WALSH GALLEGOS
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The Year in Review

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

This handout summarizes reported decisions from 2018 and 2019. We have not attempted to summarize every case, but rather, those that are particularly important and/or instructive. The handout also includes italicized "*Comments"* designed to focus on the practical implications of some of the cases. The Comments sometimes include personal opinions of the author of the handout.

ADA/SECTION 504

A.H. v. Illinois High School Association, 71 IDELR 121 (7th Cir. 2018); 881 F.3d 587

The court held that the state association was not required to lower the standards for participating in state track championships; nor was it required to create a separate category for para-ambulatory athletes. Neither of these would be a "reasonable" accommodation as they would fundamentally alter the nature of the event.

Brown v. Elk Grove USD, 71 IDELR 163 (E.D. Cal. 2018)

The court refused to dismiss the ADA/504 claims of the student who alleged he was barred from varsity basketball due to his emotional outbursts which were caused by his disability.

Comment: from the court's opinion it sounds like the school is conceding that the student was kept off the team not because of a lack of talent, but due to behavioral issues. The student had an IEP due to his emotional disturbance. The school basically argues that it can keep him off the team due to his behavior, even if the behavior is a manifestation of disability. At this early stage of legal proceedings the court rejected that argument. The court is wrong. To participate in extra curriculars the student must satisfy the standards of the school despite the disability. Controlling your emotions is one of the requirements of varsity basketball.

Clemons v. Shelby County Board of Education, 72 IDELR 24 (W.D. Ky. 2018)

The court held that the district did not discriminate against the student with Asperger's in connection with the tennis team. The coach used "challenge matches" to determine who would participate in tournaments. This was not discriminatory.

Comment: As this case demonstrates, when there are more students who want to participate on a team than the school has room for, the school can make its decisions based on athletic ability. This student was not excluded from the team, but she was not eligible for tournament play because she failed to win a "challenge match."

K.M. v. Tehachapi USD, 72 IDELR 63 (E.D. Cal. 2018)

The court refused to dismiss the claim of discrimination under ADA and 504. The student had a prescription for an ABA therapist to be with her 40 hours/week. This would be paid by the family's insurance company. The school refused to allow the therapist to accompany the student to school despite acknowledging that this was a minor matter that "could be worked out." The school also acknowledged that the therapist's presence would not be disruptive.

Comment: The court compared this request with a request for a service animal and found the two requests to be similar. This was a medical accommodation necessary for the student to attend school and the school had no good reason to turn it down.

Lawton v. Success Academy Charter Schools, Inc., 72 IDELR 176 (E.D.N.Y. 2018)

The court held that the plaintiffs were not required to exhaust their complaints about discrimination and retaliation against students with disabilities in NYC charter schools that had a very strict Code of Conduct. The students were four to five years old and repeatedly failed to comply with the Code. Consequently they were frequently sent home, and their parents were pressured to take them out of the charter school. There were also allegations that the principal had a "Got to Go" list that included these plaintiffs.

Comment: if you want to confirm your belief that charter schools don't play fair, just read this case.

Estate of Esquivel v. Brownsville ISD, 72 IDELR 270 (S.D. Tex. 2018)

The district faces potential liability under 504 due to the failure of the school to provide the physician-recommended accommodations for the severely disabled student who died after an incident in the school's aquatic program. The court applied the "deliberate indifference" standard and held that a reasonable jury could conclude that the district was deliberately indifferent by failing to provide any of the accommodations that were required by the student's doctor.

Comment: This is a good illustration of what plaintiffs have to do to recover for personal injuries occurring at a public school. Texas law protects public school districts from tort liability. So the

plaintiffs have to try to make their case under federal law. This requires the plaintiff to meet a heavy burden of proof. It is not sufficient to prove that the school was "negligent." Under 504/ADA the plaintiff must prove a more intentional course of conduct—deliberate indifference.

J.A. v. Corpus Christi ISD, 73 IDELR 21 (S.D. Tex. 2018)

The court held that liability can be imposed under ADA/504 due to intentional discrimination based on disability. This does not require proof of deliberate indifference, but only that the defendant was aware of the need for reasonable accommodation and failed to provide it.

Comment: That standard for liability is a much lower bar than is used in other circuits, most of which require proof of deliberate indifference.

Garedakis v. Brentwood Union School District, 73 IDELR 35 (9th Cir. 2018, unpublished)

The court affirmed dismissal of a denial of FAPE claim under ADA/504 due to the absence of evidence of deliberate indifference. State law claims were allowed to proceed. The claims involved abuse of children by a teacher. Key Quote:

> Once the district knew that harm to a federally protected right was substantially likely, it investigated [the teacher], placed her on notice of her misconduct, transferred her to a different school, forbid her to be alone with students, and regularly observed her classroom.

K.W. v. The Ellis School, 58 NDLR 68 (W.D. Pa. 2018)

The parent alleged retaliation for the advocacy for his daughter when the private school disenrolled the child. The court denied the school's Motion to Dismiss, holding that the lawsuit alleged facts that amounted to a plausible case of retaliation. The suit alleged 1) protected activity—emails criticizing the services the school was providing; 2) adverse action—the disenrollment; and 3) causation—the disenrollment occurred shortly after the email was received, and cited the email as a basis for the disenrollment.

Comment: Private schools have much more freedom in dealing with parents than do public schools, but there are limits. They cannot retaliate against a parent for the exercise of protected activity, such as advocating for compliance with non-discrimination laws. The parent still faces an uphill battle to prevail in this suit, but has survived the school's effort to dismiss the case.

H.P. v. Naperville Community Unit School District #203, 58 NDLR 84 (7th Cir. 2018)

The student's mother committed suicide when the student was a junior in high school in Naperville. Consequently, she moved in with her father in another school district. Naperville then refused to allow her to transfer into its high school for her senior year. The student sought a waiver of the residency requirement based on her disability—the depression and anxiety she

suffered after her mother's suicide. Without addressing any other issue, the court held that the plaintiff's claim failed because of the lack of causation. Plaintiff bears the burden of proving "but for" causation—that "but for" her disability she would be allowed to attend high school in Naperville. She could not do this as it was clear that the decision was based on a neutral basis—residency.

L.C. v. Pinellas County School Board, 73 IDELR 144 (M.D. Fla. 2018)

Schools can be held liable under 504/ADA only in cases involving bad faith or gross misjudgment. Allegations that the district denied FAPE under IDEA are not enough. In this case there was no evidence of bad faith or gross misjudgment.

The court refused to dismiss the case filed by the parents of a boy who committed suicide. The court held that there were fact issues that precluded summary judgment regarding the district's knowledge of its failure to implement the 504 plan, and possible "deliberate indifference" in light of the student's suicidal ideation.

Doe v. United States Secretary of Transportation, 73 IDELR 152 (S.D.N.Y. 2018)

The school's accommodation plan for the student with an allergy to dogs was reasonable and adequate. The school was not required to guarantee a dog-free school. The court cited OCR guidance on service animals, which the school complied with:

> Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom….they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.

However, there was enough evidence of the school's failure to enforce its 504 plan to permit the case to go forward.

P.F. v. Stanford Taylor, 119 LRP 1475 (7th Cir. 2018)

The court held that Wisconsin's Open Enrollment policy does not discriminate on the basis of disability, even though it explicitly treats students with IEPs differently from others. The state law's procedure divides students into two categories: those with IEPs and those without. If you do not have an IEP your transfer request will be compared to the district's available space in your grade level. If you have an IEP, the same factor will be considered, but also this:

> Whether the special education or related services described in the child's IEP…are available in the nonresident school district.

The court held that this is not discriminatory:

> Differential treatment of special-needs students doesn't make the program unlawful. Federal law "forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap." *Anderson v. University of Wisconsin,* 841 F.2d 737, 740 (7th Cir. 1988). The program makes decisions based on the actual needs of disabled students, so it complies with federal law.

The plaintiffs made a second argument in this case—that acceptance of students with IEPs was required as a "reasonable accommodation" under Section 504. The court rejected that as well:

> Neither the ADA nor the Rehabilitation Act [504] requires modifications that "would fundamentally alter the nature of the service, program, or activity." The requirement that nonresident school districts have the excess capacity to meet the needs of transferring students is a fundamental component of this program. Demanding that nonresident school districts accept students regardless of their existing capacity to meet student needs would upend this key feature. Federal law does not require such an overhaul.

Comment: The court's analysis is a good illustration of how our laws about disability discrimination are different from other non-discrimination laws. There is no way that a court would approve differential treatment of students based on race or religion. That's because neither of those characteristics affect how the student is served. But disability does affect services. Serving a student with a disability requires a different level of services. It usually costs more. It requires professional services and/or equipment that would not otherwise be required. Thus it is not surprising to read that 71% of Wisconsin students without IEPs were accepted for transfer, whereas only 64% of students with disabilities were.

Doe v. Pleasant Valley School District, 73 IDELR 171 (8th Cir. 2018)

The court affirmed the district court's ruling that the parent failed to show bad faith or gross misjudgment by the district when the district did not adopt all of the recommendations in the IEE.

Pritchard v. Florida High School Athletic Assn., Inc., 74 IDELR 42 (M.D. Fla. 2019)

The student sought an injunction to allow him to participate in athletics for a fifth year. The Association's rules limited students to four consecutive years, starting with the first year of 9th grade. The student had participated in athletics for four years, but was still in high school due to his repeating of 10th grade. The court denied the request. The court held that the student was not likely to successfully show that he was 1) "otherwise qualified" to participate in high school athletics, or 2) discriminated against solely based on disability. Moreover, the waiver of the state's four-year eligibility rule would be a fundamental alteration of the program, and thus, was not required. The student was treated the same as all other high school athletes. No discrimination.

Comment: However, the court refused to dismiss the claim that this neutral rule has a "disparate impact" on students with disabilities. The "disparate impact" theory is available in an ADA

case, and the court allowed the plaintiff to engage in discovery to pursue the facts that might support that theory.

Marshall v. New York State Public High School Athletic Assn., Inc., 74 IDELR 45 (W.D.N.Y. 2019)

In contrast to the Florida case, this court refused to dismiss a complaint from a student seeking a 5th year of athletic eligibility. The court held that the pleadings alleged a complete failure to respond to the request for an accommodation, which could be viewed as deliberate indifference.

Comment: These two cases appear to conflict with each other, but much of this apparent conflict can be explained by the fact that in both cases the party seeking pre-trial relief failed in that effort. In the Florida case, the student sought an injunction, which was denied. In the New York case the state commissioner tried to get the case dismissed entirely. That failed also.

K.N. v. Gloucester City Board of Education, 74 IDELR 73 (D.C.N.J. 2019)

This case is about the level of support a district must provide in an after school program to a student with autism who engages in disruptive behaviors. The court held that the district violated ADA and 504 by failing to provide the level of support the student needed. When provided a one-to-one aide, the student's behaviors were not maintained properly. But at the times when the district provided an aide supervised by a special education teacher, the behaviors were manageable. Thus to obtain "meaningful access" to the program, the student was entitled to the extra level of support.

M.L. v. Williamson County BOE, 59 NDLR 83 (6th Cir. 2019, unpublished)

Parents alleged that child abuse reports were made in retaliation for their advocacy for their child. The court dismissed the case. The parents could not produce evidence of causation, in part because there was no evidence that one of the reports was made by a person who knew of the protected activity. Moreover, the parents failed to show that the reports were a pretext for retaliation. Pretext can be shown by 1) showing that there was no basis in fact for the report; 2) showing that the facts were insufficient to motivate a child abuse report; or 3) otherwise showing that the reports were not in fact based on concerns over child abuse. The parents failed to produce evidence to support any of those theories. The court noted that the inclusion of "irrelevant personal allegations" in a child abuse report may be important, but:

> We cannot say that children's sleeping arrangements, the parents' sleeping arrangement, the parents' relationship with each other, and relatives with potential substance abuse issues are categorically irrelevant considerations when trying to figure out whether a child is being sexually abused.

Wagon v. Rocklin USD, 74 IDELR 196 (E.D. Cal. 2019)

The court held that the district was potentially liable under ADA and 504 due to bad behavior by the bus driver. The driver was accused of verbal and physical abuse of a student with a disability

and there were allegations that the abuse was directed at the student's disability. The court noted 9th Circuit precedent establishing that public entities could be liable under ADA and 504 based solely on the actions of their employees (respondeat superior), thus it was not necessary for the parent to show that the school administration knew about the incidents on the bus.

Comment: The allegations in this suit were all based on what the mother saw on videos that she reviewed after a teacher reported to her that her child had a bruise on his leg.

Aponte v. Pottstown School District, 74 IDELR 228 (E.D. Pa. 2019)

The court dismissed 504 claims against individual defendants but refused to dismiss the retaliation claim against the district. The parent had alleged that she engaged in protected activity by complaining about her child's treatment at school; and alleged an adverse action by the filing of unsubstantiated child abuse claims.

Comment: the suit alleged that the abuse claims were false when made, and supported that allegation by noting that both claims were deemed "unsubstantiated." The fact that they were unsubstantiated does not mean that they were made in bad faith or with a retaliatory motive, but the court allowed the case to proceed so that those evidence concerning those fact issues can be developed.

Clemons v. Shelby County Board of Education, 74 IDELR 232 (W.D. Ky. 2019)

The court held that the district did not discriminate against the student with Asperger's in connection with the tennis team. The coach used "challenge matches" to determine who would participate in tournaments. This was not discriminatory. Other complaints were also dismissed, the court noting that the suit alleged poor coaching, but not discrimination.
Comment: As this case demonstrates, when there are more students who want to participate on a team than the school has room for, the school can make its decisions based on athletic ability. This student was not excluded from the team, but she was not eligible for tournament play because she failed to win a "challenge match."

Another slice-of-life nugget from this one: the girl complained that she did not get a varsity letter at the banquet. That was true, but none of the girls got their letters at the banquet because the coach's daughter "threw them out the window of his car." How would Coach Taylor have handled that?

AGE LIMITS

K.L. v. Rhode Island Board of Education, 73 IDELR 61; 907 F.3d 639 (1st Cir. 2018)

The Court held that Rhode Island is required to provide special education services to eligible students up to age 22. This was based on the state's provision of adult education services for those 21 and 22 who had not attained a diploma. Since the state provided these services to non-disabled students, it had to also make FAPE available to similarly situated students with disabilities.

Comment: That may sound obvious, but the state's argument here was that "adult education" was separate and apart from "public education." Thus the case turned on the definition of "public education" as that term is used in IDEA. The state argued that the term was limited to services provided by traditional K-12 public schools. The court disagreed, noting that "public education" was characterized by 1) a significant amount of public funding; 2) state or local government oversight; and 3) services aimed at enabling the student to achieve to the level of a high school diploma. Even though R.I.'s "adult education" services were provided by an entity other than the traditional public school, they satisfied all three criteria. Thus the adult education services were "public education" and had to be provided to students with disabilities on equal terms.

ATTORNEYS' FEES

S.H. v. Mt. Diablo USD, 71 IDELR 126 (N.D. Cal. 2018)

The court held that the parent was justified in rejecting the school's settlement offer because the amount of attorneys' fees offered ($10,000) was too low. Key Quote:

> MDUSD does not dispute that it made no effort to learn the amount of attorneys' fees counsel had incurred as of the date of the offer. Nor is there any evidence in the record suggesting that MDUSD came up with the figure in the offer based on its expectation of what Plaintiff's counsel was likely to receive if Plaintiff prevailed.
>
> Given the IDEA's goal of encouraging counsel to represent plaintiffs in meritorious challenges to school districts' policies and practices, the Court concludes that Plaintiff was substantially justified in rejecting MDUSD's settlement offer.

Lincoln-Sudbury Regional School District v. Mr. and Mrs. W., 72 IDELR 28 (D.C. Mass. 2018)

The court awarded $188,996 in attorneys' fees to the school district. The parents had requested a due process hearing which was determined to be frivolous and brought for an improper purpose. Thus the school was entitled to recover fees for the costs of defending the case. The court's opinion goes into detail about billable hourly rates and practices such as "block billing." The district did not recover as much as it sought, but still…..$188,996 is not peanuts.

Comment: this opinion does not explain why the parent's claim was deemed frivolous, but you can get a clue from the facts. The student was injured in a field hockey game. The district accommodated her injury to help her catch up with missed school work. Eight months after the injury her "intensive math" class teacher recommended that next year she should take a less rigorous, but still advanced, math class. The parents claimed that the school failed to accommodate the girl, pulled her out of public school, placed her in a private school and sought reimbursement of tuition.

Barney v. Akron Board of Education, 72 IDELR 215 (N.D. Ohio 2018)

An angry judge scolded the attorneys who represented a parent and ordered them to pay $53,287.50 for the school district's attorneys' fees, plus $400 in costs. However, the court ordered the parent's attorneys to provide further information about their financial situation so the court could consider their request for a reduction in the award due to an inability to pay. In an unpublished decision, the 6th Circuit summarily affirmed the ruling in the substantive case in favor of the district: 73 IDELR 251 (6th Cir. 2019, unpublished).

Lauren C. v. Lewisville ISD, 72 IDELR 362 (5th Cir. 2018)

The court's decision was about attorneys' fees but it goes back to the hearing officer's decision that ordered the district to add "autism" as a disability label in the student's IEP. Based on this, the parents claimed prevailing party status and sought attorneys' fees. The district court held that the district fulfilled its Child Find responsibility by evaluating the student in a timely fashion. The fact that the district refused to identify the student as having autism was not a Child Find violation:

> That the LISD did not diagnose Plaintiff with autism disorder after multiple evaluations testing for autism does not mean that LISD failed to comply with its Child Find procedural obligations. On the contrary, the multiple evaluations demonstrate that the LISD complied with these obligations.

