What are the Courts Saying About You?
A review of recent decisions

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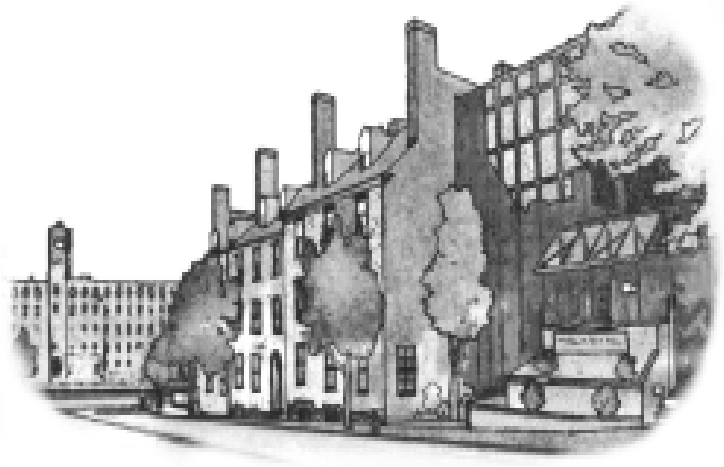

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a deeper understanding of recent key case law pertaining to certain aspects of the IDEA and Section 504. This material does not include every aspect of the law, nor does it discuss every case involving the IDEA and Section 504. 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 key decisions which have been rendered in the field of special education law. This material does not cover all aspects of the Individuals with Disabilities Education Act ("IDEA") or Section 504 of the Rehabilitation Act ("Section 504"), nor does it contain a complete discussion of all recent IDEA and Section 504 cases/opinions. The goal of this material is to provide the special education administrator with the tools necessary to interpret certain aspects of the statutory and regulatory law pertaining to the IDEA and Section 504.

II. Procedural Issues

A. Scheduling IEP Meetings

B.H. v. Joliet Sch. Dist., 54 IDELR 121, 2010 U.S. Dist. LEXIS 28658 (N.D. Ill. March 19, 2010).

Facts: In fall of 2008, B.H. was a sixth-grade student in the Joliet School District. B.H. had been diagnosed with ADD, and her parents assert that she also suffered from a learning disability and hearing loss. Beginning in fourth grade, B.H. had a Section 504 plan.

In April of 2007, the district determined that B.H. suffered from a disability described as "moderate inattentiveness," which negatively affected her ability to learn, and certain teaching modifications were made on B.H.'s behalf.

The district scheduled an IEP meeting for September 10, 2007 to discuss evaluations that student's mother, had independently obtained. Parent's attorney informed the district that parent was not available on that date, and requested that the meeting be rescheduled for either September 24, 25, or 26th at 6:30 pm. The district responded that it was not obligated to hold IEP meetings after school hours. After some team members stated that they could not attend during evening hours, the district proposed alternative dates during regular school hours. The meeting did not take place because the parent continued to insist that the Team meet after school.

Subsequently, the parent requested that the District fund an independent educational evaluation; the district refused and filed a request for due process. The parent filed cross-claims, alleging that the District violated the IDEA, Section 504 and the ADA, by (among other things) failing to convene a meeting after-school hours. The Hearing Officer found in favor of the District and the parent appealed.

Issue: Whether the district violated Plaintiff's rights under the IDEA and Section 504 by refusing the schedule an IEP meeting for after-school hours.

Holding: The district's refusal to convene after school hours was not a basis for a discrimination claim, and the court dismissed Plaintiff's claim.

The parent did not allege the student was wrongfully excluded from any educational programs. Even if the district's insistence on holding the meeting during the day amounted to excluding the student from a program, in order to establish a Section 504 claim, the parent had to demonstrate that the district acted with bad faith or gross misjudgment. Because the district offered to conduct a meeting on one of many other dates using teleconferencing equipment, and the student was not excluded from any program because of her disability, there was no evidence that the district acted in bad faith or with gross misjudgment. The student's mother failed to establish a valid 504 discrimination claim, and summary judgment was granted to the district.

Practice Pointer: Although the IDEA requires that districts convene meetings at "mutually agreeable" dates and times, there is no requirement that meetings be held after-school hours. If a parent insists on meeting after-school, it may be necessary to offer that parent alternative methods for meeting participation.

B. Notice to Parents

Adams County Sch. Dist., 55 IDELR 210 (Colo. SEA Aug. 13, 2010).

Facts: The student was eligible for special education and related services due to an unidentified disability. The student exhibited several behavioral issues, and in 2009, the school developed a Behavior Plan and IEP for the student. During the 2009-2010 school year, the student was also suspended from school on three occasions, as the result of hitting other students.

The parent has a limited understanding of English, and Spanish is her native language. The school psychologist was responsible for finalizing the student's IEP in January of 2010, supplying the parent with a copy, and preparing any prior written notices. While the district did supply the parent with a copy of the student's IEP in March 2010, it was in English, rather than the parent's native language.

Parent filed a complaint with the State, alleging that the District denied the student a free, appropriate public education by, among other things, failing to provide her with prior written notice in her native language, preventing her from understanding the services being provided to the student and from participating in the decision-making process.

During the State Complaints Officer's investigation, the parent exhibited a poor understanding of the related services, accommodations, goals and short term objectives offered in the 2009 and 2010 IEPs and of the various sensory supports and methods used to address the student's social and behavioral issues.

The parent was not supplied with a Spanish version of the IEP until June 2010, after the parent had filed her Complaint. The parent was never provided with prior written notice in Spanish, and the school psychologist explained that doing so was not a standard practice when the student's placement was not changed.

Issues: Whether the district failed to properly implement the student's IEP, and whether the district failed to supply the parent with appropriate prior notice regarding the student's IEP.

Held: The district violated the IDEA's procedural requirements by failing to provide a Spanish-speaking parent with adequate prior written notice of changes in her child's IEP.

Although the student's IEP was not always properly implemented, her academic performance steadily improved during the school year, and the student received educational benefit that was not merely de minimis. Accordingly, the improper implementation did not result in a denial of FAPE to the student.

The district, however, failed to supply the parent with prior notice regarding the child's IEP changes. An IEP may provide sufficient information to supply a parent with prior written notice; however, the district must provide such information to the parent in a timely manner and in the parent's native language. Here, the district did not provide the parent with a copy of the IEP until two months after the IEP meeting. Further, the district failed to supply the parent with a copy of the IEP in Spanish until after she filed a complaint, approximately five months later. The district's failure to supply the parent with an IEP or a prior written notice in her native language contributed to her confusion and misunderstanding concerning the services the district offered the student. Reasoning that the parent was denied a meaningful opportunity to participate in decisions regarding her child's IEP, the ED concluded that the district's procedural violations of the IDEA amounted to a denial of FAPE.

To remedy the District's violations, the DOE ordered the District to submit a corrective action plan ("CAP") addressing each of the cited violations. As part of the CAP, the District was required to submit compliant, written policies and procedures and conduct effective staff training of all staff working with children with a disability concerning such policies and procedures.

