

# How to Safely Cross the Intersection Between Law and Special Education: A Review of Recent Relevant Rulings

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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 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 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. IDEA Procedural Requirements**

### **A. Child Find**

#### **1. Truancy Issues**

Hilliard City School District, 112 LRP 53622 (Ohio SEA Oct. 2, 2012).

Facts: Student began attending the District's Middle School A in August of 2011. Student was not identified under the IDEA or Section 504. On November 8, 2011, a staff member of Middle School A sent a letter to Parent indicating that Student had an excessive number of unexcused absences. The letter stated that a doctor's note would be necessary to excuse any further absences by Student.

On November 14, 2011, Middle School A submitted an initial referral for truancy. Parent contacted the school guidance counselor on November 15, 2011. Parent reported that Student's classes were "disruptive" and caused him anxiety. She also thought that Student was being bullied.

On November 15, 2011, Student's team of teachers held a meeting. The teachers had not seen or heard of Student being bullied in class or in the hallways. On November 16, 2011 the District conducted an investigation regarding the bullying claims, but found that they were not substantiated.

On November 15, 2011, a counselor at "Directions for Youth and Families" (DFYF) contacted the District Assistant Superintendent by e-mail. The DFYF counselor stated that he had been working with the Student and "anxiety and depression" could be playing a role in Student's truancy. He also noted that Student "has a habit of playing the system." Counselor said that he and Parent were having the Student assessed by the clinical counselor at DFYF.

On November 17, 2011, the results of the bullying investigation were shared with Parent during a conference call with the Principal and Middle School A guidance counselor. Options and interventions for the Student's return to school were shared, including: placing student on shortened day at Middle School A, moving Student to a District alternative instructional program, or obtaining a doctor's note stating that the Student was unable to attend school.

A private psychologist evaluated Student shortly after Thanksgiving 2011. In his report, the psychologist stated that Student "displays significant symptoms that are common features of anxiety and depression," and "shows episodes of affective distress/anger, avoidant behaviors as well as oppositional defiant behaviors and conduct problems." The psychologist also found that "it appears that a specific, well defined, supervised plan is needed to boost [Student's] school attendance; possibly to include some adjustments/accommodations, but primarily some method of oversight to substantially increase regular school attendance (in addition to the Parent's efforts) will be needed."

On December 14, 2011, an initial meeting was held with Parent, the DFYF Counselor, the psychologist, the guidance counselor, principal, all of the Student's team teachers and the school psychologist assigned to Middle School A. The Parent shared the Psychological Consultation Report and the psychologist explained his results to everyone present. At the meeting, staff members stated that Student would not be allowed to make up academic work over the holiday break and, per the District policy, the Student would be given failing marks for all classes. The school staff suggested that Student could be transferred to a different team, or attend the District's alternative instructional program, but otherwise suggested no accommodations. A hearing was scheduled on January 4, 2012 to address Student's truancy issues.

On December 16, 2011, Parent spoke by phone with an instructor at the District's alternative middle school program. Parent rejected the program after learning that the program was located at another school and transportation was not provided. Parent then requested a transfer to Middle School B, because she continued to believe the Student was being bullied. Parent's request was initially denied, but ultimately granted by the School Board.

On January 4, 2012, the District held a "Due Process Hearing" to address the Student's truancy. It resulted in a "Truancy Prevention Due Process Hearing Agreement."

Student began classes at Middle School B on January 12, 2012. Student missed only two days of school in the month of February 2012. However, Student's attendance became an issue again in March. Parent communicated with the Middle School B staff to attempt to avoid truancy charges. Middle School B staff maintained that the psychologist's evaluation results were not "medical," because the psychologist was not a medical doctor. Therefore, Student could not be excused for absences due to anxiety and depression.

On April 19, 2012 Student was evaluated by a psychiatrist. The psychiatrist issued an evaluation report that confirmed the psychologist's diagnoses. Parent shared this evaluation with the Principal of Middle School B. The Pupil Services Coordinator and the Assistant Superintendent also reviewed this report but maintained that, because the Psychiatrist didn't specify that the Student was unable to attend school, there was

no medical basis for any kind of accommodation. Parent requested a Section 504 Plan, but was told that Student did not qualify.

On April 23, 2012, Parent contacted the pupil services coordinator and requested that he stop the truancy charges the District had filed against student. Parent provided documents from both the psychologist and psychiatrist excusing him from school. On May 3, 2012, the coordinator explained the District's procedures for a Section 504 plan to the Parent. A meeting was scheduled for May 9, 2012. On May 7, 2012, the Parent notified Middle School B that she had withdrawn the Student from the District and enrolled him in the Electronic Classroom of Tomorrow (ECOT). Parent also stated that ECOT had developed a Section 504 Plan. Parent cancelled her attendance at the meeting scheduled for May 9, 2012.

A Prior Written Notice, showing "parent cancelled meeting," was sent to the Parent on May 9, 2012 along with a procedural safeguards notice.

The District proceeded with filing formal truancy charges against the Student and Educational Neglect charges against the Parent. A hearing was held on July 26, 2012. Parent and Student's counselor attended. The magistrate dismissed all charges and closed the case.

Student attended ECOT's summer school and passed all of his classes. Parent re-enrolled the Student in the District on August 21, 2012 at the District's High School. The Parent submitted a Section 504 Plan developed by ECOT, dated May 17, 2012. The student was absent for the first 12 days of the school year. On September 5, 2012, the Parent withdrew the Student from the District to attend Virtual Community School.

On September 6, 2012 the High School pupil services coordinator met with Parent to update the Student's Section 504 Plan. At this meeting, the coordinator stated that she suspected that the Student had a disability under IDEA. She referred the Student for an evaluation and stated that the District would expedite the evaluation. Parent provided consent for an evaluation on September 10, 2012.

Issue: Whether the District violated the IDEA by failing to refer Student for an evaluation.

Held: For the parent. The hearing officer found that, based on a review of the information provided by both parties, the District violated the "child find" provision of the IDEA. 34 C.F.R. § 300.111(c)(1). The hearing officer noted that the District provides public notice regarding "child find" which states that "information from all sources will be carefully considered." Here, there was no evidence that the reports from the psychologist or psychiatrist were carefully considered. The hearing officer further found no evidence that a practical method of identifiable procedures or steps was followed.

The Student attended two middle schools in the District, and at both schools, the Student demonstrated difficulties with attendance. The District responded to these difficulties with one meeting, a "Truancy Due Process Hearing," and by filing formal truancy charges. Although Parent provided the District with evaluation reports diagnosing the Student with anxiety and depression, there is no evidence that the District considered whether his diagnosis was directly related to his poor attendance at school. The District did not develop any interventions to address the diagnoses. As a result of the Student's disorders, he had difficulty attending school which ultimately resulted in failing grades. The hearing officer found that the District (1) did not carefully consider information from all sources and (2) did not implement a practical method to identify and evaluate the Student. Therefore the District violated the IDEA's child find provision.

#### **a. Impact on FAPE**

Detroit School District, 113 LRP 7455 (Mich. SEA Jan 4, 2013).

Facts: Student was eligible for special education due to a specific learning disability. Student had also been diagnosed with sickle cell anemia, autism, and ADHD. During the 2009-2010 school year, Student was a freshman. He attended Cooley High School. At that end of that school year, Cooley High School was closed by the District. The student was assigned to Cody High School, but when Student's mother contacted Cody High School to enroll Student, they did not have his records. The school referred her to the District's placement office. Student's mother called the placement office, but she was referred back to Cody. Cody officials told her that they could not accommodate Student and referred her back to the placement office. During this time, Student did not attend school.

With only one week left in the 2010-2011 school year, the Student was assigned to Mumford High School. As a result, school officials suggested that Student enroll in the fall of 2011. During the 2010-2011 school year, the District did not telephone Student's mother regarding Student's absence from school. Student's mother never received truancy documents.

On November 18, 2010, parent provided the District with recommendations from Student's doctor; the recommendations included: individualized instruction, a high degree of structure, a consistent routine and a class schedule that is simple and the same from day-to-day. The District did not respond to these recommendations. On May 25, 2011 a Psychosocial Assessment found that Student had suffered from his year of nonenrollment.

Student attended Mumford High School in the 10th grade (2011-12 school year), but he suffered from anxiety and was subjected to bullying. While at Mumford High School, Student regularly became overwhelmed. Student also felt that his year out of school made him "stupid." Student's mother requested that the Student receive tutoring

because he had been out of school for a year, and Student's resource teacher agreed that tutoring would be beneficial. However, tutoring was never put in his IEP.

During the 2011-12 school year, Student would miss school frequently due to his sickle cell anemia, but he was not provided with any accommodations to catch up when he returned and the District repeatedly failed to address his excessive absences. In addition, some of Student's teachers had only a vague recollection of student. Parent filed a request for due process, alleging that the District denied Student a FAPE based on its failure to educate the Student during the 2010-11 school year, and its subsequent failure to provide appropriate services during the 2011-12 school year.

Issue: Whether the District failed to provide a FAPE, and was therefore responsible for private tutoring services, where the District failed to determine why Student was absent for the 2010-2011 school year?

Held: For Parent. The Administrative Law Judge (ALJ) found that Plaintiffs demonstrated that the District failed to provide a FAPE during the 2010-11 school year by failing to have an IEP in place for Student and therefore not providing services. The ALJ particularly noted that Student's mother sought to bring Student to school, but she was turned away. Student was finally enrolled at Mumford High School only after Student's mother obtained an advocate. The District violated its child find obligations when it failed to contact Student's mother by phone or visit Student to determine why Student was not in school. The ALJ concluded that "significant truancy triggers [the District's] child find obligations," and the District here failed to take action. Accordingly, the District failed to provide Student with a FAPE.