The court noted that IDEA does not require the students be classified by a specific disability label:

> A specific classification or label is not required as part of the Child Find obligations or as part of the IDEA itself.

Comment: The parents acknowledged that they were happy with the IEP and services, but wanted the autism label "in order to ensure optimal services from [the DARS], [Supplemental Security Income], and other agencies in the future." The parents appealed to the 5th Circuit, claiming they should recover attorneys' fees as "prevailing party" since the hearing officer had ordered the district to identify the student as having autism. The court denied the request for fees, noting that the change in label did not change the services the student received. Thus the parents had only obtained a "de minimis" or "technical" victory that was not sufficient to award fees.

McNeil v. District of Columbia, 73 IDELR 51 (D.D.C. 2018)

The court held that the parents were reasonable in rejecting the district's settlement offer because it included nothing for attorneys' fees.

Iowa DOE v. A.W., 73 IDELR 76 (S.D. Ia. 2018)

The court ordered the state DOE to pay attorneys' fees and costs of $317,769 due to the state's overly restrictive rules regarding special education eligibility. The district erred in finding the student ineligible, but since the error was based on the district following state criteria, the state was responsible for the fees.

Comment: the district court's decision is very brief, but it affirms the lengthy ruling by the hearing officer which is at 70 IDELR 243. The hearing officer found fault with the state's eligibility criteria. Key Quotes:

> *It is impermissible to say a child is ineligible because their impairment is minor.*
>
> *I conclude that basing determination of whether the child has a specific learning disability on the magnitude of the discrepancy in the child's performance from that of peers functionally imposes a severity test on the disability and is inconsistent with the terms of the IDEA.*
>
> *The fact that the instruction may be delivered…by someone other than a special education teacher does not take it outside the definition of special education.*
>
> *Just because the specialized instruction [off] a student with a disability requires is already part of the general curriculum, considered best practices, or offered to all students with or without disabilities does not mean that such instruction does not constitute special education. Quoting from Letter to Chambers, 59 IDELR 170 (OSEP 2012).*

Somberg v. Utica Community Schools, 908 F.3d 162; 73 IDELR 87 (6th Cir. 2018)

There is a lot of discussion of attorneys' fees in this decision in which the court awarded the parents $210,654. The unique argument that the school made was that the parents should have used the state complaint process rather than the due process hearing. The court:

> But UCS has pointed to no provision in the IDEA conditioning an award of attorneys fees on a parent's choice to utilize one procedural vehicle over another.

BEHAVIOR

Pottsgrove School District v. D.H., 72 IDELR 271 (E.D. Pa. 2018)

The court held that "The persistent use of physical restraint over three years suggests that whatever 'plan' the district had in place was inadequate." Key Quote:

> Even accepting the school district's argument that its use of restraints was always reasonable, the persistent use of such a measure is a red flag. A tool meant as a "last

> resort," deployed dozens of times over three years, is strong evidence that the behavior plan was not working.

Cook v. Little Rock School District, 73 IDELR 43 (E.D. Ark. 2018)

The court held that the absence of a BIP in an IEP for a student with autism did not amount to a denial of FAPE. The court noted that IEP Teams are required to "consider" behavioral interventions if the student has behaviors that impede learning, but this does not mean that a formal BIP is required. Here, the district provided a paraprofessional and positive behavioral interventions that helped to improve the student's behavior.

Albright v. Mountain Home School District, 73 IDELR 93 (W.D. Ark. 2018)

The court held that the district was not required to develop a new FBA/BIP for the student because the student was never removed from the current placement for more than ten days due to behavior that was a manifestation of disability; nor was the student ever assigned to an alternative setting due to a "special circumstances" offense—drugs, weapons or the infliction of serious bodily injury.

S.W. v. Abington School District, 73 IDELR 179 (E.D. Pa. 2018)

The court held that the district provided FAPE even though it did not conduct an FBA or develop a BIP after finding that the student had behaviors that impeded learning. The student's behavior was addressed in IEP content and showed positive results.

DOE State of Hawaii v. L.S., 71 (D.C. Ha. 2019)

The court held that the district denied the parent meaningful participation in the IEP process by failing to incorporate the BSP (Behavior Support Plan) into the IEP, or to send it to the parent. Key Quotes:

> Courts agree that where a student's behavioral issues impeded appropriate learning, the IEP must reasonably address those behavioral issues.
>
> Because the BSP was not made part of the IEP, the district was free to amend or curtail the BSP without Parent's knowledge or input, which seriously infringes upon her right to participate in the IEP process.

Spring Branch ISD v. O.W., 2019 WL 4401142 (5th Cir. 2019)

Issue One: Does the IEP or BIP have to "authorize" the use of physical restraint? No. Key Quote:

> Unlike the use of time-outs, the law contains no provision requiring that the use of physical restraints be expressly authorized by a student's IEP.
>
> Therefore, so long as the School District's use of physical restraints complied with state law, the use of restraints did not violate the IEP.

Issue Two: If the IEP/BIP calls for positive interventions, calm interactions, and the avoidance of power struggles, is it a violation of the IEP when the school calls in the cops? No. Key Quote:

> These strategies are not necessarily violated by a mere request for police presence, particularly to deal with a violent and escalating situation such as a student repeatedly striking a teacher and charging at her, as was the case here.

Comment: that requirement that time-out be authorized by the IEP is in Texas state law—not IDEA or any other federal law.

BULLYING

Bowe v. Eau Claire Area School District, 71 IDELR 168 (W.D. Wis. 2018)

The student with Asperger's was bullied throughout middle and high school. The parents sued the district and two principals. The court dismissed the suit because of lack of evidence of deliberate indifference. Plaintiffs did not dispute the fact that the school investigated every reported incident and took corrective action whenever bullying was confirmed. Their argument was that the school should be held liable because the bullying never ended. But as the court noted, that is not the standard for liability.

Comment: Two other interesting aspects to this case. First, the parents argued that the school inappropriately favored counseling over harsher forms of disciplinary action. Perhaps the school was pursuing restorative practices? The court noted that:

> *Defendants certainly favored counseling over other, more severe types of discipline, but it appears to have worked, at least in some instances.*

Second, the victim/plaintiff was not entirely innocent. He acknowledged that he was sometimes the aggressor. The court noted that the plaintiff called other students:

> *faggot, whore, homo, queer, lard ass, threatened to shove a hockey stick up [a student's] ass, f___ [a student's] mother and beat [a student] until his face was unrecognizable. According to Connor, his 'improper behavior' towards others is the result of the bullying leveled against him.*

Renee J. v. Houston ISD, 73 IDELR 168 (5th Cir. 2019)

The case involved a student who did not attend school for almost an entire semester due to alleged bullying at the school. The 5th Circuit held that this was not the school's fault:

> From February to June, C.J.'s teacher communicated with his parents nearly thirty times, attempting to convince them to return him to school. Administrators arranged for C.J.'s teacher to meet him at the car when his parents dropped him off and to escort him inside the school building, so he would feel safe. School officials also offered to allow C.J. to

spend the first hour of the day in the office of student support to ease his transition to the school environment. These facts belie the parents' claims that teachers and school administrators were callous and unresponsive to C.J.'s fears about bullying.

Considering C.J.'s parents' failure to follow up with the requested paperwork for five weeks while they continued to withhold him from school, and considering further the school district's repeated outreach and offers of accommodation, the school district's behavior was reasonable.

CHILD FIND

Krawietz v. Galveston ISD, 72 IDELR 205 (5th Cir. 2018)

The court held that the district failed to evaluate and identify the student in a timely fashion. The student was in the district's special education program until 2008 when the family took her out of public school. She returned to GISD four years later, never having been dismissed from special education. But GISD did not find the student's records. The district served her under 504, but did not offer to do a FIIE until after the due process hearing was requested.

Spring Branch ISD v. O.W., 72 IDELR 11 (S.D. Tex. 2018)

The court upheld the IHO ruling that the district violated Child Find. The court held that the district had adequate information about a possible need for special education by October 8, but did not initiate an evaluation until January 15. This four month delay was too long. By October 8, the student had been sent to the principal's office five times, was failing a majority of his classes despite his gifted intellect. The district was on notice that the student had ADHD and the mother had requested an evaluation.

E.S. v. Conejo Valley USD, 72 IDELR 180 (S.D. Cal. 2018)

The court ruled that the school did not violate its Child Find responsibility. This issue turned on a conversation between the mother and the principal on the day before the student started in kindergarten. The mother later testified that she asked for an IEP in that conversation. The principal denied that and produced an email she wrote to the teacher later that day. The email provided a detailed summary of the meeting with the mother and said nothing about a request for an IEP.

Comment: the contemporaneous documentation by the principal was persuasive to the court. But there is another lesson here. The school could have avoided the Child Find issue if a Prior Written Notice document had been produced by the school. After the meeting with the mother the school held a Student Support meeting. Later in the school year the school had another SST and then a third. At the third SST meeting the school decided to make a referral for a special education evaluation. The district could have provided PWN after either of the first two SST meetings. If that had been provided to the mother, along with a copy of the state's Procedural Safeguards document, it would have been strong evidence that the district complied with Child Find duties.

Letter to Siegel, 72 IDELR 221 (OSEP 2018)

"While LEAs have specific child find responsibilities, there are no specific provisions under IDEA that require LEAs to provide information about IDEA to all parents, regardless of whether their child is suspected of having a disability. We note, however, that States may have specific public awareness requirements as part of their State policies and procedures."

D.J.D. v. Madison City Board of Education, 72 IDELR 273 (N.D. Ala. 2018)

The parent requested an evaluation for special education. The district did not conduct the evaluation, but instead, provided pre-referral interventions as prescribed by the Problem Solving Team. This was standard practice in the district. The court held that the district did not violate the Child Find requirement. The student's academic performance was good and the teachers did not see a need for special education. There were behavioral issues, but the student "did not exhibit alarming behavior or other clear signs of disability."

Comment: Hmmmm. Did the school provide a Prior Written Notice when it refused to comply with the parent's request for an evaluation? It should have. But the court's decision does not say.

Montuori v. District of Columbia, 73 IDELR 12 (D.D.C. 2018)

The court held that the parent's agreement to a 504 plan did not relieve the district of its Child Find duty. Key Quote:

> Whether Plaintiffs asked the school for an IDEA evaluation or were content with the 504 plan is not the relevant question. What matters is that….DCPS was on notice of substantial evidence that A.M. could qualify for special education services. Accordingly, DCPS had a duty to evaluate him for services under the IDEA.

Comment: A familiar lesson: just because the parent agrees with the course of action does not mean you are complying with the law.

Avaras v. Clarkstown Central School District, 73 IDELR 50 (S.D.N.Y. 2018)

The court held that the district violated its Child Find responsibility by keeping the student in RTI services for sixteen months. The child received RTI services from November of his kindergarten year all the way through the end of first grade. The school noted that he made some progress and was promoted from K to 1st grade, but the court pointed out that Child Find applies to students who are passing from grade to grade.

Comment; This decision is noteworthy for two reasons. First, it overturns the decision by both levels of hearing officers (NY has a two-tier system) on this issue. This is a clear cut example of judges making educational judgment calls without deference to educational experts. Secondly, it's one of the few cases that addresses the question of how long RTI should be tried before a referral is made. The court does not give a specific answer to that, but its ruling tells us that 16 months is too long. This is particularly the case since the district did not comply with its own "eight-week cycle" standard for each tier of RTI.

M.P. v. Campus Community School, 73 IDELR 38 (Del. 2018)

Here is another Child Find failure by a school. Key Quote:

> ….by early November, the school already knew of M.P.'s seizure disorder, that he required extra help from a reading specialist in kindergarten, and that he was struggling in class, frequently absent due to well-documented health issues, and exhibiting odd behavior—he would stare off, unresponsive and unable to recollect what had been taught. Then on November 3, 2011, his classroom teacher—presumably, the educator who spent the most time with M.P.—asked the school to consider him for an IEP or 504 plan. These facts, taken together, easily triggered the school's duty under the IDEA….

Comment: On top of that, the mother had requested an evaluation.

The court held that the district did not violate child find. The district promptly responded to a parent request for evaluation when the student was in 10th grade. The district had no reason to make a referral prior to that time in light of the fact that the student was passing all classes, including multiple AP or Pre-AP courses, and had performed well on STAAR in 9th and 10th grades.

Z.J. v. Board of Education of the City of Chicago District NO. 299, 73 IDELR 95 (N.D. Ill. 2018)

The district violated the Child Find requirement by ignoring "clear signs that Z.J. may have a learning disability." These signs came in the form of low scores on the NWEA—Northwest Association Measures of Academic Progress. These scores were one of two factors, along with classroom grades, that the district relied on for promotion/retention decisions. School policy required a student to score at the 24th percentile to be promoted to 7th grade. This student was well below that for three years in a row. The court also rejected the argument that the charter school the student attended had never received the records from the traditional school, and thus had no notice of the earlier poor performance on the NWEA. But both the charter school and the traditional school were operated by the Chicago Public Schools District and the court pointed out that the Child Find obligation is the districts, not an individual campus. The school also argued that low scores in 5th grade were less significant, because they don't prevent promotion. The court:

> The Court is not convinced that a student must be on the verge of repeating a year before her low standardized test scores are taken seriously by CPS.

Culley v. Cumberland Valley School District, 73 IDELR 170 (3rd Cir. 2018, unpublished)

The court held that the district violated Child Find by finding the student with Crohn's Disease not eligible. The district offered a 504 plan, rather than identifying the student as having OHI. The rationale was that the disease did not result in a need for specially designed instruction. The court disagreed, citing the IEE that the court described as more thorough and detailed.

Comment: Context matters. The student was not doing well in school due to excessive absences and had been expelled due to disciplinary problems. It was after the expulsion that the parents made the Child Find claim.

William V. v. Copperas Cove ISD, 73 IDELR 181 (W.D. Tex. 2018)

A federal judge in Texas has come pretty close to saying that dyslexia automatically qualifies as a learning disability under IDEA. This is a case in which the district determined that the 4th grader had dyslexia, but did not qualify as having a learning disability. This decision was based on a thorough Cross-Battery assessment by a qualified evaluator. Testing showed that none of the student's cognitive abilities were below average. The student did not demonstrate the "pattern of strengths and weaknesses" that is a sign of a learning disability. So the district decided that the student did not qualify as SLD. But screening showed the student to have dyslexia and the district did provide dyslexia services to address this.
The court ruled that the district committed a procedural error by not identifying the student as having a learning disability. The judge noted that the legal definition of "specific learning disability" offers several conditions as examples of an SLD. One of those is "dyslexia." So as far as the judge was concerned, this was pretty simple:

> The IDEA's statutory language explicitly includes dyslexia as a disorder included as an SLD. The District diagnosed [the student] with dyslexia; therefore, the District violated the IDEA by determining in its assessment that [the student] no longer met the eligibility requirements for an SLD and thus was no longer entitled to Special Education or an IEP.

This turned out to be a harmless error. Even though the district did not label the student as having SLD and did not create an IEP to address it, the district continued to provide good services that enabled the student to make progress. No harm, no foul.

Comment: this decision is likely to drive educational diagnosticians batty. The court holds that once a student has been identified as having dyslexia, no further testing is required. Look at this quote:

> *In the present case, [the student] has already been diagnosed with an eligible condition, thus bypassing both the need for additional testing to determine SLD status and the District's discretion in making such a determination.*

In other words: dyslexia=SLD=IEP under IDEA. Test no more: the kid is eligible.

S. v. West Chester Area School District, 74 IDELR 20 (E.D. Pa. 2019)

The district conducted an initial evaluation in February, 2015, and determined the student was not eligible due to lack of educational need. In November, 2015, just nine months later, the district conducted another evaluation and determined that the student was eligible. The parents argued that the first evaluation must have been flawed, since the district reversed course only nine months later. The court cited 3rd Circuit precedent and rejected that argument. Key Quote:

> As discussed above, this line or reasoning fails under Third Circuit precedent given the pace at which children's needs change as they develop and progress through the curriculum.

Doe v. Cape Elizabeth School Department, 74 IDELR 95 (D.C. Me. 2019)

The court held that the district satisfied its child find obligations. The student had good grades, very few absences, and no reported discipline problems in school. However, there were many emotional and behavioral issues at home. For 9th and 10th grades, this did not affect school performance and so no referral was called for. When absences increased in 11th grade the school initiated a 504 referral which the court found reasonable. Key Quote:

> School staff considering a student's need for either an accommodation or special education services are not charting planetary motion with astronomical instruments, but are instead deciding how best to facilitate educational objectives for a unique child with particular issues in a particular school setting. In this sense, the child-find factors, in my view, should not be regarded as a clockwork armillary sphere. The standard of reasonableness calls for a measure of leeway to explore whether a school's referral occurred at an appropriate time.

Comment: An "armillary sphere" is "a model of the celestial globe constructed from rings and hoops representing the equator, the tropics, and other celestial circles, and able to revolve on its axis."

Boutelle v. BOE of Las Cruces Public Schools, 74 IDELR 130 (D.N.M. 2019)

Citing other circuits, the court treats a child find violation as a procedural matter, meaning that the parent must prove 1) that the child find requirement was violated; and 2) that this caused a denial of FAPE. The court held that the parent failed to produce evidence of a suspicion of disability in the fall of 2016.

