Mississippi Directors Conference

Mississippi Department of Education

Special Education Law Update

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Every Student Succeeds Act

Special Education Teacher Qualifications

The term "highly qualified" teacher is removed from the IDEA. It is replaced by amending the IDEA at 20 U.S.C. 1412(a)(14(C) to read that each person employed as a special education teacher:

1. has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;
2. has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and
3. holds at least a bachelor's degree.

(ESSA, Section 9214(d))

Accommodations

The ESSA requires that students on IEPs and those students receiving

accommodations under Section 504 are provided "appropriate accommodations, such as interoperability with, and ability to use assistive technology" on assessments. (Section 1111(b)(2)(B)(vii)(II))

In addition, each State Plan must address how the State will develop, disseminate information on and promote the use of appropriate accommodations. The purpose is to increase the number of students with significant cognitive disabilities participating in academic instruction and assessments for the grade level in which the student is enrolled.

Alternate Assessments

A State may provide an alternate assessment for students with significant cognitive disabilities that is aligned with the State's academic standards.
The IEP Team will make this determination.
The parents must be "clearly informed" that their student's academic achievement will be measured based on alternate standards and how the alternate assessment may delay or otherwise affect their student's ability to complete the requirements for a regular high school diploma.
The total number of students assessed for each subject (math, reading/language arts, science) using the alternate assessment cannot exceed 1 percent of the total number of students assessed in the State who are assessed in that subject.
The law prohibits a cap on any local education agency (LEA) of the percentage of students administered an alternate assessment. An LEA exceeding the 1% state cap shall submit information to the SEA justifying the need to exceed the cap. The SEA shall provide "appropriate oversight" of such LEA as determined by the SEA. (Section 1111(b)(2)(D))

Staff Training

The ESSA requires that each State Plan describe how general and special education teachers and "other appropriate staff" will know how to administer alternate assessments and make appropriate use of accommodations for students with disabilities on all assessments. (Section 1111(b)(2)(D)(i))

Supplement Not Supplant

The ESSA includes a general requirement that Title 1 funds supplement and not supplant State and local funds. The ESSA requires that a school district "demonstrate that the methodology used to allocate State and local funds to each Title 1 school ensures that such school receives all of the State and local funds it

would otherwise receive if it were not receiving assistance under Title 1". This section of the ESSA goes into effect in July of 2017.
The negotiated rule making committed was unable to achieve consensus regarding proposed rules. The Department of Education will be issuing proposed rules for public comment. (Section 1118(b))

IDEA Regulation Update

Alternate Assessments Based on Modified Academic Standards

On August 21, 2015 the United States Department of Education issued final regulations amending the ESEA and the IDEA to no longer authorize a State to define modified academic achievement standards and develop alternate assessments based on those modified academic achievement standards for eligible students with disabilities. (see 34 CFR 300.160(c)(2) and (3))
Note: Nothing in the final regulations changes the ability of States to develop and administer alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities or alternate assessments based on grade-level academic achievement standards for other eligible students with disabilities in accordance with the ESEA and the IDEA, or changes the authority of IEP teams to select among these alternate assessments for eligible students.

IDEA Proposed Regulations
Significant Disproportionality

The United States Department of Education has proposed regulations amending the IDEA's "significant disproportionality" requirements based on a student race or ethnicity. The proposed rules were published in the Federal Register of March 4, 2016. The Summary in the proposed regulations states:

> With the goal of promoting equity in IDEA, the regulations would establish a standard methodology States must use to determine whether significant disproportionality based on race and ethnicity is occurring in the State and in its local educational agencies (LEAs); clarify that States must address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using the same statutory

remedies required to address significant disproportionality in the identification and placement of children with disabilities; clarify requirements for the review and revision of policies, practices, and procedures when significant disproportionality is found; and require that LEAs identify and address the factors contributing to significant disproportionality as part of comprehensive coordinated early intervening services (comprehensive CEIS) and allow such services for children from age 3 through grade 12, with and without disabilities.

The proposed regulations could be found at: https://www.gpo.gov/fdsys/pkg/FR-2016-03-02/pdf/2016-03938.pdf The public comment period has closed.

Case Law Update

I. Child Find/Evaluation Issues

A. The U.S. Department of Education issued a guidance letter regarding students who have dyslexia, dyscalculia and dysgrahia which are conditions that "could qualify" a student as having a specific learning disability under the IDEA.

The Department stated that for those students who may need additional academic and behavioral supports to succeed in a general education environment, schools may choose to implement a multi-tiered system of supports (MTSS), such as response to intervention (RTI) or positive behavioral interventions and supports (PBIS). The Department defined MTSS as "schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors." Within the multi-tiered instructional framework, schools identify students at risk for poor learning outcomes, including those who may have dyslexia, dyscalculia, or dysgraphia; monitor their progress; provide evidence-based interventions; and adjust the intensity and nature of those interventions depending on a student's responsiveness.

The guidance states that "Children who do not, or minimally, respond to interventions must be referred (emphasis added) for an evaluation to determine if they are eligible for special education and

related services". In addition, the Department reiterated that that a parent may request an initial evaluation at any time to determine if a child is a child with a disability under IDEA and the use of MTSS, such as RTI, may not be used to delay or deny a full and individual evaluation under the IDEA.

Lastly, the Department clarified that "there is nothing in the IDEA that would prohibit the use of the terms dyslexia, dyscalculia, and dysgraphia in IDEA evaluation, eligibility determinations, or IEP documents."

Note: The Department's guidance indicated that there was no prohibition against but did not state that the terms must be used in evaluations, eligibility determinations or in the IEP. Dear Colleague Letter 66 IDELR 188 (United States Department of Education, Office of Special Education and Rehabilitative Services (2015)).

B. The United States Department of Education issued a guidance letter to clarify that children who are residing in nursing homes have the same rights under the IDEA as other students.

The guidance clarifies that the State where the child's parents reside is responsible for conducting child find activities when warranted and for ensuring FAPE is provided should the child be found eligible. In most states, the State assigns this responsibility to the school district where the parents reside. However, if the nursing home is located in the same state, but different school district of the parents' residence, the State could determine which school district in the state would be responsible.

If the child is placed or referred outside the state of residence by an educational or non-educational agency (such as child welfare or social services) the State initiating the placement is responsible for child find and provision of FAPE.

The out of state district could contractually arrange for the school district where the nursing home is located to deliver the IEP services but the placing State remains ultimately responsible. Dear Colleague Letter 116 LRP 17684 (United States Department of Education, Office of Special Education and Rehabilitative Services (2016))

C. A 13 year old student with autism had a behavior component in her IEP based on an independent educational evaluation conducted at school district expense. The student received supports, including a one to one support aide, provided by the Center for Autism and Related Disorders (CARD). The next school year the parents made a numerous requests for a reevaluation of the student's behavior based on the student's worsening behavior including aggressive

behavior which posed a threat to her health and safety.
The school took the position that the student's behavior was continuously assessed by CARD's support services which functioned as an informal assessment. The CARD assessment was based on the support aide's observation of the student as well as data she collected on the student's maladaptive behavior.
The Court held that the school failed to properly assess the student's behavior which denied the student a FAPE. The data collected through observations by the support aide does not meet the IDEA's requirement that a school "use a variety of assessment tools and strategies". In addition, the support aide was not qualified to conduct a behavioral assessment.
The student's maladaptive behaviors resulted in her being removed from the classroom on several occasions which interfered with her ability to learn and access information. As a result, she was denied educational benefit. M.S. v. Lake Elsinore Unified School District 66 IDELR 17 (United States District Court, Central District, California (2015)).

D. A student was found eligible for special education as a student with a specific learning disability. Her IEP focused on reading, math and transition services. Her parent had informed the school on several occasions that the student was suffering from a hearing loss and had undergone seven ear surgeries and was being fitted for a hearing aid. The Court, in overturning the hearing officer's and District Court's decision, found that the lack of a comprehensive evaluation of the student's hearing denied the student a FAPE.
Although the parent had never requested an evaluation of the student's hearing, the IDEA places an independent responsibility on the school to initiate an evaluation/reevaluation when it is required regardless of whether the parent sought an evaluation. The information provided by the parent regarding the student's hearing put the school on notice of its duty to evaluate. As a result of the school's failure to obtain the necessary information regarding the student's hearing, no meaningful IEP goals or services were provided. Phyllene W. v. Huntsville City Board of Education 66 IDELR 179 (United States Court of Appeals, 11th Circuit (2015)). Note: This is an unpublished decision.

E. The Court held that a student who was identified by the school district as having a speech and language impairment was denied a FAPE since the school's evaluation was not sufficiently comprehensive. Although the Court found that the school was on

notice that the student might have a disorder on the autism spectrum it never assessed the student to determine if he was autistic. The school relied on an "informal observation" (30-40 minutes) by its school psychologist who did not feel that the student required an autism evaluation. Note: The parents were never notified of the school's intent to have the psychologist observe their student or the psychologist's conclusions.

The Court stated:

> ...if a school district is on notice that a child may have a particular disorder, it must assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment. That notice may come in the form of expressed parental concerns about a child's symptoms, …, of expressed opinions by informed professionals, …., or even by other less formal indicators, such as the child's behavior in or out of the classroom. A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation.

The Court concluded that the student's IEP goals were "likely inappropriate" since the Team relied on incomplete assessment information. In addition, FAPE was denied since without a sufficiently comprehensive evaluation the parents were deprived of vital information. As a result, the parents right to meaningfully participate in the IEP process was substantially hindered.
The Court remanded the matter back to the District Court to determine the appropriate remedy. Timothy O. v. Paso Robles Unified School District 116 LRP 21676 (United States Court of Appeals, 9th Circuit (2016)).

