

# Special Education Case Law: An Overview of Recent Decisions

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Association of Special Education Administrators

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### A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of case law pertaining to certain aspects of the IDEA and Section 504 of the Rehabilitation Act. This material does not include every aspect of the law, nor does it discuss every case involving the IDEA and Section 504. The cases in this material were decided during the period of 2009 through March 2010, and may be subject to appeal. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

## Table of Contents

I. Overview .....	2
II. IEP Development .....	2
A. Present Levels, Annual Goals, Services, and Special Factors.....	2
III. Parental Consent .....	6
IV. Reimbursement for Unilateral Placements .....	8
V. Mediation.....	111
VI. Discipline.....	177
A. Off-Campus Conduct .....	177
B. Serious Bodily Injury .....	19
VII. Section 504 .....	200
A. Eligibility .....	200
B. Provision of a FAPE .....	222
C. Right to a Hearing .....	255
VIII. Protection of Pupil Rights Amendment (PPRA).....	266

## **I. Overview**

The purpose of this material is to review a selection of recent decisions which have been rendered in the field of special education law. This material does not cover all aspects of the law, nor does it contain a complete discussion of all recent cases. The goal of this material is to provide the special education administrator with the tools necessary to interpret certain provisions of the statutory and regulatory law pertaining to the IDEA and Section 504 of the Rehabilitation Act.

## **II. IEP Development**

### **A. Present Levels, Annual Goals, Services, and Special Factors**

IEPs must include, among other things, a statement of the student's present levels of academic achievement and functional performance, including:

- i. How the child's disability affects the child's involvement and progress in the general curriculum; or
- ii. For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities.

34 C.F.R. § 300.320(a)(1)(i)-(ii). IEPs must also contain measurable annual goals, including academic and functional goals designed to:

- i. Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- ii. Meet each of the child's other educational needs that result from the child's disability.

34 C.F.R. § 300.320(a)(2)(i)(A)-(B). Finally,<sup>1</sup> IEPs must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:

- i. To advance appropriately toward attaining the annual goals;

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<sup>1</sup> This section does not contain an exhaustive list of items that must be included in an IEP. A complete list of the required elements of an IEP may be found at Ed 1109.01.

- ii. To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- iii. To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 C.F.R. § 300.320(a)(4)(i)-(iii).

When developing an IEP, the IEP Team must consider, among other things, the following five (5) special factors:

1. In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
2. In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;
3. In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;
4. Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode; and
5. Consider whether the child needs assistive technology devices and services.

34 C.F.R. § 300.324(a)(2)(i)-(v); Ed. 1109.03(h).

The case of Baltimore City Public Schools, 110 LRP 5526 (Md. State Educational Agency (SEA) Nov. 4, 2009) illustrates the importance of ensuring that the above items are included in the IEP and that the factors described above are considered by the IEP team.

**Facts:** The student, a seven year old who received services under the IDEA due to a developmental delay, enrolled at [ JEMS (EMS), a school within the Baltimore City Public School (BCPS) system on June 11, 2009. Prior to that date, the student resided in another district and attended a private school, where he received occupational therapy services under a service plan.

On May 1, 2009, the student's parent called EMS to request a team meeting; she did not inform EMS that her child had been identified as a student with a disability or that he had a service plan. A team meeting was tentatively scheduled for May 28, 2009, but was rescheduled to June 4, 2009 at the parent's request. On June 2, 2009, the parent requested that the June 4, 2009 meeting be cancelled; it was rescheduled for June 9, 2009.

The team met on June 9, 2009, and the parent was informed that she would need to provide documentation that she was a resident of BCPS before the meeting could proceed. The parent was told that the meeting would be rescheduled once she provided documentation of her residency. The parent did not receive a written prior notice.

On June 11, 2009, the parent provided BCPS with proof of residency, and enrolled her child at EMS. She also provided EMS with a copy of the student's service plan, which identified the student as a student with a developmental delay. The service plan called for 30 minutes of occupational therapy per week.

School staff did not reschedule the IEP Team meeting.

On September 9, 2009, the parent requested that an IEP team meeting be scheduled, and a team meeting was convened on September 30, 2009. During that meeting, the team reviewed the service plan and determined that a reevaluation was needed to ensure that all of the needs that arose from the student's disability were identified and addressed in an IEP. The team recommended an educational assessment, a classroom observation, and a speech language evaluation. Parent agreed to those assessments that same day.

On October 14, 2009, the team met again to review the evaluation data, which included the results of the educational assessment, the classroom observation, an observation conducted by the speech language therapist, and parental concerns. The evaluative data identified academic needs in the areas of reading, math, written language and fine motor skills, and the draft IEP contained goals and services to address these areas of need.

The evaluative data also identified concerns in the areas of organization, self-control, classroom participation, work completion, and concerns regarding the student's social interaction. The present levels of performance in the IEP did not indicate needs

in these areas, and there was no documentation of the team's decision regarding whether the concerns raised in the evaluations impacted the student's education. However, the IEP contained accommodations to assist the student with improving his organization, self-control, classroom participation and work completion. The IEP did not address the concerns raised regarding social interactions.

During the meeting, the speech-language therapist reiterated the September 30, 2009 determination that a speech/language assessment was necessary. Despite the fact that the parent agreed to the assessment, it was not conducted, and the team did not reconvene to discuss the student's speech/language needs.

Parent filed a complaint with the SEA, in which she raised the following issues.

**Issues:**

1. Whether the BCPS has provided the parent with written prior notice of the IEP Team's determinations in accordance with 34 C.F.R. § 300.503; and,
2. Whether the BCPS has ensured that all of the student's needs that result from his disability have been identified and whether the BCPS has developed an IEP to address those needs in accord with 34 C.F.R. §§ 300.101 and 300.324.

During the course of the investigation, the SEA also reviewed whether the district had an IEP in place for the student at the start of the 2009-2010 school year.

**Holding:** As to all three issues, the SEA found for the parent.

With regard to issue one (1), the SEA found that the district did not provide the parent with a written prior notice at the June 9, 2009 meeting. This amounted to a procedural violation of the IDEA.

