When Nondisabled Students, Their Parents or School Staff Interfere with FAPE

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Housekeeping

- **The slides and the presentation are not legal advice.**
  - Facts, state law, and local policy can make a tremendous difference.
  - The slides are intended as an introduction to these issues and dynamics. The slides are NOT intended to provide a comprehensive listing of all relevant cases.
  - My comments and observations are based on the published decision and will not include all issues or facts presented.

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Active Cooperation Sometimes Required

- The school's ability to provide FAPE under either Section 504 or IDEA can require *active* cooperation by nondisabled students and their parents to protect allergic students from allergens.
- That a student with a disability might require a service or accommodation because of impairment should not surprise anyone.

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IDEA Eligibility Proves Need for Services

- ***Daniel R.R. v. State Bd. of Educ.,*** **441 IDELR 433 (5th Cir. 1989)**
  - "Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or **they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs."** (Emphasis added).

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Differing Treatment can be Fair Treatment

- To satisfy the FAPE duty under either Section 504 or IDEA, the school is often required to provide the student with a disability additional or different services and supports that their nondisabled peers do not receive.
- **Nondisabled students and their parents may object:**
  - Because they are required to change their lifestyle.
  - Because they see the services as unfair advantage.

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Services for One Student, Objection by Another

- **FAPE that impacts the lifestyles of others:**
  - As a parent I want to determine what my child eats at school. The school's peanut restrictions prevent that.
  - I want to know WHY my student can't bring a peanut butter sandwich to school.

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I Will Decide What to Send in my Student's Lunch.

***Liebau v. Romeo Cmty. Schs.,* 61 IDELR 231 (Mich. Ct. App. 2013, *unpublished*).**

- **The Facts:**
  - Having tried less intrusive accommodations (which failed), the elementary school banned all peanut and tree-nut products to protect a student with a severe, life-threatening allergy. The ban is part of the student's Section 504 Plan.
  - The Plaintiff is the parent of another student in the school. Plaintiff objected to the ban and notified the school that she would not comply. She informed the school of her refusal to cooperate in a note.

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I Will Decide What to Send in my Student's Lunch.

***Liebau v. Romeo Cmty. Schs.,* (cont'd)**

- **The Note:**
  - "To meet my child's needs, I will provide my child with the proper nutrition in her school lunch as I, in my sole discretion, deem appropriate. The School is not permitted to take any disciplinary action — including, but not limited to, taking away her food or removing her to a different location. Any such action against my child will be discriminatory, harassment, and an act of retaliation in violation of her rights under the Rehabilitation Act and infringes on our individual rights, including our right against despotic control and our right to freedom of choice."

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I Will Decide What to Send in my Student's Lunch.
Liebau v. Romeo Cmty. Schs., (cont'd)

- **The Allegations:**
  - (1) The ban violates constitutional rights of parent and student;
  - (2) The ban was a breach of the school's fiduciary duty and an abuse of power;
  - (3) The school used intimidation and harassment to compel student and parent to comply;
  - (4) Since plaintiff and child are not parties to the 504 Plan, they cannot be bound by a ban created pursuant to the plan; and
  - (5) The ban ignores nutritional and medical needs of Plaintiff's child.

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I Will Decide What to Send in my Student's Lunch.
Liebau v. Romeo Cmty. Schs., (cont'd)

- **The School's Response:**
  - It had a legal obligation to accommodate the allergic student and act on medical data indicating that lesser accommodations were insufficient to eliminate the risk of harm.
  - OCR had informed the school that the student with the allergy is entitled to FAPE .

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I Will Decide What to Send in my Student's Lunch.
Liebau v. Romeo Cmty. Schs., (cont'd)

- **The Court's Response:**
  - The Plaintiff and child have no standing to challenge the Section 504 Plan of another student by way of the Rehabilitation Act of 1973.
  - The nutritional needs argument loses because Plaintiff's daughter is not Section 504 eligible.
    - Plaintiff had sought Section 504 eligibility for her daughter who allegedly, due to medical condition, was *required* to consume nut products.
    - No eligibility was found, and this issue was not appealed.

