

# The Elements of Legally Defensible Transition Planning

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## Talking Points

- \* Transition planning and the legal requirements.
- \* The shades of gray.
- \* The latest court interpretations.

# First, the IDEA Requirements

With guidance from the Comments in  
the Federal Regulations.



# Transition Services

Pursuant to 34 C.F.R. §300.43:

- \* *Transition services* means a **coordinated set of activities** for a child with a disability that –
  - \* Is designed to be within a results-oriented process, that is **focused on improving the academic and functional achievement** of the child with a disability to **facilitate the child's movement from school to post-school activities**, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
  - \* Is **based on the individual child's needs**, taking into account the child's strengths, preferences, and interests; and includes

## Transition Services

- \* Instruction;
  - \* Related Services;
  - \* Community experiences;
  - \* The development of employment and other post-school adult living objectives; and
  - \* If appropriate, acquisitions of daily living skills and provision of a functional vocational evaluation.
- \* *Transition services* for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

## Transition Services

- \* Pursuant to 34 C.F.R. §300.320(b):
- \* *Transition services*. Beginning not later than the first IEP to be in effect **when the child turns 16**, or younger if determined appropriate by the IEP team, and updated at least annually, thereafter, the IEP must include –
  - \* **Appropriate measurable postsecondary goals based upon age appropriate transition assessments** related to training, education, employment, and where appropriate, independent living skills; and
  - \* The **transition services** (including courses of study) needed to assist the child in reaching those goals.

## Guidance

- \* Are transition assessments formal evaluations or competency assessments?
  - \* USDE: We do not believe clarification is necessary because the specific transition assessments used to determine appropriate measurable postsecondary goals will depend on the individual needs of the child, and are best left to states and districts to determine on an individual basis. *71 Federal Register 46667.*
- \* What is the definition of *postsecondary goal*?
  - \* USDE: We do not believe it is necessary to define “postsecondary goals” in the regulations. The term is generally understood to refer to those goals that a child hopes to achieve after leaving secondary school (i.e. high school). *71 Federal Register 46668.*

## Guidance

- \* Are measurable postsecondary goals required in each of the areas of training, education, employment, and independent living skills?
  - \* USDE: The only area in which postsecondary goals are not required in the IEP is in the area of independent living skills. Goals in this area are required only if appropriate. It is up to the IEP team to determine. *71 Federal Register 46668.*
- \* Is it mandatory for transition services to include vocational and career training through work-study and documentation of workplace accommodations?
  - \* USDE: The IDEA does not require IEPs to include vocational and career training or documentation of workplace accommodation. The IEP team determines the transition services that are needed to meet the child’s unique transition needs. *71 Federal Register 46668.*

## Transition Service Participants

- \* Pursuant to 34 C.F.R. §300.321(b):
- \* *Transition service participants.* The public agency **must invite the child with a disability to attend the child's IEP team meeting** if the purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals.
- \* If the child does not attend the IEP team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered.
- \* To the extent appropriate, **with the consent of the parents** or a child who has reached the age of majority, in implementing the requirements of this section, the public agency **must invite a representative of any participating agency** that is likely to be responsible for providing or paying for transition services.

## Guidance

- \* Can the parent decline to use the transition services offered by agencies proposed by the IEP team?
  - \* USDE: There is nothing in the IDEA that requires a parent or child to participate in transition services that are offered by agencies that the public agency has invited to participate in the IEP team meeting. **However, if the IEP team determines that such services are necessary to meet the needs of the child, and the services are included in the IEP, and the parent disagrees with the services, the parent can request mediation, file a due process complaint, or file a state complaint to resolve the issue.** 71 Federal Register 46671.

## Guidance

- \* Is it mandatory to provide the transition age student with a copy of the IEP team meeting notice or include all of the information required by §300.322(b) when inviting the student to attend an IEP meeting?
  - \* USDE: We believe it would be overly burdensome to require a public agency to include all the notice requirements above, particularly because the information is provided to the child's parents who can easily share this information with the child. However, when a child with a disability reaches the age of majority under state law, the public agency must provide any notice required by the IDEA to both the child and the parents consistent with §300.520. *71 Federal Register 46671.*

