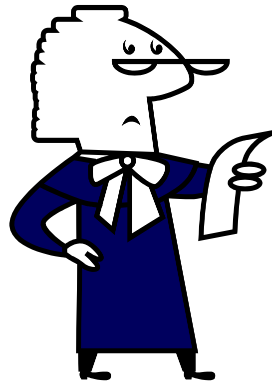
LESSONS LEARNED FROM 2016 CASES/YEAR IN REVIEW (PART 2)



TRI-STATE REGIONAL SPECIAL EDUCATION LAW CONFERENCE

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So far, 2016 has been another active year in the area of special education law! So much so, that it is worthy of a two-part session this year. This session is Part 2 of The Year in Review and, in this session, Julie will continue the discussion started by Jim Walsh the day before and further update the audience on significant special education decisions rendered thus far in 2016, including court decisions and U.S. agency interpretations.

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Domingo v. Kowalski, 66 IDELR 268 (6th Cir. 2016). The special education teacher's alleged actions, while misguided, do not entitle the parents of three students with disabilities to relief under Section 1983. While not passing judgment on the advisability of the alleged instructional methodologies (including belting a student with CP to the toilet to aid her balance; gagging an autistic student with a bandana to stop him from spitting; and toilet training an autistic child inside the classroom because of difficulties with transition), the district court's decision that these did not rise to the required level of "conscience-shocking" is affirmed. As required, the court considered 1) whether the teacher had pedagogical justification for her alleged actions; 2) whether the techniques were excessive in light of the teacher's goals; 3) whether the teacher acted in good faith; and 4) the severity of the students' injuries. Here, the teacher's "unorthodox" methods did reflect a pedagogical objective, involving attempts to address her students' undisputed educational or disciplinary needs. In addition, the teacher appeared only to have used the amount of force necessary to achieve her goals and she did not act with malice or deliberate indifference. Further, the parents did not show that their children suffered serious physical or psychological injury.

B. R.K. v. Board of Educ. of Scott Co., 67 IDELR 29 (6th Cir. 2016) (unpublished). Diabetic student is not entitled to money damages or injunctive relief based upon the fact that the district placed the student in an elementary school with a full-time nurse instead of his neighborhood school. The parents are not able to prove that the district acted with deliberate indifference in making this decision or knowingly acted in a manner to violate the student's rights. This is not a case where the district ignored a student's request for help. Rather, the parents simply disagreed with the district as to whether a nurse was necessary to provide the services that he needed. Where the Kentucky legislature took action since the filing of this action requiring all diabetic students to be placed in their neighborhood school, the parents are not entitled to injunctive relief, since it is not needed.

C. A.G. v. Paradise Valley Unif. Sch. Dist., 815 F.3d 1195, 67 IDELR 79 (9th Cir. 2016). District court's dismissal of parents' 504 and ADA claims is reversed where there is a factual dispute as to whether a 7th-grader with autism could have stayed in her gifted program with a BIP and a full-time behavioral aide. The district court is directed to consider whether the district failed to provide reasonable accommodations to the student, where a behavioral psychologist testified that the student's behavioral outbursts demonstrated a need for an FBA and BIP, which was corroborated by the student's classroom teacher who believed that the student needed more behavioral support and sought assistance to better meet the student's needs. As for the parents' request for

damages, there is evidence indicating that the parents had previously asked the district for a full-time behavioral aide. This request, along with the psychologist's testimony and a teacher email describing the current level of supports as inadequate, could support a finding that the district was deliberately indifferent to an obvious need for accommodations. Thus, on remand, the district court must consider whether the student's need for behavioral accommodations was obvious and whether the district made reasonable accommodations available.

D. C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist., 67 IDELR 111 (5th Cir. 2016) (unpublished). Dismissal of parents' 504 discrimination claims for money damages based upon hostile environment is affirmed. When the district transferred the student with ADHD to an interim alternative educational setting for 60 days after he took and displayed a picture of a classmate using the bathroom, it was not disability harassment. The parents cannot establish a hostile environment claim without showing that the district harassed the student based upon his disability. Even if it were true that district officials "conspired" to remove the student from school as alleged by his parents, they still need to connect the purported harassment to the student's ADHD. However, the parents did not allege any facts to show that the district acted in response to the student's disability rather than his behavior. Instead, the evidence showed that the district did not change the student's placement until after it conducted a manifestation determination and determined that the conduct at issue was not related to his disability. The parents' broad claim that the student's ADHD affected his ability to make good decisions is not sufficient to plead discrimination and "[i]f that conclusory statement were enough to plead discrimination, any plaintiff with ADHD could attribute any misconduct, no matter how severe, to the disability."

