School Law School, the 'Second Year': An Overview of Recent Decisions

Presented to the New Hampshire Association of Special Education Administrators

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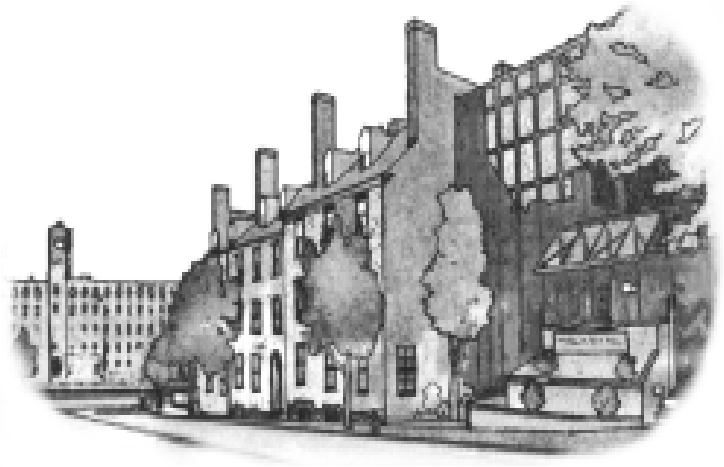

Wadleigh, Starr & Peters, P.L.L.C.
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By: Dean B. Eggert, Esquire
Alison M. Minutelli, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
aminutelli@wadleighlaw.com
Website: www.wadleighlaw.com

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 27 years he has had extensive experience representing school districts in special education matters at the administrative and appellate levels. He has spoken and lectured extensively on a wide range of legal issues in the field of education law.

Alison M. Minutelli, Esquire (JD., University of New Hampshire School of Law; B.A. Brandeis University) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. For the past 6 years, Ms. Minutelli has practiced in the field of school law, and has experience representing school districts in special education matters at the administrative and appellate levels. She has also written numerous articles on a wide range of legal issues in the field of education law.

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. The decisions contained in this material may be subject to appeal. 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 or 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. Evaluations

G.J. v. Muscogee County Sch. Dist., 58 IDELR 61; 112 LRP 5561; 668 F.3d 1258 (11th Cir. 2012).

Facts: In March 2005, G.J., an elementary school-aged child with autism and brain injuries was found eligible for special education services. In April 2008, the school district sought his parents' consent to complete a triennial reevaluation. Parents refused to consent.

In May, the child's mother again refused to sign the consent form, noting "Not approved by IEP or parents until lawyers work out guidelines. MCSD cannot evaluate [G.J.] for anything."By June 3, 2008, Parents were prepared to sign the consent form with several conditions including the condition that G.J.'s evaluation be conducted by a private doctor of their choice, and the condition that the district was prohibited from using the evaluation in any subsequent proceeding without their prior written consent.

Parents requested due process, and the hearing officer found that the school district was no longer obligated to provide special education services under IDEA because the parents had refused to consent to the IDEA-mandated triennial reevaluation. The hearing officer also found that a student had a right to an independent educational evaluation at public expense only when the school district has already performed an evaluation with which the parent disagrees. Parents appealed.

Held: For the school district. A school is entitled to reevaluate a child by an expert of its choice. The parents cannot force the school to rely solely on an independent evaluation. Parents have no right to a publicly funded independent educational evaluation until there is a reevaluation with which the parents disagree. The school district could not waive in advance its right to use its reevaluation in any challenge the parents made to the IEP proposed by the school district, particularly when the parents would retain the right to use their independent educational evaluations.

*Practice Pointer:*Before a parent may obtain an independent educational evaluation at public expense, the district must have an opportunity to evaluate the child.

Parents cannot circumvent this requirement by placing conditions on a district's evaluation, where the conditions effectively turn the district's evaluation into an independent evaluation.

III. Provision of a Free, Appropriate Public Education ("FAPE")

In *D.B. v. Esposito, et al.*, 58 IDELR 181, 2012 U.S. App. LEXIS 6099 (1st Cir. March 23, 2012), the First Circuit discussed the standard of review for determining whether a school district has offered FAPE.[1]

Facts: D.B. is a disabled child who lives with his parents in Sutton, Massachusetts. From 1999 until 2005, D.B. was a student enrolled in the Sutton public school system. In 2005, dissatisfied with the educational services D.B. was receiving, his parents removed him from the Sutton public schools and enrolled him in the Lindamood-Bell Learning Center. The Sutton schools responded by seeking a determination from the independent hearing officer of the Massachusetts Bureau of Special Education Appeals that it had complied with the IDEA. D.B. and his parents sought reimbursement for the costs of D.B.'s private education.

The hearing officer ruled for the Sutton school system and the parents filed a law suit in Massachusetts State Court which was later removed to the United States District Court. The District Court upheld the hearing officer's decision on summary judgment and the parents appealed to the First Circuit Court of Appeals.

D.B. has a significant disability which affects not only his speech, but his expressive and receptive communication, reading focus and overall cognition. D.B. received early intervention services from infancy until he entered the Sutton public school system in the fall of 1999, whereupon he received his first annual IEP. The progress made by D.B. was slow and despite making some developmental progress, as the court indicated "D.B. still lagged far behind his classmates in important ways. The areas of deficit included toileting skills and the inability to cultivate foreign language skills, comparable to those of his classmates. Subsequent evaluations of D.B. produced recommendations that he "was a good candidate for a multi-sensory, structured learning program . . ." It was against this backdrop that the First Circuit Court of Appeal heard this case.