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I Will Decide What to Send in my Student's Lunch.
Liebau v. Romeo Cmty. Schs., (cont'd)

- **The Court's Response:**
  - The liberty and property interest claims fails:
    - "Plaintiff argues that the nut-ban policy deprives her of a liberty or property interest because it requires her to purchase more expensive foods she otherwise would not have to buy…. The nut-ban policy does not require plaintiff to purchase any specific food item; it only prohibits plaintiff's child from bringing to school one very narrow class of items."

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I Will Decide What to Send in my Student's Lunch.
Liebau v. Romeo Cmty. Schs., (cont'd)

- **The Court's Response:**
  - The contract theory fails:
    - "Plaintiff further argues that because she and her daughter are not parties to the 504 plan, she cannot be bound by the nut-ban policy that was implemented pursuant to that plan. We reject this contract-based argument because the nut-plan policy imposed by the school is not a matter of contract; rather, it is based on the school district's statutory authority to adopt policies and procedures for the health, safety, and educational benefit of its students."

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I Will Decide What to Send in my Student's Lunch.
Liebau v. Romeo Cmty. Schs., (cont'd)

- **The Court's Response:**
  - "The ban is not an arbitrary exercise of power but, rather, is rationally related to the legitimate government purpose of providing an education for a student with a life-threatening allergy to nut products."
  - The student with the allergy eligible under Section 504 has rights that Plaintiff's child does not have, justifying the different treatment by the school.

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I Will Decide What to Send in my Student's Lunch.
Liebau v. Romeo Cmty. Schs., (cont'd)

- **The Court's Response:**
  - Why does the student with disability get special treatment?
    - "[T]he Rehabilitation Act is intended to address the needs of individuals with a disability to prevent discrimination against them in the services offered. **Furthermore, the different treatment of such students is rationally related to a legitimate government interest of protecting disabled students.** Plaintiff has not shown that the different treatment afforded to disabled students violates the Equal Protection Clause." (Emphasis added).

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I Will Decide What to Send in my Student's Lunch.
Liebau v. Romeo Cmty. Schs., (cont'd)

- **And why was Plaintiff's daughter's lunch searched?**
  - The court's reply was fairly simple: *You wrote a note and said you were sending nuts in her lunch.*
    - "Despite plaintiff's claim about her daughter being intimidated by lunchroom staff, plaintiff did not offer any basis for finding that school staff had conducted a search and seizure beyond the removal of banned items observed by school staff or a search of a child's belongings where the school was given advance notice that the ban was being violated."

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I Will Decide What to Send in my Student's Lunch.
***Liebau v. Romeo Cmty. Schs.,* (cont'd)**

- **And why was Plaintiff's daughter's lunch searched?**
  - "A search and seizure based on either a staff person's actual observation of an item that has the characteristics of a banned item or a noncompliant parent's notification to the school that the policy would be violated will satisfy the lesser reasonable-suspicion standard applicable to school personnel."

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Other Parents' Questions are Harassment?
***Pacific Grove (CA) Unified Sch. Dist.,* 47 IDELR 138 (OCR 2006).**

- **The Facts:**
  - A third-grade student with a nut allergy qualified for special education as Other Health Impairment.
  - Keeping the student safe required some changes in the classroom.
    - On a daily basis, the school vacuumed classroom carpet, washed all classroom desks, and required hand-washing by anyone entering the room and maintained the classroom food-free.

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Other Parents' Questions are Harassment?

***Pacific Grove (CA) Unified Sch. Dist.,* 47 IDELR 138 (OCR 2006).**

- **The Facts:**
  - Parents and students asked a lot of questions about the accommodations and why things were occurring.
  - Generally, the tone was not hostile, although the parent of the student with allergies reported hostile looks, and "3rd grade parents unnecessarily calling her and being rude."
  - The parent of the allergic student alleged disability harassment.