E. Williams v. Fulton Co. Sch. Dist., 67 IDELR 262 (N.D. Ga. 2016). If the allegations of the parent are true, the district could be liable for a former special education teacher's alleged treatment of a student with cerebral palsy and significant cognitive deficits. According to the parents, the teacher pushed their son when he walked too slowly, isolated him in dark rooms for extended periods of time, and slammed his head against lockers almost every day because he was not paying attention. In order to assert a violation of the Due Process Clause with the use of excessive corporal punishment, parents must allege behavior that is arbitrary and conscience-shocking. The parents' allegations, if true, meet that standard, as the reported amount of force used by the teacher was obviously excessive, in part, because it served no educational purpose. In addition, and although the student's alleged injuries, including PTSD, were primarily psychological, they were nevertheless severe. There are also allegations that the teacher called the student vulgar names, engaged in years of abuse and took action likely to cause serious injury. Thus, the parents' claims will not be dismissed against the district; nor will the claims that the district conspired to cover up the abuse.

F. Garza v. Lansing Sch. Dist., 68 IDELR 10 (W.D. Mich. 2016). Parents of autistic student may pursue their Section 1983 claims against three school administrators who allegedly failed to protect their son from abuse by a special education teacher. School administrators may be held liable under the 14th Amendment if they have knowledge of a

teacher's propensity to abuse students and act deliberately indifferent to the safety of students. It is not enough for parents to show that they were sloppy, reckless or negligent in performing their duties. Here, the school principal received multiple complaints from staff that the teacher abused his students and additional evidence showed that the superintendent and director of special education had received numerous reports that the teacher physically and verbally abused the children under his care. Despite this, the administrators failed to initiate an investigation or take any other protective measures to ensure the safety of students when confronted with conduct that was obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.

G. Beam v. Western Wayne Sch. Dist., 67 IDELR 88 (M.D. Pa. 2016). Parents may seek money damages under Section 504 and ADA for a denial of educational benefits. The failure to implement a Section 504 Plan may qualify as a denial of access to district programs. Here, the parents allege that the district failed to modify the student's 504 Plan or implement key provisions of it, despite having knowledge of the student's ongoing academic difficulties. Thus, they adequately plead a denial of educational opportunities. In addition, the parents have sufficiently alleged deliberate indifference on the part of the district that knew the student was failing several classes, was seeing a therapist for emotional difficulties and had spoken and written about suicide. However, the district failed to address the student's academic concerns or email them about them, as required by the 504 Plan. However, the parents' claim under Section 1983 is dismissed because the student's suicide was not a foreseeable and fairly direct result of the district's alleged failure to implement the student's 504 Plan.

H. Garedakis v. Brentwood Union Sch. Dist., 67 IDELR 205 (N.D. Cal. 2016). Request for damages by parents of six unrelated children is denied where they were not able to show "deliberate indifference" on the part of the district which requires knowledge of harm and failure to act. Here, the parents did not show any evidence showing that the special education teacher physically or verbally abused their children. Instead, they relied upon allegations made in two prior abuse actions against the teacher that did not involve their children and presented expert witness testimony suggesting that the children's behavioral changes were caused by mistreatment by the teacher. The parents never expressed any concerns that would have put the district on notice of suspected abuse, and the evidence shows that the district investigated both incidents which did not result in any evidence that the teacher posed a substantial threat to her students' federally protected rights.

I. E.T. v. Bureau of Spec. Educ., 67 IDELR 118 (D. Mass. 2016). Parents of middle school student with Asperger's cannot recover money damages on their claims under the 4th Amendment for illegal search and seizure from two school administrators who reviewed the student's drawing notebook against his wishes. Searches on school grounds are allowed as long as they are justified at the time of inception and reasonably related to the circumstances that prompted the search. Here, the student's behavioral issues, including aggressive verbal outbursts, disengagement and isolation, raised concerns for school officials. In addition to drawing pictures that often focused on guns and bombs, the student wrote an essay that discussed conflict with teachers and his plans to prove them wrong. Further, the student refused to hand over his notebook as requested by his

shadow aide and, when the aide sent him to the principal's office, the principal had reasonable grounds for suspecting that the search would turn up evidence that the student had violated the rules of the school and, specifically, that his drawings were a threat to school safety. The administrators' review of the notebook two months later was equally reasonable where the first search revealed drawings of a violent battle against teachers, but the student refused to provide his notebook on request due to fears that he would be suspended again. Finally, the search was limited to a review of the notebook and did not include his locker or other belongings.

J. Disability Rights New York v. North Colonie Cent. Schs., 67 IDELR 152 (N.D. N.Y. 2016). Protection and advocacy group has the right to investigate reports of abuse and neglect against students in a separate day class, because the students placed there are clearly students with disabilities. Both the Developmental Disabilities and Bill of Rights Act and the Protection and Advocacy for Individuals with Mental Illness Act contain a specific definition under which the children fall and a third statute at issue, the Protection and Advocacy for Individual Rights Act does not define "disability" at all. As such, the court rejects the district's argument that the P&A group must first prove that the group of students meet the definitions under those laws. The group has provided "substantial evidence" of the students' disability status—specifically, the district's decision to place them in a separate day class. This allows for an inference that the students have disabilities as defined by these statutes. Here, however, no injunctive relief is necessary because the district has now allowed the group to access the classroom and has provided approximately 805 pages of student records.