The ALJ further noted that the District's systematic failure to provide appropriate services to Student amounted to denial of a FAPE for the following school year. In addition to funding a private placement and related transportation, the District was required to fund two extra hours of tutoring every school day for two years following the order.

## **B. Transfer Students and Refusal of Services**

Griffin-Spalding County Schools, 112 LRP 44596 (Ga. SEA June 14, 2012).

Facts: Student attended middle school during the 2008-2009 school year. For the first part of the year, he received special education services pursuant to an IEP dated May 21, 2008. On December 17, 2008, Student's IEP was amended to change his placement for a period of 45 days.

Prior to the expiration of the 45 day period, the Student's IEP team convened a meeting to discuss the parent's intent to revoke consent for special education services. Student's mother explained that she felt Student needed to be more independent and accountable.

During the meeting, a District representative explained that Student would have to go through the entire referral process again before services could be reinstated. The Student's mother nonetheless signed forms refusing special education services.

On May 26, 2009, the District sent Student's mother a letter explaining the impact of her refusal of services. This included notification that Student's mother's rights as a parent of a special education student would be terminated, because Student would be considered a "general education" student. The letter also informed her that she could request an initial evaluation in the future.

On July 29, 2010, Student began high school at SHS, in a different district. Student's mother discussed Student's previous disciplinary problems with an assistant principal, but she did not mention special education or Section 504 services. The teachers at SHS honored Student's mother's request for additional assistance, including an extra set of text books, but mother still did not request special education services. Student's disciplinary problems continued.

On February 11, 2011, student used profanity and physical aggression towards a teacher. That was his seventh disciplinary incident during the 2010-11 school year. Student was given a five day out of school suspension, followed by a five day in school suspension.

On February 15, 2011, Student's mother contacted a school counselor at SHS and stated that she wanted to put student "back on a Section 504 plan." She obtained documents from the Middle School, and school officials sent a series of e-mails discussing whether Student's mother had intended to say "IEP" when she said "504 plan."

On March 17, 2011, Student was involved in another disciplinary incident. He was suspended out of school for ten days. On March 18, 2011, Student's father and Student met with the Assistant Superintendent and agreed that Student would finish the year in an alternative school. On March 18, Student's mother sent an e-mail asking why Student had not been "placed back under article 504." A school counselor contacted Student's mother to set up a meeting to discuss the difference between Section 504 and special education services, but the mother refused to attend. She had no further contact with the district regarding provision of services.

Student attended SHS at the beginning of the 2011-2012 school year. On August 31, 2011, student was involved in another disciplinary incident and suspended for ten days. A tribunal hearing was held, and student was expelled for the remainder of the year. Student withdrew from the District as of September 13, 2011 and began attending a charter school.

Issues:

1. Whether the District failed to implement an IEP that had previously been implemented by Middle School on December 17, 2008?
2. Whether the District failed to identify Student as a student with a disability and provide him with a FAPE?

Held: For the District. SHS was not required to implement Student's December 17, 2008 IEP, and its failure to do so did not violate the "child find" provision or the District's obligation to provide a FAPE. Although a District is required to provide a FAPE to a student with an IEP transferring in the middle of the school year to a school in the same state, the hearing officer found that provision inapplicable to the facts of this case. The hearing officer noted that here, Student transferred between schools when there was no IEP in effect. The December 17, 2008 IEP ceased to be in effect when the student's mother's revoked her consent for special education services. Further, the hearing officer noted that the December 17, 2008 IEP was over two years old when it was brought to the attention of SHS personnel.

The hearing officer also found that the district did not violate the "child find" provision of the IDEA, because there was no evidence that the District should have discovered that Student was a child with a disability prior to February 15, 2011. Internal e-mails demonstrated that school staff began acting upon the mother's e-mail almost immediately following February 15, and the record also demonstrated that the District attempted to contact Student's mother in March 2011 to set up a meeting. Under the circumstances, it was reasonable to attempt to discuss the difference between services available under Section 504 and those available under the IDEA. However, Student's mother refused to participate.

Because there was no evidence that Student qualified for special education services prior to February 15, 2011, the District was not obligated to provide Student with a FAPE until that point. The last evaluation had taken place over three years before (in 2007), and Student's mother's refusal to meet with District officials thwarted any new eligibility determination. The hearing officer further noted that, even if Plaintiffs could establish that the District failed to provide a FAPE, they had not met their burden of proving that any harm resulted.

### **C. Evaluations**

Avon Grove School District, 60 IDELR 177 (Penn. SEA Jan. 4, 2013).

Facts: In December 2010, the school district completed a reevaluation for a student with a speech and language impairment. In January 2011, the parent disagreed with the findings of the reevaluation report and requested an independent speech-language evaluation. The independent evaluation was conducted and the report was issued in April 2011.

In May 2012, parents requested a standardized assessment of the student's written language. The parties agreed to utilize the Test of Written Language, Fourth Edition ("TOWL-4"). At that time, the student's IEP contained a detailed writing goal and specially designed instruction for direct instruction in written expression in a small group setting, for 30 minutes per day.

In August 2012, a district speech-language pathologist administered two subtests of the TOWL. In September 2012, the district provided the results of the TOWL subtests assessment. The speech-language pathologist concluded "based on (the student's) performance on the subtests of the Test of Written Language: Fourth Edition, (the student) does not qualify for therapy in the area of written language through Speech and Language Services."

Shortly thereafter, the student's IEP team met and the writing goal was removed from the student's IEP. In addition, the direct instruction in writing was replaced with specially designed instruction in the regular education setting. The parent disagreed with these changes and requested an independent evaluation for speech-language services, including written language and auditory processing. The district denied this request and filed for due process. The district argued that the September 2012 assessment was not an evaluation, and that the subsequent changes to the IEP were merely a change in instructional approach. As a result, the parent was not entitled to an independent evaluation because the district had not evaluated the student.

Held: For the parent. The hearing officer disagreed with the district, noting that at the recommendation of the district's evaluator, based on the results of the TOWL, "a very intricate writing goal was removed from the student's IEP." In addition, daily direct instruction in a special education setting was also removed. "Both were profound changes in the student's programming that should only follow an in-depth consideration of multiple factors, not simply the result of two subtests of a single assessment tool."

The hearing officer also found that the district violated the IDEA "by using only a single measure or assessment as the sole criterion for gauging the student's needs in writing." As a result, the parents were entitled to an independent evaluation at public expense.

R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 60 IDELR 60 (5th Cir. 2012).

Facts: Student was a ten-year old student in the Alamo Heights Independent School District. She was eligible for special education due to autism, an intellectual disability, and a speech impairment. Student was essentially non-verbal. In kindergarten, student used the Picture Exchange Communication System (PECS) to communicate. In first grade, Student's parents purchased Student a voice output device called "Go Talk." Although Student continued to use PECS in school, the school agreed to try Go Talk on a trial basis. At the end of Student's first grade year, Student's

occupational therapist noted that Student appeared to work more successfully with PECS than with the Go Talk system.

At the beginning of Student's second grade year (2007-2008), the District completed an evaluation to identify Student as a child with autism. The evaluation report noted that Student was most comfortable with PECS, and a speech output system should not be implemented until Student's language was further developed. However, student's teachers continued to use the Go Talk for mathematics and reading.

At the team meeting at the end of the year, Student's father reported that Student's use of expressive language at home had decreased. District staff conducted three in-home sessions focused on PECS and Go Talk in order to help Student transfer use of the communication system to the home environment. The team also requested that the District complete an assistive technology (AT) assessment for communication by October 1, 2008. Student's team met in October 2008, but the AT assessment was not presented. This meeting was cut short due to tension between parents and the District. Another meeting was scheduled for December 2008. The AT assessment was not presented at the December meeting. Following the December meeting, the school psychologist sent an e-mail to Student's speech therapist inquiring about the assessment and was told that it had been completed.

The AT assessment was not discussed until meetings held in May and early June 2009 to prepare Student's 2009-2010 IEP. At an IEP meeting, Student's parents raised concerns regarding the District's slow implementation of a voice output device for Student. A school employee informed him that the school was in the process of implementing a voice output device for Student's use. The committee requested a second AT evaluation. Shortly thereafter, Student's mother wrote an e-mail raising concerns about the delay that this second assessment would cause.

Student began using a more advanced voice output device – DynaVox - in April 2009. Some of Student's IEP goals required the use of a voice output device. Student also borrowed devices from other students and the District began trying an additional device, Tango, to determine which device was best suited for Student.

The district completed the second AT evaluation at the beginning of Student's fourth grade year (2009-2010). Student then began using the DynaVox regularly and made significant progress.

On November 24, 2009, Student's parents filed a due process hearing request alleging denial of FAPE. The hearing officer determined that Student had not been denied a FAPE. Student then filed suit in the district court. The Court found that Student had not been denied a FAPE. This appeal followed.

Issue: Whether the District's failure to timely complete an AT evaluation and provide Student with an assistive technology device resulted in a denial of FAPE.

Held: For the District. The Court first addressed whether the District failed to create an individualized program for Student, because the District failed to complete the required AT evaluation by October 1, 2008. The Court found no clear record of whether the AT assessment had in fact been completed by October 1, 2008, but noted that it was more important that the District personnel did not discuss the evaluation at the Fall 2008 team meeting. The Court found that, because the team committee requested that the evaluation be completed by October 2008, it was clear that the committee intended to incorporate the results into Student's 2008-2009 IEP. This was not done.

The AT assessment was not discussed until May 2009, when the committee was preparing for fall 2009. The Student's IEP was not sufficiently individualized, because the AT assessment was not presented to the ARD committee in a timely fashion, or incorporated in Student's 2008-2009 IEP.

