

32. Advice to mom:

I'd start with simple pleasantries, and say that I'm looking forward to meeting with her in two weeks. After that, I would write the following:

No, the special education caseworker was incorrect in saying that the IEP meeting cannot be postponed. Nothing in the law prevents you from asking the school to postpone the annual meeting. Under IDEA, section 1414(d), as the parent, you are a required part of the IEP meeting. The school cannot hold an IEP meeting without you. You were right to be suspicious when the caseworker said the IEP meeting cannot be postponed. For instance, if you had a family emergency or health issue, surely they would understand and postpone the meeting. If the school were to go ahead and implement the IEP meeting without you, that would be a clear violation of the IDEA. That IEP would not be valid. Per 1414(e), you are a part of any committee making decisions of educational placement for your child.

I think it's a wise decision not to let the school know why you are postponing the IEP meeting. If you let them know you are consulting an attorney, that will automatically put them on the defensive. Throughout the process, it's important we work to maintain a positive relationship with the school personnel, which we'll discuss in much greater detail when we meet. You've heard that saying, it's easier to draw flies with honey than with vinegar? That's the same idea of how we need to operate.

I recommend writing a courteous and professional letter to the school. You should address it to the special education caseworker and also enclose a copy for the building principal. In your letter, explain that you understand the caseworker told you the meeting cannot be postponed, but state that regretfully, you are unable to attend the meeting as scheduled due to personal obligations. Maintain an extremely polite and courteous tone in your letter. Suggest

dates and times when you are available for the IEP meeting, and be gracious in asking the school to adjust the IEP meetings to those dates and times. You should comment on how you appreciate the school's hard work with your child. Keep a copy of the letter for your file.

The school may offer to meet by telephone or video conference instead, at the originally set time. This is allowable under 1414(f). I suggest remaining courteous, but firm that the time will not work for you, and again provide the times that you are available.

To deliver the letter, you may be tempted to send it certified mail, to ensure that the caseworker and building principal received a copy. Please do not do that; that will simply alert them that you intend to take further action. Instead, hand deliver the letter to the school. Ask the school secretary (or whoever is sitting behind the front desk) to drop off the letters for you. Then make a note in your log of the date, time, and who you dropped the letter off to. Make a note of what the person was wearing, in case you did not catch his or her name, and also note any small talk you made.

Now, regarding waiting until the new test data: At this point, I am considering advising you against that. We aren't meeting until 2 weeks from now and your IEP meeting as originally scheduled is in 5 days. Depending on schedules, I may recommend that you go ahead with the IEP meeting before obtaining new testing data. Depending on the extent of the testing done, it may be another week or so beyond our meeting, and I would like to keep everyone chugging along as though everything is normal. When we meet, I'll show you how we can use the school's testing data "against" them, so to speak. Most likely, I will ultimately want an Independent Educational Evaluation, as you pointed out, but it is most likely not "urgent" at this time.

Prior to our meeting, I'd like you to do two things. First, start keeping a log of all contact you have with school personnel. Keep track of any phone calls, letters, and email. It doesn't need

to be fancy – simply the date, time, location, the name of the person, and the matter discussed. Second, start organizing your child’s file. Find all the paperwork related to your child’s school history as well as medical and behavior history and just start putting it in order, from the oldest on the bottom to the most recent.

Please bring your phone log and your child’s file with you when we meet. Do not worry about making anything “perfect” – we’re in the beginning stages of this process. The more prepared we are on the front end, the better off we will be.

Then I’d end with asking her to email me if she has questions and that I look forward to meeting with her when I return to town. I may also suggest she look at the Wrightslaw website, to help get informed on the special education issue and see that she is not alone in having special education issues. That would also help her from feeling completely helpless or useless prior to our meeting. At this point, I would not go more in depth about the adverse assumptions—in an initial email, that would just freak the mom out. Plus, depending on the circumstances, it’s likely she’ll just need me to point her in the right direction to get a handle on the IEP situation, and then she won’t need an attorney after that.

33. Billy needs help, right away. I would tell Billy's mom that she was right to insist on a re-evaluation. At this point, I would recommend that Billy's mom obtain an Independent Educational Evaluation from the private sector. Under IDEA, Billy's mom is free to select any independent evaluator (if the school tries to tell her she can only select from a specified list, they are mistaken). An independent evaluation will provide additional evidence that the current placement is inappropriate for Billy.