## Guidance

- \* Must the child be invited to attend an IEP team meeting when the parent does not want the child to attend?
  - \* USDE: The public agency must invite the child to attend the IEP meeting if the purpose of the meeting will be the consideration of the postsecondary goals and transition services. However, until the child reaches the age of majority under state law, unless the rights of the parent to act for the child are extinguished or otherwise limited, only the parent has the authority to make educational decisions for the child under the IDEA, including whether the child should attend an IEP meeting. *71 Federal Register 46671.*

## Guidance

- \* Is informed consent required before inviting personnel from participating agencies to attend IEP meetings?
  - \* USDE: The IDEA requires the protection of any personally identifiable data, information, and records, irrespective of the requirements of FERPA. We continue to believe that a public agency is required to obtain parental consent (or the consent of a child who has reached the age of majority) before inviting representatives from other participating agencies to attend an IEP meeting. *71 Federal Register 46672.*

## Participating Agency Failure

- \* Pursuant to 34 C.F.R. §300.324(c):
- \* *Failure to meet transition objectives – Participating agency failure.* If a participating agency, other than the public agency, fails to provide the transition services described in the IEP, the public agency **must reconvene the IEP team** to identify alternative strategies to meet the transition objectives for the child set out in the IEP.
- \* *Construction.* Nothing in this part relieves any participating agency including a state vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.

## Guidance

- \* What types of collaboration are required to resolve problems regarding the failure of participating agencies to provide transition services identified by the IEP team?
  - \* USDE: The IDEA requires each state to ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each non-educational public agency and the SEA, in order to ensure FAPE is provided.

## Graduation Issues

Pursuant to 34 C.F.R. §300.102(a):

- \* The obligation to make FAPE available to all children with disabilities does not apply with respect to
  - \* Children with disabilities who have graduated from high school with a regular high school diploma.
  - \* This exception applies only to a **regular diploma**. The term regular diploma does not include an alternative degree that is not fully aligned with the state's academic standards, such as a GED.
- \* Graduation from high school with a regular diploma constitutes a change in placement requiring *written prior notice* consistent with §300.503.

## Guidance

- \* Children with disabilities who have not graduated with a regular high school diploma still have an entitlement to FAPE until the child reaches the age at which eligibility ceases under the age requirements in the state.
- \* A regular high school diploma does not include an alternative degree that is not fully aligned with the state's academic standards.
- \* *See 71 Federal Register 46580.*

## Graduation Issues

Pursuant to 34 C.F.R. §300.305(e):

- \* Evaluations before a change in eligibility ARE NOT required for students who's eligibility terminates due to graduation from a secondary school with a regular diploma, or due to exceeding the age of edibility for FAPE under state law.
- \* The public agency must provide [the child](#) with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

## Guidance

- \* Must schools provide updated evaluations for college testing and admissions purposes?
  - \* USDE: We do not believe that the IDEA should require public agencies to conduct evaluations for children to meet the entrance or eligibility requirements of another institution or agency because to do so would impose a significant cost on public agencies that is not required or contemplated by the IDEA. *71 Federal Register 46644.*
- \* Is the public agency required to conduct an evaluation for students aging out of eligibility?
  - \* USDE: It would be inconsistent with the IDEA to require public agencies to conduct evaluations for children who are exiting the school system because they exceed the age for eligibility under state law. *71 Federal Register 46644.*



## Refining Our Knowledge

through case law and OSEP letters

## Other Agency Participation

- ★ A district's failure to invite another agency to an IEP meeting on transition services may be deemed harmless if it does not result in a denial of FAPE. Although a Wisconsin district did not invite representatives from a county agency to all of the student's IEP meetings, the representatives attended the meeting at the parent's invitation. As such, the court held that any procedural violation by the district was harmless. See *Rosinsky v. Green Bay Area Sch. Dist.*, 53 IDELR 193 (E.D. Wis. 2009).

## Other Agency Participation

- ★ A district's duty to prevent the disclosure of personally identifiable information also affects its ability to invite representatives of outside agencies to IEP meetings on transition services. Noting that each IEP meeting involves a discussion of confidential information, OSEP explained that districts must seek consent every time they wish to invite an agency representative to an IEP meeting. *Letter to Gray*, 50 IDELR 198 (OSEP 2008).
- ★ If a participating agency fails to provide agreed-upon services, the IDEA requires that the IEP team meet to identify other ways to satisfy the student's transition objectives and, if necessary, revise the student's IEP. *Letter to Anonymous*, 21 IDELR 673 (OSEP 1994).

