

"The ARD Meeting Was Duly Noticed": Drafting Defensible Deliberations

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**take
note**

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The Minutes Should Reflect Dialogue: The Dialogue Reflects the Law

- Bd of Education of the Hendrick-Hudson Control School Dist. V. Rowley (U.S.1982)
- Endrew F. V. Douglas County School District (U.S. 2017)
- Cypress Fairbanks ISD v. Michael F. 118 F. 3d. 245(5th Cir.1997)

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So, What Was FAPE According to Rowley?

1. Did the school district comply with procedural requirements of the IDEA & accompanying regulations?
2. Is the IEP reasonably calculated to enable the student to receive an educational benefit?



PLUS  now clarified by U.S. Sup Ct in Endrew

Student Profile: educated in regular classrooms of public school system, she performed better than the average child, advancing from grade to grade

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What Was the FAPE Standard According to Endrew?

- “Some educational benefit” standard from Rowley did not work in Endrew
- IEP Instruction must be specially designed to meet a child’s unique needs
- IEP must be reasonably calculated to enable the child to make progress (appropriately ambitious) in light of his circumstances

Student Profile: student with Autism, behaviors interfered with progress, not in general ed setting

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What are the 4 Factors of FAPE

1. An individualized program based on the student's assessment and performance,
2. That is administered in the least restrictive environment,
3. The services are provided in a coordinated and collaborative manner by the key stakeholders, and
4. There are demonstrated positive benefits both academically and non-academically

Cypress Fairbanks ISD v. Michael F

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So, Does This Mean the U.S. Sup. Ct. Shifted the Standard to Maximizing Potential?



In the Rowley decision the U.S. Supreme Court says not required to maximize benefit



In the Endrew decision the U.S. Sup. Ct. rejected that standard requested by parents "is an education that aims to provide a child with a disability, opportunities to achieve academic success, sustain self-sufficiency, & contribute to society that are substantially equal to the opportunities afforded children without disabilities." U.S. Sup. Ct. says that is "plainly at odds with what was decided in Rowley."

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Practical Pointers: Documenting Compliance with Key Decisions

- Minutes Should: Reflect
 - Compliance with state & federal procedures
 - Child's placement – general ed setting vs. sped setting- for application of standard – where is the student receiving services, be honest call it what it is. (Is the schedule of services page clear?)
 - Child's performance, compared to gen ed peers, (benchmarks, STAAR, FIE, grades, grade snapshots)

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- Minutes Should: Reflect (continued)
 - Present Levels of Academic & Functional Performance are clear, specific, data based, responsive to the child's unique circumstances
 - Candid & forthright description of functional implications of child's disability in school settings
 - A "cogent & responsive explanation for decisions that shows the IEP is reasonably calculated to enable the child to make progress in light of his circumstances"

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- Minutes Should: Reflect (continued)
 - Documentation that IEP goals & objectives are appropriately ambitious or challenging in light of the child's circumstances – as supported by evaluation data
 - The program is individualized based on assessment & performance
 - The program is administered in the LRE
 - The Services are provided in a coordinated & collaborative manner by the key stakeholders
 - Demonstrated positive benefits both academically & non-academically

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- Minutes Should: Reflect (continued)
 - Don't forget behavioral competencies
 - Don't include a ridiculous number of goals & objectives in the IEP & then fail to review & revise the IEP in response to the student's failure to progress towards mastery of goals. Bougadis v. Pine Plains Central School District, 53 IDELR.42(S.D.Y.Y.2009)

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The Minutes Should Reflect the Right People Were There

- A reminder of the required ARDC members
 - Parent
 - Regular Education Teacher
 - Special Education Teacher
 - District Representative
 - Individual Who Can Interpret Assessment
 - Other Individuals Requested by the Parent or Agency with Knowledge
 - The Child with a Disability, When Appropriate

34 CFR §300.321

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Practical Pointers: ARDC Participants

- Send attendance sheet around at the beginning for people to record names & position, and attach it to the minutes, if on ZOOM have them announce KNOW WHO IS THERE
- If persons who are not required members of the ARDC arrive after the ARD begins, or leave before the ARDC meeting ends, record in the minutes
- Always document parent agreements to excuse a required member of the ARDC
- Note name & position of folks the parent may bring

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What if a parent shows up with an advocate or attorney & the District was not notified, should the ARDC meeting be rescheduled until the District's attorney can be present?