CONFIDENTIALITY/FERPA

Magnoni v. Plainedge Union Free School District, 72 IDELR 249 (E.D.N.Y. 2018)

The court held that disclosure of the classroom the student attended is "directory information" that can be disclosed without parent consent. The same applies to the student's favorite snack or candy. The court also confirmed that FERPA is not enforceable through Section 1983. Nor can a party obtain a declaratory judgment in a private suit over alleged FERPA violations.

Comment: Curious about the facts? An anonymous donor was giving toys and candy to some of the kids in the class. When the parents found out that the donor was the father's sister, who they had tried to keep out of their lives, they sued the district over the disclosure of confidential information about the student to the estranged aunt. However all that was disclosed was name, photograph, classroom and favorite snack or candy—all of it "directory information."

DISCIPLINE

A.V. v. Panama-Buena Vista Union School District, 71 IDELR 107 (E.D. Cal. 2018)

The parent argued that the student was entitled to IDEA procedural protections prior to his expulsion from school because the district "had knowledge" that he had a disability. The parent had requested an evaluation on September 15, and the events leading to expulsion occurred after that. This would normally put the student into the category of students who are entitled to IDEA protections due to the district's knowledge of the request. However, on September 22nd, just one week after the request, the district agreed to do the evaluation and provided the parent with a consent form to sign. She never signed it. It was provided in both English and Spanish and the court held that the district went "the extra mile" in an effort to get it signed. Mother never signed it. This removed the student from the "you should have known" category. Key Quote:

> Once the District requested Consent from Ms. Varela, it no longer had a basis of knowledge that A.V. was a child with a disability until his mother provided her Consent for Assessment.

Olu-Cole v. E.L. Haynes Public Charter School, 71 IDELR 194; 292 F.Supp.3d 413 (D.C.D.C. 2018)

The school ordered the student's removal for 45 days due to the student inflicting serious bodily injury on another student. After the 45 days, the parent sought return to the original placement which the school denied. Parent then sought an injunction from court. The court noted that the parent would normally be entitled to such relief, but in this case the school satisfied the standards for a traditional injunction to keep the student out for a few more weeks. A hearing officer's decision on the school's proposed change of placement was expected within that time frame. Safety weighed heavily in the court's analysis.

1. *Comment: This is an excellent illustration of Toolbox principles. The school used Tool #5 (Special Circumstances) to order the 45 day removal. The court properly noted that the school lacked the power to extend the removal beyond 45 days, but that it could seek such relief from a hearing officer (Tool #4) if maintaining the original placement would be dangerous.*

Spring Branch ISD v. O.W., 72 IDELR 11 (S.D. Tex. 2018)

The court held that the district failed to implement the IEP by failing to provide the services set out in the BIP and instead relying on time outs, isolation, restraint and police intervention. The court noted Texas regulations that require that "time out" be included in an IEP or BIP if it is expected that it will be used on a recurrent basis. The court did not dispute the notion that restraint and police interventions are available on an emergency basis, but thought the district overused these tools:

> Either SBISD's failure to follow the procedures in O.W.'s IEP were causing escalations and creating "emergency situations," thereby denying O.W. a FAPE, or the procedures in

> the IEP were inappropriate given SBISD's inability to prevent up to 12 emergency situations in forty days. Either way, SBISD failed to provide O.W. a FAPE.

Salyer v. Hollidaysburg Area School District, 72 IDELR 182 (W.D. Pa. 2018)

The court held that the SRO's attempted pat down search of the student with autism was not unreasonable and did not violate the 4th Amendment. Nor was it unreasonable for the officer to tackle the student when the student attempted to flee the office. The school officials and officer had reasonable, individualized suspicion that the student had a knife and intended to use it. The student's autism did not change the legal analysis. Key Quote:

> The Court further rejects Salyer's argument that his autism rendered the search unreasonable. Salyer failed to cite a single case to support his contention that an individual's mental illness alters the reasonableness inquiry into whether a search of that individual violates the 4th Amendment, and the Court is not aware of any such authority.

J.H. v. Rose Tree Media School District, 72 IDELR 265 (E.D. Pa. 2018)

The court concluded that the district properly conducted the MDR. The evidence, including two videos, showed that the student smashed another student's face into his lunch on the cafeteria table, and then landed a fist punch that broke the other student's nose and eye socket and caused a collapsed nasal cavity and concussion. The school psychologist spent 3-4 hours reviewing records. Two members of the IEP Team reviewed the videos. The student had ADHD and a learning disability. The team concluded and the court affirmed that this attack was planned for hours, if not days. Not a manifestation of disability.

Letter to Fletcher, 72 IDELR 275 (OSEP 2018)

If an expedited due process hearing is called for to appeal a disciplinary matter the hearing is to be conducted within 20 school days after the request is filed. Days when school is not in session (winter break spring break, summer) do not count. So if the hearing is requested when there are fewer than 20 school days left in the year, the hearing may be conducted early the next school year.

Montuori v. District of Columbia, 73 IDELR 12 (D.D.C. 2018)

The court held that the district denied FAPE for a period of time because the staff member responsible for student discipline did not know that the student had a BIP. Regular disciplinary measures, such as ISS, were used when the BIP called for alternatives.

Patrick v. Success Academy Charter Schools, Inc. 73 IDELR 146 (E.D.N.Y. 2018)

This lengthy court decision includes four appendices and 63 footnotes. The court noted that it reviewed over 1,000 student discipline cases. The court held that the plaintiffs properly alleged claims that the charter school failed to provide due process, abused the "special circumstances" provision of IDEA and failed to provide adequate services in the IAES. Thus those claims will

proceed. The student was repeating first grade for the third time, largely due to repeated suspensions from school. Footnote 57 is worth quoting at length:

> ….the Court recognizes the tension between the protection of [the student's] rights under the IDEA and [the school's] interests in protecting their students from harm and themselves from related liability.
>
> The disconnect here is between the "serious bodily injury" exception of the IDEA and the "continuing danger" exception of the 14th Amendment. Under the IDEA, serious bodily injury is defined very narrowly…
>
> By contrast…..the "continuing danger" exception…is clearly a more flexible standard than that for "serious bodily injury."
>
> Therefore, in some circumstances, school could be required to allow a disabled student who did not inflict "serious bodily injury," but is a "continuing danger" to return to school, or else risk being held liable under the IDEA for improperly keeping the student out of school. This potentially puts the school in the difficult position of weighing the safety of the student body against the monetary liability for violating the rights of a disabled student. However, the Supreme Court has held that this tension is an intentional feature of the IDEA.

Letter to Nathan, 73 IDELR 240 (OSEP 2019)

This letter addresses the practical problems that arise when a student falls into the category of general education students who are entitled to the legal protections of IDEA when disciplinary action is proposed. Consider: the district is expected to make a manifestation determination, but the student has not yet been evaluated or determined eligible. How does that work? According to this letter, the MDR timeline may not be postponed until after the evaluation is complete. If the evaluation can be completed prior to the deadline for the MDR (ten school days), there should be no problem. But if the evaluation cannot be completed that quickly, the school must use available information to determine if the behavior of the student was a manifestation of the "suspected disability." The letter also states that parents must be given notice of the procedural safeguards they enjoy in conjunction with proposed disciplinary action. Referring the parent to the website where the procedural safeguards are posted is not adequate:

> …the public agency would not meet its obligation to provide a parent the notice of procedural safeguards by simply directing a parent to the web site. Rather, a public agency must still offer parents a printed copy of the procedural safeguards notice.

R.S. v. Board of Directors of Woods Charter School Company, 73 IDELR 252 (M.D.N.C. 2019)

The student quit coming to school in early December, and by early March, after 49 consecutive unexcused absences, the charter school "disenrolled" the student. The court held that the school was not required to conduct a manifestation determination, but was required to provide Prior Written Notice, which the school failed to do. The court reasoned that unilateral disenrollment is

a "change of placement" thus requiring PWN; but it was not based on a violation of the code of conduct, which is why an MDR was not required.

Comment: The court acknowledged that truancy was listed as a violation of the Code of Conduct, but also noted that the code did not cite "disenrollment" as a possible consequence. Also, it appeared that the failure to attend was more about the parents than the student.

G.R. v. Colonial School District, 74 IDELR 7 (E.D. Pa. 2019)

The school expelled the general education student and the parents challenged the decision, claiming that the student was one that the school should have known to be a student with a disability. The court disagreed. The student was academically successful, but demonstrated some typical middle school organizational problems. However, the parents never asked for an evaluation or asked for special education services. The court noted that the parents knew how special education worked because they had two other children in the program. The court also noted that the concerns that were expressed by parents came three years prior to the incident for which the student was expelled.

E.C. v. USD 385 Andover, 74 IDELR 94 (D.C. Kan. 2019)

The court ruled in favor of the school district in a case where the parent alleged that the district used restraint to deal with behavior that was a manifestation of disability. The parent argued that this amounted to disability discrimination in violation of Section 504 and the ADA. The court refuted that argument, citing 10th Circuit precedent that permits certain types of "regulation" of conduct even when the behavior is a manifestation of disability:

> Even though E.C. alleges that all of his actions were "manifestations of his disability," the 10th Circuit has specifically held that "a student's conduct may be regulated," even if it is a "manifestation of his disability."

Comment: This is a fundamental point that is often overlooked. The manifestation process is required only when the school proposes a disciplinary removal that amounts to a change of placement. Other forms of regulation of conduct are permitted, even when behavior is a manifestation.

Boutelle v. BOE of Las Cruces Public Schools, 74 IDELR 130 (D.N.M. 2019)

The court affirmed the hearing officer's decision that the student's behavior was intentional, and not a manifestation of disability. The behavior was throwing rocks at other students.

N.L. v. Springboro Community City School District, 74 IDELR 161 (S.D. Ohio 2019)

The court held that the district had met its burden of proving that maintaining the current placement was substantially likely to result in injury.

Comment: This was a second grader who had demonstrated violent and disruptive behavior in first grade and second.

Jay F. v. Hart Union High School District, 74 IDELR 188 (9th Cir. 2019, unpublished)

This is an "unpublished" opinion from the 9th Circuit affirming the ruling of the district court that the student's behavior was a manifestation of disability. The district court decision includes more factual background and can be found at 70 IDELR 156.

Comment: What is noteworthy about the case is the court's conclusion that the IEP Team leaned too heavily on the opinion of the school psychologist for its decision. The school psych advised that the behavior of the student was not a manifestation of his emotional disturbance, but the court held that it was due to extensive documentation of similar behavior prior to this incident, all of which was a manifestation.

Olu-Cole v. E.L. Haynes Public Charter School, 74 IDELR 215 (D.C. Circuit 2019)

This is a case where the school removed the student for 45 school days due to "special circumstances" but then sought to continue the student's exclusion beyond the 45 school days. The lower court erred when it put the burden of proof on the parent, to show that the student would suffer irreparable harm if not re-admitted. The Circuit Court held that the burden should have been on the school.

Comment: In .the Toolbox training, we would call this a Tool #4 case. Since the 45 days had run their course, the student was entitled under the law to return to his previous placement. The school could seek to override that by asking for an "expedited hearing" and showing that the student's return to that placement was "substantially likely" to result in injury to the student or others. Thus the school should have carried the burden of proof.

ELIGIBILITY

S.P. v. East Whittier City School District, 72 IDELR 88 (9th Cir. 2018, unpublished)

The court held that the district denied FAPE to the student by failing to identify the student as having a hearing impairment. The district concluded that the student did not qualify as deaf, but the court pointed out that "deaf" and "hearing impaired" are two separate classifications. The district erred by using the definition of "deaf" to determine that the student did not have a "hearing impairment." The district then argued that this was merely a procedural error and it still provided FAPE. The court rejected that argument because of the specific provision in IDEA about IEP content when the student is identified as deaf or hearing impaired:

> In the case of a child who is deaf or hard of hearing, the IEP must consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs."

Letter to Zirkel, 72 IDELR 131 (OSEP 2018)

In this letter, OSEP tells us that states can use the "severe discrepancy" model to determine eligibility of students with a learning disability. If they use that model, the letter says that they do not have to also employ RTI techniques to satisfy 34 CFR 300.309(b)(2). However, they do still have to satisfy 34 CFR 300.309(b)(2). That is the portion of the regulation that requires the team to consider:

> Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

Consideration of this data is necessary "to ensure that underachievement in a child suspected of having a specific learning disability is not to lack of appropriate instruction in reading or math."

Comment: Translation: you can still use the severe discrepancy model if that's OK with your state. And if you do, you don't have to use RTI methods …. but you have to gather data in a way that looks an awful lot like RTI.

Iowa DOE v. A.W., 73 IDELR 76 (S.D. Ia. 2018)

The court ordered the state DOE to pay attorneys' fees and costs of $317,769 due to the state's overly restrictive rules regarding special education eligibility. The district erred in finding the student ineligible, but since the error was based on the district following state criteria, the state was responsible for the fees.

Comment: the district court's decision is very brief, but it affirms the lengthy ruling by the hearing officer which is at 70 IDELR 243. The hearing officer found fault with the state's eligibility criteria. Key Quotes:

> *It is impermissible to say a child is ineligible because their impairment is minor.*
>
> *I conclude that basing determination of whether the child has a specific learning disability on the magnitude of the discrepancy in the child's performance from that of peers functionally imposes a severity test on the disability and is inconsistent with the terms of the IDEA.*
>
> *The fact that the instruction may be delivered…by someone other than a special education teacher does not take it outside the definition of special education.*
>
> *Just because the specialized instruction [of] a student with a disability requires is already part of the general curriculum, considered best practices, or offered to all students with or without disabilities does not mean that such instruction does not constitute special education. Quoting from Letter to Chambers, 59 IDELR 170 (OSEP 2012).*

ISD No. 283 v. E.M.D.H., 74 IDELR 19 (D.C. Minn. 2019)

Here is another case of a gifted student who is never a discipline problem, but fails to attend school. The school did not refer the child for testing despite years of excessive absences. When the parents made a referral, the school conducted an evaluation but determined the student did not qualify due to lack of educational need. The court disagreed:

> The Students' mental health issues—her several diagnoses as of May 2017—appear to have directly impacted her attendance at school. As the ALJ noted, there is no evidence in the record that anything but her mental health issues caused her absenteeism. The District contends that the Student's mental health issues and absenteeism did not adversely impact her educational performance because she excelled academically when she attended school. For the same reasons the ALJ provided, the Court also rejects this argument.

Lubbock-Cooper ISD v. Sherri D., 74 IDELR 17 (N.D. Tex. 2019); and Dennis v. Lubbock-Cooper ISD, 74 IDELR 18 (N.D. Tex. 2019)

A special education hearing officer ruled against Lubbock-Cooper in two cases involving siblings. One decision was 36 pages long, fortified by 327 footnotes. The other was 34 pages long, with 292 footnotes. The analysis by the hearing officer was long, but it was also wrong. The federal court reversed both of these decisions. In both cases the court noted the extensive efforts by LCISD staff to collaborate with the parents. Key Quotes:

> The District relates that it spent an inordinate amount of time dealing with complaints by L.D.'s parents in relation to other parents and students involved in the ARD process. The record clearly shows that L.D.'s parents were involved in the ARD process and, in fact, helped write the goals and plan for L.D.'s successful year in education.
> …the record shows substantial compliance with the statute's notice provisions occurred and the parents participated in the lengthy ARD meetings and clearly knew what was going on in relation to the entire process and often dictated and/or controlled the process.

Much of the first case was about whether or not the student should have been identified as having a learning disability. The district carried the student as OHI (Other Health Impaired) and served him in the mainstream. There the student did very well:

> The record indicates, and it is undisputed, that L.D. obtained an "A Honor Roll" average (with the exception of one 89 average in a class) for the relevant school year period (August 2016-May 2017). Further, L.D. attained this commendable achievement while being educated in the mainstream non-special education classroom setting.

That's why the school people believed the student did not qualify as SLD. The court agreed.
The second case was about FAPE for a student with multiple disabilities. Reversing the hearing officer, the court held that the district provided FAPE. As to the alleged procedural errors by the school, the court offered this interesting observation:

> Regardless, the IDEA was not adopted as a "gotcha" procedural trap for those attempting to properly educate students.

Comment: It's unfortunate for the district that it had to take these cases to the federal court to overturn the erroneous rulings by the hearing officer. A student who is achieving well in general education classes in all subjects does not demonstrate the kind of "underachievement" or "pattern of strengths and weaknesses" that is characteristic of a learning disability.

Lisa M. v. Leander ISD, 74 IDELR 124 (5th Cir. 2019)

The court considers what kind of evidence should be considered, and draws a sharp distinction between disputes over eligibility vs. disputes over the appropriateness of an IEP. With regard to eligibility, the only evidence a hearing officer or court should consider is the evidence that was available at the time of the eligibility decision:

> While judicial review unavoidably looks backward, our task is to assess eligibility with the information available to the ARD committee at the time of its decision. An erroneous conclusion that a student is ineligible for special education does not somehow become acceptable because a student subsequently succeeds. Nor does a proper finding that a student is ineligible become erroneous because the student later struggles.

Comment: This did not help the district's case. The district was defending its "ineligible" decision in part based on the academic success the student had after that decision.