With regard to issue two (2), the SEA found that the IEP team considered the evaluative data regarding the student's academic and fine motor needs and developed an IEP that addressed those issues. However, the assessment data also identified concerns regarding the student's behavior and social interaction, and the present levels of performance did not indicate that the student had needs in those areas, nor was there any documentation of the basis for a determination by the team that those areas of concern did not impact the student's education. Thus, the SEA found that the district violated the IDEA.

Finally, the SEA found that the district did not have an IEP in place for the student at the start of the school year, and that the district had failed to make a

determination regarding the student's speech/language needs. Thus, the district violated the IDEA.

As a result of these violations, the district was required to convene to determine the amount and nature of compensatory services or other remedy for the student. The district was also required to take steps to determine whether these violations were systemic or case-specific. If systemic, further action would be required, including documentation of training.

***Practice Pointer:*** *When considering evaluation data, all areas of need or concern identified in the evaluation should either be addressed in some manner the IEP, or the meeting minutes should clearly reflect that a specific area of need or concern does not impact the student's education.*

### **III. Parental Consent**

Parents may revoke consent for services at any time. See 34 C.F.R. § 300.9(c)(1). This includes providing written revocation of consent for the receipt of special education and related services at any time after the child is initially provided with the same. 34 C.F.R. § 300.9(c)(3).

If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency:

- i. May not continue to provide special education and related services to the child, but must provide written prior notice before ceasing the provision of special education and related services;
- ii. May not request due process or mediation to obtain agreement or a ruling that the services may be provided;
- iii. Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and
- iv. Is not required to convene an IEP Team meeting or develop an IEP for further provision of special education and related services.

34 C.F.R. § 300.300(b)(4).<sup>2</sup>

Recently, the Office of Special Education Programs (OSEP) was asked to provide guidance regarding what LEAs are required to do when parents, both with legal authority to make educational decisions for their child, disagree on the revocation of consent for special education and related services. Letter to Cox, 110 LRP 10357 (OSEP Aug. 21, 2009).

OSEP noted that under 34 C.F.R. § 300.9(c), when a child is receiving special education services under Part B of the IDEA, a parent may revoke consent for his or her child's receipt of special education and related services at anytime. The regulations also provide that the biological or adoptive parent, when attempting to act as the parent under Part B must be presumed to be the parent unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. 34 C.F.R. § 300.30(b)(1). "Therefore, as long as the parent has the legal authority to make educational decisions for the child, the LEA must accept either parent's revocation of consent for the purposes of 34 C.F.R. § 300.300(b)(4). Upon revocation of consent for special education and related services, the LEA must provide the parent with prior written notice in accordance with 34 C.F.R. § 300.503 before ceasing the provision of special education and related services." Id. (citing 34 C.F.R. § 300.300(b)(4)(i)) (emphasis added).

If a parent, including a parent other than the parent who revoked consent, later requests that his or her child receive special education and related services, an LEA must treat this request as a request for an initial evaluation under 34 C.F.R. § 300.301, rather than as a reevaluation under 34 C.F.R. § 300.303.

Finally, OSEP clarified that a parent does not have the right to request due process to overcome the other parent's revocation of consent for special education and related services. A parent may only file a due process complaint with respect to actions by a "public agency," not by another parent. A decision by one parent to revoke consent is not an action by a public agency, and when consent is revoked, the public agency has no discretion – as a matter of law, it must provide written notice to the parents, and then cease providing special education and related service consistent with the parental revocation.

***Key Point:*** *If both parents have legal decision-making responsibility, then either parent may revoke consent of their child's receipt of special education and related*

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<sup>2</sup> The State Department of Education (DOE) has entered rule-making, and has proposed to revise section Ed 1120.05 of the New Hampshire Rules for the Education of Children with Disabilities to incorporate this provision of the Federal Regulations. See proposed Ed 1120.05(e), available at <http://www.ed.state.nh.us/education/laws/documents/1102rs112005dg112006.pdf> (accessed April 7, 2010). The DOE has also proposed to add Ed 1120.05(g), which states "A public agency shall not use a parent's refusal to consent to one service or activity to deny the child services, benefits, or activities that the parent has agreed to."

services. *Before stopping the provision of special education and related services, a written prior notice should be provided to both parents.*

#### **IV. Reimbursement for Unilateral Placements**

If the parents of a child with a disability enroll their child in a private school without the consent of the public agency, a court or hearing officer may order the public agency to reimburse the parent for the cost of that enrollment if the court or hearing officer finds that the public agency had not made a FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. 34 C.F.R. § 300.148(c). A parental placement may be found to be appropriate even if it does not meet State standards that apply to education provided by the SEA or LEA. *Id.*

The United States District Court for the District of New Hampshire recently decided a case involving a dispute over whether public school placement was appropriate and a request for reimbursement by the parents. Samantha B. v. Hampstead School District, 2009 WL 5217035 (D.N.H. Dec. 30, 2009).

**Facts:** Samantha B. was eligible for special education and related services under the IDEA due to a specific learning disability (based on a diagnosis of non-verbal learning disorder) and other health impairment (due to a diagnosis of ADHD). Samantha's learning disability impacted her academic and social/emotional development (for example, she may misperceive a friendly pat on the back as "hitting" or a loud voice or firm command as "yelling"). While she was in pre-school, she was assigned a full-time aide. She attended Hampstead Central School from first through fourth grade; during that time, she continued to have an aide assigned to her, either 1:1 or shared.

At the end of her fourth grade year, the district proposed to place Samantha at the fifth grade at Hampstead Middle School in an inclusion program, where she would participate in the majority of her classes in a regular classroom with non-disabled peers. She would receive pull-out reading instruction. Parents objected to the proposed IEP, expressing concerns about her academic, social, and physical development, and asserting that the IEP required additional accommodations and contemplated a high level of support from Samantha's educational assistant. Parents also indicated that they believed that the district should consider placing Samantha in a specialized day placement; ultimately they requested that the district consider placing Samantha at Learning Skills Academy.

Samantha's IEP team met again to make additional revisions to Samantha's IEP. Samantha's parents refused to accept the IEP, and requested due process. The parties reached a mediated settlement agreement, pursuant to which the district agreed to: 1) supplement the IEP with additional services, 2) hire an educational consultant to help the staff understand and accommodate Samantha's needs, and 3) pay for five

counseling sessions with Samantha's private psychologist. The parents agreed to accept Samantha's IEP without exceptions. The IEP was modified in accord with the agreement, and Samantha's parents accepted it on August 23, 2007.

