

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

August 23, 2013



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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. 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. Child Find

Regional School Unit No. 51 v. John Doe, 2012 U.S. Dist. LEXIS 185359 (D. Me. Nov. 29, 2012), magistrate's order approved by 2013 U.S. Dist. LEXIS 11725 (D. Me Jan. 29, 2013).

Facts: In January 2006, the Student was referred for special education due to difficulty completing independent academic work, following multiple-step directions, remaining seated, and maintaining focus, as well as due to an inconsistent short-term memory and weak organizational skills. In May 2006, he was identified as eligible for special education services under the category of "other health impaired" because of ADHD and executive functioning deficits. An IEP was created for the student; the IEP expired in May 2007.

In the fall of 2006, when the student was in 5th grade, his parents unilaterally placed him in a private school. He also had a private tutor that would attend school with him for roughly 10-20 hours per week. Student did very well academically his 5th grade year and gained confidence in academics.

In the fall of 2007, the Student returned to public school, in another school district. Parent informed the district that the student did not have a current IEP, and had not received special education services at the private school. The district informed the parent that they could refer him for special education if they wished. However, parents were concerned about the negative effects that testing would have on student, including possible lost class time, invasive testing, and self-esteem issues. As a result, the district convened a meeting to discuss the possibility of providing services under Section 504 without the need for further testing. Throughout this process, the Parent's believed he would not be eligible for special education without additional testing.

After 6th grade the parents hired a tutor to work with the student throughout the summer, however, the student continued to show difficulties during his 7th grade year (2008-2009). In October 2008, the student's team met to review the Section 504 plan. The plan was left essentially the same.

In the 8th grade (2009-2010), the student was having difficulty following directions and completing his homework on time. He began to show defiance and was unable to engage even when redirected by a teacher. His Section 504 Plan was amended in the fall of 2009 to include two evenings of extra tutoring with one of the teachers. However, this stopped during ski season when the family would travel. In November, after the student had failed 3 courses, parents referred student for special education. In March 2010, Student was identified as eligible for special education due to multiple disabilities (autism, OHI due to ADHD, and a specific learning disability in math). An IEP was developed in the spring of 2010.

Before the beginning of high school in the fall of 2010, Parents explored their options for Student's education. One option was the Small Learning Community at the high school. This program was composed of approximately 60 students taught by three teachers. The other option was a private boarding school in Massachusetts. Parents were concerned that the IEP was not sufficiently individualized to address the student's needs. Parent's main concern was that although the student did not object to special education, he would object to being singled out a various times during the day to leave his normal classroom and go to special education classes.

Parents eventually decided to send the Student to a private school in Massachusetts because the IEP in place for his transition to high school was not sufficient. The student thrived at the private school and appeared to recover from his depression and other psychological issues. The District developed an IEP for the 2011-12 school year.

In the fall of 2011, after a successful 9th grade year, the Student transferred to a more residential school in New Hampshire. This year was met with more challenges, and the student continued to show significant social and psychological needs at the school. The school engaged psychologists on a weekly basis toward the end of the year to help the student with these issues and emotions. The school was able to accommodate the student and he ended up having a successful school year.

Parents filed a request for due process, seeking reimbursement for the costs associated with their unilateral placements. Parents argued that the IEPs developed by the District for the 2010-11 and 2011-12 school years were inappropriate, and also that the student was entitled to compensatory educational services due to the District's failure to identify him from 2007 until 2010.

The hearing officer awarded parents reimbursement for the costs associated with their placement for the 2010-11 school year as compensatory education for the district's failure to identify the Student as eligible for special education from September 2007 to March 2010. The District appealed this decision. The hearing officer found in favor of the District as to the 2011-12 IEP, and the parents appealed that decision.

Held: The decision of the hearing officer was affirmed. The court first addressed the District's argument that portions of the parents' claims were barred by the IDEA's 2 year statute of limitations. The court rejected that argument, noting that the IDEA's 2 year limitations period does not apply if the parent was prevented from requesting due process because the district withheld information (such as procedural safeguards) from the parents.

The court found that the District had failed to provide the parents with their procedural safeguards in the fall of 2007. The court also found that the District should have done such, because the student was eligible for services under the IDEA in the fall of 2007, despite not having an existing IEP at the time he transferred to the District. The court noted that the District was not required to implement the IEP because it expired in May 2007 and student transferred into the District over the summer of 2007, but that it should have developed an IEP for the 2007-08 school year, or conducted evaluations to determine whether the student was no longer eligible for services under the IDEA.

The court found that the District violated its "child find" obligations in the fall of 2007 by failing to recognize that, upon his transfer, he remained IDEA-eligible. Alternatively, even if he was not then IDEA-eligible, the district violated the IDEA by failing to refer him immediately for special education services. This violation continued until Student ultimately was referred for special education services in 8th grade and identified in 2010.

The court found that the decision to reimburse the parents for the costs associated with the 2010-11 tuition was appropriate, noting that: (1) the private school was approved to educate children with disabilities; (2) social work services were made available to students who needed them; (3) the Student's placement at the private school was successful; and (4) the conflict with another student at the school was handled appropriately by the school administration.

Finally, the court found that the District's 2011-12 IEP was appropriate and Student would have received a FAPE if he had returned to the District. Therefore, parents were not entitled to reimbursement for the costs associated with the 2011-12 tuition.

Lauren G. et al. v. West Chester Area School District, 60 IDELR 4, 906 F.Supp.2d 375 (E.D. Pa. Nov. 6, 2012).

Facts: Student attended school in the district for her seventh and eighth grade years, but her parents removed her for her ninth grade year and enrolled her in a private school. She attended the private school for one and one half years and then returned to the public high school.

A few weeks after Student's re-enrollment in the District, East High's guidance counselor learned from a counselor at the private school that Lauren had "behavioral issues." In the first couple of months that Student attended East High, she met weekly with the guidance counselor as part of the District's effort to ensure a smooth transition for new students. Although Student appeared to be handling her classes, the guidance counselor noticed that she was struggling with attendance. Student also reported to the guidance counselor that she was seeing a psychiatrist.

On March 8, 2008, the spring of her 10th grade year, she was admitted to an inpatient psychiatric hospital, for suicidal thoughts. The District was informed by Student's parents on March 9. On March 21, 2008, Student was discharged from the hospital and entered the American Day Program ("American Day") for outpatient care. While at American Day, Student was diagnosed with Depression, Not Otherwise Specified (NOS), Obsessive Compulsive Disorder, Oppositional Defiant Disorder, and possible Attention Deficit Disorder. The assessment also noted that Student used marijuana, however she was not diagnosed with a substance abuse. Student explained to her mother that the marijuana helped make the repetitive thoughts about the devil and the number six go away.

On March 24, parents emailed a letter from Student's psychiatrist to the guidance counselor. This letter detailed all of Student's diagnoses. In early April 2008, Student returned to East High after her treatment at American Day. She met with the crisis counselor or guidance counselor once or twice a week. A few days after her return, her parents requested in writing that the District begin the process of getting Lauren a 504 Accommodation Plan ("504 plan"). The District convened a meeting of a "Child Study Team," which included Student's guidance counselor, but they ultimately issued a "Denial of Eligibility Letter," informing parents that Student did not meet the criteria for a 504 plan. Parents did nothing in response at the time.

At the start of Student's junior year, the 2008-09 school year, her problems began to escalate. She was withdrawn, depressed, complained of headaches and other somatic symptoms, cut classes, avoided school, and voiced a desire to drop out. She was also struggling academically. In an effort to get Student help, her mother spoke on the phone very frequently with the guidance counselor and other District staff.

In September and October of 2008, Student frequently visited the crisis counselor. The guidance counselor recommended that Student's parents find a new psychiatrist to help stabilize her. In addition to her emotional struggles, she was also struggling academically. In October, the guidance counselor noted that she was failing classes. On October 20, 2008, parents requested in writing that the District conduct a psychoeducational evaluation and a psychiatric evaluation of Student. However, on October 23, Student was again admitted to American Day because she was acting erratically, refusing to attend school, smoking marijuana, and had stolen her mother's car in the middle of the night.

On November 7, she was discharged from American Day. Her discharge summary noted that her parents were considering placing her in a boarding school. It also noted that she required ongoing substance abuse treatment. On November 10, the school psychologist determined that it was not necessary to conduct a psychiatric evaluation because Student had just been evaluated at American Day. The District issued a "Permission to Evaluate" ("PTE") letter, which the parents did not respond to because sometime between November 17 and November 28, Student began attending King George School ("King George"), a therapeutic boarding school in New England.

In December of her 11th grade year, the parents hired a school psychologist to conduct a private evaluation of the student. The psychologist diagnosed the student with Dysthymic Disorder and recommended that the student stay in a private boarding school with special services for two more years to get the care she required.

On July 9, 2009, the District conducted its evaluation of Student. As part of this evaluation, the District psychologist had access to Student's diagnoses from two previous psychiatric hospitalization programs, as well as a private psychological evaluation completed by the out-of-state school psychologist in January 2009. On August 15, 2009, Student graduated early from King George, after attending and passing all of her classes. Following this, she was able to successfully transition to Bloomsburg University.

On October 21, 2009, the District completed its Evaluation Report ("ER") and issued a Notice of Recommended Educational Placement ("NOREP"). The ER concluded that Student did not have a disability and was not eligible for special education. Based on the ER, the NOREP concluded that Student was not in need of special education. Additionally, the NOREP concluded that Student was not in need of a 504 plan or an IEP because she did not demonstrate a disability.

On November 5, 2009, Parents requested an IEE at public expense. On April 16, 2010, the District agreed to fund an IEE. A psychologist completed the IEE on September 5, 2010 and concluded that the District could consider identification of Student as requiring specially designed instruction based on an emotional disturbance.

On March 11, 2011, after unsuccessful attempts to reach a settlement with the District, Student's parents filed a formal due process complaint in which they requested a due process hearing. The Hearing Officer concluded that the district had violated its "child find" obligations when it failed to identify Lauren under §504 in April 2008. The school also violated its "child find" obligations when it failed to identify the student as a student eligible for special education under the IDEA in July of 2009. The hearing officer awarded parents tuition reimbursement for one-half the cost of a day in the program for each of the thirteen school days within the period from July 21, 2009 to August 15, 2009. The school district appealed this decision.

Issue: Did the District fail to provide the student with a free appropriate public education in violation of the Individuals with Disabilities Education Act, and §504 of the Rehabilitation Act?

Held: For the parent. The court ruled that the district's knowledge of Student's attendance problems and psychiatric hospitalizations undermined its claim that it had no reason to believe the student had a disability. The district ignored the student's psychiatrist diagnoses, her inpatient and outpatient psychiatric hospitalization, and the fact that she was cutting classes to see the guidance or crisis counselor once or twice a week. Determining that the student's depression and OCD substantially limited her learning, the court held that the district's failure to find the student eligible for a Section 504 plan amounted to a denial of FAPE and entitled the parents to tuition reimbursement.

In addition, the court found that the District denied the student a FAPE under the IDEA from the period of July 9, 2009, when it evaluated Student, until August 15, 2009, the date that Student graduated from the private school. The court rejected the parents' argument that the District should have identified the student as having an emotional disturbance under the IDEA beginning in April 2008 because at that time, the District did not have evidence that Student was exhibiting "characteristics of emotional disturbance 'over a long period of time.'" Moreover, during the period of November 2008 through July 2009, parents failed to make student available for an evaluation; thus, the court found that the District did not deny Student a FAPE during that time period.

As a result, parents were entitled to reimbursement for the costs associated with their private placement. However, the court held that the two-year statute of limitations applicable to the parents' §504 and IDEA claims limited their recovery to the period of March 11, 2009 through August 15, 2009.

III. Evaluations

South Kingstown Sch. Dist., 113 LRP 19804 (R.I. SEA Jan. 12, 2013).

Facts: Student was a thirteen year old individual, who was found to be eligible for special education in April 2010. In February 2012, parents' requested due process, seeking a comprehensive evaluation for Student. The parties settled the matter, and the District agreed to conduct an educational, cognitive, speech and language and OT evaluations on an expedited basis for the purpose of facilitating the student's attendance at a private school. The evaluations were conducted in April 2012.

The psychological evaluation was conducted on April 2, 2012 and April 10, 2012, by a certified school psychologist. The evaluator reported that the Student was reluctant to enter the testing room and was initially unintelligible and monosyllabic, and

would not proceed without parent in the testing room. The evaluator allowed the parent to remain in the room and eventually established enough rapport to proceed with the testing. The evaluator ended the first testing session after the student became oppositional and left the room without permission. During the second testing session, student related to the examiner more easily, and was compliant and cooperative for the majority of the session. Parent was permitted to remain in the testing room.

The occupational therapy evaluation occurred on April 4, 2012. The evaluator was a licensed occupational therapist. The evaluator reported that the student refused to be evaluated unless his mother could be present, and she accommodated the student by allowing the parent to sit beside the open door of the testing room. Student cooperated with the testing, but was nervous and conversed little. He exhibited slouched posture during paper/pencil tasks and exerted less effort on those tasks as well as during a handwriting assignment, and according to the examiner, the results of those tests were to be viewed with caution.

The educational evaluation was administered by a certified special educator on April 10 and April 13, 2012. The evaluator reported that the student was visibly anxious from the start and had just completed the psychological evaluation about 15 minutes prior to the educational evaluation. The examiner accommodated the student by permitting the parent to sit outside of the door of the testing room. About halfway through the first subtest, Student requested a break and left the building without permission. Student refused to return unless he could bring his dog, which he placed in his lap. The examiner permitted the student to do this and the student completed one more subtest, and then exited the building and refused to return.

The student appeared more anxious at the start of the second session than he had on the first day of testing. The evaluator attempted to administer a writing subtest but the student became upset and the parent suggested trying a math subtest. The evaluator did such, but the student again became upset and shouted. The examiner left the room and waited to see if student would calm down. Other staff heard the noise and asked if the examiner needed assistance. No further attempts were made to assess the student as the examiner was concerned that it was too stressful for student. In addition, the evaluator believed that there was sufficient information in Students file from recent curriculum-based testing.

The speech-language evaluation was conducted by a certified speech and language therapist with national accreditation through the American Speech and Hearing Association. The evaluator reported that student demonstrated mild anxiety but entered the testing room without his parent. Student initially demonstrated poor eye contact, but became more comfortable over time, and eye contact was adequate, as were his responses and comments during spontaneous conversation. Student was offered breaks but only took one and finished all subtests.

The parent disagreed with these evaluations because she believed that they did not produce valid or reliable outcomes and requested independent evaluations. The District requested due process, seeking an order that the evaluations were appropriate.

Held: For the parent, in part and the District, in part. The hearing officer first found that the psychological evaluation was appropriate, noting that although the student was highly anxious, the examiner was able to establish rapport with the student and complete the evaluation. The examiner was highly trained, qualified and certified by the State and conducted the evaluation using three separate standardized instruments. The report included an analysis of each test given, with the results indicated. The examiner had reviewed the student's record and was familiar with student. The examiner made an accommodation for student, by permitting the parent to remain in the room; this accommodation was permitted by the American Psychological Association and was documented accordingly. Thus, the evaluation was appropriate.

The occupational therapy evaluation was also conducted by a qualified, licensed, and experienced occupational therapist. It was unclear whether the examiner had reviewed the student's records prior to the evaluation, and she was unaware of the parent's concerns regarding student's sensory functioning. Student spent one hour with the examiner and completed all of the tests given to him (informal testing for assessing upper body and visual skills, a handwriting assessment, a fine motor control composite and manual coordination composite, and an informal handwriting test) and obtained sensory processing information from student's teacher, however, the hearing officer believed that the evaluation was not sufficiently comprehensive to identify all of the student's occupational therapy needs, and therefore, was not appropriate.

The hearing officer also found that the educational evaluation was inappropriate because it was incomplete. The examiner made a "valiant effort to move forward to assess the Student, but her effort failed."

Finally, the speech and language evaluation was found to be appropriate because it provided useful information and met the requirements of the IDEA.

The hearing officer found that further information was necessary and ordered the District to complete a comprehensive psychoeducational evaluation, which should include assessments in reading, writing, math, sensory difficulty, written language, executive function, behavior, independent functioning, difficulty with balance and gross motor skills, and assistive technology.

Southern York County Sch. Dist., 113 LRP 25809 (Pa. SEA May 22, 2013).

Facts: Student was evaluated on February 24, 2011 and identified as having an other health impairment. At that time, his IEP Team determined that he no longer

qualified as having a speech-language impairment. In addition, the Team found no behavior needs.

Beginning in September 2011 and continuing throughout the 2011-12 and 2012-13 school years, Student displayed inappropriate and impulsive behavior that led to numerous incident reports and disciplinary actions.

On April 10, 2012, the District requested permission to evaluate to conduct a functional behavioral assessment. Parents consented to the evaluation and agreed with the results of the evaluation.

