# What's Happening in Special Education Law?
# Important Court and Agency Decisions


**Best Practices in Public School**
**Speech-Language Pathology Conference**
**GO SSLP**

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This session will review recent developments in special education law through highlights of recent court and agency decisions relevant to the provision of free appropriate public education to students with disabilities. The information presented is designed to update all participants on what is being litigated in the area of special education and how the courts and agencies are ruling.

## MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. K.C. v. Board of Educ. of Marshall Co. Schs., 118 LRP 4489 (W.D. Ky. 2018). District's motion for summary judgment on parents' claims for money damages under Section 504 and ADA is granted. The school district was not deliberately indifferent when it had notice of a teacher's alleged mistreatment of a student with CP. Once the district was on notice, the teacher was removed from the classroom and the parents immediately withdrew the student. One of the parents of a classmate reported the allegations of abuse, alleging that the teacher was mean, yelled at the student, put him in timeout for long periods of time, yanked him and was "very rough" with him. When the district learned that the department of child-based services would be investigating, it placed the teacher in an administrative position, and the teacher remained in that position during the investigation. Under 504/ADA, parents can establish disability discrimination by showing that 1) a student was harassed based on disability; 2) the harassment created an abusive educational environment; 3) the district knew about the harassment; and 4) the district was deliberately indifferent to the harassment. Because the district did not have notice of the alleged mistreatment until 2 days after the parents removed the student from the district and the district took action as soon as it knew, the parents have not shown the necessary elements of their claim.

B. Doucette v. Jacobs, 71 IDELR 131 (D. Mass. 2018). Although the parents argue that their child's desire to bring his service dog to school is unrelated to his IEP, the allegations in their complaint show otherwise. The complaint repeatedly references the school district's refusal to amend the student's IPE to include his service dog as an accommodation; thus, it is in essence a claim under the IDEA which must first be exhausted in a due process hearing.

C. Crofts v. Issaquah Sch. Dist., 71 IDELR 61 (W.D. Wash. 2017). In a case brought by parents seeking review of an administrative hearing decision under the IDEA, they can bring claims against the district's superintendent and the special education director personally, in addition to the school district. The employees have pointed to no case law in the 9th Circuit or any other jurisdiction holding that individual employees cannot be sued personally for violations of the IDEA. Thus, the superintendent and special education director's motions to dismiss are denied.

D. Fry v. Napoleon Community Schs., 69 IDELR 116, 137 S. Ct. 743 (2017). The IDEA's requirement to exhaust administrative remedies prior to bringing money damages claims in federal court under Section 504 or the ADA applies when the

gravamen of the complaint is one for a denial of FAPE. The Sixth Circuit's analysis of the parents' claims was overly broad in requiring the parents to exhaust the IDEA's administrative remedies prior to suing for damages against a district that refused to allow a 5 year-old girl with CP to bring her service dog to school. The exhaustion requirement applies only to claims involving the provision of FAPE, not just those with a connection to a student's education. In determining whether a complaint seeks relief for a denial of FAPE, lower courts should look to the substance of the pleadings rather than to specific language or labels used. Two hypothetical questions should be considered: first, could the student assert the same claim against a public entity that was not a school, such as a public library? Secondly, could an adult at the school assert the same claim against the district? If the answer to both questions is yes, it is unlikely that the claim involves a denial of FAPE and, therefore, it does not have to be exhausted. Since neither party addressed the issue in this fashion, the case is remanded to the Sixth Circuit to consider whether the parents were seeking relief for a denial of FAPE or whether they had attempted to do so in the past.

E. J.M. v. Francis Howell Sch. Dist., 69 IDELR 146, 850 F.3d 944 (8th Cir. 2017). Applying the Supreme Court's decision in *Fry*, the question here is not whether the parent referenced the IDEA or related terminology in her complaint brought under Section 1983, 504 and ADA, but whether the substance of her complaint related to the student's education. The complaint here alleged a loss of educational benefits resulting from the district's purported use of seclusion and restraint and also stated that the district failed to provide the support services the student needed to benefit from instruction. Thus, the complaint was based on an alleged denial of FAPE under the IDEA and, although the parent framed the complaint as one alleging disability discrimination, it falls squarely within the scope of IDEA's requirement that she first exhaust administrative remedies. In addition, the parent's argument that her request for money damages made exhaustion unnecessary is rejected, as most Circuit Courts require exhaustion even when parents seek only money damages. The parent's choice of remedy does not allow her to circumvent the exhaustion requirement.

F. A.R. v. School Admin. Unit #23, 71 IDELR 12 (D. N.H. 2017). Under *Fry*, where parents are seeking relief for a denial of FAPE, they cannot sue a district under Section 504/ADA without first exhausting administrative remedies under the IDEA. While the parents here do not appear to be challenging educational services being provided to their child, the parents' complaint does focus on the district's obligation to provide support services required for the service animal to attend school with the student. The parents are not merely asking that the district allow the child to be accompanied by his service dog while he is at school. Rather, they want the district to hire, train and pay for a handler for the dog and because they are challenging the district's refusal to provide these services, their 504/ADA claims are actually seeking relief for a denial of FAPE. Thus, the parents must exhaust IDEA's remedies before seeking relief in court for disability discrimination.

G. McKenzie v. Talladega City Bd. of Educ., 69 IDELR 149, 242 F.Supp.3d 1244 (N.D. Ala. 2017). While the decisions made by the bus driver and special education teacher related to a bus evacuation drill were "ill-advised," they did not rise to the level of a constitutional violation sufficient to support a constitutional claim under Section 1983. Section 1983 only covers conduct on the part of governmental actors that is so egregious that it "shocks the conscience." Generally, the Eleventh Circuit does not recognize such claims in the education context unless the student suffered serious injuries as a result of excessive corporal punishment. However, the parent made no such allegations here. Instead, the allegations are that the student lost her balance and fell, suffering broken bones in her wrist and neck, when the driver and teacher required her to leave her wheelchair and walk off the bus. None of the employees' actions, beginning with their decision to include the student in the drill for driver training purposes and ending with their decision to have the student walk back to the school building, were the type of behavior needed for a successful Section 1983 claim. While the employees' motion to dismiss these claims is granted, the parent may refile her negligence claims in state court.

H. Lichtenstein v. Lower Merion Sch. Dist., 69 IDELR 121 (E.D. Pa. 2017). To plead a claim of relief using a "state-created danger" theory, the student needed to show that 1) the harm caused was foreseeable and direct; 2) the aides engaged in "conscience-shocking" behavior; 3) the student's "special relationship" with the district made him a foreseeable victim of the aides' conduct; and 4) the aides affirmatively created the dangerous situation at hand. Here, the student satisfied all elements when he alleged that the use of a "decrepit" chair to transport him into and out of a school swimming pool by his one-to-one aides led to his injury. According to the student, the chair's age and taped-up condition were sufficient to alert his aides that it had broken in the past. Thus, the district's continued use of that chair despite its ability to replace it could amount to deliberate indifference—a type of "conscience-shocking" conduct. The student also sufficiently stated a "special relationship" with the district by virtue of the severity of his disabilities and that he is so 'wholly dependent" on the district for his safety and well-being while being transported in the chair such that the restrictions he faces are not different from the restrictions faced by those in institutional or custodial settings. The aides' continued use of the chair qualified as affirmative conduct which placed the student in danger.

I. Saldana v. Angleton Indep. Sch. Dist., 69 IDELR 274 (S.D. Tex. 2017). Accepting the parent's allegations that the student's aide abused her child and, therefore, violated the child's constitutional right to bodily integrity, the aide's motion to dismiss the parent's Section 1983 claim for money damages is denied. The parent alleges that a school bus surveillance video shows the aide physically attacking the nonverbal child with autism 39 times in a 22-day period. The aide responded that her actions were necessary to address the student's aggression and ensure the safety of others on the bus and, therefore, she was entitled to qualified

immunity against claims brought under Section 1983. According to the parent, however, video from the security camera shows that the aide raised her voice to the student, pinched and slapped him, threw clothing in his face and struck him repeatedly with a metal seat belt buckle—all without provocation. Where the parent has provided specific factual content that is accepted as true, the court can draw the inference that the aide violated a constitutional right that was clearly established at the time of the alleged conduct. Thus, the aide's motion to dismiss is denied.

**BULLYING AND DISABILITY HARASSMENT**

A. Estate of Barnwell v. Watson, 71 IDELR 122, 880 F.3d 998 (8th Cir. 2018). The mother's general statements at IEP meetings regarding her concerns about bullying of her child with Asperger syndrome (who alleged committed suicide based on his inability to cope with bullying by his classmates) were not sufficient to put the district on notice of disability harassment. Unless the parents could show that the district knew about it and failed to intervene, an action for money damages under Section 504 may not proceed. Though the student's mother told the IEP team on more than one occasion that she worried that he was being bullied, she could not say whether the student was being targeted by his classmates. In addition, she did not have any specific observations or reports to substantiate her concerns. Thus, the mother's statements, without more, did not put the district on notice of disability harassment. A failure to address a parent's "worries" fall well short of establishing the level of bad faith or gross misjudgment needed to support a 504 claim. In addition, the parents' claim that the district actively "covered up" the conduct of other students by failing to investigate whether their child had been bullied by peers before his suicide is rejected. There is no authority that a district can discriminate against a student with a disability after his death by failing to investigate harassment that may have occurred before he died.

B. Hale v. Independent Sch. Dist. No. 45 of Kay Co., 69 IDELR 96 (W.D. Okla. 2017). Parent's complaint pursuant to Section 1983 is dismissed where it failed to allege a "conscience-shocking" disregard on the part of the ED student's middle school teachers and administrators of peer harassment. To establish that the district had increased the student's vulnerability to harassment, intimidation and bullying, the parent was required to show that district employees knowingly placed the student at substantial risk of serious, immediate and proximate harm. Although the claim was that school employees disregarded reports of peer bullying or told him to "deal with it," such actions are not sufficient to be conscience-shocking, as the potential or actual harm created must reach a "high level of outrageousness."

C. Spring v. Allegany-Limestone Cent. Sch. Dist., 71 IDELR 82 (W.D. N.Y. 2017). Without deciding the truth of the parents' complaint under Section 504/ADA, the district's motion to dismiss is denied. While districts are not automatically liable

for disability-based bullying and parents are required to show that the district was deliberately indifferent to the bullying, there may be evidence that the district's response in this case to known bullying was not reasonable. According to the complaint, the student's mother met with the principal at least six times between January and June 2013 and informed the principal that two of the student's classmates regularly used disability-related slurs when speaking to him and mimicked his physical and verbal tics caused by his Tourette syndrome. If true, this would put the district on notice of disability-based harassment. Further, the parents allege that despite the mother's meetings with the principal, the district did not investigate or take steps to prevent further bullying. Allegedly, the principal responded by stating that the student was "just trying to get [his classmates] in trouble." If this is true, it could be construed as an unreasonable response to known disability harassment.

