PREVENTING THE PREDETERMINATION CLAIM: THE COMPLIANT PATH TO IEP PLANNING

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The IDEA requires school districts to provide parents with a meaningful opportunity to participate in the development of their child's IEP. While school districts may engage in activities to prepare for an IEP team meeting, the predetermination of the meeting's outcome crosses the legal line and leaves the school district legally vulnerable.

1. What is considered "predetermination" with regard to special education services?

When the public school system "pre-selects" the special education programming or placement for a child with a disability, prior to and despite the discussion at the IEP team meeting, the school district has effectively "predetermined" the outcome of the IEP process.

In 2007, the Ninth Circuit Court of Appeals put it this way in *H.B. v. Las Virgenes,* 48 IDELR 31 (9th Cir. 2007), *on remand* 52 IDELR 163 (C.D. Ca. 2008), *aff'd* 54 IDELR 73 (9th Cir. 2010):

> Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives.

In *Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004), *cert. denied*, 110 LRP 46999, 546 U.S. 936 (2005), *on remand*, 46 IDELR 45 (E.D. Tenn. 2006)*, aff'd*, 49 IDELR 123 (6th Cir. 2008), the 6th Circuit Court of Appeals analyzed the issue of predetermination when it first considered the methodology offered by the school for a student with autism:

> The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program. This conclusion is bolstered by evidence that the School System steadfastly refused even to discuss the possibility of providing an ABA program, even in the face of impressive results. Indeed, School System personnel openly admired and were impressed with Zachary's performance (presumably attained through the ABA program), until the Deals asked the School System to pay for the ABA program. Several comments made by School System personnel suggested that they would like to provide Zachary with ABA services, i.e., they recognized the efficacy of such a program, but they were prevented from doing so, i.e., by the School System policy. *The clear implication is that no matter how strong the evidence presented by the Deals, the School System still would*

have refused to provide the services. This is predetermination (emphasis added).

While it should be noted that the District Court in *Deal v. Hamilton County Bd. of Educ.*, 46 IDELR 45 (E.D. Tenn. 2006), subsequently determined that the district's eclectic program for the student with autism was substantively appropriate and the 6th Circuit affirmed, the lesson taken from the case regarding predetermination is important.

2. Can predetermination result in the denial of a Free and Appropriate Public Education (FAPE) to the student?

Yes. The 6th Circuit in *Deal* earlier made clear that "[a] procedural violation can cause substantive harm when it seriously infringes upon the parents' opportunity to participate in the IEP process," citing *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 533 IDELR 656 (U.S. 1982) ("Congress sought to protect individual children by providing for parental involvement ... in the formulation of the child's individual educational program.").

"...Because the School System deprived the Deals of a meaningful opportunity to participate, the predetermination amounts to denial of a FAPE for Zachary."

3. What types of statements made by school personnel can result in a finding of predetermination against the public school district?

In reviewing whether the school system had an "unofficial policy" of refusing to consider the Lovaas style ABA methodology for students with autism and of "pre-selecting" the services for students, regardless of "individual needs," the Administrative Law Judge in the underlying *Deal* case found the following important:

- A special education supervisor met with the parent prior to the IEP team meeting and outlined various programs for students with autism, omitting any reference to the Lovaas style ABA methodology.

- A school representative at an IEP team meeting told the parents that there were things she would like to provide the student but that the school system could not provide the same services for every child, and on one occasion stated that she wished people would "pay their taxes" so that the school could provide ABA for the student.

- The special education supervisor told the parents that they could not ask questions during an IEP team meeting.

- School personnel informed the parents that the “powers that be” were not implementing ABA programs

In the *Las Virgenes* case, the statements of an assistant superintendent at the IEP team meeting were sufficient to warrant a finding of predetermination. In that case, the team was considering whether to bring a student back to the public school district from a private school placement. The court found the following statement by the assistant superintendent, in opening the meeting, significant:

> "Okay, so what we'll be doing today is going through the assessment *results* and then we will talk about those goals and objectives. And we'll talk about how we can meet those goals and objectives, program services -- that discussion -- *then we'll talk about a transition plan."*

The court further noted the following:

> When counsel for the parents questioned the meaning of the term "transition plan," [the assistant superintendent] explained they would talk about "what can we do to make a smooth *transition between what's happening now and what our offer is"* (emphasis in original).