In February 2013, the District referred student for a reevaluation “due to disciplinary incidents of a sexual nature.” The District proposed to conduct a psycho-educational evaluation and functional behavioral assessment, as well as a psychiatric evaluation and records review. Parents refused to consent to the proposal to evaluate, and requested that the District conduct an independent educational evaluation (IEE) at public expense.

The District denied parents’ request and filed a request for due process, seeking an order that the parent was not entitled to an IEE at public expense and that it was entitled to reevaluate the student (despite parent’s refusal to consent).

Held: For the District in part, and the parent in part. As to the parent’s request for an IEE at public expense, the hearing officer noted that the request for an IEE came as a response to the District’s proposal to reevaluate, and not as a result of a disagreement with any evaluation actually conducted by the District. Therefore, parents failed to meet the threshold requirement for an IEE: disagreement with a prior evaluation or reevaluation.

However, the District was not entitled to reevaluate the student, absent parental consent. The hearing officer found that the student was evaluated in April 2012, less than one year prior to the February 2013 evaluation proposal. The IDEA states that reevaluations “shall occur . . . not more frequently than once a year, unless the parent and the local educational agency agree otherwise.” In this case, the parents did not consent to the District’s proposal to evaluate, and as a result, the District could not conduct the reevaluation.

A. Termination of Services

Wells Ogunquit Community School District, 113 LRP 931 (Me. SEA Oct. 16, 2012).

Facts: In June 2009, the parent referred the student for special education. The student had difficulty with her speech for several years and had begun to exhibit

frustration with her progress in reading and writing. The student was identified as eligible for special education and related services in October 2009, due to a specific learning disability. The student's IEP contained one goal, pertaining to improving reading skills and included specially designed instruction in reading to be provided by a special educator for one hour per day.

In November of 2010, the IEP team met again and determined that the student continued to have difficulty with articulating words containing the letter "r," and the team added an additional 45 minutes per day of specially designed instruction in writing and spelling in the resource classroom.

In February of 2011, the IEP team met and determined that the student would benefit from more time with the general education class. The team decreased the amount of time that the student was spending in special education classrooms. The district's special education teacher was pleased with the performance of the student and believed that she was capable of spending all her time in the general education classroom. During this time, Student was also receiving private tutoring.

In the fall of 2011, the student tested at above state average in all tested categories. In October of 2011, the IEP team met again and determined to decrease the amount of time spent in special education. They based this decision on the students test scores and comments from her special education teacher.

Student was evaluated in December 2011 and January 2012, and in January of 2012, the IEP team determined that special education was no longer necessary for the student. The Team developed an "exit plan," from special education which included continuing services through February 17, 2012, commencing a full general education program on February 23, 2012, implementing an exit plan through December 15, 2012, monthly consultation between a special education teacher and student's general education teacher, reteaching and support services in spelling, decoding, reading fluency, content vocabulary, and structured work to address the development of Student's phonological memory skills for 30 minutes twice a week, accommodations, and a meeting in December 2012 to review the plan. The parents objected to this determination and requested due process. In tests conducted at the end of the 2011-2012 school year the student performed above state average.

Issues:

1. Whether the district failed to provide the student with a FAPE during the 2010-2011 school year and the 2011-2012 school year, when the student's IEP services ceased.
2. Whether the school district violated the student's right to a FAPE when it terminated her eligibility for special education and related services.

Held: The student was provided a FAPE from 2010-2011. The student was provided with special education in reading and the IEP team added an additional 45 minutes per day of specially designed instruction in writing and spelling. The student showed improvement toward her IEP goals and received above average scores on all assessments and State testing.

The school district did not violate the student's right to a FAPE when it terminated her eligibility for special education in January 2012. The school district considered whether the general education classroom could meet the student's needs. The school district also took into account the outside services that the student was receiving. The school district did not err in finding that the student was achieving adequately for her age or meeting state-approved grade level standards in test subjects.

IV. Identification

G.H. v. Great Valley Sch. Dist., 113 LRP 21589, 2013 U.S. Dist. LEXIS 70853 (E.D. Pa. May 20, 2013).

Facts: The plaintiffs ("Parents") are the adoptive parents of Student, who was adopted from Cambodia as an infant in 2001. Student had a speech and language impairment, but was not identified as a student with social-emotional or behavioral needs. When she entered public school, Student received special education for her speech and language. The District did not evaluate Student's behavioral problems or put forth a behavioral plan involving one-on-one support. It also did not recommend that Student receive Extended School Year ("ESY") services.

Student was prone to violent tantrums when she was home with her family, but was generally respectful to adults and most of her classmates while at school. After a series of particular troubling tantrums, Student was admitted to the Devereux Psychiatric Hospital for a week. There, she was diagnosed with Disruptive Behavioral Disorder, Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder, and Reactive Attachment Disorder. The District was aware of the tantrums, and it was aware that Student was receiving medical and psychiatric services.

At an April 13, 2011 IEP team meeting, Parents expressed their belief that Student should be identified as a student requiring social, emotional, and/or behavioral support. The District felt that those issues were not surfacing in the school environment such that they needed to be addressed in the IEP. In the ensuing weeks, Parents requested that the District conduct an in-home assessment of Student and they also requested an IEP team meeting and expressed their intent to look into a residential treatment facility for Student. The District denied the request for an in-home assessment, but requested permission to initiate a reevaluation of Student. The District school counselor observed Student eight times over one week and recorded no

problematic behaviors at school. Student completed third grade and her report card for the 2010-11 school year reflected no academic difficulties (As and Bs) and referenced only one behavioral issue.

At home, Student continued to exhibit serious behavioral problems. Student's private psychiatrist evaluated her at home and concluded that she required special education as a student with a serious emotional disturbance. Parents then informed the District of their intention to place Student at a private therapeutic facility in New Mexico. They also informed District of their intent to seek reimbursement from the District for the placement. In October, 2011, the District issued its Reevaluation Report and concluded that Student's social-emotional issues did not manifest themselves in the school environment such that there was interference with the student's education or the education of others. Shortly thereafter, Parents filed a complaint for a special education administrative due process hearing.

Parents argued that the District should have identified student as having an emotional disturbance or an other health impairment (due to ADHD), and that the District denied student a FAPE during the 2010-11 school year, including ESY. The Hearing Officer held that the student's identification was proper and that the District had provided Student with a FAPE. Parents appealed.

Issue: Whether Student had an emotional disturbance under the IDEA, and further, whether District denied Student a FAPE when they found her not eligible as a student with an emotional disturbance.

Held: For the District. The court found that the student demonstrated, to a marked degree, inappropriate behaviors or feelings under normal circumstances and a pervasive mood of unhappiness. The court noted that during the course of one school year, student "flew into at least five violent tantrums at home, throwing furniture and threatening the parents with boiling water, knives, and scissors." In addition, student had a "combustible relationship with two girls at school, and as a result of her jealous behavior," student had "several 'problematic,' 'emotional interactions' at school."

However, the court found that the student's behavior did not adversely affect her educational performance. The court noted that there was a "distinct divide between [student's] behaviors at school and her behaviors at home." At school, student "was respectful to adults and most of her classmates." She had a "few conflicts with classmates, which resulted in some conversations with teachers, but nothing that struck her teachers as out of the ordinary. At home, she by all accounts lashed out."

The "fact that outbursts occurred at home does not in and of itself deprive these outbursts of relevance; the question is whether the outbursts adversely affected her educational performance." The court stated that "[i]n deciding whether behavior at home impacted educational ability, courts have considered the following factors: 1)

grades; 2) assessment results; 3) testimony of mental health professionals on the severity of the emotional disturbance; 4) testimony of educators and mental health professionals on whether special education services were needed; 5) whether therapy focused on issues at home or at school; and 6) school attendance.”

In this case, student’s grades and assessments did not reflect a negative educational impact. Her grades were above average and she scored in the proficient range on statewide assessments. In addition, her teachers and service providers testified that her behavior at school did not warrant special education support, and her therapy did not center on school related issues. Her outside service providers did not identify school as a source of stress, and instead referenced issues pertaining to her adoption and feeling unwanted. The student’s one month absence from school (while she was hospitalized) was “by itself insufficient to demonstrate that her behavioral issues had an adverse impact on her educational performance.” Student did not need time to catch up when she returned to school, and she continued to perform above average. Thus, she was not eligible for special education as a result of an emotional disturbance or an other health impairment.

V. IEPs

M.M. v. San Ramon Valley Unified School District, 113 LRP 17197, 2013 U.S. Dist. LEXIS 57395 (N.D. Cal. Apr. 22, 2013).

Facts: Student was a seventh grade student at Arbor Bay, a private school; she was eligible for special education services due to a speech-language impairment. She began attending Arbor Bay when she was in first grade, and beginning with her second grade year, she was placed there by her IEP Team. At Arbor Bay, Student received specialized and individualized instruction throughout the school day in a small classroom setting with a student-teacher ratio of no more than six to one. The lead teacher was a certified special education teacher and the co-teacher had completed some coursework towards an associate of arts degree. Student received speech and language therapy, assistive technology (“AT”) services and used an Augmentative and Alternative Communication Device.

In February, 2011, student’s parents, representatives of the School District, and Arbor Bay staff participated in an IEP team meeting to review student’s IEP and draft an IEP. The 2011-2012 IEP included a proposal to change student’s placement to a “moderate” special day class with speech-language therapy services four times a week. It also provided for use of an augmentative and alternative communication (“AAC”) device for four hours per month initially, and then phased down to two hours per month as the staff developed skills to use student’s AAC device. The IEP also proposed to mainstream student for 20% of her school day.

Student's parents agreed with the IEP with the following exceptions: 1) student must remain at Arbor Bay for the 2011-12 school year; 2) student needed speech and language therapy at least five times a week; and 3) student needed two hours of use of the AAC device *per week*, not per month. The School District rejected these requests in a June 11, 2011 email and formally offered to place student at Charlotte Wood Middle School with the program and services outlined in the February IEP. Student's parents rejected this proposal and the District petitioned to have it implemented over their objections. After a hearing, the Hearing Officer found in favor of the District, concluding that the IEP offered by the district provided a FAPE in the least restrictive environment. Student's parents appealed that decision.

Issues: Whether the School District's IEP was reasonably calculated to provide Student with a FAPE.

Holding: For the parents. The court found that the School District had failed to offer Plaintiff a FAPE under the IDEA. The court found that the speech-language therapists who had worked with the student at Arbor Bay recommended at least 5 units of speech per week, and 2 hours of the AAC device per week, and that student required that level of service to receive a FAPE. In addition, the court found that the district failed to include a specific plan for how it would support student's speech-language deficits during mainstreaming; had it done so, it might have shown that the IEP was appropriate. However, the district's proposed placement had no guarantee that the student would receive support when she was participating in activities and classes with general education peers (recess, lunch, PE and electives), and that due to her communication needs, student required substantial support in social situations. The court also concluded that the district failed to establish that the student would benefit from interacting with typical peers and further, removing her from an environment in which she is able to socialize with peers and receives sufficient assistance to participate in sports and games and other activities (e.g. student council) would be detrimental to student's social development.

York School Department, Maine State Educational Agency, 113 LRP 14212 (Me. SEA Nov. 16, 2012).

Facts: Student was eligible for special education and related services due to a specific learning disability. The student had below average scores in verbal comprehension, working memory, and processing speed, but had average results in perceptual reasoning. As the student advanced to higher grades, his schoolwork became harder and he began to struggle more. Student's mother worked with the student for at least three hours a night, three nights per week on reading and math, and hired a tutor to provide additional assistance. Although the parent informed the IEP team that she had hired reading and math tutors and was spending several hours each night helping the student to review assignments and complete his homework, the team did not develop any goals designed to help the student become more independent.

In September 2011, parent placed the student in a private school in Massachusetts. Student's mother notified the school that she would not be sending the student back to the public school. Parent explained that she did not feel the student had received an appropriate education during the past five years, and that he required compensatory services. Parent requested due process, seeking reimbursement for the costs associated with the unilateral placement. Parent argued that the IEPs developed for the 2010-11 and 2011-12 school years were inappropriate. The student attended the private school for the 2011-12 school year; the District did not develop an IEP for the 2012-13 school year until after the parent had requested due process, and the IEP that was proposed was substantially similar to the IEP that was previously rejected by the parent.

Issues: Were the IEP's developed by York school district reasonably calculated to provide a free, appropriate public education to the student?

Held: For the parent. The school district's proposed IEPs were not reasonably calculated to provide FAPE to the student. The hearing officer determined that the team's failure to address the student's needs with regard to math, organizational skills, and independent learning made his IEPs deficient. The mother made the school aware of the problems that the student was having, but the IEP did not address the student's areas of difficulty. Relying on parents to provide several hours of homework assistance every day outside of school is unreasonable.

The school was ordered to reimburse the parents for the costs associated with the private school for the 2011-12 school year as compensatory services for the failure to provide a FAPE during the 2010-11 and 2011-12 school years. In addition, the district was ordered to fund the student's placement at the private school for the 2012-13 school year because it failed to offer an IEP that was appropriate for student in a timely fashion.

A. IEP Implementation

Plymouth Educational Center Charter School, 113 LRP 16077 (Mich. SEA, March 28, 2013).

Facts: Student was enrolled in the sixth grade and was eligible for special education services due to a Specific Learning Disability ("SLD") in the areas of written expression, basic reading skill, reading comprehension, reading fluency, and mathematics calculation.

In October 2012, an IEP Team meeting was held with several general and special education teachers. Parents received notice of the meeting, but did not attend. At the meeting, the Team developed an IEP that stated that the student's present levels

of academic and functional performance were below age and grade level and that his progress towards IEP goals was slow in all areas. The IEP included accommodations, and special education services. In addition, Student's English Teacher made tutoring available to all students for 1 hour every morning prior to the start of the school day. Student never took advantage of this tutoring.

Student failed English and math for the first quarter primarily because he failed to turn in assignments.

Parents requested due process, alleging that Student was denied a FAPE and that the school did not implement any of the modifications or accommodations listed in the IEP.

Issue: Whether the charter school failed to implement the modifications and accommodations in the Student's IEP and therefore denied Student a FAPE.

Held: For the charter school. The hearing officer determined that all of the evidence indicates that each teacher provided the required accommodations or modifications listed in the IEP, and therefore, Student was not denied a FAPE. The Hearing Officer acknowledged that the student "failed his core classes during the first semester," but found that "the grades were not the result of the" school's "failure to implement the IEP but of Student's failure to turn in schoolwork. Student must do his part as well."

Regional School District #73, 113 LRP 927 (Me. SEA July 12, 2012).

Facts: Student was eligible for special education due to multiple disabilities. Students IEP Team met in April 2010 to prepare for his transition from elementary school to another school in the district. Student had a health plan, and the school nurse requested documentation from the student's doctor as to the student's medical needs.

The Student's IEP from April of 2010 provided for specially designed instruction, speech/language service, OT, PT, special transportation, and nursing services consultation. The IEP also stated that the student would spend 40% of his time at school in the general education setting. The IEP stated that the student was "exempt from gym and . . . will participate within the self-contained recess when not hot/winter weather outside."

On September 1, 2010, student's doctor sent a letter to the school, stating: "it is important for the Student to maintain hydration and be in a controlled temperature environment. Generally this would involve the need for air conditioning ("AC") when the weather is hot and humid." Based on this information, the school bought two AC units - one for the student's classroom and one for the special education classroom.

The parents refused to send their child to school until AC units were installed, and they requested that AC units be installed in all of the Student's school settings, including the bus, cafeteria and all specials and therapy rooms. The District refused to provide those additional units, on the basis that there were relatively few days in the year when the temperature would be an issue, and that staff would monitor Student and return him to a classroom with AC if he showed signs of being overheated. The two AC units were installed and student began attending school on September 13, 2010.

Later that month, student's doctor clarified that student's "health is more rapidly and profoundly effected [sic] by overheating or being chilled than other children's health. However, there is no way to give exact temperature parameters for rooms for him. It will depend upon his health that day, metabolic state, room temperature and humidity. Teachers and ed techs will need to monitor him for flushed cheeks, general temperament and well being. Not an exact science."

The District also convened a Section 504 Team meeting and determined that the student qualified for a Section 504 plan to address his medically necessary accommodations. The plan provided for the use of AC units in primary classroom space (the 2 classrooms referenced above) to provide constant room temperature as much as possible on hot/humid days, and to reduce exposure to areas of the building that do not have AC. The student's IEP was not amended.

During the 2010-11 school year, there were few occasions when student was removed from music or art class to the special education classroom due to concerns about room temperature. When that happened, student would complete his assignment or participate in activities that were related to the class. Student was absent for a total of 59 days during the 2010-2011 school year.

In April 2011 the IEP team met to conduct the annual review. The IEP provided that the student would spend 44% of the day with non-disabled students. Parents did not raise any concerns regarding the AC units or other temperature related concerns.

In September 2011, students Section 504 Team met to review the Section 504 plan and health plan. The Team agreed to reduce the duplication between the two plans by having only health-related items on the health plan and classroom-related items in the Section 504 plan. The Section 504 plan continued to provide for the use of an AC. The Section 504 plan and health plan were attached to the IEP.

