

Cases that Will Change Your Life: An Overview of Recent Decisions

Presented to the New Hampshire
Association of Special Education Administrators

July 30, 2014



***Wadleigh, Starr & Peters, P.L.L.C.
Serving New Hampshire since 1899***

By: Dean B. Eggert, Esquire
Alison M. Minutelli, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
aminutelli@wadleighlaw.com
Website: www.wadleighlaw.com

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 28 years he has had extensive experience representing school districts in special education matters at the administrative and appellate levels. He has spoken and lectured extensively on a wide range of legal issues in the field of education law.

Alison M. Minutelli, Esquire (JD., University of New Hampshire School of Law; B.A. Brandeis University) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. For the past 8 years, Ms. Minutelli has practiced in the field of school law, and has experience representing school districts in special education matters at the administrative and appellate levels. She has also written numerous articles on a wide range of legal issues in the field of education law.

A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a deeper understanding of recent key case law pertaining to certain aspects of the IDEA and Section 504. The decisions contained in this material may be subject to appeal. This material does not include every aspect of the law, nor does it discuss every case involving the IDEA and Section 504. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to review a selection of recent key decisions which have been rendered in the field of special education law. This material does not cover all aspects of the Individuals with Disabilities Education Act ("IDEA") or Section 504 of the Rehabilitation Act ("Section 504"), nor does it contain a complete discussion of all recent IDEA and Section 504 cases or opinions. The goal of this material is to provide the special education administrator with the tools necessary to interpret certain aspects of the statutory and regulatory law pertaining to the IDEA and Section 504.

II. Child Find, Referral and Evaluations

Bd. of Educ. of Evanston-Skokie Comm. Consolidated Sch. Dist. 65 v. Risen, 2013 WL 3224439, 61 IDELR 130 (N.D. Ill June 25, 2013)

Facts: Student was identified under the IDEA and attended a public preschool program. Prior to his kindergarten year, the District met and proposed an inclusion program in the public kindergarten. Parents declined this offer, and placed the student in a private program at their expense.

The following school year, parents opted to send Student to another private school, located in another school district, again at their expense. He remained there for first and second grade, although his second grade year did not go well. He fell behind in reading and math and began to exhibit anger and aggression more frequently in the classroom. He began to refer to himself as stupid and threatened to kill himself on one occasion. The academic and social behavior gaps between Student and the rest of the class began to widen. Based on these set-backs, in February of his second grade year, the staff at the private school informed Student's parents that his needs exceeded their resources. Parents were advised to find an alternate placement for Student for the next school year.

In late February or early March, Student's mother notified her resident district that Student would be enrolled there during the next school year and requested that the School District begin the evaluation process for him in preparation for the following academic year. The District initially told Student's mother that the district where the private school was located was responsible for evaluating Student. Student's parents requested that their resident district conduct the evaluation since that was the district where Student would be attending public school.

In May 2011, parents enrolled Student in his public school for the upcoming school year. Parents requested an IEP and were initially informed that the IEP would be developed after the District had the opportunity to observe Student. Ultimately, however, the District agreed to evaluate the Student over the summer.

In June, the District requested that Student's parents have the private school staff complete assessment forms to assist in the evaluation. The parents returned the forms to the District later that month. On July 6, 2011, the District sent the Student's file to his neighborhood public school and advised the school that parents had requested that student be evaluated as soon as possible.

On August 3, 2011, Parent requested an update on the evaluation. On August 5, 2011, after receiving no substantive response, parents submitted an application to another private school for the 2011-2012 school year. On August 6, 2011, the District emailed parents to tell them that the evaluation would not take place over the summer as they had agreed. The District also told the parents that Student would be placed in an inclusion class that included a mix of learning disabled and non-learning disabled children. The same day the District sent the public elementary school an email informing them that Student will be in their second grade inclusion class and that they will be performing an evaluation.

On August 8, 2011, Parents sent a letter informing the School District that Student would be attending a private school and parents intended to seek reimbursement for the costs associated with the placement. On August 9, 2011, the School District contacted parents and scheduled a meeting for August 19, 2011. An evaluation was scheduled for the week of August 22, 2011.

On August 24, 2011, Student began attending the private school. However, Student's parents did not actually sign a contract with the private school or pay any money to the school until September 19, 2011, in an effort to keep their options open with the School District.

On August 26, 2011, the IEP Team met again. The IEP recommended that student be placed in an inclusion class of approximately 20 students, a quarter of whom would be special education students. This assessment was partially based on an "inclusion policy" within the District that required that special education students be included in the general education curriculum.

On September 2, 2011, parents observed a class in the inclusion classroom. They observed a typical second grade class with a large amount of sensory input, a teacher teaching from the front of the room, and reading and other activities being completed in groups of two students or more. The parents concluded that this environment would not be best for Student's development and officially entered into an agreement with the private school.

Parents subsequently requested due process. The Hearing Officer found in favor of the parents, and ordered the District to reimburse them for all costs associated with the private school. The District appealed.

Held: For the parents. The court held that the IDEA's child find requirement that school districts find special education children in their geographic area that are attending private school even if the child does not live in the district, does not relieve the school district in which the child resides from its duty to provide a free, appropriate public education (FAPE). The court interpreted the "child find" requirement to require the school district where the child is attending private school to find a child without any prompting from the parents; however, nothing in the law extinguishes the requirement for the school district in which the family resides to provide FAPE upon request of the parents. The court also held that the district failed to conduct an evaluation within the 60 day time period.

The court also held that the district denied the student a FAPE by ignoring the prior evaluative data that indicated that the student required a small class size. Finally, the court held that the School District's inclusion policy at least on its face took mainstreaming a step too far by mandating that all special education students be taught in inclusion classrooms. The District was required to reimburse the parents for the costs associated with the private school.

Regional School #38, 62 IDELR 69 (Me. State Educational Agency (SEA) Aug. 15, 2013)

Facts: Student, who was about to enter high school, had a history of difficulty with reading and writing dating back to his elementary school years. The student was also diagnosed with ADHD and had issues with anxiety and depression. In August 2010, student's parents divorced and he moved to Maine with his mother. Due to the divorce, student's family moved four different times over a six month period. His new schools did not have time to prepare evaluations, but they did meet with the mother and they acquired copies of student's prior IEPs.

In October 2010, the student began psychotherapy. Most of the experts that examined the student and his performance agreed that the student was bright and his learning disability was minor and probably overcompensated for by the IEP. There were also observations that the mother may have a negative impact on the student by convincing the student that he had a greater degree of disability than was present.

In September 2011, the School District wanted to evaluate the student to create a Behavior Intervention Plan (BIP) to address the Student's behavioral and emotional needs, which the District believed were holding the student back from advancing academically. Mother agreed to the evaluation, but subsequently revoked her consent.

During October and November 2011, multiple attempts were made to get either parent to sign the consent to psychiatric evaluations. During that same period, the student's defiant behaviors increased and academic performance suffered. In January

2012, parent agreed to the proposed evaluations, and they were conducted in February and a Team meeting was scheduled for March 2012.

Prior to the March IEP meeting, the mother had already threatened to begin home schooling the child. She also prepared to make a private placement for the child. The mother ultimately went ahead with the private placement. While in private school, the student exhibited some of the previous behaviors; however, the staff there was permitted to implement a BIP that helped to reduce the behaviors and restore the student's academic progress. The child continued in the private school for the next two years. During that time, the District continued to offer services and hold IEP meetings to update their goals for the student based on feedback provided to them by the private school and the parents.

The parents requested due process in April 2013, alleging that the IEPs for the past 3 years were inappropriate; parents requested reimbursement for the costs associated with private school placement as well as compensatory education.

Held: For the District. The student's IEPs were appropriate. Furthermore, the school attempted to get permission to evaluate the child to develop a BIP to address the student's behavior and meet the student's emotional and psychological needs. The parent's refusal to consent to the evaluations precluded the District from addressing the student's behaviors, which led to a drop in his academic performance. Furthermore, once the school conducted the evaluation, the school was prepared to offer the appropriate services, but the parents had already made up their mind to place the child elsewhere.