EVALUATIONS

Lawrence County School District of Lawrence County, Arkansas v. McDaniel, 72 IDELR 8 (E.D. Ark. 2018)

The court affirmed the IHO decision that the district denied FAPE by failing to adequately evaluate the student. The student received 504 services, was diagnosed with ADHD and autism, was recommended for the GT program and had strong grades and scores on standardized tests. The court carefully limited its ruling to the scope of the evaluation, which the court deemed inadequate. The court found fault with the belief of some school staff that the student could not possibly be eligible under IDEA due to his strong academic performance. Key Quotes:

> LCSD officials mistakenly assume that children with disabilities who perform well academically do not require special education. Although this position comports with common sense and is favored by this judge, it contravenes the IDEA's implementing regulations and guidance from the U.S. DOE.

E.S. v. Conejo Valley USD, 72 IDELR 180 (S.D. Cal. 2018)

The court held that the district failed to conduct a full, individual, initial evaluation by failing to do a FBA. The court held that the school had sufficient information about behavioral issues to require an FBA.

Comment: the court ignores the fact that there is a federal regulation that dictates when an FBA must be done, and that the facts in this case do not fit that situation. Although the school did not conduct an FBA it did conduct evaluations sufficient to classify the student as having an emotional disturbance, and to support various behavioral interventions in the IEP. It's hard to see what an FBA would have accomplished that the existing evaluations did not.

Letter to Anonymous, 72 IDELR 222 (OSEP 2018)

A review of existing evaluation data (REED) is to be done by the IEP and parent, not solely by a school psychologist.

Pottsgrove School District v. D.H., 72 IDELR 271 (E.D. Pa. 2018)

The hearing officer ordered the school to have a BCBA conduct an FBA. The court held that this was an error. FBAs are optional, not required; there is no legal mandate as to who can conduct an FBA; there is no statutory requirement that an FBA must be based on direct observation.

Albright v. Mountain Home School District, 73 IDELR 93 (W.D. Ark. 2018)

The district conducted an FBA without parent consent and without seeking to override the parent's refusal to consent. The court held that even if this is a procedural violation it made no substantive difference.

Comment: this ruling seems curious until you read the footnote:

> *It is a rare and perhaps altogether unique occasion for the undersigned to preside over a lawsuit in which a plaintiff complains of a defendant's decision not to sue the plaintiff. The Court is left with the distinct impression that literally the only way the District could have avoided this lawsuit would have been to turn the IEP team effectively into a team of one—consisting solely of Ms. Albright—and to consent in every single respect, whether material or immaterial, to Ms. Albright's IEP wishes. But that is not what the IDEA requires. Rather, an IEP team must include not only the parents of the child with a disability, but also educators and school officials, along with other individuals, and "collaboration between IEP team members" is an explicit goal of the IDEA.*

D.O. v. Escondido USD, 73 IDELR 180 (S.D. Cal. 2018)

A four-month delay in assessing a student for autism denied FAPE to the student. The child's private therapist informed the IEP Team in December that she had done an evaluation of the student and found him to be on the spectrum. She promised to deliver the evaluation report to the mother who would pass it on to the school. But this did not happen, and the school failed to follow up to seek its own evaluation of possible autism until April—four months later. The court held that this was an unreasonable delay. The court discounted the mother's failure to deliver the report, noting that "the onus is on the District, not the parent, to assess children in all areas of a

suspected disability." In accordance with 9th Circuit precedent, the court held that the failure to obtain comprehensive evaluation data amounted to a denial of FAPE.

In re: Butte School District No. 1, 73 IDELR 198 (D.C. Mont. 2019)

The court held that a FBA is not an "evaluation" under IDEA. The court noted that "evaluations" under IDEA are aimed at determining eligibility and the nature and extent of special education and related services. A FBA, on the other hand, has a more narrow focus on behavior.

Rose Tree Media School District v. M.J., 74 IDELR 15 (E.D. Pa. 2019)

The court held that the school failed to evaluate the student in all areas of suspected disability and failed to adequately evaluate her for an emotional disturbance. The record showed that OHI was a suspected disability, but the district failed to produce evidence that it evaluated the student for it. As to the E.D. evaluation the school found that the student did have an emotional disturbance, but was not eligible for services due to her strong academic record. Although the student did have a strong academic record, she was having a lot of trouble with school attendance. Key Quote:

> The District here seemingly made no effort to explore a causal relationship between M.J.'s emotional functioning and her attendance, which the District itself points out was adversely affecting her educational performance.

ISD No. 283 v. E.M.D.H., 74 IDELR 19 (D.C. Minn. 2019)

The court held that the school's evaluation failed to comply with legal standards. The school argued that it could not conduct systematic observations of the student in the classroom because the student rarely attended. The court turned this on its head:

> Although the Student's absenteeism was the primary barrier to conducting systematic observations, it has also been one of the most visible symptoms of the Student's disability.

Comment: Unfortunately, the court did not offer any suggestions for how the school can observe in the classroom a student who is never in the classroom.

Doe v. Cape Elizabeth School Department, 74 IDELR 95 (D.C. Me. 2019)

The school failed to meet the deadline for the initial evaluation, but the court excused it because the parents failed to make the student available. Key Quote:

> The Does were aware of [the school's] request to evaluate Jane and despite this, failed to produce Jane for evaluation….Their contentions imply that it was [the school] who should have ensured Jane's availability for evaluation; however, this stance flies in the

> face of the statutory burden clearly placed on parents "to produce the child for the evaluation."

The school retained an independent psychologist to conduct an FBA but the parents gave only limited consent to this and prohibited any communications with the student or clinical evaluators without the parents being present. The psychologist refused to conduct the FBA under such limitations. The court described the parent's conditions as placing "an untenable condition upon their consent."

Comment: The parents failed to get the student to school for an evaluation, and then unilaterally placed her in a residential facility in Utah. The court noted that "While Jane was unavailable and out of the state, [the school] was under no obligation to conduct an evaluation." Despite that, the school contracted with a psychologist in Utah to conduct an evaluation. Being reasonable is always a good idea.

Boutelle v. BOE of Las Cruces Public Schools, 74 IDELR 130 (D.N.M. 2019)

The school proposed to do a psychological screening of the student, but held off on that at parent request because the parent was already in the process of obtaining a full psychological evaluation. Later, the parent claimed that the school forced him to purchase his own evaluation. The court disagreed based on the facts in the record. Key Quote:

> To begin, the school's actions in accepting and then incorporating into the IEP the private evaluation procured by Plaintiff, in lieu of performing its own evaluation, did not result in substantive harm to [the student] or Plaintiff.

Letter to Mills, 74 IDELR 205 (OSEP 2019)

If a school responds to a parent request for an evaluation by conducting a screening, it must give the parent "prior written notice" of its decision about the evaluation. The school may conduct the screening, but this cannot justify a delay or denial of the evaluation. So if the school is not going to conduct the evaluation, it must give PWN to explain its decision. This letter also notes that PWN regarding an evaluation does not have to specify the person who will complete the evaluation. With regard to evaluations of a possible visual impairment, the evaluation may be made "by a medical professional such as the child's pediatrician, an ophthalmologist, or optometrist."

E.G. v. Elk Grove USD, 74 IDELR 254 (E.D. Cal. 2019)

The court upheld the ALJ decision allowing the school to re-evaluate the student even though the parents had not consented. Key Quote:

> Simply put, if Parent wants Plaintiff to receive special education services, Parent must permit reassessment when warranted.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

J.L. v. Wyoming Valley W. School District, 71 IDELR 142 (3rd Cir. 2018, unpublished)

The suit alleged that the student was injured while receiving special education transportation services due to the actions of a van driver. The court held that the gravamen of the complaint was about the denial of FAPE under IDEA, and therefore, exhaustion was required. The fact that the plaintiff sought money damages for physical injuries did not change that. Case dismissed.

S.D. v. Haddon Heights Board of Education, 71 IDELR 143 (3rd Cir. 2018, unpublished)

The court dismissed the suit for failure to exhaust administrative remedies under IDEA. The student was served under a 504 plan and the suit made no mention of IDEA. However, the gravamen of the complaint, according to the court, was the denial of appropriate educational services. Plaintiff argued that he would not have been eligible under IDEA, but the court noted that asthma counts as an "other health impairment" and that it appeared from the record to adversely affect his educational progress.

Comment: The parents also argued that if they were required to exhaust IDEA procedures, didn't that mean that the district automatically violated Child Find? The court rejected that argument without much analysis. Expect it to come up again.

A.P. IV v. Lewis Palmer School District No. 38, 72 IDELR 2 (10th Cir. 2018, unpublished)

The case was dismissed for failure to exhaust IDEA administrative remedies. The student was identified under 504 but sought relief for educational injuries that could have been addressed via IDEA. The court also held that filing an OCR complaint did not satisfy the exhaustion requirement. On appeal, the student raised arguments that had not been raised below, and the court held that they were waived.

Prunty v. Desoto County School Board, 72 IDELR 116 (11th Cir. 2018, unpublished)

This is another case that applies *Napoleon v. Fry* re: exhaustion of administrative remedies. The court dismissed the case because the gravamen of the complaint concerned a denial of FAPE, and the plaintiff had not exhausted administrative remedies.

Sophie G. v. Wilson County Schools, 72 IDELR 143 (6th Cir. 2018)

The court held that parents were not required to exhaust their claim of disability discrimination when their seven-year old daughter was denied admission to an after school care program because she was not toilet trained. The court analyzed the *Fry* case and held that this claim was separate and apart from a denial of FAPE claim. Thus exhaustion was not required.

Comment: the more interesting and more commonly presented issue is whether or not the child care facility can enforce this rule. The court does not answer that question.

Nelson v. Charles City Community School District, 72 IDELR 202 (8th Cir. 2018)

The court held that the parents were required to exhaust administrative remedies under IDEA. Having not done so, the case was dismissed. The student was never identified under IDEA or Section 504 but the parents indicated that she needed accommodations for her health issues which caused her to miss school to the point that truancy proceedings were brought. The local district acknowledged that it could not adequately meet the student's needs and encouraged the parent to enroll in an online school. The parent attempted to do so but was turned down for reasons not relevant to this case. The parent then sued under 504, alleging disability discrimination. The court held that the claim was primarily about a denial of FAPE and should have been brought via a due process hearing. The fact that the student was not ever identified under IDEA did not matter.

J.A. v. Corpus Christi ISD, 73 IDELR 21 (S.D. Tex. 2018)

The court held that the plaintiff was not required to exhaust his claims for damages under ADA/504 and Title IX because such damages are not available administratively and thus, exhaustion would have been futile.

Comment: That's not how most courts look at it.

Patrick v. Success Academy Charter Schools, Inc. 73 IDELR 146 (E.D.N.Y. 2018)

The court held that plaintiff was not required to use IDEA procedures to exhaust the claim under ADA/504. The plaintiff alleged that the school repeatedly and unnecessarily called EMS to have the student removed, applied disciplinary policies in a discriminatory fashion, and falsely asserted that the student had a bedbug on his clothing, thus requiring extermination of the student's home.

Beam v. Western Wayne School District, 73 IDELR 147 (M.D. Pa. 2018)

In a student suicide case, the court held that the parents were not required to exhaust administrative remedies under IDEA due to the student's death. The court cited several other district court cases that came to the same conclusion.

Pettus v. Conway School District, 73 IDELR 176 (E.D. Ark. 2019)

The court held that the plaintiff was not required to exhaust IDEA procedures before seeking an injunction to permit her to bring a service animal to school.

A.H. v. Clarksville-Montgomery County School System, 73 IDELR 237 (M.D. Tenn. 2019)

The court held that the parent was not required to exhaust her administrative remedies because doing so would have been futile. The complaint alleged a systemic refusal to provide a general education classroom for a preschooler whose IEP called for a general education classroom. The complaint alleged that the district did not have such a classroom and refused to provide for one.

Fry v. Napoleon Community Schools, 73 IDELR 253 (E.D. Mich. 2019)

After remand from the Supreme Court to the 6th Circuit, and then from the 6th Circuit to the district court, and after further discovery, the court held that the parents did not have to use IDEA procedures to exhaust their administrative remedies before filing suit under ADA/504. The parents sought the use of a service dog as an accommodation under ADA/504, and expressed no dissatisfaction with the IEP or special education services. The court applied the two hypothetical questions SCOTUS suggested: could the plaintiff have brought this case if the service animal was turned down at another public facility, such as a library? And could an adult at the school bring the same cause of action? The answer to both questions favored the view that exhaustion was not required.

Comment: This is only a federal court decision, but due to the fact that it is the same case as the one decided by SCOTUS it will draw a lot of attention and will add momentum to the use of service animals as ADA/504 accommodations. Part of the school's rationale was that the IEP called for an aide, and thus the student did not need the dog. But that was a FAPE analysis, not an access analysis under ADA/504.

C.M. v. Cedar Park Charter Academy PTO and Priority Systems, 74 IDELR 98 (W.D. Tex. 2019)

The court held that the plaintiff was not required to exhaust administrative remedies under IDEA before bringing a suit under Title IX alleging student-to-student sexual harassment. The plaintiff was a student with a disability, but the court pointed out that the alleged sexual harassment had nothing to do with the boy's disability. A non-disabled student could have brought the same kind of lawsuit without pursuing an administrative hearing. Key Quote:

> C.M.'s Title IX claim is thus unrelated to his disability. C.M.'s complaint asserts that he was denied an educational opportunity—the opportunity to attend Priority Systems Charter School—as a result of student-on-student sexual harassment. These allegations are materially different from alleging that Priority Systems Charter School denied him a FAPE. C.M. does not challenge his placement or the level of services provided by his IEP. Instead, the core of C.M.'s complaint concerns his harassment by [the female student] and the Defendants' failure to intervene in spite of C.M.'s complaints.

J.A. v. Monroe Township Board of Education, et. al., 74 IDELR 102 (D.C.N.J. 2019)

The hearing officer had not issued a decision even though the due process hearing was requested more than a year earlier. Despite this major violation of the 45-day timeline, the court held that the plaintiffs still had to exhaust their administrative remedies. However, the plaintiffs also filed a class action, alleging that the state was systemically violating the timelines in the law by using a state agency that it knew was incapable of satisfying the deadlines. Since this was an allegation of a systemic defect that could not be effectively addressed through the administrative process, exhaustion was not required.

Comment: What's going on in Jersey? The court noted that New Jersey Special Education Practitioners had created a task force which issued a report stating that the average time for a due process hearing decision to be issued was 312 days.

McMillen v. New Caney ISD, 2019 WL 4855234 (5th Cir. 2019)

The 5th Circuit held that exhaustion is required, even when the only remedy sought—money damages—is not available under IDEA. The law says that administrative remedies must be "exhausted" if the suit seeks "relief that is also available under this subchapter." Here, the court drew a distinction between the "remedy" preferred by the plaintiff vs. "relief that is also available." Key Quote:

> [Most courts] read "relief available" under the IDEA "to mean relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." According to this view, because the IDEA can remedy the failure to provide a blind student with a reader by giving her one, a suit seeking damages for such a failure must first exhaust the IDEA's administrative procedures.

Neske v. NYC DOE, 74 IDELR 249 (S.D.N.Y. 2019)

The court holds that a suit seeking to enforce the "stay put" requirement does not have to be exhausted through administrative proceedings.

FAPE

K.D. v. Downingtown Area School District, 72 IDELR 161 (3rd Cir. 2018

The court affirmed decisions by the hearing officer and the district court that the student received FAPE and thus parents were not entitled to tuition reimbursement. The court held that *Endrew F.* did not change the standard for FAPE in the 3rd Circuit. Key Quotes:

> IEPs must be reasonable, not ideal. Though her parents argue otherwise, K.D.'s slow progress does not prove that her IEPs were deficient.
>
> While courts can expect fully integrated students to advance with their grades, they cannot necessarily expect the same of less-integrated students…..[K.D.] received supplemental learning support for much of the day. So there is no reason to presume that she should advance at the same pace as her grade-level peers.

The parents relied on a guidance letter issued by OSERS in 2015, which stated that "Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade level content and make significant academic progress when appropriate instruction, services, and supports are provided." The letter added that "the annual goals…should be sufficiently ambitious to help close the gap" between the child's current and grade level achievements. The court noted that the letter was not legally binding, or even persuasive:

> And this guidance letter does not address the IDEA's language, let alone parse it.

The parents were "overreading" the letter, said the court, noting that the "close the gap" language was an aspirational goal, not a realistic target or a legal requirement.

The opinion of the district court also included some helpful discussion about the impact of *Endrew F.* Key Quote:

> The focus on a child's "progress" has led to confusion in our precedent. As clarified recently by the Supreme Court, and earlier by the Third Circuit, the confusion boils down to a distinction between two types of students: (1) a child who is progressing smoothly, grade-to-grade, through school; and (2) a child with a learning disability or cognitive limitation who is not progressing grade-to-grade through school. With the former student, it makes sense to view academic progress, grades, and test scores as evidence that an IEP is reasonably calculated to confer a meaningful educational benefit. But that is specifically because, with a child not afflicted with a learning disability, that is what should be expected. With the latter student, however, our precedent has warned against engaging in a retrospective analysis of academic achievement in determining the appropriateness of an IEP. This is specifically because, unfortunately, it cannot always be reasonably expected that progress will occur in such a lock-step manner when a child is suffering from a learning disability.

In this case, the court noted that the child's progress "was slow compared to her peers" and "Sometimes she would take a few steps forward, and then one step back. In light of K.D.'s severe learning disability in the areas of comprehension, reading, and writing, this kind of fragmented progress could reasonably be expected." 70 IDELR 203 (E.D. Pa. 2017)

E.F. v. Newport Mesa USD, 71 IDELR 161 (9th Cir. 2018, unpublished)

The 9th Circuit had previously ruled in this case that the district provided FAPE. Then SCOTUS decided the *Endrew F.* case and sent this case back to the 9th Circuit for reconsideration. Here, the court holds that *Endrew* clarified, but did not change, the FAPE standard that had been used in the 9th Circuit. Therefore, the decision in favor of the district was affirmed.