Samantha began her fifth grade school year at Hampstead Middle School. She remained there for four months; in January 2008, her parents withdrew her from Hampstead and placed her at Learning Skills Academy. They requested due process, seeking reimbursement for their unilateral placement.

**Holding:** For the district. The placement at Hampstead Middle School was reasonably calculated to provide Samantha with educational benefits and thus provided her with a FAPE. There was credible evidence that Samantha's education in the public school had its difficulties: Samantha reported feeling overwhelmed and anxious by the workload and multiple transitions from her classes to her locker and back to class. She was removed from school for 2 weeks due to extreme anxiety. However, despite these emotional/social issues, Samantha was making progress in those areas. She was also making academic progress and earned better than passing grades in all subjects. With the exception of reading, Samantha was taught the same curriculum as her non-disabled peers. Thus, her placement conferred some academic benefit as required by the IDEA.

The court noted that "[g]iven the nature of Samantha's non-verbal learning disability, placement at HMS might not have been appropriate if it did not foster social and emotional progress as well [as academic progress]." *Id.* at \*8. However, the record supported the hearing officer's conclusion that Samantha "was making meaningful social/emotional progress in dealing with the typical problems that a coded middle school child would have." *Id.* Although there were significant disruptions in her social/emotional progress at the beginning of the school year, Samantha "was beginning to learn to process her anxiety using a variety of breathing techniques and structured exercises and to better 'read' social interactions through role playing and social coaching." *Id.* In addition, "[m]ultiple staff members noted that by the end of the fall, Samantha was much happier and more capably interacting with her peers. . . . By late fall, Samantha's comfort level at Hampstead Middle School improved to where she ran for school student council and auditioned for and performed in the school play." *Id.* Finally, the court noted that the IDEA's preference for placement in the least restrictive environment supported the Hampstead Middle School placement.

The next reimbursement case was decided by the United States District Court for the District of Oregon, and was a decision that followed the United States Supreme Court's June 2009 decision in Forest Grove School District v. T.A., 52 IDELR 151, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2484 (U.S. June 22, 2009).<sup>3</sup> After the Supreme Court decided that

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<sup>3</sup> This decision was discussed at length in "Special Education Case Law: An Overview of Recent Decisions," which was presented to the New Hampshire Association of Special Education Administrators on August 3, 2009.

the Individuals with Disabilities Education Act does not provide a categorical bar to reimbursement for students who have not previously received special education and related services, the matter was remanded to the United States District Court for the District of Oregon for a determination as to whether T.A.'s parents were entitled to reimbursement for the costs they incurred in sending T.A. to Mt. Bachelor Academy (MBA). Forest Grove Sch. Dist. v. T.A., \_\_\_ F.Supp.2d \_\_\_, 2009 WL 4884465 (D. Or. Dec. 8, 2009). The relevant facts are as follows:

T.A. was enrolled in the Forest Grove School District from kindergarten until the spring semester of his junior year in high school. At that time, his parents placed him in a residential private school. Throughout his years in public school, T.A. experienced difficulty paying attention in class and completing his school work, but he successfully passed from grade to grade due, in part, to extensive at-home help from his parents and sister.

T.A. never received special education from the district. However, he was evaluated for a suspected learning disability in 2001. On June 13, 2001, T.A.'s evaluation team concluded that he did not have a learning disability and that he was not eligible for special education. T.A.'s mother agreed. In 2002, T.A. began using marijuana, and by early 2003, he was exhibiting noticeable personality changes. On February 11, 2003, he ran away from home. His parents took him to a psychologist, and eventually to a hospital emergency room.

In March 2003, the psychologist diagnosed T.A. with ADHD, depression, math disorder, and cannabis abuse. He recommended a residential program for T.A.; thereafter, parents enrolled him in a private academy.

Shortly after enrolling the student in private school, parents requested due process regarding the student's eligibility for special education and related services. In June 2003, the district conducted an evaluation, and in July 2003, a team determined that the student did not qualify for services under the IDEA because his ADHD did not have a sufficiently significant adverse impact on his educational performance. The parents kept the student at the private school for his senior year (2003-04 school year).

In September 2003, the parties participated in an administrative hearing, and in January 2004, the Hearing Officer issued an opinion in favor of the parents, finding that the student had a disability, that the district failed to offer him a free, appropriate public education ("FAPE"), and that the district was responsible for the costs associated with the parents' unilateral placement.

**Holding:** For the District. In determining whether reimbursement was appropriate, the court relied on general principles of equity and considered "all relevant factors," as set forth by the Supreme Court in Forest Grove. 129 S.Ct. at 2496. The court found that the parents did not provide the district with prior notice of the transfer to

MBA or request an evaluation until after he began attending MBA. In addition, the parent's initial agreement with the team's determination that T.A. was not eligible for services precluded them from obtaining reimbursement from March 24, 2003 through August 26, 2003.

With regard to the period after August 26, 2003, the court found that the parents were not entitled to reimbursement because the primary reason for enrolling T.A. in MBA was to address his drug abuse. In particular, the application for admission indicated that "the enrollment was precipitated by inappropriate behavior, depression, opposition, drug use, runaway." Forest Grove, \_\_\_ F.Supp.2d \_\_\_, 2009 WL 4884465 at \*4 (internal quotations omitted). The application made no reference to T.A.'s ADHD or difficulty with school work. The court noted that "the District's responsibility under the IDEA is to remedy the learning related symptoms of a disability, not to treat the underlying disability, or to treat other, non-learning related symptoms." Id. (emphasis added).

**Key Point:** *If the primary purpose for a unilateral placement is not educational in nature, then parents may be precluded from obtaining reimbursement for the costs associated with the placement.*

## V. Mediation

Each state must create procedures to allow parties to resolve disputes through mediation. 20 U.S.C. § 1415(e)(1); 34 C.F.R. § 300.506. The procedures must ensure that mediation is voluntary and is not used to deny or delay a parent's right to a due process hearing. 20 U.S.C. § 1415(e)(2)(A). If an agreement is reached during the mediation, the parties must execute a legally binding agreement. 20 U.S.C. § 1415(e)(2)(F). The agreement must also:

- State that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;
- Be signed by the parent(s) and a representative of the LEA who has authority to bind the LEA; and
- Be enforceable in any State court of competent jurisdiction or in a district court of the United States.

