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

ADA/SECTION 504

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.

AP v. Pennsbury School District, 68 IDELR 132 (E.D. Pa. 2016)

This is a case where a service dog bit a student. The school then barred the dog from the school. Parents sought an injunction to get the dog back in the school, but the court refused. There is a good discussion of the literature pertaining to service dogs, making the point that a properly trained service dog will not respond aggressively even if provoked to some degree.

Camfield v. Board of Trustees Redondo Beach USD, 69 IDELR 74 (C.D. Cal. 2016)

The court held that there is no basis for individual liability under the ADA. Thus the retaliation claim against several school administrators was dismissed.

Dear Colleague Letter, 69 IDELR 80 (OCR 2016)

This is about the use of restraint and seclusion with students. Besides the usual admonitions to avoid any discriminatory treatment, the letter makes the following key points:

1. The need to restrain a student not yet identified under IDEA or 504 may indicate a need to conduct an evaluation. This is particularly true if restraint is done more than once.

2. Students who demonstrate behavioral challenges may have a disability even if they are performing well academically.
3. For students already identified under IDEA or 504, the use of restraints is an indicator that the current array of services are inadequate. Do something about it.
4. Section 504 does not prohibit the use of restraint. It prohibits the discriminatory use of restraint.
5. Use of restraint or seclusion may amount to a denial of FAPE. This is true even if it is just a single instance, if the event has a "traumatic impact on that student."
6. Students who have experienced trauma in the past could be more impacted by restraint than others.

Comment: It will be interesting to see how aggressively the Trump Administration enforces the standards articulated by the Obama Administration.

FAQs re: Public Charter Schools, 69 IDELR 137 (OCR 2016)

This is about the application of Section 504 to charter schools. It is mostly a regurgitation of 504 requirements, since they are equally applicable to charter schools. However, four points stand out.

1. There is a good discussion of the practice of "counseling out" a student. The document makes it clear that such a practice, no matter how subtle, is a form of discrimination.
2. A charter must provide transportation to a student if it qualifies as a necessary related service for that student, even if the charter does not provide transportation to general education students.
3. It is permissible to have a charter that focuses on a specific disability, and the admission process can inquire about this, provided that students are not excluded because of an additional disability. In other words, it's OK to have a charter that focuses on students with autism; but that school cannot reject an autistic student who is also deaf. You can have a charter for kids with a learning disability; but you can't refuse to take the kid who is LD and OHI.
4. Charters cannot inquire in advance about disability status, even though traditional schools can. For example, a charter school cannot ask in the application process if the student has an IEP or 504 plan; but the traditional school can ask about this. The distinction is that the traditional school has to take all comers anyway, whereas charters have limited enrollment and will be selecting some students and rejecting others.

Todd v. Carstarphen, 69 IDELR 157 (N.D. Ga. 2017)

The blind mother of three non-disabled elementary aged students sought special transportation for the students. The district denied it because the students lived within half a mile of their school and the walking path was not dangerous. The court held that

1) the benefit she sought (public education) was a benefit for her children, not her; 2) nor were the children denied that benefit—many avenues of getting them to school were offered and rejected; 3) neither the ADA nor 504 recognize a cause of action for associational discrimination. Thus the children could not bring a claim based on their association with their disabled mother.

Comment: Many people volunteered to help out with this situation, but the mother insisted that the district was required to provide transportation with a person she personally approved.

Harrington v. Jamesville Dewitt Central School District, 69 IDELR 235 (D.C.N.Y. 2017)

Court dismissed 504 case because it essentially alleged a denial of FAPE and there was no IDEA exhaustion. Court cites SCOTUS decision in *Fry v. Napoleon.* Also: court held that the pleadings negated a 504 case. The student acknowledged that the reason he was removed from the lead role in the school play was because of alleged plagiarism, not his disability.

Peters v. St. Charles Parish School Board, 69 IDELR 242 (E.D. La. 2017)

Student injured her knee and doctor ordered no P.E. and no stairs for a while. The school accommodated this, including written notice to school employees to let the student use the elevator. Suit alleged one incident when student was instructed not to use the elevator for a period of time. The court:

> Even if the Plaintiff was denied the benefit of using the elevator for a short time, the Plaintiff makes no allegation that she was intentionally denied such a benefit because of her disability.

P.E. teacher ordered the student to do pushups as a punishment for not dressing out for gym and not paying the .50 she owed for a prior rental of a gym uniform. Student claimed disability discrimination. The court:

> However, here too the Plaintiff fails to allege facts to show these acts were based on intentional discrimination because of the Plaintiff's disability. In fact, the Plaintiff's complaint states the "push-ups were a punishment" for being "sassy and disrespectful." The Plaintiff alleges no facts to suggest Mr. Rodriguez's actions were taken by reason of the Plaintiff's disability. Although Mr. Rodriguez's requiring the Plaintiff to do push-ups as punishment may not demonstrate best practices of an educator, it does not give rise to intentional discrimination.

Comment: This case puts major emphasis on the 5th Circuit's insistence that a 504 claim can only be based on a refusal to accommodate—not just a failure to accommodate.

Forrester v. ISD No. 19 of Carter County, State of Oklahoma, 69 IDELR 247 (E.D. Okla. 2017)

The court dismissed the parents' claim under 504, holding that parents may not bring a claim on their own behalf under 504. Such claims are available under IDEA due to *Winkelman v. Parma City School District*, but here the court holds that the Winkelman case is based on the unique statutory scheme under IDEA, and does not apply to a 504 claim.

BEHAVIOR

Dear Colleague Letter, 68 IDELR 76 (OSERS 2016)

This one is about behavioral interventions and student discipline. The letter encourages proactive practices so that removal of students in unnecessary. It points out that research shows that out of school suspensions do not improve student behavior and sets out certain "warning signs" that might indicate that the student is not receiving FAPE.

Parrish v. Bentonville School District, 69 IDELR 219 (W.D. Ark. 2017)

This case is mostly about the use of physical force with students. It's a long, complicated opinion involving multiple plaintiffs and a frustrated federal judge who scolded all of the lawyers. All claims for relief were denied. The court was sympathetic to school officials dealing with a very difficult situation:

> The point in time at which physical force became an issue was the March 13, 2013 meeting where L's mother asked that BSD employees stop putting their hands on L, and when she was told that this would not be possible given her son's aggressive outbursts, L's mother began yelling and stormed out of the meeting.
>
> On the issue of using CPI transports to move L, the Court concludes that BSD had no choice but to use this method. While the Plaintiffs criticize BSD's decision to use this tactic, it is unclear what other alternative BSD had. L was aggressive, posed a threat to other students and staff members, and would sit down on the ground and refuse to move.

