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Austin ✯ San Antonio ✯ Irving ✯ Houston ✯ Rio Grande Valley ✯ Albuquerque

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

This handout summarizes reported decisions from 2016-2017, with selected cases from 2015 included. We have not attempted to summarize every case, but rather, those that are particularly important and/or instructive. The handout also includes italicized "*Comments*" designed to focus on the practical implications of some of the cases. The Comments sometimes include personal opinions of the author of the handout.

ADA/SECTION 504

J.V. v. Albuquerque Public Schools, 116 LRP 6184 (10th Cir. 2016)

A school security officer handcuffed a 7-year old for 15 minutes after several hours of the student being disruptive and out-of-control. Parents sued claiming disability discrimination. The court ruled for the district, noting no evidence that the handcuffing was due to the student's disability. Rather, it was due to the student's behavior. The parents argued that the behavior was a manifestation of disability. The court:

> Appellants fail to cite any evidence showing his conduct indeed was a manifestation of his disability. Indeed, they cite no authority suggesting a school may not regulate a student's conduct if that conduct is a manifestation of a disability.

Comment: Can a school "regulate" a student's conduct if the conduct is a manifestation of disability? Yes. The law prohibits a disciplinary change of placement that is based on behavior that is a manifestation. Other forms of "regulation" are not prohibited. Available forms of "regulation" include short term suspension, short term ISS, and physical restraint. Of course all of those forms of regulation must be done in compliance with state law. That was not at issue here.

BULLYING/ HARASSMENT

W.A. v. Hendrick Hudson Central School District, 67 IDELR 178 (S.D.N.Y. 2016)

The court denied qualified immunity to the Director of Pupil Services based on allegations that she sent referral packets containing confidential medical and educational records to potential placements without parental consent and against specific parental direction. The court noted that there is no private cause of action under FERPA, but this case alleges a violation of the Due Process right to privacy. The court cited 2nd Circuit cases to establish that this right was clearly established, thus opening the door to personal liability. The suit against the district was dismissed, as there was insufficient pleading to support a "failure to train" theory and the director was not a "policymaker" with final authority. Key Quote:

> Thus, in alleging "the disclosure of confidential educational and medical records without consent and against the express identification of the lack of consent from [the student's] parents," Plaintiffs have plausibly pleaded a violation of a constitutionally protected interest.

Comment: The district asserted that personally identifiable information was redacted, but the suit alleged that the student's identity was still easily traceable.

DISCIPLINE

Bristol Township School District v. Z.B., 67 IDELR 9 (E.D. Pa. 2016)

The court ordered the district to re-do the manifestation determination. A district employee filled out the manifestation determination form prior to the meeting, answering the two questions and then asking at the meeting if anyone objected. The court found this to be improper. Also, the Team approached the process "globally" rather than "diving into the specifics." The court:

> This failure to consider the specific circumstances of the incident and the alleged conduct renders the manifestation determination deficient because it precluded any meaningful discussion of whether Z.B.'s behavior was a manifestation of his disability.

Molina v. Board of Education of Los Lunas Schools, 67 IDELR 18 (D.C.N.M. 2016)

The court held that parents who were challenging disciplinary action were not required to seek an "expedited" due process hearing. The school argued that the failure to seek an expedited hearing meant that the parents had not exhausted administrative remedies. Nope.

Letter to Snyder, 67 IDELR 96 (OSEP 2015)

In this letter, OSEP advises that hearing officers have no authority to extend the shorter deadlines for expedited hearings on disciplinary cases.

ELIGIBILITY

Memorandum to State Directors of Special Education, 65 IDELR 181 (OSEP 2015)

This is a reminder from OSEP that students with high IQs should not be automatically excluded from consideration for special education services. In particular, the letter encourages state directors to re-distribute *Letter to Delisle*, from 2013 (62 IDELR 240).

Q.W. v. Board of Education, Fayette County, Kentucky, 66 IDELR 212 (6th Cir. 2015)

The court upheld the decision that the student with high functioning autism was not eligible for special education. The case focuses on "educational performance" and concludes that this term includes more than academic achievement. The issue was clearly drawn in this case: "The Parents say that 'educational performance' includes a student's academic, social, and psychological needs. The Board agrees. Where they disagree is in the meaning of that term: the Parents focus on Q.W.'s problematic behavior at home, while the Board focuses on the psychological and social aspects of Q.W.'s makeup that affect his school performance." The court ruled for the school on this. Key Quotes:

> As the district court correctly observed, the plain meaning of "educational performance" suggests school-based evaluation.
>
> …the Act and the corresponding Kentucky statute speak not at all about a child's behavior at home and in the community.
>
> The Parents' preferred reading has no limiting principle. Their position would require schools to address all behavior flowing from a child's disability, no matter how removed from the school day.

M.P. v. Aransas Pass ISD, 67 IDELR 58 (S.D. Tex. 2016)

The court affirmed a hearing officer's decision that the student was not eligible due to lack of evidence "of the nexus between disability and special education needs."

Letter to Unnerstall, 68 IDELR 22 (OSEP 2016)

This letter is about the use of the terms "dyslexia, dyscalculia and dysgraphia," and evaluations regarding those conditions. The letter points out 1) IDEA does not require a disability label or diagnosis; 2) parents are not allowed to dictate the specific areas of an evaluation; 3) if it is determined that an evaluation for possible dyslexia is needed, it must be done; and 4) an evaluation for dyslexia could be done by a medical doctor, and if the district decides that such a medical evaluation is needed, it must be at no cost to the parents.

Devon L. v. Clear Creek ISD, 116 LRP 38829, and 68 IDELR 166 (S.D. Tex. 2016)

The court approved the magistrate's recommendation in favor of the district. This is a lengthy decision outlining a complicated fact situation involving extensive correspondence between the father and the school. The student was in the special education program for a while, but then was dismissed by the ARDC (IEP Team) due to lack of educational need. Based on grades, test scores and teacher reports, the court affirmed that decision. Key Quote:

> Importantly, the determination of educational need was not for an outside provider to make but was within the judgment of the ARDC…..The observations of teachers who spend time daily with Devon in the educational setting are more reliable regarding educational need than those outside providers who base their opinions on isolated in-school observations and parent-provided information and documentation.

L.J. v. Pittsburg USD, 68 IDELR 121 (9th Cir. 2016)

The 9th Circuit Court of Appeals held that a student was receiving special education services all along, even though the district classified those services as general education. There was no dispute about the fact that L.J. was a little boy with some big problems. From second to fifth grade, the boy was suspended from school multiple times, attempted suicide at least three times, and was diagnosed with Bipolar Disorder, Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder for which he took "a cocktail of serious medications." He was admitted to a psychiatric hospital twice. The school district did not ignore any of this. In fact, the court noted that the district "has provided many services for L.J." But the sticking point was that the mother wanted the school to classify the student as eligible under IDEA. The school repeatedly refused to do that. The school's position was that L.J.'s diagnoses did not, alone, make him eligible under IDEA. In order to be eligible, he had to present an "educational need."

The school district had evaluation data to support its position. A school psychologist did extensive testing and stated her opinion—that the boy did not qualify for services. Academically, the student was achieving at an average, or above-average level. Moreover, "L.J.'s teachers, service providers, and mother all reported that L.J. had made good progress in academics and improved his social skills with his classmates" at the time the eligibility decision was made. The district court agreed with the school district, but the 9th Circuit reversed.

In doing so, the court held that the services the district was providing were not general education assistance after all. The district was, in fact, providing "special ed," even though the district did not call it "special ed." The court agreed with the basic assertion that the student was making adequate progress. But the court said that the progress was due to the special education services he was receiving. Thus the court rejected the school's argument that it was providing general education assistance. According to the court, the services being provided amounted to "special education."

Comment: The school district's position in this case is a familiar one. The argument is that the student is doing adequately without the provision of special education services. Therefore, the student does not need special education services. Therefore, the student is not eligible for special education services.

This court's decision does not refute any of that logic. The law is very clear about this. Students have to need special education services in order to be eligible to receive them. The problem, however, is that the definition of "special education" is extraordinarily fuzzy. Federal

regulations tell us that "special education" means "specially designed instruction." "Specially designed instruction" is defined as "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction." 34 CFR 300.39(b)(3).

Consider: School district's today provide accommodations and special help to a wide variety of kids under a broad banner of programs. We provide remedial, tutorial, compensatory services; programs for gifted kids; programs for English Language Learners. We try various interventions with the kids who are struggling and then measure how they respond to them. We call that RTI. We provide 504 services. On top of all that, a good teacher is expected to differentiate learning for the students in her classroom, taking into account differing ability levels, experience, home support, learning style and culture. So…exactly when does something become "specially designed instruction"?

You might think that when professional educators say, "Your Honor, those services are not 'special ed'" that courts would defer to the judgment of the professional educators. But when terms like "special education" have a legal definition, it opens the door to this kind of judicial second-guessing. This case nicely illustrates how that can happen.

Mr. and Mrs. Doe v. Cape Elizabeth School District, 68 IDELR 61; 832 F.3d 69 (1st Cir. 2016)

This case is about the eligibility of a "bright, hard-working student with dedicated parents" who has achieved straight A grades and scored well on standardized tests. The school district argued that this meant that the student did not qualify as having a learning disability. The parents argued that the student's strong academic record masked her disability in reading fluency. Is eligibility based on deficits in overall academic performance? Or is it based on deficits in the more specific area of concern? The court:

> The conjunctive phrase, "in one or more…..areas," combined with the fact that "reading fluency" is listed as a separate category from two other reading-related skills, makes clear that a reading fluency deficit is sufficient to support a cognizable SLD.

