

THE UNWRITTEN RULE IN SPECIAL EDUCATION LITIGATION: WHO IS BEING UNREASONABLE?

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Please note that citations contained within Key Quotes have sometimes been omitted to enhance readability.

El Paso ISD v. Richard R., 53 IDELR 175; 591 F.3d 417 (5th Cir. 2009)

The appeals court determined that R.R. was not entitled to an award of attorney's fees, even assuming that R.R. was the "prevailing party" under the IDEA. The appeals court observed that "[e]arly resolution through settlement is favored under the IDEA." The statute bars an award of attorney's fees for work performed by an attorney after a district's offer of settlement, when the attorney's work does not ultimately achieve more than that which was offered in the settlement. It was undisputed that R.R. did not achieve any educational benefit beyond what the district had offered. According to the appeals court, R.R. did not need to continue the litigation by pursuing the due process proceeding after the district had offered all of the relief that he had requested. Because R.R. was not substantially justified in rejecting the district's settlement offer, the IDEA prohibited an attorney's fee award for work performed subsequent to the offer of settlement.

The appeals court also determined that R.R. was not entitled to attorney's fees for his attorney's participation in the resolution meeting. The IDEA allows an attorney's fees award for work performed in any "action or proceeding." However, the IDEA specifically excludes resolution meetings from the definition of "action or proceeding." Thus, R.R. was not entitled to attorney's fees for his attorney's work at the resolution meeting.

The appeals court also concluded that R.R. was not entitled to attorney's fees for work performed prior to the resolution meeting. The IDEA states that a court shall reduce attorney's fees "whenever the court finds that . . . the parent, or the parent's attorney . . . unreasonably

protracted the final resolution of the controversy.” The appeals court determined that R.R. and his attorney unreasonably protracted the resolution of this dispute for over three years. The record showed that the district offered R.R. all relief requested in the due process complaint, including reasonable attorney’s fees. According to the appeals court, at that point, there was “absolutely no need to continue litigating.” Nevertheless, R.R. and his attorney rejected the district’s settlement, walked out of the resolution meeting, and continued litigating the claims. Because R.R. and his attorney unreasonably protracted the resolution of this dispute, the trial court erred when it awarded R.R. attorney’s fees. The court denied the district’s request to recover its own attorneys’ fees, but did order the parent’s attorney to pay court costs.

Comment: This decision is a strong confirmation that “The IDEA envisions that the parties to a dispute should resolve their differences cooperatively.” The 5th Circuit determined that the trial court was not only wrong to order \$45,000 in attorney’s fees, it “abused its discretion” by doing so when there was “absolutely no need to continue litigating.” That is a strong message, as is the order that the parent’s attorney must pay court costs.

Bingham v. New Berlin School District, 51 IDELR 61; 550 F.3d 601 (7th Cir. 2008)

The ALJ held that the school district had rendered the case moot by paying the parents the full amount of tuition reimbursement they were seeking by way of a voluntary settlement. Parents then sought attorneys’ fees but the district court and Circuit Court denied relief, noting that parents were not prevailing parties. The court relied on Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health, 532 U.S. 598 (2001). In that case, the Supreme Court rejected the “catalyst theory” of recovering attorneys’ fees in voluntary settlement cases. Here, the court held that Buckhannon applied to IDEA cases, and thus the district’s voluntary settlement of all matters effectively deprived the parents of “prevailing party” status. In fact, the court ordered the parents and their attorney to show cause as to why they should not be required to pay the costs and attorneys’ fees incurred by the district in this appeal.

Comment: The court cited the scholarly criticism of the Buckhannon rule as applied to parents in IDEA cases, but concluded that it had no choice but to follow Supreme Court precedent. The court thought the whole matter so clear cut that it criticized the parents’ attorney for not citing the case and for continuing to litigate the matter. Key Quote:

Appellants’ counsel understood that the law required prevailing party status and that they had not obtained that outcome. Nevertheless, counsel continued to litigate this case without a reasonable basis for doing so, expending the resources of the court and the opposing party.

K.E. v. ISD No. 15, St. Francis, Minnesota, 54 IDELR 215 (D.C.Minn. 2010)

The court reversed the ALJ’s ruling, and held that the district provided FAPE to the student. Procedurally, the court concluded that the ALJ restated issues in such a way that it had the effect of deciding issues that were not raised by the parties. The ALJ also erred by effectively placing the burden of proof on the district rather than the parent. Substantively, the court held that the ALJ erred to the extent that the conclusion was based on the district’s failure to formally

recognize bipolar disorder, holding that “the relevant question is whether the IEP team considered K.E.’s unique needs when developing her programming, not how her disability was identified.” The evidence showed that the student made progress, even though behavioral issues remained.