20 U.S.C. § 1415(e)(2)(F). Mediation discussions are confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. 20 U.S.C. § 1415(e)(2)(G).

In New Hampshire, mediation is available in accord with RSA 186-C:23. Participation in mediation is voluntary and mediations are confidential; in addition, any information, documents, statements, or evidence disclosed during mediation shall not be used in a subsequent proceeding. RSA 186-C:23, III.

RSA 186-C:24 describes the procedure for mediation in New Hampshire. Mediation begins when either the parent or the district file a request with the Department of Education. RSA 186-C:24, II(a). The request must “specify the issue or issues in the dispute and the relief sought.” *Id.* The mediation must be conducted within 30 calendar days after the request is received by the Department. RSA 186-C:24, II(b). At least 10 days prior to the mediation, each party must submit a summary of the significant aspects of their case. Ed 205.03(h). The summary must be sent to the mediator and the parents; copies of relevant documents may be attached to the summary, which is limited to four pages. *Id.*

The mediator’s role is to facilitate communication, to define the issues and explore alternatives, and to remain neutral. RSA 186-C:24, II(c)(1)-(3). If the mediation results in an agreement, it must be reduced to writing and signed by the parties. RSA 186-C:24, II(e).

Settlement agreements, including mediated agreement, are contractual in nature, and are governed by the principles of contract law. *Poland v. Twomey*, 156 N.H. 412, 414 (2007). If a court is called to interpret a written agreement, it will give the language used by the parties its reasonable meaning, as “intended by the parties when they wrote [the agreement].” *Behrens v. S.P. Construction Co., Inc.*, 153 N.H. 498, 503 (2006). If a contract is unambiguous, courts “will determine the parties’ intent from the plain meaning of the language used.” *Pope v. Lee*, 152 N.H. 296, 302 (2005) (citation omitted).

*Irvine Unified School District*, 53 IDELR 204 (Ca. SEA Sept. 28, 2009), illustrates the importance of drafting an unambiguous mediated settlement agreement:

**Facts:** Student, a 16-year old with type-one diabetes, had been insulin dependent for most of his life. He had a history of tardiness and absences from school, a history of failing to complete homework and long-term assignments, and he failed many of his classes during high school. In March 2008, the student was evaluated and it was determined that he did not qualify for special education services under the IDEA. Instead, the district offered to try various general education interventions. In July 2008, parents obtained an independent evaluation; the evaluator recommended that the student be identified for services due to an other health impairment. Parents filed a request for due process, challenging the district’s eligibility determination. In July 2008, the parties entered into a settlement agreement, which provided for a Section 504 plan, and which contained the following relevant provisions:

- (1) a release of any obligation by the district to provide any other educational services not referenced in the agreement, or reimbursement for any educational services or assessments, other than those expressly set forth in the agreement;
- (2) a release of any claim of compensatory education that may exist to date or that may arise as a result of the Student's educational placement through the 2008-2009 school year; and
- (3) a release of any procedural or substantive violation of IDEA which may have occurred to date or which may occur as a result of the agreement.

(emphasis added).

The parties developed and agreed to a Section 504 plan in September 2008. By January 2009, however, the student's truancy had not improved and the district convened a meeting of the School Attendance Review Board to discuss the same. The student also continued to fail his classes; as a result, the district decided that it was necessary for the student to enroll in an alternative public school, designed for pupils who needed to make up high school credits. Parents initially agreed with the transfer, but later revoked their consent, informing the district that they had initially agreed because they were afraid that the district would refer them to the District Attorney for a truancy prosecution. Parents then filed for due process, alleging in part, that the district violated its child find duties.

The district argued that the terms of the July 2008 settlement agreement (paragraph 3, above) barred the parents from raising the child find issue through the end of the 2008-2009 school year.

**Issue:** Did the district comply with child find?

**Holding:** For the parents. The settlement agreement clearly released the district from any claims through July 28, 2008, the date the agreement was signed. However, the language pertaining to the waiver of future claims and services was ambiguous.

. . . The language 'as a result of this Agreement' is very narrow and limited in scope compared to the other waiver language in the agreement. By contrast the language in the agreement which waives claims incurred prior to the date of the settlement agreement is broad and unequivocal. There is no doubt that all claims prior to July 28, 2008 are waived. . . . Even the language regarding waiver of compensatory education is broader than the language at issue. The waiver of claims for compensatory education waived any claim through the end of the 2008-

2009 school year. Compared to that language the 'as a result of this Agreement' language is far more limited.

Because of the limited language, it does not appear that the parties intended the waiver to affect all substantive or procedural denials of FAPE that Student might raise for the entire school year. If they had intended that, they would have stated that, just as they did for compensatory education or past claims.

After reviewing the entire agreement, the court held that the intent of the agreement was to preclude the student from raising any claims regarding child find / eligibility up to and including the date that the Section 504 plan went into effect, and to give the district a reasonable time to see if the 504 plan would be effective. However, the agreement did not release the district from liability for the entire school year, and by January 2009, the district knew, or should have known that the Section 504 plan was not working and that further interventions were necessary. Accordingly, the hearing officer found for the parents.

**Practice Pointer:** *If a court is asked to interpret an ambiguous agreement, it will “determin[e] what the parties, under an objective standard, mutually understood the ambiguous language to mean.” Foundation for Seacoast Health v. HCA Health Services of New Hampshire, 157 N.H. 487, 500 (2008) (internal quotations and citation omitted). Courts will “examine the agreement as a whole, the circumstances surrounding the execution and the object intended by the agreement, while keeping in mind the goal of giving effect to the intention of the parties.” Id. (internal quotations and citation omitted).*

*Thus, it is important to ensure that mediation agreements unambiguously set forth the terms of agreement. A general release provision should indicate the type of claim that is being released (ex: IDEA, Section 504) and the duration of the release (up to and including the date of the agreement and/or into the future to a date certain, such as the end of a specific school year)*

Mediation will not always be successful, and taking advantage of post-mediation settlement opportunities may assist in reducing your district's exposure if the matter proceeds to a hearing. After an unsuccessful mediation, you should:

- Define your district's ongoing risk.
- Consider returning to mediation.
- Reduce your last and best offer to writing: while the IDEA allows parents who prevail to recover attorney's fees, it also states that fees may not be awarded and costs may not be reimbursed for “services

performed subsequent to the time of a written offer of settlement to a parent if –

- (A) The offer is made at least 10 days prior to the date the due process hearing begins;
- (B) The offer is not accepted within 10 days; and
- (C) The court or hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.”