As to "educational need":

> First, insofar as Jane's academic performance is relevant under the first prong, consideration of her grades and standardized test results is not categorically barred under the need inquiry any more than it is categorically barred under the first prong inquiry. Indeed, when qualified this way, Jane's overall academic performance is relevant to the need assessment under either of the competing constructions proposed by the parties. Second, we emphasize that the need assessment—irrespective of its purpose—requires at a minimum that a child with a disorder "need[ ]" special education. That is, a child who needs only accommodations or services that are not part of special education to fulfill the objective of the need inquiry does not "need" special education.

Comment: The bottom line on this case is that the eligibility decisions are not as simple as many educators would like them to be. The court cites an OSEP letter that the inclusion of "reading fluency" in the list of areas to be considered "makes it more likely that a child who is gifted and has an SLD would be identified." In other words, yes, you can be both "gifted" and eligible for special education, even under the SLD category.

EVALUATIONS

Student R.A. v. West Contra Costa Unified School District, 66 IDELR 36 (N.D. Cal. 2015)

The parents asked to sit in and observe when the school conducted a psychoeducational and behavioral assessment. The school balked, citing concerns that the parents' presence in the room would skew the evaluation. The evaluation was never completed and the parents claimed a denial of FAPE. The hearing officer and the federal court sided with the district on this one. Key Quote:

> The court finds that parents' condition that they be allowed to see and hear the assessment was unreasonable, and they effectively withdrew their consent by insisting on that condition. The [hearing officer] accurately concluded that the District's failure to complete the required assessments was caused by Parents' interference and denial of consent, and that the request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate.

Comment: It's important to point out that the district refused the parents' request not out of stubbornness or an attitude of "we've never done that before." The district cited legitimate concerns about test integrity and security. The district took a stance because it is the district's responsibility to make sure that evaluation data is gathered properly. All decisions about IEP content and placement of the student must be based on evaluation data. Therefore, evaluation data must be valid and reliable.

A.A. v. NYC DOE, 66 IDELR 73 (S.D.N.Y. 2015)

The district conceded that it failed to do the three-year re-evaluation, but still prevailed in litigation over FAPE and private placement. The hearing officer, the state review officer and the federal court all held that the failure to conduct the re-evaluation was a procedural error that did not cause harm. The IEP Team had abundant information available to it when devising the IEP, and the parent did not question its accuracy. No harm. No foul.

Comment: We put this in the "don't try this at home" category.

Cobb County School District v. D.B., 66 IDELR 134 (N.D. Ga. 2015)

The district requested the hearing after the parent requested an independent FBA. The hearing officer, after a seven-day hearing, held that the school's FBA was inappropriate. The court affirmed, and ordered the district to pay for the independent FBA.

Comment: This one is a puzzler. The court notes that there are no legal standards for FBAs, but nevertheless holds that this one failed to satisfy legal standards. The FBA was done by a BCBA with a Master's in Psychology who had done over 100 FBAs and BIPs. She spent four hours observing the student at school and interviewing staff. She then visited the school and interviewed staff four more times. She reviewed all records. She used a form to collect data and did so over 10 days. She then compiled all of this into her report. The court upheld the hearing officer's conclusion that the FBA was inadequate "because the data collection, as designed, was never going to provide a reliable enough conclusion as to the functions of D.B.'s serious and problematic behaviors." The parents sought $271,000 in attorneys' fees; the court awarded them $75,000. The parents appealed that award to the 11th Circuit. In a further puzzling decision, the court noted that the lower court had not explained its reasons for the reduction in the amount of fees sought. Moreover, the court held that the lower court had abused its discretion by reducing the fee award even though it had concluded that the district had needlessly protracted the litigation. However, since the finding of the lower court was that BOTH parties had "over-litigated" and protracted the dispute, the court vacated the entire fee award and sent the case back down for a determination of reasonable attorneys' fees. The 11th Circuit decision is at 69 IDELR 3 (2016).

Phyllene W. v. Huntsville City Board of Education, 66 IDELR 179 (11th Cir. 2015)

The court held that the district failed to evaluate the student in all areas of suspected disability, and therefore, failed to provide FAPE. The student was identified as having a learning disability, but the court faulted the district for not evaluating for a hearing impairment. The district was on notice that the student had had seven ear surgeries and was being fitted for a hearing aid. This, combined with subpar performance by the student, imposed a duty on the district to seek a hearing evaluation. Key Quote:

> While it is certainly true that Ms. W. did not request an evaluation of her daughter's hearing, the fact that she did not do so did not absolve the Board of its independent responsibility to evaluate a student suspected of a disability, regardless of whether the parent seeks an evaluation.

Comment: The court noted that school district witnesses testified that they had no reason to suspect a hearing impairment. However, "the objective record flatly contradicts the Board's witnesses." That record was largely notes from IEP meetings and other meetings with the parent.

Timothy O. v. Paso Robles USD, 67 IDELR 227 (9th Cir. 2016)

The court held that the district committed a procedural error that resulted in a denial of FAPE and a failure to provide meaningful parent participation in the IEP process. The court faulted the district for not evaluating for autism when the student showed symptoms of the condition. Following 9th Circuit precedent, the court was emphatic:

> So that there may be no similar misunderstanding in the future, we will say it once again: the failure to obtain critical and statutorily mandated medical information about an autistic child and about his particular educational needs 'renders the accomplishment of the IDEA's goals—and the achievement of FAPE—*impossible.'* (Emphasis in the original).

The court cited earlier 9th Circuit cases for the notion that a student "must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability." Key Quote:

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

Comment: The 9th Circuit is particularly strong on this point, and particularly with autism. But the court's emphasis on the critical importance of evaluation data—both for IEP development, and for informed and meaningful parent participation—is consistent with IDEA's purposes.

Mr. and Mrs. P. v. West Hartford Board of Education, 68 IDELR 188 (D.C. Conn. 2016)

The court held that the FIE was sufficiently thorough even though it did not include cognitive testing or a writing evaluation. The court noted that the only disability under suspicion was an emotional disability and the testing was adequate for that. The court also rejected the argument that the school had not considered an IEE. The record showed that the IEE was considered, and the court noted that the school was not required to implement all of its suggestions.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

F.C. v. NYC DOE, 68 IDELR 63 (S.D.N.Y. 2016)

The court held that three claims in the suit did not have to be exhausted because they alleged "systemic" violations pursuant to policy that the hearing process could not cure. These were 1) that policy required that students be pulled out of core classes in order to receive related services; 2) that IEP Teams were prohibited from recommending 1:1 instruction or after school tutoring; and 3) that students were dismissed from special education without an evaluation.

Fry v. Napoleon Community Schools, 69 IDELR 116; 137 S.Ct. 743 (Sup. Ct. 2017)

The parents of a little girl in Michigan wanted to have Wonder, a hybrid golden doodle to serve as her service animal at school. The student had significant disabilities, and Wonder was trained to assist her. But the school district was already providing a human being as an aide for the little girl, and thus deemed Wonder unnecessary. The school turned down the request.

The parents filed suit, even though they had moved to another district which welcomed Wonder. They sued the original district, alleging that its refusal to allow Wonder to help out was discriminatory and violated ADA/504. They sought money damages, among other things, for the violation of their daughter's rights. The court tossed the case out, due to the failure of the parents to "exhaust administrative remedies." The 6th Circuit affirmed that decision. However, the U.S. Supreme Court vacated the 6th Circuit decision and sent it back for further consideration. The Court held that exhaustion is required only when the "gravamen" of the complaint is about the denial of FAPE. In this case, the parents were not alleging a denial of FAPE and sought no remedy that would be available under IDEA. They alleged a discriminatory denial of access and sought money damages.

Comment: This case does not address the service animal issue. The decision is purely procedural, and thus will be of more interest to the lawyers than the educators.

A.F. v. Espanola Public Schools, 115 LRP 43675 (10th Cir. 2015)

The court held that mediating an IDEA claim does not amount to exhaustion of administrative remedies. The plaintiff had mediated her IDEA claim and dismissed it with prejudice. Then she sued under ADA/504 and Section 1983, alleging the same facts and injuries. Thus exhaustion was required, and was not completed. Case dismissed.

Estate of D.B. v. Thousand Islands Central School District, 67 IDELR 116 (N.D.N.Y. 2016)

The court held that exhaustion was excused because it would have been futile in light of the student's suicide.

EXTENDED SCHOOL YEAR

A.L. v. Jackson County School Board, 66 IDELR 271 (11th Cir. 2015)

The parent argued that the ESY placement was not in the LRE. The court noted that the 2nd Circuit has concluded that LRE applies to an ESY placement, but the 11th Circuit has not yet decided that. Assuming, but not deciding, that LRE principles apply, the court held that the placement of the student in an alternative school where students were routinely subjected to searches, was the LRE placement. The court noted that the alternative school was the only location providing ESY for that summer, and the school was not required to create a new program specifically for this student.

Comment: The court held, however, that the case should be remanded for a finding of whether or not the routine searches of the student satisfied the standards for student searches.

FAPE

FOR THE SUMMARY OF ENDREW F. v. DOUGLAS COUNTY, SEE THE ATTACHED COPY OF *THIS JUST IN….*

R.B. v. NYC DOE, 67 IDELR 241 (S.D.N.Y. 2016)

What's interesting about this case is that parents have sought reimbursement for private placement for every year since 2009-10, and have failed every time. Here, the court found no evidence of predetermination as the record showed that parents participated in IEP Team meetings and their suggestions and concerns were addressed. The failure to interview the student in connection with transition goals was not deemed significant. The district had adequate information to devise a transition plan.