F. The parents of a student with autism emailed the school district to request an IEE at public expense. The school district granted the request. In its response, the school district stated that the assessment must follow the requirements outlined in state policy and provided a

link to an online version of the state policy document. In addition, the school imposed a financial cap of $3,000 on the IEE with the provision that the parents may submit additional information as to why the limit should be exceeded. The parents did not respond and eventually sent the school a bill for over $8,000.

The IEE invoices were submitted to the school over a year after the school approved public payment of the IEE. After considering the IEE report, the school felt that the IEE conducted did not follow the state evaluation requirements and therefore the school district refused to reimburse the parents. When the school district notified the parents that the IEE was not compliant with state policy, it invited the independent evaluator to contact the school district regarding the areas of non-compliance. There was no evidence that such contact was made.

The parents requested a due process hearing. The Court reversed the decisions of the ALJ and District Court denying reimbursement for the IEE. In so ruling the Court:

1. Remanded the case to determine whether the IEE "substantially complied" with state evaluation requirements;
2. Upheld the financial cap---even if entitled to reimbursement held that the parents could not be reimbursed more than the $3,000 cap;
3. Concluded that the school district had no legal obligation to request a hearing if it denied reimbursement based on its conclusion that the IEE did not meet agency criteria. A request must be made only if the IEE is denied on the ground of the school's conclusion that its evaluation is appropriate.
4. Addressed the timeliness issue of requesting a hearing "without unnecessary delay". Although the Court found that the school did not have a legal obligation to request a hearing the Court observed that the school could not "wait indefinitely forcing [the parents] to either demand a hearing or forsake reimbursement".

The Court held that the three month period from the submission of the invoices to the due process hearing (requested by the parent) did not violate the unnecessary delay standard. Seth B. v. Orleans Parish School Board 810 F.3d 961, 67 IDELR 2 (United States Court of Appeals, 5th Circuit (2016)).

G. The Court held that the parents were entitled to an IEE at public expense. In this matter, the school district did not meet its burden of proving its reliance on a previous school district's evaluation was appropriate. The previous school district evaluated the student when he was placed in a Juvenile Detention Center located in the district. The Court found that the district of legal residence should have

conducted a new evaluation when the student was discharged from the Detention Center and reentered high school in his district of residence. D.A. v. Meridian Joint School District No. 2 65 IDELR 253 (United States Court of Appeals, 9th Circuit (2015).

H. The United States Department of Education issued a guidance letter stating that a parent may request an Independent Educational Evaluation at school district expense if they feel that the school did not assess all of the students educational needs. Specifically, the letter states:

> When an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.

Letter to Baus 65 IDELR 81 (United States Department of Education, Office of Special Education Programs (2015))

II. Eligibility Issues

A. A student with autism was found ineligible for special education based on the Team's conclusion that there was no adverse affect on the student's educational performance. The Team based its decision on the school's evaluation and two independent educational evaluations.

The Court of Appeals in a Memorandum Decision, affirmed the decisions by the Eligibility Team, the Hearing Officer and the District Court that the student was not eligible for special education. Although the student had Asperger's Syndrome, the Court held that the evidence did not support the student's disability having an adverse effect on his educational performance putting him in need of special education.

Although the parents alleged that the school district focused too much on the student's academic performance, the hearing officer and the district court noted that the student had done well in classes that also emphasized pre-vocational and life skills. Therefore, the Court noted that in making the eligibility decision, the Team considered both academic and non-academic factors in reaching its conclusion. D.A. v. Meridian Joint School District No. 2 65 IDELR

286 (United States Court of Appeals, 9th Circuit (2015).

B. The Court of Appeals in a Memorandum Opinion upheld the District Court's conclusion that a student who was attending a private school was not eligible for special education as having a specific learning disability. The Court based its decision on evidence presented by public school that the public school staff's classroom observations in the private school showed that the student performed well in his classroom and was generally engaged with his class. He was receiving good grades and received only "tier one" accommodations. Tier 1 accommodations are those that are provided to all students. Hawaii Department of Education (DOE) v. Patrick P. 65 IDELR 285 (United States Court of Appeals, 9th Circuit (2015)

C. A student with autism was found eligible for special education and provided IEP services. The parents moved to a new state where the new school district adopted the IEP.
Two years later the three year reevaluation of the student was due. Based on the new evaluations, the Team determined that the student was no longer eligible for IEP services since his disability did not adversely affect his educational performance. The parents and school agreed that although the term "educational performance" is not defined in the IDEA or state law, it includes a student's academic, social and psychological needs. However, the parents argued that educational performance should be measured by those factors across all settings including the home while the school members of the Team focused on those factors as it affected his school performance. Although he had problematic behaviors at home, including self injurious acts, his behavior at school was generally good. The parents challenged the decision.
The Court of Appeals, in affirming the hearing officer and District Court, upheld the Team's decision. The Court rejected the parents broader interpretation that behavior at home should be considered in determining adverse affect on educational performance. To rule otherwise, the Court observed "would require schools to address all behaviors flowing from a child's disability, no matter how removed from the school day." Q.W. v. Board of Education of Fayette County 66 IDELR 212 (United States Court of Appeals, 6th Circuit (2015)). Note: This is an unpublished decision. Appeal to the United States Supreme Court denied.

III. IEP/FAPE

A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Procedural Issues

1. The Court of Appeals affirmed the hearing officer's decision that a student with autism was provided a FAPE. In a short memorandum decision, the Court held that the student's parents were not denied a meaningful opportunity to participate in the development of her IEP simply because the school did not clarify exactly what its offer of 30 minutes per week of social skills training entailed.
The Court also concluded that the student's parents did not provide sufficient evidence to show that the IEP was not reasonably calculated to address the student's educational needs, in particular, her socialization needs. Relying on the testimony of a behavioral specialist, both the hearing officer and the district court determined that the student did not require a one-to-one aide. Lastly, the Court found that there was no legal violation concerning her "mainstreaming" in the general education classes at the public school. Lainey C. v. Hawaii Department of Education (DOE) 594 F.Appx. 441, 65 IDELR 32 (United States Court of Appeals, 9th Circuit (2015). Note: This is an unpublished decision.

2. The Court in a Memorandum Opinion affirmed the District Court's decision (which reversed the ALJs decision) that FAPE was denied when the school district held the IEP Team meeting in spite of the fact that the parents informed the district four days ahead of time that they would be unable to attend. A school district can make an IEP Team decision without the parents only if it is unable to obtain their participation which was not the case here.
The school district claimed that the parents could not raise the issue of parental participation since it was not included in the

due process hearing complaint. The Court of Appeals held that the school district waived this argument since the district did not raise it in the District Court proceeding. D.B. v. Santa Monica-Malibu Unified School District 65 IDELR 224 (United States Court of Appeals, 9th Circuit (2015) Note: This is an unpublished decision.

3. The parents of a student with autism initiated a due process hearing alleging that FAPE was denied. Among the allegations, the parents argued that the school violated their IDEA rights to be meaningful participants at their student's IEP meetings by holding two meetings during the summer while the parents were out of the country.
The Court, in affirming the hearing officer, found no violation. The school had offered numerous dates to the parents for an IEP meeting and also offered alternative means of participating through telephone or videoconferencing. The parents did not accept the offer. Further, the school recorded the summer meetings and provided them with transcripts. In addition, the parents did not attend the IEP meeting that was held after their return from their travels. Therefore, the Court concluded that there was no denial of FAPE since the school made significant efforts to involve the parents in the IEP process. Dervishi v. Stamford Board of Education 66 IDELR 6 (United States District Court, Connecticut (2015))

4. The parent of a student with a traumatic brain injury initiated a due process hearing against the school alleging, among other issues, that the school denied her a meaningful opportunity to participate by holding an IEP meeting without her in attendance resulting in a denial of FAPE.
The Court found that although the parent did not explicitly refuse to attend the IEP meeting "her actions were tantamount to refusal". There were numerous attempts to schedule an IEP meeting from early August to mid November. On the morning of the meeting scheduled for November the parent emailed the school indicating she was sick and would not be able to attend. She asked that the meeting be rescheduled once again. The principal responded by stating that the meeting would proceed and offered the parent the opportunity to participate by telephone. The parent refused. The principal indicated that the meeting would go forth since the student had "urgent academic and emotional needs" that had to be

addressed.
The Court distinguished this case from the Doug C. 61 IDELR 91, 720 F.3d 1038 (9th Circuit (2013)) decision. In that case, the Court found that FAPE was denied by holding an IEP meeting without the parents in attendance in order to meet the IDEA's timeline requirement and because of the inconvenience for team members.
Here, the Court held that the school made a reasonable determination about which course of action would least likely to result in a denial of FAPE. The student's IEP goals "stagnated" due to the "endless requests for continuances of the meetings".
A.L. v. Jackson County School Board 66 IDELR 271 (United States Court of Appeals, 11th Circuit (2015)). Note: This is an unpublished decision.

5. The parents challenged the IEP on procedural grounds alleging that the IEP Team was not properly composed since there was not at least one general education teacher of the student in attendance. The student's general education teachers were invited to the IEP meeting but did not attend. The Court concluded that the IDEA procedural requirements were met. The Assistant Principal, who also was credential as a general education teacher and taught a Spanish class during the school year, did attend and participate in the development of the IEP. As the ALJ found, the evidence also established that he was qualified to and he did contribute his knowledge as a general education teacher of the academic opportunities available to student at the high school and the qualifications of the teaching staff to address the student's needs.
The Court further opined that even if there was a procedural violation it was "harmless because it did not deprive [the student] of an educational opportunity or infringe on his parents' participatory rights." Z.R. v. Oak Park Unified School District 66 IDELR 213 (United States Court of Appeals, 9th Circuit (2015)). Note: This is an unpublished decision.