Paris School District v. A.H., 69 IDELR 243 (W.D. Ark. 2017)

The court held that the behavior plan for the student was substantively inadequate. The court held that the school lumped all of the student's behaviors into the category of "noncompliance" "completely ignoring the nuances of behaviors that manifest with autism." The parent had provided considerable evaluation material about the student's

behaviors when the child was first enrolled in the school. None of that found its way into the BIP. The court also found fault with the fact that the student was assigned to an Alternative Learning Environment with no exit plan for return to the regular school:

> Sending a fifth grader to an ALE program like this one could possibly be "sitting idly….awaiting the time when they were old enough to drop out." *Endrew F. v. Douglas County*.

C.M. v. Warren ISD, 69 IDELR 282 (E.D. Tex. 2017)

The court upheld the placement of the student in a restrictive environment due to behavioral issues. There were five physical restraints of the student before Christmas. The first of these was prompted by the student throwing chairs and other objects, and then "repeatedly banging his head on the door and wall." When the teacher intervened, the boy "began hitting, kicking and biting her." It continued that way throughout the school year. The parent requested a special education due process hearing in March, 2016. Hearing Officer Mary Carolyn Carmichael conducted a two-day hearing in May, 2016 and rendered a lengthy decision in favor of the school district. The parent appealed the decision into federal court, which also ruled in favor of the school district.

The district pointed out that the student often refused to participate in the general setting: "When he was not refusing to participate…his behavior and aggressive outbursts….impeded his own learning and the learning of his peers in the general education classrooms."

BULLYING/HARASSMENT

Landon B. v. Hamburg Area School District, 67 IDELR 2013 (E.D. Pa. 2016)

The student was bullied and assaulted at the public school during his 10th grade year. In response, the parents placed him in a private school and the district agreed to fund it for two years. The student repeated 10th grade at the private school and proceeded to complete 11th grade. The dispute here was over placement for his senior year of high school. The district proposed a return to the public high school and the parent sought another year at the private school. The hearing officer ruled for the school and the court affirmed. This was based, in part, on the student's demeanor at the hearing and his ability to interact with peers successfully when he came to the school for evaluation. Moreover, the hearing officer found that the parents sabotaged the IEP process. They provided "absolutely no input regarding changes they would like to see in the IEP." The hearing officer concluded that the parents would not accept any IEP unless it included payment for the private school.

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

This is a peer-on-peer bullying case. The court cited the five factor test for liability and held that the plaintiffs fell short on the fifth factor—proof of deliberate indifference. There was sufficient evidence, at this stage of the proceedings, to show that the bullying was disability-based. This was based on allegations that the bullying was based on the student's dyslexia and his asthma, which led to weight gain. There was also sufficient evidence to show that the bullying was sufficiently severe and pervasive based on the facts that it had gone on from kindergarten to high school and resulted in the student receiving psychological counseling and taking medication. The school argued that the bullying could not be severe enough because the student passed from grade to grade. The court rejected that as a standard. However, the court ruled for the school district because of the lack of evidence of deliberate indifference:

> Neither the ADA nor the Rehabilitation Act requires the school board to ensure that absolutely no disability-based harassment or bullying occur; that is an impossible burden. Federal law requires that the defendant board of education take reasonable steps to prevent and protect vulnerable students from suffering such harassment. Even if the plaintiff is correct that these measures are having absolutely no effect the defendant has not failed to respond to the harassment, as the plaintiff alleges.

J.M. by Mandeville v. DOE State of Hawaii, 69 IDELR 31 (D. Hawaii 2016)

The court held that the IEP and Crisis Plan adequately addressed concerns over bullying. The parent argued that the school should have implemented all of the suggestions in the Dear Colleague Letter about bullying. The court held that the DCL was "aspirational" and so the district was not required to follow all of its suggestions. The court also held that districts are not required to guarantee that bullying will never occur.

Hale v. ISD No. 45 of Kay County, Oklahoma, 69 IDLER 96 (W.D. Okla. 2017)

The court dismissed the allegations of state-created danger liability based on bullying. The allegations in the suit amounted, at most, to negligence, which is not sufficient to "shock the conscience" to impose liability under the Due Process Clause.

CHILD FIND

N.M. v. Wyoming Valley West School District, 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 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.

Greenwich Board of Education v. G.M., 68 IDELR 8 (D.C. Conn. 2016)

The court held that the district violated IDEA by determining that a child was not eligible without conducting an FIE. The district primarily relied on RTI data to show that the student was making progress, and therefore, could not meet criteria as learning disabled. The court emphasized that the district is required to evaluate a child when it "suspects" a disability. There was ample reason for such suspicion here, including an independent evaluation and some data showing that the student was falling farther behind. The court also emphasized that the standard for progress with RTI is not "some" progress" but rather, "sufficient" progress. Key Quote:

> The Board's argument that K.M.'s purported progress through SRBI [Scientific Research-Based Intervention] obviated the need for a comprehensive disability evaluation does not conform to the requirements of the IDEA.

Comment: Here is another case illustrating the natural tension that exists between the Child Find mandate and the use of RTI. The school would have been in a stronger position if it had conducted an FIE and then based its decision on both the RTI data and the FIE.

Letter to Morath, 68 IDELR 231 (OSERS 2016)

OSERS here responds to a story in the Houston Chronicle accusing the Texas Education Agency of systematically denying eligibility and services to students who need them. The target of the story was the 8.5% standard in the Texas monitoring document. Districts that served more than 8.5% of its students in special education were classified as at a higher level of concern. OSERS demanded a written explanation from the agency, and ordered a discontinuation of the 8.5% indicator unless T.E.A. could demonstrate that this indicator has not resulted in practices that led to districts not referring and/or evaluating students.

Comment: T.E.A. has dropped the 8.5 indicator after much criticism from the Department of Education, Texas legislators and many parents.

Artichoker v. Todd County School District, 69 IDELR 58 (D.C.S.D. 2016)

You will rarely find a case more directly illustrating how "child find" intersects with RTI. Here, the parent verbally requested an evaluation. The district responded by initiating RTI procedures. The court found this inadequate:

> A full review of the administrative rules and guidance from the state of South Dakota, along with the relevant case law, establish that while the RTI

> process can occur before, or in conjunction with, an initial evaluation under the IDEA, if a parent makes a request for an initial evaluation of her child for special education services, the RTI proves cannot be used to delay, in any way, that evaluation.

The court thus held that the district violated Child Find.