Held: For the district. The First Circuit's decision addresses two major areas of the law. First, it discusses the First Circuit standard for FAPE. Second, it addresses the circumstances under which a parent may maintain a Section 504 claim for money damages.

The court's opinion opens by addressing the legal issue as to how one should assess the educational benefit of a child's IEP. The court's analysis endorses the Third

[1] This case is also discussed in Section VI (A), Section 504 Claims and the IDEA.

Circuit's position that "[t]he educational benefit of a child's IEP 'must be gauged in relation to the child's potential.'" The court affirms the Third Circuit's general statement of the law, but goes on to note that "Developmental disability takes many forms, however. It is not always feasible to determine a disabled child's potential for learning and self-sufficiency with any precision, particularly where the child's disability significantly impairs his or her capacity for communication."

The court observes that, "[i]n that situation, even without a complete understanding of the upper limits of the child's abilities, there can still be an assessment of the likelihood that the IEP will confer a meaningful educational benefit by measurably advancing the child toward the goal of increased learning and independence. If an IEP is reasonably calculated to confer such a benefit, it complies with the IDEA."

The court next discusses the circumstance where a child's potential might be unknowable, observing, "[f]or example, if a child's potential is unknowable, his or her IEP still could be reasonably calculated to confer a meaningful educational benefit if it is closely modeled on a previous IEP pursuant to which the child made appreciable progress." In its analysis, the court suggests that while a child's needs change over time, "if the two IEPs are substantially similar in design, that similarity provides a reasonable basis for assessing the likelihood of future progress."

After discussing the legal question of determining meaningful educational benefit, the court addresses the factual question of whether the District Court erred in finding that D.B.'s potential was "unknowable." The First Circuit finds sufficient evidence from expert evaluators such that "It was very difficult. . .to gauge [D.B.'s] potential in terms of his language skills," as indicators that the District Court did err in reaching the finding.

Finally, the court looks to the mixed question of law and fact as to whether or not the 2005 IEP complied with the IDEA because it was reasonably calculated to confer a meaningful educational benefit. The court affirms the process whereby "The District Court also looked to D.B.'s progress under his previous IEPs and 'agree[d] with the IHO that this progress, even if less than optimal, was likely to continue under the new IEP and would have been sufficient to satisfy the IDEA."

A. Parental Participation in Team Meetings

The case of *Belvidere Community Unit School District No. 100*. 112 LRP 12955, (Ill. State Educational Agency (SEA), Feb. 27, 2012) involved a parent's request for accommodations at a Team meeting.

Facts: Parents of a student with an educational disability filed a request for due process, in which they alleged, in part that the district prohibited the parents from meaningfully participating in IEP meetings and evaluations.

The child's mother asserted that, due to her ADHD and dyslexia, she required assistance to understand and actively participate in the IEP process. She requested, through her advocate and husband, the use of a tape recorder at Team meetings so that she could review the meeting at her own pace after it was ended in order to better understand and formulate questions and express concerns pertaining to the recommendations being made at the meeting.

The District objected on the grounds that recording the IEP meeting would run afoul of an Illinois eavesdropping statute and that recording would have a chilling effect on open communication between the parties. The District offered instead to provide an independent advocate through a local service agency at no cost to the parent.

Issue: Whether a school district must provide tape recordings of IEP meetings for an ADHD-dyslexic disabled parent.

Held: For the district. The Hearing Officer noted that neither the IDEA nor its implementing regulations authorized the recording of IEP meetings, or required a school district to permit recording. Thus, a State Educational Agency or a public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.

The School District's offer of accommodation to the Parents through an independent advocate at no cost to the Parent was considered a "reasonable accommodation."*See Kaskaskia (IL) Special Educ. Dist. 801*, 16 IDELR 132 (OCR 9/15/89). The District is not required to allow tape recording of an IEP meeting absent mutual agreement of both Parents and the individual IEP team members.

B. The Impact of Bullying on the Receipt of a FAPE

Clark County Sch. Dist., 112 LRP 27516 (Nev. SEA May 11, 2012).

Facts: At the time of the events at issue in this case, the student was a fifth grade student in an elementary school in the Clark County School District. The student was eligible to receive special education services under the IDEA due to a diagnosis of autism. Prior to 2011, student had been transported to and from school on a special education bus. In 2011, the District and parent agreed to transport the student in the general education bus, with specific accommodations. One of those accommodations included requiring that the student sat at the front of the bus, close to the bus driver. Parent was apprehensive about the transition to the general education bus, and there was discussion about the student returning to the other bus if the general bus did not work out.

On January 17, 2012, the student was allegedly attacked on the school bus on the way home from school. A first grader allegedly hit student on the head with a lunch box filled with ice. The district investigated, but was unable to find any witnesses to the

incident. The bus driver did not witness or report any incident involving the student on that date. The parent took the student to the hospital the following day, and the emergency room doctor prescribed no gym class for two weeks due to a head injury. Parent also received hospital discharge instructions pertaining to a head injury and a concussion.

At some point between January 17, 2012 and February 6, 2012, the transportation operations manager told parent that the student might be able to return to the special education bus.On January 24, 2012, the transportation nurse sent an e-mail informing the school nurse that the transportation operations manager had expressed willingness to resume curb to curb transportation service for student. On January 30, 2012, the school nurse sent an e-mail to the transportation nurse expressing the District's opposition to the parent's desire to return the student to the special education bus.