At that meeting, Student's mother said that the student had been experiencing diarrhea and wondered whether the water at the school was contaminated. The Team agreed that the parent would send the student to school with bottled water and Gatorade so that he did not have to drink the school water. When the diarrhea continued, Student's mother said it was caused by the time spent in the non-air-

conditioned classrooms. The mother kept the student out of school until “the district resolved the student’s diarrhea issue.” The student was kept out of school for 5 days.

During the 2011-2012 school year, the student was absent 64 days, the majority of which occurred when the student underwent back surgery. He only missed two classes because of warm weather.

Throughout the 2011-2012 school year, the mother made repeated complaints that the AC units in Student’s classroom were not running. All evidence points to the fact the AC units were running and working fine. The teachers also checked non-air conditioned classrooms to make sure they were not too hot for Student.

On May 12, 2012, Student’s parents filed a complaint, alleging the following violations:

- 1) Failure to provide supplementary aids and services since September 1, 2010 in the nature of climate/temperature control technology to enable Student to be involved in and make progress in the general education curriculum and to be educated with peers and failure to provide a FAPE by forcing Student to leave school before the school day has ended due to high indoor temperatures and/or humidity.
- 2) Failure to educate student in the least restrictive environment by removing Student from a non-climate controlled general education “specials” classroom and placing him in a climate controlled special education classroom.

Held: For the District. There was no indication that the student’s absences were caused by overheating at school. On the few occasions when student appeared to be overheating, he was promptly brought into a room that had AC and there were no further symptoms. As for the second allegation, the investigator noted that Student received art and music in the special education classroom at most two times during each of the two school years. There was no evidence that he failed to receive computer or library class with his non-disabled peers on any occasions. These few instances constitute a minor discrepancy between the program described in the IEP and the one actually delivered to the Student. This was not a material failure to implement the IEP, and the allegation was unfounded.

Shafer v. Whitehall District Schs., 113 LRP 13157, 2013 U.S. Dist. LEXIS 44336 (W.D. Mich. Mar. 28, 2013).

Facts: The student was identified at age two as having a speech-language impairment. The Student was reevaluated when he was nine years old; the Team thought that he may Prior to his most recent IEP meeting, the District team members

decided that the student would be identified as having a primary identification of a specific learning disability, a secondary identification of OHI (other health impaired) and a third identification of speech-language impairment. They concluded that he would not be classified as autistic. They did not predetermine the IEP, only the student's classification. The Administrative Law Judge ("ALJ") concluded that because the IEP was not entirely predetermined, this was only a procedural misstep and did not deny Student a FAPE. Parent appealed.

Held: The court determined that the ALJ did not err in finding that the district ultimately provided the student with an appropriate placement. The court found that though there was a procedural violation, it only constitutes a denial of FAPE if it either impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or causes a deprivation of educational benefits. In this case, the student's IEP was appropriate, and addressed all of the student's needs. Thus, the team's predetermination of the identification did not result in a denial of a FAPE.

Cape Henlopen School District, 113 LRP 11773 (De. SEA Feb. 28, 2013).

Facts: Student turned 21 years of age on September 7, 2011 and as such, under state law, his eligibility for special education services terminated at the end of the 2011-12 school year. Student had severe cognitive limitations, significant deficits in adaptive skills, and no verbal communication. In school, Student exhibited self-injurious behaviors, including hitting his head with the palm of his hand and hitting his head against objects or people. Because these behaviors impeded his learning, Student had a positive behavior support plan based on a functional behavior assessment. After convening with Student's parents, the Special Program team agreed to address these behaviors by restraining Student's hands.

Student's parents also agreed to allow Student to take the bus both to and from school each day. Student's bus ride was approximately 50 minutes each way. Student's parents only allowed Student to take the bus on the condition that the Special Program would train the bus monitor on the required behavior interventions when Student had self-injurious behavior episodes on the bus. These provisions were documented in Student's IEP. In November 2011, Student got off the bus and seemed visibly upset. Student's parent contacted the Special Program and communicated that she suspected he had an episode of self-injurious behavior on the bus ride home that day. The Assistant Principal viewed the video tape and confirmed that Student had a 5 minute episode of self-injurious behavior on the ride home. Parents expressed concern, but eventually agreed to let Student continue riding the bus with the assurance that Student would be protected if a similar episode occurred again.

On January 31, 2012, Parent again noticed that Student was visibly upset and shaken after exiting the bus. The driver confirmed to Parent that Student "was hitting

himself in the head all the way home.” The video showed that Student hit himself in the head repeatedly with the palm of his hand for the entire 50 minute bus ride. The bus monitor was standing right next to Student and observed the entire episode, but took no action to respond. Parents filed this complaint on November 14, 2012, alleging that Student was denied a FAPE during the 2011-12 school year.

Issue: Whether a district must ensure that transportation staff members have the training needed to implement a special education student’s positive behavioral supports.

Held: For the parent. Although Student’s self-injurious behaviors on the school bus did not result in a denial of FAPE, the Delaware ED ordered the district to provide training to ensure transportation staff implemented students’ IEPs and behavioral supports. Further, the district must provide a detailed corrective action plan to the Director of Exceptional Children Resources for the Department of Education on or before April 30, 2013.

B. Present Levels and Measurable Goals

In re: Student with a Disability, 113 LRP 16254 (Mo SEA, March 29, 2013).

Facts: Student was an 18 year old, senior in high school who has received special education services since preschool, due to autism and a cognitive delay. Student used to receive speech and language services early on in his education, but these were discontinued in 2006 for unspecified reasons. A speech and language pathologist visited Student’s class every week, but Student was not on her caseload. Student did not participate in any regular education classes, and attended basic skills classes and adaptive PE.

Student’s most recent three year reevaluation occurred in February 2011. However, not all of the evaluations were completed because the “Student was nonverbal.” The district did not propose to conduct communication or assistive technology evaluations.

In November 2012, after the student had turned 18, Student’s mother wrote a letter to the Special Education Director requesting an additional year of high school for Student as well as appropriate evaluations to ensure that he had the skills necessary to transition after high school.

Student had his annual IEP meeting on December 4, 2012. Student and his mother signed off on the IEP on December 7 with exceptions. One of these exceptions was disagreement with the present levels of academic and functional performance (“PLAAFPs”) and the measurable goals. Student was scheduled to graduate on May 27, 2013.

In November 2012, student's case manager attempted informal transition assessments, but did not obtain valid results due to Student's inability to effectively communicate his desires. The case manager attempted another transition assessment on January 7, 2013, but the assessment was determined to be invalid because Student would always pick the last answer on every question. His case manager then performed the Enderle-Severson transition assessment on Student on January 15.

His parents filed a complaint against the District in January 2013, raising the following issues.

Issues:

1. Whether the District erred when it did not consider Student's needs under the "Special Factors" section of the 2011 and 2012 IEPs in the areas of communication and assistive technology and whether the District erred when it did not evaluate Student for speech therapy and provide speech therapy services.
2. Whether the District erred when it did not complete any transition assessments on student to properly write post-secondary goals and provide transition services to meet those goals.
3. Whether the District erred when it failed to determine appropriate PLAAFPs and measurable IEP goals on the 2011 and 2012 IEPs.
4. Whether the District denied Student a FAPE because Student's 2011 and 2012 IEPs were not reasonably calculated to provide educational benefit.

Held: With regards to the first issue, the court found that the District had an obligation to address the unique communication needs of Student and failed to do so, leaving Student without basic skills to become independent. The District failed to assess student in all areas related to his disability. The District asserted that student can "communicate functionally in the school environment using pointing, gestures, signs, and with certain individuals, verbally," and that it "did not see a reason to change or enhance his means of communicating." However, Student's IEPs listed "communication" as an area of concern for school staff, and staff who did not work closely with student were unable to understand what he was saying. Despite this, the IEPs did not contain any goals pertaining to communication or assistive technology and student was not recently evaluated in these areas. The investigator found that the District was obligated to address student's communication and assistive technology needs and that it failed to do so, in violation of the IDEA.

With regard to the second issue, the investigator found that, although Student was difficult to assess because of his communication deficits, some form of effective assessment to determine student's transition needs should have been performed. The court found that District failed to do this and thus violated 34 CFR § 300.320(b). The investigator noted that the IEPs contained measurable transition goals, but could not determine whether the goals were adequate and appropriate for student because of the lack of transition assessments.

As to the third issue, the investigator found that the District failed to include the student's present levels of academic and functional performance in his IEPs. The investigator analyzed the present levels in the student's IEPs as follows:

Service Area: Adapted PE

Present Level: Student is doing great in PE. He likes riding the bikes, walking the gym, he is starting to interact with the staff but not with his other peers.

Goal: Given opportunity, [Student] will exercise, stretch and participate in activities at a passing grade as measured by six week/semester grading period through IEP year.

The present level "does not state what Student's present level of performance is. 'Doing great' is not a statement of present level of performance. How long does he ride a bike? This goal does not state a level of performance or what will be measured. What is a passing grade?"

Service Area: Career/Vocational

Present Level: Student is able to complete several jobs. He may need several prompts to get him going through. Directions need to be simple and not multistep because he is unable to follow them. He is doing a nice job of washing tables in the cafeteria in the mornings. He uses the dust mop in the afternoons to drag the hallways and dusts lockers. He also crushes cans for a 30-40 minute period but needs to be reminded to stay on task. I believe that short work periods are in order for him as I believe longer periods of sustained work are asking him to do more than he is capable of doing. He always seeks out a hug at the end of class period and at the end of the day. He has gone down for assemblies the last few times we've had them without fuss, but once they start he wants to leave, but hasn't left. [sic].

Goal: Given opportunity to do vocational tasks, Student will increase his on-task time with fewer prompts, consistently, as observed by his teacher for duration of IEP.

The investigator found that the present level “does not state what jobs student is able to complete or how many prompts are needed to complete them.” In addition, the goal did not change from the 2011 IEP to the 2012 IEP, and the goal did “not state what vocational tasks are being worked on, what is being measured, or what level the prompts or cues should be reduced to.”

Service Area: Math

Present Level: Student is doing well in math, he is starting to use a calculator in math, will begin to add and subtract money, still knows his numbers. Some days he decides to sit on the couch but is always easy to get him to work. We are still working with Student on counting objects.

Goal: Upon request, student will recognize the number of objects to a number with 70% accuracy consistently over the IEP with staff observation graded every 6 weeks.

The investigator found that “doing well” is not a statement of the student’s present levels. “Questions remain: What numbers does he know? What can he do with a calculator? What is Student’s present level of performance in regard to counting objects? Regarding the goal, although a level of performance is specified, the goal is vague as to what numbers are being worked on and how will it be measured.”

The investigator noted that the remaining present levels and goals were similarly deficient, and that there was “no significant documentation to demonstrate Student’s present levels. . . . Without proper [present levels] it is impossible to draft appropriate goals and have a starting point to measure them.”

Finally, the investigator found that the 2011 and 2012 IEPs were not reasonably calculated to allow Student to receive educational benefit and therefore the District denied Student a FAPE. In particular, the investigator found that the IEP failed to include appropriate present levels, measurable goals, and transition assessments. In addition, there was also “minimal data collection taken on the progress of all goals making it unclear what progress, if any, has actually been made.”

As a result, the District was required to provide compensatory education in the form of extended school year services during the summer of 2013 and the 2013-14 school year, and to provide training to staff on present levels, evaluation requirements, drafting goals, and providing transition services.

Dover-Eyota Independent School District, 113 LRP 23875 (Minn. SEA Feb. 13, 2013).

Facts: Student was 13 years old and was eligible for special education services. Parent filed a complaint against the district, arguing that the student's IEP did not include measurable annual goals and that the district did not report progress toward the goals as required by the IDEA.

The investigator found that the student's IEP contained four goals, all of which had objectives. The goals and objectives were as follows:

1. Student will increase his functional reading skills from 2 skills to 5 skills for reading; from being able to read familiar and repeated reading passages and books to being able to improve his strategies for reading new and unfamiliar words and books.
 - a. When given high interest books at his level, Student will read out loud, and be able to read with 75% accuracy for 4 of 5 trials as measured by the special education staff.
 - b. When given unfamiliar words from his reading level, Student will be able to sound out the words to build his vocabulary with 70% accuracy for 4 of 5 trials as measured by the special education staff.
 - c. When given reading books, passages, or sight words at his level, Student will be able to read correctly using visual cues to figure out unfamiliar words with 70% accuracy as measured by the special education staff.
2. Student will increase his basic math skills from mastery of the four objectives on story problems, addition facts, subtraction facts, and money to mastery of four of the four objectives on story problems addition, addition facts, subtraction facts, and money.
 - a. When given 10 random addition problems equaling 20 or less, Student will be able to obtain 90% correct on 5 out of 5 trials as measured by special education staff.
 - b. When given 10 random subtraction problems subtracting from 15 or less, Student will be able to obtain 90% correct on 5 out of 5 trials as measured by special education staff.
 - c. When given 4 oral word problems requiring addition or subtraction, Student will explain the reasoning used to determine the appropriate

- operation and number sentence with 90% accuracy in 4 of 4 trials as measured by special education staff.
- d. When given money math, Student will be able to count and make change with coins with 85% accuracy in 4 out of 4 trials as measured by teacher observation and assignments.
3. Student will demonstrate understanding and use of a variety of strategies for effective comprehension and expression of language in social situations with 90% accuracy.
 - a. Student will demonstrate the ability to provide sufficient contextual information (i.e. past events, stories, personal information, etc.) to be clearly understood 4/5 opportunities in the speech-language setting.
 - b. Student will demonstrate the ability to make a relevant comment on a conversation or topic being discussed 4/5 opportunities.
 - c. Student will demonstrate 3 appropriate verbalizations during game play (simple board, card, dice, or bingo game) with at least one other peer 4/5 opportunities.
 4. Student will increase his physical skills and independence from 0 of the 3 objectives listed to 3 of the 3 objectives listed.
 - a. Student will be able to functionally move throughout the classroom in his manual wheelchair 95% of the time as measured by his paraprofessional.
 - b. Student will wheel during the run warm-up time in physical education class. He will start wheeling for 5 minutes and increase a minute each week until he reaches 15 minutes.
 - c. Student will be able to throw a ball 10 feet to a partner 4 out of 5 attempts as measured by the Developmental Physical Education teacher in DAPE class.

The investigator found that none of the goals or objectives contained baseline data against which the student's progress could be measured. In addition, the student's present levels of academic achievement and functional performance did not specify "student's reading level, math level, social interaction level, or physical skills and independence."

Held: For the parent. The investigator found that the goals in student's IEP did not contain a baseline for measurement of student's progress, and as a result, the goals were not measurable. The district provided the parent with progress reports pursuant to the IEP, but the lack of baseline data made it impossible to determine whether the student made adequate progress. The district was required to provide the case manager with training on writing measurable annual goals, writing descriptions of how a student's progress toward meeting the goal will be measured, the necessity to review and if necessary revise IEPs when progress toward the annual goals is not on track, and the requirement of tracking progress and collecting data. The student's case manager was required to submit three IEPs, developed after completion of the training, that contained baseline data and measurable goals as evidence of correction.

Utica Community Schools, 113 LRP 7453 (MI SEA Jan. 29, 2013).

Facts: Student was in his 5th year of high school. He was eligible for services due to autism. Student's most recent IEP was developed in November 2011, when he was in his fourth year of high school. At that time, the team anticipated that he would be graduating in June 2012. Thus, the IEP ended in June 2012.

The IEP addressed post-secondary vision and transition activities, by providing that "as an adult, student would like to work with animals, expressed an interest in marine biology, and designing websites. As a career/employment assessment, the IEP provided that student was currently working a few hours a week after school at a local pet care center. The IEP identified that there was a need for activities or services for career/employment. It listed the type of activities as instruction and employment. However, no explanation was listed nor was an agency or person identified as responsible." In addition, the IEP specified that another meeting would be scheduled in December 2011 for additional transition planning. However, this meeting did not occur.

During the summer of 2012, the district contacted the parent to amend the IEP to extend the end date until November 2012. Parent agreed to this extension. No other changes were made to the IEP. The IEP contained the following goals:

1. Social/emotional. "Student's annual goal is difficulty with considering the impact of his behavior on others interferes with the classroom learning [sic]." The goal had two objectives, "which were to be measured monthly by structured observation for number of correct responses":
 - a. Student will identify 2-4 alternative thoughts that he can consider when he is feeling angry about someone else's behavior.
 - b. Student will identify alternative behavioral choices in challenging situations.