D. Lewis v. Blue Springs Sch. Dist., 71 IDELR 33 (W.D. Mo. 2017). Because the parent pleaded all necessary elements to support her disability discrimination claim under Section 504 for money damages, the district's motion to dismiss the 504 claims is denied. Because the student had an IEP that addressed his depression, ADHD and speech impairment, the student was an individual with a disability. In addition, the parent sufficiently alleged that the district's action/inaction prevented the student from participating in and benefiting from an education in the district's schools—i.e., that he required in-patient treatment because of his experiences with bullying and eventually committed suicide. As for the third element, the parent alleged that the district was aware of the student's prior suicide attempt and hospitalization, but treated incidents of peer bullying as teasing or kids being kids. If these allegations are true, they could support a finding that the district discriminated against the student on the basis of his disabilities.

E. MJG v. School Dist. of Philadelphia, 71 IDELR 34 (E.D. Pa. 2017). District did not discriminate under the ADA where the special education teacher took steps to separate a teenager with autism and a severe intellectual disability from a classmate who allegedly touched her inappropriately the previous school year. Where parent argued that the district acted with deliberate indifference when it continued both students' placements in a classroom for students with intellectual disabilities that allegedly resulted in a second incident of inappropriate touching during lunch time, her argument is rejected. This is so because the special education teacher separated the students inside the classroom by rearranging their seats and instructed the aides to monitor the student and the alleged harasser more closely. The parent's argument that the district discriminated against the student by having only one classroom for students with intellectual disabilities is also rejected. While this may have been a better accommodation for the student, the suggestion of a better accommodation is not equal to or sufficient for showing deliberate indifference.

## RETALIATION

A. D.V. v. Pennsauken Sch. Dist., 69 IDELR 250, 247 F.Supp.3d 464 (D. N.J. 2017). District staff reports to the state's division of youth and family services were not retaliation under Section 504 against the family for advocating on the student's behalf. Rather, the reports were made because of the district's good faith—albeit mistaken—belief that the student might have been subjected to abuse or improper supervision based upon an uncle's statement at an IEP meeting that he had attempted to show the student how to bathe properly when getting into the shower with him on three occasions. While any advocacy on the part of the student's family is protected activity under Section 504, there is no evidence of a connection between the advocacy and the district's calls to the state. Indeed, there is no fact question that school staff had a legitimate concern about an adult getting into the shower with a boy and showing him how to wash, including his private parts. This is especially the case where districts are required to give notice to appropriate law enforcement and child welfare authorities when a potential situation of child abuse is detected.

B. Camfield v. Board of Trustees of Redondo Beach Unif. Sch. Dist., 70 IDELR 126 (C.D. Cal. 2017). District's motion for summary judgment is granted where repeated episodes of disruptive conduct, not just advocacy on behalf of a child with a disability, caused the district to restrict a parent's presence on her child's elementary school campus. While the district conceded that the restrictions on the mother's access to campus were placed upon her close to the time she was expressing disagreement over where her child would be placed, it was undisputed that school administrators found the mother's use of profanity, raising her voice and showing up on campus unannounced unacceptable. This is a sufficient non-retaliatory basis for restricting her presence on campus.

C. H.C. v. Fleming Co. Bd. of Educ., 70 IDELR 224 (E.D. Ky. 2017). Parent's retaliation claim under Section 504 is dismissed where the district showed that it had a legitimate, nondiscriminatory reason for restricting her access to school grounds. The district's documentation of evidence of unpleasant encounters between the parent and school personnel is sufficient to overcome the parent's retaliation claim. In addition, there were letters from other parents about a particular incident of bullying that further supported that the district was not retaliating for the parent's request for a 504 hearing. Although the superintendent barred her from visiting school property without prior approval just after the parent filed for a hearing, this action was taken based upon her previous behavior toward district staff. In addition, two suspensions of her son after she filed for a hearing were because of his bad behavior, including hitting a classmate with an oversized pencil and threatening to shoot a schoolmate. Where the parent failed to show that the district's justifications for its actions were false, she could not prove unlawful retaliation.

D. McKnight v. Lyon Co. Sch. Dist., 70 IDELR 181 (D. Nev. 2017). Parent's argument that district retaliated against her when it denied her request to participate in an IEP meeting via email is rejected and parent's ADA claim against the district is dismissed. Where a parent sufficiently alleges retaliation, the burden shifts to the district to explain why its actions were not retaliatory. Here, the parent sufficiently pled a claim for retaliation by alleging that the district denied her request after she filed due process complaints against it. However, the district articulated a legitimate reason for denying the parent's request to attend an IEP meeting via email, noting that email-only participation would limit collaboration by IEP team members. In addition, the parent did not show that the district had a different reason for denying her request. Therefore, the parent has not met her burden of proof and is not entitled to relief under the ADA. In addition, the district did not retaliate when it failed to provide her with copies of a specific test that her child had taken. Not only did the district explain that copying the test would violate the testing company's terms of use and subject the district to copyright litigation, but it offered to allow the parent to examine the actual test.

E. Brown v. Metro Govt. of Nashville, 117 LRP 26131 (M.D. Tenn. 2017). District's disciplinary reprimands of three counselors after they reported in 2014 to an investigative reporter that the district improperly removed certain students from "end of course" exams to prevent their test scores from affecting overall school testing statistics may have violated the First Amendment. The district alleges that it reprimanded the counselors for releasing improperly redacted student records to the news media in violation of FERPA and not for reporting the district's illegal activity. Based upon the evidence, however, it is not clear that the counselors inappropriately released personally identifiable information and, while improper disclosure could have been the reason for reprimand, it could also be that the district decided to punish the counselors because they discovered a potential problem and then decided to air it publicly. Questions of fact must still be resolved; thus, the district's motion to dismiss is denied.

F. Carpenter v. School District No. 1, 117 LRP 16259 (D. Colo. 2017). District's motion to dismiss special education teacher's retaliation claims under Section 504 is granted. Where the teacher complained to school staff and parents about the amount of time students with autism were spending in a pragmatic learning and executive functioning program, emailed the superintendent about how the program was "illegally" operated and emailed the district's head of services about her concerns, the adverse action on the part of the district about which she complained did not constitute retaliation. Instructing the teacher not to comment on social media, not to characterize the program as "illegal," and asking her to refrain from communicating too much with parents was not materially adverse action, and she was not removed from her teaching position.

G. Hamilton v. Hite, 70 IDELR 175 (E.D. Pa. 2017). District had legitimate non-discriminatory bases for its alleged retaliatory actions. Thus, judgment is granted

in favor of the district. The grandmother's allegation that the adverse action taken against her and her grandson was retaliation for her filing of two OCR complaints is rejected. There is no basis for the grandmother's assertion that the district refused to provide needed services for the student, as the record is replete with evidence that the district offered repeatedly to provide services, but the grandmother declined them. In addition, each of the student's suspensions were not in retaliation for the OCR complaints, but were the result of the student's physical aggression, such as attacking and choking other students and hitting school employees when they tried to prevent him from fighting. Finally, the school counselors had legitimate reasons for contacting family services based upon their sincere belief that the student's behaviors indicated that there was emotional or mental health neglect occurring in the home.

H. Lagervall v. Missoula Co. Pub. Schs., 71 IDELR 40 (D. Mont. 2017). Magistrate Judge's Report is adopted and father's ADA claims are dismissed. While the parent argued that the district excluded him from the grounds of the high school based upon a disability that caused him to speak at a loud volume, the parent had a documented history of yelling at school employees, disrupting meetings with staff members, walking out of meetings because he was angry, and acting in an aggressive and intimidating manner. More than one school employee had reported the parent's behavior to the principal and several expressed concern for their own safety and welfare and were anxious about the father arriving at school in a state of escalated anger. In addition, the principal did not prohibit the father from visiting the school entirely. Rather, the principal informed him that he would need to provide notice and get permission before arriving at the school, which was intended to allow school personnel that were familiar with the father meet with him at a designated time. In addition, the principal testified that the father was allowed to come to the school every time he properly sought permission to do so. Thus, the restrictions on school visits were not based upon a disability or unreasonably restrictive.

## RESTRAINT/SECLUSION

A. A.P. v. County of Sacramento, 69 IDELR 273 (E.D. Cal. 2017). County did not discriminate against child with a disability when it kept his foster parents from incorporating a "wrapping" technique into their child's sensory diet. Thus, no violation under Section 504 occurred where the wrapping of the child in a stretchy blanket or fabric was not an appropriate accommodation under California law, which prohibits the use of restraint. There is no evidence that the wrapping technique is a potential exception under California's anti-restraint rule, because it involves tying, depriving or limiting the child's use of hands or feet. It also does not qualify as a "protective device" because those cannot prohibit a child's mobility. Thus, the refusal to allow the wrapping technique to be incorporated into the child's program was not denied because of the child's disability; rather, it was denied because of safety reasons and clearly defined state law restrictions.

B. Kimes v. Matayoshi, 71 IDELR 7 (D. Haw. 2017). Education Department's motion for judgment on the parent's 504 claim for disability discrimination is denied. The parent's evidence indicating that a former private school's crisis plan developed for her child with autism expressly stated that the use of restraint would reinforce her attention-seeking behaviors, raising questions about the appropriateness of the ED's BIP, which allowed for the use of physical restraint. The parent also presented evidence that the BIP meeting did not include any representatives from the private school and that the team did not discuss restraint before developing the student's BIP. While the parent cannot seek money damages unless she shows that the ED knew of the child's need for different behavioral interventions and failed to act on that knowledge, the parent satisfied that pleading requirements. Without deciding the truth of the parent's allegations, the parent may proceed with her 504 claim.

## CLAIMS AGAINST PRIVATE SCHOOLS

A. Doe v. League Sch. of Greater Boston, Inc., 70 IDELR 179 (D. Mass. 2017). Private special education school's position that it is not subject to a parent's claims under Title IX because it is not a federal fund recipient is rejected. Where the school received IDEA funds when it accepted tuition payments from the student's home district, it is a recipient of federal funds subject to Title IX claims. Clearly, the school's acceptance of IDEA funds was not mandatory; it could have rejected the funding by denying the student's enrollment. However, by choosing to accept payment from the student's district, the school made itself a recipient of federal funds subject to Title IX's anti-discrimination provisions. Thus, the parent's claim that another student showed her child sexually explicit images and engaged in inappropriate behaviors on multiple occasions but the school failed to separate the students after learning of this conduct may proceed.

B. G. v. Fay School, Inc., 70 IDELR 256 (D. Mass. 2017). A private school's response to the parents' requests for a Wi-Fi-free classroom to accommodate their son's Electromagnetic Hypersensitivity Syndrome could potentially be retaliation; thus, the parents are entitled to pursue an ADA claim based upon the school's refusal to allow the student to participate in after-school athletics when he moved to a homebound placement to avoid Wi-Fi. Where the school did not explain why the student's decision to begin studying at home—an action he took to avoid the headaches he allegedly suffered in the classroom—disqualified him from participating in extracurricular activities. Having failed to assert any non-retaliatory rationale for prohibiting the student from participating leaves the court to assume the school has no defense. Thus, the school's motion to dismiss the ADA retaliation claim is denied.