The IEP from 2012-2013 school year was reasonably calculated to offer FAPE in the least restrictive environment. The IEP the District offered while the child was in private school incorporated all the information available and was reasonably calculated to provide the child FAPE in the least restrictive environment. Furthermore, the fact that the District's IEP called for an approach that more directly targeted the emotional needs and demanded less rigorous academic standards to account for those needs did not make it defective. The District's IEP for the 2013-2014 was adequate to provide FAPE in the least restrictive environment. It was essentially the same as the previous years with the exception of updates to accommodate the transition into a high school environment.

Newport–Mesa Unified Sch. Dist., 114 LRP 6941 (Cal. SEA Feb. 5, 2014)

Facts: On December 6, 2011, during her senior year in high school, student was hit by a car and suffered a traumatic brain injury. The accident caused student to have "deficits in short-term memory, verbal memory, organizational skills, attention span and endurance, and gross and fine motor skills including handwriting and balance," all of which affected her education upon her return to school in March 2012. Prior to the

accident, student had mediocre grades, but was on track to graduate on time (in June 2012) and did not require special education services.

District was aware of student's accident and the aftermath. Parent kept the District up to date on every step of student's recovery. Student's doctor authorized her return to school on February 15, 2012, and on February 28, 2012, parent confirmed that she agreed that student was ready to return to school. A meeting with the student's counselor was scheduled for the following day. At that time, student was still receiving out-patient counseling, physical therapy and occupational therapy, and her mother was concerned "that Student 'had lost her filter' resulting in safety concerns for Student, specifically, Student's ability to find her way to and from class, make her way in a crowd, crossing the street, and knowing who to go to for help." However, student wanted to return to school, so in-school tutoring was proposed as a temporary plan. In early March, the tutoring program was approved and student began attending school for 1-2 hours per day.

On March 20, 2012, at a second meeting, parent informed the District that she intended to obtain a neuropsychological evaluation to determine student's post-accident cognitive baseline, and her ongoing academic needs. At that meeting, parent received a special education packet with a copy of the IDEA procedural safeguards; however, parent said that she did not want to pursue special education at the time.

At a third meeting, on March 23rd, parent and student indicated that student wanted to return to school full time. Special education evaluations were discussed, and parent affirmed that she had received the packet, but only wanted a 504 plan, not a special education evaluation. As a result, the Team did not develop a special education evaluation plan, and parent was never presented with a formal proposal to evaluate the student under the IDEA. On March 27th, a 504 Plan was prepared.

Student turned 18 in May 2012. The District did not present student with the IDEA procedural safeguards or propose to evaluate student. In June 2012, parent requested a special education assessment. At a meeting in June, District staff explained the special education process to the parent, indicating that the evaluation process would not be completed prior to graduation. The District agreed to evaluate the student, but noted that she had met the graduation requirements and would be graduating with her class in late June. The evaluation plan was signed by the student and returned to the District 2 days before graduation.

The evaluations were conducted in the summer of 2012, and the reports indicated that student would have qualified for special education services had she been assessed by the District after December 2011, and prior to her graduation.

Student requested due process, alleging that the District failed to comply with the IDEA's "child find" requirements and failed to offer student a FAPE from December 6, 2011 through June 17, 2012.

Held: For the student. The IDEA's "child find" obligations are triggered when an educational agency has a reason to suspect that a student may need special education services to address his or her disability. Traumatic brain injury is one of the 13 possible disability categories under IDEA.

The hearing officer found that a district's "child find" obligation is met when the educational agency offers a special education assessment plan, and explains what is being offered. Here, the hearing officer found that the District relied on the student's parent to affirmatively request an assessment, rather than provide the parent with the assessment plan for her consideration. Furthermore, when the student reached 18, the District had another opportunity to offer a special assessment plan directly to the student and failed.

The hearing officer further found that it was within the District's discretion to graduate the student, since she had met the graduation requirements, however, the fact that the student had graduated did not preclude the student from obtaining compensatory educational services to remedy the denial of the FAPE.

District of Columbia Public Schools, 114 LRP 3890 (D.C. SEA Oct. 20, 2013).

Facts: Student was diagnosed with ADHD. When Student was seven years old and in the 3rd grade, he was in an accident that resulted in a traumatic brain injury. The accident created deficits in Student's mobility, self-care skills, communication, cognition, and language skills causing the Student to have difficulty answering questions and completing assignments. Student suffered from behavioral problems as well.

Parent continuously updated the District on Student's rehabilitation and provided documents to remind the District of Student's brain injury. The District also visited the Student while he was in the hospital. While there, the District was informed of the possible learning impairments that the Student might suffer from as a result of the accident. Notwithstanding Parent's concern, and repeated requests for an evaluation, the District refused to evaluate the Student for IDEA eligibility and determined that due to his poor performance the Student should be held back in the fourth grade. Parent was opposed to the retention, believing that Student should have been evaluated for special education and related services. Parent requested due process.

Held: For the parent. The hearing officer noted that the IDEA does not preclude evaluations for possible "short-term" injuries. The District had knowledge of the brain injury at the time of the accident and was informed that it may affect the student's language and/or memory, but did not evaluate the student, despite the student's poor

educational performance. The District was required to evaluate the student to determine eligibility. The parent's request for compensatory education services was dismissed without prejudice, pending the results of the evaluation.

III. IEPs

A. Participation in Team Meetings

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

Facts: Student was identified under the IDEA due to multiple disabilities. Student was diagnosed with a severe seizure disorder, a cognitive impairment, and possible Pervasive Development Disorder (PDD). Student also exhibited some characteristic of autism such as restrictive and intense interests and difficulties handling change in routine. Due to her disabilities, Student had difficulty with self-care, fine motor control, and essential independent life skills like telling time and calculating the appropriate amount of money for a purchase. Her educational program included assistance with grooming and other self-care issues, such as tooth brushing and toileting.

“Student exhibited behaviors which included severe difficulty with transitions, refusals, and aggressive behaviors including hitting and scratching, in the home and school. Typically, she wears a helmet when in public or in the school, outside of the classroom for safety in the event of a seizure.” She required 1:1 assistance at all times for safety reasons. Academically, student “has deficits across the board,” and also has a history of difficulty in managing her environment, difficulty maneuvering around obstacles in her environment and using both hands on tasks.

The relationship between parents and the district was “difficult and acrimonious,” primarily due to “the different visions that the parties have considering Student’s capabilities and future.” Parents wanted an academic program that involved increasing academic challenges, while the district thought that it was more appropriate for student to learn functional skills so that she can “work in a recreational/leisure setting and live with others.”

On December 14, 2009, parents requested due process, arguing that student had been denied FAPE for the following reasons: Student’s placement in the high school’s multiple disabilities classroom was improper, the district’s IEPs had failed to challenge and assist student in gaining greater proficiency in math and reading skills, the parents were not allowed to meaningfully participate in the education process, student was not allowed to provide input into the post-secondary school planning, the post-secondary school assessment conducted by the district was improper, and the proper assistive technology and assistive technology assessments were not provided to student.

The hearing officer found that the student's IEPs were inappropriate in the areas of reading and math, and ordered compensatory services, but found in favor of the district on all other claims, including the appropriateness of the placement.

On appeal, the district argued that the prior IEPs provided student with a FAPE, and parents argued that the hearing officer erred in finding for the district on their remaining issues.

Held: For the parent in part, and the district in part. The court upheld the hearing officer's findings on the prior IEPs, but found that the district violated the IDEA when it failed to include Student in discussions about transition planning. This procedural violation resulted in a substantive denial of a FAPE because the student was excluded from discussions about her post-secondary goals and her interests and preferences were not otherwise considered by the Team.

The court noted that districts are required to provide "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills and transition services (including courses of study) needed to assist the child in reaching those goals."

