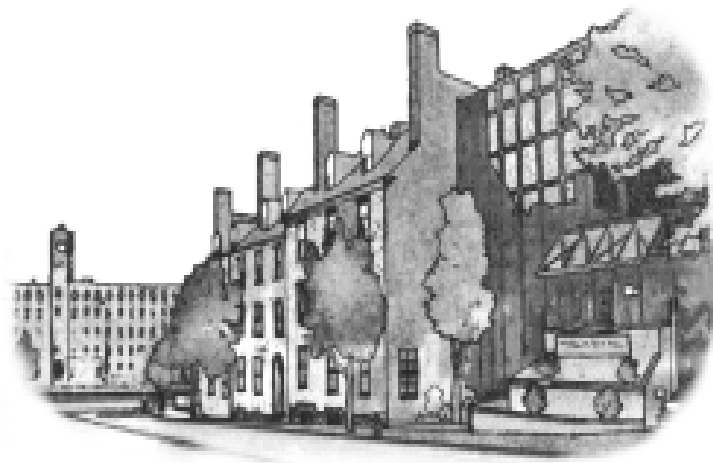


Special Education Case Law: An Overview of Recent Decisions

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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. This material does not include every aspect of the law, nor does it discuss every case involving the IDEA. The cases in this material were issued during the period of 2008 through August 2009, 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.

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 Individuals with Disabilities Education Act ("IDEA"), nor does it contain a complete discussion of all recent IDEA cases. The goal of this material is to provide the special education administrator with the tools necessary to interpret certain aspects of the statutory and regulatory law pertaining to the IDEA.

II. Reimbursement for Unilateral Placements

Several cases, including the five discussed below, involving requests for reimbursement for the costs associated with unilateral private placements, were decided in 2008 and 2009.

The first case, Forest Grove School District v. T.A., 52 IDELR 151, ___ U.S. ___, 129 S.Ct. 2484 2009 WL 1738644 (June 22, 2009), involved a request for reimbursement made by the parents of a student who had never received special education and related services from the school district. The 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.

He 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.

On appeal, the district court reversed, holding that the hearing officer had erred as a matter of law in awarding reimbursement because the student was statutorily ineligible for reimbursement in accord with 20 U.S.C. § 1412(a)(10)(C).¹ The court also held that if the student was eligible for reimbursement, principles of equity did not support an award of reimbursement.

The Ninth Circuit Court of Appeals reversed the district court’s decision that the parents were not entitled to reimbursement, and held that “students who have not ‘previously received special education and related services’ are eligible for reimbursement, to the same extent as before the 1997 [IDEA] amendments, as ‘appropriate’ relief pursuant to § 1415(i)(2)(c). The statutory requirements of § 1412(a)(10)(C) do not apply.”

The Ninth Circuit Court of Appeals remanded the case to the district court for a determination as to whether principles of equity applied to the present case. In doing so, the court reiterated that there

are no statutory requirements for tuition reimbursement for students, like T.A., who never received special education and related services in public school. Congress’ choice to legislate concerning students who previously received special education and related services did not alter the proper analysis for students who have not received special education and related services in public school, under general principles of equity pursuant to § 1415(i)(2)(C).

¹ That provision reads, in part, as follows:

If the parents of a child with a disability, *who previously received special education and related services* under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment.

See Forest Grove Sch. Dist. v. T.A., 523 F.3d 1078 (9th Cir. 2008) (italics in original) (citing 20 U.S.C. § 1412(a)(10)(C)(ii)).

Id. The court also rejected the district court’s conclusion that tuition reimbursement may be ordered in “extreme” cases for students who did not previously receive services, noting that nothing in the statutory or case law suggested that “tuition reimbursement is available only in extreme cases for parents who place their child in private school before receiving special education and related services in public school.” Id.

The district appealed to the United States Supreme Court. The question presented to the Court was as follows:

Whether the [IDEA] permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not previously received special education and related services under the authority of a public agency.

The Court held that reimbursement under such circumstances is not prohibited by the IDEA; instead the Court concluded that “IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services throughout the public school.” Id. In doing so, the Court referenced two prior decisions, Sch. Comm. of Burlington v. Dep’t of Ed. of Mass, 471 U.S. 359, 369 (1985), in which it held that the IDEA’s scope of relief provision includes “the power to order school authorities to reimburse parents for their expenditures on private special-education services if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act,” and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993), in which it held that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the host-State. Id.