Krawietz v. Galveston ISD, 69 IDELR 207 (S.D. Tex. 2017)

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

CONFIDENTIALITY/FERPA

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

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

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

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

Letter to Zacchini, 69 IDELR 188 (OSEP 2017)

OSEP was asked when districts are required to give parents notice that records are no longer needed, and may be destroyed. The answer: "when the student graduates…or otherwise leaves the public agency." Therefore, it is not necessary to give a second notice when the records retention period has expired and the records are about to be

destroyed. The letter goes on to suggest that "it would be helpful" if districts reminded parents that these records may be needed, or useful, for other purposes, such as accommodations in higher education, the workplace, or for insurance.

E.D. v. Colonial School District, 69 IDELR 245 (E.D. Pa. 2017)

The court held that a draft report on the student's behavior was a "transitional document and still subject to heavy editing and revision." Thus it was not an "educational record" under FERPA. "It was merely the first incarnation of an evaluation that was in the process of being prepared. Likewise, the court held that staff emails were not "education records." Key Quote:

> Unless Defendant kept copies of e-mails related to E.D. as part of its record filing system with the intention of maintaining them, we cannot reach the conclusion that every e-mail which mentions E.D. is a bona fide education record within the statutory definition. These e-mails appear to be casual discussions, not records maintained by Defendant.

DISCIPLINE

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

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

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

Artichoker v. Todd County School District, 69 IDELR 58 (D.C.S.D. 2016)

Because the mother verbally requested an evaluation prior to the incident for which the student was disciplined, the student was entitled to the protections of the IDEA. By suspending the student long term without providing the procedural protections of the law, the district violated IDEA.

Harrington v. Jamesville Dewitt Central School District, 69 IDELR 235 (D.C.N.Y. 2017)

Student was taken out of the lead role in the school play and assigned two days of after school detention due to alleged plagiarism, and alleged a due process violation. The

court held that neither of these actions deprived the student of liberty or property. Therefore, process was not due.

Comment: Also, he never served the detention. After meeting with the parents, the principal revoked that assignment.

ELIGIBILITY

Letter to Unnerstall, 68 IDELR 22 (OSEP 2016)

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

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

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

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

Joanna S. v. South Kingstown Public School District, 69 IDELR 179 (D.C.R.I. 2017)

This is another case in which the court notes that identifying the student's "label" is usually not significant. The school identified the student as SED. The parent preferred the autism label. The court noted that "no qualified expert or educator testified that the District's eligibility determination was wrong." Moreover, "the Parent failed to show how this alleged error impacted her son's educational benefits in any way."

EVALUATIONS

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

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

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

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

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

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

M.S. v. Lake Elsinore USD, 69 IDELR 148 (9th Cir. 2017, Unpublished)

The court summarily reversed the lower court that had held that the district violated IDEA by not conducting a re-evaluation. The court noted that the district did not think a re-evaluation was necessary; the parent had not requested one; nor had the teacher; and three years had not elapsed. Thus, under the statute, the district was not obligated to conduct a reevaluation.

B.G. v. City of Chicago School District, 69 IDELR 177 (N.D. Ill. 2017)

The court affirmed a ruling in favor of the school district and the appropriateness of its many evaluations. In part this was based on the weakness of the testimony from the parent's experts:

> Dr. Goldstein never met B.G., did not evaluate him, and did not interview any of B.G.'s teachers or other school staff. Dr. Bailey similarly did not evaluate B.G., did not conduct classroom observations, and did not conduct any interviews with school staff. The IHO took this into consideration in determining how much weight to give the expert testimony, and Plaintiffs do not cite to any legal support that this was inappropriate.

Comment: It's proper for hearing officers to take these factors into account. And it's proper for the IEP Team to do so as well.

Brandywine Heights Area School District v. B.M., 69 IDELR 212 (E.D. Pa. 2017)

The district delayed in getting a reevaluation done, and failed to provide an adequate behavior plan for a student the district knew had significant behavior issues. As a result, the court held that the district owed compensatory education for most of the student's kindergarten year. After February of that year, the district had completed an FBA and started implementing a BIP that showed progress, so the parent's request for additional comp ed was denied.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

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 golden doodle 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 has been heard by the U.S. Supreme Court, and we await a decision.

J.D. v. Graham Local School District Board of Education, 69 IDELR 265 (S.D. Ohio 2017)

Taking its cue from the Supreme Court's ruling in *Fry v. Napoleon Community Schools*, the court held that the gravamen of the complaint was about a denial of FAPE. Therefore, parents should have exhausted administrative remedies prior to seeking a TRO in court. The purpose of the TRO was to force the district to continue to pay for private placement of the student when the student's status as a resident of the district was in dispute.

Comment: It would seem that a stay put order from the hearing officer would be a simpler route for the parent.

Smith v. Rockwood R-VI School District, 69 IDELR 268 (E.D. Mo. 2017)

The court did not cite *Fry v. Napoleon Community Schools*, but it relied on its logic in dismissing the 504 claims due to failure to exhaust under IDEA. Key Quote:

> Here, plaintiff's claims revolved around an IEP team determination, denial of procedural and substantive IDEA rights, and denial of a FAPE. In the complaint plaintiff states that the Section 504 complaint arises from a "non-compliance with the IDEA." The complaint alleges the same set of facts to support both the IDEA and Section 504 claims.

L.D. v. Los Angeles USD, 69 IDELR 272 (C.D. Cal. 2017)

The court relied on the *Fry* case in holding that the suit was really about a denial of FAPE. Dismissed due to failure to exhaust.

FAPE

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

The district passed muster in a straightforward analysis of the four FAPE factors. The IEP was individualized based on evaluations; the placement was in the LRE; key stakeholders worked together in a collaborative manner; and there were positive academic and non-academic benefits.

The decision has since been affirmed by the 5th Circuit. The court held that the four-part test as consistent with the *Endrew* case.

IEEs

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.

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

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

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

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

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

Genn v. New Haven Board of Education, 69 IDELR 35 (D. Conn. 2016)

The court made three rulings regarding IEEs. First, that the IEE pertaining to reading was properly considered by the IEP Team. Second, that the district had the right to conduct its own speech evaluation before the parent was entitled to an IEE in that area. Third, that the parent had adequately expressed disagreement with the district's evaluation of reading, thereby requiring the district to pay for the IEE in that area. Key Quotes:

> However, the Court is not persuaded that a parent must announce in a formalistic manner, "I, Parent, disagree with this assessment!" to be found to have disagreed in substance with the assessment. The Parent testified before the IHO that she disagreed with the assessment because the reading tests given were not sensitive enough to pick up the phonological awareness issues which the Student faced.
>
> The Board must be afforded the opportunity to conduct the initial evaluation with professionals satisfactory to the school before the Parent may disagree and request an independent evaluation.

