his grades, his social/emotional/anxiety needs were not being addressed, with consequences that led to academic decline and, ultimately, the student being unavailable for instruction.
- The district should have reevaluated the student.
- The district was ordered to provide compensatory services.

Do's and Don'ts

DO'S

- Ask parents for more information.
- Discharge summary.
- Evaluation.
- Release of information.

- Convene the RTI/MTSS team.
- Consider supports from the District.
- Consider an evaluation.
- Document decisions made.
- Follow up with student and parents.

DON'TS

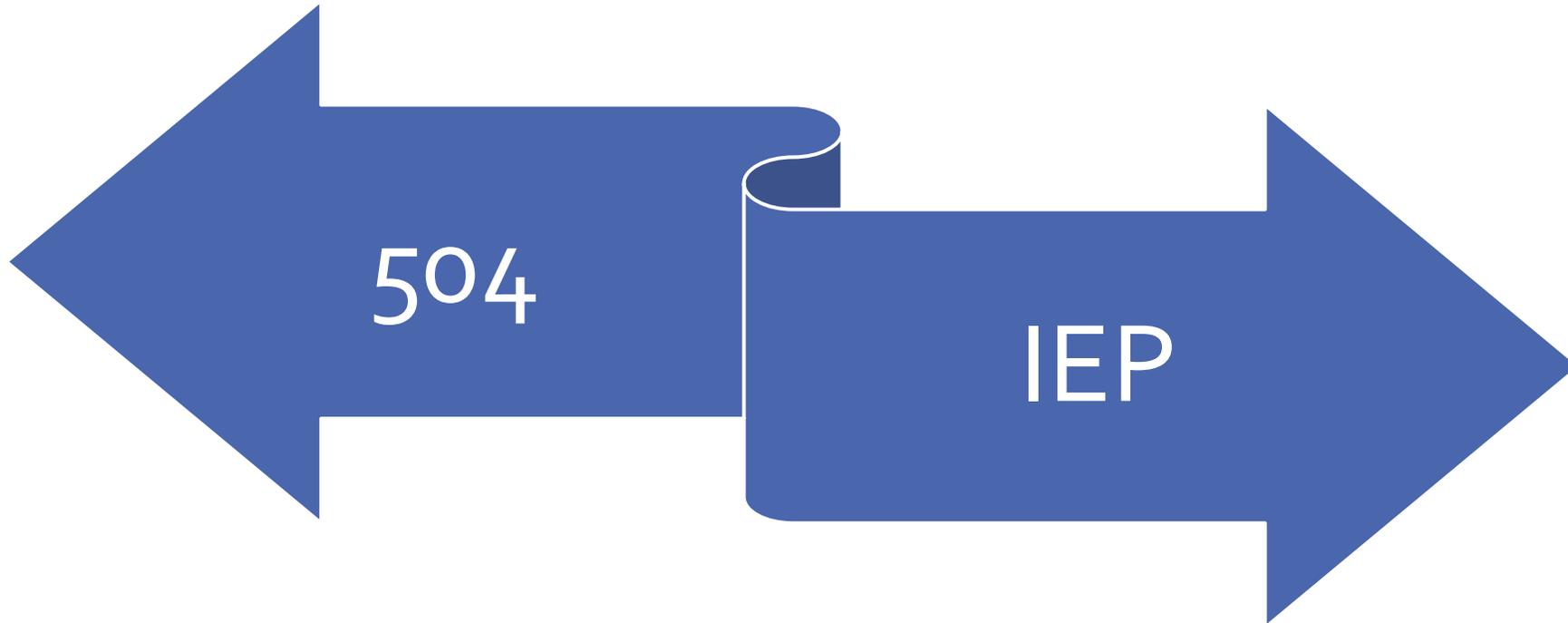
- Handle the situation alone.
- Assume a child's decreased attendance or performance is due to laziness
- Inform the parents that the district will not provide assistance since they have private services.
- Tell the parents the district does not have resources to help their child.
- Assume an alternative learning environment will "fix" the problem.