6. The IDEA gives the parent the right to bring another individual, including their attorney, with them to a scheduled IEP Team meeting. Although the IDEA requires that the school district inform the parents in advance of the IEP meeting who will be in attendance at the school district's

invitation, there is no similar requirement for the parent. Therefore, the parent has no legal obligation to inform the school district of others who will be attending the IEP meeting with them including their attorney.
However, OSEP did observe that "in the spirit of cooperation and working together as partners in the child's education, a parent should provide advance notice to the public agency if he or she intends to bring an attorney to the IEP meeting."
If a parent brings their attorney to the IEP meeting without first notifying the school district, it would be permissible for the school district to reschedule the meeting to another date and time if the parent agrees so long as the postponement does not result in a delay of FAPE. Letter to Andel 116 LRP 8548 (United States Department of Education, Office of Special Education (2016)).

7. The Court concluded that the IEP for a student with autism was both procedurally and substantively appropriate. In addition to other issues, the parents alleged that the school failed to adequately report the student's progress toward the annual goals and objectives listed in his IEPs. They contend the lack of progress reporting deprived them of meaningful participation in Drew's education.
There was evidence that the IEPs contained little or no progress reporting or measurement data and where progress was reported, it was "lacking in detail" or limited to "conclusory statements". However, the evidence also showed the parents were aware of their student's progress and were active participants in his education. There was "constant communication" between the parents and the student's special education teacher both through face-to-face meetings and a "back-and-forth notebook". The Court held that the ALJ did not err in concluding the gaps in the IEP progress reporting did not inhibit the parents from meaningful participation.

The Court did raise a concern by stating:

> In reaching this conclusion, we do not downplay the importance of regular and diligent progress reporting on IEPs. In a system built on the continuous revision of individualized plans meant to address disabled students' unique needs, data on

> what is or is not working for a student is crucial…. Thus, while we do not endorse the District's reporting in this case, without evidence that there was an impact on [the student's] education, we cannot say he was effectively denied a FAPE.

Endrew F. v. Douglas County School District 66 IDELR 31(United States Court of Appeals, 10th Circuit (2015)).

8. The Court concluded that the IEP for a student with autism was appropriate. Therefore, the parents' request for reimbursement for their private placement was denied.
The parents argued that their student required one to one instruction from a full time special education teacher. The Court held that the IEP which called for placement in a class with 6 students, a special education teacher, a classroom paraprofessional and a full time individual behavior management paraprofessional would likely produce progress. Therefore, a FAPE was offered.
The Court also addressed the allegation that the IEP goals lacked specificity and measurability. Any vagueness in the 17 goals was ameliorated by the specificity of the 96 short term objectives. The objectives provided considerable detail as to how the broader goals would be implemented and measured.
D.A.B. v. New York City Department of Education 66 IDELR 211 (United States Court of Appeals, 2nd Circuit (2015)). Note: This is an unpublished decision.

9. The parents of a student with autism rejected the IEP offered and placed the student in a private school. The parents then initiated a due process hearing seeking reimbursement.
After the IEP was developed the parents visited the school that the student would be attending. The school's social worker served as the school's "tour guide". There was conflicting testimony as to what was said on the tour. The parents alleged that they were told that the proposed school did not have the requisite staff or services called for in the IEP. The social worker disagreed with the parents version of what was said. The Court upheld the conclusion of the hearing officer, who found that social worker's testimony more credible, since a hearing officer is in the best position

to assess the credibility of the witnesses.
The Court concluded that the evidence "sufficiently demonstrated" that the proposed placement had the ability to fully implement the IEP despite any misinformation provided to the parents. B.P. v. New York City 66 IDELR 272 (United States Court of Appeals, 2nd Circuit (2015))

10. The parents of a student with "autistic-like behaviors", a specific learning disability and a speech and language impairment challenged the IEPs developed for their student by requesting a due process hearing.
The Court, in affirming and accepting the District Court's "very careful and well reasoned decision", held that the behavioral component in the IEP was properly implemented in school. Also, when the student was placed in home instruction for a four week period when the parent and members of the IEP Team were considering changes to the student's placement, the school was not obligated to provide the behavioral services in the IEP. As the District Court noted "The Plaintiff cites no authority, and the Court is aware of none, for the proposition that the IDEA required the District to transplant the entirety of the services offered in plaintiff's IEP, which contemplated in-school instruction, to plaintiff's home environment during the interim periods…". Since the services were tied to a particular location (in-school) there was not a material failure to implement the IEP. C.L.v. Lucia Mar Unified School District 67 IDELR 136 (United States Court of Appeals, 9th Circuit (2016)). Note: This is unpublished decision.

11. The IDEA does not address the use of audio or video recording at IEP meetings. Therefore, the State Education Agency or Local Education Agency has the option to require, prohibit, limit or otherwise regulate the use of recording devices at IEP meetings. Such policy must be uniformly applied and provide an exception when necessary to ensure that the parent understands the IEP process.
If the policy requires that parents provide the school notice before permitting the recording device at an IEP Team meeting, the school must schedule the meeting at a time that allows the parent to meet that notice requirement. Letter to Savit 116 LRP 11417 (United States Department of Education, Office of Special Education Programs (2016)).

12. The parent of a 20 year old student who is autistic, intellectually disabled, asthmatic, and has a obsessive compulsive disorder, mood disorder and pica challenged three of her student's IEPs.

The Court found that there were four procedural violations of state law and the IDEA in each IEP. The first violation related to the consideration of evaluation information. The Court noted that the IDEA requires that the IEP Team consider the most recent evaluation information in developing/revising an IEP. The Court then concluded "it therefore follows that the burden rested with the [school district] to demonstrate which evaluative materials were reviewed during each [IEP] meeting in reaching the terms of the IEPs". The other three procedural violations (lack of an FBA, sufficient speech-language services and parental counseling/training) violated state law requirements for the provision of IEP services to students with autism.

The Court concluded that when taken together, these procedural violations displayed a "pattern of indifference to the procedural requirements of the IDEA and carelessness in formulating the [student's] IEPs". The cumulative effect of the procedural violations resulted in a denial of FAPE.

The Court remanded the case back to the District Court to determine "what, if any, relief" the student is entitled to as a result of the FAPE deprivations for three school years. It was noted that a compensatory education award would extend services beyond the student's 21st birthday and left the mechanics of structuring such award to the Court's "sound equitable discretion". L.O. v. New York City Department of Education 116 LRP 21295 (United States Court of Appeals, 2nd Circuit (2016))

C. Substantive Issues

1. A student who was disabled under the category other health impairment had IEPs for his kindergarten and 1st grade years. The parents objected to the 2nd grade IEP developed since it did not provide the student a one to one aide, extended school services or have a full time nurse assigned to the school.

The parents initiated a due process hearing. The hearing officer found the IEP was appropriate. The District Court affirmed the hearing officer.

On appeal, the parents argued that the District Court did not use the correct legal standard in determining whether the IEP offered a FAPE. The parents contended that the 1997 and 2004 statutory amendments to the IDEA replaced the FAPE standard in the Rowley decision of the Supreme Court. They argued that the correct standard is now "meaningful" rather than "some" educational benefit.

The Court of Appeals affirmed the District Court. In doing so, the Court held that the correct standard is "some educational benefit" which has always meant more than mere minimal or trivial progress. When Congress amended the IDEA the definition of FAPE was not changed.

The Court also affirmed the holding that the IEPs provided the student a FAPE. All who testified, except the parents, opined that the student made progress. Although the student at times regressed, an expert testified that the regression at least in part was due to the extensive absences of the student from school. (30 full school days and part of 20 additional school days in 1st grade.) O.S. v. Fairfax County School Board 804 F.3d 354, 66 IDELR 151 (United States Court of Appeals, 4th Circuit (2015))

Note: The Court observed that other courts "explicitly hold that the IDEA as amended requires school districts to meet a heightened standard" than "some" educational benefit citing N.B. v. Hellgate 541 F.3d 1202 (United States Court of Appeals, 9th Circuit (2008)). However, the 9th Circuit in a subsequent case J.L. v. Mercer Island School District 592 F.3d 938 (2010) stated:

> Some confusion exists in this circuit regarding whether the Individuals with Disabilities Education Act requires school districts to provide disabled students with "educational benefit," "some educational benefit" or a "meaningful" educational benefit. …As we read the Supreme Court's decision in *Rowley*, all three phrases refer to the same standard. School districts must, to "make such access meaningful," confer at least "some educational benefit" on disabled students. *See Rowley*, 458 U.S.

at 192, 200. For ease of discussion, we refer to this standard as the "educational benefit" standard.

2. The parents challenged the appropriateness of their student's IEP. In doing so, the parents' contended that the 10th Circuit shifted the standard for measuring the substantive appropriateness of an IEP, that is, whether the IEP is "reasonably calculated to enable the child to receive educational benefits." The parents argued that the Court in Jefferson County School District v. Elizabeth E., 702 F.3d 1227 (10th Circuit 2012) abandoned the "some educational benefit" standard previously articulated in 10th Circuit cases (and applied by the ALJ and the district court) in favor of a heightened "meaningful educational benefit" standard.
The Court rejected the argument that the educational benefit standard has changed. The Court noted that the 10th Circuit has long subscribed to the Rowley Court's "some educational benefit" language in defining a FAPE and interpreted it to mean that "the educational benefit mandated by IDEA must merely be 'more than de minimis.'" Therefore, the Court held that it was bound by that standard "absent en banc reconsideration or a superseding contrary decision by the Supreme Court."
Applying the standard to the facts of this case, the Court concluded that the ALJ's findings of progress were supported by the evidence and were sufficient to show that the student received some educational benefit under both his academic and functional goals. Endrew F. v. Douglas County School District 66 IDELR 31(United States Court of Appeals, 10th Circuit (2015)).

