

# **The Year in Review: Understanding the Impact of Litigation on Your Programs and Services**

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## *Case Topics:*

FAPE & IEPs	Medical Services
Attorney's Fees	Money & Liability Issues
Least Restrictive Environment	Private School Placement
Behavior & Discipline	Section 504/ADA
Eligibility & Identification	Seclusion & Restraint
Evaluation	Procedural & Litigation
Compensatory Ed & Other Remedies	Service Animals
Confidentiality & Student Records	Stay Put

*Note: This presentation is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the presenter is not engaged in rendering legal counsel. If legal advice is required, the services of a competent professional should be sought. Melinda Jacobs is licensed to practice law in Tennessee. Ms. Jacobs makes no representation that she is licensed to practice law in any other state.*

## **SESSION'S LEARNING OBJECTIVES:**

### **Participants Will:**

- Learn the most important legal decisions in special education from the 2010-2011 school year.
- Find out how court rulings affect special education programs.
- Understand the major legal issues and trends in recent special education litigation.
- Be prepared to avoid unnecessary special education litigation.

## **I. BEHAVIOR & DISCIPLINE**

1. **Doe v. Todd County Sch. Dist., 55 IDELR 185, 2010 WL 4539349 (8th Cir. 2010).** A South Dakota district did not violate a student's constitutional rights when it denied him the opportunity to challenge his placement in an alternative setting before the local school board. Noting that the board had no authority to modify the IEP team's placement decision, the 8th Circuit reversed a decision in the student's favor. The court acknowledged that suspended students generally have the right to notice of the charges against them, as well as a hearing to dispute those charges. *Goss v. Lopez*, 103 LRP 22470, 419 U.S. 565 (1975). Under the South Dakota ED's administrative rules, those rights included formal notice and a hearing before the school board. However, the 8th Circuit pointed out that the student's IEP team convened just four days into his suspension for fighting and bringing a pocketknife to school, and decided to place him in an alternative high school. "Once the IEP team changed [the student's] placement with [the parent's] consent, the IEP team, not the school board, became the decision-maker authorized to change his placement again," U.S. Circuit Judge James B. Loken wrote. Because the board did not have the power to change the student's placement, the court explained, it had no obligation to conduct a meaningless hearing on the matter. The 8th Circuit recognized that the student's services decreased significantly in the alternative placement, from six hours a day to just two hours a day. Still, the court observed, the parent could have requested an expedited due process hearing under the IDEA to challenge the reduction in services. Noting that the parent was informed of this right, the 8th Circuit found no fault with the district's refusal to hold a school board hearing.

2. **District of Columbia v. Doe, 54 IDELR 275, 611 F.3d 888 (D.C. Cir. 2010).** A due process hearing officer acted within the scope of his authority when he modified a district's discipline of a sixth-grader with ADHD who acted out in class, the D.C. Circuit Court of Appeals held. Notwithstanding the IHO's determination that the infraction was not a manifestation of the student's disability, the IHO did not exceed his authority under the IDEA by rejecting the exclusion as inconsistent with FAPE. Following an MD review team's determination that the infraction was not a manifestation of the elementary school student's disability, the assistant superintendent placed the student in an IAES for 45 days. The parent pursued a due process hearing. At the hearing, the IHO framed the issue as whether the exclusion denied the child FAPE. He determined that an 11-day exclusion was "more appropriate" given the trivial nature of the infraction and that the alternative placement was "not appropriate." The district appealed to the U.S. District Court, District of Columbia contending that the IHO usurped the assistant superintendent's disciplinary authority. The District Court agreed, and the student's mother sought review in the D.C. Circuit. Reversing the District Court, the D.C. Circuit noted that the IDEA empowers a hearing officer to review any decision regarding placement of a child with a disability and to ensure that disciplinary action does not deprive a student with a disability of FAPE. 20 USC 1415(k)(6)(A)(i); 20 USC 1415(k)(5)(A). The case largely came down to how the court interpreted the IHO's decision. In contrast to the district, the D.C. Circuit viewed the decision as finding that the exclusion denied FAPE, not merely that it violated D.C. municipal regulations. "Because we find that the hearing officer modified [the student's] punishment only after finding that class exclusion would deny [the student] a FAPE, we reject the District's argument that the hearing officer exceeded his authority," D.C. Circuit Judge Karen LeCraft Henderson wrote. The court reasoned that the IHO's decision contained numerous

references to the IDEA and defined the issue as one of FAPE, and in that context found the placement inappropriate. “Indeed, few developments could bear more on the ‘appropriateness’ of a child’s education than his being taken from his elementary school and placed in a new setting for nine weeks,” Judge Henderson wrote.

**3. Rochester Community Schs. v. Papadelis, 55 IDELR 79, 2010 WL 3447892 (Mich. Ct. App. 2010).** A high school student with Tourette syndrome, ADHD and adjustment disorder was not entitled to an MD review. A Michigan district filed a petition against the student for school incorrigibility under a state law that applies to juveniles under age 17 who willfully and repeatedly violate school rules or regulations. Concluding that the district had made every effort to address the student’s behavioral issues without success, a juvenile court adjudicated the student guilty of school incorrigibility. On appeal, the student argued that the district was required to conduct an MD review within 10 days of filing the petition because, under the IDEA, filing the petition constituted a change in educational placement. In an unpublished decision, the Michigan Court of Appeals acknowledged that a district must conduct an MD review within 10 days of any decision to change the placement of a child with a disability because of a disciplinary infraction to determine whether the conduct was a manifestation of the student’s disability. However, that requirement did not apply to the student because he was not removed from school for more than 10 consecutive days, nor had he been subjected to a series of removals totaling more than 10 school days in one school year. Because the filing of the petition placed the student under the jurisdiction of the juvenile court without changing his educational placement, the court ruled that he was not entitled to an MD review.

**4. Jackson v. Northwest Local Sch. Dist., 55 IDELR 104, 2010 WL 3452333 (S.D. Ohio 2010).** An Ohio district missed the signs that a third-grader with ADHD could be a child with a disability when it disciplined her without first conducting an MD review. The district provided the student with intervention services for two years. Her third-grade teachers reported their increasing concerns about the impact of the student’s escalating behavior on her academic performance. The RTI team recommended that the student undergo a mental health evaluation, but it did not initiate a special education evaluation at that time. The following month, the district suspended and expelled the student for threatening behavior. When the parent filed for due process, the district argued that an MD review was not required because the student had not yet been found eligible under the IDEA. The IDEA protects students who have not been determined to be eligible under the act when the circumstances indicate that a district should have suspected that the student had a disability. When the district expelled the student, it had provided her with interventions for approximately two years yet she had made few gains. Additionally, the behavioral concerns expressed by her teacher and others warranted a referral to an outside mental health agency. Relying on the magistrate judge’s opinion at 55 IDELR 71, the District Court ruled that these circumstances provided sufficient justification for the district to suspect that the student was a child with a disability. Because the district was deemed to have known of the student’s disability, the court ruled that its failure to conduct an MD review violated the IDEA’s procedural safeguards.

**5. Mason v. Board of Educ. - Howard County Pub. Sch. Sys., 56 IDELR 14 (D. Md. 2011).** A high school graduate with ADD could not pursue claims under Section 504 or Title II against his former Maryland district because he failed to support his claims with factual

allegations. The district suspended the student for five days for allegedly being intoxicated in class. Following his graduation, the student sued the district, alleging that it violated his 504 plan. The district argued that it was entitled to dismissal because the student failed to allege facts that would suggest that the suspension was due to discrimination. Although disability laws prohibit districts from disciplining students with disabilities more harshly on the basis of disability, that is not a district's only concern. Districts must also provide students with disabilities who face disciplinary action with procedural safeguards, such as a manifestation determination and a reevaluation, if a change of placement is involved. OCR has consistently concluded that a suspension of less than 10 days does not constitute a significant change in placement or a denial of FAPE necessary to trigger the protections of the ADA and Section 504, the court noted. Because the student's suspension was only for five days, the district did not violate disability laws by failing to conduct a manifestation determination or a reevaluation before suspending him. Moreover, because the student did not allege that the district discriminated against him by disciplining him more harshly than similarly situated nondisabled student for a similar infraction, dismissal was appropriate.

## **II. COMPENSATORY EDUCATION & OTHER REMEDIES**

6. **M.L. v. El Paso Indep. Sch. Dist., 54 IDELR 41, 369 F. App'x 573 (5th Cir. 2010).** Recognizing that a Texas district admitted its failure to provide a student with speech-language services, the 5th Circuit nonetheless held that the parent's claim for compensatory education was moot. The IEP team's recent determination that the student was no longer eligible for special education warranted dismissal of the parent's complaint. The 5th Circuit noted that the parent never challenged the IEP team's eligibility determination. Instead, she sought compensatory services to make up for the district's previous implementation failure. However, the IEP team had determined that the student had no current need for speech-language therapy. The court explained that it could not consider a claim for compensatory services that the student did not need. "The request for 'compensatory' speech therapy for an impediment that no longer exists does not present a 'live' case or controversy," the 5th Circuit wrote in an unpublished decision. The 5th Circuit thus affirmed the District Court's decision at 52 IDELR 159 that the parent's claim was moot. It also affirmed the District Court's grant of an order allowing the district to evaluate the student for ADHD without the parent's consent. Noting that the IDEA precludes districts from evaluating students over a parent's objections absent an administrative or judicial order, the 5th Circuit rejected the parent's argument that the district's request for an evaluation order was moot.

7. **Ferren C. v. School Dist. of Philadelphia, 54 IDELR 274, 612 F.3d 712 (3d Cir. 2010).** A Pennsylvania district could not satisfy its duty to provide compensatory education to a 24-year-old student with multiple, severe disabilities simply by paying for three years of services at a private school. The 3d Circuit affirmed a decision at 51 IDELR 272 that required the district to develop IEPs for the student's compensatory services. The court acknowledged that the student was no longer entitled to FAPE, because she had turned 21 during the 2006-07 school year. However, the 3d Circuit observed that the IDEA allows courts to award appropriate relief, including specific action to be taken by the district. "There is nothing in the IDEA that evinces Congressional intent to limit courts' equitable power to awards of only financial support," U.S. Circuit Judge D. Michael Fisher wrote. The relief awarded by the U.S.

District Court, Eastern District of Pennsylvania was appropriate, the 3d Circuit explained, because it furthered two purposes of the IDEA: 1) preparing students for further education, employment and independent living; and 2) ensuring that the student received the services to which she was statutorily entitled. Moreover, the student could not continue in her private school placement without an IEP developed by the district. “Allowing the school district to refuse to provide IEPs and to simply fund [the student’s] compensatory education would undoubtedly further hamper [the student’s] education and deprive her of her educational rights under the IDEA,” Judge Fisher wrote. Although the district maintained that the 3d Circuit was opening the door to litigation from other students who had aged out of the IDEA and who sought IEPs as part of compensatory education, the 3d Circuit noted that such relief would be granted only if warranted by the specific circumstances of the student’s case. In addition, the court pointed out that the district could minimize the potential for litigation by complying with its obligations under the IDEA.

**8. Phillips v. District of Columbia, 55 IDELR 101, 2010 WL 3563068 (D.D.C. 2010).** Noting that it had no evidence about an 8-year-old boy’s current educational needs, the U.S. District Court, District of Columbia declined to award the child compensatory education for a 19-month denial of FAPE. The court remanded the case to the IHO with instructions to determine the amount of compensatory services, if any, the child needed to make up for deficits in his educational services. The court explained that awards of compensatory education require a fact-specific inquiry. Awards should not be based on the amount of services missed, but rather on the amount of services needed to place the student in the position he would have occupied if the district had fulfilled its FAPE obligations. Although the parent’s expert testified that the child missed approximately 255 hours of services, she presented no evidence about the child’s current educational deficits. “Indeed, [the expert] testified at the administrative hearing that [the child], at the time he was denied a free and appropriate public education, ‘might have missed developmental milestones that would have been very difficult to recoup, particularly language ones,’” U.S. District Judge Reggie B. Walton wrote. Noting that it had consistently rejected such a “cookie-cutter” approach to calculating awards of compensatory education, the court explained that it could not calculate an appropriate award based on the information available. The court thus remanded the case to the IHO for further proceedings.

**9. Wheaten v. District of Columbia, 55 IDELR 12 (D.D.C. 2010).** Despite the fact that it placed a high school student in a setting that did not meet his needs for almost two years, the District of Columbia was not required to provide compensatory education to a teen with a learning disability. The District Court agreed with an IHO that the student did not need compensatory education because the district remedied its mistake prior to litigation by funding a private school placement. In April 2007, an evaluator opined that the student’s general education placement was inappropriate. The district agreed and paid for him to attend a private school with small classes and individual counseling. The parent subsequently established in a due process hearing that the district denied the student FAPE through November 2007. However, the IHO denied compensatory education. The parent appealed. On appeal, the District Court noted that the U.S. Circuit Court of Appeals for the District of Columbia has explicitly rejected a “cookie-cutter” approach to compensatory education awards, such as providing an hour of compensatory education for every hour of inappropriate services. *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005). Instead, the Circuit requires a fact-

intensive approach focusing on the student's needs. The IHO properly determined that the student did not require additional services to reverse harm resulting from the inappropriate placement. To the contrary, the student's grades and the parent's own testimony indicated that the student's academics, behavior and self-confidence had all improved while in the private school. "Given the strides that [the student] made following his placement at [the private school], both academically and behaviorally, and the continuing services provided to him under the most recent IEP, the Court agrees with the [hearing officer's decision] that no award of compensatory education is warranted," U.S. District Judge Richard J. Leon wrote.

**10. B.A. v. State of Missouri, 54 IDELR 77 (E.D. Mo. 2010).** It was premature to dismiss a parent's lawsuit alleging her son was abused and denied FAPE at a state school for children with severe disabilities. The U.S. District Court, Eastern District of Missouri observed that the parent's IDEA, Section 504 and ADA allegations pleaded valid claims for relief, and that it was not outside the bounds of the IDEA for the parent to seek as a remedy the installation of surveillance equipment at the school. The student's mother asserted that the school failed to fully implement her son's IEP, employed untrained staff, and subjected her son, a student with cerebral palsy, to verbal and physical abuse. She sued the Missouri ED and other state agencies, seeking relief including compensatory education and an order requiring audio and video monitoring of classrooms and hallways. The defendants asked the court to dismiss the case, arguing in part that installation of surveillance equipment is not an available remedy under the IDEA. The court disagreed, noting that the IDEA gives courts discretion to grant "appropriate" relief. 20 USC 1415(i)(2)(C)(iii). Furthermore, the appropriateness of relief is to be determined in light of the purposes of the IDEA. *Town of Burlington v. Department of Educ. for Mass.*, 555 IDELR 526 (1st Cir. 1984). In this case, "ordering audiovisual monitoring would not be beyond the scope of the IDEA if such monitoring assists in providing [the student] with special education and related services," U.S. Magistrate Judge Terry I. Adelman wrote. At this stage of the case, prior to discovery, it was too early to tell whether such services would be calculated to supply the child with an appropriate program.

### **III. CONFIDENTIALITY & STUDENT RECORDS**

**11. Disability Law Center v. Discovery Academy, 53 IDELR 282 (D. Utah 2010).** A protection and advocacy agency could not gain access to student records at a therapeutic boarding school simply by claiming it had "probable cause" to believe that abuse and neglect had occurred. Noting that the agency did not produce any factual evidence that the school used improper seclusion and restraint techniques, the District Court granted the school's motion to dismiss. The agency argued that information uncovered during a previous investigation nearly five years earlier had led it to believe that the school routinely secluded and restrained its students. However, the court pointed out that the agency did not identify the facts upon which that belief was based. Instead, the agency stated that it "learned of additional credible allegations of abuse and neglect" during the first investigation. The court explained that the uncorroborated statement did not support a finding of probable cause. "The [agency] fails to provide any factual support for what the allegations were, who made the allegations, what the substance of the complaint was, or the name of the supposed victims of the abuse," U.S. District Judge Clark Waddoups wrote. The court also rejected the agency's argument that it had sole authority to decide whether there was probable cause to investigate abuse and neglect. If that were true, the

court explained, the agency would be able to conduct what was effectively a warrantless search and seizure of the school's records — a practice that would raise serious constitutional concerns. Because the agency produced no evidence of current abuse or neglect at the school, it was not entitled to access the students' records or interview the students about seclusion and restraint.

#### IV. ELIGIBILITY & IDENTIFICATION

12. **Hansen v. Republic R-III Sch. Dist., 56 IDELR 2 (8th Cir. 2011).** A Missouri district's decision not to submit evidence of a ninth-grader's performance and interpersonal relationships to a due process hearing panel came back to haunt it on appeal. Concluding that the student had an emotional disturbance and an OHI, the 8th Circuit affirmed a District Court's determination that the student was eligible for IDEA services. The 8th Circuit pointed out that the district chose not to present any evidence of its own after the parent presented his case to the hearing panel. Instead, the district asked the panel to grant a judgment in its favor based on the parent's allegedly inadequate evidence — a request the panel granted. Because the panel did not make any factual findings, the 8th Circuit was free to look at the administrative record and draw its own conclusions. The 8th Circuit held that the student, who had bipolar disorder, was a child with an ED. Not only did the student have multiple disciplinary referrals over the previous four years for threatening students and teachers, fighting with other students, and disrespecting teachers and peers, he struggled to pass his classes and failed a standardized test required to advance to seventh grade. In addition, the 8th Circuit observed that the student exhibited hyperactive, impulsive, and inattentive behavior as a result of his ADHD, and that those behaviors interfered with learning. "Although [the district] correctly states that a diagnosis of ADHD alone does not entitle [the student] to special education services, it fails to cite any evidence in the record supporting the conclusion that ADHD does not adversely affect [the student's] educational performance," the court wrote. The 8th Circuit thus affirmed the District Court's decision that the student was eligible for IDEA services under the categories of ED and OHI. In a concurring opinion, U.S. Circuit Judge Raymond W. Gruender stated that conflicting evidence in the administrative record required the 8th Circuit to defer to the hearing panel's conclusion about the student's eligibility. However, Judge Gruender believed the record supported the 8th Circuit's conclusion that the student was eligible for services as a child with an OHI.

13. **Marshall Joint Sch. Dist. No. 2 v. C.D., 54 IDELR 307 (7th Cir. 2010).** A physician's belief that a grade school student with a rare genetic condition could not participate safely in regular PE proved to be no match for an IEP team's eligibility determination. Concluding that the student did not need specialized instruction to receive an educational benefit, the 7th Circuit reversed a decision at 51 IDELR 242 that he was eligible for IDEA services. Because the ALJ's decision focused solely on the student's need for adapted PE, the 7th Circuit limited its review to whether the adapted PE services the student was receiving under a stay-put IEP were necessary. The court criticized the ALJ's finding that the student's educational performance could be affected if he experienced pain or fatigue at school. "This is an incorrect formulation of the [eligibility] test," U.S. Circuit Judge Daniel A. Manion wrote. "It is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does*." The court further held that the ALJ incorrectly relied on testimony from the student's physician that the student

needed adapted PE. The evidence showed that the physician based her opinion almost entirely on information obtained from the student's mother. She evaluated the student for only 15 minutes, and did not conduct any testing or observation of the student's educational performance. In contrast, the student's adapted PE teacher testified that the student successfully participated in a regular PE class with modifications. The 7th Circuit explained that the ALJ erred in crediting the physician's opinion over that of the IEP team, which included the adapted PE teacher. "A physician cannot simply prescribe special education; rather, the [IDEA] dictates a full review by an IEP team," Judge Manion wrote. While the team was required to consider the physician's opinion, it did not have to defer to her view about the student's special education needs. The 7th Circuit further noted that the student's need for physical and occupational therapy did not make him eligible for IDEA services, as they did not amount to specialized instruction.

**14. A.J. v. Board of Educ. of East Islip Union Free Sch. Dist., 53 IDELR 327 (E.D.N.Y. 2010).** Recognizing that a kindergartner with Asperger syndrome might have social and behavioral difficulties, the District Court nonetheless held that he was ineligible for special education and related services. The child's academic progress showed that his disability did not have an adverse effect on his educational performance. The court noted that neither the IDEA nor New York law define the term "educational performance." However, recent decisions from the 2d Circuit indicated that educational performance is limited to academic progress. *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 51 IDELR 149 (2d Cir. 2008, *unpublished*); *C.B. v. Department of Educ. of the City of New York*, 52 IDELR 121 (2d Cir. 2009, *unpublished*). The District Court thus rejected the parents' argument that, for purposes of IDEA eligibility, "educational performance" includes all difficulties resulting from a child's disability. "Rather, 'educational performance' must be assessed by reference to academic performance which appears to be the principal, if not only, guiding factor," U.S. District Judge Denis R. Hurley wrote. The court pointed out that the child in this case was performing at average to above-average levels, and was making academic progress in the classroom. Because the parents could not demonstrate an adverse effect on the child's educational performance, the district did not err in finding the child ineligible for IDEA services. The court granted the district's motion to dismiss the parents' FAPE appeal.

**15. Maus v. Wappingers Cent. Sch. Dist., 54 IDELR 10 (S.D.N.Y. 2010).** Although a seventh-grader had social and emotional difficulties as a result of ADHD, Asperger syndrome, and generalized anxiety disorder, a New York district correctly found the student ineligible for IDEA services. The U.S. District Court, Southern District of New York held that the student did not need special education to receive an educational benefit. The court recognized that neither the Part B regulations nor New York law define the term "adverse effect on educational performance." However, recent decisions from the 2d Circuit indicate that "educational performance" refers solely to academics. *See C.B. v. Department of Educ. of the City of New York*, 52 IDELR 121 (2d Cir. 2009, *unpublished*); *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.*, 51 IDELR 149 (2d Cir. 2008, *unpublished*). "No court applying New York's implementing regulations has held that a student who has excelled academically nonetheless has a right to special education services under the IDEA," U.S. District Judge Paul G. Gardephe wrote. The court noted that the student in this case consistently earned above-average grades in all of her classes. She performed at an eighth-grade level in reading and

written expression, and at a 12th-grade level in math. Thus, while the student’s disabilities might impede her social and emotional functioning, they did not impede her ability to obtain an educational benefit.