Shafi A. v. Lewisville ISD, 69 IDELR 66 (E.D. Tex. 2016)

The court made several key points about IEEs. First, the parent bears the burden of justifying fees that exceed the district's standards. Second, the district can establish cost factors, so long as they are based on research as to customary rates in the area. Third, if the district has agreed to pay for an IEE, it does not have a duty to claim that the IEE does not meet its criteria until the parent submits a bill for it. The court pointed out that 5th Circuit precedent construes IDEA "to create a presumption in favor of the education plan proposed by the school district, and places the burden of proof on the party challenging it."

Comment: This case is worth study by IEP Teams. The reasonableness and professionalism of the school district is obvious. Parents occasionally failed to respond to district requests and one of the their evaluators refused to provide her credentials or negotiate her fees, which were more than four times higher than the district's cost criteria would permit.

A.A. v. Goleta Union School District, 69 IDELR 156 (C.D. Cal. 2017)

The court upheld the decision of the district not to pay for the IEE which exceeded the district's cost criteria. The court found that the cost criteria were reasonable, and the parent failed to produce evidence of unique circumstances that would warrant a higher fee.

Comment: The district based its criteria on its survey of evaluators in the area, rejecting the highest and lowest. The court discussed two OSEP letters that address whether or not a district, in a case like this, must pay an amount up to its cap. However, the court held that the issue was not properly before it. The letters are Letter to Thorne (16 IDELR 606, 1990) and Letter to Petska, (35 IDELR 191, 2001).

Avila v. Spokane School District 81, 69 IDELR 204 (9th Cir. 2017)

The court held that the reevaluation of the student was properly done and thus the district was not required to pay for an IEE. The district evaluated in all areas of suspected disability, including specific learning disability, even though it did not refer to reading disorders as "dyslexia" or "dysgraphia."

IEPs

C.M. v. NYC DOE, 69 IDELR 117 (S.D.N.Y. 2017)

The IEP was substantively adequate. Second Circuit law does not require that the IEP include a baseline. The statement of present levels was adequate, as were the goals, when looked at in conjunction with the short term objectives.

Comment: Once again, the familiar NY pattern involving private placement of students with autism. Hearing officer rules for the parent; state review officer rules for the school; court upholds the SRO decision.

Letter to Pugh, 69 IDELR 135 (OSEP 2017)

This is about progress reports and transition. OSEP notes that the requirement to provide progress reports applies only to academic and functional goals, not the postsecondary goals of a transition plan. However, the water gets muddy after that simple statement:

> However, we assume that there would be a relationship between the academic and functional goals of a transition-aged student and that student's postsecondary goals, and that it would be necessary for a public agency to report on a student's progress in meeting postsecondary goals when reporting on the transition-aged student's progress in meeting related academic and functional goals. Therefore, OSEP believes that periodic progress reporting for transition-aged students would need to address the child's progress in meeting postsecondary goals.

Comment: Here's a simpler translation of that: No, you don't have to do this, but we think that you should. So you do have to do it. Sheesh. OSEP received this request on July 14, 2016 and sat on it until two days before Obama left office. Trump recently signed an Executive Order instructing the DOE to look for instances of governmental overreach. Hmmm.

S.G.W. v. Eugene School District, 69 IDELR 181 (D.C. Ore. 2017)

This is one of the rare cases that discusses progress reports. The court held that the frequency and timing of reports to the parent was adequate, but the content was not:

> The ALJ erred to the extent she found that the grade reports' frequency and timing rendered them inadequate. The IDEA does not specify how often progress reports must be provided…..But I agree with the ALJ that the grade reports' contents failed to accomplish the goals of progress reports under the IEP, which were to inform parents of student's progress on IEP goals specifically, not of student's academic progress generally.

Comment: The court characterizes this error as a substantive, rather than procedural error. Therefore, parent did not have to prove that the error caused harm. The "progress reports" sound like report cards—letter grades about overall academic progress in each class.

Letter to Savit, 67 IDELR 216 (2016)

OSEP confirms its view that the rules for recording IEP Team meetings can be set by state or local school districts. Those rules may restrict or even prohibit recording, so long as exceptions are made as necessary to make sure that parents understand the IEP and IEP process or to implement other parental rights. In this letter, OSEP advises that if the school requires parents to give advance notice of an intent to record, it must schedule the meeting far enough in advance to permit the parent to give notice.

J.E. v. NYC DOE, 69 IDELR 93 (S.D.N.Y. 2017)

The court held that the district predetermined placement by not considering the more restrictive placement requested by the parent, and therefore ordered tuition reimbursement of $97,000 for a school year. The district called for placement in the most restrictive setting it had available, but did not refer the matter to the Central Based Support Team for consideration of more restrictive placements in private programs. The parent had requested that the matter go to the CBST.

Pangerl v. Peoria USD, 69 IDELR 133 (D.C. Ariz. 2017)

The court held that the parent was not denied meaningful participation, even though the IEP Team finished writing the IEP after the parent left the meeting. The court carefully distinguished the fact situation here from the facts in *Doug C. v. Hawaii DOE,* a 9th Circuit decision cited by both parties. Here, the Team scheduled the meeting for two hours. The parent was accompanied by two advocates. One of the advocates said from the beginning that she could not stay longer than the two hours. When the two hour mark arrived, the IEP was not complete. The parent and advocates left the meeting and the rest of the team completed the process because the existing IEP was set to expire in a few days. The district representative informed the parents, before she left, that the team would complete the process, but that they would also reconvene to make changes to the IEP. And they did that. The court:

> The present case is somewhat similar to *Doug C.* But unlike the father in *Doug C.,* Plaintiff and her advocates were present at the November 2012 IEP meeting, stayed for the full two hours that the meeting was intended to run and only left when their advocate had to leave. Although Plaintiff suggested rescheduling the balance of the meeting, the District representatives finished the balance of the IEP without the presence of the Parents. As in *Doug C.* the District cited the expiring IEP as a reason why the team needed to complete the balance of the IEP in the absence of Parents. The District stated it would make any required addenda to the IEP and, in fact, did so immediately upon the start of the 2013 IEP year.

Comment: This is an excellent case for training, particularly to point out how well the LEA representative managed this meeting.

J.S. v. NYC DOE, 69 IDELR 153 (S.D.N.Y. 2017)

The court was not bothered by the fact that a draft of the IEP was circulated prior to the IEP Team meeting, noting that the parent received a copy of the draft, and participated in the meeting. Nor was it a problem that the school recommended the same placement for several years in a row. The record showed that other alternatives were also considered.

