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THE YEAR IN REVIEW

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

This handout summarizes reported decisions from 2015-2016. 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

Eskenazi-McGibney v. Connetquot Central School District, 65 IDELR 8 (E.D.N.Y. 2015)

The court held that parents had standing to assert a claim based on allegations that they were discriminated against and retaliated against as a result of their association with their son who had a disability. However, the court dismissed the case on the merits because there was no allegation that the bullying of the student was based on his disability. Key Quotes:

> Simply because a disabled person was bullied does not, without more, compel the conclusion that the bullying was "based on [the student's] disability."
>
> …even if students with disabilities are more likely to be bullied than students without disabilities, both based on their disabilities and based on other factors, a plaintiff nevertheless does not state a claim under the ADA and Section 504 absent some factual allegation linking the disability and the bullying. To hold otherwise would convert the ADA and Rehabilitation Act into generalized anti-bullying statutes.
>
> Why did the fellow student and bus driver bully [the student]? Was it based on [his] disability? Or was it based on some other reasons, such as personal animus?

The court also dismissed the parents' retaliation claims for much the same reason. Having failed to allege that the bullying was based on their child's disability, they failed to allege that they had engaged in "protected activity."

Lee v. Natomas USD, 65 IDELR 41 (E.D. Cal. 2015)

The court declined to grant the district's motion for summary judgment in a retaliation case under 504 and the ADA. The court notes that the *McDonnell Douglas* burden shifting analysis applies to these cases. Under that rubric, the plaintiff must first present evidence to establish a

prima facie case by showing that 1) he engaged in a protected activity; 2) the defendant knew about the protected activities; 3) an adverse action was taken against him; and 4) there was a causal connection. If this is established, the burden shifts to the school district to produce admissible evidence of a legitimate, non-retaliatory motive. If this is accomplished, the burden shifts back to the plaintiff to show that the proffered rationale is a pretext for retaliation. Here, the plaintiff established the prima facie case and the court assumed, for purposes of the analysis, that the school had a legitimate, non-discriminatory motive. Thus the ruling turned on pretext, which, as the court noted, requires "factual determinations generally unsuitable for disposition at the summary judgment stage."

Comment: The background to this is a parent who engaged in a campaign of complaints at all levels alleging falsification of records and other illegal and unethical conduct. The school attorney proposed a meeting to discuss matters, and "Plaintiff unilaterally canceled the meeting." The school then sought a TRO on three occasions. The court held that this amounted to an "adverse action." This case is an excellent illustration of how difficult it is for schools to dismiss retaliation claims prior to a full blown trial. Key Quote: "Courts have recognized that true motivations are particularly difficult to ascertain." That's why summary judgment rarely works.

<u>K.P. v. City of Chicago School District #299</u>, 65 IDELR 42 (N.D. Ill. 2015)

The court ruled for the school district in a case where a student sought an injunction to permit her to use a handheld calculator during a math test that would be used in determining her eligibility for certain selective high schools in the district. The math test was done on a computer, and for some of the questions, an on-screen calculator was available. For other questions, students were expected to do their own computation. The court held that allowing the plaintiff to use a calculator for the entire test would give her an unfair advantage and would invalidate her test results. Key Quote:

> That is not a reasonable accommodation but a substitution of artificial intelligence for the very skill the Test seeks to measure.

<u>Re: Gates-Chili Central School District</u>, 65 IDELR 152 (DOJ, 2015)

This is an investigation by the Department of Justice regarding a school district's refusal to allow a student to bring a service dog to school unless the parent provided an adult handler for the dog. The DOJ found the school in violation of the ADA and ordered it to modify its policies and practices to permit the student to use the dog, even though it would require some assistance from school staff.

Comment: This report includes a detailed analysis of the facts, which makes the school's position seem pretty unreasonable. The dog required minimal attention and the child already had a 1:1 aide accompanying her all day long who could assist with the dog. There was no question that the dog was helpful, including detecting seizures in advance. Moreover, the child

had had the dog with her at school for four years without incident. In pre-school, the dog accompanied the child without an adult handler. When the child went to kindergarten, the district insisted on an adult handler. It's dangerous for a district to discontinue providing an accommodation unless there is an obvious reason for the change.

Zdrowski v. Rieck, 66 IDELR 42 (E.D. Mich. 2015)

The court held that a "dragging incident" did not indicate bad faith or gross misjudgment by the school district. The parents argued that the teachers used the "transport hold" when they should not have. Key Quote:

> The Court finds that in the context of the case, where C.R. was threatening to harm himself, had a history of violent outbursts, and might have become more agitated by being restrained in the control hold, no reasonable jury could find that Defendants acted with bad faith or gross misjudgment by using the transport hold to take him to the office even though he was resisting.

J.R. v. NYC DOE, 66 IDELR 32 (E.D.N.Y. 2015)

Based on district court decisions in the 2nd Circuit, the court held that parents have standing to assert claims under ADA/504 related to the education of their child.

BPS v. Board of Trustees for Colorado School for the Deaf and Blind, 66 IDELR 100 (D.C. Colo., 2015)

Most of this case is about Title IX standards for liability based on student-to-student sexual harassment. But as to the ADA/504 case, the court held that a reasonable jury could conclude that the school discriminated based on disability. This was entirely based on the principal's response to a complaint from the parents that their child had been sexually abused by another student. The principal allegedly responded "that the school would not investigate the matter because [the victim] could not identify the perpetrator of the sexual abuse." This was because the victim was blind.

Comment: Add that to the list of "things not to say about bullying."

P.P. v. Compton USD, 66 IDELR 121 (C.D. Cal. 2015)

The court refused to dismiss this class action, seeking relief under 504 and the ADA for students as well as teachers adversely affected by trauma. The students allege that exposure to traumatic events "profoundly affect their psychological, emotional, and physical well-being." The school argued that physical or mental impairments do not include poverty and environmental factors, and thus these students are not "disabled." Key Quote:

> The Court does not endorse the legal position that exposure to two or more traumatic events is, without more, a cognizable disability under either of the Act. The Court simply acknowledges the allegations that exposure to traumatic events might cause physical or mental impairments that could be cognizable as disabilities under the two Acts.

Comment: Fascinating case, and no doubt, a harbinger of what we will see in the years ahead. There is much scientific and medical research about the effects of trauma. The case does not seek damages, which means plaintiffs will likely not have to prove intentional discrimination. It seeks injunctive relief, including training, restorative practices in lieu of punitive discipline, and mental health support. Here's a new term to add to your vocabulary: "trauma-sensitive schools." Straight outta Compton!

On September 29, the court denied the plaintiffs' request for a mandatory preliminary injunction that would have required district-wide trauma awareness training. The court noted that such remedies should not be granted without evidence that they are needed to prevent extreme and very serious damage. This lengthy opinion is at 66 IDELR 161. That same day, the court denied class certification for the case in another lengthy opinion: 66 IDELR 162.