On February 6, 2012 at an IEP team meeting, the student's IEP was modified to include a "buddy provision." The transportation nurse suggested this modification, which would provide the student with a peer"buddy" on the bus.

On February 9, 2012, the bus driver wrote an incident report relating in part to the student's unhappiness with being required to sit in the front of the bus when his bus buddy had decided to sit in the back of the bus. On February 13, 2012, the assistant principal observed the student moving to the back of the bus with his bus buddy; he reminded the bus driver that the student was required to sit in the front of the bus.

On February 13, 2012, parent alleged that a second incident of bullying occurred. Parent alleged that student received bruising to his right side in the area of his rib cage. The bus driver denied witnessing student being attacked on the bus. The District was once again unable to verify that a bullying incident had occurred. The investigator visited the student at home, and was shown the area of student's alleged injury, but did not see any marks. Parent withdrew the student from school following the alleged bullying incident, and enrolled him in a private school.

Issues:

1) Has the student been a victim of bullying; and

2) Did the bullying result in a denial of FAPE?

Held: For the District. The hearing officer found that some bullying may have occurred, as there was reference to a possible instance of bullying by the student's fifth grade teacher. However, that incident did not occur on the school bus. In addition, the District investigated the incident and took steps to resolve the matter. The allegations of bullying that occurred on the bus were unverified by the District. In addition, even if

those incidents did constitute bullying, they did not result in a denial of a FAPE to the student.

The Hearing Officer noted that "Bullying results in the denial of FAPE only where the abuse is so severe that the child can derive no benefit from the services offered by the school district." The Hearing Officer found that there was no evidence that the bullying incidents had any effect on the student's education. To the extent that the student received low grades, those were the result of a change in grading standards, difficulty that the student had with his teacher, and a high number of absences.

The Hearing Officer also noted that the District took steps to address the issues that the parents alleged were occurring on the bus, by implementing a buddy plan. However, the parent withdrew the student before the student had the opportunity to implement that plan for any length of time. The Hearing Officer noted that the parents' removal of student from school immediately following the school bus incident of February 13, 2012, resulted in a failure to provide the District with the opportunity to modify Student's transportation plan. The transportation nurse testified to the District's willingness to re-evaluate the plan. . .but District was never given this opportunity."

C. Transition Services and the Least Restrictive Environment

The Office of Special Education Programs ("OSEP") was recently asked to opine with regard to several questions pertaining to transition services, including whether the least restrictive environment requirements ("LRE") of the IDEA applied to "transition work placements." OSEP responded as follows:

1. Is the IEP Team required to include work placement in a transition-age student's IEP? No. The IDEA does not require a specific service, placement, or course of study; instead, those decisions are left to the IEP Team. Transition services "are defined broadly and include a range of services, including vocational and career training that are needed to meet the individual needs of a child with a disability. Work placement can be an appropriate transition service, depending on the individual needs of a student, but it is not a required component of all IEPs that address transition services. If an IEP team determines that work placement is an appropriate transition service for a child, it must be included in the child's IEP.

2. Is the IEP Team required to provide parents with 'notice of placement' when determining a student's work placement? "If the work placement is included in a student's IEP, it becomes part of the student's educational program and part of the provision of FAPE to the student. If a public agency is proposing or refusing to initiate or change a work placement that is part of a child's transition services, the public agency

would be required to provide the parent with written notice of the proposal, a reasonable time before the proposed placement is initiated or changed. Therefore, initiating or changing a child's work placement that is part of the child's IEP would require" written prior notice.

3. Can segregated work be considered an appropriate outcome, particularly with appropriate assessment in a LRE before such a placement occurs? The IDEA does not prohibit segregated employment, but LRE provisions apply equally to the employment portion of the student's program and placement.

4. Is the LEA required to provide supplementary aids and services to allow the student to participate in the least restrictive work placement possible? When an IEP Team includes a work placement as part of the student's transition services, the IEP team must consider and include in the IEP, as appropriate, any supplementary aids and services needed to enable the student to participate with other students with disabilities and nondisabled students in the work placement described in the IEP. The LEA must provide any supplementary aids and services that are identified in the IEP.

SeeLetter to Spitzer-Resnick, Swedeen, and Pugh, 112 LRP 32664 (OSEP June 22, 2012).

IV. Placement

Plainville Board of Education v. R.N., 58 IDELR 257; 112 LRP 16721, 2012 U.S. Dist. LEXIS 46995 (D. Conn. Mar. 31, 2012).

Facts: Student was diagnosed with child onset bipolar disorder in second grade (2003). He was placed in special education in February 2004, under the category of emotional disturbance. Despite the services provided to him, Student had a suspension and a psychiatric hospital stay during the 2004-2005 school year.

Student was diagnosed with ADHD in the fall of 2005, and his condition seemed to deteriorate between December 2005 and January 2006. Student's mother retained a neuropsychologist, who recommended that Student be placed in a therapeutic school until his condition stabilized. In March 2006, Student was placed by the IEP team at a therapeutic day school. He displayed verbally and physically abusive behavior towards staff at first, but his behavior improved over time. During 2005 and 2006, the district attempted to get a release from Student's mother to speak with Student's private care providers. The mother granted limited releases and declined the Board's request for an evaluation by a doctor of the Board's own choosing. Parent complained about disciplinary practices at Student's placement, including locking Student in a timeout

room with concrete walls when Student had a tendency to bang his head, and forcing Student to clean up his bodily fluids if he released them in the timeout room.