**16. Brado v. Weast, 53 IDELR 316 (D. Md. 2010).** Recognizing that home and hospital teaching qualified as specialized instruction, a District Court nonetheless held that a teenager with chronic pain was ineligible for IDEA services. The medical evidence presented at a due process hearing showed that the student did not need home-based instruction to receive an educational benefit. The court agreed with the parents that in-home instruction amounts to specialized instruction under the IDEA, regardless of whether that instruction is altered in content or form. *Board of Educ. of Montgomery County v. S.G.*, 45 IDELR 93 (D. Md. 2006). However, the court observed that the student did not need home-based instruction. The court explained that all of the accommodations the student required — frequent breaks, adjusted workloads, alternative test scheduling, and personalized instruction — could be provided under a Section 504 plan. “With the exception of [the student’s] primary care physician ..., no medical expert suggests that [the student] required [home and hospital teaching],” U.S. District Judge Peter J. Messitte wrote. As such, the court held that the district correctly found the student ineligible for IDEA services. The court declined to consider the parents’ retaliation claim, noting that they failed to raise the issue at the administrative level.

**17. Nguyen v. District of Columbia, 54 IDELR 18, 681 F. Supp. 2d 49 (D.D.C. 2010).** The tenuous connection between a 17-year-old student’s depression and his poor performance in high school undermined his parent’s claim that he was eligible for IDEA services. Finding that the student’s truancy and drug use were at least partially responsible for his educational difficulties, the District Court held that he was not a “child with a disability.” The court rejected the parent’s argument that the student had an emotional disturbance. Although the student had been diagnosed with depression, a condition that could affect his ability to attend school, the parent failed to establish a direct link between the student’s depression and his poor academic performance. In contrast, the court observed, the evidence showed that the student’s truancy and drug use negatively affected his education. As for the parent’s claim that the student had a specific learning disability, the court pointed out that the student scored higher than his aptitude level on all but two areas of testing. In the remaining areas, the difference between his ability and achievement was inconsequential. “Small differences between achievement scores and intelligence scores are insufficient to support [a] classification as having a specific learning disability,” U.S. District Judge James Robertson wrote. Noting that the discrepancy might stem from the student’s poor attendance, the court affirmed an IHO’s finding that the student was ineligible for IDEA services.

**18. Compton Unified Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9th Cir. 2010), *petition for cert. filed* (U.S. 01/06/11) (No. 10A5120).** A district could not avoid a child find claim simply by pointing out that it did not take any affirmative action in response to a high school student’s academic and emotional difficulties. Concluding that the district’s decision to ignore the student’s disability amounted to a child find violation, the 9th Circuit affirmed a decision in the parent’s favor. The district argued that the IDEA’s written notice requirement applies to proposals or refusals to initiate a change in a student’s identification, evaluation, or placement. Because it chose to do nothing, the district argued, its conduct did

not qualify as an affirmative refusal to act. The 9th Circuit disagreed, noting that it would not interpret a statute in a manner that produced absurd results. The court pointed out that the IDEA provision addressing the right to file a complaint is separate from the written notice requirement. “Section 1415(b)(6)(A) states that a party may present a complaint ‘with respect to any matter relating to the identification, evaluation, or educational placement of the child,’” U.S. Circuit Judge Harry Pregerson wrote. The court observed that the IDEA’s written notice requirement did not limit the scope of the complaint provision. By alleging that the district failed to take any action with regard to the student’s disabilities, the parent pleaded a viable IDEA claim. U.S. Circuit Judge N. Randy Smith dissented from the majority’s opinion. Determining that a “refusal” to identify or evaluate requires purposeful action by the district, the judge concluded that the parent did not have the right to bring a child find claim.

**19. D.L. v. District of Columbia, 55 IDELR 6, 730 F. Supp. 2d 84 (D.D.C. 2010).** The U.S. District Court, District of Columbia ruled that the District of Columbia’s efforts to locate and provide FAPE to young children with disabilities fell well short of its legal obligations for many years. The court held that the district violated the IDEA by failing to locate, evaluate, and properly transition children between the ages of 3 and 5 throughout the district at least through 2007. The court noted that the evaluation component of child find requires a district to conduct an initial evaluation of a child to determine whether he qualifies as a child with a disability within 60 days or within the time frame specified by the state (120 days in this case) and to determine his educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A). The court pointed out that the district agreed that it provided special education and related services to just 2 percent to 3 percent of children in the age range at issue — missing about half the children that it should have identified. Furthermore, the parties agreed that at least through 2007, the district’s outreach and public awareness efforts were inadequate, and that the district often failed to act on referrals it received. Just 65 percent of children referred received initial evaluations within 120 days. The court also found that the district failed to provide children with an effective transition to Part B services. The district conceded that most children transitioning to Part B did not have an IEP in place and enrollment in preschool special education by their third birthdays during the years in question. “There is no genuine dispute that the District’s procedures to facilitate these transitions were inadequate,” U.S. District Judge Royce C. Lamberth wrote.

**20. D.K. v. Abington Sch. Dist., 54 IDELR 119 (E.D. Pa. 2010).** Although in hindsight an elementary school student may have exhibited some symptoms consistent with ADHD, that did not establish that his Pennsylvania district violated its child find obligation. At the time, the district did not have a strong basis to suspect that the child was a student with a disability, a federal District Court reasoned. The district initially evaluated the child in 2006 in response to his parents’ request, but found him ineligible. In 2007, the parents privately obtained an ADHD diagnosis, and the district conducted a second evaluation which found the student eligible. The parents pointed to the student’s retention in kindergarten in 2004 and teacher reports as evidence that the district should have suspected the child was a student with a disability much earlier. The district prevailed at the administrative level, and the parents appealed. Ruling for the district, the court observed that to establish a child find violation, a parent must first show the district knew, or should have known, that the child was a student with a disability. Before the district learned of the ADHD diagnosis, it had insufficient reason

to suspect a disability. The court pointed to testimony that the student did not stand out from classmates, and that his inattentiveness could be explained by his young age. Although the school psychologist acknowledged after the fact that the student may have had some behavior consistent with ADHD, there was also evidence that the student's difficulties were less pronounced during the period in question and that the behavior was typical for a 5- or 6-year-old. The court also held that the student was not denied FAPE after the eligibility determination. *Editor's note: The 3d U.S. Circuit Court of Appeals affirmed the District Court's statute of limitations analysis in Steven I. v. Central Bucks Sch. Dist., 55 IDELR 35 (3d Cir. 2010), cert. denied, 111 LRP 12738 (U.S. 02/22/11)(No. 10-829).*

**21. D.B. v. Bedford County Sch. Bd., 54 IDELR 190 (W.D. Va. 2010).** A Virginia district failed to thoroughly evaluate and appropriately place a student with ADHD when it glossed over whether he also had an SLD. Because the district's flawed evaluation led to an IEP that did not target the student's needs, the district denied him FAPE. After finding the student eligible as OHI, the IEP team placed the student in inclusion classes for four consecutive years. He failed to achieve any reading goals. The parent alleged in a due process complaint that the district's evaluation was inadequate. An administrative hearing officer ruled against the parent, reasoning, in part, that the IEP team ruled out "M.R./S.L.D." On appeal, the District Court pointed to the IEP team's failure to assess the student in, or even discuss SLD despite the fact that the evidence strongly suggested the student had such an impairment. The court also observed that the hearing officer and IEP team members mistakenly conflated the SLD and mentally retarded classifications. "[T]he IEP could not accurately be described as based on [the student's] 'individual' needs if he were evaluated on the basis of this mistaken comparison," U.S. District Judge Norman K. Moon wrote. And contrary to the officer's statements, the student's services might well have changed had he been fully evaluated. There was other evidence of the IEP's deficiencies, including the fact that after four years, the student was unable to read near grade level. "Although the hearing officer observed that [the student] was promoted a grade every year ... this token advancement documents, at best, a sad case of social promotion," Judge Moon wrote. The court ordered the district to reimburse the parent for private school tuition.

**22. Compton Unified Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010).** A California district's efforts to assess a 6-year-old student's eligibility for special education services were not sufficient to comply with its obligation to provide FAPE. The student's grandparents indicated to his teacher in October that he might have ADHD. In December, the student became extremely violent and engaged in disruptive and aggressive behavior. His grandparents requested a functional analysis assessment in February. The school psychologist completed an initial psychoeducational assessment in time for the first IEP meeting in May, but the district failed to conduct the requested FAA. The student's grandparents challenged the June IEP and placement proposal, which did not contain any behavioral goals. The district argued that it did not deny any request for assessment, but proceeded with due diligence in conducting assessments and convening multiple IEP meetings before proposing a placement. "Contrary to the district's characterization of events, the administrative record supports the finding that the district did not timely assess the student in all areas of suspected disability," the court wrote. The district's failure to conduct a comprehensive assessment to identify all of the student's needs prevented the IEP team from developing an appropriate IEP and making an offer of placement that provided FAPE in the student's LRE, the court remarked. Moreover,

had the district conducted the FAA when it was requested, it would have been available for discussion at the first IEP meeting. An FAA would have enabled the IEP team to consider strategies to address the behavioral issues that impeded the student's learning, the court added.

**23. G.J. v. Muscogee County Sch. Dist., 54 IDELR 76, 704 F. Supp. 2d 1299 (M.D. Ga. 2010).** The parents of a 7-year-old with autism effectively withheld their approval for a triennial reevaluation by placing numerous restrictions on how the assessment would be conducted, a federal District Court held. However, because they were still interested in obtaining a reevaluation, the parents' non-consent did not automatically waive their son's right to IDEA services. When the parents signed the district's consent form, they attached an addendum requiring a specific evaluator, parental approval for each instrument, and meetings before and after the evaluation. An ALJ concluded that this did not constitute consent. Thus, the district did not have to provide services. On appeal, the District Court noted that although the parents contended their addendum merely tracked the IDEA's requirements, it was in fact much stricter. Furthermore, they continued to seek significant conditions, including a limitation that the reevaluation "not be used in litigation against [the parents]." "With such restrictions, Plaintiffs' purported consent was not consent at all," U.S. District Judge Clay D. Land wrote. At the same time, the refusal did not automatically waive the right to IDEA services. The court pointed out that this was not a case where the ALJ ordered the parents to consent and the parents refused. Moreover, the parents continued to express an interest in having their son reevaluated. Although the parties were unable to resolve the conditions of the reevaluation, there was no evidence that the parents would have rejected a reevaluation ordered by the ALJ. The court ordered the parents to consent to the reevaluation, observing that they were free to decline services rather than comply with the order.

**24. Hansen v. Republic R-III Sch. Dist., 56 IDELR 2 (8th Cir. 2011).** A Missouri district's decision not to submit evidence of a ninth-grader's performance and interpersonal relationships to a due process hearing panel came back to haunt it on appeal. Concluding that the student had an emotional disturbance and an OHI, the 8th Circuit affirmed a District Court's determination that the student was eligible for IDEA services. The 8th Circuit pointed out that the district chose not to present any evidence of its own after the parent presented his case to the hearing panel. Instead, the district asked the panel to grant a judgment in its favor based on the parent's allegedly inadequate evidence — a request the panel granted. Because the panel did not make any factual findings, the 8th Circuit was free to look at the administrative record and draw its own conclusions. The 8th Circuit held that the student, who had bipolar disorder, was a child with an ED. Not only did the student have multiple disciplinary referrals over the previous four years for threatening students and teachers, fighting with other students, and disrespecting teachers and peers, he struggled to pass his classes and failed a standardized test required to advance to seventh grade. In addition, the 8th Circuit observed that the student exhibited hyperactive, impulsive, and inattentive behavior as a result of his ADHD, and that those behaviors interfered with learning. "Although [the district] correctly states that a diagnosis of ADHD alone does not entitle [the student] to special education services, it fails to cite any evidence in the record supporting the conclusion that ADHD does not adversely affect [the student's] educational performance," the court wrote. The 8th Circuit thus affirmed the District Court's decision that the student was eligible for IDEA services under the categories of ED and OHI. In a concurring opinion, U.S. Circuit

Judge Raymond W. Gruender stated that conflicting evidence in the administrative record required the 8th Circuit to defer to the hearing panel's conclusion about the student's eligibility. However, Judge Gruender believed the record supported the 8th Circuit's conclusion that the student was eligible for services as a child with an OHI.

## V. EVALUATION

**25. P.L. v. Charlotte-Mecklenburg Bd. of Educ., 55 IDELR 46, 2010 WL 292129 (W.D.N.C. 2010).** The parents of a fifth-grader forfeited their chance to obtain reimbursement for an IEE when they obtained an independent assessment without waiting for the district to say whether it would pay for one and to provide a list of approved evaluators. According to the U.S. District Court, Western District of North Carolina, the parents were not entitled to reimbursement because they failed to follow the IDEA's requirements for obtaining a publicly funded IEE or to show that the district's response came too late. The parents requested an IEE on May 1, 2006. On May 9, before they received a response from the district, they had the student evaluated at a cost of \$3,250. According to the district, it sent two response letters, on May 21 and June 1, rejecting the parents' request and offering to pay \$800 for an IEE from an approved list of evaluators. The parents claimed the first letter that they received was postmarked June 8, 2006. A state review officer denied the parents' request for reimbursement, reasoning that they failed to comply with the IDEA's procedural requirements. When parents request an IEE at public expense, a district must either pay for one or request a due process hearing to show its own evaluation was appropriate. 34 CFR 300.502(b)(2). Moreover, it must do so "without unnecessary delay." 34 CFR 300.502(b)(4). Here, there was no evidence that the district delayed unnecessarily. Instead, the parents jumped the gun by paying for an IEE eight days after mailing their request and did not obtain an evaluation that matched the district's own criteria for conducting evaluations. Furthermore, the district did eventually respond to their request. Although there was disagreement over when exactly the parents received the district's letters, all of the dates asserted fell within the 60 days the district had to respond or request a due process hearing under North Carolina's statute of limitations.

**26. D.Z. v. Bethlehem Area Sch. Dist., 54 IDELR 323 (Pa. Commw. Ct. 2010).** The Pennsylvania Commonwealth Court found no flaw in an impartial hearing officer's decision not to consider an IEE request by the parent of a seventh-grader with an undisclosed disability. The request was premature, the court stated, because the parent's disagreement pertained to a district evaluation that was incomplete. The parent first agreed, but later revoked her consent to a district reevaluation. She said that she disapproved of the scope of the testing. She then e-mailed the district, asking it to pay for an independent evaluation. The district refused and then filed a due process complaint seeking permission to proceed with the reevaluation. At the hearing, the IHO declined to consider evidence related to the parent's IEE request. The parent appealed, asserting that the hearing officer violated her constitutional due process rights. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 CFR 300.502(b)(1). While the parent maintained that she requested the IEE because of her disagreement with prior evaluations, the record belied that contention, the court held. The hearing record placed her IEE request squarely within the context of the district's request for permission to reevaluate. Furthermore, her IEE request did not mention any prior district evaluation. A parent's right to

request an IEE does not vest until there is a completed evaluation with which she disagrees, the court noted. “Thus, [the parent’s] IEE request, and her attempt to inject that request into this proceeding, was premature,” the court wrote.

**27. Mumid v. Abraham Lincoln High Sch., 55 IDELR 33 (8th Cir. 2010), cert. denied, 111 LRP 12736 (U.S. 02/22/11).** The 8th U.S. Circuit Court of Appeals ruled that a Minnesota district did not discriminate against ELL students by failing to evaluate their need for special education services. The 8th Circuit acknowledged that the district had a practice of not evaluating ELL students for possible disabilities until they had been in the school system for three years. However, noting that the students sued under Title VI of the Civil Rights Act rather than the IDEA, the court explained that they needed to prove intentional discrimination on the basis of national origin. Because the students failed to demonstrate intentional discrimination, the 8th Circuit affirmed a decision in the district’s favor.

## **VI. FAPE & IEPs**

**28. A.B. v. Montgomery Co. Intermediate Unit, 56 IDELR 3 (3d Cir. 2011).** The parents of a child with a cochlear implant might have shown that an IHO’s exclusion of their expert’s testimony was improper, but they could not persuade the 3d Circuit that a Pennsylvania district denied their daughter FAPE. The 3d Circuit held that the proposed IEP, including the child’s recommended placement in a public preschool program, was reasonably calculated to provide a meaningful educational benefit. The case turned on the level of services the district was required to provide. Although the 3d Circuit agreed that the IHO erred in excluding the expert’s testimony, it pointed out that the parents’ case focused on the district’s failure to offer an ideal education. “The District Court reviewed the entirety of the evidence, including [the expert’s] testimony, and concluded that [the child] and her parents had not satisfied the relevant legal standard,” U.S. Circuit Judge Thomas L. Ambro wrote in an unpublished decision. Noting that the District Court considered the expert’s testimony and determined that its exclusion did not affect the outcome of the case, the 3d Circuit affirmed a decision reported at 54 IDELR 164 that the proposed placement was appropriate.

**29. D.S. and A.S. v. Bayonne Bd. of Educ., 54 IDELR 141, 602 F.3d 553 (3d Cir. 2010).** Evidence that a ninth-grader with cognitive difficulties performed well below grade level on achievement tests and struggled to understand teachers in his special education classes helped convince the 3d Circuit that his IEP was inadequate. The 3d Circuit reversed a decision reported at 51 IDELR 189 that the student’s good grades established a receipt of FAPE. The decision turned in part on the U.S. Supreme Court’s decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (U.S. 1982). In *Rowley*, the Supreme Court held that a student’s ability to earn passing marks and advance from grade to grade is a strong indicator that he received a meaningful educational benefit. However, the 3d Circuit pointed out that *Rowley* addressed a student’s performance in the general education classroom. “Our reading of *Rowley* leads us to believe that when ... high grades are achieved in classes with only special education students set apart from the regular classes of a public school system, the grades are of less significance than grades obtained in regular classrooms,” U.S. Circuit Judge Morton Ira Greenberg wrote. The 3d Circuit noted that despite his good grades, the student performed well below grade level in reading, writing, and math. Achievement tests indicated that

he had borderline to low-average cognitive functioning. A neuropsychologist who observed the student in class testified that the student had difficulty processing information that his teachers presented orally. Furthermore, although several evaluators recommended that the student's IEP incorporate specific remedial techniques, the IEPs only required teachers to "use a multisensory approach." Because the evidence supported an ALJ's finding that the IEPs were inadequate, the 3d Circuit held that the District Court erred in reversing the ALJ's decision.

**30. J.L. and M.L. v. Mercer Island Sch. Dist., 55 IDELR 164, 2010 WL 3947373 (W.D. Wash. 2010).** A district that focused on providing accommodations for a student with learning disabilities in reading and writing offered her FAPE, the District Court held. The court noted that the FAPE standard requires that districts offer a student some educational benefit, not that they attempt to remediate a student's deficiencies or maximize her potential. The student's parents placed her in a private school that focused on remediating learning disabilities and sought tuition reimbursement from the district. In denying their request, the court noted that *Rowley* merely requires a district to offer some benefit. Contrary to the parents' suggestion, the district was not required to bring the student up to a reading level commensurate with her peers. The fact that the district offered accommodations such as notetakers and readers rather than trying to remediate her learning disabilities, did not mean that it violated the IDEA. Nor did the fact that she did not achieve all of her IEP goals demonstrate that she was denied FAPE. The IDEA does not guarantee any particular outcome, the court noted. "What is required is an ongoing, adaptive effort to set beneficial objectives that will challenge and improve the student, combined with periodic review and revision to ensure those goals are being met or, if met, are being modified to take the student to the next level," U.S. District Judge Marsha J. Pechman wrote. Although the student did not meet all of her objectives every year, her passing grades, the attainment of many of her IEP goals, and her teachers' comments showed that she was provided some educational benefit. It was true that she read at a slower pace than her nondisabled peers. But that was not a basis for finding that she was denied FAPE, the court held.

**31. Lathrop R-II Sch. Dist. v. Gray, 54 IDELR 276, 611 F.3d 419 (8th Cir. 2010), cert. denied, 111 LRP 3206 (U.S. 01/18/11)(No. 10-7596).** The 8th Circuit affirmed a decision by the U.S. District Court, Western District of Missouri at 53 IDELR 77 that a district went above and beyond what the IDEA requires when it comes to addressing a student's behaviors. The student with autism exhibited problem behaviors throughout sixth and seventh grade — finger biting, hand flapping, loud outbursts, and sexual behaviors. His parent filed for due process, asserting that the district denied the student FAPE by failing to address his behavior issues. The parent took his claim to the 8th Circuit, where the court noted that the IDEA does not require an IEP to create specific goals for behavior. However, if behavior impedes a child's learning, the IEP team should consider positive behavioral interventions and supports to address it. The student's "2002 and 2003 IEPs both described his disruptive behaviors and included a host of strategies to address them," U.S. Circuit Judge Diana E. Murphy wrote. The district conducted a functional behavioral assessment and developed a behavioral management plan to address those behaviors. The IEPs contained a sensory diet with strategies for keeping the student on task and preventing disruptions. The district assigned a one-to-one aide. It also provided staff training on autism, hired related service providers with experience in autism, and arranged for an autism specialist to consult with the IEP team. The fact that the student made progress indicated that the district made a good-faith effort to address the student's behaviors and provide FAPE. The 8th Circuit

also held that while the student's IEP contained baseline data for many of the goals, the IDEA does not specifically mandate such specific data. The IDEA requires a statement of the student's present levels of educational performance and a statement of measurable annual goals, including benchmarks for short-term objectives. The student's IEPs in this case contained both.

**32. French v. New York State Dept. of Educ., 55 IDELR 128, 2010 WL 3909163 (N.D.N.Y. 2010).** A New York district did not deny FAPE to a student with autism whose father kept her out of school, refused to attend IEP meetings, and continually opposed its proposed IEPs. Noting that the district went out of its way to accommodate the parent's concerns, the District Court held that the child's failure to receive FAPE was caused by her father's "dilatatory tactics and unwillingness to compromise." The parent alleged that the district denied his daughter FAPE over a period of several years by committing various procedural errors, such as failing to provide prior written notice. The court noted that for a court to find a denial of FAPE on procedural grounds, there must be evidence that the error compromised the student's right to an appropriate education, seriously impeded the parent's opportunity to participate, or caused a deprivation of educational benefits. 20 USC 1415(f)(3)(E)(ii). None of those things occurred here. Although the student went for years without an appropriate program, the source of her dilemma was not the district, but her father. The court observed that the district repeatedly demonstrated a desire to accommodate the parent's concerns. It pointed to minutes of a 2001 IEP meeting, in which the team reviewed the parent's written input, discussed his request for updated evaluations, and recommended a home-based program the parent had suggested. However, the parent refused to allow his daughter to participate in the program and "repeatedly delayed the implementation of Plaintiff's proposed IEPs, regardless of how reasonable they were and regardless of whether they provided every item of relief he requested," U.S. District Judge Frederick J. Scullin Jr. wrote.