Student turned 16 in December 2007, when she was in 9th grade. However, while she was in high school, the district did not invite her to participate in IEP meetings where transition services were discussed. The district "did not consider asking [student] to the meetings because her parents never invited her, the meetings were long and adversarial, and [staff] thought they would be frightening for [student] and above her level of comprehension." The court noted that District staff should have prepared student to attend a meeting – or part of a meeting – and modified or structured the meeting to make student's attendance easier. In a subsequent proceeding, the District was ordered to pay for up to \$35,398 worth of postsecondary transition services (590 hours of postsecondary transition services and 100 round trips into the community for job training and related tasks, and reimbursement for parentally obtained transition assessments). See Gibson v. Forest Hills Sch. Dist., 62 IDELR 261 (S.D. Ohio Feb. 11, 2014).

B. IEP Development

D.S. v. Dep't of Educ., Hawai'i, 62 IDELR 112, 2013 WL 6047200 (D. Haw. Nov. 14, 2013)

Facts: Student was a 15-year old with autism. In 2009 and 2010, the Student began to exhibit sexualized behaviors including kissing female educators, grabbing female educators in inappropriate areas, exposing body parts, and removing his clothes. As a result of these new behaviors, in September 2010, Parent requested three new assessments: "a behavioral optometry assessment, a neuropsychological

assessment, and an emotional behavior assessment.” The district agreed to conduct the emotional behavior assessment, but rejected the request to conduct the other two assessments. Ultimately, however, the behavior assessment was not conducted, because the Parents did not consent in a timely fashion.

In developing Student’s IEPs for the 2011-12 school year, the IEP team relied on Student’s 2009 assessments. The 2009 assessment did not include references to Student’s new behaviors, because the behaviors had not surfaced at the time; as a result, the IEP did not have goals or objectives to address the sexualized behavior, despite the fact that the district was aware that the behaviors were occurring.

Parent requested due process, alleging that the 2011-12 IEP was inappropriate.

Held: For the parent. While the court acknowledged the information regarding the Student’s sexualized behaviors was not extensive, the information was sufficiently conveyed in order for the information to be included in the 2011-12 IEP. The court found that since the District had notice of the new behaviors, it had an obligation to investigate the scope of the new behaviors to develop an adequate IEP. The court noted that the district “was on notice that Student was displaying some very troubling sexualized behaviors that were not previously present in Student’s behavior profile. It was not objectively reasonable to disregard this information and neglect to incorporate a plan to address these new behaviors within the IEP.” The district was required to reimburse the parents for the costs associated with a unilateral private placement.

C. Transition Plans and Services

Dighton-Rehoboth Regional Sch. Dist., 113 LRP 35900 (Mass. SEA, Aug. 30, 2013).

Facts: Student had been diagnosed with multiple disabilities including Asperger’s Syndrome and Borderline Intellectual Functioning. Student was also diagnosed with multiple psychological disorders, including Reactive Attachment Disorder, Disruptive Behavior Disorder, Obsessive Compulsive Disorder, and Post Traumatic Stress Disorder. Private psychologists repeatedly diagnosed sexual disorders like paraphilia and pedophilia; however, when examined by the school system, Student’s scores for various sexual disorders fell on the “borderline” range. As a result of the borderline scores, the District refused to incorporate the sexual disorders in his IEP. Student’s goal throughout his time in school was to transition to the community, live independently, and work as an auto-mechanic.

During Student’s early school career, he was in a series of residential treatment facilities and schools. Student attended public high school with an IEP that addressed mostly his academic shortcomings in English and math. There were some stipulations for counseling services to help student better interact with teachers and peers, but those

provisions were removed as he progressed through high school. While in high school, staff continued to report that student was frequently defiant, removed, distant from peers and faculty, and frequently aggressive or antagonistic toward other students. Student's social failures were frequently noted, but never acted upon.

At some point during his high school years, student was suspended briefly from school and suspended from computer access for 30 days for accessing multiple pornography websites. Student's parents informed the district verbally and by making notes on IEP forms about their concerns that Student was a risk to young children. The parents signed releases allowing the District to access files from Student's private provider who made an assessment confirming their concern.

During his senior year, Student was hospitalized on two occasions. The first hospitalization occurred in January 2011, after parents "caught [student] downloading pornography involving young boys onto his Play Station device." His discharge report, which was provided to the district, noted "depression" and "flooded with sexual fantasies," and diagnosed "Mood Disorder [NOS], PTSD and paraphilia." The second hospitalization occurred in April 2011 "after [student] engaged in bestiality acts with the family's dog."

That same month, the District developed an IEP that covered the period of April 2011 through April 2012. However, the District also informed the parent that services would be terminated because the student had met the graduation requirements and would be receiving a high school diploma.

Parents rejected the diploma and claimed that the April 2011-April 2012 IEP was inappropriate because it did not address student's unique academic, social or sexual education needs. The parents further claimed that the transition plan offered to student was inadequate. Student remained hospitalized until he was released to a residential trade school that serves individuals with social and emotional disabilities to include sexual issues.

Parents requested due process, alleging that the student's IEPs were inappropriate because they failed to provide services for student's well documented social and sexual misbehavior. Parents requested that Student's diploma be revoked, and Student receive compensatory education.

Held: For the parents. The student's IEP was defective because it failed to develop a plan to address the student's sexual misbehavior and social problems. Student was withdrawn and failed to function well in new social environments. Throughout his years in school, student continued to have problems with his peers. He was also diagnosed with multiple behavioral disorders. However, the district relied on only a few tests that revealed that student had borderline social skills to conclude

student did not need services to address these issues. The Hearing Officer expressly disagreed with that approach.

The transition plan provided for in the IEP was found to be inadequate because it failed to include services to address either of the aforementioned areas of need. The Hearing Officer concluded that student required a residential facility to complete his education and his full transition into the community.

The hearing officer ordered that the diploma be revoked and that the District provide transition services to address student's social/emotional and sexually inappropriate behavior. Student's eligibility for special education services was extended for an additional year in order to accommodate the need for remedial education.

IV. Placement

A. Parental Input

Alloway Twp. Bd. of Educ. v. C.Q., 63 IDELR 12, 2014 WL 1050754 (D. N.J. Mar. 14, 2014)

Facts: Student had a communication impairment, motor issues, and was diagnosed with dyspraxia. Student had been educated in the district, however, when the student was in 4th grade, he was repeatedly observed spitting, hitting, making noises, and disrupting the learning environment for other students. The district provided him with an instructional aide, but the Student's behavior became worse. Student had additional problems with toileting, pulling down his pants, and pulling up teachers' shirts.

During that school year, Student was educated in a substantially separate environment, with only 1 other student, with the exception of lunch time and time in the resource room. Nevertheless, his behaviors increased to the point where the district believed that it could not educate him in-district, and the Team recommended an out-of-district placement for the remainder of the school year.

In February of 2012, the District advised Parents that it was considering an out of district placement and invited the Parents to look at other placements. Parents refused to look at other placements, because they did not want their objection to the change in placement to be misconstrued by visiting other placements. The District unilaterally chose a location for the Student and informed Parents of the decision on March 6, 2012.

In response, Parents requested a due process hearing. The Hearing Officer found in favor of the parents, and the District appealed.

Issue: Where the student's IEP does not include specific information about the Student's proposed placement, including the number of students in the class and the consultant's qualifications, is there a denial of FAPE?

Held: For the district, in part. First, the court noted that the IEP did explain why Student required an out-of-district placement. The IEP stated that Student's academic and behavioral needs required increased support at a placement where a school wide behavioral plan can be implemented and that could also address his academic needs.

The court noted that although the IEP did not contain specific information about the proposed placement, such as class size, the parents would have obtained that information had they participated in the Team process. Instead, Parents unilaterally determined that Student would not be educated out-of-district and neglected to participate in the placement process. When the district contacted the parents, "they refused to visit any program or refused to entertain any discussion regarding the out-of-district placement." Parents participated in the development of the IEP but refused to participate in placement discussions. The court noted "[a] school district cannot be faulted for drafting an IEP that does not answer all the parents' after-the-fact questions when the parents were given an opportunity to participate in the IEP and out-of-district placement process, but declined to actively engage in that process."

