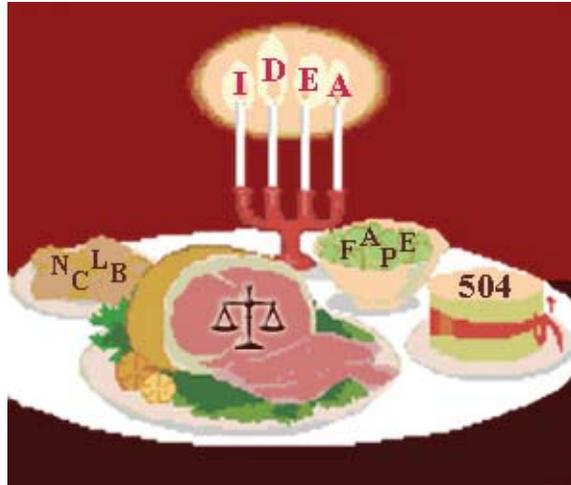


SPECIAL EDUCATION LAW UPDATE:
THE YEAR IN REVIEW



UTAH INSTITUTE ON SPECIAL EDUCATION LAW AND PRACTICE

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THE YEAR IN REVIEW

Wow! It's been another active year so far in the area of special education law! Although the IDEA has not changed since the 2004 Amendments, there is an enormous amount of litigation going on, as courts and agencies attempt to interpret and apply the law's provisions. In this session, Julie will update the audience on significant special education "legal happenings" during the past year or so, including court decisions and U.S. agency interpretations.

MONEY DAMAGES/LIABILITY

- A. C.O. v. Portland Pub. Sch., 58 IDELR 272 (9th Cir. 2012). The IDEA's provision that courts grant "appropriate relief" does not justify the district court's decision to award \$1 in nominal money damages to the parent of a former student with a disability who was denied admission to a magnet high school. Nominal damages are not an available remedy under the IDEA, as the plain language of the IDEA does not indicate the availability of compensatory or nominal damages. While the statute does allow courts to award "appropriate relief," the phrase refers to the court's jurisdiction rather than a license to award retrospective damages. IDEA is a funding statute and, as such, the remedy for noncompliance is the loss of federal funds. "Without some indication that Congress intended 'to create not just a private right but also a private remedy...a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute....'"

- B. Ferguson v. Clark County Sch. Dist., 112 LRP 29006 (D. Nev. 2012). Though the district claimed that it was unaware that a special education teacher was mistreating autistic children until March 2007, the parents' evidence indicated that the district received reports of abuse throughout 2006, suggesting that the district deliberately failed to investigate. Thus, the parents could hold the district responsible for the teacher's alleged punching, slapping, pinching and berating of children in the autism class by showing that the district failed to take action despite its knowledge that the teacher was violating the rights of children. According to the parents' evidence, teaching assistants reported the misconduct of the teacher to the school's vice principal and district supervisors on multiple occasions throughout 2006 and early 2007. Thus, the jury could find that the district had knowledge of the abuse long before its first investigation in March 2007.

- C. David G. v. Council Rock Sch. Dist., 58 IDELR 254 (E.D. Pa. 2012). District is not obligated to pay money to LD high school graduate claiming a denial of FAPE during his freshman and sophomore years under Section 504 or the ADA. This is so because the student failed to show that the district intentionally discriminated against him on the basis of disability. While the magistrate found that the district deprived the student of FAPE in the area of reading during 9th and

10th grade, liability for monetary damages requires a showing of intentional discrimination, even though a finding of a denial of FAPE does not.

- D. T.B. v. San Diego Unif. Sch. Dist., 58 IDELR 278 (S.D. Cal. 2012). While a district's failure to identify a qualified individual to assist an autistic student with G-tube feedings might have violated the IDEA, the parents cannot sue for money damages under the ADA or Section 504, as there was no evidence of intentional discrimination. In practice, the district assigned the student's behavioral support specialist to that duty, which an ALJ rules denied FAPE because it was not an individual with medical training, as required by California law, or a trained individual supervised by a school nurse. This was not a case where the district ignored accommodation requests or intended to discriminate. Moreover, the district did not refuse to provide a qualified individual to assist the student. Rather, it simply took an approach that was slightly different from the parents' interpretation of the status. There was no proof that the district acted with deliberate indifference to the student's health or safety needs.

SECLUSION/RESTRAINT

- A. E.C. v. County of Suffolk, 58 IDELR 259, 2012 WL 1078330 (E.D. N.Y. 2012). The parents' Fourth Amendment and ADA claims alleging improper restraint by two school security guards of their 11 year-old student with cognitive impairments are dismissed against the school district and the county police department. As to the ADA discrimination claim, the court does not have jurisdiction for failure to exhaust administrative remedies. As to the Fourth Amendment claim, the restraint/seizure of the student by the officers was justified, where the student, who was large for his age, picked up a rock that was at least eight inches long and held it over his head in a threatening manner and subsequently began yelling, running and attempting to punch school staff and peers. Under the circumstances, it was reasonable for the officers to immobilize his arms and seat him to keep him from running around and hitting others. Because the officers used only the amount of force necessary to keep others safe, there was no violation of the Fourth Amendment.
- B. Alexander v. Lawrence Co. Bd. of Developmental Disabilities, 58 IDELR 153 (S.D. Ohio 2012). Parent sufficiently alleged intentional discrimination under Section 504 and the ADA by alleging that the educational unit refused to allow the autistic student to attend school for a full day, failed to conduct an FBA to determine the reasons for behaviors and continued using physical restraint as a behavior management technique, despite evidence that the unit knew that the student was regressing behaviorally as a result. Thus, if the allegations are true, they could support a finding of intentional discrimination under 504 and the ADA.

BULLYING/DISABILITY HARASSMENT

- A. Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist., 112 LRP 27035 (S.D. Tex. 2012). In reconsidering an order rendered earlier this year, a district's failure to enforce its anti-bullying policies did not equate to a violation of constitutional due process rights of a middle schooler who committed suicide. Based upon the 5th Circuit's ruling in Doe v. Covington, the parent's Section 1983 case is dismissed. The Covington Court held that when addressing a student's bodily integrity, a district is only held accountable for the actions of district personnel that compromise a child's safety, unless there is a "special relationship" between the student and his school. A finding of a special relationship is limited to three scenarios: incarceration, involuntary institutionalization, and the placement of children in foster care. The scenario here did not fall under one of these categories. Thus, the district had no constitutional duty to protect the student from harm inflicted by non-district actors, or other students.
- B. Wright v. Carroll Co. Bd. of Educ., 59 IDELR 5 (D. Md. 2012). Parents' of student with autism are required to exhaust IDEA's administrative remedies prior to bringing their claims directly to court regarding their son's alleged harassment by a classmate. The parents' contention that the statutory scheme that governs student offenders under the IDEA would make exhaustion futile is rejected, as there is some form of relief that would be available under the IDEA.

PARENTS

- A. Fuentes v. New York City Dept. of Educ., 58 IDELR 212, 2012 WL 1078779 (E.D. N.Y. 2012). The noncustodial father of a visually impaired student did not have the constitutional right to challenge his son's IEP where New York law's interpretation of "parent" excludes noncustodial parents. In New York, a custodial parent has the sole right to control educational decisions unless the divorce decree or custody order says otherwise. The state's decision to exclude noncustodial parents from the definition of "parent" is rationally related to the state's interest in providing FAPE to children with disabilities. In cases of divorce, educators need to have a way of determining which parent should be involved in educational decisions, and the easiest way, where a state court has already given custody and decision-making authority to one parent, is for school personnel to trust that the custodial parent will act on behalf of the child and exclude the non-custodial parent from interfering with the custodial parent's decision-making.