<u>Gohl v. Livonia Public Schools</u>, 66 IDELR 122 (E.D. Mich. 2015)

This case was based on alleged physical abuse of a severely disabled child by a teacher, primarily based on one incident. The court 1) held that there can be no individual liability under ADA or 504; 2) dismissed claims against individual defendants in their official capacity as redundant, since the district was also sued; 3) dismissed the ADA/504 claims due to lack of evidence of any adverse impact on the child's education; 4) dismissed the 4th Amendment claim of excessive force due to 6th Circuit precedent; and 5) dismissed the 14th Amendment excessive force claim due to lack of evidence that "shocks the conscience." Key Quote:

> Plaintiff's theory comes down to the proposition that a plaintiff can make out a claim under the ADA or RA—without a showing of actual educational deprivation—simply by showing a teacher's abusive classroom conduct. Plaintiff has failed to provide any legal authority in support of such a proposition.

<u>K.L. v. Missouri State High School Activities Assn.</u>, 66 IDELR 152 (E.D. Mo. 2015)

The court dismissed the suit for failure to state a viable claim. The plaintiff was a para-athlete who sought "reasonable accommodation" to enable her to participate in state high school athletic competition. The court held that the plaintiff's requested accommodations were "unreasonable as a matter of law." Key Quote:

> Simply put, Plaintiff is requesting Defendant to change the current program to include, add and encompass events, precautions and rules which do not currently exist in the program.

Spring v. Allegany-Limestone Central School District, 66 IDELR 157 (W.D.N.Y. 2015)

In a case alleging disability-based harassment and discrimination, resulting in a student suicide, the court held that the plaintiff failed to allege that the student was a person with a disability. The suit alleged that the student had Tourette's, ADHD and Callosum Dysgenesis. The court held this pleading was inadequate to establish that the student was substantially limited in a major life activity. More surprisingly, the court held that eligibility for special education services did not mean that the student qualified under ADA/504. Key Quote:

> Further, the fact that a plaintiff receives special education services does not necessarily mean that the plaintiff qualifies as an individual with a disability under the ADA or Rehabilitation Act.

Dorsey v. Pueblo School District 60, 66 IDELR 183 (D. Colo. 2015)

Claims under ADA/504 due to bullying failed because there was no allegation that the bullying was based on disability. Likewise, claims that the student suffered physical injuries when forced to participate in building a human pyramid, which was prohibited by her 504 plan, did not allege intentional discrimination. Those claims were dismissed along with claims relating to the school's delay in getting needed snacks delivered to the student on one occasion.

Lipsey v. East Baton Rouge Parish School Board, 66 IDELR 184 (M.D. La. 2015)

The court held that the district could be vicariously liable for a teacher's abuse of a student with a disability under ADA and 504.

Comment: This is an important point, distinguishing ADA/504 cases from those brought under Section 1983. There is no vicarious liability under 1983, and thus the wrongful actions of a school district employee will usually not lead to school district liability. But vicarious liability under 504/ADA is available. The 5th Circuit confirmed this in Delano-Pyle v. Victoria County, Texas, 302 F.3d 567 (5th Cir. 2002). In that decision, the court notes that the same rule has been adopted by the 4th, 7th, 9th and 11th Circuits. This is yet another reason why districts are vulnerable to suits under ADA/504.

Snell v. North Thurston School District, 66 IDELR 186 (W.D. Wash. 2015)

The court denied the school's Motion for Summary Judgment in a suit against the district and its Director of Student Support Services. The court held that there was sufficient evidence of deliberate indifference to the child's medical needs. This was based on emails from the Director:

> "I just cannot see a 1:1 nurse for this child." "[The student[does not require 1:1 medical support unless grandma refuses to come…and I cannot hire someone to

> do just that—no agency has someone who would be available for such limited time."

There was also sufficient evidence of a denial of a reasonable accommodation. Although the district offered to transfer the student to another school where there was a nurse, the court found this to be "abrupt" and unreasonable. The proposed transfer was to take place in two days—which the court found unreasonably abrupt.

Comment: All this comes on top of the parents' victory in an IDEA due process hearing, already affirmed by the federal court. This suit seeks compensatory damages for lost educational opportunities, humiliation and mental and emotional stress. It is interesting to note that in many ADA/504 cases the plaintiff goes straight to court, and runs into the "exhaustion of administrative remedies" defense. Here, the plaintiff exhausted her administrative remedies very successfully, and only then filed the ADA/504 case for damages.

<u>D.A.B. v. NYC DOE</u>, 66 IDELR 211 (2nd Cir. 2015)

This decision is largely a matter of deference to the State Review Officer and the district court, in upholding the district's proposed placement. However, the court also upheld the district on the 504 claim which was based on the allegation the state's vaccination requirements discriminate against students with autism. Here is the Key Quote from the District Court decision, which was affirmed here by the 2nd Circuit:

> No reasonable factfinder could conclude that D.B. was prevented from attending the school because of his autism. Even under the plaintiffs' hypothetical assumptions, D.B. would not have been allowed to attend his designated school because he did not have the required vaccinations. Plaintiffs hypothesize that D.B.'s autism prevents him from obtaining the required vaccinations, and therefore the enforcement of this requirement constitutes discrimination.
>
> The only Section 504 cases that plaintiffs rely on to argue that the vaccination requirement constitutes discrimination involve sweeping, automatic exclusions of all children with a certain disease. By contrast, the Department's vaccination requirement, which allows the possibility of exemptions, is a more limited, generally applicable law intended to limit the spread of contagious disease.

Comment: The parents submitted a letter from a clinical pediatrician stating that the student had a history of adverse reactions to vaccinations. Despite that, the district denied the exemption request, noting that there was no medical basis for it. The district court decision is at 64 IDELR 69; 45 F.Supp.3d 400 (S.D.N.Y. 2014).

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.

R.K. v. Board of Education of Scott County, Kentucky, 67 IDELR 29 (6th Cir. 2016)

The court affirmed a summary judgment for the district in a dispute over which elementary school the student should attend. The student had diabetes and during kindergarten and first grade, the school assigned the student to a non-neighborhood school where there was a fulltime nurse. The parents wanted the child at the neighborhood school and produced documentation from the doctor that a nurse was not necessary. However, the school deferred to the judgment of its nurses that the boy should be in a school where a nurse was available. The court held that the parents had failed to produce any evidence of "deliberate indifference" and thus were not entitled to the money damages they sought. Key Quote:

> This is not a case where a school board ignored a student's request for help. Rather, the student's parents simply disagreed with the school as to whether a nurse was necessary to provide it.

One judge dissented.