2. Speech language. “Student’s annual goal is to improve his understanding and use of the language used in the classroom to progress in the educational setting.” The goal had two objectives:
 - a. “Student will improve his comprehension of information at multiple sentence and paragraph levels through the use of various memory, mnemonic, context, summarization, and note-taking strategies with minimal cues.” The objective was to be measured “monthly on a 4 point scale with at least a 3 on a 4 point scale for 3 out of 4 opportunities.”
 - b. “Student will formulate and use the information on various graphic organizers (focusing on the underpinnings of the writing process) to produce a single grammatical paragraph containing at least 8 sentences to include topic sentence, transitions, main ideas, supporting details, and conclusions.”
3. Speech language: Student’s “annual goal is to improve his understanding and use of the language used in the curriculum, along with increase his overall intelligibility to progress in the educational setting. This objective is to be measured monthly on a four point scale at least a 3 on a 4 point scale or 3 out of 4 opportunities [sic].”
4. Reading: “Student’s annual goal is to improve reading skills for adult life and post-secondary training education.” The goal had two objectives:

When given a written passage, student will answer questions pertaining to the main idea and answering appropriate who, what, where, when and why questions. The objective is to be measured weekly by written test and teacher log for percentages.

Student will improve vocabulary and spelling through weekly reading assignments. The objective is to measure weekly using written test and teacher log for percentages.

5. Mathematics: “Student’s annual goal is to improve mathematic skills for adult life and post-secondary training/education.” The goal had the following objectives:

Student will solve multiple step word problems as measured by using written test and teacher log for percentages.

Student will learn standard forms of measurement for volume, distance, and weight. The objective will be measured using daily written tests and structured observation for percentages.

6. Daily living skills: Student will develop skills necessary for daily living. The goal had one short-term objective:

Student will “attempt to independently resolve problems with an assignment before asking for assistance by referencing agenda, notes and tests as measured by 3 out of 4 successful attempts. This objective is to be measured daily using teacher log and structured observation for number of correct responses.”

Parent requested due process, alleging that the District denied student a FAPE by failing to provide him with an IEP that had measurable goals and by failing to provide him with a proper transition plan.

Held: For the parent. The hearing officer found that the goals in the IEP were not measurable, with the exception of the speech and language goals. “The academic goals for both reading and mathematics are not measurable as it merely states ‘percentage’. The goals do not list the actual current baseline level. The social and emotional goals state as a measurement ‘number of correct responses’. It does not state what the number is expected to be. Furthermore, the measurement indicated is monthly reports.” During the hearing, the school social worker who was responsible for the goal testified that she has not maintained monthly reports. Thus, “without the required data, the goal is not measurable.”

With regard to the transition services, the hearing officer found that “the transition plan included in student’s IEP is woefully inadequate. It does not include any measurable goals. Although it lists various assessments as completed, the assessments are not included in the IEP nor are any results from the assessments. There does not appear to be any connection between goals and services. It appears that the transition considerations in the IEP were nothing more than a check box or fill in the blank with no thought or consideration given. For instance, as an adult living goal, student identified that he ‘would like to get married and have his own home’. Next, box provides for his living arrangements as ‘student lives with his mother.’ For the check box, the question is there a need for activities or services for adult living and the ‘no’ box is checked. If the goal is to have his own home and he currently lives with a parent, it is clear that there needs to be steps or services identified in order for student to accomplish this goal. This transition plan provides nothing.” In addition, the hearing officer found that the team did not meet in December 2011 to discuss transition, despite the IEP indicating that a meeting would be held.

The hearing officer rejected the parent's argument that the student was denied a FAPE by failing to be educated in the least restrictive environment. The hearing officer noted that "despite [parent's] apparent contention that student can be successful in general education, it takes an inordinate amount of time including two class periods and accommodations for student to participate in just one government class. It is clear that student needs more than just supplementary aids and services. Furthermore, the [district] has a responsibility to ensure that student can be an independently functioning adult. It is clear from the testimony that the [district's] contention that student participate in a community based instruction is designed to have student be an independent functioning adult. [The district] cannot merely put student in general education classes just to satisfy [parent]. [The district] has a responsibility to student."

The district was required to convene a meeting to develop a transition plan with measurable goals for the student, as well as measurable academic and functional goals. However, compensatory services were not awarded.

C. Transition Services

Gibson v. Forest Hills Sch. Dist. Bd. of Educ., 61 IDELR 97, 2013 U.S. Dist. LEXIS 81908 (S.D. Ohio, June 11, 2013).

Facts: At the time of the hearing, student was a 20 year old individual who was eligible for special education and related services due to multiple disabilities. Student was diagnosed with a severe seizure disorder and possible PDD, NOS. She was also intellectually disabled and as a result, exhibited significant delays in cognitive development and adaptive behavior skills.

In December 2009, student's parents filed a request for due process, alleging that the district had denied student a FAPE during the 2007-08 and 2008-09 school years. The student's IEP included the following by way of transition goals: student would participate in a supported-assisted adult program, and would participate in a support volunteer/non-competitive activity for employment. The IEP indicated that student would live in a supported living environment. Transition services and activities were outlined under each goal. Student was not invited to the IEP meetings when the transition services were discussed. The IEP indicated that the parents wanted the student to live and work in a supported environment, and wanted her to attend a post-secondary program.

The hearing officer found in favor of the parents on the majority of their claims, but found that the district had provided an appropriate transition plan for student. Parents appealed.

Held: For the parents. The court noted that the IDEA requires that the district invite the student to attend IEP team meetings when the Team will be discussing

postsecondary goals and transition services needed to reach those goals. If the student does not attend, the district must take other steps to ensure that the child's preferences are considered.

Student turned 16 in December 2007. However, the District did not invite student to participate in IEP team meetings where transition services were discussed. The District did such because the parents had never invited her, the meetings were long and adversarial, and district staff thought that they would be frightening for student and above her level of comprehension. However, the district could have helped student prepare to attend a meeting and the team could have modified or structured the meeting to make her attendance easier. By failing to invite the student to the meetings, the district violated the IDEA.

The court noted that this procedural violation would not result in a denial of FAPE if the district took other steps to ensure that student's preferences and interests were considered. The student's case manager indicated that she considered student's interests "based on the knowledge that [she] had of [student] and what she likes to do and her interests at school," and that "she talked to [student] about jobs in the classroom and gave her choices about what she wanted to do." The court found that this "informal approach to determining [student's] postsecondary preferences and interests was not sufficient."

The court noted that transition services are generally not provided by the "regular special education teacher." In addition, the district failed to utilize age-appropriate assessments related to post-secondary goals for the student. Student had not received any formal transitional/vocational assessments. The court held that the district failed to invite the student to meetings to discuss postsecondary goals, and failed to otherwise fully consider student's interests, and that these failures resulted in substantive harm and a denial of FAPE. The court was without sufficient information to develop a remedy for this violation, and indicated that it would meet with the parties to discuss how to proceed as to the remedy.

D. Transportation as a Related Service

South Plainfield Board of Education, 113 LRP 16932 (NJ SEA April 3, 2013).

Facts: Student was diagnosed with Down's Syndrome and was eligible for services under the IDEA due to multiple disabilities. Student's 2012-13 IEP included provisions for social skills development throughout the school day and provided for an out-of-district placement. Student was transported as a related service. The private school had extracurricular activities available after school on Tuesdays and Thursdays. The student's IEP encouraged him to participate in age appropriate activities of his parents' choosing, but extracurricular activities were not a part of student's program. Parent requested transportation to and from extracurricular activities. The district

denied that request on the basis that the student's IEP did not provide for participation in extracurricular activities, and that the student was receiving a FAPE with that IEP. Parent filed a request for due process.

Issue: Whether student requires extracurricular activities after school for adequate development of social skills in order to receive a FAPE?

Held: For the district. The hearing officer found that the student's IEP provided him with the opportunity to achieve meaningful educational progress. The goals and objectives were individualized and the IEP was very comprehensive. "Extracurricular activities are not necessary for [student] to make meaningful educational progress, because social skills development is integrated into the curriculum of each class throughout the day." In addition, student was making adequate progress in achieving his IEP goals and objectives. Therefore, student was receiving a FAPE with his current IEP, which did not provide for transportation to extracurricular activities and it was not necessary to amend the IEP to include such transportation.

E. Parental Participation in the IEP Process

Recently, the Office of Special Education Programs (OSEP) opined that a district cannot adopt a policy requiring parents to provide a written copy of their concerns to the members of the child's IEP team 3 days prior to the Team meeting. Letter to Northrop, 113 LRP 24303 (OSEP, May 21, 2013). OSEP noted that while it may be helpful for parents to raise concerns prior to the meeting, particularly if resolving the concern would require extensive research or attendance at a meeting by a person who would otherwise not be in attendance, it would be inconsistent with the IDEA for a district to adopt a blanket policy requiring parents to provide written input to the team three days before a meeting in order to have their concerns addressed at the meeting. However, OSEP noted that it would be "reasonable for a public agency to establish criteria [pertaining to the acceptance of parentally obtained evaluations], including a requirement that it receive [an] entire evaluation report and not just the scaled scores by a certain time, to give the public agency the opportunity to review the report prior to scheduling an IEP team meeting to discuss that evaluation." OSEP noted that the information in the evaluation could be complex and may require significant review prior to discussions by the team, so it could be appropriate to receive that information prior to the meeting.

Doug C. v. State of Hawaii Department of Education, 2013 U.S. App. LEXIS 11904 (9th Cir. June 13, 2013).

Facts: Student was an 18 year old, who was eligible for services under the IDEA due to autism. Beginning in 5th grade, he was placed by the district at a private school.

At the start of the 2010-11 school year, when student was 15, the team met to discuss student's progress. At that time, the team discussed convening a meeting to

develop the student's subsequent IEP in late October. On October 22nd, the district called the parent to confirm that they were meeting on October 28th. Parent reported that he was not available on that day, and they agreed to meet on November 4th or 5th, subject to the parent's schedule.

On October 23rd, parent called the district and indicated that he was not available on November 4 or 5. The parties agreed to meet on November 9th.

On the morning of November 9, parent e-mailed the district, stating that he was sick and unable to attend the meeting. He suggested rescheduling the meeting for the following week, on either November 16 or 17. However, student's IEP expired on November 13. As a result, the district wanted to convene no later than Friday, November 12. The district offered to reschedule the meeting for November 10 or November 11, to accommodate the schedules of the district team members, some of whom were unavailable on Friday, November 12. Parent responded by indicating that he may be able to participate on either of those dates, but that he could not commit because he was ill. The district also suggested that the parent participate by phone or the internet. Parent declined, indicating that he wanted to be physically present at the team meeting and that he did not feel physically well enough to participate meaningfully through any means on November 9. The district decided to go forward with the meeting on November 9 and the parent did not attend.

The case manager indicated that he did such because he had already asked "13 people on three separate occasions to change their schedules and cancel other commitments to schedule the meeting. Therefore, without a firm commitment from" parent, for one of the two dates he proposed, the case manager refused to reschedule the meeting. The team met without the parent or a representative from the student's private school. The team proposed to change student's placement from the private school to the public school setting. After the meeting, the district sent parent the new IEP. The team held a second meeting on December 7th, with the parent and a representative from the private school. At that meeting, the team reviewed the "already completed IEP 'line by line.'" Parent did not provide any substantive input into the IEP because he had already rejected it. The IEP was not amended at the December 7 meeting.

On December 6th, parent requested due process, arguing that the lack of parental participation in the IEP meeting in November resulted in a denial of FAPE and seeking reimbursement for the costs associated with maintaining the student at the private school.

Held: For the parent. The court noted that parental participation in the IEP and placement process is "critical to the organization of the IDEA." This is because "parents not only represent the best interests of their child in the IEP development process, they also provide information

about the child critical to developing a comprehensive IEP in which only they are in a position to know.” As a result, the district is required to include the parents in the IEP team meeting unless they affirmatively refuse to attend.

In this case, the parent did not do such, nor was the district unable to convince him to attend. Instead, parent requested that the District convene the meeting for the following week. He indicated that he would try to participate in the meeting prior to the expiration of the IEP, but that he could not commit to doing such because he was ill. Nevertheless, the district went forward with the IEP meeting, over the parent’s objections, and changed the student’s placement for the first time in 6 years. The court noted “The fact that it may have been frustrating to schedule meetings with or difficult to work with [parent]. . .does not excuse the [district’s] failure to include him in [student’s] IEP meeting when he expressed a willingness to participate. . . . [A]n agency cannot eschew its affirmative duties under the IDEA by blaming a parent. . .an agency cannot blame a parent for its failure to ensure meaningful procedural compliance with the IDEA because the IDEA’s protections are designed to benefit the student, not the parent.”

The court rejected the district’s argument that it could not accommodate parent’s request to reschedule the meeting because of the pending expiration date on the IEP. The court noted that the attendance of student’s parent at the meeting “must take priority over other members’ attendance,” and that by refusing to reschedule the meeting, the district “improperly prioritized the schedules of the other members of the team over the attendance of” parent. The court stated “When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency’s action in such a scenario, we will allow the agency reasonable latitude in making that determination.” Here, the district was faced with meeting without the parent, or meeting after the expiration of the IEP. The court noted that the district should have waited until the parent was available and that it could have continued to provide the student with the services in the IEP pending the meeting. The court acknowledged that there may “be circumstances in which accommodating a parent’s schedule would do more harm to the student’s interests than proceeding without the parent’s presence” at the meeting, but that this was not the case here.

Finally, the court noted that the December 17 meeting was too little too late, in that the district had already developed the IEP without parental participation. The after the fact meeting did not remedy the district’s decision to hold the initial meeting without the parent. The court found that the district denied a FAPE by precluding the parent from participating in the meeting, and remanded the decision to the district court for a determination as to whether the parent would be entitled to reimbursement. In doing such, the court stated “Where, as here, the private school selected by the parent is the same school that the child has previously attended for several years under IEPs that

have been approved by all parties, we think it highly unlikely that the placement does not represent a 'proper' placement" under the IDEA.

Horen v. Bd. of Educ. of the City of Toledo Pub. Sch. Dist., 2013 U.S. Dist. LEXIS 76692 (N.D. Ohio May 31, 2013).

Facts: Student was born with a "congenital malformation syndrome called '4p-' or 'Wolf-Hirschhorn' Syndrom [sic], caused by the absence of the short arm of chromosome 4. As a result, [student] has numerous physical defects and a mental capacity 'in the profound range of [intellectually disabled].' She [was] largely immobile and non-communicative, and as such depends heavily on others." Student also suffered from a blood disorder and seizures caused by her genetic condition. Her seizures require immediate administration of oxygen, careful suction of excess saliva, rectal administration of Diastat, and a second Diastat administration 15 minutes after the first.

Student began attending EduCare, a child care/education center owned by the University of Toledo and used by the District as a placement for children with disabilities, when she was in preschool (2001-2002 school year). Beginning with the 2003-04 school year, student was in a self-contained classroom at EduCare. She remained there until the end of the 2005-06 school year.

Prior to the start of the 2006-07 school year, the district proposed to transfer student to an elementary school. Parents disagreed with that proposal and requested due process, seeking to have Student remain at EduCare. Upon receipt of the request for due process, the District informed the parents that it was holding spots for the student at both EduCare and the elementary school. However, parents did not enroll student in either facility. The Hearing Officer found that the least restrictive environment for the student was the EduCare Center, and ordered that the student be placed there and that a Team convene to determine her present levels and update her IEP. This decision was affirmed by the court. See 2010 U.S. Dist. LEXIS 98231 (N.D. Ohio), aff'd 10-4238 (6th Cir. May 26, 2011).

In February 2007, the District wrote to the parents, inquiring whether student would be returning to EduCare. The District also noted that the student was considered truant because she was not attending school in the District, and the District had not received notification that she was enrolled elsewhere or being homeschooled. The District requested that the parents either return student to EduCare or notify it of the student's current placement.

Parents responded by indicating that the District was threatening them with truancy proceedings, student was not being homeschooled, and she was being denied a FAPE. Parents also stated that they "looked forward to an interim IEP meeting."

The District responded by requesting that the parents return student to EduCare so that staff could assess her present levels of performance before convening a Team meeting. Parents responded by stating that Student would not return to school without a current IEP.

The District then made the following proposal:

- Student will attend school for one day in February so that school personnel may ascertain her present levels of performance.
- Parent or another caregiver may remain in school on that day to monitor and observe student.
- Thereafter, the district would convene a meeting (on a date in February previously suggested by parents) for the purpose of developing an interim IEP.

On March 1, parent offered to bring student to school; that day, however, the parent refused to allow staff to evaluate student because the District's attorney was not present. Parent offered to bring student to school on March 2, with an IEP meeting to follow later that afternoon. The District agreed. However, when they arrived at the meeting, parents refused to proceed because the District's attorney was present at the meeting.

The District attempted to schedule several other IEP meetings during the remainder of the 2006-07 school year. However, before each meeting, the parents made demands that the District could not comply with, and when the District failed to comply, would cancel the meeting. One such demand was a request to record the meeting; however, the District could not comply with that request due to a provision in its collective bargaining agreement.

During the summer of 2007, the District requested due process, arguing that it was permitted to have its attorney attend IEP meetings and challenging the parents' demand that they be able to record IEP meetings. The Hearing Officer found in favor of the District; on appeal, that decision was affirmed. See 655 F.Supp. 2d 794 (N.D. Ohio Sept. 9, 2009), aff'd 09-4254 (6th Cir. March 11, 2011), reh. denied (6th Cir. May 27, 2011).