It Depends.

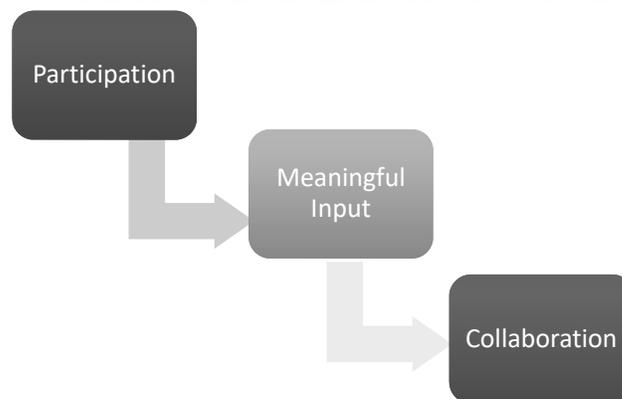
- Most parent attorneys will call the District's counsel in advance.
- Be aware of OSEP letter, Letter to Andel, 67 IDELR 156 (OSEP 2016)
- District's postponement of ARD to allow for participation of District counsel is considered appropriate by Hearing Officer - Student v. Ysleta ISD, Dkt No. 021-SE-900 (Tex. SEA 2000)
- What about a court appointed attorney or Disability Rights Texas?

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The Minutes Should Reflect District Efforts to Cooperate & Collaborate With the Parents

THREE KEY POINTS



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Are Attorneys or Advocates Required Members of the ARDC?



It just seems like it.

Keep in mind a parent can bring to the ARDC meeting other individuals who have knowledge or special expertise regarding the child. Understand the Disability Rights Texas Agenda.

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What is the Fifth Circuit Guidance on Collaboration With Parents?

In *Cypress Fairbanks ISD v. Michael F.*, one of the 4 Factors of FAPE is that the services were provided in a coordinated & collaborative manner by the key stakeholders



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What Steps Should the District Take to Ensure Parent Participation?

- How Should ARD Minutes Document This?
 - Document all efforts on ensuring parent participation in the ARDC consistent with 34 CFR §300.322
 - If participating by phone or videoconferencing note it in the minutes
 - If parent declined to participate in ARDC meeting, after notice, & requested the District to proceed, then this should be clearly noted

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What is the U.S. Supreme Court's Position on Parent Involvement in the IEP Process?

- “The core of the statute, however, is the cooperative process that it establishes between Parent and schools. School Districts have a natural advantage in information & expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of Parents and to share information with them.” *Schaffer v. Weast*, 126 Sup. Ct. 528, 536 (2005)

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And What Did Congress Say About Parental Involvement?

••• **The Act** and those regulations encourage parental input & involvement in all aspects of a child's educational program & provide many opportunities for Parents to provide information, that becomes part of the child's educational record. Comments to IDEA, Federal Register, VOL. 71, No. 156, page 46688 (Aug 14, 2006)

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What if the Parent refuses to attend the ARDC meeting, what should the minutes reflect?

Can we proceed?

Yes, BUT...

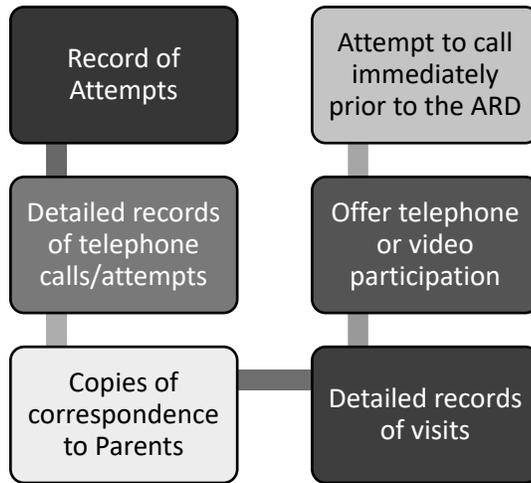
Compliance with 34CFR §300.322 is CRITICAL

(Notification of ARD, scheduling at mutually agreed on time & place)