Ultimately, the court ruled that such statements were evidence of predetermination and ruled against the public school district. The 9th Circuit Court of Appeals affirmed that decision.

4. But if the parents participated in the IEP team meeting—doesn’t that prove that the school district did not predetermine the outcome?

Not necessarily. The question is whether the parents’ opportunity to participate was “meaningful”. In considering this issue, the Third Circuit Court of Appeals noted that meaningful participation was demonstrated in the following case when a public school district considered parents’ suggestions and incorporated, at least in part, those suggestions into the IEP document. Key quote:

> The [parents] were presented with a draft IEP at a meeting on August 16, 1990. The [district]’s draft IEP was discussed, and the [parents] made several suggestions as to how the plan might be changed...The [district] considered the [parents]' suggestions and incorporated some into the IEP... Although the [parents] ultimately did not sign the revised IEP, there was clearly more than after-the-fact involvement here. The record indicates that the [parents] had

> an opportunity to participate in the IEP formulation process in a *meaningful* way.

Fuhrmann v. East Hanover Bd. of Educ., 19 IDELR 1065 (3d Cir. 1993), *rehearing denied*, 110 LRP 65930, No. 92-5218 (3d Cir. 1993)(emphasis added).

If the parents are denied the opportunity to ask questions during the IEP team meeting, or if the parents propose items for discussion that are summarily disregarded by school staff, such can constitute evidence that the parents have not been provided the opportunity to participate in the meeting in a meaningful way.

Also, see the following excerpt from *H.B. v. Gloucester Township School District et al*, 55 IDELR 224 (D. N.J. 2010):

> Defendants argue that the parents were present at each of the IEP meetings...This is undisputed but is not enough to satisfy the procedural requirements of the IDEA. Defendants further argue that the parents "were provided the opportunity to participate in discussions about the educational program and they offered opinions as to the plan being established for H.B." *(Id.)* Even if true, this conclusory statement, made without any citation to the record or evidentiary support, does not establish that the parents were allowed the opportunity to meaningfully participate in the decision-making process as is required by the IDEA...
>
> Plaintiffs have shown that for each of the IEPs before the Court, the School District had come to definitive conclusions on H.B's placement without parental input, failed to incorporate any suggestions of the parents or discuss with the parents the prospective placements, and in some instances even failed to listen to the concerns of the parents. It is clear from the evidence before the Court that the IEPs were predetermined, and therefore the School District denied the parents any meaningful participation in the development of the IEPs in violation of IDEA.

5. What is the difference between "preparation" and "predetermination"? Is it legally "okay" to prepare for the IEP team meeting in advance?

Preparation for an IEP team meeting by school district staff members will not result in a finding of predetermination where school personnel remain committed to allowing the parents an opportunity to meaningfully participate in the IEP process.

For example, in *T.P. and S.P., on behalf of S.P. v. Mamaroneck Union Free School District*, 51 IDELR 176 (2d Cir. 2009), the Circuit Court of Appeals ruled for the school district, reversing the District Court in a case alleging "predetermination." Prior to the IEP team meeting, the school's expert on autism reviewed the independent evaluation obtained by the parents and prepared a chart comparing the IEE recommendations with her own. There was at least some discussion about the matter between the expert and the chair of the IEP team. The parents alleged, and the District Court found, that this was "predetermination."

The Circuit Court disagreed. Key Quote:

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

6. Does that mean that parents are entitled to attend every meeting concerning their child that is held at school?

No. "A meeting [to which a parent is entitled to notice and has a right to attend] does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." 34 C.F.R. §300.501(b)(3).

7. As a practical matter, then, what can school personnel do to ensure that the parents' participation at the IEP team meeting is "meaningful"?