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

The court lays out the distinctions in FAPE under IDEA vs. ADA/504. The FAPE standard under 504 means that the school provides regular or special education services that 1) "are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met; and 2) are based on adherence to procedures that satisfy

the regulations. As the court notes, this requires a comparison of the adequacy of services to those offered to non-disabled students.

The court also noted the elements of a cause of action for damages under ADA/504: plaintiff is 1) a qualified individual who 2) was denied a reasonable accommodation that s/he needs in order to enjoy meaningful access to the benefits of public services; and 3) the program receives federal financial assistance. To get damages, the plaintiff must show intentional discrimination, which can be based on deliberate indifference.

Comment: This decision would open the door to many more ADA/504 suits for damages. The FAPE standard is more demanding than IDEA's, the parents' agreement to the plan is meaningless, and the district is liable if it should have known that an available accommodation was reasonable. The court reversed a summary judgment in favor of the district and remanded for more fact finding.

Doe v. Torrington Board of Education, 67 IDELR 182 (D.C. Conn. 2016)

This is a bullying case. The court dismissed the ADA/504 claims because there were no "non-conclusory allegations that the bullying of Doe was based on his disability." There were allegations of significant harassment and bullying by football players and others, but "Doe does not sufficiently allege…that anyone actually harassed, bullied, or assaulted him because of his disability or perceived disability, rather than some other reason, such as personal animus." Moreover, the allegations of deliberate indifference also fell short.

Comment: Defendants in the case included the superintendent, principal, assistant principal, athletic director, head football coach, guidance counselor, special education teacher, and social worker.

Sky R. v. Haddonfield Friends School, 67 IDELR 180 (D.C.N.J. 2016)

The court dismissed an ADA claim against the school because the ADA exempts religious organizations and entities controlled by religious organizations. This was a Quaker school.

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.

K.L. v. Missouri State High School Activities Assn., 67 IDELR 171 (E.D. Mo. 2016)

The court denied a request for a Preliminary Injunction that would have required that a para-athlete's scores in track competition be included in her school's team score. The court noted the extensive efforts of the state to accommodate students with disabilities. It also concluded that an injunction would cause harm to the Association by affording the plaintiff unequal and

preferential treatment. The court also held that the Association was not an entity subject to the ADA, and there was no evidence of intentional discrimination. Key Quote:

> The public interest is not well served by judicial intervention when a state high school activities association is exerting exceptional and sustained efforts to create additional opportunities for disabled athletes in high school track and field.

ATTORNEY'S FEES

C.W. v. Capistrano USD, 65 IDELR 31 (9th Cir. 2015)

The court held that the district was entitled to recover fees only as to the parents' 1983 and ADA claims. The parents' claims under IDEA and 504 were not frivolous or brought for an improper purpose. This reversed the ruling of the district court.

J.L. v. Harrison Township Board of Education, 66 IDELR 80 (D.N.J. 2015)

The court held that the parents' were prevailing parties, based on a settlement that was approved by the hearing officer. The school made an "offer of judgment" that generally included all of the relief obtained, but since it omitted the payment of reasonable attorneys' fees, the offer did not bar recovery of fees. However, the bad faith conduct of the parents' attorney in prolonging the dispute was grounds for a reduction of fees, which the court would determine after a hearing. Key Quotes:

> During the hearing, this Court labored to get a straight answer from Mr. Epstein [parents' attorney] as to why he simply did not respond to Mr. Gorman's [school attorney] requests for a resolution. Mr. Epstein's persiflage impeded the Court's task.
>
> IDEA was passed to reverse the history of neglect where disabled children in America sat idly in regular classrooms biding time until they were old enough to "drop out." It was not meant to be a windfall for lawyers.
>
> Even turning to the merits of the argument, however, Plaintiffs' argument is pure pettifoggery.

Comment: Upon receipt of the request for hearing the school sought mediation and requested to know what relief the parents wanted. The response was: "We'll see after we get Answers and discovery from BOTH respondents." The paper and e-trail is illuminating—the school trying to find out what it would take to resolve the matter; the parents' attorney balking.

Merrick v. District of Columbia, 66 IDELR 160 (D.C.D.C. 2015)

The court awarded the parent $107,000 in attorney's fees after she prevailed at a due process hearing. The court held that the fee award should not be reduced due to the fact that some of the parent's claims were denied. Despite the denial of certain claims, the parent obtained all of the relief she sought, and thus was entitled to full reimbursement. The court also held that the Laffey Matrix was the proper starting point for fee awards in IDEA cases, and thus the attorney's rate of $510/hour was proper. The court noted that the plaintiff produced seven affidavits in support of that rate for this lawyer. However, the court did reduce the number of hours due to some work being redundant; and reduced the rate for other work that was deemed more clerical than legal.

Comment: The Laffey Matrix is based on hourly rates in the Baltimore, D.C. area, and is maintained by the U.S. Attorneys' Office, but is also relied on by some other federal courts.

D.G. v. New Caney ISD, 115 LRP 53398 (5th Cir. 2015)

The court held that fees may be awarded even when the parent has not paid them or been billed for them, such as when the parent was represented by a federally funded advocacy group (Disability Rights Texas). The court noted a circuit split on what timeline applies to the parents' suit seeking fees as prevailing party, and declined to pronounce a specific rule for the 5th Circuit. However, the court held that the timeline does not begin to run until 90 days after the hearing officer's decision, since this is the time limit for the school district to appeal. The court also noted that the timeline for the parent is at least 30 days, and thus when added to the 90 days, the parent has at least 120 days from the date of the due process decision to seek fees. This suit, therefore, was timely.

Tina M. v. St. Tammany Parish School Board, 116 LRP 6559 (5th Cir. 2016)

The court held that obtaining a "stay put" order does not qualify as "prevailing" for purposes of attorneys' fees. Key Quote:

> Unlike a judgment on the merits or a consent decree, the relief obtained here was an automatic stay that did not address the merits or permanently alter the legal relationship of the parties.

School District of Philadelphia v. Williams, 67 IDELR 120 (E.D. Pa. 2016)

What is noteworthy about this case is the plaintiff's request for reimbursement of attorney's fees at the rate of $600/hour. This is for an experienced special education attorney who works for an advocate organization that does not charge its clients fees. In an earlier case, the court had awarded this lawyer $600/hour, but here it reduced the "reasonable" rate to $450/hour. The court thus awarded the parent a recovery of $138,763.20 as prevailing party.

Anaheim Union High School District v. J.E., 67 IDELR 81 (9th Cir. 2016)

The court held that $400/hour was a proper rate in the Los Angeles area, and thus reduced the fee award from the request that was based on rates of $450 for the hearing and $475 for the federal court work. The court also denied the fees for a person identified as a "paralegal" who was really an educational consultant. The court noted that paralegal fees are recoverable, but fees for experts are not. This person was an expert despite the attorney's characterization of her as a paralegal.