EVALUATIONS FOR STUDENTS WITH MENTAL HEALTH ISSUES

- What is the suspected disability?
 - Section 504
 - IDEA Category
- Incorporate private intervention/treatment history to the extent parents release information
- Document previous district provided supports and services.
- Social emotional status/behavioral assessments
- Functional behavior assessment
- Related services
 - Occupational therapy – sensory processing
 - Speech language pathology – pragmatic language

ACCOMMODATIONS, GOALS, OBJECTIVES AND RELATED SERVICES

504 PLAN OR IEP



Does the child need specially designed instruction?

A.W. v. Middletown Area Sch. Dist., 68 IDELR 247 (M.D. Pa. 2016)

- The school district's delay in evaluating a student with severe anxiety required the district to provide compensatory education. The student had more than 103 absences between November 1, 2011 and December 14, 2012 that were a direct result of avoidance behaviors and phobias that the district had not previously addressed.
- The court awarded compensatory services of:
 - 663.5 academic hours;
 - 136.5 psychological therapy hours;
 - 39 hours of extracurricular program services; and
 - 110 hours of vocational services.

A.W. v. Middletown Area Sch. Dist., 68 IDELR 247 (M.D. Pa. 2016)

- The student made academic progress when he moved from a brick and mortar school setting to the online school; however, his phobias and anxieties prevented the student from working. For example, he failed to attend a mandatory orientation because of his anxiety.
- The court held that an IEE “indicates that the District’s continued dereliction of its duties compounded the negative effects of [the student’s] anxiety disorders.”

What should a district do when a student won't come to school?

Find out why?

- Is it because of disability?
- Is it related to the education program?

Monitor how often?

- Are attendance issues having an educational impact?
- Is there a pattern related to the disability?

Consider changes to the IEP.

- Should a BIP be completed?
- Should a goal be added?
- Should mental health services be added?

SAMPLE IEP GOAL AND OBJECTIVES

GOAL

Given a structured support system and independently paced learning options, Nate will attend school with no more than 4 unexcused absences per quarter and will complete 80% of the required coursework by the end of the IEP.

OBJECTIVES

1.1 Nate will arrive at school, on time, and enter the learning environment of his choice as agreed upon by a menu of options (classroom, library, learning center) coordinated with the intervention specialist for 10 consecutive school days by the end of the first quarter.

1.2 Nate will participate in a structured choice system (with a menu) to organize his school day by selecting the order and duration of tasks he wants to complete as measured by a daily log 4 out of 5 school days.

SAMPLE IEP GOAL AND OBJECTIVES

GOAL

Given instruction in behavioral management strategies to appropriately manage his anxiety, without withdrawing or becoming aggressive, Nate will practice and apply these strategies to problem solve and identify a solution in 3 out of 5 opportunities.

OBJECTIVES

2.1 Given a situation which increases anxiety or frustration, Nate will verbalize what is causing the anxiety (triggers) in 4/5 opportunities with adult support.

2.2 Given a situation/task which may increase anxiety or frustration, Nate will independently utilize a transition tool to appropriately disengage for a specified amount of time to avoid making a poor choice and then reengage appropriately in 3/5 opportunities.

2.3 Given a situation or task that may increase anxiety or frustration, Nate will complete a self-management technique from a list of pre-identified choices with no more than one visual or verbal cue from an adult in 4/5 opportunities.

SAMPLE RELATED SERVICES

- Group therapy to work on social interactions, managing anxiety, school avoidance and goal setting behaviors and executive functioning skills.
- Individual therapy to address anxiety and depression to teach positive school behaviors including executive functioning skills.
- Family therapy to coordinate home/school communication and follow through including implementation of contingency plans and improving parent/child interactions related to school behaviors.

SERVICES FOR STUDENTS WITH MENTAL HEALTH ISSUES

- Accommodations or specially designed instruction?
- Functional behavior assessment/behavior intervention plan
- Safety plans
- Mental health services
 - Individual counseling
 - Group counseling
 - Family counseling
- Coordinate school services with private services
 - Release of records

EXTENDED SCHOOL YEAR SERVICES

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WHAT IS ESY?

Special education and related services provided to a child with a disability that are:

- Beyond the normal school year;
- In accordance with the child's IEP; and
- At no cost to the parents of the child.