The Court noted that in Burlington and in Carter, it had construed 20 U.S.C § 1412(a)(10)(C) as authorizing “reimbursement when a school district fails to provide a FAPE and a child’s private-school placement is appropriate, without regard to the child’s receipt of services”. Id. The Court rejected the district’s argument that 20 U.S.C § 1412(a)(10)(C) did not expressly prohibit reimbursement, and there was no evidence that Congress intended to supersede the decisions in Burlington and Carter.

Note: RSA 186-C:16-b, VI states: “Where a unilateral placement has been made, without the school district of residence being offered a reasonable opportunity to evaluate the child and to develop an [IEP], reimbursement may not be sought for any costs incurred until the school district is given an opportunity to evaluate the child and develop an [IEP].”

In the next case, Thompson R2-J School District v. Luke P., 50 IDELR 212, 540 F.3d 1143 (10th Cir. 2008), cert. denied by, Luke P. v. Thompson R2-J School District, 129 S. Ct. 1356 (U.S. Feb. 23, 2009), parents alleged that the district failed to provide their autistic son with a FAPE “because of the difficulty he experiences in generalizing skills learned in the school setting to the home and other environments.” Parents sought reimbursement for the costs associated with a private residential program, which they contended was the only setting that could provide Luke with an adequate education.

Parents argued that “the ability to generalize” is “fundamental,” and “[a]bsent the ability to generalize skills learned at school, particularly basic self help and social skills, . . . Luke’s education is effectively worthless.” The district argued that, “as a matter of law, generalization across settings is not required by IDEA so long as Luke can be said to be making some progress in school.” The court noted that “one can well argue that generalization is a critical skill for self-sufficiency and independence,” but could not “agree with [the parents] that IDEA always attaches essential importance to it.” The court held “that generalization skills need not always be included in, and progress on such skills is not necessary to ensure, a compliant IEP.”

The court found that the student was making progress in the public school, and that the IEP that was proposed by the district was reasonably calculated to confer some educational benefit. Thus, the district complied with the IDEA and the residential placement was not appropriate.

Note: This decision contained a discussion of Gonzalez v. Puerto Rico Dep’t of Educ., 34 IDELR 291, 254 F.3d 350 (1st Cir. 2001). In that case, the First Circuit Court affirmed the district court’s decision that the student required a “highly structured environment,” but that he did not require a residential placement. The First Circuit noted “[e]ducational benefit is indeed the touchstone in determining the extent of governmental obligations under the IDEA.” The court noted that it had previously held that the IDEA “does not require a local school committee to support a handicapped child in a residential program simply to remedy a poor home setting or to make up for some other deficit not covered by the Act. It is not the responsibility of local officials under the Act to finance foster care as such: other resources must be looked into.” Id. (citing Abrahamson v. Hershman, 701 F.2d 223, 227-28 (1st Cir. 1983)). The court went on to state that “as a practical matter, in cases such as this one, where all agree that the student’s activities need to be highly structured both during and after school in order for him to receive an appropriate education, clear lines can rarely be drawn between the student’s educational needs and his social problems at home. Thus, typically an IEP in cases where the student’s disability is this serious (and requires such a degree of structure) must address such problems in some fashion, even if they do not warrant

a residential placement.” In this case, the IEP included training for the student’s parents, designed to help them manage the student’s behavior at home, and the record indicated that the student’s behavior could be managed effectively. Thus, a residential placement was not required.

In M.H. v. Monroe-Woodbury Central School District, 51 IDELR 91, 296 F.App’x 126 (2d Cir. 2008), cert. denied by ___ U.S. ___, 129 S.Ct. 1584 (U.S. March 9, 2009), parents requested that the district reimburse them for the costs associated with their child’s private residential placement. Parents alleged that the district failed to provide their child, an individual with emotional and educational disabilities, with a FAPE. The district argued that its proposed placement, in a private therapeutic high school (day program) was appropriate. The Hearing Officer held that the district’s placement was appropriate; however, the district court reversed, finding that the day-program was inadequate. The district appealed, and the Second Circuit reversed the district court’s decision.

In doing so, the court noted that “the central inquiry is whether the student’s conduct outside of the school building and outside the normal hours of the school day is such that it impedes her ability to derive an academic benefit from a day program.” To determine whether “the child is likely to make progress or regress under a proposed day-program, a court must examine the record for ‘objective evidence,’ such as test scores, grades, and other similar ‘objective’ criteria.” The court also noted that it “requires that a court point to objective evidence of a child’s regression in a day-program before finding that a residential placement is required by the IDEA.” Id. (citing Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, (2d Cir. 1998) (citing examples of Ninth, Third, and First Circuit [Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983)] cases that take the same approach).