K. Fernandez v. City of New York, 68 IDELR 50 (N.Y. Supreme Ct. 2016) (unpublished). District's motion for judgment is denied and it must defend a negligence action brought by a bus aide allegedly injured by a 5-year old child being transported to and from a private special education school by a third-party provider. The aide alleged that the child injured her neck, back, shoulder and knee when she interrupted his attack on another student, requiring her to use a wheelchair and undergo multiple surgeries. Not only did the child's BIP note that he had a tendency to act out physically for no apparent reason, but it also noted that he became more violent when he rode the bus with his brother. In addition, the bus aide had reported two incidents of "very violent" and aggressive behavior a few weeks before the child attacked her on the bus. Even though the district had knowledge of the child's violent tendencies, the district did not remove the child from the bus. The district's argument that it was not responsible for injuries to the aide that occurred while the child was under the supervision of a third-party provider is rejected, because it is clear that the private school and the district owed a duty to the bus aide based upon their specific knowledge of the child's dangerous conduct and the probability that his acts could cause injury that was reasonably anticipated

RETALIATION

A. Pollack v. Regional Sch. Unit 75, 67 IDELR 40 (D. Me. 2016). Superintendent's motion for qualified immunity on the First Amendment claim and district's motion for judgment on 504 and ADA claims are denied where the district allegedly provided the parents with

copies of hundreds of staff emails about their student before they filed for due process. After they filed for due process, the Superintendent requested $2,600 for the production of certain emails, which could have been considered retaliatory. The question of the Superintendent's intent is a matter for a jury to decide.

B. Jenkins v. Butts Co. Sch. Dist., 67 IDELR 90 (M.D. Ga. 2016). Judgment is granted for the district on the parent's claim of retaliation where it could not be held liable when a teacher reported the parent to child welfare authorities legitimately and for a non-retaliatory reason. Not only was the teacher a mandatory reporter of suspected child abuse or neglect under Georgia law, she testified that she was concerned about possible harm to the child. The parent offered no evidence beyond conclusory statements and testimony to show that the district's reasons for its action were pretext for retaliation for the parent's filing of a due process hearing complaint.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Letter to Andel, 67 IDELR 156 (OSEP 2016). While the school district must inform parents in advance of an IEP meeting as to who will be in attendance, there is no similar requirement for the parent to inform the school district, in advance, if he/she intends to be accompanied by an individual with knowledge or special expertise regarding the child, including an attorney. "We believe in the spirit of cooperation and working together as partners in the child's education, a parent should provide advance notice to the public agency if he or she intends to bring an attorney to the IEP meeting. However, there is nothing in the IDEA or its implementing regulations that would permit the public agency to conduct the IEP meeting on the condition that the parent's attorney not participate, and to do so would interfere with the parent's right…." It would be, however, permissible for the public agency to reschedule the meeting to another date and time "if the parent agrees so long as the postponement does not result in a delay or denial of a free appropriate public education to the child."

B. Letter to Savit, 67 IDELR 216 (OSEP 2016). States have the discretion to put criteria in place regarding audio or video recording of IEP team meetings, which may include a requirement for parents to notify the district a certain number of days in advance of the meeting that he/she plans to record it. However, a district will need to take such a requirement into account when deciding how much notice to provide a parent of an IEP meeting in order to schedule the meeting at a time that allows the parent to meet the notice requirement and fully participate in the meeting. In addition, a school district may suspend the recording of an IEP meeting it if determines that it is not necessary in order for the parent to fully understand the meeting. However, it must ensure that doing so will not interfere with the parent's understanding of the IEP, the IEP process, or other procedural safeguards under the IDEA.

C. L.O. v. New York City Dept. of Educ., 822 F.3d 95, 67 IDELR 225 (2d Cir. 2016). District court's conclusion that the student received FAPE is reversed based upon multiple procedural violations that cumulatively resulted in a denial of FAPE, even if the individual violations did not. There were four procedural errors with respect to each of

the IEPs for three years. First, there was no evidence that the IEP teams reviewed the evaluation data in the development of the IEPs. In fact, the student's teacher testified that she could not recall reviewing any evaluative material at the 2011 IEP meeting. While the hearing officer found that each IEP was consistent with the evaluative material that was available to the IEP team at the time, the real question was whether the team actually based its decisions on that information. Second, the IEP team failed to conduct an FBA, which would have allowed the team to identify the root causes of the student's ongoing behavioral issues and to address them. Third, each IEP provided an insufficient amount of speech-language instruction, given that the student's communication skills were not improving. Lastly, the IEPs lacked parent counseling and training as required by New York law. These violations, when taken together, amount to a denial of FAPE.

D. Conway v. Board of Educ. of Northport-East Northport Sch. Dist., 67 IDELR 16 (E.D. N.Y. 2016). In a failure to exhaust administrative remedies case, the parent could not claim that she never received notice of her right to file for a due process hearing where the evidence showed that the district provided such notice. Indeed, the district documented each instance in which it provided the parent a copy of her procedural safeguards under the IDEA. The first notice accompanied a prior written notice form regarding a referral for an evaluation and request for consent, and another was provided along with April 2013 IEP team findings regarding the student's eligibility for services. Because the parent had adequate notice of her rights, her argument that exhaustion of administrative remedies would be futile is rejected.