B. Identifying the Least Restrictive Environment

R.E.B. v. State of Hawaii Dept. of Educ., 114 LRP 17746, 2014 WL 1569450 (D. Haw. Apr. 16, 2014)

Facts: Prior to Student's kindergarten year, Student, who was identified due to autism, received an IEP on May 9, 2012. The IEP consisted of special education, occupational therapy, speech and language therapy, transportation, and a variety of other supplementary aids and services, program modifications, and support. In addition, the IEP provided the student with an extended school year (ESY). Specifically, the IEP stated: "[Student] will also receive specialized instruction in the general education setting for Science and Social Studies activities *as deemed appropriate* by his Special Education teacher/Care Coordinator and General Education teacher" (emphasis added). The Student's IEP team met several times to develop Student's IEP. One focus of those meetings was mainstreaming Student.

Following the May 9, 2012 IEP meeting, the parents were informed that the least restrictive environment proposed by the team was a combination of special education and general education classes. The special education classes for reading, writing, and math would allow for specially designed instruction, so that Student would meet his needs in those areas. The modified general education curriculum would provide Student with access to nondisabled peers where Student would develop and generalize his social skills and the ability to gain increased tolerance to stimuli in various settings and generalize his learned skills.

Parents submitted a request for a Due Process Hearing on June 7, 2012. The Hearing Officer found in favor of the District and the parents appealed.

Held: For the district. The delegation of discretion to teachers and coordinators to determine the student's ability to participate in academic activities with nondisabled peers "as deemed appropriate" is not inconsistent with the least restrictive environment requirements in the IDEA.

Allowing teachers and care coordinators discretion in determining the student's ability to participate in academic activities with nondisabled peers "as deemed appropriate" is not inconsistent with LRE principles. The court found that this provision allowed for Student to have access to the general education curriculum to the maximum extent possible based on Student's need and abilities as determined by the Student's teachers and coordinators. The court noted that at the student's previous school, Student had no exposure to Student's nondisabled peers, whereas here, the teachers could modify his programming to support access to the educational environment best suited for his needs. "The 'as deemed appropriate' language actually enables the special education and general education teachers to provide Student with services in the least restrictive environment. It effectively provides access for Student to the general education curriculum for science and social studies, when it is appropriate, and to the maximum extent possible, based on Student's needs and abilities."

C. Residential Placements

Little Cypress Mauriceville Consolidated Indep. Sch. Dist., 113 LRP 16321 (Tex. SEA Mar. 25, 2013)

Facts: Student was diagnosed with bi-polar disorder, Attention Deficit Hyperactivity Disorder (ADHD), Disruptive Behavior Disorder, and Asperger's syndrome. The student transferred into the current school district for the spring term of the 2011 school year.

The District originally relied on the previous district's IEP and assessed the student to be capable of functioning in the general education environment with accommodations. After a slew of disciplinary problems the District updated the IEP to include the need for social skills education. An amended February IEP included an intervention program to help the student learn social skills.

In March 2011, the student was hospitalized on two occasions for aggressive behavior. The hospital recommended a residential facility. The parents also made the District aware that they would seek a placement at a residential treatment and educational facility known as RTC. The School District noted the student needed a Behavior Intervention Plan (BIP) and a Functional Behavior Assessment (FBA). An updated IEP was created that provided for extended school year services and the implementation of an initial BIP based on classroom observation until a proper BIP

could be developed. However, the IEP did not recommend residential placement, and the IEP only had four aspirational statements for goals with no measurable objectives.

An educational evaluation of the student was conducted over the summer and a psychological evaluation was conducted in October of 2011. The educational evaluation identified reading comprehension issues, but failed to test the student for speech requirements, despite visible evidence of difficulties communicating verbally. The psychological evaluation concluded that the student did not have any emotional disorders. However, both evaluations were found to have omitted key tests and sources of data that led to flawed results. Furthermore, the FBA and BIP called for in the May 2011 and August 2011 IEPs were never conducted and/or developed.

During the fall of 2011, the student continued to display aggressive behavior and had to be hospitalized again. The student was discharged with a recommendation that the student be placed in a self-contained setting. The student re-entered the District and was briefly placed in Life Skills setting for six weeks because it was the only self-contained instruction the District offered at the school. The District also provided additional support, including one to one aide assistance and minor tweaks to the BIP. The parent objected to the placement of the child and the failure to conduct proper evaluations.

The student's behavior continued to worsen over the next three semesters. There were continued hospitalizations followed by minor adjustments to the student's IEP. The FBA was eventually completed over the summer of 2012 and the BIP was updated that fall.

Parents continued to request a residential placement. Parents eventually sought an independent educational evaluation, which revealed a series of emotional disorders and echoed the advice following numerous hospitalizations that the student needed a residential placement in order to correct the behavior problems and to learn. The mother requested the District pay for the evaluation.

Eventually, parents brought a due process complaint against the District, alleging that the District failed to provide FAPE because the student's IEPs were not individualized for the student's needs and the student was not educated in the least restrictive environment. The mother requested relief in the form of a residential placement.

Held: For the parent. The Hearing Officer found that the District denied the student FAPE. The program was not individualized to the student's needs. The Hearing Officer noted that the student's IEPs did not change despite multiple additional evaluations, hospitalizations, and continued failure to show progress. The student required a more restrictive environment that could address the student's specific needs.

General education with accommodations and a BIP were simply not appropriate given the severity of the student's disability.

In addition, the services that the District did provide were not coordinated. Only the special education teachers actually implemented the BIP and the School District failed to reach out and coordinate their actions with private providers who were also assisting the student.

The Hearing Officer held the petitioners would be entitled to compensatory relief, but since the only relief requested was residential placement that would be the sole relief provided. The Hearing Officer used the test from the Fifth Circuit Court of Appeals to determine whether a residential placement was appropriate. The test requires that the residential placement be essential for the student to receive an educational benefit and the placement be primarily oriented towards the student's educational needs. The Hearing Officer found that the placement was necessitated by the student's extreme emotional and social needs and the program the parents chose was primarily oriented at providing the student with an education. The District was ordered to convene a meeting to determine an appropriate residential placement for the student. The placement was ordered for a maximum of one year or when the residential facility determines the student is prepared to reintegrate into the community.

Munir v. Pottsville Area Sch. Dist., 723 F.3d 423, 61 IDELR 152, (3rd Cir. 2013)

Facts: In 2005, when student was in middle school, he was hospitalized for making suicidal threats. Once he returned to school, the District conducted an evaluation to determine if Student was eligible for services under the IDEA. The Team concluded Student was not eligible because his emotional problems were not interfering with his ability to learn.

In April 2008, Student overdosed on prescription drugs. There were two additional major incidents where suicide was threatened during the summer of 2008. In August of 2008, Student's parents decided to enroll him in a private boarding school. However, Student returned to his public high school shortly after the school year began, because he notified his parents that he had thoughts of harming himself almost immediately upon beginning boarding school.

In September 2008, Student was hospitalized for suicidal ideation once again. Parents requested an IEP and the District responded by asking the parents if they could evaluate Student. Student was hospitalized again in November 2008. The district created a Section 504 plan, but did not develop an IEP. Student was hospitalized a final time in January. Following that incident, Student's parents sent him to an out-of-state, residential special education school for the rest of the school year.

The private school evaluated student in February 2009 and recommended an IEP upon his return to his neighborhood public school. The district reviewed the evaluation and developed an IEP in May 2009. The IEP included almost all of the private school's recommendation with the exception of smaller class sizes and counseling services similar to the type provided by the private school. Parents rejected the IEP because it omitted those recommendations and unilaterally placed student at another residential school that offered smaller classes and counseling services.

In August 2009, parents filed a due process complaint alleging the School District failed to conduct timely evaluations and failed to provide IDEA services. They requested compensatory education for the period between Fall 2007 and December 2008. They also requested reimbursement for the costs associated with both private schools. The Hearing Officer found in favor of the district and parents appealed.

Held: For the district. In order for the School District to be financially liable for residential services, the need for the services must be an educational requirement. The parents' decision to send Student to the first residential school was primarily motivated by a desire to address his mental health crisis not correct educational deficiencies. "School districts are responsible for the costs of a disabled child's placement in a residential program when that placement is 'necessary to provide special education and related services.' Residential placement may be necessary when the disabled child needs a highly structured environment in order to obtain any kind of educational benefit.