However, Billy's mom can use the school district's own data to show that Billy is not making adequate progress, and is in fact, regressing. I would show Billy's mom the Bell Curve, and show her how to generate charts and graphs of Billy's progress in powerpoint, which will be compelling for the IEP team (or the hearing officer, should the case go to due process).

Throughout the process, I'd let Billy's mom know that we are preparing as if we are taking the case to due process, although we'd prefer it not to have to go that far.

Although the retention happened several years ago, I'd let Billy's mom know that was a mistake on the part of the school. Research on retention not only shows that it doesn't work, but that children who are retained are much more likely to face problems (academic and behavioral) problems in school later on (including dropping out). I'd try to phrase this in a way so as not to cause her to panic.

Now, looking at the data: Billy's 3rd grade testing results are consistent with an SLD. His similarities subtest score of a 16 put him at the 98th percentile, in the top 2%. His IQ of 115 is above average, yet his reading level is below average. A discrepancy like that is often a strong indicator of a specific learning disorder. Billy has not progressed however. In sixth grade, his standard score of 85 put him a full standard deviation below the mean, at the 16th percentile. The situation is worse in eighth grade. Billy's IQ, a measure of his intelligence, dropped to 90—he

went from a full standard deviation above the mean (the 84th percentile) to below the mean. That is a giant red flag that something is wrong. His similarities subtest score is still above average, at 13 (the 84th percentile), but previously he was at the 98th percentile. He's now reading at grade level 3.5, but with a standard score of 70, Billy's reading level is in *the bottom 2%*. Teaching Billy's mom how to present the data in powerpoint will be compelling. It's common sense (or ought to be), that the 2.5 years of growth Billy made in reading is no cause for celebration when it occurred over the span of third grade (which he repeated) and eighth grade. Presenting this visually will be shocking: a child who did have above average intelligence has now been so damaged by the school that he's in the bottom two percentile.

The fact that the school wants to address his emotional needs is commendable yet misguided. First, Billy does not need to have his "label" changed in order to receive counseling: Services under IDEA are driven by the unique needs of the child, not the classification system designed for the administrative convenience of the adults in the school. Second, how should anyone be surprised Billy acts out and hates school? He's an eighth grader reading at a third grade level. Intense reading intervention to remedy the reading problem will likely have a related positive effect on his behavior as well. It's likely that Billy has serious self-esteem issues wrapped up in this. Billy has suffered from the chronic problem of low expectations for children with disabilities; the school should be *horrified* that his reading has only improved 2.5 years. The fact that the school is pleased with his reading and concerned for his behavior is indicative of the chronic problem of low expectations that children in special ed face. IDEA was enacted, in part, to counteract this! The school appears to blatantly misguided—Billy needs intervention immediately.

Parents often feel a sense of blame in these situations. Billy's mom might feel she should have stepped in earlier, she shouldn't have let the school retain Billy, etc. I'd tell her it's natural and common for parents to feel that way, but it's not her fault, and now we're looking forward to get Billy the help he needs. Billy's mom might also be very angry at the school district: special ed cases are a mix of medical malpractice (battle of the experts), divorce or equitable distribution (feelings of betrayal on both sides), litigated in federal court. I'd explain this to Billy's mom, and let her know that we need to keep a professional and workable relationship with the school folks in order to get what's best for Billy (of course, while avoiding the word "best" when dealing with school personnel). Billy is 15, so his next IEP (depending when his birthday falls, as transition services start kicking in with the IEP that will be in effect when Billy turns 16) will require planning transition services from school to post-school activities. It would be an atrocity if his IEP considers post-school activities that are not commensurate with his level of intelligence.

Using percentile ranks, as stated above, Billy is at the bottom 2% of his peers. Billy has REGRESSED since entering special education. The school should implement an intensive research based program to help Billy's reading. As I said above, I would advise Billy's mom that we are preparing as if we were going to due process and then litigation in federal court (including the importance of the 5 day rule for disclosing exhibits and witness lists). If, following Billy's mom's next meeting with the school, the school is resistant and unwilling to provide the intervention we need, I would advise Billy's mom, depending on her financial situation to get services from the private sector while we planned our next step. At 15, Billy can't afford to wait until everything gets sorted out: he needs help right away. Throughout the process with Billy's mom, I would highlight the importance of getting written documentation for everything.