E.C. v. Philadelphia School District, 67 IDELR 138 (3rd Cir. 2016)

The court refused to lower the fees awarded to the parents. The school's most novel argument for a reduction was that it was in a "distressed" financial situation. The court noted that it would "recognize and sympathize with the school district's well documented and extremely unfortunate budgetary difficulties." What it would not do, however, is reduce the fees awarded to the parent.

Troy School District v. K.M., 67 IDELR 145 (E.D. Mich. 2016)

The court awarded parents' attorneys' fees of over $152,000, plus prejudgment interest. The district argued that the fees should be reduced due to its settlement offer. But the court rejected the argument. The sequence was: 1) district offer of settlement; 2) parent rejection of that offer, and parent counter-offer, which included several of the provisions in the district's offer; 3) district rejected the counter offer. The court faulted the district for not agreeing to a partial settlement based on the provisions that the two parties agreed on. Key Quote:

> Since it was the District who rejected the Parents' counteroffer in full, rather than accepting the agreed-to provisions in the counteroffer, the District cannot now argue that it was the Parents who protracted the litigation by raising all the issues before the ALJ.

Comment: Attorneys' fees were high because the due process hearing lasted 11 days. The court seems to think the hearing would have been a lot shorter if the district had partially accepted the counteroffer.

BEHAVIOR

Oakland USD v. N.S., 66 IDELR 221 (N.D. Cal. 2015)

The court upheld an administrative decision in favor of the parent involving a student with multiple mental health issues, including substance abuse. The court noted that "the threshold trigger for mental health assessment is relatively low." Here, it was triggered by the student's "significant decline in his educational setting." The district argued that the student must be drug-free before it could evaluate him. The district thus argued that he must be treated for the chemical dependency first, and that this was not the responsibility of the district. The hearing officer rejected this and the court affirmed. Key Quote:

> There is no dispute that the District has no legal obligation to provide substance abuse treatment to Student, which is considered a medical service and not part of the special education program requirements…..The administrative judge was persuaded that the "student's substance abuse disorder is a function of his co-occurring mental health conditions and both must be treated for Student to be able to function in the school setting." The Court agrees with this conclusion…

Comment: That quote from the decision may seem contradictory. The court is saying that the district is not obligated to provide treatment for substance abuse; but neither can the district refuse to evaluate the student's mental health condition, nor can it refuse to provide mental health services until that treatment occurs.

BULLYING/ HARASSMENT

Zdrowski v. Rieck, 66 IDELR 42 (E.D. Mich. 2015)

There was no evidence of deliberate indifference, or severe or pervasive bullying. Moreover, there was no evidence that the incidents that occurred were based on disability.

J.R. v. NYC DOE, 66 IDELR 32 (E.D.N.Y. 2015)

As an example of the type of evidence that might show "deliberate indifference" the court cited the principal's response to the student's request to transfer to another bus to avoid bullying. The principal indicated that the student population was violent, and therefore, bullying was likely to occur on any bus. Key Quote:

> Although the "deliberate indifference" standard does not require that teachers and school administrators successfully prevent or eradicate all bullying behavior, surely some effort to discourage that conduct and announce its unacceptability is required.

Title IX does not protect against bullying based solely on homosexuality, but it does apply to bullying based on the failure to conform to gender stereotypes.

<u>Spring v. Allegany-Limestone Central School District</u>, 66 IDELR 157 (W.D.N.Y. 2015)

This is a student suicide case, alleging that the district and several individuals should be held liable under the ADA, 504 and the U.S. Constitution. The court dismissed the case, largely due to inadequate pleading by the plaintiff. In its analysis, the court notes that the "state-created danger" theory of liability cannot be based on passive conduct. Here, the suit alleged that the school failed to discipline those who bullied the plaintiff. The court held that this was passive conduct, and could not support the "state-created danger" theory.

CHILD FIND

<u>N.M. v. Wyoming Valley West School District</u>, 67 IDELR 235 (M.D. Pa. 2016)

This is an ADA/504 case, but the underlying issue is child find. The court refused to dismiss the case at this stage, noting that the parents had sufficiently plead a case of deliberate indifference based on the fact that the student was in a hospital that is located within district boundaries and the received no services during the 70-day stay. The court cited testimony from the director of special education that she was aware of the student's presence at the hospital prior to discharge.

<u>D.L. v. District of Columbia</u>, 67 IDELR 238 (D.C.D.C. 2016)

This is a class action alleging violations of IDEA and 504 pertaining to students transitioning from Part C to Part B services. The court held that the district had failed to timely evaluate and serve a significant number of students and imposed a court order with specific targets. The court noted that children who were eligible under IDEA must be actually receiving services at age three—just having an IEP prepared and ready was not sufficient.

Comment: Three is three.

DISCIPLINE

Troy School District v. K.M., 64 IDELR 303 (E.D. Mich. 2015)

The court refused to grant the school's request for a TRO to keep the student out of school. The school argued that the student was dangerous and violent. It was agreed that the most recent episode was a manifestation of the student's disability. Furthermore, that episode (which is not specifically described in the court's opinion) occurred when the student's "safe person" was not with him. The IEP required the presence of a "safe person." Furthermore, no serious injuries occurred. Key Quote:

> In the case before us, the facts do not indicate that Defendant K.M. is substantially likely to injure himself or others if the IEP is followed. The incident that resulted in Defendant K.M.'s most recent suspension occurred in the absence of a safe person required by the IEP and no serious injuries were recorded.

Comment: The case shows how difficult it is for the school to prevail in such a case, especially if the prior incident was one in which the IEP was not faithfully implemented.

Wayne-Westland Community Schools v. V.S., 65 IDELR 13 (E.D. Mich. 2015)

Wayne-Westland got a TRO (Temporary Restraining Order) on October 9, 2014, followed by a Temporary Injunction on October 16. The Injunction will keep the student away from any school facility until the IEP Team can meet and discuss a change of placement. The evidence showed that the student was a big kid—6 feet tall, 250 pounds. In one month in the spring of 2014 he 1) physically attacked a student and several staff members, spitting at and kicking them; 2) "menaced" two staff members with a pen held in a stabbing position and refusing to put it down when told to do so; 3) punched a student; 4) punched the principal; 5) threatened to rape a female staff member; 6) punched another staff member in the face. Later in the semester, the student attacked a security liaison. He was told to leave the building. When he attempted to return, four staff members held the door closed to keep him out. Since the student would not leave the school grounds, the entire school was placed on lockdown. When school resumed in the fall of 2014, the student 1) threatened to bring guns to school to kill staff members; 2) made racist comments toward African American staff members; and 3) punched the director of special education in the face.

That was enough to convince the court that maintaining the student in the current placement posed an imminent threat. The school had plans to continue the boy's education through Virtual Academy, with a staff member available to help him and answer questions by phone or email. The court found that plan to be sufficient.