The court thus reversed the ALJ’s ruling and declared that the parent was not the prevailing party and therefore, not entitled to attorneys’ fees. In a footnote, the court observed that even if the parent had prevailed, attorneys’ fees would have been substantially reduced because 1) for part of the time, the parent’s attorney was not licensed to practice law in Minnesota; and 2) the parents and their attorney unreasonably protracted the resolution of the matter. Key Quote:

Parent and counsel for K.E. cancelled or refused to attend four IEP meetings between October 2008 and February 2009, thereby delaying the implementation of a new IEP for K.E. for several months after the District first became aware of Parent’s concerns and [a doctor’s] recommendations in September 2008. In addition, counsel for K.E. stated on the record at the February 27, 2009, pre-hearing conference that she would “bank her annual salary” that the resolution session required by 20 U.S.C. 1415(f)(1)(B) would be unsuccessful, and—based on the uncontradicted affidavit of counsel for the District—demonstrated her belief in its futility by using profanity throughout the session and placing her feet on the table and whistling during [the special education director’s] opening comments.

D.A. v. Houston ISD, 54 IDELR 168 (S.D.Tex. 2009)

The court held that the district failed in its child find duties, but did not order any relief due to mootness and a failure by the parents to present evidence to support the claim for compensatory relief. The request to order Houston ISD to conduct an FIE was moot due to the student’s move to a new district which was conducting the evaluation. As for child find, the court held that the district had sufficient information to order an FIE as of October, 2007. Teachers from pre-K, kindergarten and first grade had all observed significant problems; the student was failing all academic courses; a private speech therapist stated that he was “in desperate need of intervention”; and the first grade teacher provided a “notebook full of documentation.” Moreover, the mother had been seeking an FIE for over a year. The suit also sought relief against the HISD principal and school counselor, but the court noted that individuals are not subject to suit under IDEA, 504 or the ADA. The court also denied relief on the 504 claim against the district, noting that district may have been negligent, but its conduct was not a gross departure from accepted standards among education professionals. Therefore, it did not amount to discrimination “solely on the basis” of disability.

Fitzgerald v. Fairfax County School Board, 50 IDELR 165; 556 F.Supp.2d 543 (E.D.Va. 2008)

This case focuses on the curious language of IDEA 2004, stating that the manifestation determination is to be done by “the local educational agency, the parent, and *relevant members* of the IEP Team (*as determined by the parent and the local educational agency*).” The Team concluded that the student’s behavior (a lengthy paintball attack on the school) was not a

manifestation of the student's disability. The parents sought to overturn that decision by arguing that the manifestation determination team was improperly constituted. They asserted that the membership should have been agreed to, and that no one could attend who had not previously been on the student's IEP Team. The court disagreed. It held that the MDR committee is "a subset of a disabled child's IEP team" and thus, the same rules apply. Therefore, "the LEA determines the school system's MDR members and the parents may determine whom they wish to invite in addition to those designated by the school and the LEA." The fact that there were people at the meeting who did not personally know the student did not bother the court. Just as with an IEP Team, the MDR committee was comprised of a combination of people. Some knew the student personally, such as the teachers and parents. Others provided particular expertise, such as the school psychologist. The court approved of the way in which the manifestation was done. At the MDR meeting, the team heard about the history of Kevin's disability and experience in school, his formal test results, his disciplinary history, his behavior in class, reports from teachers, and finally, his involvement in the specific incident under consideration. The court agreed with the team: "Kevin simply made a bad decision; he must now live with the consequences." This case also confirms that a MDR meeting is just like any other IEP Team meeting in other ways as well. The court was not bothered by the fact that members of the Team discussed the case prior to the actual meeting, nor by the fact that the school presented a draft IEP at the meeting which assumed that the behavior was not a manifestation of disability. The court quoted with approval the ruling of the hearing officer in this case that an "MDR meeting is not designed to be a jury trial." The court supported its decision by noting that it did not want to interpret the law in a way that "could result in delays, stalemates, and impasses that would leave educators hamstrung."

M.S. v. Mullica Township Board of Education, 49 IDELR 154 (3rd Cir. 2008)

The hearing officer ruled for the district on all counts except for IEE reimbursement. The district court overturned that portion of the ruling and held for the district on all counts. The Circuit Court affirmed. Much of the ruling turned on the court's perception of the reasonableness of the parties. Key Quote (from the district court):

The Court concludes that Plaintiffs are not entitled to reimbursement. The three evaluations at issue were all performed after M.S., Jr.'s unilateral removal from [public school] and while he was attending [a private program]. The record demonstrates that the evaluations were not obtained by Plaintiffs in consultation with the School District or with the intention that M.S., Jr. would return to the district. The evaluations were sought for the purpose of providing additional evidence that Defendant's services were inadequate, thereby supporting Plaintiffs' contention that an alternative private placement at public expense was necessary.

