

## Year in Review – Part I

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What a litigious year 2010 has already been in the area of special education, and it doesn't seem to slowing down! This Part I session will provide an overview of relevant court cases and "hot topics" in special education that have been issued or arisen since last year's Law Conference.

### LIABILITY AND MONEY DAMAGES

- A. Mahone v. Ben Hill County Sch. Sys., 54 IDELR 183 (11<sup>th</sup> Cir. 2010). Physical education teacher is entitled to qualified immunity in this Section 1983 action where his conduct did not shock the conscience in a constitutional sense. Allegedly, the teacher shoved the disabled student head-first into a trash can in front of his brother and another classmate during P.E. and then pulled the student out of the can by his legs. However, investigation of the incident indicated that the teacher and the student frequently engaged in horseplay in a joking manner and supported the Superintendent's conclusion that the teacher was not being malicious or mean-spirited and, therefore, only counseling was provided to the teacher not to engage in horseplay with his students. Where the parent alleged that the incident deprived her son of his liberty interest to be free from physical and mental abuse at school, the evidence did not reveal that the teacher's conduct could be characterized as arbitrary or conscious shocking.
- B. Sanchez v. Commonwealth of Puerto Rico, 53 IDELR 325 (D. P.R. 2010). Jury verdict is upheld awarding \$10,000 in compensatory damages and \$20,000 for punitive damages for an ED employee's gross negligence and reckless disregard or indifference to the rights and safety of the student. Where it was agreed and part of the student's behavior plan that a gate would be constructed to create a secured yard where the student and his classmates would play, the fact that the employee built a barred cage for him instead "constituted a clear departure from the agreement" and could have reasonably led a jury to believe that the employee violated the student's rights.
- C. K.J. v. Montgomery Pub. Schs., 54 IDELR 12 (M.D. Ala. 2010). Where a parent seeks monetary relief in a Section 504 claim, she is entitled to a trial by jury. While the parent concedes that she is not entitled to a jury trial on her IDEA claims, her request for compensatory damages under Section 504 entitles her to a jury trial on those claims under the Seventh Amendment.
- D. Oman v. Portland Pub. Schs., 54 IDELR 6 (D. Ore. 2010). Parent's failure to exhaust her administrative remedies did not prevent her from seeking nominal damages for district's alleged violation of the parent's rights under the IDEA and Section 1983. This is so, because nominal damages are available for violations of implied federal rights, such as a parent's right not to be retaliated against for attempting to exercise procedural rights

under the IDEA. In addition, nominal damages can 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 a child under the IDEA, this is not the case where she is seeking relief for alleged violations of her own substantive rights as a parent under Section 1983. Here, the student's mother claimed, among other things, that a district official prevented her from speaking to witnesses before a due process hearing. Because these claims are not subject to the IDEA's administrative exhaustion requirements, the parent could proceed to court on her own claims for nominal damages. (Note: There is a subsequent decision of C.O. v. Portland Pub. Sch., 54 IDELR 162 (D. Ore. 2010) wherein the district and its in-house counsel have been ordered to pay \$1.00 in nominal damages for retaliating against the parent for exercising IDEA rights. The attorney's refusal to share information or to allow the parent, who did not have an attorney, to contact school staff members, discouraged the parent from fully pursuing a due process complaint. As a result of the attorney's actions, the parent stopped participating in the development of her son's IEP and failed to secure the district's compliance with an ALJ's compensatory education order. When an attorney makes "blanket refusals to provide discovery before knowing what is requested, and when the attorney does so immediately after a pro se party decides to pursue her rights rather than settle, whatever protection the attorney might have for conduct within the rules evaporates").

- E. Kaitlin C. v. Cheltenham Township Sch. Dist., 54 IDELR 44 (E.D. Pa. 2010). Parent's Section 504 discrimination claim for money damages is dismissed where parent could not show intentional discrimination. "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."
- F. Funez v. Guzman, 54 IDELR 153 (D. Ore. 2010). Where the parent alleged that the school district was aware or should have been aware that groups of Hispanic students subjected others to beatings on their birthdays ("birthday beatings"), parent's claims for damages under Section 1983 for IDEA violations are dismissed. However, the parent's claims for constitutional violations remain, as the parent adequately alleged that the district had a custom or policy of posting students' names and birthdays in the hallway—coupled with an awareness that birthday beatings occurred and its failure to prevent them.
- G. Donlow v. Garfield Park Academy, 54 IDELR 169 (D. N.J. 2010) (unpublished). Where disabled student attending a private school pursuant to placement by his home school district was involved in a disciplinary incident for which the police were called and was shot, parent can not pursue a Section 1983 damages claim. Where the parent alleges that the private school is a public actor and disregarded its duty to provide for her son's safety and well-being, claim is dismissed because the private school is not a "state actor"—a prerequisite for establishing liability under Section 1983. "Merely performing a function that serves the public does not create state action," and courts have consistently held that private schools that educate disabled students on behalf of a public school district are not state actors. While the private school and school district collaborated on his IEP and the school received public funding, this is not sufficient to create a close relationship between the school and the state for this purpose.

- H. May v. Mobile County Pub. Sch. Sys., 55 IDELR 16 (S.D. Ala. 2010). Action brought by a special education teacher under Section 1983 alleging a violation of substantive due process rights is dismissed where it did not allege that the school district engaged in arbitrary or conscience-shocking behavior. The teacher claimed that despite seven documented incidents of violent behavior on the part of a student with mental disabilities, the district failed to remove him from school or otherwise ensure her safety, including preparing her to handle his outbursts. As a result, she was injured by the student when she attempted to stop him from attacking the principal. 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 district court dismiss the teacher's action. The teacher's argument that her employment relationship with the district that required her to follow the student's IEP, even if it placed her in danger, created an involuntary custodial relationship is also rejected.
- I. Johnson v. Iroquois Cent. Sch. Dist., 54 IDELR 257 (Sup. Ct. N.Y. 2010). Neither student's parents nor the school district were liable to a licensed OT who was allegedly injured when she attempted to avoid being hit and kicked by an autistic student. Clearly, there is no duty to warn an individual about a condition where the OT was actually aware that the student tended to use physical contact to express herself and that she had observed this behavior on prior occasions. Thus, the OT's claims of negligence were dismissed, as well as her claims for negligent supervision against the parents, who were not present when the incident occurred and did not have the opportunity/ability to control behavior in the classroom.
- J. Nicholson v. Freeport Union Free Sch. Dist., 54 IDELR 258, 902 N.Y.S.2d 192 (N.Y. App. Div. 2010). In an action for damages for intentional torts and negligence, district is not liable for negligent supervision of out-of-state private school where it placed a disabled student, because the parent did not show that the district knew of the private school's alleged misuse of an aversive device, a graduated electronic decelerator, designed to shock the student in order to curb certain behaviors. Where the parent asserted that the private school failed to implement her son's BIP when it used the device improperly, the school district cannot be found liable where there is no evidence that it was aware of such improper conduct.

### **SECLUSION/RESTRAINT**

- A. T.W. v. School Bd. of Seminole Co., 54 IDELR 243, 610 F.3d 588 (11<sup>th</sup> Cir. 2010). District court's decision is affirmed that teacher's conduct did not rise to the level of a constitutional violation because her actions were not unreasonable in light of the autistic student's in-class behaviors. Where excessive corporal punishment is actionable only where the conduct is arbitrary, egregious and conscience-shocking, the teacher's use of restraint could be viewed as an attempt to restore order to the classroom, maintain discipline and prevent the student from harming himself. Although the teacher may have resorted to force too soon when she pinned the student's hands behind his back on one occasion when he refused to follow instructions and swung his hands at her or when she put the student face down on the floor and sat on him when he refused to go to the "cool down room," her use of restraint was not wholly unjustified. Given the connection to the student's behavior, the court could not find the teacher's conduct to be conscience-shocking. (Note: there was a dissenting judge who determined that the teacher's behavior violated the student's constitutional rights).

- B. C.N. v. Willmar Pub. Schs., 53 IDELR 251, 591 F.3d 624 (8<sup>th</sup> Cir. 2010). Where a third grader’s BIP allowed her teacher to use seclusion and restraint as behavior management techniques, the parent could not show that the teacher’s use of them violated constitutional rights. “Because [the IEP] authorized such methods, [the teacher’s] use of those and similar methods...even if overzealous at times and not recommended by [the independent evaluator] was not a substantial departure from accepted judgment, practice or standards, and was not unreasonable in a constitutional sense.”
- C. Payne v. Peninsula Sch. Dist., 54 IDELR 72, 598 F.3d 1123 (9<sup>th</sup> Cir. 2010). Parent’s Section 1983 claim is dismissed for failing to exhaust IDEA’s administrative process. Though the parent claimed the child suffered emotional and academic injuries because of repeated placement in a 5’ x 6’ “safe room,” the child’s IEP expressly permitted its use when his behavior became unmanageable. Because the child’s injuries resulted from his placement in the room—a behavior management technique permitted by his IEP and Washington law—the parent could not show that the injuries were unrelated to his educational program and, therefore, must exhaust administrative remedies.
- D. J.D.P. v. Cherokee Co. Sch. Dist., 55 IDELR 44, 2010 WL 3270598 (N.D. Ga. 2010). In an action for compensatory damages under Section 504/ADA based upon the use of restraint with an autistic student with mental retardation, speech language disorder, ADHD and ODD by staff in an afterschool program, school district is not liable. In such cases, a plaintiff must show intentional discrimination or some bad faith or gross misjudgment on the part of school personnel. Fearful that the student was going to injure himself or others when his regular one-on-one aide was absent, employees implemented the physical restraint process and held the student’s ankles and wrists. All of the employees had experience and training working with students with disabilities, including de-escalation and physical restraint techniques and, although the employees were not familiar with the student’s BIP or 504 plan, the evidence did not demonstrate that their actions were unreasonable in light of their professional determination that the student’s behavior put him and others at risk.
- E. D.D. v. Chilton County Bd. of Educ., 54 IDELR 157, 701 F.Supp.2d 1236 (M.D. Ala. 2010). Where a teacher velcroed a 4-year-old student with PDD for less than 10 minutes in a toddler/Rifton chair that he chose to sit in, this did not rise to the level of “shocking the conscience,” at least in a constitutional sense. As the teacher explained, she placed the student in the chair to keep him from kicking people by applying the velcro waist strap so that he would not fall and sitting him in the hallway facing the wall until his mother arrived. The child sustained no physical injury from the measure and the restraint was not a sufficient deprivation of liberty that would require advance notice and a hearing. However, this ruling does not reflect on whether the teacher’s actions were lawful under state tort law.