E. R.B. v. New York City Dept. of Educ., 67 IDELR 241 (S.D. N.Y. 2016). Predetermination of placement did not occur with respect to preparations the district made in proposing two IEPs for a 17 year-old student with autism and significant developmental delays. Rather, the district considered several different classroom options for placement at the IEP meetings, heard the parents' concerns about the setting proposed and approached drafting of the IEPs with an open mind. The options considered included those that incorporated parents' comments and concerns, but the district decided against a 6:1:1 setting because it believed that the student would have difficulty remaining focused in that setting. In addition, at least one parent was in attendance at IEP meetings each year and had the opportunity to voice concerns. The fact that the district rejected the parents' request did not mean that the district categorically rejected their request without due consideration. Thus, the parents' request for private school tuition reimbursement is denied.

F. J.E. v. Chappaqua Cent. Sch. Dist., 68 IDELR 48 (S.D. N.Y. 2016). Although the parents of a student with autism disagreed with the annual goals and BIP in their child's IEP, there was no evidence of predetermination of placement by the district. Rather, the evidence reflected that both parents were actively involved and engaged in the IEP meeting and that the district addressed the majority of their concerns during the meeting. For example, when the parents indicated that quarterly meetings were insufficient to discuss the student's needs, the district planned monthly meetings to do so. Merely because the IEP did not incorporate every request made by the parents did not make them

"passive observers" or evidence any predetermination on the part of the district. Thus, the hearing officer's decision denying reimbursement for private school tuition is upheld.

IEP CONTENT/IMPLEMENTATION

A. L.M.H. v. Arizona Department of Educ., 68 IDELR 41 (D. Ariz. 2016). While a preschooler with a speech impairment made some progress with his December 2011 IEP, the IEP was not substantively appropriate. The school district's failure to consider any peer-reviewed research when deciding the number of speech service minutes denied FAPE to the student. While the district was not required to provide three to five individual sessions of speech therapy per week as recommended by the American Speech-Language Hearing Association, the district should have considered some peer-reviewed evaluative data in determining an appropriate amount of services for the student. However, the IEP team based its decision solely on the speech therapist's professional knowledge and coursework. "[B]y not following the suggested standards under any peer-reviewed research, [the district] only provided an opportunity for minimal academic advancement, which violates the IDEA." Thus, the ALJ's decision finding the amount of speech services appropriate is reversed and the case is remanded for consideration of reimbursement for private services and compensatory education.

B. DaMarcus S. v. District of Columbia, 67 IDELR 239 (D. D.C. 2016). District denied FAPE to intellectually impaired student when it failed to address the student's lack of progress through his IEPs. An IEP must be designed to produce meaningful educational benefit, but there were two major flaws in this student's IEPs. First, annual goals were repeated in a wholesale fashion across multiple IEPs, and "an alarming number of goals and objectives were simply cut-and-pasted (typos and all) from one IEP to the next." Having the same goals year after year not only caused the student anxiety and frustration, but was also a sign that the IEPs needed to be revised. However, rather than raising an alarm and working to devise a new approach—such as one that accounted for the student's noted weaknesses in processing and working memory—it appears that the district persisted in following the same ineffectual path. The second flaw in the IEPs is that, despite the student's lack of progress, the IEPs dramatically decreased his monthly SLP services. It appeared that the IEP team, relying solely on the student's IQ, made that decision based on its view that the student had "plateaued," when there was evidence that the student was capable of improving his skills, according to statements of the SLP.

C. E.H. v. New York City Dept. of Educ., 67 IDELR 61 (S.D. N.Y. 2016). The district has not shown that the IEP was likely to produce progress because it contained goals that were designed to expire by the time the new IEP was to begin implementing them. Here, the district erred in relying on 6-month goals contained in a December 2011 progress report from a private school in developing goals for the 2012-13 school year's IEP. The progress report, developed by the private school that the child attended for 3 years, included goals that the school expected the student to meet by June 2012, which the parent and the private school teacher testified that the child had progressed on. Nonetheless, the school district relied on the December 2011 report when it convened in June 2012. Thus, the goals in the proposed IEP for the 2012-13 school year did not

reflect the child's present levels of academic achievement and functional performance and, therefore, denied FAPE.

D. S.B. v. Murfreesboro City Schs., 67 IDELR 117 (M.D. Tenn. 2016). Parents' motion for judgment for the cost of the student's unilateral residential placement is granted where district assigned a substitute teacher without special education certification to a full-time special education setting when the regularly-assigned special education behavior management teacher was out on maternity leave. The student's IEP focused solely on the student's severe behavioral problems, and the IEP team had determined that the student, although very intelligent, struggled to make progress because of frequent outbursts and "rage episodes." However, the district failed to ensure that he received behavioral services—the sole reason for his full-time special education placement—while the teacher was out on leave. The district's assignment of a substitute who was not certified in special education had more than a trivial impact on the student's education. In addition, residential placement was educationally necessary because the IEP's focus on behavioral issues showed that his emotional and behavioral problems were not separate from his learning.