Extended School Year Services – Legal Standard

- School district shall consider the following when determining if extended school year services should be provided:
 - Whether extended school year services are necessary to prevent significant regression of skills or knowledge retained by the child so as to seriously impede the child's progress toward the child's educational goals; and
 - Whether extended school year services are necessary to avoid something more than adequately recoupable regression.

When is ESY necessary for the provision of FAPE?

- Must only be provided if the child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE.
- Use regression and recoupment standard.
- Failure to provide can be violation of FAPE.

Extended School Year Services

Data-based decisions!

- Is there data that indicates to the IEP team that there is a serious potential for or evidence of regression of skills beyond a reasonable period of recoupment?
- IEP team may need to reconvene if current data shows a need for ESY.
- Use progress-monitoring data.

Extended School Year Services

A school district may not:

- Limit extended school year services to particular categories of disability.
- Unilaterally limit the type, amount or duration of services.



Additional Factors?

“In addition, OSEP has advised that a determination for ESY services must consider two factors: significant regression or detrimental effect on progress toward a goal; lack of progress alone cannot justify ESY services. *Letter to Given*, 39 IDELR 129 (OSEP 2003), *affirming, M.M.. v. Sch. Dist. of Greenville County*, 303 F. 3d 523 (4th Cir. 2002) (requiring a showing that the lack of ESY would significantly jeopardize the benefits the student received during the regular school year although acknowledging that parents should not be compelled to watch their child regress in order to qualify for ESY services).”

Lakeview Local School District, 5 ECLPR 95 (SEA OH 2007).

Post-Andrew F. ESY

- Most of the relevant ESY cases occurred prior to the U.S. Supreme Court ruling in *Andrew F.*
- However, a recent IHO decision opined that it is “difficult to conclude that *Andrew F.* changes the analysis of ESY or in any way alters the extant Sixth Circuit law on the issue.”
 - *See Forest Hills LSD*, SE 3607-2018 (Aug. 8, 2018).

Private Summer Tutoring & The Regression Standard

- IEP teams should first look at empirical evidence of past regression.
 - However, parents often argue that regression did not occur because of the parents' private tutoring efforts.
- Where empirical data of regression is non-existent, ESY could still be appropriate based on education experts' review of individual assessment data.
 - Education experts should decide whether the data suggests that "the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided [ESY]." *Cordrey v. Euckert* (6th Cir. 1990).

COMMON COMPLIANCE ISSUES & SCENARIOS

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Role of District Representative

- Mandatory IEP team member.
- This person must be:
 - qualified to provide or supervise the provision of special education,
 - knowledgeable about both the general curriculum and district resources, and
 - authorized to make decisions on behalf of the district and commit its resources.
- Responsible for monitoring procedural compliance.
- Ensure meaningful parent participation is occurring.

Role of District Representative

- The goal in an IEP or an ETR meeting is to arrive at a consensus decision of the team members.
- The goal is cooperative educational planning with educators and parents coming together to develop an agreeable educational plan.
- However, where the team members are unable to reach a consensus, the district makes the decision and provides parents with prior written notice of the district's proposals and refusals.
- The district representative is the ultimate decision-maker when there is disagreement amongst the team.

Best Practices When Circulating Draft Documents

- Drafts are not required.
- Be very clear the document is a DRAFT.
- Avoid appearance of predetermination.
- Keep an open mind.
- Allow parents the opportunity to ask questions and share their input.
- Follow up with a detailed PR-01.
- After meeting, shred all copies of all drafts.

What does “prior” in Prior Written Notice mean?

- The “prior” in Prior Written Notice is referring to the outcome of the meeting which will result in the implementation of the IEP.
- The PR-01 must be provided after the IEP meeting has concluded, but before the implementation of the new IEP.
- Must give a copy of the IEP to parents before effective date.
 - Cleaned up or sloppy copy?

PR-01 Purpose

- Opportunity to thoughtfully communicate a decision to the parent.
- Opportunity to create a record of what occurred before, during or after a meeting.
- Evidence used in response to a complaint or in a due process proceeding explaining what the team/district decided, when and why.
- Opportunity to demonstrate to a lawyer/advocate that the IEP team made an informed, data-based decision after fully considering the parent's input.