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What if the Parent refuses to attend the ARDC meeting, what should the minutes reflect?
(continued)



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What if the Parent refuses to attend the ARDC meeting, what should the minutes reflect?
(continued)

**BOTTOM LINE
IMPACT**

While the District welcomes & encourages Parent participation, the District will proceed with ARDC meeting pursuant to 34 CFR §300.322

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Is it O.K. to note the District had a staffing prior to the ARDC meeting, without the Parent?

absolutely

- Meetings do not include informal or unscheduled conversations involving District personnel, or issues such as teaching methodology, lesson plans, or coordination of service provision, or preparatory activities that the District engages in to develop a proposal or response that will be discussed at a later meeting. This means Parents do not have a right to attend staffings prior to ARDC meetings. 34CFR §300.501(b)

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Is it O.K. to note the District had a staffing prior to the ARDC meeting, without the Parent? (continued)

- Staffings to prepare proposals for an upcoming ARDC meeting, draft goals, present levels often lead to more efficient ARDC meetings. Just watch out for predetermination. S.P. v. Scottsdale No.48, G2 IDELR 8c (D.C. AZ 2015)
- Document steps to ensure parents had an opportunity for participation in development of IEP prior to the ARDC meeting, but label draft documents as DRAFTS.

71 Fed. Reg. 466 78 (Aug 14 2006)

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How Should Minutes Reflect Meaningful Participation of the Parents?

interesting.

- The Fifth Circuit says that a District does not satisfy its responsibility for parent participation if there is “bad faith exclusion of the parents or a refusal to listen or get input from the parents. *White v. Ascension Parish*, 343 F.3d 373 (5th Cir. 2003)
- Parents may be denied FAPE if procedural violations significantly impeded the Parents opportunity to participate in the decision making process. 34 CFR§300.513(a)(2)(ii)

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How Do We Document to Defend Against a “Significantly Impeded” Challenge?

- Document parent’s participation every step of the way
- Note how parent’s actually participated in the process, before, during, and after the ARD
- Document parent participation & agreement to each part of the IEP
- Detail the length of meetings and/or informal conferences
- Keep documentation of all informal conferences
- Note all efforts made to encourage parent participation in the ARD or other conferences & parent response
- Note any efforts to secure release to consult with private providers

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What is Contemplated by Meaningful Participation?

- “Meaningful Participation” is not the right to a line item veto
- The District does not have to adopt the parent’s recommendations, but it does have to consider them. Meaningful participation means the ability to participate in the process, not the right to dictate an outcome

White v. Ascension Parish 343 F. 3d 373 (5th Cir. 2003)

- Don’t force the school’s position without considering other options

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Other than Participation in ARDC Meetings, What are Other Ways to Document Collaboration?

- Permit parents to inspect & review educational records prior to the ARDC meeting under FERPA & IDEA
- Emails are not required for collaboration
- Informal conferences
- Efforts to consult with private providers
- Telephone consults
- Parent/Teacher conferences
- Provision of IEP drafts

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Other than Participation in ARDC Meetings, What are Other Ways to Document Collaboration?

- Follow-up & consultation of parent's outside documentation, or reports or research
- If appropriate, in home consultation
- Teacher to teacher collaboration, including gathering present levels of academic functional performance prior to the ARDC meeting
- Include consideration of parent requests in the minutes, including information from private providers. Even if not adopted, note the consideration
- Consideration of all evaluations

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Have Courts Ever Acknowledged a Parent's Unwillingness to Collaborate?



- In *Rockwall ISD v. M.C.* 67 IDELR 108 (5th Cir. 2016)

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Have Courts Ever Acknowledged a Parent's Unwillingness to Collaborate?



The Practical Implication is that the written record of the ARDC meeting is critical. In this case, the ARD minutes, testimony, letters & emails from the District enabled the Court to conclude that the District took a “collaborative approach” to the IEP whereas “the record shows that the Parents had no intention of continuing with the ARDC unless RISD approved their proposal”

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Assume We have Documented Parent Participation, Meaningful participation, but the Parent Disagrees?

No Problem!

ZingerBug.com

- The law contemplates disagreement & has a detailed responsive process
- Prior to folding for a “total” disagreement, make sure you have clearly documented the areas with which the parent disagrees.