Practice Pointer: The IDEA regulations require that districts provide parents with written prior notice of Team decisions, in the parent's "native language or other mode of communication used by the parent, unless it is clearly not feasible to do so." 34 CFR 300.503(c)(1)(ii). The failure to comply with this procedural requirement will result in a finding that the district denied a student a free, appropriate public education (FAPE), when it significantly impedes the parent's opportunity to participate in the decision-

making process regarding the provision of a FAPE to the parent's child. As a general rule, decisions about a student's IEP and placement will always pertain to the provision of a FAPE, and written prior notice should be provided in the parent's native language. However, districts should, as a best practice, provide parents with written prior notice of all Team decisions in the parent's native language. This will ensure that they have the ability to participate in the Team process.

III. Independent Educational Evaluations

Marc M. v. Dep't. of Educ., 2011 U.S. Dist. LEXIS 6740, 56 IDELR 9, 111 LRP 5561 (D. Haw. Jan. 24, 2011), Magistrate's ruling adopted by Marc M. v. Dep't of Educ., 2011 U.S. Dist. LEXIS 64064 (D. Haw. June 15, 2011).

Facts: Student is a thirteen-year-old student, who is eligible for special education services as a result of his diagnosis of attention deficit hyperactivity disorder ("ADHD"). From the fall of 2006 to the spring of 2008, Student attended Assets School ("Assets"), a private school, pursuant to two settlement agreements between the parent and the school district.

The IEP team reconvened in September 2008 to evaluate Student's performance as well as determine what additional data was needed to define his needs. One month later, in October of 2008, Student changed medication for his ADHD; student's father and his teacher noticed a marked improvement in his behavior. On November 14, 2008, the Home School Special Education Care Coordinator ("Care Coordinator") and the District Resource Teacher observed Student at Assets and noticed that Student was responding well to activities but also reported that he continued to struggle with completing and turning in homework assignments. On December 8, 2008, a DOE Speech Therapist observed Student and noted that while he still had needs, he positively interacted with his teacher and peers. On February 26, 2009, Assets provided Defendant a Status Report for Student. One day later, Plaintiffs paid $500.00 towards enrollment at Assets for the 2009-2010 school year.

In May 2009, Student was given a standardized test and received the same score he did a year earlier. Student was again observed by a representative from the school district, who determined that Student could wait in line, follow directions, and help his peers clean up. On June 1, 2009, the IEP team met to develop Student's IEP for the 2009-2010 school year. The goals remained substantially the same as the 2008 IEP, as did the behavioral support plan. According to the IEP, however, Student was to attend Niu Valley Middle School, his neighborhood, public school, instead of Assets for the 2009-2010 school year.

At the conclusion of the meeting, Parents handed the case manager a copy of the Student's Progress Report for the 2008-2009 school year from Assets as well as a Student Profile for Spring 2009 (collectively "Spring 2009 Documentation"). Both

documents showed that Student made functional academic progress at Assets. The case manager reviewed these documents, concluded that they showed Student had made improvement at Assets, but did not copy or provide the documentation to other members of the IEP team. The Spring 2009 Documentation was not included in documents used to develop the IEP for the 2009-2010 school year. Instead, the case manager recorded that “Parents provided the DOE school with the [Spring 2009 Documentation] for the purpose of adding it to [Student's] confidential educational records.”

Despite the IEP team's decision to place Student at Niu Valley, Parents continued to take steps towards enrolling Student at Assets. By letter dated August 10, 2009, Parents informed Defendant for the first time that they disagreed with the IEP. They stated that as a result of the Defendant's failure to consider the Spring 2009 Documentation in developing the Student's IEP, they had decided to reject the IEP and request that [Student] remain at Assets at the district’s expense. The case manager did not receive this letter until August 24, 2009.

The case manager responded via letter on August 31, 2009. She stated in the letter that the IEP team should reconvene “to review the information that was provided in the Assets Student Profile from Spring 2009.” Parents did not respond. The case manager again sent a letter requesting that the IEP team reconvene and Parents again did not respond. Ultimately, Plaintiffs filed a request for an impartial hearing on October 16, 2009. At the hearing, the hearing officer found that the IEP provided a free appropriate public education ("FAPE) and ultimately concluded that the IEP was not procedurally or substantively flawed.

Issue: Whether Defendant school district’s failure to consider a private school progress report, supplied to district only shortly before an IEP meeting, was a violation of the IDEA?

Held: For the Parents. Although the parents waited until the very last moment of an IEP meeting to supply a private school progress report, there was no basis for the team to disregard it.

The District Court ruled that the district committed a procedural violation of the IDEA, which denied the child FAPE, when it declined to review the report. The court found that the report contained vital information about his present levels of academic achievement and functional performance. The document, which showed the student progressed in his current private school, contradicted the information provided in the IEP. However, the case manager who received the document did not share it with the rest of the team, because the team had just completed the new IEP.

The court noted that districts must consider evaluations parents obtain independently in any decision with respect to the provision of FAPE. 34 CFR

300.502(c)(1). It rejected the case manager's contention that because the document was provided at the meeting's conclusion, the team could not have considered and incorporated it into the new IEP. The court pointed out that the parents provided the document when implementation of the IEP was still weeks away. Moreover, although the parents delivered the document without explanation at the end of the meeting, the case manager reviewed it and concluded it showed progress. As a result, the IEP contained inaccurate information about the student's current performance. The court ruled that the procedural errors "were sufficiently grave" to warrant a finding that the child was denied FAPE.

Practice Pointer: If a parent provides you with additional information at the end of a Team meeting, it may be necessary to recess the meeting to review the information and reconvene at a later date to discuss the data and determine whether it is necessary to incorporate it into the child's IEP.

IV. IEPs

Doe v. Hampden-Wilbraham Regional School District, 54 IDELR 214, 715 F.Supp. 2d 185 (D.Mass. May 25, 2010), involved an allegation that the proposed IEP was not appropriate because (among other things) it failed to address behavior that occurred at home.

Facts: Joseph Doe, a twelve year old with autism, attended the District's public schools from 2002 through June 2007. Joseph's 2006-07 IEP expired in March 2007; the District scheduled an IEP meeting for March 21. Prior to the meeting, parents received a written evaluation from the District, which showed that Joseph had not progressed as much as parents hoped. After receiving an evaluation that indicated that the Student had not progressed as much as expected, Parents cancelled the Team meeting approximately 10 minutes before it was scheduled to start, and they did not attend a second meeting scheduled for May 23, 2007.

In June 2007, parents requested an emergency Team meeting to discuss Joseph's educational services and his IEP for the 2007-08 school year. The District was not able to schedule a meeting in June. On June 28, parents rejected the District's summer services and unilaterally placed Joseph at a private day school. During the time period between March 2007 and June 2007, the District continued to implement the 2006-07 IEP (which had expired in March).

