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Presented by: **JIM WALSH**

WALSH, ANDERSON,
BROWN, GALLEGOS
and GREEN, P.C.

ATTORNEYS AT LAW

www.WalshAnderson.com

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Please note that citations contained within Key Quotes have sometimes been omitted to enhance readability.

This handout summarizes reported decisions from 2007-2010. District court decisions are reported from 2009-10, with a few 2008 cases added. Circuit court decisions are reported back to 2007. We have not attempted to summarize every case, but rather, those that are particularly important and/or instructive. The handout also includes italicized “*Comments*” designed to focus on the practical implications of some of the cases. The Comments sometimes include personal opinions of the author of the handout.

ADA/SECTION 504

Montanye v. Wissahickon School District, 47 IDELR 154 (3rd Cir. 2007).

The federal district court ruled for the district and the court of appeals affirmed. A teacher claimed that she was retaliated against for assisting special education students. The teacher had, among other things, suggested a specific therapist to a student, made arrangements for the student’s after-school therapy sessions, then transported and accompanied the student to therapy sessions. When the district learned of these activities, the teacher was issued a letter advising her to abide by certain school policies with regard to her interaction with at-risk students. According to the teacher, this letter amounted to constructive discharge. Both the district court and the court of appeals disagreed and instead ruled that the teacher failed to set forth a claim under either the ADA or Section 504. Key Quote:

It is clear from the case law that protected activity does not include mere assistance of special education students, but, rather, requires affirmative action in advocating for, or protesting discrimination related to, unlawful conduct by others

... Indeed, the concept of ‘protected activity’ at issue here is necessarily limited to, if not speech in the strict sense, at least the sort of expressive conduct which conveys a message.

S.L.-M. v. Dieringer School District No. 343, 50 IDELR 97 (W.D.Wash. 2008)

The district was unable to get the suit dismissed because the court concluded that there was a lingering fact issue to be resolved—whether or not the district had provided the accommodations the 504 plan called for. Those accommodations (shortened assignments and extended time) were to be provided “as needed.” The district argued that “as needed” meant that not all assignments would be shortened or extended and that “as needed” did not mean the same as “whenever requested.” The court was not persuaded:

Unfortunately for Dieringer, the plain text of the Plan fails to specify if and when the listed accommodations will be provided. Thus, drawing all reasonable inferences in SLM’s favor, the language of the 504 Plan is sufficiently ambiguous to raise an issue of fact for trial.

Comment: The court seems dubious about this suit, but was not willing to toss it out at this early stage. The court stated that it would be up to the jury to decide if this student qualified under 504, but added: “the Court notes that there is little evidence, if any, to support this proposition.” While the student unquestionably had physical problems, “there is no evidence that SLM’s [problems] led to excessive absences during his time at Dieringer; in fact, his attendance was nearly perfect.” This case is one where the school district wrote up a 504 plan after the student failed to qualify for special education services. Then, because the student was doing well in school, “the Plan lay dormant.” Later, when the mother became concerned, she brought up the 504 plan and demanded the extra time and shortened assignments the plan called for in an effort to get the student’s grades up. Litigation ensued. The lesson for schools seems twofold. First, don’t offer 504 accommodations as a consolation prize. Offer them when the student has a disability that substantially impairs the student in a major life activity. Second, when you write up a 504 plan, make it clear so as to avoid arguments over interpretation.

Streck v. Board of Education of the East Greenbush School District, 50 IDELR 132 (2d Cir. 2008) (Unpublished)

The court affirmed the dismissal of the parents’ claims under the ADA and 504, noting that such claims can only be made for “reasonable accommodations to assure access to an existing program” but not for “additional or different substantive benefits.” Since the student had an IEP and was served pursuant to an IEP until his graduation, he had had access to an existing program. The suit challenged the content and sufficiency of the IEP, which the court said was not cognizable under ADA or 504. The court also affirmed the dismissal of the claim seeking monetary damages under Section 1983, noting that such claims are available only if procedural safeguards or administrative remedies have been denied. Here, the parents had an administrative hearing to challenge the IEP. Thus, they were not deprived of procedural safeguards or an administrative hearing.

B.M. v. Board of Education of Scott County, Kentucky, 51 IDELR 5 (E.D.Ky. 2008)

The school refused to hire a nurse to provide insulin injections to a student with diabetes, offering instead to transport the student to another campus where a nurse was already employed. This would involve some loss of instructional time due to transportation. When the parent rejected that offer, the school offered a number of other means of accommodating the student, but continued to refuse to hire a nurse for the child's campus. The court held that the plaintiff was not required to exhaust IDEA administrative remedies because this case did not involve educational services, but was a straight ADA/504 discrimination case. The court held that the plaintiff failed to state a cause of action because the school had offered a reasonable accommodation. Moreover, the parent could not show deliberate indifference by the school officials. Key Quote:

The Court is not persuaded that either the ADA, Section 504 or [state law] require school districts to modify school programs in order to ensure neighborhood placements when necessary services and a free and appropriate education are available at another site within the district.

Hill v. Bradley County Board of Education, 51 IDELR 93; 295 F.App.x. 740 (6th Cir. 2008)

The court dismissed a suit based on Section 1983 and Section 504 arising out of the death of a student who jumped out of a moving school bus after the driver refused to stop at a location not designated as a bus stop. The court found insufficient evidence of deliberate indifference, causation or intent to discriminate.

Comment: Though this suit was unsuccessful, it illustrates the increased use of Section 504 to address claims that in the past were treated as simple negligence cases under state law.

C.D. v. New York City DOE, 52 IDELR 8 (S.D.N.Y. 2009)

The court refused to dismiss a claim under § 504 and the ADA based on the school's failure to provide free meals to students who qualified for them and were placed in private schools by the public school as a means of providing FAPE. The court tossed out the IDEA claim, finding no violation of IDEA, but refused to dismiss the § 504 claim. The public school was already paying tuition and transportation costs for these students since it was unable to offer an appropriate program in a public school.

Sandlin v. Switzerland County School Corporation, 53 IDELR 52 (S.D.Ind. 2009)

The court dismissed a suit alleging disability discrimination due to the lack of evidence of bad faith or gross misjudgment. After a seizure, the school held a 504 meeting and sent the student home until staff could be properly trained to deal with a seizure. The student missed ten days of school as a result. Key Quote:

With the evidence presented to the court, no reasonable jury could conclude that Sandlin's absence was either the result of a gross misjudgment or done in bad

faith. For the ten days after the first seizure at the high school, no reasonable jury could find intentional discrimination that violated the ADA or the Rehabilitation Act.

Brado v. Weast, 53 IDELR 316 (D.C.Md. 2010)

The court affirmed a hearing officer's decision that the student was not eligible despite chronic and severe pain. The evidence showed that the student did not need to receive instruction at home, but could be served at school with accommodations available under Section 504. These included frequent breaks, adjusted workloads, alternative test scheduling and personalized instruction.

Comment: The school had served the student at home under IDEA for a few years, but then reversed course and dismissed her, and offered 504 accommodations. The court noted case law to the effect that homebound instruction is "specially designed instruction" even if it is not modified in content or form. Thus if the evidence had showed that the student needed to be served at home, she would have been deemed eligible.

Kaitlin C. v. Cheltenham Township School District, 54 IDELR 44 (E.D.Pa. 2010)

The court dismissed the suit because it sought compensatory damages under 504 but did not allege intentional discrimination. The student suffered an injury in a P.E. class and the teacher later acknowledged that she was unaware of the student's physical limitations. The court observed that the case was more about negligence than intentional discrimination and could not be brought under 504 for damages.

Celeste v. East Meadow Union Free School District, 54 IDELR 142 (2nd Cir. 2010) (Unpublished)

The student relied on crutches when he was ambulatory and a wheelchair when he was not. Minor architectural barriers on school property forced him to take a 10-minute detour each way to go to and from the athletic fields. The 20 minute total detracted from his participation as manager of the football team and cut in half his participation time in a typical 45-minute PE class. The student sued the District from denying him meaningful access to its programs as provided under Title II of the Americans with Disabilities Act. A jury found the District liable and awarded \$115,000. The Court upheld the jury's decision on liability, finding that "For each of the physical areas found by the jury to have the effect of denying [the student] access to school programs, [the student] offered plausible, simple remedies, which are [minimal] compared with the corresponding benefits by way of access achieved." However, the Court vacated the award as arbitrary and remanded the case for a new trial on the issue of damages.

AGE LIMITS

Ferren C. v. School District of Philadelphia, 51 IDELR 272 (E.D.Pa. 2009)

The court ordered the district to provide compensatory educational services to the student who was 23 years old. The court noted that “stay put” would not authorize such an order since the right to IDEA services ceases at age 21. However, the court retained the authority to order compensatory services as an equitable remedy to address the failure to provide FAPE while the student was entitled to it.

ATTORNEY’S FEES

A.W. v. East Orange Board of Education, 48 IDELR 209; 248 F. App’x. 363 (3rd Cir. 2008)

The East Orange school district found A.W. ineligible for special education services. When the parent filed a due process hearing request, the parents and district entered into an agreement to implement and develop an IEP for A.W. The parents then sued in federal court to recover the fees paid to a non-attorney consultant. The court ruled that the parents were not a prevailing party for purposes of attorneys’ fees. The Third Circuit agreed. Key Quotes:

Although a party benefiting from a settlement agreement could be a prevailing party, the change in the legal relationship must be in some way judicially sanctioned. We have found a stipulated settlement judicially sanctioned where it (1) contained mandatory language; (2) was entitled “Order;” (3) bore the signature of the District Court judge; and (4) provided for judicial enforcement.

Under this authority, A.W. is not a prevailing party by virtue of having obtained an acceptable IEP...A.W. and the School District developed the IEP through negotiations out of court, and no court has endorsed the agreement with a judicial imprimatur. Thus, the District Court did not err in denying A.W.’s motion.

The court also noted that even if they had “prevailed” the parents would not be entitled to reimbursement for the payment of non-attorney expert fees for educational consultants.

D.S. v. Neptune Township Board of Education, 49 IDELR 181; 264 F.App’x. 186 (3rd Cir. 2008)

Parents were not entitled to attorneys fees despite numerous favorable rulings. The school district determined that the student was not eligible for special education. The parents requested a due process hearing to challenge that decision, but withdrew it before hearing. Thus there was never a decision that the child was eligible. The court concluded that attorney’s fees are never available unless the student is eligible for services:

It is undisputed that the parents secured four separate orders from the ALJ ordering Neptune to conduct a special education evaluation of the child, to pay for an IEE and to pay for the educational costs of the child’s placement at KidsPeace. But for retaining counsel, the parents would not have secured these benefits for

the child. However, under the plain language of the statute, these benefits alone, without the determination that the child needed special education, do not make him a child with a disability.

The definition of a “child with a disability” reflects Congress’ intent that the fee shifting provision should only apply where a child has an impairment listed in 20 U.S.C. 1401(3)(A)(i) and “needs special education and related services.

Robert K. v. Cobb County School District, 50 IDELR 62 (11th Cir. 2008)

The parents obtained an order from the administrative law judge which stated that the school district had violated a previous settlement agreement. The order included a requirement that the school abide by “stay put.” Based on that order, the parents then sued to recover their attorneys’ fees. The 11th Circuit held that the parents were not entitled to recover attorneys’ fees. Although they had prevailed, they had not prevailed on a claim based on the IDEA. Their claim was based on state law and relied on a breach of contract theory. Furthermore, a “stay put” order “generally will not support an attorneys’ fees award because it is not merits based.”

Deptford Township School District v. H.B., 50 IDELR 92 (3rd Cir. 2008)

The parents prevailed at the due process stage, but the district court reversed and ruled for the school. By that time, however, the parents had already received some compensation from the school for interim services based on the due process victory. The district court allowed the parents to keep that money, and based on this interim victory, also awarded attorney’s fees of \$98,550. The Circuit Court reversed the award of attorney’s fees:

The fact that [the parents] achieved only temporary relief requires judgment in favor of the School District because such relief is not equivalent to final relief on the merits.

Comment: It probably did not help the parents’ cause when the court noted that their attorney “either through gross carelessness or worse—initially sought fees that included 60 hours billed in a single day.”

El Paso ISD v. Richard R., 53 IDELR 175; 591 F.3d 417 (5th Cir. 2009)

The appeals court determined that R.R. was not entitled to an award of attorney’s fees, even assuming that R.R. was the “prevailing party” under the IDEA. The appeals court observed that “[e]arly resolution through settlement is favored under the IDEA.” The statute bars an award of attorney’s fees for work performed by an attorney after a district’s offer of settlement, when the attorney’s work does not ultimately achieve more than that which was offered in the settlement. It was undisputed that R.R. did not achieve any educational benefit beyond what the district had offered. According to the appeals court, R.R. did not need to continue the litigation by pursuing the due process proceeding after the district had offered all of the relief that he had requested. Because R.R. was not substantially justified in rejecting the district’s settlement offer, the IDEA prohibited an attorney’s fee award for work performed subsequent to the offer of settlement.

The appeals court also determined that R.R. was not entitled to attorney's fees for his attorney's participation in the resolution meeting. The IDEA allows an attorney's fees award for work performed in any "action or proceeding." However, the IDEA specifically excludes resolution meetings from the definition of "action or proceeding." Thus, R.R. was not entitled to attorney's fees for his attorney's work at the resolution meeting.

The appeals court also concluded that R.R. was not entitled to attorney's fees for work performed prior to the resolution meeting. The IDEA states that a court shall reduce attorney's fees "whenever the court finds that . . . the parent, or the parent's attorney . . . unreasonably protracted the final resolution of the controversy." The appeals court determined that R.R. and his attorney unreasonably protracted the resolution of this dispute for over three years. The record showed that the district offered R.R. all relief requested in the due process complaint, including reasonable attorney's fees. According to the appeals court, at that point, there was "absolutely no need to continue litigating." Nevertheless, R.R. and his attorney rejected the district's settlement, walked out of the resolution meeting, and continued litigating the claims. Because R.R. and his attorney unreasonably protracted the resolution of this dispute, the trial court erred when it awarded R.R. attorney's fees. The court denied the district's request to recover its own attorneys' fees, but did order the parent's attorney to pay court costs.

Comment: This decision is a strong confirmation that "The IDEA envisions that the parties to a dispute should resolve their differences cooperatively." The 5th Circuit determined that the trial court was not only wrong to order \$45,000 in attorney's fees, it "abused its discretion" by doing so when there was "absolutely no need to continue litigating." That is a strong message, as is the order that the parent's attorney must pay court costs.

Bingham v. New Berlin School District, 51 IDELR 61; 550 F.3d 601 (7th Cir. 2008)

The ALJ held that the school district had rendered the case moot by paying the parents the full amount of tuition reimbursement they were seeking by way of a voluntary settlement. Parents then sought attorneys' fees but the district court and Circuit Court denied relief, noting that parents were not prevailing parties. The court relied on Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health, 532 U.S. 598 (2001). In that case, the Supreme Court rejected the "catalyst theory" of recovering attorneys' fees in voluntary settlement cases. Here, the court held that Buckhannon applied to IDEA cases, and thus the district's voluntary settlement of all matters effectively deprived the parents of "prevailing party" status. In fact, the court ordered the parents and their attorney to show cause as to why they should not be required to pay the costs and attorneys' fees incurred by the district in this appeal.

Comment: The court cited the scholarly criticism of the Buckhannon rule as applied to parents in IDEA cases, but concluded that it had no choice but to follow Supreme Court precedent. The court thought the whole matter so clear cut that it criticized the parents' attorney for not citing the case and for continuing to litigate the matter. Key Quote:

Appellants' counsel understood that the law required prevailing party status and that they had not obtained that outcome. Nevertheless, counsel continued to

litigate this case without a reasonable basis for doing so, expending the resources of the court and the opposing party.

Weissburg v. Lancaster School District, 53 IDELR 249; 591 F.3d 1255 (9th Cir. 2010)

The District evaluated the student and recommended eligibility based on Mental Retardation but determined that the student did not display behaviors consistent with Autism. The Hearing Officer found that the student should have been eligible under both Mental Retardation and Autism; however, the Hearing Officer found that the student was not denied a FAPE in that he received the educational benefits to which he was entitled under the IDEA regardless of his eligibility classification. The Ninth Circuit disagreed. California state law requires special education teachers to be certified to instruct students with particular disabilities, including Autism. If the District had found the student eligible as a child with Autism, the child had a legal right to instruction by a teacher with autism certification. The Court acknowledged that the child did not lose educational opportunities as a result of his misclassification because his teacher had dual certification in mental retardation and autism. The Court said that the misclassification could have resulted in the child being instructed by a teacher who did not have autism certification. “Although [the child] did, in fact, receive placement in the proper classroom, the school district refused to recognize his additional primary disability of autism, and thus his legal right to such a placement, until his eligibility category was changed.” The Court concluded that the change in classification altered the parties’ legal relationship such that the parents were prevailing parties for purposes of attorneys’ fees. The Court clarified that a denial of FAPE is not necessary for prevailing party status and attorneys’ fees.

A.O. v. El Paso ISD, 54 IDELR 42 (5th Cir. 2010)

The court held that it had jurisdiction to consider the case even though the district offered all of the relief the parent requested, including \$3000 in attorneys’ fees. While the court held that it retained jurisdiction of the case, it also pointed out the similarity of this fact situation with that of Richard R. v. El Paso ISD. In that case, the 5th Circuit also declined to dismiss the case as “moot” but denied all attorneys’ fees on the theory that the plaintiff had unnecessarily protracted the litigation by refusing to accept the school district’s settlement offer.

Wood v. Katy ISD, 54 IDELR 82 (S.D.Tx. 2010)

The court first dismissed the parents’ suit based on a failure to exhaust administrative remedies. The school district then filed a claim to recover attorneys’ fees, arguing that the case was frivolous. The court denied that claim, noting that it had no jurisdiction over the merits of the claim and therefore, had no jurisdiction over a claim for attorney’s fees. Key Quote:

The Court agrees and sympathizes with Defendants in their argument that Plaintiffs have failed to satisfy black-letter law that all IDEA administrative remedies must be exhausted before bringing civil suit in federal court.

Nevertheless, the difficulty here is that Defendants’ motion to dismiss requested, and this Court granted, a dismissal for lack of subject matter jurisdiction.

BEHAVIOR

Lauren P. v. Wissahickon School District, 51 IDELR 206 (3rd Cir. 2009) (Unpublished)

The court ruled that the parents were not entitled to reimbursement for tuition at a private school, thus overturning the district court. The administrative panel had concluded that the private school was not appropriate and the district court did not specify why that was wrong. The parents were entitled to compensatory education, but not reimbursement for the tuition at the private school.

L. G. v. School Board of Palm Beach County, 48 IDELR 271 (11th Cir. 2007)

The hearing officer ruled for the school district, as did the federal district court and the Circuit Court. The parents of an 8-year old student with a SED were not entitled to reimbursement for residential placement. The evidence showed serious behavior problems at home, but not at school:

The plaintiffs first presented evidence that in early July 2004, B.G. had a violent episode at home, where he threw things, tried to smash a mirror over his mother's head, and ran out into the street in traffic. Although this behavior is alarming, we have said that a FAPE consists of meaningful gains inside the classroom, and that the IDEA does not require that the student be able to generalize behaviors from the classroom to the home setting.

Thompson R2-J School District v. Luke P., 50 IDELR 212; 540 F.3d 1143 (10th Cir. 2008)

This case very squarely presents the legal issue of whether or not generalization of skills beyond the school setting is required. The court held that it was not. The parents prevailed in this case at every level until the Circuit Court. But also, at every level, every fact finder concluded that the student was making some degree of progress on his IEP. The problem was that those skills were not translating to settings outside of school. Thus the parents sought a residential placement, but the court held for the school district. Key quotes:

The school district responds that, as a matter of law, generalization across settings is not required by IDEA so long as Luke can be said to be making some progress in school, and cites cases from the Eleventh and First Circuits, as well as various district courts so holding. We are constrained to agree with the school district and our sister courts. Though one can well argue that generalization is a critical skill for self-sufficiency and independence, we cannot agree with appellees that IDEA always attaches essential importance to it.

While we are sympathetic to Luke's parents' desire to see their child thrive, the difficulty with their argument is that Congress did not provide in IDEA a guarantee of self-sufficiency for all disabled persons, and the most authoritative

arbiter of congressional intent has already reached this conclusion. *Note: the court is referring to the Rowley case, which it then discusses.*

The court discussed the rulings of the administrative hearing officers and lower court as follows:

These tribunals reached a contrary judgment in this case only because, in their judgment, ‘whatever educational progress Luke made...was meaningless if there was no strategy to ensure that those skills would be transferred outside the school environment. For reasons we have explained, however, this conclusion rests on a legal error. No educational value or goal, including generalization, carries special weight under IDEA. The fact that, by the admission of every factfinder in this case, Luke was making some educational progress and had an IEP reasonably calculated to ensure that progress continued is sufficient to indicate compliance, not defiance, of the Act.

Comment: No doubt it helped the school district that the hearing officer and the court found that the school district was attempting to serve Luke well. The court: “This is not the usual IDEA dispute where the student and parents allege that their concerns have gone unheeded or unaddressed in the IEP process. Indeed, both the IHO and the ALJ found the December 2003 IEP to represent a “monumental and genuine effort on the part of the District to improve [Luke]’s performance in a number of areas affected by his autism.”

C.N. v. Willmar Public Schools, ISD No. 347, 53 IDELR 251; 591 F.3d 624 (8th Cir. 2010)

The student’s BIP allowed the teacher to use seclusion and restraint. The Court explained that the BIP set the standard for the teacher’s use of seclusion and restraint. “Because [the IEP] authorized such methods, [the teacher’s]- use of those and similar methods ..., even if overzealous at times and not recommended by [the independent evaluator], was not a substantial departure from accepted judgment, practice or standards, and was not unreasonable in the constitutional sense.” Thus, the teacher’s use of seclusion and restraint did not amount to a Fourth Amendment violation. The court also dismissed the IDEA claim against the district because the parents and child did not reside in the district at the time of the request for a due process hearing. This followed 8th Circuit precedent.

G.C. v. School Board of Seminole County, Florida, 52 IDELR 255 (M.D.Fla. 2009)

The court dismissed a suit alleging unconstitutional restraint of the student. The parent made many allegations of restraint but failed to present evidence of any injury that would be so severe as to violate the constitution. There was evidence involving restraint of the student at the bus stop to keep him from running. The teacher placed her leg over the student’s legs. The court found this to be “not obviously excessive,” and that it did not cause any “shock the conscience” injuries to the student.

B.D. v. Puyallup School District, 53 IDELR 120 (W.D.Wash. 2009)

The court upheld a hearing officer's decision in favor of the school district. Among other rulings, the court observed that "The use of a quiet room or area, offered to the student to go to voluntarily if some noise disrupted or agitated him, is not an aversive therapy." State law has a definition of "aversive interventions" but the court held that this technique did not meet that definition.

Alleyne v. New York State Education Dept., 54 IDELR 51 (N.D.N.Y. 2010)

The court held that New York had the authority to adopt regulations restricting the use of aversive techniques, but it kept in place an injunction to prevent New York authorities from imposing their regulations on a residential school in Massachusetts that served New York students.