School districts are not, however, financially responsible for the placement of students who need twenty-four-hour supervision for medical, social, or emotional reasons, and receive only an incidental educational benefit from that placement. . . . In determining whether schools should be held financially responsible for the costs of residential placement, courts must consider whether the service is necessary to ensure that the child receives some educational benefit, and they must assess the strength of the link between that service and the child's educational needs."

In this case, the first residential program selected by the parents had an educational component, however, student did not require a residential placement to address his educational needs, but instead required the placement to address his mental health needs. As a result, Student parents were not entitled to reimbursement for the expenses associated with the private placement.

Nor were the parents entitled to reimbursement for the costs associated with their second residential placement. The services set forth in the IEP proposed by the District were appropriate and offered the Student a FAPE. The IEP utilized the information from the evaluation and incorporated almost all of the evaluator's recommendations. Although a smaller class size may "contribute to [Student's] ability to learn more easily," it was "not necessary to ensure that [Student] received meaningful educational benefits.

As a result, parents were not entitled to reimbursement for educational expenses related to sending him to the second private school.

Fort Bend Indep. Sch. Dist., 61 IDELR 58, 113 LRP 16323 (Tex. SEA Apr. 3, 2013)

Facts: Student was diagnosed with ADHD and depression and was eligible under the IDEA due to OHI and an emotional disturbance.

In August 2012, prior to the 2012-2013 school year, the student was evaluated by the School District's psychologist as part of her triennial reevaluation. The results of the evaluation showed evidence of depression and other emotional disorders, as well as difficulty controlling her mood. The evaluation also indicated that "Student focuses a great deal on trying to remain calm that interferes with student's daily functioning and task completion." The student's parents were aware of these problems, but they had not previously made this knowledge available to the School District.

While at school, student did not show "overt signs of depression or sadness. . . . Student's affect was generally happy and friendly to teachers and peers. Student was often thought of as a 'leader' by more than one teacher. However, Student had a hopelessness that things would get better, and thought that it would be better if Student just gave up or quit. 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." Student's teachers believed that she was "a bright, academically capable and popular student who is lazy and under motivated."

Parents requested that the School District pay for the student to be placed in a residential environment to deal with her emotional problems. The School District refused, but the School District did create a Behavior Intervention Plan (BIP) and offered the student emotional support and special education services to deal with the emotional problem.

In October 2012, the parents unilaterally placed the student in a residential facility that also offered 9 hours of educational instruction five days a week. In a meeting to discuss the student's future education, the School District refused to fund the residential placement based on the belief that the School District could treat the psychological needs of the student with counseling and therapy for one hour a week as was recommended by the evaluation.

Parents requested due process, alleging that the IEP was not appropriate and that the student required a residential placement. Parents requested reimbursement for

the costs associated with the placement, as well as placement in the residential setting going forward.

Held: For the parent. The Hearing Officer noted that a residential placement is required when it is necessary for the child to receive an educational benefit and the placement is primarily oriented towards providing such benefit. The Hearing Officer held the placement was essential in this case for the student to receive an educational benefit because the public school setting “with conventional and limited psychological counseling simply allows Student to remain locked in a ‘prison’ of [her] own mind.” Furthermore, the primary purpose of the placement was to deal with the emotional issues so the student would receive an educational benefit.

However, since the School District was not provided an opportunity to address the full extent of the student’s emotional issues after they were first brought to the School District’s attention in August 2012, the School District was not liable for the fall semester of the residential placement.

D. Predetermination

S.P. v. Scottsdale Unified Sch. Dist. No. 48, 62 IDELR 86, 2013 WL 5655527 (D. Ariz. Oct. 17, 2013).

Facts: Student was eight years old and had a learning disability and speech and language impairment making her eligible for special education services. On May 11, 2009, Student’s IEP team met to discuss Student’s IEP for the next year. At the time, Parents requested speech and psychoeducational evaluations from independent experts. Therefore, the IEP team formulated a plan to the extent that the team could, but agreed to wait for the new evaluations prior to completing the IEP.

The Team met to discuss the results of the evaluations on August 10, 2009, and to discuss placement for the next school year. The district discussed several possible programs within the district that were consistent with the recommendations from the evaluations. The district arranged for the parents to visit the programs and the parents did such.

At some point between August 10 and August 20, the date of the next team meeting, district staff met to discuss placement options. The Team met again on August 20; the meeting lasted for 2 hours. At the meeting, Parents expressed their concerns about the proposed placements and expressed interest in enrolling the Student in a private school. At the end of the meeting, the District indicated that the placement would be at one of its proposed placements, not the Parent’s private school choice.

The next day, via a letter, the District reiterated where the Student would be placed and explained how the placement would meet the Student's needs based on the Student's recommendations and evaluations. That same day the Parents informed the District that they would be enrolling the Student at the Private School.

On August, 18, 2011, the Parents filed a due process complaint alleging predetermination of placement.

Held: For the district. The IDEA permits districts to engage in preparatory activities to develop a proposal or a response to a parent proposal that will be discussed in a later IEP meeting.

The court found, despite the fact that there was an email prior to the August 20th meeting stating the Student's placement had been "approved" at one of the District's proposed placements, that the School did not predetermine the Student's placement. The email was in reference to the fact that there was space available at the proposed school and the Student would be accepted if the team proposed that placement. The IEP team discussed all of the possible placements for two hours at the August 20th meeting, and parents had ample opportunity to participate in the meeting.

V. FAPE

A. Failure to Evaluate

Rodriguez v. Indep. Sch. Dist. of Boise City, 63 IDELR 36, 2014 WL 1317697 (D. Idaho Mar. 28, 2014)

Facts: Student is 15 and has been diagnosed with autism spectrum disorder and anxiety disorder. Under Student's December 2010 IEP, he was to attend Hillside, the District's junior high school for autistic students. Hillside was approximately an hour away from Student's home. In August of 2011, Student began to attend Hillside.

Student's teacher described student's behavior as severe from his first day of school. Student engaged in inappropriate and aggressive behaviors from September to mid-October 2011, including stabbing his teacher's arm with a pencil. On September 22, 2011, the Student was sent home early because of his aggressive behavior towards other students and staff. On October 10th, student hit an aide and it left a mark. On October 12th, student was sent home from school after he hit his teacher in the face, which caused her face to swell and left a mark in the shape of student's hand. During that same period, Parents alleged that Student's teacher stabbed student with a pencil, locked student in a quiet room, and deprived student of food and water.

On October 14, 2011, an incident occurred on the bus. Other students saw student stand up on the bus, while the bus was moving. In response the bus driver told the student to sit down and pushed the student down into his seat with his foot. The

incident was not reported by the bus driver. However, the bus driver and bus monitor did indicate that the student hit several buttons on the dashboard when exiting the bus.

On October 17th, parent took student to the hospital. The hospital record stated that the student complained of bilateral knee pain that parent said the injury was a result of bus driver's kick. The doctor referred parent to a social worker who suggested that the parent talk to the police about a possible battery. The October 17, 2011 police report indicated that the parent wished to press charges against the bus driver and the student's teacher.

On October 17, 2011, the District contacted parents to set up a meeting to review student's behavioral intervention program and IEP. The IEP team held a meeting on October 20th, without parents. The team reviewed student's IEP and BIP, and determined that Hillside would continue to be an appropriate place for the Student. On October 26th, parent wrote to the district and requested an updated functional behavioral assessment (FBA) and an IEP. In that same letter, parent expressed that the student did not want to return to school, because student had heightened anxiety as a result of the incidents at school and on the bus.

Thereafter, student's IEP team met on five separate occasions between November 9, 2011 and December 13, 2011. At the first meeting, parents raised the issue of home bound services, but it was not discussed at that meeting, because the topic was not on the agenda. At the following meeting, parents brought up homebound services again, but the District rejected the idea and told the parents that the student must return to Hillside immediately. Parents received a written prior notice rejecting their request for home bound services on November 18th. The District explained that home bound services would not be provided, because the Student had not submitted any documentation to indicate that illness or accident necessitated Student's absence from school for more than ten days. Ultimately, the District proposed to update the student's IEP, FBA and BIP. On December 14th, the Parent rejected the updated IEP, FBA, and BIP, and objected to the District's refusal to provide homebound services.