## **PROTECTION & ADVOCACY INVESTIGATIONS**

- A. Disability Law Center v. Discovery Academy, 53 IDELR 282 (D. Utah 2010). Protection and advocacy agency is not entitled to access student records at a therapeutic boarding school by claiming it had “probable cause” to believe that abuse and neglect occurred. Where the agency did not produce any factual evidence that the school used improper seclusion or restraint techniques, the case is dismissed. “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.” In addition, agency’s argument that it has sole authority under the Protection and Advocacy for Individuals with Mental Illness Act (PAMI) to decide whether there is probable cause to investigate abuse and neglect is rejected. Otherwise, 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 student records or interview the students about seclusion and restraint.

### **DISABILITY HARASSMENT/RETALIATION**

- A. Reinhardt v. Albuquerque Pub. Schs. Bd. of Educ., 40 NDLR 156, 595 F.3d 1126 (10<sup>th</sup> Cir. 2010). District court’s ruling on summary judgment in favor of the school district is reversed where the speech-language 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. In addition, the SLP filed an IDEA complaint with the state education department which, after conducting an investigation, ordered the district to take corrective action. The SLP historically received a salary increase due to her above-average caseload, but after she filed her complaint with the state department, the district limited the number of students it assigned to her and reduced her to a standard contract. In attempting to protect the rights of special education students by complaining to school and state officials, the SLP engaged in activity protected under Section 504 and the First Amendment and there is a question of fact as to whether the district retaliated against her.
- B. Fox v. Traverse City Area Pub. Schs. Bd. of Educ., 605 F.3d 345 (6<sup>th</sup> Cir. 2010). District did not violate probationary teacher’s First Amendment rights when it did not renew her teaching contract, as its decision was based upon numerous documented performance deficiencies during her two-year probationary period, not because she voiced concerns to the special education director and the school principal that her caseload exceeded that allowed by law. 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. In addition, to be protected, an employee’s speech must address a matter of public concern, and statements made pursuant to an employee’s official duties are not protected by the First Amendment. Here, the teacher’s statements concerning class size were made to her supervisor, not to the board, the public or to an agency outside the chain of command. Moreover, the teacher’s comments related to her employment conditions and did not address a matter of public concern.
- C. M.Y. v. Grand River Academy, 54 IDELR 255 (N.D. Ohio 2010). Dismissal of ADA and Section 504 claims brought by private high school student is not appropriate where student alleged that he was bullied and harassed by his peers, which included being physically assaulted, causing him to become so depressed that he threatened to harm himself. According to the complaint, school officials not only ignored the student’s reports of peer harassment, but also told him that it was their policy to look the other way when upperclassmen punished or hazed younger students. Where the student claimed that the school discriminated against him by failing to protect him from harm and by denying him the benefit of the educational program and services offered to nondisabled students, headmaster’s and school’s motion to dismiss is denied.

- D. Herrera v. Giampietro, 54 IDELR 222 (E.D. Cal. 2010). Where parent claims retaliation under the ADA, the 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) causation. If the district states a legal reason for taking the adverse action, the parent must then show that reason is merely a pretext. While the district identified a lawful reason for transferring the parent's nephew out of the district, there was a factual question as to whether the district's explanation was merely a pretext for retaliating for the parent's complaints filed with the CDE about her own autistic son's programming. Thus, case will not be dismissed.
- E. Doe v. Wells-Ogunquit Comm. Sch. Dist., 54 IDELR 120, 698 F.Supp.2d 219 (D. Me. 2010). Where parent brought IDEA claims, as well as 504 retaliation claims alleging that the district retaliated against her by hiring an unqualified evaluator, ignoring recommendations of the student's physician and excluding her from placement discussions, 504 claims are dismissed where the case turns only on purported violations of IDEA procedural rights. This is not a case where the act underlying the alleged retaliation was unrelated to the IDEA.

### **PARENTS**

- A. J.C. v. Slippery Rock Area Sch. Dist., 54 IDELR 127 (Pa. Comm. Ct. 2010). Where parent's rights were not terminated, student's mother who was incarcerated had the authority to make educational decisions for her child, even though a juvenile court temporarily transferred legal and physical custody to county youth services.

### **HOMELESS STUDENTS**

- A. L.R. v. Steelton-Highspire Sch. Dist., 54 IDELR 155 (M.D. Pa. 2010). When 13-year-old's grandmother's house was destroyed by fire, he became a "homeless youth" under the McKinney-Vento Act and the district was required to continue providing educational services and transportation to him. The district's argument that he was no longer homeless because he was living with relatives in another district is rejected, as the McKinney-Vento Act applies to children who share housing of others due to the loss of their own housing, regardless of the duration of the stay. In addition, the Act requires districts to continue the education of homeless students in their school of origin, unless the parent or guardian objects. If the district disputes the student's status as a homeless youth, it must enroll the student in school until the dispute is resolved.

### **CHILD-FIND/IDENTIFICATION/EVALUATION**

- A. Compton Unified Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9<sup>th</sup> Cir. 2010). District can not avoid a child find claim simply by taking the position that it did not take any affirmative action in response to high schooler's academic and emotional difficulties. The district's decision to ignore the student's issues constituted a child find violation and the district court's decision in the parent's favor is affirmed. Where the district argued that the IDEA's written notice requirement applies only to proposals or refusals to initiate a change in a student's identification, evaluation or placement and its decision to do nothing did not qualify as an affirmative refusal to act, the argument is rejected. The Court will not interpret a statute in a manner that produces "absurd" results and the IDEA's provision addressing the right to file a due process 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,’” and the IDEA’s written notice requirement does not limit the scope of the due process 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. (Note: The dissent in this case noted that determining that a “refusal” to identify or evaluate requires purposeful action by the district and the parent did not have the right to bring a child find claim without a “refusal”).

- B. D.L. v. District of Columbia, 55 IDELR 6, 2010 WL 3154097 (D. D.C. 2010). Summary judgment is granted to parents where there was no genuine issue of fact regarding the district’s failure to have IEPs in place and enrollment in preschool special education for students by their third birthdays during the years in question (through 2007). This is clear where the district agreed that it provided special education and related services to just 2-3% of children between the ages of 3 and 5—missing about half of the children that it should have identified. Further, the parties agreed that at least through 2007, the district’s outreach and public awareness efforts were not adequate and that the district often failed to act on referrals it received.
- C. D.K. v. Abington Sch. Dist., 54 IDELR 119 (E.D. Pa. 2010). 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 his ADHD diagnosis, it had insufficient reason to suspect a disability. Rather, the student did not stand out from his classmates and 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 when he was first evaluated and found ineligible and were typical of a 5 or 6-year-old.
- D. D.B. v. Bedford County Sch. Bd., 54 IDELR 190 (W.D. Va. 2010). Student with ADHD and found eligible for services as OHI was denied FAPE where district did not properly consider and evaluate for possible SLD. Despite the fact that the evidence strongly suggested the student was SLD, the IEP team failed to assess for SLD or even discuss SLD. In addition and contrary to the hearing officer’s finding, the student’s services might well have changed had he been fully evaluated in *all areas of suspected disability*. “Although the [hearing officer] observed that [student] was promoted a grade every year...this token advancement documents, at best, a sad case of social promotion” where, after four years, the student is unable to read near grade level. Thus, the parents are entitled to reimbursement for private schooling.
- E. Compton Unified Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010). Where student displayed violent and disruptive behaviors and his grandparents requested a functional analysis assessment (FAA), FAPE was denied when the district failed to assess the 6-year-old in all areas of suspected disability. While the school psychologist completed an initial psychoeducational assessment, the district’s failure to conduct an FAA prevented the IEP team from developing an appropriate IEP and making an offer of placement that provided FAPE. An FAA would have enabled the Team to consider strategies to address the behavioral issues that impeded the student’s learning.