E.H. & K.H. v. Board of Ed. of Shenendehowa Central Sch. Dist., 53 IDELR 141 (2nd Cir. 2009) (Unpublished)

Because the IEP identified techniques that his teachers could use to address his behavior issues, the lack of a formal BIP did not make the student's program deficient. The court also rejected the argument that the parents were denied the right to meaningful participation. Key Quote:

The record reflects a robust, if acrimonious, dialogue between school personnel and plaintiffs, as well as plaintiffs' participation in many meetings aimed at developing educational programming for C.H. Thus, we identify no error, much less one capable of denying C.H. a FAPE.

The court also ruled in favor of the district on placement. A witness testified that a six-student classroom would be the "best" placement for a student. The court found that the six-student classroom would not have been the least restrictive environment as required by the IDEA and that the IDEA does not require district to provide the "best" possible placement so long as the district offers to provide an appropriate education which allows the child to receive meaningful educational benefit.

Rodriguez v. San Mateo Union High School District, 53 IDELR 178 (9th Cir. 2009) (Unpublished)

The student was arrested for taking beer from a store. Pursuant to an agreement with a juvenile court, the student's parent placed him in a private residential program. Claiming that the district's failure to develop a BIP after the student's arrest amounted to a denial of FAPE, the parent sought reimbursement for the residential placement. The Court found that the student's behavioral problems did not cause harm or a serious threat of harm to persons or property, which would have required a BIP under the California regulations. The Court also found that the student did not show evidence of other circumstances warranting a BIP under the IDEA. While the student's truancy interfered with his learning, the District adequately addressed that issue in the student's IEP.

CHILD FIND

A.P. v. Woodstock Board of Education, 50 IDELR 275; 572 F.Supp.2d 221 (D.C.Conn. 2008)

The court held that the district did not violate its child find duty. The student made progress in regular education with interventions designed by the Child Study Team. Eventually, the school determined that the student was eligible for special education, but the parent complained that this came too late. The parents argued that the school's routine use of the CST as a "pre-referral" process was a "per se violation of the IDEA." The court rejected that argument. The court noted state laws that require the use of regular education interventions prior to a referral for special education testing. The second argument asserted that the school used the CST improperly as a "roadblock," intentionally designed to prevent referrals. But the court held that these assertions were not borne out by the record. The law states that parents can make a referral at any time. The record showed that these parents knew this, or should have known it. They never did make a referral even though they knew how to do so. Third, the parents argued that if, in fact, it is permissible for schools to use this CST process, then the CST should be required to follow all of the rules and procedures that apply to IEP Team meetings. Parents should be notified and included in all meetings with an opportunity to participate in every decision. The court rejected that argument as well. The court concluded that the procedural safeguards parents enjoy under the IDEA are triggered by a referral for special education testing—not by pre-referral activities such as a meeting of the CST.

Comment: The term "response to intervention" does not appear anywhere in the court's decision. But educators who read this one will understand instantly what was going on. In alignment with RTI theory, the school used regular education staff and services to provide the extra help the student needed. The school provided one year of informal intervention by the teacher, and a second year of formal action by the CST. The court ruled in favor of the school district on all grounds. But this case illustrates the inherent tension between Child Find and RTI. The campus based support team is charged with balancing this tension and making decisions about kids on an individualized basis.

Letter to Eig, 52 IDELR 136 (OSEP 2009)

OSEP here advises that a district cannot refuse to evaluate a student who resides in the district on the basis of the child's placement by the parents at a private school outside of the district's boundaries. The letter makes it clear that if student lives in District A and attends a private school in District B, both districts have a child find responsibility. District A has the duty to make FAPE available; District B has the duty to provide proportionate share services to privately placed, eligible students. Thus a parent may obtain two evaluations. Key Quote:

While the Department generally discourages parents from requesting evaluations from two LEAs, if a parent chooses to request evaluations from the LEA responsible for providing the child with a program of FAPE and a different LEA that is responsible for considering the child for the provision of equitable services, both LEAs are required to conduct an evaluation.

Regional School District No. 9 Board of Education v. Mr. and Mrs. M., 53 IDELR 8 (D.C.Conn. 2009)

The court affirmed a hearing officer's decision that the district had failed in its child find obligation. The parent informed the school that the child had been placed in a psychiatric hospital. The district had also been informed that the child had a prior diagnosis of depression, and was taking anti-depression medications. This was enough, according to the hearing officer and the court, to trigger the child find duty. Three days after the school was informed of the psychiatric hospitalization, the parent placed the child in a residential program in Utah. The Connecticut school argued that it had no further duty once the child went to Utah, but the court rejected that argument. Key Quotes:

Thus, M.M.'s placement in Utah does not divest District 9 of its IDEA obligations to a student who remained officially registered at [the Connecticut school] and a resident of Connecticut.

Anello v. Indian River School District, 53 IDELR 253 (3rd Cir. 2009) (Unpublished)

The court held that the district did not violate child find because the student was making adequate progress under a 504 plan. The parents requested an evaluation for IDEA eligibility on February 3, 2004, and the district conducted an evaluation. But there was no duty on the part of the district to conduct an evaluation prior to that time. The student's grades "were improving in all subjects, including math, and the School District could not know she would later fail both the third grade and the [statewide test]."

D.K. v. Abington School District, 54 IDELR 119 (E.D.Pa. 2010)

The court affirmed an administrative decision in favor of the school district in a child find dispute involving a young child who was eventually determined eligible due to ADHD. The child was retained in kindergarten and continued to experience some difficulties in first and second grade. The district provided Title I reading support and behavioral plans for the student. During the first grade year the parents requested an evaluation. The district conducted the evaluation and determined the student was not eligible. The evaluation indicated the student had low-average to average cognitive ability and age appropriate concentration and attention levels. During second grade, the school provided 180 minutes of reading support and 30 minutes of math support per week. Grades improved. During the summer after second grade the parents obtained an ADHD diagnosis and shared it with the school. The district did another evaluation and this time declared the student eligible as OHI. Key Quotes:

A determination of whether the District failed to identify a student eligible for special education services in a timely fashion requires a finding that the District knew, or should have known, that the child was disabled or in need of special education.

Without signs of a disability at the relevant times, the Court agrees that prior to receiving a diagnosis of ADHD and conducting its second evaluation, the District had insufficient reason to believe that D.K. was a student with a mental impairment that substantially limited one or more of his major life activities. The Court agrees with the Hearing Officer's logic that one must take into account the fact that children develop cognitively and socially at different rates.

CONFIDENTIALITY/FERPA/RECORDS ACCESS

Disability Law Center of Alaska, Inc. v. Anchorage Sch. Dist., 53 IDELR 2; 581 F.3d 936 (9th Cir. 2009)

The Disability Law Center of Alaska is the state's designated Protection and Advocacy agency for the state of Alaska. The Law Center received complaints regarding mistreatment of students in the intensive needs special education class at a particular school. Acting pursuant to its statutory investigatory authority under the Development Disabilities Act, the Law Center requested information regarding the class, its students, its staff, and any relevant school district investigations. The school provided most of the information but not the contact information for the students' guardians. The Court agreed with the Department of Health and Human Services and the Department of Education that "FERPA does not bar a P&A from obtaining access to the name of and contact information for a parent, guardian, or other legal representative."

Comment: Two other circuit courts have permitted federally funded protection and advocacy groups to have access to student records without parent consent. See State of Connecticut Office for Protection and Advocacy for Persons with Disabilities v. Hartford Board of Education, 46 IDELR 121 (2nd Cir. 2006); and Disability Rights Wisconsin, Inc. v. State of Wisconsin Department of Public Instruction, 46 IDELR 122 (7th Cir. 2006). In 2010, a district court in Utah refused to allow the Disability Law Center to have access to records at a boarding school, noting the lack of factual evidence to support a finding of probable cause that abuse and neglect had occurred. See Disability Law Center v. Discovery Academy, 53 IDELR 282 (D.C.Utah 2009).

Letter to Gray, 50 IDELR 198 (2008)

OSEP advises in this letter that schools must obtain consent from parents or adult students to invite representatives of outside agencies to IEP Team meetings to discuss transition services, and that such consent must be obtained prior to each IEP Team meeting. OSEP: "Therefore, it is not permissible under this regulation for a public agency to obtain the consent of the parents or eligible child only one time before the transition planning process is initiated for the child until the child leaves school." Moreover, "one annual consent would not be sufficient if there is more than one IEP Team meeting conducted during a 12-month period."

S.A. v. Tulare County Office of Education, 12 FAB 38 (E.D.Cal. 2009)

The court held that the school was not required to turn over every email that personally identified the student. The court examined the definition of "education records" and noted that an item

must be both “personally identifiable” and “maintained” by the school to be an “education record.” The court concluded that only those emails that were printed out and kept in the student’s permanent file were “education records” subject to parent inspection. Key Quote:

In applying these considerations to the instant case, the Court finds that California DOE correctly determined that emails that are not in Student’s permanent file are not “maintained” by TCOE. Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, Student’s assertion—that all emails that identify Student, whether in individual inboxes or the retrievable electronic database, are maintained “in the same way the registrar maintains a student’s folder in a permanent file”—is fanciful. [Cite omitted]. Like individual assignments that are handled by many student graders, emails may appear in the inboxes of many individuals at the educational institution. FERPA does not contemplate that education records are maintained in numerous places. As the Court set forth above, “Congress contemplated that education records would be kept *in one place with a single record of access.*” Id. at 434 (emphasis added). Thus, California DOE’s position that emails that are printed and placed in Student’s file are “maintained” is accordant with the case law interpreting the meaning of FERPA and the IDEA. Id. (“The word ‘maintain’ suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database.”).

CONSENT

Letter to Guess, 47 IDELR 135 (OSERS 2007)

This letter is about parental consent in connection with Medicaid or other insurance reimbursement. Consent that is given “for a specified amount of services for a specified amount of time would be sufficient.” The letter provides an example: “if it is known that a child is to receive three hours per week of OT for 36 weeks, parents could be asked to give consent to the public agency’s billing of the parent’s public benefits or insurance for 108 hours of service.” Consent can be obtained at an IEP meeting, but can also be obtained afterwards. If there are changes in the amount of service, or the cost, a new consent would be necessary. Letter to Smith, 48 IDELR 134 (OSEP 2007) says the same thing.

Colbert County Board of Education v. B.R.T., 51 IDELR 16 (N.D.Ala. 2008)

The parent did not consent to the initial provision of services, but prevailed at the due process hearing when the IHO ruled that the district’s proposed IEP was not appropriate. The court reversed and ruled for the district, noting that the district cannot provide services in the absence of consent, and cannot be held liable for a denial of FAPE under those circumstances. Moreover, the IHO should not have conducted the due process hearing because a resolution session was not ever conducted. The court was unconcerned about who was at fault for that, noting that “it is irrelevant whether one party deserves more blame than the other party because the issue is

whether a due process hearing can be held where no resolution meeting has been held.” The court held that it cannot.

DISCIPLINE

Q and A on Discipline Procedures, 52 IDELR 231 (OSERS 2009)

This is a good reference—a Q and A on a variety of discipline topics in light of IDEA 2004 and the final regulations.

M.M. v. Special School District No. 1, 49 IDELR 61; 512 F.3d 455 (8th Cir. 2008)

The parent prevailed at the administrative level and with the district court, but the Circuit Court ruled for the school district. The court concluded that there was no denial of FAPE in 2003-04 because the parent failed to give the school timely notice of her concerns and an opportunity to address them. Key Quote:

After M.M. was suspended for assaulting another student and a member of the Laney staff, [the parent] left the IEP team meeting convened to consider the problem, did not request revisions to M.M.’s IEP, did not protest the transfer to Olson or request a due process hearing, and then enrolled M.M. outside the District that fall. Though M.M. re-enrolled at Olson shortly thereafter, this sequence of events gave the IEP team and the district no timely notice of a claim that M.M.’s otherwise appropriate IEP should have been revised before her transfer to Olson....Under these circumstances, the District may not be held responsible for a failure-to-revise violation in the 2003-04 school year.

The court also concluded that the lower court had applied the wrong standard. Despite the suspensions and a transfer to another school, year end reports showed progress. Moreover:

When a child’s primary disability is a behavioral disorder, the school district does not violate IDEA simply because the child failed to achieve the IEP’s behavioral goals.

The court also discussed “stay put” in the disciplinary context:

When a parent and the school district’s educational professionals agree that a child with a behavioral disability needs a change of placement but cannot agree on an appropriate alternative, the school district must maintain the current, admittedly inappropriate placement under the stay-put IEP until the due process procedures have concluded, unless the parties agree to an interim alternative placement....The parties have agreed that a change of placement is needed; only their failure to agree on an interim change, combined with the school district’s stay-put obligations, have left the child in a setting that is not successfully controlling her dangerous misbehavior.

The court noted that if the child was suspended for more than ten days, educational services must be provided, but also observed that the district had offered home schooling services and the parent rejected this offer.

Letter to Anonymous, 49 IDELR 227 (2007)

This letter addresses those regular education students who make a “should have known” claim, asserting that the district “had knowledge” of a disability prior to a disciplinary incident. OSEP states that even while such a claim is pending before an IHO the district may proceed with its expulsion hearing. The letter notes that the parent’s request for an evaluation came AFTER the incident that caused the proposed expulsion. There was no definite conclusion that the school “should have known” of a disability because that issue was still pending before the IHO. Thus the school could proceed with its regular disciplinary proceedings and treat the student as it would a regular education student. However, if the IHO concludes that the school “should have known” of a disability “the hearing officer has the authority to determine the educational placement of the child and may order that a manifestation determination review be conducted.”

Fitzgerald v. Fairfax County School Board, 50 IDELR 165; 556 F.Supp.2d 543 (E.D.Va. 2008)

This case focuses on the curious language of IDEA 2004, stating that the manifestation determination is to be done by “the local educational agency, the parent, and *relevant members* of the IEP Team (*as determined by the parent and the local educational agency*).” The Team concluded that the student’s behavior (a lengthy paintball attack on the school) was not a manifestation of the student’s disability. The parents sought to overturn that decision by arguing that the manifestation determination team was improperly constituted. They asserted that the membership should have been agreed to, and that no one could attend who had not previously been on the student’s IEP Team. The court disagreed. It held that the MDR committee is “a subset of a disabled child’s IEP team” and thus, the same rules apply. Therefore, “the LEA determines the school system’s MDR members and the parents may determine whom they wish to invite in addition to those designated by the school and the LEA.” The fact that there were people at the meeting who did not personally know the student did not bother the court. Just as with an IEP Team, the MDR committee was comprised of a combination of people. Some knew the student personally, such as the teachers and parents. Others provided particular expertise, such as the school psychologist. The court approved of the way in which the manifestation was done. At the MDR meeting, the team heard about the history of Kevin’s disability and experience in school, his formal test results, his disciplinary history, his behavior in class, reports from teachers, and finally, his involvement in the specific incident under consideration. The court agreed with the team: “Kevin simply made a bad decision; he must now live with the consequences.” This case also confirms that a MDR meeting is just like any other IEP Team meeting in other ways as well. The court was not bothered by the fact that members of the Team discussed the case prior to the actual meeting, nor by the fact that the school presented a draft IEP at the meeting which assumed that the behavior was not a manifestation of disability. The court quoted with approval the ruling of the hearing officer in this case that an “MDR meeting is not designed to be a jury trial.” The court supported its decision by noting that it did not want to interpret the law in a way that “could result in delays, stalemates, and impasses that would leave educators hamstrung.”

District of Columbia v. Doe, 51 IDELR 8; 573 F.Supp.2d 57 (D.C.D.C. 2008)

The school imposed a 45 day suspension on the student and assigned him to an alternative program. The IHO found that the behavior was not a manifestation of disability and that the placement at the alternative school would not be a denial of FAPE. Nevertheless, the IHO found the length of the suspension to be excessive and lowered it to 11 days. Parents then claimed \$30,000 in attorneys' fees as prevailing parties. The district sought a declaratory judgment that the IHO had exceeded his authority. Parents sought to dismiss for mootness since the student no longer lived in the district and the district would, therefore, not be able to impose the longer penalty. The court held the issue presented—the authority of the IHO—was “capable of repetition yet evading review” and thus provided an exception to the mootness doctrine. The court then found in favor of the school district. Key Quotes:

The Superintendent is the final decision-maker with respect to disciplinary decisions for non-disabled students. [Cite to school policy omitted]. The hearing officer exceeded the scope of his authority when he reduced the Assistant Superintendent's suspension, in spite of his finding that the student's conduct was not a manifestation of his disabilities and that the discipline imposed would not constitute a denial of a FAPE.

ELIGIBILITY

Mr. and Mrs. N.C. v. Bedford Central School District, 51 IDELR 149; 300 App'x. 11 (2nd Cir. 2008)

The court affirmed the district court's conclusion that the student did not qualify as having a serious emotional disturbance. His behavior, including drug use and aggression, was more typical of social maladjustment than a SED. The court also noted that a drop of nine points in GPA from one year to the next was not a sufficient “adverse effect” on educational performance to warrant eligibility.

Mr. I and Mrs. I v. Maine School Administrative District No. 55, 47 IDELR 121; 480 F.3d 1 (1st Cir. 2007)

The court held that the student was eligible due to Asperger syndrome despite the fact that she behaved well and received good grades. The court relied on a state regulation that defined “educational performance” as including “academic areas (reading, math, communication, etc.), non-academic areas (daily life activities, mobility, etc.), extracurricular activities, progress in meeting goals established for the general curriculum, and performance on State-wide and local assessments.”

As to “educational performance”:

The district court properly articulated this standard as ‘whether [LI’s] condition adversely affected her performance in any of the educational areas Maine has identified.

As to “adversely”:

The district court correctly ruled that any negative impact, regardless of degree, qualifies as an ‘adverse effect’ under the relevant federal and state regulations defining the disabilities listed in 1401((3)(A)(i).

In a footnote, the court specifically expresses its disagreement with the Ashli case on this point.

As to “special education”:

While ‘speech-language pathology services’ comprise a category of ‘related services,’ directly teaching social skills and pragmatic language to LI amounts to adapting the content of the usual instruction to address her unique needs and to ensure that she meets state educational standards, viz., those defining educational performance to include ‘communication’ and requiring progress in ‘career preparation.’ The district court did not err in ruling that the services recommended for LI by her neuropsychologist and speech-language pathologist, and agreed to by the PET as part of its Rehabilitation Act plan, are ‘special education.’ [Citations omitted].

Hood v. Encinitas Union School District, 47 IDELR 213; 486 F.3d 1099 (9th Cir. 2007)

The court held that the student was not eligible due to SLD or OHI, because there was no need for specially designed instruction. As to a learning disability, the court held that the student failed to show that her disability could not be “corrected through regular or categorical services within the regular instructional program. The parents argued that “correctable” means that the services provided would cause the discrepancy between achievement and potential to narrow— i.e., that the learning disability would be lessened or cured. The court said that the parents’ brief “offers no case law in support” of that standard. Instead, the court ruled that the proper standard was the Rowley standard of educational benefit. Since the student was receiving an educational benefit from the services provided in the regular classroom, any learning disability that she had was “correctable.” Likewise, her ADD condition did not require special education.

Board of Education of Montgomery County, Md. v. S.G., 47 IDELR 285; 230 F.App’x. 330 (4th Cir. 2007)

The IHO, the district court and the Circuit Court all ruled that the student was eligible due to schizophrenia which satisfied the SED standard. The Circuit Court observed that courts should give deference to the school’s educational professionals, but: “We have rejected the argument, however, that the hearing officer must always defer to the school’s experts.” The district also

argued that the student's frequent absences from school were due to medical reasons (schizophrenia) and not remediable through special education. The court did not agree. It noted the evidence that the middle school environment aggravated the student's condition and contributed to her problems. "Thus, S.G. is not analogous to a student with cancer or a purely 'medical condition,' because her classroom setting affects the symptoms of her emotional disturbance and as a result her ability to receive the appropriate education she is due."

R.B. v. Napa Valley USD, 48 IDELR 60; 496 F.3d 932 (9th Cir. 2007)

The Circuit Court held that the student was not eligible because she did not meet the criteria for a SED. The student was a severely disturbed child who "excelled in her classes, scored high marks on achievement tests, and frequently made the honor roll," but who was also involved in intimidating and physically aggressive behavior toward staff and students. The school district evaluated R.B. and concluded she did not qualify for special educational services, but that she was a "qualified handicapped individual" under Section 504. The district developed a behavioral intervention plan for her. After there was an escalation of behavioral incidents during R.B.'s fifth grade year, R.B.'s mother met with a psychologist who recommended that R.B. be placed in a private residential treatment facility. The mother advised the district that she was placing R.B. in the private program and demanded reimbursement. The district conducted another evaluation of R.B. and again concluded that R.B. was not eligible for special education services under IDEA.

The parent appealed the IEP team's conclusion at a due process hearing where the hearing officer agreed with the school district that R.B. was not entitled to special education services. Both the district court and the Circuit Court agreed. Key Quotes:

Once the District implemented the support plan, R.B.'s behavior improved. In other words, while R.B. engaged in inappropriate behavior over several years of school, that behavior was 'to a marked degree' only during one trimester of one grade. We accord particular deference to the [hearing officer's] thorough and careful finding that R.B.'s behavior was not 'pervasive and ongoing,' and conclude that R.B. cannot establish IDEA eligibility on the basis of inappropriate behavior during her fifth-grade year.

R.B.'s inappropriate behavior further does not amount to a 'severe emotional disturbance' because it did not adversely affect her educational performance....

Appellants cite the District's development of Rehabilitation Act Section 504 plans and behavioral support plans as further evidence that R.B.'s behavioral problems adversely affected her educational performance. The Rehabilitation Act is, however, a separate statutory scheme with different qualifying criteria, and R.B.'s satisfaction of those criteria do not automatically make her eligible under the IDEA. Furthermore, California school districts commonly turn to behavioral support plans as alternative remedies for students who do not satisfy the IDEA's criteria for a 'severe emotional disturbance.'

Letter to Clark, 48 IDELR 77 (OSEP 2007)

What does “adversely affects educational performance” mean for the on-grade level student with a speech impairment?

It remains the Department’s position that the term ‘educational performance’ as used in the IDEA and its implementing regulations is not limited to academic performance.

Alvin ISD v. A.D., 48 IDELR 240; 503 F.3d 378 (5th Cir. 2007)

The court concluded that the student was not eligible due to OHI. The student’s ADHD did not result in a need for specially designed instruction. The court observed that “adversely affects educational performance” is a necessary component of the OHI designation, but that it is not sufficient to make the child eligible—there still must be a need for special education services:

Therefore, the fact that A.D.s ADHD adversely affects his educational performance does not necessarily mean that he is eligible for special education services under the IDEA.

The student did not need those services, and thus was not eligible:

AISD argues that the district court properly determined that the testimony of A.D.’s teachers, who observed his educational progress first-hand, is more reliable than much of the testimony from A.D.’s physicians, who based their opinions on faulty information culled from isolated visits, select documents provided by A.D.’s mother, and statements from A.D.’s mother about what she believed was happening in school. Finally, AISD argues that much of A.D.’s behavioral problems are derived from non-ADHD related occurrences, such as alcohol abuse and the tragic death of A.D.’s brother. Thus, AISD asserts, any educational need is not by reason on A.D.’s ADHD, as required by the statute. We agree with the district’s argument and find that the district court’s factual findings were not clearly erroneous.