CHILD FIND/IDENTIFICATION/RTI

- A. Jamie S. v. Milwaukee Pub. Schs., 58 IDELR 91, 668 F.3d 481 (7th Cir. 2012). The district court erred when certifying a child find claim as a class action, and its decision in that regard is vacated, in addition to the decision that the school district had committed systemic child find violations. The district court's order

approving a settlement agreement between the class of students and the State Department of Education is also vacated, as well as an order requiring the district to take extensive remedial action. The class, which was defined as IDEA-eligible students “who are, have been or will be denied or delayed entry or participation” in special education, leaves no way to determine which students were members of the class. “In short, a class of unidentified but potentially IDEA-eligible disabled students is inherently too indefinite to be certified” as a class. Further, the unique nature of each child’s circumstances makes a class-wide resolution of the child find claims inappropriate.

- B. D.G. v. Flour Bluff Indep. Sch. Dist., 59 IDELR 2 (5th Cir. 2012) (unpublished). The District’s failure to evaluate a high schooler did not, in and of itself, entitle the student to compensatory education. A district cannot be liable for a child find violation, unless the student actually needs special education. While no circuit courts have specifically addressed whether a child find violation is contingent on the student’s actual eligibility for services, this court has ruled previously that a student’s ineligibility for services prevented him from recovering for procedural violations. Here, the district court found the District liable for a child find violation but never determined that the student was eligible under the IDEA. In addition, the evidence in the record shows that the student performed well for several years after being diagnosed with ADHD and that his severe behavioral problems, which were the basis of his parent’s child find claim, began only after his parents got a divorce. Where the District took prompt action in response to the parent’s request for an evaluation at the end of the student’s 9th grade year, the District did not violate its child find duty. Thus, the parents are entitled to no relief and the award of attorney’s fees to them is vacated.

ELIGIBILITY

- A. C.M. v. Department of Educ., 58 IDELR 151, 2012 WL 662197 (9th Cir. 2012) (unpublished). District court’s decision that the student with CAPD and ADHD is not a child with a disability and eligible for services under the IDEA is upheld. Based upon the student’s performance in her regular education classes, with accommodations and modifications, she was able to benefit from her general education classes without special education services. The parent’s argument that the Read 180 program, pre-algebra course and math lab amounted to “specialized instruction” is rejected. Students who can benefit from general education classes with accommodations and modifications do not have a need for special education. The court agrees with the district court that substantial evidence supported the hearings officer’s conclusion that the reading and math classes were not “special education” classes, but were regular education classes with small enrollments designed to provide additional support and were open to many types of students who needed additional help. In addition, the department evaluated the student in all areas of suspected disability and the student did not qualify for services under the category of SLD or OHI, since the department could meet the student’s needs with a Section 504 plan.

- B. J.D. v. Crown Point Sch. Corp., 58 IDELR 125 (N.D. Ind. 2012). Deaf student's receipt of FAPE was not contingent on his disability label. Rather, his IEP addressed his unique needs and conferred meaningful educational benefit, even though the IEPs did not contemplate whether the student also was SLD. Failing to properly label a student's disability in his IEP will not deprive him of FAPE, as long as the student receives an appropriate education, his parents receive an opportunity to participate in the IEP process, and he is not deprived of educational benefits. Here, the district received extensive notice of the student's cognitive deficits from his teachers and parents, which served to ensure that the district crafted IEPs that were tailored to address those deficits. In addition, records showed that in response to teacher and parent concerns, the district developed IEP goals and appropriate benchmarks and provided services geared toward increasing the student's reading fluency. Though the district ultimately determined that the student was not eligible as SLD, it increased the special education services he received when the parents provided private evaluation results indicating that the student was dyslexic. Importantly, the student made steady progress with reading pursuant to the district's attention to his cognitive deficiencies. In addition, the increase in his standardized test scores from second to fourth grade proved that his IEPs likely conferred meaningful benefit.
- C. E.M. v. Pajaro Valley Unif. Sch. Dist., 58 IDELR 187 (N.D. Cal. 2012). District did not err in using the student's IQ score on the WISC-III in making its severe discrepancy analysis and in finding the student was not eligible as a child with an SLD. Under the California regulations in effect at the time of the determination, the student needed to show a discrepancy of at least 22.5 points between intellectual ability and academic achievement. While the student would have met the standard had the results of the KABC that was administered by the district's psychologist been used, the district's reliance on the WISC-III score obtained by the private psychologist was not unreasonable. The WISC-III was the most commonly used test at the time and was the best predictor of student performance, serving as an accurate measure of the student's "true cognitive potential."

EVALUATIONS

- A. Letter to Reyes, 112 LRP 23105 (OSEP 2012). Breaks in the school schedule, regardless of their length or impact on staff availability, cannot be used to extend the applicable timeframe for conducting initial evaluations. Unless state law provides for a different timeline, an initial evaluation must be conducted within 60 calendar days after the district receives parental consent. Although OSEP recognizes that conducting evaluation activities during extended breaks, such as during the school's summer vacation can be challenging for school districts, particularly if fewer staff members are available, that challenge does not relieve them of their obligation to timely evaluate students in order to ensure that FAPE is available.

- B. G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012). Parents did not show a denial of FAPE to their child with autism and a brain injury based upon a failure to reevaluate his special education needs during his kindergarten year. Here, the parents effectively denied consent for the district's proposed reevaluation when they imposed significant conditions upon their consent for reevaluation. Rather than signing the consent form the district provided, the parents wrote a seven-point addendum which stated that the district would use the parents' chosen evaluator, that the parents would have the right to discuss the assessment with the evaluator prior to its consideration by the IEP team, and that the evaluation results would be confidential. The district court was correct when it held that the parents effectively withheld their consent for the reevaluation. Clearly, the parents' conditions "vitiating any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district." In addition, the lack of an underlying evaluation prevented the parents from obtaining an IEE at public expense.
- C. Nalu Y. v. Department of Educ., 58 IDELR 154, 2012 WL 844366 (D. Haw. 2012). Hearing officer overlooked evidence that the first-grader with OHI and a speech language impairment became visibly upset whenever he thought about returning to the public school proposed by the school district after being in private school for two years. The parent claimed that the child "would freak out and cry" when they drove near the building and the private school teacher testified that the child was afraid of the school and that she had to continue to reassure him he was not going back. The district evaluator did not evaluate this issue because there was no other data indicating the child had an anxiety disorder and the public school teacher indicated that the child was a happy first grader when he was there during the initial month of first grade. Because the student's private teacher had far more interaction with him, the hearing officer erred in disregarding her testimony and the parent's.