Throughout the summer, the District and the parents attempted to schedule an IEP meeting, but were unable to agree on a date. Parents filed a request for due process on August 3. The District continued to attempt to schedule an IEP team meeting, but was not able to reach agreement on a date. Ultimately, it scheduled a meeting for September 17. The parents contacted the District on September 12 and

told them not to hold the meeting. The District encouraged parents to attend, but they did not. Thus, the meeting was cancelled.

The Team finally met on October 11 and 24 to develop a new IEP for the 2007-08 school year. Parents rejected the IEP in January 2008. Parents believed that the IEP should have contained: 1) specific behavioral recommendations (due to the nature and severity of the Student's interfering behaviors at home and at school); 2) plans for generalization of skills to different settings; 3) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable.

The hearing, which had been postponed by agreement of the parties, occurred over nine days from January 2008 through July 2008. The hearing officer issued a decision in September 2008, in which he found (in part) that the 2007-08 IEP was appropriate and the parents were not entitled to reimbursement for their unilateral placement. Parents appealed.

Issue: Whether the 2007-2008 IEP was reasonably calculated to provide the Student with a FAPE.

Holding: For the District. There was ample evidence in the record to support the hearing officer's findings that the IEP addressed Joseph's special education needs by proposing to utilize numerous teaching methodologies and different teaching systems, and provided him with the opportunity to interact with his peers.

The IEP also included "steps the district must take to decrease Joseph's interfering behaviors and keep him on task and productive. The IEP lists accommodations necessary to ensure Joseph stays on school tasks, including clear and consistent routines and expectations, preferential seating near the teacher and away from distractions, directed, supported play opportunities, guided support through transition periods, behavior plan for time on tasks and engagement in activities, and positive reinforcement during the day." The IEP also contained a behavior goal.

Although the IEP did not address how to deal with behaviors that occurred at home, the IEP focused "on what can be done in the environment that the school district can control – school itself. In setting goals for how to minimize Joseph's disruptive behavior at school, it would be reasonable to expect that this work would translate into better behavior at home as well."

The IEP also contained statements of the special education and related services and supplementary aids and services that the District would provide to the student. Those included: "language-based curriculum, multi-model approach, pairing visualized with auditory instruction, 1:1 teaching, reinforcement of mastered items, discrete trial format, direct instruction, intensive instruction based on applied behavior analysis, small

groups, models, prompts, guided support, sensory diet, modified fourth grade curriculum, direct 1:1 speech/language therapy each day, and a 1:1 assistant in all settings."

Finally, the IEP included plans for generalizing skills to different settings. Among other things, it called for the Student to work on gross motor skills during PE and recess, and to work on learning to participate appropriately during classes, assemblies, and meetings.

In contrast, in New Milford Board of Education v. C.R., 54 IDELR 294, 2010 U.S. Dist. LEXIS 61895, 2010 WL 2571343 (D.N.J. June 22, 2010), the court held that the District was obligated to reimburse parents for an in-home program that they provided to their child, T.R.

Facts: In 2004, the Parents filed due process; the District entered into a settlement agreement with the parents of T.R., a child diagnosed with autism. Pursuant to the agreement, T.R.'s parents provided him with in-home education, which the District partially reimbursed until October 31, 2006. At that time, the parents continued providing the in-home services at their own expense.

The student's 2006-07 IEP placed him in public school, with one home visit per week from a school staff member. Parents agreed with this IEP, and continued funding the in-home services.

Parents disagreed with the 2007-08 IEP, which provided for (among other things) two monthly home visits. The Team continued to meet and the District offered additional home programming hours, but parents continued to disagree and request home education in the form of the private program that T.R. had previously received (and that the parents continued to provide).

Parents filed for due process, alleging that T.R.'s 2006-07 and 2007-08 IEPs did not provide him with a FAPE. Parents requested reimbursement for the in-home services that they had provided since November 1, 2006. Parents argued that T.R. required substantial in-home instruction "to curb his aggression and self-stimulation." Parents agreed with the placement at the public school during school hours, but wanted the District to fund two hours per day of after-school, in-home instruction.

During the hearing, the parents' expert testified that "T.R.'s ability to learn at [school] requires a home program." The hearing officer found in favor of the parents, on the basis that the school was unable to provide adequate behavioral intervention and the in-home program provided the student with behavioral and communication benefits that allowed the student to benefit from school. The district appealed that decision.

Issue: Whether the District denied the student a FAPE by failing to include the after-school, in-home program in the student's IEP.

Holding: For the parents. The district's placement did not "sufficiently address T.R.'s behavioral issues." The in-home program provided by the parents "complements the academic instruction delivered at [school] and is necessary to provide T.R. with a meaningful education," and was necessary for the student to receive a FAPE. The IEP proposed by the District did not sufficiently address the student's behavioral issues. Without the after-school, in-home program, the student would not make sufficient educational progress at school.

Practice Pointer: Generally, when a student makes educational progress in the school setting, it will not be necessary for a district to show that the student can demonstrate the same level of progress in other settings, such as the home. However, if the student's IEP goals and objectives are drafted in such a way as to suggest that the student should be demonstrating the same level of progress over a variety of settings, the student's failure to do such could result in a finding that the student is not making sufficient progress. Moreover, if a student's out of school behaviors are such that they interfere with his/her ability to learn, it may be necessary for the District to address those behaviors.

V. Reimbursement for Unilateral Placements

Forest Grove Sch. Dist. v. T.A., 638 F.3d 1234, 111 LRP 30252 (9th Cir. 2011)[1]

Facts: T.A. was enrolled in the Forest Grove School District from kindergarten until the spring semester of his junior year in high school. At that point, he was removed by his parents and enrolled at Mount Bachelor Academy, a private boarding school. While at Forest Grove High School, T.A. received mostly C's and D's; however, a school evaluation conducted in 2001 revealed that he did not have a learning disability. Accordingly, T.A. was considered ineligible for special education services.

In fall 2002, T.A. began to use marijuana regularly, and in early 2003, he ran away from home. As a result, T.A.'s parents took him to a psychiatrist to be evaluated, and they enrolled him in a three-week program for troubled youth at Freer Wilderness

[1] This case is a continuation of a line of cases pertaining to the parent's request for reimbursement for their unilateral placement. In 2009, the United States Supreme Court issued a decision in Forest Grove School District v. T.A., , ___ U.S. ___, 129 S.Ct. 248452, IDELR 151 (U.S. June 22, 2009). This decision was discussed at length in "Special Education Case Law: An Overview of Recent Decisions," which was presented to the New Hampshire Association of Special Education Administrators on August 3, 2009. The Court remanded the case back to the district court level; that court issued a decision in December 2009. Forest Grove Sch. Dist. v. T.A., 675 F.Supp.2d 1063 (D. Or. 2009). The District Court's decision on remand was discussed at length in "Special Education Case Law: An Overview of Recent Decision," which was presented to the New Hampshire Association of Special Education Administrators on April 9, 2010.

Therapy Expeditions, where it was also revealed that T.A. had used cocaine. After the psychiatric evaluation, conducted in March 2003, T.A. was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), depression, and marijuana addiction.