In October 2007, the District sent parents a draft proposed IEP. The District asked the parents to update it as to student's current levels of performance and provide any recent reports from therapists regarding student. Parents did not respond.

Later that month, parents requested a Team meeting on October 30 or November 1. The District issued a written notice of a team meeting for November 1, to develop an interim IEP in accord with the prior administrative order.

The parent responded by emailing the District, stating that the meeting notice was deficient because it did not state that the meeting was convened at parent's request. The District then issued a revised notice.

On October 28, 2007, parents emailed the District "demanding that before the November 1st meeting, [it] provide the parents with [student's] 'educational information as well as charter, licensing and/or contract information about her stay-put placement, Educare.'"

Parents went to the District on October 31st. They were provided with the opportunity to review the student's educational records, but declined to do such. Instead, they left and cancelled the IEP meeting. Parents refused to attend any IEP meetings until "such time as we have been assured that [the district] will fully comply with the IDEA and Ohio law as well as provide us all the requested records at its own cost." Parents sent the District another communication indicating that they refused to participate in an IEP Team meeting unless they were permitted to record the meeting and exclude the District's attorney from attending meetings.

In April 2008, parents filed a request for due process. Due to numerous delays on the part of the parents, the hearing did not conclude until June 2011. The Hearing Officer found that the parents had impeded the process by failing to participate in meetings unless they could record them and preclude the district's attorney from attending and that the district had failed to propose an IEP, but its failure to do such was caused by the parents' failure to participate in IEP meetings.

Parents appealed this decision.

Held: For the District. The court found that the parents "unilateral actions repeatedly caused the meetings [scheduled by the district] not to go forward," and that "[i]n doing so, the parents failed to fulfill their duty to participate in the IEP process, and thereby impaired that process irredeemably." The court noted that even without an IEP, the District was willing to provide a FAPE to student because it: told the parent that it was keeping placements open at EduCare and the elementary school; repeatedly sought to convene IEP meetings; expressed a willingness to complete an IEP; sought participation from the parents; and prepared a draft IEP. In contrast, the parents' refusal to respond to the draft IEP or the request for evaluative data "kept the cornerstone of [the] IEP from the builder's hands."

1. Notice of Team Meetings

W.K. v. Harrison School District, 2012 U.S. Dist. LEXIS 93666 (W.D. AR July 6, 2012), *aff'd*, 2013 U.S. App. LEXIS 12000 (8th Cir. June 14, 2013).

Facts: Student was an 11 year old child with severe autism. He was largely non-verbal, had a low cognitive level, and had great difficulty interacting with others. He had profound behavioral issues that were uncontrolled, and on a regular basis he exhibited violence towards himself, his teachers, and his fellow students. He could not be left unattended with other children, as he was likely to injure them. Student would hit, scratch, bite, and destroy property at home and at school. His unpredictable displays of violent and destructive behavior have resulted in injuries to several of his teachers over the course of his public education. Student required constant monitoring and assistance from one to two teachers or paraprofessionals assigned exclusively to him, and his maladaptive behaviors included destroying toys, eating crayons and play dough, biting the tips off of markers, shredding and eating paper, climbing shelves and cupboards in the classroom, and running from the classroom in an attempt to exit the school. Since he was in kindergarten, he has been placed in a self-contained special education classroom, receiving little to no instruction in the regular classroom setting.

At the start of the 2010-11 school year, student was suspended from school after he punched his paraprofessional in the neck, causing her to lose consciousness, and resulting in a call to 911 and delivery of emergency medical services. A team meeting had been scheduled for September 7, 2010 to discuss the student's program and behavioral issues. After the incident with the paraprofessional, the meeting was moved to September 2nd. Student's parents were notified on August 30th that the meeting date had changed, but they were not notified that there was a new purpose for the meeting: to address student's assault on his teacher and to recommend that he receive homebound services rather than services in the school setting. Parents were unaware of this change, and felt "blindsided" when they arrived at the meeting. Ultimately, the district did not change the student to a homebound placement, although they continued to discuss alternative placement arrangements with the parent at two subsequent IEP team meetings. In January 2011, parents withdrew student from public school and enrolled him in a private school. Parents filed a request for due process, requesting that the district reimburse them for the costs associated with tuition and transportation. Parents argued that the district denied the student a FAPE and failed to place him in the least restrictive environment. The hearing officer found that the district had committed a procedural violation by failing to provide sufficient and appropriate notice to student's parents regarding the proposed change in placement in September 2010, but denied the parents' request for reimbursement on the basis that the procedural violation did not result in a denial of a FAPE. Parents appealed.

Held: For the district. The court noted that the district's failure to provide the parents with prior notice of the changed purpose of the meeting in September 2010 constituted a procedural violation. However, it did not result in a denial of FAPE. Parents arrived at that meeting "with the full advance knowledge that their child had recently violated the school's code of conduct by acting out with such unprecedented violence as to cause serious bodily injury to a teacher." Parents were also aware that their child had been suspended for four days as a result of the attack. Thus, parents

“had enough information about the current situation and their child’s educational progress to date to provide some level of participation in the meeting, though not full participation or adequate preparation due to [the district’s] failure to give proper advance notice of the meeting agenda. It is obviously that [parents] must have been aware that their child’s behavior was an issue and that the safety of the school staff would be a likely topic of conversation during the meeting. This factor mitigates the effect of [the district’s] procedural error.”

In addition, after the meeting, the district did not unilaterally change the student’s placement without parental approval. Instead, the district recognized that parents did not want homebound services and attempted to work with parents to arrive at an acceptable solution agreeable to all parties. After the September meeting, the district gave parents “ample opportunities to revisit the placement issue” but parents “failed to avail themselves of these opportunities.” The district contacted parents via telephone and e-mail on September 15 and September 29 to invite them to participate in follow-up meetings and discussions geared toward providing educational services to student. On November 9th, at parents’ request and with proper advance prior notice, the team met to discuss placement options, though no suggested placements were agreed to by parents.

At parents’ request, the District agreed to pay for a behavioral evaluation at a private school, and the team agreed to reconvene at the end of November to review the results of the evaluation and discuss the student’s placement in the public school in light of those results. The team met and discussed the evaluation and the various placement options. However, at that time, parents had already decided to enroll the student in a private school and they rejected the district’s proposed placements.

The parents “did not provide the district an opportunity to implement the proposed IEP in the school setting on a shortened school day or to implement the proposed IEP through homebound services. The district should have been given this opportunity prior to the decision to remove [student] for private school placement.” Thus, court held that the procedural violation did not result in the denial of FAPE and rejected the parents’ request for reimbursement.

VI. Placement

Y.B. v. Board of Education of Prince George’s County, 59 IDELR 22, 895 F.Supp2d 689 (D. Md. Sept. 7, 2012).

Facts: Student was born in Russia in 1992. He was adopted in 2003, when he was eleven years old. He was enrolled in a private school, but was transferred to the public school that same school year (6th grade). When he was in 8th grade, he began receiving special education services based on his diagnosis of ADHD. He was also diagnosed with ODD, depressive disorder, and RAD. At the start of the spring semester

of his ninth grade year, the student's grades began to slip and he was transferred to a school at a military hospital base. He received special education services, individual and group counseling, and substance abuse counseling for alcohol and marijuana use.

During the 2008-2009 school year, the student was placed at a private day school where he received roughly 29 hours per week of special education. The student received mostly As and Bs while attending the private school. During the spring, Student's behavior deteriorated and he began running away from home, violating school rules, and resumed using alcohol and marijuana. In May of 2009, the school requested a manifestation meeting to determine if the student's behavior was caused by his disability. The Team did not conduct a manifestation determination because he had less than 10 days of suspensions. However, the team proposed to conduct an FBA and to develop a behavior plan. The private school dismissed the student in June of 2009 due to lack of attendance and poor behavior.

In July of 2009, the IEP team met to determine a placement for Student. The parents requested that the student be placed in a residential school, but the team determined that the LRE was a private day school. In September 2009, shortly before school started, Student ran away from home and did not return until Thanksgiving. Student was placed by the court at a residential facility. In February of 2010, he returned home and began attending the private school; he did well, earning Bs in all of his classes.

The IEP team provided for ESY, but the student only attended 7 days of the summer session. He was again returned to his court ordered placement, for electronic monitoring violations. The student returned to the private school in October of 2010, but in December of 2010, the State transferred him to a 12 month residential treatment center with a separate day school. The 12-month program offered counseling both on an individual level and on a group level.

In July of 2011, the residential school discharged the student from its residential program because he was psychiatrically stable and no longer demonstrated a medical necessity for the level of care that the school provided. The program recommended that the student receive substance abuse treatment, and he was transferred to an in-patient facility in Maryland.

In August of 2011, the IEP team met to determine Student's placement for the 2011-12 school year. They decided on the non-public day school Pathways School in Maryland. The student's parent, however, refused to sign a consent form granting the school system permission to send a referral packet to the school.

The parent filed a due process complaint stating that the student needed a residential facility and compensatory educational services for the school system's purported failure to provide the student with a FAPE during the 2008-2009, 09-10, 10-

11, and 11-12 school years. The hearing officer found in favor of the district and the parent appealed.

Issues:

1. Did the student's IEP that called for placement in a private day school provide the student with a FAPE, or was the placement of the student in a residential program necessary to receive some educational benefit?
2. Is the student entitled to compensatory educational services?

Held: The parents have failed to show that the school district did not provide a FAPE to the student. The fact that the student ran away from home on several occasions and often went missing did not mean that the District was required to pay for a residential placement. The student made good progress at the day school when he attended. While the student may have needed additional supports to address his mental and emotional needs, the court observed that the district was not responsible for providing those additional services. The court agreed with the Hearing Officer's finding that the student's "emotional problems are segregable from his ability to learn." As a result, the student did not require a residential placement. "That [Student's] emotional and mental needs [may have] required a certain level of care beyond that provided at [his day schools] does not necessitate a finding that the [Board] should fund that extra care when it [could] adequately address [his] educational needs separately."

Deer Valley Unified Sch. Dist. v. Schripsema, 113 LRP 18719, 2013 U.S. Dist. LEXIS 61748 (D. Ariz. Mar. 20, 2013).

Facts: Student was a first grader who had been diagnosed with Autism Spectrum Disorder. He is able to communicate his wants and needs to staff. He understands routine and functional directions, he runs and interacts with his peers on the playground, and he is able to work in small groups with peers. However, he refuses to follow teacher directions in general education classrooms. His speech is intelligible 90% of the time and is fluid, but repetitive.

On May 5, 2011, the district held an IEP meeting. Parent attended the meeting. The IEP identified socialization and communication as important parts of Student's education. On May 9, the district e-mailed the parent a Written Prior Notice ("WPN") stating Student would be placed in the autism program located in a special school called Terramar Elementary School ("Terramar"). Terramar was not discussed at the May 5 meeting and no representative from the school was present. Parent expressed concern and gave notice of her intent to unilaterally place Student in a different school and seek reimbursement. She believed that Terramar was not an appropriate placement and would deny Student a FAPE.

The autism program at Terramar consisted of only four students who all used augmentative communication devices. Only two of the four had verbal ability. An educational consultant who had worked with two of the students visited the Terramar autism program on more than one occasion and observed that none of the four students verbalized or used dialogue. She testified that it would not be an appropriate placement for Student. When Parent filed the complaint, the district stated that it could have brought typically developing peers into the classroom during certain times to interact with the otherwise isolated Student.

The Hearing Officer found that the district denied the student a FAPE and the district appealed the decision.

Issue: Whether the district's contention that it could have brought typically developing peers into the classroom at certain points during the day to interact with the otherwise isolated student sufficiently met the requirements of the student's IEP. The IEP identified communication and socialization as his two critical areas of need.

Held: For the parent. The court determined that Student needed regular interaction with verbal peers to develop his communication and social skills and that his IEP contained goals pertaining to improving Student's communication. Placement at Terramar was not appropriate because Student was isolated from typical peers, even during non-academic times, such as lunch. This was inconsistent with the goals and objectives in the student's IEP. Therefore, the court ordered the district to reimburse the parent for the child's private placement.

A. Change in Location

Aikens v. District of Columbia, 2013 U.S. Dist. LEXIS 87256 (D.D.C. June 21, 2013).

Facts: Student was a 17 year old, who was eligible for services under the IDEA due to an emotional disturbance. In February 2011, student's IEP team developed an IEP that required that the student "receive specialized instruction outside a general education setting for 31.5 hours per week, 4 hours per month of behavioral support services, and speech and language therapy for 30 minutes per month."

During the 2010-11 school year, student was placed at the Transition Academy at Shadd. At the end of the school year, Shadd was closed and moved to the Ballou Senior High School building. Parent received notice that Shadd was closing at the end of the school year, but it was unclear whether parent was notified that student would be starting school at the local high school in the fall. In August 2011, parent informed the district that she was placing student in a private day school. The district responded, indicating that it did not intend to reimburse the parent because the student could receive a FAPE at the local high school. In November 2011, parent requested due

process, seeking reimbursement for the unilateral placement, and arguing that the district improperly changed the student's placement.

The hearing officer found that the program that the student would be attending at the high school was a separate program, outside of the general education setting (it was located in the high school facility). The hearing officer found that while there were some differences between Shadd and the program at the public school, the differences were not material or substantial. As a result, the hearing officer found that the decision to move the student to the program at the high school did not constitute a change in placement. Parent appealed that decision.

Held: For the district. Parents argued that the student's move from Shadd to the public school program constituted a change in student's educational placement, and that the district's failure to involve parent in the decision and failure to provide her with written prior notice of the change resulted in a denial of FAPE. The court found that the hearing officer considered the differences between the two programs. The hearing officer recognized that the public school program "is housed within a mainstream high school while Shadd had its own building," but that he "determined that this difference was inconsequential," because the program did not "share the same space within the [high school] building and access between the two schools is controlled." In addition, the hearing officer also found that Shadd and the other program both "provide[d] strong behavioral and social/emotional support for students and utilize[d] a special space for behavior management." In addition, "any particular differences in the behavior management spaces were not 'material or substantial.'"

The court affirmed the hearing officer's decision that the educational programs at the two facilities were not materially or substantially different, and as a result, no change in placement occurred. In addition, the parent failed to establish that any element of the educational program at Shadd was changed or eliminated when the student moved to the public school program. Instead, student "would have continued to experience the same general educational program. . .-specialized instruction outside of the general educational setting by certified teachers with a support staff of social workers, behavioral technicians, and a school psychologist. In the absence of a 'fundamental change' or 'elimination of' a basic element of [student's] educational program at Shadd when it moved to [the public school setting], there has been no change in educational placement." As a result, the district was not required to provide written prior notice or involve parent in the decision to move the student. Because the district did not deny the student a FAPE, the parent was not entitled to reimbursement.

P.V. v. School District of Philadelphia, 60 IDELR 185, 2013 U.S. Dist. LEXIS 21913 (E.D. Pa. Feb. 19, 2013).

Facts: Parents of students with autism filed a class action against the School District of Philadelphia ("the district"), alleging that the districts transfers students with

autism in kindergarten through eighth grade without providing the level of parental notice and involvement required under state and federal law.

The district places autistic children into one of three support classrooms based on “grade level.” When a student requiring autism support completes the highest grade level provided in his or her current school, the district transferred that student to a different school where those services would continue to be provided. The building assignment decision is not made by a student’s IEP team, and parents are generally not involved in the process. The district also provides no written notice prior to the building assignment decision. The district usually did not advise parents that their child will be transferred until after the decision has been made. There was no formal process for notice and sometimes parents are only given oral notice from teachers that their children may be transferred, before they begin receiving transportation letters indicating that the child will be attending a different school.

Parents wanted the court to order that the district discontinue the transfer process, and require that any school which contains an autism support classroom shall offer autism programming for the same years that the school provides programming for children who are not disabled. If that cannot be accomplished, the parents asked the court to order the district to provide for parental notice and involvement prior to the transfer decision. Parents allege that this “upper leveling” transfer process constitutes a change in their educational placement and violates the IDEA, “as it occurs with little or no parental notice or involvement, without required consideration of children’s individualized circumstances, and in direct violation of the mandated individual planning process of the IDEA.”

Issue: Whether transferring students with autism to a separate school building in the school district constitutes a change in their “educational placement” under IDEA.

Held: For the parents. The court found that the transfers qualified as changes in the students’ educational placements. The court noted that the transfers including a change in location, a change in bus ride, acclimation to an unfamiliar environment, separation from former classmates. The court also found that since all of the students involved in the transfers had autism, the unplanned transition would likely affect their learning rate and learning sequences, since difficulty with transition is a characteristic of autism. The court explained that, therefore, the district had to follow the IDEA’s placement procedures, including parent participation and appropriate notice, before transferring students with autism to new schools.