## CHILD FIND/EVALUATIONS

A. M.G. v. Williamson Co. Schs., 71 IDELR 102 (6th Cir. 2018) (unpublished). School district's failure to immediately conduct a second evaluation after

evaluating a kindergartner with speech and motor difficulty and finding her ineligible under the IDEA was justified where district addressed her ongoing deficits with RTI interventions. To establish a child find violation, a parent must show that the district overlooked clear signs of disability and had no justification for its failure to evaluate. Here, the parent failed to show either where the district evaluated the child in December 2010, she began kindergarten less than a year later and, at age 4, was the oldest child in her class. The district effectively used general education intervention strategies, such as RTI and, later, a Section 504 plan, to ensure that the child was making adequate progress. Thus, the district court's decision in the district's favor is affirmed.

B. Lincoln-Sudbury Regional Sch. Dist., 118 LRP 3300 (D. Mass. 2018). Hearing officer's decision that the district did not violate the IDEA is upheld. The parent's contention that the district should have immediately evaluated the student and found her eligible for IDEA services under the category of TBI when she was accidentally struck with a teammate's hockey stick is rejected. Although the student's private physician diagnosed her with a concussion, he concluded that the student could return to school in two weeks with classroom accommodations, including extended time for assignments and tests. However, the district had no reasonable basis to suspect that the concussion negatively impacted the student's ability to learn and, when the student returned to school, she declined to use most of the accommodations offered by the teachers. In addition, she exhibited no lasting symptoms of the concussion, such as change in behavior, once she was cleared to return to school. Although the parents argued that the student received an "incomplete" grade in her advanced math course, the student received that grade because she refused to take the final exam. In fact, she maintained good grades in all other classes and continued to participate in school sports and other nonacademic activities. Thus, there was no reason to suspect any need for special education service sufficient to trigger the duty to evaluate.

C. D.L. v. District of Columbia, 70 IDELR 59, 860 F.3d 713 (D.C. Cir. 2017). District court's order granting class of preschoolers with comprehensive relief is affirmed. The district's failure to timely evaluate and identify preschoolers with disabilities and ensure smooth and effective transitions from Part C to Part B programs was systemic and could not be resolved on a case-by-case basis. Although individual relief is appropriate in most IDEA actions, the district's IDEA violations here affected large numbers of preschoolers and spanned over more than a decade. Specifically, the district court found that the district failed to identify between 98 and 515 preschoolers each month and failed to provide appropriate transition services for over 30% of toddlers receiving services under Part C. In addition, the district's challenge to the district court's specific benchmarks and gradual timelines for achieving compliance are upheld.

D. B.G. v. City of Chicago Sch. Dist. 299, 69 IDELR 177, 243 F.Supp.3d 822 (N.D. Ill. 2017). School district did not violate the IDEA when it conducted an evaluation of a bilingual 14 year-old with SLD and ED in English instead of

Spanish. Thus, the parent is not entitled to a series of IEEs as a result. The IDEA required the district to evaluate the student in the language and form that was most likely to yield accurate information about the student's academic, developmental and functional abilities. The hearing officer's finding that the student was proficient in English is supported by multiple professionals who assessed the student and testified at the due process hearing. Notably, one of the evaluators had bilingual Spanish certification and the other had a certificate in Spanish special education. Further, the student was not an EL student and he routinely spoke English at school and told the evaluators he felt more comfortable with English-language assessments.

E. Davis v. District of Columbia, 69 IDELR 218, 244 F.Supp.3d 27 (D. D.C. 2017). Charter school's failure to conduct a comprehensive OT and auditory processing evaluation violated the IDEA. Because the results of two private IEEs showed that the student may have developed disorders that were independent of those previously diagnosed after she was exited from special education, the school failed to reassess the child's IDEA eligibility. Schools have an affirmative duty to locate, identify and evaluate all students who need or may need special education due to a disability. This extends to students who are suspected of having a disability. Here, the parent asked the charter school to conduct a comprehensive evaluation after obtaining the IEEs indicating the recent deficit in visual-motor integration and auditory processing, which likely caused the student's grades to fall to C's and D's over the course of the school year. The school district's argument that it had reevaluated the student the prior school year and found that the child's diagnosed LD no longer hindered her academic performance is rejected, as the school should have reassessed eligibility for IDEA services under different disability categories.

F. Krawietz v. Galveston Indep. Sch. Dist., 69 IDELR 207 (S.D. Tex. 2017). Districts are required to identify, locate and evaluate all children who need special education as a result of a suspected disability. In this case, when the student re-enrolled in the district for the 2013-14 school year, she immediately had behavioral issues, so a 504 Plan was developed to provide for accommodations needed for PTSD, ADHD and OCD. In addition, her application indicated that she had received special education in the past and that she had never been dismissed from special education services but since the district could not locate her previous records, it was determined that she had been dismissed. Although the accommodations in the Plan, such as extended time to complete assignments and small group testing, enabled the student to pass ninth grade and resulted in improved behaviors during that school year, her behaviors and academic performance deteriorated the following year. The evidence showed that the student scored below the 20$^{th}$ percentile on standardized tests, failed several classes and engaged in criminal behaviors, such as stealing. In addition, records indicated that the student was hospitalized in September 2014 for disability-related health issues. However, the district failed to refer the student for an evaluation until April 2015, approximately 6 months after it became aware of the

student's difficulties. The district's argument that the student's academic success in the 9th grade precluded the need for an evaluation is rejected, as the district's child find duty arose anew in the Fall of 2014 based upon the student's decline, hospitalization and incidents of theft during the semester, taken together. Thus, the hearing officer's award of compensatory education is upheld.

G. Board of Educ. of the Wappingers Cent. Sch. Dist., 71 IDELR 9 (S.D. N.Y. 2017). Parents are awarded private school tuition for the two school years their daughter spent out of the district. While attending a private boarding school, the student posted suicidal thoughts on social media and her parents were informed that she was hurting herself while attending the boarding school. After she was asked to leave the private school, a psychologist reported that the student should be in a therapeutic placement, and the parents notified the school district of the situation and their intent to explore schooling options. They were told that the district would "look into" options for the student, but the parents did not hear back from the district for several months and more than 6 months passed before an evaluation occurred. The parents placed the student in a therapeutic residential school in Arizona and sought reimbursement from the district. The decisions of the local and state hearing officers are affirmed where the district did not meet its child find duty to evaluate the student within a reasonable period of time from when it had reason to suspect that the student may need special education services. The passage of time between when the district knew of the student's issues and when the evaluation took place was not "reasonable" under the IDEA. Indeed, the district's delay in conducting the evaluation resulted in having no IEP in place by the beginning of the following school year.

## ELIGIBILITY

A. D.B. v. Ithaca City Sch. Dist., 70 IDELR 1(2d Cir. 2017). Parent's contention that the district's proposed IEP was not appropriate because it did not recognize the student's disability specifically as a "nonverbal learning disorder" is rejected. NVLD is not formally recognized as a psychiatric diagnosis by medical literature or by the state of New York. Accordingly the district's failure to specifically identify the disability in the IEP does not compel a finding that the district does not understand the nature of the student's disability or the extent of her needs. Thus, the lower court's dismissal of the parent's private residential school reimbursement claim is affirmed.

B. D.L. v. Clear Creek Indep. Sch. Dist., 70 IDELR 32 (5th Cir. 2017) (unpublished). At the time that the district determined that the student with anxiety, depression and ADHD was not eligible for IDEA services in 11th grade, the student was excelling academically and socially. A student with an impairment is not eligible under the IDEA unless there is an academic need for special education services. In determining such need, the district must consider then-current performance and cannot find a student eligible based solely on concerns that the student might require special education services at some point in the future. While the student

had received services during his freshman and sophomore years based upon suicidal ideation, declining grades and difficulty with interpersonal relationships, he was dismissed for special education just before the beginning of his junior year based on his academic and social progress. Indeed, the student earned A's in all of his classes, was rarely tardy or absent, and scored average on his college entrance exams. In addition, teachers praised his comportment and academics. Thus, none of the evidence available at the time of the eligibility determination suggested a continued need for services.

C. G.D. v. West Chester Sch. Dist., 70 IDELR 180 (E.D. Pa. 2017). Intellectually gifted third-grader with an anxiety disorder is not eligible under the IDEA for services and the district's determination that there is no need for services is upheld. The school psychologist's evaluation report was not deficient, when the psychologist spoke with the student's therapist two weeks before issuing an evaluation report. The psychologist testified that the therapist did not tell her that the student could not return to school but, instead, told her that the student was able to hold it together at school and that the behaviors at issue were displayed in the home. Further, the therapist's characterization of the school as "an unhealthy environment" for the student was based on the student's mistrust of her assigned school counselor. The school psychologist recognized, however, that the student needed a trusted adult on campus and indicated that the district could put that support in place. Thus, the school psychologist properly considered the private therapist's input, and the district adequately addressed the student's anxiety by developing a Section 504 plan.

D. Lauren C. v. Lewisville Indep. Sch. Dist., 70 IDELR 63 (E.D. Tex. 2017). District's refusal to add autism eligibility to the student's IEP is upheld where the student does not meet the criteria for autism eligibility. Reportedly, the parents wanted autism added to the IEP because it would help them obtain services from outside agencies. While the district knew in 2002 that the student's physician diagnosed her with autism, the district evaluated the student within a reasonable time after learning of that diagnosis and found her not eligible as a child with autism. The fact that the district did not classify her with autism did not mean that it violated its child find duty. To the contrary, the multiple evaluations that it conducted demonstrate compliance with child find requirements. Further, the IDEA does not require districts to affix a student with a particular label. Rather, the question is whether the district offered an IEP that is sufficiently individualized to address the student's needs and to provide meaningful educational benefit to the student. The district has met that standard by providing the student with ABA and other services that have resulted in academic, social and behavioral progress.

E. Joanna S. v. South Kingstown Pub. Sch. Dist., 69 IDELR 179 (D. R.I. 2017). IEP team's determination that student's primary disability is ED rather than autism is upheld. No qualified expert or educator disagreed with the classification, even though the student's treating therapist diagnosed him with autism, as well as

anxiety. Two educational experts deemed the student's anxiety to be his most significant difficulty. Further, the parent did not identify any harm resulting from the student's allegedly inappropriate classification, so even if the parent were correct that that primary disability is autism, there is no right to relief.

F. A.A. v. District of Columbia, 70 IDELR 21 (D. D.C. 2017). District's argument that the fifth-grader's good grades disqualified her from IDEA eligibility is rejected. Clearly, this child's anxiety, mood disorder and inability to regulate her emotions that resulted in her removal to the kindergarten classroom for approximately 20 days during the school year, caused her to fall behind in classroom instruction. As such, her parents demonstrated that her disability impeded her educational performance. Based upon the fact that the child tried to jump out of her second-floor bedroom at least two times while saying she wanted to kill herself surely meets the criteria of "a general pervasive mood of unhappiness or depression" or "inappropriate types of behavior or feelings under normal circumstances" sufficient to meet eligibility for ED.

**INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs)**

A. Avila v. Spokane Sch. Dist. 81, 69 IDELR 204 (9th Cir. 2017) (unpublished). District's reevaluation of student for SLD was appropriate and parents' request for an IEE is rejected. The fact that the school district's reevaluation of the student with autism did not specifically evaluate for dyslexia and dysgraphia did not make it inappropriate. The reading and writing assessments conducted covered a variety of disorders in addition to SLDs and satisfied the district's duty to evaluate the student in all areas of suspected disability. The district did not refer to specific reading and writing disorders but, instead, evaluated for "specific learning disabilities," which covers a number of reading and writing difficulties.

B. A.A. v. Goleta Union Sch. Dist., 69 IDELR 156 (C.D. Cal. 2017). Parents are not entitled to reimbursement for a neuropsychological evaluation that cost $6,000. Because the parent is the party seeking relief, she bore the burden of proving that there was a need for an exception to the district's $4,500 fee cap. Indeed, the district gave the parent several opportunities to explain any unique circumstances, such as complex medical, educational, health or psychological needs that would warrant an exception to the district's capped rate. However, the parent responded only that the student had autism and used an augmentative communication device. In addition, the parent's advocate, who had a pre-existing relationship with the evaluator, had not been able to explain why she rejected the other evaluators on the district's list. Indeed, the parent selected the evaluator weeks before the advocate contacted other independent evaluators, which casts doubt on the parent's contention that their selection was necessitated by the lack of any other qualified evaluator. The parent's failure to show unique circumstances requires affirmation of the ALJ's decision in the district's favor.

C. Parker C. v. West Chester Area Sch. Dist., 70 IDELR 94 (E.D. Pa. 2017). Where the parents did not challenge the district's evaluator's methodologies or qualifications but simply asserted that their second evaluator's report was more "comprehensive and thorough," the parents' request for school district reimbursement for their IEE is denied. There is no evidence that the district's evaluator's methodologies or credentials were deficient. In addition, the district was not required to re-administer formal cognitive testing when that was done just six months earlier.

D. E.P. v. Howard Co. Pub. Sch. Sys., 70 IDELR 176 (D. Md. 2017). While parents have a right to a publicly funded IEE if the district's evaluations are inappropriate, parents cannot simply challenge an evaluator's conclusions. Rather, they must show that the evaluator's methodologies were flawed. Here, the parents failed to meet this requirement where the two evaluators at issue were both qualified to assess the student's educational and psychological needs and used a variety of assessment tools and strategies when conducting the evaluations of the student with ADHD. The tools and strategies used included standardized tests of academic performance and intellectual ability, teacher input, parent input, classroom observations and a review of the student's educational history and records. Further, the evaluators offered sound explanations for choices that they made that the parents' expert characterized as errors. For instance, in response to the parents' argument that the district should have conducted additional subtests of the WJ-III academic achievement test, the evaluator explained that the student's above-average performance on the subtests already administered made additional testing unnecessary—a decision which is entitled to substantial deference by the ALJ and the court. Similarly, the school psychologist did not err in using a "pattern of strengths and weaknesses" model, which is a model approved by the Maryland DOE for evaluating SLD. Finally, the psychologist's decision not to interview the student was based upon her belief that the student did not have the necessary self-awareness of his difficulties to provide valuable information.

E. R.Z.C. v. Northshore Sch. Dist., 71 IDELR 2 (W.D. Wash. 2017). The ALJ's decision that the district's reevaluation and determination that student was no longer eligible for special education services is affirmed. The independent neuropsychological evaluation obtained by the parents that recommended specialized instruction does not invalidate the district's decision. It was unclear whether the student has dysgraphia, but he still would not be entitled to IDEA services based upon the fact that the record is replete with evidence that the student's ability to learn and do his classwork did not depend on special education services that he was receiving prior to the May 2015 reevaluation and the creation of a 504 Plan. The district properly exited the student from special education.

## THE FAPE STANDARD

A. Endrew F. v. Douglas Co. Sch. Dist. RE-1, 69 IDELR 174, 137 S. Ct. 988 (2017). The Tenth Circuit's "merely more than de minimis" standard sets the bar too low when assessing whether a student with a disability has been provided with FAPE. From a substantive perspective, schools are to offer an IEP that is reasonably calculated to enable a child to make progress in light of the child's circumstances. Thus, the Tenth Circuit's finding that the district provided FAPE is vacated and remanded for further proceedings. [NOTE: On August 2, 2017, the Tenth Circuit vacated its decision and remanded the matter to the district court for further proceedings consistent with the Supreme Court's decision. Oral argument was held before the district court on February 7, 2018].

B. Endrew F. v. Douglas Co. Sch. Dist. RE 1, 118 LRP 5674 (D. Colo. 2018). On remand, it is found that the IEP proposed by the school district at the time the parents withdrew their child with autism from public school and placed him in a private school for students with autism was not reasonably calculated to enable him to make progress in light of his circumstances. Specifically, the IEP proposed for the fifth grade in April 2010 contained the same annual goals as those IEPs for the second, third and fourth grades, with only minor changes to the short-term objectives. In addition, the district had not conducted a functional behavioral assessment or developed a formal BIP for the student. The district's inability to develop a formal plan or properly address the student's behaviors that, in turn, negatively impacted his ability to make progress on his educational and functional goals "cuts against the reasonableness of the April 2010 IEP." While the proposed IEP may have been appropriate under the 10th Circuit's previous "merely more than de minimis" standard, under the Supreme Court's FAPE standard, the proposed IEP denied FAPE. Thus, on remand from the 10th Circuit, the administrative law judge's decision denying the request for reimbursement of private school tuition and transportation costs is reversed.

C. C.G. v. Waller Indep. Sch. Dist., 70 IDELR 61 (5th Cir. 2017) (unpublished). This Circuit's standard for FAPE is not inconsistent with the *Endrew F.* standard. Under the Fifth Circuit's 4-factor standard, an IEP is appropriate if 1) it is individualized on the basis of a student's assessment and performance; 2) it is administered in the LRE; 3) it is implemented in a coordinated and collaborative manner by the key stakeholders; and 4) it demonstrates positive academic and nonacademic benefits. The parents' argument that the child's IEP did not satisfy the *Endrew F.* standard which requires an IEP to be "appropriately ambitious" in light of the child's unique circumstances is rejected, since the two standards are not inconsistent. While the district court in finding the district's IEP appropriate did not articulate the *Endrew F.* standard verbatim, the court's analysis of the IEP is fully consistent with that standard and leaves no doubt that the district court was convinced that the IEP was appropriately ambitious in light of the child's circumstances.

D. M.L. v. Smith, 70 IDELR 142, 867 F.3d 487 (4th Cir. 2017), cert. denied, 118 LRP 2066 (1/16/18). The IDEA's definition of FAPE does not include religious and cultural instruction, and a district has no obligation to maximize the potential of students with disabilities. Rather, the IDEA requires districts to provide special education services that will allow students with disabilities to access the general curriculum. Where these parents concede that their only objection to the IEP proposed by the district is the absence of religious instruction on his cultural preferences, the IEP did not deny FAPE. Indeed, the district offered reasonable accommodations for the student's religious preferences, where it indicated that it would allow the student to skip community trips to fast food restaurants that did not serve kosher food and would provide a story time event in the library as an alternative to Halloween celebrations that the parents found offensive. Where an IEP must be reasonably calculated to allow a student to make progress in light of his circumstances, the parents' argument that the district is required to provide instruction in the practices and customs of Orthodox Judaism is rejected.

E. Sean C. v. Oxford Area Sch. Dist., 70 IDELR 146 (E.D. Pa. 2017). Courts and hearing officers are required to address the substantive appropriateness of an IEP based on information available at the time of its development. Here, the SLD student's IEPs for 9th, 10th and 11th grades addressed his known academic and behavioral issues and were designed to confer educational benefit that was appropriate in light of the student's circumstances. As to the parent's position that the district denied FAPE by waiting until the 11th grade to address the high schooler's anxiety, the hearing officer found that the district had no reason to address the issue, as the student did not exhibit behaviors that caused educators to view him as having anxiety. Importantly, the IEP team revised the student's IEP on several occasions after the parent informed the district of the student's mental health needs to address emotional and behavioral issues. Further, the student made progress toward many of his annual goals and advanced from grade to grade, despite his lack of attendance, inattentiveness and "erratic" academic performance. Thus, compensatory education is not warranted and the hearing officer's decision in favor of the district is upheld.

F. C.D. v. Natick Pub. Sch. Dist., 69 IDELR 213 (D. Mass. 2017). The hearing officer's application of the "some educational benefit" standard in a 2015 decision finding in favor of the district's proposed program complicates this court's review of it in light of the *Endrew F.* decision by the Supreme Court. According to the hearing officer, the proposed IEP was designed to meet the student's unique needs and was reasonably calculated to enable her to receive an educational benefit. However, the Supreme Court later held that an IEP must allow a child to make progress that is appropriate in light of her unique circumstances. Because the court needs to know whether the standard used by the hearing officer aligns with the *Endrew F.* standard, the case is remanded to the hearing officer to indicate whether she would have reached the same or a different result under the *Endrew F.* standard and decide whether further proceedings at the due process hearing level are appropriate.

G. Paris Sch. Dist. v. A.H., 69 IDELR 243 (W.D. Ark. 2017). The BIP for a 4th-grader with Asperger's was inappropriate, because it did not inform teachers as to how to handle her behaviors of verbal disruption, physical aggression and property destruction. Thus, the hearing officer's determination that FAPE was denied is upheld. When the student was enrolled in the district, her parent provided a BIP and evaluation reports that identified numerous behavioral problems. Previous providers revealed that the student had behavioral outbursts, including physical aggression, when she became frustrated or overstimulated. However, the district's BIP generally characterized the student's difficulties as "noncompliant behavior" and failed to explain how the behavior related to her autism disability and completely ignored the nuances of behaviors that manifest with autism. According to the hearing officer, the teachers seemed unaware of the connection between the student's behaviors and her difficulties with figurative language and change in routine. The BIP did not inform the teachers as to how to handle the student's behaviors and they testified that they did not understand the "noncompliance." Where the hearing officer evaluated the BIP under the "more than trivial benefit" standard for FAPE, which is a lesser standard than the *Endrew F.* Court enunciated, the Supreme Court decision did not alter the hearing officer's decision on this issue.

H. E.D. v. Colonial Sch. Dist., 69 IDELR 245 (E.D. Pa. 2017). Though the IHO did not have the benefit of the *Endrew F.* decision when finding that the 5 year-old child with a speech and language impairment had been provided with FAPE, the hearing officer applied a similar standard when evaluating the appropriateness of the child's IEP. Just because the child had not met grade-level curriculum standards by the end of her kindergarten year, that did not mean she was denied FAPE. Here, the child was younger than her classmates and her impairment affected her acquisition of early academic skills in math, reading and written expression. However, report cards and teacher testimony indicated that the child made progress in those areas. For example, at the beginning of the school year, the child was able to identify six letters, but by the end of the year, she could identify thirty-two. In addition, by the end of her kindergarten year, the child was able to meet some of the district's kindergarten curriculum standards for math, reading and writing. Further, the district recognized the child's need for services related to attentional and behavioral difficulties and developed a far more comprehensive IEP for her just five months after initial implementation of the IEP. Given that the child made progress in the general education setting and advanced to first grade, she received FAPE.