The administrative record established that the child was making academic, social, and emotional progress in the day program, and none of the psychological reports suggested that she required a residential program to make academic progress. Thus, the court held that the district’s program was appropriate.

The United States District Court for the District of New Hampshire recently affirmed a decision denying a parent’s request for reimbursement. J.P.E.H. v. Hooksett School District, 109 LRP 39711, 2009 DNH 098 (D.N.H. 2009). In that case, the parent appealed an administrative decision in which the hearing officer found that her child was no longer eligible for special education. Parent sought reimbursement for the costs associated with her unilateral private placement.

Facts: In October 2003, the student was deemed eligible for special education and related services as a result of a speech-language impairment. During the 2003-04 school year, the student’s IEP provided for speech-language and resource room instruction. At the beginning of the 2004-05 school year, at the request of the parent,

resource room assistance was removed from the student's IEP. Prior to the start of the 2005-06 and 2006-07 school years, the parent requested that the student receive "no treatment different from that afforded his peers." Id.

In late 2006, the district conducted a triennial reevaluation of the student. Based on the results of the evaluation and on the student's classroom performance, the team determined that the student was no longer in need of special education, and instead recommended that he receive a Section 504 plan. Parent then filed a request for due process. The district filed a separate complaint, seeking affirmation of its determination that the student did not qualify for special education. The two complaints were consolidated and the Hearing Officer determined that the district had established that the student no longer qualified as a child with a disability.

Parent appealed in August 2007, and she enrolled her son in a private school for the 2007-08 school year; in her appeal, she requested reimbursement for the costs associated with the private placement.²

Holding: Affirmed. The court held that the student was not denied a FAPE, and therefore, that the parent was not entitled to reimbursement. The court rejected the parents' argument that the student's most recent IEP goals and objectives were not measurable, noting that the goals and objectives were revised at parent's request and that the parent had agreed that the amendments resolved the measurability issue. The court also held that the record supported the ruling that the student was no longer eligible for special education; the reevaluation showed "adequate improvement in the areas that initially qualified [the student] for special education," and "at his mother's request, [student] last received specially designed instruction when he was in the second grade," and his performance demonstrated that he was able to benefit from his education without such instruction. Id.

In another local case, K.R. v. Brookline School District, 588 F.Supp.2d 175 (D.N.H. 2008), parents appealed an administrative decision, denying their request for reimbursement for the costs associated with a private residential school. Parents argued that the IEP offered by the district was inappropriate, and that their private, residential placement was appropriate for their daughter's needs.

In particular, parents asserted that the IEP "did not provide for 'pull-out services in math, organization, and study skills-the areas most affected by [the student's] disabilities.'" The court rejected that argument, noting that pull-out services had been offered, but were rejected by the parents, and that even without pull-out services, the proposed IEP was reasonably calculated to confer a FAPE. The court reached this conclusion based "on the wide array of services offered to [the student] coupled with the

² In October 2008, the United States District Court held that the parent could seek reimbursement for the costs associated with the private placement. See J.P.E.H. v. Hooksett Sch. Dist., 51 IDELR 164, 2008 WL 4681827 (D.N.H. 2008).

objective academic progress she made under [her prior IEP].” Thus, the proposed IEP, which expanded and improved upon the prior IEP, was reasonably calculated to provide the student with educational benefits.

The court went on to note that, even if the proposed IEP was inappropriate, the placement chosen by the parents was not the least restrictive environment in which the student could receive a FAPE. The court found that the parents failed to establish that their private placement was the least restrictive environment, but instead “continually emphasize[d] the reasons why the [placement] was well-suited to educate [the student], and high-light the academic progress she made at that school.” The court concluded that the student received a FAPE from the public school, a lesser restrictive environment. Thus, the parents’ unilateral placement was not appropriate and they were not entitled to reimbursement.

III. IEPs and FAPE Claims

A. Related Services

School districts are required to provide students with related services when the provision of such services is necessary to ensure that a student receives a FAPE. 34 C.F.R. § 300.17.

Related services include “transportation, and such developmental, corrective, and other supporting services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a [FAPE] as described in the [IEP] of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.” 20 U.S.C. § 1401(26)(A); Ed 1102.04(q).