Brown v. District of Columbia, 67 IDELR 169 (D.C.D.C. 2016)

The court held that an IEP that completely fails to identify the least restrictive environment in which the student will be placed is a technical violation that amounts to a denial of FAPE. The court tells us that the IEP simply listed the number of hours of special services the student would receive, but did not describe the recommended placement.

C.G. v. Waller ISD, 67 IDELR 270 (S.D. Texas 2016)

The district passed muster in a straightforward analysis of the four FAPE factors. The IEP was individualized based on evaluations; the placement was in the LRE; key stakeholders worked

together in a collaborative manner; and there were positive academic and non-academic benefits.

Comment: This decision was affirmed by the 5th Circuit AFTER the Endrew F. decision from the Supreme Court. The court held that the four-part test used by the 5th Circuit was consistent with Endrew F.

Mr. and Mrs. P. v. West Hartford Board of Education, 68 IDELR 188 (D.C. Conn. 2016)

The court held that the IEP and services were substantively adequate, even though for a while the district provided less homebound service than state regulations required. The court noted that the amount of services increased as medications became effective, and provided compensatory services. Another placement was deemed adequate under the *Rowley* test—less than ideal, but adequate.

Comment: This case provides a good example of the wide gap that sometimes exists between best practice and legal compliance. This court found numerous procedural and substantive problems with the school's services, but concluded that none of them denied FAPE. Other courts would have been less deferential to the school district.

Swanson v. Yuba City USD, 68 IDELR 215 (E.D. Cal. 2016)

This is a fight over who will provide the medical care to the student with autism and diabetes. The parent favored an LVN who had served the student in the past; the district assigned an RN. The hearing officer wrote a 32-page single-spaced decision in favor of the district and the federal court affirmed that. Much of this was based on deference to the hearing officer who made findings that some of the parent's testimony was inconsistent and not credible. As for legal issues, the case reminds us that IEPs do not have to specify who the particular service provider will be.

Meares v. Rim of the World School District, 69 IDELR 38 (C.D. Cal. 2016)

"By failing to provide for a male aide, the District's IEP did not offer a placement that met Plaintiff's 'unique needs' under the IDEA, and thus denied Plaintiff a FAPE." The record showed that the student had a pattern of violence aimed at female staff members, and generally related better to men.

Comment: The implications of this decision are obvious. If gender can be a factor, why not race?

IEEs

Letter to Baus, 65 IDELR 81 (OSEP 2015)

OSEP was asked if a parent can request an IEE in an area that was not previously assessed by the school district's evaluation. Key Quote:

> When an evaluation is conducted….and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area…

The letter goes on to say that the district must respond to such a request by promptly requesting a due process hearing or arranging for the IEE.

Comment: What the OSEP letter does not address is whether the district can and/or should respond to the request by offering to do its own evaluation in the omitted area.

Seth B. v. Orleans Parish School Board, 67 IDELR 2; 810 F.3d 961 (5th Cir. 2016)

The court held that districts can refuse to pay for an IEE for two different reasons, calling for two different procedures. First, a district can refuse to pay for an IEE based on the fact that the district's own evaluation is appropriate. If that is the basis for the refusal to pay, the district must initiate the due process hearing mechanism and must do so in a timely fashion. The second reason for a district to refuse to pay for an IEE would be based on the assertion that the IEE did not satisfy the district's criteria. If that was the basis for the non-payment, the district would not be required to ask for a hearing. It could instead do what New Orleans did here: inform the parents that it would not pay, and let the parents decide if they want to challenge that decision. The court pointed out that the only point of contention here was reimbursement. The district had already said that it would consider an IEE.

The court also held that the IEE only needed to be "substantially compliant" with district requirements.

> We do not suggest that "a couple of paragraphs" or a "prescription pad" notation will now pass muster…."Substantial compliance," allowing reimbursement in this context, means that insignificant or trivial deviations from the letter of agency criteria may be acceptable as long as there is substantive compliance with all material provisions of the agency criteria and the IEE provides detailed, rigorously produced and accessibly presented data.

Comment: The practical effect of this decision is that special education directors should take a good look at their IEE criteria and operating guidelines. Anything that requires a district to

either pay for the IEE or seek a hearing should be reviewed. Get your school attorney involved in this.

A.L. v. Jackson County School Board, 66 IDELR 271 (11th Cir. 2015)

The school did not have to reimburse the parent for an IEE. The court held that the district made an IEE available, at school expense, but the parent failed to follow through. Instead, the parent waited two years, and then had her child evaluated by a doctor in Colorado. This district is in Florida. The court held that the parent sabotaged the IEE process.

Haddon Township School District v. New Jersey DOE, 67 IDELR 44 (N.J. Super. Ct. App. Div. 2016)

The district sued the state agency after OSEP ruled that the parents were entitled to an IEE. (It is not clear from the opinion if "OSEP" refers to the federal DOE or the state). The court ruled against the district. The court noted that there was a conflict between state and federal regulations pertaining to IEEs. State regs said that if an IEE was requested in an area not yet evaluated by the district, the district would be able to do an evaluation before the parent could get an IEE. This court holds that this state regulation conflicts with federal law, and thus, the parent was entitled to an FBA in this case even though the district had not yet conducted such an evaluation. The district also argued that the parent was not entitled to an IEE because there was no evaluation to disagree with. This is because at the three-year reevaluation the district conducted a REED (Review of Existing Evaluation Data) and concluded that no further evaluation was required. The court held that the REED was a necessary part of the re-evaluation process, and thus triggered the parent's right to an IEE.

Comment: This is an interesting and important ruling, albeit from state court.

F.C. v. Montgomery County Public Schools, 68 IDELR 6 (D.C. Md. 2016)

The parties conducted a review of existing evaluation data (REED) and concluded that no further evaluation was needed. Several months later, the parents requested an IEE. In response, the district offered to conduct a full individual evaluation. The parents filed for due process, seeking an IEE. The court ruled in favor of the district, noting that the district had not yet conducted an evaluation with which the parents disagreed. The REED process did not constitute an "evaluation."

Comment: This is a very well-reasoned decision, strongly supporting the idea that a school can respond to an IEE request by offering to do its own evaluation. The court pointed out that if the parents would have allowed the school to do that, and then disagreed with the evaluation, then they would have been entitled to an IEE. Also interesting to note that the court refused to comply with a DOE letter that says that a REED "may constitute the reevaluation." The court noted that DOE letters are not legally binding.

Horne v. Potomac Preparatory Public Charter School, 68 IDELR 38 (D.C.D.C. 2016)

The court held that the school unnecessarily delayed in responding to the IEE request. The school asked the parent to withdraw the request. The parent promptly refused to do so. Three months then passed without the district requesting a hearing to prove the appropriateness of its own evaluation. The hearing officer thought this was reasonable, but the court did not.

IEPs

Holman v. District of Columbia, 67 IDELR 39 (D.C.D.C. 2016)

Even though the student graduated from high school in three years, and ranked 60th in a class of 130, the court held that she was entitled to compensatory services due to the district's failure to implement the IEP. The court concluded that only 17% of the services prescribed by the IEP were actually provided. This amounted to a material failure to implement the IEP. The court held that the student did not need to demonstrate that she suffered harm—only that there was a "material failure" to implement the IEP. The court bolstered its conclusion by noting that testing showed that the student had regressed in academic areas during high school and was reading at the 4th grade level.

Comment: The court clearly held the opinion that the school district simply graduated the student without providing any educational benefit. Thus it completely discarded the fact of graduation and the student's standing in the upper half of the graduating class.

Damarcus S. v. District of Columbia, 67 IDELR 239 (D.C.D.C. 2016)

The court rejected most of the parent's challenges to the IEP, but held that the district denied FAPE by repeating IEP goals and objectives year after year, despite lack of progress, and reducing services. Key Quotes:

> The wholesale repetition of goals and objectives across multiple IEPs is of far greater concern, however, as it indicates an ongoing failure to respond to Damarcus's difficulties.
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> Here, an alarming number of goals and objectives were simply cut-and-pasted (typos and all) from one IEP to the next.
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> The IEP Team was therefore required to "revise[ ] the IEP as appropriate to address….[that] lack of expected progress toward the annual goals." But there is scant evidence that this occurred, at least in 2013 and 2014. Rather than raising an alarm and working to devise a new approach….it appears that the District persisted in following the same ineffectual path.

> Even worse, with regard to speech-language pathology, the District actually decreased Damarcus's monthly services from four hours to two in 2013, then again from two hours to thirty minutes in 2014.
>
> The District weakly attempts to argue that because Damarcus made no progress when receiving four hours of instruction per month, plaintiffs cannot show that the decrease in services harmed him in any way…..By the District's logic, it would be entitled to sit a failing student alone in a quiet room for six hours a day, because he would be no worse off there than receiving ineffectual instruction.

Comment: Do you remember the slogan: All Children Can Learn? This case shows how some courts put some legal power into that slogan. The parent's attorney made many technical arguments about the IEPs lack of specificity and reliance on research. The court rejected all of that, but ruled in favor of the parent on the basis of the perception that the school had concluded that this student had "plateaud" and was not going to progress any further. That slogan, All Children Can Learn, is not just a slogan. It's a critical feature of IDEA.

SE.H. v. Board of Education of Anne Arundel County Public Schools, 67 IDELR 198 (4th Cir. 2016)

The Circuit Court upheld a decision that the district was not required to state in the IEP that a person trained in CPR and the Heimlich maneuver would be accessible at all times. Much of the opinion is about whether or not the lower court should have deferred to the ALJ's decision. The court said that the ALJ decision was properly made and thus entitled to deference.