First, keep an open mind at the meeting. Remember, answers such as "we've never done it that way before," or "we don't do that here," or "you can suggest it, but that doesn't mean we have to provide it," can get the school district into trouble if the parents later challenge that they were denied the important procedural safeguard of participation in the development of their child's IEP.

Second, use an agenda to guide the IEP team meeting. When preparing the agenda for the IEP team meeting, always include a statement on the face of the agenda that parents are encouraged to participate throughout the process, asking questions and voicing suggestions and/or concerns.

Third, consider carefully proposals made by parents. Don't automatically discount those proposals or suggestions. Consider them. While not every suggestion made by the parents must be adopted, those suggestions do need to be considered.

Fourth, don't automatically discount the suggestions/ recommendations made by parents' experts/outside evaluators. Once an IEE report has been furnished to the school district, the IEP team must consider the results of that evaluation. Statements such as "no matter what the independent evaluator says, the District has already decided what the program will be," or "we are refusing the outside report," can be used later against the school district as evidence of predetermination.

Fifth, keep good documentation (see below).

8. So we don't have to adopt every suggestion made by the parents to be able to defend a claim of predetermination?

No. The school need not adopt every suggestion; however, the school is charged with reviewing those suggestions made by parents.

As noted by the 8th Circuit Court of Appeals:

> A school district's obligation under the IDEA to permit parental participation in the development of a child's educational plan should not be trivialized. See *Rowley,* 458 U.S. at 205-06 ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.").
>
> Nevertheless, the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives. In this case, the record shows that the School District considered both the possibility of providing Grace with in-home instruction and the possibility of reimbursing her parents for the cost of educating her at home through the Institutes, but rejected these options on the ground that they would not provide her with

> sufficient interaction with other children. The School District's adherence to this decision does not constitute a procedural violation of the IDEA simply because it did not grant Grace's parents' request. For these reasons we agree with the hearing panel's determination that the School District did not deprive Grace's parents of their procedural rights.

Blackmon v. Springfield R-XII School District, 31 IDELR 132 (8th Cir. 1999), *rehearing denied*, 110 LRP 65933, No. 99-1163 (8th Cir. 2000).

9. How can we establish that school personnel did not predetermine the outcome of the IEP team meeting?

Ask yourself this question: If an administrative law judge were to review the documentation of the IEP team meeting in the future, would that individual be able to tell—solely from the document—that the school district kept an open mind and provided the opportunity for the parents to meaningfully participate in the development of the IEP?

When preparing documentation of the meeting or the prior written notice of the decisions reached, use language that clearly reflects the efforts of the school district in this regard. Examples:

- "The team discussed ___ possible placements and the pros and cons of each."
- "The chair asked the parents what alternatives they would like the team to consider."
- "The team agreed to _____ in response to parental input."
- "The parent said _____ and in response, the team decided _____.

Remember, only the IEP team can make decisions regarding the IEP. Using statements such as the "school decided to _____" can result in a finding of predetermination. Thus, avoid statements (both oral and written) such as:

- "The school has developed the IEP and is presenting it to the parents today."
  - ✓ Consider instead, "the purpose of the team meeting is to develop the student's IEP."

- "This meeting is to change the student's placement from _____ to _____."
  - ✓ Consider instead, "the team will today consider the student's placement in the LRE, considering a continuum of placement alternatives."
- "The district rejects the report of the independent evaluator."
  - ✓ Consider instead, "the team has reviewed and considered the IEE report and determined no changes to the IEP are needed," OR "the team has adopted the following recommendations made by the outside evaluator..."

10. Let's look at some additional cases that provide guidance.

Hjortness v. Neenah Joint School District, 48 IDELR 119; 508 F.3d 851 (7th Cir. 2007).