The Sixth Circuit Court of Appeals recently affirmed a decision from the United States District Court, Northern District of Ohio, pertaining to the provision of related services. Winkelman v. Parma City Sch. Dist., 411 F.Supp.2d 722 (N.D. Ohio 2008), aff’d by, 294 Fed. App’x 997, 51 IDELR 92 (6th Cir. 2008), cert. denied, 557 U.S. ____, 109 LRP 38984 (June 29, 2009). In that case, the parents filed a request for due process, alleging that the district failed to provide their son with a FAPE because the IEP proposed for the 2003-04 school year did not include music therapy, did not contain a sufficient amount of speech therapy or one-to-one instruction, and did not contain a specific plan to implement the student’s need for occupational therapy. The parents

requested reimbursement for their unilateral placement at a private school. The hearing officer determined that the district offered the student a FAPE; parents appealed.

First, with regard to the allegation pertaining to occupational therapy, the court found that the parties agreed that the student's 2003-04 IEP did not contain specific goals and objectives for OT; instead, it indicated that the student would be assessed for OT within 30 days of the new school year. The district's OT testified that she did not draft any OT goals because she had not previously worked with the student (he was transitioning to a new school), and she wanted to assess his present levels before drafting goals. Based on the testimony, the hearing officer determined that the failure to include specific goals and objectives for OT constituted a procedural violation, and not a substantive violation of the IDEA. The hearing officer found that: (1) the OT was a very credible witness who wanted the goals to reflect the student's current level of performance within the scope of his new environment; (2) the assessment of the student's abilities and adaptation to his new environment were important factors in the creation of appropriate goals and objectives; (3) given that the student's motor skills were on par with the majority of motor skills required for his age-group, he would not be significantly impacted by the thirty-day delay; and, (4) the parents consented to the initiation of OT services. The court affirmed the hearing officer's ruling that the lack of goals and objectives constituted a procedural violation and did not result in a denial of FAPE.

Second, the court also affirmed the hearing officer's decision that the reduction in speech-language from 90 minutes per week to 60 minutes per week did not deny a FAPE. The court agreed with the hearing officer's conclusion that "the fact that [the student] was progressing with 90 minutes of speech therapy . . . does not mean that 60 minutes would offer him no educational benefits." *Id.* Before recommending 60 minutes of speech, the district's SLP had spoken with the student's teachers and his prior SLP, reviewed his progress, and observed the student. Similarly, the court also affirmed the hearing officer's decision regarding one-to-one instruction, noting that "there is no evidence that the [student] needs a set amount of one-on-one instructional time to receive a [FAPE]." *Id.* The district had proposed a placement in a special education classroom consisting of 6 to 8 students with a teacher and two aides; students would receive one-to-one and small group instruction, and the students would be exposed to "both disabled and nondisabled peers" and "afforded the opportunity to generalize . . . social and language skills across diverse environments." *Id.* The court agreed that the district's placement proposal, with its reduced one-to-one instruction, was appropriate.

Finally, with regard to music therapy, the court held that the student did not require music therapy to receive educational benefits; thus, the fact that the proposed IEP did not include music therapy did not deny him a FAPE. The court noted that the student had received music therapy in prior years, but that he could learn without receiving music therapy. In addition, the court noted that the teacher the district had

proposed for the student incorporated music into her lesson plans and that the district had an adaptive music class that was available to the student.

B. Extra-Curricular Activities

Schools are obligated to ensure that students with disabilities have an equal opportunity to participate in non-academic and extracurricular activities along with their non-disabled peers. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) requires that an IEP include:

a statement of the special education 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 for the child . . . (bb) . . . to participate in extracurricular and other non-academic activities; and (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph.

See also 34 C.F.R. § 300.107(a) (public agencies must “take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities”).

Under the IDEA, nonacademic and extracurricular services and activities include:

- Counseling services;
- Athletics;
- Transportation;
- Health services;
- Recreational activities;
- Special interest groups or clubs sponsored by the public agency;
- Referrals to agencies that provide assistance to individuals with disabilities; and
- Employment of students, including both employment by the public agency and assistance in making outside employment available.