## ELIGIBILITY FOR SERVICES

- A. Marshall Joint Sch. Dist. No. 2 v. Brian and Traci D., 54 IDELR 307 (7<sup>th</sup> Cir. 2010). Where the ALJ's decision that the student continued to be eligible for special education under the IDEA focused solely on the student's need for adapted PE, the district court's decision affirming it is reversed. The ALJ's finding that the student's educational performance *could* be affected if he experienced pain or fatigue at school is "an incorrect formulation of the [eligibility] test." "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 evidence showed that the student's physician based her opinion that he needed adapted PE on information entirely from his mother and upon an evaluation that lasted only 15 minutes with no testing or observation of the student's actual performance. In contrast, the student's PE teacher testified that he successfully participated in PE with modifications. "A physician cannot simply prescribe special education; rather, the [IDEA] dictates a full review by an IEP team" and while the team was required to consider the physician's opinion, it was not required to defer to her view as to whether the student needed special education. Further, the student's need for PT and OT did not make him eligible for special education under the IDEA, as those services do not amount to specialized instruction.
- B. A.J. v. Board of Educ. of East Islip Union Free Sch. Dist., 53 IDELR 327 (E.D. N.Y. 2010), unpublished disposition. Where New York law does not define "educational performance" and "adverse effect," applicable authority provides that "educational performance" must be assessed by reference to academic performance "which appears to be the principal, if not only, guiding factor." Where the kindergartner with Asperger Syndrome was performing at average to above-average levels and was making academic progress in the classroom, there was no adverse effect on educational performance for purposes of IDEA eligibility.
- C. Maus v. Wappingers Cent. Sch. Dist., 54 IDELR 10 (S.D. N.Y. 2010). While neither the IDEA nor New York law define the term "adverse affect on educational performance," the Second Circuit has indicated that "educational performance" refers only to academics. Thus, where 7<sup>th</sup> grader with social and emotional difficulties as a result of ADHD, Asperger syndrome and generalized anxiety disorder consistently earned above-average grades in all of her classes and performed at an 8<sup>th</sup> grade level in reading and written expression and a 12<sup>th</sup> grade level in math, she is not disabled. While her conditions might impede her social and emotional functioning, they do not impede her ability to obtain an educational benefit.
- D. Brado v. Weast, 53 IDELR 316 (D. Md. 2010). Although hospital/homebound teaching qualifies as specialized instruction, teenager with chronic pain is ineligible for IDEA services. Though the parents' argument is correct that in-home instruction amounts to specialized instruction under the IDEA, regardless of whether that instruction is altered in content or form, the evidence at the hearing indicates that the student does not need home-based instruction. Rather, all of the accommodations the student requires--frequent breaks, adjusted workloads, alternative test scheduling, and personalized instruction—can 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]...." As such, the district correctly found the student ineligible for IDEA services.

- E. Nguyen v. District of Columbia, 54 IDELR 18 (D. D.C. 2010). Student does not have an emotional disturbance where his truancy and drug use were at least partially responsible for his educational difficulties. Although student was diagnosed with depression, parent failed to establish a direct link between that and his poor academic performance. In addition, small differences between student's ability and achievement were insufficient to support SLD eligibility and such discrepancy might stem from the student's poor attendance.

### **INDEPENDENT EDUCATIONAL EVALUATIONS**

- A. P.L. v. Charlotte-Mecklenburg Bd. of Educ., 55 IDELR 46, 2010 WL 2926129 (W.D. N.C. 2010). Where parents obtained an IEE without waiting for the school district to respond and provide a list of approved evaluators, parents are not entitled to reimbursement for their IEE because they failed to follow IDEA's requirement for obtaining a publicly-funded IEE. In addition, the parents were not able to show that the district's response came too late and they jumped the gun by obtaining and paying for an IEE eight days after mailing their request for an IEE. Although there was disagreement as to when the parents received the district's response that it would pay \$800 for an IEE from its approved list of examiners, all of the asserted dates of receipt fell within the 60 days the district had to respond or request due process under North Carolina's statute of limitations.
- B. D.Z. v. Bethlehem Area Sch. Dist., 54 IDELR 323 (Pa. Comm. Ct. 2010). Parent's request for an IEE was premature where the parent's disagreement with the school district's findings pertained to a district evaluation that was not complete. The parent first agreed to the district's reevaluation but later revoked her consent to it because she did not agree with the scope of the testing proposed. She subsequently e-mailed the district, asking for an IEE. The district refused and sought a due process hearing seeking permission to proceed with the reevaluation. The hearing officer was correct in refusing to consider the parent's request for an IEE as part of the hearing, as the parent's right to request an IEE does not vest until there is an evaluation completed by the district with which the parent disagrees. [NOTE: The court also ruled in a separate decision that where this parent had requested 14 due process hearings for her two children between 2001 and 2009 and the district was the prevailing party each time, there is a reasonable likelihood that the parent brought the requests for an "improper purpose." Thus, the district could proceed with its attorney's fee action against the mother. See, Bethlehem Area Sch. Dist. v. Zhou, 54 IDELR 311, 2010 WL 2928005 (E.D. Pa. 2010)].

### **PROCEDURAL SAFEGUARDS/VIOLATIONS**

- A. K.L.A. v. Windham Southeast Supervisory Union, 54 IDELR 112 (2d Cir. 2010) (unpublished). The term "educational placement" only encompasses the student's placement on the LRE continuum, not the specific location. "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." There was no procedural violation where the parents participated substantially in all discussions about the student's IEP. In addition, the parents' claim that a general education teacher's absence from certain IEP meetings amounted to a denial of FAPE is rejected. Not only did the teacher participate in IEP meetings to the extent appropriate, there was no evidence that his increased presence would have resulted in a different placement offer.

- B. A.H. v. Department of Educ. of the City of New York, 55 IDELR 36, 2010 WL 3242234 (2d Cir. 2010) (unpublished). The absence of the child's special education teacher at an IEP meeting did not impede the child's right to FAPE, limit his parent's ability to participate in educational decisionmaking or cause the denial of educational benefits. While another special education teacher who served as an IEP coordinator was present at the meeting, there was no evidence that the teacher was not familiar with the program options for the student. In addition, the student's general education teacher, who was aware of his educational needs, was also present, along with a school psychologist. Importantly, the parents actively participated in the IEP meeting, as shown by the fact that their efforts resulted in the student's placement in a smaller classroom setting.
- C. Berry v. Las Virgenes Unif. Sch. Dist., 54 IDELR 73 (9<sup>th</sup> Cir. 2010) (unpublished). District court's determination that district personnel predetermined placement is affirmed. Based upon the superintendent's statement at the start of the IEP meeting that the team would discuss the student's transition back to public school, the district court had found that the district determined the student's placement prior to the meeting.
- D. Blanchard v. Morton Sch. Dist., 54 IDELR 277 (9<sup>th</sup> Cir. 2010). District is not required to select parent's chosen aide for student with autism. The parent failed to show that the educational assistant assigned by the district was unqualified to serve the student and, therefore, could not establish an IDEA violation. In addition, the parent could not prevail on her Section 504 or ADA claims because she failed to show that the district was deliberately indifferent to her son's educational needs when it assigned someone other than her chosen aide.
- E. C.H. v. Cape Henlopen Sch. Dist., 54 IDELR 212 (3d Cir. 2010). While the district's failure to have an IEP in place by the first day of school is not condoned, the failure did not amount to a denial of FAPE. "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." Because the parents failed to establish substantive harm, they were not entitled to tuition reimbursement. In addition, the parents declined to participate in additional IEP meetings over the summer because of their travel schedule and they did not notify the district of their placement of the student in a residential facility.
- F. Ka.D. v. Solana Beach Sch. Dist., 54 IDELR 310, 2010 WL 2925569 (S.D. Cal. 2010). The fact that the district's special education director expressed concerns to the parent that she believed that the district and parent would be unable to reach an agreement regarding placement did not amount to a predetermination of placement. Rather, meeting notes reflected that the team discussed conflicting recommendations of evaluators and discussed the private school placement desired by the parents at length. Indeed, the transcripts of the meetings indicate that the student's mother was a welcomed and active participant in the IEP discussions and there was no evidence that the district had a policy of rejecting private schools as options for placement. In addition, there was no evidence that the district's evaluation was inappropriate, so the parent's request for \$24,000 for her evaluator's bill is rejected.
- G. L.M. v. Pinellas County Sch. Bd., 54 IDELR 227 (M.D. Fla. 2010). Transferring an autistic student from one school to another pending resolution of a due process complaint

is not a violation of the Act's stay-put provision. The then-current placement generally refers to the student's educational program, not the particular school building where the program is implemented. Because the parents did not assert that the district proposed to modify the student's general education program, the relocation and alleged difficulty with transition did not amount to a change in her educational placement. Thus, the parents are not entitled to a stay-put order preventing her transfer to another location.

- H. N.S. v. State of Hawaii, 54 IDELR 250 (D. Haw. 2010). An IEP is not required to identify the particular school site where the child will attend school. Where the IEP stated that the student would attend a preschool inclusion setting daily with 100 minutes per day spent on 1:1 Discrete Trial Teaching, it did not deny FAPE. The physical location where a placement will be implemented is an administrative decision, not a required component of an IEP. In addition, the term "inclusion preschool" was not too vague, as 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. Because the parents failed to show that the IEP would not confer FAPE, they could not recover the costs of private school placement.
- I. Kalliope v. New York State Dept. of Educ., 54 IDELR 253, \_\_\_ F.Supp.2d \_\_\_, 2010 WL 2243278 (E.D. N.Y. 2010). Where it is alleged that the New York ED instructed IEP teams to stop placing students in 12:2:2 classes, plaintiffs may be able to establish that the ED violated the IDEA's procedural protections by predetermining placement. Further, the plaintiffs alleged that ED directed IEP teams to deny 12:2:2 placements to students who needed them to progress. "These allegations state a plausible claim that NYSED's interference with the IEP process has hampered the progress of the individual plaintiffs' children...." Thus, this case will not be dismissed.
- J. M.N. v. New York City Dept. of Educ., 54 IDELR 165, 700 F.Supp.2d 356 (S.D. N.Y. 2010). As the Second Circuit has held, an IEP need not recommend a placement at a specific school in order to satisfy the IDEA. Rather, a student's "educational placement" for IEP purposes refers only to the "general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the "bricks and mortar" of the specific school." In addition, the parents did not argue that the student, who has been placed exclusively in specialized classes since beginning school, was being considered for participation in the regular education environment. To the contrary, at the pertinent IEP meeting, the parents informed the team of their intention to enroll the student at the Charter School. Because the Charter School offers no general education environment, the presence of a general education teacher at the meeting was unnecessary. In addition, the parents did not demonstrate that the absence of a general education teacher impeded their opportunity to participate in the team's decision-making process. Accordingly, the absence of a general education teacher did not constitute a procedural defect.
- K. S.H. v. Plano Indep. Sch. Dist., 54 IDELR 114 (E.D. Tex. 2010). School district's failure to include a private program representative at an IEP meeting resulted in a denial of FAPE and an order for the district to reimburse the parents \$14,625 for private school services for a 3-year-old student with autism. FAPE was denied because the private program representative's absence from the team meeting resulted in an inappropriate placement of the student in an integrated classroom, as well as a failure to provide ESY services. As noted by the hearing officer, the lack of ESY services resulted in the

student's "unmastering" of the objectives he had mastered in the private program. Clearly, 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" and the incomplete IEP team resulted in a loss of educational opportunities. The district did not offer ESY because it lacked data regarding the possibility of regression for the student, which 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.