Ms. M. v. Falmouth School Department, 69 IDELR 86 (1st Cir. 2017)

The district court held that the school district unilaterally decided not to provide the specific reading program called for in the IEP. The court held that this was a material failure to implement the IEP, even though the student made progress with the method that the district used. On appeal, the 1st Circuit reversed, holding that the IEP did not mention a specific reading program. The court held that the reference to a specific program was not in the IEP but only in "ancillary documents" that were not binding.

L.M.H. v. Arizona DOE, 68 IDELR 41 (D.C. Ariz. 2016)

This is a rare case that relies on the "peer reviewed research" requirement to conclude that the district denied FAPE. After rejecting numerous procedural complaints by the parent, and complaints about ESY, the court held that the district denied FAPE by failing to consider any peer-reviewed research. Whether the student made progress or not was deemed irrelevant, as the IEP would be judged as of the time of its development, not afterward. The parent had provided ASHA recommendations regarding speech therapy. The court held that the district did not have to comply with the ASHA recommendations, but had to consider them or some other "peer-reviewed" research.

Comment: This is all based on a portion of the federal regulation that outlines the requirements for an IEP: "A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable…." 34 CFR 300.320(a)(4).

IEP TEAM MEETINGS

A.L. v. Jackson County School Board, 66 IDELR 271 (11th Cir. 2015)

The court held that the district did not violate the parent's rights or IDEA when it held an IEP Team meeting without the parent. The district had attempted to schedule the meeting for several months, and the parent was consistently not available. The parent called in sick on the day of the meeting and the district insisted on going forward, due to the needs of the student. The district offered to include the parent by telephone, and the parent refused. Key Quotes:

> Although [the parent] did not explicitly refuse to attend the November 17, 2010 IEP meeting, her actions were tantamount to refusal.
>
> While parent participation in developing a child's IEP is certainly an important goal of the IDEA, in this case, [the student's] specific educational goals stagnated because of [the parent's] seemingly endless requests for continuances of the meetings scheduled by school personnel.

Comment: Note that the school did not base its decision on its frustration with the parent, or the need to accommodate the schedules of school personnel, but on the need of the student for changes to the IEP.

T.K. v. NYC DOE, 67 IDELR 1; 810 F.3d 869 (2nd Cir. 2016)

The court held that the district's refusal to discuss bullying and its effect on the child's education at IEP Team meetings was a procedural denial of FAPE in that it precluded parents from having meaningful participation. Based on that conclusion, the court awarded the parents reimbursement for private school tuition. Key Quote:

> The Department's persistent refusal to discuss L.K.'s bullying at important junctures in the development of her IEP "significantly impeded Plaintiffs' right to participate in development of L.K.'s IEP. This constituted a procedural denial of a FAPE similar to other procedural violations that our sister circuits have held to constitute denials of a FAPE, such as the predetermination of an issue prior to an IEP meeting.

Comment: The original ruling by the district court in this case got a lot of national attention as it was the first to hold that bullying could deprive a student of FAPE. On appeal, the court here affirms the ruling in favor of the parent, but the decision is more about IEP Team meetings than bullying or FAPE. The court does not hold that the bullying itself deprived the student of FAPE. It was the repeated refusal of the district to discuss it in IEP Team meetings that prompted the court's decision.

Rockwall ISD v. M.C., 67 IDELR 108 (5th Cir. 2016)

The court concluded that the parents had taken an inflexible "all or nothing" approach at the ARDC (IEP Team) meeting. Dissatisfied with the district's proposed placement of their daughter, the parents sought reimbursement for private school tuition. They won their case before the special education hearing officer, but Rockwall appealed into federal court. The federal district court ruled for the district, and now the 5th Circuit has affirmed.

The court's opinion notes that the parents and their advocate frequently voiced their questions and ideas during the ARD meeting, and that "RISD officials repeatedly revised the language of their proposal to incorporate the parties' suggestions." The court concluded that it was the parents who refused to return to the table to complete the work on the IEP unless the district agreed to their plan. Districts are sometimes accused of going into ARDC meetings with a "predetermined" mindset. Here, it was the other way around.

Comment: Educators may get tired of lawyers harping on the importance of written documentation. But this case is a great example of how important the written record is. The ARD minutes, testimony, letters and emails from the district enabled the court to conclude that the district took "a collaborative approach" to the IEP process, whereas "the record shows that the Parents had no intention of continuing with the ARDC unless RISD approved their proposal." Lesson for parents: if they offer to have an IEP Team meeting, go to the meeting.

Letter to Andel, 67 IDELR 156 (OSEP 2016)

This letter is about attorney participation in IEP Team meetings. The letter tells us that 1) attendance of attorneys should be "strongly discouraged;" 2) the school must inform the parent in advance of who will attend whereas the parent has no such obligation; 3) "in the spirit of cooperation and working together as partners….a parent should provide advance notice" if the parent plans to bring a lawyer to the meeting; 4) schools may not conduct the meeting "on the condition that the parent's attorney not participate; and 5) it is permissible for the school to reschedule the meeting, but only if this is done with parental agreement and the delay does not result in a denial of FAPE.

Letter to Savit, 67 IDELR 216 (OSEP 2016)

OSEP confirms its view that the rules for recording IEP Team meetings can be set by state or local school districts. Those rules may restrict or even prohibit recording, so long as exceptions

are made as necessary to make sure that parents understand the IEP and IEP process or to implement other parental rights. In this letter, OSEP advises that if the school requires parents to give advance notice of an intent to record, it must schedule the meeting far enough in advance to permit the parent to give notice.

Brown v. District of Columbia, 67 IDELR 169 (D.C.D.C. 2016)

After the student was shot eight times, sustaining serious physical and emotional injuries, the district should have convened an IEP Team meeting to consider what changes this would require in his IEP. Not doing so deprived the student of FAPE.

T.Y. v. NYC DOE, 68 IDELR 182 (E.D.N.Y. 2016)

The court affirmed a magistrate's recommendation, including the ruling that the school denied FAPE to the child by refusing to discuss methodology at the IEP Team meeting. There was testimony that the student had not responded well to ABA or TEACCH methodologies, but had done well with the methodology used at the private school where the parents placed him. The court ruled against the parents on most of their objections to the IEP (FBA/BIP, transition, parent counseling) but affirmed the magistrate's ruling about methodology. The magistrate's recommendation addresses the methodology dispute at 116 LRP 37325. The court's decision does not address the issue, but only affirms the magistrate.

Mr. and Mrs. P. v. West Hartford Board of Education, 68 IDELR 188 (D.C. Conn. 2016)

The court held that the absence of a general education teacher from an IEP Team meeting did not amount to a procedural violation of IDEA.

Mr. and Mrs. P. v. West Hartford Board of Education, 68 IDELR 188 (D.C. Conn. 2016)

The court noted that the failure of the school to give the parents a copy of the IEP for six months after the IEP Team meeting was a violation of IDEA, but held that it did not deprive the student of FAPE or deny the parents' right to meaningful participation. "Parents attended every PPT and do not allege they were not aware of what programming was selected for Student throughout the relevant time period, and are therefore not entitled to reversal on this basis." The hearing officer also found that the district committed numerous other procedural violations, but held that none of them denied FAPE. The court affirmed that ruling.

LEAST RESTRICTIVE ENVIRONMENT

Norristown Area School District v. F.C., 67 IDELR 3 (3rd Cir. 2016)

The court held that the school denied FAPE when it moved the student to a mainstream setting without the one-to-one assistance the student needed. The court awarded compensatory services, tuition reimbursement and almost $140,000 in attorneys' fees to the parents. The student had been served in a highly restrictive setting for kindergarten and half of first grade. Then the school moved the student to the mainstream classroom for part of the day. For second grade, the IEP called for the student to spend 87% of his day in the mainstream without one-to-one support.

Comment: This case is a good reminder of the importance of considering supplementary aids and services when moving students to a less restrictive setting. The court noted that "F.C.'s placement in a general education classroom may well have been appropriate, but the School District should have provided [the student] with the supplementary aids and services he needed to be successful in that environment."

S.M. v. Gwinnett County School District, 67 IDELR 137 (11th Cir. 2016)

The court affirmed judgment in favor of the school district's placement of the student outside of the mainstream classroom for reading, writing and math. The court held that the district had provided many supplementary aids and services and rejected others as not feasible. The student required "direct, explicit, small group instruction with drill and repetition, which instruction is significantly different from that of a general second grade classroom."

Comment: That description of the student's needs provides a readily understandable rationale for the move to a more restrictive environment.

Jason O. v. Manhattan School District No. 114, 67 IDELR 142 (N.D. Ill. 2016)

The court ruled in favor of the school district and its change of placement for the student to a more restrictive setting. The court relied heavily on the testimony of an independent educational expert who had observed Jacob in the classroom setting over a period of almost three months and written an 11-page report. She made the case that Jacob needed the kind of services that could only be provided in a more restrictive setting, such as the SELF program. Her report noted that the boy should be served "in an environment that can support appropriate relationships, learn to display empathy for others, learn to alter his own behavior to conform to the standards in place, accept responsibility…value another's point of view, and accept authority." In her testimony at the hearing, she stated that "he needed more support systems. He needed trained staff to be able to address the teachable moments that were occurring throughout his day that could not be done in a GenEd setting." The expert said that

the SELF program was good for kids with "similar characteristics, the disrespect, the unpredictable behavior, the impulsivity, the lack of remorse, the trouble with social skills."

Comment: When districts propose moving a student to a more restrictive environment over parental objections, the district has to convince the hearing officer of three things: 1) the current placement is not working; 2) we have really tried; and 3) the student will do better in the more restrictive setting. The Manhattan School District passed all three tests.