INDEPENDENT EDUCATIONAL EVALUATIONS

- A. Council Rock Sch. Dist. v. Bolick II, 58 IDELR 122 (3d Cir. 2012) (unpublished). The parent's view that he was entitled to public funding for an IEE simply because he disagreed with the district's evaluation is misplaced. The district need not reimburse the parent where it was able to show that its own evaluation was appropriate.
- B. S.F. v. McKinney Indep. Sch. Dist., 58 IDELR 157 (E.D. Tex. 2012). Magistrate judge recommends that the school district be responsible for funding two IEEs that were privately obtained by the parents of a student with autism and speech and hearing impairments. This is so because the IDEA regulations require districts to use a variety of assessments that are administered in accordance with

any instructions provided by their producers and that they be administered in a child's native language or mode of communication. While the district did use a variety of assessment tools to evaluate the student, it did not properly administer them. For instance, the district administered an assessment designed for autistic students, but its guidelines specifically stated that it should not be used with students who are hearing impaired. While the district argued that the assessment was used only to assess the student's social and communication skills because she had already been determined to be autistic, the court noted that the IDEA does not make such a distinction in its strict requirement to administer evaluations in accordance with producer guidelines. Further, while the assessment administrators used sign language during the evaluation, the record did not show that the administrators were fluent in sign language or that it was the sole language used during the assessments.

- C. R.A. v. Amador County Unif. Sch. Dist., 58 IDELR 152, 2012 WL 844301 (E.D. Cal. 2012). Parent's complaint is dismissed where it sued the district for the cost of IEEs they obtained after the district found their son ineligible for IDEA services. This is so because there is no statement in the complaint that the parents actually requested an IEE from the district.

PROCEDURAL SAFEGUARDS/VIOLATIONS

- A. J.W. v. Governing Bd. of East Whittier City Sch. Dist., 58 IDELR 211, 2012 WL 1026486 (9th Cir. 2012) (unpublished). Where an IEP team was unable to reach agreement on the 4-year-old student's IEP and the parent agreed to receive a written IEP offer after the meeting rather than to continue the meeting on a later date, the parent was not excluded from the IEP process when the district modified the draft IEP after the meeting ended. The district's special education director sought clarification from the speech provider regarding one speech goal about which there had been discussion, but no agreement, at the meeting. The ALJ's characterization of the change in the speech goal as "minor" is upheld and the district had no obligation to reconvene the IEP team to discuss the speech goal.
- B. M.M. v. LaFayette School District, 58 IDELR 132 (N.D. Cal. 2012). Parents' claim that district's "withholding" of RTI data impeded their opportunity to participate in the development of the SLD student's IEP is rejected. Where the district used a severe discrepancy model for determining eligibility, the district had no obligation to use earlier-accumulated RTI data as a basis for the student's initial IEP; nor did the district's failure to disclose the RTI data to the parents amount to a denial of FAPE. While there is an IDEA regulatory requirement to disclose "the instructional strategies used and the student-centered data collected," that only applies if the district uses an RTI method to determine SLD eligibility. Although the district did implement RTI strategies before referring the student for an IDEA evaluation, it based its eligibility determination on a severe discrepancy model. Clearly, the district conducted appropriate evaluations and based the

student's IEP on the evaluation results. Thus, its failure to consider RTI data did not violate IDEA.

- C. Scot S. v. Department of Educ., 58 IDELR 123, 2012 WL 668874 (D. Haw. 2012). Although the student's IEP would have been more accurate had it included details about his progress in a private autism clinic, an IEP developed prior to the start of the clinic program was appropriate. Here, the parents' repeated failure to provide records of the student's progress prevented the Department from being able to update its IEP. In this situation, five days after developing an IEP that proposed the student's gradual transition to a public school setting, the Department agreed to fund the student's placement in the private autism clinic through the end of December. In exchange, the parents agreed that they would supply updated information about the student's progress, but failed to do so. Thus, the parents cannot seek to hold the Department responsible for the lack of an updated IEP, where they hindered, and ultimately prevented, the Department from effectively updating the March 2009 IEP to reflect the student's development at the autism clinic. Though the parents' lack of cooperation with the IEP process would not excuse the Department's failure to offer FAPE, the March 2009 IEP, which offered intensive instruction and services, as well as opportunities for mainstreaming, was appropriate.
- D. M.D. v. Department of Educ., 58 IDELR 221 (D. Haw. 2012). Even though the IEP vaguely stated that speech-language therapy would be provided "in a variety of delivery systems to include, but not be limited to" individual pull-out, individual push in, pull-out to small groups, collaboration with other professionals and observation to gauge progress and to adjust program, it was not inappropriate. The SLP explained that the wording was used in an effort to keep the flexibility needed to address the autistic student's changing needs and ensure generalization of his skills, and the method for delivering services is within a district's discretion, including the format within which a service is provided. In fact, the ED provided more speech language therapy minutes than the IEP actually required, and the vast majority of those minutes were devoted to direct instruction. In addition, the parent failed to show that her ability to participate in the IEP was inhibited, where the district regularly corresponded with the parent and invited her to participate in meetings, although she did not attend most of them. The district also kept her apprised of her son's progress by regularly providing her with educational data and records. Thus, reimbursement for private tuition is rejected.
- E. B.P. v. New York City Dept. of Educ., 58 IDELR 74 (E.D. N.Y. 2012). Allegations that the school district failed to include an appropriate general education teacher on the student's IEP team or to provide access to evaluative data to the student's private school teacher were not enough to find that the district denied the student FAPE. The parents' contention that the general education teacher on the student's IEP team was not appropriate because there was no evidence that she was teaching fourth or fifth grade at the time of the

meeting is rejected, because the IDEA does not require the general education teacher on an IEP team to be teaching at a particular grade level. In response to the parents' claim that the student's private school teacher, who participated in the meeting by phone, did not have access to adequate evaluative data, the parents' own testimony showed that the teacher reviewed evaluation and progress reports before the meeting. In addition, the IEP included appropriate measurable goals and other children in the proposed SDC placement functioned at substantially similar levels despite their varying disabilities. Where the proposed IEP is substantively and procedurally appropriate, the parents' request for private school tuition reimbursement is denied.

- F. Luo v. Baldwin Union Free Sch. Dist., 56 IDELR 158 (E.D. N.Y. 2012). Parent's claim that he was denied adequate participation in the educational decision-making process is denied. Where the district evaluated the student prior to an IEP meeting, the evaluator concluded that the autistic student was not ready to learn some of the skills in the IEP and recommended the parent participate in home instruction. The parent's position was that the district shut him out of the decision-making process by providing the evaluation report just two days before the meeting and presenting the recommendations, which he vehemently opposed, as a "fait accompli." In this case, however, the evidence indicated that the parent was meaningfully engaged in the decision-making process, since the evaluator solicited the father's opinions as part of the reevaluation process and the parent prepared written responses to the portions of the evaluation report that he opposed. Further, the father actively participated in an extended IEP meeting where the evaluation was presented and discussed with him in detail. "To the extent [the parent] suggests that he did not have enough time to respond to [the evaluator's] recommendations, this allegation is belied by [the parent's] written objections."
- G. N.F. v. Chariho Regional Sch. Dist., 58 IDELR 161 (D. R.I. 2012). Parents of student with ADHD and ODD will not prevail on their claim that the district denied FAPE by failing to include mental health services in his IEP. Clearly, the district would have provided those services had the parents consented to them, based upon notes taken by the student's IEP team during an IEP meeting. According to these notes, the student's mother indicated that she was not interested in receiving clinical services through a therapeutic day program, as she had outside providers and did not want to address these services at that time. Although the mother claims that the notes misstated what she said during the meeting, she did not produce any admissible evidence showing that the notes were not accurate. In addition, other evidence suggests that the mother's lack of consent to the mental health services did not result from the district's alleged failure to provide her with a consent form, as her own testimony at the due process hearing indicated that, even if she had been presented with the form, she was not sure she would have signed it. Thus, the omission of mental health services from the student's IEP did not entitle the parents to relief.