T.A.'s parents immediately removed him from public school and enrolled him at Mount Bachelor Academy. On the Mount Bachelor application, T.A.'s father did not mention T.A.'s ADHD or schoolwork in response to a question asking "which specific events precipitated enrollment in the program?" Instead, he cited T.A.'s drug use and behavioral problems.

After enrolling T.A. at Mount Bachelor, in April 2003, his parents filed a complaint against Forest Grove for a failure to provide T.A. with a Free Appropriate Public Education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA") and requested an administrative due process hearing. In July 2003, a team of specialists from Forest Grove confirmed T.A.'s diagnosis of ADHD but determined that he was not eligible for services under the IDEA because his ADHD did not have a severe adverse effect on his academic performance.

In 2004, the hearing officer issued an opinion in favor of T.A.'s parents, holding that T.A. was disabled, that the diagnosis had a severe adverse effect on his academic performance, and that Forest Grove had thus failed to provide T.A. with a FAPE. Accordingly, the hearing officer held that Forest Grove was responsible for the costs associated with his placement at Mount Bachelor.

On appeal, the district court reversed, holding that T.A. was statutorily ineligible for reimbursement of private school expenses under 20 U.S.C. § 1412(a)(10)(C) and that principles of equity did not support an award of reimbursement. The Ninth Circuit Court of Appeals reversed the decision that T.A.'s parents were not entitled to reimbursement, holding that, under general principles of equity, students who had not previously been diagnosed with a disability are nonetheless entitled to reimbursement as 'appropriate' relief pursuant to 20 U.S.C. § 1415(i)(2)(C). Additionally, the court rejected the district court's conclusion that "tuition reimbursement is available only in *extreme cases* for parents who place their children in private school before receiving special education services in public school." *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9th Cir. 2008) (italics in original).

The Ninth Circuit remanded to the district court to determine whether, after considering all relevant factors, principles of equity applied to the present case. The school district appealed to the Supreme Court, and the Court affirmed that reimbursement under IDEA is not precluded where the child had not previously received special education under the authority of a public agency. On remand, the district court held that the parents were not entitled to reimbursement because they had unilaterally placed him in private school as a result of his drug abuse and behavioral problems, not due to an educational disability recognized by IDEA. The district court cited the timing

of the change in schools and the fact that his father listed T.A.'s behavioral issues, depression, and drug use as the reasons for enrollment at Mount Bachelor as relevant factors in the decision. The parents appealed the decision to the Ninth Circuit Court of Appeals.

Issue: Whether the district court abused its discretion in determining that the parents of a student with ADHD and depression could not recover the cost of his placement in a private boarding school.

Holding: For the district. There was sufficient evidence in the record to support the finding that T.A.'s parents enrolled him at Mount Bachelor solely because of his drug abuse and behavioral problems, and his parents are not entitled to reimbursement for the cost of his private school tuition.

The Ninth Circuit found that there were ample facts to support the conclusion that T.A. was transferred to Mount Bachelor solely for non-academic purposes. The timing of T.A.'s enrollment directly coincided with the escalation of his drug and behavioral problems and his attempt to run away from home. There was no attempt to transfer the student during the two-year period when ADHD and poor academic performance were the sole issues. Furthermore, statements made by T.A.'s father on the boarding school application specifically indicated that T.A.'s drug and behavioral problems were the sole reason for his enrollment, and his academic difficulties were not mentioned.

When the statements made on the application were considered in conjunction with the timing of T.A.'s enrollment, it was not illogical, implausible, or without support for the district court to infer that the enrollment was solely for non-academic purposes.

The court reiterated that its decision "does not seek to establish a rule of law which requires parents who seek to address all of their child's needs to answer each and every question with the response: Disability." *Forest Grove Sch. Dist. v. T.A.*, 111 LRP 30252 (9th Cir. 04/27/11) (internal quotation marks omitted). Rather, a fact-specific weighing of the equities of the case must be conducted, and the particular circumstances of this cases warrant a finding that there was no clear factual error in the determination that T.A.'s academic performance did not play a role in his transfer to Mount Bachelor. Accordingly, the circumstances of this case weighed against reimbursement.

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

VI. Discipline

In re: Student with a Disability, 55 IDELR 299, 110 LRP 73688 (Wyo. SEA, Dec. 17, 2010).

Facts: The student was enrolled at the District and was eligible for special education and related services due to a cognitive disability. The parents expressed concern regarding several aspects of the Student's special education programming, and also about the treatment the Student received by a particular staff member. The Student was frequently sent home from school due to his behavior, and the teacher suspended the Student on two occasions for three days each time.

The Student's IEP indicated that there were times when student became upset with staff or students, and that administration was called when the student was physically aggressive, but that those behaviors became less frequent as the school year went on. The team determined that the Student's behavior did not interfere with his learning. Thus, the student's IEP did not contain a behavioral intervention plan to address the Student's behavior.

However, the student's IEP progress reports indicated that the Student had problems with aggression, and that his behaviors were increasing.

The District convened a meeting to discuss the student's three year reevaluation. When the IEP Team met, they determined: (a) no additional assessments were necessary, (b) Student continued to be eligible for and in need of special education under the category of Cognitive Disability, (c) Student's behavior impedes his learning or the learning of others, and (d) Student did not require assistive technology devices or services. The Team developed an IEP that indicated that the student's behavior does impede his learning or the learning of others, but the team did not draft a behavior intervention plan. Further, the team indicated that the Student had "three physically violent outbursts in the last quarter, and there have been 23 documented incidences of [ ] hitting staff or peers." Thus, the Team proposed to place the student in a special education classroom, on the basis that he required a specialized curriculum, 1:1 assistance, and small group instruction. However, the IEP did not address the Student's need for a behavior intervention plan or 1:1 assistance in any more detail.

Parents rejected the IEP and filed a complaint, alleging that the student's IEP was inappropriate. As part of the investigation, the Student's private service provider was interviewed. The provider cared for the Student two afternoons and evenings per week. She indicated that the Student did not display any inappropriate behavior while in her care and that he did not display any aggression or anger.

After the parent filed the complaint, the District proposed to conduct evaluations, including a functional behavioral assessment, assessments for post-secondary transition, and an "assessment to inform instruction and transition."

The District also proposed to amend the IEP to include paraprofessional support, additional goals, an update to the transition plan, and an updated behavior support plan.

Issues:

1. Whether the District denied the Student a free appropriate public education (FAPE)?

2. Whether removing the Student from school for disciplinary reasons resulted in a change of placement because the removals exceeded a total of 10 school days?

3. If the removals resulted in a change of placement, whether the District failed to issue written prior notice before proposing or refusing to initiate or change the identification, evaluation, or educational placement, or the provision of FAPE to the Student?

Held: For Parents. The investigator found, without explanation, that the IEP proposed by the district was not reasonably calculated to meet the student's educational needs.