G.S. v. NYC DOE, 68 IDELR 154 (S.D.N.Y. 2016)

The parents argued that the assignment of a 1:1 aide was overly restrictive. The court rejected this argument:

> The requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement.

LIABILITY

Phipps v. M.P. Clark County School District, 67 IDELR 91 (D.C. Nev. 2016)

The court dismissed all claims against school police officers, but refused to dismiss the suit against the district. This was all based on physical abuse of a child that the police officers observed through a hidden camera in the classroom. The suit against them was based on the theory that they "failed to monitor the live feed on March 5, 2012, or take immediate action to intervene when they witnessed [the aide] aggressively dragging and pinning M.P. on March 6, 2012." The court pointed out that these allegations, even if proven true, were not sufficient to impose liability:

> …the Officer Defendants cannot be said to have taken any affirmative action to place M.P. in harm's way.
>
> Instead, Plaintiffs' evidence shows only a possibility that the Officer Defendants could have more quickly resolved a dangerous situation they played no part in creating.

However, the court did not dismiss the case against the school district. In large part, this was based on the fact that the teacher's aide testified that the district had trained her to use physical restraint, and that she completely complied with her training. The district refuted that assertion, but the conflict in the testimony created a fact issue that precluded the court from issuing an early dismissal of the case.

Williams v. Fulton County School District, 67 IDELR 262 (N.D. Ga. 2016)

> In sum, the Complaint alleges that a FCSD teacher routinely abused special education students, that FCSD and dozens of its employees knew of the abuse, but that FCSD did little to nothing in response for at least three years.

The court held that the plaintiffs had plead an adequate case to impose liability on the district for this based on Section 1983 and the Due Process clause.

The claim against the principal was also allowed to proceed:

> The Complaint, which alleges a multi-year reign of terror by Pickens against her disabled students, and a totally impotent and improper response by Principal Boyd and others, sufficiently alleges "clearly established" violations of the Constitution.

The court denied motions to dismiss many other individual defendants, but strongly suggested that they would be dismissed based on a good motion for summary judgment.

Comment: This is a horrific case. The Complaint runs 176 pages with 23 counts against the district and 28 individuals. If half of what is alleged is true, the district and some of its employees will be facing serious liability. The teacher is alleged to have used techniques that stopped just short of waterboarding. The court noted that the plaintiffs had already settled with the teacher who was allegedly the direct abuser of the child.

Garza v. Lansing School District, 68 IDELR 10 (W.D. Mich. 2016)

The court held that the allegations of physical abuse by a special education teacher were sufficient to satisfy the "shocks the conscience" standard. However, three individual defendants were dismissed due to the lack of allegations that they knew about it or had supervisory authority. Other defendants were not dismissed. The 504/ADA claim against the district was dismissed because there was no pleading of facts showing that the abuse was based on the student's disability.

Sims v. Board of Education of Winton Woods School District, 68 IDELR 138 (S.D. Ohio 2016)

The court held that the complaint sufficiently alleged that the Director of Pupil Services was the final policymaker for the district with regard to evaluation and provision of services to the student. Therefore, the district was potentially liable under Section 1983. The case alleges that the district willfully and deliberately refused to evaluate the student or provide needed services, thus discriminating on the basis of disability. The court also denied qualified immunity to the Director in light of allegations that she acted with animus toward the student and/or family.

Salyer v. Hollidaysburg Area School District, 68 IDELR 197 (W.D. Pa. 2016)

The court refused to dismiss the suit against the district and three district officials over the alleged violation of the student's 4th Amendment rights. The suit alleges that the school resource officer touched, grabbed and slammed the student to the ground causing physical injury. The suit further alleges that all three school officials were aware that the student had autism and experienced extreme fear and agitation when touched or confined by others.

Comment: They were searching the student, looking for a knife. According to the suit, before the school resource officer came on the scene, the assistant principal and dean of students had both accepted the student's claim that he had no knife. Further, they had already searched his pockets, binder, locker and under his shirt. It is not clear from the court's opinion why the resource officer thought that a further search was called for.

PARENTAL RIGHTS/RESPONSIBILITIES

Stanek v. St. Charles Community Unit School District #303, 65 IDELR 122; 783 F.3d 634; (7th Cir. 2015)

The court held that the parents could pursue claims under IDEA for violations of their own rights. Key Quote:

> [The parents] allege that the District intentionally kept them from participating in special education procedures when teachers and administrators ignored their phone calls and attempts to schedule meetings and ignored eight requests for Matthew's records. These actions, they allege, enabled the school to continue neglecting Matthew, causing him emotional distress and academic loss. This is enough to state a claim that their own rights under IDEA were violated.

Frank v. Sachem School District, 67 IDELR 30 (2nd Cir. 2016)

The court affirmed the dismissal of the case brought by the mother seeking damages for an overly restrictive placement. The court noted that the father had custody of the child and had consented to the placement. This precluded a finding of "deliberate indifference" by the school.

A.G. v. Paradise Valley USD, 67 IDELR 79 (9th Cir. 2016)

The court holds that parent agreement to a change of placement does not prevent them from suing for denial of FAPE under 504/ADA. The court also dismissed arguments that the parents should have requested the accommodations they later sued over: "A.G.s parents did not have

the expertise—nor the legal duty—to determine what accommodations might allow her to remain in her regular educational environment.

P.F. v. Board of Education of Bedford Central School District, 67 IDELR 148 (S.D.N.Y. 2016)

The court held that the district had predetermined the placement, failing to allow meaningful parent participation. There were four IEP meetings and the parents vigorously participated, but the hearing officer and the court held that the district was committed to its proposed placement "regardless of what evidence and reports the parents brought forward."

Comment: This case followed a familiar New York pattern. The hearing officer ruled for the parent; the state review officer ruled for the school; the court ruled for the parent.

Baquerizo v. Garden Grove USD, 68 IDELR 2 (9th Cir. 2016)

This case breaks no new ground with the law. It is largely a story of a parent who litigated over the IEP every year from 2006 to 2012 and was uncooperative in setting up IEP meetings and getting evaluations done. There were some procedural errors committed by the district, but the hearing officers and courts attributed most of that to parental actions and omissions. Relief denied.

J.K. and J.C. v. Missoula County Public Schools, 68 IDELR 68 (D.C. Mont. 2016)

The court ruled in favor of the district on the predetermination claim, noting that the school offered and discussed several possibilities, but the "parents resisted everything short of a private therapeutic boarding school." Key Quote:

> The fact that [the school] had thought about [the student's] needs and contemplated changes to the 2013 IEP prior to the 2014 meetings shows preparation, not predetermination.

Comment: This was an appeal from a 15-day hearing involving 30 witnesses, 176 exhibits and a 60-page decision. The court deferred to the hearing officer's fact findings, noting that they were the result of a careful and detailed analysis.

Beckwith v. District of Columbia, 68 IDELR 155 (D.C.D.C. 2016)

The court affirmed a recommendation from a magistrate (116 LRP 40087) stating that the district denied FAPE to the child by failing to conform to D.C. regulations pertaining to physical restraint. The magistrate classified this as a procedural, rather than substantive error; held that the lost instructional time did not deprive the student of FAPE; but held that the failure to convene an IEP Team meeting to discuss the incident denied the parent's right to meaningful participation. D.C. regulations required prompt notice to the parent and an IEP Team within five days. The district restrained the child six times and never called for the IEP Team meeting.

Comment: This case illustrates the importance of complying with state and district regulations pertaining to physical restraint.

PLACEMENT

Fort Bend ISD v. Douglas A., 65 IDELR 1 (5th Cir. 2015)

The court overturned the IHO and district court, holding that the school was not responsible for the costs of the residential placement. The court held that the parent failed to prove that the residential facility was appropriate. To be appropriate, a residential facility must be 1) essential in order for the child to receive a meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education. Key Quote:

> Two factors are critical: "whether the child was placed at the facility for educational reasons and whether the child's progress at the facility is primarily judged by educational achievement."

The first factor is based on parental motivation. Here, the parents placed the student for non-educational reasons—concerns over drugs and possible suicide. As to the second factor, the evidence showed that discharge from the facility would be based on successful treatment of the disability, rather than educational achievement.

York School Department v. S.Z., 65 IDELR 39 (D.C. Me. 2015)

The district was ordered to reimburse the parents for two years of tuition at Eagle Hill School, a pricey boarding school serving only students with learning disabilities. The parents pulled him out of public school after 9th grade and placed him at Eagle Hill. The court held that the district denied FAPE, despite testimony from his teachers that he was passing all classes. The independent expert retained by the parent rebutted this testimony, his scores on standardized tests were not so good, and his mother was making a "nearly superhuman" effort at home to assist the student in school.

Comment: Among residential placement cases, this one is unusual and interesting. Most residential placement cases involve a more dramatic, urgent situation. Students are psychotic, extremely violent, circling down the drain of substance abuse, or suicidal—or all of the above. P.Z. is none of that. The independent expert in this case described P.Z. as having average to low average cognitive ability. He has very slow processing speed. He has language difficulties and finds reading difficult. All of this leads to anxiety. He is qualified for special education services.

But no one described this particular student as having any kind of unique problem. Learning disabilities are common. Public schools serve thousands of students like P.Z. He comes across in

the court's decision as a student who certainly faces some challenges and needs some extra support and help. But a private boarding school at over $65,000 per year? Is that why Congress passed this law? You have to wonder.