The Court next considered whether the District's failure to adequately individualize Student's IEP constituted denial of a FAPE. The court found that the District's failure to timely consider the AT evaluation did not amount to denial of a FAPE because Student still "demonstrated positive academic and non-academic benefits" during the 2008-2009 school year. Although the record established that Student made much more significant progress after Student began working consistently with DynaVox, the Court found that the "record contains ample evidence that [Student] demonstrated positive academic and non-academic benefits from her use of AT devices, including PECS, between Fall 2008 and Fall 2009, the period that elapsed before an AT evaluation was incorporated into her IEP." Because Student continued to make some progress with the system, the District did not deny Student a FAPE. The court noted that achieving one's "maximum education potential" is not what is required by the IDEA, rather, the question was whether Student received more than a de minimus academic benefit, which she did.

Accordingly, the court held that the District did not deny the Student a FAPE.

#### **D. Staff Training**

Pasadena Independent School District, 58 IDELR 210 (Tex. SEA Feb. 6, 2012).

Facts: Student was a teenager diagnosed with autism and receiving services pursuant to the IDEA. Student began receiving services from the school district at an early age in combination with Applied Behavior Analysis (ABA) training provided by a private school. In 2009, Student's mother requested that Student receive instruction in sex education. Certain IEP team members claimed that Student was not capable of understanding sex education. However, in response to the parent's request, goals relating to identifying parts of the body, responding to strangers, and using appropriate social behavior were included in the Student's IEP.

Parent filed a request for due process, alleging, in part, that the District failed to timely assess and address Student's needs for sex education.

Issue: Whether the District failed to provide staff with appropriate training – specifically with regard to staff responses to a parental request for a sex education program for Student – and, if so, whether that constitutes denial of a FAPE?

Held: For the Parent. The hearing officer found that the student needed “concrete, specific instruction in . . . what is and isn't appropriate social and sexual behavior.” The goals that were included in the Student's IEP were appropriate, however, the District did not include goals relating to sex education in Student's IEP until his parent requested them.

The hearing officer noted that the District might have included such goals in Student's IEP much earlier if District staff had been properly trained. Because Student had learned, and been encouraged, to be non-confrontational, there was a risk that he might respond positively to inappropriate touching. Additionally, Student takes longer to absorb concepts; therefore sexual education should have been started at a relatively early age. The hearing officer noted that the IEP goals relating to sex education were appropriate, but ordered the district to train relevant staff members on how to teach sex education to students with autism or intellectual disabilities.

#### **E. Present Levels**

In re: Student with a Disability, 60 IDELR 90 (N.Y. SEA Sept. 12, 2012).

Facts: Student was diagnosed with autism and a moderate intellectual disability, and had deficient adaptive functioning and limited interpersonal skills. She experienced significant global developmental delays. Student was ambulatory but nonverbal. She would point to or take desired items to communicate her wants. For the 2009-10 and 2010-11 school years, the student attended a class with 5 other students, a teacher and an aide, and received speech-language therapy and occupational therapy.

On March 15, 2011, the student's IEP team convened for the student's annual review and to develop an IEP for the 2011-12 school year. Attendees included the parents, the student's special education teacher, a district school psychologist, student's speech therapist, and an occupational therapist. The team reviewed some “portfolios and assessments.” The team recommended that student remain in the same placement, and receive substantially the same services.

On September 1, 2011, the parents notified the IEP team leader, by a “10 day notice,” that they were unilaterally placing the student at the Rebecca School for the upcoming school year and would seek direct payment or tuition reimbursement for that placement. The student began attending the Rebecca School on September 20, 2011, and she continued there through the 2011-12 school year. The student made significant progress during the course of the year.

The parents initiated a due process complaint on February 1, 2012. They alleged that the student had not made progress during the 2009-2010 and 2010-2011 school years, and the District offered the same ineffective program for the 2011-2012 school year. They further alleged that the March 2011 IEP was inappropriate because it failed to adequately reflect the student's needs and did not contain achievable, measurable goals to address those needs. They alleged that the District's behavior suggested predetermination. Parents sought reimbursement for tuition at the Rebecca School and additional services to remedy the District's failure to provide a FAPE.

A hearing officer heard the case on April 24 and 26, 2012, and decided that the District failed to offer the student a FAPE for the school years 2010-2011 and 2011-2012. The hearing officer awarded the parents additional services and direct funding and reimbursement of the costs at the Rebecca School. The District appealed.

Issue: Whether the District denied the student a FAPE?

Held: For Parents. Although the State Review Officer (SRO) found that the District did not violate its procedural obligations at the March 2011 IEP meeting, the SRO found that the IEP was substantively deficient. The student's IEP stated that she exhibited "significant delays in the areas of visual motor, self-care, and sensory processing skills." However, the IEP provided little detail about the current nature and extent of her deficits, and the goals were not sufficiently related to her present levels of performance.

The IEPs listed goals and objectives for the student related to her need to improve her ability to make eye contact, interact with peers, sort items, point to the picture of a given object, identify five body parts, stay in her seat, walk in a line, and follow simple directions. Although some of the goals and objectives could be broadly construed to relate to the student's identified sensory process, visual motor, and self-care deficiencies, the State Review Officer found it difficult to determine whether the goals and objectives actually met the student's needs. Thus, the IEP did not adequately address the student's needs.

The District's failure to sufficiently identify the student's present levels of functional performance in her IEPs amounted to a denial of a FAPE. The SRO found that the parents' private school selection was appropriate, and equitable considerations favored reimbursement.

## **F. Parental Participation**

Over the past year, a number of courts have dealt with the issue of whether or not a parent was denied meaningful participation in the development of an IEP or placement proposal.

Gwinnett County School District, 113 LRP 676 (Georgia SEA Dec. 13, 2012).

Facts: Student was a high school student eligible for services pursuant to the IDEA. Student was diagnosed with Asperger's Syndrome and Dysthymic Disorder. Student began receiving services in the District in 2009, when he was in eighth grade.

At the end of Student's eighth grade year, Student's IEP team met to prepare an IEP for the following year (2010-2011). The IEP indicated that Student often failed to finish assignments, rushed through class work, and performed inconsistently on quizzes and tests. Student would make inappropriate comments in class – and would frequently be disruptive and need redirection. Despite these issues, Student reported that he liked his middle school teachers. Student's IEP indicated that Student would attend his neighborhood high school, Peachtree Ridge.

Over the summer, Student's parents moved to a new house, in the same school district but within the boundaries of another high school, North Gwinnett High School. In an effort not to disrupt Student's education, parents and the District agreed to allow Student to remain at Peachtree Ridge. However, after a few weeks, Student enrolled at North Gwinnett, because Student's parents were concerned that the District might revoke the transfer at any point.

Student was resistant to attending North Gwinnett from the beginning. He stated that it reminded him of a previous middle school where he had been abused. On Student's first day, he curled up in a ball and rocked back and forth in the back of his parents' car. Student felt that he did not have friends at North Gwinnett, because no one spent time with him outside of school. Student stated that he did not feel that he "belonged" at North Gwinnett. Student's parents believed that he was suffering ongoing depression and anxiety due to his continued enrollment at North Gwinnett.

The District offered to allow Student to transfer to Collins Hill High School, but plaintiffs ultimately refused because Student was reluctant to meet a new group of people and establish himself.

The court noted that Student's experience at North Gwinnett was not entirely negative. Teachers reported having a positive impression of Student, and they observed Student interacting with other students in a manner indicating that they were "friends." In fact, Student's teachers seemed to believe that Student was doing well socially. One teacher reported having to move Student away from his friends, because he was being too social. Another reported that Student seemed to recognize social cues to a much greater degree than other students with Asperger's. Student's academic performance, with the exception of mathematics, was also notably good.

On March 4, 2011, Student's IEP team met to prepare an IEP for the 2011-2012 school year. The concerns discussed in the meeting mirrored the concerns stated in Student's previous middle school IEP. Student had trouble staying on task, rushed

through assignments, and his test and quiz scores were inconsistent. Although Student's parents informed the school that Student's anxiety and depression were increasing, school staff did not notice the same change. Student's parents declined to sign the IEP. They requested due process, and ultimately reached a settlement agreement whereby the District agreed to perform an evaluation of student.

The North Gwinnett school psychologist evaluated Student in May and June 2011. The psychologist reported that North Gwinnett appeared to be an appropriate placement for Student, but parent's persistent negative attitudes towards the school might make another placement a more comfortable learning environment.

Thereafter, Student's parents filed a second due process complaint. They also kept Student home from school at the beginning of the 2011-2012 school year. An IEP meeting was scheduled for August 11, 2011 to discuss Student's IEP. On August 14, Student notified the District that he had decided to return to North Gwinnett against his parents' wishes. On August 18, 2011 the team met again and determined that Student would remain at North Gwinnett and be transitioned into more general education classes. Student's father signed the IEP, but indicated his disagreement with the placement.

Student's parents did not allege that the program violated the IDEA, but rather alleged that the District violated the IDEA "by not taking into consideration Plaintiff's thoughts or feelings" and second by "disregarding Plaintiff's and his parents' beliefs that attendance at Peachtree would benefit him."

Issue: Whether the District denied Student a FAPE when it did not permit parents to transfer Student's placement to Peachtree Ridge?

Held: For the District. The Hearing Officer engaged in a two part inquiry evaluating: (1) whether the State complied with the procedural provisions of the IDEA, and (2) whether the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits.