A.V. v. Lemon Grove School District, 69 IDELR 155 (S.D. Cal. 2017)

The court held that the failure to invite a representative of the private school that the district was considering as a placement was a procedural violation. However, it did not deprive the student of FAPE or impede parental involvement in the process.

Comment: The district did not invite the teacher from that school because it feared that it would look like placement was predetermined.

S.H. v. Tustin USD, 69 IDELR 176 (9th Cir. 2017)

This is a case where the parents allege that the district predetermined placement and denied them meaningful participation in the process. The context was a change of placement proposed by the school after six IEP Team meetings. The court ruled for the district. Key Quote:

> The record clearly shows that Appellants were provided adequate—and arguably extraordinary—opportunities to participate in the placement decision. Appellants visited the proposed placement multiple times, before and after the placement decision. And at least one of the Appellants attended and participated in every IEP meeting, effecting many changes to the plan.

Comment: As seems typical, the "denial of meaningful participation" here was made by parents deeply involved in the process.

B.G. v. City of Chicago School District, 69 IDELR 177 (N.D. Ill. 2017)

The court noted that the parent was present, with counsel, at the IEP Team meeting, did not object to, or express disagreement with any of the evaluation reports presented at the meeting. Parent also did not object when district professional staff spoke to her about their evaluations prior to the meeting. Then this:

While a parent's failure to object to an IEP does not waive their right to challenge, it "casts significant doubt on their contention that the IEP was legally inappropriate."

LEAST RESTRICTIVE ENVIRONMENT

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

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

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

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

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

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

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

The court ruled in favor of the school district and its change of placement for the student to a more restrictive setting. The court relied heavily on the testimony of an independent educational expert who had observed Jacob in the classroom setting over a period of almost three months and written an 11-page report. She made the case that Jacob needed the kind of services that could only be provided in a more restrictive setting, such as the SELF program. Her report noted that the boy should be served "in an environment that can support appropriate relationships, learn to display empathy for others, learn to alter his own behavior to conform to the standards in place, accept

responsibility…value another's point of view, and accept authority." In her testimony at the hearing, she stated that "he needed more support systems. He needed trained staff to be able to address the teachable moments that were occurring throughout his day that could not be done in a GenEd setting." The expert said that the SELF program was good for kids with "similar characteristics, the disrespect, the unpredictable behavior, the impulsivity, the lack of remorse, the trouble with social skills."

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

Dear Colleague Letter: Preschool LRE, 69 IDELR 106 (OSEP 2017)

This DCL is a reminder that the LRE provisions apply equally to the preschool children. This is the case even if the LEA does not offer preschool to non-disabled children.

LIABILITY

Johnson v. Boston Public Schools, 69 IDELR 127 (D.C. Mass. 2017)

The court granted immunity to the state DOE based on 11th Amendment immunity. "Congress did not abrogate sovereign immunity for Section 1983 suits."

C.R. and J.R. v. Novi Community School District, 69 IDELR 120 (E.D. Mich. 2017)

This is a student-on-student sexual harassment case involving a student with an emotional disturbance allegedly harassing a smaller autistic student. Both boys in middle school. The court held that a reasonable jury could conclude that the district was deliberately indifferent due to the actions and inactions of the principal and assistant. There were also sufficient allegations to go forward with a retaliation claim. The plaintiff's equal protection claim was dismissed, but the Due Process claim, based on state-created danger, was allowed to proceed. This was largely based on actions of the teacher in isolating the two boys in a small room after she had previously seen inappropriate touching. The principal also faces possible supervisory liability. The "failure to train" claim was allowed to proceed, in part because of the district's failure to respond to a Dear Colleague Letter. 504/ADA claims were dismissed.

Comment: This one makes for an interesting case study of what not to do. The court cited the fact that the school failed to keep a record of past misconduct by students; did not provide training on sexual harassment; deleted evidence (videos); and held the victim as equally at fault as the perpetrator. Of course all of this is at an early stage, but

still, the case would be good for training about the types of actions and omissions that would lead a court to conclude that the district was deliberately indifferent.

Lichtenstein v. Lower Merion School District, 69 IDELR 121 (E.D. Pa. 2017)

The court held that plaintiff had adequately plead a case of liability under the 14th Amendment due to 1) the "special relationship" theory as well as 2) state created danger. The superintendent was dismissed from the case, but the district and two employees remained as defendants. The case involved an injury to a 20-year old student, allegedly due to the district's use of a "decrepit" chair to transport him in and out of the swimming pool, which was held together by tape and not designed for that purpose in the first place.

Comments: Courts have routinely rejected the "special relationship" theory of liability for public school students. Here, the court opens that door just a bit based on 3rd Circuit precedent indicating that a special relationship may arise "between a particular school and particular students." (Emphasis in the original).

Saldana v. Angleton ISD, 69 IDELR 152; 117 LRP 16905 (S.D. Texas 2017)

The court dismissed the 14th Amendment claim against the district, and the Equal Protection claim against the bus monitor, but allowed the Due Process claim against the monitor to proceed. Upon re-pleading, the plaintiff alleged sufficient facts to allege a deprivation of the child's liberty interest in bodily integrity and to overcome the monitor's claim of qualified immunity.

Comment: This case is going to turn on the bus videos. The plaintiff alleges that video evidence will show numerous "vicious" assaults of the child by the bus monitor. The plaintiff alleges that the videos will show "violent attacks by a child abuser for no legitimate reason other than the fun of it."

McKenzie v. Talladega City BOE, 69 IDELR 149 (N.D. Ala. 2017)

A severely disabled student was injured in the process of an evacuation drill from the bus. The suit alleged violations of substantive due process and equal protection. The court dismissed the suit, noting that the conduct alleged fell far short of "conscience-shocking" behavior.

Saldana v. Angleton ISD, 2017 WL 1498066; 69 IDELR 274 (S.D. Tex. 2017)

A bus monitor in Angleton ISD has been sued for allegedly abusing a student with autism, repeatedly, on the school bus. The pleadings in the case include this:

> That on 37 bus trips over a 22-day period, [the bus monitor] viciously assaulted the minor Plaintiff, with no provocation whatsoever, a verified and documented 39 times, including pinching, slapping, and striking him

> with a metal belt buckle, his school supplies and even his own tennis shoes.

The suit alleges that the videos on the bus will confirm all this. The bus monitor filed a Motion to Dismiss the case, asserting her qualified immunity. The court denied the Motion, holding that the law on this is "clearly established." Key Quote:

> A reasonable school district employee would have understood that a school bus monitor's repeatedly striking a disabled, nonverbal student, without any provocation of justification, violated the child's substantive due process rights and that such conduct was objectively unreasonable in light of the clearly established law at the time.