34 C.F.R. § 300.107; Ed 1102.02(o).

The case of Independent School District No. 12 v. Minnesota Department of Education, 109 LRP 37544, 2009 WL 1751844 (Minn. Ct. App. June 23, 2009), involved a claim that the District violated the “IDEA by failing to list in the child’s [IEP] supplementary aids and services needed by the child to participate in extracurricular and other nonacademic activities that the parents had selected for her,” and that the

District violated the IDEA by refusing to provide “supplementary aids or services for the child at a fifth-grade graduation party sponsored by a parent-teacher organization (PTO).” Id. The hearing officer found for the parents and the school district appealed.

Facts: In January 2008, the district conducted a triennial evaluation; as part of the reevaluation, the district and the parents discussed accommodations for the student. In February 2008, parents provided the district with a list of accommodations for their daughter’s participation in extracurricular activities. The list included special supervision after the regular school day ended and excusing absences from practices or games. Parents did not identify, and the proposed accommodations did not relate to, any particular extracurricular activity.

The student’s IEP Team met in late February. The district believed that the parents had agreed that, because the child had not signed up for any extracurricular activities, no accommodations would be included in the 2008-09 IEP. Instead, it was agreed that if the child decided to participate in a specific activity, she had a right to equal treatment under Section 504, and the parents could request a Section 504 plan. In contrast, the parents argued that, at the February meeting, and at a second meeting in March, the district “insisted that extracurricular activities could be addressed only in a section 504 plan and refused to discuss accommodations related to these activities.” The IEP that was proposed for 2008-09 did not include any accommodations for extracurricular activities. Parents rejected the proposed IEP, requested more information about extracurricular and nonacademic accommodations, asked that supervision at clubs be written in the IEP and that the IEP include consideration of nonacademic activities, in particular, Band, and asserted that the Team was required to consider extracurricular activities.

In April 2008, the parents and the district met, and the parents indicated that they wanted their daughter to explore participation in clubs and volleyball. At the meeting, the parents and the district discussed specific clubs and sports, and what accommodations would be necessary for the child to participate in those activities.

In May 2008, parents met with the district to request accommodations (supplementary aids and services) for a fifth-grade graduation party sponsored by the PTO. The district informed the parents that it would not provide accommodations because the PTO was a separate organization, the event was held off school grounds, was held outside of the school day, and was not district-funded. Shortly thereafter, the parents requested due process. The hearing officer found for the parents and the district appealed.

Holding: The first issue, whether the district was required to include accommodations for extracurricular and nonacademic activities in the student’s IEP, was affirmed. The second issue, whether the district was required to provide accommodations at the graduation party sponsored by the PTO, was reversed.

With regard to the first issue, the court rejected the district's argument that "FAPE does not encompass extracurricular and nonacademic activities." The court concluded that "a child's IEP team has an obligation to *consider*, based on the student's overall situation and parental requests, whether the child's IEP should include a specific extracurricular activity and, if so included, identify the supplementary aids and services necessary for that child's participation in the activity." *Id.* (italics in original). The court also held that "the IEP need only include such activities as are required for the education of the child," and held that it is the IEP team that determines whether participation in a particular extracurricular or nonacademic activity is appropriate based on the child's strengths, concerns for enhancing education, evaluation results, and academic, developmental, and functional needs." *Id.*

The court reversed the Hearing Officer's decision with regard to the second issue, holding that the graduation party was not an extracurricular or nonacademic event under the IDEA. The court found that the graduation party was a "bona fide, independent program," that was held away from school premises, outside of the school day, was not district-funded, and was not supervised by district staff. There was no evidence that the event was school initiated or that the PTO was a district-sponsored organization; thus, the district was not required to provide accommodations at the graduation party.

IV. Evaluations

There have been several recent opinions pertaining to independent educational evaluations. In accord with 34 C.F.R. § 300.502(b)(1), parents have the right to obtain an independent educational evaluation ("IEE") at public expense if the parent disagrees with an evaluation obtained by the public agency. If the parent makes a request for an IEE, the district must, "without unnecessary delay":

- i. Request due process to show that its evaluation is appropriate; or,
- ii. Ensure that the IEE is provided at public expense, unless the agency demonstrates at a hearing that the parent's evaluation did not meet agency criteria.

34 C.F.R. § 300.502(b)(2)(i)-(ii). The public agency may ask why the parent objects to its evaluation, however, it may not require that the parents provide an explanation and it may not unreasonably delay providing the evaluation at public expense or filing a request for due process. 34 C.F.R. § 300.502(b)(4).