## Transition Plans & IEPs

- ★ Although an IEP must contain statements of transition services, it does not require an IEP to have a stand-alone transition plan as part of an IEP. Because transition services were mentioned in the IEPs and because transition services were actually provided to the student, there was no IDEA violation. *Sebastian M. v. King Philip Reg'l. Sch. Dist.*, 56 IDELR 204 (D. Mass. 2011).
- ★ The IDEA does not require a stand-alone transition plan as part of an IEP. While an IEP must include a statement of transition services, it does not require that "those statements be articulated in a separate component of the IEP." "Merely pointing to the absence of a stand-alone transition plan cannot form the basis for a founded claim of procedural error." *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 49 IDELR 180 (1<sup>st</sup> Cir. 2008).

## Transition Plans & IEPs

- ★ While the student's IEP did not contain an explicit statement of transition services, the court found from the evidence that appropriate services had been provided nonetheless, and the IEP contained language that addressed the student's needs for community awareness and daily living skills. *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10<sup>th</sup> Cir. 1996).

## Transition Plans & IEPs

- \* Finding no obvious flaws in the description of postsecondary transition services in a high schooler's IEP, the 3<sup>rd</sup> Circuit refused to rule that the IEP violated the IDEA procedurally or resulted in educational harm.
- \* The parents alleged that the IEP's statement of transition services was deficient. The Court noted that the student's IEPs correctly stated that she desired to enroll in college and set forth the academic requirements for doing so. In addition, her IEP for her senior year included a detailed checklist designed to assist her in transitioning out of high school. Finally, the district provided the student's parents with extensive information about agencies that could further assist the student in making a smooth transition to life after graduation.
- \* "In these circumstances, even assuming that the information provided in the IEP was imperfect, we agree with the District Court that [the student] was not deprived of any educational opportunity," the court wrote.
- \* *See Rodrigues v. Fort Lee Bd. of Educ.*, 57 IDELR 152 (3<sup>rd</sup> Cir. 2011).

## Transition Plan Responsibility

- \* The parents of a student with an undisclosed disability could not recover the \$75,000 cost of their son's postsecondary transition program from either a Pennsylvania district or the vocational school that refused to give him an application.
- \* Determining the student's online charter school was responsible for arranging transition services, the court affirmed the dismissal of the parents' disability discrimination claims.
- \* The charter school was the student's LEA under the IDEA. As such, it was responsible for providing the student FAPE.
- \* The district's failure to recommend that the student attend a vocational-technical school was not based on the student's disability. The district was not the student's LEA, and thus was not required to make sure the student received FAPE.
- \* *See Dutkevitch v. Pennsylvania Cyber Charter School.*, 57 IDELR 32 (3<sup>rd</sup> Cir. 2011), *cert denied* 112 LRP 13472.

## Postsecondary Goal Requirements

- \* Must an IEP include measurable postsecondary goals in each of the areas of training, education, employment, and independent living skills? Are there any circumstances in which goals for training and education can be combined?
- \* The IDEA does not define the terms "training" and "education." However, the areas of training and education can reasonably be interpreted as overlapping in certain instances.

## Postsecondary Goal Requirements

- \* The IEP Team must consider the unique needs of each individual student with a disability. If the IEP Team determines that separate postsecondary goals in the areas of training and education would not result in the need for distinct skills for the student after leaving high school, the IEP Team can combine the training and education goals of the student into one or more postsecondary goals addressing those areas.

## Postsecondary Goal Requirements

- ★ Thus, in some instances, it would be permissible for the IEP to include a combined postsecondary goal or goals in the areas of training and education to address a student's postsecondary plans, if determined appropriate by the IEP Team.
- ★ On the other hand, because employment is a distinct activity from the areas related to training and education, each student's IEP must include a separate postsecondary goal in the area of employment.
- ★ See *Questions and Answers on Secondary Transition*, 57 IDELR 231 (OSEP 2011) and *Letter to Cox*, 112 LRP 6511 (OSEP 2011).