B. Reimbursement for Unilateral Placements

Fort Bend Independent School District, 113 LRP 16323 (Tex. SEA, April 3, 2013).

Facts: In August 2012, Student was found eligible for special education and related services due to an emotional disturbance and an other health impairment (due to ADHD). Student was also diagnosed with depression. Prior to August 2012, Student had received accommodations through a Section 504 plan.

Student's summer 2012 psychological evaluation noted that student was "sad and anxious" and had "a great deal of difficulty controlling [her] mood." She also had "many thoughts that student cannot control," and she "focuses a great deal on trying to remain calm that interferes with student's daily functioning and task completion." She has been demonstrating persistent emotional and behavioral problems in the school setting for a long period of time, including failing grades, poor participation in classroom activities, and frequent somatic illnesses.

Thereafter, student's Team met to develop an IEP. Parents indicated that student was receiving private therapy for anxiety. The Team noted that the student's strengths included: interacting appropriately with peers, respecting authority, following oral and written directions, having good social skills, writing complete sentences using punctuation, comprehending short passages and recalling details needed to answer questions, and solving mathematical problems using the correct operations. The Team determined that student's behavior impedes the learning of herself and others, significantly interferes with student's ability to meet general academic mastery levels, and affected student's involvement and progress in the general curriculum. The Team developed a behavior plan to address her failure to complete school work. The Team proposed to place student in the general education setting, with in-class support from a special education teacher, and counseling services. Parents agreed with this proposal.

However, in October 2012, student's parents unilaterally placed student in a private residential facility. Student attended the facility until January 2013. Between October and January, parents notified the district on at least two occasions, that they would be placing student in another long-term residential facility. Parents placed student because student was failing classes, not turning in work, and did not care about her failing grades.

Despite her diagnosis of depression, student did not show overt signs of depression or sadness at school. Her affect was generally happy and friendly to teachers and peers, and she was considered a "leader" by more than one teacher. However, Student "had a hopelessness that things would get better, and thought it would be better if Student just gave up or quit." She had "no sense of the future or a belief that things were going to go well. . . . The biggest impediments to Student's academic success were student's cycles of avoidance and crisis. Student avoided doing schoolwork for reasons associated with emotional disturbance, anxiety and depression until there was a crisis created by the real risk of failing a class. During the crisis, Student's anxiety and avoidance behaviors were heightened."

Parent filed a request for due process, seeking reimbursement for the student's private placements.

Issue: Whether the parents were entitled to reimbursement for the costs associated with their two private placements.

Holding: The parents were not entitled to reimbursement for the costs associated with the October-January placement. They were, however, entitled to reimbursement for the educational costs associated with the second placement.

The Hearing Officer found that the first placement was for therapeutic purposes, to address Student's spiraling emotional problems and escalating general misbehavior. It was not primarily motivated by a need to change Student's educational setting.

The second placement, however, was intended to address student's educational needs, as well as her emotional needs. The Hearing Officer found that the District did not provide Student with a FAPE because the student's IEP focused on academics, rather than "on the kind and amount of psychological counseling which would allow Student to derive an academic benefit from the schedule of services." Student was failing to perform in school, and her lack of motivation and disinterest was a "mask for depression and nearly constant anxiety."

"Student's lack of academic performance has caused a pattern where Student risks failure of multiple classes that are otherwise not beyond Student's intellectual and academic capabilities. Student's 'plan' to perform at the borderline level for most of a semester in most classes and then attempt to 'pull out' a passing grade at the end of a semester, is an ineffective and destructive self-devised 'accommodation' to address the anxiety caused by her" disability.

The Hearing Officer found that the "limited school day [provided for in the IEP] does not accommodate the therapeutic interventions that must occur after hours, and the normal school rules and organization is inconsistent with that of a therapeutic, structured learning environment. [The District] should not be faulted for developing an IEP for Student that would otherwise fit Student's academic abilities and non-disruptive behavior. On its face, the [IEP] appears to be the least restrictive environment for Student. It is not, however, because of Student's disabilities and unique needs. A general education setting with conventional and limited psychological counseling simply allows Student to remain locked in a 'prison' of his/her own mind. The program designed by the [district] is not sustainable for this student, at this time."

However, parents were only entitled to reimbursement for those components of the tuition that were "for primarily educational purposes," calculated at 9 hours per day, 5 days per week. In addition, the placement was limited to a one year term, because

the parents did not provide the District with the opportunity to “partner in devising an appropriate educational placement for Student.”

VII. Discipline

A. The “Knew or Should have Known” Standard

Anaheim Union High School District v. J.E., 2013 U.S. Dist. LEXIS 72031 (C.D. CA May 21, 2013).

Facts: In 2012, student was in 10th grade at the district’s high school. He was not identified as eligible for special education and related services under the IDEA. However, Student had struggled with academics throughout his childhood and adolescence, and his ability to perform academically had diminished as time passed. Before he started high school, his mother contacted the school counselor and informed her that student suffered from anxiety and nervousness and had difficulty performing academically.

When he was in 9th grade, he was unable to digest the material in Algebra 1 and could not complete assignments. His teacher and parent agreed that he required tutoring. He barely passed the course and did not advance to the next level of math. That same year, he suffered a panic attack in his Spanish class. His teacher escorted him to the health office and observed him hyperventilating and crying. She spoke with student’s mother and suggested that student may benefit from a Section 504 plan. Student’s anxiety worsened during that school year, and he began treatment with a psychiatrist. He was diagnosed with anxiety and ADHD. During the summer between 9th and 10th grade, student attempted suicide and was hospitalized for psychiatric treatment. Parent discussed these events with a school counselor, who explained that student was unlikely to qualify for special education “because he did not have a history of disciplinary problems.”

Parent subsequently requested a Section 504 plan, and in September 2011, student’s psychiatrist wrote a letter setting forth student’s diagnoses and suggesting proposed accommodations. The Section 504 team met in late September. Several of student’s teachers attended the meeting. All of his teachers reported that student frequently left the classroom, had significant trouble concentrating in class and organizing his work, did not complete his work, exhibited signs of nervousness and anxiety, and suffered from drowsiness caused by his medication. The team agreed that student’s ADHD and anxiety negatively impacted his ability to focus and consequently impeded his ability to learn. As a result, the team developed a Section 504 plan with 14 accommodations. The team did not discuss the possibility of a special education evaluation or express concern that the accommodations in the plan would be insufficient for student. However, student’s mental health problems continued to interfere with his learning, in spite of the implementation of the plan. His teachers were aware that his

mother heavily assisted with his completion of homework. Student was suspended in mid-February 2012, after a disciplinary incident. He was removed and placed in a community day school.

Thereafter, parents filed a request for due process, asserting that the student was entitled to IDEA protections because the district knew or should have known that he was a child with a disability prior to the disciplinary infraction. The hearing officer concluded that the district should have known that the student may qualify for services under the IDEA, and therefore, that the district failed in its Child Find obligations under the IDEA. Had the District conducted an evaluation, it would have found that the student was eligible for services under the IDEA as a result of an emotional disturbance. The district appealed this decision.

Held: For the parent. The court noted that there were three ways that a district would be deemed to have knowledge that a child was a child with a disability for purposes of invoking the IDEA protections relative to discipline: 1) the parent has expressed concern in writing that the child is in need of special education and related services; 2) the parent has requested an evaluation; or 3) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the Director of Special Education or other supervisory personnel. The district argued that the court should construe the “pattern of behavior” as implicating disciplinary issues. The court rejected this argument for the following reasons: 1) “The plain meaning of the word ‘pattern of behavior’ does not support such a narrow reading. A pattern is ordinarily construed as recurrent, similar or related events. Behavior implicates outwardly observable characteristics and actions”; 2) have a disability does not always result in disciplinary problems, and 3) a plain-meaning construction of pattern of behavior does not eviscerate the distinction between a Section 504 plan meeting and the IDEA. “Teachers may communicate isolated events at Section 504 plan meetings that do not create a pattern for purposes of the IDEA.” The court agreed with the hearing officer that the district had knowledge that the student was a child with a disability, because his teachers had repeatedly communicated specific concerns to a school administrator regarding a “worrisome pattern of behavior that interfered with [student’s] educational experience. [Student] was regularly unable to sit through an entire period of class and exhibited obviously anxious behavior, like the panic attack. An unmodified classroom environment was plainly too taxing for his emotional stability. He was also nearly failing certain courses and unable to complete his work.” As a result, student was entitled to the procedural protections offered by the IDEA, including a manifestation determination meeting.

B. Manifestation Determination

Bangor School Dep’t, 113 LRP 923 (Me SEA March 8, 2012).

Facts: Student began receiving special education in January 2002, due to a speech-language impairment. She was also diagnosed with Bipolar disorder, ADHD-Combined Type, ODD, and a mood disorder.

In February 2010, Student transferred to the Bangor School District. The district implemented Student's prior IEP until March 15, 2010, when a new IEP was developed. At that meeting, no behavioral concerns were noted. The IEP did not include behavioral interventions or goals.

During the fall of the 2010-11 school year, Student received numerous detentions and warnings for things such as name calling, slamming doors, and using profanity. In December 2010, student struck a student. The following week, she struck another student and was suspended for 2 days. Four days later, she struck a third student and was suspended for 1 day. The student's IEP team met in January 2011 to discuss the recent poor behavior. The Team considered referring the student for a risk assessment, but agreed to try interventions first. As a result, since the assaults occurred in the hallway, the student was allowed to arrive late to class in an effort to keep her out of the hallway with other students.

The IEP team met in March of 2011 for the annual review. No new services were added, but the accommodations that allowed the student to avoid stressful transition situations were continued.

Later in March, the student was suspended for 7 days for threatening to kill a teacher and spitting in the counselors face. Thereafter, the Team met to conduct a manifestation determination, although the District had determined that the Student's 10 days of suspension did not constitute a change in placement. The Team reviewed a functional behavioral assessment and concluded that the incidents leading to the suspensions were caused by the student's disability. The Team proposed further evaluations and proposed to provide tutoring until the evaluations were complete. The IEP team amended the students plan to call for 10 hours of home instruction a week with a tutor.

The tutor reported good effort and good behavior from the student for the most part, but in June of 2013, the student struck the tutor. A new tutor was assigned and the student successfully completed all her coursework until the end of the school year.

The IEP team met in September of 2011 to review the evaluations and to make programming decisions for the 2011-2012 school year. The district proposed a reintegration plan under which the student, while continuing to receive one hour per day of homebound instruction, would gradually increase the time spent in the school, starting with one hour per day and adding one additional hour per day each week until the student was attending four hours per day.

The student's mother rejected the reintegration plan and the homebound instruction offered to the student. An IEP team meeting was held in October of 2011 that the parents did not attend. The team determined that if the parents continued to refuse to permit the student to receive homebound instruction and to cooperate with the reintegration plan, the student would be reported as truant. The parents did not agree and the student was reported as truant.

In December of 2011, the parents finally agreed to the reintegration plan and by January 2012, the student was attending school full time again. Parent filed a complaint with the State, alleging the following:

Issues/Findings:

1. Whether the district failed to conduct a proper and adequate manifestation determination review in March 2011.
 - a. Held: For the Parent. The district failed to conduct a proper and adequate manifestation determination review in March of 2011. The district concluded that the student's assaultive behavior was not typical of a student with ADHD, thus it was deemed not to be a manifestation of the student's disability. However, the district ignored the student's diagnoses of bi-polar disorder and ODD – the failure to consider these disabilities, coupled with the fact that the behavior was likely caused by these disabilities, indicated that the manifestation determination was improper. However, the District conducted a functional behavioral assessment and reviewed the student's behavior plan – as a result, the improper manifestation did not result in any adverse consequences to student.
2. Whether the district failed to provide special education and related services sufficient to enable the student to advance appropriately toward attaining her behavioral goals, to be involved in and make progress in the general education curriculum, and participate in extracurricular and other nonacademic activities prior to her suspension in March 2011.
 - a. Held: For the parent. The student's IEP did not contain any behavioral goals or services addressing behavioral issues until March 2011, and the IEP should have included such services as of January 2011. In addition, the services that were included in March 2011 did not include direct instruction or assistance with social skills deficits. It was not until December 2011, that the IEP included services pertaining to behavioral goals – social work and counseling.
3. Whether the district failed to provide educational services after the student's suspension to enable her to continue to participate in the general education curriculum.

- a. Held: For the District. The district provided educational services after the student's suspension on March 31, 2011 to enable her to continue to participate in the general education curriculum. The school provided tutoring services that covered all of the general curriculum courses and provided language tutoring.
4. Whether the school district failed to provide behavioral intervention services and modifications after the student's suspension in March 2011 designed to address the behavior violation so that it did not recur.
 - a. Held: For the District. The district did not fail to provide behavioral services after the student's suspension from school in March 2011. The school conducted a FBA shortly after the incident and introduced a series of interventions and modifications designed to prevent reoccurrence of the problem behaviors.
5. Whether the district failed to provide education to the student in the least restrictive environment.
 - a. Held: For the District. The school did not fail to provide educational services in the least restrictive environment. While home schooling is the most restrictive educational environment, the determination to change the student's placement to homebound instruction was based on very real concerns for the safety of the student and the other members of the school community.
6. Whether the district considered the student's individual educational needs, including the need for specialized instruction, when determining to provide tutorial services in the period from September 2011 to December 2011.
 - a. Held: For the District. The district did not fail to consider the student's individual educational needs, including the need for specialized instruction, when determining to provide tutorial services between September 2011 and December 2011.

VIII. Retrospective Testimony

The following case addresses the extent to which courts can rely on testimony from district personnel about additional aspects of the educational program that the student would have received (beyond what was proposed in the IEP) had he/she attended the program proposed by the district. This type of testimony is referred to as "retrospective testimony," or "testimony that certain services not listed in the IEP would actually have been provided to the child if he or she had attended the school district's proposed placement."

R.E. v. New York City Dept. of Ed., 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012), cert. denied, 2013 U.S. LEXIS 4528 (U.S. June 10, 2013).

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

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

Parents requested due process. The hearing officer found in favor of the parents, and the district appealed. On appeal, the State Review Officer reversed, noting that the proposed public school teacher testified that his class "actually consisted of five students and five adults," and that the instructors and paraprofessionals were adequately trained and had appropriate credentials. He also found that the parents would have been provided with opportunities for parent training and counseling at the public school, despite the fact that these services were not mentioned in the IEP. Parents appealed. The court found in favor of the parents, concluding that the review officer erred when it considered "after-the-fact testimony . . . as to what the teacher . . . would have done if [student] had attended his class." The court adopted "the rule that the sufficiency of the IEP is determined from the content within the four corners of the IEP itself."

In the second case, the student attended a full day preschool program, in a class with 8 students, 1 teacher and 3 aides. She received various services including speech, OT, and ABA therapy. In April 2008, her Team met to develop an IEP for the 2008-09 school year. The Team proposed to place the student in a 6:1:1 class, with speech services and OT. The IEP noted that the student demonstrated behaviors that interfered with her ability to learn, but the Team concluded that her behavior did not seriously interfere with instruction and can be addressed by the classroom teacher. Parents rejected the IEP because they believed it did not contain sufficient 1:1 ABA support. They requested due process.

As with the first case, the hearing officer's decision in favor of the parents was reversed by the State Review Officer. Relying on the teacher's testimony about her classroom methods, the SRO found that the District's proposal was sufficient. He noted that the teacher used elements of ABA therapies in her classroom, and that Student would have received 25 minutes of 1:1 ABA instruction per day. In addition, although the proposed IEP did not include daily speech therapy, the classroom teacher testified that such services were incorporated into her class. Parents appealed, and prevailed at the district court. The court rejected the "DOE's invitation to the Court to overlook deficiencies in the IEP based on subsequent testimony that the recommended placement might have later sought to cure those deficiencies." The District appealed.

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

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

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

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

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

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

D.C. v. New York City Dep’t of Educ., 113 LRP 12931, 2013 U.S. Dist. LEXIS 42764 (S.D.N.Y. Mar. 25, 2013).

Facts: Student was a 10-year-old boy with autism and a life-threatening seafood allergy. He attended the Rebecca School, a private school in New York City, since 2007. The District has paid the tuition from 2007 until the 2009-2010 school year.

As of April 2010, the district had not met to develop Student's IEP for the 2010-11 school year. On April 30, 2010, Student's mother entered into an enrollment contract with the Rebecca School for Student for the 2010-2011 school year. She did this because she feared that the district would fail to place Student at the Rebecca School and she was worried that he would lose his spot.

On May 25, 2010, an IEP meeting was held. The IEP classified student as autistic with a number of other disabilities and recommended a twelve-month school year, beginning with a summer term. The IEP also indicated that student had a severe seafood and fish allergy and there could be "no seafood in the environment" because even the smell of it could send him into anaphylactic shock. The District offered to place the student at P188, a local public school.