In January 2007, Student received a triennial evaluation. In April 2007, the IEP team met to review the results of the triennial evaluation. Parent requested an independent neuropsychological exam. The district agreed, but its director of special education objected to testing on the basis that Student disliked being tested. In May 2007, the team did an annual review, and agreed to change Student's disability to Other Health Impaired rather than Serious Emotional Disturbance. The team also found that Student had not mastered any goals or objectives listed in IEP and had only made minimal progress on many of them.

During the 2007-2008 school year, Student had problems with some of his new teacher's policies, including strictly enforced discipline for incomplete homework. His behavior escalated in September 2007, causing him to be sent to the emergency room and leading Parent to request a new placement. Student received one to two hours per day of homebound instruction while Parent investigated a new placement.

After a three week intake process, the district ultimately agreed to place Student at the Intensive Education Academy. Student continued to not make significant progress there, and was hospitalized twice. After the first hospitalization, the IEP was changed to provide for 30.75 school hours per week, but from January to May 2008, Student received no instruction in science, social studies, or specials, and he was dismissed at 11am. His counseling and services were reduced, and he did not receive homebound instruction. In June 2008, Student was suspended and then discharged due to safety concerns after he struck two staff members.

The IEP team met soon after to discuss alternative placements. Parent wanted residential placement. The district wanted a day placement with a summer ESY at a school that used restraint and seclusion, which did not appeal to Parent. Parent rejected school's recommended placement andsubsequently requested placement at a residential school that provided year-round special education and therapeutic treatment. The district disagreed that residential placement was necessary and recommended a diagnostic placement at a clinical day school.

The Parent rejected this placement offer. In September 2008, Parent wrote to the district indicating that she intended to enroll Student in her chosen residentialplacement. Student seemed to be making academic progress at his residential placement, had not missed any school days since his enrollment, and had not been physically restrained.

Parent filed a request for due process, seeking reimbursement for the costs associated with the residential placement. The hearing officer found that the district failed to provide a FAPE to Student during 2007-08 and 2008-09 school years and that

it had to reimburse Student's parents for the cost of his attendance at a private residential school during the 2008-09 school year. The district appealed.

Issue:Whether the hearing officer erred in granting Parent reimbursement for Student's placement at the residential school.

Held:The court found for the parent, and upheld the hearing officer's decision. The court noted that whether a parent is entitled to reimbursement involves a three-step inquiry. First, the court asks whether the public agency has complied with IDEA's procedures. Second, it considers whether the IEP developed through IDEA's procedures is reasonably calculated to enable the child to receive educational benefits. If the IEP is procedurally or substantively deficient, it asks whether the private schooling obtained by the parents is appropriate to the child's needs.

Here, the district committed two procedural violations – it failed to provide adequate notice of its proposed evaluations and it failed to consider Parent's independent educational evaluations. Thus, thedistrict's IEP was not reasonably calculated to provide the child with educational benefit.

The court noted that the student's educational programs for the 2007-08 and 2008-09 school years were not appropriate. In 2007-08, Student had to be forcibly brought to school every day, and had sufficient trouble in school to alert the district that the placement was inappropriate. Student only received one to two hours per day of homebound tutoring with no other services in September and October of 2007. After January 2008, Student returned to school for two hour academic days with no additional services, which was not sufficient to provide Student with a reasonable chance of making academic progress, particularly in light of the 30.75 hours per week he was supposed to receive per his IEP. Nor did Student receive the ESY services he was supposed to during summer 2008 to make up for this deficiency. Although the district made efforts to help Student, the court found that the measures taken were simply stopgaps designed to manage his behavior rather than provide him with educational benefit.

During the 2008-2009 school year, the district never developed an IEP. The court rejected the district's argument that it failed to do such because the parent refused to consent to an evaluation, noting the refusal to consent did not insulate the District from liability, for two reasons. First, the district did not give Parent sufficient information on which to base informed consent for an evaluation (the doctor's credentials were given very generally). Second, the district, which already had extensive information on Student's condition, did not identify any relevant new information that would be discovered through another evaluation.

Finally, the court found that the parent's placement was appropriate. The record reflected that Student made significant progress there. He was able to attend classes

for full days. He required a residential placement because he had difficulty making transitions and needed therapeutic intervention throughout the day.

J.P. vs. New York City Dept. of Educ., 58 IDELR 96, 112 LRP 6150, 2012 U.S. Dist. LEXIS 12762 (E.D.N.Y. 2012).

Facts: At the start of the 2008-09 school year, the student was a 12-year-old boy with an emotional disturbance. He had been receiving special education services since preschool, and from kindergarten through sixth grade, he attended a small, private special education school. During that time period, his class sizes ranged from 6 to 11 students.

In February 2008, parents began considering 4 private schools that the private school had recommended the student attend during the 2008-09 school year. In February 2008, parents enrolled in the student in one of the 4 placements suggested by the private school.

In March 2008, the student's IEP Team met to develop an IEP for the 2008-09 school year. The Team developed an IEP that recommended:

1) A special class within a community school with a ratio of 12 students to 1 teacher and 1 paraprofessional (12:1:1);
2) Individual and group counseling in a group of 3 two times per week;
3) Speech/language therapy twice per week in a group of 3.