The investigator also found that removing a student with a cognitive disability from class for disciplinary reasons resulted in a change of placement in violation of 34 CFR 300.530. Districts may remove students with disabilities from class for misconduct related to their disabilities as long as the suspension or punishment does not alter the student's educational placement or deny the student FAPE. Once a student has missed 10 days of school, districts are required to decide, on a case-by-case basis, whether a pattern of removals constitutes a change in placement. A change of placement may occur if the student has been subjected to a series of removals for behavior that is substantially similar to the student's behavior in previous incidents.

The investigator noted that it was unclear exactly how many times or for how long the student was removed because the district kept no record of when it sent him home. Based on the information provided by the parties, the investigator estimated that the student was removed from school on at least 20 different occasions for aggressive behavior. The cumulative total of these removals for substantially similar reasons resulted in a pattern of removals constituting a change in placement. The district thus deprived the student of educational opportunities by repeatedly sending him home without providing him with the services in his IEP.

The investigator also noted that having parent pick up the student when he was dismissed resulted in not receiving the transportation services indicated in the IEP.

Finally, the investigator found that the District failed to provide written prior notice of either the disciplinary change in placement or the change in service due to the disciplinary removals.

The investigator concluded that the district violated the IDEA. It instructed the district to discontinue the practice of sending the student home and ordered it to provide him with compensatory education.

VII. Section 504

A. Evaluation and Eligibility

Cassopolis (MI) Public Schools, 111 LRP 24653 (OCR Aug. 2, 2010)

Facts: During the 2009-2010 school year, the student was enrolled in third grade at the District's Sam Adams Elementary School. The student had been diagnosed with ADHD by his treating physician and was being medicated for it, but he had never been evaluated for a disability or identified as a student with a disability.

The complainant's primary concern was that the student had a hard time with organization and worked slower than other students, and as a result, he could not partake in the school's "Fun Friday's" rewards program, which rewarded students who had done well academically and behaviorally with fun activities. The student's teacher considered him a "slow-average student," but the complainant did not express concerns about his grades during the school year. However, the parent visited the student's classroom during the day to assist him with his work so that he could complete it and qualify to attend Fun Fridays. Even with this assistance, the student was not always successful.

In December 2009, the complainant requested a meeting to address her concerns and the trouble the student was having with completing his work on time and staying organized. The parent met with the Superintendent (who was also the Section 504 Coordinator) in December 2009 and again in January 2010. The parent did not request an evaluation at either of those meetings, and the school indicated that the student did not need a 504 plan.

According to the complainant, the District never sought the complainant's permission to evaluate the student and did not discuss the need to evaluate the student. According to the school superintendent, the complainant's major concern was that the student was not qualifying for the Fun Friday's program. The superintendent felt that there was no evidence that would require a 504 plan because the student was a good

student with good test scores, and there was little evidence of hyperactivity in the classroom. Rather than develop a 504 plan, the superintendent was working on an ADHD plan.

The complainant also met with the school principal and complained about the requirements of the Fun Friday program. Although the student's ADHD was brought up, the District did not have any medical records documenting his ADHD. The principal was under the belief that a 504 plan was only used for students with medical issues. When the principal and complainant met again in February 2010, the complainant demanded that the principal sign off on a 504 plan that the complainant had created, but the principal refused. The director of special education also determined that, based on the student's grades and successes, he was not eligible for a 504 plan.

After the January 2010 meetings, the complainant tried to enroll the student in Edwardsburg Public Schools, but the student was denied acceptance due to "discipline issues." The complainant alleged that the principal made negative remarks about the student that resulted in the denial of enrollment. The principal's voicemail message to the school did not mention discipline problems, and the principal claims that she had reported that the child was "a good kid."

Subsequently, parent filed a complaint with OCR.

Issue: Whether the District failed to conduct a timely and appropriate evaluation of a student it should have suspected had a disability in violation of 34 C.F.R. § 104.35, and whether the District retaliated against the student because the complainant asserted his rights under Section 504 in violation of 34 C.F.R. § 104.61.

Holding: For the parent, in part, and the district, in part. OCR found that the District failed to comply with the evaluation requirements of Section 504 because it did not conduct a timely evaluation. However, the evidence was insufficient to support a conclusion that the District retaliated against the student.

OCR found that the District had sufficient information regarding the student's difficulty with school work and the complainant's concern about the student to require the District to seek the complainant's consent to evaluate the student prior to late January, when the complainant specifically requested an evaluation and services under a 504 plan. The District did not evaluate the student until May, and then it was only to determine whether he had a learning disability, because the administrators believed that a student with ADHD was not eligible to receive services as a student with a disability under Section 504. The complainant did not provide the school with medical documentation necessary to initiate an evaluation; however, if a medical assessment is necessary to make a proper determination, it is the District's obligation to see that the student receives the assessment at no cost to the parent.

In response, the district submitted a resolution agreement, pursuant to which it agreed to evaluate the student. If the evaluation indicates that the student is eligible under either Section 504 or the IDEA, the district agreed to promptly convene a meeting to develop an appropriate plan, and determine "what compensatory education is necessary to supplement the education instruction the student received during the 2009-2010 school year."

OCR further held that the evidence presented was insufficient to show that the principal had made negative comments to Edwardsburg about the student's discipline record. On the contrary, the evidence is clear that the key reason the student's application was denied was that Edwardsburg had no space, not because of discipline. Thus, the parent's allegation that the district retaliated against the student was unfounded.

Westport (CT) Public Schs., 54 IDELR329 (OCR Sept. 2, 2009).

Facts: During the 2007-2008 school year, the student was a third-grader within the district. The student had an asthma and mold allergy, and his records showed eighteen absences and eleven visits to the school nurse during the school year in question, some of which the Complainants alleged were directly related to the allergies. The Complainants claim that they provided extensive medical information to the district suggesting that the student could not attend the school due to his allergies.

Due to the alleged severity of the student's health issues in the school, namely the indoor air quality issues, his parents requested a transfer of the student to a different school within the district. Along with the request to the school, the Complainants included letters from the student's pediatrician, allergist, and pulmonologist. The pediatrician's letter stated that the student had asthma and requested that he be placed in the classroom with the lowest mold count. The pulmonologist and allergist's letters stated similar information. The district denied their request, stating that it had no medical basis for a transfer. The district offered to have the school medical advisor speak with the student's physicians to determine whether there were additional medical considerations. Based on the information provided by the pediatrician and documentation suggesting that the student was not having any difficulties in school, the medical advisor informed the district that a school transfer was not warranted. The Complainants then removed the student from the district and sent him to a private school.

Issue: Whether the information that was available to the district indicated that the student might be in need of a 504 plan, and whether the district failed to conduct a necessary evaluation of the student to determine his eligibility for services under Section 504.

Holding: The information available to the district about the student's conditions was insufficient to prompt a Section 504 eligibility determination. However, the district failed to comply with the procedural requirement to provide notice to the Complainants of their right to challenge the district's determination under Section 504.

Under Section 504, a district should evaluate students who are having problems in school when the district has reason to believe that those problems are attributable to a disability. Based on the medical documentation and the student's history of absences and visits to the nurse's office, OCR concluded that the district had limited information pertaining to the nature and severity of the student's disability and the impact it had on his ability to participate in the district's educational program. The information was insufficient to require that the district conduct a Section 504 evaluation.