In response to the written prior notice, student's doctor sent a note to the District indicating that homebound services should be provided because of the student's fear of returning to Hillside. In reply, the District requested further information regarding how the doctor reached this conclusion.

By February 2012, the District had received 3 other recommendations from doctors all indicating that the student should receive homebound services and be gradually transitioned back to school. At a February 2, 2012 IEP team meeting, the Parents restated their position that student could not return to Hillside based on his disability and that the District had not adequately assessed student's need to gradually return back to school. In response, the District stated the student could return to school at any time.

After this meeting, the District agreed to implement the student's IEP and BIP at another school. On February 10th, the Parents and the rest of the IEP team met and discussed the selection of a different school and gradually transitioning the student back to school.

On February 21, 2012 parents requested a due process hearing, alleging that the student's IEP was inappropriate and requesting that the district place the student in a school near his home, and that the District provide a compensatory education to make up for the time that Student did not attend school.

Held: For the parent in part and the district in part. The court found Student's behavioral problems were properly addressed by the FBA, BIP, and IEP, even when his behaviors became more aggressive. The court reasoned that a number of factors supported by the record could have been the cause of Student's increased behavioral problems, which included medication changes and a new environment. Therefore, the court held that the student was not denied a FAPE, because the services in the student's IEP and BIP were reasonably calculated to provide educational benefit through October 14th 2011. The court also found that there was no evidence that the alleged abuse by the teacher had occurred, and that the student (who had reported the incident to his parents) was an unreliable reporter.

After Student's absence from school, beginning on October 17, 2011, the court held that the District did not provide the student with a meaningful opportunity to receive educational benefit. The court found that the district repeatedly put the burden on the Parents to justify their request for homebound services, in spite of numerous recommendations for homebound services. The court noted that the District had no basis to conclude that the student could return to school at any time. The court concluded that the district denied the student a FAPE by "summarily rejecting his Parents' request for homebound services without adequately evaluating [student's] need for an alternative placement pending completion of an appropriate reintegration plan."

The court went on to state that the district's position that the student could return to Hillside at any point, "ignores . . . Parents' legitimate concerns about a school environment and bus ride that made their son extremely anxious. . . . Such a dismissive attitude undermines the Parents' essential role in the development of their child's educational program." Although the student was "not a reliable reporter of objective facts, the record nevertheless demonstrate[d] that [student] perceived he was abused in [the] classroom and on the bus. Because [student] was disciplined at Hillside and on the bus, there is evidence that [student's] perceptions were based on real events, not delusional fabrications. According to his Parents, [student's] perceptions rendered him too anxious to return to Hillside, a reaction entirely consistent with [student's] long history of anxiety towards new environments." The District had no basis for concluding

that the student could return to school at any time, and it “was not the Parents’ responsibility to prove [student’s] anxiety was more severe than usual; rather, it was [the district’s] duty to evaluate [student] in light of the Parent’s legitimate concerns and [his doctor’s] recommendations.” The District failed to do such and forced parents to choose between “a potentially traumatizing” return to Hillside or no services at all. Student was awarded compensatory education services.

B. Bullying as a Denial of FAPE

Recently, the Office of Special Education Programs (OSEP) advised districts not to immediately change a student’s placement as a result of bullying. See Dear Colleague Letter, 61 IDELR 263 (OSEP Aug. 20, 2013). OSEP opined that a district should only adjust a student’s placement if the bullying prevents the child from receiving a FAPE. OSEP went on to opine that placing the child in a more restrictive environment without exhausting all other mechanism of responding to bullying might result in a denial of FAPE.

In re: Student with a Disability, 113 LRP 26976 (Ky. SEA, June 11, 2013)

Facts: Student was identified under the IDEA as having autism, and had been diagnosed with Asperger’s syndrome, Tourette’s syndrome, Attention Deficit Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD), depression, and anxiety.

During the school year, the student was allegedly subjected to repeated physical assaults, such as being pushed into lockers and spat on, and bullying. The student’s peers created a game that involved trying to activate the facial tics associated with his Tourette’s syndrome. The student also had a journal stolen; he used the journal to express his frustrations instead of acting out.

During the fall of 2011, parent made several bullying complaints. However, there were frequent communication barriers to reporting the bullying, and the school, for the most part, was unable to prevent many of the bullying behaviors. The student’s case worker was unable to identify many of the alleged incidents.

As a result of these incidents, the student became highly anxious and resorted to self-abuse at home, and talked about suicide. On October 6, 2011, the student’s parents requested the student be “homebound.” The student’s psychologist testified that the student’s experiences in school were causing suicidal thoughts and exacerbating his medical conditions.

On advice of the school authorities and the student’s doctor, the student remained homebound for the spring of 2012. However, the School District only

provided a few hours of instruction and delayed for several months in providing counseling and social skills services.

An annual meeting and IEP were conducted in preparation for the student's return to public school for the 2012-13 school year. The revised IEP included a full time para-educator to look after the child that would be phased out as required, additional time to move between classes so the child was not jostled during the change in classes, and additional special education services.

Instead of returning the child to public school, the parents decided to send the child to a private military boarding school. The highly regimented environment seemed to suit the child. However, the school did not offer any special education support services.

On July 30, 2012, the parents of the student brought a complaint against the School District for denial of FAPE. Specifically, the parents alleged failure to protect the student from bullying and assault, failure to place the student in the least restrictive environment, failure to properly implement the student's IEP, failure to provide the number of homebound hours of instruction necessary, and failure to provide the psychological services required under the IEP. The hearing was conducted in February and March 2013.

Held: For the parents in part, and the district in part. The student was denied FAPE during the fall term of the 2011-2012 school year. The school failed to address the bullying problem in the school. This led to a series of incidents that ultimately prevented the student from learning in public school, the least restrictive environment. Once the issue became apparent, the School District also failed to provide the full time support staff to correct the problem or provide an alternative public school placement with full time support staff. This led to the child receiving in-home services, which was not the least restrictive environment for the student. That constituted a denial of FAPE.

Additionally, the student was denied FAPE during the spring term of the 2011-2012 school year. Once homebound, the number of hours of instruction were insufficient. The student did not receive proper math instruction due to a failure to provide the appropriate text book. The student was not provided the minimum of two hours of social skills instruction while homebound and what instruction he was provided was inadequate because the student had no opportunity to practice the skills being taught. Finally, the School District failed to adequately monitor the implementation of the IEP.

However, the student was not entitled to compensatory education services. Based on the student's continued A/B performance and the fact he was already ahead of his peers in math and other subjects there was insufficient evidence to indicate the student suffered an academic loss due to the failure to provide services.

Similarly, the parents were not entitled to tuition reimbursement. The private school the student was sent to did not offer special education services and was not a proper placement. The IEP and corresponding Behavior Intervention Plan (BIP) that was developed for the 2012-2013 school year was adequate. The student could have attended his public high school during the 2012-2013 school year.

Los Feliz Charter School for the Arts, 113 LRP 52559 (Office of Civil Rights, Aug. 30 2013)

Facts: Los Feliz Charter School for the Arts is a charter elementary school in California. From December 2011 until June 2012, a student with autism who attended the school was repeatedly harassed and bullied. According to the reports, the harassment included sexual innuendoes and other inappropriate sexually suggestive behavior. The student's mother contacted the principal several times about the on-going bullying. Several staff members also reported seeing the bullying occur or heard about it second hand from other students. Despite these warnings, no systemic corrective actions were taken beyond the individual staff members responses to specific events. As the bullying continued, the student began to develop anxiety and headaches and the mother ultimately decided to remove him from school.

The mother, after not receiving any follow-up from the school, contacted the Office of Civil Rights (OCR), and filed a complaint alleging that the school failed to respond appropriately to the notification of harassment for reasons of disability and sex.