3. The parents of a student with autism were reimbursed for their unilateral placement in a private special education school by a hearing officer. The school used a teaching methodology known as DIR/Floortime. [Note: DIR/Floortime is a form of play therapy that uses interactions and relationships to reach children with developmental delays and autism. Floortime is based on the theory that autism is caused by problems with brain processing that affect a child's relationships and senses, among other things. It strongly emphasizes social and emotional development. Autism Web: A Parent's Guide to Autism Spectrum Disorders]

The school district developed an IEP for the following school year which called for placement in a special class for students with autism in a public school that offered year round services. Many of the goals in the IEP came from a report created by the private special education school. However, the IEP does not require that DIR/Floortime be used to implement the goals.

The hearing officer, state review officer and District Court held that the IEP was appropriate. The Court of Appeals vacated the decision and remanded the matter for further consideration of whether the IEP was appropriate without adopting the methodology from the private school.

The Court noted that:

> We have held that, because of their specialized knowledge and experience, state administrators are generally superior to federal courts at resolving "dispute[s] over an appropriate educational methodology.…That deference is warranted, however, only if the state administrators weigh the evidence about proper teaching methodologies and explain their conclusions.

In this case, neither the hearing officer nor state review officer determined whether the "DIR/Floortime" methodology was necessary to implement the goals in the IEP even though it was listed as an issue in the due process complaint. The general conclusion that the IEP was "sufficient to address the student's demonstrated needs," was no replacement for a direct evaluation of the evidence on teaching methodology. The Court concluded that a "failure to consider any of the evidence regarding ... methodology ... is precisely the type of determination to which courts need not defer." E.H. v. New York City Department of Education 611 F.Appx. 728, 65 IDELR 162 (United States Court of Appeals, 2nd Circuit (2015)) Note: This is an unpublished decision.

4. A high school student was “twice exceptional” being both academically gifted and IEP eligible. The student, who was diagnosed with Asperger’s Syndrome, obsessive compulsive disorder, mood disorder, adjustment disorder and Tourette’s

syndrome, had a 1:1 paraprofessional and attended general education classes (including advanced placement classes) for the majority of her day. Her GPA was above 4.0 due to her advanced placement courses.

The student was raped over Christmas vacation of her sophomore year while the family was on vacation. The parents and school agreed to postpone the annual review of her IEP scheduled for January and instead developed an interim IEP with several accommodations to ease her transition back into school after the rape. That spring the student had experienced some inappropriate social and physical interactions with other students. In addition, although she auditioned for the school choir, she was not selected.

The parent requested an IEP Team meeting where she spent a good portion of the time advocating for her daughter to be put on the choir. When the Team refused the request, the student was withdrawn from school and placed in a private special education school out of state. A due process hearing was requested.

The Court, in affirming the ALJ, held that the IEP provided the student with a FAPE. First, the Court rejected the argument that FAPE was denied since the annual IEP review did not take place since the parent agreed to the course of action. Second, the Court found that each incident of bullying that was reported was promptly investigated and resolved. Lastly, the Court noted the student was making academic progress and had a better attendance record. The IEP Team worked closely with the student's medical/mental health team and implemented their recommendations for the student. Sneitzer v. Iowa Department of Education 66 IDELR 1 (United States Court of Appeals, 8th Circuit (2015))

5. The parents of a student with a speech and language impairment rejected an IEP that proposed moving their student from a class co-taught by a regular education and special education teacher to a self-contained classroom. The parents received prior written notice identifying the school to which the student would be assigned. The parent wanted to visit the school but was unable to do so since the school was closed for the summer.

   The parents made a unilateral private school placement and initiated a due process hearing seeking reimbursement. The

parent was the only witness who testified about the proposed placement and felt her student "would shut down completely" if placed there. The school district did not present evidence that the proposed placement would be able to implement the IEP as written. The Court, in referencing one of its prior decisions in R.E. v. New York City (2012), stated that whether a FAPE is offered must be based on an evaluation of the written IEP and that "speculation that the school district would not adequately adhere to the IEP is not an appropriate basis for a unilateral placement."

The Court found that the District Court appeared to have erroneously held that a student must physically attend a proposed placement before challenging the school's ability to implement the IEP. It is not speculative to find that an IEP cannot be implemented at a proposed placement that lacks the services required by the IEP.

However, the Court upheld the appropriateness of the IEP. The issues raised in the due process complaint (size of the school, student-teacher ratio, the appropriateness of the language based program, etc.) were not prospective or speculative challenges to the school's ability to provide the IEP services. The issues were substantive challenges to the IEP and placement itself. Based on the evidentiary record the IEP would have provided the student with a FAPE. M.O. v. New York City Department of Education 793 F.3d 236, 65 IDELR 283 (United States Court of Appeals, 2nd Circuit (2015)).

In a subsequent decision citing the M.O. case, the Court held that the parents' allegation that their student with autism would have been placed in a classroom with "an inappropriate grouping of students" was retrospective evidence barring it from being considered. This issue is distinct from a challenge on the school's actual or non-speculative ability to implement the IEP which is a proper issue for consideration. J.C. v. New York City Department of Education 116 LRP 10230 (United States Court of Appeals, 2nd Circuit (2016)). Note: This is an unpublished decision.

6. The United States Department of Education issued a guidance letter stating that an IEP "must be aligned with the State's academic content standards for the grade in which the child is enrolled" (emphasis added) in order to have meaningful

access to the general curriculum.
However, the Department recognized that this alignment must guide but not replace the IEP Team's individualized consideration of the student. The Department's guidance further stated:

> In a case where a child's present levels of academic performance are significantly below the grade in which the child is enrolled, in order to align the IEP with grade-level content standards, the IEP Team should estimate the growth toward the State academic content standards for the grade in which the child is enrolled that the child is expected to achieve in the year covered by the IEP. In a situation where a child is performing significantly below the level of the grade in which the child is enrolled, an IEP Team should determine annual goals that are ambitious but achievable. In other words, the annual goals need not necessarily result in the child's reaching grade-level within the year covered by the IEP, but the goals should be sufficiently ambitious to help close the gap.

In addition, for students with significant cognitive disabilities the IEP Team may determine that the student's performance will be measured against alternate academic achievement standards. Such standards must still be aligned with that State's grade level content standards, however, they may be restricted in scope or complexity or take the form of introductory skills. Dear Colleague Letter 66 IDELR 227 (United States Department of Education, Office of Special Education and Rehabilitative Services (2015)).

IV. Related Services/Assistive Technology

A. The United States Supreme Court Decision – Irving Independent School District v. Tatro, 104 S. Ct. 3371, IDELR 555:511 (1984).

1. The United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

    a) A child must have a disability so as to require special education under the IDEA;

    b) The service must be necessary to aid a child with a disability to benefit from special education; and

    c) The service must be able to be performed by a non-physician.

B. OSEP issued a letter to the field raising concerns that based on reports it received a growing number of children with an autism spectrum disorder (ASD) may not be receiving needed speech and language services. They also raised a concern that speech-language pathologists and other appropriate professionals may not be included or their input obtained in evaluation, eligibility and IEP/IFSP meetings. OSEP stated "Some IDEA programs may be including applied behavior analysis (ABA) therapists exclusively without including, or considering input from, speech language pathologists and other professionals who provide different types of specific therapies that may be appropriate for children with ASD when identifying IDEA services for children with ASD." The letter reminds schools that "ABA therapy is just one methodology used" to address the needs of children with ASD and that Team decisions regarding services must be based on the unique needs of each individual child with a disability. Dear Colleague Letter 66 IDELR 21 (United States Department of Education, Office of Special Education Programs (OSEP) (2015)).

C. A high school student who was deaf used a hearing aid and the IEP called for an FM system which did not consistently work. The student was able understand about 40% of what was being said and relied on lip reading and facial expressions to communicate. In addition to procedural violations (an example being the lack of measureable goals), the Court, in affirming the hearing officer, concluded the student was denied a FAPE since the IEP did not provide appropriate assistive technology services such as Communication Access Realtime Translation (CART) or other similar speech to text technology as recommended by two outside

evaluators.
The Court rejected the school's argument that the hearing officer erred in his legal analysis by using a standard from the Americans With Disabilities Act (ADA). The hearing officer's discussion of law was based on the FAPE standard as articulated in the Rowley decision. DeKalb County Board of Education v. Manifold 65 IDELR 268 (United States District Court, Northern District, Alabama (2015)).

D. A student with "profound physical and intellectual disabilities" also has a chronic epileptic seizure disorder. His doctor prescribed drug treatment (Diastat) which needs to be administered rectally "without delay" if his seizure lasts for more than five minutes to avoid a life threatening condition.
The student's health plan provided for the administration of the medication if the student has a seizure lasting more than five minutes at school. Although the student never had a seizure lasting more than five minutes at school or on the school bus, his seizures increased in frequency and duration.
The school adopted a bus policy which stated that if the student had a seizure on the special education school bus the driver would call 911 and proceed to either the school or the student's home whichever was closer. The policy allowed for an exception if the student's doctor provided sufficient information. In this case, the parent refused to sign a release to allow the school to speak with the student's doctors. All of the school's questions were to go through the parent and the parent would let the school know what the doctor stated.
The Court found that the student was denied a FAPE since the IEP did not include a trained bus aide to accompany the student. However, the aide need not administer the medication unless the school bus could not reach either the student's home or school within five minutes after the seizure begins without additional information from the student's doctors. Oconee County School District v. A.B. 65 IDELR 297 (United States District Court, Middle District, Georgia (2015)).

E. A first grade student was diagnosed with several medical conditions including allergies to certain foods, dust, mold, etc., asthma, a swallowing disorder, seizure disorder and feeding difficulties. His IEP called for a one on one aide to provide instructional, physical and environmental supports.
Protocols were in place in the event the student choked on food or a

foreign object, if anaphylaxis occurred or if he went into respiratory arrest. Some staff in the school were trained to perform the Heimlich maneuver and to administer CPR as necessary. The parents wanted the student's IEP to require that the student's aide be trained in these procedures. The Coordinator of Special Services would not allow her to be trained since it would set a precedent and the aide already "had too much on her plate".