- H. G.D. v. Torrance Unif. Sch. Dist., 58 IDELR 156 (C.D. Cal. 2012). The fact that the IEP for the 6 year-old autistic student did not incorporate each of the goals as specifically written by the child’s private behavioral support provider did not make the IEP inappropriate. Although the goals were phrased and organized differently, the district included goals addressing the student’s significant needs, while excluding the ones that it deemed unnecessary or not age appropriate. In addition, the most important goal was to maintain and generalize social skills across play opportunities and it was included, as well as a number of specific goals to address that need.
- I. M.C. v. Katonah/Lewisboro Union Free Sch. Dist., 58 IDELR 196 (S.D. N.Y. 2012). Because the parent clearly knew that the proposed program contemplated the provision of specialized reading instruction, the fact that it was not specified on the IEP that she would be receiving that instruction in a special class did not make the IEP inappropriate. Thus, the parent is not entitled to reimbursement for the unilateral private placement of the student with dyslexia. The parent’s argument that the IEP should have been more specific in light of the student’s dyslexia and significant reading deficits is rejected. The Second Circuit has not adopted the “four corners” rule requiring that courts look only to the explicit content of the IEP when determining its appropriateness. Rather, looking beyond the document itself, the parent was clearly aware of the availability of specialized reading services at the public school and the item’s absence “did not interfere with the parent’s ability to judge the appropriateness of [the IEP].”
- J. D.S. v. State of Hawaii, 58 IDELR 281 (D. Haw. 2012). While the IDEA requires the IEP team to include at least one general education teacher and one special education teacher of the child, the evidence showed that the only reason the ED did not invite the private school teacher was that the private school had a standing policy of not attending IEP meetings. The ED’s care coordinator testified that she had invited the school’s teachers to meetings in the past, but they did not show up. Given that the private school barred its staff members from attending, the ED was not required to invite the private school teacher. The parents did not produce any case law indicating that IDEA requires a teacher’s presence when the private school has a policy expressly forbidding it. In addition, even if the failure to invite the teacher ran afoul of IDEA procedurally, it did not produce any substantive harm where the IEP offered the student FAPE.
- K. J.T. v. Department of Educ., 59 IDELR 4 (D. Haw. 2012). Even though the district believed it was required to hold an IEP meeting for the SLD student by March 3, 2010, that did not excuse its decision to proceed with the meeting without the parent in this case. The district’s position that the internal deadline for annual IEP reviews takes precedence over the parent’s right to participate is rejected. In this case, the parent did not refuse to attend the meeting; rather, she informed that ED that she was unable to attend the meeting scheduled for the next day and asked if the team could meet the following week. While the district held two follow-up meetings attended by the parent, the parent’s after-the-fact

participation did not remedy her exclusion from the initial IEP meeting. In addition, the ED erred in failing to consider an independent evaluator's report and the parent's concerns about the student's health and communication skills. These procedural violations denied the student FAPE and compensatory education would be the best way to compensate for the procedural violations. Thus, the parties are to arrange for an evaluation of the student to determine his compensatory education needs.

IEP APPROPRIATENESS/FAPE STANDARD

- A. L.F. v. Houston Indep. Sch. Dist., 58 IDELR 63 (5th Cir. 2012). In the Fifth Circuit, an IEP is reasonably calculated to provide educational benefit if it 1) reflects the student's assessments and performance; 2) is administered in the LRE; 3) is developed and implemented by key stakeholders; and 4) is designed to produce positive academic and nonacademic benefits. Here, notes taken at IEP meetings reflect that the district clearly considered the unique needs of the ED student, as the IEP team report included an FBA and a BIP. Records also show that the team considered ESY services and determined them to be unnecessary. In addition, the team considered several placements before determining that a behavioral class was the student's LRE. Moreover, records reflect that the district implemented the student's IEP and that the team developed goals that reflected the student's abilities. "Although [the student] consistently performed at least one grade level below her peers, the IEP listed goals, specific objectives, and evaluation methods that required [her] to improve." In addition, records reflect that the district made many attempts to include the parent in the development of the IEP, but it never received a response.
- B. D.B. v. Esposito, 58 IDELR 181, 675 F.3d 26 (1st Cir. 2012). While it is true that the district court did not have sufficient information about the student's cognitive potential, the proposed IEP was reasonably calculated to provide the student with educational benefit. A court or hearing officer may find that a district offered FAPE even if information about the student's potential is not available. There are some situations where evaluators may not be able to measure the potential accurately, as in this case, where they were unable to do so because of the student's significant communication difficulties. In such circumstances, an IEP may be appropriate if it is modeled on a previous IEP through which the student made progress. This child had been nonverbal and unfocused when he began his services at age 3, but since that time, he has evolved into a "total communicator" who knows more than 100 words, speaks short phrases and is able to identify several written words and numbers. "Even without knowing the upper limit of [his] potential for learning and self-sufficiency, we have no trouble concluding that these achievements were meaningful for him." Thus, the district court's ruling that the District offered FAPE is affirmed.
- C. Stamps v. Gwinnett Co. Sch. Dist., 59 IDELR 1 (11th Cir. 2012) (unpublished). School district's proposal for school-based services for three siblings with genetic

conditions, neurological disorders and an unspecified immune deficiency is appropriate. The medical evidence presented by the parents at the due process hearing, including the testimony of the students' pediatrician, did not establish the students' need for homebound services. According to the pediatrician, the students' immune deficiencies did not require preventive treatment and their immune systems would improve with age. In addition, the students had not been sick in several years and an expert in pediatric infectious diseases testified that the children would have the same probability of getting sick as other children and that they should not have any restrictions on their socialization activities at school or in the community. In addition, because the school regularly cleaned children's tools and work spaces between instructional sessions and the parents only disinfected teaching areas and materials intermittently, the public schools provided a more sterile learning environment for the students.

- D. T.G. v. Midland Sch. Dist. 7, 58 IDELR 104 (C.D. Ill. 2012). Parents' case alleging that high schooler's IEPs did not include appropriate goals is dismissed. The IEPs included reading, writing and speech-language goals that were measurable, targeted the student's needs, and for the most part, were clearly written. Although the goal labeled "reading comprehension" did not actually require the student to read and required her only to listen to a story and answer questions about it, the evidence showed that the student's reading comprehension skills increased when the goal was implemented. In addition, the parents' claim that the writing goals lacked a means for objectively measuring progress is rejected, because it was sufficient that the IEPs required the teacher to evaluate the student's progress on a numerical scale. "It is not unreasonable to provide for a teacher to qualitatively measure a student's writing, and, indeed, the Court does not see any other means of measuring progress in writing skills." Similarly, the parents are incorrect that the speech language goal was not appropriate because it required the student to verbally express several grammatically correct sentences describing pictures. The fact that the goal did not state how many words the sentences should have, nor what tense they should be in, did not render it vague or immeasurable. Moreover, the goal was linked to evaluation data indicating the student had difficulties with certain pronoun and verb usage. Finally, the student's mother was highly involved in developing the IEPs and had significant influence on their content. The fact that she did not object to the goals at the time they were written clearly undermined the parents' contention that they were inappropriate.
- E. Savoy v. District of Columbia, 58 IDELR 129 (D. D.C. 2012). Although the school district provided a ninth-grader with 1,660 minutes rather than 1,710 minutes of specialized instruction each week, the district was not liable for an IEP implementation failure. There is no evidence that the slight loss of instructional time prevented the student from receiving FAPE. The difference in instruction listed on the IEP and provided by the district amounted to only 10 minutes a day, or 3 percent of the time required by his IEP. In addition, the parent failed to demonstrate that the student needed those 10 minutes of services to achieve his IEP goals. In fact, during the due process hearing, the parent did not even attempt

to argue that the missing minutes deprived the student of any educational benefit. Further, the district provided all of the behavioral services set forth in the student's IEP. Without evidence that the loss of 50 minutes of specialized instruction each week impeded the student's education, the parent could not demonstrate a material implementation failure that entitled the student to relief, and the student's placement in a public high school was appropriate.