The Office of Special Education Programs ("OSEP") recently issued an opinion pertaining to IEEs and response to intervention ("RTI"). Letter to Zirkel, 52 IDELR 77 (OSEP, Dec. 11, 2008). OSEP was asked the following questions:

1. If a district adopts RTI as its official approach as the process prior to a formal evaluation for identifying children with a specific learning disability (“SLD”) and early during the process a parent who disagrees with the RTI approach obtains an IEE that indicates that a student has a SLD because of a severe discrepancy analysis, is the district obligated to pay for the IEE?
2. If the parent obtained the IEE referenced in #1, above, after he received notice from the district that the child had responded successfully to the RTI process, and thus, there was no need for a formal evaluation, would the district be obligated to pay for the IEE? Is the district obligated to consider the IEE and either reject it as not meeting the agency criteria or give the IEE little weight in light of the success with RTI?

With regard to the first question, OSEP opined that the parent would not be eligible for reimbursement for the IEE because the district had not completed an evaluation. Id. (emphasis added). OSEP went on to note that “when a parent requests reimbursement for an IEE prior to the completion of the district’s evaluation, the school district may deny the request for reimbursement without filing for a due process hearing.” Id. (emphasis added). OSEP referred to the commentary to the regulations, which states that “[t]he parent . . . would not have the right to obtain an IEE at public expense before the public agency completes its evaluation simply because the parent disagrees with the public agency’s decision to use data from a child’s response to intervention as part of its evaluation to determine if the child is a child with a disability and the educational needs of the child.” Id. (citing 71 Fed. Reg. 46689 (Aug. 14, 2006)).

In answering the second question, OSEP reiterated that the parent would not have the right to an IEE at public expense because the district had not completed an evaluation. However, parents do have the right to request an evaluation to determine if the child is a child with a disability under the IDEA. If the team has determined that it is not necessary to evaluate the child, the district is not obligated to consider the results of the IEE. OSEP reiterated that data from the RTI process is one component of the process, and that public agencies may not use a single measure or assessment, including RTI, as the sole criterion for determining whether a child has a disability. Id.

In Hacienda La Puente Unified School District, 109 LRP 39577 (Ca. State Educational Agency (“SEA”) 2009), the district filed a request for due process in response to parents’ request for several IEEs at public expense. The facts of that case were as follows:

- The student was a 19 year old, who was eligible for services under the IDEA due to a cognitive impairment and a speech-language impairment. The student's primary language was Spanish.
- The district conducted a triennial evaluation in January 2009. At that time, the following assessments were conducted:
 - Psychoeducational assessment;
 - Speech-language assessment;
 - Transition assessment;
 - Occupational Therapy assessment; and
 - Physical therapy assessment.
- In March 2009, parents indicated that they disagreed with the evaluations, and requested IEEs at public expense in all of the above areas. The district agreed to conduct a physical therapy IEE at public expense.

The SEA found that the district's assessments were conducted by trained qualified individuals holding the appropriate licenses and credentials for the assessments. The SEA further found that each of the assessors was knowledgeable about the Student's disability and that they were competent to perform the assessments. The assessors all used a variety of assessment tools, tests, and materials, all of which had been validated. Two of the assessors were bilingual (school psychologist and OT), and an interpreter assisted with all other evaluations. The assessments were selected and administered in a nondiscriminatory manner and were administered according to the instruction manuals. Thus, the SEA held that the district's assessments were appropriate and the parents were not entitled to IEEs at public expense.

In contrast, in Lafayette School District, 109 LRP 39519 (Ca. SEA 2009), the district was ordered to reimburse parents for half of the cost of their IEE. The relevant facts were as follows:

- Student was a nine year old third grader; in February 2007, he was referred for a determination of eligibility under the IDEA.
- In April 2007, the district conducted a psychoeducational assessment of the student; thereafter, the student's team agreed that he was eligible for special education and related services as a result of a specific learning disability. Parents did not express any disagreement with the evaluation at the April 2007 team meeting, or at a second meeting in February 2008.