Comment: It helped the school's case that neither the parent nor the student contested the motion or appeared in court. The evidence was primarily in the form of an affidavit from the director of special education. Even though this court case was "uncontested" it is still a good indication of the kind of evidence schools need to produce when requesting an expedited hearing to show that the student's continued presence on campus is dangerous.

Prior to the adoption of federal special education laws a student like this one would probably have been expelled from school. That is no longer an option. The school has a continuing duty to provide a FAPE—Free Appropriate Public Education. But as this case indicates, the school can seek immediate assistance from a court to move a dangerous student off campus.

Z.H. v. Lewisville ISD, 65 IDELR 106 (E.D. Tex. 2015)

The court concluded that the student's behavior was not a manifestation of his disability, thus overturning the hearing officer's decision. The student's pediatrician testified that the behavior of making a "shooting list" was a manifestation of the student's autism and ADHD. But the court cited the testimony of the school psychologist, "a member of the ARD Committee who actually observed Z.H. in a classroom setting."

C.C. v. Hurst-Euless-Bedford ISD, 65 IDELR 195 (N.D. Tex. 2015)

The court upheld the district's decision to place the student in the DAEP due to a violation of the code of conduct that was not a manifestation of disability. The parents argued that the student was not guilty of a code violation. The court held that this was "not relevant" because the court was reviewing the decision of the ARDC, not the principal.

Valdez Hernandez v. Board of Education of Albuquerque Public Schools, 66 IDELR 78 (D.N.M. 2015)

The court held that APS did not discriminate against student with disabilities in connection with the use of physical restraint. APS policy allows for physical restraint of any student under emergency circumstances, and allows additional restraint of a student with a disability only if spelled out in the IEP. A "Best Practices Manual" that spelled out suggestions pertinent to the restraint of students with disabilities did not mean that the district was singling out such students for restraint, or otherwise discriminating. The court noted that distinctions based on disability can be justified when "predicated on specific or particularized safety concerns" or when it "genuinely benefits the disabled."

Comment: This has implications for how physical restraint is addressed in a student's BIP. Note that the policy allows for restraint of any student in an emergency, which SPS identifies as falling into four categories. The policy then says: "any restraint used beyond the four specific situations listed above shall be identified on the student's IEP as part of the student's behavior plan."

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.

C.C. v. Hurst-Euless-Bedford ISD, 67 IDELR 111 (5th Cir. 2016)

The district placed the student in DAEP for 60 days for invading another student's privacy by taking a picture of him in the bathroom stall. The court upheld a dismissal of a 504 claim based on an alleged hostile environment. The pleadings did not establish that the school's actions were based on the student's disability. Key Quote:

> The Plaintiffs did not allege facts suggesting that the Defendants acted against CC for any reason other than his multiple behavioral infractions.

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

Q.W. v. Board of Education of Fayette County, Kentucky, 64 IDELR 308 (E.D. Ky. 2015)

The court affirmed a hearing officer decision in favor of the school district. The student has autism but is not eligible for special education. The evidence did not show that his autism

adversely affected educational performance. The student was achieving above grade level academically and school officials reported appropriate social and behavioral interaction at school. Key Quote:

> While “educational performance” may be understood to extend beyond the four corners of a report card to include a student’s classroom experience, it does not include the child’s behavior at home. Social and behavioral deficits will be considered only insofar as they interfere with a student’s education. Here, they do not.

Comment: Very interesting case. Parents produced a lot of expert testimony, but the hearing officer was more persuaded by educators with classroom experience with the student. The court pointed out that one parent expert had never met the student, and the others had limited or no experience with the student in the school setting.

<u>Memorandum to State Directors of Special Education</u>, 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).

<u>Q.W. v. Board of Education, Fayette County, Kentucky</u>, 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 evalution.
>
> …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.

E.L. Haynes Public Charter School v. Frost, 66 IDELR 287 (D.D.C. 2015)

The court reversed the hearing officer, and held that the student was not eligible. The argument was over educational need. The court emphasized that the school followed all procedural requirements and the IEP Team was unanimous in determining that the student was not eligible. Citing Rowley, the court noted that "while a parent's agreement does not bar a later challenge to the decision of an MDT [Multi-Disciplinary Team] meeting, it nonetheless figures into evaluating a school's compliance with the IDEA." Honing in on "adverse impact," the court noted that "academic progress should be the primary focus." The student had a host of emotional problems, but academic progress was reasonably good.

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."

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 parent 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.

ISD No. 413, Marshall v. H.M.J., 66 IDELR 41 (D. Minn. 2015)

The court held that the district failed to conduct a proper evaluation when it neglected to do a medical evaluation to determine the cause of the student's absenteeism. The student was diagnosed with General Anxiety Disorder and had other lingering health issues from undergoing chemotherapy as a toddler. The student missed 34 days of school in kindergarten; 35 days in 1st grade and 39 of 102 days in 2nd grade at the time of the hearing. The IEP Team concluded that the student was not eligible for special education services. The court held that it was improper to decide eligibility until the evaluation was complete.

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 FBA was inappropriate. The court affirmed, and ordered the district to pay for the FBA.

Comment: The court notes that there are no legal standards for FBAs, but nevertheless holds that this one failed to meet the non-existent legal standard. 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."

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.

<u>E.L. Haynes Public Charter School v. Frost</u>, 66 IDELR 287 (D.D.C. 2015)

The parent claimed that the school failed to evaluate in all suspected areas by not conducting a FBA. The court rejected this argument, noting that the regulations do not require any particular evaluation instrument. The court distinguished an earlier case that dealt with an FBA to help develop IEP content. Here, the issue was eligibility, and there was no requirement to conduct a FBA.

> Furthermore, the IDEA itself does not mandate a FBA—or any other particular evaluation—as part of the evaluation process.

<u>Timothy O. v. Paso Robles USD</u>, 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.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Licata v. Salmon, 64 IDELR 263 (E.D.N.Y. 2015)

Parent sought an injunction to require the school to transport the student home from an after school day care program. Court held that exhaustion was required, whether the claim was brought under IDEA or 504. The court also noted that even if jurisdiction were established, the parent would not be entitled to an injunction as he was not likely to prevail on the merits. The school did not recommend or pay for this private, after school program. The school provided transportation TO the program, but would not likely be required to provide transportation FROM that program to the home.

M.S. v. Marple Newtown School District, 64 IDELR 267 (E.D. Pa. 2015)

The court dismissed the case due to failure to exhaust. The case sought damages under the ADA/504 but also sought relief that was available under IDEA. Therefore, exhaustion was required.

Davis v. Douglas County School System, 64 IDELR 302 (N.D. Ga. 2015)

The complaint was that the school was not wheelchair accessible and therefore out of compliance with ADA/504. The court dismissed the case because of failure to exhaust IDEA procedures.