34. I would rely on Burlington and Carter and focus on the purposes of IDEA under 1400(d). I'd also rely on 1412(a)(10)(C) in seeking tuition reimbursement for unilateral placement in private school.

First, I'd have to establish that the public school did not provide FAPE in a timely manner. To be a child with a disability, under 1401(3), in addition to the problems she has as stated in the facts, she must need special education as a result of them. Presumably, the school district is not contesting that she's a child with a disability as it (eventually) became willing to implement an IEP for her.

Under Carter, the parents can place Isabel in a private school and seek tuition reimbursement. The school received the parents' letter on Oct. 7, 2007 and did nothing to determine Isabel's eligibility until after due process proceedings were initiated in March. "Timely" is a subjective term, however surely 6.5 months exceeds timely. Thus, because receipt of the letter is not disputed, the parents may be eligible for tuition reimbursement.

The school board attorney will contest this by arguing that the parents did nothing else to seek special education services. They did not follow up to the letter or do anything else until initiating due process proceedings. The school board attorney will try to frame the parents as just trying to get out of paying the private school bills. This will fail: Once the parent requests an initial evaluation, in writing, under 1414(a), the school has sixty calendar days to conduct the evaluation. The parents had no legal responsibility to follow up. Despite this, the hearing officer may be unconvinced, so I'd have to work with the parents to craft a compelling argument as to *why* they did not follow up (even though they were under no obligation to do so). Perhaps they simply believed the school district was doing what it should and they were reluctant to appear to step on toes until at last they decided enough was enough.

The school board attorney will next say that even *if* the school was not providing FAPE, 1412(a)(10)(C) requires certain steps, which the parents did not take, in order to gain tuition reimbursement. At the last IEP meeting the parents attended, they must have stated, in writing, their problems with the IEP, their intent to withdraw the child and place her in private school, and that they would seek reimbursement from the public school. Alternatively, 10 days prior to withdrawing the child from school, the parents need to provide notice in writing (the same information that would have been required at the IEP meeting). The parents did not do so, therefore, the school board attorney will argue, no reimbursement. However, there are certain circumstances under 1412(a)(10)(C) where the parent need not give notice, including if the school district prevented the parents from doing so, if notice would have been futile, or if notice would have harmed the child. In this instance, the parents had reason to believe notice would have been futile—the school effectively ignored the first letter, why would they pay any attention to another?

The school board attorney will next say that *even if* the previous school board's arguments fail, the school is willing and able to implement an appropriate education for Isabel; the special education staff is just waiting to teach her, yet the parents have stubbornly refused to budge, as all they care about is getting the tuition bill paid off. To refute this, I'd return to the language of 1412(a)(10)(C) that requires FAPE be provided in a *timely* manner. The fact that the school failed to do so is sufficient reason to place Isabel in private school and seek reimbursement.

Moreover, under 1414(a)(3) (Child Find), the public school has an *affirmative duty* to identify, locate, and evaluate all children with disabilities, be they in public schools, private

school, home school, or a juvenile detention center. The public school has not done so with respect to Isabel.

Now, 1412(a)(10)(C) does not *guarantee* tuition reimbursement—that will be up to the hearing officer. The parents will have to show that what is now offered by the school is not appropriate for Isabel’s unique needs. I would have to show how the time in public school, without services, has *damaged* Isabel; not only is the educational placement inappropriate, it has caused her to regress. Obviously, I would need her records and evaluation data to do this. I would also compare the services offered by the private school to the public school. I would focus on making the hearing officer see Isabel as a person, try to have some of her personality come through the hearing. Then the hearing officer would have a concrete person to attach the disabilities on to. That will make the hearing officer more attune to Isabel’s needs and more sympathetic to the parent’s position. I would make completely sure the parents do not use the words “best” or “maximize” in describing how the private school program better serves Isabel’s needs (per Rowley, IDEA provides a basic floor of educational opportunity; there is no right to an education that best suits Isabel’s needs). I would make sure the parents have a good explanation for why they did not attend the IEP meeting and that they can explain it in a sympathetic way to the hearing officer. I’d also return to the purposes of IDEA 2004 and convey that a “a free appropriate public education that emphasizes special education and related services is designed to meet their unique needs”—I’d have to highlight what the private school offers and show how the public school cannot offer that, despite their (alleged) best intentions.