- During a team meeting in September 2008, parents informed the district that they disagreed with the April 2007 evaluation, and requested an IEE at public expense. The district received the request on September 18 or 19, 2008.
- After receiving the letter requesting an IEE, the district's Director of Student Services spoke with the district team members and listened to the recording of the meeting. She then concluded that the parents did not agree with the assessment, but with the evaluator's characterizations of it. The director wrote to the parents on September 25, and informed them that the district was proposing to assess the student, with vision and OT assessments. The letter was silent with regard to the parents' request for an IEE.
- Parents wrote back on October 2, 2008, questioning the Director's "unilateral" decision that new assessments were warranted. Id. Parents indicated that under the IDEA, the district was required, without unnecessary delay, either to fund the IEE or file for due process. Parents specifically requested that the district respond to the request for an IEE.
- The Director responded to the parents on October 15. The Director indicated that the district believed that the parents were disagreeing with the interpretation of the assessments, and not the results of the assessments. The letter was again silent with regard to the request for an IEE.
- After sending that letter, the district did not act on the parents' request for an IEE, and it interpreted the parents' silence as agreement with its interpretation in the October 15 letter.
- On November 18 or 19, parents filed a complaint with the California Department of Education, alleging that the district had unnecessarily delayed in responding to the parents' IEE request and had failed to fund the IEE or request due process. The district filed a request for due process on December 3. By that time, 74 days had passed since the district received the parents' request.

The SEA found that the district interpretation of the parents' disagreement was not supported by the evidence, and that the parents clearly had expressed disagreement with the April 2007 evaluation. The SEA found that "[t]here was no evidence in the record that Parents ever gave the District reason to believe they were abandoning, or even reconsidering, their IEE request." Id. Thus, the district's 74-day

delay in responding to the request was unnecessary, unreasonable, and unjustifiable, and the district was responsible for funding the IEE.

However, the SEA held that the district was only responsible for ½ of the costs associated with the IEE because the parents did not express disagreement with the IEE for 17 months; that delay was unreasonable, especially in light of the fact that the student's team had agreed to two IEPs. As a result, the parents were responsible for ½ of the costs of the IEE.

V. Section 504

A. Eligibility

The following two cases involve eligibility under Section 504 and the IDEA.

The first case, Ellenberg v. New Mexico Military Institute, 109 LRP 41802 (10th Cir. 2009), involved an appeal of a decision from the United States District Court for the District of New Mexico. The relevant facts are as follows:

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. 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.

In the second case, Maine (ME) School Administrative District #70, 51 IDELR 83 (OCR 2008), a school district violated Section 504 when it failed to consider whether a student was eligible for services under Section 504 after determining that he was not eligible for services under the IDEA. Parents alleged that the district's failure to determine whether the student was eligible for services under Section 504 resulted in a denial of FAPE.

In April 2007, the district convened a meeting to determine whether the student was eligible for services under the IDEA. The team ultimately concluded that the student was not eligible for services, but recommended that the student receive OT consults. The team also recommended various classroom accommodations. Parent attended the meeting and did not disagree with the outcome. Parent also received notice of her IDEA due process rights. Section 504 eligibility was not discussed.

In September 2007, parent filed a complaint with OCR. That same month, the student's teacher noted that he was impulsive, interrupted, was unable to complete work at times, had excessive movement with his seat, and poor decision-making ability. She began implementing several of the accommodations that the team had discussed in April 2007. She also requested a meeting with the parent; however, the meeting did not resolve any of the outstanding issues. Parent then met with the Superintendent and made a special education referral. In late September, the student began taking medicine for ADHD; at that time, the teacher noted a significant shift in the student's behavior and improvements in his grades. In November 2007, a team convened to dispose of the parent's referral; the team determined that the student remained ineligible for services. Parent was again provided with IDEA procedural safeguards.

In December 2007, while OCR was investigating the parent's complaint, a team convened to determine whether the student was eligible for services under Section 504. The team determined that the student was not eligible because his ADHD did not substantially limit the major life activity of learning. Nevertheless, the team developed an action plan that included various accommodations.

In investigating the parent's complaint, OCR found that the district violated Section 504 when it failed to determine whether the student was eligible for services. OCR noted that in April 2007, the District had information suggesting that the student's ability to learn may have been impaired by his ADHD. This information included a statement from the student's physician, teacher observations, and information regarding existing interventions.

B. Right to a Hearing

In Escondido (CA) Union Elementary School District, 109 LRP 24519 (OCR 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.

C. Compliance

In the case of Waterbury (CT) School District, 51 IDELR 198 (OCR 2008), the school district was found to have violated Section 504 after the student's private school failed to implement the student's IEP.

Facts: At some point prior to the start of the 2006-07 school year, the district placed the student at ASD. The student wears two hearing aides and uses an FM system during the school day and she communicated using spoken English and American Sign Language ("ASL"). After she was placed at ASD, the student was diagnosed with Type I diabetes. As a result, the student's IEP Team developed and

incorporated a Section 504 plan, a medical management plan, and medical orders into the student's IEP.