Hicks v. Kilgore, 69 IDELR 266 (M.D. Ga. 2017)

The court held that the principal and assistant principal were entitled to qualified immunity in a suit alleging that they violated the student's rights under the 14th Amendment by questioning the nine-year old autistic student about a bomb threat, without notice to the parent. The court held that "questioning of a child by a school official in the face of a bomb threat does not rise to the level of conscience shocking behavior."

PARENTAL RIGHTS/RESPONSIBILITIES

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

The court holds that parent agreement to a change of placement does not prevent them from suing for denial of FAPE under 504/ADA. The court also dismissed arguments that the parents should have requested the accommodations they later sued over: "A.G.s parents did not have the expertise—nor the legal duty—to determine what accommodations might allow her to remain in her regular educational environment.

Letter to Kashyap, 68 IDELR 254 (OSEP 2016)

OSEP was asked if the right to inspect records under IDEA is limited to parents of students who are determined to be eligible for special education. OSEP says no. The regulations do not limit the right of access to only those parents whose children have been evaluated and determined eligible.

Comment: Duh. The parents would be entitled to the records under FERPA anyway.

Pangerl v. Peoria USD, 69 IDELR 133 (D.C. Ariz. 2017)

The parent claimed that the district failed to implement IEPs properly, but the court disagreed, noting that the parent had withdrawn consent for speech therapy from the two therapists employed by the district. The court noted that "Plaintiff is not entitled to his choice of service providers under IDEA." The failure to provide 7% of the speech services was not deemed significant.

E.D. v. Colonial School District, 69 IDELR 245 (E.D. Pa. 2017)

The district, on advice of counsel, refused to allow the parent's expert to observe a classroom prior to the due process hearing. The attorney wrote that the purpose of the observation was to develop "an expert report for litigation purposes." The court held that barring the expert did not infringe on parental rights. The court pointed out that the expert wanted to visit a classroom where the student was not enrolled, and in which nobody had any intention of enrolling him. This was not part of an IEE, since the expert sought to evaluate a classroom, not a student. Key Quotes:

> Dr. Cane's visit would not have constituted an IEE. Section 300.502(b)(1) of the Regulations provides for evaluations of a child, not a specific educational program....
>
> Plaintiffs' procedural rights do not extend so far as to require Defendant to cooperate in furnishing new evidence for litigation purposes.

PERSONAL ISSUES

Pistello v. Board of Education of the Canastota Central School District, 69 IDELR 209 (N.D.N.Y. 2017)

This is a discrimination/retaliation case from a teacher. The court held that the teacher engaged in "protected activity" by pointing out in an email to the superintendent that IEPs were not being implemented properly. The teacher suffered an "adverse employment action" when she was transferred and assigned to teach subjects for which she was not certified. There was enough evidence of causation to keep the case alive at the Motion to Dismiss stage.

Comment: This all began when the teacher sent an email to the superintendent, bypassing the director of special education, pointing out that she had three students who were routinely going to a career skills program after just 10 minutes in her classroom, whereas the IEPs called for them to be in the classroom for the entire class. The email observed that "This indicates that we—as a district—are not in compliance. If these students fail—as they all are now failing—their parents could sue the school district."

PLACEMENT

A.V. v. Lemon Grove School District, 69 IDELR 155 (S.D. Cal. 2017)

There is excellent discussion in this case about the distinction between "placement" and "location" including citations of many cases holding that the IEP does not have to identify a specific school. Key Quotes:

> Educational placement under the IDEA refers to the general educational program in which a student is enrolled rather than the specific school assigned.
>
> The IDEA does not require that the IEP name a specific school location.
>
> Therefore District's unilateral selection of Sierra [the specific school] did not violate IDEA.

Comment: However, there are also cases holding that the IEP must identify a specific school when the ability of the school to implement the IEP is in question. Here, it was not. Parents conceded that Sierra could implement the IEP.

PROCEDURAL SAFEGUARDS

Y.A. v. NYC DOE, 69 IDELR 76 (S.D.N.Y. 2016)

The district failed to provide the parent with the Procedural Safeguards document and also failed to translate it. The district's excuse for the lack of translation was that the parent spoke English. This was true, but the parent routinely requested a translator for meetings and gave her testimony at the hearing via translator. Key Quote:

> IDEA does not dispense with its Notice requirement when a parent appears to know some English. Rather, it requires the Notice to be provided in the parent's native language unless it is clearly not feasible to do so.

Comment: This case presents a good illustration of how courts distinguish between minor and major procedural errors. The court concluded that the school violated state law by not having a psychologist at the IEP Team meeting. However, the court held that this was merely a technical violation that caused no harm. The language issue, however, denied the parent the opportunity to participate in the process in a meaningful way. Thus, it was a denial of FAPE.

C.M. v. NYC DOE, 69 IDELR 117 (S.D.N.Y. 2017)

The court found that the IEP Team made numerous procedural errors, but not enough to amount to a denial of FAPE. The district did not evaluate in all areas of suspected disability; did not conduct a FBA; did not develop a BIP, which violated state regulations and did not include parent counseling and training in the IEP. The parent also alleged a denial of meaningful participation in the process, but the court rejected that, noting that the parent was in attendance and actively participated in the IEP Team meeting.

RELATED SERVICES

Paris School District v. A.H., 69 IDELR 243 (W.D. Ark. 2017)

The court held that the district improperly took PT out of the IEP without first evaluating the student's need. The district claimed that the student had physically attacked the PT, but the record did not support this. There was no evaluation to justify the termination of services and the PT did not attend the IEP Team meeting where the decision was made.

REMEDIES

Somberg v. Utica Community Schools, 69 IDELR 94 (E.D. Mich. 2017)

This decision was only about the amount of compensatory education to be provided. The court ordered the district to provide one year of tutoring and one year of transition services, to be directed by a special master. Due to the bad relationship between the parties, none of the services were to be provided by the district directly. The court also held that the student moving out of the district and completing high school elsewhere did not make the case moot.

Board of Education of Albuquerque Public Schools v. Maez, 69 IDELR 98 (D.C.N.M. 2017)

The court granted an injunction to APS, modifying the relief ordered by the hearing officer. This occurred while the appeal on the merits was pending. APS successfully argued that it would suffer irreparable harm by paying out $5000 for private speech therapy, that it was fully capable of providing at no cost via its own staff. The parents argued that $5000 could hardly be an "irreparable" harm when APS has a budget of $1.3 billion. But the court pointed out that injunctive relief does not require proof of financial hardship, but rather "irreparable harm." The court was convinced that if APS paid out the money, it would never get it back, even if it later prevailed on the merits.