34 C.F.R. § 300.517(c)(2)(i).

Thus, if you are not able to reach agreement at a resolution session or mediation, committing your best offer to writing and sending it to the parents in accord with the IDEA may allow you to reduce your district’s level of exposure.

However, when reducing your offer to writing, you should not reference the mediation or the discussions that occurred during the mediation. Mediations are confidential, and by referring to them in your written offer you run the risk that a court will refuse to consider your written settlement offer.

The case of J.D. v. Kanawha County Bd. of Educ., 571 F.3d 381 (4th Cir. 2009), illustrates this point.

**Facts:** In March 2005, the parents and the district attended a mediation session in an attempt to resolve issues pertaining to the provision of a free, appropriate public education (FAPE) to J.D. During the mediation, the parties drafted an agreement; however, the parents opted not to sign the agreement, and instead, on March 29, 2005, they filed for due process.

On May 13, 2005, the district sent a letter to the parents, stating:

Please accept this letter as the written offer of Kanawha County Schools to settle the due process hearing request on behalf of [J.D.], on the terms and conditions set forth in the settlement agreement reached but not signed at the mediation session held on March 11, 2005.

The parents rejected this offer, and the matter proceeded to a hearing on the following five (5) issues:

1. Whether the March 2005 IEP provided sufficient individual instruction;
2. Whether the district erred by implementing a new IEP in March 2005, after the parents filed for due process;
3. Whether the school properly conducted a multi-disciplinary evaluation team assessment;
4. Whether the school owed J.D. compensatory speech and language services; and
5. Whether J.D. should have received ESY services in 2004.

The hearing officer found for the District on the first issue, and for the student on the remaining issues. He ordered the district to provide the student with a new occupational therapy evaluation and with compensatory speech and language services, and to convene a team meeting to determine whether he required compensatory ESY services and any other assistance.

The parents appealed the first issue, and requested \$112,292 in attorney's fees, on the basis that they had prevailed on four of the five issues before the hearing officer. The district argued that 20 U.S.C. § 1415(i)(3)(D)(i) barred the fee award because the district had made a written settlement offer and the settlement offer was more favorable to the parents than the relief eventually provided by the hearing officer. The district provided the court with a copy of the settlement letter and the draft agreement.

The District Court refused to consider the May 13, 2005 settlement offer on the basis that the mediation was confidential, and awarded the parents \$34,072 in attorney's fees.<sup>4</sup> See 20 U.S.C. § 1415(e)(2)(G). The district appealed that decision to the Fourth Circuit Court of Appeals.

**Holding:** For the parents. Under the IDEA, "discussions that occur during the mediation process . . . may not be used as evidence in any subsequent due process hearing or civil proceeding." J.D., 571 F.3d at 385 (citation omitted). The district's settlement offer explicitly referred to the mediation discussions by offering to settle "on the terms and conditions set forth in the settlement agreement reached but not signed at the mediation session." The district could not "circumvent the confidentiality requirements by referring to the mediation in its offer and introducing that document into a civil proceeding." Id. (internal quotations omitted). The court noted that the district could have offered to settle for the same terms that were offered during the mediation without referring to the mediation in its written settlement offer.

**Key Point:** *Mediation sessions are confidential. If you left mediation with your last and best offer on the table, you can (and should) reduce that offer to writing in an attempt to limit your fee exposure. However, the written offer should make no reference to the mediation.*

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<sup>4</sup> The fee award was reduced due to the parents' limited success.

## VI. Discipline

### A. Off-Campus Conduct

Recently, the Illinois SEA had occasion to hear a case involving a dispute over a manifestation determination. The conduct underlying the manifestation determination proceeding involved a Facebook posting that occurred when the student was at home, during a time period when the student was attending an interim-alternative placement. See Township High School District 214, 110 LRP 14705 (Ill. SEA Feb. 4, 2010).

**Facts:** At the time of the complaint, the student was a 17-year old enrolled as a junior in public school. He was eligible for special education and related services due to a specific learning disability and an other health impairment, as a result of bipolar disorder and ADHD.

At the beginning of the 2009-10 school year, the student was involved in several bullying incidents: his car was egged during a football game, his car was keyed with the words “f\_\_\_ you,”<sup>5</sup> he was called “daisy” by other students, he was hit in the head with balls during a dodge ball game in PE (after he had already been disqualified from the game), he was pushed into a locker and a urinal, and had garbage smeared on him and his backpack after PE. The day of the garbage incident, the student was involved in an altercation with another student; the conduct was found to be a manifestation of his disability, but his team agreed to a 45 day interim alternative placement.

By November 23, 2009, the student had been placed at the interim setting; however, on that particular day, he was home. The student used Facebook to send the following private message to another public school student, C.C.: “when I come back to school I’m going to look for u and kill u.” C.C. responded via Facebook: “dude you keep saying that sh\_\_ u aren’t coming back to school.” C.C. also used Facebook’s instant message feature to ask Student “Why did u say that on Facebook.” Student responded to the instant message by telling C.C. to call him and giving him his cell phone number. When C.C. called the student, he was at the grocery store with his mother, who listened to the conversation. Mother reported that the student asked C.C. why he bullied him, and C.C. said “I don’t know man, I’m sorry.” C.C. subsequently reported the entire incident to school officials and told them that during the telephone conversation, the student said “I should have beat your ass”; mother denied hearing the student say that. The school accessed C.C.’s Facebook page and printed out the messages.

Following this incident, the student was recommended for expulsion for violating school policy, which prohibited conduct that interfered with, disrupted, or adversely affected the school environment, school operations, or an educational function, including conduct that may reasonably be considered to be a threat or an attempted intimidation of a staff member or endanger the health or safety of students, staff or

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<sup>5</sup> There was no evidence that car was keyed on school grounds.

school property. The code of conduct also stated that the school was authorized to discipline students for disobedience or misconduct, including but not limited to “[e]ngaging in hazing or any kind of aggressive behavior that does physical or psychological harm to another or any urging of other students to engage in such conduct. Prohibited conduct includes any use of violence, force, noise, coercion, threats, intimidation, fear, harassment, bullying, hazing or other comparable conduct.”