**33. J.D.G. v. Colonial Sch. Dist., 55 IDELR 197, 2010 WL 4340693 (D. Del. 2010).** The parent of a student with Down syndrome may have preferred that the middle school student's Delaware district focus on academic instruction over independent living skills, but that did not make the IEP inappropriate, the U.S. District Court, District of Delaware held. The evidence indicated that the IEP's goals and focus on teaching the student to function independently in the community was justified based on his limited academic potential and his postsecondary transition needs. After the student failed to make progress on his 2007-08 IEP goals, the IEP team decided to stop the focus on rote memorization and repetitive academic drills that his parent preferred. The parent filed a due process complaint challenging the adequacy of the IEP. A hearing officer ruled against her, and the parent appealed. Under *Rowley*, the court noted, districts must offer educational instruction specially designed to meet the unique needs of a student, supported by such services as are necessary to permit the child to benefit from the instruction. The court pointed out that the district offered a small structured class specifically suited to the student's needs, and set goals and provided services that built on his strengths while preparing him for independent living. The court noted that the hearing record lacked evidence that the IEP was inappropriate. "Rather, it demonstrate[d] the parents' belief that [the IEP] is not rigorous enough," U.S. District Judge Sue L. Robinson wrote. Testimony indicated that the parents may not have fully grasped the limited nature of the student's capabilities. However, that was no basis for overturning the IHO's decision. Due to his age and the necessity to transition him into independent living, it was appropriate to shift the IEP's focus.

**34. New Milford Bd. of Educ. v. C.R., 54 IDELR 294 (D.N.J. 2010)(unpublished).** A New Jersey district had to foot the bill for a student's private afterschool instruction when the student's school failed to address his self-stimulatory and aggressive behavior. A federal District Court held that the home-based afterschool program was necessary for the student to receive meaningful benefit at school. The student's behaviors occurred both at home and at school, and included becoming aggressive when he had difficulty expressing himself. The parent filed a due process complaint, alleging that the district denied the student FAPE and seeking reimbursement. An ALJ ruled in the parent's favor, reasoning that the student's day school was incapable of providing adequate behavioral intervention and that the home program supplied behavioral and communication benefits that allowed the student to benefit from school. The district appealed. On appeal, the District Court cast aside the district's argument that districts are not required to ensure that a student can generalize skills outside of school as long as the student obtains some benefit. "This Circuit has expressly mandated the provision of 'meaningful educational benefits in light of the student's intellectual potential,' not a lesser 'some progress' standard," U.S. District Judge José L. Linares wrote. Moreover, the issue was not the student's ability to generalize skills outside of school, but his ability to obtain any benefit from the school without the intervention he received at home. The court pointed to testimony that the student needed the home program in order to learn at school. Finally, the parent training supplied by the day school did not address the student's behavior.

**35. M.P. v. Poway Unified Sch. Dist., 54 IDELR 278, 2010 WL 2735759 (S.D. Cal. 2010).** The fact that a student with a specific learning disability failed to achieve all of his IEP goals or perform on a par with his peers did not mean that a California district denied him FAPE. Teachers' testimony that the student made substantial progress in reading, math, and language usage helped establish that the student's program was reasonably calculated to confer an educational benefit. After an ALJ ruled that the district offered the student FAPE, the parents appealed to federal court. In a motion for summary judgment, the parents pointed out that the gap between the student and his nondisabled peers increased in word analysis and vocabulary, and that the student failed to achieve all 11 of his goals and to reach state reading and writing standards. The District Court noted that an IEP offers FAPE if it is reasonably calculated to enable the child to receive educational benefits. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). In this case, the student's state testing results showed substantial academic improvement. Furthermore, the student's teachers testified that he made some progress toward all of his goals and that the IEP was modified to specifically address the goals he did not reach. The court acknowledged that the student did not achieve every goal or reach the level of an average, proficient student according to the testing, his report card, and progress report. "That, however, does not indicate that 'meaningful progress' was not made," U.S. District Judge Janis L. Sammartino wrote. The fact that the student made some headway in his academics established that the district offered him FAPE.

**36. Jaccari v. Board of Educ. of the City of Chicago, 54 IDELR 53, 690 F.Supp. 2d 687 (N.D. Ill. 2010).** Progress reports detailing a fourth-grader's improvements in reading, math, and classroom conduct helped an Illinois district to deflect claims that it denied the student FAPE. The U.S. District Court, Northern District held that the student's classroom progress trumped his poor performance on a series of standardized tests. The court

acknowledged that the student's standardized test scores slipped from the kindergarten-first grade level in May 2006 to below the kindergarten level in February 2008. However, the court explained that those test scores were not dispositive. "Given his cognitive impairment and emotional disturbances, it is unclear what [the student] should be scoring on standardized tests and how much of a yearly increase in his scores should be expected," U.S. District Judge Ruben Castillo wrote. The real question, the court observed, was whether the student's IEPs were reasonably calculated to provide educational benefits. The court noted that the student's IEPs contained goals and benchmarks tailored to his levels of performance, and provided access to specialized instruction. Moreover, progress reports showed that the student made academic and behavioral improvements. Not only did the student make far more progress in reading than his teacher expected, the court observed, but he showed "great improvement" in his attitude and his willingness to cooperate with school staff. Concluding that the IEPs were designed to provide more than trivial progress, the court entered judgment for the district.

**37. Doe v. Hampden-Wilbraham Reg'l Sch. Dist., 54 IDELR 214, 715 F.Supp. 2d 185 (D. Mass. 2010).** The IEP of a child with autism, which specifically addressed his at-school behavior, offered him FAPE, a federal District Court held. While noting that the impact of the IEP's behavioral strategies would likely spill over to the home environment, the court pointed out that the district was only obligated to address those behavioral issues the student displayed in school. The parents alleged in an administrative hearing that the IEP denied the student FAPE by failing to address the student's severe at-home interfering behavior, and because it lacked specific statements regarding specialized instruction and generalization of skills. As relief, they sought reimbursement for a unilateral private placement. An ALJ denied that request, and the parents appealed. The District Court noted that an IEP must be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade, but need not maximize his potential. *North Reading Sch. Committee v. Bureau of Special Educ. Appeals of the Massachusetts Dept. of Educ.*, 47 IDELR 215 (D. Mass. 2007). The court observed that the IEP contained behavioral goals and specific steps the district would take to decrease the student's interfering behaviors and keep him on task, such as preferential seating and support during transitions. "While there is no specific reference in the IEP about how to deal with the interfering behaviors at home ... the IEP does focus on what can be done in the environment that the school district can control — school itself," U.S. District Judge Nancy Gertner wrote. The court also noted that the IEP included a detailed statement of special education and related services, and numerous plans for generalizing skills to different settings. Because the IEP offered the student FAPE, his parents could not obtain tuition reimbursement.

**38. W.R. and K.R. v. Union Beach Bd. of Educ., 54 IDELR 197 (D.N.J. 2010), *aff'd*, 111 LRP 12486, No. 10-2345 (3d Cir. 02/17/11).** The adequacy of a student's IEP. The finding that the student made slow progress in a resource room was irrelevant, given the ALJ's determination that the IEP, when developed, was reasonably calculated to provide FAPE. The student, a fifth-grader with dyslexia, an expressive/receptive language disorder, an auditory processing weakness, and ADHD, was offered group reading instruction. The parents alleged that the student made better progress with one-to-one instruction using a specific methodology. An ALJ agreed that the district denied the student FAPE, reasoning that the student was still reading at a second-grade level. However, she found that the IEPs were reasonably calculated to confer educational benefit. On appeal, the District Court agreed with the district's view that the ALJ's

decision was “at odds with itself.” The court observed that an IEP’s adequacy can only be determined as of the time it is offered and that later progress may only be considered in determining whether the original IEP was reasonably calculated to afford educational benefit. *Fuhrmann v. E. Hanover Bd. of Educ.*, 19 IDELR 1065 (3d Cir. 1993). At the same time that the ALJ found the child’s progress was not swift enough, the ALJ determined the district’s multi-faceted approach to his reading difficulties was calculated to result in progress. Furthermore, the evidence showed that the student did progress, and that he was more motivated in the resource room than in a one-to-one setting. Finally, the parents’ contention that the IEPs fell short because they did not require strict fidelity to the Wilson reading program amounted to an impermissible attempt to dictate educational methodology.

**39. M.B. v. Hamilton Southeastern Schs., 55 IDELR 4 (S.D. Ind. 2010).** An Indiana district’s refusal to allow a student to attend both morning and afternoon kindergarten sessions did not amount to a denial of FAPE. While the district held two identical kindergarten sessions each day, it did not offer full-day kindergarten to any students. The parents of a 5-year-old with a traumatic brain injury were insistent that the student be allowed to attend kindergarten for a full day, not so that he could receive special education services, but so that he would benefit from hearing the same lessons twice. When the district denied the parents’ request, they removed the child to a private placement. The parents requested reimbursement for the private school, arguing that the district’s proposed placement in a half-day kindergarten denied the student FAPE. For a court to award reimbursement, a parent must show that the IEP the district offered was not providing the student FAPE. “Arguably any student — disabled or not — benefits academically by receiving repetitive instruction and attending more hours of school,” the court wrote. However, given the reality of limited resources, the IDEA does not require districts to devote unlimited resources to assist a student with a disability in reaching his highest potential, the court added. According to both teachers and private providers, the student was progressing academically, behaving appropriately, and keeping pace with his peers. Because the school provided resources and services that were reasonably calculated to enable the student to receive educational benefits, the court held that it complied with the IDEA’s requirements. Accordingly, the court denied the parents’ request for reimbursement.

**40. K.E. v. Independent Sch. Dist. No. 15, 54 IDELR 215 (D. Minn. 2010).** A Minnesota district demonstrated that it provided FAPE to a fifth-grade student with ADHD and bipolar disorder. An ALJ concluded that the district denied the student FAPE. The district challenged the ALJ’s conclusion, arguing that the student’s passing marks, advancement in grade level, and academic progress demonstrated that she did receive FAPE. The parents argued that she was denied FAPE because she did not meet her goals in the areas of reading, writing, organization, and behavioral and social skills. A district satisfies its obligation to provide FAPE when it offers individualized instruction and services tailored to provide the student with some educational benefit. “Academic progress is an important factor among others in ascertaining whether the student’s IEP was reasonably calculated to provide educational benefit,” the court wrote. Contrary to the ALJ’s ruling, the District Court held that the district provided the student with FAPE. The student’s progress reports demonstrated meaningful academic progress in the areas of reading, spelling, and math, the court observed, and standardized test results showed growth in math, reading, and language. The student’s lack of progress on her writing goal did not nullify progress she made in other areas, the court said.

“Despite the severity of her mental illness and the changes in her medical treatment, [the student] made [academic] progress, received passing grades in her classes, advanced from grade to grade, and demonstrated growth on standardized tests,” the court wrote. The school did not violate the IDEA simply because the student failed to achieve the IEP’s behavioral goals, the court ruled.

**41. C.G. and L.G. v. New York City Dep’t of Educ., 55 IDELR 157, 2010 WL 4449386 (S.D.N.Y. 2010).** Neither a child’s behavioral or toileting needs nor the protestations of his parent established that a New York district had to continue providing afterschool ABA services to a child with autism. The District Court affirmed a state review officer’s decision that the child’s IEP was calculated to confer meaningful benefit even without the services. The student attended a day school for several years where he was assigned a paraprofessional for behavioral issues. The district also provided parent training and 15 hours of afterschool one-to-one ABA services per week. The parents argued that the afterschool services were essential for the child to receive FAPE. The SRO disagreed, and the parent challenged the decision in federal court. The District Court noted that FAPE requires an IEP that is likely to provide progress and not regression. The question was whether the progress the student achieved in school was only possible when coupled with his afterschool services. According to his day school teacher, the person most familiar with his educational development, continuing the services would be a “benefit” rather than a necessity for progress. In fact, the teacher conceded that the student could meet all of his short-term academic goals in about a year without that benefit. Furthermore, although the day school director indicated the family “required additional support,” the district was addressing those needs. “While some areas, such as toilet training, may be difficult to address in school, such limitations are not sufficient to demonstrate that the IEP is calculated to yield regression rather than progress ... especially in light of the parent training conducted by [the day school] to help deal with such issues,” U.S. District Judge Barbara S. Jones wrote.

**42. Klein Indep. Sch. Dist. v. Hovem, 55 IDELR 92, 2010 WL 3825416 (S.D. Tex. 2010).** A district failed to offer FAPE to a highly intelligent high school student with a learning disability, the U.S. District Court, Southern District of Texas held. The court found that the district skirted its duty to provide services, including transition services, to address the student’s severe writing impairment. The student’s difficulties included transferring ideas to paper. It took him hours to write a few sentences. The district placed him in general education classes and offered a portable speller and access to a computer, which he did not use. Although testing showed many of his skills remained at an elementary school level throughout high school, the district did not revise the IEP. However, it insisted that it provided the student FAPE, pointing out that he passed all of his classes. But the District Court noted that teachers held the student to a different standard than his classmates. They overlooked missing assignments, allowed him to answer orally, told him to type assignments at home, and encouraged his heavy reliance on family help, thus circumventing “having to continuously seek and try individualized methods that might assist him,” U.S. District Judge Melinda Harmon wrote. Moreover, the student’s ongoing inability to write anywhere near grade level undermined the district’s contention that it offered an appropriate program. Finally, his “transition plan” lacked goals and services to help him transition to postsecondary life and attend college, although the district knew this was his goal. Instead, it merely indicated that he

needed OT and assistive technology. “While highlighting his passage of classes ... [the district] downplayed the crucial impact ... [that] an inability to write ... inevitably plays in a person’s ability to function in life,” Judge Harmon wrote. Because the district failed to address the student’s needs, the court ordered the district to reimburse the student’s parents for educational services they obtained privately.

**43. Barron v. State of S. Dakota, 55 IDELR 126 (D.S.D. 2010).** While the parents of several deaf children were understandably dismayed by South Dakota’s decision to sharply limit admissions to a state school for the deaf, they failed to allege a valid IDEA claim. Although the parents contended that their children would be better off in a residential setting for students with hearing impairments, they conceded that the students were benefiting in their respective public schools. Due to declining enrollment at South Dakota School for the Deaf, the state Board of Regents decided to alter the school’s mission to focus on outreach services. The parents, whose applications were rejected, alleged that the decision to scale back the school’s programs denied their children FAPE. They stated that their children needed to be immersed in a signing environment and cited concerns with social isolation in public school. First, the court also noted that the board’s plan aligned with the IDEA’s mainstreaming preference. Next, it observed that although the IDEA requires an individualized education, it does not require the specific placement that parents prefer and does not require an educational institution to accede to parents’ demands. *Bradley v. Arkansas Dep’t of Educ.*, 45 IDELR 149 (8th Cir. 2006). All that is required by the act is the provision of meaningful access to education with some educational benefit. Thus, “[e]ven if a child might learn more quickly at a school for the deaf, the State is not required to provide the best possible education at such an institution if the public schools can provide an appropriate education,” U.S. District Judge Lawrence L. Piersol wrote. The court held that the parents failed to establish that the board deprived the students of FAPE by failing to bestow what they viewed as the best situation for their children.

**44. E.S. and M.S. v. Katonah-Lewisboro Sch. Dist., 55 IDELR 130 (S.D.N.Y. 2010).** Observing that a district essentially recycled a teenager’s last IEP, the U.S. District Court, Southern District of New York held that the district denied the student FAPE. Because the IEP goals and objectives were not based on the student’s current academic performance, which had improved substantially, the program was not adequately individualized. The parents rejected the district’s proposal to place the student with cognitive deficits in a special class and sought tuition reimbursement. Two administrative officers ruled against them. On appeal, the District Court noted that an IEP must be tailored to offer benefit based on improving a student’s present educational performance. *D.D. v. New York City Bd. of Educ.*, 46 IDELR 181 (2d Cir. 2006). The court found the repetition of the annual goals and short-term objectives from the prior year’s IEP troubling. The IEP team should have designed a new program to take into account the objectives the student had already met, as well as the objectives that continued to challenge him, rather than resurrecting the old one. It pointed out that the IEP team had available to it the private school teachers’ progress reports showing the student substantially improved in reading, writing, math, and history. Under the circumstances, it was “not credible that after a full year of education, [the student’s] needs were identical to those the [IEP team] found the year before,” U.S. District Judge Loretta A. Preska wrote. Rather than developing an IEP based on the student’s current needs, the district simply reprinted the unedited IEP from

the prior year, the court found. Because the district failed to offer FAPE and because the parents' unilateral placement was appropriate, the court required the district to reimburse them for private tuition.

**45. Dumont Bd. of Educ. v. J.T., 54 IDELR 231 (D.N.J. 2010).** Although a district maintained that it might have offered additional services after assessing a preschool student's first month in her new placement, it did not save her IEP. Reasoning that what mattered was the document's actual provisions, not what the district might offer, the District Court held that the IEP fell short by omitting a sensory diet and a behavior plan. The student with autism, who was preparing to transition to Part B, had a history of self-injury, tantrums, and communication deficits. Her IEP stated: "[u]se sensory activities, tickles, hugging, deep pressure, physical touch." The IEP also stated that a BIP might be offered if the need arose. The parents refused to sign it, and sought reimbursement for a unilateral placement. An ALJ ruled in their favor, and the district appealed. At trial, district staff members testified that they would have provided an adequate sensory program. But this was beside the point, the District Court reasoned, given that the IEP as written lacked a detailed program. Furthermore, the IEP failed to include the numerous sensory techniques that the district testified were available at the proposed placement or reference the student's prior sensory diet. Although the IEP and the district's witnesses indicated a BIP might have been created after an initial assessment period, "neither of these qualified statements of a behavior modification plan's availability satisfied the need identified by the ALJ with respect to [the student's] education," U.S. District Judge José L. Linares wrote in an unpublished decision. Noting that the student made meaningful progress in the private placement, the court ordered the district to reimburse the parents for its cost.

**46. D.G. v. Cooperstown Cent. Sch. Dist., 55 IDELR 155, 2010 WL 4269127 (N.D.N.Y. 2010).** The parent of a student with deficits in reading and written expression failed to establish that a district denied her son FAPE by not offering a particular multisensory reading program that she preferred. The evidence indicated that the district's own reading programs were research-based and utilized a multisensory approach that would have addressed the student's dyslexia. According to the parent, the district told her that school personnel would be trained in her preferred methodology. Ultimately, the training did not occur. The parent placed the student in private school and sued for tuition reimbursement. She alleged that the district denied the student FAPE by, in part, failing to offer an appropriate reading program. The court noted that a district offers FAPE if it develops an IEP designed to confer meaningful benefit. There is no requirement that it offer every service a parent desires, even if that service would maximize the student's benefit. The court pointed out that the district did have multisensory reading programs in place, just not the one the parent recommended. "While [the parent] may have preferred the district to employ the Wilson program, the district did not fail to provide [the student] a free appropriate public education by utilizing other proven methods," U.S. District Judge David N. Hurd wrote. The court also determined that the IEPs contained the student's present levels of performance and measurable and appropriate goals. Finally, placement in an integrated classroom along with small-group instruction in a resource room was appropriate. Had the student attended the district, his program would have conferred educational benefits. Because the district offered the child FAPE, the parent was not entitled to reimbursement.

**47. High v. Exeter Township Sch. Dist., 54 IDELR 17 (E.D. Pa. 2010).** A high school junior with learning disabilities may have had her sights set on college, but that did not invalidate an IEP goal that called for her to read at a sixth-grade level by the end of the year. The U.S. District Court, Eastern District of Pennsylvania held that the goal was reasonable in light of the student's severe deficits. The court acknowledged that the student's transition plan focused on college preparedness, and included activities such as taking placement tests and attending college fairs. Still, the court rejected the parents' claim that the student's IEP goals did not match her transition plan. The court explained that the IDEA does not require a student's transition plan to dictate her IEP goals. "While it may be ideal if a transition plan influences IEP goals, a newly identified transition goal will not change the ability of a child to progress at a higher rate academically," U.S. District Judge Juan R. Sanchez wrote. The court pointed out that when the student returned to the district in 11th grade after two years of private schooling, she was reading at a fourth-grade level. Although the student continued to struggle, she was reading at a sixth-grade level by the end of her junior year. Moreover, the student received a final grade of 100 in algebra, and was writing at a near-collegiate level. Finding that the student made meaningful progress despite her ongoing deficits, the court held that her IEP was appropriate.

**48. E.Z.-L. v. New York City Dep't of Educ., 56 IDELR 10 (S.D.N.Y. 2011).** A New York district may have failed to include parent training and counseling in the IEP of an elementary school student with autism, but that omission did not require it to fund the child's private placement. The U.S. District Court, Southern District of New York held that the IEP was appropriate under the IDEA and state law. New York regulations require districts to offer parent training and counseling to parents of children with autism so that the parents can assist their children with appropriate follow-up activities outside of school. The court acknowledged that the challenged IEP did not include such services. However, the court pointed out that the school proposed as the child's placement offered parent training opportunities consistent with the state regulations. According to the assistant principal, the school brought in speakers to discuss various teaching methodologies and offered parent training on an as-needed basis. "[The assistant principal] explained that parent training can be done individually or in groups, and that the school offers transportation and babysitting services to ensure that parents are able to participate in training opportunities," U.S. District Judge Sidney H. Stein wrote. The court thus affirmed an SRO's conclusion that the omission of parent training and counseling did not make the child's IEP deficient under state law. The court also held that the lack of a transition plan in the IEP did not amount to a denial of FAPE. Although it agreed that the IEP should have included specific services to assist the child with her move from her private school to the public program, the court observed that the public school would have offered services to address the child's transition needs.

**49. Independent Sch. Dist. No. 12, Centennial v. Minnesota Dep't of Educ., 55 IDELR 140 (Minn. 2010), *cert. denied*, 111 LRP 12740 (U.S. 02/22/11).** The Minnesota Supreme Court reversed the Minnesota Court of Appeals' holding that IEPs may include only those extracurricular activities that a student with a disability needs to receive FAPE. By reading an additional requirement into the law, the state Supreme Court observed, the Minnesota Court of Appeals restricted students' ability to obtain the supplementary aids and services they needed to participate in extracurricular activities to the maximum extent appropriate.