- L. T.S. v. Weast, 54 IDELR 249 (D. Md. 2010). District's decision to hold an IEP meeting without the parents in attendance did not deny their child FAPE. After the district made several unsuccessful attempts to include the parents, the district was entitled to convene the IEP team. The parents left meetings, refused to attend or postponed several meetings during the summer for various reasons and, because the school year was about to begin, the team met in mid-August. A district may meet without a parent if it is unable to convince the parents that they should attend. Here, the parents had the opportunity to participate but chose not to do so and acted unreasonably by declining to attend any of the summer meetings.
- M. Board of Educ. of the Toledo City Sch. Dist. v. Horen, 55 IDELR 102, 2010 WL 3522373 (N.D. Ohio 2010). The district denied FAPE when it seriously infringed on the parents' opportunity to participate in the decisionmaking process by proceeding with an IEP meeting in their absence. Although the parents called to cancel the meeting indicating that they would re-schedule but never did so, the district should have taken additional steps to reschedule an IEP meeting with them. A parental request to reschedule an IEP meeting is not the same as a refusal to meet. The district should have attempted to identify another date or, at the very least, should have informed the parents that it intended to proceed with the meeting. This is especially the case where school staff met with the parents earlier on the same day as the IEP meeting (and in the same school building) and should have asked them if they intended to stay for the IEP meeting, notwithstanding the parents' earlier indication that they could not attend.
- N. Tracy N. v. Department of Educ., 54 IDELR 216, \_\_\_ F.Supp.2d \_\_\_, 2010 WL 2076938 (D. Haw. 2010). While districts must generally have an IEP in place by the beginning of the school year, in determining whether a district must reimburse parents for a unilateral private placement while evaluations are being conducted by the district, courts must look at the reasonableness of the district's actions. Here, "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." Further, the parent did not show that the temporary day treatment program offered by the district was inappropriate, where testimony indicated that the placement would have facilitated the student's transition to a less restrictive setting.
- O. D.C. v. Klein Indep. Sch. Dist., 54 IDELR 187, \_\_\_ F.Supp.2d \_\_\_, 2010 WL 1798943 (S.D. Tex. 2010). Where parents moved student to an out-of-state residential placement in Utah prior to the annual IEP meeting, the district is not required to convene an annual IEP meeting after that time. Rather, the IDEA requires each school district to create IEPs only for those children "within its jurisdiction."

- P. Millay v. Surry Sch. Dept., 54 IDELR 191, 707 F.Supp.2d 56 (D. Me. 2010). ALJ's decision that a residential placement was appropriate for a nonverbal hearing and visually impaired student is reversed where the IEP team never seriously considered residential placement as a proposal. If it was the district's intent to propose residential placement for the student, it was required to comply with the prior written notice requirements in proposing it. Because it did not, the hearing officer exceeded his authority in ordering residential placement.
- Q. S.T. v. Weast, 54 IDELR 83 (D. Md. 2010). Although the notes from a previous May IEP meeting indicated that the student needed a full-time special education placement, the district's offer to mainstream a sixth-grader with mental retardation for lunch and nonacademic classes at a subsequent meeting indicated that there was no predetermination of placement. This is so because the notetaker testified that the written statement from the previous meeting was intended only to refer to the student's need for a restrictive setting for academic instruction. Moreover, the IEP team decided to continue the placement discussion in July so that it could obtain information about the middle school setting. "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]." In addition, there was no evidence that the parents were excluded from the IEP process.
- R. N.S. v. District of Columbia, 54 IDELR 188 (D. D.C. 2010). Where the district's proposed IEP did not contain present levels of performance or supplementary aids and services that would be provided in the regular setting and failed to provide for pull-out instruction, the student was denied FAPE and funding for private schooling is warranted. Although district witnesses testified that pull-out services would have been provided if needed, neither the IEP nor the IEP Team meeting notes reflected that this was discussed and no clear offer of services was made. Thus, the parents are entitled to reimbursement for the cost of a unilateral private placement.
- S. J.N. v. District of Columbia, 53 IDELR 326 (D. D.C. 2010). Where the parties never agreed to a final IEP meeting date and there was no evidence that, had the district contacted the parent, it could not have persuaded her to attend the third scheduled meeting, a denial of FAPE occurred when the district proceeded with the IEP meeting in the parent's absence. After receiving no response to two notices for meeting provided to the parent, the district sent a third notice that explained that the meeting would be held three days later. On each of the following three days, the parent called the district to propose alternative dates but the district did not respond and held the meeting without her.
- T. B.H. v. Joliet Sch. Dist. No. 86, 54 IDELR 121 (N.D. Ill. 2010). Although it may have been more convenient for the parent of a teenager with ADD to attend an evening IEP meeting, district's refusal to convene after school hours was no basis for a discrimination claim under Section 504. Clearly, 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. Thus, the parent failed to establish a valid 504 discrimination claim because she did not allege the student was wrongfully excluded from any educational programs. Although the district conceded that it refused to schedule an after-hours IEP meeting, "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. J.G. v. Briarcliff Manor Union Free Sch. Dist., 54 IDELR 20 (S.D. N.Y. 2010). Parents were not denied opportunity to participate in August IEP meeting when the district contacted the parents to schedule an IEP meeting as soon as it learned that they were dissatisfied with an IEP developed earlier in the summer. Although the parents indicated that they were available, they later asked that the meeting be postponed until after Labor Day and the parents declined to participate by phone. Because the district was required to have an IEP in place by the beginning of the school year, it was not unreasonable for the district to proceed with the meeting in the parents' absence. In addition, the parents committed to a private placement before the August 9<sup>th</sup> meeting. In fact, the father had told the special education director that he did not "see any sense in being there" because "his daughter is not coming." District's IEP made FAPE available.

### **PARENTAL CONSENT**

- A. G.J. v. Muscogee County Sch. Dist., 54 IDELR 76, \_\_\_ F. Supp. 2d \_\_\_ (M.D. Ga. 2010). Where parents placed numerous restrictions on how a reevaluation would be conducted, including the requirement for a specific evaluator, parental approval for each instrument and meetings before and after the evaluation, this was not really consent for a reevaluation. However, the ALJ's finding that the district was not required to provide services on that basis was not correct, because the parents' refusal to consent did not automatically waive the right to IDEA services and the parents continued to express an interest in having their son reevaluated. Parents are required to consent to the reevaluation pursuant to the court's directions or they are free to decline services. (NOTE: There is a chilling/interesting quote here: "The Court finds that several final observations are appropriate. The record in this action and in the administrative proceeding suggests that counsel have a hostility toward one another that is troubling. The briefs and other submissions from both sides contain vituperative language regarding the opposing party and counsel. Common courtesy and civility seem absent from most meetings between counsel and the parties. The emotional strain between Plaintiffs and representatives of MCS D is understandable, but counsels' conduct in aggravating that strain is unprofessional and counterproductive. While contested legal issues require zealous advocacy, the ultimate resolution of a child's right to an adequate education also depends upon collaboration, which requires mutual respect. The Court encourages counsel to lay down their swords, at least temporarily, so that the parties can regain their focus on the fundamental goal at the heart of their dispute: developing an appropriate educational plan for a young child who is depending upon them to do so." SECOND NOTE: The court subsequently denied fees to the parents and found that they did not succeed in obtaining a declaration that the district had denied FAPE. Although the court did rule that that the ALJ incorrectly determined that the parents' refusal to consent to the reevaluation absolved the district from further responsibility, this did not transform the parents into prevailing parties for purposes of fees. G.J. v. Muscogee County Sch. Dist., 55 IDELR 99, 2010 WL 3732254 (M.D. Ga. 2010).

### **STAY-PUT**

- A. N.D. v. Hawaii Dept. of Educ., 54 IDELR 111, 600 F.3d 1104 (9<sup>th</sup> Cir. 2010). Preliminary injunction for the parents of nine students who sued over Hawaii's "Furlough Fridays" initiative (which shortened the school year by 17 days) is rejected. This is so because the students are unlikely to succeed on the merits of their case alleging that the initiative is a "change in placement," which triggers stay-put. This initiative does not change the placement, as the students will attend the same class, same program, etc. "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....” It seems that the students' claims were better characterized as a material failure to implement and the parents can still pursue such arguments, but they would not trigger the IDEA's stay-put provisions. [NOTE: In at least one subsequent administrative hearing, the Department was able to show, based upon a teacher's thorough data collection, that the student was progressing, notwithstanding the furlough days. See, Dept. of Educ., State of Hawaii, 54 IDELR 106 (SEA HI 2010)].