S. v. Wissahickon School District, 50 IDELR 216 (E.D.Pa. 2008)

The court ruled that the school did not fail to evaluate the student in a timely fashion. Even though the district was on notice that the student had been identified as having ADHD, his performance in school did not indicate a need for specially designed instruction. The court relied heavily on the testimony of numerous teachers who all reported much the same thing: the student was an average student without any attention problems. Thus the failure to evaluate the student while he was in middle school was not a denial of FAPE. Key Quote: “However, even a medical diagnosis of ADHD would not automatically qualify a student for special education.” When the student was in high school, the school did conduct an evaluation and declare the student eligible. However, the court found that the IEPs that were offered to the student were

adequate, even though the student did not make much progress. The IEPs were “reasonably calculated” to confer benefit based on the information the district had at the time. Key Quote: “Unfortunately, Richard’s consistent refusal to engage in the services provided to him constituted an insurmountable obstacle to the successful implementation of the District’s programs.” This decision was affirmed by the 3rd Circuit: Richard S. v. Wissahickon School District, 52 IDELR 245 (3rd Cir. 2009).

Comment: This one reads like the classic dispute between parents claiming “he is disabled and you are not helping” and teachers claiming: “he is immature and irresponsible and you are not helping.” Consistent testimony from teachers who knew the student over multiple years was persuasive to the court, and the Circuit Court quoted a psychiatrist who wrote that “resistance to any intervention or treatment [was] a primary component of his illness or disability.”

Loch v. Board of Education of Edwardsville Community School District #7, 50 IDELR 221 (S.D.Ill. 2008)

The student had diabetes and was diagnosed with emotional problems but did not qualify because she did not need special education services. Although she missed a lot of school, she was able to complete makeup work. The court concluded that the student was doing fine until her sophomore year of high school when she “just quit going” to high school. The court rejected the parents’ argument that the district’s failure to follow the 504 plan caused the student to become emotionally disturbed. There were minor problems with the implementation of the 504 plan, but nothing significant. The court also dismissed several claims that had not been specifically presented to the IHO under the theory that the parents had not exhausted administrative remedies on those claims. This decision was affirmed by the 7th Circuit in Loch v. Edwardsville School District No. 7, 52 IDELR 244; 327 F.App’x. 647; (7th Cir. 2009).

C.B. v. DOE, City of New York, 52 IDELR 121; 322 F.App’x. 20 (2nd Cir. 2009)

The court affirmed a ruling that the student was not eligible for services under IDEA even though she was diagnosed with ADHD and bipolar disorder. This was largely based on academic performance, both before and after the diagnosis, indicating successful performance, above grade level.

Ellenberg v. New Mexico Military Institute, 52 IDELR 181 (10th Cir. 2009)

Although the student’s IEP under the IDEA would suggest a Section 504 eligibility, the mere existence of an IEP did not in itself establish a substantial limitation on the student’s ability to learn or any other major life activity. “Of course an IDEA disability may – and in the majority of cases probably will – substantially limit a major life activity. But the point here is that it need not, and thus a plaintiff must individually show substantial limitation.”

EVALUATIONS

Letter to Christiansen, 48 IDELR 161 (OSEP 2007).

OSEP states in this letter that if an FBA is “used to evaluate an individual child to assist in determining whether the child is a child with a disability and the nature and extent of special education and related services that the child needs, it is considered an evaluation under IDEA and parent consent is required for an FBA conducted as an individual evaluation or reevaluation.” If the FBA is “conducted for individual evaluative purposes to develop or modify a behavioral intervention plan for a particular child,” a parent who disagrees with that FBA would have the right to request that the district pay for an IEE.

On the other hand, if the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole, the parental consent requirements of IDEA generally would not be applicable because that sort of FBA would not be focused on the educational and behavioral needs of an individual child.

M.S. v. Mullica Township Board of Education, 49 IDELR 154 (3rd Cir. 2008)

The hearing officer ruled for the district on all counts except for IEE reimbursement. The district court overturned that portion of the ruling and held for the district on all counts. The Circuit Court affirmed. Much of the ruling turned on the court’s perception of the reasonableness of the parties. Key Quote (from the district court):

The Court concludes that Plaintiffs are not entitled to reimbursement. The three evaluations at issue were all performed after M.S., Jr.’s unilateral removal from [public school] and while he was attending [a private program]. The record demonstrates that the evaluations were not obtained by Plaintiffs in consultation with the School District or with the intention that M.S., Jr. would return to the district. The evaluations were sought for the purpose of providing additional evidence that Defendant’s services were inadequate, thereby supporting Plaintiffs’ contention that an alternative private placement at public expense was necessary.

The IDEA provides that IEPs will be developed through cooperation and collaboration between teachers, special education professionals, and parents. Similarly, the governing regulation contemplates that parents are entitled to reimbursement for independent evaluations when they are collaborating with the local educational agency in developing an appropriate IEP, based on the district’s own evaluations and any independent evaluations.

Moreover, § 300.502 clearly assumes that the disabled child is living within the district from which reimbursement is sought. Plaintiffs moved out of the district before M.S., Jr. ever attended [the district’s] classes during the 2005-2006 school year. The year before, he had attended [private school]. Defendants had not been ‘the public agency responsible for the education of the child in question’ since

September, 2004, and never again became responsible for M.S., Jr.'s education because he moved out of the district before re-enrolling.

Richardson v. District of Columbia, 50 IDELR 6; 541 F.Supp.2d 346 (D.C.D.C. 2008)

The court sided with the district, concluding that the district acted reasonably in seeking consent to obtain access to private evaluations that had already been done, rather than doing its own evaluation. The court viewed the parents as unreasonably withholding access to the information that already existed and that was crucial to a determination of eligibility. Based on the information it had, the district concluded that the student was not eligible and the court agreed. The court described the parents' position as "inexplicable", "simply obfuscation", and "def[ying] reason."

Comment: In most instances, districts want to conduct their own evaluations rather than relying on one done independently. Here, however, the district asked to see the independent evaluations that had recently been done. The parents blocked access, which the court found to be unreasonable. It did not help the parents' case that the court found the conduct of their lawyer to be "either contemptuous or incompetent."

Letter to Sarzynski, 51 IDELR 193 (2008)

In this letter, OSEP clarifies that determining eligibility is not the sole purpose of "evaluation." An evaluation designed to determine whether services should be increased or decreased is an "evaluation" requiring parental consent. Routine progress monitoring of all students is not an "evaluation" but when a procedure is "specific to an individual child" and is "crucial to determining a child's continuing eligibility for services or changes in those services" then the procedure is an "evaluation" and consent must be obtained.

Letter to Janssen, 51 IDELR 253 (OSERS 2008)

OSERS confirms that there are no statutory or regulatory requirements pertaining to the necessary qualifications to conduct a FBA. In particular, there is no Part B requirement that a FBA be conducted by a Board Certified Behavioral Analyst.

Letter to Torres, 53 IDELR 333 (OSEP 2009)

OSEP was asked whether "a student without an IEP, referred by the teacher and RTI team to a Speech/Language screening after district-wide academic benchmark testing (Tier II/RTI) can be pulled out....from their classroom to screen for Speech and Language skills?" The response:

The Individuals with Disabilities Education Act (IDEA or Act) specifies that the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

OSEP was also asked if, after such a screening, the school could provide the teacher with “developmental information regarding articulation, grammar, semantics, and syntax skills in order to best determine further testing and interventions.” OSEP responded by saying that IDEA and its regulations neither requires nor prohibits this practice. The letter also points out that screenings may not be used to delay the timeframe for an evaluation beyond what the law calls for.

G.J. v. Muscogee County School District, 54 IDELR 76 (M.D.Ga. 2010)

The court affirmed a hearing officer’s decision that the parents had placed so many restrictions on their consent to a three-year reevaluation that they did not actually give “consent.” However, the court also held that this did not mean that the parents had waived their right to IDEA services for their child. The court ordered the parents to consent to an evaluation under terms set out by the court. Key Quotes:

Though Plaintiffs argue that, for the most part, their addendum [containing the conditions to consent] merely tracks what is required by IDEA and the Family Educational Rights and Privacy Act of 1974, [cite omitted] some of their requirements are much more restrictive. For example, the addendum specifies who shall conduct the evaluation; it requires that the parents approve each of the specific instruments to be used for the evaluation; it requires that the evaluator meet with the parents before and after the evaluation; it requires that the evaluator discuss the evaluation results with the parents before the results are submitted to the IEP team; and it requires that the evaluation be used only for the purpose of developing G.J.’s IEP. In addition, Plaintiff added the condition that the testing must be done in L.J.’s presence.

The court then set out the conditions that would apply to the ordered evaluation:

- (1) The reevaluation may be used to update G.J.’s IEP or for any other purpose permitted by IDEA.
- (2) MCSD shall select the evaluator(s) to conduct the reevaluation. If the parties still agree on Dr. Lanckenau, then Dr. Lanckenau should be selected to conduct the reevaluation.
- (3) MCSD shall consult with Plaintiffs to determine a mutually agreeable date and time for the reevaluation.
- (4) MCSD shall disclose to Plaintiffs in writing all information relevant to the reevaluation, including but not limited to (a) the date and time, (b) the location, (c) the duration, and (d) the procedures, assessment tools, and strategies to be used.
- (5) The issue of whether G.J.’s parents are permitted to observe all or part of the reevaluation shall be left to the evaluator, and Plaintiffs shall be informed of the evaluator’s decision prior to the reevaluation.
- (6) If the evaluator determines that additional tests are necessary, then MCSD shall seek consent for those tests in accordance with these requirements.

- (7) The reevaluation results and reports shall not be shared with any third parties without prior written consent from G.J.'s parents except to the extent allowed by FERPA and IDEA.
- (8) The parties shall receive the reevaluation results at the same time.
- (9) If G.J.'s parents disagree with the reevaluation results, they may request an IEE.

Letter to Moffett, 54 IDELR 130 (OSEP 2009)

OSEP here advises that schools are not obligated to conduct testing for students to satisfy the criteria for testing accommodations on College Board or other college entrance examinations. OSEP points out that a parent can request a reevaluation at any time, but in responding to the request, the first step is to conduct a "review of existing data." That review is to focus on the need for more data to determine the child's continued eligibility, the child's educational needs, present levels, the need for special education and related services, and whether modifications or changes to the IEP are called for. It is not designed to meet eligibility criteria for testing accommodations for college entrance. Key Quotes:

In response to a comment requesting clarification regarding whether schools must provide updated evaluations for college testing and admissions purposes and other comments related to testing for postsecondary education or employment, the Department stated: "We do not believe that the regulations should require public agencies to conduct evaluations for children to meet the entrance or eligibility requirements of another institution or agency because to do so would impose a significant cost on public agencies that is not required by the Act." Accordingly, there is no requirement under Part B of the IDEA that a public agency conduct a reevaluation of a child with a disability or additional testing solely to satisfy the eligibility criteria established by the College Board or other testing programs.

Moreover, there is nothing in the IDEA that bars a District from conducting testing to satisfy the eligibility criteria established by the College Board or other testing programs, but such testing generally would not be covered by Part B of the IDEA and would have to be paid for out of an alternate funding source.

N.B. v. Hellgate Elementary School District, 50 IDELR 241; 541 F.3d 1202 (9th Cir. 2008)

This case begins with a doctor's report, just before the child turned three, that "an autistic component appears to be complicating" the child's performance. When the family moved from New Jersey to Montana, they brought that report with them and shared it with Montana school officials. The Montana school adopted the boy's New Jersey IEP, and began serving him. A few months later, the parents brought up autism again, and the school informed the parents that testing was available at no cost at a local Child Development Center. Autism testing was completed several months later, but the parties ended up in litigation. The parents claimed that the district's services were inadequate, and sought reimbursement for other educational expenses they had incurred. They also sought ESY services. The district prevailed on the ESY issue. The Court noted the evidence of the child's steady progress, and lack of evidence of regression. But

as far as services to the child during the school year, the Circuit Court reversed the lower court, and ruled that the parents were entitled to reimbursement for the additional educational services they had provided. The Circuit Court based its decision solely on what it characterized as the district's failure to evaluate in all areas of suspected disability. According to the court, the doctor's report itself was enough to trigger the duty to evaluate for autism. Key Quotes:

Hellgate did not fulfill its statutory obligations by simply referring C.B.'s parents to the CDC. Such an action does not "ensure that the child is assessed," as required by 20 U.S.C. 1414(b)(3)(C).

Similar to the circumstances in Amanda J., without evaluative information that C.B. has autism spectrum disorder, it was not possible for the IEP team to develop a plan reasonably calculated to provide C.B. with a meaningful educational benefit throughout the 2003-04 school year. (Emphasis added).

Comment: The court did not analyze the content of the IEP, the grades or progress reports or teacher testimony. The absence of an evaluation in all areas of suspected disability was enough for the court to conclude that FAPE was denied. This is a strong message about the importance of evaluations.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

J.P. v Cherokee County Board of Education, 47 IDELR 123; 218 F.App'x. 911 (11th Cir. 2007)

Suit was filed against the district, the superintendent and other employees alleging physical, emotional and educational injuries. The court dismissed the case for failure to exhaust administrative remedies. Key Quotes:

Consistent with the unambiguous statutory language, which provides that "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child," we have interpreted the IDEA's exhaustion requirement as applying to a "broad" spectrum of claims.

The court rejected the theory that exhaustion was futile because the plaintiffs sought relief not available in the due process system—money damages. The court noted that "if the plaintiff's argument is to be accepted, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant."

Ellenberg v. New Mexico Military Institute, 47 IDELR 153; 478 F.3d 1262 (10th Cir. 2007)

The court held that it lacked jurisdiction in the case because the parents had not exhausted administrative remedies. The parents had requested a due process hearing to force admission of their daughter to the New Mexico Military Institute, a public, residential boarding school in Roswell. Despite the fact that the parents pursued this matter to its completion before filing suit, the court held that administrative remedies were not exhausted because the parents had not ever requested an IEP Team meeting in the Los Alamos school district, where the father and daughter

lived, or in the Taos district where the student was residing while attending a residential boarding school. In effect, the message was “you skipped a step.” Key Quotes:

Although [the parents] advanced through the state administrative process, [they] ignored two of the IDEA’s most basic initial steps. First, they did not obtain an IEP from either of S.E.’s undisputed LEA’s for the 2003-04 school year...Second, they did not request a change to S.E.’s then current IEP as prepared by the Taos Municipal School District for the 2002-03 academic year.

McQueen v. Colorado Springs School District No. 11, 47 IDELR 283; 488 F.3d 868 (10th Cir. 2007)

The hearing officer ruled that the district’s ESY policy did not violate the IDEA. By agreement of the parties, the hearing was limited to this narrow legal issue. No evidence was presented concerning the specific provision of services to the student. The federal district court affirmed. The Circuit Court ruled for the school district also, but on different grounds. It held that the parents had not exhausted administrative remedies. Key Quote:

The administrative process under Section 1415 was not completed in this case. We recognize that the state educational agency issued a decision. But it addressed only an abstract question of law: “whether the CDE guidelines for determining ESY services and the [District’s] ESY policy violate the IDEA by limiting required ESY services to maintaining learned skills rather than developing new skills. The role of the Section 1415 process is to resolve a complaint about the education of a specific child.

Kutasi v. Las Virgenes USD, 48 IDELR 59 (9th Cir. 2007)

The Circuit Court held that exhaustion was required because the injuries complained about were educational and could be remedied, at least to some degree, through the administrative process. The suit alleged that the school kept the student out of school inappropriately, refused to reimburse the parents for therapy expenses and prevented them from participating in the IEP Team process. In light of Winkelman, the court held that it did not matter whether the case alleged a violation of the parents’ rights or the child’s—exhaustion was required. The fact that the suit sought money damages did not eliminate the requirement to exhaust.

Cave v. East Meadow Union Free School District, 49 IDELR 92; 513 F.3d 240 (2nd Cir. 2008)

The court dismissed this suit for failure to exhaust administrative remedies. The plaintiffs sought an injunction allowing a student with a hearing impairment to bring his service dog to school. It also named 15 individual defendants and sought \$150,000,000 in damages. Even though the case was brought under 504 and Section 1983, the court held that IDEA’s procedures had to be exhausted. Key Quotes:

Importantly, complainants must overcome this significant procedural hurdle not only when they wish to file a suit under the IDEA itself, but also whenever they

assert claims for relief available under the IDEA, regardless of the statutory basis for their complaint.

K.F. v. Francis Howell R-III School District, 49 IDELR 244 (E.D.Mo. 2008)

Based on allegations that the school had a policy of early dismissal for students with disabilities who were assigned to a certain program, the court held that the parents could pursue a 504 claim without exhausting IDEA administrative remedies. The court focused on the allegations of a “generalized practice” of shortened school days rather than an individualized decision. Moreover, the court held that the parents could seek relief for their own financial losses due to the extra care they had to provide for their child, citing Winkelman v. Parma City School District, 127 S.Ct. 1994 (2007) and Blanchard v. Morton School District, 509 F.3d 934 (9th Cir. 2007).

Papania-Jones v. Dupree, 50 IDELR 31 (5th Cir. 2008)

The court upheld the dismissal of a suit based on failure to exhaust. The parents had filed complaints with the state agency under Part C, but had not requested a due process hearing. The court held that the trial court had no jurisdiction. Exhaustion was required even if the parents did not have actual knowledge of the requirement. The argument that exhaustion would have been futile also failed.

Brooke M. v. State of Alaska Department of Education and Early Development, 50 IDELR 273 (9th Cir. 2008) (Unpublished)

The court dismissed the case because the plaintiff had not exhausted administrative remedies. Rather than ask for a due process hearing, the student filed an administrative complaint with the state agency. The agency ruled in favor of the school. The student then sued the state, claiming that it had failed in its supervisory responsibilities under IDEA. The court held that exhaustion via a due process hearing was required.

Levine v. Greece Central School District, 52 IDELR 12 (W.D.N.Y. 2009)

The court dismissed the case due to failure to exhaust. The court pointed out that the school had provided the parents with multiple copies of the procedural safeguards document and was not obligated to explain that exhaustion was required prior to filing suit. None of the exceptions to the exhaustion requirement (futility, systemic violations) applied in this case.

Payne v. Peninsula School District, 110 LRP 16683 (9th Cir. 2010)

The court dismissed a case brought under Section 1983 alleging that the teacher had caused academic and emotional injuries to the child by repeatedly placing him in a locked “safe room.” The court held that this is the type of dispute that must be taken to a due process hearing before going to court. The case was dismissed due to failure to exhaust administrative remedies. Key Quote:

Simply put, Payne is contesting one part of the comprehensive educational strategy used to address D.P.'s unique situation. The safe room was included in his IEP, is a recognized educational tool under Washington statutes....and its use allegedly led to injuries that the services provided under IDEA are meant to address. This is not to say we condemn or endorse the manner in which the safe room was used here. Rather we believe that, as an educational strategy (even if a misguided or misapplied one), it was better addressed initially by the administrative process.

Sch. Bd. Of Lee County, Florida v. M.M., 109 LRP 63187 (11th Cir. 2009)

The parents claimed that the district retaliated against them during the IEP development process and failed to provide services as required by a settlement agreement that resulted from an IDEA due process hearing. The court concluded that the parent's claims primarily related to the provision of a FAPE and must be exhausted administratively. Therefore, the claims were properly dismissed by the district court because the parents failed to exhaust their administrative remedies as required by the IDEA.

Huson v. Simi Valley Unified Sch. Dist., 53 IDELR 38 (9th Cir. 2009) (Unpublished).

"Plaintiffs must exhaust administrative remedies before filing a civil lawsuit if they seek relief for injuries that could be redressed to *any degree* by the IDEA's administrative procedures." *Internal cite deleted*. The parents initially sought IDEA services and were denied. The parents seek to avoid the exhaustion requirement by adopting the district's position that the student is ineligible for IDEA services. The IDEA provides the opportunity for any party to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE. The disagreement over the student's education falls within these bounds, and must be administratively exhausted before the parents may bring other claims.

Shuler v. Springfield R-XII Sch. Dist., 53 IDELR 3 (8th Cir. 2009) (Unpublished)

The district court properly dismissed the parent's claims for failure to exhaust administrative remedies and failure to file claims within the statute of limitations.

EXTENDED SCHOOL YEAR

Letter to Copenhaver, 50 IDELR 16 (OSEP 2007)

In a letter described as "informal guidance" which is "not legally binding" OSEP addresses the requirements for personnel who provide ESY services. Must they be "highly qualified"? OSEP:

Under Part B regulations, no distinction is made between the personnel qualifications for special education and related services provided pursuant to a child's IEP as part of the regular school program and those provided pursuant to an IEP as ESY services. Personnel providing ESY services should meet the same

requirements that apply to personnel providing the same type of services as part of a regular school program.

FAPE

Ringwood Board of Education v. K.H.J., 49 IDELR 63 (3rd Cir. 2007)

In an unpublished decision, the 3rd Circuit ruled that the district failed to provide FAPE to the student. This was largely based on fact findings of the IHO who issued a 51-page decision after a seven day hearing in favor of the parents. The district court ruled for the school but the Circuit Court held that the district court failed to provide appropriate deference to the fact findings of the IHO. The court noted that a district court must explain why it disregards IHO findings, and must cite to the record to justify its decision. That did not happen here. The district court had held that the boy received an “appropriate” albeit not optimal education. The Circuit Court disagreed:

We have previously stated that “[w]hen students display considerable intellectual potential, IDEA requires ‘a great deal more than a negligible benefit.’” ...Because K.J. had only made “negligible progress” during the 2001-02 school year and was still one to two years behind grade level after the 2002-03 school year, we find that the ALJ properly concluded that the Board failed to provide K.J. with an appropriate education under the IDEA.

J.P. v. County School Board of Hanover County, Virginia, 49 IDELR 150; 516 F.3d 254 (4th Cir. 2008)

This case is similar to the Ringwood case. Again, the Circuit Court chastises the district court for its reversal of the IHO decision. The district court gave little weight to the IHO decision because it concluded that the fact findings were not “regularly made” and should, therefore, be disregarded. The Circuit Court disagreed:

In this case, there is nothing in the record suggesting that the hearing officer’s process in resolving the case was anything other than ordinary. That is, the hearing officer conducted a proper hearing, allowing the parents and the School Board to present evidence and make arguments, and the hearing officer by all indications resolved the factual questions in the normal way, without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case.

The court noted that there were no specific requirements for how detailed the IHO decision must be, or for a detailed explanation of reasoning. Incidentally, the IHO decision was 25 pages long, so it obviously contained some details. The court vacated the district court’s order, including the award of attorney’s fees of \$180,000.

Draper v. Atlanta Independent School System, 49 IDELR 211; 518 F.3d 1275 (11th Cir. 2008)

The hearing officer ruled that the school district failed to provide FAPE to a student with dyslexia who had been misidentified as having a cognitive disability. The federal court upheld

that ruling and the Circuit Court affirmed. J.D. tested at an IQ of 63 in third grade. Several years later, J.D. was enrolled by his mother in a private tutoring program where his reading level increased by two grades. This prompted the family to request that their son be further evaluated. The school complied, and though the student again tested at about an IQ level of 60, some discrepancies in the test scores caused the school psychologist to recommend further testing. That further testing showed that the student had an IQ 20 points higher than previously found, and as a result, he was reclassified as having a learning disability. The school district did not, however, provide the reading services promised in the IEP and a mediated agreement, and they did not change the student's reading program even though it produced no gains over three years. The hearing officer found that the district not only misdiagnosed the student as having mental retardation, it then made no effort to further evaluate him for five years in violation of clearly established law. Both the hearing officer and federal court held that the parent's claim was not barred by the two-year statute of limitations because the family did not have reason to know the student had been injured by his placement until the later IQ testing. Key Quotes (from the *district court* decision, which is at 47 IDELR 260; 480 F.Supp.2d 1331):

As for the 2002-03 school year, J.D.'s IEPs were not based on accurate, up-to-date information as APS contends because they were based on the 1998 evaluation.