The IEP also contained goals to address difficulties with reading, writing, receptive and expressive language skills, math word problems, and emotional issues.

During that meeting, the parents indicated that they had found a possible placement for the student. The District did not agree with that program, on the basis that it would be "almost impossible or very difficult for [J.P.] to function in a less restrictive environment than what they recommended because of his academic and emotional difficulties." The District informed the parent that it would contact her with its recommended placement.

Before receiving a placement offer from the district, the parents made two payments to the private school they had previously located. By July 1, 2008, they had paid for over half of the tuition for the 2008-09 school year.

On August 13, 2008, the district informed the parent that the student was going to be placed at "Life Sciences Secondary School," in a 12:1:1 class. Parents indicated that they would visit the school, but that J.P. would be starting the year at the private school they had located. After vising the placement, the parents informed the district that they did not agree with the placement because the students in J.P.'s class were

lower functioning than J.P. and the program was too restrictive. Parents indicated that they would seek reimbursement for their unilateral placement.

Parents requested due process, and the hearing officer ordered reimbursement. The district appealed and the State review officer reversed, finding that the district had offered the student a FAPE in the least restrictive environment. As a result, parents were not entitled to reimbursement for their unilateral private placement. Parents' appealed.

Held: The school district provided the child with a FAPE. The court rejected the parents argument that the district's placement was not the least restrictive environment for J.P., noting that J.P.'s recommended placement was in a therapeutic special education setting. The reports indicated that he required a lot of attention from his teacher to negotiate his social interactions and needed to be reminded not to disrupt the class and to raise his hand to answer questions. Everyone on the team, including the parents, agreed that a general education setting was not appropriate for the student, and that he required a more restrictive environment. Thus, the parents were not entitled to reimbursement.

The court went on to note, that even if the parents had established that the district had denied a FAPE, that their request for reimbursement would have been denied on equitable grounds. The court found that the parents never intended to enroll J.P. in a public school and did not participate in good faith in the IEP process. The court noted that parents "attitude as an observer in the process rather than an active participant displays an utter lack of good faith. The record suggests that plaintiffs were attempting to game the system and obtain reimbursement for their son's private school education."

Furthermore, because the mother failed to express any misgiving about the school district's placing her son in a special education setting during the IEP process, the court found that the student's parents were trying to game the system and force the school district to pay for a private education that the son did not actually need under the IDEA.

V. Refusal of Services

Lamkin v. Lone Jack C-6 Sch. Dist., 58 IDELR 197, 112 LRP 13571. (W.D. Mo. Mar. 1, 2012).

Facts: Plaintiff A.M. had severe physical disabilities as a result of a seizure and bleeding on the left side of her brain when she was two days old. In Spring of 2011, her parents told the District that A.M. needed to transition from the private preschool that she had been attending because she was aging out of that program. However, the district did not plan for her transition to an age-appropriate educational program.

On August 23, 2011, the District held an IEP meeting with Parents, and informed Parents that it believed A.M. should be placed in the "Missouri State School for the Severely Handicapped." Plaintiffs were displeased with this, and on September 2, Mother emailed a District official informing him that Mother withdrew consent for A.M. to receive IDEA services, and requested that the District provide A.M. accommodations under Section 504 of the Rehabilitation Act of 1973.

The official informed Mother that the District would not provide 504 accommodations because Mother had rejected IDEA services. Mother enrolled A.M. into District as a regular student and again requested 504 accommodations;her request was denied. On October 3, 2011, District allowed A.M. to attend school as a regular student (after allegedly placing a call to the Missouri Children's division for educational neglect).

Parents filed a complaint on October 19, 2011 alleging violation of 504, violation of Title II of the ADA, and claims under 1983 for procedural due process violations. Plaintiffs allege that Defendants subjected A.M. to discrimination on the basis of her disabilities and that Defendants interfered with the Parents' right to make decisions regarding A.M's upbringing and education. Parents filed a motion for preliminary injunction. Defendants filed a motion for summary judgment on the theory that Plaintiffs had not met the exhaustion requirement of IDEA.

Issues:

1) May parents sue under 504 and the ADA without exhausting their administrative remedies if parent has withdrawn consent for Child to receive IDEA services?

2) Must a District provide 504 accommodations after a parent has withdrawn consent for Child to receive IDEA services?

Held: For the district.

1) The IDEA's exhaustion requirement applies equally to relief available under other statutes if the relief sought under those statutes would also be available under the IDEA. There are three exceptions to the exhaustion requirement: 1) futility; 2) the failure of administrative remedies to provide adequate relief; and 3) the establishment of an agency policy or practice of general applicability that is contrary to law. A parent may not bypass the IDEA's administrative procedures by voluntarily revoking consent under the IDEA and then recasting their grievances under 504 and the ADA.

2) Recent amendments to the IDEA regulations provide that "[o]nce a parent revokes consent for a child to receive special education and related services, the child is considered a general education student…[After revocation], a teacher is not required to provide the previously identified IEP accommodations in the general education environment, …[and the child] should be treated the same as all other general education students in that classroom." Cmt. To the Regulation, 73 Fed. Reg. 73006, at 73011-73013 (Dec. 1, 2008). By rejecting the services developed under the IDEA, the parent essentially rejected what would be offered under Section 504.