First, the Hearing Officer found no procedural violation of the IDEA. The Hearing Officer noted that it was clear the Student's parents had been involved with the decision making process at every step of the way. Student's parents had regular contact with Student's teachers, and it was clear that the school psychologist considered the parent's concerns in his evaluation. In addition, the Team – including the parents - discussed parents' concerns regarding the Student's continued attendance at North Gwinnett, and the educational members of the Team agreed that the student's disability did not require that his program be administered in another school.

Second, the Hearing Officer found that the District did not deny Student a FAPE by not permitting him to transfer to Peachtree Ridge High School. There was no evidence that the District offered a program which was not "reasonably calculated to

confer educational benefit.” Plaintiffs did not allege that the program was not adequate, but only that the placement of the program was objectionable. The Hearing Officer further noted that Student’s parents had the option of transferring Student to Collins Hill High School, but elected not to transfer Student. The Hearing Officer also found that Student’s difficulties at North Gwinnett resulted from his disability, not the placement. Student experienced many of the same difficulties at North Gwinnett as he had in middle school. In addition, Student expressed reluctance to become settled at North Gwinnett due, in part, to the ongoing litigation.

Third, the Hearing Officer found that plaintiffs failed to demonstrate that the District violated Student’s right to receive a FAPE in the least restrictive environment. The Hearing Officer noted that the student’s Team discussed the parents’ concerns with placement at North Gwinnett High School and determined that the Student’s needs could be appropriately met there in the general education setting. Thus, the District’s motion to dismiss was granted.

### **III. The Provision of a Free, Appropriate Public Education (FAPE)**

#### **A. FAPE in the New Hampshire District Court**

Pass v. Rollinsford School District, 113 LRP 9161, 2013 DNH 029 (D.N.H. March 5, 2013).

Facts: Student was an 18-year-old student in the eleventh grade. Her parents were both deceased, and she was under the care and guardianship of her older sister, T. Student struggled with a learning disability in mathematics, and performed about five or six years behind other students her age. Student also had deficits in social communication and executive functioning.

Student attended public school in Maine from kindergarten through sixth grade. In 2005, Student and T. moved to North Carolina, where Student attended the seventh grade. The North Carolina school district classified Student as eligible for services under the IDEA. The North Carolina district developed an IEP for Student in March 2006.

Student and T. then moved to Rollinsford, New Hampshire. From December 2006 to September 2008, Student attended middle school in that District. She received substantially the same services that she had received in North Carolina: mathematics and language support in a special education learning center for ten hours per week, one hour per week of speech-language therapy, and three hours per week of an assisted study hall. Student otherwise remained in a general education setting.

In April 2008, the District proposed a transition plan for Student’s transition to ninth grade. The proposal identified Student’s needs as “math applications, reading comprehension and speech/language.” The IEP provided a number of

accommodations, including: access to the learning center to complete assignments; extended time to complete tests; access to a calculator; reductions in the length and scope of assignments; and study guides. It provided for an assisted study hall for 90 minutes/day. T. signed the IEP without exception on April 8, 2008.

In September 2008, Student began attending ninth grade at Somersworth High School. On October 2, 2008, the District convened a meeting and revised Student's IEP to remove reading goals and associated services from Student's IEP, because she was reading at grade level. T. agreed with the revised IEP without exception.

Student attended general education classes for her entire ninth grade year. During her 90 minute assisted study-hall sessions, paraprofessionals would work with Student to reinforce concepts from class and to develop social skills. Student also participated in a lunch group to help develop her social skills. Student passed all of her classes, earning A's and B's, and was promoted to tenth grade.

Student began her tenth grade year (2009-2010) experiencing social difficulties. On September 24, 2009, Student's IEP team met to review her IEP. The primary focus of the meeting was Student's social struggles. Following the meeting, the District proposed a revised IEP containing "social/behavioral goals." T. signed the IEP without exception.

In mid-November 2009, T. e-mailed Student's case manager expressing concern that Student's IEP was not sufficiently addressing Student's social skills deficits. In response, the District held an IEP team meeting on January 21, 2010. The District added a weekly speech-language consultation to Student's services, but otherwise left the IEP unchanged. T. refused to sign the IEP, because she was concerned that Student's mathematics needs were not being met.

The District agreed to have its speech-language pathologist evaluate Student. The evaluation, which took place in February 2010, placed Student's core language score in the average range, but her "Pragmatic Judgment" score in the fifth percentile. Student was in the fifth percentile for Understanding Spoken Paragraphs, and the ninth percentile for Formulated Sentences and the Language Memory Index.

On February 17, 2010, the District held another IEP meeting to review the results of the speech and language evaluation. The District did not revise Student's IEP. T. again refused to sign the proposed IEP. On March 15, 2010, T. submitted an application to enroll Student in a private residential summer program at the Riverview School in Massachusetts.

During this time period, the District's psychologist performed psycho-educational testing of Student. The psychologist found Student well below average in social and communication skills, community skills, motor skills, and personal living skills. Student's math score was in the fourth percentile. Student otherwise tested in an average range.

On April 27, 2010, another IEP meeting was held. T. requested that the District provide speech-language services for pragmatics and social communication. The District denied this request. The District revised Student's IEP to provide Student with summer assistance in math and social skills for three hours per day, three days per week from July 6, 2010 through August 5, 2010. On May 7, 2010, T. rejected the IEP.

In June 2010, T. wrote to the District superintendent stating that the District was not meeting Student's needs. T. notified the District of her intent to unilaterally place Student at Riverview School for the summer and to subsequently seek reimbursement from the District.

On June 22, 2010, the District convened an IEP team meeting with T. and refused funding for the Riverview School summer program. The District did offer to provide Student with post-graduate assistance to meet other, non-academic needs. Student passed all of her classes and was promoted to Eleventh grade. She attended the Riverview School for the summer of 2010. She excelled both academically and personally in that program.

In September 2010, Student returned to Somersworth High School for her eleventh grade year. The District proposed an IEP, which offered no new services. T. rejected it. In early October 2010, Student's IEP team met to review an independent evaluation performed by a private neuropsychologist. The neuropsychologist diagnosed Student with Asperger's Syndrome. The District agreed that Student was also eligible for IDEA services due to autism. In light of this diagnosis, the District offered to instruct Student in mathematics using a self-paced program. District did not offer to provide the social skills instruction recommended by the neuropsychologist. T. rejected the IEP.

On October 26, 2010, the District held another IEP meeting. T. explained that Student was very stressed about school, including her English class. After the meeting, the District issued a new proposed IEP that included an assisted study hall, recreational therapy once a week (involving interaction in a group setting with her peers and local community), and a life skills class. On November 18, 2010, T. rejected the proposed IEP.

T. then notified the District of her intent to unilaterally place Student at the Aucocisco School, a state-approved special education day school in Maine. At the time she left for Aucocisco, Student was earning a C+ grade in her English course and As and Bs in other graded courses.

Student began classes at the Aucocisco School on December 6, 2010. Aucocisco School staff found that it was necessary to return to foundational mathematics concepts, because Student did not understand concepts from kindergarten level math. Student made marked social and academic progress at the school.

T. first filed a due process complaint with the New Hampshire Department of Education on October 5, 2010, seeking reimbursement for Student 's unilateral placement at the Riverview School summer program. T. subsequently amended her complaint to include allegations that Student's 2008-2009, 2009-2010, and 2010-2011 were inappropriate to address Student's special education needs, and to seek reimbursement for the Aucocisco school placement.

After presiding over a hearing in January, 2011, the hearing officer found that Student's IEPs had adequately addressed Student's social and emotional issues, and rejected both reimbursement claims. T. appealed.

Issue: Whether the IEPs proposed for student for the 2009-2010, 2010-2011, and 2011-2012 complied with the IDEA, and whether T. was entitled to reimbursement for the Student's unilateral placements?

Held: For the District. The Court first noted that, to the extent that T. alleged that Student's 2009 IEP was inadequate, the claim was barred by the two year statute of limitations. The Court then went on to find that the District provided Student with a FAPE for both the 2010-2011 and 2011-2012 school years. T. was therefore not eligible to receive reimbursement for Student's private placement.

The Court explained that the District was obligated to provide a program that was "reasonably calculated to deliver educational benefits" to Student. In evaluating whether the District's IEPs adequately provided Student with a FAPE, the Court examined whether the IEPs adequately addressed (1) Student's academic needs, and (2) Student's social needs.

The Court found that the District adequately addressed Student's academic progress, and particularly in Student's weakest discipline – mathematics. The Court noted that during Student' seventh and eighth grade years, Student was provided with only limited support for mathematics, but appeared to make sufficient academic progress. IEP progress reports noted that Student required additional support at home, but that Student "demonstrated strong growth overall." The program for Student in ninth grade followed the general pattern of her seventh and eighth grade IEPs – a mainstream mathematics class with some additional support and minor accommodations. Student was able to earn a B in mathematics in her ninth grade year.

Given Student's apparent success in a mainstreamed mathematics class, placing Student in a mainstream classroom for her tenth grade year was not inappropriate. Further, T. did not object to this IEP when it was implemented. Student's success in the mainstream classroom environment also demonstrated that the placement was not inappropriate. The Court did not find Student's low test scores dispositive of Student's academic progress. The Court noted that "it is not inconceivable, or even out of the ordinary, that a student who scores so poorly on standardized tests in comparison to his or her peers might nonetheless achieve passing grades in a basic, grade-level

mathematics course without assistance, at least when that student is an exceptionally hard worker -- as everyone agrees [Student] is.”

The Court then went on to affirm the hearing officer’s decision that Student’s “social and emotional issues were addressed at school.” The Court found that the daily assisted study hall sufficiently targeted Student’s social and emotional needs. Student’s case manager would use this time to “script” Student’s day so that Student would be prepared for certain events. Student also received weekly consultations with the District’s speech-language pathologist and participated in the social skills lunch group. The Court found that the services offered sufficiently addressed Student’s needs, because it was clear that Student had benefitted from the social skills instruction provided by the District.