PR-01 Purpose

- Tell the story.
 - Who was there?
 - What was decided?
 - Why?
 - What data was considered?
 - Was Parent Notice Given? (Include a reference in Box 6).
- Document parent input and agreement.
- A parent of a child with a disability may elect to receive required prior written notices via electronic communication.
 - District should document such a request by a parent.

Amending a PWN

- Parents have the right to request to amend education records that are inaccurate, misleading, or invade the student's privacy rights.
- Usual response: Print out email, letter and include in student's special education file.

PWN Tips

- Don't put "because it is required for triennial review" in a PWN proposing an evaluation.
- Instead: "An evaluation is necessary to determine the child's continued eligibility as a child with a disability and/or the district has determined that the educational or related services needs of the child warrant a reevaluation."

PWN Tips

- Don't indicate the IEP team made a decision it did not make. (State that the District proposes/refuses; indicate that the team did not consider other options because it is not a team decision).
- Don't try to write a complicated PR-01 during a meeting and hand it to the parents as the meeting concludes.
- Don't use a template and not customize it to the situation.
- Remember to consult with colleagues regarding the necessity or the content of a PR-01 in difficult situations.

PWN Example – Sufficient Notice?

2. A description of the action proposed or refused by the school district:

Annual IEP

3. An explanation of why the school district proposes or refuses to take the action:

The annual IEP review is required by law and will allow the team to review academic progress and implement new objectives.

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

No other options were considered, annual review required by law.

5. A description of each evaluation procedure, assessment, record or report the school district used as a basis for the proposed or refused action:

Progress monitoring and academic assessments.

6. A description of other factors that are relevant to the school district's proposal or refusal:

Input from the IEP team, including the parent/guardian and consideration of any outside evaluation.

PROVISION OF PROCEDURAL SAFEGUARDS

PWN Example – Sufficient Notice?

2. A description of the action proposed or refused by the school district:

The ETR (Evaluation Team Report) team met on December 14, 2015 to review the ETR results. The team determined that the Student no longer met eligibility as a Student with a disability. The Parent initially agreed with this determination and signed accordingly, but subsequently determined that she disagreed that the Student was no longer a student with a disability.

3. An explanation of why the school district proposes or refuses to take the action:

Under the Ohio Operating Standards for the Education of Children with Disabilities, students must meet eligibility criteria in order to be eligible for specially designed instruction. Based on the information contained in the Student's ETR, there was no evidence of disability.

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

No other options were considered, as the results of the ETR did not support a disability.

5. A description of each evaluation procedure, assessment, record or report the school district used as a basis for the proposed or refused action:

Review of records information from previous assessment, test results DIBELS report, information from parent.

6. A description of other factors that are relevant to the school district's proposal or refusal:

Parent may contact _____ for a second level review. The District will document that the Parent initially agreed to with the eligibility determination but subsequently disagreed with the determination in an updated copy of the report.

Cincinnati CP No. 0006-2016

- **ODE regarding the first PWN:** This prior written notice does not provide sufficient content, as required by the regulation, and for that reason, it is not in compliance with this regulation.
- **ODE regarding the second PWN:** This prior written notice is in compliance with this regulation.

PWN Can Help Establish Facts

FINDING:

The district is not in violation of 34 C.F.R. 300.39(b)(3)[Special education- Specially designed instruction]. Specially designed instruction means adapting, as appropriate to the needs of an eligible student with regards to the content, methodology, or delivery of instruction to address their unique needs. In this case, the IEP team met on April 28, 2014 and discussed home instruction provided to the student in order to meet the one- on- one- instructional needs of the student. However, there is no evidence to suggest it was presented as the only option. The PR-01 noted the parent was not in agreement with this option and left the meeting early, and no other options were discussed. The IEP team met again on May 27, 2014 to amend the IEP to include one-on-one in school instruction for the student, and again on July 16, 2014 to further amend the IEP to include one-on-one instruction, specifically in the areas of math, language arts, and science as needed for five days a week. The PR-01 notes that the team, which included the parent, agreed that this specially designed instruction is appropriate to meet the needs of the student.

Keep it Objective and Factual

- “The parent raised her voice, told the special education director she was a horrible person and left the meeting.”
- Not: “The parent shouted and stormed out of the room.”