- F. Corpus Christi Indep. Sch. Dist. v. C.C., 112 LRP 30156 (S.D. Tex. 2012). While the student's IEP required that he be provided with 189 minutes of general education instruction each day, but he only received 145 minutes of that instruction on Tuesdays and Wednesday when he received speech and fine arts instruction instead of P.E., this implementation failure is harmless. The student made progress during the 2010-11 school year, despite the shortfall in services. Thus, the student is not entitled to compensatory education services, since there was no material implementation failure. The loss of 44 minutes of general education time for 2 days per week represents 9% of the student's weekly required general education minutes and less than 5% of his total instructional time each week.

- G. Smith v. District of Columbia, 58 IDELR 155 (D. D.C. 2012). Though the student's mother believed that her son would have made greater progress if the district had provided him with a laptop, the received FAPE without it. The student made slow-but-steady progress, which reflected his ability to learn. Specifically, he made approximately three months' worth of progress in reading and four months' worth of progress in math in a 12-month period. According to the student's special education teacher, he showed great progress in reading initiative, made progress in decoding, and "made a lot of progress and growth" in math. Thus, while the student might have made greater improvements with the laptop and educational software recommended in the AT evaluation, the fact that he received some educational benefit without a laptop showed the device was not necessary for the student to receive FAPE.

- H. Department of Educ. v. C.B., 58 IDELR 279 (D. Haw. 2012). While transition services might be "highly important" for some students with disabilities, the failure to include them in a preschooler's IEP was not a denial of FAPE. IDEA does not require an IEP to include transition services designed to ease a child's move from private to public school. Although the hearing officer identified difficulties with transition as one of the child's unique needs, she did not identify any support for the conclusion that the IEP team's failure to discuss transition services or the provision of a transition plan amounted to a denial of FAPE. In addition, the ED developed a separate transition plan for the child after the IEP meeting. With respect to the IEP's failure to state specific number of hours the student would work with the paraprofessional, this alleged procedural violation did not deprive the student of FAPE or impede the parents' participation in the IEP process. Even if the IEP should have included it, the omission did not require the ED to fund the child's private program.

TRANSITION SERVICES

- A. Carrie I. v. Department of Educ., 112 LRP 31627 (D. Haw. 2012). District's proposed public school program is not appropriate where the IEP team relied upon a prior version of the IDEA when developing the student's transition plan. Rather than merely identifying the agencies responsible for providing transition services to the teenager with autism and Landau-Kleffner syndrome, the ED was required to conduct age-appropriate transition assessments, develop appropriate postsecondary goals and identify the services needed to reach those goals. The lack of these assessments alone is enough to constitute a "lost educational opportunity." In addition, because the state's vocational rehabilitation agency was likely to be responsible for providing or funding transition services for the student, the ED should have invited a representative of that agency to attend the IEP meeting. These procedural failures resulted in a denial of FAPE.

METHODOLOGY

- A. Ridley Sch. Dist. v. M.R., 58 IDELR 271 (3d Cir. 2012). District court's decision that the district's reading program was adequately supported by peer-reviewed research is affirmed. The IDEA does not require a district to choose the program supported by the optimum level of peer-reviewed research. "Rather, the peer-reviewed specially designed instruction in an IEP must be 'reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential.'" Where an organization devoted to literacy research reviewed the district's chosen method and found that it was aligned with current research and the research indicated that the child would benefit from the district's chosen reading program (Project Read), the district offered FAPE.

BEHAVIOR MANAGEMENT/FUNCTIONAL BEHAVIOR ASSESSMENTS

- A. J.W. v. Unified Sch. Dist. of Johnson Co., 58 IDELR 124, 2012 WL 628181 (D. Kan. 2012). While the 6-year-old autistic student continued to regularly bite his hands and slap himself at school, the district did not deny him FAPE. The district's use of positive behavioral interventions and supports were clearly designed to assist the child to progress toward reaching his IEP goals, and the IDEA does not require a district to eliminate behaviors that interfere with a child's learning. Rather, the IDEA requires a student's IEP team to "consider the use" of positive behavioral interventions and supports, which the district did in this case. Not only did the district consider the use of interventions and supports, it actually implemented a variety of behavioral management strategies, including the use of visual scheduling, token reinforcement, verbal praise, breaking down tasks into smaller tasks and a Picture Exchange Communication System. Even the parents' autism consultant agreed that the district was using a number of positive behavioral supports to address the student's behaviors. While the court acknowledges the parents' claim that their child failed to make progress and is sensitive to their concerns, the IEPs were reasonably calculated to provide FAPE.

- B. M.W. v. New York City Dept. of Educ., 112 LRP 31319 (E.D. N.Y. 2012). While the district may have violated state law when it did not conduct an FBA for a student with autism whose behavior impeded his learning and that of others, this failure was harmless where the IEP team considered the use of positive interventions and supports. Not only did the IEP note a need for positive reinforcement, it included a behavioral plan that identified strategies for encouraging positive behavior. Thus, the district's failure to conduct an FBA did not result in any harm to the student. In addition, the IEP's failure to recommend parent counseling and training—another state law requirement for IEPs for students with autism—the parents had counseling and training opportunities available, as the proposed school offered numerous workshops and other opportunities to help train parents and assist them in dealing with their child's educational needs. Thus, the failure to mention these services in the IEP did not amount to a denial of FAPE.

STAY-PUT PLACEMENT

- A. G.B. v. New York City Dept. of Educ., 58 IDELR 100 (S.D. N.Y. 2012). The district is not required to continue the elementary autistic interstate transfer student's enrollment at his current school during administrative proceedings to challenge the district's proposal that the student be placed in a program that did not use ABA. "Current placement" for purposes of stay-put refers to the last agreed upon placement before due process commences. Pendency does not require a student to remain at a particular site or location and placement means program, not a particular school or institution. Although the new district is not required to pay for the student to continue attending his current school, it is required to facilitate a comparable program.
- B. L.J. v. School Bd. of Broward Co., 58 IDELR 220, ___ F.Supp.2d ___ (S.D. Fla. 2012). Where the student's 2002 IEP became his stay-put placement after the parent filed a due process complaint challenging his 2005 IEP and during the course of litigation from 2006-2008, flexibility in implementing a stay-put IEP may be required where a student is progressing from one level of education to another. The significance of any deviations should be considered in light of whether it was even possible or appropriate to precisely implement those provisions in the student's new school (to which the student transferred with the parent's agreement) in light of the IEP's goals. The "materiality" of an IEP implementation failure in this unique context is gauged by reference to changes in the educational setting inherent in a transfer, while accounting for the fluidity of educational methodologies over time and place.