I. T.M. v. Quakertown Comm. Sch. Dist., 69 IDELR 276, 251 F.Supp.3d (E.D. Pa. 2017). District's motion for summary judgment is granted and hearing officer's decision that FAPE has been provided in the LRE is affirmed. The hearing officer was correct in rejecting the parents' contention that the district should have provided for one-on-one programming instead of providing for socialization opportunities to their 11 year-old child with autism, global apraxia and an

intellectual disability. Under *Endrew F.*, a district must provide a meaningful benefit that is "substantial, not minimal" but is not required to provide each child with a disability opportunities that are substantially equal to those afforded children without disabilities. Though the parents alleged that the child could not benefit from interacting with his classmates either in the special education or general education settings, the district's tracking of the child's progress in socialization shows that it was complying with the *Endrew F.* standard and providing the student with meaningful benefit. The district documented the student's progress through his IEPs, showing progress in maintaining appropriate social and physical boundaries, keeping his hands and feet to himself, saying "please" and "thank you," apologizing for mistakes and communicating short messages. In addition, the student was given daily opportunities to interact with peers with and without disabilities during lunch, recess, built-in lesson breaks, group activities, art and music classes and in the hallways. Thus, the IEP team designed and implemented a program that provides a meaningful educational benefit consistent with the *Endrew F.* standard.

J. E.G. v. Great Valley Sch. Dist., 70 IDELR 3 (E.D. Pa. 2017). Part of the hearing officer's order is upheld in favor of the district, even though the reading progress of a fifth grade student with a severe learning disability is "maddeningly slow." While the parents allege that the IEP for the 2015-16 school year failed to address their child's reading deficits and that he had achieved little progress in reading, the IHO correctly found that the reading program outlined in the IEP was individualized for the student's intensive needs. The evidence showed that the reading program taught the student new reading skills and techniques that he regularly applied in the classroom. Although the parents argued that the student was still reading at a second-grade level, this did not render the IEP inappropriate. In light of *Endrew F.*, improvement of the student's reading accuracy was appropriate given the severity of his learning disability. In addition, several recent evaluation reports indicated that the student was making progress toward all of the annual academic goals listed in his IEP. The significance of the student's ability to generalize Wilson reading skills across all settings strongly indicates that the instruction is working.

K. A.G. v. Board of Educ. of the Arlington Cent. Sch. Dist., 69 IDELR 210 (S.D. N.Y. 2017). The adequacy of an IEP depends upon whether it is reasonably calculated to enable a child to receive educational benefits and, under *Endrew F.*, for most children, FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade. The IEP in this case is adequate where the district used the resource room to work on the dyslexic student's reading and writing and part of the day was dedicated to decoding and encoding skills. In addition, when the student was integrated into the regular classroom, there was both a regular education teacher and a special education teacher there to provide a level of support based upon the goals in the IEP. In addition, the progress reports showed that the student was meeting IEP goals. Thus, the district's program was tailored to meet the student's

needs in decoding, encoding, reading and writing and the student received educational benefits. Thus, the parents' motion for summary judgment on their IDEA claims is denied.

L. Pocono Mountain Sch. Dist. v. J.W., 70 IDELR 200 (M.D. Pa. 2017). The district cannot rely on the student's passing grades to prove that he made appropriate academic progress during 6th and 7th grade. While the hearing officer considered the student's 6th grade report card that reflected that the student had earned at least a C in all academic classes a sign of progress, other evidence reflected that the student was not making adequate gains and making minimal progress toward his IEP goals. The student's failure to progress academically at "more than a snail's pace" carried far more weight, and the student's progress was so incremental that there was no reasonable basis to believe that the student could reach or accomplish IEP goals within a yearly term. In addition, the student had scored "below basic" on a statewide assessment of reading and writing skills despite receiving higher scores in previous years. This, along with the student's ongoing academic and behavioral struggles indicate that the district denied FAPE. Thus, the hearing officer's award of compensatory education is affirmed.

## PROCEDURAL SAFEGUARDS/VIOLATIONS

A. L.M.P. v. School Bd. of Broward Co., 71 IDELR 101, 879 F.3d 1274 (11th Cir. 2018). Parents may not simply allege the existence of an improper district policy in claiming an IDEA procedural violation. In order to sue the district for "predetermination," these parents had to show that they suffered an injury as a result of that policy. While the parents claim that the district injured them by impeding their ability to participate in the IEP process, all three of the IEPs for the autistic triplets included ABA services in the form of PECS-based instruction. Thus, the district's inclusion of an ABA-based service in the IEPs, regardless of how it was intended to be used or whether it matched the specific services requested by the parents refutes the parents' argument that they were denied meaningful participation. They "simply were not denied any ABA-based service in their children's IEPs." Because the parents limited their appeal to the alleged procedural violation, the court will not consider with the PECS-based instruction was appropriate or whether the children needed additional ABA services to receive FAPE.

B. J.P. v. City of New York, 71 IDELR 77 (2nd Cir. 2017) (unpublished). Predetermination of placement occurs when district IEP team members do not come to the IEP meeting with an "open mind." Here, the parents argued that the district was unwilling to consider their input on the proposed placement. However, the evidence reflected that the IEP team heard the parents' objections and convened a second meeting to address those objections and explain the team's reasoning for the proposed placement. In addition, the parents fully participated in both IEP meetings and, while the district did not offer the private school

placement that the parents sought, the district IEP team members gave the parents a meaningful opportunity to participate.

C. M.C. v. Antelope Valley Union High Sch. Dist., 69 IDELR 203 (9th Cir. 2017). Although the parent participated in the IEP meeting, where the district modified the amount of vision services to be provided to the student in order to correct a mistake in the IEP (from 240 minutes per month to 240 minutes per week), this was a procedural violation that impeded the parent's ability to monitor implementation of her son's IEP. Where a parent is unaware of the services provided to a student, FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP. Although it is unclear whether the procedural violation resulted in educational harm to the student, the parent was forced to file a due process hearing and find out on the first day of the hearing that the services had been changed. The legal fees she incurred for the hearing were sufficient to constitute harm sufficient to find a denial of FAPE. Where the district court rejected the proposition that FAPE was denied because the district did not develop goals in all areas of need (citing *Rowley* for the proposition that maximization of potential is not required), the ruling of the district court is reversed and remanded for a determination of whether the IEP satisfied the *Endrew F.* standard. The Ninth Circuit describes the *Endrew F.* standard by first quoting it and then using the following language: "In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can 'make progress in the general education curriculum'…taking into account the progress of his non-disabled peers, and the child's potential." Note: The opinion was amended on May 30, 2017 to make minor changes to language of calling an IEP "a contract" and changing that to "like a contract." 69 IDELR 203.

D. S.H. v. Tustin Unif. Sch. Dist., 69 IDELR 176 (9th Cir. 2017) (unpublished). The fact that the 13 year-old's IEP team made many changes to the IEP during many meetings with the parents reflected sufficient participation on the parents' part. At least one parent participated in each of the six IEP meetings and the team made several changes to the proposed IEP after the parents provided their input. The parents' failure to consent to the student's placement, either during or after the meetings, did not demonstrate a lack of participation. Just because the parents and other IEP team members did not actually voice concerns about the IEP at the final meeting does not mean they did not have the opportunity or information necessary to do so. In addition, any failure on the part of the district to provide PWN of the proposed placement was harmless in light of the parents' extensive participation (the meetings, according to the hearing officer's decision, contained about 20 members and six meetings were held between October 2012 and March 2013 over a period of more than 18 hours).

E. Rachel H. v. Dept. of Educ., 70 IDELR 169, 868 F.3d 1085 (9th Cir. 2017). While an IEP must include the location of a student's proposed services, "location" does

not mean the specific school the student will attend necessarily. Here, the Education Department interprets "location" to mean the type of environment as opposed to a particular school, which is consistent with the legislative history of the IDEA. Thus, the failure to identify a specific school in a student's IEP does not, in itself, establish an IDEA violation.

F. Luo v. Baldwin Union Free Sch. Dist., 69 IDELR 88 (2d Cir. 2017) (unpublished). It is well-settled that the IDEA does not entitle parents to determine the "bricks and mortar" of the specific school site. Here, the district did not violate the IDEA when it denied the father's request to place the student with autism in an out-of-state school using "natural methods" to educate children with developmental delays. The father participated in the decision-making process, and "educational placement" refers only to the type of program that the student will receive as opposed to specific school site. In answering the key question of whether the parent had the opportunity to participate in the placement decision, it is noted that the parent attended the student's IEP meetings and shared his belief that the student required placement in the special school. Although the district members disagreed with him, the parent could not show that the team disregarded his input.

G. J.R. v. Smith, 70 IDELR 178 (D. Md. 2017). Where the district's placement specialist allegedly called the student's mother prior to an IEP meeting and told her to be "ready for a fight," that does not mean that predetermination of placement occurred. Rather, the student's IEP team had a "robust" discussion about the potential private placement versus the potential public school placement. Where the mother alleged that the program specialist stated that the IEP team's chair intended to place the student in a public school program that had been under consideration, this did not prove that the district had made up its mind. The placement specialist was simply alerting the parents to the IEP chair's state of mind and letting them know that they were going to need to persuade the other members of the IEP team that their son required a private school program for FAPE. Indeed, the phone call should be viewed in light of the placement specialist's testimony that "no decision was made outside of the IEP team." In addition, the IEP team chair did not make the placement decision by himself. Instead, the district team members, including the program specialist, agreed on the public school program following a thorough discussion of both placements. Thus, the parents failed to prove that they were excluded from participation in the IEP process. Thus, the ALJ's decision that the parents were not entitled to private school reimbursement is affirmed.

H. Jackson v. Chicago Pub. Schs., 70 IDELR 33 (N.D. Ill. 2017). Where the district took 97 school days to finalize the initial IEP for a preschooler, it was in violation of the state's 60-day timeframe. However, the delay stemmed from the district's efforts to include the parent in the IEP process. Here, the district notified the parent of an IEP meeting within the 60-day period, but the parent did not attend; nor did the parent attend any of the four additional IEP meetings that the district

scheduled over the following 10 weeks. The district was correct to prioritize parent participation over the state timeframe, and it would be inconsistent with Supreme Court authority to penalize the district when it was unable to complete the IEP within the deadline because it went out of its way to include the parent in the development of her child's IEP. The district developed the IEP without the parent only after she failed to attend the fifth meeting it had scheduled to discuss her son's program.

