What's New? A Review of Recent Rulings

Presented to the New Hampshire Association of Special Education Administrators

April 11, 2014

Wadleigh, Starr & Peters, P.L.L.C.
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A Word of Caution

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

I. Overview

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

II. Child Find

Greenwich Board of Education, 113 LRP 15789 (Ct. SEA Jan. 3, 2013).

Facts: When the student was in first grade, she experienced difficulties in learning to read. Her mother noticed the difficulties and discussed them with the student's teacher. The student had difficulty recognizing words and letter sounds. Her teacher referred her to the "student assistance team/response to intervention team." On the referral form, the teacher noted that she was wondering why student's "rate of progress [was] so slow." The teacher listed lack of retention of letter sounds, sight words and spelling.

Following the referral, student began meeting with a reading specialist, who provided the student with scientific, research-based interventions three times per week. The reading specialist did not believe that interventions were needed because the student's reading level, according to school records, was on grade level at the beginning of the school year.

In January, parents informed the district that they had hired a tutor, who began working with the student in December. On January 30, 2012, the school principal wrote to the parents, indicating that the student's "word practice in school would be intensified because the Student was showing 'inconsistency in her ability to recognize sight words and high frequency words.'"

Throughout the year, parents continued to express concerns about student's lack of progress in reading to the classroom teacher, reading specialist, and school principal. In the spring, the parents hired an outside evaluator to conduct an evaluation. The evaluator met with the student 6 times, and concluded that the student suffered from a reading disorder that adversely affects her ability to learn. The evaluator found that the student's reading rate, accuracy and fluency on the Gray Oral Reading Test (GORT-V) were well below average. Results of the other assessments were also below average, and the evaluator noted that the student became highly agitated when asked to read, "a negative emotional response that is atypical of a student making steady progress."

On June 12, 2012, parents submitted a formal referral for special education services, and a request that a referral meeting be scheduled. The referral meeting took

place on June 19, 2012. At that meeting, the parents presented their report from the independent evaluator, who also attended the meeting.

Reading assessments conducted by the school indicated that the student entered first grade on grade level, but completed the year below grade level, despite the scientific, researched-based interventions, the private tutoring, and supplemental instruction from her first grade teacher. The student did make progress on her reading, moving from a "D" (where on grade level at the start of first grade was "D," "E," or "F") to an "H" (where grade level is "I," "J," or "K"). At the meeting, her teacher also reported that the student had learned a list of 100 site words, exceeding the benchmark of 88 words.

At the meeting, the Team discussed the parents' evaluation but did not propose to conduct any additional evaluations. The Team concluded that the Student was not eligible for special education and related services, based primarily on the fact that the student had progressed to reading level "H" over the course of the year, the number of sight words that she had learned, and data from the reading specialist.

On June 22, 2012, parents had student tested by a private school "that specializes in instructing students with language-based learning disabilities." Student performed below grade level in reading, and the school concluded that the student had a language-based learning disability.

On July 30, parents filed a request for due process, seeking reimbursement for the costs associated with the unilateral placement at the private school. On August 13, parents wrote to the district, indicating that they were unilaterally placing student.

Held: For the parents. First, the Hearing Officer found that the District had sufficient evidence to suspect that the student had a learning disability, including the referral for interventions from the student's teacher. "Although a [district's] refusal to evaluate a student may be reasonable where a parent's referral is baseless, this is not such a case." The Team had sufficient information to suspect that the student may have a disability and the District should have conducted an evaluation. The Hearing Officer noted that the data collected by the reading specialist did not constitute an evaluation, and the student's overall lack of progress in reading, coupled with the evaluations obtained by the parents, established that she had a specific learning disability in the area of reading.

The Hearing Officer also found that the District's failure to identify the student resulted in a denial of a free, appropriate public education for the 2012-2013 school year. Parents demonstrated that the private school, which specializes in instructing students with language-based learning disabilities, provided an appropriate education for the student. The District was ordered to reimburse the parents for the costs associated with the placement, as well as the costs associated with the evaluations that they obtained.

III. Eligibility: Emotional Disturbance

G.H. v. Great Valley Sch. Dist., 61 IDELR 63, 2013 WL 2156011 (E.D. Pa. May 20, 2013).

Facts: Student was adopted from Cambodia when she was an infant. She attended kindergarten and first grade at a private school. When she was in first grade, parents sought a comprehensive evaluation from the district for academic concerns in language arts, speech and language, attention issues, and social-emotional issues. The district conducted assessments, interviewed parents and teachers, and issued an initial evaluation report. The report concluded that student had a speech-language impairment, and student began receiving speech and language support at the private school. Student was not identified as having an emotional disturbance or any behavioral needs.

In the Spring of 2010, student began to experience increased difficulty with social issues, and her behavior at home intensified and deteriorated. Parents informed the district that they would be enrolling student in public school at the start of her second grade year (2010-2011). Student's IEP Team met to develop an IEP for the upcoming school year; the IEP was based on the evaluations conducted earlier in the school year, information received from her speech-language provider, a private occupational therapy evaluation, and her grades at the private school. The district did not re-evaluate student's behavioral problems or include a behavioral plan in the IEP. The district also did not recommend ESY services for the summer. Following the development of the IEP, the Team proposed a placement.

Student had a number of tantrums when she was at home for the summer. One tantrum culminated in police involvement and a visit to the Devereux Psychiatric Hospital. The following day, she had another tantrum, during which she grabbed a butcher knife and stabbed a chair. Student was admitted to Devereux for one week and was diagnosed with Disruptive Behavioral Disorder, ODD, and ADHD.

The District was aware of the tantrums and was aware that student was receiving medical and psychiatric services. In September 2010, student's Team met and concluded that the June 2010 IEP did not need to be revised. Parents signed in agreement to the IEP and placement.

Student's at-home tantrums continued throughout the fall. Her behavioral problems increased in December 2010, with the introduction of a new student into her class. She began having issues at recess and gym, and increasingly violent tantrums at home. In February 2011, she was again admitted to Devereux for one week, following a violent in-home tantrum. Immediately upon her return, she had another tantrum and was returned to Devereux until mid-March 2011. Her tantrums continued after she returned home.

Her IEP team met in April 2011. Parents indicated that they believed that student should be identified as having an emotional disturbance. The district acknowledged the parents' concerns, but felt that the issues were not surfacing in the school environment such that they needed to be addressed in the student's IEP. The district continued to recommend that she be identified as having a speech-language impairment, and did not amend the IEP to include accommodations for the student's behavioral issues. The Team also did not recommend ESY services for the summer. Parents disagreed with the ESY decision and requested an in-home assessment of the student. They also notified the district of the intent to investigate residential facilities. The District denied the request for an in-home assessment, but requested permission to conduct updated evaluations.