The IDEA provides that IEPs will be developed through cooperation and collaboration between teachers, special education professionals, and parents. Similarly, the governing regulation contemplates that parents are entitled to reimbursement for independent evaluations when they are collaborating with the local educational agency in developing an appropriate IEP, based on the district's own evaluations and any independent evaluations.

Moreover, § 300.502 clearly assumes that the disabled child is living within the district from which reimbursement is sought. Plaintiffs moved out of the district before M.S., Jr. ever attended [the district's] classes during the 2005-2006 school year. The year before, he had attended [private school]. Defendants had not been 'the public agency responsible for the education of the child in question' since September, 2004, and never again became responsible for M.S., Jr.'s education because he moved out of the district before re-enrolling.

G.J. v. Muscogee County School District, 54 IDELR 76 (M.D.Ga. 2010)

The court affirmed a hearing officer's decision that the parents had placed so many restrictions on their consent to a three-year reevaluation that they did not actually give "consent." However, the court also held that this did not mean that the parents had waived their right to IDEA services for their child. The court ordered the parents to consent to an evaluation under terms set out by the court. Key Quotes:

Though Plaintiffs argue that, for the most part, their addendum [containing the conditions to consent] merely tracks what is required by IDEA and the Family Educational Rights and Privacy Act of 1974, [cite omitted] some of their requirements are much more restrictive. For example, the addendum specifies who shall conduct the evaluation; it requires that the parents approve each of the specific instruments to be used for the evaluation; it requires that the evaluator meet with the parents before and after the evaluation; it requires that the evaluator discuss the evaluation results with the parents before the results are submitted to the IEP team; and it requires that the evaluation be used only for the purpose of developing G.J.'s IEP. In addition, Plaintiff added the condition that the testing must be done in L.J.'s presence.

The court then set out the conditions that would apply to the ordered evaluation:

- (1) The reevaluation may be used to update G.J.'s IEP or for any other purpose permitted by IDEA.
- (2) MCSD shall select the evaluator(s) to conduct the reevaluation. If the parties still agree on Dr. Lanckenau, then Dr. Lanckenau should be selected to conduct the reevaluation.
- (3) MCSD shall consult with Plaintiffs to determine a mutually agreeable date and time for the reevaluation.
- (4) MCSD shall disclose to Plaintiffs in writing all information relevant to the reevaluation, including but not limited to (a) the date and time, (b) the location, (c) the duration, and (d) the procedures, assessment tools, and strategies to be used.
- (5) The issue of whether G.J.'s parents are permitted to observe all or part of the reevaluation shall be left to the evaluator, and Plaintiffs shall be informed of the evaluator's decision prior to the reevaluation.

- (6) If the evaluator determines that additional tests are necessary, then MCSD shall seek consent for those tests in accordance with these requirements.
- (7) The reevaluation results and reports shall not be shared with any third parties without prior written consent from G.J.'s parents except to the extent allowed by FERPA and IDEA.
- (8) The parties shall receive the reevaluation results at the same time.
- (9) If G.J.'s parents disagree with the reevaluation results, they may request an IEE.

D.B. v. Bedford County School Board, 54 IDELR 190 (W.D.Va. 2010)

The court ruled in favor of the parent, overturning the decision of the hearing officer. The ruling was largely based on the failure of the school district to evaluate the student for a learning disability. The court concluded that the district and the hearing officer were fundamentally confused about the relationship between mental retardation and specific learning disabilities. The school district's written argument in the case stated that "The basis of a SLD [Specific Learning Disability] designation would have been mental retardation as a result of [the student's] low cognitive scores." Key Quote:

However, this is clearly erroneous, given that, pursuant to the pertinent regulations, SLD and MR are contraindicated, i.e., they are mutually exclusive, and thus MR would not have formed "the basis of a SLD designation.

Comment: The hearing officer conducted a three-day hearing and issued a 35-page report. It is rare for a court to overturn a detailed decision like this one, but here the court concluded that fundamental errors were made. The court pointed out that without a proper evaluation of the suspected disability the IEPs could not have satisfied the Rowley standard.