I. N.W. v. District of Columbia, 70 IDELR 10, 253 F.Supp.3d 5 (D. D.C. 2017). In the development of an IEP, a district must ensure that it clearly specifies the nature and type of services that the student will receive. In this case, the autistic student's IEP team determined that the student needed special education services on a full-time basis, including during lunch and recess. According to IEP meeting notes, the student needed supports during recess and lunch in order to enhance his social interaction with nondisabled peers. However, the district did not include a provision in the IEP document calling for social supports during lunch and recess, although the district argued that it verbally promised the parents that it would deliver the necessary supports. There was no way for the district to guarantee the receipt of these supports at lunch and recess, however, without explicitly included them in the student's IEP. One of the purposes of the IEP is to ensure that services provided are formalized in a written document that can be assessed by parents and challenged if necessary. Thus, the parents are granted partial summary judgment finding that the student's IEP is inappropriate.

J. S.H. v. Mount Diablo Unif. Sch. Dist., 263 F.Supp.3d 746, 70 IDELR 98 (N.D. Cal. 2017). Where the district's interim IEP did not clearly state the setting in which speech/language services would be provided to the student—either individually or in a group setting—it denied FAPE. The services offered were not sufficiently clear and specific enough to permit the parent to make an intelligent decision as to whether to agree, disagree or seek relief through a due process hearing regarding the district's offer of services. Because the parent had requested speech and language services in both individual and group settings, but the district only offered one session without indicating the setting, the parent's ability to meaningfully participate in the development of her child's IEP was impaired. This is especially significant where the independent evaluator recommended services in both settings, but the parent was not provided sufficient information to evaluate the school district's offer of services in light of the evaluator's recommendations. Thus, the district is ordered to convene the full IEP team to develop an appropriate program and is ordered to provide compensatory speech/language services, as well as reasonable attorney's fees to the parent.

K. J.E. v. New York City Dept. of Educ., 69 IDELR 93, 229 F.Supp.3d 223 (S.D. N.Y. 2017). IEP team's failure to consider the child's need for one-to-one instruction, which the parent believed was needed for the child to make progress, denied FAPE. Thus, the district is required to reimburse the parent $97,700 for the cost of the child's private school tuition. While an IEP team is not required to

adopt a parent's views, it must give due consideration to her input. Here, the parent and the child's private school teachers disagreed with the team's recommended 6:1:1 placement during the IEP meeting and asserted the child's need for one-to-one assistance. The district's obligation to consider the parent's input in this regard does not depend on whether the district had a one-to-one placement available. The team had the duty to expressly consider the option.

L. J.S. v. New York City Dept. of Educ., 69 IDELR 153 (S.D. N.Y. 2017). Where district prepared for an IEP meeting by drafting and circulating a proposed IEP for a 6 year-old student with autism, this did not amount to a predetermination of placement under the IDEA sufficient to constitute a denial of FAPE. The district demonstrated that the final IEP took into consideration the comments and concerns expressed by one of the parents during the IEP meeting. Indeed, the parents conceded that they were provided with a copy of the draft and that the final product reflected their comments and concerns. While parents have the right to provide input into the IEP process, they do not "have the right to veto decisions with which they disagree." In addition, the parents failed to provide any "non-speculative" evidence that the proposed placement would be unable to implement the IEP as written. Thus, the parents' claim for tuition reimbursement for private school is denied.

M. A.V. v. Lemon Grove Sch. Dist., 69 IDELR 155 (S.D. Cal. 2017) (Note: school site is considered "placement" under California law). Parents' claim that the school district predetermined placement is rejected. At a January 2015 meeting, it was decided that the student with dyslexia needed small group instruction in a structured setting with intensive reading support. The district considered some possible private schools to implement the IEP and selected a school other than the one desired by the parents. The district explained that its chosen school was closer to the student's home, had an immediate opening, and could meet the student's needs. The parents' assertion that the district was unwilling to consider alternatives to its selection is rejected where the parents and their advocate engaged in a thorough discussion with other IEP team members about the student's needs during the January meeting as well as during a May 2015 meeting. In addition, the district's special education director investigated whether the parents' chosen school would be appropriate. The team's discussion the preferred school as well as the district's willingness to investigate the advocate's concerns about the school proposed by the district illustrated the district's willingness to consider other options. Thus, no predetermination occurred.

N. P.C. v. Rye City Sch. Dist., 69 IDELR 122 (S.D. N.Y. 2017). Where meeting notes indicate that the 5th grader's IEP team discussed counseling and speech and language therapy goals, the goals accidental omission was harmless. While the omission constituted a procedural violation, it was a technical error and not actionable where it did not significantly impede the parents' participation in the decision-making process. Rather, the notes reflect that the team discussed the student's counseling and speech goals and the IEP developed at a May 2012

meeting included speech and language therapy and counseling services based on those goals. In addition, the parents did not seem to rely on that omission when they opted to continue their son's unilateral private placement for a third year and during a July 2012 meeting, they made no mention of the fact that the IEP team had left out those goals previously, further suggesting that the omission did not interfere with or otherwise affect their decision to place the student in the private school. Thus, the review officer's decision is upheld and the parents are denied tuition reimbursement.

O. Tamalpais Union High Sch. Dist. v. D.W., 70 IDELR 230 (N.D. Cal. 2017). Parents are entitled to reimbursement for private school tuition and transportation expenses based upon the district's failure to distinguish between individual and group speech and language therapy in the student's 2015-16 IEP. Parent participation under the IDEA relates to implementation of the IEP as well as development of it. Thus, parents must have a clear understanding of the type and amount of services being offered. The IEP here did not include a clear description of the student's speech and language services where the IEP team checked boxes indicating that the student would receive "individual" and "group" therapy but omitted any description of the group services to be provided. The district's argument that the IEP team's discussions put the parent on notice that it intended to provide 45 minutes of speech and language services in a pragmatic social skills group with individual therapy to be provided occasionally as needed is rejected. Whether or not the services were discussed at the IEP meeting, the district was required to commit in writing to a clear and enforceable plan.

## IEP CONTENT/IMPLEMENTATION ISSUES

A. K.M. v. Tehachapi Unif. Sch. Dist., 69 IDELR 241 (E.D. Cal. 2017). As a whole, the IEP goals appropriately addressed the elementary student's ability to stay on task. While the parent's argument that the student needed to improve her attention span to obtain educational benefit is not disputed, it is not required that an IEP have specific goals to address each area of identified need. Rather, the IEP annual goals must meet a student's needs and the IDEA does not require that they have a one-to-one correspondence to every specific need. The question is whether the annual goals overall will address the educational needs resulting from the student's disability and, in this case, they do. The student's IEPs for first and second grade included goals that addressed her ability to comply with directions and directly measured her ability to stay on task long enough to comply with two and three-step directions. In addition, the IEP required the district to provide a visual schedule, preferential seating, on-task reminders and a one-to-one aide—all of which would address her attentional difficulties. While the ALJ decided the case prior to the *Endrew F.* decision, this student's IEP met the Supreme Court's standard by including goals that addressed all areas of need, including the student's ability to stay on task.

B. C.M. v. New York City Dept. of Educ., 69 IDELR 117 (S.D. N.Y. 2017). Parents are not entitled to funding for their unilateral private school placement for their son with autism. While the annual goals should have contained more detail, the detailed short-term objectives remedied that. The objectives developed for each goal provided critical guidance on progress monitoring that the goals lacked. As the SRO pointed out, the objectives included criteria for evaluating the student's success (for example, 80 per cent accuracy in 4 out of 5 opportunities) as well as the procedures for evaluating the student's progress, such as teacher observation or classroom activities. The SRO correctly found that the objectives were sufficiently detailed to guide a teacher in providing the student with instruction.

C. K.D. v. Downingtown Area Sch. Dist., 70 IDELR 203 (E.D. Pa. 2017). Although the annual goals in the student's 2nd grade IEP were carried over from her 1st grade IEP, the student made appropriate progress. The significant improvement in the student's PLAAFP's from one year to the next demonstrated progress. While the IEP team opted to keep many of the goals from the previous year's IEP, the team developed more advanced goals in the areas of writing, reading comprehension and math calculation. In addition, with respect to the unchanged goals, the student's baselines increased significantly. The fact that the school district did not revise these goals merely shows it was continuing to target the student's reading ability with repetition in core areas. The IDEA does not require a district to increase a student's annual goals based on her lack of achievement; rather, the IDEA states that the team must revise the student's IEP to address lack of progress. Here, the district modified the student's IEPs to include additional specialized instruction and it tried different research-based reading programs until it found one that worked. Finally, placement tests conducted in second grade showed that the student's reading and writing skills improved dramatically during the 2nd grade school year. While the student did not make as much progress as her parents would have liked, her progress was appropriate in light of the severity of her learning disabilities.

D. S.M. v. Hendry Co. Sch. Bd., 70 IDELR 249 (M.D. Fla. 2017). District court adopts Magistrate's recommendation dismissing parents' IDEA claim. The district's failure to file a required plan with the Florida Department of Education in order to use a speech and language associate to provide services to the student with autism, holoprosencephaly and hydrocephalus did not amount to a denial of FAPE. In Florida, districts may use speech-language associates rather than certified or licensed SLPs if the associate has an undergraduate major in speech-language pathology and is under the direction of a certified or licensed SLP with a master's degree or higher in speech-language pathology. Here, the associate at issue met the educational requirements and was under state-mandated supervision. The fact that the district did not file the required plan for approval with the FLDOE was not enough to constitute a denial of FAPE.

E. S.B. v. New York City Dept. of Educ., 70 IDELR 221 (E.D. N.Y. 2017). District erred in developing reading goals for a second-grader with a speech and language

impairment that called for her to identify main ideas, analyze the motivations of characters, and use "context clues" to improve her vocabulary when she was unable to recognize many of the letters of the alphabet. Indeed, a classroom observation conducted one month prior to the development of the IEP revealed that the student was not able to write words. Instead, she was learning to write the sounds that she heard within words, such as "SPMKT" for "supermarket." Nonetheless, the IEP did not include any goals related to learning the alphabet. Thus, the proposed reading goals in the district's IEP were far too advanced for the student where there is no evidence that interpreting and critical thinking skills are "particularized" to the student's individual needs and disability, and the district representative was unable to explain how the annual goals related to the student's unique disability-related needs. Because the IEP is not designed to enable the student to make appropriate progress, the district is to reimburse the parents for any private school expenses not already paid under the stay-put provision.

F. Methacton Sch. Dist. v. D.W., 70 IDELR 247 (E.D. Pa. 2017). The district denied FAPE when proposing an IEP for the high school student with SLDs and a speech and language impairment, and the hearing officer's decision that the parents are entitled to private school tuition is affirmed. Where the student had attended a private school for two years in accordance with a settlement agreement reached in 2013, the IEP team had two sources of information available when drafting the student's IEP—the results of standardized achievement tests the district recently administered to the student and the grades the student had made at the private school. However, as the hearing officer found, the goals in the proposed IEP were focused upon the student's performance in the district's curriculum, which was information that was not then-available to the IEP team. The district's plan to gather performance data after the student returned to public school was not adequate, because the failure to obtain any baseline data at the time the IEP was written meant that the goals themselves were insufficient to provide guidance to teachers regarding the student's specific instructional needs and the expected progress at the district's high school. The district had access to the student while he was attending the private school and should have obtained current baseline data upon which to base the proposed IEP goals.