In early June, student was approved for admission to a local residential treatment facility, based on a recommendation from a community mental health system. Parents did not believe that the offered placements were appropriate, and they investigated outside of the regional area. At that same time, the District conducted a functional behavioral assessment, as part of the reevaluation. Parents recorded multiple problematic behaviors and tantrums at home. The District's school counselor, who observed the student 8 times over one week, observed no problematic behaviors at school.

The Student completed third grade in the district. Her report card reflected no academic difficulties (As and Bs) and made one note of behavioral issues. She scored in the proficient range in mathematics and reading on the state assessment. At home, however, she continued to exhibit serious behavioral problems.

In June 2011, a private evaluator concluded that she should be identified as having a serious emotional disturbance. Parents then informed the district that they intended to place the student in a residential facility in New Mexico, and that they would be seeking reimbursement for the costs associated with the placement. Student enrolled at the private school in July 2011. At that time, the District was still in the midst of its reevaluation process.

In October 2011, the District issued a reevaluation report and concluded that student no longer qualified as a student with a speech and language impairment. It also concluded that the 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." However, the Team concluded that the student qualified under Section 504 and developed a Section 504 plan to address speech-language articulation issues and emotional regulation issues.

Parents filed a request for due process, alleging denial of FAPE and seeking reimbursement. Following a 5 day hearing, the hearing officer found in favor of the district. The hearing officer concluded that the student was not exhibiting any significant social, emotional, and behavioral outbursts in the educational environment and there

was no adverse impact on the student's educational performance. As a result, student received a FAPE and was not entitled to compensatory education or reimbursement. Parents appealed.

Held: For the District. The court noted that the student met the first element of an "emotional disturbance," because she had at least 5 violent tantrums at home over the course of one year, throwing furniture and threatening the parents with boiling water, knives, and scissors. She also had a "combustible" relationship with two girls at school, and as a result of her jealous behavior had several "problematic" emotional interactions at school. She was also admitted to a local mental health treatment facility. Taken together, these incidents established that the student was "'demonstrat[ing] to a marked degree, inappropriate types of behavior or feelings under normal circumstances,' and/or a 'pervasive mood of unhappiness.'"

However, the student's behaviors were not adversely affecting her educational performance. The court noted that there was "a distinct divide between her behaviors at school and her behaviors at home." At school, she 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 court acknowledged that "emotional issues which occur at home are still relevant to IDEA analysis 'so long as those problems had a significant effect on [the] ability to learn. . . . In 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 assessment results did not reflect a negative educational experience. Her grades were above average and she scored in the proficient range on state assessments. Moreover, her grades at private school were consistent with her grades at public school.

In addition, her teachers testified that her behavior in school did not warrant special education support. She was observed to be self-controlled and responsible, and overall, her behavior did not stand out.

Her absences from school (due to her stay at the hospital) did not establish the existence of an adverse impact on her academic performance, and her treatment at the hospital focused on at-home issues. School was not identified as a source of stress for the student, and she had no trouble catching up when she returned from the hospital.

A. Negligence Claims

Moore v. Hamilton Southeastern Sch. Dist., 61 IDELR 283, 2013 WL 46072228 (S.D. Ind. Aug. 29, 2013).

Facts: Parent, the mother of a child who committed suicide in October 2010, filed suit against the district, alleging (among other things) negligence per se based on a violation of the IDEA.

Parent alleged that during his sixth grade year, student enrolled in school in the district. The following year, student began experiencing disciplinary problems at school; these problems continued throughout his time at school. In total, he was involved in 36 disciplinary incidents in a period of less than 2 years. His misbehavior usually consisted of inappropriate physical contact with other students, such as slapping, spitting, punching, kicking or placing gum in another student's hair.

When the student was in 7th grade, he received 15 disciplinary referrals in "unstructured settings," leading the principal to express concerns about the student's ability to control himself. The principal described him as "a 'likeable kid' and a 'pretty intelligent guy,' but frustrating to an administrator because of the volatility of his behavior: 'One minute he'd be your friend and giving you high fives, and the next he'd turn around and do something he shouldn't have been doing as soon as you're out of eyesight.'"

In an essay written in the spring of the student's seventh grade year, the student "related that he had 'cut himself,' run away from home, and attempted to overdose on pills; he explained that he did 'not know what's wrong with [him]' and felt unable to control his impulsive behavior." In April of that year, he "made an apparent suicide attempt in a closet at school, leaving a note in which he expressed fear of punishment by his stepfather as his primary motive." He was admitted to the hospital for 9 days and underwent psychiatric treatment. When he returned from the hospital, he received no additional attention or interventions from school officials.

Following the incident, he continued to receive out-patient psychiatric treatment and was medicated. He was diagnosed with ADHD, major depressive disorder, and ODD. When the 2010-2011 school year began, he received 14 disciplinary referrals. In December, the principal recommended that the student be expelled. Around that time, the student's mother had him evaluated by a neuropsychologist, who concluded that the student "receiving adjustments to his learning environment was 'critical' to his well-being." The evaluator recommended that he be referred for special education services, and his mother did such, indicating that this was the first time she became aware of the possibility of such services.

The district convened a Team meeting, and stayed the expulsion process pending the completion of the referral process. The student was evaluated, and scored

at or above average in all subject areas on the cognitive testing. On behavior scales, he was rated "at risk" for depression, attention problems, and study skills. A classroom observation was not conducted. The Team concluded that student "demonstrated 'inappropriate behaviors under normal circumstances,' one of the five criteria sufficient to establish 'emotional disability' status for a student . . . . However, the [team] concluded that [student] did not qualify for disability status, reasoning that his 'C average' grades were evidence that he was 'successful' in the normal environment and was not suffering an adverse educational impact from his behavioral problems."

After the Team reached this determination, the student was expelled. Following his expulsion, he attended "Shelter Care, which provided a more structured learning environment." According to his mother and therapist, he showed signs of improvement during this period.

At the start of the next school year, he enrolled as a freshman at his neighborhood public school. High school staff was not told about his history of behavioral problems, including the suicide attempt. While in high school, he was involved in 4 disciplinary referrals, but was "predominantly the victim of other students' actions." His clothes were stolen, his backpack was dumped in the hallway, he was physically harassed by other students (punched), and he was called names such as "flamer" and "fa**ot." In October 2010, when the school was on a fall break, student committed suicide in his parents' home. "He left a suicide note, which [was] addressed to his parents and mentions the weight of their expectations on him and a recent inquiry from his stepfather about his sexual orientation. A large segment of the one-paragraph note also [dealt] with school issues and rea[d] as follows:

> Skool [sic] is getting harder. I can get tests and class work done, yeah that's easy. Mr. Wright is a douche because I take all my notes and I answer any questions he asks me. So he can take what he said and shove it. [Earlier in the week, the student had received a detention for disruptive talking in class]. The talking in his class is only every once in a while, he just likes to give out detentions because he is a douche. It's really hard to tell you I am killing myself but stuff has just built up to [sic] much for me to handle."