E. Singletary v. Cumberland Co. Schs., 67 IDELR 115 (E.D. N.C. 2016). The district's omission of tricycle riding from the IEP of a preschooler with quadriplegic CP was not a denial of FAPE, where evidence reflected that the child would not have benefited from it. Instead, physical therapists who had worked with the child testified that riding a tricycle would have been detrimental to her. One of the PTs (also the district's special education director) discussed the child's inability to operate a tricycle based upon her limited neck and trunk control. In addition, adaptive tricycle training would interfere with the child's progress toward dynamic sitting. Although the parents had testified that the child had ridden adaptive tricycles in the past and that learning to ride a tricycle was a curriculum goal for preschoolers, the PT who worked with the child during the school year at issue stated that she could only operate a tricycle by using muscles that she should not be using and that a video of the child using an adaptive tricycle at home confirmed his view that the child did not have the necessary prerequisite skills to use it.

F. Oskowis v. Sedona-Oak Creek Unif. Sch. Dist. #9, 67 IDELR 150 (D. Az. 2016). District is required to provide 212 hours of compensatory education to a nonverbal 10 year-old boy with autism where it waited too long between working on short-term objectives on three of his annual IEP goals. For the only goals that correlated with basic reading skills—color-matching and photo-matching—the IEP allotted 200 minutes per week. However, the district's 2-month delay in advancing the student between the first and second short-term objectives for those goals entitled him to 93 hours of compensatory education. Similarly, the district's 2-month delay in advancing the student between objectives on his shape-matching goal—the only one that correlated with basic math skills—required it to provide 84 hours of compensatory education. Finally, where the district did not provide the modeling that the student needed to work on related short-term objectives for the "object motor action" goal, an award of 23 hours of compensatory education for listening skills and 12 hours of OT are awarded. As the ALJ noted, the district did not begin working with the student on his second short-term objectives related

to color-matching, photo-matching and shape-matching until November 2012, despite the fact that the student had mastered the first short-term objectives for all three of those goals in September 2012.

THE FAPE STANDARD

A. Reyes v. Manor Indep. Sch. Dist., 67 IDELR 33 (W.D. Tex. 2016). The parents' argument that FAPE was denied because the 19 year-old failed to master any of his IEP goals is rejected. The district took extensive measures to address the student's aggression and self-injurious behaviors, and the district could not help the student with functional skills until it addressed his unpredictable aggression toward staff members. The district consulted with a board certified behavior analyst, who remained with the student all day in his separate classroom and trained two full-time aides with respect to the student's behavior. Those staff members monitored and recorded the student's behavior every 5 to 15 minutes in an effort to identify the precursors to his aggression. In addition, the behavioral interventions employed allowed staff to work toward progress on the student's IEP goals. For example, the district introduced a tablet into the student's routine and attempted to teach him to say "yes" or "no" to reflect his desires; the student began to tolerate the sound of an electronic razor near his face; and, on occasion, the student did fold towels of different sizes. While the student's progress was slow and not always consistent, there was progress nonetheless sufficient to constitute FAPE.

B. M.H. v. Pelham Union Free Sch. Dist., 67 IDELR 154 (S.D. N.Y. 2016). Where the school district maintained detailed documentation of the student's progress in reading, math, comprehension and motor skills, the student's slow but steady progress during the previous two school years showed that he was receiving FAPE. The court was able to identify numerous gains that the student had made during the 2011-12 and 2012-13 school years, including reading words beginning with "th" and "sh" and progressing from reading 40 "consonant-vowel-consonant" words to reading every one that he encountered. The documentation also reflected that the student had learned to perform basic addition without using manipulatives, was following multi-step directions and answering reading comprehension questions. Further, progress reports showed that the student had mastered 10 of the 24 annual IEP goals and made varying degrees of progress toward another 10 of them. Thus, the student's progress demonstrates that the district's program was likely to yield progress, not regression, for the 2013-14 school year. Thus, the parents are not entitled to reimbursement for the student's unilateral private school placement.

C. Ricci v. Beech Grove City Schs., 68 IDELR 67 (S.D. Ind. 2016). Parents of student with TBI and other disabilities were not able to show that the district's proposed public program was inappropriate. Rather, the student's 2013-14 IEP would have allowed him to make educational progress. Here, the parents' arguments centered on their belief that the private program that the student was attending was better than the school district's proposed program. However, the IDEA does not require a court to compare the two programs and Seventh Circuit authority directs hearing officers and reviewing courts to consider whether the proposed IEP will confer an educational benefit, not the best

education available, when determining the appropriateness of an IEP. Where the parents did not submit any evidence showing that the proposed public school program would not meet the student's needs, there were no grounds for reversing the hearing officer's decision in favor of the school district.