VI. Admission of Additional Evidence on Appeal

Pass v. Rollinsford Sch. Dist., 57 IDELR 221, 2011 U.S. Dist. LEXIS 116770 (D.N.H. Oct. 7 2011).

Facts: Plaintiff, the older sister and guardian of a student with an educational disability under the IDEA, filed a request for due process, seeking reimbursement for the costs associated with the unilateral placement of the student in two private educational programs. The hearing officer found in favor of the District, and the guardian appealed.

The guardian filed a motion for an evidentiary hearing to introduce additional evidence into the administrative record. The evidence that the parent sought to introduce pertained to the student's recent performance at one of the private placements. The District objected.

Issue: Is evidence of the student's post-hearing progress at a private school admissible?

Held: For the guardian. The court found that the evidence of the student's progress and performance at the school was relevant and not cumulative of evidence already in the record. The court noted that the IDEA provides that a district court "shall hear additional evidence at the request of a party," but that the right to submit additional evidence is not automatic. The court noted that a person seeking to introduce additional evidence must provide a "solid justification for doing so." Generally, the court will "exclude evidence that merely repeats or embellishes evidence already in the administrative record."

However, "evidence concerning relevant events occurring subsequent to the administrating hearing may appropriately be used to supplement the record." The court found that the additional evidence that the plaintiff sought to introduce pertained to the student's progress and performance at the school, after the hearing had concluded. The court found that the evidence was potentially relevant to the appropriateness of the

District's proposed IEP and the plaintiff's unilateral placement. The court noted that the additional evidence would not simply repeat or embellish material already in the record. The court indicated that at the time of the hearing, the student had only been in the private school for a few weeks. Thus, evidence of her progress and performance at the school for the additional five months "may provide a more complete and accurate portrayal of the comparative advantages offered by that placement."

VII. Section 504

A. IDEA Actions Recast Under Section 504

In *D.B. v. Esposito*, 2012 US App. LEXIS 6099 (1st Cir. March 23, 2012), the First Circuit Court of Appeals dealt with the continuing question as to whether an IDEA based case can give rise to discrimination claims under Section 504 and, civil rights claims under Section 1983 and retaliation claims under the Rehabilitation Act and Title V of the ADA.

The court commenced its analysis by affirming the general principal of "exhaustion." Observing "Like an IDEA claim, a non-IDEA claim that seeks relief also available under the IDEA must be exhausted administratively through the IDEA's due process hearing procedures before it can be brought in a civil action in state or federal court." In analyzing the issue, the First Circuit noted that "Because the IDEA is 'simply not an anti-discrimination statute,' (citations omitted), a discrimination claim under the Rehabilitation Act or the ADA involving a denial of a FAPE is not co-extensive with an IDEA claim. (citations omitted). To prevail on an IDEA claim, a plaintiff must show that he or she has a qualifying disability and has been denied a FAPE. To prevail on a discrimination claim under the Rehabilitation Act or the ADA involving a denial of a FAPE, a plaintiff must make an additional showing that the denial resulted from a disability-based animus. (citations omitted)"

As the court turned to the retaliation claims, it observed that "[c]ompliance with the IDEA does not necessarily disprove a claim under the Rehabilitation Act or the ADA that a school system retaliated against a disabled student, or the student's family, for advocating on behalf of the student's right to be free from disability-based discrimination in the provision of a FAPE." The court also observed that: "However, in the face of a school system's compliance with the IDEA, as in this case, a plaintiff who asserts that the content of an IEP or the conduct of an IEP process was retaliatory must show evidence of something more than a disappointing IEP or the predictable back-and-forth associated with the IEP process in order to survive summary judgment. Appellants have not done so and thus, have not shown that the school system's legitimate non-retaliatory explanations for its actions were pretextual."

In light of these findings, the court had no difficulty disposing of a related First Amendment claim and a Section 1983 claim.

B. Nursing Services

R.K. v. Bd. of Educ. of Scott Cnty, KY,.55 IDELR 247, 755 F. Supp. 2d 800 (E.D.Ky. Dec 15, 2010).

Facts: In March 2009, R.K.'s parents enrolled in him Kindergarten at his neighborhood elementary school (EES). The parents advised the school board that R.K. had been diagnosed with Type 1 diabetes, and the district informed the parents that their child would not be able to attend EES because it did not have an on-site nurse. The district offered transportation to either of two public elementary schools which were the only schools in the system with on-site nurses available. R.K. attended one of the schools, AMES for the 2009-2010 and 2010-2011 school years.

In December 2009, the parents advised the district that R.K. had an insulin pump and therefore no longer needed daily insulin injections. Instead, he only required assistance in monitoring the pump and counting carbohydrates. Parents requested that the district allow R.K. to attend EES, his neighborhood school, because he no longer required assistance from a nurse. The district denied parents request, on the basis that state law required that a nurse, or other qualified medical personnel, monitor the child's insulin pump and assist with carbohydrate calculations. State law required districts to delegate nursing functions in accord with the Kentucky Board of Nursing, and the Board of Nursing had issued an advisory opinion that nurses should maintain responsibility for monitoring insulin pumps and counting carbohydrates in a school setting. Thus, the district believed that the student was required to attend a school with a nurse on staff.