Shortly thereafter, the parent filed suit. The district then filed a motion for summary judgment.

Held: For the parent. The court first addressed the parent's negligence claims, noting that courts apply 'negligence per se" principles to unexcused violations of both state and federal statutes. However, "violation of a statute alone does not suffice to constitute a breach of duty under negligence per se principals. In order to prevail, the plaintiff must also show the statute is applicable to his or her case – that it 'was

designed to protect the class of persons in which the plaintiff is included against the risk of the type of harm which has occurred as a result of its violation.'"[1]

The court noted that since there was dispute over the student's eligibility under the IDEA, it was possible that the student was within the class that the IDEA was intended to protect. With regard to the evaluation process, the court noted that the "IDEA urges schools to take into account the discrepancy between a student's educational potential (as measured by aptitude tests or other means) and his or her actual performance, reasoning that a large enough performance gap is evidence of the effects of a disability." The court noted that the student's aptitude was above the mean, and his "C" average, may have been inapt as a baseline of acceptable performance. This was particularly true since the student did well in his alternate placement, where he received in-school counseling, during the period of his expulsion. The court stated: "[t]he school had ample evidence of [student's] behavioral problems, and at least some basis for an inference that his emotional symptoms were dampening his classroom ability as well; on those grounds, their decision not to classify as a disabled student who admittedly otherwise qualified – solely on the basis of his supposedly satisfactory grades – seems unreasonable."

The court also found that there was a genuine issue of material fact as to whether the eligibility determination – if incorrect – resulted in a loss of educational opportunity, seriously infringed the parents' opportunity to participate in the IEP process, or caused a deprivation of educational benefit. As a result, the court found that there was a genuine issue of material fact as to the negligence per se claim and denied the district's motion for summary judgment.

IV. Transfer Students

When a student transfers into a district mid-year, the new resident district's obligations will vary depending on whether the student is transferring from in-state or from another state. When a child with an IEP in effect transfers from one school district to another school located in the same state, the new district "shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law." 20 USC 1412(d)(2)(C)(i)(I).

[1] In New Hampshire, the negligence per se doctrine applies if "the injured person is a member of the class intended by the legislature to be protected, and ... [if] the harm is of the kind which the statute was intended to prevent." McCarthy v. Weathervane Seafoods, 10-CV-395-JD, 2011 WL 4007406 (D.N.H. Sept. 8, 2011) (quoting Mahan v. N.H. Dep't of Admin. Servs., 141 N.H. 717, 754 (1997)). In addition, "[a]n implicit element of this test is whether the type of duty to which the statute speaks is similar to the type of duty on which the cause of action is based." Id.

When a child with an IEP in effect transfers from another state in the same academic year, the district "shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation . . . if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law." 20 USC 1412(d)(2)(C)(i)(II).

The Office of Special Education and Rehabilitative Services (OSEP) recently issued an opinion pertaining to conducting initial evaluations for children who transfer districts. Letter to State Director of Special Education, 61 IDELR 202 (OSEP July 19, 2013). OSEP wrote the letter to "address concerns expressed . . . regarding the unique educational needs of highly mobile children with disabilities under the [IDEA] and to [provide] . . . assistance in improving the educational stability of, and post-school outcomes for, these highly mobile children."

OSEP noted that when a child transfers to a new school district in the same year, whether in the same State or in a different State, after the previous school district has begun but not yet completed the initial evaluation, both school districts must coordinate to ensure completion of the evaluation. This must occur as expeditiously as possible, however the timeframe for the completion of the evaluation "does not apply when the following two conditions are present: the new school district is making sufficient progress to ensure prompt completion of the evaluation; and the parent and new school district agree to a specific time when the evaluation will be completed." OSEP also noted that the IDEA requires that the districts "promptly" exchange educational records when a child transfers school districts, and the prompt exchange of "relevant records avoids duplicating previously conducted evaluations, and provides critical data to the new district to ensure the timely completion of the evaluation."

OSEP opined that when a child transfers while an evaluation is pending but not yet complete, the new districts are frequently postponing the evaluation until they can utilize their RTI process. "This practice could unnecessarily delay the initial evaluation of highly mobile children. If a child transfers to a new school district during the same school year before the previous school district has completed the child's evaluation, the new school district may not delay the evaluation or extend the evaluation time frame in order to implement an RTI process." The new school can implement RTI while simultaneously completing the evaluation process.

OSEP also noted that the provision of comparable services includes ESY services, if the existing IEP includes such services. If the IEP does not include such services, and the team had not determined whether such services were necessary, the new district will need to do such.

V. IEPs

A. Parental Participation

Horen v. Bd. of Education of the City of Toledo Pub. Sch. Dist., 113 LRP 48072 (N.D. Ohio Nov. 26, 2013).[2]

Facts: On March 29, 2009, the district's Director of Student Services wrote to parents to schedule an IEP Team meeting. In the letter, the Director indicated that the student had a classroom assignment in her private school as her "stay-put placement." The letter also indicated that the Director had previously sent the parent a draft IEP, and suggested that they contact him if they needed another copy. He noted that district staff did not have the opportunity to observe the student for 2 years, and requested that the parent provide updated information pertaining to the student's present levels of performance. He also enclosed paperwork, seeking consent to a triennial reevaluation, which was "essential to [the] development of a new IEP." Finally, he enclosed a meeting notice, and requested that the parents provide alternate dates if they were unavailable on the proposed date.

On April 6, 2009, parents wrote to the Superintendent, stating

> This letter is in response to *another* correspondence sent to our house . . . scheduling a meeting for April 7 . . . Thank you for more evidence of [the district] continuing to deny [student] a [FAPE]. Please stop sending correspondence to our home … No matter how many letters [the district] sends, the facts will not change until [the district] does what it is required to do. Nor will we change our stance. As such, *we object to any meetings regarding our daughter being conducted without our full participation until such time as [the district] complies not only with the IDEA, but with the hearing officer's rulings as well*. . . . We will continue [sic] any further correspondence addressing the same issues as harassment. Stop it.

(italics in original).

Parents did not attend the Team meeting, nor did they propose an alternate date, and they did not agree to the request to reevaluate.