## **VII. LEAST RESTRICTIVE ENVIRONMENT**

**50. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 53 IDELR 279, 592 F.3d 267 (1st Cir 2010).** The parents of a 19-year-old student with multiple, severe disabilities could not convince the 1st Circuit that their daughter's proposed 2005-06 IEP was inappropriate. Not only did the program address the student's literacy needs, the court observed, but the proposed SDC placement was the student's LRE. The court first addressed the parents' claim that the IEP did not address the student's reading difficulties. Although the district agreed to use the parents' requested methodology, the parents claimed that the student's instructor lacked the hands-on experience needed to use that method. The 1st Circuit disagreed. Noting that the student's progress in reading was commensurate with her intellectual ability, the court held that the district's methodology was appropriate. As for the student's placement, the court rejected the parents' argument that the SDC was a more restrictive placement than home-based instruction. New Hampshire regulations define SDC placements as being less restrictive than home instruction. The court recognized that the facility in which the SDC was located also housed individuals with severe disabilities. However, it rejected the notion that the facility was more akin to a hospital or institution — the most restrictive setting identified in the state regulations. "The [facility] ... also runs an approved, licensed, special day school, and [the student] attended that day school and returned home each evening to spend time with her family and in her community," the 1st Circuit wrote. The court further noted that the regulations define home-instruction as receiving all or part of a special education program in the home. Thus, while the parents' proposed home program included community-based interaction, it was a more restrictive placement under state law. The 1st Circuit affirmed the District Court's decision at 50 IDELR 278 that the district offered FAPE in the LRE.

**51. A.G. v. Wissahickon Sch. Dist., 54 IDELR 113, 374 F. App'x 330 (3d Cir. 2010)(unpublished).** A Pennsylvania district complied with the LRE mandate when it placed a student with mental retardation in only one academic class with regular education peers, the 3d U.S. Circuit Court of Appeals held. Although her mother wanted the teenager to spend the entire school day with nondisabled peers, such a placement was inappropriate given the student's cognitive deficits and disruptive behavior. The district initially placed the student, a nonverbal 18-year-old, in a life skills class with mainstreaming for assemblies, lunch, homeroom, gym, and recess. The parent alleged the district violated the LRE mandate. An appeals panel agreed, instructing the district to include the student in regular classes for music, art, and one academic subject. The mother filed an action in federal court, seeking full mainstreaming. The District Court affirmed the panel, and the mother appealed. The IDEA requires districts to educate children with disabilities with nondisabled peers to the "maximum extent appropriate." 34 CFR 300.114(b). In this case, the student could not be satisfactorily educated full-time in a regular class, even with accommodations, the 3d Circuit reasoned. The district implemented numerous supplemental aids and services, including modifying the curriculum, yet the student reaped little academic or social benefit from mainstreaming. However, she made significant progress in her life skills class. Furthermore, the student was prone to loud vocalizations, was not toilet trained, and engaged in other behavior that would negatively affect her classmates. Having complied with the appeals panel's order, the district was now educating the student in the regular education setting to the maximum extent

appropriate, the 3d Circuit ruled. The 3d Circuit thus upheld the District Court's ruling at 50 IDELR 280 that the student was provided FAPE, as evidenced by her improved life skills.

**52. R.H. v. Plano Indep. Sch. Dist., 54 IDELR 211, 607 F.3d 1003 (5th Cir. 2010), cert. denied, 111 LRP 12733 (U.S. 02/22/11) (No. 10-436).** The fact that a district's preschool program included children with disabilities, as well as typically developing children did not make it an inappropriate placement for a 4-year-old boy with autism and a speech and language impairment. Concluding that the proposed placement was the child's LRE, the 5th Circuit affirmed a ruling in the district's favor. The court first rejected the parents' claim that the IEP team did not consider any placements other than the inclusion program, which they characterized as a special education placement. According to the evidence provided at the due process hearing, the IEP team decided against the private general education preschool program requested by the parents because it didn't believe the school could implement the child's IEP without the district's direct supervision. As for the parents' claim that *Daniel R.R.* required the district to place the child in a general education setting, even if that required a private placement, the 5th Circuit noted that the IDEA addresses the right to a free appropriate public education. "*Daniel R.R.* does not consider or speak to the circumstances at issue here, where the public preschool curriculum does not include a purely mainstream class," U.S. Circuit Judge Jerry E. Smith wrote. Thus, while *Daniel R.R.* precludes a child's removal from the general education setting unless he cannot be educated satisfactorily with the use of supplemental aids and services, it does not require a private placement when the district offers only an inclusion program. The 5th Circuit affirmed a decision reported at 50 IDELR 41 that the proposed placement was appropriate. The court also held that the parents were not entitled to reimbursement for private services the child received during the summer of 2005. Not only did the parents fail to provide proper notice of the placement, the court explained, but the program failed to include any special education services.

**53. C.P. and J.D. v. State of Hawaii, Dep't of Educ., 54 IDELR 218 (D. Hawaii 2010).** The behavioral progress that an 8-year-old boy made after three weeks of one-to-one instruction in a self-contained classroom helped convince a District Court that the placement was appropriate. Noting that the child's IEP called for his gradual inclusion in an afterschool social program — an activity his violent behaviors once made impossible — the court held that the placement was the child's LRE. The court acknowledged that the child would benefit from peer interaction. However, the court observed that the child's aggressive behaviors, which included hitting peers and staff, throwing a stapler, upending furniture, and urinating in public, had a negative impact on teachers and classmates. "It is undisputed that [the child] had physically attacked other students and staff on several occasions," U.S. District Judge David Alan Ezra wrote. "The fact that [the child] was isolated from his peers is not, in itself, indicative that he was not provided with the LRE." The court pointed out that the child's IEP team reconsidered his self-contained placement after three weeks. Based on the child's progress, the team amended the IEP to provide for gradual reintegration into the general student population. Determining that the placement was appropriate in light of the child's extreme behavioral difficulties, the court held that the parents were not entitled to recover the costs of the child's private schooling.

**54. Las Virgenes Unified Sch. Dist. v. S.K., 54 IDELR 289 (C.D. Cal. 2010).** The substantial cognitive and communication deficits of a student with autism were too severe for

him to reap any benefit from full-time mainstreaming, the U.S. District Court, Central District of California held. Because a general education class would confer no academic or social benefit to the middle school student, the district did not violate the LRE mandate by offering a blended placement instead. The district proposed placing the student in a special day class for core academics and mainstreaming him for other classes and activities. The student's parents rejected the proposal as too restrictive. They wanted him to continue full-time in general education classes with the support of an aide. The district filed a due process complaint, seeking a declaration that its proposal offered FAPE in the LRE. A hearing officer ruled against the district, and the district appealed. The District Court pointed out that the IDEA's preference for mainstreaming is not absolute. Instead, it must be balanced with the requirement to develop a program addressing a child's individual needs. The student's cognitive abilities were so much lower than that of his grade level peers that he could not participate academically in a general education class, the court observed, even with substantial modifications. Furthermore, given that he would sit isolated from the class with his aide to receive instruction, he would not benefit socially and would distract peers. The court pointed out that the student's parents understood the student could not benefit academically in a general education class, but desired the placement to achieve their socialization objectives. However, the court was unaware of any authority that would require placing a student with a disability in a general education class for the sole purpose of increasing his proximity to the general education student body. "Nothing in IDEA jurisprudence suggests that parents may require a placement that has no educational benefit," U.S. District Judge Gary Allen Feess wrote.

**55. M.H. and E.K. v. New York City Dep't of Educ., 54 IDELR 221 (S.D.N.Y. 2010).**

Testimony that a kindergartner with autism and difficulties with language, attention, and reciprocity would have reaped no benefit from a less restrictive environment or exposure to peers helped his parents obtain \$80,000 in tuition reimbursement. The District Court relied on a psychologist's statements that the student required one-to-one instruction and that the presence of typically developing peers would have distracted him. Rejecting the New York ED's proposal to place the child in a 6:1+1 special class, the parents unilaterally placed him in a private program. An SRO denied the parents reimbursement, concluding that the ED's proposed special class was appropriate. The parents appealed. On appeal, the ED asserted that its placement was appropriate and that even if it were not, the program the parents chose was too restrictive. The District Court determined that the ED's placement was inappropriate because it failed to offer sufficient ABA trial training. As to the private program, the court noted that LRE may be considered in determining whether a parent's unilateral placement choice is appropriate. *M.S. v. Board of Educ. of the City Sch. Dist. of the City of Yonkers*, 33 IDELR 183 (2d Cir. 2000). However, it rejected the district's argument that the program was overly restrictive because it provided only one-to-one instruction and offered little contact with other students. The court cited a psychologist's testimony that the child was unable to interact with other students unless prompted by an aide, that he required intensive one-to-one instruction and ABA therapy to avoid regression, and that he was not ready to model typically developing peers.

## **VIII. MEDICAL SERVICES**

**56. American Nurses Ass'n. v. O'Connell, 54 IDELR 259, 110 Cal. Rptr. 3d 305 (Cal Ct. App. 2010).** A legal advisory issued by the California ED authorizing unlicensed school personnel to administer insulin to students with diabetes was invalid, the California Court of Appeal held. The court ruled that California law authorizes the administration of insulin to a student only by a licensed health care professional or by an unlicensed person who is expressly authorized by statute to administer insulin in specified circumstances, even if the student requires such injections pursuant to a Section 504 or IEP plan. Following a federal lawsuit by the American Diabetes Association, the California ED issued a legal advisory as part of a settlement agreement. The advisory authorized trained unlicensed school personnel to administer insulin in nonemergency situations when a nurse was unavailable. Two nurses associations sued the ED, arguing that the legal advisory was inconsistent with state law. The California ED appealed. The Court of Appeal noted that California education law provides that "any pupil who is required to take, during the regular school day, medication prescribed for him or her ... may be assisted by the school nurse or other designated school personnel." However, the court determined that the state legislature's intent was to permit assistance by other personnel only to the extent that those personnel were otherwise authorized by law to assist. Administering insulin to a student was not something an unlicensed staff person who was not a family member could lawfully do in California. The court also rejected the ED's contention that the requirements of the IDEA and Section 504 preempted California law. There was insufficient evidence that, despite California's financial woes, districts could not achieve compliance with federal law, while using only licensed personnel, a family member, or the student to administer insulin shots.

## **IX. MONEY & LIABILITY ISSUES**

**57. Mahone v. Ben Hill County Sch. Sys., 54 IDELR 183, 377 F. App'x 913 (11th Cir. 2010)(unpublished).** A PE teacher was not liable for alleged constitutional violations related to an incident involving a middle school student with asthma and ADHD. The teacher allegedly shoved the student head-first into a trash can in front of his brother and another classmate during PE class. He then allegedly pulled the student out of the trash can by his legs. The superintendent instructed the principal to investigate the incident. The investigation indicated that the student and the teacher frequently engaged in horseplay in a joking manner. Concluding that the teacher was not being malicious or mean-spirited, the principal counseled the teacher not to engage in horseplay with his students. The student's parent sued the teacher under Section 1983, alleging that his actions violated the student's substantive due process rights under the 14th Amendment. Specifically, the parent argued that the incident deprived the student of his liberty interest to be free from physical and mental abuse at school. The 11th Circuit held that the District Court was correct in finding that the teacher's actions could not be characterized as corporal punishment because there was no evidence that he acted to punish the student. Moreover, the evidence did not suggest that the teacher's conduct was arbitrary or conscience-shocking. Although the student allegedly experienced post-traumatic stress disorder and other psychological injuries as a result of the incident, the court noted, he did not sustain any physical injuries. A teacher whose conduct is neither corporal punishment nor

conscience-shocking does not trigger a substantive due process violation, the court explained. While the teacher had no legitimate purpose for his actions, the court reasoned, his conduct did not shock the conscience in a constitutional sense. Absent a constitutional violation, the teacher was entitled to qualified immunity.

**58. Sanchez v. Commonwealth of Puerto Rico, 53 IDELR 325 (D.P.R. 2010).** Actions taken by an employee of the Puerto Rico ED violated a student's constitutional rights. Rather than building a fenced-in play area for the student and his classmates, the parents alleged that the ED placed him in a cage to contain him. The student's parents sued the ED and the employee in her individual capacity under Section 1983, alleging that they violated the student's constitutionally protected liberty rights. The ED and its employee appealed the unfavorable outcome, arguing that the evidence did not support the jury's verdict. Affirming the verdict, the court noted that the employee raised several defenses and the jury individually and meticulously considered each claim. The employee further argued that she was entitled to qualified immunity because she did not violate the student's constitutional rights. The employee's understanding was that the parent consented to the construction of a gate, leading a reasonable person in her position to believe that her conduct was lawful. The fact that the jury awarded punitive damages assisted the court in finding that the employee was not entitled to qualified immunity. The construction of a gate was part of the student's behavioral modification plan in which he and his classmates would play in a created, secured yard and would participate in recreational activities during recess. The evidence demonstrated that the implementation of the plan by the employee "constituted a clear departure from the agreement inasmuch as a barred cage was built instead," U.S. District Judge Camille L. Velez-Rive wrote. This could have reasonably led the jury to believe that the employee violated the student's rights.

**59. K.I. v. Montgomery Pub. Schs., 54 IDELR 12 (M.D. Ala. 2010).** Because a parent sought monetary relief in her Section 504 claim against an Alabama district, she was entitled to a trial by jury. The U.S. District Court, Middle District of Alabama struck the parent's request for a jury trial only insofar as it addressed her IDEA claim. The parent conceded that she did not have a right to a jury trial under the IDEA. However, she argued that her request for compensatory damages under Section 504 gave her the right to a trial by jury. The District Court agreed. U.S. District Judge Mark E. Fuller explained that a request for monetary damages in a Section 504 action creates a Seventh Amendment right to a jury trial. "Therefore, it is clear that [the parent and the student] ... are entitled by the Seventh Amendment ... to a trial by a jury on their Rehabilitation Act claim," Judge Fuller wrote. The court thus denied the district's motion to strike the parent's request for a jury trial on the Section 504 claim.

**60. Oman v. Portland Pub. Schs., 54 IDELR 6 (D. Ore. 2010).** A parent's failure to exhaust her administrative remedies did not prevent her from seeking nominal damages from an Oregon district for its alleged violation of her rights under the IDEA and Section 1983. Nominal damages are available for violations of implied federal rights, such as a parent's right not to be subjected to retaliation for attempting to exercise her procedural rights under the IDEA. Nominal damages provide a parent with the satisfaction of knowing that a federal court concluded that her rights were violated, as well as an enforceable judgment requiring the district to alter its conduct for the parent's benefit. Although a parent must exhaust

administrative remedies before filing suit in court when seeking relief for her child under the IDEA, this is not the case when she is seeking redress for alleged violations of her own substantive rights as a parent under Section 1983. Here, the student's mother claimed a district official prevented her from speaking to witnesses before a due process hearing. Because these claims were not subject to the IDEA's administrative exhaustion requirements, the court ruled, the parent could proceed to court.

**61. Kaitlin C. v. Cheltenham Township Sch. Dist., 54 IDELR 44 (E.D. Pa. 2010).**

Without deciding whether a district's failure to implement a 10th-grader's IEP could qualify as disability discrimination, the District Court dismissed the parent's Section 504 claim. The court held that the parent could not recover monetary damages under Section 504 without showing intentional discrimination. According to the parent, the district discriminated against the student when it required her to participate in a physical fitness test despite her physical limitations. The court acknowledged that the student's IEP exempted her from physical activities, and that the fitness teacher was unaware of the IEP provision. However, the court explained that a request for monetary damages under Section 504 requires a showing of intentional discrimination. Although the 3d U.S. Circuit Court of Appeals held in *Ridgewood Board of Education v. N.E.*, 30 IDELR 41 (3d Cir. 1999), that a parent seeking relief under Section 504 does not need to establish discriminatory intent, the District Court observed that *Ridgewood* did not involve a claim for monetary damages. The court noted that the parent only alleged negligent conduct on the part of the school district. "The operative facts in the complaint establish that school officials were unaware that the Fitness for Life class included some physical activities like the fitness test that resulted in [the student's] injury," U.S. District Judge R. Barclay Surrick wrote. Concluding that the parent's failure to allege intentional discrimination defeated her claim for monetary damages, the court granted the district's motion to dismiss.

**62. Funez v. Gusman, 54 IDELR 153 (D. Ore. 2010).**

An Oregon district had to continue litigating a parent's Section 1983 claims after the court dismissed some but not all of the charges. A high school student who received special education services based on an undisclosed disability claimed he was taken to the wrestling or weight room on his birthday before the start of classes began and was repeatedly kicked and punched by several classmates. The "birthday beating" caused the student to sustain injuries so severe that they required hospitalization. The parent sued the district under Section 1983 for constitutional violations and violations of the IDEA. The parent alleged that the district was aware or should have been aware that groups of Hispanic students subjected other students to beatings on their birthdays. The district posted a birthday list in the hallway. The district requested dismissal of the IDEA claim, arguing that the parent failed to show that the alleged FAPE violation was related to the student's disability. Relying on *Blanchard*, 48 IDELR 207, the District Court ruled that the parent could not bring a Section 1983 claim for the district's alleged failure to provide FAPE. "Congress did not intend Section 1983 to be available to remedy violations of the IDEA," the 9th Circuit wrote in *Blanchard*. The District Court rejected the district's request to dismiss the parent's claims for constitutional violations, noting that the parent adequately alleged that the district had a custom or policy of posting students' names and birthdays — coupled with an awareness that birthday beatings occurred and its failure to prevent them.

**63. Donlow v. Garfield Park Academy, 54 IDELR 169 (D.N.J. 2010).** A private school's receipt of federal funds and implementation of IEPs for students with disabilities did not transform it into a public actor. While enrolled at the school during ninth grade, a student was involved in an incident during for which school officials contacted police. A confrontation with police resulted in the student being shot. Alleging that the school disregarded its duty to provide for the student's safety and well-being, the student's guardian ad litem sued the school on his behalf under Section 1983 for violating his constitutional rights. The school argued that it was entitled to dismissal because the student failed to show that it was a state actor, a prerequisite to establishing liability under Section 1983. The student argued that his IEP, which was implemented in conjunction with the public school board, was evidence that public officials were aware of and approved of the private school's conduct, thereby creating state action. To determine whether conduct amounts to state action, the court considered whether the school's conduct was fairly attributable to the state. "Merely performing a function that serves the public does not create state action," the court wrote. Moreover, courts have consistently held that private schools that educate special education students are not state actors. While the student alleged that the school and the board collaborated on his IEP, and that the school received public funding, this was not enough to create a close relationship between the school and the state. Absent evidence that the school and the state acted as joint participants, the student could not pursue a Section 1983 action.

**64. May v. Mobile County Pub. Sch. Sys., 55 IDELR 16 (S.D. Ala. 2010).** An Alabama district's knowledge of a middle school student's violent propensities was not enough to allow a teacher to hold it constitutionally liable for injuries she sustained while implementing his IEP. The student, who had mental disabilities, allegedly injured the teacher when she attempted to stop him from attacking the principal. The teacher claimed that despite seven documented incidents of violent behavior, the district failed to remove him from school or take other steps to ensure her safety, such as preparing her to handle his violent outbursts. The teacher sued the district under Section 1983, alleging that it violated her substantive due process rights by being deliberately indifferent to her safety. An employee must allege that her employer engaged in arbitrary or conscience-shocking behavior to establish a substantive due process violation. Because the district's alleged deliberate indifference to the teacher's safety did not rise to the level of conscience-shocking behavior, the magistrate judge recommended that the court deny the teacher's attempt to hold it liable for constitutional violations. In *DeShaney v. Winnebago County Department of Social Services*, 103 LRP 32360, 489 U.S. 189 (1989), the U.S. Supreme Court recognized that the state has a limited duty to protect citizens from harm that arises when the state has the person in its custody. The teacher argued that to comply with the IDEA, she had no choice but to follow the student's IEP, even if it placed her in danger. Therefore, she claimed, her employment relationship with the district was similar to someone in state custody. The magistrate judge rejected the notion that by submitting herself to unsafe job conditions, at the risk of losing her job, the teacher converted a voluntary employment relationship into an involuntary custodial relationship worthy of government protection from workplace hazards. *Editor's note: The District Court adopted the magistrate judge's report and recommendation at 55 IDELR 45.*

**65. Johnson v. Cantie, 54 IDELR 257 (N.Y. App. Div. 2010).** A grade school student's violent outburst toward a licensed occupational therapist prompted a negligence suit against her

parents and the district. However, neither party was liable for the therapist's injuries. The therapist was allegedly injured when she attempted to avoid being hit and kicked by a student with autism. She claimed that the district and the student's parents were negligent in failing to warn her of the student's violent behavior. The district and the parents requested dismissal, arguing that the therapist failed to establish that such a duty existed. To establish liability for negligence, an injured party must show that a duty existed, the defendant breached that duty, the breach was the direct cause of her injuries, and the party suffered damages. In dismissing the therapist's suit, the court wrote, "it is well established that there is no duty to warn an individual about a condition of which ... she is actually aware or that may be readily observed by a reasonable use of ... her senses." The district and the parents used the therapist's own statements to establish that she was aware that the student tended to use physical contact to express herself because she had observed this type of behavior on previous occasions. Absent a duty to warn the therapist about the student's potentially violent behavior, dismissal was appropriate, the court ruled. The therapist's negligent supervision claim against the parents also failed, the court said, because they were not present and, therefore, did not have an opportunity or the ability to control their daughter's behavior in the classroom.

**66. Nicholson v. Freeport Union Free Sch. Dist., 54 IDELR 258, 902 N.Y.S. 2d 192 (N.Y App. Div. 2010).** A New York district avoided a claim that it negligently supervised the out-of-state private school where it placed a student with a disability. Because the student's mother presented no evidence that the district knew of the school's alleged improper use of aversive interventions, including electric shocks, she could not proceed with her claims. The Massachusetts school for students with severe disabilities employed a graduated electronic decelerator, which shocks students, in order to curb certain behaviors. The parent asserted that the school, with the district's knowledge, failed to implement her son's BIP when it used the device improperly. A trial court rejected the district's request to dismiss the complaint, and the district appealed. The New York Supreme Court, Appellate Division reversed that decision. The district "cannot be held liable for inadequate supervision where, as here, there is no evidence that it was aware of the improper conduct," the court wrote. The court also rejected the parent's claim that use of the device amounted to an intentional tort. The court noted that New York law does not prohibit the use of aversives, including use of the device in question. Moreover, the parent was estopped from asserting the claim, because a prior court approved a BIP for the student, with the mother's consent. That BIP incorporated use of the device. Finally, the court dismissed the parent's Section 1983 claims based on her failure to exhaust her administrative remedies.