RELATED SERVICES

- A. Petit v. U.S. Dept. of Educ., 58 IDELR 241, 675 F.3d 832 (D.C. Cir. 2012). The U.S. Department of Education did not exceed its authority when it enacted regulations in 2006 that specifically excluded cochlear implant mapping from the

definition of related services. The ED's interpretation of the IDEA's definition of "audiology services," which does not include mapping of cochlear implants, is entitled to deference as long as it bears a rational relationship to the IDEA itself. Based upon information from the American Academy of Audiology, the ED concluded that mapping must be conducted by audiologists in specialized clinics with at least two years of experience and 450 hours of contact with individuals who have cochlear implants. In addition, the ED considered the fact that mapping would impose a significant financial burden on school districts, based upon the specialized equipment and personnel required. ED also determined that mapping was not necessary for students with cochlear implants to receive FAPE and that the service did not need to be provided during school hours or on school grounds. Thus, the ED did not err in enacting the regulatory provision.

LEAST RESTRICTIVE ENVIRONMENT

- A. Letter to Colleague, 112 LRP 14029 (OSEP 2012). A school district with limited or no preschool programs for nondisabled students is not absolved from its obligation to comply with the IDEA's LRE requirement applicable to disabled preschoolers. The LRE provision applies whether or not the school district operates public preschool programs for nondisabled children and districts "must explore alternative methods to ensure that the LRE requirements are met" for disabled preschoolers. These methods may include: 1) providing opportunities for them to participate in preschool programs operated by other public agencies (such as Head Start or community-based child care); 2) enrolling preschool children with disabilities in private programs for nondisabled preschool children; 3) locating classes for preschool children with disabilities in regular elementary schools; or 4) providing home-based services. In addition, if a school district determines that placement in a private preschool program is necessary for a child to receive FAPE, the district must make that program available at no cost to the parent.

- B. Williams v. Milwaukee Pub. Schs., 58 IDELR 252, 2012 WL 1205124 (E.D. Wis. 2012). Because the 9th grade cognitively impaired student made virtually no academic progress in her less restrictive multi-categorical class, the district's proposal to move her to a self-contained class did not violate the IDEA's LRE provision. In the multi-categorical placement, the student shut down, refused to follow directions, participate or complete her work. After a year in which multiple BIPs, supports (including a one-to-one paraprofessional for three hours per day) and other services proved ineffective and based upon IEP team members' view that the student was shutting down because she became frustrated when she could not understand grade-level work, the less restrictive class became "unsatisfactory." In addition, when the proposal to change her placement was made, the team relied not only on the student's failure to progress during the ninth grade, but upon years of evidence showing that she struggled in the multi-categorical classes in elementary school as well. Because the student could not learn there, the decision to move her was not a denial of FAPE.

- C. Ka.D. v. Nest, 58 IDELR 244, 2012 WL 1144291 (9th Cir. 2012) (unpublished). Parents are entitled to recover \$6,100 for the cost of a private school placement where the evidence showed that the 4-year-old was not ready to handle a part-time general education classroom that had a large number of peers in it, as recommended by the school district. The proposed placement would have required her to interact with about 42 other children, counting the 30 different core group of students in the general education class and the 12 children from her special education class. Despite having evidence that the child had documented difficulties with transitions and large groups, the IEP team recommended a part-time placement in the general education inclusion class, which did not reflect the child's unique needs.
- D. T.L. v. Department of Educ. of the City of New York, 58 IDELR 213, 2012 WL 1107652 (E.D. N.Y. 2012). Parents are not entitled to reimbursement for private school tuition where district offered FAPE in the LRE to high school student with ADHD. The parents' argument that the district's proposed transfer from a special class to a larger collaborative class was inappropriate is rejected. While the parents argued that the proposed class was too big and would not provide the student access to the individualized instruction that he needed, the district countered that the class offered the student placement in the LRE while still being appropriate for his needs and abilities. Where the collaborative class contained 19 general education students and three students with IEPs, was taught both by a general education and special education teacher, all of the students had reading and math functioning levels similar to the student's, a district representative testified that the student would have the opportunity for more individualized instruction there, and his IEP contemplated the provision of classroom modifications and related services to further address his needs, the proposed placement offered FAPE.

PRIVATE/RESIDENTIAL PLACEMENT

- A. T.B. v. St. Joseph Sch. Dist., 58 IDELR 242, 677 F.3d 844 (8th Cir. 2012). Parents are not entitled to reimbursement for costs of student's home-based program, which was focused upon skills such as answering social questions, waiting in line at the store, and playing games with others. Even if the parents were able to establish a procedural violation due to the district's failure to develop IEPs after the parents withdrew him from school and began the home program, they could not recover the costs of an inappropriate program. Although the home program provided some basic instruction in math, reading and listening comprehension, these services were secondary to the teaching of social and behavioral skills. While the program may have supplemented the student's educational needs, it was not designed to help him receive an educational benefit.
- B. T.R. v. Cherry Hill Township Bd. of Educ., 58 IDELR 260 (D. N.J. 2012). Autistic student could not be satisfactorily educated in a special day class, where

the student's behaviors included hitting others, screaming 100 or more times during the school day, noncompliance, such as throwing instructional materials and self-stimulatory behaviors. This conduct prevented him from learning academics or daily living skills, despite 1:1 attention provided. In addition, the student's behaviors persisted and even got worse. Because the student will only acquire life skills and academic progress with the consistency of instruction that a residential placement can provide, a residential placement is ordered. An educational program does not simply include the material taught in lessons "but necessary life skills such as toileting are considered part of the child's educational needs."

- C. Munir v. Pottsville Area Sch. Dist., 112 LRP 31473 (M.D. Pa. 2012). Although the 17-year-old student with severe depression made progress in a therapeutic residential program where his parents unilaterally placed him, the district is not required to reimburse the parents for the cost of the private program. While educational and emotional needs may sometimes be intertwined, the evidence here showed that the student earned above-average grades in school. In addition, testimony indicated that the parents placed the student in the residential setting because he had threatened to harm himself and they feared for his safety. Although the student clearly benefited from the educational opportunities offered by the residential placement, these educational benefits were "subsidiary to the therapeutic and emotional benefits [the student] received in an effort to prevent another suicide attempt." Because the unilateral placement was intended to address the student's emotional rather than his educational needs, the parents' claim for reimbursement is denied. In addition, given the student's success at school, the district did not violate its child find obligations by failing to identify him as an ED student after his initial psychiatric hospitalizations because the district had no reason to suspect at that time that he student required special education as an ED student.
- D. N.T. v. District of Columbia, 58 IDELR 69 (D. D.C. 2012). Though the district failed to include small-group instruction in the grade schooler's proposed IEP, that did not require the district to pay for the student's private placement, because the restrictiveness of the student's unilateral private placement made reimbursement an inappropriate remedy. Reimbursement for private schooling is not an appropriate remedy where the district is ready, willing and able to meet the student's needs. Although the proposed IEP did not expressly mention small-group instruction, there was no evidence that such a service was unavailable in the district's public schools. Clearly, the district's special education consultant anticipated that the student would receive such small-group instruction at the neighborhood elementary school, and the hearing officer ordered that the IEP be modified to provide for small-group instruction. The private placement, which only served students with moderate or severe disabilities, was overly restrictive. While unilateral placements by parents do not need to satisfy the LRE requirement, hearing officers may consider the restrictiveness of a private placement in determining whether reimbursement is an appropriate remedy.