On June 3, 2009, they wrote another letter to the Superintendent, stating:

[2] An earlier decision involving the same parties was summarized in our July 2013 materials for the August Academy: "School Law School, the 'Third Year': An Overview of Recent Decisions", Horen v. Bd. Of Educ. of the City of Toledo Pub. Sch. Dist. LEXIS 76692 (N.D. Ohio May 31, 2013).

> [The Director] is useless and incompetent and we believe getting kick-backs from the attorneys to keep fighting the [parents]. Maybe you are too … We will continue our letter-writing campaign, and informing the public especially during levy time, about [the district's] practices.

No further communication took place between the parties regarding the 2009-2010 school year. In August 2012, Parent filed a request for due process, alleging (among other things) that the district failed to comply with child find requirements, failed to have an IEP in place prior to the first day of school, and failed to have an IEP in place for the 2009-2010 school year.

The hearing officer found in favor of the district, noting that it attempted to comply with child find, but that the parents' letter "communicated a desire to have no further communication with [the district]." Parents appealed.

Held: For the district. The court noted that "the record clearly and convincingly supports the findings that the parents' actions caused the 2009-2010 IEP process neither to begin nor be completed. . . . The cornerstone of this finding is the correspondence, quoted above . . . . A more blatant refusal to participate in the process is hardly conceivable. . . . Under these circumstances the Board can not [sic] be faulted for not trying to go further to meet its obligations to [student]."

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 kindergarten, he had 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 obvious 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.

B. Transition Planning

OSEP recently responded to a letter requesting clarification regarding the secondary transition requirements in the IDEA, and whether services at postsecondary institutions can be provided as part of a student's transition services. Letter to Dude, 62 IDELR 91 (OSEP Sept. 3, 2013). OSEP noted that it "believes that providing a high school student with a disability the opportunity to take one or more courses at a community college or other postsecondary institution prior to high school graduation can be critical in facilitating the student's transition from secondary school to college or the workforce." OSEP noted that attending classes at a postsecondary institution could be designated as a transition service on the IEP "and paid for with IDEA Part B funds, consistent with the student's entitlement to a [FAPE]."

There is no requirement that such courses be offered as part of the IEP; instead, the decision must be made by the IEP Team, on a case-by-case basis. The Team is not required to include a particular transition service(s) on an IEP based solely on a parent or student's request.

OSEP also noted that if a student with a transition plan attends a postsecondary institution, the services set forth in the student's IEP must be provided at that location, including but not limited to, transportation and paraprofessional support, if the student requires such services to receive a FAPE.

C. Braille Instruction

OSEP recently issued a letter in response to "concerns voiced by parents and advocates of blind and visually impaired children . . . that the number of students receiving instruction in Braille has decreased significantly over the past several decades." The letter was intended to "provide guidance to States and public agencies to reaffirm the importance of Braille instruction as a literacy tool for blind and visually impaired students, to clarify the circumstances in which Braille instruction should be

provided, and to reiterate the scope of an evaluation required to guide decisions of IEP Teams in this area." Dear Colleague Letter, 61 IDELR 172 (OSEP June 19, 2013).

Teams must ensure that students who are blind or visually impaired are provided with the Braille instruction they need to receive FAPE and to ensure their meaningful access to the general education curriculum offered to nondisabled peers. Teams should consider the need for Braille instruction on an individual, case-by-case basis, and without undue delay. Teams "must ensure that the instructional time allotted for Braille instruction is sufficient to provide the level of instruction determined appropriate for the child."

OSEP noted that "[t]he IDEA requires that Braille instruction must be provided to a child who is blind or visually impaired, unless the IEP Team determines, based on an evaluation of the child's current and future reading and writing needs, that Braille instruction is not appropriate for a particular child." Such evaluations should be "thorough and rigorous, include a data-based media assessment, be based on a range of learning modalities, including auditory, tactile, and visual, and include a functional visual assessment." In addition, "because the evaluation must also assess a child's future needs, a child's current vision status should not necessarily determine whether it would be inappropriate for that child to receive Braille instruction while in school."

VI. Placement

A. Lack of Progress and the Need for a More Restrictive Setting

Chicopee Public Schools, 113 LRP 30800 (Mass. SEA July 25, 2013).

Facts: Student was a 10 year old, who was eligible for special education and related services due to emotional disabilities, ADHD, and autism spectrum disorder, "along with demonstrated failure to make effective progress in school commensurate with his potential." Student has "considerable" intellectual potential. He regularly attains scores in the superior range on measures of cognitive functioning and demonstrates academic achievement consistent with that potential. "His disabilities make it extremely difficult for [student] to learn and maintain social communication skills in all settings and to regulate his emotional and behavioral responses to people, transitions, and instruction in the classroom setting."

During the 2011-2012 school year, he received speech-language and counseling services within the general education classroom. Teachers reported minimal engagement and progress with these services. His in-school behavior worsened over the course of the year.

Prior to the start of the 2012-2013 school year, the Team developed an IEP that placed student in an "inclusion" classroom in a different school for the fifth grade. The Team also agreed to provide in-home tutoring for the remainder of the 2011-2012 school year.

In September 2012, the student began attending the inclusion class. There was a fifth grade teacher, special education paraprofessional assigned to work directly with the student, daily consultation and intervention with an autism specialist, a social language pragmatics group, consultation with a speech/language pathologist, regular guidance services and significant classroom accommodations. The team also conducted a "pre-functional behavior assessment" and developed a behavior intervention plan. Reports from all service providers indicated that the student refused to engage in classroom or individualized academic work, could not form positive relationships with peers or productive relationships with adults, regularly disrupted classroom and school activities, and was not making progress toward any IEP goal or in any school-related area.

The Team met in November 2012 and proposed to evaluate in a substantially separate classroom designed for students with emotional difficulties located in another public school in the district. Parent agreed with the evaluations, but requested that they be conducted in a private school. The district refused, and the student remained in the inclusion class.

Student was evaluated in January 2013, and was found to have superior intellectual potential and severe social-emotional disabilities. The evaluators recommended a "structured learning environment," with clear rules and consistent consequences for non-compliant and disruptive behaviors, and direct social skills instruction embedded throughout the day.

The Team then used the evaluations to develop an IEP for the 2013-2014 school year. District staff indicated that the student was not making effective progress in the inclusion classroom and recommended a specialized, substantially separate educational program that could implement the recommendations from the evaluators. Parent requested placement in a private school and the district requested due process.

Issue: Whether the 2013-2014 IEP was reasonably calculated to enable the student to receive a FAPE.