- B. L.Y. v. Elysian Charter Sch. of Hoboken v. Bayonne Bd. of Educ., 54 IDELR 244, 2010 WL 2340176 (3d Cir. 2010) (unpublished). Where the charter school developed an IEP for the student to attend a private school, the IDEA's stay-put provision does not apply to force the school district to fund the private placement while the school district is challenging the proposed placement under the provisions of state charter school law. In this situation, the student's "current educational placement" for stay-put purposes is the operative placement actually functioning at the time the dispute arose, which is the placement at the charter school.
- C. R.Y. v. State of Hawaii, 54 IDELR 4 (D. Haw. 2010). Department of Education violated the IDEA when it terminated student's current placement at a private school while a dispute over her graduation was pending. This is so, even where the 20-year-old ED student met state requirements for graduation with a regular high school diploma.
- D. B.A.W. v. East Orange Bd. of Educ., 55 IDELR 76, 2010 WL 3522096 (D. N.J. 2010). District is required to re-instate a 19-year-old's placement at a private school while the issue of whether the student was properly awarded a diploma is being litigated. In May of the school year, the student requested mediation challenging his request to receive another year of special education beyond his senior year and, in June, requested a due process hearing one day before the scheduled graduation. Because the student's "current placement" when he filed for due process over his pending graduation was as a 12<sup>th</sup> grader at the private school, the district should have maintained that placement during the pendency of the administrative and judicial proceedings, even where the ALJ ruled in an emergency hearing that the student would suffer no harm if he were to graduate.
- E. Tindell v. Evansville-Vanderburgh Sch. Corp., 54 IDELR 7 (S.D. Ind. 2010). Where a 19-year-old student was challenging the district's decision to graduate him from his residential facility, a college internship program is the "stay-put" pendency placement since the residential placement was closing. When adhering to a student's exact educational program becomes impossible, a district must provide a comparable placement for purposes of stay-put. Where the district was not proposing an alternative placement, the only question was whether the internship program was appropriate and it was not clear that the education the student would receive there would be inappropriate. In addition, the district's argument that FAPE is not available to students with regular diplomas is unpersuasive where the validity of the student's graduation is in dispute.
- F. Alleyne v. New York State Educ. Dept., 54 IDELR 51 (N.D. N.Y. 2010). Although the State of New York was entitled to limit and ultimately phase out the use of aversives as a matter of educational policy, the ED could not enforce the ban against an out-of-state school in Massachusetts from using the interventions while an IDEA dispute was pending. Although the State has a duty to oversee the health and well-being of the New

York residents there, the students' parents approved the use of aversives to manage problem behaviors and the students' IEPs permitted the school to use them. Thus, it would alter the status quo if the ban were enforced before the parents' FAPE claims were resolved. [NOTE: Another court subsequently found that the New York ED did not deny FAPE to seven students by barring the Massachusetts school's use of aversive interventions on them, as the basis for the new regulations is consistent with the requirements and purposes of IDEA to use positive behavioral supports and interventions. See Bryant v. New York State Educ. Dept., 55 IDELR 38, 2010 WL 3418424 (N.D. N.Y. 2010)].

- G. J.H. v. Los Angeles Unified Sch. Dist., 54 IDELR 195 (C.D. Cal. 2010). Where the ALJ ruled that the district offered an appropriate placement for an autistic student but that it did not contain sufficient speech/language and behavioral services for him, the district is required to provide the related services ordered by the ALJ during the pendency of the parents' lawsuit. The parents established that the "current educational placement" included private placement at his parents' expense, along with the related services the ALJ determined were necessary to provide FAPE because the ALJ's determination amounted to an "agreement" between the parent and the state that a change in placement was appropriate for purposes of stay-put.

**FAPE STANDARD/MEANINGFUL EDUCATIONAL BENEFIT**

- A. Lathrop R-II Sch. Dist. v. Gray, 54 IDELR 276, 611 F.3d 419 (8<sup>th</sup> Cir. 2010). District court's ruling that school district provided FAPE to student with autism is affirmed. Where the student exhibited severe problem behaviors during sixth and seventh grade, such as finger biting, hand flapping, loud outbursts and sexual behaviors, the student's IEPs included "a host of strategies to address them." For example, the district conducted an FBA and developed a behavioral management plan to address the behaviors and his IEP included a sensory diet with strategies for keeping the student on task, as well as a one-to-one aide. The district also provided autism training to staff, employed related service providers experienced with autism and hired an autism specialist to consult with the IEP team. The fact that the IEP did not contain specific goals for behavior did not mean that the student was denied FAPE, where the team did consider PBIS to address behavior, as required by the IDEA. In addition, the student made progress, which indicated that the school district made a good-faith effort to address his behaviors and to provide FAPE to him. While the student's IEP contained baseline data for many of his goals, the IDEA does not require such specific data, as long as the IEP contains a statement of present levels of educational performance and a statement of measurable annual goals.
- B. D.S. v. Bayonne Bd. of Educ., 54 IDELR 141, 602 F.3d 553 (3<sup>d</sup> Cir. 2010). District court's rejection of ALJ's findings in favor of student is reversed where student, despite his good grades, performed well below grade level in reading, writing and math on standardized assessments. Although the Supreme Court in Rowley held that a student's ability to earn passing marks and to advance from grade to grade is a strong indicator that the student received meaningful educational benefit, "[o]ur 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."
- C. New Milford Bd. of Educ. v. C.R., 54 IDELR 294 (D. N.J. 2010) (unpublished). District is required to fund autistic student's private after-school home-based program where the

district failed to properly address his self-stimulatory and aggressive behavior. The district's argument that it was not required to ensure that the student could generalize skills outside of school is rejected because "[t]his Circuit has expressly mandated the provision of 'meaningful educational benefits in light of the student's intellectual potential,' not a lesser 'some progress' standard." Moreover, the issue was not the student's ability to generalize skills learned into the home, but his ability to obtain any benefit from the school without the home intervention. There is sufficient testimony that the student needs the home program in order to learn at school. In addition, the parent training provided by the school did not address the student's behavior.

- D. M.P. v. Poway Unif. Sch. Dist., 54 IDELR 278, 2010 WL 2735759 (S.D. Cal. 2010). Where the parents alleged a denial of FAPE based upon the fact that the gap between their SLD student's performance and his nondisabled peers increased in word analysis and vocabulary and that he failed to achieve all 11 of his IEP goals and to reach state reading and writing standards, their claims are denied. Clearly, an IEP offers FAPE if it is reasonably calculated to enable the child to receive educational benefits. Here, the student's state testing results indicated substantial academic improvement and his teachers testified that he made some progress toward all of his goals. Further, the IEP was modified to specifically address the goals that he did not achieve. While the student did not achieve every goal or reach the level of the average, proficient student, that does not indicate that "meaningful progress" was not made.
- E. Jaccari v. Board of Educ. of the City of Chicago, 54 IDELR 53, 690 F.Supp.2d 687 (N.D. Ill. 2010). Where progress reports detailed student's improvement in reading, math and classroom behavior, student was not denied FAPE. This is so, even though the student's standardized test scores slipped from the kindergarten-first grade level in May 2006 to below kindergarten level February 2008, as those test scores are 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." The real question is whether the student's IEPs were reasonably calculated to provide educational benefits. Clearly, they were designed to provide more than trivial progress.
- F. Doe v. Hampden-Wilbraham Regional Sch. Dist., 54 IDELR 214 (D. Mass. 2010). IEP specifically addressing at-school behavior provided student with FAPE. It is clear that the school district is only obligated to address those behavioral issues that the student displays in school, not the student's severe at-home interfering behaviors. The IEP contained behavioral goals and specific steps the district would take to decrease the student's behaviors and keep him on task, including 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." Importantly, the IEP also included a detailed statement of special education and related services and numerous plans for generalizing skills to different settings. Thus, the parents' request for private school reimbursement is denied.
- G. W.R. v. Union Beach Bd. of Educ., 54 IDELR 197 (D. N.J. 2010). Where the ALJ's decision indicated that the district's IEPs were calculated to provide educational benefit but found that the student had not progressed enough in reading, the decision was "at odds with itself." The appropriateness of an IEP can only be determined as of the time it is offered and later progress may only be considered in determining whether the original

IEP was reasonably calculated to afford educational benefit. Where the ALJ found the student's progress was not swift enough, the ALJ determined the district's multifaceted approach to his reading difficulties was calculated to result in progress and, therefore, the IEPs should have been determined appropriate. In addition, the evidence showed that the student made progress and 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 a particular reading program amounted to an impermissible attempt to dictate educational methodology.