**67. A.L. v. Ann Arbor Pub. Schs., 56 IDELR 15 (E.D. Mich. 2011).** The parents of a teenager with an emotional impairment and a learning disability were not required to exhaust administrative remedies before seeking monetary relief over their daughter's sexual assault in a school stairwell. Because the parents sought money damages, the student had graduated, and the alleged harm could not be undone by the IDEA's administrative process, exhaustion would have been futile, the District Court held. The parents signed a mediation agreement placing the student at a district school on the condition that she have an adult escort. They believed the student's lack of appropriate emotional regulation made her vulnerable. Subsequently, the escort and a school administrator allegedly pressured the student and parents into foregoing the service. Shortly thereafter, a classmate sexually assaulted the student. The parents sued the

district for failing to accommodate her and for subjecting her to a “state-created danger.” Relying largely on the 6th Circuit’s decision in *Covington v. Knox County School System*, 32 IDELR 29 (6th Cir. 2000), the District Court ruled that it would have been pointless for the parents to pursue a due process hearing. As in *Covington*, the parents were seeking solely money damages and the student had graduated. Nor was this a case where the parents had the chance to obtain relief before the student left school. Although the student was still attending at the time they filed the complaint, “the administrative process could not have undone the harm that she suffered,” U.S. District Judge Mark A. Goldsmith wrote. However, the court dismissed the parents’ state-created-danger claim, finding insufficient evidence that the district was aware there was a substantial risk of serious harm to the student.

## **X. PRIVATE SCHOOL PLACEMENT**

**68. Struble v. Fallbrook Union High Sch. Dist., 56 IDELR 4 (S.D. Cal. 2011).** A provision in California’s education code created an unexpected stumbling block for a parent seeking a court order for her son’s placement in an uncertified private school. Noting that state law forbids ALJs from ordering such placements, the District Court determined that its hands were similarly tied. The parent argued that because the IDEA required the court to “grant such relief as [it] determined is appropriate,” the court had the authority to order a private placement at public expense. However, the court observed that the state’s education code prohibits hearing officers from issuing decisions that require a student with a disability to be placed in an uncertified nonpublic school at public expense. “The court considers it inadvisable to award a remedy that was not available at the administrative proceeding,” U.S. District Judge Larry Alan Burns wrote. Still, the parent was not without a remedy. The court pointed out that the parent placed the student in the uncertified private school because she was dissatisfied with the student’s most recent IEP. If, on remand, the ALJ found that the IEP was inappropriate, the parent could seek reimbursement for the private placement.

**69. Mr. and Mrs. A. v. New York Dep’t of Educ., 56 IDELR 42 (S.D.N.Y. 2011).** A federal District Court held that the parents of a student with autism were entitled to tuition payment relief for private school tuition they incurred but could not afford. In a case of first impression, the court held that where parents cannot front the costs of private tuition, and where the private school nevertheless enrolls the child on the parents’ agreement to pay, parents who satisfy the reimbursement test may obtain an award of retroactive direct payment to the private school. The parents here placed their child in private school after the district failed to make a placement offer. Because the tuition exceeded their combined income, the parents agreed to pay the entire \$84,900 yearly tuition if the district did not. A state review officer, while finding the student was deprived of FAPE, denied tuition relief. On appeal, the District Court noted that courts’ have broad discretion under the IDEA to “grant such relief as ... is appropriate.” 20 USC 1415(i)(2)(C)(iii). Nor is that discretion limited by the IDEA’s tuition reimbursement provision. *Forest Grove Sch. Dist. v. T.A.*, 52 IDELR 151 (U.S. 2009). Moreover, courts have ordered prospective direct tuition payment in the context of stay-put orders and compensatory education awards. “It is entirely counter-intuitive to argue ... that a court may ... require a [district] to pay a private school directly and prospectively for special education, may require the district to retroactively reimburse parents for private school tuition previously paid, but may not order a [district] to pay the private school directly and

retroactively for expenses already incurred,” U.S. District Judge Paul G. Gardephe wrote. Such an approach would limit the right of unilateral withdrawal to those able to pay out of pocket, thus undermining the IDEA’s universal guarantee of FAPE to all children with disabilities, regardless of means.

**70. Stevens v. New York City Dep’t of Educ., 54 IDELR 84 (S.D.N.Y. 2010).** Despite a New York district’s failure to convene an IEP meeting and resulting denial of FAPE to a student with multiple disabilities, the district was not obligated to reimburse the student’s mother for the cost of his private school program. Unbeknownst to the district, the parent had already applied for the student’s admission to a private school when his IEP team met in January 2007. The IEP team planned to reconvene in June, but never did. The student began attending private school in September without giving notice to the district. The parent waited until January 2008 to request tuition reimbursement. A parent is entitled to reimbursement if: 1) the IEP was not reasonably calculated to enable the student to receive educational benefits; 2) the private placement is appropriate to address the student’s needs; and 3) equitable considerations support the parent’s claim. Conceding that it did not offer FAPE, the district still disputed the second and third factors. “A unilateral private placement is only appropriate if it provides education instruction specifically designed to meet the [student’s] unique needs,” the court wrote. In ruling that the placement was inappropriate, the court observed that the student attended general education classes and did not receive modifications or special services to address his deficiencies. Although the private school provided a structured environment and small class size, the court dismissed these features as nothing more than educational and environmental advantages that might be preferred by parents of any student. Even if the parent had succeeded in showing that the private placement was appropriate, her failure to notify the district before she unilaterally enrolled the student barred her recovery of tuition for equitable reasons.

**71. R.B. and H.Z. v. New York City Dep’t of Educ., 54 IDELR 223, 713 F.Supp. 2d 235 (S.D.N.Y. 2010).** Although a sixth-grader’s parents failed to inform a New York district of their daughter’s placement in a private preparatory school, they still could recover the cost of the student’s special education program. The U.S. District Court, Southern District of New York held that the district’s failure to provide a final notice of placement excused the parents’ lack of notice. The court observed that the purpose of the notice requirement is to inform the district that the parents are rejecting the proposed placement. When, as in this case, the district does not make a placement offer, there is no need for the parents to provide notice. “[The parents] could not have informed [the district] that they were ‘rejecting the placement proposed by the public agency’ because the [district] never made a placement recommendation for [the parents] to reject,” U.S. District Judge Richard J. Sullivan wrote. The court acknowledged that the parents could have been more vigilant about contacting the district when they failed to receive a notice of placement as promised. However, the court found no evidence that the parents were uncooperative. On the contrary, the fact that the parents paid more than \$2,000 for “tuition insurance” showed that they were willing to consider the district’s eventual placement offer. The court ruled that the parents were entitled to recover the \$13,800 cost of the student’s supplemental special education program. They could not recover the full prep school tuition, however, as there was insufficient evidence that the general education program was specifically tailored to meet the student’s needs.

**72. Indianapolis Pub. Schs. v. M.B., 56 IDELR 8 (S.D. Ind. 2011).** The grandparent of a sixth-grader with an emotional disturbance was not entitled to reimbursement for placing her grandson in parochial school. Because there was no evidence that the school was providing any special education services the child needed, the District Court could not find that the program was appropriate. The boy's grandmother enrolled him in parochial school after she became dissatisfied with his public school program. An IHO granted her tuition reimbursement, and a special education appeals board followed suit. The district appealed. The court observed that after finding the district denied the child FAPE, the IHO glossed over the question of the parochial school's fitness. Instead, the IHO relied on the grandparent's testimony that the student's grades improved and the principal offered tutoring. The court explained that a unilateral private placement is not appropriate if it does not provide at least some special education services that the public placement failed to provide. In this case, there was no evidence the school provided any of the services the district allegedly denied him. In fact, there was no indication it provided any special education services. Nor was there evidence that academic tutoring would have addressed the student's ED or behavioral problems. Although the student appeared to be doing well in his new school, the court pointed out that academic success is not sufficient to show a unilateral placement is appropriate. "Rather, the IDEA requires an identification of the special education services that were lacking in the ... public school and a demonstration that at least some of those services are being provided by the private school," U.S. District Judge William T. Lawrence wrote. Because the grandparent offered no such evidence, the court set aside the IHO's reimbursement award.

## **XI. SECLUSION & RESTRAINT**

**73. T.W. v. School Bd. of Seminole County, Fla., 54 IDELR 243, 610 F.3d 588 (11th Cir. 2010).** Despite claiming that the teacher of an autism class provoked the behaviors that prompted her to physically restrain a middle school student with PDD-NOS, a parent could not show that the teacher or the district violated the student's constitutional rights. The 11th Circuit affirmed a decision reported at 52 IDELR 155 that the teacher's actions were not unreasonable in light of the student's in-class behaviors. The court explained that excessive corporal punishment is actionable only when the conduct is arbitrary, egregious, and conscience-shocking. Although the parent alleged that the teacher's actions were rooted in malice and sadism, the court observed that her use of restraint could be viewed as an attempt to restore order, maintain discipline, and prevent the student from harming himself. For example, the court observed that the teacher pinned the student's hands behind his back on one occasion when he refused to follow her instructions and swung his hands at her. In another incident, the teacher put the student face down on the floor and sat on him after he refused to go to a "cool down room." Recognizing that the teacher may have resorted to force too soon, the 11th Circuit nonetheless observed that her use of restraint was not wholly unjustified. "We disapprove of [the teacher's] actions in no uncertain terms, and we are sympathetic to the harm that [the student] and his classmates suffered as a result of [her] misconduct," U.S. Circuit Judge William H. Pryor Jr. wrote. Given the connection to the student's behavior, however, the court could not find that the teacher's conduct was conscience-shocking. U.S. Circuit Judge Rosemary Barkett dissented from the majority's opinion, determining that the teacher's use of restraint and excessive force violated the student's constitutional rights.

**74. J.D.P. v. Cherokee County, Ga., Sch. Dist., 55 IDELR 44, 2010 WL 3270598 (N.D. Ga. 2010).** Afterschool program staff did not expose a Georgia district to ADA or Section 504 violations when they restrained a student with autism, mental retardation, a speech-language disorder, ADHD, and ODD. On a day when the student's regular one-on-one aide was absent, the student became agitated. He threw his shoes at one employee and tried to hit another in her face and head. Fearful that the student was going to injure himself or others, employees implemented the physical restraint process, which resulted in employees holding each of the student's ankles and wrists. The student sued the district for ADA and Section 504 violations, alleging that the district failed to adequately train its employees to appropriately respond to the student's behaviors, causing the situation to escalate. To establish a claim for compensatory damages under the ADA or Section 504, a plaintiff must show intentional discrimination or some bad faith or gross misjudgment by school officials. All of the employees had experience and training in various areas from working with students with disabilities, including deescalation and physical restraint techniques, the court noted. Although the employees who restrained the student were not familiar with his BIP or 504 plan, the court observed, the evidence did not demonstrate that their actions were unreasonable in light of their professional determination that his behavior put himself and others at risk. Despite the fact that the employees did not utilize all of the specific techniques in the student's BIP and 504 plan, there was no indication "that their method of restraint harmed the student in any way or was inconsistent with their professional training," the court held.

**75. D.D. v. Chilton County Bd. of Educ., 54 IDELR 157, 701 F.Supp.2d 1236 (M.D. Ala. 2010).** Strapping a 4-year old boy with pervasive developmental disorder to a therapeutic chair in a hallway for several minutes did not violate the 14th Amendment, according to the U.S. District Court, Middle District of Alabama. Under the circumstances, including the child's aggression and the brevity of the restraint, the measure did not "shock the conscience," at least in a constitutional sense. The teacher who placed the child in the chair explained that she wanted to stop him from kicking people. She claimed that she presented the child with the option of sitting in his chair or using the therapeutic chair, and that the child chose the latter. The teacher applied the chair's waist strap and sat the child in the hallway facing the wall until his mother arrived. The mother sued the district for depriving the child of his right to liberty and bodily integrity. The court pointed out that to violate substantive due process, the conduct must be conscience-shocking. *Peterson v. Baker*, 5 GASLD 53, 504 F.3d 1331 (11th Cir. 2007). The court held that the teacher's actions fell well short of that standard. It noted that the situation might have been different if the student had been restrained for an entire school day. Here, however, the child was restrained for less than 10 minutes in a chair he chose to sit in. Moreover, the child sustained no physical injury from the measure. The court also held that the restraint was not a sufficient deprivation of liberty that required advance notice and a hearing. Finally, declining to exercise jurisdiction over the parent's negligence claims, the court noted that its ruling did not reflect on whether the teacher's actions were lawful under state tort law.

## **XII. SECTION 504/TITLE II OF THE ADA**

**76. D.L. v. Unified Sch. Dist. No. 497, 54 IDELR 1, 596 F.3d 768 (10th Cir. 2010).** Noting that a parent could not attribute any of her children's absences to a district's refusal to serve nonresidents with autism, the 10th Circuit held that she could not sustain claims for

Section 504, Title II, or constitutional violations. The 10th Circuit affirmed the District Court's decision that the parent did not have grounds to seek relief for disability discrimination. The 10th Circuit explained that the parent could not sue the district unless the students suffered an actual injury as a result of the district's conduct. Although the district informed the parent that it did not have the resources to provide special education and related services to nonresident children with autism, there was no evidence that the district excluded the students from school. On the contrary, the evidence showed that the students missed school for several days in January 2000 because the parent was sick and unable to provide transportation. The court noted that the parent submitted an affidavit of residency upon the students' return to school, and that they remained in the district's schools until the parent withdrew them for unrelated reasons in December 2000. "Even if [the parent and the students] established that application under the nonresident policy would have been futile, they nevertheless lacked standing because they have not demonstrated any causation between the [district's] actions and their own injury," the 10th Circuit wrote. The court also upheld a judgment for the district on the parent's IDEA claim. Even if the parent had a viable IDEA claim, the court explained, she waived that claim by failing to address it fully at the District Court level.

**77. Mark H. v. Hamamoto, 55 IDELR 31, 620 F.3d 1090 (9th Cir. 2010).** Despite claiming that the parents of two children with autism were seeking relief for IDEA violations, the Hawaii ED could not shake off allegations that it violated Section 504 by denying the children meaningful access to a public education. The 9th Circuit held that the ED's alleged failure to provide reasonable accommodations, coupled with evidence of its deliberate indifference, could support an award of damages under Section 504. To seek relief for denial of FAPE under Section 504, the parents needed to show that: 1) their daughters needed autism-specific services; 2) the ED was aware of that need but failed to provide the services; and 3) the services were available. The 9th Circuit found that the parents' evidence raised genuine questions of fact as to each element. The court noted that a psychologist with the Hawaii Department of Health informed the ED of the children's need for discrete trial training and a trained therapeutic aide as early as 1994. However, the ED did not provide any autism-specific services until 1999. The fact that other students with autism were receiving such services from the ED showed that the services were available as a reasonable accommodation. "Accordingly, [the parents] raised genuine issues of material fact as to whether [the Hawaii ED] denied the girls meaningful access to the benefits of a public education by denying them reasonable accommodations," U.S. Circuit Judge Harry Pregerson wrote. Furthermore, the ED's failure to investigate whether discrete trial training and a therapeutic aide were available suggested that it acted with deliberate indifference. The court also observed that the lack of autism-specific services allegedly prevented the children from receiving any benefit from their public education. Noting that nondisabled students would receive some benefit from public education, the court found sufficient evidence that the services provided to the girls were not designed to meet their needs as adequately as the needs of students without disabilities. The 9th Circuit reversed a judgment in the ED's favor and remanded the case for further proceedings.

**78. Holmes-Ramsey v. District of Columbia, 55 IDELR 198, 2010 WL 4314295 (D.D.C. 2010).** The mother of a 4-year-old with ADHD, cognitive deficits, and a speech language disorder could not establish a Section 504 claim based on "garden variety" IDEA violations, the

District Court held. Noting that the D.C. Circuit requires allegations of bad faith or gross misjudgment to sue under Section 504 for denied educational services, the court held that claims of a belated screening and denial of speech language services did not satisfy the requirement. In her lawsuit, the parent asserted that the district violated the IDEA's child find provision by failing to screen the student for special education services until nearly a year after her third birthday. She also claimed that the district denied the student FAPE by failing to address her speech language deficits. The court noted that something more than a mere failure to provide FAPE must be shown to assert a Section 504 claim in the context of educational services. *Lunceford v. District of Columbia Bd. of Educ.*, 556 IDELR 270 (D.C. Cir. 1984). The court observed that the parent's complaint contained no facts from which it could infer that the district acted in bad faith or with gross misjudgment. There were no facts indicating the district had a policy that systematically excluded the student from receiving an appropriate education. The court rejected the parent's contention that withholding needed services and delaying an evaluation satisfied the requirement. "These allegations, though serious, amount to garden variety IDEA violations," U.S. District Judge Colleen Kollar-Kotelly wrote. Because the allegations in the parent's complaint fell short of stating a 504 claim, the court dismissed that part of the case.

**79. Celeste v. East Meadow Union Free Sch. Dist., 54 IDELR 142 (2d Cir. 2010).**

Architectural barriers on a middle school campus denied a student with cerebral palsy meaningful access to its programs. The student relied on crutches when he was ambulatory and a wheelchair when he was not. Minor architectural barriers on school property forced him to take a 10-minute detour each way to go to and from the athletic fields. The 20-minute total detracted from his participation as manager of the football team and cut in half his participation time in a typical 45-minute PE class. The student sued his New York district for denying him meaningful access to its programs as provided under Title II of the ADA. The district appealed the jury's finding of liability, arguing that the student failed to introduce any objective or expert testimony to support his Title II claim. The district offered neither a compelling argument nor an established legal precedent establishing that expert testimony was necessary to prove a denial of access claim, the 2d Circuit observed. The district also argued that the student was required to provide evidence of cost-effective measures it could have taken to correct the alleged architectural barriers on campus. The student satisfied this requirement, the 2d Circuit noted. "For each of the physical areas found by the jury to have the effect of denying [the student] access to school programs, [the student] offered plausible, simple remedies, which are [minimal] compared with the corresponding benefits by way of access achieved," the 2d Circuit wrote in an unpublished decision. The court upheld the jury's conclusion on liability but vacated its decision to award the student \$115,000.

**80. D.R. v. Antelope Valley Union High Sch. Dist., 55 IDELR 163, 2010 WL 4262047 (C.D. Cal. 2010).**

A California district had to provide an elevator key for a high school student with difficulty walking, pending the outcome of her discrimination case. The District Court noted that the 17-year-old was likely to ultimately establish that the district violated Section 504 and Title II by denying the accommodation, which would have enabled her to reach her classes and extracurricular activities in a timely, inconspicuous manner. The student, who had a neurological disorder causing reduced leg strength, was often late to class after her school added a second floor. However, the district declined to entrust her with her own key. Instead, it

offered a mobility liaison from whom she could request a key on an as-needed basis. The parent sued for discrimination, and asked the court to require the district to provide a key pending the outcome. The court noted that a plaintiff may obtain an emergency order only if she is likely to ultimately prevail in her case. It rejected the district's argument that the requested accommodation was unreasonable. The student established that a key would have enabled her to access the school's programs. Moreover, her request addressed the failings of the district's proposed accommodations, which offered either a part-time aide who was often unavailable or a dedicated aide who would have isolated her from peers. In addition, there was no evidence that the accommodation would fundamentally alter the district's programs due to safety and security risks. Although the district asserted that it had to cordon off unsupervised areas of the school to prevent drug use and sexual activity, it presented no evidence that the student was involved in these activities. "Mere speculation that possession of an elevator key will lead to 'mischief' is insufficient to meet [the district's] burden," U.S. District Judge S. James Otero wrote.

**a. Retaliation**

**81. Reinhardt v. Albuquerque Pub. Schs. Bd. of Educ., 40 NDLR 156, 595 F.3d 1126 (10th Cir. 2010).** A New Mexico school district must defend its treatment of a speech-language pathologist who advocated on behalf of students with disabilities. The pathologist repeatedly complained to her superiors about inaccurate caseload lists, which not only deprived qualified students of services but also impacted the staff pathologists' contract status and salaries. Unable to get a response, the pathologist filed an IDEA complaint with the state education department. The ED conducted an investigation and ordered the district to take corrective action. The teacher historically received a salary bump due to her above-average caseload. However, after filing her complaint with the ED, the district limited the number of students it assigned her and reduced her to a standard contract because her smaller caseload did not support an extended contract. The pathologist sued the district for retaliating against her for advocating on behalf of students with disabilities in violation of Section 504 and the First Amendment. In attempting to protect the rights of special education students by complaining to school and state officials, the pathologist engaged in activity protected by Section 504, the 10th Circuit held. The district's decision to reduce her caseload, and the attendant reduction in her salary, qualified as adverse actions. Although the pathologist had no entitlement to an extended contract, the court noted that under the circumstances, a reasonable employee might be dissuaded from advocating on behalf of students knowing that her workload and salary would be impacted. Because the adverse action occurred close in time to the pathologist's protected activity, the court ruled that she established a causal connection between the two. Finding that the pathologist adequately called into question the legitimacy of the district's explanation for reducing her caseload and her salary, the court held that she could take her Section 504 retaliation claim to trial.

**82. Fox v. Traverse City Area Pub. Schs. Bd. of Educ., 110 LRP 28729, 605 F.3d 345 (6th Cir. 2010).** A Michigan district did not violate a probationary teacher's First Amendment rights when it did not renew her teaching contract. The district explained that its decision was based on numerous documented performance deficiencies during the teacher's two-year probationary period. The special education teacher disputed that her performance was

deficient, contending that the district's decision came five months after she voiced concerns to her supervisors that the size of her caseload exceeded that allowable by law. During her first year, she carried a caseload that did not exceed the legal limit of 21 students. Her second year, she volunteered to participate in a reading program, which in her estimation made her responsible for 34 students in various classes. According to the district, the teacher was relieved of her participation in the program because she fell behind in her other responsibilities. The teacher sued the district for retaliating against her in violation of her free speech rights. To establish a First Amendment violation, the teacher was required to show that: 1) her statements were protected speech; 2) she suffered an adverse employment action; and 3) the adverse action was motivated at least in part by the exercise of her speech rights. To be protected, an employee's speech must address a matter of public concern. Statements made pursuant to an employee's official duties are not protected by the First Amendment. To determine whether the teacher's complaints amounted to protected speech, the court examined both the content and the context of the speech. The court noted that the teacher's statements concerning class size were made to her supervisor, not to the board, the public, or an agency outside the chain of command. Moreover, the teacher's comments pertained to the conditions of her employment and did not address a matter of public concern, the court observed. Reasoning that the teacher's speech was not entitled to protection under the First Amendment, the 6th Circuit ruled that the District Court properly dismissed her retaliation claim.