Held: For the district. The hearing officer noted that the district had properly identified and evaluated student. There were 5 evaluations in 2 years, along with daily notes of observations over the course of 3 months. All of the evaluations reached the same recommendations: student's current learning needs required a substantially separate, highly structured, behaviorally oriented special education program. The proposed IEP summarizes the most recent evaluation results, and explains how the student's emotional, health, and autism disabilities adversely affect his performance in the areas of verbal and non-verbal communication and social interactions. The student had not made effective progress in acquisition of age-appropriate social-emotional-behavioral skills despite gradually increasing special education supports in the mainstream setting, and as a result, a more restrictive setting was appropriate.

D.W. v. Milwaukee Pub. Schs., 61 IDELR 32, 526 F. App'x 672 (7th Cir. April 26, 2013).

Facts: Student received special education since she was in first grade, due to a moderate cognitive disability. Through 8th grade, she attended "special, 'multi-categorical' classes in which students with various disabilities are taught together in the same classroom." These classes were less restrictive than the contained classes serving only children with cognitive disabilities.

While the student was in 8th grade, his Team met to develop an IEP that covered the remainder of the 8th grade year, and the majority of her first year of high school. The IEP noted that the student performed at a first-grade level in math, a second-grade level in reading and language arts, and displayed inappropriate behavior, such as refusing to participate or follow directions, about 60 percent of the time. Student "lack[ed] functional and organizational skills," and the IEP contained goals in the area of math (advancing to a 2nd grade level), reading, language arts and writing (advancing to a 3rd grade level), and cooperating with teachers 60 percent of the time. Based on her performance in 8th grade, her teachers doubted that she would succeed in a multi-categorical classroom in ninth grade, but acquiesced to her parents' strong preference that she be placed in such a classroom, so that she would be on track to receive a high school diploma.

Student struggled in her 9th grade classroom, receiving Ds and Us (unsatisfactory) in most of her subjects. She frequently refused to participate in class. After receiving the first progress report, the Team convened to develop a behavioral intervention plan to address the student's refusal to participate. Under the plan, the student would receive several hours of one-on-one instruction per day, extra time for tests, modifications to assignments, and daily progress reports.

Despite these interventions, the student's performance did not improve, and her team reconvened and recommended that she be placed in a special class for students with cognitive disabilities. Parents disagreed with the proposal, and the Team again tried to modify student's behavior by providing her with classwork at her instructional level, seating her near the teacher and providing positive feedback. Student still did not show improvement, and the Team proposed that she attend the self-contained classroom.

Parents requested due process, claiming that the district failed to provide a FAPE by proposing a placement that was not in the least restrictive environment. Parents also argued that the behavior plan was inadequate and the student's teachers had failed to comply with the IEP. The hearing officer held in favor of the district, finding that the behavior plan was adequate because the IDEA does not specify any substantive requirements for such plans, and that the parents had failed to present any evidence other than the student's low grades, to establish that the teachers were not implementing the IEP. "Because [student's] grades were based on objective criteria

applied to all ninth-grade students . . . they were not relevant to her teacher's efforts to help her reach her IEP goals." The hearing officer also found that the IEP was appropriate and the proposed placement was not more restrictive than necessary. The parents appealed.

The district court affirmed the decision on the grounds set forth in the hearing officers' order. Parents again appealed, continuing to assert that the student's poor grades establish that the teachers had failed to implement her IEP because they were not teaching at her instructional level.

Held: For the district. The court found that the student's "poor grades do not show that her teachers failed to ma[k]e a good-faith effort to help her meet the goals in her educational plan. The record does not compel a conclusion that better work by the teachers would have led to higher grades; indeed, the record does not compel a conclusion that the teachers' work fell short."

Parents' argument that the cognitive disability class was too restrictive also failed because the parents were unable to show that the student was obtaining "some benefit from mainstream classes." The court stated: the "relevant inquiry is whether the student's education in the mainstream classroom was 'satisfactory' (or could be made satisfactory through reasonable measures)." Because the educational members of the Team had testified that the student "could not learn satisfactorily in the multi-categorical classroom," placement in the more restrictive setting was appropriate.

B. In-Home Instruction

A.K. v. Gwinnett County Sch. Dist., 62 IDELR 253 (11th Cir. Feb. 14, 2014).

Facts: Student was eligible for services under the IDEA. In February 2010, student's IEP Team met to discuss her program. Prior to that, she had been placed in a "moderate autism spectrum disorder classroom," pursuant to a settlement agreement between the parent and the District.

At the meeting, parents informed the district that student was taking nutritional supplements every 45 minutes and requested that the student be provided home-bound services for three months (the duration of the nutritional supplement regime) so that she could receive the diet in a low-stress environment. The district offered to provide the services in school, but ultimately agreed to provide home-bound instruction for the remainder of the school year.

The Team met again in May 2010, and the district proposed to continue in-home instruction for the summer with a switch to in-school placement for the 2010-11 school year. Parents requested the in-home services be continued and rejected a plan that would place the student in school for two hours per day and in her home for three hours per day. The Team met again in August, and the parents rejected the placement offer.

Parents then filed another request for due process, alleging that student needed an in-home program so that she could maintain her strict diet.

The hearing officer held in favor of the district and the parent appealed. The district court affirmed the decision, and the parent appealed.

Held: For the district. "To determine whether the IDEA requirement for a FAPE is met, [courts] inquire (1) whether the school district complied with the procedures set forth in the [IDEA]; and (2) whether the IEP was reasonably calculated to enable the child to receive educational benefits in the least restrictive environment." The court found that the student's IEP met the IDEA's substantive requirements. The District proposed to place the student in the autism spectrum disorder classroom, and the parent's disagreed and demanded in-home schooling. The court noted that the "LRE requirement of IDEA, though, aims to educate disabled children in the classroom with their non-disabled peers." Quoting the IDEA, 20 USC 1412(1)(5)(A), the court noted that "[i]t seems clear, then, that the statute favors reintegrating children into the school setting, where they can socially interact with other children."

The parent did not present evidence justifying in-home schooling. "Student's strict diet was not prescribed by a medical doctor, she does not have a life threatening condition, and she is not under the regular care of a medical doctor. Most importantly, though [parent] provides no evidence that [the district] will be unable to adequately supply [student] with her special diet."

VII. Discipline and the Manifestation Determination

In re: Student with a Disability, 62 IDELR 217 (Kan. State Educational Agency, Nov. 25, 2013).

Facts: Student was a 15 year old transfer student with an IEP, due to an other health impairment, from Massachusetts. Following her transfer, her Team met and a new IEP was put into place by October 8, 2013. Student's medical history included: epilepsy diagnosed at 22 months of age, mood disorder, depression, anxiety, and PTSD. A neurological assessment conducted by the student's former doctor indicated that her epilepsy impacts her decision making.

On October 9, 2013, student was found in possession of 3 lighters, drug paraphernalia and marijuana. Student gave conflicting stories about the items to the resource officer, first claiming that she was returning some of the items to another student, and then stating that she had received the items that morning from a third student. Security footage established that she had not received any items that morning. Student was arrested and suspended for 10 days.