The student’s team conducted a manifestation determination on 12/17/09 and on 1/5/10. An expulsion hearing was scheduled for 1/5/10, immediately after the manifestation meeting. Parents presented evidence from an independent evaluation, indicating that the student’s behavior (with regard to the Facebook postings) was a manifestation of his disability. However, the District team members believed that the student’s conduct was intentional – he had to log in to Facebook, search for the person with whom he wanted to communicate, indicate that he wanted to send a private message, and type and send the message. The student’s team determined that his conduct was not a manifestation of his disability; ultimately, the student was expelled for the remainder of the 2009-2010 school year, and for the entire 2010-2011 school year.

Parents filed a request for an expedited due process hearing on January 5, 2010.

**Issues:**

1. Whether the student’s behavior resulting in the recommendation of expulsion was a manifestation of his disability; and
2. Whether expulsion was proper as a result.

**Holding:** For the parents. When conducting a manifestation determination, the team must answer two questions: 1) was the student’s conduct caused by, or did it have a direct and substantial relationship to his/her disability and 2) was the student’s conduct a direct result of the district’s failure to implement his/her IEP? If the answer to either of these questions is yes, then the conduct is deemed to be a manifestation of the student’s disability. 20 U.S.C. § 1415(k)(1)(E)(i)-(ii).

The Hearing Officer found that the testimony from the parents’ independent evaluator was credible, and that the testimony of the District witnesses ran counter to their assertions that the student planned the threat and intended the consequences. In particular, District witnesses testified that the student had difficulty paying attention, poor organizational skills, was easily distractible, could experience severe ups and downs in moods with an inability to self regulate, and exhibited poor executive functioning, including difficulty with, or an inability to plan.

Thus, the Hearing Officer reversed the determination that the student’s behavior was not a manifestation of his disability, and ordered that the student return to the public school placement. The student’s IEP Team was ordered to convene to determine an

appropriate plan, and the expulsion was reversed and ordered to be expunged from the student's record.

## **B. Serious Bodily Injury**

School personnel may remove a child to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child:

1. Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

34 C.F.R. § 300.530(g).

In the case of Bisbee Unified School District No. 2, 110 LRP 7292 (Ariz. SEA Jan. 6, 2010) the Arizona State Educational Agency was asked to interpret the "serious bodily injury" provision.

The relevant facts are as follows: the student, an elementary school student with high-functioning autism, had a behavioral intervention plan (BIP) as part of his IEP. The student was "large and very strong for his age, and c[ould] be very aggressive in his behaviors. He ha[d] exhibited violence towards teachers and other students in the past when he [wa]s experiencing these aggressive behavior 'episodes.'"

On September 2, 2009, the student had an aggressive episode. School staff followed the BIP, but the student did not calm down and his behaviors continued to escalate. The classroom was cleared of other students and the principal came to the room to assist in calming/controlling the student. The student was laying on the floor, throwing items, and reacting violently; thus, the teacher and his aide decided to physically restrain the student by holding down his arms and legs so that he would not hurt himself or them. The principal assisted by holding down the student's legs. At some point during the incident, the principal stopped holding the student's legs and began to use his cell phone to call for more assistance. The student believed that the principal was calling his parents to have them come to the school; the student lunged at

the principal and tried to grab the phone. During the altercation, the student kicked the principal and the principal felt a “sharp pain.” The principal continued trying to restrain the student.

A police officer assigned to the school arrived shortly thereafter, and determined that, for safety reasons, it was best to place the student in handcuffs. The student was handcuffed until the parent arrived and student calmed down. Later that day, the principal filed assault charges against the student. The principal also went home because his knee and shoulder hurt; however, he did not call an ambulance or go to an emergency room and he did not see a doctor until September 24, 2009 (22 days later). During the hearing, the principal testified that his knee was swollen and his shoulder hurt after the incident. The day after the incident, the principal filled out Worker’s Compensation forms.

The student was suspended for 6 days, and a manifestation meeting was held on September 14. The IEP team, including the principal, determined that the conduct was a manifestation of the student’s disability but decided to place the student in an interim alternative educational setting (IAES) for 45 days because the student caused serious bodily injury to the principal. The IAES placement was at the high school, in a room with a one-to-one instructor who was supervised by a special education teacher. The student worked on his IEP goals and the general education program and remained in that placement for 45 days. The student made good progress in that setting.

With regard to the placement at the IAES, the hearing officer found for the parent. The student did not cause serious bodily injury to the principal. Serious bodily injury requires “extreme physical pain,” and the evidence did not support a finding that the student caused the principal extreme physical pain. In particular, the principal did not testify that he experienced extreme or severe pain in his knee, and his acts following the incident did not support a finding of extreme physical pain. The principal “did not cry out in pain, drop to the floor, become unconscious, call for an ambulance, or do anything else that one would expect when a person is in ‘extreme’ pain.” The hearing officer found that while the principal was in pain, he was not in “extreme” pain. Thus, placement in the IAES was improper and violated the IDEA.

However, the IAES placement provided the student with meaningful benefit, and enabled him to continue to receive services and make progress toward achieving his IEP goals; thus, compensatory education was not necessary.

## **VII. Section 504**

### **A. Eligibility**

The United States Supreme Court recently declined to hear a case involving eligibility under Section 504. In Ellenberg v. New Mexico Military Institute, 109 LRP

41802, 572 F.3d 815 (10th Cir. 2009), cert. denied 130 S. Ct. 1016 (U.S. Dec. 14, 2009), the Tenth Circuit Court of Appeals held that a student's eligibility under the IDEA does not automatically establish eligibility under Section 504 and the ADA. The relevant facts are as follows:

The New Mexico Military Institute (NMMI), a state educational institution, denied plaintiff admission because of behavioral problems at a residential treatment facility, past drug use, level of medication requirements, and need for continued counseling. At the time NMMI denied the request for admission, plaintiff was eligible for special education services under the IDEA. Plaintiff sued, alleging that the admission decision violated the IDEA, Section 504 and the ADA. The district court found that NMMI had complied with the IDEA and dismissed that claim; it also held that compliance with the IDEA meant that the Section 504 and ADA claims failed as well. Plaintiff appealed, and the court found that the plaintiff had failed to exhaust her administrative remedies; thus, the district court should not have addressed the merits of the IDEA claim. See Ellenberg v. New Mexico Military Institute, 478 F.3d 1262, 1271-73 (10th Cir. 2007). The appeals court remanded the case to the district court, with instructions to dismiss the IDEA claim for lack of jurisdiction; it also instructed the court to address the Section 504 and ADA claims, which were not barred by the failure to exhaust.