The parents requested a due process hearing under the IDEA, Section 504 and the ADA. The Administrative Law Judge dismissed the Section 504 and ADA claims for lack of jurisdiction. The ALJ concluded that the IEP met IDEA standards.

On appeal, the District Court granted summary judgment for the school district on all of the claims.

The Court of Appeals affirmed the summary judgment order regarding the IDEA claim. The Court remanded the Section 504 and ADA rulings back to the District Court since the basis of the District Court's Order ruling was not apparent. The District Court has been directed to clarify its reasoning in disposing of the parents' Section 504 and ADA discrimination, reasonable accommodation, retaliation and FAPE claims. SE.H. v. Board of Education of Anne Arundel County Public Schools 116 LRP 17694 (United States Court of Appeals, 4th Circuit (2016)). Note: This is an unpublished decision.

V. Placement/Least Restrictive Environment

A. The parents of a student with autism who posed significant behavioral problems in school were offered placement in an approved private special education school by the school district. The parent rejected the offer and initiated a due process hearing.

The hearing officer ordered that the student shall be referred to a Team "which will consider all options for the student's placement, including non-approved non public schools."

The Court overturned the hearing officer's order. Unlike a case where the parents are seeking reimbursement for a private school placement they made, under the IDEA the placement by a school district in a private special education school must be in a school approved for special education by the state. A FAPE is defined by the IDEA as special education and related services that "meet the standards of the state education agency." Therefore, a hearing officer's order directing the school district to consider placing the student in a non-approved school was contrary to the IDEA. Z.H. v. New York City Department of Education 65 IDELR 235 (United States District Court, Southern District, New York (2015))

B. The IEP Team for a pre-schooler with autism changed the student's placement from a special education pre-school class to a pre-school collaborative classroom based on the parents' request. The parents believed their student needed a general education class placement. Based on an Independent Educational Evaluation obtained by the parents they unilaterally placed their student in a private preschool, and began paying a 1:1 behavioral aide. They then initiated a due process hearing to obtain reimbursement for the costs associated with their private placement and behavioral aide.
The Court, in affirming the District Court and Administrative Law Judge, concluded the IEP's placement offered the student a FAPE in the least restrictive environment. The Court found that the IEP was both procedurally and substantively appropriate.
Procedurally, the school provided a continuum of placement options including programs with peers who are not disabled, provided the parents with a meaningful opportunity to participate in the IEP development and did not predetermine placement.
The Court, in applying the factors of the Holland decision (the educational and non-academic benefits to the student if placed in a general education and the effect on the teacher and classmates if the student was placed in general education) , concluded that the substantive requirements of the IDEA were met.
The Court affirmed the findings of the lower court and ALJ which stated that the legal analysis must focus primarily on the IEP's proposed placement, not on the alternatives that the parents may have preferred. The findings cited the testimony of the child's former special education teacher who opined that the student would need the constant assistance of the aide in a regular preschool which would create dependence. In addition, the other experts similarly expressed the opinion that the student was not yet ready for a regular preschool class setting. A.R. v. Santa Monica Malibu School District 116 LRP 618 (United States Court of Appeals, 9th Circuit (2016)). Note: This is an unpublished decision.

C. The IEP for a student with a disability changed the student's placement for the receipt of reading, writing and math instruction. The reading instruction was moved from a resource classroom to an "Intense Academic Program" classroom.
The parents' request to visit the proposed classroom with other students present was denied by school district based on confidentiality concerns. The parent declined the school's invitation to visit the classroom when no other students were present.

A due process hearing was requested raising 8 issues. The hearing officer, finding for the school district on 7 issues, concluded that the IEP provided the student a FAPE. However, he did find that the refusal to allow the classroom visit was a procedural violation "that inhibited [the parents'] ability to participate in the IEP process".
The parents then initiated an action for attorney's fees with a counterclaim filed by the school district seeking a reversal of the hearing officer's finding.
The Court held that the hearing officer's finding was in error. There is no specific right to view a proposed placement under the IDEA. An OSEP letter that addressed the issue stated that such determinations may be addressed by State and/or local policy. The OSEP letter further encourages the parties to work together including opportunities for parents to observe their children's classrooms and proposed placements. In this case, the Court found that the school had done so by offering an observation when no other students were present.
Since the school prevailed on all 8 issues, the parents were not deemed prevailing parties for the purposes of attorney's fees. John and Maureen M. v. Cumberland Public School 65 IDELR 231 (United States District Court, Rhode Island (2015))

D. In 1993, a class action lawsuit was filed by a group of parents of students with disabilities against the school district seeking, among other outcomes, a full continuum of special education and related services at sites as close to the home of the student with a disability as possible.
A Consent Decree was negotiated between the class and the school district. A few years later, the attorney representing the class obtained Court approval for the "effective elimination of special education centers". The school district appealed the ruling.
Mediation and further negotiations occurred over the years resulting in a stipulation that required the school district to decrease enrollment in special education centers by 33% by 2015. By 2014, 8 of the 18 special education centers had been closed to enrollment. In addition, a letter from the Special Education Administration stated that all pre-school aged students with disabilities would be sent to general education schools rather than special education centers. The parents of students who were attending special education centers were not invited to be part of the negotiations or provide input.
A group of parents who want to maintain their students in special education centers sought to intervene in the class action lawsuit challenging the new school district policy. Their request was denied

by the District Court.
The Court of Appeals reversed allowing them to intervene. The Court observed that the denial of intervention would impair their ability to safeguard the interests of their students in seeking retention of the special education centers as placement options. The Court rejected the argument that the parents, if dissatisfied, may seek a due process hearing challenging their student's placement decision. Individual due process hearings would be a "comparatively inefficient and ineffective means of achieving system wide relief". Smith v. Los Angeles Unified School District 116 LRP 21298 (United States Court of Appeals, 9th Circuit (2016))

VI. Unilateral Placements

A. The United States Supreme Court in Burlington, MA v. Department of Education et al., 105 S. Ct. 1996, IDELR 556:389 (United States Supreme Court (1985), held that parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that:

1. The school district's IEP is not appropriate;

2. The parent's placement is appropriate; and

3. Equitable factors may be taken into consideration

B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the Burlington standard if the placement is "proper". Florence County School District Four et al. v. Carter, 114 S. Ct. 361, 20 IDELR 532 (United States Supreme Court (1993)).

C. The parents of a student with autism and the school district agreed to a publicly funded private school placement in 2006. In 2008, the parents who were now dissatisfied with that private school moved their student to a religiously affiliated private school without special education services. The IEP for the 2008-2009 school year stated that the parents would pay tuition for that school and the school district would provide reading instruction, OT, PT, and speech services to be provided by private providers outside of class.
The IEP for the 2009-2010 school year offered a public placement rejected by the parents. The parents kept their student in the religious

private school and paid for some (but not all) of the services the public school had previously paid for. The parents initiated a due process hearing in April 2010. No further IEPs were developed for the student.

The hearing officer denied reimbursement. The District Court affirmed but held that public school violated the "stay put" requirement and ordered reimbursement of the parent's out of pocket expenses in paying for the extra services stated in the 2008-2009 IEP.

The Court of Appeals affirmed the denial of reimbursement for tuition finding that the IEP was both procedurally and substantively appropriate. Although the school violated the IDEA by not offering any IEP after the 2009-2010 school year, the Court held that the parents were not entitled to tuition reimbursement since the private school was not appropriate.

The Court however held that the school district violated its stay put obligations. It ordered reimbursement from the date that the parent requested a due process hearing for the actual amount of services the parent had privately paid for. In addition, the Court ordered compensatory education for any of the appreciable differences between the full services called for in the 2008-2009 IEP (the last IEP implemented) and the actual reimbursed services the parents paid for. Doe v. East Lyme Board of Education 790 F.3d 440, 65 IDELR 255 (United States Court of Appeals, 2nd Circuit (2015)).

D. The parents of a student who is emotionally disturbed unilaterally placed their student in a residential treatment facility before a scheduled IEP Team meeting was convened to discuss the student's academic, behavioral and anxiety needs.

The IEP Team did not agree to place the student in a residential facility. The parents subsequently placed the student in private school and sought reimbursement by requesting a due process hearing.

The parties settled the dispute. The school agreed to reimburse the parents for tuition for the 9th grade and fall semester of the 10th grade. The parents agreed to give the school 30 days notice if they intended to re-enroll their student in the school. The parents provided such notice in November of the 10th grade year.

The school convened an IEP Team meeting in December. The parents and their advocate were involved in the discussion and many of their suggestions were incorporated into the IEP although the IEP was not yet finalized. At the end of the meeting the parents stated that they wanted their student to remain at the private school and

possibly take a class or two at the public school to ease her way back in.

After several attempts to schedule another IEP Team meeting to finalize the IEP the parents responded that there was no need for any further Team meeting unless the Team would agree to place the student in the private school. No further IEP Team meeting was held.

The parents initiated a due process hearing seeking reimbursement for the private tuition for the student's second semester in 10th grade. The hearing officer ordered reimbursement. The District Court reversed finding that the school complied with both the procedural and substantive IDEA requirements.