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What Should be Noted About the Disagreement ARD?

Follow the procedures of 19 T.A.C. § 89.1050(h) regarding the 10 day recess period:

When mutual agreement about all required elements of the IEP is not achieved, the parent(s) or adult student who disagree(s) shall be offered a single opportunity to have the committee recess for a period of time not to exceed 10 school days. This recess is not required when the student's presence on the campus presents a danger of physical harm to the student or others, or when the student has committed an expellable offense or an offense, which may lead to a placement in an AEP. The requirements of this subsection (h) do not prohibit the members of the ARD committee from recessing an ARD committee meeting for reasons other than the failure of the parents and the school district from reaching mutual agreement about all required elements of an IEP.

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What Should We Do During the 10 Day Recess?

- During the recess the committee members shall consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons, which may assist in enabling the ARD committee to reach mutual agreement.
- The date, time, and place for continuing the ARD committee meeting shall be determined by mutual agreement prior to the recess.

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What if After the Recess There Is Still No Agreement?

- If a ten-day recess is implemented as provided in paragraph (1) of this subsection and the ARD committee still cannot reach mutual agreement, the district shall implement the IEP with which it has determined to be appropriate for this student.
- When mutual agreement is not reached, a written statement of the basis for the disagreement shall be included in the IEP. According to SB1259, a statement of whether or not the parent (or adult student) and the administrator are in agreement with decisions made is required.
- When a district implements an IEP with which the parents disagree or the adult student disagrees, the district shall provide prior written notice to the parents or adult student as required in 34 CFR §300.503.
- Parents shall have the right to file a complaint, request mediation, or request a due process hearing at any point when they disagree with the decisions of the committee.

19 TAC § 89.1050(h) and SB1259

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Can't the District Just Give the Parents What They Want?

- It depends. Remember that the school remains responsible for providing FAPE, not the parent.
- IDEA places the obligation to provide a FAPE on the District., not the parent. Although it is certainly desirable and commendable for a school district to take seriously parental input and to try to accommodate parental desires, schools cannot circumvent their legal responsibility to provide FAPE by deferring to parental choices about education. *Daryl B. v. Lake Travis ISD*, Dkt. No. 050-SE-996 (Texas Hearing Officer dec'n. 1997).
- [T]he law does not mandate that parental wishes be followed to the detriment of the child's education, and districts remain liable for the provision of FAPE." *Dallas ISD*, Docket No. 028-SE-0906, 107 LRP 32102 (Texas Hearing Officer Janis Herd, 2006).

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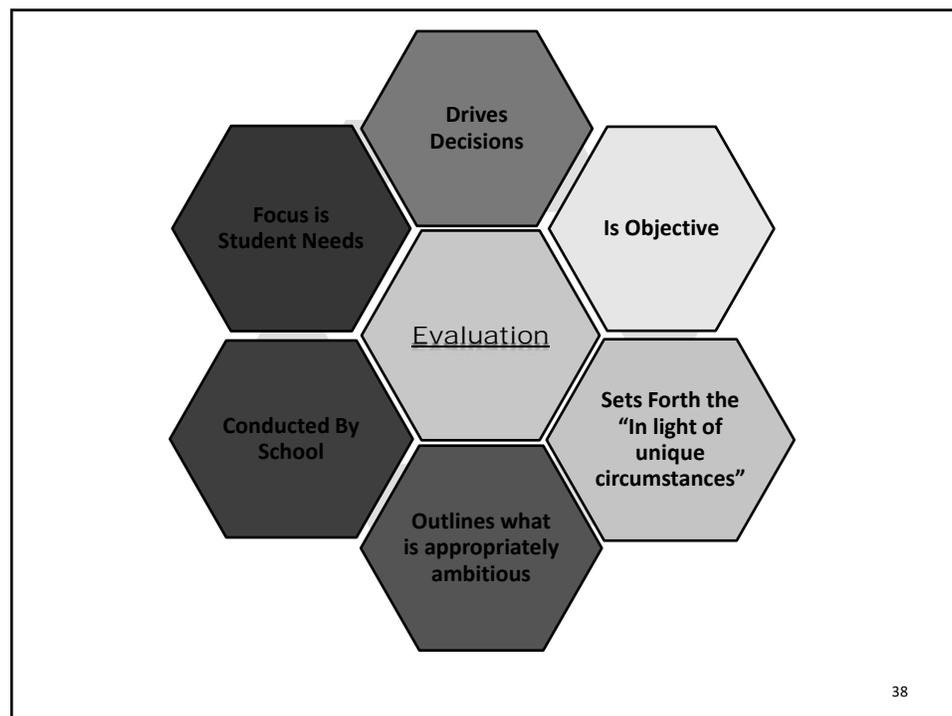
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What is the Best Way to Respond to a Parent's Request for Services Which Are Not Educationally Required, Based on Assessment, or Appropriate?