**83. Herrera v. Giampietro, 54 IDELR 222 (E.D. Cal. 2010).** Despite a district's assertion that it had a lawful reason for transferring her nephew out of the district, the parent of a child with autism established a valid ADA retaliation claim. It was a factual question and thus not a proper basis for dismissal as to whether the district's explanation was merely a cover for retaliating for the parent's prior accommodation requests. The district forced the parent's nephew to transfer to another district after discovering he was not a district resident. The parent sued the district, contending that the district's action was reprisal for her advocacy for her son. The district asked the District Court to dismiss the case. To establish an ADA retaliation claim, a parent must show that: 1) she engaged in protected activity; 2) the district knew of the activity; 3) the district took adverse action; and 4) the protected activity was the cause of the adverse action. If the district states a legal reason for the adverse action, the parent must then show that reason was merely a pretext. The court pointed out that the fact that a district has a lawful basis for adverse action, such as a transfer, does not automatically insulate it from liability if one can establish it was motivated, even in part, by animus based on a protected activity like accommodation requests. The court also rejected the district's contention that the parent lacked standing to sue based on her nephew's injury. The parent was suing based on her own resulting emotional distress. Furthermore, the parent alleged that distress was significant. "While conduct must be material to be adverse in the ADA retaliation context, it need not be traumatic," U.S. District Judge Oliver W. Wanger wrote.

**84. Doe v. Wells-Ogunquit Community Sch. Dist., 54 IDELR 120, 698 F.Supp.2d 219 (D. Me. 2010).** The parent of a student with an undisclosed disability could not proceed with a Section 504 claim alleging that a Maine district retaliated against her by committing various procedural violations. The District Court dismissed the claim, reasoning that it turned exclusively on rights created by the IDEA. The parent's lawsuit alleged both IDEA and Section 504 violations. Her 504 claim asserted that the district retaliated by hiring an

unqualified evaluator, ignoring the recommendations of her son's physicians, and excluding the parent from placement discussions. The district asked the court to dismiss the 504 claim. Citing the 1st U.S. Circuit Court of Appeals' decision in *Diaz-Fonseca v. Puerto Rico*, 45 IDELR 268 (1st Cir. 2006), the court observed that if a case turns entirely on rights created by the IDEA, the party has no viable independent claim under Section 504 or Title II. In granting the district's dismissal request, the court held that the parent's 504 claim was based only on purported violations of IDEA procedural rights. This was not a case where the act underlying the retaliation was unrelated to the IDEA, such as an allegation of sexual abuse. "The Court finds that Plaintiff's Rehabilitation Act claim is a mirror of her IDEA claim, and thus falls squarely within the rationale of *Diaz-Fonseca*," U.S. District Judge George Z. Singal wrote. The court granted the district's request to dismiss the parent's 504 claim.

### **b. Disability Harassment**

**85. Dear Colleague Letter, 55 IDELR 174 (OCR 2010).** While lauding efforts by districts and SEAs to reduce bullying in schools, Assistant Secretary for Civil Rights Russlynn Ali reminded agencies in a "Dear Colleague" letter issued Oct. 26, 2010, that some bullying may require a more comprehensive response than merely disciplining the perpetrator or counseling the victim. Some conduct falling under an anti-bullying policy also may trigger the district's duties under Section 504, Title II, Title VI, and Title IX to take steps to prevent recurrence and eliminate any hostile environment. "These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination," Assistant Secretary Ali wrote. The ED stated that districts should keep two things in mind when responding to reported bullying. First, they should avoid shaping a response based on how the victim labels the incident, and instead determine whether the nature of the conduct implicates the student's federal civil rights. Second, districts "should look beyond simply disciplining the perpetrators." If a hostile environment exists, districts must take a systemic approach to address the unique effect that the misconduct had on school climate. The ED offered a hypothetical situation in which several classmates threw objects at a student with an SLD and repeatedly called him names referencing his impairment. The student reported that he was being continually "taunted and teased." A district that viewed the incident as bullying and merely offered counseling services would have responded inadequately because it would have failed to take steps to address the hostile environment. Such steps should involve disciplining the harassers, consulting with the district's Section 504 coordinator to ensure a thorough response, training staff to recognize disability discrimination, and monitoring the harassment so it does not resume.

**86. M.Y. v. Grand River Academy, 54 IDELR 255 (N.D. Ohio 2010).** A private high school in Ohio faced further proceedings to resolve ADA and Section 504 claims lodged against it by a student with Asperger syndrome. The student alleged that he was bullied and harassed by his peers, which included being physically assaulted. He claimed that he became so depressed he threatened to harm himself. According to the student, school officials not only ignored his reports of peer harassment, but they also told him that it was their policy to look the other way when upperclassmen punished or hazed younger students. Moreover, the school disciplined him several times for the assaults and other harassment he experienced at the hands

of upperclassman. The student sued the school, alleging that it discriminated against him on the basis of his disability in violation of the ADA and Section 504. The school and its headmaster requested dismissal, arguing that even if true, the allegations did not entitle him to relief under either act. Both laws prohibit recipients of federal funding from discriminating against students on the basis of disability. The court noted that the student alleged that the school discriminated on the basis of disability by failing to protect him from harm, and by denying him the opportunity to benefit from the educational programs and services it offered to nondisabled students by expelling him after less than three months. Because more information was needed to determine whether the student's claims had merit, the court held that dismissal was not appropriate during the early stages of the case.

**87. P.R. v. Metropolitan Sch. Dist. of Washington Twp., 55 IDELR 199, 2010 WL 4457417 (S.D. Ind. 2010).** Promptly responding to reports of disability harassment made by a middle school student who had HIV helped an Indiana district avoid Section 504 and Title II violations. After the student confided her HIV status to a friend, she was subjected to teasing and name-calling at school and online. The incidents occurred intermittently from sixth grade until eighth grade when the student withdrew from school. The student's parent sued the district for failing to adequately respond to the alleged peer harassment on the basis of the student's disability. The District Court noted the similarities between the language in Title IX and in Title II and Section 504 when deciding to apply a five-part test modeled after the standard established in *Davis v. Monroe County Board of Education*, 2002 LRP 860, 526 U.S. 629 (1999). To hold the district liable for disability-based peer harassment, the student was required to show that: 1) she was an individual with a disability; 2) she was harassed based on her disability; 3) the harassment was so severe or pervasive that it altered the condition of her education; 4) the district knew about the harassment; and 5) the district was deliberately indifferent to it. Although the district disputed whether the student was an individual with a disability, the court ruled that she was, based on the voluminous case law deeming HIV infection a physical impairment that substantially limits the major life activity of reproduction. Although much of the harassment occurred over a period of years, making it seem less severe or pervasive, the court ruled that the stress-related physical symptoms she suffered could be attributable to the harassment. Next, the court noted that the district was aware of at least three distinct incidents of harassment, one during each year of middle school. According to the district, school personnel reacted to each reported incident, met with the alleged harassers, admonished them for their behavior, and informed all interested parents. Although the student argued that a jury should be allowed to determine whether the district's response was reasonable, the court disagreed. While the student and her parent may have believed that her harassers should have received harsher punishment, "school administrators enjoy a great deal of flexibility when making disciplinary decisions and responding to allegations of harassment," the court wrote. Holding that the student failed to show that the district's response was clearly unreasonable, the court dismissed the student's claims.

### **XIII. SERVICE ANIMALS**

**88. K.D. v. Villa Grove Community Unit Sch. Dist. No. 302 Bd. of Educ., 55 IDELR 78, 2010 WL 3450075 (Ill. App. Ct. 2010).** A single provision in the Illinois School Code undermined a district's efforts to keep a 6-year-old boy with autism from bringing his dog to

school. Determining that the dog qualified as a “service animal” despite its alleged failure to respond to commands or provide the child with necessary assistance, the Illinois Appellate Court held that the child could bring the dog to all school functions. The decision turned on the plain language of Section 14-6.02 of the school code. That provision states that a district must permit service animals such as guide dogs, signal dogs, or any other animal trained to perform tasks for the benefit of a student with a disability to accompany the student at all school functions, whether inside or outside of the classroom. “Despite the inevitable impact a service animal’s presence at school will have on a student’s individualized education plan, the School Code requires school districts to admit the service animal with the student so long as the animal meets the definition set forth in Section 14-6.02,” Justice James A. Knecht wrote. The court observed that the dog performed specific tasks to benefit the child. In addition to applying deep pressure to calm the child, the dog prevented the child from eloping when the two were tethered. The court rejected the district’s argument that the dog’s failure to obey all commands raised questions about its status as a service animal. “Section 14-6.02 does not specify service animals must behave perfectly at all times,” Justice Knecht wrote. Nor did the dog lose its status as a service animal because it was commanded by a one-to-one aide rather than the child. Because the dog met the definition of a service animal under state law, the court held that the district could not exclude the dog from the child’s classroom. The court affirmed a decision reported at 53 IDELR 300 that allowed the child to bring the dog to school.

**89. Colorado Springs (CO) Sch. Dist. #11, 56 IDELR 52 (OCR 2010).** School district was found in violation of Section 504/Title II of the ADA for refusing to discuss the provision of a service animal as a related service during the development of a student’s IEP. A second-grader with Cerebral Palsy Quadriplegia had been accompanied to school by his service dog during the first grade. However, the next school year, the boy’s mother was informed by the principal that the dog was banned from the school due to a teacher’s allergic reaction to the animal. In response, the mother asked her son’s IEP team to consider adding the dog to the IEP as a supplementary aid/related service. The team leader stated that the presence of the dog was not an academic matter and therefore could not be a part of the child’s IEP. OCR found that the IEP team should have carefully considered and documented its decision with regard to the provision of a service animal at school as a part of the student’s IEP.

#### **XIV. TRANSITION SERVICES**

**90. Rodrigues v. Fort Lee Bd. of Educ., 56 IDELR 48 (D.N.J. 2011)(unpublished).** A district created and implemented an adequate transition plan for a student with cerebral palsy, the District Court held, by providing her with information, resources, and instruction to help her develop the interpersonal and independent living skills that she would need after graduation. The court rejected her father’s contention that the plan was not individually tailored to the student’s needs. The District Court noted that the 3d U.S. Circuit Court of Appeals has not defined what amount of transition planning is required in an IEP. However, the District Court observed that a transition plan is substantively adequate if it includes a discussion of transition services under the IDEA. The plan in this case included assessments and goals related to training, education, employment, independent living skills, and the transition services the child needed to reach those goals, as required by the IDEA implementing regulation at 34 CFR 300.320(b). Contrary to the parent’s assertion, the plan included information that was specific to the student. It addressed her

individual needs and goals, including her desire to attend college. Furthermore, the district implemented the plan by providing information about local agencies, including a community college and an independent living program that could assist the student in transitioning. The district also created a social skills class for her and a small group of peers to help her improve her interpersonal skills and “street smarts.” Finally, all versions of her senior IEP included an extensive “senior year checklist,” of what students needed to do in order to facilitate a smooth transition to life after school.

## **XV. PROCEDURAL & LITIGATION ISSUES**

**91. J.C. v. Slippery Rock Area Sch. Dist., 54 IDELR 127, 1581 C.D. 2009 (Pa. Commw. Ct. 2010).** Absent an order terminating her parental rights, a student’s mother who was incarcerated still had authority to make educational decisions for her child. Because Pennsylvania law provides that a temporary award of legal custody does not sever a parent’s other rights, the mother had standing to file a due process complaint on her daughter’s behalf, a state court ruled. Following the mother’s alleged assault on the student, a juvenile court temporarily transferred legal and physical custody to county youth services. The mother filed a due process complaint after the district refused to hold an IEP meeting. The district asked the hearing officer to dismiss the complaint. It argued that the mother lacked standing, claiming that youth services now had exclusive authority to make educational decisions for the child. The IHO followed suit, and the parent appealed. The court’s holding turned on the temporary nature of the transfer order. First, the court noted that a parent always has standing with regard to her child’s education despite the temporary transfer of legal custody. Furthermore, although there appeared to be pending petition of termination of parental rights in the juvenile court, the current status of that matter was not on the record before it. In this case, the juvenile court had transferred the child’s legal custody on a temporary basis, a situation “wholly different from the involuntary termination of parental rights,” Judge Robert Simpson wrote. Under the state’s Juvenile Act, a temporary award of custody, in contrast to termination of parental rights, is subject to the remaining rights of the parent. Thus, at this point, the mother still had rights over her child’s educational program.

**92. K.L.A. v. Windham Southeast Supervisory Union, 54 IDELR 112 (2d Cir. 2010).** The fact that a teenager’s parents opposed her placement in a public high school’s life education program did not mean that the district’s decision to place the student in that program was procedurally deficient. Noting that the parents participated in the IEP process, the 2d Circuit held that the specific location of the student’s services was a matter for the district to decide. The court first rejected the parents’ claim that a general education teacher’s absence from certain IEP meetings amounted to a denial of FAPE. Not only did the teacher participate in IEP meetings to the extent appropriate, but there was no evidence that his increased presence would have resulted in a different placement offer. As for the parents’ claim that they were excluded from discussions about their daughter’s placement, the court explained that the term “educational placement” only encompasses the student’s placement on the LRE continuum. Under the regulations in effect in Vermont at the time, the district had the exclusive right to decide the specific location of the student’s services. “Though the parents are afforded input as to the determination of the general characteristics of an appropriate educational placement, they cannot summarily determine a specific placement,” the 2d Circuit

wrote in an unpublished decision. The court pointed out that the parents participated substantially in all discussions about the student's IEP. Finding no evidence of a procedural violation, the 2d Circuit affirmed a judgment in the district's favor.

**93. A.H. v. Department of Educ. of the City of New York, 55 IDELR 36, 2010 WL 3242234 (2d Cir. 2010).** The failure to include all required members at an IEP team meeting may have resulted in costly litigation, but it did not pin liability on a New York district. A three-judge panel of the 2d U.S. Circuit Court of Appeals, in an unpublished decision, held that the absence of the child's special education teacher did not impede his right to FAPE, limit the parent's ability to participate, or cause the denial of educational benefits. The parent alleged that both the teacher's absence and the failure of the IEP to address the student's difficulties with transitions and large groups denied him FAPE. The District Court agreed but denied tuition reimbursement based on the equities. The parent appealed. On appeal, the 2d Circuit noted that a procedural error denies FAPE only if it impedes FAPE or parental participation or causes a deprivation of educational benefits. 20 USC 1415(f)(3)(E)(ii). None of that happened here. The court pointed out that another special education teacher who served as an IEP coordinator was present at the meeting and there was no evidence that the teacher wasn't familiar with the program options for the student. Furthermore, the student's general education teacher, who was aware of his special education needs, was also present, as was a school psychologist. Moreover, the parents actively participated, as shown by the fact that their efforts led to the student being placed in a smaller classroom. The court also noted that the IEP specifically addressed the child's difficulty in dealing with large groups of children by moving him to a 12:1:1 class and included a BIP that addressed his distractibility. "The relevant inquiry was not whether the proposed IEP provided all possible support to ensure that [the student] did not lose focus, but rather whether objective evidence indicated that the child was likely to progress, not regress," the panel wrote. Because the IEP was reasonably calculated to enable some progress, it was substantively adequate.

**94. Berry v. Las Virgenes Unified Sch. Dist., 54 IDELR 73, 370 F. App'x 843 (9th Cir. 2010)(unpublished).** Despite claiming that it considered a number of factors before deciding on a placement for a student with autism, a California district failed to show that it complied with the IDEA's procedural safeguards. The 9th Circuit affirmed the District Court's decision at 52 IDELR 163 that the district predetermined the student's placement in a special day class. The decision turned on the assistant superintendent's statement at the start of the IEP meeting that the team would discuss the student's transition back to public school. Based on that statement and the evidentiary record as a whole, the District Court found that the district determined the student's placement before the meeting. "It specifically found [the district representatives'] testimony about being open to considering alternative placements incredible, and found credible the mother's testimony that her minimal participation [in the meeting] was due to futility," the 9th Circuit wrote in an unpublished decision. The 9th Circuit observed that the District Court's findings were not clearly erroneous. Concluding that the district violated the IDEA's procedural requirements by predetermining the student's placement, the 9th Circuit upheld the District Court's ruling in the parent's favor.

**95. Blanchard v. Morton Sch. Dist., 54 IDELR 277, 385 F. App'x 640 (9th Cir. 2010)(unpublished).** When selecting an aide for a student with autism, a Washington district

was not required to defer to the parent's preference. Relying on the District's Court's reasoning, the 9th Circuit dismissed the parent's claims that the district violated the IDEA, Title II, and Section 504. The parent removed the student from his program just 22 days after he began working with the educational assistant. The parent initiated due process proceedings, arguing that the district denied her son FAPE by failing to assign a particular educational assistant to work with her son. Although the parent had a specific individual in mind to serve as the student's educational assistant, that individual neither applied for the position nor expressed a desire to accept the job if offered. Moreover, the parent failed to show that the educational assistant the district assigned to work with the student was unqualified. Absent evidence that the educational assistant assigned by the district was unqualified, the parent could not establish an IDEA violation, the court held. The District Court properly ruled that the parent could not prevail on her Section 504 and Title II claims, the 9th Circuit held, because she failed to demonstrate that the district was deliberately indifferent to her son's educational needs when it assigned someone other than the parent's choice to serve as the student's aide.

**96. C.H. v. Cape Henlopen Sch. Dist., 54 IDELR 212 (3d Cir. 2010).** Recognizing that a teenager with SLDs did not have an IEP in place at the start of the 2006-07 school year, the 3d Circuit nonetheless rejected the notion that a Delaware district denied the student FAPE. The 3d Circuit affirmed a decision reported at 50 IDELR 217 that the procedural violation was harmless. The court explained that a procedural error does not amount to a denial of FAPE unless it impedes the child's right to FAPE, impedes the parents' participation in the IEP process, or results in a deprivation of educational benefits. Although the IDEA required the district to have an IEP in place for the student on the first day of classes, the court pointed out that the student did not attend school in the district during the 2006-07 school year. Instead, the parents enrolled the student in a residential school for students with SLDs. "Absent any evidence that [the student] would have suffered an educational loss, we are left only to determine whether the failure to have an IEP in place on the first day of school is, itself, the loss of an educational benefit," U.S. Circuit Judge D. Michael Fisher wrote. The 3d Circuit noted that it did not condone the district's failure to have an IEP in place at the start of the school year. However, it declined to hold that the lack of an IEP automatically qualifies as a denial of FAPE. Because the parents failed to establish substantive harm, they were not entitled to tuition reimbursement. The court further observed that the parents declined to participate in additional IEP meetings over the summer because of their travel schedule, and that they did not notify the district of the student's residential placement. Given the parents' lack of cooperation, the 3d Circuit held that the District Court also could have denied reimbursement on equitable grounds.

**97. Fort Osage R-I Sch. Dist. v. Sims, 55 IDELR 127, 2010 WL 3942002 (W.D. Mo. 2010).** The parents of a student with Down syndrome and autism failed to establish that they were denied meaningful participation in developing their child's IEPs. A District Court ruled that the parents and their consultants actively participated in IEP meetings and that the district incorporated many of their suggestions into the child's program. After placing their daughter in a private program for students with severe disabilities, the parents sued the district, alleging that it predetermined the student's IEPs and withheld information at IEP meetings. Predetermination amounts to a denial of FAPE where parents are effectively deprived of meaningful participation

in the IEP process, the court explained. However, in this case, the parents, their experts, and an advocate were actively involved in the child's numerous IEP meetings, and their extensive input resulted in changes to many components of the IEPs, including goals, modifications and present levels of performance. "The district spent an inordinate amount of time and manpower to accommodate the Parents and their representatives' positions," U.S. District Judge Fernando J. Gaitan Jr. wrote. The court also found that district IEP team members did not withhold important information during the IEP process such that the parents' involvement was significantly hampered. In one instance, a team member merely failed to express her belief that the parents' disciplinary tactics were inadequate. In another case, a team member with minimal knowledge of the student failed to state her disagreement with a couple of areas of a proposed program. The fact that IEP team members did not reveal their every thought did not establish that the district prevented the parents' from meaningfully participating.

**98. Ka.D. v. Solana Beach Sch. Dist., 54 IDELR 310, 2010 WL 2925569 (S.D. Cal. 2010).** There was insufficient evidence that a California district decided its placement offer for a 4-year-old girl with autism ahead of time. The fact that its special education director expressed concerns that the district and parent would be unable to reach an agreement was not tantamount to predetermination, a District Court held. The parent rejected the district's offered placement, enrolled the child in private school, and sought reimbursement. An ALJ ruled in favor of the parent in part, ordering the district to reimburse the parent for private school costs. However, the parent took the case to federal court, arguing that the ALJ also should have found that the district predetermined its offer. The parents asserted that the special education director decided beforehand that the parties would disagree and thus was dismissive of proposals that included keeping the student in private school. The court pointed out that although the director expressed concerns, and although the parent may have been frustrated by the IEP, neither established that the district decided on a placement before the meeting. In fact, meeting notes showed that the team discussed the conflicting recommendations, including apparently discussing the private school at length. "Indeed, after reading the transcripts, this Court was left with the impression that Student's mother was a welcomed and active participant in the IEP discussions," U.S. District Judge Thomas J. Whelan wrote. Nor was there any evidence that the district had a policy of rejecting private school placements. The court also affirmed the ALJ's decision rejecting the parent's request that it pay an independent evaluator's \$24,000 bill, reasoning that the parent offered no evidence that the district's own evaluation was inappropriate.

**99. L.M. and D.G. v. Pinellas County Sch. Bd., 54 IDELR 227 (M.D. Fla. 2010).** A Florida district could relocate a student with autism while her parents litigated a due process complaint. The stay-put provision of the IDEA provides that unless otherwise agreed, a student must remain in her then-current educational placement until due process proceedings are completed. The parents contended that the student's then-current placement was her particular school. Relying on the stay-put provision, the student's parents asked the court to intervene to stop the district from transferring the student to another school. Then-current placement generally refers to the student's educational program, the court explained, not the particular building where the program is implemented. "Although moving the location of the student's services may in some circumstances be a change in the educational placement, such circumstances are not present [here]," the court wrote. The parents further argued that

transitions were extremely difficult for the student, and that transitioning from one location to another could affect the student's ability to learn. Noting that the parents did not assert that the district proposed to modify the student's general educational program, the court ruled that the relocation and her difficulty with transition did not amount to a change in her educational placement within the meaning of the stay-put provision. Therefore, the parents were not entitled to a stay-put order preventing the district from transferring her to another location.