- H. M.B. v. Hamilton Southeastern Schs., 55 IDELR 4 (S.D. Ind. 2010). District's refusal to allow child with TBI to attend both a.m. and p.m. kindergarten sessions did not deny the child FAPE and, therefore, the parents are not entitled to private school reimbursement. According to teachers and private providers, the child was progressing academically and behaviorally in the ½ day program and was keeping pace with his peers. Because the district provided services that were reasonably calculated to enable the child to receive educational benefits, it complied with the IDEA. "[G]iven 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."
- I. K.E. v. Independent Sch. Dist. No. 15, 54 IDELR 215 (D. Minn. 2010). Where the student's progress reports reflected that she made meaningful educational academic progress in reading, spelling and math, her lack of progress on her IEP writing goal and the fact that she failed to achieve her behavioral goals did not nullify the progress she made in other areas. "Despite the severity of her mental illness and the changes in her medical treatment, [she] made [academic] progress, received passing grades in her classes, advanced from grade to grade, and demonstrated growth on standardized tests." A district satisfies the requirement to provide FAPE when it offers individualized instruction and services tailored to provide the student with some educational benefit.
- J. Klein Indep. Sch. Dist. v. Hovem, 55 IDELR 92, 2010 WL 3825416 (S.D. Tex. 2010). District failed to offer FAPE to LD high school student where it failed to provide for appropriate transition services or to address the student's severe writing impairment and, therefore, must reimburse the student's parents for private services they obtained. Where it took hours for the student 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. In addition, although testing reflected many of his skills were at an elementary level throughout high school, the district did not revise his IEP. The district's position that the student was provided FAPE based upon the fact that he passed all of his classes is rejected, where his teachers held the student to a different standard from his classmates, overlooking missing assignments, allowing him to answer orally and asking him to type assignments at home. In addition, teachers encouraged heavy reliance on help from his family, thereby circumventing "having to continuously seek and try individualized methods that might assist him." Moreover, the student's inability to write close to grade level undermined the district's contention that it had offered FAPE to him. Finally, the district's transition plan lacked goals and services to assist the student in the transition to postsecondary life and attend college, even though the district knew this was his goal. Instead, the plan only set forth the provision of OT and assistive technology services.

## **AUTISM METHODOLOGIES**

- A. Dumont Bd. of Educ. v. J.T., 54 IDELR 231 (D. N.J. 2010). Where the district's proposed IEP did not specifically provide for a sensory diet and a behavior plan and lacked a detailed program, the fact that district staff testified that they would have provided an adequate sensory program or BIP after an initial assessment period is irrelevant. In addition, where witnesses testified that no program would be appropriate that did not provide for Floortime, the district's program was not appropriate.

## **SERVICE ANIMALS**

- A. K.D. v. Villa Grove Comm. Unit Sch. Dist. No. 302, 55 IDELR 78, 2010 WL 3450075 (Ill. App. Ct., 4<sup>th</sup> Dist. 2010). Autistic student has the right to have his service dog attend school with him, as the dog meets the Illinois statute's definition of "service animal" and the statute on its face permits the dog to attend school with the student. The parents are not required to exhaust IDEA's administrative process because the administrative agency's expertise is not involved when the sole question is whether the dog constitutes a service animal under the Illinois School Code, a matter that is irrelevant to any educational benefit that he provides to K.D. As long as the dog provides some benefit to the student, which this one does when it applies deep pressure to calm the child and prevents the child from eloping when tethered to the child, it is a "service animal" under the Code. In addition, the district's argument that an adult-handler, and not the student, must control the dog for it to "accompany" the student is rejected.

## **COMPENSATORY EDUCATION AND OTHER REMEDIES**

- A. M.L. v. El Paso Indep. Sch. Dist., 54 IDELR 41 (5<sup>th</sup> Cir. 2010) (unpublished). Though the district admitted its failure to provide a student with speech-language services, the parent's claim for compensatory education was moot, based upon the IEP team's recent decision that the student was no longer eligible for special education services. The parent did not challenge the IEP team's eligibility determination but sought compensatory services to make up for the previous implementation failure. However, the team had determined that the student had no current need for S/L therapy; thus, the court could not consider a claim for 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."
- B. Ferren C. v. School Dist. of Philadelphia, 54 IDELR 274, 612 F.3d 712 (3d Cir. 2010). While the student was no longer entitled to FAPE because she had turned 21 during the 2006-07 school year, the district's duty to provide compensatory education to this 24-year-old student with severe disabilities is not satisfied merely by paying for three years of service at a private school. "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."
- C. Phillips v. District of Columbia, 55 IDELR 101, 2010 WL 3563068 (D. D.C. 2010). Case is remanded to the hearing officer to determine the amount of compensatory services, if any, for a 19-month denial of FAPE. This must be a fact-specific inquiry and should not be based on the amount of services missed but, rather, on the amount of services needed to put the student in the position he would have been if the district had

fulfilled its FAPE obligations. Though the parents' expert testified that the student missed 225 hours of services, she presented no testimony as to the child's current educational deficits and testified only that the student "might have missed developmental milestones that would have been very difficult to recoup." Even if entitlement to an award is shown through a denial of FAPE, "[i]t may be conceivable that no compensatory education is required for the denial of [a free and appropriate public education]...either because it would not help or because [the student] has flourished in his current placement...."

- D. Wheaten v. District of Columbia, 55 IDELR 12 (D. D.C. 2010). District is not required to provide compensatory education, even though its program did not meet the student's needs for almost two years. The hearing officer was correct in finding that the student did not need compensatory education because the district remedied its mistake prior to litigation and funded a private school placement once an evaluator concluded that the student's general education placement was not appropriate. The hearing officer properly determined that the student did not require additional services to reverse harm resulting from the inappropriate placement because the student's grades and the parent's testimony indicated that the student's academics, behavior and self-confidence had all improved while in the private school. Thus, no award of compensatory education is warranted.
- E. B.A. v. State of Missouri, 54 IDELR 77 (E.D. Mo. 2010). It is not outside the bounds of IDEA for a parent to seek the remedy of mandating installation of surveillance equipment at the State School for the Severely Handicapped. Where the student's mother asserted that the School failed to fully implement her son's IEP, employed untrained staff and subjected her son to verbal and physical abuse, ordering audio and video monitoring of classrooms and hallways could be an available remedy under the IDEA. This is because the IDEA gives courts the discretion to grant "appropriate" relief and, 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." At this stage of the case, it is too early to decide whether such services would supply the child with an appropriate program. Thus, the case will not be dismissed at this juncture.

#### **PRIVATE SCHOOL/RESIDENTIAL PLACEMENT**

- A. Shaw v. Weast, 53 IDELR 313 (4<sup>th</sup> Cir. 2010) (unpublished). Where 20-year old student with emotional disturbance and PTSD was progressing in her private day school program, she did not need residential placement in order to receive educational benefit. Residential placement is required only if residential care is essential for the child to make any educational progress. Here, the placement was necessitated by medical, social or emotional problems that were segregable from the learning process and where the student needed around-the-clock assistance with basic self-help and social skills. Although her progress in the district's special day school slowed during psychiatric episodes, she made educational progress when those stabilized. Thus, the ALJ's decision denying tuition reimbursement to the parents is affirmed.
- B. J.L. v. Francis Howell R-3 Sch. Dist., 54 IDELR 5 (E.D. Mo. 2010). Reimbursement for residential placement is denied where student with ADHD and history of psychiatric issues was making progress in his public school program when his parents withdrew him and placed him in residential. There is no basis for reimbursement, even if the residential facility is a better fit or improved the student's interactions with his parents. In this case, each of the IEPs appropriately addressed the student's changing academic needs,

including his reading difficulties. In addition, the student's grades and credits earned showed that he was progressing adequately in public school and that it was addressing his emotional needs, as the student's teachers testified that the student was no longer having significant behavioral problems at school. Finally, the mother's statements in the residential facility's questionnaire that the student's tantrums occurred only at home with his parents also worked against them. "To the extent that his parents enrolled [the student]...based on his behavior at home, there is no legal basis upon which they can be reimbursed for this placement."

- C. Smith v. James C. Hormel Sch. of the Virginia Inst. of Autism, 54 IDELR 75, 2010 WL 3702528 (W.D. Va. 2010). District is not responsible for student's lapse in services when the private school terminated his enrollment based upon increasingly violent and disruptive behaviors. This is so because the district offered to provide homebound services while it searched for a new placement, but the parents refused the offer. In addition, the district made prompt and ongoing efforts to provide the student with services.
- D. Stevens v. New York City Dept. of Educ., 54 IDELR 84 (S.D. N.Y. 2010). Despite district's denial of FAPE for failing to convene an IEP meeting, district is not required to reimburse parent for the cost of his private school program where the private placement was not appropriate. In the private program, the student attended general education classes and did not receive modifications or special services to address his disabilities. Even if the parent were successful in proving the private placement was appropriate, her failure to notify the district before unilaterally placing the student in the private school barred her recovery of tuition for equitable reasons.
- E. R.B. v. New York City Dept. of Educ., 54 IDELR 223 (S.D. N.Y. 2010). Where school district did not send a final notice of recommended placement (as it said it would do) and, therefore, did not finalize its offer for placement, the parents are excused from providing the district with 10 days' written notice that they rejected the district's proposed program. Thus, the school district is required to pay \$13,800 for the student's private special education program.

#### **PRIVATE PLACEMENT COSTS**

- A. Atlanta Indep. Sch. Sys. v. S.F., 55 IDELR 97, 2010 WL 3731114 (N.D. Ga. 2010). A school district is not entitled to recover reimbursement for private school costs that the district has paid pursuant to an order of an ALJ, even if the ALJ's order is subsequently reversed.

#### **LEAST RESTRICTIVE ENVIRONMENT**

- A. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 53 IDELR 279, 592 F.3d 267 (1<sup>st</sup> Cir. 2010). Not only did the district's program address 19-year-old student's severe disabilities and her literacy needs, the proposed SDC placement is the student's LRE. Student's progress in reading is commensurate with her intellectual ability and the district's reading methodology was appropriate. In addition, the parents' argument that the SDC was a more restrictive placement than home-based instruction is rejected, where New Hampshire regulations define SDC placements as being less restrictive than home instruction. Although the facility where the SDC is located also houses individuals with severe disabilities, the facility is not akin to a hospital or institution, which is 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.” Thus, while the parents’ desired home program included community-based interaction, it was a more restrictive placement under state law.