The Court of Appeals denied reimbursement on the grounds that the parents' actions were unreasonable. The IDEA provides that private tuition "may be reduced or denied…upon a judicial finding of unreasonableness with respect to the actions taken by the parents". (20 U.S.C. 1412(a)(10)(C)(iii)(III)) In so holding, the Court stated:

> In sum, the record indisputably reveals that the parents adopted an "all-or-nothing" approach to the development of [the student's] IEP and that they thereby adamantly refused to consider any of [the school district's] alternative proposals that did not involve [the student] remaining at the [private school] for the spring 2012 semester. As the district court supportably found, the parents' actions "broke down" the IEP-development process, resulting in an incomplete IEP for [the student] for the spring 2012 semester. We conclude that the parents' actions, well-intentioned as they may have been, constituted an unreasonable approach to the IEP-development process, rather than the collaborative or interactive approach envisioned by the IDEA.

Rockwall Independent School District 116 LRP 9727 (United States Court of Appeals, 5th Circuit (2016)).

VII. Behavior and Discipline

A. The parents of a student with autism challenged the appropriateness of their student's IEPs on several grounds. Regarding behavior, the parents alleged the IEPs were legally deficient since they failed to adequately address his behavior since the school did not conduct a

functional behavioral assessment or implement a behavior intervention plan.

The Court upheld the IEPs holding that the alleged failure to conduct a functional behavioral assessment or develop a behavior intervention plan did not violate the IDEA. The IDEA only requires a school district to conduct an FBA or to implement a behavior plan if there is a disciplinary change of placement which was not the case here. Absent a disciplinary change of placement, the IDEA requires the IEP Team to "consider the use of positive behavioral interventions and supports and other strategies" if behavior is impeding the student's learning or that of others. The evidence supported the conclusion that the Team considered the student's behavioral issues with interventions and was in the process of reassessing his behavior interventions when the student was withdrawn from school. Endrew F. v. Douglas County School District 66 IDELR 31 (United States Court of Appeals, 10th Circuit (2015)).

B. A 12 year old junior high school student on an IEP based on his ADHD took a picture of another student sitting on a toilet in a bathroom stall without a door. The Vice Principal investigated the incident and determined that the behavior was a violation of the other student's privacy and amounted to a felony warranting suspension from school.

A manifestation determination review meeting concluded that the behavior was not a manifestation of the student's disability. The student was then placed in a disciplinary alternative educational placement for 60 days.

The Vice Principal also encouraged the parent of the other student to file a criminal charge. A criminal charge was filed but eventually dismissed.

The student with a disability and his parents then filed a complaint with OCR alleging that the school retaliated against the student based on his disability. OCR determined there was no violation of Section 504 since the school had a legitimate reason for taking disciplinary action against the student.

The student with a disability and his parents then filed a due process hearing request. The hearing officer upheld the school district's decision. The decision was appealed to District Court with additional claims based on Section 504 and the equal protection and due process clauses of the Constitution. The Court dismissed all claims. The parents then appealed the Section 504 claim dismissal to the Court of Appeals. The Court affirmed the dismissal. The Court

found that the parents did not allege facts supporting the allegation that the school acted based on the disability or that the behavioral infraction was the result of the student's ADHD. C.C. v. Hurst-Euless-Bedford Independent School District 67 IDELR 111 (United States Court of Appeals, 5th Circuit (2016)). Note: This is an unpublished decision.

C. A student with a disability was found to be consuming illegal drugs with a staff member while in the school. The student was suspended for 10 school days while awaiting an expulsion hearing in front of the school board. Before the hearing, the student had criminal charges filed against him. The student entered into a plea agreement where he admitted to possessing a controlled substance, agreed to cooperate with the school's investigation of the staff member and agreed to forfeit his appeal of his expulsion from the school.
A manifestation determination was made where it was decided that there was no manifestation between his disability and his misconduct. The school told the student and his parents that he would be attending an alternative school that specializes in providing services to students with disabilities that have behavioral issues. The parents requested that other options be considered but none were offered. The parents refused to have their student enroll in the alternative school. The school then initiated truancy proceedings in state court.
The student then initiated proceedings in federal court alleging his constitutional rights to due process had been violated. The Court dismissed the proceedings. In doing so, the Court held "an entitlement to public education does not include the right to attend a particular school" and a student's transfer from a regular high school to an alternative school does implicate the constitutional right to due process. Alex K. v. Freedom Area School District 66 IDELR 130 (United States District Court, Western District, Pennsylvania (2015)). Note: This case was filed under Section 1983 raising constitutional issues and was not decided under the IDEA provisions.

VIII. Harassment/Bullying Issues

A. The United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) issued a letter providing an overview of a school district's responsibilities under the IDEA to address bullying of students with disabilities. Although there is no federal law addressing bullying , the Department defines

bullying as:

> Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g , cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

The Department emphasized that bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA whether or not the bullying is related to the student's disability. The denial of FAPE must be remedied.

The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in

which the bullying occurred to determine if changes to the environment are warranted. Dear Colleague Letter 61 IDELR 263 (United States Department of Education, Office of Special Education and Rehabilitative Services and the Office of Special Education Programs (2013)).

B. The Office for Civil Rights (OCR) issued a guidance document regarding a school district's responsibility to address the bullying of a student who is deemed disabled under Section 504.
The bullying of a student on any basis (whether disability related or not) who is receiving services and/or accommodations under a 504 plan may result in a denial of FAPE that must be remedied. A school's compliance with state law and/or local school policy is not sufficient to meet the school's responsibility under Section 504.
Under Section 504, as part of the school's response to bullying, the school should convene the Section 504 Team to determine whether, as a result of the effects of bullying, the student's needs have changed such that the student is no longer receiving a FAPE. The effects of bullying could include adverse changes in the student's academic performance or behavior.
If the Team determines that the student's needs have changed, the Team must determine the extent to which additional or different services are needed. If the Team is considering a change of placement, the Team must ensure that the Section 504 least restrictive environment requirements are met. The Team must safeguard against "putting the onus on the student with the disability to avoid or handle the bullying". Dear Colleague Letter: Responding to Bullying of Students With Disabilities (United States Department of Education, Office for Civil Rights (2014).

C. A student with a disability was placed in a general education class taught by both a general and special education teacher. The student also had a one to one itinerant teacher. Starting in the third grade, the student was subjected to both verbal and physical bullying on a nearly daily basis. The parents contacted the student's teachers and administrators expressing their concern. They received no response. The parents also tried to raise the issue of bullying twice at IEP meetings but were told by the principal it was not an appropriate issue for discussion. The parents unilaterally placed their student in a private special education school and initiated a due process hearing seeking reimbursement.
The Court held that FAPE was denied based on the fact that the IEP Team refused to discuss the issue of bullying. The school district's

"persistent refusal to discuss [the student's] bullying at important junctures in the development of her IEP significantly impeded [the parents'] right to participate in the development" of the IEP.
The Court stated that since the decision was based on a procedural violation it was not deciding the issue of whether the bullying was so severe that there was a substantive denial of FAPE. In addition, the Court expressed no opinion whether the District Court's test for determining when bullying results in a denial of FAPE was a correct one under the IDEA.
After finding that the private school was appropriate, the Court ordered that the parents were entitled to be reimbursed. T.K. v. New York City 810 F.3d 869, 67 IDELR 1 (United States Court of Appeals, 2nd Circuit (2016)).

D. The United States Department of Education issued a guidance letter which clarifies that a school is allowed to share some information regarding the outcome of the school's investigation of a harassment complaint with the parent of the student who had been subjected to harassment without violating FERPA. The Department stated that "the Department has long viewed FERPA as permitting a school to disclose to the parent of a harassed student (or to the harassed student if 18 or older or in attendance at a post-secondary institution) information about the sanction imposed upon a student who was found to have engaged in harassment when that sanction directly relates to the harassed student."
The letter shares examples of disciplinary sanctions which directly relate to a harassed student which include, but are not limited to: "an order that the harasser stay away from the harassed student" and an order "that the harasser is prohibited from attending school for a period of time, or transferred to other classes." Letter to Soukup 115 LRP 18668 (United States Department of Education, Family Policy Compliance Office (2015))

E. The parent requested access to her student's educational records as provided for under FERPA. The school provided physical access to all records except for a harassment investigation report which contained personally identifiable information of multiple students. The school offered to meet with the parent and inform her of the specific information in the report involving her student. The parent filed a complaint against the school.
The United States Department of Education concluded that the school did not violate FERPA. There is a limit on a parent's right to inspect and review their student's educational records when a record

contains information on other students.

The Department stated:

> When education records contain information about more than one student, the parent may inspect, review, or be informed of only the specific information about his or her children. 34 CFR § 99.12(a). A school district should accordingly redact the names of, or information which would be personally identifiable to, any other students mentioned in the education record before providing a parent access to the student's education records. In cases where joint records cannot be easily redacted or the personal identifiable information omitted, the school district may satisfy the parental request for access by informing the parent about the contents of the specific record in question.

Letter to Prescott 115 LRP 39435 (United States Department of Education, Family Policy Compliance Office (2015))

F. The parents of a student with autism were told by other students that their student was verbally and physically bullied on the school bus with no one intervening. The student would go into a fetal position with his head under a pillow when asked about the incidents. The parents then initiated legal action against the school district to be provided access to video tapes that were recorded on the bus.

The Court held that the parents must be given access to the tapes even though the tapes are considered educational records under the Family Educational Rights and Privacy Act (FERPA). There was a "good faith basis" for the parents' belief that the videos are necessary for the determination of what claims, if any, they have against the school district.

FERPA provides for the disclosure of educational records without parent consent if "such information is furnished in compliance with a judicial order". (20 U.S.C. 1232g(b)(2)). The Court ordered, in compliance with FERPA requirements, that prior to providing the tapes to the parents of the student victim that the parents of the other students on the tape be notified of the court ordered disclosure.

Goldberg v. Regional School District #18 115 LRP 34551 (Connecticut Superior Court (2015)).

Note: The FERPA provision cited by the Court refers to "judicial

orders" and does not reference special education hearing officers.