Despite the fact that his reading skills decreased, APS continued to use the Lexia reading program, and by the time of the hearing he was still reading at the 3rd grade level. Based on a preponderance of the evidence, the Court agrees with the ALJ's conclusion that APS failed to provide J.D. a FAPE by providing him essentially the same services that had failed him for three years in reading.

Finally, APS failed to design J.D.'s IEPs for the 2003-04 and 2004-05 school years to meet his individualized needs by failing to review and assess whether he had mastered his goals and objectives from the previous year and by failing to revise J.D.'s IEPs in certain areas from one year to the next.

Joshua A. v. Rocklin Unified School District, 52 IDELR 64 (9th Cir. 2009), (Unpublished)

This is the first reported case to address the requirement to base an IEP on "peer reviewed research" to the extent practicable. The case involved a child with autism. The district court found for the school district and the circuit court affirmed. Key Quotes:

Student also argues that District's program violates the IDEA because it is not based on peer-reviewed research. However, both Adams and Deal (on remand) ultimately found that an eclectic approach similar to the one proposed by District met the IDEA's substantive requirements. See Adams, 195 F.3d at 1145. This eclectic approach, while not itself peer-reviewed, was based on "peer-reviewed research to the extent practicable."

M.W. v. Clarke County School District, 51 IDELR 63 (M.D.Ga. 2008); Motion to Reconsider denied at 51 IDELR 156

The court held that the three-year old student with autism received FAPE in the LRE, and that the parents had failed to prove the appropriateness of their private placement. The district served the student in a more restrictive setting than the setting sought by the parents, but the court concluded that this was necessary to provide the student with the services he needed. The court also rejected arguments about evaluations in native language, and the necessity for certain related services. Key Quotes:

With regard to testing in the native language....

The Court concludes that it was not feasible to administer a Mandarin Chinese ABLIS to M.W. because no such instrument existed and that testing in Mandarin Chinese would not have provided M.W.'s instructors with the information they needed to construct an English-language curriculum.

With regard to certain related services...

It is clear, however, that such additional services [parent training and a behavioral plan for the home] are only required to the extent necessary to allow the child's progress in the classroom.....Because it is apparent from the record, however, that M.W. was making adequate progress in the classroom, the IDEA did not obligate Defendant to provide at-home services.

D.S. v. Bayonne Board of Education, 54 IDELR 141 (3rd Cir. 2010).

The District Court found that the student's good grades established a receipt of FAPE. The Third Circuit disagreed, stating "Our reading of *Rowley* leads us to believe that when ... high grades are achieved in classes with only special education students set apart from the regular classes of a public school system, the grades are of less significance than grades obtained in regular classrooms." Despite the good grades, the student performed well below grade level in reading, writing and math. Achievement tests indicated borderline to low-average cognitive functioning. In finding that the IEP was inadequate, the Court also gave weight to the fact that the student had difficulty processing information that his teachers presented orally, and the fact that the Individual Education Program ("IEP") did not incorporate specific remedial techniques recommended by several evaluators. Key Quote:

Overall, we think that it is clear that a court should not place conclusive significance on special education classroom scores, a conclusion that we believe is reinforced by the circumstances that, as here, there may be a disconnect between a school's assessment of a student in a special education setting and his achievements in that setting and the student's achievements in standardized testing. When there is such a disconnect we think that there should be an especially close examination of the appropriateness of the student's education.

Blake C. v. DOE Hawaii, 51 IDELR 239; 593 F.Supp.2d 1199 (D.C.Ha. 2009)

The court reversed a hearing officer's decision, holding that the IHO used the wrong standard to determine if FAPE was provided. The hearing officer specifically rejected a "meaningful educational benefit" standard in favor of "some benefit." The court ruled that this was erroneous in light of N.B. v. Hellgate Elementary School District, 541 F.3d 1202 (9th Cir. 2008).

Letter to Frank, 52 IDELR 16 (OSEP 2009)

Key Quote: "Accordingly, States and LEAs may expend Part B funds for preschool, elementary school and secondary school education and may not expend Part B funds for postsecondary education."

T.H. v. District of Columbia, 52 IDELR 216; 620 F.Supp.2d 86 (D.C. 2009)

The court upheld the hearing officer's ruling that the IEP was reasonably calculated to provide FAPE even though the student made little progress. The court observed that failure to make progress may be due to numerous factors, and is not necessarily evidence that the IEP was flawed. Key Quotes:

The law has always found the reasoning of "post hoc propter hoc" fallacious. It is therefore fallacious to reason that the IEP caused this regression because T.H. regressed after its creation, when there were other equally valid reasons for its regression.

While academic success may be an important factor and may even be the most important factor, it is not the only one. In other words, even though plaintiffs argue that some evidence of academic progression is necessary in order for a Hearing Officer and a reviewing court to conclude that a student's IEP was adequate, the bottom line is that this is not mandated by the statute. Rather, as articulated recently by the 4th Circuit, "progress, or the lack thereof, while important, is not dispositive." *Simchick v. Fairfax County School Board*, 553 F.3d 315 (4th Cir. 2009).

Smith v. James C. Hormel School of the Virginia Institute of Autism, 53 IDELR 261 (W.D.Va. 2009); magistrate report accepted at 54 IDELR 75

The student was residentially placed by the school district at a private program for students with autism. That program discharged the student in December, 2007, due to behavioral issues. Parents later sued the school district for allegedly failing to provide FAPE after the discharge. But the court ruled for the school district, noting its prompt efforts to provide appropriate services. Key Quote:

Indeed, it is clear from the record that Greene County made great efforts to provide Johnnie with a suitable education. It placed him at VIA at public expense pursuant to an appropriate IEP; Johnnie's discharge from VIA was not something

Greene County took lightly. Greene County was, at all times, ready and willing to provide educational services to Johnnie and/or find him an alternative placement.

K.S. v. Fremont Unified School District, 53 IDELR 287 (N.D. Cal. 2009)

The ALJ ruled in favor of the school district and the district court upheld that decision. The parents of K.S., an 11-year-old child with autism spectrum disorder, contended that K.S. was capable of making educational progress beyond what the IEP permitted her to achieve. The ALJ found that K.S. was making “progress that was reasonably to be expected in light of the nature and extent of her disabilities.” The district court agreed. Key Quote:

Slow progress...is not necessarily indicative that plaintiff did not receive a FAPE, especially in light of the substantial evidence in the record concerning plaintiff’s autism and cognitive impairments. Indeed, the fact that the plaintiff achieved but did not surpass the majority of her goals tends to show that the IEPs were designed appropriately.

Huffman v. North Lyon County School District, 53 IDELR 147 (D. Kan. 2009)

Applying the “some benefit” standard to the student’s IEP, a hearing officer ruled in favor of the school district and the district court upheld the decision. In this case the mother of C.H., a child with autism and other attendant disabilities, was found not to be entitled to tuition reimbursement. The parent argued that not having an autism specialist present at the IEP meetings was a violation of federal and state regulations. She also contended that the court applied an incorrect standard of FAPE. However, C.H.’s substantial progress indicated that the IEP provided “some educational benefit” as evidenced by the student’s progress reports. The court observed that the parent’s complaint stemmed not from a lack of progress, but from the district’s “failure” to ensure greater success. Key Quotes:

Although it is understandable that parents would advocate for their children to receive services best calculated to produce maximum benefits, this is simply not the standard this court applies when addressing alleged violations of the [IDEA].

The hearing officer found that defendants did not commit procedural violations by failing to administer tests to C.H. that were designed specifically for students with autism and by failing to staff the IEP team with educational professionals who had autism-specific training or by providing an autism specialist or consultant to aid in the development of the IEPs.

Certainly, it would be preferable for an individual with extensive experience with a student’s particular disability to take part in formulating that student’s IEP, but the IDEA simply does not require this much.

Jaccari J. v. Board of Education of the City of Chicago, 54 IDELR 53 (N.D. Ill. 2010)

The hearing officer ruled in favor of the school district and the district court upheld that decision. The issue presented in this case was whether a child's poor performance on standardized tests indicated the District failed to provide the student with a FAPE. Teacher testimony and various progress reports indicated that the student was exceeding expectations both academically and behaviorally. The court found that standardized test scores are not the sole measure of a student's progress. Key Quote:

Given his cognitive impairment and emotional disturbances, it is unclear what [the student] should be scoring on standardized tests and how much of a yearly increase in his scores should be expected...other indicators suggest that [the student] is making progress.

J.L. v. Mercer Island School District, 52 IDELR 241 (9th Cir. 2009)

In overturning a District Court ruling in a reimbursement action, the 9th Circuit confirmed that IDEA 1997 did not raise the *Rowley* basic floor of opportunity standard for determining if an IEP provided FAPE. The court soundly refuted the lower courts reasoning for holding that IDEA 1997 raised the bar in regards to FAPE. The District Court had ruled that by its description of transition services as intending to foster independent living and economic self-sufficiency IDEA 1997 had adopted a new standard of FAPE. The Circuit Court concluded that if Congress wanted to change the FAPE standard it would have done so by directly changing the definition of FAPE. Key Quote:

We conclude that the district court misinterpreted Congress' intent. Had Congress sought to change the free appropriate public education "educational benefit" standard -- a standard that courts have followed vis-à-vis *Rowley* since 1982 -- it would have expressed a clear intent to do so. Instead, three omissions suggest that Congress intended to keep *Rowley* intact. First, Congress did not change the definition of a free appropriate public education in any material respect. If Congress desired to change the free appropriate public education standard, the most logical way to do so would have been to amend the free appropriate public education definition itself. Second, Congress did not indicate in its definition of "transition services," or elsewhere, that a disabled student could not receive a free appropriate public education absent the attainment of transition goals. Third, Congress did not express disagreement with the "educational benefit" standard or indicate that it sought to supersede *Rowley*. In fact, Congress did not even mention *Rowley*.

Houston Independent School District v. V.P., 53 IDELR 1 (5th Cir. 2009)

The district court affirmed the hearing officer's determination that HISD failed to provide a FAPE. The court declared the student's IEP to be inadequate and insufficiently individualized to meet the student's auditory needs. On appeal, the court upheld the district court's ruling, but ordered an additional year's worth of tuition to be paid to the parents for the time the appeal was

pending. While many issues were presented in this case, the court found passing grades and advancement could not prove a meaningful educational benefit of an IEP when grades are the product of unapproved deviations from the IEP. Key Quote:

Passing grades and yearly advancement were not found to be adequate measures because ... [it] resulted from modifications the special education director unilaterally imposed. The IEP Committee ...never evaluated the changes...

The court also held that while the District placed the student in a regular education classroom, the student was not able to effectively interact with peers. In short, the IEP failed to provide the student with the least restrictive environment for her condition. Key Quote:

Though HISD tried to accommodate [the student] in a regular education classroom, the district court concluded that [the student] was not receiving a meaningful educational benefit from such a placement.

A.B. v. Clarke County School District, 110 LRP 21410 (11th Cir. 2010) (Unpublished)

Another student sexually assaulted the Petitioner when they attended the same elementary school. However, the Court rejected the parents' claim that the other student's enrollment in their son's middle school would cause their son to regress. The parents wanted access to the other student's educational records in order to prove their case. The Court noted that it was "sheer speculation" to suggest that a review of the classmate's records would prove that his presence was harmful.

David G. v. Council Rock School District, 52 IDELR 160 (E.D. Pa. 2009)

A hearing officer ruled in favor of the parents and a district court upheld that decision. At issue was whether the district deprived a student of FAPE by failing to provide him with individualized reading instruction in the 9th and 10th grades. While the student had a specific reading disability, he received reading instruction only in his English class. The court reasoned the district failed to address his unique reading needs and required the district to fund the former student's enrollment in a year-long adult literacy program and to reimburse him for his mileage and parking expenses. Key Quote:

...by not offering David a discrete period of remedial reading the School District failed to deliver FAPE in this area.

Quatroche v. East Lyme Board of Education, 52 IDELR 96 (D. Conn. 2009)

A district court held that the school district did not violate a deaf student's First Amendment rights by failing to provide closed-captioning on the high school's closed-circuit news program. The student argued that the schools' Morning Show is a forum provided for student discourse and was one of the primary ways in which students received information regarding the school. The issue in this case was the scope of the student's right to receive this information. The court

found the school's Morning Show is a nonpublic forum; therefore, the restrictions on speech need only be reasonable and viewpoint neutral.

Pohorecki v. Anthony Wayne Local School District, 53 IDELR 22 (N.D. Ohio 2009)

The hearing officer determined that an incorrect classification under IDEA did not deny a student FAPE and the district court agreed. The issue in this case was whether a school district was required to reclassify a student's disability in order to provide an appropriate FAPE. The student was diagnosed with ADHD, OCD, and ODD and was classified in second grade as a child with "emotional disturbance." The student displayed difficulty with relationships, inappropriate behavior, and depression. The student was subsequently diagnosed with Asperger's Syndrome. An IEP team met to discuss his eligibility classification of an "emotional disturbance" and determined that the student still qualified under the ED category. The parents argued that the incorrect classification was a denial of a FAPE. The court reasoned the student's disability was complex, properly classified, and not a denial of FAPE in and of itself. Key Quote:

The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.

The important issue is whether the goals and objectives are appropriate for the student, regardless of the classification...the District was not required to classify [the student] as autistic...so long as the District recognized the disability and provided services necessary to ensure FAPE.

Bougades v. Pine Plains Central School District, 53 IDELR 42 (S.D.N.Y 2009)

The court reversed administrative decisions and held that the district denied a FAPE. In this case, a sixth grade learning disabled student did not make satisfactory progress toward any of his 27 IEP goals relating to reading and writing. Additionally, his progress in reading showed regression on a standardized test, and his writing continued to be a critical area of concern. The student failed two core classes and was not promoted to the seventh grade-largely due to an inability to complete homework assignments. Despite these concerns, the district did not offer any services or modifications in the IEP. The court held that the IEP failed to address the student's difficulties in writing and in completing his homework, ruling that the parent's were entitled to tuition reimbursement.

HARASSMENT

S.S. v. Eastern Kentucky University, 50 IDELR 91 (6th Cir. 2008)

This case was filed by a middle school student diagnosed with cerebral palsy, ADHD, dyslexia, PDD and PTSD. The student claimed that he was bullied and harassed throughout his three years at the middle school, which was operated by Eastern Kentucky University to train student teachers. The court analyzed the ADA/504 claims under the standards set out by the Supreme Court in Davis v. Monroe County Board of Education, 526 U.S. 629, a 1999 case involving student-to-student sexual harassment. The 5-part test used by this court required the plaintiff to prove 1) the plaintiff is an individual with a disability; 2) he was harassed based on that

disability; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of his education and create an abusive educational environment; 4) the defendant knew about the harassment; and 5) the defendant was deliberately indifferent to the harassment. The court granted summary judgment to the school based on the 5th factor. Key Quote:

The record shows that [the school] responded to all of the alleged incidents involving S.S. of which it was made aware, and that its responses included conducting individual and group interviews with S.S.'s classmates in an attempt to determine who was at fault, instructing S.S.'s classmates not to taunt him, arranging for outside speakers to talk to the students about name-calling, identifying related topics for discussion at school assemblies and in small groups, monitoring S.S., at times separating S.S. from other students who had been involved in the altercations, holding a mediation session between S.S. and another student, disciplining both S.S. and the other students who were found to be at fault, calling the police, having the police talk to an offending student, and calling the other students' and S.S.'s parents to discuss the disciplinary problems.

The court also rejected claims based on denial of due process, equal protection and Section 1983.

IEEs

P.R. v. Woodmore Local School District, 49 IDELR 31; 256 F.App'x. 751 (6th Cir. 2007)

In an unpublished decision, the Circuit Court affirmed a ruling that the school district was not obligated to reimburse the parents for an IEE. The argument was over the fact that the district had not asked for a due process hearing to prove the appropriateness of its own evaluation. But the context was crucial. The parents had initiated due process over eligibility and then amended their request to include the IEE issue. This was the first notice to the school of the IEE. The school proposed to request a hearing but, according to the court, "It was Parents who protested and insisted that these matters be addressed in the due process hearing that they had requested and that was set to begin within a few days." The matter was addressed in the hearing and the school successfully proved up its own evaluation. Thus reimbursement was not called for, but the court rejected the district's argument that the parents were not entitled to reimbursement because they failed to notify the school that they disagreed with the district's evaluation. Key Quote:

Next, the district court properly rejected the School District's argument and the SLRO's legal conclusion that, pursuant to 300.502(b)(2), Parents were not entitled to reimbursement for the IEE because they failed to first notify the School District that they disagreed with its Evaluation and wanted an IEE. This argument has been rejected by several Circuit Courts of Appeal. [Cites to decisions from the 3rd, 4th and 7th Circuits omitted].

Harris v. District of Columbia, 50 IDELR 194; 561 F.Supp.2d 63 (D.C.D.C. 2008)

The court held that a “functional behavioral assessment” (FBA) is an evaluation. Therefore a parent may disagree with the district’s FBA and request an independent evaluation.

Blake B. v. Council Rock School District, 51 IDELR 100 (E.D.Pa. 2008)

The court held that the district’s evaluation was appropriate and therefore the school was not obligated to pay for an IEE. On the consent form, the parents had listed some specific tests that they wanted the district to use, but the court held that “The Parents’ request neither changed the District’s mandate under IDEA nor obligated the District to administer any particular evaluations.” One of the complaints was that the school did not use any projective testing in the evaluation of a possible emotional disturbance. The school psychologist stated that she found such testing to be not valid or reliable. The court noted that “the school psychologist’s opinion of projective testing is supported by most psychometric authorities and that projectives are not tools for categorical identification under IDEA.” Key Quote: “Furthermore, IDEA simply gives Plaintiffs the right to an appropriate evaluation—not diagnoses with which they agree.”

Comment: Due to the cost of litigation it is rare to see a case involving payment for an IEE go this far when no other issues are presented.

School Board of Manatee County, Fla. V. L.H., 53 IDELR 149 (M.D.Fla. 2009)

The court upheld an ALJ order that required the school to permit a private psychologist retained by the parent to observe the child in the school setting. The court quotes from a 2004 OSEP Letter to Mamas:

There may be circumstances in which access may need to be provided. For example, if parents invoke their right to an [IEE] of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement. Letter to Mamas, 42 IDELR 10 (OSEP 2004).

IEPs

Van Duyn v. Baker School District 5J, 107 LRP 51958; 502 F.3d 811 (9th Cir. 2007)

The 9th Circuit joined other Circuit Court in ruling that a failure to implement the IEP is a denial of FAPE only if it is a material failure. Key Quote:

We hold that when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.

The court rejected the argument that the failure to implement the IEP was equivalent to changing the IEP:

If accepted, this proposition would convert all IEP implementation failures into procedural violations of the IDEA, but there is no indication that a conflation of this sort is intended or permitted by the statute.

The court also rejected the argument that the IEP is a contract:

First, the IEP is entirely a federal statutory creation, and courts have rejected efforts to frame challenges to IEPs as breach-of-contract claims.

The court concluded that the discrepancies in this case between what the IEP called for and what was provided were minor and not material. However, the court ordered the district to pay some of the parents' attorney's fees due to a partial victory at the administrative level. The parent was not entitled to fees for the services of the parent who was also an attorney.

A.K. v. Alexandria City School Board, 47 IDELR 245; 484 F.3d 672 (4th Cir. 2007)

The Circuit Court ruled that the district denied FAPE because the IEP did not specify a particular school at which the student would be served. The IEP called for the student to be served at a private day school, but did not specify a school. The chair of the meeting mentioned two schools that might work, but neither was identified in the IEP. Key Quote:

We emphasize that we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided. There is no reason for us to frame the issue so broadly. But, certainly, in a case in which the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes, the IEP must identify such a school to offer a FAPE.

The district court had ruled for the school district, in part, because the IEP Team chair had mentioned two schools that might work. Neither was identified in the IEP itself. The Circuit Court called this an error:

In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. Expanding the scope of a district's offer to include a comment made during the IEP development process would undermine the important policies served by the requirement of a formal written offer....

Comment: Upon remand, the district court zapped the district for tuition reimbursement for another two years due to the same problem—the failure to identify a specific school for placement. It's at 50 IDELR 13.

T.P. v. Mamaroneck Union Free School District, 51 IDELR 176; 554 F.3d 247; (2nd Cir. 2009)

The Circuit Court ruled for the school district, thus reversing the district court in a case alleging “predetermination.” Prior to the IEP Team meeting, the school’s expert on autism reviewed the independent evaluation obtained by the parents and prepared a chart comparing the IEE recommendations with her own. There was at least some discussion about the matter between the expert and the chair of the IEP Team. The parents alleged, and the district court found, that this was “predetermination.” The circuit court disagreed. Key Quotes:

Even if there was such discussion, [referring to the meeting between the expert and the Team chair before the meeting] this does not mean the parents were denied meaningful participation at the meeting. IDEA regulations allow school districts to engage in “preparatory activities....to develop a proposal or response to a parent proposal that will be discussed at a later meeting” without affording the parents an opportunity to participate. See 34 CFR 300.501(b)(1) and (b)(3). Mamaroneck’s conduct was consistent with these regulations.

Comment: It helped the school’s case that the Team made changes at the meeting in response to the parents’ input. This is perhaps the strongest evidence a school can offer to show that it has not “predetermined” the outcome. In a predetermination case the parents have the burden of proving that the school approached the IEP Team meeting with a closed mind, not even considering other ideas and possibilities. When the Team adopts some parental recommendations that argument loses steam.

Bend-Lapine School District v. K.H., 48 IDELR 33; 234 F.App’x. 508 (9th Cir. 2007)

The court summarily concluded that the lower court’s ruling in this case was not clearly erroneous, and therefore, would be affirmed. That ruling, at 43 IDELR 191, held that the IEP denied FAPE due to a lack of baseline data, measurable goals and a description of services to be provided.

Avjian v. Weast, 48 IDELR 61; 242 F.App’x. 77 (4th Cir. 2007)

The court held that the school district was not responsible for the residential placement costs of the student (\$571/day) when the IEP clearly called for a private day school placement. When the parents expressed interest in a residential placement during the IEP Team meeting, the Team told the parents about a facility to which they could apply. But the IEP document called for a private day program, and the parents signed the IEP, indicating their agreement. The court held that the written document dictated the outcome, rather than the comments of Team members:

This Court has found that when evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. See A.K. ex rel. J.K. v. Alexandria City School Board, 484 F.3d 672, 2007 WL 1218204 (4th Cir. 2007). Expanding the scope of the offer to include comments

made during the IEP process undermines the important policies served by requiring a formal written IEP.

G.N. v. Board of Education of the Township of Livingston, 52 IDELR 2; 309 F.App'x 542 (3rd Cir. 2009) (Unpublished)

The district court observed: "It is clear from the face of the finalized IEP that no goals and objectives were included." Despite this procedural error by the school district, the court concluded that the student received FAPE. Key Quote:

The failure to include goals and objectives violates IDEA. However, to elevate this failing to a denial of FAPE would be elevating form over substance.