- B. A.G. v. Wissahickon Sch. Dist., 54 IDELR 113 (3d Cir. 2010) (unpublished). Though the parent wanted the nonverbal 18-year-old to spend the entire school day with nondisabled peers, the district’s placement in only one academic class with regular education students is appropriate given the student’s cognitive deficits and disruptive behavior. In this case, the student can not be satisfactorily educated full-time in a regular class, even with accommodations. While the district implemented numerous supplemental aids and services, including modifying the curriculum, the student reaped little academic or social benefit from mainstreaming. However, she made significant progress in her life skills class. Further, the student was prone to loud vocalizations, was not toilet trained, and engaged in other behavior that would negatively affect her classmates.
- C. R.H. v. Plano Indep. Sch. Dist., 54 IDELR 211, 607 F.3d 1003 (5<sup>th</sup> Cir. 2010). Proposed placement for 4-year-old autistic child in district’s inclusion program is appropriate. The fact that it included children with disabilities, as well as typically developing children, did not make it inappropriate. Clearly, the IEP team decided against the private general education preschool program requested by the parents because the team did not believe that the school could implement the child’s IEP without the district’s direct supervision. The parents’ reliance upon Daniel R. is misplaced, as it does not consider or speak to the circumstances in this case, where the public preschool curriculum does not include a purely mainstream class. Thus, while Daniel 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. In addition, the private school program had no special education services to meet the needs of the child.
- D. C.P. v. Department of Educ., 54 IDELR 218 (D. Haw. 2010). Self-contained classroom is the LRE for 9-year-old student where student’s aggressive behaviors, which included hitting staff and other students, throwing a stapler, upending furniture and urinating in public had a negative impact upon teachers and classmates. In addition, the student made behavioral progress after three weeks of one-to-one instruction in the self-contained classroom, and the IEP team reconsidered his placement and amended the IEP to provide for gradual re-integration into the general student population based upon that progress.
- E. Las Virgenes Unif. Sch. Dist. v. S.K., 54 IDELR 289 (C.D. Cal. 2010). Autistic student’s cognitive and communication deficits are too severe for him to receive educational benefit in a full-time placement in a regular classroom. The IDEA’s preference for mainstreaming is not absolute and must be balanced with the requirement to develop a program that addresses the student’s individual needs. Because the student’s cognitive abilities are so much lower than that of his grade level peers, he could not participate academically in a general education classroom, even with substantial modifications. Further, given that he would sit isolated from the class with his aide to receive instruction, he would not benefit socially and would distract peers. While the parents wanted the placement to achieve socialization objectives and understood that he could not

benefit academically in a general education classroom, the court is unaware of any authority that would require placement in a general education classroom solely for the purpose of increasing his proximity to the general education student body. Thus, the district's proposed placement in a special day class for core academics and mainstreaming for other classes and activities was appropriate.

- F. M.H. v. New York City Dept. of Educ., 54 IDELR 221 (S.D. N.Y. 2010). Where a psychologist testified that the kindergartner with autism was unable to interact with other students unless prompted by an aide and that he required intensive one-to-one ABA instruction to avoid regression, parents' request for tuition reimbursement for private center for students with autism is upheld. In addition, it was clear that the student was not ready to model typically developing peers and the district's proposed program was not appropriate because it did not offer sufficient ABA trial training.

### **DISCIPLINE**

- A. District of Columbia v. Doe, 54 IDELR 275, 611 F.3d 888 (D.C. Cir. 2010). Notwithstanding the due process hearing officer's determination that the infraction at issue (acting out in class and being disrespectful to a substitute teacher) was not a manifestation of the sixth grader's ADHD, the hearing officer did not exceed his authority when he determined that an 11-day exclusion was "more appropriate" than the 45-day IAES placement imposed by the assistant superintendent, given the trivial nature of the infraction and the fact that the alternative placement would deny FAPE to the student.
- B. Rochester Community Schs. v. Papadelis, 55 IDELR 79, 2010 WL 3447892 (Mich. Ct. App. 2010). Where the school district filed a petition with the juvenile authorities for school incorrigibility as contemplated under state law, the filing does not constitute a "change in educational placement." Thus, a manifestation determination was not required prior to the filing of the petition with juvenile authorities.
- C. Jackson v. Northwest Local Sch. Dist., 55 IDELR 104, 2010 WL 3452333 (S.D. Ohio 2010). The failure to conduct an MD review prior to suspending and ultimately expelling a student for threatening behavior violated the IDEA's procedural safeguards. Clearly, the district should have known that the student had a disability at the time it expelled her because it had provided her with RTI services for approximately two years but she had made few gains. In addition, there were behavioral concerns expressed by her teacher and others that resulted in a referral to an outside mental health agency for an evaluation.

### **TRANSITION**

- A. High v. Exeter Township Sch. Dist., 54 IDELR 17 (E.D. Pa. 2010). Although transition plan of high school junior with LD focused on college preparedness, that did not invalidate an IEP goal for her to read at a 6<sup>th</sup> grade level by the end of the school year. IDEA does not require a student's transition plan to dictate 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." It is important that when the student returned to the district after 2 years of private schooling, she was reading at a 4<sup>th</sup> grade level and she was reading at a 6<sup>th</sup> grade level by the end of that school year.

## **MEDICAL/HEALTH SERVICES**

- A. American Nurses Assoc. v. O’Connell, 54 IDELR 259, 110 Cal Rptr. 3rd 305 (Cal. Ct. App. 2010). Where California law only authorizes administration of insulin to a student by a licensed health care professional or by an unlicensed person expressly authorized by statute to do so, the California ED’s legal advisory authorizing unlicensed school personnel to administer insulin at school is invalid. This is so, even if the student requires such injections pursuant to a 504 Plan or IEP. The advisory authorized trained unlicensed school personnel to administer insulin in non-emergency situations when a nurse was unavailable but the court determined that the legislature’s intent was to permit assistance by other personnel only to the extent that those personnel were otherwise authorized by law to assist. There was insufficient evidence that California districts could not achieve compliance with federal law while using only licensed personnel, a family member or the student to administer insulin shots.

## **PRO SE PARENTS**

- A. M.D.F. v. Independent Sch. Dist. No. 50 of Osage Co., 54 IDELR 252, 2010 WL 2326260 (N.D. Okla. 2010). Parent can not proceed with his 504 claims that the district denied FAPE by impermissibly restraining his son. Though an individual may act as his own counsel in federal court, a non-lawyer parent generally may not bring a pro se action on his child’s behalf. Even if the parent amended the complaint to include his own claim under IDEA, the action would not be saved because the parent has not exhausted his administrative remedies.

## **ATTORNEYS’ FEES**

- A. Weissburg v. Lancaster Sch. Dist., 53 IDELR 249, 591 F.3d 1255 (9<sup>th</sup> Cir. 2010). Because the change in a student’s classification to autism gave him the legal right to instruction by a teacher with autism certification under California law, the parents were the prevailing parties for purposes of recovering attorney’s fees. Although the district classified the child as mentally retarded, his teacher had dual certification in MR and autism. However, the misclassification could have resulted in the child being instructed by a teacher who did not have autism certification. “Although [the child] did, in fact, receive placement in the proper classroom, the school district refused to recognize his additional primary disability of autism, and thus his legal right to such a placement, until his eligibility category was changed.” Clearly, the change in classification altered the parties’ legal relationship. In addition, the fact that the child’s attorney was his grandmother did not preclude a fee award as such restrictions in other cases do not apply to relatives other than the child’s parents.
- B. Children’s Center for Developmental Enrichment v. Machle, 54 IDELR 273, 612 F.3d 518 (6<sup>th</sup> Cir. 2010). A private school is not a public agency under the IDEA and, therefore, can not recover legal fees from the parents’ attorney under IDEA’s fee-shifting provision. In fact, the school argued throughout the case that it could not be held liable under the IDEA because it is a private school.
- C. District of Columbia v. Straus, 53 IDELR 250, 705 F.Supp.2d 14 (D. D.C. 2010). Where the hearing officer dismissed the due process complaint as moot since the school district agreed to pay for an independent psychiatric evaluation, district was not the

prevailing party. The district did not obtain an award of judicial relief; rather the hearing officer determined that the district's agreement to fund an IEE mooted the parents' claim that the district's delay in conducting an assessment denied the student FAPE. "If the district were considered a prevailing party under these circumstances, then [it] could ignore its legal obligations until parents sue, voluntarily comply quickly, file for and receive a dismissal with prejudice for mootness, and then recover attorney's fees from the parents' lawyers." This would deter parents' attorneys from accepting IDEA cases and undermine the purpose of the statute.