While the Court acknowledged that there was evidence that Student made more social progress at Aucocisco, the Court found it clear that Student made “meaningful social progress” while attending high school in the District.

The Court further found that the IEPs did not cause harm to Student. Because the District did not violate the IDEA, T. was not entitled to reimbursement for unilaterally placing Student in a private school.

Richards v. Hudson Sch. Dist., 2013 DNH 32, 2013 U.S. Dist. LEXIS 34693 (D.N.H. March 12, 2013).

Facts: Student was eligible for special education and related services under the IDEA due to a seizure disorder and a speech-language impairment. From first through fifth grade, student attended Nottingham West Elementary School in the Hudson School District. She completed sixth grade at Hudson Memorial School. Shortly before the start of her seventh grade year (2011-12), Student’s parents withdrew her from Hudson Memorial and enrolled her in Learning Skills Academy.

From second through sixth grade, student’s IEP included two hours per day of instruction at The Reading Foundation. When developing the IEP for the student’s sixth grade year, the educational members of the Team proposed to provide reading instruction at Hudson Memorial, to eliminate the disruption imposed upon the student by a daily commute from Hudson to Amherst during the school day. At parents’ request, however, the Team agreed to continue providing services at The Reading Foundation.

On June 17, 2011, Student’s IEP Team met to discuss an IEP for Student’s seventh grade year. At that meeting, parent said that she would send her concerns with the draft to the District via email. However, she did not do such. The Team met again on June 23, to continue reviewing the IEP and to discuss the results of an independent evaluation. The Team incorporated all but one of the evaluator’s recommendations into the draft IEP. The only recommendation that was not included was “a recommendation that the student be placed in a special-education school using a language-based

curriculum across all subject areas, with classes of no more than eight students composed of peers with similar academic potential and achievement.” At the end of the meeting, the District indicated that it would revise the IEP and send the parents a copy of the revised IEP.

On August 3, the District sent the parents a copy of the revised IEP. The IEP included reading services at Hudson Memorial, rather than at The Reading Foundation. On August 16, parents, through their educational advocate, requested various clarifications to the IEP. On August 19, the District sent the parents a revised IEP. That same day, the District received a letter from the parents’ attorney, indicating that they rejected the IEP and were enrolling student at Learning Skills Academy. Parents also attached a request for due process, seeking reimbursement for the costs associated with the student’s unilateral placement at Learning Skills Academy.

The Hearing Officer found for the District and the parents appealed.

Held: For the District. The Court noted that the issue in this case turned on whether the student’s IEP for the 2011-12 school year was reasonably calculated to enable the child to receive educational benefits. The parents’ appeal “addresse[d] only the issue of [student’s] academic progress [during prior school years], arguing that once the Hearing Officer found that her progress had not been ‘meaningful or significant’ he was obligated to find that [the District] had failed to provide her with a FAPE.” The appeal focused on this “purported error of law, . . . [and did] not address” the 2011-12 IEP.

The Court found that it was “undisputed that the IEP proposed for the student’s seventh-grade year was ‘reasonably calculated to enable [her] to benefit from her education,’ and that the proposed IEP could ‘be effectively delivered at Hudson Memorial School.’ . . . Because plaintiff concedes that the student’s seventh-grade IEP was reasonably calculated to enable her to benefit from education at Hudson Memorial, there is no basis for a determination that public placement under that IEP would violate IDEA. Without such a determination, there is no basis for ordering HSD to reimburse plaintiff for the cost of sending her daughter to LSA.”

## **B. Requests for One-to-One Aides**

Miami-Dade County School Board, 112 LRP 56742 (Fla. SEA Sept. 25, 2012).

Facts: Student was a mildly autistic child of average intelligence. Student began attending school in a Miami Dade County School in 2011, after moving to Florida from Puerto Rico. At the time of the hearing, Student had completed third grade. Student’s primary language was Spanish. Student received special education and related services and ESOL instruction at school. Student took certain classes in a general education setting, but Student’s primary instruction took place in a self-contained

special education class with 12 students. Student also received occupational therapy, language therapy, and counseling services.

The hearing officer noted that the record demonstrated that Student proved to be “non-aggressive, pleasant, friendly, social, outgoing, and enthusiastic.” Student was able to communicate in full sentences, and express feelings. In the general education setting, student was an average performer and demonstrated that he could complete class work primarily on his own, although Student sometimes required some redirection.

Student’s previous IEP was completed May 20, 2011 at a school in Puerto Rico. In Puerto Rico, Student had a full-time one-to-one aide to assist Student in, and to and from, school. The IEP did not contain a provision requiring the one-to-one aide; it was ordered after parent filed suit against the District because Student came home from school with a laceration in his “private area.”

The District provided the services described in the May 2011 IEP until October 12, 2011. On October 12, 2011, the District convened an IEP meeting to develop a new IEP. The IEP provided a “resource room” placement for Student 41-79% of the time, and provided that the “primary transportation mode” would be “individualized stop without supervision.” Student’s mother indicated that she agreed with the IEP.

On February 2, 2012, Student and Student’s friend reported an alleged confrontation with another student to their teacher. The teacher reported the incident to the principal, who interviewed all of the children involved. The principal contacted Student’s mother. Student’s mother was then told a “more troubling” version of the story by the Student’s friend’s mother. She contacted the school to request a one-to-one aide for the safety of her child.

An IEP team meeting was held on February 8, 2012. The team reviewed an observation report of Student, which found that Student was compliant and able to stay on task in class. Small modifications were made to the October 2011 IEP, but one-to-one support was not added. Student’s mother indicated that she agreed with the IEP. On March 29, 2012 the IEP team met to review the February 2012 Interim IEP. At that meeting, the team again discussed paraprofessional support and again reached the conclusion that, despite the mother’s position, Student did not require paraprofessional support. The mother indicated disagreement with the outcome of this meeting.

On April 11, 2012, Student’s mother filed a due process complaint, alleging that the District denied FAPE by failing to provide a 1:1 aide. A hearing was held August 30, 2012. At the hearing, the Mother presented only her own non-expert testimony.

Issue: Whether the Miami-Dade County School Board denied Student a FAPE by failing to provide Student with a full-time one-on-one aide?

Held: For the District. The hearing officer first explained that, under the IDEA, the school district's decision regarding provision of services is accorded some deference. Therefore, the mother had the burden of demonstrating that the District failed to provide her child with a FAPE. Rather than considering the "safety" of Student, the inquiry focused on whether the District failed to provide Student with a FAPE.

The hearing officer found that the mother's non-expert testimony did not provide a sufficient basis for finding that the District had failed to provide a FAPE. Further, the testimony of the District's educators established that Student's IEP was reasonably calculated to, "and in fact did," produce meaningful educational benefit for Student. Student made marked progress in the District, without a paraprofessional. Because student's progress was more than "trivial or de minimus," the hearing officer found that the District provided Student with a FAPE and denied the mother's request for a paraprofessional aide.

#### **IV. Retrospective Testimony**

R.E. v. New York City Dept. of Ed., 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012).

Facts: This case involved consolidation of several cases and considered whether the hearing officers and/or State Review Officers in each case improperly considered "retrospective testimony," or "testimony that certain services not listed in the IEP would actually have been provided to the child if he or she had attended the school district's proposed placement."

The first case involved a student with autism who attended a private school in Manhattan. He was in a class with 5 other children, all of whom had their own aide. He also received 30 hours of ABA therapy, speech-language services and OT.

In May 2008, the Student's IEP Team met to develop an IEP. The IEP included a 12-month placement in a public school setting with six students, one teacher, and two paraprofessionals (6:1:2), one of whom would be assigned to student on a one-to-one basis. The IEP also included speech services, OT, and counseling, as well as a behavior plan. Parent rejected the proposed placement because it did not include sufficient 1:1 instruction.

Parents requested due process. The hearing officer found in favor of the parents, and the district appealed. On appeal, the State Review Officer reversed, noting that the parents would have been provided with opportunities for parent training and counseling at the public school, despite the fact that these services were not mentioned in the IEP. Parents appealed.

In the second case, the student attended a full day preschool program, in a class with 8 students, 1 teacher and 3 aides. She received various services including speech, OT, and ABA therapy. In April 2008, her Team met to develop an IEP for the 2008-09 school year. The Team proposed to place the student in a 6:1:1 class, with speech

services and OT. The IEP noted that the student demonstrated behaviors that interfered with her ability to learn, but the Team concluded that her behavior did not seriously interfere with instruction and can be addressed by the classroom teacher. Parents rejected the IEP based on the inadequate 1:1 ABA support. They requested due process.

As with the first case, the hearing officer's decision in favor of the parents was reversed by the State Review Officer. Relying on the teacher's testimony about her classroom methods, the SRO found that the District's proposal was sufficient. He noted that the teacher used elements of ABA therapies in her classroom, and that Student would have received 25 minutes of 1:1 ABA instruction per day.

Issue: When, if ever, is it permissible for a district to augment the written IEP with retrospective testimony about additional services that would have been provided at the proposed placement?

Held: The court engaged in an in-depth analysis regarding what constitutes "retrospective testimony," and when it may be appropriately used. While the Court declined to adopt a rigid "four corners" rule (prohibiting testimony that goes beyond the face of the IEP) proposed by Plaintiffs, it held that "testimony regarding state-offered services may only explain or justify what is listed in the written IEP." Testimony cannot be used to support any modification that is materially different from the written IEP. "A deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP." The court noted that, in holding that retrospective testimony impermissible, it followed the First Circuit's decision in Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st. Cir. 1990).