The court concluded that the parents had meaningful participation and the student made progress. The 3rd Circuit affirmed. The district court's decision is at 48 IDELR 160.

Termine v. William S. Hart High School District, 48 IDELR 272; 249 F.App'x. 583 (9th Cir. 2007)

In an unpublished decision, the 9th Circuit ordered the district to reimburse the parents for half of the expenses incurred at a private school due to the district's material failure to implement the IEP. This arose in the context of a transfer to the district. The court concluded that the new district failed to implement the previous IEP "to the extent possible within existing resources" as required by state law. The court also found fault with the district's failure to conduct an IEP Team meeting, noting that the district "was under this obligation whether or not [the student's] mother chose to participate." Equitable considerations reduced the parent's recovery to half of the expenses.

Lessard v. Wilton-Lyndeborough Cooperative School District, 49 IDELR 180; 518 F.3d 18 (1st Cir. 2008)

The student did not have an IEP in place at the start of the school year, but the court concluded that this did not deprive the student of FAPE.

The IEP Team met seven times, normally for between two and three hours, and produced a 60-page IEP, to which the parents did not agree. The parents could not, or would not, identify specifically what they disagreed with. The district offered to pay for a lawyer for the parents to participate in mediation, if the parents would identify what they disagreed with. The parent refused to testify at the hearing.

The Circuit Court held that 1) IDEA does not require a "stand-alone transition plan"; 2) IDEA requires a behavioral plan only when certain disciplinary actions are taken, and not simply because the child has behaviors that impede learning—in those cases, the team is merely required to "consider, when appropriate" formulating such plans; 3) a school does not violate IDEA simply because the parent has refused to sign the IEP before the start of the school year;

and 4) the 1997 amendments to IDEA did not change the Rowley standard with regard to transition plans. Key Quotes:

Many judges are parents too, and we can admire the determination with which the appellants have pursued the best possible education for their profoundly disabled daughter. That is as it should be. [Cite omitted]. But determination must be tempered by an understanding that school districts, like parents and children, have legal rights with respect to special education. In demanding more than the IDEA requires, the appellants frustrated the operation of a collaborative process and put the School District in an untenable position.

Comment: The same parties battled over the next year's IEP also, with the 1st Circuit again upholding the school's actions. See Lessard v. Wilton-Lyndeborough Cooperative School District, 53 IDELR 279; 592 F.3d 267. The proposed IEP in this case was 77 pages and was developed through six IEP Team meetings, but it was never agreed to by the parent.

Letter to Boswell, 49 IDELR 196 (2007)

“There is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated.” However, the letter goes on to point out that schools must give parents full information, in the native language, of all information relevant to activities for which consent is sought.

Tarlowe v. New York City Board of Education, 50 IDELR 186 (S.D.N.Y. 2008)

The court affirmed the administrative decision that the parents were not entitled to reimbursement. Four key rulings: First, the court determined that the IEP Team did not need to include a general education teacher because there was no indication that the student might be “participating in the regular education environment.” The IEP stated that the student could participate in lunch, assemblies, trips and other school activities with non-disabled students, but this court found that “regular education environment” is a term referring to the place where regular education instruction takes place—not extracurricular activities. Moreover, there was no evidence of harm associated with the absence of the general education teacher. Second, the court found the goals to be measurable because they incorporated objectives that were measurable. Third, the school erred by failing to check the box indicating that the student had behavioral issues, but this was harmless because the IEP addressed those issues. Fourth, the offer of placement at a specific site was timely since it was done prior to the start of the school year. The IEP developed at the IEP Team meeting did not specify a particular school, but the court held that notice to the parents prior to the start of the next school year was still timely.

Fisher v. Stafford Township Board of Education, 50 IDELR 272; 289 F.App'x. 520 (3rd Cir. 2008)

The court agreed with the hearing officer and the district court that the parent was not entitled to reimbursement for the supplemental payments she made to teacher aides employed by the district. The parent claimed that without her payments the district would not have been able to

employ Lovaas-trained aides, which is what the IEP required. The court concluded that this was “pure speculation.” Furthermore, the parent failed to give written notice to the school that she was seeking such reimbursement. On another issue, the court held that occasional failures to have the proper aides at school did not amount to a material failure to implement the IEP. The court noted that when one of the student’s two aides resigned the district had no prior notice that this was going to happen and “it does not seem unreasonable that it might take a few weeks to find a suitable replacement.” The school was still providing an aide three out of five days a week. The student would not have an aide for ten days over a five week period. Dissatisfied with this, the parent pulled the student out of school altogether for those five weeks.

R.S. v. Placentia-Yorba Linda USD, 51 IDELR 237 (9th Cir. 2009) (Unpublished)

The court upheld decisions in favor of the school district, concluding that the district offered FAPE in the LRE for the two years in question. The court pointed out that an IEP is not to be judged in hindsight by progress made, but rather: “the court looks to the IEP’s goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer a meaningful benefit on the student.” As to LRE, the court noted the tension between the preference for mainstreaming as opposed to “the primary objective” of providing an appropriate education.

J.P. v. Enid Public Schools, 53 IDELR 112 (W.D.Okla. 2009)

The court held that the student received FAPE because he received appropriate services, even though the IEP did not identify all of the services needed. Key Quote:

As plaintiffs point out, the IEP documents themselves are, unfortunately, quite sparse. The evidence of the IEPs as implemented, however, demonstrates that the District’s efforts were reasonably calculated to provide J.P. with some educational benefit. Many of the services that plaintiffs point to as lacking from the IEP document were actually provided by the District.

The court also concluded that the student did not require residential placement and that even if he did, the parents failed to provide the proper notice.

Comment: Some courts take the written IEP document more seriously than others. This is a case where the hearing officer and the court looked more to what actually happened rather than what was written in the IEP. There are hearing officers and courts who would have ruled against the district on the basis of the “sparse” nature of the IEP as written.

Souderton Area Sch. Dist. v. J. H., 53 IDELR 179 (3rd Cir. 2009) (Unpublished).

The school district determined the student’s present writing level based on three sources: progress reports, Woodcock Johnson III, and a rubric-based writing sample. The court stated that “while the PSSA writing rubric may be insufficient when given alone, ‘when considered in conjunction with an unquestionably objective measure of achievement [like the WJ III], the rubric may prove to be more effective.’” Subsequent to the district’s development of the

student's IEP, the parents obtained a private OT report that recommended OT. The district immediately offered to conduct an OT evaluation and requested parental consent for the evaluation. The court found that after evaluation by the district it may become clear that the student requires OT; however the privately-secured OT report alone is not enough to demonstrate that the district's IEP is inappropriate. Key Quote:

When the issue of OT needs surfaced, the School District reasonably offered to re-evaluate J.H. for those needs within thirty days upon his return to public school, which has not yet occurred.

The fact that the student received speech services at the private school did not convince the Court that the student required those services. The private school provides large-group speech therapy to all of its students. Thus, the student's participation in this therapy does not reveal anything about his individual needs. Furthermore, the fact that he also received small-group therapy does not, in itself, prove the need for services.

District of Columbia v. Bryant-James, 53 IDELR 290; 675 F.Supp.2d 115 (D.C. 2009)

The court upheld the hearing officer's finding that the IEP denied FAPE, largely due to a disconnect between the recommendations in an evaluation and the placement. The evaluation called for the student to be in a quiet, highly structured, distraction-free environment. The student was placed in a small class setting (11 students) with preferential seating, but the hearing officer and the court concluded that this did not adequately fulfill the recommendations in the evaluation.

S.T. v. Weast, 54 IDELR 83 (D.C.Md. 2010)

At an IEP Team meeting in May, 2007, the IEP was developed that called for the student to receive 30 hours of self-contained special education instruction, which would mean that the student was fully self contained with no mainstreaming. The Team concluded the meeting by referring the matter to a "central IEP meeting" scheduled for July. At the July meeting, the school proposed changing the mix to 22.5 hours in self contained classrooms and 7.5 hours of mainstreaming for lunch and electives. The parents alleged that this amounted to "predetermination" by the school, by changing the IEP to fit a predetermined public school placement. The parents placed the child in a private school and sought reimbursement. The ALJ concluded that the notations on the May IEP were "misleading and a mistake." The ALJ also concluded, based on the testimony, that the July meeting was a continuation of the May meeting, and thus the May IEP was only a draft and not the final product. The court affirmed the ALJ decision. Key Quotes:

Lastly, the ALJ appears to have been persuaded by the testimony of Ms. Angel that the thirty hours of self-contained special education listed on the May IEP was written at the instruction of the Brooke Grove principal who "ran out of willingness to listen to [the team] go over and over" about it.

Although the Court agrees with Plaintiffs that the school district has an obligation to develop clearly written IEPs, the IEP does not become complete until it identifies a placement for where the child will receive special education services.

T.Y. v. New York City Department of Education, Region 4, 53 IDELR 69 (2nd Cir. 2009).

The District has a policy of not specifying a particular school in an IEP. A child's placement is determined by a "citywide placement officer who looks at which school would be the most appropriate." The parents argued that the district's policy deprived them of their right to meaningful participation in the development of the IEP. The term "educational placement" in the regulations refers only to the general type of education program in which a child is placed. The requirement that an IEP specify the "location" does not mean that the IEP must specify a specific school site. "We conclude that because there is no requirement in the IDEA that the IEP name a specific school location, T.Y.'s IEP was not procedurally deficient for that reason."

IEP TEAM MEETINGS

Q. and A on IEPs, Evaluations and Reevaluations, 47 IDELR 166 (OSERS 2007)

This is a good resource for OSEP's views on transition, students transferring from one district to another, IEP Team meetings, and parental consent for evaluations.

H.Berry v. Las Virgenes USD, 54 IDELR 73 (9th Cir. 2010)

In a 2007 decision, the Ninth Circuit concluded that the district court correctly stated the standard for "predetermination" prior to the IEP meeting. However, the court remanded back to district court because that court failed to "make specific factual findings regarding the School District's intent or state of mind prior to and during the IEP meeting." In 2008, the district court made those findings, and concluded that the district had improperly "predetermined" placement. In a brief, unpublished opinion, the 9th Circuit affirmed that ruling. The district court's analysis largely hinged on statements from the assistant superintendent at the start of the meeting: "Okay, so what we'll be doing today is going through the assessment results and then we will talk about those goals and objectives. And we'll talk about how we can meet those goals and objectives, program services—that discussion—*then we'll talk about a transition plan.*" (Emphasis in the court's opinion). The court concluded that this statement indicated a predetermined mind set by the district to transition the student back to the public school from the private school.

R.B. v. Napa Valley USD, 48 IDELR 60; 469 F.3d 932 (9th Cir. 2007)

The court ruled that the IEP Team failed to include a special education teacher, but that this error was harmless. At the time of the IEP team meeting the student was attending a residential treatment center at parental expense. The child was not identified as a student with a disability at the time. The meeting was for the purpose of determining eligibility and, if eligible, placement. The parent sought reimbursement for, and continued placement at, the residential facility. The team determined that the student did not qualify. The team did not include any of the student's current teachers. It did include a school district employee who had served as the student's regular education teacher six years earlier. It also included a certified special education teacher

who had never taught the child. The current teachers were not at the IEP Team meeting, but did testify at the due process hearing. Moreover, the court affirmed the ruling that the child was not eligible for special education services.

The court concluded that the requirements for teachers at the IEP meeting changed with the 1997 amendments. The current teacher was no longer required. Instead, the IEP team had to include a regular education and special education teacher who had provided services to the student at some point. Thus the requirement to have a regular education teacher “of such child” on the team was satisfied by the inclusion of the teacher from six years earlier.

There was a special education teacher at the meeting, but she had never served as this child’s special education teacher. This was a procedural error, but it was harmless because 1) the current special education teachers testified at the due process hearing; and 2) the student did not qualify for special education services anyway. Key Quotes:

With regard to the regular education teacher...

We conclude that, after the 1997 amendments, the IDEA no longer requires the presence of the child’s current regular education teacher on the IEP team. The phrase “at least one regular education teacher of such child” gives a school district more discretion in selecting the regular education teacher than the phrase “the teacher.”

And the special education teacher?

Like the companion provision on the regular education teacher discussed supra, we interpret this provision not to require the participation of the child’s current special education teacher.

We conclude that Miller’s participation did not satisfy the IDEA because we interpret the statute and regulation to require a special education teacher who has actually taught the student.

Why this error was harmless....

Similarly, in this case, the administrative hearing cured the procedural error in the composition of the IEP team. If the IEP team had included [special education teachers of the child] the District would have satisfied the requirement that a special education teacher or provider of the child be included. Although R.B.’s IEP team lacked such a person, [the special education teachers] both testified at length during the hearing.

A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place....In other words, a procedural violation cannot qualify an otherwise ineligible student for IDEA relief. Therefore, the omission of a special education teacher or provider from

R.B.'s IEP team is harmless if R.B. is ineligible for IDEA benefits. Because we affirm the district court's acceptance of the SEHO's determination that R.B. does not qualify for IDEA relief, we hold that the District's procedural violation in the composition of R.B.'s IEP team is harmless error.

Hjortness v. Neenah Joint School District, 48 IDELR 119; 508 F.3d 851 (7th Cir. 2007)

The Circuit Court ruled for the school, holding that the IEP was properly developed despite the fact that the school added goals to the IEP after the meeting. Moreover, the district had not "predetermined" placement. The IHO ruled against the school on the "predetermination" issue, but the court reversed. Key Quotes:

Considerable time was spent in multiple IEP conferences at which Joel's parents and their advocate participated. At several times during these conferences, the team attempted to set specific goals and objectives, but the Hjortnesses insisted that 'the issue on the table [was whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be.' The school district arguably should have held a second IEP meeting to review the goals and objectives that were not discussed at the meeting. However, this procedural violation does not rise to the level of a denial of a free appropriate public education. The record does not support a finding that Joel's parents' rights were in any meaningful way infringed.

In this case, it is not that Joel's parents were denied the opportunity to actively and meaningfully participate in the development of Joel's IEP; it was that they chose not to avail themselves of it. Instead of actively and meaningfully participating in the discussions at multiple IEP meetings, the Hjortnesses refused to talk about anything other than '[whether the school district would pay for [Joel] to be at Sonia Shankman where he needs to be.' As a result, the school district was left with no choice but to devise a plan without the meaningful input of Joel's parents. Under these circumstances, the parents' intransigence to block an IEP that yields a result contrary to the one they seek does not amount to a violation of the procedural requirements of the IDEA. To hold otherwise would allow parents to hold school districts hostage during the IEP meetings until the IEP yields the placement determination they desire.

Predetermination?

Recognizing that we owe great deference to the ALJ's factual findings, we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school district did not need to consider private placement once it determined that public placement was appropriate.

Comment: Reading this case, it is difficult to escape the conclusion that the court simply did not approve of the way the parents pursued this matter. The court clearly believed that the parents were unreasonable and intransigent.

There was a dissenting opinion. That judge relied on the factual findings of the ALJ and concluded they were not clearly erroneous. Those findings were 1) that the district had its mind made up about placement before the IEP meeting; and 2) that most of the IEP goals were added to the IEP after the meeting, thus depriving the parents of meaningful input.

S.B. v. Pomona Unified School District, 50 IDELR 72 (C.D.Cal. 2008)

The court held that the IEP Team meeting was fatally flawed due to the absence of a regular education teacher. The district argued that the requirement to have a regular education teacher at the meeting did not apply when students are in preschool. The court disagreed:

There is no support for Defendant's argument that the absence of [the regular education teacher] was no violation because Student's preschool was not a "regular school environment." Although the IDEA does not define a "regular education teacher" or "regular education environment," the statute's definitions of a "child with a disability" and a "FAPE" suggest that Congress intended the benefits of the IDEA and its corresponding procedural safeguards to apply to children attending preschool.

Comment: This argument has swirled around since IDEA 1997 first required the presence of a regular education teacher if the student "is, or may be, participating in the regular education environment." This is the first case to directly address the issue. The teacher in question was the student's teacher at the private preschool he attended before being declared eligible for special education services.

Horen v. Board of Education of City of Toledo Public School District, 53 IDELR 79; 655 F.Supp.2d 794 (N.D.Ohio 2009)

The parties had reached an impasse and no IEP was developed for the student because the parents insisted on tape recording IEP Team meetings and the district did not permit it. The district wanted its lawyer to attend the meetings, and the parent objected. The court upheld the school's position on both issues. The court cited an OSEP memorandum to the effect that "if a public agency has a policy that prohibits or limits the use of recording devices at IEP meetings that policy must provide for exceptions if they are necessary to ensure that the parent understands the IEP or the IEP process or to implement other parental rights guaranteed under Part B." The district did have a policy prohibiting tape recording, and the parents failed to show that they were entitled to an exception. As to the attorney: "Plaintiffs have no legal basis on which to refuse to participate in an IEP session simply because one of TPS's attorneys is present."

Drobnicki v. Poway USD, 53 IDELR 210 (9th Cir. 2009)

The District scheduled the IEP meeting without asking the parents about their availability. The parents informed the District that they were unavailable on the scheduled date and wanted to reschedule. The District did not contact the parents to arrange an alternative date; however, the District offered to let the parents participate by speakerphone. Whether the parents actually had

a conflict does not matter, according to the Court. The Court found that the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time. Key Quote:

The use of [a phone conference] to ensure parent participation is available only "if neither parent can attend an IEP meeting." The District's procedural violation deprived the parents of the opportunity to participate in the IEP process and denied the student FAPE.

J.N. v. District of Columbia, 53 IDELR 326 (D.C. 2010)

The court held that the district denied the parent the opportunity to have meaningful participation at the IEP Team meeting by conducting the meeting without the parent and at a time the parent had objected to. The district sent three notices, proposing alternate dates, and received no response from the first two. So the third notice stated when the meeting would be held. The parent responded to the third notice with phone calls asking that the meeting be rescheduled, but the district did not do so. The federal district court pointed out that 1) the September 21 date was never agreed to; 2) there was no evidence that the parent could not be convinced to attend the meeting; and 3) the parent made "timely, diligent and reasonable efforts to reschedule" the meeting. The court thus concluded that the school had effectively eliminated the parent's ability to participate. The court noted that this was a procedural error that "undermine[s] the very essence of the IDEA."

J.G. v. Briarcliff Manor Union Free School District, 54 IDELR 20; 682 F.Supp.2d 387 (S.D.N.Y. 2010)

The parents were not denied the opportunity for meaningful participation, even though the school held a meeting without them. As soon as the school found out that the parents were dissatisfied with the proposed IEP the school attempted to set up an IEP Team meeting. The parents asked that the meeting be postponed, but the district was unwilling to do so due to the pending start of school and the requirement to have an IEP in place at that time, but the school offered to include the parents by telephone and to have another meeting in September. The court found that the school acted reasonably and did not deny the parents the opportunity to participate.

Comment: The court also noted that the parents had made the decision to put the child in private school prior to informing the school of the dissatisfaction with the proposed IEP. It is also interesting to note that the IEP in question was discussed at an IEP Team meeting attended by the parents on June 13, but the proposed written IEP was not actually developed at that time. It was done after the meeting and then sent to the parents on July 22. The court pointed out that "there is no legal authority requiring parental presence during the actual drafting of the written IEP document."

K.L.A. v. Windham Southeast Supervisory Union, Dummerston School District, 54 IDELR 112 (2nd Cir. 2010) (Unpublished)

The parents claimed that they were excluded from discussions about their daughter's placement. The Court explained that the term "educational placement" only encompasses the student's placement on the LRE continuum. The IEP determined placement in a public high school's life education program. The district had the exclusive right to decide the specific location of the student's services. Key Quote:

We also remain unpersuaded by the parents' argument that they were not afforded the opportunity to weigh in on K.L.A.'s educational placement. The record amply reflects the tremendous amount of access and input the parents enjoyed throughout the IEP-development process. It also starkly demonstrates – as both the Hearing Officer and the district court found – that it was the parents themselves who, by categorically opposing any placement at BUHS ... and developing a completing IEP, rendered impossible a fully collaborative experience.

The parents also argued that the IEP meetings were procedurally defective on account of the absence of the student's regular education teacher at some of the IEP meetings. The Court found that the IDEA required at least one regular education teacher of the student be part of the IEP team, and that the regular education "shall, to the extent appropriate, participate in the review and revision of the IEP of the student." Key Quote:

Thus, the mere absence of a regular educator at any given IEP meeting is not a per se procedural violation. Rather, the inquiry is whether Mr. Achenbach had attended K.L.A.'s IEP meetings "to the extent appropriate." In concluding that Mr. Achenbach's participation was appropriate under the circumstances, we decline the parents' invitation to reduce the analysis to a strict counting exercise. Notwithstanding the fact that Mr. Achenbach appears to have attended more meetings than the singular meeting the parents would have this Court believe he attended, we do not find persuasive the parents' speculative argument that Mr. Achenbach's increased presence could have led to a different educational placement for K.L.A.

S.H. v. Plano ISD, 54 IDELR 114 (E.D.Tex. 2010)

The court affirmed rulings by the hearing officer that 1) the IEP Team meeting was not properly constituted; 2) this procedural error caused substantive harm; and 3) the district's failure to invite proper people to the IEP Team meeting amounted to a withholding of information sufficient to override the statute of limitations. Key Quotes:

While the parents could have invited a representative from Wayman [the private program where the child had been served prior to turning three] to attend the May 18, 2006 ARD committee meeting, the record reveals that the parents were unfamiliar with the IDEA's procedures and special education services. The

Defendant did not invite a Wayman representative to attend the May 18, 2006 ARD committee meeting, nor does the record reflect that the Defendant sought permission from the parents to invite a Wayman representative to attend the same.

The court concluded, as the hearing officer had, that the presence of a representative from Wayman would have made a difference in the placement of the student and the provision of ESY. As for the statute of limitations:

The statute of limitations does not apply to a parent if the parent was prevented from filing a due process complaint because the school district withheld requisite information from the parent. [Cite omitted]. Having reviewed the record, the court agrees with the finding of the Special Education Hearing Officer that the parents were prevented from filing a timely due process complaint due to the Defendant's failure to include appropriate individuals on the May 18, 2006 ARD committee.

B.H. v. Joliet School District No. 86, 54 IDELR 121 (N.D.Ill. 2010)

The court held that the school district's refusal to hold an IEP Team meeting after school hours did not violate IDEA or Section 504. Key Quotes:

Regarding issue (d) [scheduling of IEP Team meeting], federal regulations clearly provide that IEP meetings are to be scheduled at a "*mutually* agreed on time and place." 34 CFR 300.322(a)(2) (emphasis added). The IHO correctly found that the concept of mutual agreement does not encompass one party's unilateral insistence that an IEP meeting be held at a particular time, especially when that time is after school hours.

The parties agree that District 86 refused to schedule an IEP meeting after school hours; however, this refusal simply does not fall within the bounds of acts prohibited by Section 504, even if it may have been unfair or inconvenient to Plaintiffs in some sense.