On remand, the district court found that the plaintiff failed to make a prima facie showing that she was a person with a disability under Section 504 and the ADA; the court specifically held that plaintiff's "eligibility for special education services under the IDEA and her existing [IEP] did not automatically establish a prima facie showing of disability under Section 504 and the ADA." Ellenberg, 109 LRP 41802.

On appeal, plaintiff argued, in relevant part, that her eligibility for special education and having an IEP under the IDEA made her, by definition, a person with a disability under Section 504 and the ADA.

The Tenth Circuit affirmed, holding that the plaintiff's "failure to offer evidence that her disability substantially impairs a major life activity is fatal to her prima facie case under Section 504 and the ADA." In so holding, the court rejected the plaintiff's argument that her IDEA eligibility automatically entitled the plaintiff to eligibility under Section 504 and the ADA. The court noted that the plaintiff would still have to demonstrate that her disability substantially limited a major life activity, in this case, learning. The "mere receipt of an [IEP] under the IDEA [does not] by itself demonstrate a substantial limitation." Id. The court did acknowledge that "an IDEA disability may – and in the majority of cases probably will – substantially limit a major life activity. But the point here is that it need not, and thus a plaintiff must individually show substantial limitation." Id. Thus, the plaintiff's failure to argue that she was substantially limited in a major life activity was fatal to her Section 504 and ADA claims.

## **B. Provision of a FAPE**

In the case of Palm Beach County (FL) School District, 52 IDELR 109 (OCR, Southern Division, Atlanta, Feb. 13, 2009), parents filed a complaint with OCR, alleging that the district denied the student, a 5-year old kindergartener, a free and appropriate public education by failing to provide him with related aids and services designed to meet his individual educational needs. The student was diagnosed with Type 1 diabetes and required blood sugar level tests and food monitoring during school hours.

Prior to the student's enrollment at the school, the parent requested that a private aide accompany the student throughout the day to monitor him for signs of high or low blood sugar, test his blood sugar levels at the appropriate times, and monitor what he ate for lunch. On August 11, 2008, the district conducted a 504 meeting and developed a 504 plan. The plan required that a minimum of three staff members be trained to provide services for the student, including identification of physical signs of blood sugar changes, administration of glucagon and possible insulin injection. The plan also required that staff be able to provide this care at the school and outside of regular school hours to allow for participation in extracurricular activities and field trips. The plan did not include a 1:1 aide. The district implemented this plan, including providing the required training, during the 2008-2009 school year.

OCR found that the district developed and implemented the 504 plan, and that the related aids and services in the plan met the student's individual educational needs. The student did not require a 1:1 aide.

In Boston (MA) Public Schools, 53 IDELR 199 (OCR, Eastern Division, Boston, June 29, 2009), parents filed a complaint with OCR, alleging that the District violated Section 504 by:

1. Failing to conduct an appropriate evaluation, ensuring that placement decisions were made by a group of knowledgeable persons, before a significant change in placement in April 2007; and
2. Denying the student a free appropriate public education (FAPE) by failing to provide educational services when the student was excluded from school for a period of time during April and May 2007.

During the course of its investigation, OCR added the following issue:

3. Did the district deny FAPE by failing to take steps to overcome the parents' rejection of the non-initial placement proposal?

OCR found the following facts:

At the time the complaint was filed, the student was a 16-year old sophomore at Snowden International School in Boston. When he was in pre-school, he was diagnosed with neurological delays consistent with lead poisoning. During the 2006-07 (sophomore) school year, the student's IEP included a provision of counseling for social skills and anxiety and special education in language arts and math.

On April 2 and 3, 2007, the student expressed suicidal ideation to school staff; the school conferred and determined that the student's safety was at risk and on April 3, the parents were called to pick up the student. Parents were informed that the student needed to receive a psychological evaluation before he could return to school. The student spent the night at Boston Children's Hospital and was then referred for a psychiatric evaluation at an adolescent partial hospital program at Bournewood Health Systems (Bournewood). The student attended Bournewood from April 10 through April 12, 2007. On April 12, parents withdrew the student from the program, stating that there was an illness in the family. The discharge summary indicates that the student had been diagnosed with Asperger's Syndrome.

After the student was discharged from Bournewood, the district was unable to determine the status of the student – the district did not know whether the student would return to Bournewood and neither the district nor Bournewood were able to contact the parents.

At the time of the student's removal from school, the district had a suicide prevention and intervention memorandum that set forth the district's procedures for addressing suicide concerns. It stated in part:

All students returning to school after a period of absence are required to bring notes of explanation/excuse for absence, signed by the parent/guardian. Students returning to school after emergency treatment for suicide intervention must also bring a letter from an appropriate medical/mental health provider. Parents should be notified of this requirement, before the student returns to school. The letter should indicate that the student is able to return and to function in the school setting. Those students unable to return for medical or mental health reasons after a crisis situation are served under the provisions of Home and Hospital Instruction.

On April 23, 2007, the district contacted the Student's psychiatrist at Bournewood and requested a re-entry letter for the student. The psychiatrist refused to draft the letter, asserting that she did not know the student well enough. The following day, the psychiatrist telephoned the school nurse, and they filed a report with the Massachusetts Department of Social Services, alleging that the parents were neglecting the student by failing to provide him with medical care and treatment.

On April 25, 2007, the student's tenth (10<sup>th</sup>) day out of school, his case manager contacted the district's Assistant Program Director to obtain tutoring for the student. The Director stated that the district could not provide tutoring because the student had not been officially discharged from the hospital.