The court found that for the system to function properly, parents must have sufficient information about the IEP to make an informed decision as to its adequacy. "By requiring school districts to put their efforts into creating adequate IEPs at the outset, IDEA prevents this type of "bait and switch," even if the baiting is done unintentionally." Retrospective testimony may only be used to explain or justify the provisions of an IEP.

In the cases at bar, the court found that the State Review Officers had improperly considered retrospective testimony. However, consideration of retrospective testimony alone does not amount to denial of a FAPE.

In the first case, the court concluded that reliance upon retrospective testimony, even in combination with deficiencies in a functional behavior assessment, did not rise to the level of a denial of a FAPE. The court found that the evidence supported the conclusion that the IEP was reasonably calculated to enable the student to make educational progress.

In the second case, the court found that the circumstances warranted full reimbursement to parents for a unilateral placement. This was based in part of the hearing officer and SRO's reliance on retrospective testimony regarding the services that the student would have received, but were not documented in the student's IEP. The court explained that the "[student's] parents had no knowledge or guarantee from the IEP that [the student] would have received a teacher who conducted daily 1:1 ABA sessions."

## **V. Administrative Exhaustion**

Wright v. Carroll County Board of Education, 59 IDELR 5 (D. Md. May 24, 2012).

Facts: Student was a fifth grade student with autism. At the beginning of the 2008-2009 school year, Student expressed fear about attending school because he was being beat up. As early as September 2, 2008, Student's mother reported Student's fear to the school. She had previously communicated concerns to the Student's teacher. Student's mother was assured by "unspecified school officials" that the situation was viewed seriously.

On or about October 22, 2008, Student was attacked by a fellow Student, M. Student had black eyes and a swollen lower lip. After the October 22 incident, Student began avoiding school.

Following the October 22 occurrence, Student's mother asked to visit the school to "observe the instructional circumstance" in the Student's classroom. A three day visitation period was arranged. During this time, Student's mother noticed that Student was seated very close to M. Student's mother discovered that several of Student's teachers had not been provided with specific information relating to the bullying attacks upon Student.

At some point following the attacks, Student was placed in lower level classes. Student began to see a psychiatrist and a social worker. Both diagnosed Student with post-traumatic stress disorder. Student and his mother alleged that Student began suffering from a "debilitating ancillary condition known as rectal prolapse" and that this condition could require surgical intervention.

Student began receiving home instruction in November 2008. After Student withdrew, Student's family retained counsel and, after two years, obtained an out-placement for Student. Student's family sought to recover treatment costs, lost wages, and attorney's fees, and certain other losses. The family alleged that they had "exhausted, for all intents and purposes, administrative remedies," and that "further administrative process would be futile."

Issues: Whether the family had properly exhausted its claims pursuant to the IDEA and Section 504?

Held: For the District. The Court held that the Plaintiffs failed to exhaust remedies under the IDEA and Section 504. Although parents need not exhaust remedies when doing so would be futile, the Court noted that the “burden of demonstrating that administrative procedures should be excused fall on the party seeking to avoid them.” Because the Plaintiffs did not first seek a due process hearing, they did not appropriately exhaust their administrative remedies.

Although the IDEA does not specifically address victims of violations of school disciplinary rules, the Court noted that the IDEA requires administrative exhaustion for claims arising from a special education student’s violation of the school disciplinary rules. The Court found that the IDEA’s protections would have adequately addressed the Plaintiffs’ concerns in this case. Further, the Court noted that, tort-like monetary damages are “simply inconsistent with IDEA’s statutory scheme.”

The Court found that the Plaintiffs failed to exhaust their Section 504 claim, because, although exhaustion is not required for an independent Section 504 claim, it is required where the Section 504 claim is tied to an IDEA claim.

## **VI. Placement**

### **A. Predetermination Issues**

P.C. v. Milford Exempted Village Schools, 113 LRP 2902 (D. Ohio Jan 17, 2013).

Facts: Student received services pursuant to the IDEA and Section 504 of the Rehabilitation Act. Student had multiple disabilities, including a mixed expressive and receptive language disorder, a mild cognitive impairment with an IQ of 60, executive functioning deficits, motor problems including having dysarthric speech, deficits in visual perception, attention difficulties, and memory problems.

Student’s parents and the District agreed on Student’s IEPs until February of 2009. At that time, District proposed moving Student from the privately-owned Langsford Learning Acceleration Center, where Student had received reading services for third, fourth, fifth, and sixth grades, back to Student’s home school. Student’s parents filed a due process challenge and invoked the stay-put provision of the IDEA. The District and Parents settled the matter a few months later, and Student continued to receive reading instruction at Langsford.

Student’ IEP team convened three times in May 2010 to write Student’s IEP for the 2010-2011 school year. According to Student’s parents, the team reached an impasse on the third day when they discussed Student’s reading goals. The Parents believed that the District had predetermined Student’s return to his home school for reading instruction. Parents did not consent to placement at Student’s home school for reading instruction, but the team agreed on the remainder of the IEP goals. The District requested an impartial due process hearing on August 6, 2010, requesting that Student

be provided reading services at his home school. The District claimed that Student would make similar progress at his home school and that his home school would be the "least restrictive environment."

A due process hearing was held on October 28, October 29, November 4, November 5, and November 11, 2010. The hearing officer issued a decision on December 20, holding that Defendant met its burden of proof in demonstrating that its proposed placement for reading provided a FAPE in the least restrictive environment. The hearing officer ordered that Student's reading placement be changed to the reading room at his home school as requested by Defendant, that his IEP be amended to provide for one-on-one instruction.

Student's parents appealed to a State Review Officer (SRO). The SRO affirmed the decision of the hearing officer.

Plaintiffs then filed a Complaint with the District Court, seeking a reversal of the SRO decision and a finding that the 7th grade IEP did not provide Student with a FAPE.

Issues:

1. Whether the District predetermined Student's reading placement?
2. Whether the 2010-2011 IEP failed to provide FAPE to Student?

Held: For Parents. The Court found that school officials impermissibly predetermined Student's reading placement prior to the May 2010 IEP meetings. The Court noted that the record demonstrated, as early as November 2009, that IEP team members formed opinions that Student should leave Langsford. Further, preplanning notes demonstrated that the home school recommended that Student be switched from Langford. The testimony of IEP team members established that school members had multiple conversations relating to removing Student from Langsford. The Court noted that, rather than discussions of which program would most benefit Student, it appeared that school staff merely discussed how Student would no longer attend Langsford.

The Court explained that, while "officials are permitted to form opinions and compile prior [sic] to IEP meetings," officials must "come to meeting with suggestions and open minds." The Court found that the record demonstrated that the District here did not go to the IEP meeting with an open mind. Rather, District officials went to the meeting with the intention of removing Student from his Langsford placement. There was further no evidence here that school officials reviewed any specific criteria or data to establish their conclusion that this course of action would be the best for Student.

The Court went on to find that the District's procedural violation caused substantive harm to Student, and thus denied Student a FAPE. Because the District predetermined Student's reading placement, the parents could not be "meaningfully

involved” in the discussion of the specific methodology which would be used to teach Student. Accordingly, the Court reversed the hearing officer and SRO’s opinions, and found the District had failed to provide Student a FAPE. The Court declared Parents the prevailing parties.

## **VII. Discipline Issues**

### **A. Hearing Officer Authority**

In Letter to Ramirez, 60 IDELR 230 (OSEP Dec. 5, 2012), OSEP was asked to provide guidance regarding whether a hearing officer has jurisdiction to determine whether a certain action by a student with a disability amounts to a violation of the school district’s Student Code of Conduct. OSEP noted that under the IDEA “a hearing officer in an expedited hearing regarding discipline, decides whether to return the child with a disability to the placement from which the child was removed if the removal was a violation of 34 CFR 300.530<sup>1</sup> or the child’s behavior was a manifestation of the child’s disability; and decides whether to order a change of placement to an appropriate interim alternative educational setting for not more than 45 school days if maintaining the current placement is substantially likely to result in injury to the child or to others.”

OSEP opined that “[b]ecause the hearing officer’s authority includes a determination regarding 34 CFR 300.530 and that provision includes references to removal from the current placement of a child with a disability who violates a code of student conduct, there may be instances where a hearing officer, in his discretion, would address whether such a violation has occurred. The IDEA and its implementing regulations neither preclude nor require that a hearing officer determine whether a certain action by a student with a disability amounts to a violation of the school district’s Student Code of Conduct.”

### **B. Unilateral Removals**

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<sup>1</sup> 34 CFR 300.530 states, in relevant part:

(a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) General. (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

Vincent v. Kenosha Unified School District, 59 IDELR 242, 2002 US Dist. LEXIS 138096 (E.D. Wisc., Sept. 26, 2012).

Facts: Student was eligible for services due to autism. For several years, she has had increasing behavioral disruptions, including visual/auditory hallucinations, assaultive/biting behavior, and low frustration tolerance. Student was also physically aggressive towards teachers and has bitten herself and banged her head. From June 2006 through July 2008, she lived at a behavioral health program pursuant to a court order initiated by an Alabama Child Welfare Agency. While there, she attended a private school, but was absent “on most if not all school days” due to safety concerns. The transition from her residency at the health center to her residency with her parents was marked by severe mood swings, bizarre behavior, and incidents where she became physically aggressive without apparent provocation or reason. On one occasion, she had an episode that caused her parents to take her to the emergency room. Thereafter, she was admitted to a state mental health institute.