LEAST RESTRICTIVE ENVIRONMENT

R.H. v. Plano ISD, 54 IDELR 211 (5th Cir. 2010)

The court upheld the denial of the parents' request for reimbursement for tuition at a private preschool. The parents argued that the private preschool was a "general education" setting, and therefore, less restrictive than the preschool special education program offered by the school district. The court directly addressed a common point of contention in placement disputes involving preschoolers: if a public school does not or cannot offer a fully mainstreamed placement, then is the public school required to first try the private preschool program? Here is how the court dealt with this issue:

R.H. asserts that “PISD offers no mainstream public classes for preschool children.” In such a case, he argues, PISD was required to begin with the presumption that it would place him in “[t]he only mainstream placement available,” a “‘private’ placement at a preschool for typically developing children,” and remove him from the private setting only if it could not provide a satisfactory education there.

The IDEA, however, makes removal to a private school placement the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education. Courts should therefore be cautious before holding that a school district is required to place a child outside the available range of public options.

The court also upheld the denial of reimbursement for summer tuition at the private school, based on the parents’ failure to give notice of this private placement to the school. The court held that the notice requirements applied, even though there was never an IEP Team meeting that specifically addressed summer services. The court upheld the district court’s view that “the lack of extended school year services was part and parcel of R.H.’s IEP” at the time, and thus he was required to give notice of his intent to reject the terms of the existing IEP.

Letter to Whole, 50 IDELR 138 (2008)

OSEP states that “IDEA does not prescribe the number or percentage of children with disabilities who must be educated in any particular environment.”

A.G. v. Wissahickon School District, 54 IDELR 113 (3rd Cir. 2010)

The District placed the student, a nonverbal 18-year-old, in a life-skills class with mainstreaming for assemblies, lunch, homeroom, gym, and recess. The parent wanted the student to spend the entire day with nondisabled peers. The District implemented numerous supplemental aids and services, including modifying the curriculum, yet the student received little academic or social benefit from mainstreaming. She made significant progress in her life skills class. Furthermore, she was prone to loud vocalizations, was not toilet trained, and engaged in other behavior that would negatively affect her classmates. The Court found that the student could not be satisfactorily educated full-time in a regular class, even with accommodations.

M.H. v. Monroe-Woodbury Central School District, 51 IDELR 91; 296 F.App’x. 126 (2nd Cir. 2008)

The court held that the child did not require residential placement because the evidence showed that she was making progress in a day program. “The central inquiry,” according to the court, “is whether the student’s conduct outside of the school building and outside the normal hours of the school day is such that it impedes her ability to derive an academic benefit from a day program.” Here the evidence showed progress through grades and testimony from certified experts.

Madison Metropolitan School District v. P.R., 51 IDELR 269 (W.D.Wis. 2009)

The court affirmed a hearing officer's decision that required the school district to reimburse the parents for part of the tuition at a private preschool. The IEP called for special education services to be provided to the child at the preschool, and also noted the student's need for interaction with non-disabled peers. The district argued that the parents privately placed the child at the preschool due to their own work schedules. The court described that as "irrelevant."
Key Quotes:

.....the District fails to cite any persuasive support why it should not have to pay for the necessary non-disabled peer interaction component of P.R.'s program just because P.R.'s parents enrolled him in what the program team agreed was an appropriate least restrictive environment.

.....permitting a school district to obtain a financial windfall by not paying for portions of private preschool programs or daycare settings that provide disabled students necessary non-disabled peer interaction would be a disincentive for school districts to create inclusive public preschools that could provide all the appropriate services and supports necessary to insure that disabled preschool aged students receive a free appropriate public education in the least restrictive environment.

Comment: The parents did not ask the school to pay the tuition at the time of the IEP meeting. Everyone assumed that the student would be attending the preschool program because the parents needed the daycare and there were no other alternatives. Months later the parents asked the school to pay for it. The fact that the IEP Team acknowledged the student's educational need for interaction with non-disabled peers was crucial to the outcome. Decisions like this will encourage schools to find more inclusive settings for preschoolers within the public school environment.

L. v. North Haven Board of Education, 52 IDELR 254; 624 F.Supp.2d 163 (D.C.Conn. 2009)

The court affirmed the district's placement of the student in a more restrictive environment, rejecting the argument that the school was obligated to operate with a presumption that the student should be placed in a general education environment for 80% of the day. In part, the court relied on the fact that the parents had rejected parts of the proposed behavior plan. Behavioral problems were the main reason the student was moved to a more restrictive environment, and the IEP Team developed a behavior plan, parts of which the parents rejected.
Key Quote:

I agree with the Hearing Officer's determination that the Board offered an appropriate behavior plan for 2006-07 and any deficiency in its implementation cannot be attributed to the Board because the parents refused to accept a central concept of that plan—the time out room.

Comment: As is usually the case, the parties had very different perceptions of what the time out room was going to be like, but the hearing officer and court agreed with the school's perception, that it was a reasonable method.

LIABILITY

H.H. v. Moffett, 52 IDELR 242 (4th Cir. 2009)

The court held that neither the teacher nor the aide were entitled to qualified immunity from personal liability. The suit alleged that the teacher and aide kept the child confined to a wheelchair through the entire school day, even though this was not necessary. The suit alleged that this was done maliciously, rather than for any educational purpose, and that it was accompanied by mocking and disparaging comments to the student. The constitutional right at stake was the right to be free from unreasonable restraint. Key Quote:

We stress that Appellees' facts make this an unusual case, and our opinion is one that no reasonable teacher who errs in judgment ought to fear. Qualified immunity is intended to protect officials who make reasonable mistakes about the law. [Cite omitted]. But the immunity simply does not extend protection to an official motivated by the kind of bad faith alleged here.

Comment: Some of the allegations in this case were based on information obtained from a recording device the parent attached to the child's wheelchair. The fact that the child, a kindergarten student, had limited ability to communicate, due to her disabilities, was also a factor.

Muskrat v. Deer Creek Public Schools, 52 IDELR 284 (W.D.Okla. 2009)

The court refused to dismiss a claim of constitutional injury based on allegations of extreme physical and psychological punishment of a student. The allegations rose to the level of "shocking the conscience" and sought relief for non-educational injuries, and thus the parents were not required to exhaust administrative remedies.

M.S. v. Seminole County School Board, 52 IDELR 286; 636 F.Supp.2d 1317 (M.D.Fla. 2009)

This is one of the many cases arising out of allegations of abuse of many students by a special education teacher. In this case the court held that the teacher was not entitled to qualified immunity from personal liability. The court held that the allegations rose to the level of "shocking the conscience" thus amounting to a deprivation of substantive due process due to the use of excessive force. The court said that the factors to be considered were 1) the need for the application of force; 2) the extent of the injury inflicted; and 3) whether force was applied in good faith to maintain and restore discipline. The court noted that if the allegations in the suit proved to be true, "it would be difficult to conclude that [the teacher's] actions were not malicious."

Lopez v. Metropolitan Government of Nashville and Davidson County, 52 IDELR 291 (M.D.Tenn. 2009)

The case involved a 19-year old allegedly forcing a 9-year old, severely disabled student to perform sexual acts on him on the school bus. The 9-year old student was placed by the district in a private program for students with severe behavioral issues. However, the district continued to provide transportation. This was a special education bus with only a few students, but it had no monitor and had a substitute bus driver. The sub did not have specific information about the two students, their disabilities or behavioral histories. The older student had a long history of misconduct, including several sexual incidences. The parents sued under Section 1983 for a deprivation of substantive due process, and Title IX, along with negligence claims under state law. The court held that the parent was not required to exhaust administrative IDEA remedies because it would have been futile. Moreover, the parent was seeking recovery for a rape—not an educational deprivation. The court dismissed the constitutional claim against the private school that served the student, holding that the school was not a “state actor” even though it received public funds, provided educational services and was regulated by the state. The court refused to dismiss the constitutional claim against the school district which was based on the state created danger theory. The court also refused to dismiss the Title IX claims which were based on deliberate indifference to student-to-student sexual harassment.

Vicky M. v. Northeastern Educational Intermediate Unit, 53 IDELR 74 (M.D.Pa. 2009)

This is a case alleging long term, pervasive abuse of students by a teacher, along with an effort by others to cover it up. With regard to the substantive due process claim, the court refused to grant qualified immunity to the teacher in the face of allegations that satisfied the “shock the conscience” standard. The court also denied qualified immunity to some, but not all, of the administrative officials based on allegations that they were aware of what was happening and contributed to “a culture of ignoring and discouraging abuse allegations, creating an environment for continued abuse.” Qualified immunity was granted to those administrative officials who had not received direct warnings that abuse was occurring. The court dismissed the Equal Protection claim, noting that there was no evidence that the abuse, or cover up, was intentional discrimination on the basis of disability. Claims for money damages due to violations of IDEA were dismissed based on previous cases holding that such relief is not available. The court did not dismiss the 504 claims, noting the existence of disputed material facts.

J.G. v. Card, 53 IDELR 118 (S.D.N.Y. 2009)

This is a suit against teachers, teacher aides, the principal, the superintendent and the school district alleging “grave and persistent” abuse of students with autism. The suit was filed on behalf of the students, and also alleged causes of action for the parents themselves. The court dismissed all claims against the superintendent and the district. There was no evidence that district policy caused any injuries, and the superintendent was not sufficiently personally involved. However, the court refused to dismiss claims against the principal, and declined to grant qualified immunity to the principal. This opinion does not address claims against the teachers or aides.

King v. Pioneer Reg. Educ. Service Agency, 53 IDELR 196; 688 S.E.2d 7 (Ga. Ct. of Appeals, 2009)

The Court ruled that a school district was not liable for the death of a special education student who committed suicide after being placed in a “time-out”/“seclusion” room by school officials. When J.K. arrived at school on the day of death, he was given a length of rope to hold up his pants because he had forgotten his belt. Later J.K. was locked in the seclusion room after he exhibited threatening behavior toward other students. While in the room, he used the rope to hang himself. The parents sued PRESA under Section 1983. The suit alleged that PRESA failed to adequately train employees and failed to maintain adequate policies and procedures regarding: 1) the use and supervision of the seclusion room; 2) prevention of suicide by students; and 3) the supervision and handling of students with behavioral disorders such as those exhibited by Jonathan. According to their claim, these failures amounted to deliberate indifference to and deprivation of his constitutional rights under the Fourteenth Amendment’s Due Process Clause.

To sustain their claim under Section 1983, the court required the parents to demonstrate that J.K.’s death was caused by deprivation of a constitutional right to which he was entitled and that a policy, custom or practice of PRESA caused the deprivation. The court rejected the contention that detaining J.K. in the “seclusion room” created a “special relationship” between the school and student such that the school had an affirmative duty to prevent harm to the student. The parents also failed to identify an official “policy, practice, or custom” that violated J.K.’s rights under Section 1983. The court found no evidence of deliberate indifference to and deprivation of J.K.’s rights under the Fourteenth Amendment’s Due Process Clause. It also found no evidence that school staff were aware that J.K. was a suicide risk. The court also denied claims under IDEA, noting that it does not permit recovery of damages for personal injuries.

Mahone v. Ben Hill County School System, 110 LRP 26891 (11th Cir. 2010) (Unpublished)

The court affirmed a ruling that “qualified immunity” shielded the district and several school employees from liability. The court concluded that the student’s constitutional rights were not violated. The fact situation involved what the court called “the Trash Can Incident.” The teacher allegedly shoved a student’s head into the trash can and pulled him out by his legs. The student had poor motor skills, asthma, and ADHD. The superintendent ordered an investigation of the incident. The principal did so, and concluded that that this was horseplay and there was no malicious intent. He advised the teacher to cease doing this in the future. The court held that this conduct “does not shock the conscience in a constitutional sense” and thus there was no violation of the student’s constitutional rights. Moreover there was no evidence of malice or an intent to harm the student. Finally, the court noted that the school investigated the matter and reprimanded the teacher.

NO CHILD LEFT BEHIND

Board of Ottawa Township High School District 140 v. Spellings, 49 IDELR 152; 517 F.3d 922 (7th Cir. 2008).

Two districts and some parents alleged that NCLB conflicted with IDEA, and asked the court to declare that IDEA controlled. The district court dismissed the case, holding that the parties lacked standing to sue. The Circuit Court reversed that decision, but then turned to the merits of the case and rejected the argument. Key Quotes:

A remand to address the merits is unnecessary, because plaintiffs' claim is too weak to justify continued litigation. Let us suppose, as plaintiffs assert, that the NCLB and the IDEA are irreconcilable in some respects. Then the earlier enactment, which is the IDEA, must give way. Plaintiffs' view that an earlier law can repeal a later one by implication has time traveling in the wrong direction.

School District of the City of Pontiac v. Secretary of Education, 109 LRP 65523; 584 F.3d 253 (6th Cir. 2009)

The district court had dismissed this challenge to NCLB on a preliminary motion, holding that the plaintiffs had failed to state a claim upon which relief can be granted. The 6th Circuit Court decided to hear the case "en banc" meaning that all 6th Circuit judges would be involved. The en banc court split on the case 8-8. This had the effect of affirming the decision of the district court to dismiss the case. In June, 2010, the Supreme Court refused to hear the case, thus leaving intact the dismissal. The case largely hinges on interpretation of a single sentence in NCLB:

Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, *or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.* 20 U.S.C. 7907(a), emphasis added.

The plaintiffs (school districts and teacher unions) argued that NCLB imposed costs on school districts in violation of this provision. The district court dismissed that challenge and that decision has ultimately been upheld.

Newark Parents Association v. Newark Public Schools, 108 LRP 65906 (3rd Cir. 2008)

The court held that NCLB does not confer a private right of action on parents to enforce its provisions regarding notice to parents and supplemental educational services.

Comment: This is the first Circuit Court to address this issue.

PARENTAL RIGHTS/RESPONSIBILITIES

Lauren W. v. DeFlaminis, 47 IDELR 183; 480 F.3d 259 (3rd Cir. 2007)

The Circuit Court held that the district's insistence on a waiver from the parents in connection with a settlement was not an act of illegal retaliation. The parent was unable to prove any causal connection between his protected activity (advocacy for the child) and the act of "retaliation" (the requirement to sign a waiver). On another interesting issue, the court held that the parents were not entitled to have their IEE funded by the school because they had agreed with the school's evaluation:

We, however, never have held that parents who expressly agree with a district's evaluation but obtain an independent evaluation are entitled to reimbursement for the evaluation and we cannot imagine how we could do so....Of course, in this case inasmuch as Lauren's parents both checked "yes" and signed the District's evaluation, they indisputably agreed with it. Though no doubt their agreement did not preclude them from obtaining their own evaluation they could not make a claim on the District to pay for it.

Winkelman v. Parma City School District, 47 IDELR 281; 127 S.Ct. 1994 (U.S. 2007)

"The question" according to the Supreme Court, "is whether parents either on their own behalf or as representatives of the child, may proceed in court unrepresented by counsel though they are not trained or licensed as attorneys." The answer:

Petitioners construe these various provisions [in IDEA] to accord parents independent, enforceable rights under IDEA. We agree. The parents enjoy enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court.

We conclude that IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child.

C.G. v. Five Town Community School District, 49 IDELR 93; 513 F.3d 279 (1st Cir. 2008)

The court denied a parental claim for reimbursement, largely on the basis of "obstructive conduct" by the parents. Key Quotes:

The district court supportably found that the parents' actions disrupted the IEP process, stalling its consummation and preventing the development of a final IEP. Moreover, the court found, the parents did so despite their knowledge that the School District planned to complete the unfinished portions with the parents' help. Tellingly, the court determined that the cause of the disruption was the

parents' single-minded refusal to consider any placement other than a residential one. Such Boulwarism, whether or not well-intentioned, constitutes an unreasonable approach to the collaborative process envisioned by IDEA. Here, that attitude sufficed to undermine the process.

Comment: "Boulwarism" refers to Lemuel Boulware, former VP of GE who was known to present "take it or leave it" offers to the union during negotiations.

Jenkins v. Rock Hill Local School District, 49 IDELR 94; 513 F.3d 580 (6th Cir. 2008)

The Circuit Court reinstated a 1983 suit for retaliation against the superintendent. The parent alleged that the superintendent reported her to child welfare authorities, excluded the child from school and refused to provide homebound tutoring, all in retaliation for the parent's letter to the local newspaper and complaints to school and other government officials. The court held that these activities were "protected speech" under the First Amendment and that the parent had alleged the elements of a legitimate claim of retaliation. The district was dismissed from the case as there was no evidence of a policy or custom of retaliation. Other claims asserted by the parent were rejected by the court. There was no invasion of privacy nor was there an infringement of the right to liberty in raising children.

Ballard v. Philadelphia School District, 50 IDELR 32 (3rd Cir. 2008)

The court held that "A parent can waive her child's right to a FAPE." The court cites Fitzgerald v. Camdenton R-III School District, 439 F.3d 773 (8th Cir. 2006). Here, the parent had signed a settlement agreement with the advice of counsel, and the court dismissed the case with prejudice. The parent then tried to re-open the case, arguing that she signed the agreement under duress. The court rejected that argument. The fact that the parent felt pressured by her attorney, and was under time constraints to consider and sign the settlement agreement did not amount to "duress." Moreover, the court concluded that the settlement agreement did not violate public policy even if it effectively approved services that fell short of FAPE. Parents can waive the right to FAPE.

Blanchard v. Morton School District, 52 IDELR 3 (W.D.Wash. 2009)

The court dismissed the suit in which the parent sought to have a particular person appointed as aide to the child. The court noted that the parent's preferred provider did not want the job. Moreover, there was no evidence of any inadequacy with the aide assigned.

Fuentes v. Board of Education of the City of New York, 52 IDELR 152; 569 F.3d 46 (2nd Cir. 2009)

The court dismissed the case for lack of "standing." The court held that under New York law, the non-custodial parent did not have decision making authority with regard to education unless the divorce decree said so. Here, the decree did not grant the father such authority. Therefore, as the non-custodial parent, he did not have standing to obtain a due process hearing.

Comment: Note that the authority of the father, according to the court, is a matter of state law. Thus the court did not construe IDEA to provide a trump card. If the father lacked standing in the eyes of state law, then he lacked standing. Note also that “standing” here refers only to the power to take a matter to due process hearing. The non-custodial parent would still have the right to participate in meetings and have input with regard to the child’s education.

J.W. v. Fresno USD, 52 IDELR 194; 611 F.Supp.2d 1097 (E.D.Cal. 2009)

The court affirmed a hearing officer’s decision in favor of the school district involving a hearing impaired student. Among many other claims, the parents argued that the mainstream placement for 4th, 5th and 6th grades was inappropriate. The district countered with the argument that the parents had asked for this. Thus the district argued that the parents could not later claim a denial of FAPE over the placement they had asked for. The court rejected the theory that the parents had somehow waived the right to complain of this; but on the other hand, the court implied that the parent’s insistence on a mainstream placement bolstered the decision in favor of the school district. Key Quote:

Accordingly, while the claim is not waived, Student’s parents insistence on mainstreaming at the time the IEP was made supports the ALJ’s conclusion that the District provided Student a FAPE, as discussed more fully below.

Letter to Cox, 54 IDELR 60 (OSEP 2009)

This letter concerns situations in which parents each have equal authority with the child, but disagree about the continuation of special education services. What should the district do if one parent revokes consent while the other parent wants services to continue? OSEP advises that the district must honor the revocation request, and the other parent may not invoke a hearing to challenge the decision. Key Quotes:

Therefore, as long as the parent has the legal authority to make educational decisions for the child, the LEA must accept either parent’s revocation of consent for the purposes of 34 CFR 300.300(b)(4).

In addition, a parent does not have the right to use Subpart E of the Part B regulations to `overcome the other parent’s revocation of consent for special education and related services. Pursuant to 34 CFR 300.507(a)(1), a parent may only file a due process complaint with respect to any of the matters described in sections 300.503(a)(1) and (2). Section 300.503(a)(1) and (2) cover actions by a “public agency,” and not by another parent.

PLACEMENT

J.R. v. Mars Area School District, 52 IDELR 91; 318 F.App'x. 113 (3rd Cir. 2009)

The court ruled for the school district. At issue was whether the district's unilateral "relocation" of Joseph in an inclusion classroom, rather than providing one hour per day in a resource room, amounted to a change in the "educational placement" under the IDEA. Key Quote:

The IDEA does not define the term "educational placement" and thus "identifying a change this placement is something of an inexact science." [Cite omitted]....As we explained in [an earlier case] "the question of what constitutes a change in educational placement is necessarily fact specific" and thus, "in determining whether a given modification in a child's school day should be considered a "change in educational placement" the "touchstone" is whether the modification is "likely to affect in some significant way the child's learning experience."

Noting that the student continued to receive the same services from the same teacher, and was only moved to a different room, the court characterized this as a "unilateral relocation" by the school district, rather than a "unilateral change of placement."

Marc V. v. North East ISD, 455 F.Supp.2d 577 (W.D. Tex. 2006), *aff'd* 2007 WL 2751430 (5th Cir. 2007), 48 IDELR 41 (W.D. Tex. 2007)

The hearing officer ruled in favor of the district, and both the district court and 5th Circuit upheld. In all three proceedings, the relevant judges concluded that the district had complied with IDEA and that ARD committees (Texas talk for "IEP Team") are not required to agree with or defer to the doctor's recommended placement on homebound. Key Quote:

After reviewing the administrative record, the Court concludes that Plaintiffs' unilateral actions in removing Marc from school during the 2003-04 school year and demanding homebound placement without obtaining prior ARD committee approval prevented Marc from realizing all the benefits of his IEPs.

The Court disagrees with Plaintiffs' assertion that the ARD committee was required to consent to the homebound placement prescribed by Dr. Harkins. The IEP is developed by the ARD committee for each student with a disability. Contrary to Plaintiffs' assertions, [state law] does not mandate ARD committee deferral to a doctor's homebound placement decision when this section is considered in the context of other IDEA statutory provisions.

John M. v. Board of Educ. of Evanston Twp. High Sch. Dist. 202, 48 IDELR 177; 502 F.3d 708 (7th Cir. 2007)

The Circuit Court remanded this case for further proceedings with regard to "stay put." The district court had held that co-teaching was part of John's IEP, and therefore, subject to stay-put. Key Quotes:

The term ‘educational placement’ is not statutorily defined, so that identifying a change in this placement is something of an inexact science. Indeed, we have admitted to a hesitancy to establish in any definitive and rigid way the meaning of ‘educational placement.’ Rather, we have seen wisdom in, and therefore have adopted, the fact-driven approach employed by our sister circuits.... [W]e recognize[] that within the term there must be ‘enough room to encompass [the child’s] experience’... [and] that the educational status quo for a ‘growing, learning’ young person often makes rigid adherence to particular educational methodologies ‘an impossibility.’ Under these circumstances, respect for the purpose of the stay-put provision requires that the former IEP be read at a level of generality that focuses on the child’s ‘educational needs and goals.’

In complying with the stay-put provision, we must interpret ‘educational placement’ to incorporate enough flexibility to ‘encompass [the child’s] experience.’ A child’s interim educational regime must produce as closely as possible the overall educational experience enjoyed by the child under his previous IEP. To achieve that result, we must recognize that educational methodologies, appropriate and even necessary in one educational environment, are not always effective in another time and place in serving a child’s continuing educational needs and goals.

Protestations that educational methodologies proven to be helpful to the child in the past are now impossible must be evaluated with a critical eye to ensure that motivations other than those compatible with the statute, such as bureaucratic inertia, are not driving the decision. Suggestions for methodological change that would dilute the statute’s policy of ‘mainstreaming’ disabled children to the ‘maximum extent appropriate,’ deserve special scrutiny. The ‘removal of children with disabilities from the regular educational environment occurs only when the nature or the severity of the disability of a child is such that education in regular classes with the use of supplementary aid and service cannot be achieved satisfactorily.’