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Other Parents' Questions are Harassment?

***Pacific Grove (CA) Unified Sch. Dist.,* 47 IDELR 138 (OCR 2006).**

- **OCR: What do you expect?**
  - OCR finds no violation — other parents wanting answers is not harassment; it's to be expected.
  - "In order for the classroom program to work effectively and result in a reasonably safe environment for the Student, **the voluntary cooperation of other students and their parents was essential.** Part of this process was an on-going dialogue and informational process." (Emphasis added).

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Other Parents' Questions are Harassment?

Pacific Grove (CA) Unified Sch. Dist., **47 IDELR 138 (OCR 2006).**

- **OCR: What do you expect?**
  - "Much of the behavior identified by the complainants represents reasonable inquiries on the part of parents and their children who were participants in the classroom to which Student was assigned."
  - "In many cases, the questioning by parents and students were made to Student's mother and her aide. It appears that this was done to avoid questioning the Student directly, in most cases."

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Other Parents' Questions are Harassment?

Pacific Grove (CA) Unified Sch. Dist., **47 IDELR 138 (OCR 2006).**

- "The evidence shows that the District took reasonable steps to inform the affected students and their families as to the nature of the modifications to their educational environment and to explain the necessity for the changes."

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Other Parents' Questions are Harassment?

***Pacific Grove (CA) Unified Sch. Dist.,* 47 IDELR 138 (OCR 2006)**

- **Providing information is essential to cooperation.** "The other participants were being asked to alter their customary behavior in ways that were novel and restrictive of their personal preferences. It is reasonable that, without animus or a discriminatory purpose, they might question the necessity of the procedures they were being asked to follow."

- But what about FERPA confidentiality concerns?

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Some Final Thoughts on Impacting the Lifestyles of Others

- **Bans or prohibitions should be as limited as possible while still providing the appropriate level of safety to the student with disability.**
  - Data matters.
    - Is the student's allergy so serious that even trace amounts of nuts will trigger a reaction, or does the student need to consume nuts to trigger it? How serious is the reaction? Has the allergy been triggered at school?
    - What precautions are used in other settings the student frequents?
  - A perfectly safe school environment is not required. *Washington (NC) Montessori Pub. Charter Sch.,* 60 IDELR 79 (OCR 2012); *See also, Saluda (SC) Sch. Dist. One,* 47 IDELR 22 (OCR 2006).

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Some Final Thoughts on Impacting the Lifestyles of Others

- **A ban or limitation should be explained sufficiently to enable nondisabled peers and parents to understand why it is necessary.**
  - That means getting FERPA consent to disclose details of previous exposures and consequences.
  - Neither the school nor the parent should assume that limits on the actions of others will be embraced warmly upon mere announcement.
  - Dave Note: Best results come from personalizing the need and articulating to others why the action is necessary.

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Services for One Student, Objection by Another

- **Why do nondisabled peers and their parents object?**
  - The competition problem:
    - How can a special education student be valedictorian?
    - I understand that the student may need some help, but THAT MUCH help?
    - Some school opportunities are limited.
  - The result? Allegations of unfair advantage over accommodations, services, and difference in treatment.
    - The following cases also include situations where the school prevented unfair advantage.

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Accommodation or Unfair Advantage

PGA TOUR, INC. v. Martin, **20 NDLR 188 (U.S. 2001).**

- **The Facts:**
  - Martin has a degenerative circulatory disorder resulting in severe pain and atrophy in his right leg.
  - As a professional golfer with a tour card, Martin wanted to participate in tournaments run by the PGA.
  - The problem: PGA rules generally require competitors to walk the course during tournament play.