Endrew F. v. Douglas County School District RE 1, 71 IDELR 144; 290 F.Supp.3d 1175 (D.C. Colo. 2018)

This is the district court's follow up on the case decided by the Supreme Court. SCOTUS remanded the case for consideration of whether or not the proposed IEP met the standard the Court laid out by which IEPs must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The court held that the IEP offered by the district did not satisfy the standard. In part this was based on the failure of the district to have in place a behavior plan designed to reduce the adverse effect of inappropriate behaviors.

F.L. v. Board of Education of the Great Neck Union Free School District, 72 IDELR 232 (2nd Cir. 2018)

This is another case where the court affirms that the district provided FAPE even though the student's progress was slow and less than desired by the parent. The court cited *Endrew F.* for the notion that an IEP need not aim at grade level achievement.

Johnson v. Boston Public Schools, 73 IDELR 31 (1st Cir. 2018)

The court held that *Endrew F.* did not change the standard for FAPE in the 1st Circuit. Based on that standard, the student in this case received FAPE, despite slow progress. Key Quote:

> To the extent that [the parent] implies that "slow" progress is, in and of itself, insufficient to constitute a "meaningful educational benefit," we cannot agree. Instead, the relationship between speed of advancement and the educational benefit must be viewed in light of a child's individual circumstances.

A.L. v. Alamo Heights ISD, 73 IDELR 71 (W.D. Tex. 2018)

The court upheld the IHO decision that the district provided FAPE. The court used the four factors from *Michael F.* placing emphasis on the fourth factor—evidence of progress:

> At the end of the 2014-15 school year, A.L. passed all his classes, including Pre-AP Spanish, Pre-AP English, Pre-AP Chemistry and AP World History, while receiving no incompletes.

S.C. v. Oxford Area School District, 73 IDELR 90 (3rd Cir. 2018)

In 9th grade the student's GPA was 0.97. In 10th grade it was 2.04. In 11th grade it was 2.19. The court affirmed decisions by the ALJ and the district court that the school provided a FAPE that satisfied the *Endrew F.* standard. Key Quotes:

> But reasonable does not mean perfect. A program need not and cannot guarantee a student's academic progress.
> S.C. kept pace with his grade level, went from failing several of his classes to passing all of them, and increased his GPA. And he achieved all that despite missing dozens if not hundreds of classes each year, including many of his academic-support classes.

Comment: Rulings like this one will be very disappointing to parents who thought that SCOTUS significantly raised the bar for FAPE in the Endrew F. decision.

E.R. v. Spring Branch ISD, 73 IDELR 112 (5th Cir. 2018)

The court held that the SCOTUS ruling about FAPE in *Endrew F. v. Douglas County* is not a game changer for us in the 5th Circuit as it is consistent with the way we have always interpreted what "FAPE" means. Key Quote:

> Our court's four *Michael F.* factors and the Supreme Court's holding in *Endrew F.* do not conflict…..*Endrew F.* provides more clarity for what constitutes an appropriate IEP, but it does not render the *Michael F.* factors inapplicable. Both fit together.

The court concluded that the standard for FAPE in the 1st Circuit did not change with the *Endrew F.* decision. The court held that *Endrew's* standard for FAPE was consistent with prior 1st Circuit precedent. The case was about whether or not the student required special education services in math. Based on testimony from several teachers, the hearing officer concluded that the student did not. The court affirmed.

A.W. v. Tehachapi USD, 74 IDELR 11 (E.D. Cal. 2019)

The court held that the student received FAPE, even though the school failed to implement one component of the IEP. The IEP called for a personal aide who would be supervised two hours/week by a BCBA. The school provided the aide, but for three months failed to provide the supervision by a BCBA. The court held that this did not impede the student's right to FAPE. The only testimony that the student required the BCBA supervision came from the mother who "is not a behavior or education specialist." In contrast, the school produced testimony from a school psychologist that the supervision by a BCBA was not necessary. The court also noted that the student made progress on behavioral goals, albeit less than the parent would have liked.

E.M. v. Lewisville ISD, 74 IDELR 61 (5th Cir. 2019)

In a very short opinion, the 5th Circuit affirmed decisions by the hearing officer and the district court in favor of LISD. The district discontinued sign language services and articulation goals for the student over parental objections. All three tribunals found that these decisions were based on the evaluation information and recommendations of school staff based on experience with the child. Therefore, the IEP offered by the district, even with these changes, offered FAPE.

C.D. v. Natick Public School District, 74 IDELR 121 (1st Cir. 2019)

The court held that *Endrew F.* does not require courts to separately consider whether an IEP is "appropriately ambitious" and contains "challenging objectives." Instead, the FAPE standard is "progress appropriate in light of the child's circumstances."

Comment: Courts will not look at it that way but IEP Teams should.

IEEs

Letter to Anonymous, 72 IDELR 251 (OSEP 2018)

IDEA does not address the right of parents to have third parties observe the child in the classroom. However, if the parent is obtaining an IEE, a classroom observation may be necessary. In that event, the school must permit the independent evaluator enough time to observe the child as is necessary to conduct the evaluation in a way that satisfies district criteria.

S.S. v. Hillsborough Township Public School District, 73 IDELR 210 (D.C.N.J. 2019)

The court held that the parents were not entitled to reimbursement for the cost of the IEE. The parents had given consent for a three-year reevaluation, but before the re-eval was done they requested an IEE. The district turned it down because it had not yet done its own evaluation. The parents then revoked consent for the district's evaluation, obtained the IEE and sought reimbursement. Nope. Moreover, because the IEE request was invalid, the district was not required to seek a hearing to prove the appropriateness of its own evaluation. Key Quotes:

> The plain language of 34 CFR 300.502(b) and [state regulations] makes clear that parents are only entitled to an IEE at the district's expense when they disagree with an evaluation or reevaluation that has been completed, which has not occurred in this instance.
> Furthermore, when an IEE request is invalid, a school district is not required to file for due process within 20 days.

D.S. v. Trumbull Board of Education, 73 IDELR 228 (D.C. Conn. 2019)

The school conducted an FBA. The parents disagreed with it and requested a publicly funded IEE. But the IEE request included a broad range of other tests, well beyond an FBA. The court held that the parents were only entitled to an IEE regarding the FBA. Key Quote:

> I conclude that a parent's statement of disagreement with a limited assessment does not entitle a parent to insist that the school district pay for an IEE to conduct additional testing or assessments beyond the scope of the assessment with which the parent has disagreed.

When the parent requested the additional IEEs the school responded by offering to conduct its own assessment in those areas. The parents revoked consent for any such testing to be done by the school. The court spotted this as a "strategic" but unwise decision:

> …what is surprising is that the parents did not simply consent to and wait for the school district to conduct its own triennial evaluation that was scheduled for [five months later] (or even request that the school district accelerate this evaluation). Instead, as noted above, the parents strategically withdrew their consent to additional testing proposed by the school district…For purposes of their due process hearing and this litigation in general, the parents would be in a far different and stronger position had they consented to a broad range of testing…and then asserted their right to a comprehensive IEE if they disagreed with the substance of the school district's comprehensive evaluation.

The court also held that the two-year statute of limitations applied to an IEE request.

Letter to Zirkel, 74 IDELR 142 (OSEP 2019)

OSEP advises that a parent would be entitled to an IEE if the parent disagrees with an evaluation that determines that the student is not eligible. If, in a situation like that, the parent obtains an evaluation at the parent's expense, the IEP Team would be required to consider it.

A.H. v. Colonial School District, 74 IDELR 219 (3rd Cir. 2019, unpublished)

The court denied the parent's request for funding of an IEE. The most interesting part of the decision is the explanation for why the hearing panel discounted the testimony of the parent's expert:

> …she had neither met nor observed Student, was not aware of Student's programs in her current placement, and was not familiar with the most recent data collected for Student.

L.C. v. Alta Loma School District, 74 IDELR 261 (C.D. Cal. 2019)

The court held that the district unnecessarily delayed in making a request for hearing to challenge the request for an IEE. The district agreed to the IEE, subject to its criteria, which capped the cost at $900. The evaluator chosen by the parents charged $2400—but this information was provided only to the school, not the parents. The school informed the parents that the cost of the IEE was excessive, and it would not fund it. Considerable back and forth ensued. The parents never gave the school an explanation of "unique circumstances" that would justify the excess costs, but the school never informed the parents of the actual numbers—what the cost cap was, and how much the IEE was over it. The parents asked about that, and the school never directly answered the questions. Ultimately the school sought a due process hearing to challenge the IEE request, but the parents argued that the school waited too long. The ALJ held that the delay was not too long, but the federal court reversed that. The court held that the district committed a procedural violation by delaying too long in asking for a hearing. However, the record did not establish that this procedural error caused a denial of FAPE, so the case was remanded to the ALJ. While both sides withheld important information from the other, the court pointed out that the district bears the responsibility for clear communication about this. Key Quotes:

…but the District did not explain what the cost maximum under the Policy was, nor how much Dr. Stephey's evaluation would exceed that maximum. That missing information is obviously vital to the discussions between the District and Plaintiff's parents….

….a school district certainly can be considered to have unnecessarily delayed in funding an IEE or filing for due process by obfuscating crucial information relevant to the parents' request for an IEE after the parents ask for that information.

Again, the onus is on the District, not the parents, to ensure that the IEE dispute is resolved without unnecessary delay.

Comment: A lot of fuss and bother over a small sum of money. As usual, things got more complicated when both sides lawyered up and the arguments shifted to terms of a settlement agreement, including indemnity, release and attorneys' fees. The decision recounts the extended correspondence in detail, including the attorneys' fees requests that creeped up from $1000 to close to $10,000 as the negotiations dragged on.

IEPs

Anchorage School District v. M.G., 72 IDELR 124 (D.C. Alaska 2018)

This was is about follow through and implementation of an IEP. The IEP called for a residential placement, with the specific location to be "administratively determined." This was in May, 2016. Five months later the district had not found a location. The mother placed the child at the Perkins School for the Blind in Massachusetts and the court approved of that placement, ordering the district to pay the costs.

Comment: the court's opinion suggests that the school anticipated that Perkins would be the placement until it found out that Perkins was not Medicaid eligible and was way more expensive than other residential schools for the blind. The court noted that cost would have been an appropriate factor if the district had located another school that could fully meet the student's needs. Some of the possible schools lacked a weekend program, which the student needed. Some, like Texas School for the Blind, did not accept students from out of state. Perkins was the only placement that worked. Thus a student from Alaska was placed in Massachusetts. In a later ruling, the 9th Circuit affirmed that Perkins would be the "stay put" placement.

Pottsgrove School District v. D.H., 72 IDELR 271 (E.D. Pa. 2018)

The court faulted the district for including a toileting goal in the student's IEP without any plan for how the goal would be achieved. Key Quote:

> The Court is reminded of the proverb, sometimes attributed to Antoine de Saint Exupery, and lately popularized by Coach Herm Edwards, that "a goal without a plan is a wish."

A.L. v. Alamo Heights ISD, 73 IDELR 71 (W.D. Tex. 2018)

The court held that the district had an IEP in place at the beginning of the school year, as required by law. The problem was that the parent disagreed with the proposed IEP at an ARDC meeting held just before the start of the school year. So the district provided Prior Written Notice, informing the parent that the previous year's IEP would be continued until the ARDC could agree on new goals. Good enough:

> Taken together, this evidence suggests to the Court that there was an IEP in place at the beginning of the 2015-16 school year—the 2014-15 IEP—and Parent had notice of its implementation.

E.R. v. Spring Branch ISD, 73 IDELR 112 (5th Cir. 2018)

The parents argued that the IEP was fatally flawed because it only addressed the student's "critical needs" and did not include every grade level TEKS standard for 4th grade. But the court noted that "providing [the student] with every single TEKS strand and standard would not have been individualized. To the contrary, excessive goals could have put her in a position where success would have been exceedingly unlikely."

Comment: The IEP must be "appropriately ambitious." Both of those words are important. This seems to be a case where the parents sought an IEP that would have been overly ambitious…inappropriately ambitious.

Colonial School District v. G.K., 73 IDELR 224 (3rd Cir. 2019)

The court ruled (1) that the hearing officer erred by relying on post-IEP progress in determining if the IEP was appropriate; (2) that some level of subjectivity in assessing progress is appropriate, and inevitable; and (3) that the absence of measurable goals is a procedural error, not a substantive one.

R.E.B. v. State of Hawaii DOE, 74 IDELR 125 (9th Cir. 2019, unpublished)

The court held that IDEA "does not require that an IEP list the specific school where summer transition services till take place." Nor does it require a listing of the qualifications of personnel who will serve the student. Furthermore, it was permissible for the IEP to give the teachers some discretion to decide when the student would participate with non-disabled peers on certain activities. Key Quote:

> Given J.B.'s autism, it was reasonable for the IEP team to conclude that he would be able to participate successfully with nondisabled peers for some of those activities but not for others, and that those activities that would be proper for J.B. could not be determined at an IEP meeting months or years before the activities happened.

Comment: The IEP called for the student to participate in activities "as appropriate" and the court emphasized that this was about "experiments, simulations, and field trips." The court was OK with this "nuanced determination." The term "as appropriate" should never be used in connection with related services which must be detailed in the IEP regarding "frequency, duration and location." But field trips and experiments are another matter.

L.J. v. School Board of Broward County, Florida, 74 IDELR 185 (11th Cir. 2019)

The 11th Circuit joins the 4th, 5th, 8th and 9th in holding that a failure to implement an IEP is a denial of FAPE only when the school "materially" fails to do so. Key Quote:

> The plaintiff must prove more than a minor or technical gap between the plan and reality; de minimis shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's IEP.

Here, the court held that the school passed this test. Many of the services that the school failed to provide were due to the student's refusal to attend school. That refusal was not due to the failure to implement the IEP.

Comment: This is an important high level court decision that includes a good discussion of the distinction in cases between those that are about the IEP as written vs. the IEP as implemented. Thus it makes for important reading for lawyers. However, it is also an example of how broken our system of legal review is. This decision from 2019 is about an IEP that was written for the 2005-06 school year. Due to continuous litigation, that IEP (for third grade) remained in effect due to "stay put." The administrative law judge conducted a hearing that lasted 18 non-consecutive days over a two year period. That hearing concluded in October, 2009, but it was more than a full year later when the ALJ issued a decision. The case then went to federal district court, which made its ruling six years (SIX YEARS!!!) later. Then it went to the Circuit Court. The Court noted this:

> *As a result, L.J.—now 26 years old—is long gone from the Broward County school system, and any compensatory education he could receive from this case is surely less valuable than it would have been during his middle school years.*

No kidding. This one scores high on the Sheesh-O-Meter.

Edmonds School District v. A.T., 74 IDELR 218 (9th Cir. 2019, unpublished)

This case provides a good example of how inattention can render an IEP inappropriate. Key Quote:

> Over the course of the two years leading up to A.T.'s enrollment at Provo [a private residential facility] A.T.'s grades dropped dramatically, and he received more than 20 formal disciplinary offenses at school, including two emergency expulsions that were later converted to long term suspensions. Nevertheless, the District did not formally reevaluate A.T. and his IEP essentially remained the same.

Comment: The district also argued that the student's truancy excused its failure to modify the IEP. Nope:

> We are skeptical that this could be a valid excuse in any case, but even if it could be, it is not a valid excuse here. Before A.T. fully stopped attending school, the District had almost two years of A.T.'s performance at school on which to base a new educational plan, as well as a report with an entirely new mental health diagnosis for A.T.

Spring Branch ISD v. O.W., 2019 WL 4401142 (5th Cir. 2019)

Federal regulations permit parents and schools to modify a student's IEP without the formality of an ARDC meeting, if there is a "written document" to that effect. 34 CFR 300.324(a)(4). In its recent decision, the 5th Circuit cites one modification that was properly done, and one that was not.

On May 6, 2015, the school and the mother agreed in writing that the student's school day should begin at 9 a.m. instead of the normal 7:30 a.m. No IEP Team meeting was held, and this shortened the student's school day by 90 minutes, but the court was OK with it because the

"formal written document" that the school and mother signed satisfied the requirements of the law.

Twelve days later the parties agreed that the school day for the remaining 11 days of the school year would be shortened to a mere three hours. Note: the court's decision says that the mother "agreed" to this. However, there was no "formal written document" in place. The only "written" documentation the school could cite was an email from one staff member to another which noted that they had discussed this with the mother, and that a "brief ARD" [IEP Team meeting] would be necessary. That ARD was never held. There was no written confirmation of the mother's agreement. The court held that this was an "actionable violation" of the IEP.

Comment: That email said that this shortened day was needed in order to "survive the last 11 days of school." Reading this court decision, even years after these events, the weariness and frustration of school staff is evident. It's also understandable. This was a challenging student, the year was almost over and everyone was exhausted. In fact, at the suggestion of an outside counselor the boy was pulled out of school altogether for the final three days. So they did not "survive" the last 11 days. Of course emotional exhaustion is not going to factor into a court's decision. The regulations require a formal written document. There wasn't one.

IEP TEAM MEETINGS

Letter to Zirkel, 72 IDELR 46 (OSEP 2018)

OSEP says that IDEA does not give guidance on whether or not the opinions of a dissenting member of the IEP Team should be included in the student's record. However, in the context of the evaluation of a student for a specific learning disability there is a provision calling for members of the team who disagree to submit a written statement. As to other situations, IDEA does not speak to it, so it is up to state and/or local policy.