Text messages from student's phone established that she was interested in purchasing marijuana from the first day she began school (September 9, 2013) until the

contraband was found in her possession on October 9, 2013. The messages also showed "a course of conduct revolving around purchase/use/consumption of marijuana that appears to be thought out and planned." On October 11, 2013, student emailed her parent stating that her "suspension 'was a blessing in disguise! I am staying away from all of the drugs and alcohol and this was my wake up call and I feel better . . . not having to hide anything.'"

Student's Team held a manifestation meeting on October 14, 2013. Prior to the meeting, the Team completed a description and narrative of the student's behavior (possession of contraband and marijuana). The Team inquired whether the "conduct in question [was] caused by or did it have a direct [and] substantial relationship to student's disability." The educational members of the Team believed that the student's epilepsy did not cause her to bring drugs to school. Instead, they believed that the student organized and networked with students to obtain drugs, as shown by the text messages from student's phone. The educational team noted that the student's Massachusetts IEP indicated that the student was "able to articulate good and bad choices." The educational team members also noted that the student "concealed the illegal activity during the investigation and hid the contraband among other items in her backpack."

Parents filed a request for due process, alleging that the Team made a manifestation determination without reviewing all relevant information supplied by the parent and made a decision prior to the meeting.

Held: For the district. During the hearing, parent testified that the team failed to consider information contained in a "white notebook." The educational members of the Team did not recall her asking that the information in the notebook be considered, but that even if the parent had done such, it "would not have made a difference because it contained no new diagnosis and no indication that [student's] behavior and control problems were related to her seizures."

The educational team members testified that they did not believe that the student's possession of contraband and marijuana had a direct and substantial relationship to her disability because:

- Student was aware that her activity was illegal based on the text messages and that she had hidden the items in her backpack
- Student's texts demonstrated forethought, planning, and networking
- There was no evidence of impulsiveness and ample evidence of planning;
- Information from the student's doctor indicated that student had the "ability to compensate and could problem solve."

- Student's "30 days of text messages show that [student] was knowledgeable about drugs."
- Student had 3 days to think about bringing the marijuana pipe to school and used planning and forethought.
- Student's problem solving skills are within expectations for her age.
- Student had previous conduct problems.

Parents testified that student did not knowingly or willingly bring the drugs to school, and that her conduct was a manifestation of her disability because:

- Her doctor's report indicates that she is "not capable of thinking through the process of bringing contraband to school because of the impact of her disability on [her] decision making."
- The district had the student for only 4 weeks and could not know what impact her disability has on her thought process.
- The district failed to consider 10 years of the student's educational/psychological history (the white notebook).
- Student's disability causes her to lack executive and cognitive functions.
- Her conduct shows impulsivity that was tied to her disability – she told her parents she "did not know why she did this."
- Student has a history of lying, and the text messages were "fluffing or lies to impress her friends and not true statements or planning."
- The student is immature and not cognitively developed. She behaves like a 12 year old instead of a 15 year old.
- The Team did not consider the impact that epilepsy has on cognitive thinking.

The hearing officer found that there was substantial evidence to support the fact that student's disability was not caused by and did not have a direct and substantial relationship to her disability.

VIII. Exhaustion of Administrative Remedies

Young v. Ohio, 60 IDELR 134 (S.D. Ohio Jan. 14, 2013).

Facts: Student was a two year old, who had been diagnosed with moderate to severe autism spectrum disorder and encephalopathy. When he was eighteen-months old, his pediatrician referred him for early intervention services and he was assessed by

Cincinnati Children's Hospital. The evaluator opined that student "would be a good candidate for Applied Behavioral Analysis (ABA) programming. ABA is an effective treatment for many young children with autism. Children's Hospital recommended twenty-five to forty hours per week of ABA treatment for" student. The same recommendation was repeated by another physician from the Children's Hospital a month later.

Parents presented both documents to the defendants (State of Ohio, Ohio's IDEA Part C Coordinator, and the County Board of Developmental Disabilities) who refused to amend the IFSP to reflect the recommendations for ABA therapy, and refused to reimburse parents for any treatment that they obtained on their own.

Several months later, student was assessed again; the evaluator made the same recommendation for 25-30 hours per week of intensive applied behavior analysis programming. The defendants informed the plaintiffs that the early intervention program did not provide ABA therapy because there was not a certified ABA provider within the county.

In August 2012, parents signed an amended IEP, indicating that they agreed with exceptions. The defendants informed the plaintiffs that the IFSP was not valid because it included points of disagreement, and the defendants ceased providing services.

In October 2012, plaintiffs filed an administrative hearing. They also filed a request for a temporary restraining order ("TRO") with the federal court, along with a complaint alleging violations of the IDEA, Section 504, and 42 USC 1983. The request for the TRO was heard prior to the administrative hearing. At the TRO hearing, the court ordered the defendants to immediately begin providing the student with the agreed-upon services in the IFSP. Plaintiffs sought an order requiring that the defendants provide ABA therapy, or reimburse the parents for the same.

The Defendants argued (among other things) that the plaintiffs were not entitled to injunctive relief because they failed to exhaust their administrative remedies.

Held: For the plaintiffs.

The court found that the plaintiffs were not required to exhaust their administrative remedies before filing suit in federal court. The court noted that Part B of the IDEA clearly requires exhaustion of administrative remedies before filing a civil action to enforce rights under the IDEA. 20 USC 1415(l). However, the court noted that "there is no corresponding requirement under Part C of the IDEA," nor had the state adopted such a requirement in its Part C regulations. As a result, it was not necessary for plaintiffs to exhaust their administrative remedies.

The court also granted the plaintiffs' request for injunctive relief, finding that they had a substantial likelihood of succeeding in establishing that the student required ABA

services. The court noted that the plaintiffs had prevented sufficient evidence that the defendants had predetermined that the student would not receive ABA therapy, and that there was an 'unofficial policy' of not providing ABA services. The court granted the plaintiffs' motion for a temporary restraining order and ordered the defendants to provide at least 40 hours of ABA services per week, or reimburse parents for the delivery of the same service. The court noted that since the student was almost 3 years old, the services would be compensatory in nature.

IX. FERPA

A. The Legitimate Educational Interest Standard

Letter to Roberts, 113 LRP 9493 (FPCO, Jan. 15, 2013).

Facts: Parent sent a letter to the FPCO, inquiring whether "school officials would be permitted by FERPA to communicate to [a] newly hired employee that [parent] had accused the employee of bullying and inappropriately touching [parent's] daughter."