Based upon the student's history of progress during her five years in an inclusion setting, when she did not have an IEP, a placement in a special education school was inappropriate. Thus, the hearing officer's denial of reimbursement to the parents is upheld.

- E. C.L. v. Scarsdale Union Free Sch. Dist., 58 IDELR 227, 2012 WL 983371 (S.D. N.Y. 2012). Although the student made progress in a private school for students with learning disabilities and attentional problems where her parents placed her, the placement is not appropriate when the student also made meaningful progress in his general education public school program the previous year. Though the district denied FAPE by failing to find him eligible for services, the parents' argument that he required the unilateral placement in the special school is rejected. The student had friends in public school and would have continued to benefit from exposure to his typical peers, including gaining confidence. Thus, he did not require an environment that isolated him from them. Additionally, the private school does not have an Occupational Therapist on staff, which the student needs. The issue is not whether a unilateral placement provides benefits that any child would want, the issue is whether it provides instruction designed to meet the unique needs of a student with a disability, which this placement did not do.

- F. J.A. v. New York City Dept. of Educ., 58 IDELR 223, 2012 WL 1075843 (S.D. N.Y. 2012). The private school teacher's testimony that the student required "constant redirection" was not sufficient to show that the school district's proposed placement in a 12-to-1+1 classroom was inappropriate. The IEP team specifically accounted for the student's distractibility when it proposed a small, supportive classroom setting which included a paraprofessional who could redirect him as needed and where the classroom teacher testified that he accommodated students with attentional and sensory deficits by previewing material and allowing them frequent breaks. In addition, it was evident that school personnel would have been able to accommodate the student's difficulty with crowds and loud noises. Thus, the private teacher's credible testimony concerning the student's social limitations was not sufficient to hold the student's IEP was inadequate to meet his needs.

- G. Plainville Bd. of Educ. v. R.N., 58 IDELR 257, 2012 WL 1094640 (D. Conn. 2012). Because the district's IEP was not appropriate and the student with Bipolar Disorder was not progressing on his goals in his therapeutic day placement, the district is responsible for the cost of the student's residential placement. The student had to be forcibly transported to his therapeutic day program every day and, just a few weeks into the 2007-08 school year, his behavior escalated to the point where he required emergency psychiatric treatment. Although his IEP team recognized that he needed intensive direct instruction in several areas, it determined that he would only attend school until 11 a.m. each day. Thus, the student did not receive instruction in science or social studies during that time and his counseling services were reduced to 15 minutes.

The services provided appeared to be “stopgap” measures to manage his behavior rather than to educate him. “A two-hour school day with no additional services was not sufficient to provide [him] with a reasonable chance of making academic progress, especially in view of the [team’s] determination that he should be in school 30.75 hours per week.” Importantly, the student made significant progress after the parents enrolled him in the residential program.

PRACTICE AND PROCEDURE

- A. M.M. v. LaFayette Sch. Dist., 112 LRP 29129, ___ F.3d ___ (9th Cir. 2012). Where ALJ dismissed six of the parent’s 16 claims as untimely but had not yet conducted a hearing on the FAPE complaint, the parent could not challenge the ruling in federal court, as the parent’s lawsuit was premature. Where the IDEA is silent on whether a party may seek judicial review of a prehearing order before the ALJ issues a final decision in the matter, the principles underlying the “final judgment rule”—the promotion of judicial efficiency and avoidance of multiple lawsuits—also apply to reviews of administrative decisions in IDEA matters. The district court was correct in noting that allowing the parent to appeal aspects of the due process proceedings in a piecemeal fashion would run counter to the IDEA and would hinder efficient resolution of the administrative proceedings and did not err in dismissing the parent’s complaint.

STATUTE OF LIMITATIONS

- A. Swope v. Central York Sch. Dist., 58 IDELR 32, 796 F.Supp.2d 592 (M.D. Pa. 2012). Claims of former LD student who filed for due process seeking compensatory education for the district’s alleged failure to provide him with FAPE from his 7th-grade through 11th-grade school years are dismissed as time-barred under the IDEA. The IDEA encompasses a two-year statute of limitations which requires a parent to request a due process hearing within two years of the date she “knew or should have known about the alleged action that forms the basis of the complaint.” The statute also provides for two circumstances under which the statute is not applied, including where the district specifically misrepresented that it had resolved problems forming the basis of the complaint, or if it withheld information from the parent that was required to be provided under the IDEA. Here, the former student contended that the district convinced his mother that there was no need for reevaluations, which prevented her from pursuing due process and deprived him of appropriate related services and resulted in a drop in his grades. However, there was no evidence that the district withheld any information from the student’s mother. Rather, it was clear that his mother was well-aware that he had academic problems as evidenced by years of her dissatisfaction with the district’s approach to her son’s education. In addition, the district also provided her with standardized test scores that indicated significant problems. Because the record showed that the district previously provided the mother with notice of the procedural safeguards, the mother either knew or had a basis to know that she could have filed due process complaints

before the student's 11th-grade year. Thus, the student's pre-junior year claims, which arose more than two years before his due process request, were not sustainable and the hearing officer did not err in dismissing them.

DISPUTE RESOLUTION

- A. Letter to Eig, 112 LRP 23127 (OSEP 2012). Although the IDEA is silent on this issue, districts should attempt to arrange for individual or conference telephone calls if a parent cannot physically attend a resolution meeting. If the parent informs the district in advance that he/she cannot attend in person, it would be appropriate for the district to ensure parent participation using alternative means, such as video conferences or conference calls, subject to the parent's agreement.

ATTORNEYS AND ATTORNEY'S FEES

- A. Corpus Christi Indep. Sch. Dist. v. D.H., 112 LRP 30147 (S.D. Tex. 2012). Parents' overall fee award is reduced based upon the contract that the parent signed to hire her attorney, which provided that the parent would not attend a resolution meeting or settle her claims without the attorney's consent and that, if she did, she would become personally liable for paying his fees. According to the district, a settlement was imminent after the parent and school representatives met to resolve her claims prior to the due process hearing, but the parent refused to sign anything at the resolution meeting, saying that her attorney told her not to. Based upon that, the district argued that the fee request after the parent prevailed at the due process hearing should be drastically reduced because the hearing and appeal could have been avoided. Because the attorney's contract was calculated to and did unreasonably lengthen the process, the fee amount is reduced by half the number of hours the attorney logged prior to the resolution session. In addition, the hours the attorney logged between the resolution session and the district's formal settlement offer were eliminated.
- B. Bethlehem Area Sch. Dist. v. Zhou, 58 IDELR 185 (E.D. Pa. 2012). The clear language of the IDEA that permits a school district to recover attorneys' fees from a parent only applies when the parent initiates the due process complaint. Where the district felt compelled to file due process complaints in response to the parent's refusal to allow for a reevaluation and the parent's request for an IEE, the district was not required by the law to do so.
- C. I.S. v. School Town of Munster, 58 IDELR 186 (N.D. Ind. 2012). In filing for fees against the parent (who is also an attorney), the district sufficiently alleged that the parent filed a due process complaint for an improper purpose. The IDEA has two standards for fee recovery by districts: 1) a district may recover fees from the parent's counsel if the due process complaint was frivolous, unreasonable or baseless; 2) a district may recover fees from a parent if the parent acted with an improper purpose, such as to harass the district or increase the cost of litigation. Although the parent here is also an attorney, she is a parent for fee-

shifting purposes. The district alleged that the parent acted with an improper purpose by making many redundant filings and requests for records, failing to submit documents as required and canceling hearings at the last minute. “Coloring all of this is the allegation that [the parent] is a licensed attorney with considerable litigation experience in the special education arena.” Therefore, while the parent alleged that she was successful in some ways at the administrative level—a circumstance that would indicate that her claim was not frivolous or filed for an improper purpose—the district’s allegations are sufficient to survive a motion to dismiss.