TRANSITION SERVICES

A. Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ., 68 IDELR 33 (6th Cir. 2016) (unpublished). The district's failure to timely conduct transition assessments, in addition to its failure to consider the student's preferences and needs denied FAPE. The district's failure to invite the student to an IEP meeting for postsecondary transition planning was a harmless procedural violation, because even if the student had attended the confrontational meetings—a decision that would have exposed her to yelling, slamming doors and general animosity—she would not have been able to articulate her wishes. However, the failure to assess the student's transition needs resulted in a loss of educational opportunity, where the district's evaluation largely consisted of observing her performing assigned tasks, such as wiping tables and shredding documents, which offered little insight into her preferences and interests. In addition, a third-party vocational assessment conducted when the student was 19 recommended further evaluation of her interests, stamina and ability to improve with repetition, which was not done. Thus, the district failed to develop an appropriate transition plan. If the student had received additional training and assessments, she could have worked in a supported setting rather than attending a non-vocational program as suggested by the district.

PRIVATE SCHOOL/RESIDENTIAL PLACEMENT

A. Rockwall Indep. Sch. Dist. v. M.C., 816 F.3d 329, 67 IDELR 108 (5th Cir. 2016). The unreasonable nature of the parents' behavior justifies the denial of their request for tuition reimbursement for private schooling. In this case, the evidence indisputably shows that the parents were not reasonable when they took an "all-or-nothing" approach and refused to attend a follow-up IEP meeting with the district unless the district agreed to their request to allow the student to remain in private school for the rest of the semester and to reimburse them for the cost of the private placement. At a December 2011 meeting, the IEP team discussed techniques that had benefited the student in her private school placement and agreed to incorporate many of those methods into the proposed public school program. The parents asked that the student remain in the private school for the rest of the semester while taking one or two public school classes and refused to attend a follow-up meeting to finalize the student's IEP, as evidence in their email correspondence with the district's special education director. According to them, all that was left for the district was to "let us know what their decision is" regarding their proposal to allow the student to remain in the private school. Later correspondence from the parents reflected their complete unwillingness to cooperate unless the district agreed to their proposal in full.

B. Luo v. Baldwin Union Free Sch. Dist., 67 IDELR 15 (E.D. N.Y. 2016). Hearing officer's decision that the district offered FAPE is upheld, and the district is not required to

provide an out-of-state private school placement for the student with autism. Parent's argument that he was denied meaningful opportunity to participate in the placement decision because the district refused to consider information about the out-of-state school is rejected. The right to participate in the placement process does not include the right to select the specific school that the student will attend. Further, New York regulations require IEP teams to consider in-state programs before approving out-of-state ones. Here, the parent did not appear willing to accept any placement other than the private special education school and refused to visit any other options. The IDEA, however, only guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents." The team considered a variety of evaluative data and identified multiple public school programs that could meet the student's needs. Thus, the district was not required to offer the out-of-state placement that the parent wanted.

C. W.W. v. New York City Dept. of Educ., 160 F.Supp.3d 618, 67 IDELR 66 (S.D. N.Y. 2016). Parent is entitled to private school funding because district did not present any evidence that the proposed assigned school was able to provide the types of services the student needed. In addition, the district failed to contradict information in a letter from the mother where she related that the school's parent coordinator had told her that the school would not and could not implement the student's IEP during a site visit. While parents who reject public school placements based upon information obtained during school site visits do so at their own risk if the district can demonstrate that the proposed school was capable of implementing a student's IEP, the district here did not demonstrate that and bore the burden of proving that. The parent coordinator purportedly told the mother that the school could provide a 12:1 class or integrated co-teaching classes but not the combination of the two settings as set forth in the student's IEP. In addition, she also allegedly stated that the school did not offer integrated co-teaching classes for art, music or P.E.

D. E.P. v. New York City Dept. of Educ., 68 IDELR 21 (S.D. N.Y. 2016). Parent's challenge to district's proposed program for teenager with autism was speculative. While the parent alleged that the unit coordinator for the proposed program indicated during a tour of the school that three of the children were nonverbal and that the other three had minimal verbal skills and that she observed students from the class running in the hallway, parents cannot challenge a proposed placement by merely arguing that an IEP would not have been effectively implemented at the proposed school. The parent's only evidence regarding the verbal functioning of the members of the proposed classroom is her own account of the unit coordinator's characterization of the students. In addition, the parent's hypothesis relied on her erroneous assumption that the same students would be attending the class when her son joined it. Thus, tuition reimbursement for private schooling is denied.

E. Q.C.-C. v. District of Columbia, 67 IDELR 60 (D. D.C. 2016). Student with ADHD and SLD could not benefit from district's proposed program and district is ordered to place the student in a private special education school for the remainder of the school year. Hearing officer's order requiring the district to modify the student's IEP to include

regular education with 25 hours of specialized instruction each week (rather than the 5 hours in the proposed IEP) is not sufficient to provide the student FAPE. The evidence presented by experts demonstrates that the student would face potentially insurmountable difficulties if the hearing officer's proposed IEP were implemented. While the Act's LRE requirement is important, the first consideration is whether the district's proposed placement is capable of meeting the student's needs. Based upon testimony from numerous special education experts indicating that the student had significant difficulty with focus and overstimulation, the private school is the only environment capable of meeting the student's needs and providing FAPE.