The student's attendance records did not provide any information to suggest that the student's absences were related to his asthma or mold allergy. Neither an interview with the school nurse nor a review of the nurse's log provided any indication that the student's visits to her office were related to his asthma or mold allergy. Furthermore, although the student's inhaler was provided to the school, the student did not use it.

The student's doctors and the school's medical advisor provided the school with limited information pertaining to the nature and severity of the student's disability and the impact it had on his ability to participate in the district's educational programs. The evidence also did not suggest that the student was underperforming academically. This information was insufficient to trigger an obligation for the district to evaluate the student for services under Section 504.

Because the district had notice that the parents believed that the student had a serious medical condition that justified the student's transfer to another school in the district and that Complainants were seeking to invoke the protections of Section 504, the district was obligated to give the Complainants notice of its decision not to evaluate, and of the Complainant's right to request an impartial hearing to challenge that decision. The district's failure to provide the Complainants with notice of its decision and their right to request a hearing raised a compliance concern under Section 504. The district voluntarily agreed to resolve the concern by notifying the Complainants of the district's system of procedural safeguards.

B. Access to Programs and Benefits

Upper Dublin Sch. Dist., 8 ECLPR 37 (Pa. SEA April 7, 2010).

Facts: The parents of a first-grade student, who was a student with a disability under Section 504 due to a severe allergy to "peanuts and tree nuts," filed a request for due process, alleging that the District violated Section 504 by failing. In the fall of 2008, during the student's kindergarten year, the parents and the district signed a Section 504

Service Agreement ("Agreement") to ensure that precautions would be put in place to prevent the student's exposure to peanut and tree nut products so that he could safely attend school. The Agreement covered staff training, dissemination of information concerning nut allergies, and precautions to be taken in the classroom, cafeteria, and at school sponsored activities.

The parents remained dissatisfied with the Agreement's terms, believing that it was insufficient to fully assure the student's safety. In particular, the parents were concerned with provisions for using disinfectant to clean tables and chairs, and the use of antibacterial hand wash or wipes for students to clean their hands after lunch instead of soap and water. They also sought to ban additional classes of food products that were manufactured in a facility where nut products are manufactured, and they wanted to include a provision allowing the student to go to the nurse at his request.

Issue: Whether the district provided the student with a Section 504 Service Agreement sufficient to assure that he could safely attend school during the 2008-2009 and 2009-2010 school years, and whether the district properly implemented the Agreement to assure that the student's needs were met as adequately as the needs of his non-disabled peers.

Holding: The district did not discriminate against the student, and the district implemented his Section 504 Agreement appropriately.

Section 504 only requires that the district provide services that meet the student's needs as adequately as the needs of non-disabled persons are met. It does not require maximizing the student's participation and providing the best possible or ideal program or complying with a parent's subjective view of proper implementation. In this context, the district was required to assure that the student could participate safely in terms of minimizing the possibility that he would be exposed to peanut or tree nut allergens. The student was not excluded from participating in any activity that occurred during school hours during the 2008-2009 or 2009-2010 school year.

In some instances, the student's safety required some alteration to his participation in school activities. Those alterations, however, were minimal and did not rise to the level of discrimination. The Agreement was implemented, and the student participated in activities to the same extent as his peers to the maximum extent appropriate to meet his needs. The student was neither isolated nor treated less favorably than peers, because he ate in the cafeteria daily. The nut-free table was located close to another kindergarten class, at least one table removed from the regular table reserved for the student's class.

However, the district was ordered to revise the student's Section 504 Agreement to ensure that all accommodations currently provided to the student are reflected in the written Agreement and to include a provision allowing the student to go to the nurse for

possible allergic reactions at his request or by staff referral. The district was also ordered to inform the Parent Teacher Organization that it is obligated to implement the Section 504 Agreement with respect to any program/activity conducted within a District building or on school grounds.

1. Architectural Barriers

Celeste v. E. Meadow Union Free Sch. Dist., 54 IDELR 142, 373 F. App'x 85 (2d Cir. 2010).

Facts: The parents of a student with cerebral palsy filed suit against the school district, alleging that it violated Section 504 and the ADA by denying the student access to its programs. The student was forced to rely upon crutches when ambulatory and a wheelchair when not. Minor architectural barriers in the school forced the student to take a ten minute detour each way in order to reach and return from the athletic fields behind the school. The detour impacted the student's participation as manager of the football team and it cut his time to participate in his physical education class in half. The school's bus shelter also lacked a curb cut where buses pick up and drop off students; as a result, the student was required to use a curb cut either on the opposite side of the platform, which was more than 150 away from the bus stop and requiring the student to travel in the bus lane and the adjacent driveway, or to use a curb cut more than 150 feet away.

Issue: Whether a student with cerebral palsy was denied meaningful access to the school's programs due to small architectural barriers in place on the school's campus.

Held: The architectural barriers on the school campus denied a student with cerebral palsy meaningful access to its programs, in violation of the ADA and Section 504.

Under the Section 504 and the ADA, an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the district offers. The unnecessary usurpation of the student's time that was caused by the school's architectural barriers resulted in a denial of his meaningful access to the programs provided to all other students at the school. The student also suggested plausible, simple remedies to the problem. He suggested that the school put in curb cuts where necessary and fix the pavement to make it more accessible.

Additionally, any new construction must be readily accessible to and usable by individuals with disabilities. The ADA regulations provide specific guidelines for new pedestrian walkways and bus stops. The alternative routes available to students with disabilities seeking to board or disembark at the bus shelter were insufficient to qualify as accessible, and they make the bus shelter unusable for disabled students.

2. Extracurricular Activities

Hernando County Sch. Dist., 56 IDELR 142, 111 LRP 6885 (Office for Civil Rights, Nov. 9, 2010)

Facts: A 12th-grader with an educational disability who was receiving home-based instruction, filed a complaint, alleging that school officials discriminated against him on the basis of disability by failing to inform him of certain school activities, including a "senior exit interview," in which students could meet with teachers and community members to discuss their post-graduation plans, and the Senior Prom. The student's IEP did not contain any provisions pertaining to notification about school activities.

Teachers handed out lists for students to sign up for exit interviews in class, but the student claimed he was never given the opportunity. Although the district posted information about some school activities on its website, and an internet-based portal, there was no evidence that either source mentioned senior career interviews. The student's mother filed an OCR complaint.

Issue: Whether the district impeded the student's ability to take part in extracurricular and nonacademic activities, in violation of Section 504 (34 CFR § 104.37(a)).

Held: For student. Providing an incomplete list of school activities on its website did not fulfill the district's duty to provide the homebound high schooler with equal chance to participate. OCR concluded that the obligation to provide equal opportunity to participate in nonacademic activities is not dependent on whether it is mentioned in a student's IEP, and is not dependent on whether the activity is mandatory. Moreover, equal access means access to all extracurricular and nonacademic activities, which necessarily includes proper notice of those activities on a consistent basis.