G. A high school student with ADHD and a nonverbal learning disability was verbally and physically harassed at school by other students. The student was insulted by homophobic slurs.
The parents, one of whom was employed by the school, reported the incidents to the school. They also repeatedly emailed the principal with their concerns. The principal responded but not always to the satisfaction of the parents.
After the student had graduated, the student and his parents sued the school district alleging violations of Section 504 and the ADA. The lawsuit alleged that the district discriminated against the student based on his disability by failing to prevent their student from being harassed.
The Court held that in order to prevail the student and parents needed to prove: (1) the student was an individual with a disability; (2) he was harassed by fellow students based on his disability; (3) the harassment was sufficiently "severe, pervasive, and objectively offensive" that it effectively prevented him from access to the educational benefits/opportunities at school; (4) the school knew about the harassment; and (5) the school was "deliberately indifferent" to it.
The Court first raised doubts whether the harassing conduct was based on his disability. Even if it was, the Court concluded that the school was not deliberately indifferent. The school investigated each reported incident and used disciplinary measures such as warnings, parent conferences, detentions and suspensions against the offending students. The school also assigned a paraprofessional to follow the student during the school day to monitor his safety. A school is not held to the legal standard of eliminating student on student harassment. The Court therefore granted a motion for summary judgment for the school district. S.B. v. Board of Education of Harford County 116 LRP 13691 (United States Court of Appeals, 4th Circuit (2016))

IX. Liability Issues

A. A former high school student with autism is now 20 years old and attending college. He signed a Delegation of Rights, as provided under state law, giving his parents the authority to act on his behalf in making educational decisions when he became an adult student. The student and parents alleged that when in high school the student was not provided the accommodations stated in his IEP and school

personnel ignored the parents phone calls and attempts to schedule meetings and ignored eight requests to view their student's educational records. As a result they alleged the student started failing his courses, became anxious, and suffered headaches and nausea which caused him to miss school. The parents hired a private tutor for the student as a result.

A due process hearing was requested. The hearing officer dismissed the request due to the failure of the parents to comply with pre-hearing requirements.

The parents then sued the former school district, teachers and administrators, both in their official and personal capacity, under Section 1983, the IDEA, Section 504, the ADA and the 14th Amendment. The District Court dismissed the lawsuit holding that the parents lacked legal standing since the claims were based on the IDEA and all IDEA rights reverted to the student when he turned 18.

The Court of Appeals reversed the dismissal holding that the Delegation of Rights provided them legal authority and the allegations included claims that their parental rights were violated regarding participation in meetings and access to their student's educational records. In addition, they were seeking reimbursement for the private tutor they had paid for. The allegations were also sufficient to support a retaliation claim under Section 504 and the ADA.

The Court affirmed the dismissal of Section 504 and ADA claims against staff in their personal capacity. However the Court held the IDEA claims against school personnel in their personal capacity should not have been dismissed. The Court stated "We draw the line, however, at the IDEA claims, which should have gone forward at this stage. We have not found a decision from any circuit holding that individual school employees cannot be personally liable for violating IDEA." The case was remanded back to the District Court for further proceedings. Stanek v. St. Charles Community Unit School District #303 783 F.3d 634, 65 IDELR 122 (United States Court of Appeals, 7th Circuit (2015)).

B. The Director of Special Education initiated contact with social services reporting that, based on teachers' statements and statements from the student, she had reason to believe that the father of a student with an intellectual disability engaged in inappropriate physical behavior with the student. After investigating the report, social services found that the abuse allegations in the report were unsubstantiated.

The parents then initiated a Section 1983 cause of action against

school staff alleging retaliation based on the 1st Amendment in response to their advocacy and deprivation of substantive due process. The claims against the staff, except for the Director of Special Education, were dismissed.
The Court of Appeals, affirming the District Court, held that the Director was not entitled to qualified immunity. The Court found that the parents' allegations established that the Director was motivated at least in part by the father's advocacy on behalf of his student in filing the child abuse report. Even though the Director was a mandated reporter of abuse under state law, the Court stated it does not conclusively establish that she would have initiated the abuse report absent the father's strong advocacy on behalf of his daughter. The case will proceed to trial. Wenk v. O'Reilly 783 F.3d 585, 65 IDELR 121 (United States Court of Appeals, 6th Circuit (2015)). Request for appeal to the United States Supreme Court denied. (2016)

C. The parent of a student with autism sued the special education teacher and the school district under Section 1983 for alleged violations of her student's Constitutional rights under the 4th and 14th Amendments.
The use of an unlocked "safe room" was in the IEP's behavior component to be used to calm the student down if overly stimulated or aggressive. The parents alleged the teacher used a locked dark "safe room" to punish the student. The parent alleged that the student was kept in the room for an undetermined amount of time and often took his clothes off, urinated and defecated in the room. The parent also claimed that the teacher kept the student in the safe room until he defecated and then made him clean up his own feces as a form of punishment.
The Court of Appeals, in reversing the District Court, held that the special education teacher was entitled to qualified immunity under both the 4th and 14th Amendment claims. The Court found "at the time she acted, it would not have been clear to a reasonable official that placing [the student] in the safe room, as part of his aversive and behavioral intervention plan, was an unconstitutional seizure" and "it would not have been clear to a reasonable official that having [the student] assist in cleaning up after he defecated in the safe room violated [the student's] substantive due process rights". The Court remanded the matter for further proceedings on the remaining claims. Payne v. Peninsula School District 623 F.Appx. 846, 66 IDELR 3 (United States Court of Appeals, 9th Circuit (2015). Note: This is an unpublished decision.

D. A former teacher and manager of a special education program for students with emotional and behavioral disabilities sued the school district alleging retaliation for exercising her 1st Amendment rights. While employed, the former teacher raised concerns with the administration and parents regarding the operation of the program and mainstreaming opportunities for the students.
Her evaluations worsened and she was eventually transferred to a different school She took a medical leave and never returned to the school. She alleged that she was "constructively discharged" for her advocacy.
The Court, in affirming the District Court, held that her speech was not protected by the 1st Amendment. The Court concluded that her communication to the administration and parents was made in her role as "public employee" not as a private citizen. Tristan Coomes v. Edmonds School District No.15 116 LRP 11143 (United States Court of Appeals, 9th Circuit (2016)).

X. Procedural Safeguard/Due Process Issues

A. Due Process Hearing Officer Authority

1. The parents of a student who was blind, hearing impaired, autistic and intellectually disabled was placed a the State School for the Blind and Deaf. The parents brought a due process hearing challenging the IEP revised for their student changing the student's placement to a local school district. The parents asked for an order placing the student in an out of state private residential school for the blind (Perkins School). The hearing officer and the District Court both concluded that the student was denied a FAPE and the local school district was not an appropriate placement. The Court ordered compensatory services to be provided at "an appropriate residential school" to be determined by the student's IEP Team.
The Court of Appeals, adopting the reasoning from the 6th and D.C. Courts of Appeal, held that the lower court violated the IDEA by delegating the placement issue to the IEP Team. The Court stated:

> Allowing the educational agency that failed or refused to provide the covered student with a FAPE to determine the remedy for that violation is simply at

> odds with the review scheme set out at § 1415(i)(2)(C). Furthermore, as noted by [the parent], such an approach could trap [the student] in an endless cycle of costly and time-consuming litigation. That is, by remanding the placement issue to the IEP team, [the parent] will have no recourse but to seek another due process hearing, and potentially file another federal lawsuit should the IEP team refuse to place [the student] at Perkins.

The Court remanded the placement issue back to the District Court to determine if the student should be placed at the Perkins School. M.S. v. Utah School for the Deaf and Blind 116 LRP 19237 (United States Court of Appeals, 10th Circuit (2016)).

B. Attorney Fees

1. The parents initiated a lawsuit for attorneys' fees. The Court found that the parents prevailed in the due process hearing when the Court found that the school district's evaluation was not appropriate and ordered the district to pay for an independent educational evaluation. In a companion decision, the Court also held that the student was not eligible for special education.

   Although the parents were prevailing parties and brought their attorneys' fees claim in a timely manner, the Court denied reimbursement. The Court held that since the parents were not a "parent of a child with a disability" under the IDEA (a child with a disability who is in need of special education), the Court was bound by the clear language of the IDEA limiting the award of attorneys' fees to a parent of a child with a disability. D.A. v. Meridian Joint School District No. 2 65 IDELR 253 (United States Court of Appeals, 9th Circuit (2015).

2. The parents of a student with a disability initiated a due process hearing challenging the IEP's proposed change of placement from a school based setting to home tutoring. As an initial matter, the parents asked the Administrative Law Judge for a "stay put" order allowing the student to return to school as provided by the last agreed upon IEP. The ALJ

issued the order.
The parents and school district subsequently settled the placement dispute through mediation. The ALJ closed the case based on the settlement.
The parents then initiated a lawsuit seeking attorney's fees related to the "stay put" order. The Court, in reversing the District Court, held that the parents were not a prevailing party under the IDEA and therefore were not entitled to attorney's fees. The ALJ "stay put" order was not a ruling on the merits of the parent's due process hearing complaint and did not alter the legal relationship of the parties. Tina M. v. St. Tammany Parish School Board 67 IDELR 54 (United States Court of Appeals, 5th Circuit (2016))

C. Statute of Limitations

1. The Court addressed the legal question of whether the IDEA's two year statute of limitations (unless a State has enacted a different period of time) limited the time period for filing a due process hearing and/or limited the period of time in which a remedy can be awarded.
In the first Court of Appeals decision on the issue, the Court concluded that the IDEA's statutory wording is ambiguous. After analyzing the rules of statutory interpretation and legislative intent, the Court held that the IDEA's statute of limitations only applies to the filing of the due process hearing complaint, that is, it must filed within two years after the parents "knew or should have known" about the alleged violation (Note: The IDEA contains two exceptions: specific misrepresentations by the school or the withholding of statutorily mandated information). The two year statute of limitations does "not act as a cap on a child's remedy for timely filed claims that happen to date back more than two years before the complaint is filed." Therefore, compensatory education can be awarded to whatever extent is necessary to make up for the child's denial of FAPE and is not limited to the two year period. G.L. v. Ligonier Valley School District 66 IDELR 91 (United States Court of Appeals, 3rd Circuit (2015)).