When Refusing to Increase Services

- “The data supports the current type and frequency of intervention and the student is making progress. Therefore, the IEP team refused to increase the student’s speech minutes.”

When No Decision Was Made

- “The IEP team did not change the draft IEP and kept the accommodations as proposed.”

IEP Drafting Tips and Progress Monitoring

- Data collection is crucial to writing defensible IEPs.
 - Present levels must include baseline data.
 - Goals and objectives must relate to each other and be data-driven.
- Can progress be seen from IEP to IEP?
- Can progress be seen in the assessments?
- Can progress be seen in work samples?

Data Integrity

- Consider using the same assessments in order to have apples-to-apples comparisons.
- All assessments must be given with integrity.



Reconvene if No Progress

- “The IEP Team also may meet periodically throughout the course of the school year, if circumstances warrant it. For example, if a child is not making expected progress toward his or her annual goals, the IEP Team must revise, as appropriate, the IEP to address the lack of progress.”
- Q&A on U. S. Supreme Court Case Decision *Endrew F. v. Douglas County School District Re-1* (December, 2017).

Peer-Reviewed Research

- The IEP must include a statement of the special education and related services and supplementary aids and services, **based on peer-reviewed research to the extent practicable**, to be provided to the child.
- The statement does not need to specifically identify specific reading programs by name; however, once one is chosen, it should be implemented according to the program.

Practical Tips for Conflict Avoidance and Resolution

- Provide individualized instruction.
- Respect the law.
- Communicate with parents.
 - Speak English, not Edu-speak.
- Maintain documentation (but don't editorialize).
- Know more than the parents and advocates do.
- Know the staff and their strengths and weaknesses.
- Choose your battles.
- Avoid the blame game.
- Data, data, data. And more data.
- Trust your judgment, and when in doubt, consult others.

Privately Obtained Assessments

- What are “privately obtained assessments”?
 - Any report, prescription, or other document shared by the parent authored by an outside “expert” regarding the child’s disability or education.
- What are the District’s obligations?
 - If a parent provides the District with a privately obtained assessment then the District must “consider” the assessment (so long as it meets the District’s assessment criteria) in any decision made regarding the provision of FAPE.

You Be the Judge! – Scenario #1

- Sam is a thirteen year old boy who suffers from general anxiety disorder, separation anxiety disorder, social phobia, depressive disorder and oppositional defiant disorder.
- In the fall of 2011, his emotional needs began to manifest at school, mostly through school absences and behaviors in class. For example, Sam had more than 103 absences between November 1, 2011 and March 29, 2012.
- The district put him on a 504 plan in February of 2012. In March, his parent enrolled him in the district's cyber school and the 504 plan was discontinued.
- The student made academic progress when he moved from a brick and mortar school setting to the online school.
- The district initiated an evaluation and offered an IEP in December of 2012.
- The parents filed for due process in February of 2013 alleging child find violations.

Did the district violate its child find obligation?

- Court: The school district's delay in evaluating a student with severe anxiety required the district to provide compensatory education.
- The court awarded compensatory services of:
 - 663.5 academic hours;
 - 136.5 psychological therapy hours;
 - 39 hours of extracurricular program services; and
 - 110 hours of vocational services.
- *A.W. v. Middletown Area Sch. Dist.*, 68 IDELR 247 (M.D. Pa. 2016).

You Be the Judge! – Scenario # 2

- Robbie is in fourth grade. He has complained multiple times that he is being bullied at school. The district has investigated these incidents and has been unable to substantiate any of the alleged incidents.
- Multiple students have, in fact, accused Robbie of bullying them and Robbie has been disciplined for mistreating others.
- Heather is Robbie's mom. She believes her son, not the school officials.
- Heather has contacted school officials in "an abusive, threatening and degrading manner" on multiple occasions. Heather asserted she was aggressively advocating for her child's protection.

You Be the Judge! – Scenario # 2

- In November, Heather requests a Section 504 hearing.
- In December, Heather comes to the school and accuses the principal of harassing her family.
- Then Robbie gets an in-class discipline. Heather calls and accuses the principal of lying about the reason.
- Robbie is then disciplined for hitting another student with an oversized pencil.
- The principal writes to Heather and requests all future correspondence be in writing. Heather follows up with a phone call.
- Robbie is disciplined for threatening to shoot another student in mid-January.