Troy School District v. K.M., 65 IDELR 91 (E.D. Mich. 2015)

The court upheld a hearing officer's decision in favor of the parent due to the numerous procedural violations by the school district and the failure to implement the IEP in the least restrictive environment. The court held that the district changed placements without an IEP Team meeting, and ordered disciplinary changes of placement without a manifestation determination. Moreover, numerous components of the IEP were not implemented and the proposed placement in a self-contained behavior unit was likely to be harmful to the student.

Comment: School officials will find this decision frustrating. During the student's 6th grade year the school held seven IEP Team meetings, 12 behavior planning sessions and several other meetings on top of that. Due to the student's behavior the classroom was evacuated eight times and emergency responders were called in five times. Among other things, the student bit the principal on the leg hard enough to draw blood, threw chairs at people and attempted to crash through a school window with a 55 inch log. His father prevented that, but was hit in the head and neck by the log. Tough kid to handle. There was a lot of expert testimony in support of the student, which persuaded the hearing officer, who penned a 100-page decision in favor of the student.

G.S. v. NYC DOE, 68 IDELR 154 (S.D.N.Y. 2016)

Parents objected to the proposed placement based on their tour of the facility and some comments made by the counselor who gave them the tour, leading them to believe that the school was not capable of implementing the IEP. The court rejected this argument, noting that it was speculative.

School District of Pittsburgh v. C.M.C., 68 IDELR 102 (W.D. Pa. 2016)

The district offered a combination of online learning and campus-based instruction to ease the student's transition back to public school. The parents kept her at a very small private school (28 students) where the teachers were not certified in special education and the student did not have an IEP. The ALJ ruled for the parents, and the court affirmed.

Comment: The district argued that the parents were trying to keep their daughter out of the public school "solely on the grounds of antiquated, unsupported, and unconscionable opinions of race." This argument was based on the fact that the mother had confided that her daughter "was fearful of African-American teenage girls" as the result of an altercation when the girl was in 8th grade. However, the court held that this was not the basis for the ALJ's decision.

PRACTICE AND PROCEDURE

Letter to Kane, 65 IDELR 20 (OSEP 2015)

OSEP found no fault with Minnesota guidelines limiting due process hearings to three hearing days of six hours each. The guidelines identify this as a "best practice" that should apply in all but "exceptional circumstances."

B.S. v. Anoka Hennepin Public Schools, 66 IDELR 61 (8th Cir. 2015)

The court found that it was not an abuse of discretion for the hearing officer to limit the parties to nine hours of testimony each. The hearing officer made this decision at a pre-hearing conference, after hearing from the parties about how long it would take them to present their cases. Minnesota statutes required hearing officers to limit a due process hearing to the time sufficient for each party, and to maintain control of the hearing. State regulations include a "best practices" manual which indicates that a hearing should not exceed three days, absent special circumstances. Key Quote:

> And while B.S. spends much time and energy arguing about the due process rights of parents and children in an IDEA proceeding, we note that even in the criminal context, where a party's liberty interest is at stake, the Supreme Court has rejected the idea that the accused has an unfettered right to present all relevant evidence.

M.S. v. Utah Schools for the Deaf and Blind, 67 IDELR 195 (10th Cir. 2016)

The court found fault with the lower court's decision to delegate the placement decision to the IEP Team. The court held that once the court held that the school had denied FAPE, it could not allow the school's IEP Team to fashion a remedy for the deprivation. Thus the case was remanded to the district court for a definitive ruling on the placement issue.

Moore v. Kansas City Public Schools, 68 IDELR 1 (8th Cir. 2016)

The suit alleged that a student with intellectual disabilities was raped by another student at school, in an unused area of the building that was supposed to be locked and blocked off. The case was filed in state court, seeking relief for negligent supervision and premises liability under state law. The district removed the case to federal court, claiming it was an IDEA case in disguise, and then got it dismissed for failure to exhaust administrative remedies. The Circuit Court reversed that decision. The court held that this was a legitimate state court suit that did not present a federal question. Nor was exhaustion required prior to pursuing remedies available under state law.

Letter to Eig, 68 IDELR 109 (OSEP 2016)

This letter states that the press should not be allowed to attend a due process hearing unless the parent has opted for an open hearing. However, even in a so-called "closed" hearing, the parent is entitled to bring counsel and "individuals with special knowledge or training with respect to the problems of children with disabilities." According to OSEP, this could include "a family member of the child or educational professionals or others not involved in the specific issues of the hearing but who are interested in learning more about due process proceedings or who are there to provide general support to the parent or child."

Comment: That sounds like we have 1) closed hearings; 2) open hearings; and 3) quasi open hearings. This Letter is "significant guidance" but not legally binding. OSEP has not yet issued a letter that it considers "insignificant guidance."

Sacramento City USD v. R.H., 68 IDELR 220 (E.D. Cal. 2016)

This case illustrates how difficult it is to overturn a hearing officer's decision, particularly a lengthy one. Courts give particular deference to the findings of the hearing officer if they are "thorough and complete." This seems to be encouraging longer decisions from the hearing officers. Here, the court twice cited the fact that the decision was 39 pages. The hearing officer issued a split decision and the court affirmed it in all respects. The district appealed the decision because it awarded the parents reimbursement for a year of residential treatment.

Comment: This case makes for interesting reading for those dealing with very bright students with emotional problems and an ability to manipulate the adults seeking to serve them. The description of the student as "manipulative" is not my assessment—it was in the testimony of the service providers and affirmed by the hearing officer. This was a classic battle of the experts in terms of how best to serve the complex needs of this student. The case illustrates the authority of hearing officers to second guess educational decisions of educators as long as they have support in the record to do so.

PRIVATE SCHOOL STUDENTS

Letter to Sarzynski, 66 IDELR 51 (OSEP 2015)

This letter clarifies that "child find" applies to students who attend private schools located within the district, even if the parents reside in another country.

REMEDIES

Rideau v. Keller ISD, 57 IDELR 166; 819 F.3d 155 (5th Cir. 2016)

Parents are not entitled to recover damages for their own mental anguish under ADA or 504.

Stanek v. St. Charles Community Unit School District #303, 65 IDELR 122; 783 F.3d 634; (7th Cir. 2015)

The court notes a circuit split on the issue, but holds that Section 1983 can be used to remedy IDEA violations and that individuals can be held liable under IDEA.

Domingo v. Kowalski, 116 LRP 874 (6th Cir. 2016)

This is a teacher v. aide case, based on allegations from the aide that the teacher was abusing severely disabled children. The court noted that the allegations, if true, amounted to "abuse" but nothing "unconstitutional." Parents failed to carry their heavy burden of proof. The actions alleged were not "conscience-shocking."

Comment: The case is yet another reminder of what can happen in a classroom for low functioning students that goes unobserved for too long. Concerns over that very issue are what caused Texas legislators to mandate cameras for classrooms, when requested.

Phipps v. Clark County School District, 67 IDELR 91 (D.C. Nev. 2016)

In response to a parent complaint, the district installed hidden video cameras in a classroom that served non-verbal students with autism. No one watched the live feed on the first day the cameras ran, but on the second day, school police monitored the video and observed abuse committed by a teacher's aide. They contacted the campus administration, confirmed that the aide's use of restraint was inappropriate, and arrested the aide. She later pled guilty to misdemeanor child abuse. Parents sued the police officers for not acting more quickly, and the school for an unofficial policy of permitting such abuse. The court granted summary judgment in favor of the officers due to the lack of evidence of any affirmative act on their part that endangered the child. However, the court refused to dismiss the district from the case, noting that there were fact issues yet to be resolved and a reasonable jury could conclude that the district "had a policy of deliberate indifference which facilitated the unwarranted use of force upon students." The court also held that punitive damages are not available in a 1983 case against a governmental entity.

Beam ex rel Estate of C.B. v. Western Wayne School District, 67 IDELR 88 (M.D. Pa. 2016)

The court dismissed the 1983 claim after the student's suicide, but held that the plaintiffs pled a plausible case under 504. The suit alleged that the district consistently failed to implement the student's 504 plan, were aware of the student's suicidal tendencies. The court noted that 504 suits do not require proof of ill will, but only bad faith or gross misjudgment. Here, the evidence showed that "Defendants knew that C.B. was disabled, knew that they were required to follow the Section 504 Plan and knew that if they did not follow the Plan, particularly the requirement to notify his parents of any academic failures, which Defendants knew were linked to C.B.'s suicidal ideations, that it was likely that C.B. would commit suicide."

Comment: Sometimes it's impossible to read these cases with only an analytical, legal point of view. There is too much human suffering. This boy shot himself and left a handwritten note that said, in part, "I cannot live as a failure I'm sorry Mom and dad."

Martin v. East St. Louis District #189, 67 IDELR 206 (S.D. Ill. 2016)

The intellectually disabled girl was raped by a general education student at the public school. The court dismissed the claims against the district and several of its employees. Summary judgment was proper as to the constitutional due process claim because there was no legal duty to prevent the student from harm caused by third parties. The Title IX claim was dismissed because there was no indication that the defendants had knowledge of the specific risk to the student. The ADA/504 claims were dismissed due to the same lack of knowledge, and also the fact that there was no indication that the rape was due to the student's disability.

Comment: The court repeatedly expressed its sympathy for the plaintiffs, but held that their remedy would be under state law, not federal.

Allison W. v. Oak Park and River Forest High School District #200, 67 IDELR 263 (N.D. Ill. 2016)

The court noted a Circuit Court split on the issue, but held that in the 7th Circuit, a plaintiff can seek relief under Section 1983 for an IDEA violation.

Doe v. Dallas ISD, 68 IDELR 44 (N.D. Tex. 2016)

In a case alleging that the student was sexually assaulted by another student, the court dismissed claims based on constitutional theories (special relationship, state-created danger, failure to train, right of parents to direct the upbringing of the child).