Alboniga v. School Board of Broward County, Florida, 65 IDELR 7 (S.D. Fla. 2015)

This case is about the parent's request that the student be accompanied by a service dog, as a reasonable accommodation under ADA/504. The parent did not allege a denial of FAPE and did not allege that the dog's presence was educationally necessary. Therefore, the court held that exhaustion was not required.

A.D. v. Haddon Heights Board of Education, 65 IDELR 37 (D.C.N.J. 2015)

The court dismissed the case due to failure to exhaust, even though the student was not identified under IDEA and made no claim under IDEA. The student had asthma and related health conditions and was served via 504. The suit alleged inadequate services along with retaliation. The court held that exhaustion was required because the "retaliation and discrimination claims are inextricably linked to the key benefit secured by the IDEA—a free and appropriate public education." The fact that plaintiff sought relief not available under IDEA ($$$) did not change the analysis.

Comment: This decision, and the 3rd Circuit cases it relies on, make a strong case for exhaustion, even when the student, like this one, was never served under IDEA and never cites IDEA in the pleadings.

J.A. v. Moorhead Public Schools ISD No. 152, 65 IDELR 47 (D.C. Minn. 2015)

The case was dismissed for failure to exhaust. The suit was based on 504 and ADA and did not cite IDEA. However, the student was in the special education program and the complaint was about the school's use of a storage closet as the "quiet room" for the student. Since the IEP called for a quiet place, the suit was "not wholly unrelated" to the IEP process, and therefore, exhaustion was required.

Fry v. Napoleon Community Schools, 65 IDELR 221; 788 F.3d 622 (6th Cir. 2015)

The parents of a little girl in Michigan wanted to have Wonder, a hybrid goldendoodle to serve as her service animal at school. The little girl 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 their little girl to another district which welcomed Wonder. They sued the original district, alleging that its refusal to allow Wonder to help out was illegal. 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."

Comment: Since the suit was based on Section 504 and the Americans with Disabilities Act (ADA) the lawyers evidently thought that they did not have to go through the special education due process hearing system. They went right to court, without requesting a special education due process hearing. That turned out to be a mistake. The school district filed a Motion to Dismiss the lawsuit, arguing that the parents were required to "exhaust administrative remedies." That's legalese for "you have to get a special ed due process hearing first. You can't go to court until you do that."

This case sheds no light on the issue of when a school is obligated to permit a service animal to accompany a student to school. The decision is purely procedural, and thus will be of more interest to the lawyers than the educators. The case will be heard by the Supreme Court during its next term.

Wellman v. Butler Area School District, 66 IDELR 65 (W.D. Pa. 2015)

The court dismissed the case without prejudice due to failure to exhaust. The case alleged that the student suffered a concussion at school sponsored events, and that the district failed to accommodate his subsequent educational needs. Even though the case was brought under ADA/504 and Section 1983, the court held that exhaustion was required because the suit was about the identification, evaluation, placement and provision of FAPE for a student. The court also held that the parties' earlier Settlement Agreement did not satisfy the exhaustion requirement because there was no administrative ruling.

Comment: The parents initially requested a special education hearing, and that's what led to the Settlement Agreement. That Agreement specified that all claims were released, including those under IDEA, ADA "or any other Federal or State statute." How do you turn around and file a suit under the ADA and 1983 after signing that Agreement?

K.J. v. Greater Egg Harbor Regional High School District Board of Education, 66 IDELR 79 (D.N.J. 2015)

The court held that exhaustion was not required because the claims under ADA and 504 sought relief not available under IDEA (damages). For the same reason, the settlement of the IDEA claim did not render the 504/ADA claims moot.

Comment: That's a minority point of view.

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.

Kuhner v. Highland Community Unit School District No. 5, 66 IDELR 131 (S.D. Ill. 2015)

The court dismissed the case for failure to exhaust, but allowed the plaintiff to amend the complaint so as to seek relief solely for physical injuries, which would not require exhaustion. The plaintiff alleged pervasive bullying, which caused her to attempt suicide and resulted in homebound placement. There were also allegations of physical harm inflicted by other students. The petition sought relief for emotional injuries and educational deprivation, and thus required exhaustion. But the court noted that "If the Complaint solely sought compensation for

J.K.'s physical injuries and the medical bills she incurred, then exhaustion of IDEA administrative procedures may have been futile."

Dorsey v. Pueblo School District 60, 66 IDELR 183 (D. Colo. 2015)

The court held that 1) seeking damages as a remedy did not enable the plaintiff to avoid exhaustion; 2) the fact that the plaintiff no longer lived in the district did not make exhaustion "futile"; 3) the claim related to bullying did not require exhaustion; 4) the claim for damages due to physical injuries allegedly caused by the school did not require exhaustion; 5) the claim about the delay in getting required snacks to the student did not require exhaustion; and 6) the claim pertaining to the school's failure to provide a second set of books after the student broke her leg required exhaustion.

Comment: Even though some of these claims were allowed to go forward without exhaustion, the court ruled in favor of the district on all of them.

Carroll v. Lawton ISD No. 8, 115 LRP 53032 (10th Cir. 2015)

The court held that exhaustion was required in a case where parents alleged acts of abuse by the teacher. The court held that the suit sought relief, in part, for educational injuries and thus, exhaustion was required and not futile.

Doe v. Berkeley County School District, 66 IDELR 248 (D.S.C. 2015)

The court held that exhaustion would have been futile and was not required. This was due to the fact that the student had moved to a new district in a new state. Thus the defendant district "had neither the obligation to pay for Jane's special education needs nor the power to create enforceable accommodations for her."

Comment: The court distinguished a case that held otherwise on two bases. First, the other case involved a student who moved, then sued; this was a case where the plaintiff sued, then moved. More significantly, the court pointed out that the district in this case waited too long to assert the argument—18 months after the suit was filed, after extensive discovery, six scheduling orders, and just two months prior to trial. The court noted that "Defendants should have moved for dismissal or summary judgment in April 2014 or soon thereafter."

M.S. v. Marple Newtown School District, 66 IDELR 273 (3rd Cir. 2015)

The case was dismissed for failure to exhaust. This was a 504 case, alleging that the school failed to protect the student from boys who were harassing her. The parent complained that the school did not place the students in separate classrooms, and then retaliated against her for advocating for her child. The court held that the pleadings indicated that the case was about educational placement, and the injuries could have been remedied through IDEA proceedings.

As to the retaliation claim, the court cited an earlier 3rd Circuit decision holding that retaliation claims related to rights under IDEA must also be exhausted.

Pollack and Quiron v. Regional School Unit 75, 67 IDELR 40 (D. Me. 2016)

The court held that the parents failed to exhaust administrative remedies when they refused to attend an IEP Team meeting to discuss their request that the student be allowed to wear a recording device all day.