**100. N.S. v. State of Hawaii, Dep't of Educ., 54 IDELR 250 (D. Hawaii 2010).** The phrase "inclusion preschool," along with a description of how much time a 3-year-old with pervasive developmental disorder would be removed from a general education class, adequately described her placement, a federal District Court held. The court rejected her parents' contention that the IEP had to identify the particular school the child would attend. The IEP stated that the student "will be in a full preschool inclusion setting daily with 100 minutes per day spent on 1:1 Discrete Trial Teaching." After rejecting the IEP as too vague, the parents placed the child in private school and pursued tuition reimbursement. A hearing officer denied their reimbursement request, concluding that the IEP offered FAPE. The parents appealed. On appeal, the District Court noted that the physical location where a placement will be implemented is an administrative decision, not a required component of an IEP. The court also rejected the parents' contention that the IEP was too vague because it failed to define the term "inclusion preschool." An IEP must only include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the general education class and in extracurricular and nonacademic activities. 34 CFR 300.320(a)(5). "Student's IEP specifically explains how much time Student will not participate in regular class, making it clear that Student would not be with other students at all times," U.S. District Judge Susan Oki Mollway wrote. Finally, the IEP contained an adequate statement of the special education and related services the student would receive. Because the parents failed to show that the child's IEP did not offer her FAPE, they could not recover the cost of sending her to private school.

**101. Kalliope R. v. New York State Dep't of Educ., 54 IDELR 253, 2010 WL 2243278 (E.D.N.Y. 2010).** Allegations that the New York ED prohibited a particular student-teacher ratio were sufficient to create viable claims under the IDEA and Section 504. Declining to dismiss the case, a federal District Court reasoned that the allegations constituted plausible claims that the ED precluded parents' meaningful participation, denied their children FAPE, and discriminated against the students. According to the complaint, the ED instructed IEP teams to stop placing students in 12:2:2 classes. The school and the parents of several students whose IEPs included such placements sued the ED. The ED asked the court to dismiss the case for failure to state a valid claim. The court observed that a complaint must merely allege a plausible set of facts sufficient to raise a right to relief above the speculative level. In finding the complaint adequate, the court likened it to the complaint in *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir. 2004), which asserted that a district refused to consider ABA therapy. As in *Deal*, the complaint here contended that the agency prohibited IEP teams from considering whether a particular placement might be appropriate. Based on those allegations, the plaintiffs might establish that the ED violated the IDEA procedurally by predetermining placement. Furthermore, the plaintiffs contended that the ED directed IEP teams to deny 12:2:2 placements to students who needed them to make progress. "These allegations state a plausible claim that [the ED's] interference with the IEP process has

hampered the progress of the individual plaintiffs' children ... and thereby substantively violated IDEA," U.S. District Judge Joseph F. Bianco wrote. Finally, the plaintiffs' assertions that the ED prohibited a particular instructional model despite students' needs created a plausible claim that the ED acted with gross misjudgment and thus violated Section 504.

**102. M.N. and H.N. v. New York City Dep't of Educ. Region 9 (Dist. 2), 54 IDELR 165, 700 F.Supp.2d 356 (S.D.N.Y. 2010).** Despite claiming that a charter school for children with autism offered a one-size-fits-all program, the parents of a 5-year-old boy failed to show that their son's program was deficient. The District Court held that the child did not need additional services from his school district to receive FAPE. The court recognized that more than half of the charter school's students received related services after school. However, the charter school's director testified that those services were not educationally necessary, and that some parents used them as a means to provide structure for their children outside of the school setting. "[The director] further testified that the notion that students at the charter school need extracurricular services comes from early autism research that suggested forty hours a week of services was a 'magical number,'" U.S. District Judge Richard J. Sullivan wrote. Although the parents argued that the charter school did not address the student's unique needs, the court observed that the child's curriculum focused on his language and social skills deficits. Moreover, the director testified that the child made "huge progress" during his time at the school. As such, the court held that the child did not need related services outside of school hours to receive FAPE. The court also rejected the parents' procedural challenges to the placement. Because the parents informed the IEP team of their intent to enroll the child in the school, the district did not have to invite a general education teacher to the IEP meeting. Furthermore, the IEP did not need to identify the specific school the student would attend, so long as it identified the type of educational program.

**103. S.H. v. Plano Indep. Sch. Dist., 54 IDELR 114 (E.D. Tex. 2010).** A Texas district's failure to include a private program representative at an IEP meeting resulted in a FAPE denial and a hefty reimbursement bill. Because the representative's absence led to an inappropriate placement, the district's procedural error violated the IDEA substantively, the District Court held. The parents filed a due process complaint seeking tuition reimbursement to cover the child's dual enrollment in private school over the summer and for the first few months of the 2006-07 school year. The IHO awarded reimbursement, concluding that the district's improperly constituted IEP team was the reason that it offered an inappropriate placement in an integrated classroom and failed to require ESY services. The lack of ESY, said the IHO, resulted in the student "unmastering" the objectives he had mastered in the private program. On appeal, the District Court agreed with the IHO. The court pointed out that an IEP team must include, among others, "At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child." 34 CFR 300.321(a)(6). The court held that the incomplete IEP team resulted in a loss of educational opportunities. The district knew the child fell on the severe end of the autism spectrum. Yet it did not offer ESY because it lacked data regarding the possibility of regression for the new student — data the private program representative would have provided. Furthermore, had the district invited the representative, it would not have placed the child in an integrated classroom, which was a poor fit in light of the child's severe deficits, the court noted. The court awarded \$14,625 in private tuition reimbursement. It also ruled that the parents prevailed for purposes of attorney's fees.

**104. T.S. v. Weast, 54 IDELR 249 (D. Md. 2010).** The parents of a 9-year-old with a seizure disorder failed to show that an IEP team's decision to meet without them denied their child FAPE. The U.S. District Court, District of Maryland ruled that the district was entitled to convene the IEP team without the parents after it made several unsuccessful efforts to include them, and that the resulting IEP offered the child an appropriate placement. The parents left, refused to attend, or postponed several meetings during the summer for various reasons. Because the school year was about to begin, the team met without them in mid-August. The parents rejected the resulting IEP and placed the child in private school. They asserted that the IEP team violated the IDEA procedurally and denied the child FAPE. An ALJ sided with the district and declined to award tuition reimbursement. On appeal, the court noted that a district may meet without a parent if it is unable to convince the parents that they should attend. 34 CFR 300.322(d). In this case, the parents had the opportunity to participate, the court observed, but chose not to, "as was their right." However, that did not mean that the district violated the IDEA by continuing without them. Furthermore, any alleged procedural irregularity did not interfere with the provision of FAPE. The parents failed to provide evidence, other than stating their own preference, that the proposed placement was inappropriate. Finally, the parents acted unreasonably by declining to attend any of the summer meetings. "While the Parents may have been continuing to gather information and evaluations about their son's disorder, the IEP team meetings could not simply be pushed back over and over again, because an IEP needed to be created ... before the beginning of the school year," U.S. District Judge Deborah K. Chasanow wrote.

**105. Board of Educ. of the Toledo City Sch. Dist. v. Horen, 55 IDELR 102, 2010 WL 3522373 (N.D. Ohio 2010).** An Ohio district should have done more to reschedule an IEP meeting or at least it should have informed the parents that the meeting was going forward, a District Court held. The court ruled that the district denied the child FAPE by seriously infringing on the parents' opportunity to participate in the IEP process. The district sent a written invitation to an IEP meeting instructing the parents to call if they wished to reschedule. According to the district, the parents called to cancel and indicated that they would reschedule but never did so. The district proceeded without them. Citing *Shapiro v. Paradise Valley Unified School District No. 6*, 38 IDELR 91 (9th Cir. 2003), the court noted that a parental request to reschedule an IEP meeting is not the same thing as refusing to meet. Although districts are not required to ensure parental participation, in this case the district did not do enough to try to include them. The district should have attempted to find a better date, or at the very least it, should have revealed that it was intending to proceed with the meeting. Furthermore, staff members who met with the parents on the same day as the IEP meeting should have asked the parents if they could stay for the meeting, notwithstanding the parents' earlier indications to the contrary. "This is especially so because the IEP meeting took place later the same day in the same building as the [parents'] meeting with two other staff members," U.S. District Judge James G. Carr wrote. Although the procedural violation denied the child FAPE, no harm occurred because the district never implemented the placement the IEP team proposed that day. Thus, the parents were not entitled to relief.

**106. Tracy N. v. Department of Educ., State of Hawaii, 54 IDELR 216, 2010 WL 2076938 (D. Hawaii 2010).** The Hawaii ED's delay in issuing a final placement offer for the 2008-09 school year did not deny FAPE to a student with an emotional disturbance, a federal District

Court held. The ED's delay was a consequence of the parent's request for additional assessments. Although the student's behavior had greatly improved, the ED proposed placing him in another day treatment program. The parent thought he should be mainstreamed, and the ED agreed to reassess the student over the summer and consider less restrictive placement. The parent unilaterally placed the student in a private program. On Sept. 22, after the school year had begun, the ED issued an IEP placing the student in his home school. The parent alleged that the ED denied the student FAPE and sought tuition reimbursement. The District Court held that the parent failed to establish either that the initial temporary placement was not the student's LRE or that the ED's delay in making a final offer denied the student FAPE. The court acknowledged that districts generally must have an IEP in place at the beginning of the school year. However, in determining whether a district must reimburse parents for a unilateral placement while it conducts evaluations, courts look at the reasonableness of the district's actions. *J.G. v. Douglas County Sch. Dist.*, 51 IDELR 119 (9th Cir. 2008). In this case, "any delay in Student's placement for the 2008-09 school year was due to the re-assessment being conducted at Mother's request and also due to Mother's cancellation of three scheduled IEP meetings," U.S. District Judge Alan C. Kay wrote. Furthermore, the parent did not establish that the temporary day treatment placement was inappropriate. The court pointed to testimony that the placement would have facilitated the student's transition to a less restrictive setting.

**107. D.C. and A.C. v. Klein Indep. Sch. Dist., 54 IDELR 187, 711 F.Supp. 2d 739 (S.D. Tex. 2010).** A Texas district did not violate the IDEA by failing to convene an annual IEP meeting for a student whose parents moved her to an out-of-state residential facility. The U.S. District Court, Southern District of Texas explained that the high school student with ADHD was unilaterally placed in a private program in Utah less than a year after her last annual meeting. The students' parents later filed a due process complaint, alleging among other things, that the district failed to convene an annual IEP meeting. An IHO ruled against them, and the parents appealed. The District Court observed that the IDEA requires each district to create IEPs only for children "within its jurisdiction." 34 CFR 300.323(a). Furthermore, the regulation at 34 CFR 300.132 requiring districts to provide services to students unilaterally placed in private school is limited to schools "located in the school district served by the LEA." The last IEP meeting was November 2007, the court noted. Thus, if the student had remained in the district, the IEP team would have been required to meet by November 2008. However, because the parents moved her out of the district 10 months prior to that date, they effectively negated the district's obligation to hold an annual IEP meeting. The court also rejected the parents' claim that an e-mail they sent the district on Jan. 11, 2008, triggered the district's duty under state law to convene an IEP team meeting. The e-mail did not request a meeting, but merely discussed the parents' placement decision. Finally, the Texas one-year statute of limitations barred the remaining claims.

**108. Millay v. Surry Sch. Dep't, 54 IDELR 191, 707 F.Supp.2d 56 (D. Me. 2010).** A Maine district's failure to satisfy the IDEA's notice of placement requirement prevented an administrative hearing officer from properly concluding that a residential placement was appropriate for a nonverbal student with hearing and visual impairments. The IDEA requires districts to provide a written explanation of why a proposed placement is appropriate; a description of other options considered by the IEP team and the reasons they were rejected; and a description of the factors that were relevant to the district's proposal. Here, a hearing

officer selected a placement that the IEP team never seriously considered a legitimate placement. “If it was [the district’s] intent to place [the student] at [the residential facility,] it should have complied with the notification requirements,” the court wrote. Instead, it attempted to argue that its failure to comply with notice requirements did not restrict the hearing officer’s authority to consider a placement abandoned by the IEP team. “The [long and complex] history of this case illustrates why compliance with the notice requirement and the use of the IEP as a focal point for the hearing officer’s review are important,” the court wrote. The notice requirement is a critical procedural safeguard that gives parents fair notice of what issues are being contested at the administrative hearing, the court explained. Because the hearing officer indicated that a residential placement was appropriate, despite the fact that the district never notified the parent that it was proposing the facility, the court adopted the magistrate judge’s recommendation, finding that the hearing officer exceeded his authority.

**109. S.T. v. Weast, 54 IDELR 83 (D. Md. 2010).** A district’s offer to mainstream a sixth-grader with mental retardation for lunch and nonacademic classes may have differed from IEP meeting notes calling for a self-contained placement, but that discrepancy was not enough to establish predetermination. The District Court affirmed an ALJ’s finding that the district complied with the IDEA’s procedural safeguards. The parents argued that the district’s offer of partial mainstreaming, just two months after it stated that their child required 30 hours of self-contained instruction each week, showed that the district predetermined the student’s placement in a public middle school. The court acknowledged that the notes from a May 2007 IEP meeting indicated the student’s need for a full-time special education placement. However, the court pointed out that the notetaker wrote that statement at the instruction of the school principal, who had become frustrated with the discussion about the student’s placement. According to the notetaker, that statement was intended only to refer to the student’s need for a restrictive setting for academic instruction. Moreover, the court observed, the team decided to continue the placement discussion in July 2007 so that it could obtain information about the middle school’s services. “Once [the district] obtained the needed information about the services [and presented it at the July 2007 meeting], the school representatives were satisfied that [the student’s] needs could be met at [the public middle school],” U.S. District Judge Alexander Williams Jr. wrote. Although the parents disagreed with the placement offer, there was no evidence that they were excluded from the IEP process. As such, the court found no evidence of predetermination.

**110. N.S. v. District of Columbia, 54 IDELR 188, 709 F.Supp.2d 57 (D.D.C. 2010).** Significant gaps in an elementary school student’s IEP helped justify his parents’ decision to place him in a private program instead. Because the IEP left out the child’s present levels of performance, supplementary aids and services, and failed to offer needed pull-out instruction, the program denied the student FAPE. The IEP stated that special education services would no longer be offered on a pull-out basis, but would be provided in the student’s inclusion class. The parents argued that the student would be too overwhelmed to benefit in that setting. They placed the student in a private program, and sought reimbursement. The District Court disagreed with the district’s argument that the IEP’s inadequacies were de minimis, noting that the document failed to identify services, including OT, which the district acknowledged the child needed. Furthermore, the IEP contradicted itself by rejecting pull-out services in favor of inclusion while stating that the student required a small structured setting to learn. Although

the district testified that pull-out services would have been provided if needed, neither the IEP nor the team meeting notes reflected this. The court also rejected the argument that the district could not be liable for denying FAPE because the parents never gave the IEP a chance. Citing *Forest Grove School District v. T.A.*, 50 IDELR 1 (9th Cir. 2008), *aff'd*, 52 IDELR 151 (U.S. 2009), the court observed that parents are not required to wait and see a proposed IEP in action before concluding that it is inadequate. Because the IEP as written did not offer an appropriate program, and because the district acknowledged that the unilateral placement was appropriate, the court ordered the district to reimburse the parents for its cost.

**111. B.H. v. Joliet Sch. Dist. No. 86, 54 IDELR 121 (N.D. Ill. 2010).** Although it might have been more convenient for the parent of a teenager with ADD to attend an evening IEP meeting, a district's refusal to convene after school hours was no basis for a discrimination claim. There was no allegation that the student was excluded from any program because of her disability, nor was there evidence that the district acted in bad faith or with gross misjudgment. After some team members stated they could not attend during evening hours, the district proposed alternative dates during regular school hours. The student's mother filed a Section 504 lawsuit. In dismissing the parent's claim, the court noted that the parent failed to establish a valid 504 discrimination claim because she did not allege the student was wrongfully excluded from any educational programs. The district conceded that it refused to schedule an after-hours IEP meeting. "[H]owever, this refusal simply does not fall within the bounds of acts prohibited by Section 504, even if it may have been unfair or inconvenient to Plaintiffs in some sense," U.S. District Judge Charles R. Norgle wrote. In addition, the court noted that to establish her 504 claim, the parent had to demonstrate that the district acted with bad faith or gross misjudgment. *Tammy S. v. Reedsburg Sch. Dist.*, 41 IDELR 133 (W.D. Wis. 2003). The court pointed out that the district offered to conduct a meeting on one of many other dates using teleconferencing equipment. Thus, even if its insistence on holding the meeting during the day amounted to excluding the student from a program, there was no evidence that its decision was made with bad faith or gross misjudgment.

**112. Dudley v. Lower Merion Sch. Dist., 56 IDELR 40 (M.D. Pa. 2011).** The fact that a parent obtained an administrative order requiring a district to provide her 18-year-old son with compensatory education did not prevent her from claiming "aggrieved party" status under the IDEA. Because the district had not provided any of the relief awarded, the U.S. District Court, Eastern District of Pennsylvania held that the parent could sue to enforce the IHO's order. The court recognized that the IDEA allows "any party aggrieved" by an IHO's decision to appeal that decision in court. However, it rejected the district's argument that the parent's success at the administrative level prevented her from taking the case any further. Looking at the IDEA as a whole, the court explained that a parent who does not receive the relief ordered by an IHO is just as "aggrieved" as a parent who obtains no relief at all. "Adopting the school district's provision would result in the existence of a giant loophole in the IDEA," U.S. District Judge Harvey Bartle III wrote. "Such a loophole would allow unfortunate delays in the resolution of important and immediate issues concerning a child's remedial education and generally open the door to significant mischief by a school district, neither of which, in our view, Congress intended." The court pointed out that the district had not provided any of the relief ordered, despite the fact that the IHO issued her decision nearly one year earlier. Concluding that

further delay would be “contrary to the letter and spirit of the IDEA,” the court denied the district’s motion to dismiss.

**113. Horn v. Tennessee Dep’t of Educ., 56 IDELR 45 (M.D. Tenn. 2011).** Vague statements, conclusory allegations, and inappropriate requests for relief may have grounded a parent’s pro se “No Child Left Behind” lawsuit over her child’s special education program. Noting that the incarcerated parent cited no authority showing the District Court had power to grant any of the relief she sought, a magistrate judge advised dismissing the case. The parent’s complaint alleged, in part, that her efforts to advance her child’s education were “intentionally impaired,” and that her daughter has “truly been a victim of not being afforded a free appropriate public education and has been left behind.” Among the relief she sought was for the state ED and district to “finance any future educational advancement” for her daughter, a student with ADHD. Her requests for relief went on: “Not sure if this is legal, order the State Board of Education to issue her High School Diploma.” The magistrate judge noted that pleadings filed by plaintiffs suing without an attorney are construed liberally. Nevertheless, a complaint that lacks any arguable basis in law or fact is frivolous under 28 USC 1915(e)(2) of the Prison Litigation Reform Act. Here, the parent’s allegations consisted of threadbare recitals of facts, supported by conclusory statements. Furthermore, there was no basis in law or fact for the remedies she sought. The court had no power to order the ED to finance her daughter’s future education. Nor did the parent cite authority for the proposition that it could simply order the board to issue her diploma, especially without evidence that she fulfilled her graduation requirements. “Because Plaintiffs are not entitled to the relief sought, they have failed to state a claim upon which relief can be granted, and their claims are frivolous,” the magistrate judge wrote.

**114. Honeoye Central Sch. Dist. v. S.V., 56 IDELR 6 (W.D.N.Y. 2011).** A New York district convinced the District Court to return to state court a lawsuit it filed against a New York parent who allegedly breached a settlement agreement. The court held that it lacked subject matter jurisdiction, noting that the case did not arise out of the IDEA’s resolution session or mediation provisions, and that it was not about FAPE, but merely whether the parent of a child who was blind had to hold up her end of the bargain. A consultant for the parent negotiated a settlement with the district. The district complied by revising the child’s IEP, but the parent failed to withdraw her due process complaint in accordance with the parties’ agreement. The district sued the parent for breach of contract in state court, and the parent removed the case to federal court. The district argued the case should be remanded. The District Court agreed. It noted that there are only two types of settlement agreements under the IDEA that give rise to a federal question: those reached through the IDEA’s mediation process under 34 CFR 300.506 or those obtained through a resolution session pursuant to 34 CFR 300.510(a)(1). Negotiations in this case were conducted outside of both processes. Moreover, the district’s claim was purely one of contract law. “The lawsuit before this Court is not whether [the child] will obtain a free and appropriate public education, but whether the contract entered into between [the parent] and [district] is enforceable,” U.S. District Judge Charles J. Siragusa wrote. Accordingly, there was no basis for federal jurisdiction. The court granted the school district’s request.

**115. Marc M. v. Department of Education, State of Hawaii, 56 IDELR 9 (D. Hawaii 2011).** Although the parents of a teen with ADHD waited until the very last moment of an IEP

meeting to supply a private school progress report, that was no basis for the team to disregard it. The District Court ruled that the Hawaii ED violated the IDEA procedurally and denied the child FAPE when it declined to review the report, which contained vital information about his present levels of academic achievement and functional performance. The document, which showed the student progressed in his current private school, contradicted the information provided in the IEP. However, the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. The IEP called for the student to attend public school for the upcoming school year. The parents reenrolled the student in private school, and sought reimbursement. The court noted that districts must consider evaluations parents obtain independently in any decision with respect to the provision of FAPE. 34 CFR 300.502(c)(1). It rejected the coordinator's contention that because the document was provided at the meeting's conclusion, the team could not have considered and incorporated it into the new IEP. The court pointed out that the parents provided the document when implementation of the IEP was still weeks away. Moreover, although the parents delivered the document without explanation at the end of the meeting, the care coordinator reviewed it and concluded it showed progress. As a result, the IEP contained inaccurate information about the student's current performance. The court ruled that the procedural errors "were sufficiently grave" to warrant a finding that the child was denied FAPE.