J.G. v. State of Hawaii DOE, 72 IDELR 219

The court held that the district did not predetermine placement or deny the parents' meaningful participation in the process. Moreover, the LRE decision was properly made.

Comment: As usual, the parents who claim denial of meaningful participation were very extensively involved in the process. They participated in all five (FIVE!) IEP Team meetings and are quoted in the court's opinion providing input that the team took seriously. The case is a good one for school staff to study regarding placement in the LRE. The team used a worksheet and made notes on it pertaining to the pros and cons of each possible placement on the continuum. The worksheet was based on the factors for consideration as outlined by 9th Circuit case law.

F.L. v. Board of Education of the Great Neck Union Free School District, 72 IDELR 232 (2nd Cir. 2018)

The hearing officer had ruled that the district committed a procedural error when it "consistently disregarded the father's concerns." The district court overturned that decision and here, the Circuit Court affirms, noting that "the audio recordings and over 500 pages of transcripts of those recorded meetings" made it clear that the father's concerns were listened to. There were at least eight IEP Team meetings with at least 10 people at each meeting.

Comment: Eight meetings, with ten people at each. Audio recordings that were transcribed, producing over 500 pages. And the father claims that no one listened. Worse than that, the initial hearing officer failed to recognize the difference between being listened to vs. getting what you want. Parents are entitled to the former, but not the latter.

Pottsgrove School District v. D.H., 72 IDELR 271 (E.D. Pa. 2018)

The court held that the district did not err by failing to include a BCBA or behavioral specialist in IEP Team meetings. The court noted that participation by such people is discretionary. Neither the parent nor the school exercised their discretion to include such people. "Therefore, the hearing officer erred when she blamed the school district for not ensuring the attendance of these staff members."

Colonial School District v. G.K., 73 IDELR 224 (3rd Cir. 2019)

The court overturned that hearing officer's decision that the school denied the parents' meaningful participation. Key Quote:

> We decline to deem "meaningful participation" to require perfect comprehension by parents of all aspects of a student's IEP.

Comment: The parents cited a portion of 34 CFR 300.322 that requires that "The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting." The court concluded that the sweeping phrase "whatever action is necessary" should be interpreted in context, by considering the rest of the regulation which provides example of what might be "necessary." The examples involve interpreters for English Language learners or those with hearing impairments. Key Quote:

> *These are procedural safeguards rather than a substantive guarantee that parents must fully comprehend and appreciate to their satisfaction all of the pedagogical purposes in the IEP.*

R.S. v. Board of Directors of Woods Charter School Company, 73 IDELR 252 (M.D.N.C. 2019)

The parties had agreed on time and place for an IEP meeting and a facilitator was to attend. However, when the facilitator was not able to attend, the school notified the parent of this, and indicated it wanted to proceed with the meeting. The parent turned that down—did not want to

attend without the facilitator. The meeting was to be held by telephone. The school called the parent at the appointed time and the parent did not answer. The school held the meeting, and determined the student to be eligible. The court held that this did not violate the law:

> The court finds that WCS did provide R.S.'s parents with "the opportunity to participate" in the November 1, IEP meeting, as required under the IDEA. The parents were notified of the meeting in advance, and the meeting was mutually agreed upon by the IEP team at the October 28 meeting—including the parents. There is no evidence that the parents faced any difficulties in attending the November 1 meeting, and R.S. does not make any argument to that effect. Instead, Father appears to have simply refused to answer the telephone, apparently because the parents didn't want IEP meetings to be held without a DPI facilitator. But there is no legal requirement that a facilitator be present at IEP meetings and [the special education director] specifically informed R.S.'s parents that the meeting would proceed as scheduled without the facilitator.

Lisa M. v. Leander ISD, 74 IDELR 124 (5th Cir. 2019)

At an IEP Team meeting that lasted 3.5 hours and was well attended by appropriate professionals, the Team determined that the student was eligible for special education. However, the content of the IEP was not agreed to, so the Team held a second meeting one month later. In between the two meetings the district held a staffing to which the parent was not invited. At that meeting the district reversed its position, concluding that the student was not eligible. This was formalized at the second IEP Team meeting. The hearing officer, district court and 5th Circuit all held that the initial decision was correct—the student was eligible. The court observed the murkiness of the standard for "educational need" and noted that there are no 5th Circuit decisions that define the term. The key factor for the court was the fact that the initial decision was well supported by data the Team considered, whereas there was no new data to be considered at the second meeting. Key Quotes:

> As is par for the course in contentious IDEA cases, the record includes evidence that supports each side.
>
> …what is factually unique about this case is how the District interpreted available information.
>
> Twelve days later, [after the initial decision that the student was eligible] after a private meeting, the District reversed its position. No meaningful new information had been acquired about [the student].

Comment: There is nothing improper about the district holding a "private meeting" to which parents are not invited. Parents must be included in IEP Team meetings, but districts can conduct staffings privately. The federal regulations define "meetings" and exclude: "preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." 34 CFR 300.501(b)(3).

Pangerl v. Peoria USD, 74 IDELR 246 (9th Cir. 2019)

The meeting continued for 20 minutes after the parents left. The court upheld a ruling that this did not deny the parents' right to participate in the meeting:

> As parents participated in the vast majority of the meeting [over two hours] and then chose to depart, with the knowledge that the District would continue to finish the IEP and without expressing any reason why they could not stay, the continuation of the meeting for 20 additional minutes did not constitute a serious infringement of their right to participate.

LEAST RESTRICTIVE ENVIRONMENT

L.H. v. Hamilton County DOE, 72 IDELR 204; 900 F.3d 779 (6th Cir. 2018)

The court held that the district failed to place the student in the LRE based on the faulty notion that mainstreaming is appropriate only if the student can master grade level curriculum. Key Quotes:

> Numerous teachers testified that L.H. was not benefitting from his placement at Normal Park because he could not master the grade-level curriculum—that standard was improper.

The court quoted the following from the district court's decision with approval:

> "What the IDEA implies, the case law makes explicit: a child need not master the general-education curriculum for mainstreaming to remain a viable option. Rather, the appropriate yardstick is whether the child, with appropriate supplemental aids and services, can make progress toward the IEP's goals in the regular education setting."

B.E.L. v. State of Hawaii DOE, 71 IDELR 162 (9th Cir. 2018, unpublished)

The court upheld the placement of the student in a more restrictive environment by applying the 9th Circuit's four factor test: 1) the educational benefits of placement fulltime in a regular class; 2) the non-academic benefits of such placement; 3) the effect the student had on the teacher and children in the regular class; and 4) the costs of mainstreaming the student. *Sacramento City USD v. Rachel H.,* 14 F.3d 1398 (9th Cir. 1994).

A.B. v. Clear Creek ISD, 73 IDELR 3 (S.D. Tex. 2018)

The court held that the district was proposing a placement that was more restrictive than necessary. The district proposed placement in the "Learning to Learn" classroom, where all core academics would be provided. Prior to this the student was served in the general classroom. The evidence showed that the student was doing pretty well in his mainstream setting. Progress reports indicated that he was on track to achieve his IEP goals. The district was very precise in how it reported progress. The court pointed out that district records showed that as of the 18th

week of school the student was already at or close to the goal for the 27th week in Social Studies, Math and Science. Moreover, by all accounts his behavior had improved. Key Quote:

> Despite CCISD's claims to the contrary, there is no overwhelming evidence in the record establishing that A.B. is so limited in function, or so demanding as a student, as to entirely absorb a teacher's time and create an undue burden, especially with a paraprofessional providing in-class and resource room support. Also, in light of A.B.'s improved behavior, he is no longer disruptive in a disciplinary sense and has shown marked improvement such that he no longer exhibits task avoidance behavior.

Some would point out that the student was not at grade level. Here is what the court said about that:

> Although A.B.'s test scores and evaluations showed academic performance below his assigned grade level, with instruction at a slower pace and with more repetition, his progress remained consistent and markedly improved in a general educational setting.

R.F. v. Cecil County Public Schools, 74 IDELR 31 (4th Cir. 2019)

The parents of the student in the case did not want their daughter to spend time with her non-disabled peers. They believed it would be better for their daughter to be with kids who were more like her. Thus they sought placement in a special private school that only served students with disabilities. Maybe placement in that school would be better, educationally, but the 4th Circuit held that it would not satisfy the legal standard. Key Quote:

> [The parents] argue that they are not urging [the school district] to increase the number of hours that [the student] spends with her peers who are not disabled; instead, they contend that the LRE for [the student] would include more time among peers with disabilities, and they seek placement in a private school to achieve that outcome. This argument miscomprehends the LRE requirement, which is defined in terms of the extent to which children with disabilities "are educated with children who are *not* disabled." (Emphasis added).

Comment: Here's a prediction: in the coming years there will be more parents who feel like the parents in this case. They don't care so much about the traditional notion of LRE. They want their child to get the best possible education, and if that happens to be in a school that only accepts students with autism, or learning disabilities, or some other disability, they will be fine with that. When parents who believe that way reach critical mass, we might see changes in the law. In the meantime, LRE means the placement that offers the most time with the non-disabled students. That's why the parents lost the argument in this case.

R.M. v. Gilbert USD, 74 IDELR 92 (9th Cir. 2019, unpublished)

In this unpublished decision, the 9th Circuit approved a change in the student's IEP which increased his special education service by 20 minutes per day. The court cited *Endrew F.* for the

notion that the IEP must be more than de minimis. This factor justified a reduction in service in the mainstream.

C.D. v. Natick Public School District, 74 IDELR 121 (1st Cir. 2019)

The court declined to adopt the 5th Circuit's *Daniel R.R.* test for LRE compliance, preferring instead the 1st Circuit's precedent: *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990).

LIABILITY

Crofts v. Issaquah School District, 72 IDELR 15 (W.D. Wash. 2018)

The court held that IDEA does not permit courts to impose liability on individual defendants. Therefore, all of the individual educators were dismissed from the suit.

Pozos Leon v. Tillamook County School District, 72 IDELR 61 (D. Ore. 2018)

A four-year old girl was left on the bus, alone in the dark, unable to get herself out of the car seat. This went on for 75 minutes. The court held that the bus driver and the school were potentially liable for a violation of the 4th Amendment due to an unreasonable seizure of the student. The school district also faces potential liability under the "state created danger" theory.

Comment: the comment by the superintendent's executive assistant that "things like this happen four or five times a year" seemed particularly damaging to the school's case.

Beecham v. Roseville City School District, 72 IDELR 70 (E.D. Cal. 2018)

The court refused to dismiss a suit against a preschool teacher who allegedly verbally and physically abused children. The teacher was potentially liable under the 4th Amendment for the use of excessive force, and also for a denial of Equal Protection by picking on students who were racial minorities. The suit against the principal and superintendent was dismissed as there was insufficient evidence of deliberate indifference. The principal responded promptly to every report of misconduct. The teacher was terminated right before Thanksgiving.

A.T. v. Dry Creek Joint Elementary School District, 72 IDELR 122; 316 F.Supp.3d 1204 (E.D. Cal. 2018)

The court held that individual educators were potentially liable for an unconstitutional seizure of the student due to 112 instances of physical restraint over a three year period. Restraint was authorized by state law and consented to by the parents. But the school failed to follow some of its guidelines re: restraint and the court was bothered by the sheer number. The court refused to grant qualified immunity to the educators. Key Quote:

> Here, Plaintiff has alleged a minimum of 112 instances of restraint and containment, and 2,719 minutes of isolation over the course of three years. At the most basic level, then,

> Plaintiff's allegations are not necessarily that every individual instance of restraint or containment was unconstitutional but that the totality of the number of such uses of therapeutic containment coupled with Defendants' failure to inform the parents of what they were doing, as well as their failure to prepare behavioral emergency reports, failure to hold IEP meetings, and/or failure to conduct functional analysis assessment reports has resulted in a violation of A.T.'s right to be free from un warranted or unreasonable seizure at school. That right was clearly established at the time of the alleged violations.

Comment: Notice: it was not the use of restraint alone, but the failure to keep the parents informed or to take proactive measures to come up with a better plan that caused the problem. The educators have appealed this ruling to the 9th Circuit where the case is pending.

Tims v. Clark County School District, 72 IDELR 235 (D.C. Nev. 2018)

The court held that the principal was not entitled to qualified immunity in a suit alleging that he knew of physical abuse of a special education child, failed to respond to it and failed to notify the parent. This was based on the pleadings, given the benefit of the doubt at this stage to the plaintiff.

Crochran v. Columbus City Schools, 73 IDELR 33 (6th Cir. 2018, unpublished)

The student fell and injured front teeth after the teacher had put him in a body sock as a therapeutic tool to manage behavior of the student with autism. The court held that this was a "seizure" under the 4th Amendment, but that it was reasonable and, therefore, not a violation of the student's constitutional rights. Nor was the injury a "conscience shocking" incident so as to implicate the 14th Amendment.

Wordlow v. Chicago Board of Education, 73 IDELR 117 (N.D. Ill. 2018)

The school security officer handcuffed a compliant six-year old who had stolen a piece of candy from her teacher. The court held that this was excessive for and an unreasonable seizure as a matter of law. The law on this was "clearly established" and so the officer was not entitled to qualified immunity, and faces potential personal liability. As to the liability of the school district, the court held that there were too many factual issues to be resolved. Thus the court denied Motions for Summary Judgment filed by both sides

Comment: Sometimes you can tell where the court is headed by the opening sentence of the opinion. This one is a good example:

> *This case arises out of Chicago Public School Security Guard Divelle Yarbrough's decision to handcuff a compliant, six-year-old special education student because she allegedly took candy from a teacher, purportedly to teach the child a lesson—a decision made by Yarbrough without parental consent and despite the fact that the child presented no risk of flight or harm to herself or others.*

Suraci v. Hamden Board of Education, 73 IDELR 173 (D.C. Conn. 2019)

The court dismissed the suit against the Coordinator for Elementary Special Education. The suit alleged that the Coordinator intentionally inflicted emotional distress on the student by calling for an ambulance to take him to a psych ward for an emergency evaluation. This was prompted by what the school perceived to be a threat. The court held that the Coordinator did not humiliate, embarrass or mistreat the student in any way. Key Quote:

> Riccitelli did not abuse or misuse her authority as a school official or use it as a cloak for misconduct, as it is undisputed that Board of Education Policy required her to take action to ensure school safety under the circumstances as she understood them to be.

K.C. v. Marshall County Board of Education, 73 IDELR 196 (6th Cir. 2019)

The court affirmed a summary judgment in favor of the district in a teacher-to-student abuse case. The court held that there was no fact issue regarding deliberate indifference. The school had no knowledge of any abuse until May 1, 2016, and acted promptly thereafter. The parents permanently pulled the child out of the district on April 29, 2016, and the court held that any deficient actions after that date could not be considered "deliberate indifference" because they did not cause the student to suffer any further abuse. Key Quote:

> Thus, the post-complaint faults that plaintiff alleges in the Board's handling of his complaint—shoddy interviews, lack of communication, etc.—cannot constitute deliberate indifference because, even assuming those actions were deficient, they did not cause K.C. to suffer any further abuse.

Washington v. Katy ISD, 74 IDELR 157 (S.D. Tex. 2019)

A school police officer tased and handcuffed J.W., a 17-year old special education student. The mother sued the district and the officer, alleging excessive use of force and violations of various legal standards. The court dismissed the complaint against the district, but allowed the case to proceed against the officer. The SRO asked to be dismissed from the case based on "qualified immunity." This protects governmental officials from personal liability unless they violate federal legal standards that are so "clearly established" that they should have known better. Several pages of the court's decision describe previous cases involving the use of force in the school setting, and the arguments of both sides in this case. Bottom line: the court concluded that the facts here were too unsettled for it to toss the case out at this early stage. Did the student push a staff member in an effort to leave the building? The court thought that was an important factor, but the facts were not clear. Then there was this:

> And [the SRO] did not stop using the taser when J.W. stopped resisting. The record evidence of [the SRO's] interactions with J.W. shows genuine factual disputes material to deciding whether the tasing itself, its length, and its intensity, were objectively reasonable. These disputes preclude summary judgment.

Wagon v. Rocklin USD, 74 IDELR 196 (E.D. Cal. 2019)

The court held that the district was potentially liable under the 4th Amendment based on a single incident of excessive force. The suit accused the bus driver of shoving a severely disabled student into his seat while the student was fully harnessed and incapable of getting out of the seat on his own. Key Quote:

> However, a single adverse action against a student in school is adequate to establish a prima facie violation of 4th Amendment rights.

PARENTAL RIGHTS/RESPONSIBILITIES

Harris v. Cleveland City Board of Education, 71 IDELR 189 (E.D. Tenn. 2018)

Parent's IDEA complaint was dismissed because the student was 18 and did not participate in the suit. Key Quote:

> When Michael turned 18 on March 31, 2017, all rights under the IDEA transferred to him. Therefore, when Michael declined special education services during the April 25, 2017 meeting with school personnel, his position was controlling.

The court also dismissed the Section 1983 claim made on behalf of the student, noting that "a parent may not bring a 1983 claim for any alleged violation of the child's constitutional rights." Moreover, the mother could not represent her son's interests in court because she is not a lawyer.