On June 17, 2010, parent contacted the local public special education school, P188, to arrange a tour and was informed that the earliest available tour date was July 13. She was also told that all of the children were served lunch together in the cafeteria. On June 22, parent notified the defendants of her intention to place Student unilaterally in the Rebecca School for the 2010 summer session and the 2010-2011 school year. The summer session began July 6, a week before her scheduled tour at P188. Parent alleged that she provided notice of the unilateral placement in order to comply with IDEA's procedural requirement and to ensure that if, upon a tour of P188 she found the facility inadequate, student would have no interruption in his education.

When parent toured the school, she discovered that P188 was not a seafood-free environment. Fish was on the menu in the cafeteria for the day that she was there, and further, children were free to bring in lunch from home with no restrictions on seafood. Additionally, the Parent Coordinator informed parent that seafood was prepared by high school students in the on-campus work site cafeteria on the third floor. Parent also spoke with one of the school nurses who confirmed that the environment was not seafood free and that the school could not control for the airborne allergy or the smell trigger when the food was being cooked.

After the visit to P188, parent informed the Department via letter that she was rejecting the placement at P188 as inappropriate for student for several reasons. The first was that the environment was not seafood-free as required in the IEP. The second was that the school lacked the proper occupational therapy equipment. The third was that the school used a teaching method, TEACHH, that was inappropriate and ineffective for student. The fourth and final reason was that student would receive no more than 6:1:1 support, despite the requests during team meetings for a lower ratio and more individualized support. The district neither offered an alternative placement

nor attempted to correct any misimpression that may have been created during the tour regarding the allergy protocol or lunch menu. Parent filed a request for due process, seeking direct payment of student's tuition at the Rebecca School for the 2011-2012 school year. During the hearing, the district claimed that they "would have" transformed the school into a seafood-free environment." The Hearing Officer found in favor of the parents and the district appealed.

Issue: Whether the District's offer to transform a special education school into a seafood-free environment to meet the needs of a 10-year-old boy with autism and a life-threatening seafood allergy would have provided the student with a FAPE.

Held: For the parent. The court held that it cannot consider the services a district "would have" provided in addition to the services identified in the student's IEP. The court noted at the time the District made the placement offer, it failed to inform the parent of the students that P188 would have taken to create the seafood free environment that the IEP required. As a result, the placement proposal was inappropriate.

IX. Section 504

A. Eligibility

Torrington (CT) Board of Education, 60 IDELR 295 (OCR Oct. 26, 2012).

Facts: During the 2011-2012 school year, the student was in the second grade. The student had been on a health plan for the 2010-2011 and the 2011-2012 school year because she had a shellfish allergy. Under the plan, arrangements were made to administer an EpiPen when the student was exposed to shellfish. Notice was sent to the other students' parents to make sure that shellfish was not brought to school, and the student sat at a shellfish free table. In December of 2011, the principal notified the student's parents that fish would be served on the school menu in an effort to make the school lunch menu healthier.

The student was tested for fish allergies (up until this point the student had only been tested for a shellfish allergy). The student tested positive and as a result, in January 2012, the parents requested that the student be referred to the District's 504 process. The parents allege that had the request not been made, the student would still be on the health plan.

Issue: Did the district violate §504 by failing to determine a student's eligibility even though they addressed the student's severe shellfish allergy by placing her on a health plan?

Held: For the parent. The district placed the student on a health plan beginning in 2010, but did not consider whether she was 504-eligible per its normal practice for students with allergies. The district also admitted that had the parent not requested a 504 plan in 2012, it never would have evaluated the student.

OCR noted that the actions made by the district might have been adequate to ensure the students safety, but it is essential that eligibility determinations for students suspected of having disabilities are made within the context of §504, which includes providing parents with notice of their §504 rights.

B. Accommodations

Moody v. New York City Department of Education, 60 IDELR 211, 2013 U.S. App. LEXIS 4870 (2d Cir. March 12, 2013).

Facts: An 11-year-old boy with diabetes preferred to eat hot lunches at school. His mother would pack lunches with the expectation that the school cafeteria workers would heat the lunch for the boy. The school's cafeteria offered a selection of hot and cold foods that the student could eat. The District indicated that it was not willing to heat up the lunches packed by the parent, and the mother filed suit.

The District Court ruled in favor of the school, and the mother appealed, arguing that the court erred in determining that heating student's food was not necessary because the student would not eat if his food was not heated.

Held: For the District. Schools are not required to provide the student's preferred accommodation. The district only has to ensure that the student had meaningful access to school lunch and other district programs. The district accommodated the student by providing him with options for hot lunch and monitoring his blood glucose level. Even if the student sometimes skipped lunch and disliked the food on the school menu, that did not warrant a further accommodation in addition to what the district had already provided.

G.B.L. v. Bellevue Sch. Dist. #405, 60 IDELR 186, 2013 U.S. Dist. LEXIS 21490 (W.D. Wash. Feb. 15, 2013).

Facts: Plaintiff G.B.L. ("Student") was a minor child who attended school in the Bellevue School District ("District") for the 2010-2011 school year. In January 2010, Student was diagnosed with ADHD and sensorineural hearing loss and therefore qualified for special education services. He was given an IEP that went into effect for the remainder of the 2009-2010 school year.

For the 2010-2011 school year, Student was accepted into the district's gifted program, even though his entrance score was one point below the requirement. In

August 2010, the IEP team met to create a new IEP that would go into effect when the student began the gifted program.

Student's performance in the gifted program began satisfactorily, but both his grades and his mood quickly declined over the course of the school year. The homework load was much more time intensive in the gifted program. During his sixth grade year in regular education, which has much less homework than the gifted program, the student spent four hours each night doing homework. In the gifted program, the student couldn't keep up with the homework and his therapist suggested a two hour per night limitation on the amount of homework assigned. The district denied this request, finding that this would fundamentally alter the gifted program curriculum standards, grading standards, and performance expectations.

Parent filed suit, alleging that the district denied Student a FAPE by failing to limit his homework to 2 hour per day. The hearing officer found in favor of the district, and parents appealed.

Issue: Whether the district discriminated against a student with ADHD by denying his request to complete a lesser amount of homework each night than the amount that was required of the other students in this fast-paced gifted program.

Held: For the district. The court found no evidence that the district failed to accommodate the student or otherwise denied him access to the gifted program on the basis of disability. The court noted that the assigned homework was an "essential component" of the coursework in the gifted program, and that the student would be unable to keep up in class discussions if he completed only two hours of homework each night.

C. Peer on Peer harassment

M.J. v. Marion Independent School District, 113 LRP 19278, 2013 U.S. Dist. LEXIS 63350 (W.D. Tex. May 3, 2013).

Facts: Plaintiff M.J. is an individual with disabilities, including diagnoses of bipolar disorder and ADHD. His disabilities cause him to engage in erratic behavior and lead to panic attacks, paranoia, and hallucinations. He was the target of verbal and physical harassment and bullying from 2005 to 2009 while a student in the Marion Independent School District ("MISD"). Plaintiffs claim that MISD consistently failed to address the harassment, and that the abuse caused M.J. to become anxious, depressed, angry and even suicidal.

On March 10, 2009, M.J. was punched in the face by another student and taken to the hospital, where he was diagnosed with a fractured sinus. M.J. had to undergo

surgery to remove bone fragments and a blood clot from his sinus. After the incident, M.J.'s parents enrolled him in a private school for the 2009-2010 school year.

Plaintiffs filed for an administrative hearing pursuant to § 504. The 504 Hearing Officer issued a decision in favor of MISD, finding that they took reasonable steps to protect M.J. from harassment. The Plaintiffs then filed for a due process hearing pursuant to the Individuals with Disabilities Education Act ("IDEA"). The parties entered into a settlement agreement on the parents' IDEA claims, which included a release of all claims arising under the IDEA. Parents then filed a lawsuit against MISD in federal court, asserting (among other things) that the District violated § 504. MISD filed a Motion for Summary Judgment.

Issue: Whether a school district could be held liable for student-on-student harassment under § 504, and if so, whether district was entitled to judgment as a matter of law.

Holding: For the student. The court began by agreeing with other Circuit Courts that a school district can be held liable for student-on-student harassment under § 504 if: 1) the plaintiff has a disability; 2) was harassed on the basis of that disability; 3) the harassment was sufficiently severe or pervasive that it altered the condition of his/her education and created an abusive educational environment; 4) the district knew about the harassment; and, 5) the District was deliberately indifferent to the harassment.

The parties agreed that the student had a disability and that the district was aware of the alleged harassment, so the plaintiff met the first and fourth prongs of the test. The court found that there was a genuine issue of material fact regarding whether the student was harassed on the basis of his disability, noting that the student was frequently called names like "stupid, dumb a**, ret**d, idiot, special ed, and psycho." Student also testified that his classmates 'made fun of him for being in a special needs classroom," and "told him: '[Y]ou're so dumb . . . you're worthy of suicide.'"

The court also found that there was a genuine issue of fact regarding the third and fifth prongs of the test, whether the harassment was sufficiently severe or pervasive that it altered the condition of student's education and whether the district was deliberately indifferent to the harassment. The court noted that to establish deliberate indifference, the plaintiff must prove that the district's "response to the harassment or lack thereof must be clearly unreasonable in light of the known circumstances, such that the district's actions subjects the victim to further discrimination. Actions and decisions by officials that are merely inept, erroneous, ineffective or negligent do not amount to deliberate indifference."

The court found that the district's response to the student's complaints "was generally not clearly unreasonable." While the student was in grades five through nine, he frequently complained to teachers and staff about the alleged discriminatory acts.

On most occasions, the district took some remedial action. For example, when the student was in 5th grade, he reported that Student A punched him in the stomach and called him names. The teacher spoke with Student A, and Student A did not harass student again. During student's 6th grade year, Student B whipped towels and threw insects at him during gym class. He would also call him names like "stupid, re***d, and dumba**." Student reported that the gym teacher took Student B into his office and "yelled at him so loud that everyone could hear." When the situation did not stop, the gym teacher would separate student from everyone else.

In seventh grade, student reported that Student C was "messing with him." Later that day, Student C was called to the office over the intercom and when he returned to class "he seemed kind of upset with [Student]." The vast majority of student's complaints were addressed in similar ways, with some action being taken by the school to remedy the situation. "The fact that the remedies failed to put an end to the incidents between M.J. and some of his peers is not evidence that the school was deliberately indifferent; merely marginally effective actions do not expose a school district to liability."

However, during M.J.'s ninth grade year, student alleged that the following incidents occurred: Student D would "'pop' him on the back of his head with his ring during math lab about once or twice a week." M.J. would report this to his math teacher, and ask if he could go to ABLE, an area at school designated by his IEP as a place for him to cool off, she would tell him "no, sit down and get to work," and that she didn't care that Student D was "mess[ing] with him." She would tell him to "sit down and get to work." M.J. reported that on one occasion, Student D "came up behind M.J. and started 'choking him,' and it 'became a huge altercation,' but all [the teacher] did was say 'Michael, get out of the classroom,' and send him to ABLE."

Student also testified that during a February 2009 IEP Team meeting, he reported that Student D was bullying him in math lab, but the Team "just went to something else," and "tried to get him off subject." The court noted that there was a genuine issue of fact regarding whether the math teacher's response to the incidents in her classroom was appropriate, or whether she acted with deliberate indifference.

In addition, the court found that there was an issue of fact regarding whether the disability-based harassment was so severe and pervasive as to effectively deny M.J. equal access to the district's resources and opportunities. The court noted that student was struggling in math class, and that his teacher had reported to his parents that he was "having a difficult time working in math lab, didn't participate, work problems, or even attempt to work them mentally." He failed to answer any questions on the 8th grade assessment for math, earning a 0 out of 40 points. Student claims that he did not participate or try in math lab because his classmates made fun of him when he got the answer wrong.

Stewart v. Waco Indep. Sch. Dist., 113 LRP 10762, 711 F.3d 513 (5th Cir. Tex. 2013).

Facts: Student suffered from a cognitive impairment, speech impairment, and hearing impairment and qualified as a person with a disability under the Americans with Disabilities Act and the Rehabilitation Act. She attended A.J. Moore Academy, then a district high school, as a special education student. After an incident between Stewart and another student, the district modified Stewart's IEP to provide that she be separated from male students and remain under close supervision while at school. Nonetheless she was involved in three other instances of sexual conduct, which she characterized as "sexual abuse." Each of these incidents occurred when she was allowed to go to the ladies' room on her own. Following the incidents, the district did not take any steps to modify her IEP or to prevent future abuse.

Parent sued the district in state court, alleging gross mismanagement of her IEP and failure to reasonably accommodate her disabilities. The district removed on federal-question grounds. The District Court dismissed the suit for failure to state a claim. Parent appealed to Fifth Circuit.

Issue: Whether student adequately alleged that the district engaged in gross misjudgment when it refused to change her IEP to address peer sexual harassment.

Held: For the parent. The Fifth Circuit explained that the obligation to reasonably accommodate a student extends beyond the first attempt when the student asks for an additional accommodation, or the district is aware that the initial accommodation is failing and that additional accommodation is required. The Court determined that at some point, continued use of ineffective methods in response to specific conduct becomes gross misjudgment and the student's claim was more than speculative. Therefore, they reversed and remanded in part the ruling of the district court to dismiss the case.

1. Investigations

Bethany T. v. Raymond Sch. Dist., 2013 DNH 74, 2013 U.S. Dist. LEXIS 67012, 2013 WL 1933756 (D.N.H. May 10, 2013).

Facts: On nearly a dozen occasions during the 2010-11 school year, student, a "half African-American, half Caucasian male," was a freshman at Raymond High School ("RHS"). During the school year, he was subjected to racial slurs from other RHS students. One student also threatened to burn a cross in student's front yard while wearing a white hood. Another student taunted student with a book about the KKK. The incidents occurred throughout the entire school year and each incident was reported to the district. The school disciplined some but not all of student's harassers. Parent alleged that no additional steps were taken to prevent the harassment from continuing to occur.

Parent alleged that the harassment became so severe that student “found himself sick with the idea of going to school and was absent for at least (20) days. In response, . . . [the district] sent him truancy letters threatening police action and court costs and fines if he continued to miss school.”

Parent filed suit against the District, alleging, among other things, violations of Title VI, Section 1983, state law, and negligence. The District moved for summary judgment.

Held: For the parents. The court noted that to establish a violation of Title VI (racial discrimination), the parent needed to establish that the District was deliberately indifferent to the alleged student-on-student harassment. Deliberate indifference is shown where the district’s response to the harassment or lack thereof was clearly unreasonable in light of the known circumstances. Deliberate indifference usually presents a jury question.

The school district here asserted that this is an appropriate case for summary judgment because the basic facts about their response to the harassment are not in serious dispute. However, what is reasonable must be a fact that is undisputed in order for summary judgment to occur. In this case, what the school district did is not in dispute, but whether that action was reasonable was in dispute, and summary judgment was denied. The court also denied summary judgment on the plaintiffs’ negligence claim for the same reasons.

With regard to the Section 1983 claim, the court noted that “the issue of whether a municipality had a custom or policy that caused a violation of a plaintiff’s right is a jury question,” unless “no reasonable jury could conclude that the municipality had such a policy or custom.” The court found that a jury could conclude that such a policy existed, noting that “school principals and superintendents may be ‘policymakers’ for purposes of school discipline,” and that the “actions or inactions of policymakers may evidence a custom or practice of the municipality.”

D. Changes in Placement

Metro Nashville (TN) Public School District, 113 LRP 9959 (OCR Oct. 5 2012).

Facts: Student was a 14 year old 8th grader who was diagnosed with ADHD. Student began attending school in the district at some point after the start of the 2011-12 school year. On December 9, 2011, parent requested that the student be evaluated. That day, the student received an in-school suspension from December 12 through December 16, due to an incident where he was hitting other students. On December 13, while he was serving the in-school suspension, he was suspended for another incident which involved him inappropriately touching a female student and exposing

himself. The student received four days of out of school suspension for this incident. His out of school suspension ended on December 19, the last day before the Christmas break.

When school resumed on January 5th, the student's team met to discuss the out of school suspension. Parent requested a manifestation determination and a full evaluation. The district agreed to evaluate. The team, with the exception of the parent, decided that the student should remain in the in-school suspension until his evaluation was completed because they felt that the student was a danger to other students. He remained in the in-school suspension from January 5th until January 24th, 2012. During that time, he was in a classroom with a teacher, but the teacher did not provide him with any instruction. Instead, student completed copies of work from his other teachers and submitted the work to the teacher in the in-school suspension classroom.

The team met again on January 24, 2012. The team discussed the evaluation and conducted a manifestation meeting. The team determined that the behavior on December 13 was a manifestation of the student's disability. The team also agreed that the student would have a Section 504 plan. After that meeting, the student was returned to the regular education setting. His schedule was changed and he had new teachers with more structure. He was observed by a behavioral specialist for two weeks. The team met in February and the behavioral specialist indicated that the student did not need a behavior plan. Thereafter the team developed a safety plan.

On February 8, the date of the meeting to develop the safety plan, student was suspended due to an incident that occurred at a basketball game. Another manifestation meeting was held and it was determined that the student's behavior was not a manifestation of his disability. Student was suspended for the rest of the year.