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Accommodation or Unfair Advantage

PGA TOUR, INC. v. Martin, **20 NDLR 188 (U.S. 2001).**

- **The Facts:**
  - PGA's position: "Walking is a substantive rule of competition, and that waiving it as to **any individual for any reason** would fundamentally alter the nature of the competition." (emphasis added).
  - Due to his condition, Martin was unable to walk the 18-hole course. Walking caused him pain, fatigue, and anxiety.
    - He was at significant risk of hemorrhaging, developing blood clots, and "fracturing his tibia so badly that an amputation might be required."

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Accommodation or Unfair Advantage

PGA TOUR, INC. v. Martin, **20 NDLR 188 (U.S. 2001).**

- **The Facts:**
  - Martin's request to use a golf cart during tournament play was denied by the PGA:
    - Without making any attempt to review the medical evidence provided by Martin in conjunction with his request; and
    - Without any attempt to consider Martin's personal circumstances, and the impact of the walking rule as applied to him.

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Accommodation or Unfair Advantage

PGA TOUR, INC. v. Martin, **20 NDLR 188 (U.S. 2001)**

- "Martin presented evidence, and the judge found, that ***even with the use of a cart,*** Martin must walk over a mile during an 18-hole round, and that **the fatigue he suffers** from coping with his disability **is 'undeniably greater'** than the fatigue his able-bodied competitors endure from walking the course." (Emphasis added).

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Accommodation or Unfair Advantage

***PGA TOUR, INC. v. Martin,* 20 NDLR 188 (U.S. 2001).**

- "The other golfers have to endure the psychological stress of competition as part of their fatigue; **Martin has the same stress plus the added stress of pain and risk of serious injury.** As he put it, he would gladly trade the cart for a good leg." (Emphasis added).

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Accommodation or Unfair Advantage

***PGA TOUR, INC. v. Martin,* 20 NDLR 188 (U.S. 2001).**

- **How important is walking to golf?**
  - "Arnold Palmer, Jack Nicklaus, and Ken Venturi explained that fatigue can be a critical factor in a tournament, particularly on the last day when **psychological pressure is at a maximum.** Their testimony makes it clear that, in their view, permission to use a cart **might well give some players a competitive advantage** over other players who must walk." (emphasis added).

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Accommodation or Unfair Advantage

***PGA TOUR, INC. v. Martin,* 20 NDLR 188 (U.S. 2001).**

- **The Supreme Court: How important is walking to golf?**
  - Not very. The walking rule or "no cart rule" is not an essential attribute of the game of golf.
  - The walking rule does not guarantee that each competitor will play under exactly the same conditions.
  - Pure chance may have a greater impact on the game than the walking rule.

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Accommodation or Unfair Advantage

***PGA TOUR, INC. v. Martin,* 20 NDLR 188 (U.S. 2001).**

- **The Supreme Court: This is not unfair advantage.**
  - "A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament."
  - "What it can be said to do, on the other hand, is to allow Martin the **chance to qualify for and compete** in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires." (Emphasis added).

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Services for One Student, Objection by Others

- **The underlying argument of unfair advantage lives on as the basis of complaints by both parents of nondisabled students and, sometimes, school personnel.**
  - The argument: The student with disability is not receiving accommodations or appropriate services, but, instead, an unfair advantage.

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How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, **39 IDELR 64 (D.N.J. 2003)**

- **The Facts:**
  - Senior student suffered "substantial fatigue" from an unspecified physical impairment.
  - She was unable to attend school for a full day, and was provided, by IEP, "a hybrid program that allows her to attend morning classes and receive the remainder of her instruction at home."

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How Can She Possibly be the Valedictorian?
***Hornstine v. Township of Moorestown,* (cont'd)**

- **The Facts:**
  - She took many honors classes with weighted grades and was poised to be the class valedictorian.
  - **Community unrest about her "unfair advantage,"** together with a **new superintendent,** resulted in a proposed **retroactive** policy change under which the school board would have discretion to name multiple valedictorians or could award the honor to someone other than the student with disability.