- Offer to conduct an assessment in the area of dispute to determine if the service is necessary to confer an educational benefit.
- Be wary of IEP's that contain more information or requirements than are educationally necessary.

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General Considerations Regarding ARDC Deliberations:

- Practical Pointers
 - Do not permit parents or advocates to direct ARD or minutes
 - The ARD record should reflect every evaluation considered by the ARDC
 - State any areas of disagreement & summarize in ARD minutes

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General Considerations Regarding ARDC Deliberations:

- Practical Pointers (continued)
 - Do written minutes, don't rely on a tape recording or zoom.
 - Make the minutes reflect the agenda.
 - Don't try to do a blow-by-blow.
 - Summarize the issues discussed, the positions taken, the parent's requests, the District's response, and your action plan.
 - Stick to the facts. Avoid vague conclusory statements.
 - Distinguish District's offer of FAPE and offer of enrichment activities.
 - Summarize District's proposed program or create action plan at the end.
 - There is no requirement to read minutes aloud at the end of the meeting.
 - Remind parents ARD Committee seeks agreement to program, not minutes.
 - Identify any parent edit as a parent addendum.
 - There is no legal requirement to prepare minutes BUT it is your opportunity to tell your story to a potential reader (judge, TEA, OCR.). Don't draft on screen as you move along.

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General Considerations Regarding ARDC Deliberations:

- Practical Pointers (continued)
 - Keep administrative reasons out of the minutes
 - Stay evaluation & child centered, do not compromise professional judgement
 - Note District offers & parent's acceptance or rejection of offers
 - Key Guideposts – purpose, current progress, parent input, regulatory reg. & action plan
 - Action plan in minutes should be consistent with PWN

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So If Minutes Are Not Really Required, Why Are We Doing Them?

Because the minutes are the best record of what you have done.

1. "The written report of the ARD committee shall document the decisions of the committee with respect to issues discussed at the meeting."
19 T.A.C. § 89.1050(e) (current TEA Regulations)
2. Well written minutes provide the best evidence regarding a fact in dispute and are typically generated before the parties are in litigation.
3. Commitments Reflected in the Minutes are Binding on the District? YES
Michael J. v. Houston ISD, Dkt. No. 364-SE-798 (Texas Hearing Officer dec'n November 1998 – James Holtz).
4. Must minutes Have a Certain Level of Specificity? NO
James S. v. McKinney, Dkt. No. 122-SE-1200 (Texas Hearing Officer dec'n March 2001 – James Holtz).

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**One MORE Note.....KEEP TRACK OF
CHANGES TO TEXAS ADMIN. CODE**

- ARDC NEEDS TO ACCEPT A NURSE OR PA SIGNATURE FOR OHI
- FBA AND BIP WILL BE REQUIRED FOR ANY STUDENT WITH A DISABILITY (DISCIPLINARY CHANGE OF PLACEMENT) WHETHER RELATED OR NOT
- PLUS MORE BIPS ANNUALLY
- MORE DOCUMENTATION /RESTRAINT AND TIMEOUT

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CASES FOR LATE NIGHT READING (WHILE WATCHING OZARK ON NETFLIX)

- Ms. Ineeta Drink, knows how to have a good time. She loves Netflix and FAPE cases. Her TOP TEN cases:
- E.R. V SPRING BRANCH
- SBC V NYC DOE
- E.M. V LEWISVILLE
- HOUSTON V BOBBY R
- O.W. V SPRING BRANCH
- CM. V WARREN



Slide 45

DH1 Denise Hays, 5/26/2022

DH2 Denise Hays, 5/26/2022

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