**116. L.M. v. Lower Merion School District, 55 IDELR 275 (E.D. Pa. 2011).** The parent of an 18-year-old former student with an SLD who signed a settlement agreement to resolve a due process complaint on her daughter's behalf learned that the agreement was not enforceable in District Court. The agreement released her daughter's Pennsylvania district from liability for alleged IDEA violations and created an educational fund that the student could use for educational expenses until the end of the 2011-12 school year, when she would turn 21. After the student graduated, the district disputed whether she could use the funds for college expenses. After exhausting her administrative remedies, the parent sued the district for violating the settlement agreement by not making the funds available to her daughter. In dismissing the parent's claim for lack of jurisdiction, the court noted that federal courts have jurisdiction over claims seeking enforcement of settlement agreements of due process complaints, provided they were reached in IDEA mediations or resolution sessions. 20 USC 1415(e)(2)(F)(iii); 20 USC 1415(f)(1)(B)(iii). Many courts have ruled that agreements reached outside of the formal mediation or resolution process are not enforceable in District Court. Because the parent did not allege that the settlement was reached during a mediation session or formal resolution process, the court held that the IDEA provided no basis for resolving the parties' dispute. Ruling that the parent failed to satisfy any other criteria to establish jurisdiction, such as diversity of citizenship, the court dismissed the lawsuit.

**117. Hazen v. South Kingstown Sch. Dep't, 56 IDELR 16 (D.R.I. 2011).** The fact that a Rhode Island district responded to the concerns of the parents of a child with autism regarding the rate at which an aide would be faded out showed the parents genuinely participated in developing the IEP. The District Court observed that although the parents missed one of three IEP meetings due to the district's failure to provide notice, they actively participated in follow-up meetings, and the procedural error had no impact on the child's receipt of FAPE. The parents alleged that their meaningful participation was impeded because the decision regarding how far to reduce the dedicated aide's support was made at the meeting they missed. The

parents attended two subsequent IEP meetings, however. They later sought judicial review of a hearing officer's finding that the procedural violation was harmless. The District Court agreed with a magistrate judge's "exhaustively comprehensive and thoughtful report" recommending adopting the administrative decision. The magistrate judge cited the parents' active and productive involvement in an IEP meeting convened the following day, as well as a meeting three months later. Adding no analysis of its own, the court agreed with the magistrate judge's focus on the fact that the parents' and their experts took part in discussions regarding reducing the aide's hours at the meetings, and as a result, the district agreed to increase those hours beyond what it had proposed. The district also agreed to their request for additional data collection. The fact that the IEP team changed course following the initial meeting showed the reduction it considered there was not set in stone. Finally, the student's academic and behavioral progress demonstrated that the parents' exclusion from the meeting did not impact the student's receipt of FAPE.

a. **Stay Put**

**118. R.S. and M.S. v. Somerville Bd. of Educ., 55 IDELR 279 (D.N.J. 2011).** A high school student with Asperger syndrome could continue to attend a private sectarian school at public expense while a New Jersey district challenged the legality of the placement in administrative proceedings. After the student was physically attacked in sixth grade by his peers on a school bus, his New Jersey district and his parents agreed to send him to a private religious school. Years later, the state ED notified the district that the placement violated a state law prohibiting districts from placing students in sectarian schools at public expense. The parents opposed the district's proposed public placement and requested that the private school be identified as the student's stay-put placement. After an unfavorable ruling at the administrative level, the parents asked the District Court to allow the 11th-grader to stay in his private placement while the dispute was pending. The dilemma facing the court was whether the stay-put provision could be interpreted to enable the student to remain at a school where the district could not legally place him. Stay-put provides that a student be permitted to remain in his current educational placement during the pendency of any IDEA proceedings. Once the stay-put placement is determined, a district must continue to finance the placement to maintain the status quo, the court explained. Because the student was attending the sectarian school at public expense when the parties' placement dispute began, the court ruled that it was his stay-put placement. Although the placement, if made today, would violate state law, the court determined that the sectarian school should continue to be his stay-put placement until the entire case was resolved, either by agreement or through litigation. By modifying the district's payment obligation to allow it to reimburse the parents for the student's tuition costs rather than paying the school directly, the court addressed concerns that public funds were being used to support a sectarian school.

**119. N.D. v. State of Hawaii, Dep't of Educ., 54 IDELR 111, 600 F.3d 1104 (9th Cir. 2010).** The parents of several students with disabilities failed to convince the 9th U.S. Circuit Court of Appeals to put Hawaii's "Furlough Fridays" program on hold while they pursued due process complaints. Because the furlough program did not constitute a change in educational placement, the parents were unlikely to succeed on their claim that the stay-put provision required the continuation of a 180-day school year. Facing a fiscal crisis, Hawaii reduced the

year for all public school students by 17 days. The parents argued in a due process complaint that the reduction amounted to a change in placement triggering stay-put. Hawaii disagreed, and went forward with the plan. The parents then sought a temporary injunction. The District Court denied the motion, and the parents appealed. On appeal, the 9th Circuit agreed that the parents were unlikely to succeed on the merits of their due process complaint — a prerequisite to a temporary injunction. The court’s decision turned on its interpretation of “current educational placement.” The court explained that “educational placement” means the general education program of the student. Thus, a change in placement occurs when a student is moved to a different type of program or when there is a significant alteration of the student’s program even though he stays in the same setting. Here, the students would remain in the same classification, same district, and same education program. Furthermore, this was not a situation where the government was singling out students with disabilities or isolating them from nondisabled peers — two of the IDEA’s underlying concerns, the court observed. To the contrary, Furlough Fridays applied to everyone. It was also not a case involving a complete cut-off of funding for a particular type of educational setting. “To allow the stay-put provisions to apply in this instance would be essentially to give the parents of disabled children veto power over a state’s decisions regarding the management of its schools,” U.S. Circuit Judge Jerome Farris wrote. Judge Farris remarked that the students’ claims were better characterized as a material failure to implement. The parents could still pursue such arguments. However, they would not trigger the IDEA’s stay-put provisions.

**120. L.Y. v. Bayonne Bd. of Educ., 54 IDELR 244, 2010 WL 2340176 (3d Cir. 2010)(unpublished).** A 13-year-old student with learning disabilities could not attend private school at public expense while his New Jersey district challenged the proposed placement. The charter school where the student attended prepared an IEP for the following school year, placing the student in a private school. Pursuant to state law governing charter schools, the district challenged the proposed placement. The parent asked the court to order the district to pay the student’s private school tuition under the IDEA’s stay-put provision while its challenge was litigated. Noting that the IDEA does not define the term “current educational placement,” the 3d Circuit held that the term refers to the operative placement actually functioning at the time the dispute arose. A determination of the student’s stay-put placement in this case was complicated by the fact that the district initiated its challenge after the student completed the academic year at his charter school but before he enrolled in the private school. Noting that neither the IDEA, state laws implementing the IDEA, nor case law covered this unique situation, the 3d Circuit looked to congressional intent to determine whether the charter school or the private school was the appropriate stay-put placement. “Placing him at the [private] school at this stage would not be consistent with the purpose of the stay-put provision to maintain the status quo until the conclusion of the due process hearings,” the 3d Circuit wrote in an unpublished decision. Reading the IDEA’s stay-put provision in harmony with state law, the 3d Circuit denied the parent’s request because allowing the student to enroll in private school over the district’s objections would eviscerate the district’s right of appeal.

**121. R.Y. v. State of Hawaii, Dep’t of Educ., 54 IDELR 4 (D. Hawaii 2010).** A 20-year-old student with an emotional disturbance could seek relief for the termination of her IDEA services despite the fact that she had met all of Hawaii’s requirements for graduation with a regular diploma. The U.S. District Court, District of Hawaii held that the ED’s decision to

graduate the student while a dispute over her graduation was pending amounted to a stay-put violation. The court acknowledged that the student appeared to have satisfied the requirements for graduation. Although the parent argued that the courses at the student's private school were not up to state standards, the results of recent assessments contradicted her claim that the student performed well below grade level. Still, the court held that the ED erred in graduating the student. U.S. District Judge J. Michael Seabright explained that the stay-put provision required the ED to continue the student's private placement for the duration of the dispute. The court rejected the ED's argument that the student's right to FAPE ended upon her graduation. "Accepting [the ED's] reasoning would result in the untenable result that a school may unilaterally terminate a student's benefits under the IDEA simply by granting her a regular high school diploma, even though the issue of her graduation is properly before a hearing officer and/or court," Judge Seabright wrote. The court remanded the case for a determination of whether the student was entitled to relief for the stay-put violation.

**122. B.A.W. v. East Orange Bd. of Educ., 55 IDELR 76, 2010 WL 3522096 (D.N.J. 2010).** A New Jersey district had to reinstate a 19-year-old student with an LD to his private school while it litigated whether the student was properly awarded a state-issued diploma. During an IEP meeting in January of his senior year, the publicly placed student requested another year of special education. The district denied the request. In May, the student requested mediation, and in June, he requested a due process hearing. One day before the scheduled graduation, a hearing officer ruled in an emergency hearing that the student would suffer no harm if he were to graduate. The student, who was awarded his diploma, appealed and sought a preliminary injunction, seeking an order that he be readmitted under the IDEA's stay-put provision. U.S. District Judge José L. Linares noted in an unpublished decision that three factors were not disputed: 1) graduation constitutes a change in educational placement; 2) the student requested a due process hearing prior to his graduation; and 3) the filing of a request for a due process hearing triggers the IDEA's procedural safeguards, including the stay-put provision. The district argued that the student couldn't satisfy the first element because there was no change in placement where the student did not graduate until after there had been a final decision by the emergency hearing officer on the placement claim. But the District Court was not persuaded by that argument. The student requested mediation in May and filed for due process in June before his graduation, the court noted. It also explained that the district's "interpretation would render the stay-put provision meaningless because the school district could unilaterally graduate handicapped children." Next, the court determined that the student's current placement when he filed for due process over his pending graduation was as a 12th-grader at the private school where he was participating in a curriculum developed and implemented by an IEP team in January 2010. The district should have maintained that placement during the pendency of the administrative and judicial proceedings.

**123. Tindell v. Evansville-Vanderburgh Sch. Corp., 54 IDELR 7 (S.D. Ind. 2010).** A college internship program was the pendency placement for a student with autism spectrum disorder, a federal District Court ruled. Because the student's initial stay-put placement was closing, and because there was insufficient evidence that the internship program was inappropriate, the court ordered the district to pay for the student's attendance there pending the outcome of litigation. The parents' underlying lawsuit challenged the district's decision to graduate the 19-year-old student from his residential facility. The District Court determined

that the facility was his stay-put placement. When the facility planned to close, the parents sought a preliminary injunction permitting transfer of the student to the internship program, a program for students with high-functioning autism. The court explained that when adhering to a student's exact educational program becomes impossible, a district must provide a comparable placement. The court noted that the district proposed no alternative placement. Thus, the only question was whether the internship program was appropriate. Although the district argued that the two placements were not comparable, it was not clear that the education the student would receive in the new program would be inappropriate. Moreover, the district's argument that FAPE is not available to students with regular diplomas was unpersuasive, because the validity of the student's graduation was in dispute. Finally, although FAPE is typically not available in a college setting, "courts may, pursuant to their equitable discretion, move beyond a 'college' label in the interest of the child," the court wrote.

**124. J.H. v. Los Angeles Unified Sch. Dist., 54 IDELR 195 (C.D. Cal. 2010).** The pendency placement for a 4-year-old with autism and severe verbal apraxia included additional related services ordered by an ALJ, the District Court held. The ALJ's determination amounted to an agreement between the state and parents that a change in placement was appropriate for purposes of stay-put. The ALJ ruled that the district offered an appropriate placement but insufficient speech language and behavioral services. He ordered the district to provide additional services during litigation while the child remained in private school at his parents' expense. The parents appealed the placement issue and sought a stay-put order that included the related services ordered by the ALJ. Pursuant to 34 CFR 300.518(c), stay-put for children transitioning to Part B includes special education and related services that are not in dispute. Further, where a hearing officer "agrees with the parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and parents." 34 CFR 300.518(d). The court rejected the district's argument that because the ALJ disagreed with the parents as to the appropriate educational setting for the student, that he did not agree that a substantive change of placement was needed. "The IDEA's implementing regulations require only that the ALJ agree ... that 'a change of placement is appropriate,' not that all changes are appropriate, in order to establish an agreement between the State and the parents," U.S. District Judge Dean D. Pregerson wrote. The ALJ's conclusion that the related services were substantively inappropriate amounted to such an agreement, thus incorporating the ordered services into the student's pendency placement.

**125. Atlanta Indep. Sch. System v. S.F., 55 IDELR 97, 2010 WL 373114 (N.D. Ga. 2010).** The parents of a student with autism successfully prevented a district from seeking reimbursement for private school costs the district paid pursuant to an ALJ's order. The U.S. District Court, Northern District of Georgia held that parents of a child awarded private services because the district's IEP was found inappropriate by a hearing officer are not required to reimburse the district even if the administrative decision is later reversed. Concluding that the district denied the student FAPE and provided an inappropriate placement, the ALJ ordered the district to fund the student's private school placement. The district challenged the ALJ's ruling in court. In its appeal, the district sought an order requiring the parents to reimburse it for the payments it had made for private school since the date of the ALJ's decision. The parents asked the court to dismiss that part of the district's case prior to trial. The District Court noted that the 11th U.S. Circuit Court of Appeals has not addressed

the issue. However, it agreed with *Town of Burlington v. Department of Education*, 555 IDELR 526 (1st Cir. 1984), in which the 1st Circuit held that where a final administrative decision deems a proposed IEP inappropriate and orders a district to fund placement, and the parents implement that decision, a district may not obtain reimbursement for the funds they expended simply because the decision is later reversed. Citing policy concerns raised in *Burlington*, the District Court observed that few parents would be able or willing to implement an administrative order in their favor if they faced the prospect of having to reimburse the district at final judgment.

**126. Mangum v. Renton Sch. Dist., 56 IDELR 46 (W.D. Wash. 2011).** A Washington district had to reinstate a teen who was found ineligible for IDEA services in his general education home-based program while his parents challenged the eligibility decision in court. There was no reason to make an exception to stay-put, merely because the student was seeking eligibility, rather than challenging an IEP, according to the District Court. Since elementary school, the student had been enrolled in the district's "HOME" program, a collaborative program between the district and parents who wish to educate their children at home. The parents of the teen sought an IEP, but the district found the student ineligible. A few months after the parents challenged that determination in a due process hearing, and then in court, the district exited the student from the program, citing the parents' failure to submit lesson plans. The parents invoked stay-put. The district responded that it was not bound by the stay-put provision given that it never found the student eligible under the IDEA. The court pointed out that a student who has been deemed eligible but challenges some aspect of his IEP may invoke stay-put. "There is no obvious reason that Congress would exclude students who seek to force the District to find them disabled, thus requiring the school to develop an IEP," U.S. District Judge Richard A. Jones wrote. The court further pointed out that students found ineligible have the right to a due process hearing and other procedural safeguards. There was no reason to treat a student differently merely because he seeks the protection of stay-put. The court also observed that Congress created the pendency rules in part to prevent retaliation against students invoking rights under the IDEA. That purpose applies equally, the court observed, where a student questions a district's finding that he does not qualify for any IDEA services.

**b. Attorney's Fees**

**127. Blackman v. District of Columbia, 56 IDELR 1 (D.C. Cir. 2011).** The fact that thousands of students with disabilities joined forces to pursue an IDEA action against the District of Columbia did not prevent them from recovering more than \$4,000 in attorney's fees when the district was found liable for FAPE violations. Determining that the fee cap applies to individual students rather than the class action, the D.C. Circuit affirmed an award of \$1,454,030 in attorney's fees. The D.C. Appropriations Act precludes the District of Columbia from paying more than \$4,000 in attorney's fees to "an attorney who represents a party" in an IDEA action. Although the district argued that the term "a party" should be read to include multiple "parties," the D.C. Circuit disagreed. The court rejected the district's reliance on the Dictionary Act, 1 USC 1, which states that singular words used in acts of Congress include their plural forms unless the context of the statute indicates otherwise. U.S. Circuit Judge David Bryan Sentelle observed that pluralizing the words "attorney," "party" or "action" would create situations in which an attorney could never recover more than \$4,000 for work

performed in multiple IDEA actions involving different students. “Additionally, this construction would provide a perverse incentive for breaking single class actions into inefficient multiple actions to generate larger counsel fees in direct contradiction of Congress’ apparent goal at reducing costs,” Judge Sentelle wrote. The court concluded that the D.C. Appropriations Act was intended to address individual IDEA proceedings rather than class actions. Holding that the fee cap did not apply to the class action, the D.C. Circuit affirmed the District Court’s decision at 53 IDELR 284.

**128. Gary G. v. El Paso Indep. Sch. Dist., 56 IDELR 32 (5th Cir. 2011).** The limited amount of time that a parent’s attorney spent working on an IDEA action in preparation for a due process filing helped a Texas district to reduce its liability for the parent’s legal expenses by almost 93 percent. Holding that the parent was not justified in rejecting the district’s proposed FAPE settlement at the very outset of the case, the 5th Circuit reduced his fee award from \$44,572 to \$3,243. The parent argued that he was substantially justified in rejecting the proposed settlement, as it would not have been enforceable in court and did not include attorney’s fees. The 5th Circuit disagreed. With regard to enforceability, the court pointed out that all settlement agreements reached during a resolution session are enforceable in court. Because the district reaffirmed its settlement offer at a resolution session just two weeks later, the court held that any agreement reached would have been enforceable. Turning to the lack of attorney’s fees, the 5th Circuit observed that the omission of attorney’s fees from a FAPE settlement may, in some instances, justify a parent’s refusal of that offer. In this case, however, the attorney had spent only 13.8 hours on the case before the district offered to settle. Given that the district offered all of the relief the parent sought, and far more than the parent recovered in the administrative proceeding, the court held that he was not substantially justified in rejecting the offer. As such, the parent could not recover fees for work performed after he rejected the proposed settlement. The 5th Circuit did however hold that the parent was entitled to recover fees for those initial 13.8 hours his attorney spent on the case. Although the parent’s rejection of the settlement resulted in four years of litigation, the court pointed out that the district’s failure to include attorney’s fees in the settlement offer was at least partly to blame. The 5th Circuit thus ruled that the parent was entitled to \$3,243 in legal expenses.

**129. El Paso Indep. Sch. Dist. v. Berry, 55 IDELR 186, 2010 WL 4459735 (5th Cir. 2010) (unpublished).** The 5th U.S. Circuit Court of Appeals ruled that a Texas district could recover a portion of its attorney’s fees from a parent’s attorney who continued to pursue IDEA claims that had become moot. A three-judge panel pointed to evidence that the attorney rebuffed generous settlement offers, pursued unnecessary services, and engaged in delay tactics. The parent initially filed a due process complaint seeking compensatory speech therapy. Shortly afterward, the district determined the student no longer had a speech impediment and exited him from special education. Nevertheless, the district made several settlement offers, to no avail. A hearing officer dismissed the complaint as moot, and the parent’s attorney sued in federal court. The district counter-sued for attorney’s fees and was awarded \$10,000. On appeal, the 5th Circuit noted that the IDEA allows attorney’s fees awards against parents’ attorneys who persist in litigating after a case clearly becomes frivolous, unreasonable, or without foundation. 20 USC 1415(i)(3)(B)(i)(II). In ruling for the district, the 5th Circuit observed that the attorney never contested the IEP team’s determination that the student no longer needed speech therapy. And while continuing to

litigate for unnecessary services, he rejected the district's offers of full relief. Furthermore, the court noted, while the attorney employed stonewalling tactics so the student could continue to receive unnecessary services under a three-year-old IEP, he refused the district's request to fully evaluate the student for services he might actually need. Finally, even accepting the notion that he had good reason to reject the settlement offers, the case was about more than a refusal to settle, the panel explained. "[T]his case involves an attorney repeatedly prolonging litigation and stonewalling efforts to conclude it to the detriment of his client ... who continued receiving services under an old and unnecessary plan while the 'grown-ups' fought," the panel wrote.

**130. Bridges Pub. Charter Sch. v. Barrie, 54 IDELR 186, 709 F. Supp. 2d 94 (D.D.C. 2010).** A District Court refused to let a parent's attorney off the hook for a possible attorney's fees award against the lawyer and a former co-counsel. Because a public charter school offered enough facts to show that the parent's complaint was frivolous, and that the attorney nevertheless continued to litigate it, it held that the school stated a plausible claim for relief. In her due process complaint, the parent alleged that the school failed to consult with her when developing her child's IEP or to convene a placement meeting. A hearing officer found in favor of the school. The school then sought \$15,994 in attorney's fees. One of the attorneys asked the court to dismiss the action for failure to state a claim. The court noted that the IDEA authorizes courts to award fees to an educational agency against the attorney of a parent who files a complaint that is frivolous or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous. 34 CFR 300.517(a)(1). The court observed that three witnesses testified at the hearing that the school discussed goals, objectives, and placement with the parent at the IEP meeting. It also pointed to the hearing officer's statement that the claims were baseless and that the evidence "overwhelmingly established" that the school consulted with the parent. Moreover, because the school offered sufficient facts to state a valid claim that the due process complaint was frivolous when filed, it also stated a claim based on the attorney's continuing to litigate up until the attorney's departure from the law firm.

**131. R.P. v. Prescott Unified Sch. Dist., 56 IDELR 31 (9th Cir. 2011).** Just because an Arizona district prevailed in an IDEA action against the parent of a child with autism, didn't mean that it could recover more than \$141,000 in attorney's fees and costs from the parents' lawyer. Determining that the parents' claim was valid, albeit unsuccessful, the 9th Circuit reversed the District Court's award of attorney's fees. The 9th Circuit rejected the District Court's conclusion that the parents did not seek any relief available under the IDEA. While the parents could not recover monetary damages and did not have any out-of-pocket expenses for which they could seek reimbursement, they did request compensatory education for their son. The parents did not have to identify specific services they wished their son to receive in order for their request for compensatory education to be valid. "Had the District Court determined that [the child] was denied a FAPE, it could well have provided for additional services to help [the child] make up for lost time," Chief U.S. Circuit Judge Alex Kozinski wrote. The 9th Circuit criticized the District Court's *post hoc* reasoning that the parents' failure to obtain relief from the district made their claim frivolous or baseless. If courts applied that standard, the 9th Circuit explained, attorneys would be reluctant to take on meritorious IDEA claims for fear of being saddled with a six-figure fee award. The 9th Circuit further noted that the parents' action could

not have been pursued for an improper purpose, as held by the District Court, when their IDEA claim was valid. Concluding that the District Court erred in awarding fees, the 9th Circuit reversed its decision at 53 IDELR 23. However, the 9th Circuit affirmed the District Court's ruling at 52 IDELR 36 that the district offered the child FAPE.