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How Can She Possibly be the Valedictorian?
***Hornstine v. Township of Moorestown,* (cont'd).**

- **The Court is not happy:**
  - "Given that this case has generated a firestorm of controversy, it is important to emphasize at the outset what this case is not about. First, it is not about whether plaintiff is disabled; that is undisputed by defendants."

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How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, **(cont'd).**

- **The Court is not happy:**
  - "Second, it is not about the appropriateness of the accommodations plaintiff received through her IEP; she was afforded these accommodations by the Board to level the academic playing field for her, and in fact, her achievements are a model example of a successful IDEA program."

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How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, **(cont'd).**

- **The Court is not happy:**
  - "This case is about an outstanding student who overcame the hardships of her disability to achieve the best grades in her class, and who is now in danger of having her accomplishments tarnished by her own school's administrators in the name of rectifying an imagined injustice."

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How Can She Possibly be the Valedictorian?

***Hornstine v. Township of Moorestown,* (cont'd).**

- **The Court is not happy:**
  - **"They have lost sight of the fact that plaintiff, unlike her peers, suffers from a debilitating medical condition,** which has never been disputed by the Board, and that her accommodations were aimed at putting her on a level playing field with her healthy classmates." (Emphasis added).
  - **Note: This is the heart of a *faux* unfair advantage argument.** Ignoring disability means impact of disability can be ignored as well.

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How Can She Possibly be the Valedictorian?

***Hornstine v. Township of Moorestown,* (cont'd).**

- **There is no perfect fairness and equality in education.**
  - "As in a professional game of golf, it is impossible to guarantee that a student's educational abilities will be the sole determinant of academic success in a highly regarded and competitive high school."
  - Teachers employ different grading standards, even those who teach the same course.

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How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, **(cont'd).**

- **The trouble with fairness and equality in education.**
  - Grading itself is often subjective. The same teacher may grade differently two students in the same class who are performing substantially at the same level.
  - Students have different technological support available to them in their homes or may enjoy the benefit of an older sibling or parent to assist them.

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How Can She Possibly be the Valedictorian?

Hornstine v. Township of Moorestown, **(cont'd).**

- "The permutations are endless; the playing field for students rarely is the same."
- "Just as the disabled golfer in *Martin* did not receive an unfair competitive advantage from his accommodation, neither did plaintiff receive an unfair competitive advantage from her accommodation."

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Other Examples of the Competition Problem

***Doe v. Haverford Sch.,* 39 IDELR 266 (E.D. Pa. 2003)**

- Private school, reasonable accommodation analysis.
- 11th grader with sleep apnea and phase-delayed syndrome (sleep cycle from 3:00 or 4:00 a.m. to noon).
- Two *more* requests for accommodations are rejected.
  - Promotion to 12th grade, despite failure to meet promotion criteria.
  - Five additional months to complete schoolwork from the third quarter and in excess of two additional months to complete schoolwork from the fourth quarter for four courses.

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Other Examples of the Competition Problem

***Doe v. Haverford Sch.,* (cont'd).**

- **The Court:**
  - "Allowing the plaintiff to make up quizzes, tests, and exams months after his classmates completed these tasks gives the plaintiff months of preparation that his classmates did not have."
  - "Although tests are designed to test what a student knows, part of taking the tests and part of the educational process is to prepare to take quizzes, tests, and exams in a timely fashion."

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Other Examples of the Competition Problem

***Doe v. Haverford Sch.,* (cont'd).**

- **The Court:**
  - "Haverford's conclusion that avoiding those parts of its educational requirements lowers its academic standards is a decision for the school to make...."
  - **Dave Note:** This is not a FAPE standard case. BUT aren't we really just talking about the scaling of an appropriate accommodation to the point it is no longer appropriate? Too much of a good thing can be inappropriate and unfair.