Opinion: Under FERPA, a school may not generally disclose personally identifiable information from education records to a third party, unless the parent has provided written consent, or one of the statutory exceptions applies. One such exception permits nonconsensual disclosure of information to school officials, including teachers, who have a legitimate educational interest in the information contained in his records. FPCO noted that "we have generally concluded that a school official would not have a legitimate educational interest under FERPA to information in an education record pertaining to a complaint made against such school official by a parent or student as the information would not be generally deemed necessary for the school official to carry out his or her responsibility."

B. Disclosure of Information from Discipline Records

Letter to Anonymous, 113 LRP 35726 (FPCO June 19, 2013).

Facts: Parent filed a complaint with the FPCO, alleging that the district violated FERPA when it failed to provide parent and his son with the final results of a disciplinary hearing concerning another student who 'assaulted' parent's son in the high school locker room. "Specifically, you state that the District failed 'to provide requested information to the victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense concerning the final results of a disciplinary hearing with respect to the alleged crime."

Conclusion: Under FERPA, "disciplinary action or proceeding' means "the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules . . . applicable students of the institution. Any records made as a result of such a disciplinary action or

proceeding are education records under FERPA because they are directly related to students and are not specifically excluded from the definition of education records."

The regulation referenced by the complainant pertains solely to post-secondary institutions, and not to high schools. However, FPCO noted that FERPA "provides that if the education records of a student contain information on more than one student, the parent may inspect and review or be informed of only the specific information in the record about the student who is his or her child. However, there may be information in an education record that is directly related to two or more students and which cannot be separated easily and remain understandable to a parent. In such a case, FERPA provides that a school is required to permit each parent (for whom there is information directly related to his or her child) to inspect and review or be informed of such information."

FPCO noted "if the sanction in the final outcome of a disciplinary proceeding for a high school student (the perpetrator) is to stay at least 25 feet from another student (the victim) at all times, such information would be directly related to both students. The school would be permitted to let both parents inspect and review or be informed of such a sanction." However, schools cannot disclose information about disciplinary actions that apply only to one student, such as a suspension.

C. Disclosure to Other Educational Institutions

Letter to Anonymous, 113 LRP 35724 (June 19, 2013).

Facts: Parent filed a complaint against the district, alleging that it violated FERPA by disclosing personally identifiable information from her son's educational records, without consent, to various private schools.

The student had been engaging in "physically aggressive 'fight or flight' behaviors such as grabbing and hitting teachers and aides. On May 11, 2011, [the Student] hit three classroom staff. After the incident," the district convened an IEP Team meeting with the parents and indicated that it wanted to change the student's educational placement. In a subsequent letter, the district indicated that it had already contacted a number of placements regarding the student. Parents had not given the district consent to communicate with the placements, and they filed a complaint with FERPA.

Finding: FERPA prohibits schools from disclosing information from educational records without written consent. One such exception to that rule permits schools to disclose information "to another school where the student seeks or intends to enroll. The sending school may make the disclosure if it includes a statement in its annual notification of rights that it discloses education records for this purpose, or if it makes a reasonable attempt to notify the parent in advance of the disclosure."

The FPCO noted that it interprets this provision as permitting "nonconsensual disclosure of information from education records in connection with educational placements" under the IDEA. "That is, an educational agency or institution that is subject to FERPA may disclose personally identifiable information from a student's education records to a third party (such as another school) in order to make an educational placement under Part B."

D. Amending Records

Letter to Anonymous, 113 LRP 28736 (FPCO April 16, 2013).

Facts: Parent filed a complaint alleging that the district violated FERPA by denying the parent's request for a hearing "after refusing to amend a medical report," which the parent believes to be inaccurate.

According to the parent, the medical report, which was "written by a District physician . . . incorrectly reports that [student] was hospitalized for Depakote Toxicity and not migraines," and that the parent had the student "on a regimen of Toradol."

Finding: The District is not required to hold a FERPA hearing. FERPA affords parents the opportunity to seek amendment of an education record when they believe the record is misleading or inaccurate. If the school does not amend the record, it must inform the parent of the right to a hearing.

"This right is not unlimited, however, and a school is not required by FERPA to afford a parent the right to seek to change substantive decisions made by school officials, such as grades or other evaluations of a student." The legislative history for FERPA states that it "was not intended to overturn established standards and procedures for the challenge of substantive decisions made by an educational institution." Instead, it was "intended to require only that educational agencies and institutions conform to fair recordkeeping practices and not to override the accepted standards and procedures for making academic assessments, disciplinary rulings, or placement determinations. Thus, while FERPA affords parents the right to seek to amend education records which contain inaccurate information, this right cannot be used to challenge a grade or an individual's opinion, unless the grade or the opinion has been inaccurately recorded."

FPCO was unable to determine whether the information contained in the medical report was factually inaccurate, and requested additional information from the complainant.

X. Section 504 Claims

A. Major Life Activities

Logan (OH) Local Sch. Dist., 113 LRP 24739 (OCR March 7, 2013).

Facts: Parent filed a complaint alleging that the district discriminated against a student on the basis of disability by failing to complete an evaluation in a timely manner, and "as a result the District inappropriately subjected the Student to discipline for behavior related to his disability."

Student was diagnosed with ADHD and oppositional defiant disorder in May 2010. A health history form listing the student's diagnoses was submitted to the district, and parent requested an evaluation in May 2010. The district informed the parent that since it was near the end of the school year, it would try interventions and evaluate at the start of the next school year.

The parent met with the principal, school psychologist, and special education director in June 2010. Parent was informed that the student did not qualify for Section 504 because the data collected by the district indicated that the student's ADHD and ODD did not adversely affect his educational performance, and that he did not need special education and related services under the IDEA. Parent was informed that the district would continue to try interventions at the start of the next school year. The District provided parent with a written prior notice, indicating that the Team had reviewed the Student's grades, group testing scores, and discipline records. The Team noted that the Student's grades of Bs and Cs, a cognitive abilities test that showed the Student had average intellectual ability, and state achievement test results showed that the student was proficient in the areas tested. Thus, the Team concluded that the diagnoses of ADHD and ODD were not adversely affecting his educational performance.

The Team met again in September 2010 and developed an intervention plan. Parent again requested an evaluation, but the request was denied. In December 2010, the team met again; parent indicated that the interventions were not working, and the Team began discussing an evaluation.

In January 2011, the Team met to continue discussing interventions. Parent was given a copy of her IDEA procedural safeguards. In March 2011, parent received a written prior notice stating that Student's eligibility under Section 504 "should be explored." Student's interventions were discontinued without notice to the parent in April 2011, and reinstated in May 2011.