D. Due Process Hearing Time Limits

1. An attorney who represents parents asked OSEP to review a

"guideline" issued by a state's Office of Administrative Hearings, which states that, "[i]n all but exceptional circumstances, evidentiary hearings should be concluded within three hearing days of six hours each."
The attorney described a hearing during which the ALJ informed the parties in advance of the hearing and at regular intervals throughout the hearing that each party would be granted nine hours of hearing time to present testimony and conduct cross-examination. It was alleged that the effect of the time limitation to eighteen hours (total) was that parents were deprived of the opportunity to present testimony in support of their claims and counsel was not permitted to cross-examine any of the other party's witnesses.
OSEP stated that the guideline appears, on its face, to be consistent with the requirements of the IDEA because it permits a hearing officer to extend the time limitation for evidentiary hearings under "exceptional circumstances". If a party felt their rights to a due process hearing were violated, the appropriate course of action would be to appeal the matter to a court. Letter to Kane 115 LRP 3525 (United States Department of Education, Office of Special Education Programs (2015)).

2. The parents of a student with a disability sought to present additional evidence to the District Court appealing an adverse decision by the hearing officer. The parent first alleged that the hearing officer imposed an arbitrary time line for witness examination and a full presentation of their case.
The Court disagreed. The hearing officer, in a pre-hearing order, granted the parent's attorney request for a four day hearing. The hearing officer noted that the lists of witnesses contained numerous witnesses testifying to the same matters and suggested that affidavits be submitted for some of the witnesses. The parent's attorney never objected to the hearing officer's efforts to keep things moving forward or asked the hearing officer for additional time to introduce relevant evidence for the proceedings.
The Court noted "Moreover, IHO's[Impartial Hearing Officers], like judges, have the inherent authority to manage hearings to avoid needless waste and delay. They should exercise control when necessary to manage the proceedings and eliminate unnecessary costs and redundancy, including imposing reasonable time limits where appropriate."

The Court, however, did allow additional evidence to be presented by the parents when the hearing officer allowed the school district to submit an affidavit after the evidentiary record was closed which appeared to contradict the testimony of one of its own witnesses without the opportunity of the parents to cross examine or present rebuttal evidence. L.S. v. Board of Education of Lansing School District 65 IDELR 225 (United States District Court, Northern District, Illinois (2015)).

E. State Administrative Complaints

1. The U.S. Office of Special Education Programs clarified that if a State Education Agency (SEA) has determined that corrective actions are necessary as a result of an administrative complaint investigation and a due process hearing is subsequently filed on the same issues, the SEA cannot permit the school district to delay implementation of the corrective actions. Under its IDEA general supervisory responsibility the SEA would be obligated to ensure that the corrective actions are completed as soon as possible within the timeframe specified in the SEA's written decision, and not later than one year from the SEA's identification of the noncompliance.

OSEP also addressed the types of corrective actions the SEA may order to remedy a state complaint finding that a public agency has failed to provide appropriate services to a student. OSEP stated that SEAs have broad flexibility to determine the appropriate remedy or corrective action necessary to resolve a complaint and the nature of corrective actions will differ based on the specifics of the particular complaint. One option is that an SEA may order child-specific services that must be provided in order to ensure that a child with a disability receives FAPE. Another option is for the SEA to order the IEP Team to be reconvened to develop a program that ensures the provision of FAPE for that child or order compensatory services. OSEP cautioned:

> However, because the IDEA contemplates that the IEP Team, which includes the child's parent, is best equipped to make informed decisions regarding the specific special education and related

> services necessary to provide FAPE to the child, an SEA should carefully consider whether ordering the provision of services not previously in the IEP is appropriate and necessary to ensure the provision of FAPE.

Letter to Deaton 65 IDELR 241 (United States Department of Education, Office of Special Education Programs (2015)).

F. Miscellaneous Issues

1. The parents of a student with a disability appealed the decision of a due process hearing officer denying them reimbursement of a private school placement. In their appeal to the District Court the parents requested a jury trial. The school district submitted a motion to strike the request for a jury trial The Court granted the motion to strike holding that since the parents are only seeking equitable relief they are not entitled to the Seventh Amendment right to a trial by jury. Mr. and Mrs. A. v Greenwich Board of Education 66 IDELR 97 (United States District Court, Connecticut (2015)).

2. The parents of a student with a specific learning disability initiated a due process hearing alleging that their student was denied a FAPE. The hearing officer concluded that the student was denied a FAPE for two years. The hearing officer ordered, as compensatory education, that the student be placed in private school for one year, be provided speech and language services and an independent educational evaluation at school expense.
The school filed an appeal. In addition, the school filed a Motion to Stay the hearing officer's order pending the outcome of the judicial appeal. The Court denied the Motion. In doing so, the Court applied four factors in considering the request to stay the proceedings. It concluded that: (1) the school was not likely to succeed on the merits of their appeal; (2) the "irreparable harm" to the school district is outweighed by other factors in the analysis; (3) any significant delay in providing the compensatory education to the student would substantially injure the student; and (4) the public interests of the IDEA represents a "strong statement of public policy" that students should be shielded from harm by receiving an

inappropriate education. Willington Board of Education 65 IDELR 300 (United States District Court, Connecticut (2015)).

3. The Office of Special Education programs issued a guidance letter addressing issues that may arise as a result of a due process hearing being filed. Regarding a resolution session, OSEP affirmed the option of amending the IEP during a resolution session without the need of having a full IEP Team meeting. The IDEA allows an IEP to be amended after the annual IEP Team Meeting without holding another IEP Team meeting if both the parent and school district agree. (see 343 CFR 300.324(a)(4)) As OSEP stated "The IDEA does not place any restrictions on the types of changes that may be made so long as the parent and the public agency agree". OSEP also clarified, that unlike mediation, the IDEA has no provision that requires that resolution discussions be kept confidential. Therefore, absent any enforceable agreement by the parties requiring resolution discussions be kept confidential, such discussions can be introduced in a subsequent due process hearing or civil proceeding.
Lastly, OSEP restated an earlier position that even if "stay put" is in place there is nothing in the IDEA regulations that relieves a school district of its responsibility to have at least an annual IEP Team meeting. However, if the IEP Team revises the IEP while "stay put" is in place the new IEP cannot be implemented unless the parents and school agree. Letter to Cohen 116 LRP 6068 (United States Department of Education, Office of Special Education Programs (2015))

XI. Section 504/ADA Issues

A. A student who was gifted and disabled was originally placed in a gifted program in a regular public school. After her behavior became aggressive and disruptive, her IEP changed her placement to a special school for students who are emotionally disturbed. The parents agreed to the change of placement.
At the special school, the student engaged in aggressive behavior assaulting staff and the school's security officer. The student was handcuffed and arrested twice for assault and battery. The charges were eventually dropped. The student was then moved to a private psychiatric school at school district expense.
The parents then initiated a due process hearing under the IDEA and

also filed an action in Court alleging violations of Section 504, the ADA and state law tort claims. The parents and the school entered into a settlement resolving all of the IDEA claims.

The District Court granted summary judgment in favor of the school district on all of the remaining claims under Section 504, the ADA and state law. The Court of Appeals reversed and remanded the case back for further consideration.

In doing so, the Court provided an analysis of the similarities and differences between the standards under the IDEA, Section 504 and the ADA. The Court discussed the legal errors in the lower court's decision which included the following.

First, the Court stated that the parents consent to the IEP change of placement did not bar the parents from challenging that placement. Therefore, the parents claim that their student was denied meaningful access under Section 504 should not have been dismissed based on their previous consent to the placement.

Second, the parents alleged that the school never provided sufficient behavioral evaluations or supports which resulted in inappropriate accommodations under Section 504. The Court, in its reversal, held that even though the parents never requested the behavioral support services it was not determinative of their claim. The Court observed that the parents did not have the expertise "nor the legal duty" to determine what accommodations might allow their student to remain in a regular education environment. A.G. v. Paradise Valley Unified School District 116 LRP 8356 (United States Court of Appeals, 9th Circuit (2016))

B. A student with cerebral palsy was on an IEP which called for one-on-one paraprofessional support. She has a service dog who assists her by increasing her mobility and assisting with some physical tasks. The student was not allowed to bring her service dog to school. The school administrators prohibited the service dog reasoning that the dog would not be able to provide any support that the paraprofessional could not provide.

The family began homeschooling their student and filed a complaint with OCR. OCR found that the school violated the ADA by not allowing the student to bring her service dog to school. The family then sued the school, the principal and the school district alleging violations of the ADA, Section 504 and state disability law.

The Court, in a 2-1 decision affirming the District Court, dismissed the lawsuit for failing to exhaust the IDEA's due process hearing system. The Court found that the "core harms" that the family raises

relate to the specific purposes of the IDEA. Specifically, the Court stated:

> The exhaustion requirement applies to the [parents'] suit because the suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. The [parents] allege in effect that [the student's] school's decision regarding whether her service animal would be permitted at school denied her a free appropriate public education. In particular, they allege explicitly that the school hindered [the student] from learning how to work independently with [the service animal], and implicitly that [the service animal's] absence hurt her sense of independence and social confidence at school. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents.

Fry v. Napoleon Community Schools 788 F.3d 622, 65 IDELR 221 (United States Court of Appeals, 6th Circuit (2015)). Request to appeal to the United States Supreme Court pending. The Court has invited the Solicitor General to file a brief in this case expressing the views of the United States. (2016)

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.