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Some Final Thoughts on the Competition Problem

- The core of unfair-advantage thinking is sometimes the refusal to acknowledge impact of disability and the need for services as a response.
- Too much of a good thing can be a BAD thing.
- Individualized evaluation and appropriate determination of services prevents unfair advantage.
- Be careful with services and accommodations in accelerated classes, especially when they remove the essential elements that make these accelerated classes.

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Some Thoughts on School Employees Interfering with FAPE

Can the principal veto an IEP if she's trying to save money? *Modoc County (CA) Office of Education,* 24 IDELR 580 (OCR 1996).

"The complainant, other parents of disabled students, and former staff told OCR that they have observed or directly experienced ongoing manipulation of the IEP process by MCOE officials in an effort to forgo providing services and cutting costs."

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School Employees Interfering with FAPE

Modoc County (cont'd).

Can the principal veto an IEP if she's trying to save money?

"Many situations involve MCOE officials controlling IEP team decisions, disapproving requests or suggestions with no explanation, imposing procedural delays, intimidating staff and parents, and instructing staff to generalize IEPs... [These] presented no educational justification for their decisions and accepted no arguments."

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School Employees Interfering with FAPE

Teacher shortages continue to plague US: 86% of public schools struggle to hire educators, USA Today Online, October 17, 2023

- **"Nearly 9 in 10 public school districts struggled to hire teachers heading into the school year,** and many potential hires were deterred by low salaries."
- "the National Center for Education Statistics… a data-collecting arm of the Education Department, surveyed more than 1,300 K-12 schools in mid-August, providing a glimpse into how the 2023-24 school year is shaping up.
- "The shortages were most common in subjects that generally have been difficult to fill for years: special education, science and foreign languages."

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School Employees Interfering with FAPE

Most Classroom Teachers Feel Unprepared to Support Students With Disabilities, EDWEEK, May 29, 2019

- **In data from 2019: 'Less than 1 in 5 general education teachers feel 'very well prepared' to teach students with mild to moderate learning disabilities,** including ADHD and dyslexia, according to a new survey from two national advocacy groups.'"
- "The survey found that **only 30 percent of general education teachers feel 'strongly' that they can successfully teach students with learning disabilities**—and only 50 percent believe those students can reach grade-level standards."
- "Overall, the findings depict a teaching corps that considers itself ill-equipped to meet the needs of millions of children with disabilities in the nation's public K-12 schools and clings to misconceptions about student learning and attention issues."

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School Employees Interfering with FAPE

Most Classroom Teachers Feel Unprepared to Support Students With Disabilities, EDWEEK, May 29, 2019

“a quarter of the survey respondents indicated that they believe ADD/ADHD diagnoses result from poor parenting, evidence that ‘some teachers express beliefs suggesting they are unaware of scientific findings showing that learning disabilities and ADHD are based on differences in brain structure and function.’”

“The findings square with the conclusions of a survey released by the Council for Exceptional Children earlier this year. That survey found that **special education teachers are concerned about the ability of general education teachers and supervisors to work with students who have disabilities.”**

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School Employees Interfering with FAPE

Most Classroom Teachers Feel Unprepared to Support Students With Disabilities, EDWEEK, May 29, 2019

“Of the general education teachers who participated in the National Center for Learning Disabilities and Understood survey, just **56 percent of teachers believed IEPs provide value to students, and just 38 percent believe IEPs improve their teaching.”**

“Focus groups and teachers surveyed both point to the challenges of remembering accommodations for each child and to the **perception that IEPs and 504 plans often include accommodations or services that are not necessary,’ the report found.”**

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Some Final Thoughts on School Employees Interfering with FAPE

- Campus accountability for special education & 504 compliance
  - A lesson from a BBQ restaurant
- Disability law compliance should be viewed from the perspective of each employee's contract– and her agreement to obey federal law, state law and local policy.
  - **Inability** to comply with IEP/504 Plan should result in campus administration seeking training and resources for the employee unable to comply.
  - **Unwillingness** to comply should result in appropriate employment action (growth plan, official directive, suspension, etc.).

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