In May 2011, the District "tried to develop a Section 504 plan, but it did not include a behavior intervention plan." During the 2010-11 school year, student had problems with behavior and was removed from class or suspended on numerous occasions. Parent believed that he was removed from class 3 to 4 times per week.

Finding: The District's evaluation process did not comply with Section 504. To be eligible for a FAPE under Section 504, a "student must be determined to have a

physical or mental impairment that substantially limits one or more major life activities. The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. Major life activities that are to be considered are not limited to learning, and also include, but are not limited to, functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Major life activities also include the operation of a major bodily function such as immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

Under Section 504, districts are required to evaluate any child "who, because of disability, needs or is believed to need special education or related aids and services." (34 CFR 104.35(a).

Section 504 does not set forth specific timelines for school districts to complete evaluations; however, districts must ensure that students "are evaluated and provided access to meaningful educational services without unreasonable delay." When determining whether an evaluation was completed in a reasonable time period, OCR indicated that it considers, as guidance, the timelines set forth in state laws and regulations.

In this case, OCR found that the District "should have suspected" that the student had a disability, and therefore, should have conducted a timely evaluation. The parent requested an evaluation on several occasions, and the District failed to evaluate because it had determined that the student's disabilities were not impacting his learning, without considering whether any other major life activities were substantially limited by the disability.

In addition, the district's focus on the student's progress was improper because the student was receiving interventions; thus, the "District improperly considered the ameliorating effects of these mitigating measures."

The district submitted a voluntary resolution plan that included the following: meeting with the parent to determine whether the student required compensatory services due to its failure to timely evaluate during the 2010-2011 school year; providing in-service training to staff on Section 504; and, reviewing its policies and procedures, particularly those pertaining to evaluations and referrals, and making eligibility determinations.

B. Accommodations

Moody v. New York City Dep't of Educ., 60 IDELR 211, 513 F. App'x 95 (2d Cir. March 12, 2013).

Facts: Student was diagnosed with diabetes and was a qualified individual with a disability under Section 504. He had a Section 504 plan with accommodations that included monitoring of his blood glucose level and various lunch menu options. Parent requested that the district heat the student's lunches that he brought from home, because the student did not like the lunches offered by the school.

Parent filed suit against the district, alleging a violation of Section 504. The district court granted the district's motion for summary judgment and the parent appealed.

Held: For the District. The court agreed with the district court that "[w]hile heating J.M.'s food may have helped him adjust to his disability, . . . Section 504 . . . and the [ADA] . . . do not require 'optimal' accommodations. It is undisputed that diabetics do not need to eat hot food in order to manage their diabetes successfully. Therefore, even if J.M. sometimes skipped lunch and disliked the food on the school menu, that did not warrant a further accommodation in addition to what the school had already provided. The accommodations the school had provided – lunch menu options and monitoring of J.M.'s blood glucose level – afforded J.M. meaningful access to the benefit to which he was entitled: public school lunches."

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.

C. Requests for Assistive Technology After a Refusal of IDEA Services

D.F. v. Leon County Sch. Bd., 62 IDELR 167 (N.D. Fl. Jan. 2, 2014).

Facts: Student had been identified under the IDEA due to a hearing impairment. The student's mother also had a disability and had designated the student's grandmother as the parent's representative in the IEP process. Before he entered middle school, his Team met to develop an IEP. They did not give notice of the Team meeting to the student's grandmother, and the IEP was "adopted without input from a parent or the grandmother." The new IEP called for the student to attend a special one-hour class each day for students with disabilities. Parent did not want student to attend such a class, and withdrew her consent. At the same time, the parent requested services under Section 504, including assistive technology to assist the student in hearing in the classroom.

The district refused to provide the requested services, and the parent filed suit, alleging violations of Section 504 and the ADA. The district moved to dismiss, alleging that the parent failed to state a claim upon which relief may be granted because it "does not allege that the [district] denied the requested services based 'solely' on the plaintiff's disability. The district did not move to dismiss because the parent failed to exhaust administrative remedies.

Held: For the parent. The court noted "Absent the allegation that the plaintiff's mother withdrew her consent to services under the IDEA, the complaint's allegations would plainly be sufficient to state a claim on which relief may be granted. The [district's] motion to dismiss thus turns on the proposition that the withdrawal of IDEA consent waives any right a student otherwise would have under the Rehabilitation Act and ADA." The court went on to state "Even assuming that the withdrawal of IDEA consent waived the plaintiff's corresponding rights under the Rehabilitation Act and ADA, the waiver was not as extensive as the School Board now claims." Although the parent withdrew her consent to the services offered under the IDEA, she simultaneously requested assistive technology services. "An explicit request for services can constitute a waiver of those services. And while a person can forfeit a right without knowingly waiving it, there is no basis for asserting that by withdrawing consent to offered IDEA services, the plaintiff forfeited the right to different services that allegedly were available under a different federal statute. . . . [A] parent's refusal to consent to a more-comprehensive plan that includes a one-hour class for students with disabilities does not necessarily authorize a school district to refuse to provide technology to help a student hear in other classes. The school district cannot be required to provide the

technology based solely on the statutory requirement to provide a free appropriate public education – under the IDEA and perhaps even under the Rehabilitation Act – but the school district can be required to provide the technology based on another provision of law, including, if applicable, the Rehabilitation Act or ADA."

XI. 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.

XII. Section 1983

Mowery v. Logan County Bd. Of Education, 58 IDELR 192 (S.D. W. Va. March 15, 2012).

Facts: Student had been diagnosed with Fabry’s disease, and was receiving homebound instruction under Section 504. Student alleged that he was treated differently from other students on the basis of his disability, when he was prohibited from attending extracurricular activities at the school.

Student’s parents filed suit against the District, alleging, among other things, deprivation of civil rights in violation of 42 U.S.C. 1983, and the equal protection clause

of the U.S. Constitution. The District moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

Held: The motion to dismiss was denied. The court noted that the "Plaintiff claims he was treated differently from other students . . . as he was not allowed to participate in extracurricular activities. He alleges that Defendants prevented him from participating because of his 'inability to physically attend'" the high school. Plaintiff alleged that "he was often told, 'If you're too sick to come to school, you're too sick to attend these events.'" The court found that if these allegations are true, the District intentionally discriminated against him by treating him differently than other students.

The court also found that the plaintiff had alleged sufficient allegations to establish that "no rational basis exists to allow [the district] to bar [student] from extracurricular activities." The court noted that "[g]enerally, state regulation or policies that do not pertain to a fundamental right or a suspect class are presumed to be valid." The court noted that it was "unable to make a final determination that the disparate treatment Plaintiff received was related to a legitimate purpose. However, viewing the facts in the light most favorable to the plaintiff, he has alleged enough facts to support an equal protection violation that survives" a motion to dismiss.

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