The Circuit Court ruled for the school, holding that the IEP was properly developed despite the fact that the school added goals to the IEP after the meeting. Moreover, the district had not "predetermined" placement. The IHO ruled against the school on the "predetermination" issue, but the court reversed. Key Quotes:

> Considerable time was spent in multiple IEP conferences at which Joel's parents and their advocate participated. At several times during these conferences, the team attempted to set specific goals and objectives, but the Hjortnesses insisted that 'the issue on the table [was whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be.' The school district arguably should have held a second IEP meeting to review the goals and objectives that were not discussed at the meeting. However, this procedural violation does not rise to the level of a denial of a free appropriate public education. The record does not support a finding that Joel's parents' rights were in any meaningful way infringed.
>
> In this case, it is not that Joel's parents were denied the opportunity to actively and meaningfully participate in the development of Joel's IEP; it was that they chose not to avail themselves of it. Instead of actively and meaningfully participating in the discussions at multiple IEP meetings, the Hjortnesses refused to talk about anything other than '[whether the school district

> would pay for [Joel] to be at Sonia Shankman where he needs to be.' As a result, the school district was left with no choice but to devise a plan without the meaningful input of Joel's parents. Under these circumstances, the parents' intransigence to block an IEP that yields a result contrary to the one they seek does not amount to a violation of the procedural requirements of the IDEA. To hold otherwise would allow parents to hold school districts hostage during the IEP meetings until the IEP yields the placement determination they desire.

Predetermination?

> Recognizing that we owe great deference to the ALJ's factual findings, we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school district did not need to consider private placement once it determined that public placement was appropriate.

Comment: Reading this case, it is difficult to escape the conclusion that the court simply did not approve of the way the parents pursued this matter. The court clearly believed that the parents were unreasonable and intransigent.

There was a dissenting opinion. That judge relied on the factual findings of the ALJ and concluded they were not clearly erroneous. Those findings were 1) that the district had its mind made up about placement before the IEP meeting; and 2) that most of the IEP goals were added to the IEP after the meeting, thus depriving the parents of meaningful input.

Drobnicki v. Poway USD, 53 IDELR 210 (9th Cir. 2009).

The District scheduled the IEP meeting without asking the parents about their availability. The parents informed the District that they were unavailable on the scheduled date and wanted to reschedule. The District did not contact the parents to arrange an alternate date; however, the District offered to let the parents participate by speakerphone. Whether the parents actually had a conflict does not matter, according to the Court. The Court found that the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time. Key Quote:

> The use of [a phone conference] to ensure parent participation is available only "if neither parent can attend an IEP meeting." The District's procedural violation deprived the parents of the opportunity to participate in the IEP process and denied the student FAPE.

J.N. v. District of Columbia, 53 IDELR 326 (D.C. 2010).

The court held that the district denied the parent the opportunity to have meaningful participation at the IEP Team meeting by conducting the meeting without the parent and at a time the parent had objected to. The district sent three notices, proposing alternate dates, and received no response from the first two. So the third notice stated when the meeting would be held. The parent responded to the third notice with phone calls asking that the meeting be rescheduled, but the district did not do so. The federal district court pointed out that 1) the September 21 date was never agreed to; 2) there was no evidence that the parent could not be convinced to attend the meeting; and 3) the parent made "timely, diligent and reasonable efforts to reschedule" the meeting. The court thus concluded that the school had effectively eliminated the parent's ability to participate. The court noted that this was a procedural error that "undermine[s] the very essence of the IDEA."

J.G. v. Briarcliff Manor Union Free School District, 54 IDELR 20; 682 F.Supp.2d 387 (S.D.N.Y. 2010).

The parents were not denied the opportunity for meaningful participation, even though the school held a meeting without them. As soon as the school found out that the parents were dissatisfied with the proposed IEP the school attempted to set up an IEP Team meeting. The parents asked that the meeting be postponed, but the district was unwilling to do so due to the pending start of school and the requirement to have an IEP in place at that time, but the school offered to include the parents by telephone and to have another meeting in September. The court found that the school acted reasonably and did not deny the parents the opportunity to participate.

Comment: The court also noted that the parents had made the decision to put the child in private school prior to informing the school of the dissatisfaction with the proposed IEP. It is also interesting to note that the IEP in question was discussed at an IEP Team meeting attended by the parents on June 13, but the proposed written IEP was not actually developed at that time. It was done after the meeting and then sent to the parents on July 22. The court pointed out that "there is no legal authority requiring parental presence during the actual drafting of the written IEP document."