Conklin v. Jefferson County Board of Education, 68 IDELR 122 (N.D. W.Va., 2016)

This suit arose from the alleged violent attack by a teacher of a student with a disability in the classroom. Claims against the teacher and principal in their official capacities were dismissed as redundant of the claims against the district. The principal was entitled to qualified immunity

from any liability under Section 1983 because there was no allegation of the violation of a clearly established constitutional right being deprived by the principal. However, immunity for the teacher was denied as there was an allegation that the court construed as excessive corporal punishment which would violate the 14th Amendment. Claims under 1983 against the district were dismissed—no policy or custom leading to the alleged injuries. Claims under ADA/504 against the individuals were dismissed, but not the claim against the district.

Comment: The school argued that the ADA/504 claims should have been exhausted through IDEA procedures as they alleged a denial of FAPE. The court mentioned that issue, but did not address it.

Sparman v. Blount County Board of Education, 68 IDELR 202 (N.D. Ala. 2016)

The court noted that pursuant to 11th Circuit authority, plaintiff could not maintain a Section 1983 suit based solely on allegations of a violation of ADA or 504.

SERVICE ANIMALS

Riley v. School Administrative Unit #23, 67 IDELR 8 (D.C.N.H. 2016)

The court approved the magistrate's recommendation to deny the parent's request for an injunction to require the school to provide a handler for the child's service animal. Along the way, the court held that the parents did not have to exhaust IDEA administrative remedies because the animal was not an educational service, but was provided for health and safety reasons. The court distinguished the two reported cases where districts were required to permit the dog without an adult handler. Here, the facts were that the animal could not be tethered to the wheelchair, nor could the student provide verbal commands. In the two earlier cases, the students effectively served as "handler" by having the dog tethered to them.

Comment: The two earlier cases are: Alboniga v. School Board of Broward County, 65 IDELR 7 (S.D. Fla. 2015) and C.C. v. Cypress School District, 2011 U.S. Dist. LEXIS 88287 (*C.D. Cal. 2011).*

STATE RESPONSIBILITY

Letter to McWilliams, 66 IDELR 111 (OSEP 2015)

This letter addresses state complaint procedures regarding BIPs. The state (Michigan) concluded that it would investigate a school's failure to implement a child's BIP only if the BIP was mandated by IDEA due to behavior that is a manifestation of disability. OSEP says that is wrong. Key Quote:

> As noted above, a BIP developed through the IEP process is a proper subject of a State complaint, regardless of the manner in which the BIP is reflected in a child's IEP.
>
> …while IEP Teams are not required to include BIPs in an IEP outside the context of a manifestation determination, IEP Teams may elect to include BIPs in other circumstances, such as when they deem a BIP necessary for a child whose behavior impedes his or her learning or that of others to receive FAPE.

Letter to Lipsitt, 67 IDELR 126 (OSEP 2015)

OSEP states that state agencies should send a written decision to the complainant at the conclusion of the matter, whether the resolution is based on SEA decision, or the SEA's acceptance of the LEA's proposed resolution.

Letter to Anonymous, 67 IDELR 188 (OSEP 2016)

OSEP was asked if it is permissible to have a state regulation that "requires the board of education to approve/determine services and setting after the child's IEP is developed" by the IEP Team. OSEP notes that there is no federal law or regulation prohibiting such a regulation "so long as the Board is not permitted to unilaterally change a child's IEP and/or placement." Also, the board's actions must not delay or deny services for a child. Thus if the board determines that the program or placement are not appropriate, the state must make sure that the IEP team meets promptly to "consider the Board's objections or concern and to make revisions, if needed."

Comment: What?!?!?!?!

In another part of this letter, OSEP advises that the decisions of due process hearings should redact information that would identify the child or family, but not the name of the district or the hearing officer.

Johnston v. New Miami Local School District Board of Education, 68 IDELR 201 (S.D. Ohio 2016)

In this case the plaintiffs argued that the state agency should be held liable for the failure of the LEA to provide FAPE. The court noted that there are circumstances under IDEA where that can happen. However, the standard is that 1) the failure of the LEA must be significant; 2) the parents must put the state on notice of the LEA's failure; and 3) the state must have a reasonable amount of time to compel the LEA to comply. Here, the court held that the plaintiffs fell short on the third factor. This was all triggered by the LEA's expulsion of a student without the provision of services. When notified of this, the SEA ordered compliance, threatened to withhold funds, and then actually did withhold funds. Although this process took longer than the plaintiff wanted (a little over two months), the court found it to be a reasonable amount of time.

TRANSPORTATION

A.S. v. Harrison Township Board of Education, 67 IDELR 207 (D.C.N.J. 2016)

The court held that parents were entitled to reimbursement for transportation while the student was unilaterally placed in a private program. Moreover, the rate of reimbursement should have been the IRS mileage rate at the time, rather than the state's rate for official business. However, parents were not entitled to wages.

Comment: This case was about other issues as well—they did not go to court over mileage reimbursement alone.

TRANSITION

Gibson v. Forest Hills Local School District Board of Education, 68 IDELR 33 (6th Cir. 2016)

The court affirmed the ruling that the district committed three procedural errors that collectively amounted to a denial of FAPE. The district 1) did not invite the student to a transition meeting; 2) did not adequately take into account the student's preferences and interests; and 3) did not adequately conduct age appropriate assessments.

UNILATERAL PLACEMENT/TUITION REIMBURSEMENT

W.D. v. Watchung Hills Regional High School Board of Education, 65 IDELR 63; 602 F.App'x 564 (3rd Cir. 2015)

The parent's request for tuition reimbursement was denied because he failed to provide the required notice to the school district, prior to placing his child in the private school. The timeline is critical:

> July 10: parent filed application for son to attend The Forman School, a private college prep boarding school;
>
> August 7: child is accepted;
>
> August 13: parent signs enrollment agreement and pays full first year tuition ($61,700);
>
> August 24: parent sends letter to district, stating his intent to place child in private school, and to seek reimbursement;

September 6: student begins attending orientation at Forman;

September 7: IEP Team meets, develops revisions to the proposed IEP the school would offer.

During the September 7th meeting, the parent revealed that the student was attending Forman's orientation program. Upon learning this, the school terminated the meeting.

The parent is required to give written notice of the intent to remove a student and seek removal at least 10 business days before the removal. The court held here that the student's removal was a "fait accompli" as of August 13th. Thus the notice that the parent sent on August 24th was late.

Comment: The parent got support in this case via amicus briefs from Advocates for Children of New Jersey, Disability Rights New Jersey, the Education and Health Law Clinic at Rutgers School of Law in Newark, the Education Law Center, the Statewide Parent Advocacy Network of New Jersey, and the New Jersey chapter of the International Dyslexia Association. All of this in support of a parent who has the means to front the tuition of $61,700 to send his child to a college prep boarding school. This is why we have federally funded special education services?

W.W. v. NYC DOE, 67 IDELR 66 (S.D.N.Y. 2016)

The court overturned a state review officer's ruling and held that parents were entitled to a full year of tuition. The parent presented evidence that the school to which the student was assigned was not capable of implementing the IEP. The district did not rebut this evidence. The court held that in a tuition reimbursement case the district bears the burden of proving that its proposed placement is appropriate. This is based on Second Circuit precedent.

Comment: The court also made the observation that the state review officer's ruling was entitled to no deference because it was based on an erroneous legal conclusion. Administrative hearing officers are entitled to deference with regard to fact findings, but not legal conclusions that are erroneous.

S.B. ex rel N.J.B. v. Murfreesboro City Schools, 67 IDELR 117 (M.D. Tenn. 2016)

The court ordered the district to reimburse the parents for a residential, out-of-state placement, thus reversing the decision of the hearing officer. The key factor was the change of placement the district called for when the student was doing poorly in school. The school called for a change to a more restrictive environment. The move was designed to place the student in a setting where he would receive services fulltime from a special education certified behavior management teacher. However, that teacher went on maternity leave and the sub was not even special ed certified. Whoops.

Comment: At the IEP Team meeting where the change was made the certified behavior management teacher who was supposed to serve the student expressed concerns over the placement, noting that "the classroom did not run on a set schedule or routine and she was concerned that the situation in her classroom was not the safest for [the student]." At the hearing, the principal also expressed concerns. One wonders who was in favor of this placement.

E.T. v. Bureau of Special Education Appeals, 67 IDELR 118 (D.C. Mass. 2016)

The parents put the student in a private, sectarian school that did not provide special education services at all. The parents were quite happy with this placement, and even declared to the school that the student "did not need special education at all." This was surprising in light of the fact that the high school student had been receiving special education services since first grade. Even more surprising, the parents sought tuition reimbursement. The court held that the public school did not have to pay for the private placement.

TRULY MISCELLANEOUS BUT INTERESTING

Wenk v. O'Reilly, 65 IDELR 121 (6th Cir. 2015)

The court held that the making of a child abuse report is an "adverse action." This is true whether the report is true or false. Thus if it is done in retaliation for the exercise of protected rights, it is an act of illegal retaliation. The critical question then becomes motivation. Key Quote:

> Under this rule, then, a report of child abuse—even if it is not materially false and there is evidence in the record that could support a "reasonable basis" to suspect child abuse—is actionable if the reporter made the report "at least in part" for retaliatory motives.

The court noted that the complaint alleged that the report of child abuse was embellished and in some parts entirely fabricated. The court held that the complaint should not be dismissed. Moreover, since the law on this is "clearly established" the director of pupil services who reported the alleged abuse is not entitled to qualified immunity.