## Inadequate Transition Plans

- ★ Despite claiming that their daughter's postsecondary transition services were "too generalized" and "inadequate," the parents the need for compensatory education.
- ★ The Court held that the student's transition services were appropriate. Although the parents' rehabilitation consultant testified that the student's travel training could have been improved, the court explained that the district had no obligation to maximize the student's potential. Instead, the district only needed to ensure that the student's travel training resulted in meaningful benefits.
- ★ The student received transition services in other areas as well. In addition to participating in employment-related classes, where she learned skills such as résumé writing and job interviewing, the student attended a life skills summer program and participated in a community services club. The student made progress on transition goals related to handling and calculating money.
- ★ Concluding that the student benefited from her transition plan, the court held the district did not err in failing to provide the parents' preferred level of services.
- ★ See *K.C. v. Nazareth Area Sch. Dist.*, 57 IDELR 92 (E.D. Pa. 2011).

## Assessments and Interests

- \* The District Court held that the transition plan, which reflected the student's strong interests in fashion and child care, was reasonably calculated to provide FAPE. The court found that the transition plan was appropriate.
- \* An occupational assessment conducted in the student's junior year showed that she had both a high interest and a high skill level in the fields of fashion, child care, and child development. The student also had a high interest score in the area of performing arts, but her skill score in this area was in the 'very low' range.
- \* Based on the assessments, the IEP team developed a transition plan that called for the student to work in a clothing store -- a job that she enjoyed and performed well. The transition plan also called for the student to work as a classroom aide in an elementary school music class. While that placement was discontinued the following year due to the student's dissatisfaction with the position, the district included one-to-one music instruction in the student's IEP.
- \* The court concluded that the transition plan reflected the student's skills and interests, and included a series of practical goals that would help her transition into life after high school.
- \* See *K.C. v. Mansfield Indep. Sch. Dist.*, 52 IDELR 103 (N.D. Tex. 2009).

## Age Appropriate Transition Assessments

- \* Instead of merely identifying the agencies responsible for providing transition services, the ED should have conducted age-appropriate transition assessments, developed appropriate postsecondary goals, and identified the services needed to reach those goals. "The lack of assessments alone is enough to constitute a lost educational opportunity and establish a denial of FAPE. See *Carrie I. v. Dep't. of Ed., State of Hawaii*, 59 IDELR 46 (D. Haw. 2012).

## Link to IEP Goals

- ★ The IDEA does not require a student's transition plan to dictate her IEP goals. Although the process is results-oriented, a transition plan will not be invalid because of a failure to influence IEP goals. The IDEA simply requires that meaningful educational progress be made in line with the student's particular needs and interests. See *High v. Exeter Twp. Sch. Dist.*, 54 IDELR 17 (E.D. Pa. 2010).

## Sufficiency of Transition Plan

- ★ Although the student met the eligibility requirements for graduation, his parent refused to allow him to accept his diploma because, allegedly, he was not prepared for independent living. The parent argued that the student's IEP was not reasonably calculated to enable him to receive educational benefit during his senior year because the student did not make sufficient progress toward his IEP goals.
- ★ Absence of progress toward IEP goals per se does not make an IEP inadequate. Relying on the 1st U.S. Circuit Court of Appeals ruling in *Lessard v. Wilton Lyndeborough Cooperative School District*, 49 IDELR 180 (1<sup>st</sup> Cir. 2008), the District Court reviewed the student's IEP as a snapshot, not a retrospective. "The inquiry is not whether the student was fully prepared for independent living or whether he continued to have significant problems in some areas," the court wrote.
- ★ Rather, the correct standard for considering a denial of FAPE claim is whether the district, by virtue of a reasonably calculated IEP, made educational benefit available to the student. Because the 12th-grade IEP contained transition services, and provided services to address the student's identified areas of difficulty, it was reasonable to conclude that the IEP was reasonably calculated to provide the student with educational benefit.
- ★ See *Doe v. Marlborough Pub. Schs.*, 54 IDELR 283 (D. Mass. 2010).

## Deficient Transition Plans

- \* Students who graduate without transition services may be entitled to post-graduation relief. The court ordered compensatory relief when a school district fails to provide appropriate transition services prior to awarding a regular high school diploma. *See J.B. v. Killingly Bd. of Educ.*, 27 IDELR 324 (D. Conn. 1997).

## Caution

- \* Court decisions have been wide and variable when it comes to graduation and the sufficiency or deficiency of transition planning.
- \* One point is clear, graduation does not cut off the right to compensatory education for a past violation. Although proving harm may be difficult, it is possible to prevail in a claim for compensatory education post-graduation.
- \* Minimizing surprises and matching pictures will avoid many potential disputes.

# Questions?

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