L.F. v. Lake Washington School District #414, 72 IDELR 152 (W.D. Wash. 2018)

The district imposed restrictions on how it would communicate with the parent due to the manner in which the parent communicated. The district informed the parent that "the tone and manner of some of his communication and interaction with District staff and administrators has regrettably made several of these individuals feel intimidated and bullied." The district set up bi-weekly meetings and limited communication to those meetings. When that didn't work, they went with a monthly meeting. When that didn't work, they limited communication to email. The parent sued alleging discrimination, retaliation, and restriction of his Free Speech rights. Nope.

Comment: the district was careful to ensure that the parent would be appeal to appeal its decision, and to participate in any event that was open to all parents.

Parrett v. Coronado USD, 73 IDELR 92 (S.D. Cal. 2018)

The parent filed a state complaint about IEP implementation. The district responded to that by requesting a due process hearing on the same issues. This halted the complaint investigation. The parent incurred $8,425 in attorneys' fees for handling the due process hearing. The district later dismissed the hearing request after the parent indicated consent to the IEP goals. The complaint investigation continued and was decided in favor of the parent. The parent then sued

the district, alleging that the request for a DPH was retaliatory. The court held that it was not. The court held that the filing of a DPH request is not an adverse action. The district argued that it was required to seek a hearing due to a provision in California law. The court held that it did not matter if it was required or not:

> Yet, even assuming that CUSD was not required by California law to request the due process hearing, there is no question that CUSD was permitted under federal law to request the hearing based on the dispute about Tyler's IEP as reflected by Ms. Parrett's request.

The court also held that the district was immune from any liability for this action based on the Noerr-Pennington doctrine. This legal doctrine states that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct."

Forest Grove School District v. Student, 73 IDELR 115 (D.C. Ore. 2018)

The court held that it was permissible for the school to impose a "communication protocol" which limited parent email communication with staff. At first the protocol required a once a week email to the case manager. When the case manager was overwhelmed due to the "large volume of emails" and the "terse and intimidating" tone, the special education director took over. Later, the protocol required all communication go to the school attorney. The court held that none of this impeded meaningful parent participation.

Comment: This is a lengthy court decision in 2018 about communication and IEP Team meetings from 2011-12. Something wrong with that.

R.S. v. Board of Directors of Woods Charter School Company, 73 IDELR 252 (M.D.N.C. 2019)

This case involved parents who were difficult, but not impossible, to work with. Key Quote:

> To be sure, the record demonstrates that at several points R.S.'s parents complicated, if not frustrated, the IEP development process. But even if WCS felt hampered in its efforts to comply with the mandates of the IDEA, the parents' actions simply do not rise to the level of relieving WCS of liability for failing to develop an IEP for R.S.

PERSONNEL ISSUES

Richard v. Regional School Unit 57, 72 IDELR 203 (1st Cir. 2018)

The teacher failed in her retaliation case despite the fact that she proved that 1) she engaged in protected activity; 2) suffered an adverse employment action; and 3) the reasons offered by the school were pretextual. The teacher failed to convince the court that the adverse actions were taken because of her protected activities. The superintendent was clearly hostile to the teacher and believed her to be a poor classroom manager. There was scant evidence that the

superintendent even knew about the teacher's protected activities, or that they would have motivated him to seek her dismissal.

PLACEMENT

E.R. v. Spring Branch ISD, 73 IDELR 112 (5th Cir. 2018)

The district transferred the student from one Life Skills Unit to another one on a different campus, without approving this change at an IEP Team (ARD) meeting. The court held that this was a change of "location" but not a change of "placement." Only a change of "placement" requires an ARD. Relying on earlier 5th Circuit precedent the court noted that "placement' does not mean a particular school, but means a setting (such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction." Parents were fully in the loop, listened to and accommodated in many ways.

M.S. v. Los Angeles USD, 73 IDELR 195 (9th Cir. 2019)

The court held that the district denied FAPE to the student by not considering a possible residential placement and by predetermining placement without such consideration.

Comment: This is a bizarre case. The reason the district did not consider a residential placement is because the student was already residentially placed by state juvenile authorities due to severe mental health needs. The court held that residential placement for mental health and residential placement for educational reasons were two separate things, and so the district retained an obligation to consider whether or not the student needed residential placement for educational reasons. This seems to be about who pays for the service, rather than what the services are. But the court declined to sort that issue out:

> *In reaching its conclusion here, the Court notes that it takes no position regarding which public entity may ultimately be responsible for payment of residential treatment services in the even that multiple entities….independently decide a particular residential placement is appropriate…*

Oliver C. v. State of Hawaii DOE, 74 IDELR 1 (9th Cir. 2019, unpublished)

A change in location is not a change of placement, and therefore, the "stay put" rule did not apply. After the family moved, the school moved the student to a school closer to the new home. The IEP remained the same. Therefore this was only a location change—not a change of educational placement.

R.M. v. Gilbert USD, 74 IDELR 92 (9th Cir. 2019, unpublished)

The court affirmed that a change in location is not a change in placement.

PRACTICE AND PROCEDURE

B.E.L. v. State of Hawaii DOE, 71 IDELR 162 (9th Cir. 2018, unpublished)

The court refused to consider arguments about procedural errors by the school district because they were not raised in the notice of hearing filed by the parent, and were not agreed to by the parent. The original notice only alleged that the placement was overly restrictive, so the court limited its analysis to that issue.

S.C. v. Chariho Regional School District, 72 IDELR 20; 298 F.Supp.2d 370 (D.C.R.I. 2018)

The hearing officer held that the district failed to offer FAPE, but denied any relief to the parent because the proposed private placement was inappropriate. The school did not appeal the decision, and also failed to counterclaim when the parent appealed. The court held that the school's failure to challenge the "denial of FAPE" finding meant that the court could not overturn it. The court held that the school waived its right to challenge that finding.

Comment: this is an unusual situation that might be of interest to lawyers. It made sense that the district chose not to appeal the IHO decision, since no relief had been granted. But the court held that the district could have challenged the adverse fact finding once the parent took an appeal. Failure to do so turned out to be costly for the school.

ISD No. 283 v. E.M.D.H., 72 IDELR 30 (D.C. Minn. 2018)

The court granted an injunction in favor of the school district to postpone the payment to the parents for services previously provided and to be provided in the future. The court reasoned that the payment of money for services was not about the current placement, and thus the injunction did not violate the stay put rule. So while the district's appeal of the due process decision was pending, the district was not required to comply with the DPH order of reimbursement. Key Quote:

> Without a stay, the District could be required to pay over $200,000 to cover both past and prospective private services. Even with a multi-million dollar operating budget, this is not an insignificant amount of money, particularly because the District maintains that it is capable of providing these services using its own licensed and qualified special education staff.

Johnson v. Boston Public Schools, 73 IDELR 31 (1st Cir. 2018)

The court held that discussions, including settlement negotiations, that took place at a prehearing conference may be admitted into evidence in the hearing. IDEA bars the admission of evidence derived from a "mediation." Here the court held that mediation "does not, however, refer to any setting in which the parties discuss settlement in front of a third party, but only negotiations that occur before a designated mediator."

A.L. v. Alamo Heights ISD, 73 IDELR 71 (W.D. Tex. 2018)

The court came close to declaring the case moot due to the student's graduation from high school, but allowed the plaintiff to proceed based on a request for compensatory services in the form of a tutor to assist with college work. The court based its ruling on *Lauren C. v. Lewisville ISD*, 2018 WL 4376166 (5th Cir. 2018). The court also upheld the IHO's ruling that excluded the testimony of two experts due to plaintiff's failure to supplement or amend their deposition testimony. A third expert was properly excluded because she was omitted from the final witness list. Even though she had been listed on earlier lists, the IHO was correct to exclude her testimony based on the failure to include her on the final list, which prevented the district from taking her deposition.

Somberg v. Utica Community Schools, 908 F.3d 162; 73 IDELR 87 (6th Cir. 2018)

Courts owe less deference to hearing officers and ALJs when their findings are not based on educational expertise. However, "even a decision based on educational expertise is less persuasive if no reasoning is provided."

Comment: This distinction between ALJ/IHO decisions based on educational expertise vs those that are not assumes that the ALJ/IHO has some educational expertise. They often don't. They often are lawyer with no training or expertise in educational issues. If we really wanted ALJs and IHOs with educational expertise we would require certified educators to serve, rather than lawyers.

Z.J. v. Board of Education of the City of Chicago District NO. 299, 73 IDELR 95 (N.D. Ill. 2018)

The hearing officer held that the parent had knowledge of a possible Child Find violation when the student was in 3rd grade, and since she did not request a hearing until 7th grade, it was barred by the Statute of Limitations. The court held that this was erroneous. Rather, the claim would be limited to the two years prior to the date of the request. Moreover, in this case, regardless of what the parent knew, the school had an independent obligation to refer the student, which the school failed to do in timely fashion.

Doe v. United States Secretary of Transportation, 73 IDELR 152 (S.D.N.Y. 2018)

The court held that the parents have standing to sue on behalf of their minor child under ADA/504.

Ms. S. v. Regional School Unit 72, 73 IDELR 223 (1st Cir. 2019)

The Circuit Court holds that IDEA and state law in Maine contain a single two-year statute of limitations. This aligns the 1st Circuit with the 3rd (*G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3rd Cir. 2015) and the 9th (*Avila v. Spokane School District 81*, 852 F.3d 936 (9th Cir. 2017). Thus a due process complaint must be filed within two years from the date

when the parent knew, or should have known, of the action that forms the basis for the complaint.

Letter to Zirkel, 73 IDELR 241 (OSEP 2019)

In this letter OSEP tells us that Part B funds under IDEA may not be used to provide RTI services to a student who has not been determined eligible for special education. Thus Tiers Two and Three under RTI may not be funded with Part B funds since the students receiving those services have not been determined to be eligible for special education services.

R.S. v. Board of Directors of Woods Charter School Company, 73 IDELR 252 (M.D.N.C. 2019)

The parents alleged that the school made misrepresentations that should create an exception to the statute of limitations. The court rejected this argument, noting that the alleged misrepresentation was that the school was seeking to develop an IEP and was providing comparable services for the transfer student. The court held that these are not the kind of "specific misrepresentations" that would allow for an exception to the SOL.

Comment: This case also includes a lengthy section about the level of deference a state level hearing officer should provide to the initial hearing officer.

DOE State of Hawaii v. L.S., 71 (D.C. Ha. 2019)

The court did not give the normal deference to the hearing officer's findings because the decision did not demonstrate a careful, impartial consideration of all of the evidence or a sensitivity to the complexity of the issues presented. The court also reversed several findings by the hearing officer about the IEP because they were based on testimony offered at the hearing, rather than information available to the IEP Team at the time it developed the IEP.

Aponte v. Pottstown School District, 74 IDELR 228 (E.D. Pa. 2019)

The school district filed a Motion to Dismiss in a case where the parent appealed an adverse due process decision. The court held that this was the wrong motion at the wrong time. Instead, a Motion for Judgment on the Administrative Record or for Summary Judgment would be appropriate after the court has reviewed the administrative record.

PRIVATE SCHOOL STUDENTS

Letter to Wayne, 73 IDELR 263 (OSEP 2019)

OSEP says that if the local district has offered an IEP to the parent of a privately placed child, and the parent expresses a clear intent for the child to remain
n in the private school, the LEA "is not required to make FAPE available to the child." Of course if the parent changes course and enrolls the child in the LEA, then an IEP must be provided.

PROCEDURAL SAFEGUARDS

A.H. v. Clarksville-Montgomery County School System, 73 IDELR 237 (M.D. Tenn. 2019)

The court held that the parents' refusal to consent to the IEP and placement did not mean that the parent was withholding consent for the provision of special education services. Thus the district was not relieved of its obligation to provide FAPE:

> Nothing in the IDEA shields an agency in a case where parents agree that their child is entitled to services but refuse to consent to the way in which the agency wishes to provide them.

Comment: The school argued that the parents never agreed to any IEP. But the IEP Team agreed that the child's placement "if possible" would be in a general education classroom, with pullout services only for direct language instruction. That sounds like it was agreed to. It sounds like the IEP Team agreed on both IEP content and placement, but the school refused to provide the kind of placement (general education preschool) the IEP called for.

RELATED SERVICES

M.G. v. Williamson County Schools, 71 IDELR 102 (6th Cir. 2018, unpublished)

The Circuit Court affirmed a decision in favor of the district. The district complied with child find; kept the parents informed, despite the failure to provide "prior written notice" on three occasions; and its decision not to provide OT and PT was properly supported. Key Quote:

> Although [the parents] challenge [the school's] conclusions by pointing to [the child's] doctor's prescription for occupational and physical therapy, "a physician cannot simply prescribe special education." The IDEA does not require schools to provide physical and occupational therapy to all students who might "benefit from or need" those services outside of the educational context; rather, the IDEA only requires schools to provide those services to students who required them in order to receive "the full benefit of special education instruction." We therefore find [the child's] educators' numerous assessments a better indicator of her need for special education services than [the child's] doctor's prescription.

Letter to Kane, 72 IDELR 75 (OSEP 2018)

OSEP advises that districts are not required to make up for services missed due to the administration of statewide or district wide tests that are required (such as STAAR). Nor would the district be obligated to makeup services if the parent keeps the child at home during such assessments.

E.I.H. v. Fair Lawn Board of Education, 72 IDELR 263 (3rd Cir. 2018, unpublished)

The student had autism and epilepsy. After a seizure, her doctor prescribed Diastat, a medication that must be administered rectally after any seizure lasting more than two minutes. The parents asked the school to provide a trained person on the bus to administer the medication if needed. The school eventually provided the aide, but did not amend the IEP to include this as a related service. Instead, the school listed the aide in the student's IHP—Individual Health Plan. The district court held that this was permissible but the Circuit Court reversed this decision, holding that the IEP should have been amended to include the trained aide. Therefore, the parents were prevailing parties and entitled to attorneys' fees.

Comment: You must be wondering "what difference does it make?" As long as the school provided the service, why did it matter whether it was in the IHP or the IEP? The court addressed that in a footnote:

> *Unlike an IEP, which incorporates a "Stay Put" component, meaning a student's IEP cannot be changed or disregarded at will, an IHP, such as the one presented by the Board to L.H., has no stay-put safeguard.*

Of course it also means the parents have prevailed in an IDEA dispute. Attorneys' fees.

Pangerl v. Peoria USD, 74 IDELR 246 (9th Cir. 2019, unpublished)

"The IDEA provides no entitlement to parents' choice of service providers."

REMEDIES

Pangerl v. Peoria USD, 73 IDELR 49 (D.C. Ariz. 2018)

The school "unenrolled" the student pursuant to a state law after ten days of absence. The parent filed for a due process hearing over this issue and the hearing officer dismissed the complaint. The court affirmed that decision noting that the unenrollment decision was a matter of state law. Moreover, the court held that the state law did not conflict with IDEA. The court also dismissed a retaliation claim, noting that such claims cannot be made under IDEA. Retaliation claims are permissible, but here, the plaintiff failed to show a causal connection between the protected activity (efforts to enforce IDEA rights) and the adverse action (the unenrollment decision):

> Plaintiff has simply alleged that T.P. was unenrolled pursuant to a generally applicable state unenrollment statute after T.P. failed to attend school. This is not sufficient to state a retaliation claim under IDEA.

S.C. v. Chariho Regional School District, 72 IDELR 20; 298 F.Supp.2d 370 (D.C.R.I. 2018)

The court held that the parents were entitled to an award of compensatory education, the specifics of which were to be determined by the IHO. The parent failed to get the relief they sought: residential placement. But the court held that they had adequately included a claim for

compensatory services to establish that they had "exhausted" their administrative remedies on that.

Comment: The court instructed the IHO to take into account the poor behavior of the parents and their attorney in walking out of an IEP meeting when they did not get the school's approval of a residential placement. However, the court held that this was not sufficient to completely deny relief when the school's proposed IEP was found to be deficient. The IHO will have to sort this out.

Somberg v. Utica Community Schools, 908 F.3d 162; 73 IDELR 87 (6th Cir. 2018)

The case was not moot even though the parents had withdrawn the student from the school district. That's because they sought "backward looking relief"—compensatory services. If they were seeking an injunction, the case may have been dismissed as moot.
The court also held that parents must demonstrate an educational loss when their case is based on procedural errors by the school. But when the error is substantive, such as IEP goals that are not measurable, no such showing is required.

L.C. v. Pinellas County School Board, 73 IDELR 144 (M.D. Fla. 2018)

The court held that a "failure to train" cause of action requires proof of more than a single incident:

> However, an isolated injury caused by an untrained employee provides no basis for an inadequate-training claim.

Barry v. Cedar Rapids Community School District, 74 IDELR 46 (N.D. Ia. 2019)

This suit arises from an alleged slap of a student by the driver of the special education bus. Multiple adults were on the bus as they attempted to get the wheelchair bound student down the lift and off the bus as he hit, kicked and spit at people. His mother was there, as was the principal. The mother alleged that the driver slapped the student, but school staff reported that any physical contact was involuntary and initiated more by the student. The court dismissed the 4th Amendment claim because the restraint of the student at the time was for safety and was reasonable. Key Quote:

> [The mother's] argument to the contrary depends on the fact that A.P.'s wheelchair was locked into the lift and that [the driver] was scolding him to hold still. Although these facts may technically constitute "restraint" on A.P.'s "freedom of movement," there is absolutely no evidence that these restrictions were unreasonable.

The court refused to dismiss the 14th Amendment claim which was based on alleged excessive force. The parties disputed whether or not the driver acted with malice. Based on this lingering factual dispute, the court refused to dismiss this part of the case. Claims of discrimination based on disability and retaliation were tossed out, as was the conspiracy claim.