F. J.M. v. New York City Dept. of Educ., 67 IDELR 153 (S.D. N.Y. 2016). Where 14 year-old's IEP did not require her to attend a small school or have a noise-free setting at all times, her parents' request for private school costs is rejected. The student's placement in a self-contained special education program on the campus of a large district high school was appropriate. While the IEP requires that the student be placed in a classroom with a 6:1:1 teaching ratio, it makes no mention of the size of the school that she must attend, whether with respect to the physical building itself or the number of other students in the school. In addition, the IEP did not require her to have a quiet environment at all times or to have opportunities to socialize with peers at lunch. Where class bells were not audible in the special education wing and the students there had the ability to eat lunch in a private cafeteria, the school was able to implement the student's proposed IEP.

G. Z.B. v. District of Columbia, 68 IDELR 136 (D. D.C. 2016). Parents are not entitled to reimbursement for private schooling where there was no evidence that the proposed public school program was inappropriate. As long as the proposed IEP is reasonably calculated to provide an educational benefit, the FAPE requirement has been met. The degree of progress that the student made at the private school is largely irrelevant, as none of the evaluations established the student's need for an out-of-district special education program. In addition, the district did not have the opportunity to implement its proposed IEP, because the parents withdrew the student from school just 4 days after it took effect. The student's progress at the private school is not persuasive evidence that a placement in the public school district would not have worked.

LEAST RESTRICTIVE ENVIRONMENT

A. A.R. v. Santa Monica Malibu Sch. Dist., 66 IDELR 269 (9th Cir. 2016) (unpublished). While the district has the obligation to educate a preschooler with autism with nondisabled peers to the maximum extent appropriate, its placement of the student in a collaborative class is the child's LRE. Given that the child required prompting to interact with other children, he would not benefit from a general education placement. In addition, the IEP team discussed a number of placement options and when the parents rejected one preschool collaborative class option due to the age of the other children in that class, the district offered an alternative in a pre-academic preschool class with more age-appropriate models. The district provided several options tailored to meet the needs of the child, including programs with non-disabled peers. Thus, the district complied with the IDEA's requirements and the parents are not entitled to reimbursement for their unilateral private school placement.

B. S.M. v. Gwinnett Co. Sch. Dist., 67 IDELR 137 (11th Cir. 2016) (unpublished). The district's documentation of the full range of supplementary aids and services considered for a second-grader with difficulties in reading, writing and math supported its decision to offer pull-out instruction in those academic classes. The district provided supplementary aids and services so that the child could remain in the regular classroom in other academic subjects. For example, co-teaching was provided in the regular classroom for science and social studies. Clearly, the child required direct, explicit, small-group instruction with drill and repetition to make progress in the areas of reading, writing and math, which was very different from that provided in the general education classroom. Thus, the district could not meet the child's needs in a mainstream setting even with supplementary aids and services and the district has mainstreamed the child to the maximum extent appropriate.

C. Smith v. Los Angeles Unif. Sch. Dist., 822 F.3d 1065, 67 IDELR 226 (9th Cir. 2016). Group of parents who want their children to stay in separate special education settings may intervene in this case to challenge a settlement agreement entered into by a different group of parents and the school district that would lead to the elimination of special education centers. The settlement agreement, which was renegotiated, resulted in curriculum changes for the students in the centers whose IEPs previously recommended full-time placement in a special education center. Thus, challenging at this time is appropriate, even though the litigation has been going on for over 20 years. The parents' delay in intervening into the lawsuit is also justified because they did not appreciate the "full import" of the changes based upon the "rosy language in which the changes were portrayed" by the district. Thus, these factors weigh in favor of these parents' intervention in this case.

D. N.T. v. Garden Grove Unif. Sch. Dist., 67 IDELR 229 (C.D. Cal. 2016). District's decision to place student in a special day class rather than in a private at-home ABA program is appropriate and met the student's need for small-group and individual services that would allow him to receive significant individual attention either through the teacher or an IBI aide. In addition, the IEP included four 90-minute intensive behavioral intervention clinics per week, which would provide one-on-one instruction in various skill areas. The district developed this program after having reviewed numerous independent and district-affiliated evaluation reports, and several evaluators testified that the student learns better in a small group as opposed to a one-on-one setting.

E. Jason O. v. Manhattan Sch. Dist. No. 114, 67 IDELR 142 (N.D. Ill. 2016). The district's proposed self-contained classroom is the LRE for a kindergartner with persistent behavioral problems. The program will provide opportunities for the child to interact with nondisabled peers in art, music and gym, as well as in academic classes when appropriate. The district provided social emotional services, resource support and a BIP to support the student in the general education class, but his frequent aggression and non-compliance continued and his academics were on a "downward trajectory." The child's behavior was not improving and instances of non-compliance have increased. Meeting goals is not possible in the general education setting where the child could not receive

immediate, frequent correction to address his anger and insensitivity toward peers. Thus, the self-contained class is the LRE where the student can receive educational benefit.