## LEAST RESTRICTIVE ENVIRONMENT

A. Dear Colleague Letter, 69 IDELR 106 (OSEP 2017). This DCL supersedes the 2012 OSEP DCL and includes additional information on the reporting of educational environment data for preschool children. A preschooler receives special education and related services in a "regular early childhood program" when at least half of the children in the class are nondisabled and services are delivered in the child's class during the course of daily activities in which the whole class participates. States are to annually report on the number of preschoolers with disabilities who attend a regular early childhood program and whether they receive the majority of hours of special education and related

services in such program or in another location. A regular early childhood program is one in which at least 50% of the children are nondisabled (i.e., children who do not have IEPs). This might include a kindergarten class, Head Start, a public preschool class, a private preschool or kindergarten program, or group child development centers or child care. However, programs such as informal weekly neighborhood playgroups or home settings do not qualify. For example, a child would not be receiving instruction or services in a "regular program" if services are delivered in a one-to-one therapeutic setting or in a small group comprised solely of children with disabilities in a different location in the building.

B. School District of Philadelphia v. Post, 70 IDELR 96 (E.D. Pa. 2017). School team did not seriously consider the child's ability to participate successfully in a general education classroom when determining placement. Rather, school employees repeatedly indicated that the child's autism diagnosis demonstrated a need for placement in the autism support program and there appeared to be "minimal, if any," discussion of the possibility of providing supplemental aids and services to the child so that he could be educated in a regular education classroom. In addition, the district offered a part-time general education placement after the parents objected to the autism support program, but the IEP failed to give a reason for the change, which further suggested that the team did not meaningfully consider the child's participation in a regular kindergarten class. The team also failed to consider the benefits the child would receive from a general education placement, where the child would have received greater benefit based upon the fact that he was an observational learner who benefited from modeling nondisabled peers. Finally, the child does not have any behavioral problems that would significantly impede the learning of others students. Thus, the district erred in failing to consider placement in the general education setting.

## ONE-TO-ONE AIDES

A. Rylan M. v. Dover Area Sch. Dist., 70 IDELR 15 (M.D. Pa. 2017). Parental concerns about the safety of a student with Ehlers-Danlos syndrome who suffered a concussion during a fainting spell at school does not support the need for a one-to-one medically trained aide for the student. A district must provide reasonable accommodations under Section 504 that will ensure meaningful participation in educational activities and meaningful access to educational benefits. When the parents requested that an aide be included in the student's 504 plan, the district instead opted to revise and improve the student's medical protocols. For instance, the district developed a schedule to ensure that two faculty members would always be in proximity to the student and distributed a medical alert poster to the school nurse, teachers and substitute teachers. In addition and after the concussion, at least three physicians who examined the student declined to recommend the provision of a medically trained aide. Rather, the student's pediatric cardiologist stated that the student had no barriers to learning and recommended interventions such as a cooling vest and adequate fluid intake.

Further, school staff consistently testified that the student was able to articulate when he was going to have a problem. Thus, the failure to provide a one-to-one aide did not deny FAPE under Section 504.

**BEHAVIOR/FUNCTIONAL BEHAVIORAL ASSESSMENTS & BIPS**

A. N.G. v. Tehachapi Unif. Sch. Dist., 69 IDELR 279 (E.D. Cal. 2017). The district provided FAPE to the 7 year-old student with autism and speech and language impairment, even though it did not conduct an FBA as soon as the parents expressed their concerns about the student's behavior. Rather, the ALJ correctly found that the district appropriately focused on strategies and interventions instead of conducting assessments to address the student's behavioral issues. Under the *Endrew F.* clarified standard for FAPE and for a student who is not fully integrated in the regular education classroom and not able to achieve on grade level, an IEP "need not aim for grade-level advancement" but should be "appropriately ambitious" in light of the student's circumstances so that the student has a chance to meet challenging objectives. The district afforded the student FAPE because the IEP team took steps to address the student's behavioral issues, including adding an adult aide to the classroom to work 1-on-1 with the student; using positive reinforcement to reward the student's good behavior; arranging for an aide to meet the student when he arrived at school in the morning and to reinforce behavior and "prime" him for the day; using timers and cues for transitions; using visual tokens and supports; and eliminating locations that triggered behavioral issues, such as the cafeteria, from the student's schedule.

B. C.M. v. Warren Indep. Sch. Dist., 69 IDELR 282 (E.D. Tex. 2017) (unpublished). Student's severe behavioral problems, including noncompliance, eloping and physical aggression toward staff and other students, prevented him from receiving instruction in the general education classroom. Thus, the court will not focus upon the student's academic abilities and instead will look to whether the student's IEP was reasonably calculated to enable him to make progress in light of his circumstances. Here, the student's IEP was designed appropriately and, although staff had to restrain the student 5 times when he was aggressive or violent, the teacher testified that his behavior improved significantly after the district developed and implemented a BIP. Further, the teacher testified that the student made some progress in English, reading, math and social studies. This progress is appropriate in light of the student's circumstances where his own behavior so significantly impedes his access to general education and placement in the self-contained classroom where he received one-to-one instruction was his LRE. Not only is the placement necessary to address the student's severe behavioral problems, the BIP provided him the opportunity to earn time with general education peers when he behaved appropriately.

C. Albright v. Mountain Home Sch. Dist., 70 IDELR 95 (W.D. Ark. 2017). Parent of student with autism did not show that the district erred in using sensory integration as a behavior management technique. While the parent's expert

testified that sensory integration treatment is a "pseudoscientific intervention" that reinforces maladaptive behaviors by rewarding students with pleasant activities, these criticisms are not accurate here. The district's board-certified behavioral consultant was keenly aware of the purpose of the student's behaviors and testified at great length about the nature and variety of the practices the district uses with the student, including many that the parents' expert specifically recommended. While it is recognized that the behavioral consultant shared some of the expert's concerns about the potential for sensory integration to be counterproductive, this student's extensive sensory issues require a program with some sensory integration. Thus, the administrative decision finding in the district's favor is upheld.

**DISCIPLINE/MANIFESTATION**

A. A.V. v. Panama-Buena Vista Union Sch. Dist., 71 IDELR 107 (E.D. Cal. 2018). The parent's failure to consent to an IDEA evaluation bars the 12 year-old student with ADHD from claiming the protections of the IDEA in a discipline context. While a district generally must conduct a manifestation determination for a student who does not currently receive IDEA services if it has reason to believe the student has a disability at the time of the disciplinary infraction, an exception exists if the district proposes an evaluation and the parent fails to provide consent for it. Here, the district prepared copies of its assessment plan in both English and Spanish and mailed them to the parent's home address on at least four occasions. In addition, district personnel provided the parent with a Spanish version of the consent form and reviewed the form with her, explaining why the district was asking to conduct an evaluation. Thus, the district met the requirement to make reasonable efforts to obtain the necessary consent from the parent, going the "extra mile, and then some, to do so, all to no avail." While the parent did return the signed consent form in January 2015, the district was not required to conduct an MD before it expelled the student in November 2014.

B. J.M. v. Liberty Union High Sch. Dist., 70 IDELR 4 (N.D. Cal. 2017). District's expulsion of a high school student with ADHD and 504 services is upheld and the student's discrimination suit is dismissed. Under 504, a district must evaluate a student prior to imposing a significant change of placement, including disciplinary removals. When the student here was involved in a "threatening confrontation" with a classmate, the district convened a team and concluded that the student's misconduct did not have "a direct or substantial relationship" to his disability. The student's claim that the district should have assessed whether his conduct merely "bore a relationship" to his ADHD is rejected where 504 does not include guidelines for making manifestation determinations but does provide that a district's compliance with the procedural safeguards of the IDEA is one means of meeting Section 504's evaluation requirement. Here, the evidence showed that the district appropriately followed its evaluation procedures, which mirrored the procedural safeguards outlined in the IDEA regulations.

C. Doe v. Osseo Area Sch. Dist., 71 IDELR 35 (D. Minn. 2017). District did not discriminate when it made its decision as to whether the student's ADHD, PTSD and Major Depressive Disorder caused him to write racist graffiti on the inside of a stall door and on a toilet paper dispenser in the boys' bathroom. The parents' argument that the manifestation determination should have considered whether there was any connection to his disabilities since it was made under Section 504 is rejected. Section 504 does not establish specific requirements for making manifestation determinations. Rather, 504 regulations require a district to adopt and implement a system of procedural safeguards that can be satisfied by using the same procedural safeguards that would apply in cases with IDEA-eligible students, which is what the district here chose to do. Where the IDEA requires a team to consider whether the student's misconduct was caused by or had a substantial relationship to his disability, the parents' lesser standard is rejected. The parents do not cite any Section 504 student discipline cases that use the standard that they argue the school district should have applied. In addition, OCR applies a causation standard as well; thus, the parents could not show that the district should have applied a lesser standard in its review of the student's conduct.

## STUDENTS IN JUVENILE JUSTICE/CORRECTIONAL FACILITIES

A. V.W. v. Conway, 69 IDELR 185, 236 F.Supp.3d 554 (N.D. N.Y. 2017). County jail is enjoined from placing juveniles with disabilities in 23-hour isolation and school district is ordered to provide appropriate special education services to them until this class action case is resolved. Here, the juveniles were able to show what was necessary to obtain injunctive relief where they alleged two distinct IDEA violations: the provision of "cell packets" that did not conform to any IEP and repeated removals to solitary confinement without the benefit of a manifestation determination. Thus, the juveniles were substantially likely to succeed on the merits of their class action and it is clear that applicable regulations strongly indicate that the district and the jail jointly share the obligation to provide FAPE to qualified students. In addition, the lack of appropriate educational services would hinder important aspects of development for the juvenile students and evidence indicates that the "cell packets" are not adequate to meet their educational needs—which is a factor that goes against the public interest. Finally, the need to maintain safety and security is not as strong as the juveniles' right to appropriate educational services. Thus, the district is required to immediately provide special education services and other procedural protections pending the outcome of the case.

## METHODOLOGY

A. Ms. M. v. Falmouth Sch. Dept., 875 F.3d 75, 69 IDELR 86 (1st Cir. 2017). The IDEA does not require an IEP to include a specific instructional methodology for a student. Here, the exclusion of any particular reading program in the IEP appears deliberate and suggests that the IEP team intended to provide for a degree

of flexibility in the implementation of the student's educational program. The fact that the district's prior written notice referenced the SPIRE reading program did not require its use for the third-grader with Down syndrome and ADHD. Rather, the prior written notice was not part of the child's IEP, and the IEP did not mention a methodology but provided for "specially designed instruction" in reading and math.