Finding: OCR concluded that the school had failed to appropriately address the allegation of harassment. Multiple staff members were aware of an on-going pattern of bullying and harassment, and "targeting" as it was described by the staff, of the student by a particular classmate aggressor. However, the staff failed to take any action beyond immediate corrective action to resolve a specific incident. In addition, the staff heard second hand of other incidents that were not responded to.

According to statements from the staff and the mother both the assistant principals and the principal tended to dismiss the incidents as "play-ground stuff" with no systemic follow up.

OCR also found the reporting procedures being used to be inadequate. The school staff was unaware of any of the specific reporting procedures that dealt with harassment on the basis of disability or sex. Instead, the staff was resolving the conflicts using the school local discipline protocols. Furthermore, although there was a complaint box on the school's website there was no specific method of lodging complaints for harassment based on disability or sex. Nor was there any mention of any complaint procedures found in the parent's handbook the school distributed. The district entered into a resolution agreement with OCR, which included the following:

1. Sending a letter to all students, parents, and staff explaining the school will not tolerate incidents of bullying and harassment due to disability or sex.
2. Providing student with compensatory services, including one week of summer programming for teens with autism, fifteen one hour counseling sessions with a licensed psychologist chosen by the complainant provided the psychologist's rate does not exceed \$175.00 per hour, and ten one hour sessions of academic tutoring in English Language Arts.
3. Drafting and distributing written guidance to all staff pertaining to responding to complaints of harassment.
4. Training all staff on identifying and responding to harassment.
5. Revising its grievance procedures.

South Madison Community Sch. Corp., 114 LRP 4856 (Ind. SEA Nov. 25, 2013).

Facts: Student, who was identified under the IDEA, repeatedly reported to School that he was called names, hit, slapped, pushed, threatened, and intimidated. Teachers responded with a "toughen up" approach. District staff did not file incident reports in response to the bullying complaints, even though there was a policy requiring such reports. During one incident, the student informed the bus driver that he was being bullied; the driver told the student to tell the Principal and watched as the student talked with Principal. However, no report was filed for this incident.

In another incident, the Principal refused to believe the student, because the accused was from a "good family." When the accused admitted to slapping the student, the Principal replied that the student must have "started it." No incident report was filed.

As a result of these incidents, student began having suicidal thoughts and a fear of returning to school. Student began seeing an outside therapist. A doctor who saw the student, reported the student was hitting himself in the head, because student believed that it would hurt less when other students hit him at school. Parent contacted the school and the District to investigate the incidents, but the District declined to investigate. When parent received no response from the District, student was pulled out of school for four days until student could be transferred to another school. Parent requested due process, claiming that during Student's four days out of school, Student was denied a FAPE.

Held: For the parent. When a student with a disability is bullied to the point that it exacerbates his disability, he is prevented from receiving a meaningful educational benefit and is denied a FAPE.

The hearing officer found that the District knew or should have known bullying incidents were occurring, and that the bullying created an environment that had a substantially detrimental effect on the Student's mental health. As a result of the District's unresponsiveness, Student missed four days of school because he feared being bullied and did not receive a FAPE during that time.

C. Failure to Provide Services

Gresham-Barlow Sch. Dist., 63 IDELR 55 (Or. SEA March 3, 2014)

Facts: Student was identified under the IDEA due to a specific learning disability, communication disorder, and an other health impairment. Prior to the school year, student was diagnosed with a medical condition that required him to have open heart surgery. Following Doctor's orders, parent requested home tutoring from the school during Student's period of recovery.

The district provided the student with a tutor within six days of the parent's first request. Parent chose not to work with the first tutor, because the tutor was a substitute teacher and parent was concerned that the tutor's other responsibilities would interfere with student's tutoring. The district provided a second tutor and parent chose not to work with the second tutor due to concerns about potential scheduling conflicts. The District located a third tutor, who was acceptable to the Parent. However, the third tutor needed surgery so he was unable to continue tutoring while recovering. Once again, Parent requested a tutor, but by the time the District was able to find another individual, the third tutor had recovered.

During the Student's period of convalesce, parent informed school that due to student's extreme fatigue, tutoring would be limited to one hour a day, for a total of five hours a week. At the time of the due process hearing, the District's log stated the Student received 7.5 hours of tutoring in October, 6.5 hours in December, and 4.5 hours in January before the parent removed the student from the District.

Parents filed a complaint, alleging that the District denied student FAPE by failing to provide student a suitable tutor.

Held: For the district. Parent refused the District's offer of a FAPE by rejecting the tutors obtained by the District and limiting the amount of time that student could be tutored. The administrative officer found that the Student was afforded the basic floor of educational opportunity, and made progress during the time that he was tutored.

VI. Discipline

Roseville Joint Union High Sch. Dist., 113 LPR 44610 (Ca. SEA Oct. 4, 2013).

Facts: Student was identified under the IDEA due to being partially hard of hearing. The student also had a relatively lengthy disciplinary record, but there was no indication that student required services due to an emotional disturbance. Prior to August 2012, the Student had also been identified as OHI due to ADHD, however, that identification was removed after an evaluation.

In May 2013, student, while using his girlfriend's phone, discovered there were texts between his girlfriend and a dance instructor that the student found disturbing. The student confronted his girlfriend in the hallway and their conversation escalated, requiring school staff to intervene. Over a prolonged period, multiple members of the school staff attempted to separate the two students and get the student to calm down. The student continued to attempt to pursue his girlfriend. At one point, the student struck one of the school's staff that was attempting to block the student from approaching the other female student. Following this incident, the student was sent home for the day and suspended pending further decisions by the administration.

While at home, the student sent out a text to a friend stating that he was going to overdose on pills. The student was later hospitalized for the suicidal ideation. While hospitalized, the student was suspended. He was also diagnosed with bipolar disorder. The District was informed of this diagnosis when a school administrator visited the student in the hospital. The parents also informed the School District about the student's bi-polar disorder diagnosis at the manifestation determination meeting.

At the manifestation meeting, the district determined that the incident was not a manifestation of the student's disability. In making that determination, the Team did not consider the diagnosis of bi-polar disorder. As a result, the District decided to expel the student. The student's parent objected to these decisions.

The parent filed a due process hearing request claiming that the District violated the IDEA when they failed to consider the student's new diagnosis of bi-polar disorder. The parent requested the child be reinstated in school.

Held: For the parents. As part of the manifestation determination, the Team is required to consider all of the available information not just the disorder listed on the current IEP. The School District was required to examine the student's past ADHD diagnosis, as well as the student's recent bi-polar disorder diagnosis.

The Hearing Officer found that based on the evidence, the student's actions were not attributable to his ADHD. However, the District did fail to assess the diagnosis of bi-polar disorder during the manifestation meeting. The District was required to reinstate the student and convene a manifestation meeting to assess if the student's actions were manifestations of the student's bi-polar disorder.

VII. Section 504

A. Evaluations

Dover-Sherborn Public Schools, 113 LPR 27872 (OCR (Boston) Apr. 15, 2013)

Facts: The student qualified under Section 504 due to ADHD. In May 2011, student's mother reported to the district that she felt the student's failing health and concentration problems were related to Lyme disease. Student was subsequently diagnosed with Lyme disease in December 2011.

In January 2012, there was a meeting held to determine if the student was eligible for services under the IDEA. The District did not attempt to get the Lyme Disease diagnosis and subsequently did not consider the diagnosis when the Team determined that the student did not qualify for services under the IDEA.

Around the same time, the student stopped attending school, due to her Lyme Disease. At a Section 504 Team meeting, parents were only allowed fifteen minutes to provide input, despite the fact that much of the student's education was occurring in her home. The District provided one hour of tutoring services in the major subject areas per week.

Over the course of the next several months, as the District received information about the student's condition, one district staff member would update the student's Section 504 plan. Over the summer, the parents requested updated evaluations, which the district declined to conduct until October.

After the October evaluation, the student was deemed to be eligible for special education services under the IDEA. Parents disagreed with the proposed IEP because it did not include reference to the student's Lyme Disease.

Parents filed a complaint with OCR, alleging that the District failed to develop a placement to meet the student's needs, failed to evaluate the possibility of Lyme disease, limited the parents participation in meetings and excluded the parents from placement decisions, denied the student an opportunity to take part in after school activities, and failed to provide information on the accommodation plan or administrative remedies to the parents of the student.