Aponte v. Pottstown School District, 74 IDELR 228 (E.D. Pa. 2019)

The court held that 1) IDEA does not impose liability on individuals; 2) neither compensatory nor punitive damages are available under IDEA; 3) 504 claims may not be brought against individuals; and 4) a 504 claim cannot support punitive damages.

Pangerl v. Peoria USD, 74 IDELR 246 (9th Cir. 2019, unpublished)

"There is no obligation under the IDEA to provide for day-for-day compensation for time missed; instead, appropriate relief may be determined based on a fact-specific assessment."

Hernandez v. Fort Bend ISD, 74 IDELR 263 (S.D. Tex. 2019)

A middle school boy sexually assaulted a middle school girl on the school bus. Both students had intellectual disabilities. The two students had just boarded the bus at the end of school. The driver was not yet on the bus. The bus monitor was on the bus, but according to the court, she was "on her cellphone in the back of the bus" when the assault occurred in the first row of seats. When another student got her attention, the monitor quickly intervened. The claim of disability discrimination failed for a couple of reasons. First, the plaintiffs failed to convince the court that the assault occurred *because of* the girl's disability. Second, the record showed that the district's response to the incident was not "deliberately indifferent." The fact that the bus monitor failed to prevent this may show ineffectiveness, or even negligence. The school district seemed to think so—it terminated the monitor's employment. But neither ineffectiveness nor negligence equates with "deliberate indifference."

SERVICE ANIMALS

Berardelli v. Allied Services Institute of Rehabilitation Medicine, 72 IDELR 201 (3rd Cir. 2018

The court held that the standards pertaining to service animals under the ADA apply equally to Section 504. Those regulations require the modification of policies and practices to permit an individual to be accompanied by a service animal. Thus, the request for a service animal is deemed "reasonable" as a matter of law, unless some exception applies.

Comment: The parents had to make their case under 504 rather than the ADA because the only relief sought was damages for past denial of the service animal, and damages are not available under Title III of the ADA. The school was a private school. There is no discussion in the opinion about the applicability of Section 504 to the private school, but the school must be receiving federal financial assistance. Without that, 504 would not apply. Interestingly, the public schools that the student attended welcomed the service animal.

Doe v. United States Secretary of Transportation, 73 IDELR 152 (S.D.N.Y. 2018)

The court held that the 504 plan for the student with a dog allergy was adequate, but there was enough evidence of the district's failure to comply with it to allow the case to proceed. The plaintiffs also alleged a variety of constitutional injuries, all of which were dismissed.

Pettus v. Conway School District, 73 IDELR 176 (E.D. Ark. 2019)

The court held that the plaintiff was not entitled to an injunction ordering the school to allow her to bring a service animal to school. The student had panic attacks and the school developed a 504 plan with several accommodations. However, the 504 Team turned down the request for the dog. The court upheld that decision:

> The existence of specific regulations concerning service animals does not mean that a service animal is always a "reasonable" accommodation under the ADA.

The court noted that 1) the dog's presence would be distracting to others, especially those with allergies; 2) the anxiety attacks were relatively infrequent; 3) the district has provided several accommodations to address this issue; 4) the student is high achieving and involved in school activities; and 5) deference is due to the judgments of educators:

> The district is staffed by experienced educators and administrators who are responsible for educating many students in addition to K.P. Its determination that bringing [the dog] to school is unreasonable is one factor weighing against permitting it.

STATE RESPONSIBILITY

Letter to Lipsitt, 72 IDELR 102 (OSEP 2018)

In this letter, OSEP confirms the broad discretion state agencies have in addressing complaints. This includes the authority to order compensatory services upon a finding that a child or group of children were denied appropriate services.

Texas Education Agency v. U.S. DOE, 908 F.3d 127; 73 IDELR 87 (5th Cir. 2018)

The 5th Circuit affirmed the decision of the Department of Education that Texas is ineligible for over $33 million in special education federal money. The Court held that the weighted student model that Texas uses for funding of special education is fundamentally flawed. In effect it enables individual ARD Committees to determine the overall level of state funding for special education. Funding in Texas is tied to student need. Student need is determined case by case as ARD Committees write IEPs and determine placement. Under the Texas model if a student needs less intense services, the state provides less funding. So if a thousand ARD Committees reduce services by just a little bit for each student it has a cumulative effect on state funding. Thus in 2012 Texas allocated $33 million less for special education than it had in 2011.

Texas argued that every child in Texas still received an appropriate education. For purposes of this case that was not disputed. But the Circuit Court said that it didn't matter. The statute is pretty simple. It looks at the total amount of money you allocate for special ed from year to year. Did it go up or down? If it went down, you broke the law. Simple.

The court pointed out that Texas could have sought a waiver of the requirement. If it could produce "clear and convincing evidence" that every eligible child in Texas was receiving an

appropriate education, it could obtain a waiver from the Secretary of Education to justify reduced funding. But T.E.A. did not do that. Instead it relied on the complex "weighted student" formula that had the effect of reducing funding.

The court pointed out how the Texas formula empowered ARD Committees to do what only the Secretary of Education is authorized to do:

> The weighted-student model circumvents the waiver process by allowing a state to reduce its amount of financial support whenever the state—rather than the Secretary—determines that special education needs of children with disabilities are adequately funded. Indeed, Texas claims to have funded special education according to the diverse instructional arrangements that its students need to succeed. But the state admits that those needs are determined by an "individualized education program" team. Conversely, the IDEA entrusts that discretion to the Secretary, permitting a waiver only if she concludes that all disabled children enjoy a free appropriate public education. Thus, the weighted-student model undermines the waiver process by enabling a state to decide, on its own initiative, that it sufficiently funded the needs of children with disabilities.

Comment: Some of you may be thinking: isn't the ARD Committee supposed to determine student needs? And the answer to that is yes—absolutely. But that does not give the ARD Committee the power to determine the funding. The state is obligated to fund special education with at least the same amount of money that it allocated the previous year. If state officials believe that there is a good reason to deviate from that in a given year they are supposed to explain that to the Secretary of Education and get approval for the reduction. T.E.A. did not do that.

A.H. v. Clarksville-Montgomery County School System, 73 IDELR 237 (M.D. Tenn. 2019)

The court held that the state agency was potentially liable for a denial of FAPE. Key Quote:

> The state is not merely a pass-through entity directing funds to LEAs. An SEA has express implementation, monitoring and oversight obligations; it cannot merely disburse funds "and then wait for the phone to ring." The State Defendants argue, nevertheless, that, when they fail in those responsibilities and their failure leads to a child's being denied a FAPE, the child is limited to suing her LEA.
>
> Numerous courts have rejected this argument, including this one.

Commonwealth of Pennsylvania DOE v. D.E., 74 IDELR 62 (E.D. Pa. 2019)

After a charter school went out of business and defaulted on tuition payments to a private school that it had been ordered to make the court held that the state department of education was responsible for the payments. The court cites with approval the following quote from an earlier decision by the 4th Circuit:

> Ultimately it is the SEA's responsibility to ensure that each child within its jurisdiction is provided a FAPE. Therefore, it seems clear than an SEA may be held responsible if it fails to comply with its duty to assure that IDEA's substantive requirements are implemented. *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997).

The court also offered these observations from an earlier decision:

> Charter schools present a unique challenge under the IDEA. When public school districts encounter financial difficulties, they do not simply cease to exist, but rather, merge or consolidate. Charter schools, in contrast, can simply disappear. *Charlene R. v. Solomon Charter School*, 63 F.Supp.3d 510 (E.D. Pa. 2014)

Letter to Zirkel, 74 IDELR 171 (OSEP 2019)

In this letter, OSEP advises that the SEA, through the complaint process 1) has jurisdiction to order tuition reimbursement; 2) has jurisdiction to address parent complaints over disciplinary changes of placement and manifestation determinations; 3) is obliged to resolve complaints alleging a failure to implement a due process hearing decision; and 4) a due process hearing officer can order compensatory services and/or other remedies in connection with a complaint over disciplinary changes of placement.

STAY PUT

Letter to Anonymous, 72 IDELR 163 (OSERS 2018)

OSERS advises that the request for an IEE does not invoke "stay put." Only a request for due process would do that. Thus if the district re-evaluates a student, determines the student is no longer eligible, and provides a Prior Written Notice to that effect, the school can discontinue services despite the parent's request for an IEE. However, if the parent were to also ask for a due process hearing to challenge the eligibility decision, then "stay put" would go into effect.

Scordato v. Kinnikinnick School District, 72 IDELR 248 (N.D. Ill. 2018)

The IEP Team called for a change of placement for the student to move from middle school to high school. The meeting was held February 5, 2018 and the change was to take place at the start of the 2018-19 school year. At the conclusion of the IEP Team meeting the school provided the parents with notice that the services in the revised IEP would begin in ten days. The parents disagreed with the change of placement but did not request a due process hearing until March 22nd. The IHO ruled for the school. The parents appealed to federal court and sought a "stay put" order to keep the student at the middle school. The court held that the "then current educational placement" was the one proposed at the February meeting—i.e., the high school. Thus the parents were entitled to a "stay put" order but it was not what they wanted.

Comment: the court does not label the notice provided by the school as a "prior written notice" but that's what it sounds like. This is an interesting argument by the school, which the court

agreed with: that if the parents do not timely object to a change of placement the "current placement" is the new placement.
Neske v. NYC DOE, 74 IDELR 249 (S.D.N.Y. 2019)

The parents prevailed in a due process hearing, obtaining reimbursement for the private placement at iHope, a private school. For the following year, the parents unilaterally moved the child to iBrain, another private school. They sought tuition reimbursement on the basis of "stay put." The court turned down what it called a parental request for a "portable voucher."

Comment: there is a backstory here, as indicated by the court's observation that "Plaintiffs are at least the seventh family to seek a pendency order after unilaterally moving their child from iHope to iBrain in the past year."

TRANSFER STUDENTS

Letter to Anonymous, 72 IDELR 222 (OSEP 2018)

When a student transfers to another state during the school year the new district is not required to conduct an evaluation of the student if it does not need new information to determine eligibility and develop an IEP.

R.S. v. Board of Directors of Woods Charter School Company, 73 IDELR 252 (M.D.N.C. 2019)

The court held that the speech/language services the new school provided after the transfer were "comparable" even though not exactly the same as in the previous IEP. However, the school did not meet the "comparable" standard when it provided modified PE instead of adapted PE.

Comment: The distinction here was that the IEP called for Speech and Language Services, which the new school did provide, albeit with a different methodology. The IEP also called for adapted PE, which the school did not provide. Modified PE was deemed not the same as adapted PE.

Letter to Siegel, 74 IDELR 23 (OSEP 2019)

If a student moves to a new district in the same state during the summer, does the new district have to hold an IEP Team meeting before the next school year starts? Here, OSEP says yes, citing the regulation that requires that an IEP be in place at the start of the school year.

TRANSITION

In re: Butte School District No. 1, 73 IDELR 198 (D.C. Mont. 2019)

"Petitioners have adopted a 'see what sticks' approach to the case." Nothing stuck. In a decision punctuated with 197 footnotes, the court rejected arguments that the school denied FAPE procedurally and substantively. The most unique aspect of the case is the treatment of the adult student who has no guardian, and has not been declared incompetent, but who "is determined not to have the ability to provide informed consent." IDEA requires states to create a procedure for

the appointment of the parent or some other appropriate individual to represent the educational interests of the child. Montana had not created such a procedure. Therefore, the court held that there was no "cognizable claim against the District."

Letter to Olex, 74 IDELR 22 (OSEP 2019)

OSEP advises that parent consent would not be required for an age-appropriate transition assessment if 1) such assessments are provided annually to all transition-aged students with or without disabilities; or 2) if the purpose of the assessment is to develop appropriate postsecondary goals, rather than determining whether a child has a disability and the nature and extent of special education and related services needed.

Comment: If the district notifies parents that the purpose of the age-appropriate transition assessment is solely to help in developing postsecondary goals, OSEP here advises that parental consent is not needed.

C.D. v. Natick Public School District, 74 IDELR 121 (1st Cir. 2019)

The court held that the district appropriately addressed the student's transition to post-secondary services, noting that IDEA "does not require a stand-alone transition plan" nor "does the statute require that the underlying transition assessments take a particular form."

Pangerl v. Peoria USD, 74 IDELR 246 (9th Cir. 2019, unpublished)

"The ALJ reasonably found that, while the transition plans were vague, their vagueness was primarily the result of T.P.'s own lack of readiness to make more specific decisions at that time."

UNILATERAL PLACEMENT/TUITION REIMBURSEMENT

DOE State of Hawaii v. L.S., 71 (D.C. Ha. 2019)

The court held that the private program was "proper" for reimbursement purposes even though it was a "therapeutic day program" rather than an academic institution. However, the court ordered a remand to the hearing officer to recalculate the amount of tuition reimbursement. The IHO had ordered $155,493. The court found this to be excessive due to "redundant, excessive, and improper services far beyond what Student requires." Moreover, administrative costs "appear grossly overbilled at 20 hours every month at various staff members' regular hourly rates, for as much as $150 per hour." After the excessive costs are eliminated, the court also ordered a further 25% reduction due to improper parent conduct in the process. In doing so, the court affirmed the hearing officer's finding that the parent "did not come with clean hands."

Doe v. Cape Elizabeth School Department, 74 IDELR 95 (D.C. Me. 2019)

The court held that the parents were not entitled to reimbursement because they had not proven any procedural or substantive violations by the school. On top of that, the court noted that the parents would be deemed ineligible for reimbursement due to their unreasonableness:

> I agree with the hearing officer's assessment that, by failing to produce Jane for evaluation, then unilaterally placing Jane in two separate institutions outside of the state, and finally, placing "an untenable condition upon their consent to allow Jane to be evaluated" the Does acted unreasonably and do not qualified for reimbursement under the IDEA.

Edmonds School District v. A.T., 74 IDELR 218 (9th Cir. 2019, unpublished)

The court rejected the argument that Provo Canyon school was more medical than educational. The court noted that it was an accredited school with a full school day, certified teachers and only group therapy that was only 40 minutes per day.

Bellflower USD v. Lua, 74 IDELR 231 (C.D. Cal. 2019)

The parents placed the child in a private, religious school for the 2014-15 school year. In the spring of 2015 the mother sent a letter to the Bellflower USD where the family still lived. The letter asked for an IEP meeting and an IEP for the 2015-16 school year. The student still lived in Bellflower but the private school was located in a neighboring district. The district refused to hold the meeting, believing that it was not legally responsible for doing so until the child re-enrolled in the district. The court held that the district was required to hold the meeting and its failure to do so denied FAPE and meaningful parent participation. The parents were entitled to tuition reimbursement. The fact that the school offered religious instruction did not render the private placement inappropriate.

Comment: This was simply a misunderstanding of the law. If the parent sought "proportionate services" while attending the private school, the neighboring district where the private school was located would be responsible. But the duty to offer and/or provide FAPE belongs to the district of residence.

C.D. v. Natick Public School District, 74 IDELR 121 (1st Cir. 2019)

The court held that the district appropriately addressed the student's transition to post-secondary services, noting that IDEA "does not require a stand-alone transition plan" nor "does the statute require that the underlying transition assessments take a particular form."

TRULY MISCELLANEOUS BUT INTERESTING

Letter to Duncan, 73 IDELR 264 (OSEP 2019)

This letter is about services to eligible students in adult prisons. The letter says that "if the State demonstrates to the IEP team that there is a bona fide security or compelling penological interest that cannot otherwise be accommodated for that child, the IEP Team may modify the child's IEP and the IEP requirements in 34 CFR 300.320 need not apply." This might mean that the IEP would aim at a GED rather than a regular high school diploma.

Council of Parent Attorneys and Advocates, Inc. v. Devos, 74 IDELR 13 (D.C.D.C. 2019)

COPAA challenged the regulation issued by the Trump Administration that delayed the compliance date for the disproportionality regulations issued by the Obama Administration. The court held that COPAA established standing to pursue this case and that the Trump Administration violated the Administrative Procedures Act in the way it adopted the regulation. It's safe to assume this battle will continue.

Wong v. Seattle School District, 74 IDELR 155 (W.D. Wash. 2019)

Parents of another student obtained a TRO to keep the Wong's child (J.W.) out of school. This came after a stormy year of bullying complaints by the other parents, some of which were substantiated and some of which were not. The Wongs sued the district over many things, including the TRO. The court:

> Given the court order that J.W. be excluded, the District did not act in bad faith or with deliberate indifference in following that order. Moreover, the record contains numerous indications that the District attempted to challenge the exclusion or lessen the impact on J.W.'s education. The District provided tutoring for J.W. during this time, and provided multiple District witnesses to testify on J.W.'s behalf in further TRO hearings.

The other parents (the Pontrellis) were not parties to this suit, but the court had a few things to say about them:

> As for the Pontrellis themselves, Plaintiff fails to cite authority imposing liability on school districts for the actions of other students' parents.
> There is also little indication the Pontrellis' actions, while shockingly insensitive to J.W.'s disability, were directed at J.W. because of his disability. There is little evidence that the District encouraged in any way the Pontrellis unfortunate and misguided attempt to obtain a restraining order against J.W. excluding him from school.

Comment: It may have been "unfortunate and misguided" but a local judge issued that TRO at the request of the Pontrellis and then extended it for a further period of time. The original TRO was issued on February 7, 2014; it was re-issued on February 18 and was quashed after a hearing on February 25th.