METHODOLOGY DISPUTES: WHAT'S FAIR AND WHAT'S FOUL?

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You're attending an IEP meeting on behalf of a public school district, and the following ever-popular question is raised by the parents of the child in question: "I went online, and I did a lot of research about reading program 'XYZ.' I think program XYZ sounds perfect for my child, and not only do I want you to purchase and deliver it to my child, I want you to write that name brand *into* the IEP itself." Many questions run through your mind: Do I have to purchase this program? If so, do I have to use the name brand in the IEP? What if this program is ineffective for this child? What if we have another program that we think is appropriate? Can we use that one instead? What if the parents don't want it?

All of these questions (and many more) pertain to one of the most common day-to-day IEP issues - the methodology dispute. Generally speaking, public school districts have significant discretion to choose the means and methods through which special education services are provided. Even when services requested by parents might be equally appropriate – or even "better" than a public agency's selected program - public school districts are generally permitted to select their own programs and services so long as the school district's selected methodologies appropriately meet the child's needs. *See, e.g., J.E. v. Boyertown ASD*, 2011 WL 476537 (E.D. Pa. 2011); *J.C. v. New Fairfield Bd. of Educ.* 2011 WL 1322563 at *16 (D.Conn. 2011); *D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F.Supp.2d 435 (N.D.N.Y. 2010); *Rosinsky v. Green Bay Area School Dist.*, 667 F.Supp.2d 964, 984 (E.D.Wis. 2009).

Given this legal standard, our opinion as to what is "fair" and what is "foul" when it comes to methodology disputes follows:

"Fair:"

- If the school district, in its professional opinion, believes that its preferred methodology will appropriately address the student's needs, it may employ that methodology instead of a methodology requested by the parents. The district should be careful, however, to ensure that its selected methodology is, in fact, appropriate. This should start with consideration of the IDEA's preference for methods that are based in research.
- The school district is not obligated to – nor should it – include the methodology by name-brand in the child's IEP. If the school district does this, it may result in a substantial, negative impact upon the student if the "written-in" methodology proves ineffective, or is later discontinued. This is due to the fact that a change in methodology would require an IEP revision, and any dispute raised as a result of that recommended revision may activate the IDEA's "stay-put" provision. In other words, the school district may end up stuck with the old, failing methodology for months (or years) while litigation plays out. In the meantime, the student suffers. Instead, use generic, yet specific descriptors of an appropriate methodology that allow for the potential use of multiple programs. That will allow the school district to retain the methodological flexibility to which it is entitled without risking the student's progress.

"Foul:"

- It is possible, but unlikely, that the same methodology – while potentially appropriate for a strong majority of students – is going to be appropriate for *every* student. We recommend that public school districts diversify their methodology options.
- If a district-desired methodology is inappropriate *on its* face, the district should not proceed with the use of such methodology *from the outset*. For example: if the publisher of the program in question strictly prohibits the use of the program for students over the age of 13, that program should not be used for high school students unless the need for an exception can be clearly demonstrated.
- Even if the program in question appeared appropriate at the outset, it should be abandoned if objective evidence shows it to be inappropriate over a reasonable period of time. In other words, school districts have the discretion to choose amongst *appropriate* methodologies, but run the serious risk of denying students an appropriate education if they continue to use ineffective programs beyond the point that the program's ineffectiveness should have reasonably been discovered. If a program is ineffective, we recommend that the district in question strongly consider changing its methodology as soon as reasonably possible. Again, that does not necessarily mean that the district must adopt the parents' desired methodology; it must only use *some other* appropriate methodology, which may or may not be the parentally-desired program.

There are, of course, inevitable questions of fact that may arise in any individual dispute. Parents retain the right to contend that the student did not make meaningful progress with the district-selected methodology or that the district's decision to change methodology came too late. Additionally, parents may raise questions about the research basis of the methodology and the training received by the professionals charged with delivering that methodology to the student. If a district's selected methodology proves effective or the district switches away from an ineffective methodology(ies) within a reasonable time, however, the district's likelihood of success in any dispute greatly increases.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.