Finding: For the parents. OCR found that the District had denied the student FAPE. The District was required to evaluate the student for Lyme disease once they

were informed Lyme disease could be a cause of the academic problems. The failure to take into account the student's medical condition was a denial of FAPE. The subsequent changes to the accommodation plan, made on an ad-hoc basis while the student was not in school, were found to be an additional denial of FAPE. As a result, the District was required to revise its Section 504 policies and procedures, conduct staff training, and convene a meeting to evaluate the student to determine whether her Lyme Disease constitutes a disability under the IDEA and Section 504, and to determine if the failure to provide services for that disorder requires compensatory education services.

B. Failure to Implement

San Diego (CA) Unified Sch. Dist., 113 LRP 1533 (OCR Jan. 31, 2013)

Facts: Student "has visited multiple pediatricians and physicians for a constellation of severe and evolving medical complaints since a young age." When she entered 9th grade, her "health deteriorated significantly," and she missed significant amounts of class, especially morning classes.

In November 2008, parents requested an evaluation under the IDEA. Student was assessed and the team determined that she did not qualify for special education services. However, she was referred to the Section 504 Team.

Ten months later, in February 2010, the Section 504 plan was completed. The plan included accommodations, aids, and services, such as: extra time on assignments and tests; a second set of books at home; alternate assignments; exemption from physical education class and fitness tests; and a permanent pass to go to the nurse's office when she felt ill. Despite the plan, the student's health continued to prevent her from attending school on a regular basis.

From December 2010 through June 2011, the "school lobbied the [parent] to look into alternative settings for the Student since, as described by a School administrator, the School is a 'comprehensive high school' and other District schools 'typically deal with more challenged, health-related anomalies. School staff communicated to the [parent] and Student in these meetings that they were not equipped to make any more modifications to the scheduling or course-work for the Student, and that she did not fit in at the School because of her disabilities." At one point, student was enrolled in an on-line high school, but this did not work out because the student had increasing difficulties with reading, writing, and processing.

Parent obtained several independent evaluations, and requested that the district incorporate the recommendations into the Section 504 plan. The parent and district had several meetings, many of which were contentious, and the additional accommodations were not included in the plan. At the end of the 2010-2011 school year, the student's honors history teacher presented a letter to the team stating that he had chosen to not

implement alternate assessments for the rest of the school year, despite the fact that it was a required accommodation in the student's Section 504 plan. The district did not instruct the teacher that he was required to comply with the Section 504 accommodations.

Throughout the school year, district staff observed that when the student was in school, she was "excessively fatigued and tearful." She frequently cried when she attended Section 504 meetings, and the School Psychologist recommended considering mental health services for the Student. Staff observed that the student spent "huge efforts" when reading, writing, and completing work, and her parents provided her with substantial tutorial support.

Parent filed a complaint alleging that the district violated Section 504 by (among other things) failing to implement the Student's 504 plan.

Finding: For the parent. The Section 504 plan that was developed by the Team "did little to address the Student's clearly evident attendance problems. The District and School's position has been to address the Student's disabilities and educational needs only when she was able to arrive at School. . . . The District was largely inflexible, and refused to consider such options as at-home tutoring or other proactive efforts that would have enabled her to keep up with her assignments at home when necessary, but attend school when well enough. Instead, the onus was placed on the Student's parents to provide tutors and other assistance to the Student at home." When the student continued to struggle with attendance, the District was obligated to address the "apparent barriers" to education.

OCR also faulted the district for its "unwillingness to address her impaired reading, writing, attention, processing, and emotional health. . . . In multiple regards, it was readily apparent that the Student's academic needs were not being effectively addressed; among other things that due to her serious medical conditions she was not regularly attending school and her parents reported singularly persistent difficulties with writing." OCR found that the district should have taken steps to address these additional issues.

The District agreed to implement a corrective action plan, pursuant to which the district would train staff on Section 504, in particular as to how a "health condition that adversely affects a student's school attendance may constitute a disability; the responsibility to conduct additional evaluations where a student with a disability does not attend school regularly; what services, modifications, or accommodations should be considered to meet the needs of a student with a disability whose attendance is adversely affected; and the scope of appropriate inquiries for medical documentation," and to reimburse the parent for certain educationally-related expenses.

VIII. The Americans with Disabilities Act

As the following case illustrates, a district that develops an appropriate IEP for a student with a hearing impairment could still find itself defending a Title II claim based on the accommodations it offers to help the student participate in classroom activities.

K.M. v. Tustin Unified Sch. Dist., 61 IDELR 182, 725 F.3d 1088 (9th Cir. 2013), cert. denied, 113 LRP 9688 (U.S. March 3, 2014)

Facts: Two high school students with hearing impairments requested that their school districts provide them with Communication Access Realtime Translation (CART) in the classroom. CART is a word-for-word transcription service, in which a trained stenographer provides real-time captioning that appears on a computer monitor. Both school districts denied the requests, but offered other accommodations.

Both parents requested due process. At the hearings, the students' teachers testified that they were able to participate in classroom discussion comparably to other students; the students' disagreed, indicating that they "could only follow along in the classroom with intense concentration, leaving her exhausted at the end of each day." Parents appealed the decisions to the district court.

In the district court proceedings, the students argued that the denial of CART services violated the IDEA and Title II of the ADA. In each case, the district court granted summary judgment for the school district, holding that the districts had complied with the IDEA and that the ADA claims were barred by their failure of the IDEA claim.

Both students appealed to the Ninth Circuit. They did not contest the conclusion that the district complied with the IDEA, but argued that Title II imposes effective communication obligations on public schools that are independent of, and not coextensive with, obligations under the IDEA.

Issue: Whether a school district's compliance with its obligations to a deaf or hard-of-hearing child under the IDEA also necessarily establishes compliance with its effective communication obligations to that child under Title II of the ADA.

Holding: For the parent. A district's compliance with the IDEA does not necessarily establish compliance with its "effective communication" obligations under Title II. The 9th Circuit rejected the District Courts' reasoning that a district's development of an appropriate IEP forecloses all ADA claims. While the IDEA requires districts to provide a "basic floor of opportunity" to students with disabilities, Title II requires districts to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others.

Title II of the IDEA includes an "effective communications regulation," which contains two requirements: 1) "public entities must 'take appropriate steps to ensure

that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others,” and “public entities must ‘furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.’” See 28 CFR 35.160. Auxiliary aids and services include “real-time computer-aided transcription services” and “videotext displays.” Finally, in “determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.” However, public entities are not required to “take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity, or in undue financial and administrative burdens.”

Furthermore, the 9th Circuit observed, Title II requires districts to provide appropriate auxiliary aids and services, including "real-time computer-aided transcription services," when necessary to provide individuals with disabilities an equal opportunity to participate in district programs and activities. The court noted that Title II's effective communication requirement differed significantly from the IDEA's FAPE requirement. "The result is that in some situations, but not others, [districts] may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA." Because the court could not predict how the IDEA would intersect with Title II in any particular case, it rejected the notion that the success of a student's IDEA claim dictates the success of her Title II claim. Instead, the 9th Circuit advised courts to consider the relevant statutory and regulatory framework when deciding claims under the IDEA and Title II. The court thus remanded the cases of two students with hearing impairments to their respective District Courts for further proceedings on whether each student's district complied with Title II's effective communication requirement.

Table of Contents

I. Overview	1
II. Child Find, Referral and Evaluations	1
III. IEPs.....	7
A. Participation in Team Meetings	7
B. IEP Development	8
C. Transition Plans and Services	9
IV. Placement	11
A. Parental Input.....	11
B. Identifying the Least Restrictive Environment.....	12
C. Residential Placements	13
D. Predetermination	18
V. FAPE.....	19
A. Failure to Evaluate	19
B. Bullying as a Denial of FAPE	22
C. Failure to Provide Services.....	26
VI. Discipline	26
VII. Section 504	28
A. Evaluations.....	28
B. Failure to Implement.....	29
VIII. The Americans with Disabilities Act.....	30