Shortly thereafter, her parents contacted the district and indicated that they intended to enroll her for the 2008-2009 school year. Student remained hospitalized until September 2, 2008. The district convened a team meeting to develop an IEP on September 10, 2008. At that time, the team discussed that the student required a complete reevaluation to determine her academic and behavioral needs. The team was unable to determine the student’s academic skills, as her prior performance in school was minimal due to behavioral issues. Parents indicated that she could read and write, but it was unclear at what levels. The team proposed to reevaluate the student and in the meantime, developed an IEP that focused on behavioral issues.

The IEP contained one goal, pertaining to reducing negative behaviors. The IEP indicated that the student was to receive education two days per week, for one hour per day after school hours, but in a school setting. This would allow the student to be supervised more closely as she transitioned into a school setting. This was done due to the prior aggressive behaviors that presented safety concerns. The team discussed and rejected placement in a self-contained classroom due to safety concerns. Parents agreed with the proposal.

The student began receiving services in September 2008. On the first day, she performed well and had no instances of aggressive behavior. On the second day, however, the student was physically aggressive toward her teacher and she bit herself. Her father and two staff members restrained her until she calmed down. The teacher who had provided instruction to the student expressed concerns about continuing to provide services due to safety concerns. A second teacher also expressed reluctance to work with the student. Thereafter, the district stopped asking other teachers and informed parents that it was discontinuing services. No further services were rendered in school or in home.

Parents agreed with the district's proposal to reevaluate in October 2008. However, the district did not begin the reevaluation process until January 2009. The district did not request parents' consent to extend the 60 day time period for reevaluations. After the reevaluation was completed, the team developed an IEP. The district implemented that IEP beginning in May 2009.

Subsequently, parents filed a request for due process, seeking compensatory education for the period during which the student did not receive any educational services. The hearing officer found for the parent and the district appealed.

Held: For the parent. The court found that the district's unilateral decision to discontinue services violated the IDEA. The court noted that the district "never had the authority to order [student] to stay off campus for more than ten days." The court went onto note that "even construing [student's] violent behaviors in the most extreme light possible, she never caused severe bodily injury to another." The court noted that the student "was entitled to be in school receiving a free appropriation public education despite her behavioral problems pursuant to her effective and substantively appropriate IEP." As a result, the student was entitled to compensatory educational services for the period of September through May 2009. The court also faulted the district for its unilateral extension of time to reevaluate the student, noting that the district had substantially exceeded the sixty day time period allowed by law, and that it had also done so without seeking to obtain consent from the parent.

## **VIII. FERPA**

### **A. School Officials**

Letter to Heiligenthal, 112 LRP 58499 (FPCO, Sept. 17, 2012).

Facts: Parent filed a complaint with the Family Policy Compliance Office ("FPCO"), alleging that "On or about February 15, 2011, the high school counselor. . . enlisted student aides to enter grade information for a number of . . . high school students, including [her daughter], . . . in violation of the disclosure provisions in FERPA."

Finding: For the district. The FPCO investigated and found that it did not appear that FERPA was violated. FPCO noted that one of the exceptions to the prior written consent requirement in FERPA allows school officials to obtain access to education records, so long as the educational agency has determined that those individuals have "legitimate educational interests" in the information. 34 CFR 99.31(a)(1). FPCO noted that the term "school official" was not defined in the statute or regulations, but that it has been interpreted broadly to include not only a teacher or administrator, but also volunteers, including student volunteers.

FPCO noted that FERPA requires that educational agencies include in their annual notification of rights under FERPA a statement indicating that it has a policy of

disclosing personally identifiable information to school officials with legitimate educational interests, and if so, a specification of the criteria for determining which parties are school officials and what the agency considers to be a legitimate educational interest. Thus, if a district has appropriately included volunteers, such as student aides, as school officials in its notification, then the students may have access to education records to carry out their aide responsibilities. Under FERPA, the student aides, just like school officials, cannot disclose information from education records that they gained access to in their capacity as a school official.

## **B. Requests for E-Mail Communication**

Brownsburg Community School Corp., 59 IDELR 146 (Ind. SEA Feb. 13, 2012).

Facts: On December 20, 2011, parent requested a copy of the student's educational record. On December 22, 2011, she was informed that the file would be available on January 4, 2012. The District provided the parent with copies of the Student's IEPs and evaluation reports. Parent filed a complaint, alleging that the file was incomplete because it did not contain e-mail correspondence pertaining to the student, written requests for evaluations submitted by the parent, and a copy of a complaint filed by the parent in June 2010. Thereafter, the District discovered a separate file that included all of the requested materials, with the exception of e-mails. Those documents were provided to the parent within 45 days of the original request.

Held: For the District. The State found that the District complied with the parent's request for records within 45 days of the original request. The investigator also noted that "e-mail correspondence exchanged between school staff that either directly or indirectly involves the student does not necessarily meet the definition of an educational record. E-mail is used as a communication tool among school staff. Educational records are records directly related to a student and maintained by a public agency or by a party acting for the public agency. There is no indication that any e-mail communications either exist concerning the Student or that, if they do exist, that they have been maintained by the School as part of the Student's educational record."

## **IX. Section 504 Claims**

### **A. Bullying and Harassment**

Galloway v. Chesapeake Union Exempted Village Schools Board of Education, 60 IDELR 13, 2012 U.S. Dist. LEXIS 152080 (D. Ohio Oct. 23, 2012).

Facts: Student was at all relevant times a student at the Chesapeake Union Exempted Village Schools. Student was diagnosed with Asperger's Syndrome, ADHD, a seizure disorder, and a specific learning disability and identified as a student with a disability pursuant to the IDEA, the ADA, and Section 504 of the Rehabilitation Act of 1973.

Plaintiffs alleged that Student had been the victim of disability-based discrimination, harassment, and bullying by teachers and students in District schools since 2005. The parent's allegations included the following:

- One teacher repeatedly questioned Student regarding his seizures in front of the entire class and questioned whether he really had seizures;
- Students threw water on their pants to mock the fact that during seizures Student could become incontinent;
- Students would call Student 'seizure boy' with the knowledge and approval of the teacher;
- A student destroyed a class project Student had constructed;
- Students would move Student's belongings, hide his belongings, shove him, threaten to break his computer, steal his backpack, and damage his computer;
- A student pulled a chair out from behind Student;
- A student punched Student in the back;
- Students encouraged Student to commit suicide; and,
- Students committed sexual assaults on Student, in which students would come up behind Student in a locker room and grind their penises into Student's back.

After each incident, parents alleged that they informed school officials and asked for help. The school officials did not take steps to address student or teacher behavior. Plaintiff reported the incidents to as many as fifteen different District teachers and officials. The parents eventually requested that Student be removed from his teacher's classroom.

The parents also consulted with an independent autism expert, who agreed to educate school officials about autism. Student's parents met with the school principal to discuss their concerns regarding the school's failure to meet their obligations under federal and state law. In response, the principal asserted the Student was acting out in class. He presented parents with a "petition" signed by several students in Student's class, and student's teacher, indicating that the students wanted Student "out of there."

Parents alleged that the Student suffered physical injuries and emotional distress from the pervasive and severe harassment Student was subjected to in the District.

Student's parents claimed that they also suffered emotional distress in seeing their son endure the bullying.

Student and Student's parents then brought claims against the District alleging violation of the American with Disabilities Act, Section 504 and Title IX. The District moved to dismiss the complaint, on the basis that it failed to state a claim for which relief may be granted.

Held: For Parents. The Court explained that, to establish discrimination under Section 504 or the ADA, a plaintiff must demonstrate that he or she is (1) disabled under the relevant statute, (2) 'otherwise qualified' for participation in the program, and (3) being excluded from participation in, or being denied the benefits of, or being discriminated against, by reason of his or her disability.

Here, the Court noted that the allegations satisfied the required elements. The incidents alleged by Student demonstrated were clearly disability based. Students in his classes regularly ridiculed him, with the knowledge and even endorsement of teachers. Plaintiffs alleged sufficient facts to demonstrate that the District had knowledge of the incidents, and that the incidents were based on student's disability.

The Court next evaluated the Title IX claim, regarding student-on-student sexual harassment. To establish student-on-student sexual harassment, a plaintiff must demonstrate: (1) that the harassment was so severe, pervasive and objectively offensive that it deprived Student of access to educational opportunities/benefits, (2) that the District had actual knowledge of the harassment, and (3) that the District was deliberately indifferent to the harassment. The Court found that the level of conduct here satisfied all three elements. Although the Court expressed some concern regarding whether the discrimination was actually based on Student's sex, and therefore a violation of Title IX, the Court found plaintiff's allegation that the harassment was based on Student's "gender and perceived sexual orientation" sufficient to withstand a motion to dismiss.

D.A. v. Meridian Joint School District No. 2, 60 IDELR 192 (D. Idaho 2013).

Facts: Student attended school in the Meridian Joint School District (MSD) beginning in 2004. At that time, he had been diagnosed with expressive-receptive language disorder, central auditory processing disorder, possibility of dyslexia and dysgraphia, and possibility of Asperger's Syndrome. He received special education services from 5<sup>th</sup> grade (2004-05) through 8<sup>th</sup> grade (2007-08).

In April 2008, MSD removed Student from his Individualized Education Program (IEP). Student's parents questioned this decision and obtained an independent evaluation, which confirmed a diagnosis of Asperger's Syndrome. The parents brought the diagnosis to MSD and requested that the District do an evaluation to determine Student's IDEA eligibility.

In September of 2008, MSD determined that Student would receive accommodations under Section 504 of the Rehabilitation Act. For the remainder of the relevant time period, the District denied services pursuant to the IDEA, but provided accommodations pursuant to Section 504 of the Rehabilitation Act.