If the parties dispute what the IEP requires, as they do here with respect to co-teaching, the court must evaluate the IEP as a whole and determine whether such a methodology is required under the terms of the IEP. Under usual circumstances, the court should find it unnecessary to go beyond the four corners of the document in order to make that determination. However, vagueness in the instrument with respect to how its goals are to be achieved may require that the court turn to extrinsic evidence to determine the intent of those who formulated the plan. A methodology not mentioned in the plan may well indicate that those who formulated the plan did not consider that particular methodology a necessary component to the plan—although they well may have intended that some comparable methodology be implemented. Here, the term ‘co-teaching’ is not mentioned in the May 2004 IEP itself. Therefore, the district court ought to determine, after evaluating the entire May 2004 IEP as a totality, whether the parties regarded this methodology as an essential part of the plan or as simply one of several ways by which the plan could be implemented.

Comment: It is dismaying to see that after more than 30 years of litigation, high level courts cannot agree on or even define such a basic term as “educational placement.”

PRACTICE AND PROCEDURE

Doe v. Westerville City School District, 50 IDELR 132 (S.D.Ohio 2008)

The court dismissed the parents’ suit based on the two-year statute of limitations. The statute begins to run when the parents “knew or should have known” that the child was not receiving a FAPE. In this case, that was when the parents obtained a private evaluation which concluded that the student had a language based learning disability and ADHD. This private evaluation was not shared with the school district at that time, but it sufficiently put the parents on notice to start the statute running. The court also dismissed claims for emotional stress because this was a straight appeal of a due process decision under IDEA, not a 1983 case. Claims against individual school officials were also dismissed as they were, at all times, acting within the scope of employment and thus were acting at all times in their official capacity. The fact that the complaint alleged bad faith and malice did not alter that analysis. In a later ruling, the court held that neither IDEA nor NCLB permit a trial by jury. See 51 IDELR 245 (2009).

J.M.C. v. Louisiana Board of Elementary and Secondary Education, East Baton Rouge Parish School Board, 50 IDELR 157; 562 F.Supp.2d 748 (M.D.La. 2008)

The parents had settled a due process hearing request via email correspondence and a written settlement agreement, without ever having a formal resolution session. The district did not call for a resolution session, but simply offered a settlement. Parents agreed to the settlement, but then sued the district for violating the settlement agreement. The district sought dismissal for failure to exhaust administrative remedies. The court held that 1) parents did not exhaust administrative remedies; 2) language in the settlement agreement did not obviate the need to exhaust; 3) the court could not determine if the settlement agreement was of the type referred to in IDEA as having been achieved at a resolution session, but 4) since the school district had not called for a resolution meeting, it did not follow required procedures and could not use “exhaustion” as a means of defeating the court’s jurisdiction. Motion to dismiss was denied.

Comment: The court seems to imply that a settlement agreement reached at a resolution session can be enforced directly in court, without the necessity for a due process hearing.

Somoza v. New York City DOE, 50 IDELR 182; 538 F.3d 106 (2nd Cir. 2008)

The court held that the statute of limitations begins to run when the parent knew or should have known about the alleged action that forms the basis for the complaints. Here, the court held that the statute began to run when the parent observed her daughter’s rapid progress in a specialized program and was informed by an expert that her daughter had not previously received a FAPE. The court did not decide whether a one-year or two-year statute applied. Under either one, the claim was time barred.

Friendship Edison Public Charter School, Chamberlain Campus v. Smith, 50 IDELR 192; 561 F.Supp.2d 74 (D.C.D.C. 2008)

The court held that evidence from the resolution session was admissible. A resolution session is not the same as settlement negotiations, and thus evidence of what happened at the resolution session is admissible. The IHO in this case erred as a matter of law by excluding the school district's offer of evidence with regard to an offer it had made in the resolution session.

Jonathan H. v. Souderton Area School District, 52 IDELR 31; 562 F.3d 527 (3rd Cir. 2009)

The court held that IDEA's 90-day timeline for filing a civil action does not apply to counterclaims. The 90-day limit applies to the initiation of an action, while a counterclaim is a response to an IDEA suit.

Wood v. Katy ISD, 53 IDELR 10 (S.D.Tex. 2009)

The court dismissed the 504, ADA and Section 1983 claims due to failure to exhaust administrative remedies under IDEA. The parents had filed a special education due process hearing, but the hearing officer dismissed all claims under 504, ADA and Section 1983. So the parents filed suit under those statutes, but the court dismissed them, noting that all of the claims under any of the statutes involved the identification, evaluation and placement of the student. These are all claims that can be made under IDEA, and therefore, exhaustion is required.

H.C. v. Colton-Pierrepont Central Sch. Dist., 52 IDELR 287 (2nd Cir. 2009) (Unpublished).

A dispute over the enforcement of a settlement agreement is purely a matter of determining a district's obligation under the settlement agreement. It does not concern the identification, evaluation, placement or the provision of FAPE to the child. Resolution of the dispute will not benefit from the "discretion and educational expertise [of] state and local agencies, [or the] full exploration of technical educational issues' related to the administration of the IDEA." "Consequently, a due process hearing before an IHO was not the proper vehicle to enforce the settlement agreement."

Letter to Baglin, 53 IDELR 164 (OSEP 2008)

OSEP here advises that the parties may agree to confidentiality as part of a resolution agreement. However, a school district may not require confidentiality as a condition for conducting the resolution meeting.

PRIVATE SCHOOL STUDENTS

Q and A on Serving Children with Disabilities Placed by Their Parents in Private Schools, 47 IDELR 197 (OSERS 2007)

Letter to Chapman, 49 IDELR 163 (2007)

In this letter, OSEP points out school districts are not obliged to provide “proportionate share services” to students who attend private, for-profit schools, but they are still obliged to find and evaluate such students pursuant to the “child find” mandate. OSEP says that each state must determine “which public agency is responsible for conducting child find under 34 CFR 300.111 for children suspected of having a disability attending for-profit schools. Generally, this agency is the LEA in which the child resides.”

Comment: Notice that OSEP does not put the child find duty on the district where the private school is located, but rather, leaves it up to the state.

Board of Education of Appoquinimink School District v. Johnson, 50 IDELR 33; 543 F.Supp.2d 351 (D.C.Del. 2008)

The court overturned a hearing panel’s decision and ruled that the school district was not obligated to pay for an interpreter for the deaf student who was placed by his parents in a private school. The public school offered FAPE, including an interpreter, in the public school setting, but the parent opted for the private school. The district showed that the “proportionate share” allocation for the entire school district was \$3,639. The cost of the interpreter for this one student would have been \$37,000. Key Quote:

The cost for the student’s full time interpreter exceeds \$37,000 per year, more than ten times the amount available for all parentally-placed private school in the district falling within the provisions of the IDEA. This fact alone demonstrates the inequity that would arise with respect to the other parentally-placed private school students if the District were required to fund a one-to-one ASL interpreter for the student.

Alternatively, the court also pointed out that the hearing panel exceeded its authority by considering this case in the first place. “Complaints regarding the provision of services to parentally-placed private school students are not subject to due process procedures.”

Comment: As the court points out, “...when the parent of an eligible child opts out of a public school where a FAPE could be provided, that parent is opting for a lesser entitlement.” Nieuwenhuis by Nieuwenhuis v. Delavan-Darien School District, 996 F.Supp. 855 (E.D.Wis. 1998).

Letter to Goldman, 53 IDELR 97 (OSEP 2009)

OSEP states that once a student is declared eligible the student remains eligible until one of four events occurs: 1) exceeding age limits; 2) graduation with a regular diploma; 3) dismissal by IEP Team after an evaluation; or 4) move to another state. Thus a parental decision to serve an eligible student via home schooling, or to place the child in a private school, does not change the student’s eligibility.

PROCEDURAL SAFEGUARDS

Letter to Lieberman, (OSEP 2009)

OSEP advised that “prior written notice” is required when the school agrees to a change of placement proposed by the parent. Likewise, PWN is required when the school proposes a change of placement to which the parent agrees: “Nothing in the statute or regulations indicates that the notice is related to a parent’s attitude toward any changes proposed or refused by the public agency.” OSEP offered “a change to the type, amount, or location of the special education and related services being provided to a child” as an example of the type of change that would necessitate a PWN. Finally, the IEP document itself can be used as “part of the prior written notice as long as the document(s) the parent receives meets all the requirements in 34 CFR 300.503.”

Compton Unified School District v. Addison, 54 IDELR 71; 598 F.3d 1181 (9th Cir. 2010)

This case involved a 9th grader who scored below the first percentile in standardized testing. She failed every academic subject in the fall of 10th grade. Teachers described the girl as “like a stick of furniture” in the classroom. According to the court, the girl “sometimes refuses to enter the classroom, colored with crayons at her desk, played with dolls in class, and urinated on herself in class.” But because the mother did not want the child “looked at” the district decided not to “push.” However, the school did refer the child to a third-party mental health counselor, who recommended testing for special education. Still, the school did not conduct an evaluation, instead, promoting the student to the 11th grade. When the parent sought a due process hearing, alleging that the district failed to “find” the child in a timely fashion, the district argued that the hearing officer had no jurisdiction. The school focused on the statement in the law that schools must give notice of any “proposal” or “refusal” to do certain things, such as evaluating a child. Likewise, a parent can get a due process hearing over any such “proposal” or “refusal.” So the school argued that it never “refused.” When the parent asked the school to conduct an evaluation, it promptly did so. The 9th Circuit ruled for the parents, noting that it would “avoid statutory interpretations which would produce absurd results.” The court quoted the dictionary and found that “refuse” means “to show or express an unwillingness to do....” and noted that the district’s “willful inaction in the face of numerous ‘red flags’ is more than sufficient to demonstrate its unwillingness and refusal to evaluate Addison.” One judge dissented, pointing out that this holding does not strengthen “the role and responsibility” of parents, as IDEA intends to do, but rather, it “weakens the parents’ role by casting responsibility to monitor and identify children’s development solely on to the shoulders of our school system.”

Comment: This case presents an interesting public policy discussion about the roles and responsibilities of parents vis a vis school districts. But for practical purposes, there are two important points here. First, watch for those “red flags.” Second, be prepared to “push” when necessary to meet the needs of the student.

RELATED SERVICES

Petit v. U.S. Department of Education, 51 IDELR 66; 578 F.Supp.2d 145 (District of Columbia, 2008)

This suit challenged the DOE's definition of "related services" which excludes mapping of cochlear implants. The court held that IDEA is ambiguous about the scope of the term "related services" and that the Department's definition of it was reasonable.

C.N. v. Los Angeles USD, 51 IDELR 98 (C.D.Cal. 2008)

The court upheld the decision of the ALJ that the district's decision to use the "gravity method" of feeding through the child's gastrostomy tube, rather than the "plunge method" did not deprive the student of a FAPE. The gravity method was recommended by medical protocols and even the child's own doctor testified that the plunge method was unsafe.

J.T. v. Missouri SBOE, 51 IDELR 270 (E.D.Mo. 2009)

The court refused to dismiss a case in which a student/resident of a state school sought an order that the state provide audio and video surveillance of his treatment so that his parents could monitor. The court would not rule out the possibility that such a service could qualify as a related service under IDEA or a reasonable accommodation under 504.

*Comment: A similar case came to the same conclusion: F. v. Missouri SBOE, 53 IDELR 50 (E.D.Mo. 2009). See also C. v. Missouri SBOE, 53 IDELR 81 (E.D.Mo. 2009). See also Plock v. Board of Education of Freeport School District No. 145, 53 IDELR 267 (Ill. App.Ct. 2nd 2009) where the court held that audio recording of special education classes violated the state's *Eavesdropping Act*.*

Q and A on Serving Children with Disabilities Eligible for Transportation, 53 IDELR 268 (2009)

REMEDIES

Board of Education of Fayette County, Kentucky v. L.M., 47 IDELR 122; 478 F.3d 307 (6th Cir. 2007)

The court held that neither hearing officer nor courts can authorize IEP Teams to reduce or modify awards of compensatory education. In doing so, the court followed the lead of the D.C. Circuit in Reid ex. rel. Reid v. District of Columbia, 401 F.3d 516 (D.C.Cir. 2005).

As far as the standard to be used, the court rejected an approach based on a "rote hour-by-hour compensation" favoring instead a more flexible approach designed to place the child in the same position he or she would be in if the district had not violated IDEA. The court remanded the case to the district court to apply this analysis and make a specific award of compensatory education.

On other issues, the court held that the school had not failed “child find” standards, and that the student was not entitled to ESY in one particular summer. Key Quotes:

We now adopt the standard first articulated in Clay T. v. Walton County School District, 952 F.Supp. 817, 823 (M.D. Ga. 1997), which provides that a claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.

The court was particularly sensitive to the very young age of the child (K-2) testimony of educators that an overly hasty referral to special education could be damaging. Moreover, the district provided services during the early years in regular education that enabled the student to succeed.

As to ESY, the parent failed to prove that such services were “necessary to avoid regression so severe that the child would not be able to catch up during the following school year.”

Comment: There is additional judicial criticism of the rote, hour-by-hour approach in Friendship Edison Public Charter School Collegiate Campus v. Nesbitt, 49 IDELR 159 (D.C. 2008). The court points out that an award of compensatory education must be “based on a prospective consideration of a student’s needs.” Therefore, it is fact-specific and must be based on a good record as to the student’s current levels and needs.

Moseley v. Board of Education of Albuquerque Public Schools, 47 IDELR 211 (10th Cir. 2007)

The court held that the student’s claims for injunctive relief were rendered moot by his graduation from high school while the case was pending. The court noted that “We struggle to see what equitable remedy this court could impose, given that Mr. Moseley has already graduated from high school and cannot return to Del Norte [High School].” The court observed that the 10th Circuit had not yet decided whether IDEA permits compensatory damages, but dodged the issue by noting that the student had not sought such relief in the complaint.

A.W. v. Jersey City Public Schools, 47 IDELR 282; 486 F.3d 791 (3rd Cir. 2007)

The Circuit Court reversed an earlier ruling and held that IDEA violations cannot be enforced through Section 1983. The earlier ruling was W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995). In this case, the court looked at cases since Matula, in particular the Supreme Court’s decision in City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005). Based on that review, the court acknowledged that “we are now convinced that our ruling in Matula is no longer sound.” Key Quotes:

The IDEA includes a judicial remedy for violations of any right “relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate public education to such child.” Given this comprehensive scheme, Congress did not intend Section 1983 to be available to remedy violations of the IDEA such as those alleged by A.W.

The court reached the same conclusion with regard to Section 504: “Accordingly, we conclude that Section 1983 is not available to provide a remedy for defendants’ alleged violations of A.W.’s rights under Section 504.”

Smith v. Guilford Board of Education, 48 IDELR 32; 226 F.App’x. 58 (2nd Cir. 2007)

The court reinstated a suit that had been dismissed by the district court, noting that “It is well-settled that, while IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to Section 1983 to enforce its provisions—including the right to FAPE—and to obtain damages for violations of such provisions.”

Blanchard v. Morton School District, 48 IDELR 207; 504 F.3d 771 (9th Cir. 2007), *cert. denied* 2008

The Ninth Circuit concluded that money damages are not available to parents under the IDEA. Key Quotes:

We have held that money damages are not available under the IDEA for the pain and suffering of a disabled child. Witte ex rel. Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1275 (9th Cir. 1999). The question before us now is whether 42 U.S.C. Section 1983 creates a cause of action for money damages under the IDEA for the lost earnings and suffering of a parent pursuing IDEA relief. We hold that it does not.

Mark H. v. Lemahieu, 49 IDELR 91; 513 F.3d 922 (9th Cir. 2008)

The court held that violations of IDEA can be redressed only with prospective relief, but that violations of 504 can be redressed with compensatory damages also. The court held that the fact that remedies are available under IDEA does not preclude a suit under 504 if the parents can prove a violation of 504. The court also held that FAPE standards under the two statutes are different—thus a ruling that FAPE was provided under IDEA does not necessarily mean that FAPE was provided under 504. Likewise the reverse is true—a district that violates IDEA does not necessarily violate 504. The court established a high standard for 504 liability: “Thus, a public entity can be liable for damages under Section 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons.”

In a footnote, the court noted that another 9th Circuit decision from 2007 held that IDEA cannot be enforced through Section 1983. See Blanchard v. Morton School District, 504 F.3d 771 (9th Cir. 2007), discussed below. Key Quote:

We do not here decide whether the H. family has alleged a privately enforceable cause of action for damages against the state. To this point, both parties have proceeded on the assumption that the IDEA and the Section 504 FAPE requirements are identical, and have not litigated whether any of the Section 504 FAPE regulations, as opposed to the IDEA FAPE requirements, can support a

private cause of action. We therefore remand to the district court for further proceedings. On remand, the H. family should be given an opportunity to amend its complaint to specify which Section 504 regulations they believe were violated and which support a privately enforceable cause of action.

Comment: Keep in mind that the 504 regulations themselves say that the implementation of an IEP that meets IDEA standards is “one means of meeting the standard” set out in 504. Thus, if the hearing officer or court concludes that the IEP in question satisfies IDEA standards, there should be no liability under 504. Here, the IHO ruled that the state failed to comply with IDEA. The students were denied FAPE under IDEA. That was already settled and this fight was over the remedy. This decision holds that damages may be available, but the parents will have to do more than show the violation of IDEA which they already proved—they will have to prove that 504’s standards were also violated.

J.N. v. Pittsburgh City School District, 50 IDELR 74; 536 F.Supp.2d 564 (W.D.Pa. 2008)

The court denied a claim for compensatory education based on multiple physical injuries sustained by the student as a result of assaults by classmates. The key, according to the court, was the fact that the student did not experience an educational loss. Key Quote:

As Defendant notes, Plaintiff has cited no case in which a court has predicated a denial of FAPE on the safety of the student in the absence of a resulting loss of education. On the contrary, courts have held that a claim under the IDEA is viable only if procedural violations affect a child’s substantive rights.

Despite the assaults, the student actually missed very little school and the parents acknowledged that he progressed well. Key Quote:

While we empathize with the Parents’ concern for the safety of their child, who is certainly entitled to special attention, our authority is based on law, not emotion, and the IDEA does not offer the remedy of compulsory education for the specific series of limited injuries incurred by the Student in the circumstances evidenced in this record.

The court also summarily rejected the argument that the administrative appellate panel was biased because it was chaired by an education professor who, ruled for the school district in every opinion he authored over a two year period.

Comment: This is the type of decision that surprises a lot of educators. The student was repeatedly injured by one of his classmates, suffered injuries, and yet the school is not held responsible. The key to understanding this decision is that the parents brought this case under IDEA, not state tort law, and that they sought compensatory education—a remedy that is designed to compensate for loss of education, not physical injuries.

Couture v. Albuquerque Public Schools, 50 IDELR 183; 535 F.3d 1243 (10th Cir. 2008)

The court granted qualified immunity to individual defendants who were sued over constitutional claims arising from the use of time out and various physical punishments holding that, as a matter of law, the actions of the educators were reasonable and the due process interests of the student were not implicated. Key Quotes:

The educators’ response was particularly reasonable given that the timeouts were expressly prescribed by M.C.’s IEP as a mechanism to teach him behavioral control. The IEP, which was developed by educational specialists in conjunction with M.C.’s mother, and to which she agreed in writing, sets forth educational and behavioral methods that M.C.’s classroom teachers were required to follow. Neglecting to follow the IEP—including failure to use the prescribed timeouts—could have exposed the teachers to liability.

While the timeouts were not as effective as the teachers hoped, the continued employment of timeouts over a two-month period was reasonable. If we do not allow teachers to rely on a plan specifically approved by the student’s parents and which they are statutorily required to follow, we will put teachers in an impossible position—exposed to litigation no matter what they do.

Nicholas W. v. Northwest ISD, 51 IDELR 179 (E.D.Tex. 2008)

The plaintiff sued 19 individuals under § 1983 alleging violations of IDEA. The court refused to dismiss the complaints. The court cited 5th Circuit precedent for this, *Morris v. Dearborne*, 181 F.3d 657 (5th Cir. 1999), which held that “violations of the protections guaranteed by the IDEA may be pursued through § 1983, which broadly encompasses violations of federal statutory as well as constitutional law.” This case was ultimately dismissed due to plaintiff’s attorney’s failure to meet court deadlines. See 51 IDELR 238 and 53 IDELR 43, both from 2009.

Horen v. Toledo City School District, 51 IDELR 273 (N.D.Ohio 2009)

The court dismissed a suit brought against the school district’s attorneys noting that the attorneys were not “state actors” for purposes of § 1983, and cannot be guilty of a “conspiracy” with their client. Nor were the attorneys subject to Section 504 or Title II of the ADA because they were not recipients of federal financial assistance.

T.W. v. School Board of Seminole County, Florida, 52 IDELR 155 (M.D.Fla. 2009)

The court granted summary judgment to a teacher and the school district after concluding that the student had not suffered a constitutional injury. The student alleged physical and verbal abuse by the teacher, much of which was confirmed by teacher aides who worked in the classroom. However, the court concluded that the three instances of physical restraint, along with the profanity and verbal abuse, did not “shock the conscience” of the court, and therefore, did not violate the constitution.

Comment: The facts alleged in this case are very disturbing, and the case includes footnotes indicating that the teacher was charged with criminal child abuse in state court, and that there are 14 companion cases arising out of the same fact situation. This decision only addresses possible liability under the U.S. Constitution. Other avenues of redress exist.

Parker v. Fayette County Public Schools, 52 IDELR 212 (6th Cir. 2009)

The student with autism “wandered off” during gym class and was found hours later, naked and covered with mud. The suit was brought under Section 1983, alleging a violation of the constitutional right to bodily integrity. The court dismissed the suit, noting that the evidence did not show any “trauma or injury, physical or otherwise.” Thus the right to bodily integrity was not violated.

Streck v. Board of Education of the East Greenbush Central School District, 52 IDELR 285 (N.D.N.Y. 2009)

The court ordered the district to pay for a compensatory reading program for a student who had graduated, but been denied FAPE. The parents sought \$150,000 for the full cost of tuition, room and board the first year of college, a laptop computer, and two years of anticipated private schooling. But the court held that they were only entitled to recover the costs of a compensatory reading program—not the entire cost of first year of college. Moreover, the student had received financial aid to cover 37% of his first year costs, so the court ordered the district to pay 63% of the cost of the reading program, or \$7,140. Parents also recovered the cost of an IEE, but were denied recovery for anticipated future private schooling as the court observed that “IDEA allows parents to recover only actual, not anticipated, expenses for private school tuition and related expenses.”

P.P. v. West Chester Area School District, 53 IDELR 109; 585 F.3d 727 (3rd Cir. 2009)

The court held that a two-year statute of limitations applied to claims under Section 504; that compensatory education is not available as a remedy for procedural violations unless substantive harm results; and that parents were not entitled to an IEE when they requested it prior to asking the district to do an evaluation.

D.D. v. Chilton County Board of Education, 53 IDELR 331; 655 F.Supp.2d 1191 (M.D.Ala. 2009)

The court refused to dismiss a Section 1983 suit over improper physical restraint even though the claim could have been brought under IDEA. The court noted that 1983 cannot be used to remedy violations of IDEA, but in this case, the parent alleged a violation of the 14th Amendment. The suit alleges that a teacher left a child restrained and unsupervised in a Rifton chair in a hallway in a way that was not authorized by the IEP.