- D. Blackman v. District of Columbia, 53 IDELR 284, 677 F. Supp. 2d 169 (D. D.C. 2010). In an action seeking almost \$2,000,000 in attorneys' fees, given the district's current financial woes, reimbursing the parents' attorneys at their market rates would be inequitable. Thus, their hourly rates are reduced by 17% due to the district's "financial straits."
- E. School for Arts and Learning Pub. Charter Sch. v. Barrie, 54 IDELR 315 (D. D.C. 2010). Charter school cannot recover fees for an allegedly frivolous due process complaint filed against it because the hearing officer issued no relief. Rather, the complaint was dismissed as moot. Therefore, the school was not the prevailing party where there was no judgment in favor of the school that was accompanied by judicial relief.
- F. Wood v. Katy Indep. Sch. Dist., 54 IDELR 82 (S.D. Tex. 2010). Although the district succeeded in the dismissal of a discrimination lawsuit on the basis of the failure to exhaust administrative remedies, district could not obtain fees for frivolity because the court lost jurisdiction over that issue when it dismissed the case for failure to exhaust. "The Court agrees and sympathizes with [the district] in their argument that [the parents] have failed to satisfy black-letter law that all IDEA administrative actions must be exhausted before bringing civil suit in federal court." However, the IDEA's fee-shifting provisions do not by themselves confer subject matter jurisdiction over the underlying substantive action.
- G. Bridges Pub. Charter Sch. v. Barrie, 54 IDELR 186 (D. D.C. 2010). School may proceed with action against parents' attorney where 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 continues to litigate after the litigation clearly became frivolous. Where three witnesses testified at the hearing that the school discussed goals, objectives and placement with the parent at the IEP meeting and the hearing officer stated that the parents' claims were baseless and that the evidence "overwhelmingly established" that the school consulted with the parent, there are sufficient facts to support the school's claim that the due process complaint was frivolous.
- H. J.D. v. Kanawha County Bd. of Educ., 53 IDELR 315 (S.D. W.Va. 2010). Former attorney who represented the parents of an autistic preschooler with autism could not recover legal fees directly from the district. Clearly, the award of fees belonged to the parents, not their former attorney. The attorney's argument that awarding fees directly to the parent would have dire consequences for FAPE litigation because no attorney would represent parents who were unable to pay large retainers up front is rejected. The IDEA's fee-shifting provision authorizes courts to award fees to a prevailing party who is the parent of a child with a disability and, "[p]ursuant to this language, the fee award belongs to the prevailing party." "The existence of a fee dispute between a party and his former

counsel does not amend this statutory mandate,” and the attorney can pursue a separate claim against the parents if they fail to pay any legal fees owed.

- I. Jeremiah B. v. Hawaii Dept. of Educ., 54 IDELR 21 (D. Haw. 2010). Fees for work conducted by parents’ attorney related to a resolution session are not recoverable and should be deducted from award.
- J. C.Z. v. Plainfield Comm. Unit Sch. Dist. No. 202, 53 IDELR 317 (N.D. Ill. 2010). Parents were the prevailing parties based upon the hearing officer’s involvement in a status conference between the parents of a child with autism and the school district. The district’s claim that it voluntarily offered all of the relief requested by the parents is rejected where it was only after the hearing officer had a telephone conference to discuss the status of the case that the district agreed to provide compensatory services in addition to funding for private placement.
- K. M.L. v. Bourbonnais Sch. Dist., 54 IDELR 88 (C.D. Ill. 2010). Parent is entitled to only 40% of her legal fees where she only achieved partial success on the issue of transportation. Balancing the parent’s limited success against her victory on the transportation claim, a 60% reduction in fees was reasonable.

#### **STANDING TO BRING IDEA CLAIMS**

- A. Traverse Bay Area Intermed. Sch. Dist. v. Michigan Dept. of Labor and Econ. Growth, 55 IDELR 1, 615 F.3d 622 (6<sup>th</sup> Cir. 2010). School districts do not have standing under the IDEA to bring an action against the state educational agency unless the claim directly involves a student’s IEP. Although the IDEA provides for an “aggrieved party to seek relief, this provision only applies to matters involving a particular student’s identification, evaluation, placement or services. Thus, the dismissal of the district’s challenge of an SRO’s authority to hear an appeal of a decision denying the parent’s request to incorporate a FAPE settlement into an order of dismissal is affirmed.

#### **PRACTICE AND PROCEDURE**

- A. Steven I. v. Central Bucks Sch. Dist., 55 IDELR 35, 2010 WL 3239469 (3d Cir. 2010). Student could not seek relief for eight years’ worth of allegedly inappropriate services because he had a reasonable opportunity (i.e., a seven-month window or “grace period”) to file his IDEA complaint under old law, which contained no statute of limitations. Indeed, there was a 7-month gap from the date of the enactment of the 2004 IDEA and its effective date. Because the student did not file his claim within that grace period, he can seek relief only for alleged IDEA violations that occurred within the previous two years.
- B. Knight v. Washington Sch. Dist., 54 IDELR 185 (E.D. Mo. 2010). Parents’ case challenging hearing panel’s decision that a due process complaint failed to meet the IDEA’s pleading requirements is dismissed. This is so because the plain language of the IDEA provides that courts have jurisdiction only to review findings and decisions issued in a due process hearing and no hearing took place in this instance.
- C. Friendship Edison Pub. Charter Sch. v. Nesbitt, 54 IDELR 151, 704 F.Supp.2d 50 (D. D.C. 2010). Even though the school is appealing an award of compensatory education to a former learning disabled student and notwithstanding the possibility that the award may

be reduced, the district must proceed with providing the 3300 hours of tutoring to make up for the denial of FAPE, and its request to defer the award is denied. The school's contention that it was likely to succeed on appeal is rejected, though the school's contention that it will be harmed because it can not recover the estimated \$200,000 it will cost to provide the tutoring is acknowledged. However, if a delay is allowed, the student (who is 25) will have to continue to wait for educational services to which he is entitled and, therefore, the harm that the student will suffer outweighs the potential harm to the school.

- D. H.M. v. Haddon Heights Bd. of Educ., 54 IDELR 287, 2010 WL 2571343 (D. N.J. 2010). Because the IDEA requires a District Court to "hear additional evidence at the request of a party," parents' request to present additional evidence consisting of progress reports and expert opinions based upon supplemental instruction the parents obtained after the district declassified the student is granted. Where the Third Circuit takes the view that a court must consider additional evidence that is relevant, non-cumulative and useful in determining whether FAPE has been provided, parents should not be foreclosed from providing evidence that was not before the ALJ. "If the Court were to do so, it would be in direct contradiction of the express language of the IDEA and Third Circuit precedent, and would obviate the IDEA's option of bringing a civil suit at the conclusion of the administrative process."

#### **NO CHILD LEFT BEHIND (NCLB)**

- A. Renee v. Duncan, 110 LRP 54658 (9<sup>th</sup> Cir. 2010). Case is decided in favor of a group of California students, their parents and two community organizations where NCLB's regulation allowing teaching candidates in alternative certification programs to be deemed highly qualified violates the plain meaning and intent of the statute. Clearly, this regulation results in a disproportionate number of "interns"/teachers without full state certification to teach minority and low income students in California, which clearly undermines congressional intent to ensure that schools in these areas have fully credentialed instructors. Though it is undisputed that NCLB gives states great flexibility in deciding which teachers are fully certified under state law, and that the secretary cannot compel a state to adopt any specific credentialing system, identifying teachers as highly qualified who are not fully certified (though making progress toward certification through an alternative route) under state standards does not comport to NCLB.

#### **SECTION 504/AMERICANS WITH DISABILITIES ACT**

- A. D.L. v. Unified Sch. Dist. No. 497, 54 IDELR 1, 596 F.3d 768 (10<sup>th</sup> Cir. 2010). Parent has no standing to seek relief for disability discrimination based upon district's policy not to serve non-resident students with autism. This is so because there was no showing of any injury based upon the district's actions.
- B. Mark H. v. Hamamoto, 55 IDELR 31, 2010 WL 3349198 (9<sup>th</sup> Cir. 2010). The ED's alleged failure to provide reasonable accommodations to two siblings with autism, coupled with evidence of its deliberate indifference, could support an award of damages under Section 504. To seek relief for a denial of FAPE under Section 504, the parents need to show that: 1) their children needed autism-specific services; 2) the ED was aware of the need but failed to provide the services; and 3) the services were available. Where the parents' evidence raised genuine issues of fact as to each element, the district

court's findings in the ED's favor are reversed and the case is remanded for further proceedings (to a different district judge this time). The lack of autism-specific services allegedly prevented the children from receiving any benefit from their public education and, since nondisabled children would receive some benefit from public education, there is 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 real issue here is whether money damages are available for violations of Section 504's FAPE requirement).

- C. Celeste v. East Meadow Union Free Sch. Dist., 54 IDELR 142 (2d Cir. 2010). Jury's finding of discrimination under the ADA is upheld where minor architectural barriers on school property forced student with cerebral palsy to take a 10-minute detour each way to go to and from the athletic fields, which detracted from his participation as manager of the football team and cut in half his time for participation in the typical 45-minute PE class. The district's argument that the student failed to present expert testimony is rejected, as well as the argument that the student did not show cost-effective measures it could have taken to correct the alleged architectural barriers. Indeed, he testified that cutting a few curbs, fixing some pavement and removing some cleat cleaners could have made the property more accessible to him. While the jury's liability finding is upheld, however, the award of \$115,000 in damages is vacated because it is not supported.

#### **PRIVATE SCHOOLS UNDER IDEA/504**

- A. Russo v. Diocese of Greensburg, 55 IDELR 98, 2010 WL 3656579 (W.D. Pa. 2010). Where Title IX and Section 504 apply only to programs or activities receiving federal financial assistance, whether the district court had jurisdiction to hear the disabled student's claims turned on whether the Catholic high school or diocese receives federal assistance. Although the particular high school that plaintiff attends does not participate in the national school lunch program, another school in the diocese does. Because the other school has no legal status separate from the diocese, the diocese is the school system for purposes of Title IX and 504 and the other school's participation in the program transforms the student's high school into a federal fund recipient. Even if the high school were not subject to suit because of its sister school's participation in the school lunch program, it was exposed to liability because it participates in the federal E-rate program which provides technology funding to promote universal access to the internet.
- B. Children's Center for Developmental Enrichment v. Machle, 54 IDELR 273 (6<sup>th</sup> Cir. 2010). Private school does not qualify as a public agency under the IDEA and, therefore, cannot recover legal fees from a parents' attorney for bringing a frivolous action. The IDEA does not authorize awards of fees to private schools. "In fact, [the private school] has argued throughout [this case] that it cannot be held liable under [the IDEA] because it is a private school."