During this period, Student was the subject of many incidents of harassment. Other students took his gym clothes, physically attacked Student (resulting in bruising), called Student names, and engaged in other emotional, physical, and verbal attacks. Student then burned down his parent's house, which his doctor testified was an act triggered by the bullying incidents.

Student's parents initiated administrative proceedings under the Rehabilitation Act and the ADA, alleging that the District violated Section 504 and the ADA based on, among other things, the District's failure to adequately address bullying incidents involving Student.

On January 23, 2012, the hearing officer issued a decision finding in favor of the District. On March 5, 2012, Student's parents filed with the District Court, seeking review of the hearing officer's decision. The District filed a motion for summary judgment.

Issue: Whether the District violated Section 504 of the Rehabilitation Act and the American with Disabilities Act when it failed to respond to reports of harassment and bullying?

Held: For Parents. The Court first noted that defeat a motion for summary judgment the Student and Parents would have to demonstrate that there was a "genuine issue of material fact."

The Court explained that school district liability for peer-on-peer harassment has not been specifically addressed by the Supreme Court. However, the circumstances here could be analogized to Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). In Davis, the Court found that districts can be liable for peer-on-peer sexual harassment pursuant to Title IX of the Civil Rights Act where the District was "deliberately indifferent to sexual harassment, of which they have actual knowledge that is so severe, pervasive and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

The Court then explained that, in the context of Section 504, a plaintiff must prove five elements to establish peer-on-peer disability-based harassment:

1. The plaintiff is an individual with a disability;
2. He or she was harassed based on that disability;

3. The harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment;
4. The defendant knew about the harassment; and,
5. The defendant was deliberately indifferent to the harassment

First, the Court found that Student had a disability qualifying him for Section 504 accommodations.

Second, the Court found that there was sufficient evidence that Student had been bullied based on his disability. One of Student's classmates testified that he witnessed other students calling Student, "retard," stealing his gym clothing, and being "brutal and cruel" towards student, in addition to other incidents.

Third, the Court explained that harassment must be "severe, pervasive, and objectively offensive that it denies its victims equal access to education." Thus, "damages are not available for simple acts of teasing or name calling among school children." Examples of conduct rising to the level of harassment sufficient to establish a case of peer-on-peer disability based discrimination include harassment that results in: physical denial of access of school resources, dropping grades, change in the student's demeanor or classroom participation, becoming homebound or hospitalized, or self-destructive or suicidal behavior. Here, Student burned down his parent's house in response to the bullying and was incarcerated for an extensive period of time. The Court found this sufficient to satisfy the third element.

Fourth, although the District argued that it had no knowledge of the harassment, the Court found that the evidence established that the school could have known. The school's guidance counselor testified that Student's mother raised concerns in a 2009 meeting, and Student's peer testified that the physical education teacher was present during times when Student was being harassed.

Fifth, the Court explained that "deliberate indifference" requires "both knowledge that a harm to federally protected right is substantially likely, and a failure to act upon that likelihood." A District will not be liable merely because the measures it takes in response to reports of harassment are ultimately ineffective. Rather, the District "must respond to known peer harassment in a manner that is not clearly reasonable." To satisfy this claim, a plaintiff must demonstrate that the school's deliberate indifference caused further harm. Here, it was clear that the school's own policies regarding harassment were not followed after learning of bullying incidents from Student's mother. In particular, the plaintiff alleged that the District never took any steps "to prevent or remediate" the harassment.

Moore v. Chilton County Board of Education, 113 LRP 12940, 2003 US Dist. LEXIS 43275 (M.D. Ala., March 27, 2013).

Facts: Student suffered from Blount Disease, a “growth disorder that causes the lower leg to angle inward, making the person appear bow-legged.” Student was also overweight as a result of an eating disorder. Her physical attributes made her a “target for a wide variety of bullies at school,” and she was targeted “virtually every day.” Parents allege that her peers “called her cruel names, ‘pushed’ her, ‘made fun of her,’ knocked her books to the floor, and subjected her to ‘pig races’ on the school bus.<sup>2</sup> On one occasion, her classmates locked her in a janitor’s closet and on another occasion, ‘stripped down’ her pants and underwear in front of other peers.”

Parents allege that when student complained about the cruel treatment to her teachers or other officials, she was punished for “having a bad attitude.” She was given detention and placed in time-out. In addition, although Blount Disease caused her to be “unusually slow,” teachers punished her for being late to class, rather than accommodate her slowness. In addition, parents alleged that numerous school administrators and teachers witnessed the bullying, but that no school official did anything to stop it. Ultimately, the student committed suicide.

Parents filed suit against the district, alleging, among other things, violation of Section 504 and the ADA. The district moved to dismiss, arguing that the parent failed to exhaust administrative remedies under the IDEA and that they failed to state a claim for disability discrimination under Section 504 and the ADA.

Held: For the parent. As to the exhaustion requirement, the court found that exhaustion would be futile, as there were no IDEA based remedies that could be awarded to the parent.

The court also found that the parents had sufficiently pled a cause of action under Section 504 and the ADA. The court noted that the district did not dispute that the student had a qualifying disability and that she was harassed based on her disability. The district also conceded that the harassment was sufficiently severe or pervasive so as to alter the condition of the student’s education. The district argued that it did not know about the harassment and that it was not deliberately indifferent to harassment. The court disagreed, noting that the parents had specifically alleged that the district had actual notice and knowledge of the harassment, and that there were allegations that they had observed the harassment first hand, as well as received reports from the student. They also alleged that the school bus driver was aware of the “pig races” that occurred on the school bus. Parents also alleged that the Board did not take steps to prevent the bullying, and that the teachers had actually ignored reports from the student by telling her that she had a bad attitude when she complained about bullying. The court noted that the plaintiffs sufficiently alleged that the district acted with deliberate indifference and that it had “an attitude of permissiveness that amounted to discrimination.”

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<sup>2</sup> “The complaint describes the ‘pig races’ as a school-bus game in which a high school senior male grabs and ‘ugly,’ ‘fat’ girl and kisses her on the cheek, in front of jeering students.”

## **B. Medical Evaluations**

South Monterey County (CA) Joint Union High School District, 112 LRP 28705  
(OCR April 18, 2012).

Facts: Student began attending school in the District when he was in 9<sup>th</sup> grade (2010-11 school year). While attending a different district, the student was diagnosed with ADHD. In September 2010, the District met with the parent to discuss a possible Section 504 plan. They met again in October 2010, twice in December 2010 and twice in January 2011 to discuss Section 504 eligibility. Each time, parent was informed that she would need to produce a medical diagnosis to obtain a Section 504 plan. During that time period, the Student performed very poorly in his classes, earning grades of Ds and Fs.

In January 2011, parent provided a diagnosis of ADHD from 2004. On February 2, 2011, the District convened another Section 504 Team meeting and created an accommodation plan. No evaluations or other assessments were conducted. The Student continued to receive Ds and Fs for the remainder of the school year. Parent filed a complaint with OCR, alleging violations of Section 504.

Held: For the parent. OCR found that the District was acting under an “erroneous belief that a medical diagnosis was required to qualify a student for a Section 504 plan.” OCR noted that:

*for some disabilities, such as ADHD, districts commonly require a medical evaluation as an element of a broader evaluation process. Though other approaches exist, OCR does not dispute making a medical examination a requisite element of the evaluation of a student suspected of being an individual with ADHD. However, even if a medical evaluation is a professionally accepted, reasonable element of an evaluation, a district cannot, as occurred here, delay or deny an evaluation because it was waiting for the parent to produce the medical diagnosis. Nor can a district, as was done here, exclude consideration of the full range of other suspected disabilities while waiting for such a diagnosis.*

OCR also faulted the District for seeking to impose the cost of obtaining the medical diagnosis on the parent, noting that the District required a medical diagnosis but never offered to pay for the same. OCR noted that “a parent may share a timely medical evaluation that already has been obtained or may, with informed consent, volunteer to obtain a medical evaluation; however, if the parent does not follow through, as long as the parent does not withdraw consent to an evaluation, the school district retains the obligation to arrange for and pay for a necessary medical assessment.”

OCR found that when the Team met in February 2011 to develop a plan, the information was outdated and therefore, presumed that the plan was invalid. This finding was supported by the student's poor performance for the remainder of the school year. The District was required to convene a meeting to determine whether any additional evaluations were necessary, whether the Section 504 plan needed to be modified, and whether the student had any academic deficits that needed to be addressed through compensatory education, such as 1:1 tutoring.

#### **X. Section 1983**

Atherton v. Norman Public School District, LRP 56107, 2012 US Dist. LEXIS 163088 (W.D. OK Nov. 15, 2012).

Facts: A school district in-house security guard who was attempting to control the behavior of a student with autism, pepper sprayed the student. The student was using a cake spatula for a pretend sword. The student's parents filed suit against the district, alleging that the student suffered personal injuries as a result of the pepper spray. The parents' claims included a violation of 42 USC § 1983, based on violations of rights protected by the Fourteenth Amendment. The school district moved to dismiss, arguing that the plaintiff failed to state a claim under § 1983.

Held: For the parent. The court found that the parents' complaint included sufficient allegations to properly plead a § 1983 cause of action. In particular, the parent alleged that the district had a policy and custom of not properly training school police personnel on the use of proper restraint of special needs students, and that as a result, the student suffered injury. The court noted that "a municipality may not be held liable under § 1983 solely because its employees inflicted injury on the plaintiff." However, a municipality may be liable if it has a policy or custom of failing to adequately train and supervise employees, as long as the failure results from deliberate indifference. The court noted that the deliberate indifference "may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipalities action or inaction, such as when a municipality fails to train an employee in specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations."

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