Parent filed a complaint with the Office for Civil Rights (OCR), alleging that the district discriminated against the student by changing his placement without an evaluation or meeting regarding placement.

Held: For the parent. OCR found that the decision to keep the student in the out of school suspension in January 2012 constituted a significant change in placement, and the decision was made without following the Section 504 process. OCR noted that Section 504 requires that a be evaluated before there is a substantial change in placement, and that the decision to keep the student in the in-school suspension "was not based on any documented data from someone knowledgeable to make such a decision. The student was placed in a classroom without peers and submitted work to the teacher assigned to sit with him in this classroom. There was no instructional interaction between the student and the teacher in the room with him. . .[T]he student was removed from the regular education classroom pending evaluation results, thereby denying him the opportunity to interact with regular education students and the regular education curriculum."

The district was required to provide training to its staff on Section 504 procedures. In addition, it was required to conduct an evaluation to determine if compensatory services were required for the time that the student remained in the in-school suspension while his evaluation was being completed. If such services were necessary, the district was required to amend the Section 504 plan to specify the services that would be provided. The district was also required to remove from the student's record the days he remained in the in-school suspension pending the evaluation.

E. Deliberate Indifference

Herrera v. Hillsborough County School Board, 2013 U.S. Dist. LEXIS 86172 (M.D. FL June 18, 2013).

Facts: Student had a neuromuscular disorder that left her confined to a wheelchair. On the afternoon of January 25, 2012, student was placed on a district school bus for transportation home after school. She was not properly positioned and secured on the bus. At some point during the bus ride, student had difficulty holding up her head. She developed an obstructed airway. After a period of time, the bus attendant noticed that student was unable to breathe, but made no effort to check student's airway, remove her from the chair, or begin resuscitation efforts. Rather the bus attendant called student's mother and asked her to come to the bus. The bus driver stopped the bus at an intersection. The bus attendant and the bus driver did not attempt to resuscitate student and did not call 911.

Subsequently, student's mother arrived and discovered student in her wheelchair, unresponsive, blue and not breathing. Parent took student out of her wheelchair and attempted to resuscitate her. Parent also called 911. Student was airlifted to the hospital and was pronounced dead shortly thereafter.

Parents filed suit against the district, alleging violations of Section 504, the Americans with Disabilities Act, and 42 USC § 1983. The district filed a motion to dismiss the complaint, arguing that the parent failed to state claims for relief under those statutes.

Held: For the parent. The court found that the parents' complaint included allegations that the district was deliberately indifferent to student on the basis of her disability. These facts included allegations that prior to January 25th, there were numerous incidents involving serious injury and/or a reckless disregard for the well-being and safety of students with disabilities. Parents alleged that in October 1999, a middle school student with a disability was dropped off at the wrong location and was subsequently struck by a car and killed trying to find his way home. In February 2011, a student with "profound disabilities" was sent home from school with an unexplained

fractured femur. In December 2011, a young student with disabilities was left alone on a school bus for approximately 6 hours. Parents also alleged that during the 2011-12 school year, concerns were noted in student's school records and IEP about staff observations that student's head was falling more frequently and that she was having difficulty picking her head up by herself. Parent observed transportation staff having difficulty properly securing student's wheelchair and observed on numerous occasions that school staff did not properly position student in her wheelchair. Parent reported to school personnel, on numerous occasions, that they had to tilt the wheelchair back because student's neck was weak and her head was floppy. Despite this, student continually returned home with her wheelchair in the upright position.

Parents also alleged that the district knew that student had trouble keeping her head in an upright position and failed to provide student with the necessary accommodations to address this problem. In addition, after her death, parents retrieved the student's wheelchair from school and discovered that it was in an upright position. The court found that these allegations supported the claim that the district knew that harm to the student was substantially likely and they failed to act on that likelihood. Parents also alleged a failure to accommodate student's disability.

The court also rejected the district's argument that the parents' Section 1983 claims failed to sufficiently allege a policy or custom of the district. The court noted that under Section 1983, districts may be held liable "only for the execution of a governmental policy or custom," and that the complaint "must identify the governmental policy or custom which caused [student's] constitutional injury. Plaintiffs also must allege that the policy or custom was the moving force of the constitutional violation. A policy is a decision that is officially adopted by the municipality or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. . . A custom is a practice that is so settled and permanent that it takes on the force of law. A school district is not deliberately indifferent simply because the measures it takes are ultimately ineffective. . . Additionally, there are 'limited circumstances' in which a failure to train or supervise can be the basis for liability under Section 1983. A failure to train qualifies as a municipal policy if the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights that the failure to train amounts to deliberate indifference to a constitutional right."

The court found that the parents' complaint included sufficient allegations of a policy, practice, or custom, which caused student's injury. Parents allege that the district knowingly hired a director of Special Education with no meaningful training, certification, or background in Special education; that there were multiple incidents involving injuries and deaths of student before and after student's death; that these incidents demonstrated a pattern and practice of disregarding the safety and rights of special education students; that the district had knowledge of systemic problems in the special education program prior to student's death and that it failed to meaningfully investigate, report, and address the numerous incidents involving students before and after student's

death. In addition, the district was placed on notice that student was having trouble keeping her head up by herself and took no action or made appropriate accommodations to address the problem. As a result, the district's motion to dismiss was denied.

X. The Family Educational Rights and Privacy Act (FERPA)

Over the course of the past year, the Family Policy Compliance Office (FPCO), the office responsible for enforcing FERPA, has issued several opinions pertaining to access to records.

In Letter to Segura, 113 LRP 7194 (FPCO Oct. 2, 2012), FPCO opined that:

- A school district is not required to provide a parent's attorney with access or copies of educational records in response to his or her request, and it is not required to respond to such a request within the 45 day time limit set by FERPA. This is because the attorney does not hold FERPA rights with regard to gaining access to the student's educational records and because FERPA does not require the district to provide copies of education records.
- Similarly, a district is not required to respond to a request for copies of, or access to, educational records received by any third party (other than the parent or eligible student), even if the request is accompanied by written parental consent.
- A district must comply with a request for access to records from a parent or eligible student within 45 calendar days of receipt of the request. This time period begins to run as of the date the district receives the request for access to records.

Similarly, in Letter to Tagg, 113 LRP 5521 (FPCO, Nov. 7, 2012), the FPCO opined that a school district is not required to provide the parents of a 22 year old student with access to the student's educational records. The student provided written permission to the school, authorizing disclosure of the records to student's parents, but the district refused. Parents claimed that the district was violating their rights under FERPA. FPCO investigated and found that the complaint was unsubstantiated. FPCO noted that once the student turns 18 years old or enters post-secondary education at any age, the school is only required to give the student access to the records. The school may give the parents access with written permission from the student, but they are not required to do such.

In contrast, in Letter to Lianides, 113 LRP 7159 (FPCO Oct. 9, 2012), the FPCO found in favor of a non-custodial parent who was denied access to her minor daughter's educational records. In that case, the student was in the custody of her paternal

grandmother, who requested that the school prohibit both parents from accessing student's records. When the non-custodial parent requested access to the records, the district denied the request and the parent complained.

FPCO opined that the district should have provided the parent with access to the records. FPCO noted that schools are required to provide custodial and noncustodial parents alike with full rights under FERPA unless the school has been provided with evidence that there is a court order, state statute, or other legally binding document that specifically revokes these rights. The district was not provided with any of these documents, therefore, the district violated FERPA when it refused to provide the parent with access to the records.

Recently, OSEP issued an opinion, indicating that early intervention service providers must have written parental consent in order to disclose information from an early intervention record to a Part C funding source. Letter to Flynn, 113 LRP 24305 (OSEP May 8, 2013). OSEP noted that HIPAA would not permit the disclosure without prior parental consent because the IDEA and FERPA do not authorize disclosure (without parental consent) of early intervention records to agencies that act solely as a funding source for services.

Finally, Letter to Fagan, 113 LRP 7161 (FPCO Oct. 9, 2012) addresses the inadvertent disclosure of records that were contained on a flash drive. A school attorney wrote to the FPCO requesting guidance as to whether a disclosure of records may have occurred when the flash drive could not be located.

FPCO opined that the district's response to the loss of an electronic data storage device from a classroom will determine whether it violated FERPA. The FERPA safeguarding recommendations recognize that no system is perfect and sometimes information will get out. FERPA does not dictate requirements for safeguarding education records, but the FPCO encourages the holders of personally identifiable information to consider actions that mitigate the risk and are reasonably calculated to protect such information.

Schools may use any reasonable method to protect the information. The FERPA Safeguarding Recommendations specify that an educational agency or institution that has experienced a theft of files should consider one or more of the following steps:

1. Report the incident to law enforcement authorities.
2. Determine exactly what information was compromised.
3. Take steps immediately to retrieve data and prevent any further disclosures.
4. Identify all affected records and students.
5. Determine how the incident occurred.
6. Determine whether institutional policies and procedures were breached.

7. Determine whether the incident occurred because of a lack of monitoring and oversight.
8. Determine steps that will prevent the incident from happening in the future.
9. Notify students of steps they should take if they believe their information was stolen.

Failure to take reasonable and appropriate steps to protect education records could result in the release or disclosure of personally identifiable information from education records and may constitute a policy or practice of permitting the release or disclosure of education records in violation of FERPA requirements.

XI. Negligence

Phillips v. Robertson County Board of Education, 159 IDELR 227, 2012 Tenn. App. LEXIS 631 (Tenn. App. Sept. 11, 2012).

Facts: Student was privately diagnosed with Asperger's syndrome. The psychologist who diagnosed the student sent a letter to the school stating that the student would need help with "social negotiation" and that he was likely to be bullied at school. The parents and school officials report that the student was constantly reporting bullying incidents and requesting help. The district found the student ineligible for special education. However, the school did develop a plan to deal with the student's social issues. The student would receive preferential seating in class and would have a card system to signal to teachers when he felt stressed or the other students bullied him.

After a teacher left the classroom unattended one day, which was against school policy, another student struck the student in the eye, and he sustained permanent damage. The parents sued for negligence and prevailed. The district appealed.

As her defense, the teacher claimed that she was never formally informed of the student's disability. She only knew of the student's preferential seating from "water-cooler" chat. The teacher was also not aware of the majority of the child's classroom accommodations. The district argued that the physical conflict between the student and his classmate was not foreseeable and that it was not negligent not to inform the teacher of the student's accommodations.

Issues: Did the school district, or the teacher individually, act negligently and thus allow the student to be injured?

Held: For the parent. The appeals court observed that schools have a duty to safeguard students from reasonably foreseeable dangerous conditions including the dangerous acts of fellow students. This incident was foreseeable because the school knew the classmates bullied the student. Even if it were true that the particular

classmate had not bullied him in the past, the district had reason to expect that some classmate would bully the student.

The appeals court upheld the trial court's determination that given what the defendant district knew about the student, and the actions they had taken against other students after investigating student's complaints, it was certainly foreseeable that other incidents in which student would be abused or perceive himself to be abused would occur.

The court of appeals also upheld the trial court's determination that the teacher acted negligently. The teacher was negligent in failing to follow the school board's policy and the instructions of the principal and assistant principal with regard to leaving students in the classroom unattended. While the defendants argued that leaving seventh graders alone in a classroom was not negligent, when one of those students suffered from the same conditions as the student in question, it is negligent.

The principal and other school officials were negligent in failing to advise the teacher properly of the student's condition and his special accommodations.

A. Negligent Supervision

Mitchell v. Cedar Rapids Community Sch. Dist., 113 LRP 26046, 2013 Iowa Sup. LEXIS 77 (Iowa June 21, 2013).

Facts: In the fall of 2007, student was a 14 year old freshman who received special education services from the district. She had an IQ of 67 and was a "Level II" special education student at the district's public high school. Student had an IEP that had "no special behavioral considerations and suggested she was capable of independently performing daily living skills except money management." Although not referenced in her IEP, "Student was rarely, if ever, without direct adult supervision because of her diminished capacity."

During the school year, one of student's special education teachers observed student spending time with a 19 year old, twelfth grade special education student. The teacher observed the two students engaging in physical contact, including kissing. The teacher assumed the relationship was age-appropriate and could not recall signs that the relationship was against student's will. She did not recall any history of the other student having behavior problems. The teacher could not recall whether she spoke with the students about their relationship, but she had specific concerns after witnessing the students together at school that they were sexually active, "were likely to be together if absent from class at the same time, and might engage in sex if left unsupervised."

On October 26, 2007, student called her mother from school and asked if she could ride the bus after school to another friend's house. Student had never made this

request and was usually picked up by her parent or grandparent, but her parent gave permission and instructed student to call when she reached her friend's house.

Student and her friend decided to leave school one period early, and did such, despite not having permission to leave school during the day. They met up with the male student in the school parking lot. The male student did not have class during the last period and had permission to leave campus.

The three students went to the male student's grandparents' house, which was approximately two and a half miles from the school. Student and her male friend stayed at his grandparents' house for approximately 20 minutes, then walked a few blocks to the home of another student, who was in 10th grade. While there, the male student raped student while the other student watched. While the rape was occurring, the other student shot at student with a BB gun. Student and the male student then returned to the female student's house. Student did not report the rape to her parents until May 2008. At that time, parents filed a police report; the male student pled guilty to "sex abuse in the third degree."

The district had a computerized system in place for tracking student attendance and absences. A teacher would document a student's absence on a computer in the classroom at the beginning of each class. If a student was not present and his/her parent had not called to authorize the absence, then it was marked as unexcused. At the end of school, an automated message would call the parents of each student with an unexcused absence and inform the parents of the periods that the student missed. Teachers were not required to call parents to alert them of their child's absence. The absences of student and her female friend were recorded in the computer system and the automated call was placed at the end of the day. No other steps were taken with regard to the students' absences.

Parent filed suit against the district, alleging that the district was negligent and had breached a duty of reasonable care by: 1) failing to adequately supervise student; 2) failing to timely notify parent of student's unauthorized absence from school; 3) failing to adequately monitor student's attendance at school; 4) failing to take appropriate and immediate action upon the discovery of student's absence from school; 5) failing to provide adequate security to prevent special education students from leaving campus without authorization; and 6) failing to maintain an adequate system of monitoring special education students during the day.

A jury trial was held in November 2011; the jury returned a verdict for student with damages in the amount of \$500,000. The jury found that the school was 70% at fault and the student was 30% at fault.

The district filed several post-trial motions, which were denied, and the district appealed.

Held: For the parent. The court found that there was sufficient evidence to generate a jury question on the issue of whether the harm student suffered was among the potential harms that made the district's conduct tortious. The parties agreed that students in the age range of the student and male student will often engage in sexual activity and will go to some length to avoid supervision in pursuing such activity. While the district contended that student's skipping her last class of the day made it, as a matter of law, no more likely she would have a sexual encounter with the male student later that day than had she been supervised through the end of the school day, the court disagreed.

The court noted that Student "was a Level II special education student functioning at approximately a third-grade level and was nearly always under adult supervision. The Level II special education teachers at [the district] typically undertook substantial precautions upon discovering absences from class, including consulting other teachers, the front office, and often even the students' parents, in large part because of safety concerns about the students." Student was especially trusting and may have been unable to distinguish safe situations from unsafe situations. In addition, student had been observed having physical encounters with the male student.

Despite this, the district's response to student's absence was limited to the recording of the absence in the computer system, and notifying the parent of the absence that evening, several hours after the incident occurred. The court concluded that the evidence was sufficient to support the jury's findings that the district acted unreasonably and that its negligence increased the risk of student's harm.

E.C. et al. v. County of Suffolk, 58 IDELR 259, 882 F.Supp. 2d 323 (E.D.N.Y. March 30, 2012), *aff'd* by 60 IDELR 242 (2d Cir. March 14, 2013).

Facts: Student had severe cognitive delays, but was physically advanced for 11 years old, began throwing pebbles on the playground. When he was told to stop, he held an 8-inch rock over his head. Subsequently he began yelling, running, and attempting to punch staff members and fellow students. Ultimately, school security guards held his arms and pulled him into a seated position. The parents sued for disability discrimination under the Americans with Disabilities Act and unlawful seizure under the Fourth Amendment.

Issues: Can the parents bring an ADA claim without exhausting their administrative remedies?

Did the security guards act reasonably under the circumstances?

Held: For the District. The court ruled that the parents must exhaust all administrative remedies before bringing an ADA claim to court. There was no evidence

that the parents were denied an administrative hearing or that there was systemic problem that would have allowed the district court to sidestep the requirement.

The court also ruled that the seizure was reasonable under the 4th Amendment because the student put himself and others at risk when he appeared to threaten staff members with a large rock. In addition, it was reasonable to immobilize him and restrain his arms to prevent him from running around and hitting people. The guards used only the amount of force necessary to accomplish this goal. At one point, they released the Student because they thought the restraint was upsetting him only to have the student attempt to hit people again. Thus, the actions of the guards were reasonable under the fourth amendment.

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