On September 25, 2007, the student's parent removed her from ASD. The district placed the student at IEA on October 9, 2007.

Allegations: Parents filed a complaint with OCR, alleging that:

- 1) The district failed to implement the student's IEP with regard to an American School for the Deaf ("ASD") field trip on July 12, 2007;
- 2) The district failed to provide services to the student during an orientation at the Intensive Education Academy ("IEA") from September 5, 2007 through September 7, 2007;
- 3) The district failed to provide services to the student from September 25, 2007 through October 5, 2007, after the parent removed the student from ASD as a result of its failure to implement the student's IEP on September 24, 2007; and,
- 4) The district failed to train the student's transportation personnel on diabetic care and on basic sign language and communication strategies in the fall of 2007.

OCR's Investigation:

- 1) The district failed to implement the student's IEP with regard to an American School for the Deaf ("ASD") field trip on July 12, 2007;

OCR found that the student's IEP required that her parents receive 2 days advance notice of changes in planned activities, including field trips, so that the student's lunch, snacks, and insulin dosage could be adjusted. The IEP also required that a medical professional attend all field trips with the student, and that aides who are designated as "Diabetes Care Assistant Providers" for the student "know the appropriate steps to take when blood sugar levels create emergency situations." Id. The "doctor's orders," which were incorporated into the student's IEP specified that the student's blood sugar must be retested 15 minutes after a blood sugar reading below 70 and a subsequent snack. The student's medical plan, which was also part of her IEP, called for administration of glucagon if the student experienced certain symptoms of extreme low blood sugar.

With regard to the advance notice requirement, OCR found that the trip was planned several days in advance, but that the parents were not informed about the trip until one hour before the scheduled departure. In addition, no medical provider was available to attend the trip; as a result, ASD contacted the parent and invited her to attend.

OCR also found that the ASD staff members who were attending the trip were not aware that they should call 911 if the student had an emergency medical situation (high or low blood sugar). OCR found that the student had low blood sugar shortly after arriving at the destination, and the ASD staff did not call 911 or contact any medical professionals. In addition, ASD staff did not follow the "Doctor's orders" section of the IEP, and ASD failed to bring glucagon on the trip, despite the provision in the medical plan that required the same.

- 2) The district failed to provide services to the student during an orientation at the Intensive Education Academy ("IEA") from September 5, 2007 through September 7, 2007;

OCR found that the parent and the district visited IEA as a possible placement, and that the student attended orientation at IEA from September 5, 2007 through September 7, 2007. The district agreed to provide ASL interpreters and an FM system for the student for the entire orientation. However, the district did not arrange for an ASL interpreter for September 5, 2007, and the district failed to inform IEA that it was required to charge the FM system prior to the orientation. As a result, the student's interaction with others on September 5 was limited, and IEA reported a "distinct difference in the level of the [s]tudent's interaction with her peers as well as her participation in classroom activities when she was provided with access to both the FM System and the interpreter on September 6th and 7th." Id.

- 3) The district failed to provide services to the student from September 25, 2007 through October 5, 2007, after the parent removed the student from ASD as a result of its failure to implement the student's IEP on September 24, 2007; and,

OCR found that the parent removed the student from ASD on September 25, and that on that same day, the district scheduled a meeting for October 1, 2007 to discuss placement. However, the student was out of school without any services for 8 school days.

- 4) The district failed to train the student's transportation personnel on diabetic care and on basic sign language and communication strategies in the Fall of 2007.

Finally, OCR found that although the student's IEP indicated that ASD staff would meet with transportation personnel, and that the district would participate in the training, the district failed to provide sign language or communication training to the transportation staff.

Conclusion: Based on the above, OCR determined that the district violated Section 504. OCR noted that the district "remained responsible under Section 504 for providing the [s]tudent with a FAPE when it placed her in ASD," and as a result, "the [d]istrict [was] responsible for failing to ensure that ASD implemented the [s]tudent's IEP." Id. The district was also responsible for failing to train transportation personnel and failing to provide the interpreter and FM System during orientation.

The district entered into a voluntary resolution agreement, whereby it agreed, in part, to provide the student with 25 hours of compensatory education, training to transportation personnel, and to appoint a "primary contact person . . . to respond to concerns involving the provision of services" to the student. Id.