Comment: Interesting legal moves by APS to get the hearing officer's order modified while the appeal is pending.

K.G. v. Sergeant Bluff-Luton Community School District, 69 IDELR 216 (N.D. Iowa 2017)

Parents alleged that the teacher forcibly dragged a student across the floor, resulting in carpet burns. The court granted summary judgment to the district on the 14th Amendment substantive due process claim; granted summary judgment to the individual defendants on the 14th Amendment claim due to qualified immunity. However, the 4th Amendment claim of unconstitutional seizure was allowed to proceed.

D.V. v. Pennsauken School District, 69 IDELR 250 (D.C.N.J. 2017)

The court dismissed the retaliation complaint due to lack of evidence of causation. The school made a child abuse report after a meeting with the family in which the uncle acknowledged showering with the nine-year old, mentally challenged student. The court held that no reasonable jury could find that the child abuse report was motivated by an intent to punish the family for advocating for the child. Moreover, there was no evidence of any animus or ill will on the part of the district. The claims of sex discrimination and bullying based on sexual orientation was also dismissed. The court noted that the evidence showed only isolated classroom insults, and nothing severe or pervasive. Moreover, the district investigated the reported incident promptly.

Bowe v. Eau Claire Area School District, 69 IDELR 275 (W.D. Wis. 2017)

The court held that the student alleged plausible claims under the ADA/504, the Equal Protection Clause (Class of one theory) and Title IX based on peer to peer harassment. Moreover, exhaustion of IDEA procedures was not required. In making this ruling, the court relied on *Fry v. Napoleon.* The suit claimed that the student was verbally abused based on disability and sexual stereotype. Defendants included the district and two principals who allegedly knew of the bullying and did nothing about it.

Comment: Unlike most cases, in this one the district conceded that it was deliberately indifferent to bullying that it knew about. No doubt this concession was only for the purpose of this Motion to Dismiss, and the district will contest this issue in the future. Still, there are many cases in which districts have obtained a dismissal based on that factor. Another interesting feature of the case is the discussion of whether or not words like "pussy" "bitch" and "whore" as used by middle school kids amount to sexual harassment. This court, at this point of the litigation, says that they do.

STATE RESPONSIBILITY

Letter to Anonymous, 67 IDELR 188 (2016)

OSEP was asked if it is permissible to have a state regulation that "requires the board of education to approve/determine services and setting after the child's IEP is developed" by the IEP Team. OSEP notes that there is no federal law or regulation prohibiting such a

regulation "so long as the Board is not permitted to unilaterally change a child's IEP and/or placement." Also, the board's actions must not delay or deny services for a child. Thus if the board determines that the program or placement are not appropriate, the state must make sure that the IEP team meets promptly to "consider the Board's objections or concern and to make revisions, if needed."

Comment: What?!?!?!?!

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

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

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

H.E. v. Walter D. Palmer Leadership Learning Partners Charter School, 68 IDELR 244 (E.D. Pa. 2016)

"This dispute presents the increasingly prevalent and pressing question of who is responsible for a charter school's past failure to provide a FAPE to children with disabilities under the IDEA when the charter school has closed its doors." The court holds that the state agency has that responsibility:

> …PDE retains ultimate responsibility to ensure that a child's right to a FAPE is secured where a charter school cannot or will not fulfill that obligation.

STAY PUT

J.M. by Mandeville v. DOE State of Hawaii, 69 IDELR 31 (D. Hawaii 2016)

A hearing officer in 2014 approved the student's placement at a private school due to the public school's failure to provide FAPE. One year later the district proposed a change of placement back to the public school. The parent challenged this, but this time

the hearing officer, and then the court, ruled in favor of the district. Nevertheless, the parent was entitled to "stay put relief." Presumably, this means full reimbursement for the tuition at the private school.

Comment: This case nicely illustrates the high cost of seeking a change of placement when the parent does not agree with it. The school district "won" this case….sort of. The hearing officer and the court ruled in favor of the district. But because of the stay put rule, the district still faces the cost of private school tuition for the entire length of the judicial proceedings. That's a pretty costly victory.

Genn v. New Haven Board of Education, 69 IDELR 35 (D. Conn. 2016)

The court held that the stay put placement was the last placement recommended by the IEP Team, not the placement where the student is served:

> A then-current educational placement within the meaning of the IDEA does not mean that the Student is entitled to stay in a private placement at the expense of the Board. Instead, it means that the last recommended IEP placement remains in place during the pendency of the hearings.

School District of Philadelphia v. Kirsch, 69 IDELR 28 (E.D. 2016)

The parents of twins obtained a "stay put preliminary injunction" whereby the district was ordered to pay over $300,000 to the parents for tuition dating back to 2013, and also including the current (2016-17) school year. The court also ordered the district to continue these payments as tuition became due "during the pendency of all appeals in this matter." The court also awarded the parents attorneys' fees of $185,505.

Comment: In the initial due process hearing, the parent obtained tuition reimbursement based on a denial of FAPE only for several months—from September to December, 2013. In December 2013 the district offered an IEP that provided FAPE. Nevertheless, solely due to the stay put rule, the parents have obtained tuition reimbursement all the way through the 2016-17 school year.

Paris School District v. A.H., 69 IDELR 243 (W.D. Ark. 2017)

The court held that the Alternative Learning Environment was not the "stay put" placement even though it was the "then current" placement when the due process hearing was requested. The court affirmed the IHO decision on this point, holding that the due process hearing was challenging the ALE placement. The record showed that the mother was not given proper notice that the IEP Team would be considering a change of placement; the meeting was "organized hastily without thorough review of data and without the participation of key people." Moreover, the mother stated that she "knew nothing" about the ALE.

Comment: This is a great illustration of the risks districts create for themselves when they rush a parent into a change of placement, particularly a disciplinary removal.

TRAINING OF STAFF

Paris School District v. A.H., 69 IDELR 243 (W.D. Ark. 2017)

The court denied the general accusation that district staff were inadequately trained. People were properly licensed and certified. However, the specific accusation that the staff that served the student in 5th grade were inadequately trained was upheld. This was largely based on testimony from the coach who was the primary teacher in the Alternative Learning Environment, including this doozy:

> This lack of training manifested itself in the indifference that some of the staff took towards handling A.H.'s disabilities seriously. For example, when asked about accommodations that he made for A.H. while she was in the ALE, Coach Prieur stated "and I mean, I guess, you know, I'll get in trouble for saying this, but I just didn't think she needed some of these accommodations, because she was doing so well on her stuff and so I really didn't make a whole lot of accommodations for her."