- D. Johnson v. District of Columbia, 58 IDELR 184, ___ F.Supp.2d ___ (D. D.C. 2012). Magistrate refused to reduce the parent’s attorney’s rate from \$400 to \$300 per hour. Since the proceedings lasted for months (and one proceeding for years) and involved numerous exhibits, \$400 per hour is reasonable for the experienced special education lawyer.
- E. Garvin v. Dist. of Columbia, 58 IDELR 215, ___ F.Supp.2d ___ (D. D.C. 2012). While the due process hearing lasted just one day, it was sufficiently complex to justify an attorney’s fee of \$400-450 per hour. The hearing involved 11 exhibits, 29 listed witnesses, lengthy closing arguments, lengthy preparation and resulted in a 12-page single-spaced decision by the hearing officer.
- F. T.B. v. Mount Laurel Bd. of Educ., 58 IDELR 217, 2012 WL 1079088 (D. N.J. 2012). The parent’s attorney, with 20 years of experience, is entitled to \$400 per hour for work performed, notwithstanding that he received far less than that in other IDEA actions. The attorney submitted affidavits from education lawyers with similar experience and expertise in support of his request, which showed that his hourly rate was within the range of prevailing rates in the community. The district submitted no evidence to show that the rate was excessive. However, the overall fee award is reduced for excessive time spent on certain tasks and the parents’ lack of total success in the case.
- G. R.L. v. Miami-Dade Co. Sch. Bd., 58 IDELR 285 (S.D. Fla. 2012). Parents’ request for \$128,767 in fees is rejected. Because the district had requested the due process hearing to demonstrate the appropriateness of its proposed IEP, the parents cannot recover fees for work performed by their attorney in the five months prior to the district’s filing. Further, the attorney spent an excessive amount of time on exhibits for the hearing and on drafting, reviewing, and revising the proposed final order for the case. In addition, the award is reduced to account for the parents’ lack of success on certain issues. Thus, an amount of \$32,661 was appropriate as reasonable.

SECTION 504/AMERICANS WITH DISABILITIES ACT

- A. Dear Colleague Letter, 58 IDELR 79 (OCR 2012). The Office for Civil Rights issued this updated FAQ document to further address changes made by the 2008

ADA Amendments Act. OCR reiterates that students who did not qualify as disabled under Section 504 prior to January 1, 2009, may be disabled under the ADAAA under its expansive definition of disability. Extensive Section 504 evaluation or analysis is not necessarily required to determine whether a disability exists. In addition, a disabled student under Section 504 may only need a related service, even if not eligible for special education services. Although school districts may no longer consider the ameliorative effects of mitigating measures in making a disability determination, those can be considered in evaluating the needs of a disabled student for services, including the need for a 504 Plan. Continuing a student on a health plan may not be sufficient under 504 if the student needs or is believed to need special education or related services because of a disability.

- B. Lamkin v. Lone Jack C-6 Sch. Dist., 58 IDELR 197 (W.D. Mo. 2012). Relying on Letter to McKethan (1986 OCR), once a school district has determined that a student is disabled under the IDEA and has developed an IEP, the parents cannot reject IDEA services and then compel the school district to develop a 504 Plan. Here, the parents' "revocation of services under IDEA was tantamount to revocation under Section 504."
- C. Weidow v. Scranton Sch. Dist., 58 IDELR 93 (3d Cir. 2012) (unpublished). District court's decision in favor of granting summary judgment to the school district is upheld on the student's Section 504 and ADA claims. The former student did not show that her bipolar disorder—which is clearly a physical or mental impairment—substantially limited her in one or more major life activities for purposes of being considered an individual with a disability. Although the 2008 ADA Amendments rejected the notion that "substantially limits" means "significantly restricted," the ADA Amendments do not apply to claims, like these, that arose prior to their effective date of January 1, 2009. Thus, in considering whether the student's bipolar disorder significantly restricted her ability to concentrate, sleep, care for herself, or interact with others, it is important that while the student was under the care of a psychiatrist throughout high school and had episodes of self-destructive behavior, she had "some friends" and socialized with acquaintances. Although the student experienced some harassment at school, those interactions were limited to specific classmates. In addition, the student failed to show that she was unable to manage tasks, such as dressing herself, driving, concentrating or sleeping. "Indeed, that she successfully completed high school and went onto college speaks very well of her and reflects that she was not severely restricted." Because the student is not an individual with a disability, her claims of discrimination will not be addressed.
- D. Rayan R. v. Northwestern Educ. Intermed. Unit No. 19, 58 IDELR 95, 2012 WL 398781 (M.D. Pa. 2012). In the Third Circuit, parents are not required to allege intentional discrimination when they have also alleged an IDEA Part-B violation, because the latter is almost always a violation of Section 504. Thus, parents' discrimination claims will not be dismissed.

PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES

- A. S.S. v. Whitesboro Cent. Sch. Dist., 58 IDELR 99 (N.D. N.Y. 2012). Parents' ADA and 504 damages claims on behalf of their daughter are dismissed, as the parents' request that the student be allowed to leave the pool during swim practices and competitions to calm her nerves whenever she suffered a panic attack is unreasonable. The parents' allegation that the district should have allowed their daughter to leave the pool for intermediate periods of time, and on unannounced occasions, without being dismissed from the team is rejected. "There is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions." The ability to enter and stay in the pool is an essential requirement of being a swim team member and allowing the student to do otherwise would have fundamentally altered the nature of the swim team program.
- B. Mowery v. Logan Co. Bd. of Educ., 58 IDELR 192 (S.D. W.Va. 2012). Homebound high school student with a hereditary metabolic disorder stated valid claims for disability discrimination and disparate treatment under Section 1983, 504 and ADA based upon the district's refusal to allow him to attend a senior class dance and other events because he was "too sick" to attend school. Based upon the allegation that he was often told, "if you're too sick to come to school, you're too sick to attend these events," it appeared that the district treated him differently than other high schoolers on the basis of disability. In addition, student's claims dating back to his freshman year may proceed, because the student's alleged exclusion from senior class events could be viewed as part of a pattern of exclusion for discrimination and Section 1983 purposes.

FERPA/CONFIDENTIALITY

- A. Oakstone Comm. Sch. v. Williams, 112 LRP 17689 (S.D. Ohio 2012). Student whose services were discussed at a due process hearing is entitled to keep her educational records confidential. Even though the parent chose to make the hearing open to the public, her supporters publicized the hearing on Facebook and a representative of an advocacy group attempted to videotape the proceedings, the protections of FERPA apply even to those educational records used as exhibits in public hearings. While the private school may have wanted to respond to questions resulting from the highly publicized due process hearing, the student is a minor and is not a party to the school's lawsuit for attorney's fees. "The fact that her parent made the due process hearings public does not diminish [her] privacy interests in her records." Thus, the court grants the parent's motion to have the hearing transcripts and the first page of the hearing officer's order placed under seal.