Comment: School district attorneys will want to cite this case for the proposition that presenting your issue to the IEP Team is a necessary part of the duty to "exhaust administrative remedies." Usually, the issue of exhaustion comes up when the parents do not seek a special education due process hearing, but here it was about an IEP Team meeting. It helped the district's case that it produced written documentation urging the parent to attend an IEP Team meeting to discuss the request. For parents' lawyers, the case again shows that parents who refuse to attend an IEP Team meeting are making a mistake.

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.

Dabney v. Highland Park ISD, 67 IDELR 179 (N.D. Tex. 2016)

Plaintiffs alleged denial of FAPE under IDEA and Section 504, but never requested a special education due process hearing. Thus these claims were dismissed due to failure to exhaust administrative remedies.

Comment: Lawyers take note: the court held that exhaustion is a jurisdictional requirement—not just an affirmative defense.

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.

IEEs

Stepp v. Midd-West School District, 65 IDELR 46 (M.D. Pa. 2015)

The court denied the request for an IEE at public expense, thus upholding the decision of the hearing officer with a very comprehensive review of the facts.

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.

<u>E.L. Haynes Public Charter School v. Frost</u>, 66 IDELR 287 (D.D.C. 2015)

The court upheld the ruling that the district had to reimburse the parent for the IEE. The court held that the district's psychological evaluation was flawed because it did not include an interview with the student.

Comment: That seems pretty obvious, but the problem was that the student refused to be interviewed.

<u>A.L. v. Jackson County School Board</u>, 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.

<u>Haddon Township School District v. New Jersey DOE</u>, 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.

PRACTICE AND PROCEDURE

Brittany O. v. Bentonville School District, 64 IDELR 299 (E.D. Ark. 2015)

The court held that a claim for attorneys' fees based on a successful due process hearing must be filed within 90 days of the due process order. Here, the suit was filed too late, and was dismissed.

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."

Alboniga v. School Board of Broward County, Florida, 65 IDELR 7 (S.D. Fla. 2015)

The court held that the case involving the service dog was not moot, even though the school had always permitted the dog at school and did not require the parent to provide a handler. The court pointed out that the school was violating its own policies by doing this: "A change in government conduct by administrative fiat in violation of its own rules cannot constitute 'unambiguous' or 'consistent' termination of allegedly improper conduct."

Comment: No good deed goes unpunished.

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.

G.L. v. Ligonier Valley School District Authority, 66 IDELR 91 (3rd Cir. 2015)

This case claims to be the first at the Circuit Court level to address how the statute of limitations affects the court's authority to award compensatory education. The court holds that parents must file for due process within two years from the date that they knew or should have known of an IDEA violation. But if they timely file, and prove their case, the remedy is not limited by any statute of limitations. Key Quote:

> For these reasons, we hold today that, absent one of the two statutory exceptions found in Section 1415(f)(3)(D), parents have two years from the date they knew or should have known of the violation to request a due process hearing through the filing of an administrative complaint and that, assuming parents timely file that complaint and liability is proven, Congress did not abrogate our longstanding precedent that "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem."

Comment: This is an important decision, which includes a detailed analysis of statutory text and congressional intent on this issue. The result, if followed in other circuits, opens the door to much more generous awards of compensatory education.

Wood v. Katy ISD, 66 IDELR 158 (S.D. Tex. 2015)

The federal district court in Houston ruled decisively in favor of the district on this one, in which the parents sought reimbursement for tuition at a private residential school in Vermont. This special education case was decided by a special education due process hearing officer over six years ago, on February 7, 2009. The IHO ruled for Katy ISD, and the parents appealed to federal court. Now, at last, we have a ruling on that appeal. Again, the KISD prevails. Much of the problem here seemed to stem from the complexity of the administrative record. The judge found the administrative record voluminous and disorganized. She ordered the parties to file amended motions addressing two key issues, and to keep the paperwork to 50 pages or less. One party complied with that order, the other did not. Here's how Judge Melinda Harmon put it:

> While KISD complied with the Court's order, Plaintiffs' submission is still voluminous, contains documents that are not part of the official administrative record, an absence of citations to the record to support their assertions, and irrelevant and/or incompetent summary judgment evidence. The Court does the best it can with the current record and again reminds the parties that it is not

> obligated to “sift through the record in search of evidence” to support a party’s opposition to a motion for summary judgment.

Comment: The judge had good reasons for ruling for Katy ISD on this case. The evidence showed that the student consistently performed well, the district brought in respected experts to support its case, and all procedural requirements were satisfied. But it didn’t help the parents’ cause that the judge was irritated with their lawyer.

<u>S.K. v. North Allegheny School District</u>, 66 IDELR 215 (W.D. Pa. 2015)

While this opinion is about procedural wrangling over a Motion to Amend the Complaint, the court’s decision sheds light on 504/ADA principles. Ultimately, the court held that the mother of the severely disabled child had a plausible claim, and had standing, to seek relief under ADA/504. The district challenged the mother’s standing since she was not disabled. However, the court noted that “It is widely accepted that under both [504] and ADA, non-disabled individuals have standing to bring claims when they are injured because of their association with a disabled person.”

Comment: The district comes off looking pretty bad in this one. The child was blind, deaf, incapable of basic self-care with significant cognitive and motor impairments. For his single mom to work, he had to attend a day care with the staff to meet his needs. There was no such day care in the district, but there was one LESS THAN TWO MILES FROM THE SCHOOL HE ATTENDED! District refused to provide transportation. Sheesh.

<u>W.S. v. Wilmington Area School District</u>, 66 IDELR 249 (W.D. Pa. 2015)

The court dismissed the case due to the mother’s lack of standing. The father had sole legal custody and the right to make educational decisions. The record of family law proceedings in this case was so confusing that the court did not try to sort it out, nor did it base its ruling on them. Instead, the court held that the mother was “judicially estopped” from asserting that she had some degree of custody because it was inconsistent with her pleadings and testimony in other cases. Key Quote:

> The Court concludes that Mother has acted in bad faith. In so doing, the Court does not question Mother’s personal motives in seeking to be engaged with W.S.’s education. The record is clear that both of W.S.’s parents are highly committed and involved with giving him the best possible education. But the record is equally clear that when they do not agree, all bets are off and they will use any means available—including the courts—to vindicate their points of view.

Reyes v. Manor ISD, 67 IDELR 33 (W.D. Tex. 2016)

The plaintiff alleged that the Texas one-year statute of limitations violates the "open courts" provision in the Texas constitution. But the court holds that this constitutional provision only applies to common-law causes of action, not those based on a federal statute.

L.S. v. Calhan School District RJ-1, 67 IDELR 63 (D. Colo. 2016)

This decision is about the admissibility of "additional evidence" when the court is reviewing a due process hearing decision. Here, the court allowed the district to present evidence of 1) an incident in which the student assaulted a staff member; 2) a new evaluation; and 3) an IEP based on the new evaluation. All of these events—the assault, the evaluation and the IEP—occurred after the due process hearing. However, the court did not allow the district to present another expert to testify about the LRE standard and the errors allegedly made by the hearing officer.