Comment: Sentences that begin "I'll get in trouble for saying this" should probably end right there.

TRANSITION

J.M. by Mandeville v. DOE State of Hawaii, 69 IDELR 31 (D. Hawaii 2016)

The court noted that a student moving from private school to public school is not entitled to a "transition plan" since this is only required to address post-secondary transition. However, the student did need a "plan for transition," which the IEP provided.

Comment: It might be wise to distinguish between a "transition plan" and a "plan for transition." Here the student needed the latter, but not the former.

S.G.W. v. Eugene School District, 69 IDELR 181 (D.C. Ore. 2017)

The court held that IDEA does not require any particular transition assessment tool, but "a student interview, without more, is insufficient."

R.B. v. NYC DOE, 69 IDELR 263 (2nd Cir. 2017)

The court held that the district provided FAPE to the student and was not responsible for private school tuition. The main point of contention was the transition plan. Parents argued that the district failed to conduct an in-person evaluation of the student for transition purposes. The court held that even if that was true, there was no denial of FAPE. The district relied on a privately obtained evaluation, consulted with the student's private school teachers, interviewed the parents and invited the student to attend meetings where transition would be discussed. Parent declined to bring the student. Key Quote:

> Here, even assuming arguendo that the failure to conduct an in person assessment of D.B. violated applicable state or federal regulations, the lack of an in person assessment did not impeded D.B.'s right to a FAPE, significantly impede the Parents' opportunity to participate in the decision making process, or deprive D.B. of educational benefits.

TRANSPORTATION

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

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

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

TRANSITION

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

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

Letter to Anonymous, 69 IDELR 223 (OSEP 2017)

OSEP was asked what it means to "annually update" a transition plan, and whether or not this means that the plan should always be revised with each year. The response says

what you would expect: kids change from year to year, and so, it's up to the IEP Team, which must "carefully consider whether the existing IEP's postsecondary goals and transition services remain appropriate to support the child in working toward what he or she hopes to achieve after leaving high school."

UNILATERAL PLACEMENT/TUITION REIMBURSEMENT

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

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

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

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

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

L.H. v. Hamilton County DOE, 68 IDELR 274 (E.D. Tenn. 2016)

The court held that the placement offered by the school was inappropriate due to LRE concerns, but also held that parents were not entitled to reimbursement for a Montessori school because it was not appropriate either. The court noted that the student made good progress at Montessori, but held that this was not the issue:

> The Court's reimbursement analysis does not turn on whether L.H. made progress while at TMS, but rather on whether the decision to place L.H. at

> TMS was, at the time, proper under the IDEA and reasonably calculated to enable L.H. to receive educational benefits.

The court held that the placement did not satisfy those standards because 1) the student needed systematic, intensive instruction on "building-block" skills and TMS did not provide this; and 2) TMS was not sufficiently structured for the student's individual needs.

Comment: Well, there is a decision that will make no one happy.

TRULY MISCELLANEOUS BUT INTERESTING

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

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

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

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

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

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

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

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

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

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

Dear Colleague Letter, 68 IDELR 108 (OSERS) 2016)

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

Hicks v. Benton County Board of Education, 69 IDELR 32 (W.D. Tenn. 2016)

The court held that the plaintiff alleged enough facts to survive the Motion to Dismiss. She alleged that she engaged in protected activity by advocating for students with disabilities and had her employment terminated as a result. The court rejected the 1983 claim against the district because the principal who recommended the nonrenewal was not a "policymaker" and there was no evidence of a custom or pattern of the district ignoring constitutional violations. The court also held that the aide's complaints about her daughter's education were not on matters of public concern, and thus not protected by the First Amendment. The aide's conversations with parents were part of her official duties, and thus not protected either. The court denied plaintiff's motion for reconsideration of parts of its ruling at 69 IDELR 128 (2017).

Comment: This is an employment dispute, but is worth inclusion here because it arises from a familiar scenario—aide v. teacher.

OSERS FAQs about Charter Schools and Students with Disabilities, 69 IDELR 78 (2016)

51 questions and answers.

Letter to Wentzell, 69 IDELR 79 (OSERS 2016)

A lower court decision in Connecticut includes this:

> …the education appropriate for some students with disabilities may be extremely limited because they are too profoundly disabled to get any benefit from an elementary or secondary school education.
>
> Schools [should] identify and focus their efforts on those disabled students who can profit from some form of elementary and secondary education.

Based on this logic, the court ordered the state to:

> submit new standards concerning special education which rationally, substantially, and verifiably link special education spending with elementary and secondary education.

In this letter, OSERS expresses concern over the parts of the decision "that suggest that a school district need not provide programming or services to all IDEA-eligible children in all areas of need." Key Quote:

> Contrary to the lower court's view, Connecticut and its school districts may not choose to provide special education and related services only for those students whom local educators believe may ostensibly benefit more from a traditional, elementary or secondary academic program. Rather, they have an obligation to provide special education and related services to all eligible children with disabilities, including children with more severe or significant disabilities.

Comment: I thought this was settled a long time ago with the case of Timothy W. v. Rochester, N.H. School District, 875 F.2d 954 (1st Cir.), cert. denied, 493 U.S. 983 (1989).

V.W. v. Conway, 69 IDELR 185 (N.D.N.Y. 2017)

This is a class action on behalf of juveniles who are placed in solitary confinement for 23 hours/day. The court held that class certification was proper; exhaustion was not required; and plaintiffs were entitled to a preliminary injunction based on a likelihood of success in proving violations of IDEA and constitutional standards.

Comment: The district argued that it was powerless in this situation, that law enforcement authorities had blocked them from providing direct services. The court did not accept that, at least not at this stage of the game. Discovery had not yet been done.

Q and A on Significant Disproportionality, 69 IDELR 254 (OSEP, OSERS 2017)

This was issued February 23, 2017, thus represents the view of the current administration.

A.P. v. County of Sacramento, 69 IDELR 273 (E.D. Cal. 2017)

This is a dispute between a foster family and the county over the use of a wrapping technique that the court concludes is a physical restraint. The court does not make any rulings about the propriety of this technique whereby the student is wrapped in a stretchy fabric or lightweight blanket "like a burrito." Nor does the case involve use of this technique at school. This was about the county ordering the foster family not to use this technique, even though it was medically recommended. The county not only ordered the family not to use wrapping—it also ordered a complete cessation of the student's "sensory diet" for two weeks. The court held that this made a plausible case of deliberate indifference to medical needs, thus a potential violation of substantive due process.

Comment: I learned from this case that "sensory diet" has nothing to do with what you eat. It's about limiting sensory input. Oh!!! That makes sense.