COMPENSATORY EDUCATION/OTHER REMEDIES

A. M.S. v. Utah Schools for the Deaf and Blind, 822 F.3d 1128, 67 IDELR 195 (10th Cir. 2016). District court erred in delegating its authority to the student's IEP team to determine an appropriate remedy for the team's discontinuation of the student's residential placement. District courts cannot delegate their authority to decide a remedy to IEP teams. Allowing the educational agency that failed or refused to provide the student with FAPE to determine the remedy for that violation is at odds with the review scheme set out under the IDEA and such an approach would create an "endless cycle" of litigation which would require parents to seek a due process hearing each time they disagreed with the proposed remedy. On remand, the district court is to consider an appropriate residential placement for the student.

B. Holman v. District of Columbia, 153 F.Supp.3d 386, 67 IDELR 39 (D. D.C. 2016). Even though 18 year-old student graduated from high school with a 2.23 GPA, she is entitled to compensatory education where the district's failure to implement her IEP was a "material implementation failure." The "crucial measure" under the materiality standard is the "proportion of services mandated to those provided and not the type of harm suffered by the student. Thus, the due process hearing officer's reliance on the fact that the student did not suffer harm based upon the fact that she graduated from high school in three years is irrelevant. The fact that the district only scheduled 28% of the service hours required by the student's IEP, as well as the fact that her special education teacher missed at least one class per week and did not stay for the entire class period denied FAPE. Even if the student needed to demonstrate educational harm for a finding of denial of FAPE, she still proved it here where she regressed in five core academic areas between 2010 and 2014 and was reading at a 4th grade level when she received her diploma. Thus, the district must convene an IEP meeting for the student who will remain eligible for compensatory education until age 22.

C. Stapleton v. Penns Valley Area Sch. Dist., 67 IDELR 268 (M.D. Pa. 2016). School district may need to fund a former student's college tuition based upon an 8 year-old due process order where the IDEA does not explicitly prohibit the use of compensatory education for postsecondary expenses. Thus, the parents' action to enforce the due process order and to use part of the relief to pay for college tuition will not be dismissed. In *Letter to Riffel* (OSEP 2000), the U.S. DOE recognized that compensatory education is an equitable remedy that could be appropriate beyond the period when a student is entitled to FAPE and stands for the proposition that no rule absolutely prohibits the use of compensatory education for postsecondary expenses. Thus, the court needs to conduct a fact-intensive inquiry to determine whether the student is entitled to the requested relief.

D. A.S. v. Harrison Township Bd. of Educ., 67 IDELR 207 (D. N.J. 2016). Although the parents were entitled to obtain additional reimbursement for mileage to transport their child to his private school because the hearing officer failed to use the standard IRS

business mileage rate to calculate the award, the parents are not entitled to minimum wage compensation for their time and effort spent transporting their child. IDEA only requires districts to pay actual expenses of transportation and there is no case law or statutory precedent for awarding parents minimum wage or any other amount for driving their child to school where they already receive mileage reimbursement.

E. A.S. v. Harrison Township Bd. of Educ., 68 IDELR 96 (D. N.J. 2016). Ordering a district to establish a trust fund to pay for compensatory education to a child who went without services for 12 days can be an appropriate remedy in an IDEA case. There is court authority for doing so, and the IDEA authorizes a court to "grant such relief as [it] determines is appropriate."

SERVICE ANIMALS

A. United States v. Gates-Chili Cent. Sch. Dist., 68 IDELR 70 (W.D. N.Y. 2016). In an ADA case brought by the federal government against a school district, the factual questions that exist over whether the 8 year-old student has the ability to handle her service dog at school and whether an adult handler is needed require a denial of the district's motion for judgment. The evidence is unclear as to whether the multiply disabled child is able to tether herself to and command her service dog. Although the government alleges that the child only requires assistance with untethering and occasional prompting, the school district alleges that the adult handler tethered and untethered the dog, assisted or directed the child when she tethered herself and issued commands to the dog. These facts need to be resolved before the court can determine whether the school district has violated the ADA. If the dog is tethered to the child and all she needs is to untether her from the dog, the child can be considered to be in control of the dog. However, if the child requires school district personnel to actually issue commands to the dog, as opposed to occasionally reminding her to do so, then she cannot be considered in control of her service dog. It is noted that the school district has conceded that it would have no issue helping the child untether herself from the dog.

B. A.P. v. Pennsbury Sch. Dist., 68 IDELR 132 (E.D. Pa. 2016). Parents' request for preliminary court injunction that would allow their child to bring his diabetic alert dog to school pending resolution of their 504 and ADA claims is denied. As noted by the magistrate judge, the parents are not likely to prevail on the merits of their discrimination claim where the obligation for the school district to make reasonable modifications in its policies, practices and procedures to accommodate the dog does not extend to an animal that has bitten another person. In fact, the ADA regulations clearly permit a school district to exclude a service dog that cannot be controlled by its handler and bites a member of the public. The dog, as a trained service animal, should not exhibit any aggressive behavior in a school setting—regardless of whether the bitten classmate taunted the dog or not. Further, while the classmate's injury was enough to establish that the animal posed a "direct threat," the dog's history of disruptive behavior on school grounds (multiple incidents of barking, growling, nipping and chewing on classroom supplies) showed that the biting behavior was not an aberration from normal behavior.