On April 28, 2007, parents informed the district that they were obtaining an independent evaluation of the student; on May 2, 2007, the district received a letter from an independent psychologist stating that the student was not "an imminent danger to himself or others" and that he could return to school with close supervision during transitions and unstructured time. The district approved the assignment of a 1:1 aide, and the student returned to school on May 7, 2007. Excluding April vacation and holidays, the student missed a total of 17 days of school.

The student's team met on May 31, 2007 and determined that Parkway Academy of Technology and Health would be the proper placement for the student. His IEP was revised, and placement was proposed. On June 15, 2007, parents rejected the placement proposal, insisting that he remain in the current placement. Despite the fact that the district's procedural safeguards indicated that the district was required to notify the Massachusetts Bureau of Special Education Appeals (MBSEA) within 5 days after a parent refused consent to an IEP or proposed placement, and that if the district believed the parents' refusal would result in a denial of FAPE, the district must take steps to ensure that FAPE is provided, the district did not notify the MBSEA until October 2007, and did not convene a team meeting until February 27, 2008. In addition, the district did not request due process or take other steps to obtain the parents' consent or override her refusal.

**Discussion:** OCR found that the student's 17-day exclusion from school constituted a significant change in placement. The district's procedures resulted in staff excluding the student from school based on the failure to obtain a medical clearance with regard to a suicide risk that reasonably could have been related to the student's disability; this action led to the significant change in placement. As a result, in accord with 34 C.F.R. § 104.35, the district should have convened a team meeting to consider data relating to the student's needs, including whether further evaluations are necessary, whether modifications to the student's program and placement were required, and if the student cannot return to school, whether any services or accommodations were necessary to provide the student with a FAPE while he remained out of school.

The district was required to revise its suicide memorandum to remove the requirement that a student's parents must provide a re-entry letter from a medical or mental health provider. The district was also required to assign an internal liaison for each student with respect to whom the district was involved in a suicide intervention; the liaison was required to make all reasonable efforts to gather available information from family, medical providers, and mental health professionals about the student's treatment

states and ability to return to school. If the liaison determined that the student will be out of school for more than 10 consecutive days, a team meeting must be called (before the 10<sup>th</sup> day).

With regard to issue 2, whether the district denied the student a FAPE, OCR found that the district failed to provide tutoring (or any other services) to the student during the 17 days that he was absent from school. Since the district did not determine that the student's suicide threat was unrelated to his disability, its failure to provide educational services denied the student a FAPE. The district agreed to convene a meeting to determine whether any compensatory services were necessary.

Finally, OCR found that the district's significant delay (from June 15, 2007 until October 2007 to notify the MBSEA and from June 15 until February 2008 to convene a team meeting) after the parent's rejection of its placement proposal denied the student a FAPE. The district agreed to convene a meeting to determine whether additional services are necessary, and to revise its policies and procedures to ensure that steps are taken to try to provide services that are rejected by the parent. OCR noted that those steps could include: delivering services to the extent possible when parental consent is not legally required; holding further meetings to try to secure consent or otherwise reach agreement; or seeking formal mediation or requesting due process.

### **C. Right to a Hearing**

In Escondido (CA) Union Elementary School District, 109 LRP 24519 (OCR Jan. 6, 2009), parent alleged, in part, that the district failed to provide him with adequate procedural safeguards by effectively denying access to an impartial hearing to dispute the team's determination that the student was not a child with a disability.

With regard to the district's procedural safeguards, OCR found that district policy provided for three levels of review: Level I – the parent submits written disagreement with a decision regarding the identification, evaluation, or educational placement of a student with disabilities and the principal and the school site committee review the issue and attempt to resolve it; Level II – if the disagreement continues, the parent may request that the Coordinator of Pupil Services review the issue; Level III – if the disagreement continues, the parent may request a Section 504 due process hearing. In accord with the policy, parents had to proceed through levels I and II before requesting a hearing.

OCR found that the district's policy violated Section 504 because it did not provide parents with an "unqualified" right to an impartial hearing. See 34 C.F.R. § 104.36. OCR noted that Section 504 does not prohibit districts from having informal resolution processes prior to a hearing, and that informal processes are encouraged; however, parents cannot be required to utilize informal resolution procedures prior to requesting a hearing.

## VIII. Protection of Pupil Rights Amendment (PPRA)

The Protection of Pupil Rights Amendment (PPRA), 20 U.S.C. § 1232h, applies to programs that receive funding from the United States Department of Education. The PPRA is intended to protect the rights of parents and students by:

- Seeking to ensure that schools and contractors make instructional materials available for inspection by parents if those materials will be used in connection with an ED-funded survey, analysis, or evaluation in which their children participate; and
- Seeking to ensure that schools and contractors obtain written parental consent before minor students are required to participate in any ED-funded survey, analysis, or evaluation that reveals information concerning:
  - Political affiliations or beliefs of the student or his/her parents;
  - Mental or psychological problems of the student or the student's family;
  - Sex behavior and attitudes;
  - Illegal, anti-social, self-incriminating and demeaning behavior;
  - Critical appraisals of other individuals with whom respondents have close familial relationships;
  - Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
  - Religious practices, affiliations, or beliefs of the student or the student's parents; or
  - Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

In Letter to Pye, 13 FAB 11 (Family Policy Compliance Office (FPCO), May 7, 2009), parents alleged that rights afforded to them under the PPRA were violated by the district when it failed to notify them of their rights under the PPRA, and by failing to offer them an opportunity to opt their child out from participation in a survey that asked questions from some of PPRA's eight sensitive areas.

The FPCO investigated and determined that the District's survey asked the student to respond to questions about sex behavior or attitudes and illegal, anti-social, self-incriminating, or demeaning behavior. In addition, the district violated the PPRA by failing to provide parents with annual notice of their rights under the PPRA. The district was required to provide the FPCO with written assurance that district officials had been informed of the PPRA's provisions and that the district will notify parents of the PPRA's provisions.

***Practice Pointer:*** *Under the PPRA, districts are required to develop policies pertaining to student privacy, parental access to information inspection of instructional material, administration of physical examinations or screenings, and the collection, disclosure, or use of personal information for certain purposes. In addition, districts are required to provide parents with notice of their PPRA rights at least annually (at the beginning of the school year), and at certain times throughout the school year. See 20 U.S.C. § 1232h.*