You Be the Judge! – Scenario # 2

- The Superintendent writes Heather and directs her not to come on school property without his permission in January.
- Heather brings her son to school in March.
- The school files criminal trespass complaint against her.
- Heather sues on her own behalf and on behalf of her son, alleging disability discrimination and retaliation.

Did the District retaliate?

- No.
- Parent claimed that the district banned her from school grounds because she advocated for her child under Section 504.
- The Court held that the district had a legitimate, nondiscriminatory reason for banning the parent.
- The District had provided detailed records that the parent had been banned for contentious and unpleasant interactions with school personnel; had provided a written ban; and had filed a criminal trespass complaint after the parent had violated the ban.
- H.C.; R.D.C. v. Fleming Cty. Bd. of Edn., 118 LRP 29496 (6th Cir. 2018).

You Be the Judge! – Scenario #3

- Marilee has a neurological disorder that necessitates private occupational and physical therapy.
- She was evaluated in preschool as possibly developmentally delayed and the district determined she was not a child with a disability.
- When she was in kindergarten she was placed on an RTI plan for reading and a general education intervention team met regularly to address areas of concern, including fine/gross motor problems.
- She was observed throughout that year and placed on 504 plan after the parents provided various medical records to the district.
- Marilee repeated kindergarten (she was 4 when she started initially) and was provided OT consultations on the 504 plan.

You Be the Judge! – Scenario #3

- At the end of her first grade year, Marilee began to fall behind academically, and the district evaluated again. The district determined she was not eligible as a child with a disability. She had motor-skill deficits, but those skills were within or above normal range and did not impact her education.
- The parents requested services under IDEA three times between the two evaluations. The district did not evaluate and did not respond with prior written notices.
- Her parents withdrew her and filed for due process (in TN).

Did the District deny FAPE when it failed to provide PWN?

- Court: For a court to award relief for a procedural violation of the IDEA, the plaintiff must show the violation resulted in substantive harm to the student or the parents.
- Court: Plaintiffs are not entitled to relief because Marilee was not substantively eligible for special education services.
- Court: The IDEA does not require schools to provide physical and occupational therapy to all students who might “benefit from or need” those services outside of the educational context; rather, the IDEA only requires schools to provide those services to students who require them in order to receive “the full benefit of special education instruction.”
- M.G. v. Williamson County Schools (C.A. 6 2018).

You Be the Judge! Scenario #4

- J.D. is deaf, autistic and has a history of violent and destructive behaviors.
- School district and parents agreed to place the student in a specialized residential school in PA in 2015.
- J.D.'s parents moved to Nicaragua "to pursue a lifelong humanitarian calling to help individuals in disadvantaged countries learn survival and self-sufficiency through bee-keeping."
- They signed a grandparent caretaker affidavit for the student.
- Graham filed a declaratory judgment in juvenile court to invalidate the grandparent affidavit and refused to pay for the private placement because neither the student nor parents resided in the district.

You Be the Judge! Scenario #4

- The parents filed for due process and filed a federal court action seeking a temporary restraining order to have Graham pay the tuition.
- They claimed the due process proceeding was too slow and the student would be discharged before a decision was made.

Did they win?

- No.
- Court: Must exhaust administrative remedies. The due process procedures exist to determine questions such as whether Graham owed the student a FAPE; cannot go to court before those steps are taken.

Scenario # 5

- Suzy's parents believe she is tested entirely too much at school, so they keep her home during statewide testing.
- Billy ordinarily gets 30 minutes daily of Orton Gillingham instruction. During testing week, he misses his assigned Orton period 3 times due to taking assessments.
- Does the district owe either student compensatory education for special education missed during testing?

Does the district owe comp ed?

- Ruling: Districts do not need to provide make-up instruction to students with disabilities who miss regularly scheduled special education services to participate in statewide or districtwide assessments. OSEP informed a rehabilitation center administrator that IDEA-eligible students are generally not entitled to compensatory education for special education services missed due to testing.
- *Letter to Kane, 118 LRP 17276 (OSEP 04/18/18).*