K.L.A. v. Windham Southeast Supervisory Union, Dummerston School District, 54 IDELR 112 (2nd Cir. 2010) (Unpublished).

The parents claimed that they were excluded from discussions about their daughter's placement. The Court explained that the term "educational

placement" only encompasses the student's placement on the LRE continuum. The IEP determined placement in a public high school's life education program. The district had the exclusive right to decide the specific location of the student's services. Key Quote:

> We also remain unpersuaded by the parents' argument that they were not afforded the opportunity to weigh in on K.L.A.'s educational placement. The record amply reflects the tremendous amount of access and input the parents enjoyed throughout the IEP-development process. It also starkly demonstrates – as both the Hearing Officer and the district court found – that it was the parents themselves who, by categorically opposing any placement at BUHS ... and developing a completing IEP, rendered impossible a fully collaborative experience.

KaD v. Solana Beach School District, 54 IDELR 310 (S.D.Cal. 2010).

The court affirmed the ALJ's ruling that the IEP was not predetermined. Prior to the meeting, the special education director had expressed her concern that the parties would not be able to come to consensus, but this was not sufficient to show predetermination. Key Quote:

> A review of the IEP meetings indicates that the conflicting recommendations were discussed at the May 11, 2007, and June 13, 2007, meetings.....Indeed, after reading the transcripts, this Court was left with the impression that Student's mother was a welcomed and active participant in the IEP discussions.

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

The court found that the administrative law judge did not err in determining that the school district had not predetermined the number of hours the student required in a self-contained placement.

> Here, the parents of the disabled child in question argue that their child was denied a FAPE because the school significantly impeded their opportunity to participate in the decision-making process when MCPS allegedly changed the number of hours S.T. needed in self-contained classrooms between the May and July IEP meetings to fit a public school placement, an unlawful process known as predetermination.

> ...The parents rely heavily on their contention that the May meeting ended with a consensus that S.T. needed thirty hours of self-contained special education that was suddenly, and without substantive discussion, changed in the July meeting, in which only one Brooke Grove representative who had personal knowledge of S.T. attended. They essentially argue that this procedural error by itself is a denial of a FAPE, and that the ALJ ignored the gap in the credibility of MCPS' witnesses. However, the Fourth Circuit requires the procedural violation to actually interfere with the parents' ability to participate in the educational development progress. The ALJ found that the parents and their advocate attended the July meeting, and were able to reassert their position that S.T. required a fully self-contained program that was not agreed to by MCPS team members.

S.A., a Minor, by and through L.A., Guardian Ad Litem v. Exeter Union School District, 110 IDELR 69145 (E.D. Cal. 2010).

On appeal, the District Court was asked to decide whether the IEP denied a student with autism FAPE because the school district allegedly predetermined an offer of behavioral services without allowing the student and the student's mother meaningful participation in its development. Although the district previously had agreed with the parent to contract with an outside provider for behavioral services for the student, the Superintendent of Schools subsequently allowed the contract with the outside provider to lapse.

The Superintendent expressed concern about contracting out services for which the school district remained legally responsible. While the contract was not renewed, the school district continued to pay the outside provider to serve the student for several months. The parent subsequently requested a special education due process hearing, arguing in part that the school district predetermined the behavioral services.

The court disagreed, holding that the evidence demonstrated the district did not predetermine the student's behavioral services.

> Although District chose not to renew its contract with [the outside provider] prior to the October 7, 2008 IEP, and that decision was made outside of an IEP, there is no evidence that the offer made to Student was predetermined. On the contrary, District continued to pay for [the outside provider] to provide Student behavior supervision services from July 1, 2008 through the October 7, 2008 IEP meeting. Thus, although District's contract with [the outside provider] was not renewed, there is no indication that District

intended to terminate Student's services provided by [the outside provider] unilaterally. Additionally, the parties stipulated that at the end of the October 7, 2008 IEP, District's attorney told Mother and her attorney that District's offer would not go into effect without parental consent. This further supports the ALJ's conclusion that the IEP offer was not predetermined and that the October 7, 2008 offer allowed parental participation.

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