Meares v. Rim of the World School District, 69 IDELR 38 (C.D. Cal. 2016)

In its initial ruling, the court held that the district was not obligated to provide a one-to-one aide who was capable of keeping pace with the student on the mountain biking team. This was neither a failure to implement the IEP, a denial of FAPE nor a breach of contract. Key Quote:

> The Court questions how far Plaintiffs' logic might be extended; if Madison was the preeminent mountain biker in Southern California, would the District be required to somehow locate a biking aide to keep pace? 66 IDELR 39 (C.D. Cal. 2015)

In a later ruling, the court held that the district was obligated to provide a male aide who was capable of keeping up with the student on the team. In an interesting and novel decision, the court held that this was not necessary for the provision of FAPE, but was necessary to afford the student an equal opportunity to participate in extracurricular activities. In support of this, the court cited 34 CFR 300.117. Key Quote:

> The provision of an aide for Plaintiff so that he can apply to be on the team does not mean, as counsel for the district argued, that just anyone could walk on to [the] team, regardless of their interest or capabilities. Rather, as Plaintiff's counsel noted, an equal opportunity only guarantees that everyone can seek to apply for the team; participants must still be able to have a minimally sufficient speed and aptitude for the activity, but can't be denied that equal opportunity solely by reason of their disability.

Comment: The court noted that cost might be a relevant factor in a case where the requested service was not necessary for FAPE, but only for "equal opportunity." However, the costs were not significant here. The court also noted that it was feasible for the district to find an aide who could keep up with the student as he was not an "Olympic-grade biker."

R.J. v. Rivera, 68 IDELR 101 (E.D. Pa. 2016)

The charter school shut down due to financial problems. Parents of two students sought a due process hearing, alleging a denial of FAPE. They named as defendants both the defunct charters, and the state agency. The hearing officer ruled in favor of the parents. Here, the parents sought attorneys' fees from the state agency. The agency argued that it did not deny the student's FAPE, and was not a "guarantor" of charter school solvency. The court:

> As the *Charlene R.* Court [an earlier case with similar facts] noted, Pennsylvania has encouraged the growth of charter schools, which are considered to be public schools and LEAs under the IDEA. These charter schools, unlike public school districts, "can simply disappear," leaving students with no recourse other than suing the PDE and the Commonwealth to vindicate their rights.

Comment: Other states also encourage the growth of charter schools, treat them as public schools, and have seen a few go bust in the middle of the school year.

Dear Colleague Letter, 68 IDELR 108 (OSERS 2016)

This is about virtual schools. It recounts the basic requirements of IDEA and emphasizes that they all apply in the virtual setting. The Letter notes that Child Find presents particular problems due to limited teacher interaction with students, and suggests that SEAs should call for additional methods of "finding" eligible children, such as screenings or questionnaires. Parent referral alone should not be the primary means of taking care of Child Find responsibilities.

THIS JUST IN...

BY: Jim Walsh

DEVELOPMENTS IN SPECIAL EDUCATION LAW

MAR 2017 | NO. 324

SCOTUS CLARIFIES "FAPE" STANDARD

Thirty-five years ago the U.S. Supreme Court decided the case of *Board of Education of Hendrick Hudson Central School District v. Rowley.* This was the first Supreme Court case interpreting the Individuals with Disabilities Education Act. The issue in *Rowley* was about the meaning of the term "FAPE"—Free Appropriate Public Education. The Court noted that the statutory definition left much unresolved. There is a lot of ambiguity in terms like "appropriate." After analyzing the law in detail, the Court concluded that a student's IEP must be "reasonably calculated to enable the child to receive educational benefits." If the school district followed all of the procedures in the Act, and offered an IEP that satisfied that standard, the school district was offering FAPE.

The Court then applied that standard to the particular circumstances of the child in the case. Amy Rowley was a fully mainstreamed first grader with a hearing impairment. Despite her disability, Amy achieved academically better than most of the students in her class. She was expected to satisfy grade level standards, and she did. She earned promotion from first grade to second. Given all of that, the Court held that Amy was already receiving a FAPE with the services the school district offered. The additional service that the parents requested—a sign language interpreter—was not necessary.

In the ensuing 35 years all of those involved in special education have struggled to apply the *Rowley* standard to millions of children and millions of IEPs. It has not been easy. The Court told us that a good IEP offers "educational benefits." But how much? If the student was like Amy Rowley, the standard was pretty easy to apply. If the student was fully mainstreamed, and the IEP called for grade level performance, then the question was: does this IEP call for services that are "reasonably calculated" to enable this student to achieve at grade level?

But what about all those other kids? If the student was not served in the mainstream classroom, and was not expected to achieve at grade level, how much "educational benefit" was sufficient? In the *Rowley* decision, the Supreme Court specifically declined to address that issue. The Court noted that its analysis of FAPE was confined to the facts of the case it was deciding. In other words, the *Rowley* case told us what FAPE means for kids like Amy Rowley, leaving for another day, and another case, a decision about what FAPE means for other kids.

Kids like Endrew F.

Background. Endrew lives in Colorado, where he was diagnosed with autism at age two. He attended school in Douglas County School District from preschool through 4th grade. During that 4th grade year Endrew's parents became dissatisfied with his rate of progress. Endrew presented some behavioral problems, such as screaming in class, climbing over furniture and running away from school. His parents were concerned that he was stalling in his progress, both academically and behaviorally. They noted that his IEP looked very much the same from year to year, citing the same goals. It looked to them like he was not making any progress.

The parents pulled Endrew out of public school and placed him in Firefly Autism House, which specializes in serving students with autism. Within six months, Endrew showed significant progress. Thus, the parents were disappointed when the public school offered an IEP for 5th grade that looked to be much the same as the IEPs from previous years when Endrew progressed so little. The parents rejected the proposed IEP and eventually sought a due process hearing, alleging that the district was not offering an IEP that would confer FAPE.

THE ROWLEY CASE TOLD US WHAT FAPE MEANS FOR KIDS LIKE AMY ROWLEY, LEAVING FOR ANOTHER DAY, AND ANOTHER CASE, A DECISION ABOUT WHAT FAPE MEANS FOR OTHER KIDS.

The parents lost before the hearing officer, the federal district court and the 10th Circuit. All of those tribunals concluded that the district's IEP satisfied the *Rowley* standard, and thus, offered FAPE. The 10th Circuit noted that *Rowley* required only "some" educational benefit. According to the 10th Circuit, and in particular, Judge Neil Gorsuch, this meant that the IEP was adequate as long as it offered educational benefits that were "merely more than *de minimis.*" This Latin phrase means "of little importance….trifling….insignificant." Thus, as long as the IEP offered just a tad more than an "insignificant" amount of educational benefit, it was OK, according to the 10th Circuit.

SCOTUS Speaks. Chief Justice Roberts wrote the Court's opinion, and all eight of the justices joined in with no dissent and no concurring opinions. The Court rejected the 10th Circuit's standard and came up with this instead: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

News accounts have declared this to be a new standard for FAPE. It is not. It is the same standard as the one the Court enunciated 35 years ago, but it is applied to a different set of students. The Court in this case repeatedly cited its earlier decision and expressly relied on the analysis and logic of that opinion. The Court's clarification of what "some educational benefit" means should be very helpful to educators and parents alike when they are designing an IEP for students who are more like Endrew than Amy.

In fact, when developing IEPs, we might be wise to start with this question: is this student more like Amy, or Endrew? Here's an important quote from the Court:

> *Rowley* had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

What Was Rejected. The standard adopted by the Court in this case was not what the school district proposed, but it was not what the parents proposed either. The school district argued that Judge Gorsuch and the 10th Circuit had it right--that as long as the IEP would confer "merely more than *de minimis*" benefits, it was adequate. The Court described the standard it enunciated as "markedly more demanding" than the 10th Circuit standard.

But the Court also rejected the standard proposed by the parents. They argued that FAPE requires an IEP designed to offer the child "opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities." The Court observed that it had rejected that same argument 35 years ago in the *Rowley* case. Citing its earlier ruling, the Court noted that "The requirement that States provide 'equal' educational opportunities would …seem to present an entirely unworkable standard requiring impossible measurements and comparisons." So an IEP does not have to offer an equal opportunity to succeed, but it should be "appropriately ambitious" and aim for attainment of "challenging objectives."

The Practical Effect. The Supreme Court has rejected the 10th Circuit's view of FAPE for the lower functioning student, but not the 5th Circuit's. One reason the Supreme Court took this case is because different Circuit Courts had different interpretations of the *Rowley* decision. It was the 10th Circuit's standard that was found to be inadequate. The 5th Circuit never has adopted a "merely more than *de minimis*" standard. Instead, we have the case of *Cypress Fairbanks ISD v. Michael F.*, which establishes a four-part test for FAPE. Our courts and hearing officers have applied that test since 1997 when *Michael F.* was decided. The 5th Circuit said that an IEP must 1) be individualized on the basis of the student's assessment and performance; 2) be administered in the least restrictive environment; 3) include services that are provided in a coordinated and collaborative manner by the key stakeholders; and 4) produce positive academic and non-academic benefits.

The bottom line on the *Endrew* case for Texas educators is that it is consistent with the standard we have been using since 1997. In particular the first part of the 5th Circuit's test ("individualized on the basis of assessment and performance") is consistent with the Supreme Court's language ("…make progress appropriate in light of the child's circumstances"). ARD Committees should continue to focus on the four-part test, asking themselves: in light of this child's circumstances, including the data we have regarding the student's assessment and performance, is this IEP likely to enable the student to make an appropriate amount of progress?

The case of *Endrew F. v. Douglas County School District RE-1* was decided by the U.S. Supreme Court on March 22, 2017.

FOR MORE INFORMATION

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