In this case, the district failed to ensure such access because it did not thoroughly communicate to the student what activities were available. OCR acknowledged that the district used a variety of methods to inform students of activities, including listing major activities on the school's website, but it did not provide a comprehensive list. Moreover, the district lacked a specific policy or method for disseminating such information to students receiving instruction at home, or to their parents. There was also no mention of any mechanism for ensuring such students received notice in a timely manner.

VIII. Miscellaneous

A. Long-Term Suspensions

Appeal of Keelin B., 2011 N.H. LEXIS 66, No. 2010-225 (N.H. 2011)

Facts: The Principal of a school in the Sunapee School District received an email at his District email account, purportedly authored by a particular student, which contained a sexually suggestive message. A Sunapee school teacher also received an email at her school district email account, purportedly authored by the same student, which contained vulgar and sexually explicit language. The teacher forwarded the message to the principal, asking whether the sender could be identified.

Both recipients opened their respective email messages on their home computers. Because the Principal could not identify who sent the emails, he contacted the Sunapee Police Department, and after an investigation, the police determined that the emails originated from a computer in Keelin B.'s home. In November 2008, Keelin B. provided a statement to the police acknowledging that she had "logged on to my dad's black computer at my house." She also stated: "I made up a Gmail account under the name of [another student]. This only happened one day, and only two emails were sent; one to Mr. Moynihan, and one to [the teacher]."

The Superintendent for the Sunapee School District, met with Keelin B. and her parents, and determined that Keelin B. had sent both emails under the name of a different student. He imposed a ten-day school suspension, from November 19 through December 5, and informed her parents that he would recommend to the Sunapee School Board that it impose a long-term suspension under RSA 193:13, II. By email dated November 19, Keelin B. apologized to the teacher. Her parents appealed the Superintendent's suspension decision to the school board and requested that it dismiss the request for a long-term suspension.

The school board conducted a hearing and voted to continue Keelin B.'s suspension through January 23, pursuant to RSA 193:13 (2008), bringing the total suspension period to thirty-four school days. It identified several rules in the student handbook that were violated by the student's misconduct, including the "Unacceptable Use" policy relating to use of the school district's computer information system, several sections of the "Behavior and Discipline Code," and the "Harassment (Anti-Harassment) Policy."

Ultimately, the school board decided:

> Keelin created an email account under the name of another student and using that account participated in sending two emails, one to the principal and one to a teacher, … at their school email

addresses. The emails were offensive, abusive, harassing, vulgar and profane, causing embarrassment and distress to the student, in whose name they were sent, and the recipients.

These facts show that Keelin neglected or refused to conform to the reasonable rules of the school, for which the School Board may impose a long term suspension under RSA 193:13. Keelin's conduct violated the District's Acceptable (Computer) Use Policy, Behavior Code and Harassment (Anti-Harassment) Policy.

In addition to continuing the suspension, the school board required Keelin B. to perform community service, and also made provisions for her to keep up with her course work. The school board informed the petitioners of their right to appeal to the state board of education "[p]ursuant to RSA 193:13 and New Hampshire Department of Education Regulations, ED 317.04 (e) and (f)."

Parent appealed, and the State Board of Education upheld the School Board's decision. The parent then appealed that decision to the New Hampshire Supreme Court.

Issues:

1. Whether the State Board of Education erred in upholding the school board's decision because the school board acted in excess of statutory authority and in violation of Ed 317.04 by imposing a suspension in excess of ten days for neglect or refusal to conform to reasonable rules of the school and school policies.

2. Whether Keelin B.'s suspension was improper because the Sunapee School Board failed to comply with its own policy that limits long-term suspensions to twenty school days.

3. Whether suspension was a permitted sanction in this case because the maximum punishment available under the "Acceptable Use Policy" in the student handbook is suspension from the school district's computer system for ninety days.

4. Whether the Sunapee School District acted in excess of its statutory authority by imposing suspension for electronic communications that occurred off school campus and outside a school safe zone.

Held: As to the first, issue, the Court found that the school board did not act in excess of its statutory authority or in violation of 317.04 when it imposed a suspension in excess of ten days for neglect or refusal to conform with the reasonable rules of the school. The Court emphasized that administrative rules cannot conflict with the statute they are intended to implement, and here, RSA 193:13 expressly authorizes school

boards to impose suspensions in excess of ten days for gross misconduct or refusal to conform with reasonable rules of the school. Thus, to the extent that the state regulation (Ed 317.04) precludes school districts from imposing long-term suspensions for misconduct that does not involve an act of theft, destruction or violence, or possession of a pellet ball gun, BB gun, or rifle, then it conflicts with RSA 193:13, and is therefore invalid.

However, because administrative agencies, such as school districts, must comply with their own rules and regulations, the school district violated its own rules (policies) when it imposed a suspension beyond twenty days. The fact that the school district could have pursued expulsion did not permit the district to exceed the twenty-day limitation on long-term suspension. The Court thus reduced Keelin B.'s suspension to twenty days.

The Court upheld the suspension, because the School Board found Keelin B. in violation of numerous provisions of the student handbook for which suspension is a possible sanction. Thus, the violation of the acceptable use policy was not the only infraction.

Finally, the Court found that the school district did not act in excess of its statutory authority, because the school board found that Keelin B. participated in sending e-mails to the principal and teacher at their school e-mail addresses. The court found that this properly fell within the scope of RSA 194:3-d, which provides that school districts shall adopt a policy which outlines the appropriate and acceptable, and inappropriate and illegal use, of school computer systems and networks.

Practice Pointer: Courts will strictly construe language in student discipline policies.

B. Discipline for Off-Campus Conduct

The last two cases were decided by the Third Circuit Court of Appeals. Both cases involve allegations that the school districts improperly disciplined the students for off-campus conduct.

Layshock v. Hermitage School District, 593 F.3d 249 (3d Cir. Feb. 4, 2010), rehearing en banc granted, opinion vacated by 2010 U.S. Dist. LEXIS 7362 (3d Cir. April 9, 2010), aff'd on rehearing by 2011 U.S. App. LEXIS 11994 (3d Cir. June 13, 2011).

Facts: In December 2005, Justin Layshock, a seventeen-year old high school senior, created a parody profile of the school principal on MySpace.com.[2] The parody

[2] The parody included the following statements: "I...AM...SUCH...A...BIG...HARD-A[__]!!!!!," "Birthday: too drunk to remember," "Eye Color: Big," "Hair Color: Big," "Height: Big," "Right-Handed or Left-Handed:

was created off-campus during non-school hours. Although Justin only informed a few of his close friends about the parody, word spread until most, if not all, of the student body was aware of the parody. During the same time period, three other students (identities unknown) also created offensive and vulgar profiles about the principal. The three unknown profiles were more vulgar and offensive than the profile created by Justin. The principal learned about the profiles from his daughter, who was a student in the district.