Parents filed suit in the United States District Court, alleging that the district's refusal to allow R.K. to attend EES with accommodations violated Section 504 of the Rehabilitation Act and the ADA (among other laws).The district moved for summary judgment.

Issues:

1. Whether parent has failed to meet the administrative exhaustion requirements of the Individuals with Disabilities Education Act; and,

2. Whether the district violated a) Title II of the ADA, b) § 504 of the Rehabilitation Act, and/or c) the Kentucky Civil Rights Act.

Held:With regard to the first issue, the court found for the parent.Parent's claims were outside of the purview of the IDEA. The IDEA states that nothing in it shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the ADA, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of children with disabilities. Parent's claims included constitutional

and statutory violations independent of the IDEA and are not subject to the IDEA's requirement of exhaustion of administrative remedies.

As to the second issue, the court found for the school district. The district declined to station a nurse at EES because full time nurses were already in place at two other schools and in light of the cost burden that would be placed on the school system by employing another full time nurse. The district considered parents' request that they train EES staff to monitor the student's blood sugar and administer insulin as necessary but declined to do so because of potential liability under Kentucky regulations.

The districts decision to enroll the Child at AMES was objectively reasonable in light of the situation. Parent failed to articulate any reason that AMES is unreasonable or insufficient to provide an adequate education for the Child. The Court was not persuaded that either the ADA, § 504, or the Kentucky Civil Rights Act require school districts to modify school programs in order to ensure neighborhood placements when necessary services and a free and appropriate education are available at another site within the district. Parent could not demonstrate that the district failed to accommodate R.K. or discriminated against him on the basis of disability.

C. Compliance with Section 504 Plans

Morris (NJ) School District,111LRP 70051. (Office for Civil Rights (OCR), E.D.N.Y. Sept 9, 2011).

Facts: Parent filed a complaint with OCR, alleging that during 2010-2011 school year, the District discriminated against her son (Student) on the basis of his disability, when it failed to provide:

1) Weekly emails- the Section 504 Plan indicated that the student was to receive weekly emails documenting his missing assignments, class progress with assignments and decorum in class, and that the student was to "answer and save each of these emails and that parents and supervisors will always be included on the cc: line.";

2) Written copies of homework assignments – the Section 504 plan required that teachers provide written copies of homework assignments and utilize proximity techniques to refocus Student;

3) Copies of class lecture notes – the Section 504 plan required that teachers provide copies of class notes and handouts "when possible"; and

4) A review and update of the Student's school contract – the Section 504 plan indicated that Student would meet with his teachers at various times throughout the year, and that the Student agreed to maintain a minimum grade of B+ in each of his courses. If he failed to do such, he would suffer a consequence.

Held:

1) OCR found that the District failed to provide the Student and the complainant with weekly emails despite their providing him with regular emails. OCR found that the teachers provided regular, but not weekly, email correspondence; however, the Section 504 plan required weekly emails. Thus, the district failed to follow the plan.

2) OCR found that, despite the District's assertion that class notes were sometimes posted on "Moodle", an online system that the District used to provide all students with homework assignments and course information, the District staff did not consistently provide written copies of homework assignments to the Student. Although the District had provided the student with a Netbook and an iPad for use in class, and he could have accessed "Moodle" from either device, that was not a substitute for the terms of the plan, which required written copies of homework assignments.

3) The "Moodle" system contains syllabi for courses and teachers posted information to the system for students to use as study guides. However, the district did not provide hard copies of class notes to the student; thus, it violated the Section 504 plan.

4) OCR found that the District failed to review and update the Student's school contract.

As a result, the District agreed to enter into a voluntary corrective action plan, pursuant to which it agreed to provide training to teachers on the implementation of Section 504 plans.

D. Discontinuation of Section 504 Plans

Hudson (NH) Sch. Dist., 58 IDELR 22 (OCR Sept. 30, 2011).

Facts: A parent of a student with a Section 504 Plan filed a complaint with OCR alleging that the District discriminated against her daughter by failing to follow proper procedures in determining the student's eligibility for services under Section 504 prior to and during the 2008-2009 school year.

In February 2009, when the complaint was filed, the student was a junior at Alvirine High School. The student suffered from chronic migraine headaches.

A Section 504 Plan was developed in March 2008. The plan identified the student's impairment as migraine headaches and noted that the headaches impacted the student's learning, because the student was only able to attend school for half days. The plan included the following modifications: adjustment of academic schedule as needed to accommodate for medical difficulties; make up privileges for medically documented absences; and in-home tutoring to facilitate make-up work and continue class work. The plan did not state how often the tutoring services would be provided, nor did it prescribe any conditions for receipt of such services.

In May 2008, the District received a note from the student's doctor, indicating that the headaches had abated and she could return to school full-time. The student subsequently did such. E-mail communication between the parent and the principal indicated that there was an understanding that the Section 504 Plan would remain in effect, at least through the end of the 2007-2008 school year. It is unclear whether the parties agreed that the plan would continue into the 2008-2009 school year.

In August 2008, the parent contacted the principal via e-mail, and requested assistance with ensuring that tutoring services would be available in the event that the student needed them. Parent indicated that he did not believe that tutoring services were required at the present time, but that he wanted to ensure that a process was in place so that the services would be immediately available if the student needed them. In September, the principal responded with a detailed plan pertaining to tutorial services, in the event the student required such. The plan included a detailed description of how and under what circumstances the student would receive the services, and provided for a progressive level of services depending on the number of absences from school. The e-mail indicated that the student would be provided tutoring services if absent 60% of the time during a three week period. The principal also indicated that the plan would be in place immediately, even though the District did not have any medical documentation indicating that the headaches had begun to reoccur. The principal requested that the medical documentation be provided by October 1st, so that the team could put together a formal 504 Plan.