B. A.M. v. New York City Dept. of Educ., 69 IDELR 51 (2d Cir. 2017). District's proposed placement for a 6 year-old student with autism in a 6:1+1 setting with no specific methodology did not offer FAPE. Where all evaluation reports and evaluative data before the IEP team yielded a "clear consensus" that the student needed a one-to-one setting with intensive ABA therapy, the IEP developed must reflect that consensus. This is true "whether the issue relates to the content, methodology, or delivery of instruction in a child's IEP." Where all of the reports that addressed the child's needs with regard to class size and methodology called for a one-to-one setting with intensive ABA therapy, and none of the evaluative data available to the IEP team suggested that the child could benefit from a larger setting or a different methodology, the one-to-one setting with ABA therapy should have been included in the IEP. Further, the district did not conduct any evaluations of its own that would raise questions about the recommendations in the evaluation materials. Thus, the district erred in relying on the district psychologist's opinion that the child could be appropriately educated in a less restrictive setting that would not use a specific methodology. The district court's decision is reversed and remanded for a determination on the parents' private school reimbursement claim and whether the private placement is appropriate.

C. R.E.B. v. State of Hawaii Dept. of Educ., 70 IDELR 194, 870 F.3d 1025 (9th Cir. 2017). Department violated the IDEA in failing to specify ABA as a teaching methodology in the student's IEP because the student's IEP team discussed ABA at length and recognized that it was integral to the student's education—And ABA is widely recognized as a superior method for teaching children with autism. Where a particular methodology plays a critical role in the student's educational plan, it must be specified in the IEP, rather than left up to individual teachers' discretion. Similarly, the Department violated the IDEA when it did not specify in the IEP the LRE during the regular and extended school year, which left it "as deemed appropriate" by his special education teacher/care coordinator and general education teacher. This improperly delegated that determination of placement to teachers outside of the IEP process. Finally, the failure to include transition services necessary for the student to transition from his private school environment to the public school environment denied FAPE.

D. N.B. v. New York City Dept. of Educ., 70 IDELR 245 (2d Cir. 2017) (unpublished). The failure of the district's proposed IEP to specifically require the use of the DIR/Floortime methodology for the student with autism is not a denial of FAPE. While the annual goals and short-term objectives in the proposed IEP were almost identical to the goals and objectives created by the

private school she was attending, the goals did not mandate the use of DIR/Floortime. While the goals were based upon the student's success in the private program, they addressed her unique areas of need and did not require a particular methodology for implementation. The State hearing officer was correct in rejecting the parents' assertion that IDR/Floortime is the only means of achieving progress for the student. The teachers at the proposed school used a variety of methodologies and tailored their instructional techniques to all of the students' individual needs. Thus, the parents are not entitled to reimbursement for their private placement of their child.

## RESIDENTIAL PLACEMENT

A. Edmonds Sch. Dist. v. A.T., 71 IDELR 31 (W.D. Wash. 2017). ALJ's decision ordering district to reimburse parents for residential placement of a high school student with ADHD, ODD and schizophrenia is affirmed. The district's primary argument that the student could perform well academically when his medical conditions were under control does not make the residential placement "medical" in nature, and the placement was not required based purely on the student's medical needs. The support services the student received at the residential placement in Utah, which included psychological services, social work services, therapeutic recreation, counseling and medication management, all qualify as related services under the IDEA. Clearly, the student needed to receive these services in a residential setting to address his truancy and his tendency to elope—both of which significantly impeded his learning. In addition, the school district's program did not provide FAPE, as the student did not progress in its program.

## COMPENSATORY EDUCATION/OTHER REMEDIES

A. Board of Educ. of Albuquerque Pub. Schs. v. Maez and Mondragon, 69 IDELR 98 (D. N.M. 2017). Administrative order requiring district to fund 40 hours of private speech and language therapy for a student with autism is stayed, where the district will suffer irreparable harm by having to spend approximately $5,000 for private speech and language therapy that it cannot recoup from the parents if successful on appeal. In addition, the balance of harms tips in favor of the district where the student can get speech and language services provided by district personnel. The district would not be acting in the public interest if it spent thousands of dollars of taxpayer money on services it could provide in house. Further, there is lack of evidentiary support for the administrative ruling, which suggests that the district is likely to succeed on the merits of its appeal.

B. Somberg v. Utica Comm. Schs., 69 IDELR 94 (E.D. Mich. 2017). Court will appoint a special master to identify appropriate compensatory service providers and arrange for ongoing payment for such services. The deterioration in the parties' relationship during the 4-year legal battle here would make the district's involvement in the provision of compensatory services inappropriate. The district will be responsible for the related costs, fees and expenses of the special master.

C. Doe v. East Lyme Bd. of Educ., 70 IDELR 99, 262 F.Supp.3d 11 (D. Conn. 2017). Creation of an escrow account for a student with autism will allow student to arrange for appropriate compensatory education services during his college years. Because the student went without related services set out in his 2008-09 stay-put IEP for 6 years and received only those services that his mother could afford, the district committed a "gross violation" of IDEA rights that entitled the student to services beyond his high school graduation. While the district is currently using videoconferencing to provide speech and language services, the district did not provide any evidence that it could provide PT, OT or Orton-Gillingham instruction in that manner. The value of the compensatory services owed is $203,478 based upon the full value of services set out in the IEP and deducting from it a previous reimbursement award. The district has 14 days to deposit this amount into an escrow account which will be monitored by an agent.

D. R.S. v. Board of Educ. of the Shenendehowa Cent. Sch. Dist., 70 IDELR 154 (N.D. N.Y. 2017). Where pure money damages are not available as relief under the IDEA, the parents' claim for immediate relief in the form of moving and relocation expenses from New York to Massachusetts is denied. Here, the parents point out purely a financial injury estimated to be between $5,500 and $7,000 per month because it cost that much more to move to and live in Massachusetts than in New York. The parents have not offered any legal support for their argument that a district may be responsible for relocation costs and the IDEA does not require districts to pay for non-educational expenses or other types of money damages.

E. Montgomery Co. Intermed. Unit No. 23 v. C.M., 71 IDELR 11 (E.D. Pa. 2017). While the Third Circuit has indicated that compensatory education should put students in the same position they would have been in if the district had not violated the IDEA, it has not prohibited hour-for-hour calculations of compensatory services. Thus, the hearing officer's finding that the district's failure to meet any of the preschooler's educational needs justified an award of five hours of compensatory education for each school day the child went without FAPE is valid. Clearly, the district's failure to provide the intensive, full-day supports the child required justified this hour-for-hour calculation of compensatory education. However, once the district offered a language-based preschool class in November 2015 and the child made meaningful progress in it, the hearing officer erred in awarding compensatory education through June 2016. In addition, the parents' request to convert the compensatory education award into a monetary trust fund is denied.

## SECTION 504/ADA DISCRIMINATION ISSUES GENERALLY

A. Harrington v. Jamesville Dewitt Cent. Sch. Dist., 69 IDELR 235 (N.D. N.Y. 2017). Honor student's failure to connect the district's decision to prohibit him from participating in a school play to his depression and anxiety requires

dismissal of his 504 claims against the district. A student seeking relief for disability discrimination is required to show that the district excluded him from or denied him the benefits of its programs or activities on the basis of disability. Here, the student's exclusion from the school play was a result of his alleged plagiarism in a writing assignment. The student's claim that a citation error in the assignment was a result of a mental impairment and ongoing stress did not show that the district acted based upon a disability. In fact, the student's complaint admits that he was excluded from the play because of his supposed plagiarism, not because of his disability. In addition, the student's claim that the district failed to accommodate his depression and anxiety directly relates to the provision of FAPE and must be first exhausted.

B. C.D. v. Grant Co. Bd. of Educ., 71 IDELR 17 (W.Va. Ct. App. 2017). Lower court's decision that the district afforded diabetic student with a reasonable accommodation is affirmed. Under the student's 504 plan, it was noted that the district would not penalize the student for absences related to her diabetes, including those required for medical appointments, as long as she submitted a handwritten note. During the Spring semester of 2015, she accumulated 14 unexcused absences without submitting the notes, however. As a result, the district filed a truancy complaint, which was later dismissed. Under state law (that is in line with Section 504), districts are required to provide accommodations when they are aware of a student's disability and that an accommodation exists to meet a need. Here, the district did not meet quarterly to review the student's absences as it had agreed to do in her 504 plan. However, it was not disputed that her absences were excused when a written note was provided and until the student stopped submitting the notes. The district was not responsible for acquiring the notes associated with the absences; rather, the student failed to take advantage of the reasonable accommodation when she did not provide the required documentation to the school. There was no discrimination here.

C. Rivera-Quinones v. Department of Educ. of Puerto Rico, 69 IDELR 101 (D. P.R. 2017). Education agency's motion to dismiss ADA Title II claim is denied where the agency did not dispute that the student with spina bifida, hydrocephalus and CP was a student with a disability under the ADA. In addition, Title II places an affirmative obligation on educational agencies to make their program accessible to students with disabilities, and a student's inability to access a facility by wheelchair clearly amounts to discrimination "by reason of" disability. Here, the parent claimed that her child could not access her main classroom due to architectural barriers that make it inaccessible by wheelchair. This is clearly a plausible ADA Title II claim.

D. Todd v. Carstarphen, 69 IDELR 157, 236 F.Supp.3d 1311 (N.D. Ga. 2017). Blind parent of nondisabled children may not pursue an "associational discrimination" claim under Title II of the ADA against the district when it denied her request for door-to-door transportation for her children between the family's home and a nearby elementary school. Title II only prohibits discrimination against

individuals with disabilities. While the Title II regulations prohibit districts and other public entities from excluding individuals from services, programs and activities based on their relationship or association with an individual with a disability, the statute itself does not. Where the statutory provisions of ADA's Titles I and III do include this language, it is telling that Title II does not. Even if Title II did permit such a claim, the district offered multiple solutions for getting the children to and from school safely, including the creation of a walking group and arranging for them to be driven by parent volunteers, but the parent rejected every proposal based upon her distrust of strangers.

**PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES**

A. A.H. v. Illinois High Sch. Association, 71 IDELR 121 (7th Cir. 2018). High school athlete with CP and spastic quadriplegia did not show that his requested accommodation for state-level track and field events was reasonable. The creation of a separate para-ambulatory division would fundamentally alter the nature of the state championships and is, therefore, not required. While creating the separate track and field division might not result in a financial or administrative burden for the Association, it would fundamentally alter the essential nature of the competition. According to the Association, the purpose of having demanding qualifying times is to ensure that only the best and fastest runners—approximately 10% of all track and field athletes in the state—had the opportunity to compete in the championships. The creation of a new division would lower the current qualifying times and make it easier for certain runners to qualify for state. In addition, the student is a full member of his school's track team and has participated in every meet; thus, being provided with the same opportunity as his nondisabled teammates to compete for a spot in the state championships Thus the Association's refusal to create a separate division did not constitute disability discrimination under Section 504/ADA

**EDUCATION RECORDS/FERPA/CONFIDENTIALIT**

A. Wong v. State Dept. of Educ., 71 IDELR 128 (D. Conn. 2018). Parents do not have a private right to sue under FERPA. Therefore, the district's motion to dismiss is granted. The Supreme Court has ruled that FERPA does not provide parents or students with the right to sue for access to education records. Rather, FERPA's remedy is that the Secretary of Education may withhold federal funds from any educational agency or institution that violates the statute's provisions.