On December 15, Justin accessed the MySpace profile from a school computer, and showed it to other classmates. The following day, he attempted to access the profile from school, in an attempt to delete it. School administrators were not aware that Justin accessed the profile on campus until the following week, when they began investigating the profile. However, during the period of December 16 through December 21, school administrators limited students' use of computers to the computer labs or library where internet access could be supervised. Computer programming classes were also cancelled.

The school district learned that Justin may have created the profile on December 21. He and his mother met with the Principal and Superintendent, and Justin admitted to creating the profile. No disciplinary action was taken at that time. Following the meeting, Justin went to the Principal's office and apologized for creating the profile. He followed up with a written apology letter on January 4, 2006.

On January 3, 2006, the district sent Justin a letter, indicating that the school intended to hold an informal hearing to consider disciplinary action, based on violations of the school disciplinary code. Following the hearing, Justin received a ten-day suspension, was removed from his advanced placement classes and placed in the

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Big," "Your Heritage: Big," "The Shoes You Wore Today: Big," "Your Weakness: students laughing at me," "Your Fears: students laughing at me," "Your Perfect Pizza: big," "Goal You Would Like to Achieve This Year: be big," "Your Most Overused Phrase On an Instant Messenger: big," "Thoughts First Waking Up: too...damn...big," "Your Best Physical Feature: bigness," "Your Bedtime: big," "Your Most Missed Memory: bein blogger [sic]," "Pepsi or Coke: big pepsi," "McDonalds or Burger King: big king," "Single or Group Dates: big dates," "Lipton Ice Tea or Nestea: bigtea," "Chocolate or Vanilla: biganilla," "Cappuccino or Coffee: bigaccino," "Do you Smoke: big cigs," "Do you Swear: big words," "Do you Shower daily: ?," "Have you Been in Love: big heart," "Do you want to go to College: big principal," "Do you want to get Married: big," "Do you believe in yourself: bigly," "Do you get Motion Sickness: big puke," "Do you think you are Attractive: big n beer-gutted," "Are you a Health Freak: big steroid freak," "Do you get along with your Parents: dads too big," "Do you like Thunderstorms: big cloud," "Do you play an Instrument: big drum," "In the past month have you Drank Alcohol: big keg behind my desk," "In the past month have you smoked: big blunt," "In the past month have you been on Drugs: big pills," "In the past month have you gone on a Date: big hard-on," "In the past month have you gone to a Mall: big credit card," "In the past month have you eaten a box of Oreos: big familysizedubbelstufds [sic]," In the past month have you eaten Sushi: big fish tires," "In the past month have you been on Stage: big yell at students," "In the past month have you been Dumped: big dump in pants," "In the past month have you gone Skinny Dipping: big lake, not big d[___]," "In the past month have you Stolen Anything: big keg," Ever been Drunk: big number of times," "Ever been called a Tease: big whore. . . ."

Alternative Curriculum Education Program, and was prohibited from participating in school events, including graduation. Justin and his parents brought suit, alleging that the district violated his First Amendment rights.

The district court held that the school district could not establish a sufficient nexus between the speech and a substantial disruption of the school environment. On appeal, the Third Circuit Court of Appeals affirmed.

Issue: Whether a school district may punish a student for expressive conduct that originated off of school grounds, did not disturb the school environment, and was not related to any school sponsored event.

Held: For the parents. The district did not challenge the trial court's finding that the profile did not cause a substantial disruption at the school. Instead, it argued that there was a sufficient nexus between the creation and distribution of the vulgar and defamatory profile of the principal to permit the district to regulate the conduct. The court held that the district could not punish the student for creating the profile unless it resulted in a foreseeable and substantial disruption in the school.

The following case involves similar facts:

J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. Feb. 4, 2010), rehearing en banc granted, opinion vacated by 2010 U.S. App. LEXIS 2388 (3d Cir. April 9, 2010), decision reached on appeal by 2011 U.S. App. LEXIS 11947 (3d Cir. June 13, 2011).

Facts: In Spring 2007, J.S., an 8th grader at Blue Mountain Middle School, created a Myspace profile from her home on a Sunday evening, using her parents' computer. The URL for the profile was "http://www.myspace.com/kidsrockmybed," and the subject of the profile was J.S.'s principal. Rather than identify the principal by name, J.S. referred to him as "m-hoe=]" and she copied and pasted his picture from the middle school website onto the profile.[3]

[3] The profile included the following: "Interests: general: detention. being a tight a[__]. riding the fraintrain. spending time with my child (who looks like a gorilla). baseball. My golden pen. f[___]ing in my office. hitting on students and their parents. Music: I love all kinds. favorite is techno. Television: almost anything. I mainly watch the playboy channel on directv. OH YEAH BITCH! Heroes: myself. ofcourse. About me: HELLO CHILDREN yes. It's your oh so wonderful, hairy, expressionless, sex addict f[_]ga[__], put on this world with a small d[___] PRINCIPAL I have come to myspace so I can pervert the minds of other principal's to be just like me. I know, I know, you're all thrilled Another reason I came to myspace is because- I am keeping an eye on you students (who i care for so much) For those who want to be my friend, and aren't in my school I love children, sex (any kind), dogs, long walks on the beach, tv, being a d[___] head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN so please, feel free to add me, message me whatever [sic]"

The following day, numerous students approached J.S. to talk about the profile at school, generally saying that they found it funny. After school, J.S. made the profile private so that it could only be viewed by people J.S. invited to be "m-hoe=]'s" friend. J.S. granted "friend" status to 22 other students. Students could not view the profile at school because the school computers blocked access to Myspace.

On Tuesday, a student informed the principal about the profile and told him that J.S. created it. The next day, the student gave the principal a hard copy of the profile. That day, the principal met with the Superintendent and they concluded that the profile violated the school's Acceptable Use Policy because it violated copyright laws (by using the principal's picture without permission).

On Thursday, J.S. was suspended for ten days. That day, two teachers had to quite their classes because students were talking about the profile. In addition, a guidance counselor had to proctor a test so that an administrator could sit in on the meeting with J.S., her parents, and the Principal. When J.S. returned from her suspension, two students decorated her locker to welcome her back and several students congregated in the hallway while it was being decorated.

J.S. filed suit against the district, arguing that the district violated her First Amendment right to free speech by punishing her for creating the profile. The District Court granted summary judgment in favor of the district and J.S. appealed.

Held: For the student. The student's speech did not cause a substantial disruption in the school, and could not reasonably have led school officials to forecast a substantial disruption in school; thus, the District's decision to discipline the student violated her *First Amendment* free speech rights.

Practice Pointer: New Hampshire's bullying law, RSA 193-F, indicates that conduct that occurs off of school property or outside of a school-sponsored activity or event constitutes bullying or cyberbullying "if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event." However, districts should take care not to discipline students for off-campus conduct, unless such conduct causes a substantial disruption to the orderly operations of the school. As the above cases illustrate, imposing discipline for conduct that merely interferes with a pupil's educational environment could result in a finding that the district violated the student's first amendment rights. Note that this does not prohibit districts from using non-disciplinary interventions on students who engage in off-campus bullying or cyberbullying.