STATE RESPONSIBILITY

Q and A on Monitoring, Technical Assistance and Enforcement, 47 IDELR 167 (OSERS 2007)

Q and A on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 52 IDELR 266 (OSERS 2007)

Chavez v. Board of Education of Tularosa Municipal Schools, 52 IDELR 162; 614 F.Supp.2d 1184 (D.C.N.M. 2008)

In a lengthy and analytical opinion, the court held that the state agency could be held responsible for providing direct services to the student. Key Quote:

Regarding the IDEA claim against NMPED, the Court now finds that the NMPED breached its duties under the IDEA to provide Matthew Chavez with FAPE for the 2003-2004 and 2004-2005 school years. Specifically, the NMPED had adequate notice that Matthew Chavez was not receiving any educational services and that Tularosa Schools was violating its duties. Rather than taking measures to compel Tularosa Schools to come into compliance with IDEA, the NMPED took the stance that it need do nothing. The NMPED cannot properly wash its hands of its responsibility to make certain that Matthew Chavez was provided direct services.

Comment: For complicated reasons, the court made this finding but refused to order any remedy. The case is noteworthy for its detailed analysis of the respective responsibilities of LEAs and the SEA. Follow up decisions in this matter can be found at 52 IDELR 197, 52 IDELR 198 and 52 IDELR 229, all decided in 2009.

Delaware Valley School District v. P.W., 52 IDELR 192 (M.D.Pa. 2009)

The school district sued the state agency seeking indemnification and contribution to the district for the costs of serving a student. The court dismissed the district's case, noting that school districts do not have standing to bring suits under IDEA.

STAY PUT

C.P. v. Leon County School Board, Florida, 47 IDELR 212; 483 F.3d 1151 (11th Cir. 2007)

The Circuit Court held that the district did not violate its duty to annually review the IEP. The district was locked into the "stay put" IEP and could not come to agreement with the parent on any changes. Key Quotes:

The thrust of C.P.'s argument is that the School Board violated the IDEA's requirement that LEAs update a child's IEP annually in order to provide FAPE, even though the stay-put provision had been invoked and even though the School

Board and parents could not agree on an alternative placement. We hold that the School Board complied with its obligations under the IDEA.

Section (d)(4)(A) does not require the IEP team to alter an IEP annually; rather, it requires that it review the IEP annually and revise it “as appropriate.” Here, the IEP team held an IEP meeting on August 14, 2003 and engaged in ongoing dialogue with C.P.’s mother regarding possible alternatives. This constitutes a review under section (d)(4)(A).

Letter to Watson, 48 IDELR 284 (OSEP 2007)

“There is nothing in the regulation at 34 CFR 300.518 that relieves a public agency of its responsibility under 34 CFR 300.324(b)(1) to convene a meeting of the IEP Team, periodically, but not less than annually, to review, and if appropriate, revise, an IEP for a child with a disability, even if the public agency is required to maintain the child’s current educational placement while administrative or judicial proceedings are pending.”

S.K. v. Parsippany-Troy Hills Board of Education, 51 IDELR 106 (D.C.N.J. 2008)

The court affirmed an ALJ decision in favor of the school district, holding that the district’s proposed change of placement to a self-contained placement was appropriate. This decision, rendered in October, 2008, involves the IEP for the 2006-07 school year. For that school year, the district proposed moving the student from a mainstream setting to a self-contained placement. The ALJ agreed with the school about that. However, the ALJ did not render her decision until August 31, 2007—*after the completion of the school year at issue*. The parents then appealed to federal court. The federal court agreed with the school district and the ALJ that the student should be served in a self-contained placement. This decision was rendered in October, 2008, which is *after the completion of a second school year since the proposal was made*. In the federal court case, the district asked the court to declare the self-contained placement as the “stay put” placement. The court declined to do so, noting:

The law states that the child’s placement at the time of the due process request is the stay-put placement until the dispute regarding the child’s program or placement is ultimately resolved.

Comment: This case is an excellent example of what is wrong with the “stay put” rule. Here we have a child who was supposed to go to a self-contained placement in the fall of 2006. Two years later, he is still being served in a placement that has been deemed inappropriate by both the ALJ and the court. “Stay put” makes sense if the litigation process moves swiftly to an ultimate conclusion in a short period of time, but it does not work that way. Due to the continuation of litigation, this child has been in inappropriate placement for over two school years now.

M.M. v. New York City DOE, 51 IDELR 128; 583 F.Supp.2d 498 (S.D.N.Y. 2008)

The court held that stay put does not apply to a student transitioning from an IFSP under Part C to public school services under Part B. In doing so, the court sided with the 11th Circuit on this issue rather than the 3rd. See D.P. ex. rel. E.P. v. School Board, 483 F.3d 725 (11th Cir. 2007); Pardini v. Allegheny Intermediate Unit, 420 F.3d 181 (3rd Cir. 2005).

Board of Education of Appoquinimink School District v. Johnson, 51 IDELR 182 (D.C.Del. 2008) *Note: the merits of this case are discussed above under Privately Placed Students in a case reported at 50 IDELR 33.*

The issue concerned the provision of a sign language interpreter for a student placed by his parents in a private school. The hearing panel concluded that the district had offered FAPE and that the interpreter was not necessary to provide FAPE. However, the panel ordered the district to provide the interpreter as part of the “proportionate share” services provided to private school students. The district court reversed that decision (see the discussion of that case earlier in this handout and at 50 IDELR 33). The parents requested a “stay put” order while they pursued an appeal to the circuit court. In this decision, the court denies the request for a stay put order. The court noted that 1) the hearing panel held that the interpreter’s services were not necessary for the provision of FAPE; and 2) two circuit courts (6th Circuit and D.C. Circuit) have held that “stay put” does not apply to a district court decision that is being appealed to the Circuit Court.

Farzana K. v. Indiana DOE, 53 IDELR 180 (N.D.Ind. 2009)

The court held that the parent’s insertion of the words “for now” in connection with her agreement to placement did not change that placement as “stay put.” The IEP documents explicitly stated that “I understand and AGREE with the recommendation of the case Conference Committee.” Insertion of the words “for now” after “AGREE” did not alter the fact that the parent agreed to the placement, thereby making it the “stay put” placement.

R.Y. v. State of Hawaii DOE, 54 IDELR 4 (D.C.Ha. 2010)

The parent and adult student challenged the student’s proposed graduation. The court affirmed a hearing officer’s decision in favor of the school on that issue—the parent had not proved that the diploma was improperly issued. However, the court held that the school was obligated to continue services to the student during the pendency of the dispute pursuant to “stay put” since the proposed graduation was challenged. The school had not done so, and thus, the parent was entitled to a remedy for the violation of “stay put.” The court sent the case back to the hearing officer to determine the appropriate remedy.

Joshua A. v. Rocklin USD, 52 IDELR 1; 559 F.3d 1036 (9th Cir. 2009)

Although the court ruled in favor of the school district in this case, it also ordered the district to honor the “stay put” placement throughout the proceedings, including the appeal to the circuit court. The “stay put” placement required the district to co-fund 40 hours/week of in-home educational services provided by a nonpublic agency. In a separate opinion the court held that

the district's proposed IEP was appropriate, but here the court held that the "stay put" provision entitled the parents to reimbursement for the costs of the private in-home services during the pendency of the appeal. Key Quote:

Ultimately, refusing to enforce the stay put provision during the appeals process would force parents to choose between leaving their children in an education setting which potentially fails to meet minimum legal standards, and placing the child in private school at their own cost. Congress sought to eliminate this dilemma through its enactment of [the stay put provision].

Comment: In this case all three tribunals (hearing officer, district court, circuit court) held that the placement proposed by the school district was appropriate and provided FAPE. So in retrospect, we can see that the parents were not being forced to choose between private school and "an education setting which potentially fails to meet minimum legal standards."

TRANSFERS

Sterling A. v. Washoe County School District, 51 IDELR 152 (D.C.Nev. 2008)

The student moved from California to Nevada. The dispute was over where certain DHH services (Deaf and Hard of Hearing) would be provided—at the school or in the home. The school in California had done it in the home, which is what the parents preferred. The school in Nevada provided the services at an elementary school campus. The focus of the case is on the requirement to provide "services comparable to those described in the previously held IEP." The court ruled in favor of the Nevada school district, holding that "comparable" does not mean "identical," but rather, "similar." In this case the services were the same, and only the location was different. Parents advanced many arguments as to why the home was a better location, but the court noted that IDEA does not require the school to provide "the absolutely best educational setting for the child."

Letter to Champagne, 53 IDELR 198 (OSEP 2008)

OSEP here advises that parental consent for the initial provision of services remains in effect when students go from preschool to kindergarten; from one school district to another in the same state; and even when they go to a new state. In the interstate transfer, the consent for the provision of services remains valid, but the new district may find it necessary to obtain consent for a new evaluation of the student. Key Quote:

If the parent previously provided consent for the initial provision of services and the child never exited special education, there is no need for the new public agency to obtain consent for the provision of special education services.

TRANSITION

K.C. v. Mansfield ISD, 52 IDELR 103; 618 F.Supp.2d 568 (N.D.Tx. 2009)

The court ruled for the school district in a case where parents sought a residential placement based, in part, on allegations that the district failed to provide appropriate transition services. The District Court held that the transition plan, which reflected the student's strong interests in fashion and child care, was reasonably calculated to provide FAPE. An occupational assessment conducted by the district showed the student had both a high interest and a high skill level in the fields of fashion, child care, and child development. The assessment also indicated a high interest in performing arts but the skill score in that area was in the "very low" range. Based on the assessments, the IEP team developed a transition plan that called for the student to work in a clothing store and to work as a classroom aide in an elementary school music class. Although the placement in the music class was discontinued the following year due to the student's dissatisfaction with the position, the district included one-to-one music instruction in the student's IEP to address her interest in music. The court concluded that as required by the IDEA the transition plan reflected the student's skills and interests, and included a series of practical goals that would help her transition into life after high school. The court thus held that the district had no obligation to pay for the student's placement in a music academy for students with cognitive disabilities.

Rosinsky v. Green Bay Area School District, 53 IDELR 193 (E.D.Wis. 2009)

A district court in Wisconsin concluded that the district provided appropriate transition services despite the fact that the district failed to issue written invitations to two outside service providers. The court noted that the parent invited the two and one of them attended all three of the IEP Team meetings at which transition was discussed. The other attended only one of the three, but conveyed his recommendations to the Team. Noting that the district is only required to invite such service providers "to the extent appropriate" the court held that any procedural error that occurred was harmless. In reaching this conclusion the court put the emphasis on substance over form. Key Quote:

[Quoting from an earlier case] "The failure of the plan to discuss transition is, however, a procedural flaw, not a substantive one: no one would be complaining about the language of the plan if the District had in fact been providing transitional services to [the student]. The important question is therefore whether the District failed to give [the student] something to which she was entitled."

High v. Exeter Township School District, 54 IDELR 17 (E.D.Pa. 2010)

The junior in high school had an IEP that called for her to make one year's progress in reading, which would have brought her reading up to the 6th grade level. The transition plan called for her to go to college. The court held that the apparent lack of consistency between transition plan and IEP goals did not mean that FAPE was denied. The district provided solid evidence of educational progress and implemented the transition plan appropriately. Key quote:

Failing to show there was no transition plan, Plaintiffs claim instead the IEP was deficient because it failed to state how Stephanie would meet her transition goal of attending college. However, there is no requirement for a transition plan to dictate IEP goals. Unlike the IEP, a transition plan is not a strictly academic plan, but relates to several post-secondary skills, including independent living skills and employment. While it may be ideal if a transition plan influences IEP goals, a newly identified transition goal will not change the ability of a child to progress at a higher rate academically.

Therefore, while the District helped Stephanie realize she wanted to attend college, the District was not required to ensure she was successful in fulfilling this desire. The IDEA is meant to create opportunities for disabled children, not to guarantee a specific result. [Cites omitted]. Stephanie was six grade levels behind in reading when she arrived at the District for 11th grade. It was unreasonable for Stephanie's parents to expect she would be reading at a 12th grade level by graduation.

The court also discussed how a transition plan compares with an IEP:

Plaintiffs further argue the transition plan was inadequate because the district did not provide progress monitoring of the transition goals. Plaintiffs' arguments rely on the standard for progress monitoring of the IEP, which is not the standard for a transition plan. Transition plan statutory requirements contain no progress monitoring requirement. An IEP must include a method to measure a child's progress; however, a transition plan must only be updated annually and include measurable goals and corresponding services.

Sinan v. School District of Philadelphia, 48 IDELR 97 (E.D.Pa. 2007) affirmed by the 3rd Circuit at 109 LRP 59299 (2008)

According to the parents of a 19-year-old special education student, the district's failure to mention vocational and practical living goals made the transition plan incomplete. The district countered that the plan called for the student to meet with college guidance counselor and the transition plan was limited to college preparation rather than vocational goals at the parents' insistence. But according to the parents, IDEA obligated the district to plan for a student's postsecondary vocational and practical training regardless of the expressed desires of the parents. Observing that "case law does not offer strong support for the Plaintiffs' proposition that the District has an affirmative duty to provide for vocational and practical training in all transition plans, without regard to a student's individual needs and preferences," the court held that "the transition plan's focus on college planning was appropriate given [the student's] needs, preferences and interests at the time."

UNILATERAL PLACEMENT/TUITION REIMBURSEMENT

Gagliardo v. Arlington Central School District, 48 IDELR 1; 489 F.3d 105 (2nd Cir. 2007)

The court denied the claim for reimbursement due to the inappropriateness of the private school. The court held that the private school was not “appropriate” under IDEA even though the student had a good experience there and made educational progress. The court relied on fact findings by the hearing officer regarding the absence of the kind of trained staff that the IEP called for:

It is understandable that a district court would be receptive to parents under these circumstances; a child’s progress is relevant to the court’s review. But such progress does not itself demonstrate that a private placement was appropriate. Indeed, even where there is evidence of success, courts should not disturb a state’s denial of IDEA reimbursement where, as here, the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not. A unilateral private placement is only appropriate if it provides ‘education instruction *specifically* designed to meet the *unique* needs of a handicapped child.’ Emphasis in the original.

Forest Grove School District v. T.A., 109 LRP 36046 (Sup. Ct. 2009)

The court held that students who have not previously received special education services from a public school are not precluded as a matter of law from obtaining tuition reimbursement under IDEA. The court held that the IDEA statute referring to students who “previously received” special education services from a public agency simply does not apply to those students who did not receive such services. The court also held that reimbursement is available to parents of such students on equitable principles and is not limited to “extreme” cases.

C.S. v. Governing Board of Riverside USD, 52 IDELR 122; 321 F.App’x. 630 (9th Cir. 2009)

The court affirmed a decision denying the parents’ reimbursement for a private placement. The hearing officer denied the claim based on the finding that the parents had not given the school district the opportunity to make a formal offer of placement. The court held that this was not an abuse of discretion. The court also denied the request for IEE reimbursement because 1) the request for reimbursement came prior to receipt of the school’s evaluation; and 2) the hearing officer had concluded that the school’s evaluation was appropriate.

S.J. v. Issaquah School District No. 411, 52 IDELR 153; 326 F.App’x. 423 (9th Cir. 2009)

The court affirmed decisions by the hearing officer and the district court in favor of the school, denying a claim for reimbursement. The parents argued that the IEP was fatally flawed because certain pages in it were left blank. The court brushed this off, noting a lack of evidence of harm or prejudice to the student from this omission. The request for reimbursement was denied due to, among other reasons, lack of notice, and failure to give the district an opportunity to address objections to the IEP. The court found no problem with a provision in the BIP that allowed the

school to provide medication to the student at school. The court distinguished an earlier case on a similar issue (Valerie J. v. Derry Co-op School District, 771 F.Supp. 483 (D.N.H. 1991)) because the parents agreed to this provision, whereas in the New Hampshire case, the parents had not.

Comment: With regard to the blank pages on the current IEP the court made a surprising observation, noting that “prior IEPs prepared by the District included the requisite statements and S.J.’s teachers could refer to those statements.” It would not be a good idea for educators to infer from this comment that it is OK to rely on out-of-date IEPs. It is the current IEP that matters.

Mary Courtney T. v. School District of Philadelphia, 52 IDELR 211 (3rd Cir. 2009)

The court denied a claim for reimbursement for placement at a residential health care facility. Referring to an earlier 3rd Circuit decision, the court held that “Only those residential facilities that provide special education, however, qualify for reimbursement under *Kruelle* and IDEA.” Here, the court concluded that the placement was designed to address medical, rather than educational, issues. The court noted that the facility had no educational accreditation and employed no educators on-site. The court also rejected the argument that the services provided at the facility amounted to “related services.” The court noted that prior case law made it clear that the term “related services” excludes “hospital services.” Key Quotes:

Here, though Plaintiffs go to great lengths to distinguish SLS from a hospital, the facility is nonetheless far more similar to a hospital than a school or even a residential educational facility. SLS’s promotional materials indicate that it specializes in the treatment of individuals with “depression, dual diagnosis, psychosis, borderline personality disorder and similar psychological problems.” It addresses these conditions through a combination of “assessment, diagnosis, psychotherapy and medication management,” as well as a number of group therapy offerings. Furthermore, patient care is coordinated and directed by the patient’s personal psychotherapist, which in Courtney’s case was a psychiatrist. It is also worth reemphasizing that SLS has no educators on-site, offers no educational services, and is not accredited with or regulated by educational authorities.

Richardson ISD v. Michael Z., 52 IDELR 277; 580 F.3d 286 (5th Cir. 2009)

The court vacated a lower court ruling that would have required the school to pay for the residential placement of the student. The court held that the lower court did not apply the correct standard to the case. The court agreed with the lower court that the proposed IEP from the school was inappropriate, but that was not enough to justify residential placement. The court disagreed with the 3rd Circuit’s ruling on the same issue in the *Kruelle* case and instead adopted this test:

In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful

educational benefit, and 2) primarily oriented toward enabling the child to obtain an education.

Ashland School District v. R.J. 53 IDELR 176; 588 F.3d 1004 (9th Cir. 2009); Ashland School District v. E.H., 53 IDELR 177; 587 F.3d 1175 (9th Cir. 2009)

In a pair of cases decided on the same day, the 9th Circuit ruled that the district was not required to reimburse the parents for residential placements. In both cases the parents had prevailed at the due process level, and been reversed by the district court. The Circuit Court upheld the district court's analysis and rulings. In both cases the parents argued that the district court should have applied an "abuse of discretion" standard in reviewing the administrative ruling. The court rejected that, noting that district courts are to give deference and due weight to the findings of the hearing officer but are to review the matter de novo. The court also confirmed in both cases that residential placement is proper only when necessary for educational purposes.

Shaw v. Weast, 53 IDELR 313 (4th Cir. 2010) (Unpublished)

The student, a 20-year-old with an emotional disturbance and post-traumatic stress disorder, was hospitalized multiple times for suicidal ideation. Concerned about her safety and medication compliance, her parents placed her in a residential facility and sought reimbursement. The Court found that the student's safety, mental health and medical issues were distinct from her educational needs, and thus did not obligate the District to fund a residential placement. The Court noted that a residential placement is required only if residential care is essential for the child to make any educational progress. Key Quote:

That [the student's] emotional and mental needs required a certain level of care beyond that provided at [the day school] does not necessitate a finding that the student should fund that extra care when it can adequately address her educational needs separately.

K.J. v. Fairfax County School Board, 110 LRP 1693 (4th Cir. 2010) (Unpublished)

The Court held that the parents were not entitled to reimbursement for the tuition because a court can award reimbursement only if the school district has denied the student a FAPE and the parents' chosen placement is otherwise appropriate. The District's proposed placements were appropriate.

TRULY MISCELLANEOUS BUT INTERESTING

L.A. v. Granby Board of Education, 47 IDELR 284; 227 F.App'x. 47 (2nd Cir. 2007)

The lower court ordered the parents to pay \$65,418 to their own attorneys. The Circuit Court vacated that order, noting that there was nothing in IDEA authorizing a court to order a parent to pay his or her own attorneys' fees.

Wiles v. DOE Hawaii, 51 IDELR 212; 593 F.Supp.2d 1176 (D.C. Ha. 2008)

Special education cases rarely go to a jury, but this one did. The jury concluded that the Department of Education did not violate 504 by denying services to the student, or by retaliating against the parents. Key points: First, even though only 75% of the IEP was implemented, this was acceptable in light of the fact that the IEP called for 68.5 hours per week of skills training, an amount that the parent's expert called "ridiculous." Second, the jury was provided plenty of evidence of how caring and professional the staff members were. Third, the court cited evidence to the effect that the school may have spent from \$244,000 to \$270,000 annually on services to the student.

Nicholson v. State of New York, 52 IDELR 15; 872 N.Y.S.2d 846 (N.Y.Ct.Cl. 2008)

The parent sued the state of New York due to the use of electric shocks on a student who was placed in a Massachusetts residential facility. The suit was based in negligence, asserting that New York was negligent in putting the Massachusetts facility on the "approved" list of residential placements. The court dismissed the suit, noting that the state was immune from negligence claims under state law. Furthermore, the parent failed to show that the state was negligent.

Kalbfleisch v. Columbia Community Unit School District Unit No. 4, 53 IDELR 266; 920 N.E.2d 651 (Ill. App. Ct. 5th Dist. 2009)

The court affirmed an injunction that required the school to permit the student with autism to have a dog with him at the school. The school district was unsuccessful in trying to move the case to federal court and in arguing that the parent was required to exhaust administrative remedies. The suit is not based on IDEA, but rather on a state law that says: "Service animals such as guide dogs, signal dogs, or any other animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in or outside the classroom."

Hough v. Shakopee Public Schools, 53 IDELR 232; 608 F.Supp.2d 1087 (D.C.Minn. 2009)

The court granted a summary judgment in favor of students with disabilities who were routinely searched at school. The court held that students with disabilities have an expectation of privacy at school, and thus are protected from unreasonable searches by the 4th Amendment. The court also rejected the argument that students had waived their right to privacy by obtaining special education services. The school argued that this particular group of students were "cognitively impaired, emotionally disturbed, and suffer an extensive range of development disorders" resulting in a need for a quiet, controlled and restricted environment. The court said that even so, this did not justify the intrusive searches being conducted. The court noted that it was a "crucial distinction" that these students were assigned to an educational program, not a punitive one. Some courts have approved of random searches of students assigned to disciplinary alternative programs.

Lewellyn v. Sarasota County School Board, 53 IDELR 288 (M.D.Fla. 2009)

The court ruled in favor of the school district in a case involving the discipline of two students, but the most noteworthy aspect of the case was the court's comments about the case in general:

Mrs. Lewellyn, the mother of the two disabled students at issue, filed a single-spaced 33-page affidavit detailing school yard squabbles, progress reports, and other accounts of day-to-day school activities. She feels that her children were bullied and unfairly treated by Defendant. She describes meetings that she had with teachers as well as her analysis of other student's hand-written letters concerning her children.

The court is sensitive to Mrs. Lewellyn's desire to protect her children and to provide them with every advantage in life. However, it is not this federal tribunal's role to agonize over who pushed whom down in the sandbox. Neither is it the Court's role to determine if certain referrals to the Principal's office were, indeed, warranted.