L.S. v. Calhan School District RJ-1, 67 IDELR 63 (D.C. Colo. 2016)

This case provides an analysis of when additional evidence should be admitted. Over the parent's objection, the court admitted into evidence most of what the school district offered. The opinion provides a review of Circuit Court decisions on this issue.

Brittany O. v. Bentonville School District, 67 IDELR 114 (W.D. Ark. 2016)

The court denied the parent's IDEA claim as untimely, holding that appeals to court must be filed within 90 days of the date the hearing officer issues the decision. The court also denied parent's request for an injunction against the state commissioner, holding that parent did not establish standing. There was no evidence that state officials played any part in the transfer decision that the parents were suing over.

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.

Dabney v. Highland Park ISD, 67 IDELR 179 (N.D. Tex. 2016)

A suit against a superintendent in his "official capacity" is the same thing as a suit against the district. The plaintiffs sued both HPISD and its superintendent. The court said that this was redundant. Thus all claims against the former superintendent were tossed out. The parents' claims as individuals were dismissed because they did not allege that they have disabilities or were discriminated against due to a disability.

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

The court followed 3rd Circuit precedent in holding that the due process hearing must be filed within two years of the KOSHK date (Known or Should Have Known). However, plaintiffs are entitled to full relief for whatever injuries are proven. The student's lack of progress does not necessarily put the parent on notice of an injury, as it may be due to the student's low abilities. Here, the court held that the KOSHK date was the date of the meeting where a new evaluation showed the student falling farther behind.

STAY PUT

Sheils v. Pennsbury School District, 64 IDELR 294 (E.D. Pa. 2015)

After a hearing officer approved a partial change of placement proposed by the school, the father appealed that decision to court, and attempted to invoke stay put to prevent the change from going into effect. However, the mother agreed with the change of placement. The parents were divorced and had equal "legal custody." The court held that stay put can be modified based on agreement of one parent, even when the other parent does not agree. The court also held that stay put does not apply to a proposed FBA. Thus the parent cannot invoke stay put to prevent a school from conducting a FBA.

School District of Philadelphia v. Kirsch and Misher, 66 IDELR 247 (E.D. Pa. 2015)

The district failed to have a completed IEP in place at the start of the 2013-14 school year, but had an appropriate IEP in place as of December, 2013. The parents claim for tuition reimbursement was therefore cut off as of December. However, because the matter was in litigation by that time, the parents were entitled to reimbursement for the rest of the 2013-14 school year. This was not due to a denial of FAPE, but due to the operation of stay put. The parties were still in litigation during the 2014-15 school year, and so the parents were entitled to reimbursement for that entire year, despite the fact that there was no denial of FAPE. And the court noted it did not have jurisdiction to consider a FAPE claim for 2015-16, but it still ordered continued tuition reimbursement until the litigation was over.

Comment: Sheesh.

Wimbish v. District of Columbia, 66 IDELR 281 (D.D.C. 2015)

The court ordered the district to continue to pay for the student's private school tuition pursuant to "stay put" until all judicial proceedings were complete. The parent had placed the student in the pricey ($45,000/year) school the previous year and the hearing officer had

concluded that this was proper due to the district's failure to offer an appropriate placement. Now in year two, the district proposed to remove the student from special education altogether, but the parent was challenging that decision. Thus stay put applied, and the private school qualified, even though it was not approved by the state and appeared to offer only simple accommodations, rather than special education services.

Comment: There is no indication in the opinion that the district approached the dismissal of the child properly. The parent alleged that there was no evaluation to support this decision, and they were simply notified of it as a fait accompli at the IEP Team meeting.

A.P. v. Board of Education for City of Tullahoma, Tennessee, 67 IDELR 69 (E.D. Tenn. 2016)

The court awarded attorneys' fees to the plaintiff for obtaining a stay put order from the federal court after it was denied by the hearing officer. As the court points out, this case did not involve a perfunctory, automatic stay put. The issue was strongly contested by the school district and the parent was forced to appeal to court to obtain stay put relief after the hearing officer turned down the request.

Comment: The school's argument was that the parents requested the due process hearing too late, and thus were not entitled to due process. This was based on state regulations, which must provide for a very short time frame. The IEP Team decision was April 28th. Written notice of it was provided on May 9th. Parent filed for due process on May 16th. That seems pretty prompt.

TRULY MISCELLANEOUS BUT INTERESTING

Alboniga v. School Board of Broward County, Florida, 65 IDELR 7 (S.D. Fla. 2015)

The school district argued that the DOJ exceeded its authority in promulgating its regulations pertaining to service animals. The court disagreed, noting that regulations are entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Since Congress has not spoken directly to the issue of service animals, the regulations are entitled to deference "if they are reasonable in light of the language and purpose of the ADA and unless they are arbitrary, capricious, or manifestly contrary to the ADA." The court further held that the school violated the law by requiring the parent to provide liability insurance and proof of vaccinations that exceeded state law requirements. The court also held that the severely disabled child was serving as "handler" of the dog by having it tethered to his wheelchair. The school was ordered to have someone accompany the boy and the dog when the dog needed to urinate. This was not considered "care and supervision." The court held that that term refers to "routine or daily overall maintenance of a service animal." This dog did not eat or drink during the school day, and required no "care or supervision" beyond having someone accompany the boy when he

took the dog out to urinate. The court acknowledged that this was a close call, but held that this was considered an accommodation of the boy, rather than "care or supervision" of the dog.

Comment: We are sure to hear about this case. It includes a very thorough analysis, with cites to many cases.

E.T. v. Bureau of Special Education Administrative Law Appeals, 65 IDELR 75 (D.C. Mass. 2015)

The student sued over a variety of issues, including the fact that school officials seized his comic book drawings. The suit alleged that this was an invasion of privacy in violation of a state law, and also an infringement on First and Fourth Amendment rights. The court dismissed the claims to the extent that they alleged educational injuries due to res judicata and/or failure to exhaust administrative remedies. But the court did not dismiss the claim for invasion of privacy, or the constitutional claims.

Comment: I always thought that when a teacher told you to hand over that notebook, you had to do it. No?

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, 66 IDELR 39 (C.D. Cal. 2015)

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?

Hinton v. Lenoir County Public School Board, 66 IDELR 109 (E.D.N.C. 2015)

The court dismissed a pro se complaint for failure to exhaust administrative remedies. What makes the case interesting is the plaintiff's assertion that she was thwarted from filing a due process complaint by ineffective counsel. The court noted that even if true, this does not create an exception to the exhaustion requirement; furthermore, plaintiff could have filed for due process on her own.