The District received a letter from the student's doctor in late September, indicating that he had met with the student and that her headaches were not under control. The letter indicated that the student may require further accommodations at school that would allow her to participate for a shortened day. The Section 504 team met in October and developed a new plan for the student, which incorporated the recommendations for tutorial services outlined in the principal's correspondence. Neither of the student's parents were present at that meeting. The revised plan was subsequently sent to the student's parents and they signed the same. However, the parent wrote on the plan that he was requesting that the 60% requirement not be a

"hard and fast" rule. The District did not provide the parents with notice of the 504 Procedural Safeguards prior to or subsequent to the development of the October 2008 504 Plan.

In January 2009, the Section 504 team met again and modified the plan to reflect, among other things, an increase in tutoring and the student's enrollment in a Spanish 1 course. The student's parents were not given prior notice of the meeting, nor did they receive their Section 504 Procedural Safeguards.

Issues:

1) Whether the District denied the student a FAPE by not following required procedures to review and make placement decisions for the 2008-2009 school year; and

2) Whether the District failed to provide the parent with appropriate procedural safeguards.

Held: For the parent.As to the first issue, OCR found that the District failed to comply with the procedural requirements of Section 504 in making decisions regarding the student's Section 504 placement and services. Specifically, OCR found that the District's effectively discontinued the plan at the conclusion of the 2007-2008 school year, and that this action occurred outside of the Section 504 team process. Although the medical documentation indicated that the student's migraines had abated and that she could return to school on a full-time basis, there was no evidence that the District made a formal determination regarding the student's continued eligibility. Moreover, although the principal put various measures in place to address the student's potential absences for the 2008-2009 school year, pending the submission of additional medical documentation and the reconvening of a team meeting, this too, was done outside of the Section 504 team process.

With regard to the second issue, OCR found that the District failed to comply with Section 504 by failing to provide the parent with Notice of Team Meetings and with their Section 504 Procedural Safeguards. Although there was consistent communication between the District and the parents, the District failed to provide the parents with prior notice of the meetings and parents did not attend the same.

Because the medical documentation indicated that the student's headaches were no longer impacting her learning, OCR determined that the student was not entitled to an individual remedy. However, the District agreed to revise its Section 504 protocols to ensure that parents receive prior notice of team meetings and notice of procedural safeguards. The District also conducted training to staff regarding the requirements of Section 504.

E. Harassment

Dallas County (AL) Schools, 58 IDELR 233 (OCR Oct. 28, 2011).

Facts: A parent filed a complaint with OCR, alleging that the student's Aide discriminated against him on the basis of disability. Parent alleged that the Aide told the student that if he didn't find his glasses, Santa Claus would not come. Parent alleged that, the student, who was autistic and had limited intellectual abilities, took the statement literally and became so anxious that the parent had to bring him to the doctor the following day.

Parent alleged that she reported that the statement had been made to the IEP Team and that the student was upset, but she did not mention the Aide by name. Parent believed that the Aide intentionally discriminated against the student because she knew how much the statement would upset the student.

Issue: Whether the Student was harassed based on disability when his Aide told him that if he did not find his glasses, Santa Claus would not come, which caused him anxiety, in violation of Section 504.

Held: For the District – OCR found that there was insufficient evidence to support a conclusion that the Student was subjected to harassment on the basis of disability. OCR interviewed the parent, the Student's pediatrician, and several district staff members, including the Aide. The Aide denied making the comment to the Student. Instead, the Aide indicated that she had told the student that he would not be able to see the board without his glasses.

The student's pediatrician confirmed that he saw the student for an appointment, but he could not recall any specific incident at school nor did he have any notes to indicate that the Student had been upset by a teacher or aide at school. He stated that his notes only indicated that he treated the student for a behavior problem and for difficulty breathing.

VIII. Family Education Rights and Privacy Act ("FERPA")

In Letter to Anonymous, 15 FAB 5, 111 LRP 67052 (FPCO May 17, 2011), the Family Policy Compliance Office ("FPCO") refused to open an investigation into an alleged FERPA violation, on the basis that the complaint did not provide specific allegations to give the FPCO office reason to believe that a FERPA violation occurred.

In that case, the complainant alleged that the school district violated FERPA by failing to provide her with the opportunity to inspect and review her child's education records within 45 days of the parent's January 27, 2010 request. The parent enclosed, with her complaint, a copy of a March 15, 2010 email to the parent from the school

principal. The email indicated that the district attempted to set up an appointment for the parent to review and inspect the records, but that the parent did not respond until March 11, 2010, two days before the 45-day period expired. FPCO opined that it was "unreasonable for a parent to expect a school to set up an appointment for the Parent to inspect and review education records in that timeframe."

IX. Conclusion

Over the past year, courts have continued to refine, define and at times redefine our understanding of the IDEA. Perhaps one of the most significant developments has been the increased risk of litigation under Section 504 in which parents seek monetary relief rather than programmatic relief. The best preventive measure to such developments continues to be an approach to education driven by "best practices," rather than "adequacy" as the benchmark.

Table of Contents