Draper v. Atlanta Independent School System, 49 IDELR 211; 518 F.3d 1275 (11th Cir. 2008)

The hearing officer ruled that the school district failed to provide FAPE to a student with dyslexia who had been misidentified as having a cognitive disability. The federal court upheld that ruling and the Circuit Court affirmed. J.D. tested at an IQ of 63 in third grade. Several years later, J.D. was enrolled by his mother in a private tutoring program where his reading level increased by two grades. This prompted the family to request that their son be further evaluated. The school complied, and though the student again tested at about an IQ level of 60, some discrepancies in the test scores caused the school psychologist to recommend further testing. That further testing showed that the student had an IQ 20 points higher than previously found, and as a result, he was reclassified as having a learning disability. The school district did not, however, provide the reading services promised in the IEP and a mediated agreement, and they did not change the student's reading program even though it produced no gains over three years. The hearing officer found that the district not only misdiagnosed the student as having mental retardation, it then made no effort to further evaluate him for five years in violation of clearly established law. Both the hearing officer and federal court held that the parent's claim was not barred by the two-year statute of limitations because the family did not have reason to know the

student had been injured by his placement until the later IQ testing. Key Quotes (from the *district court* decision, which is at 47 IDELR 260; 480 F.Supp.2d 1331):

As for the 2002-03 school year, J.D.'s IEPs were not based on accurate, up-to-date information as APS contends because they were based on the 1998 evaluation.

Despite the fact that his reading skills decreased, APS continued to use the Lexia reading program, and by the time of the hearing he was still reading at the 3rd grade level. Based on a preponderance of the evidence, the Court agrees with the ALJ's conclusion that APS failed to provide J.D. a FAPE by providing him essentially the same services that had failed him for three years in reading.

Finally, APS failed to design J.D.'s IEPs for the 2003-04 and 2004-05 school years to meet his individualized needs by failing to review and assess whether he had mastered his goals and objectives from the previous year and by failing to revise J.D.'s IEPs in certain areas from one year to the next.

Smith v. James C. Hormel School of the Virginia Institute of Autism, 53 IDELR 261 (W.D.Va. 2009); magistrate report accepted at 54 IDELR 75

The student was residentially placed by the school district at a private program for students with autism. That program discharged the student in December, 2007, due to behavioral issues. Parents later sued the school district for allegedly failing to provide FAPE after the discharge. But the court ruled for the school district, noting its prompt efforts to provide appropriate services. Key Quote:

Indeed, it is clear from the record that Greene County made great efforts to provide Johnnie with a suitable education. It placed him at VIA at public expense pursuant to an appropriate IEP; Johnnie's discharge from VIA was not something Greene County took lightly. Greene County was, at all times, ready and willing to provide educational services to Johnnie and/or find him an alternative placement.

School Board of Manatee County, Fla. V. L.H., 53 IDELR 149 (M.D.Fla. 2009)

The court upheld an ALJ order that required the school to permit a private psychologist retained by the parent to observe the child in the school setting. The court quotes from a 2004 OSEP Letter to Mamas:

There may be circumstances in which access may need to be provided. For example, if parents invoke their right to an [IEE] of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement. Letter to Mamas, 42 IDELR 10 (OSEP 2004).

Lessard v. Wilton-Lyndeborough Cooperative School District, 49 IDELR 180; 518 F.3d 18 (1st Cir. 2008)

The student did not have an IEP in place at the start of the school year, but the court concluded that this did not deprive the student of FAPE.

The IEP Team met seven times, normally for between two and three hours, and produced a 60-page IEP, to which the parents did not agree. The parents could not, or would not, identify specifically what they disagreed with. The district offered to pay for a lawyer for the parents to participate in mediation, if the parents would identify what they disagreed with. The parent refused to testify at the hearing.

The Circuit Court held that 1) IDEA does not require a “stand-alone transition plan”; 2) IDEA requires a behavioral plan only when certain disciplinary actions are taken, and not simply because the child has behaviors that impede learning—in those cases, the team is merely required to “consider, when appropriate” formulating such plans; 3) a school does not violate IDEA simply because the parent has refused to sign the IEP before the start of the school year; and 4) the 1997 amendments to IDEA did not change the Rowley standard with regard to transition plans. Key Quotes:

Many judges are parents too, and we can admire the determination with which the appellants have pursued the best possible education for their profoundly disabled daughter. That is as it should be. [Cite omitted]. But determination must be tempered by an understanding that school districts, like parents and children, have legal rights with respect to special education. In demanding more than the IDEA requires, the appellants frustrated the operation of a collaborative process and put the School District in an untenable position.

Comment: The same parties battled over the next year’s IEP also, with the 1st Circuit again upholding the school’s actions. See Lessard v. Wilton-Lyndeborough Cooperative School District, 53 IDELR 279; 592 F.3d 267. The proposed IEP in this case was 77 pages and was developed through six IEP Team meetings, but it was never agreed to by the parent.

N.S. v. District of Columbia, 54 IDELR 188 (D.C.D.C. 2010)

The court held that the IEP failed to meet IDEA standards, thus reversing the decision of the hearing officer. The district acknowledged several deficiencies in the IEP, such as the absence of a statement of present levels or a description of the supplementary aids and services, but argued that these were technical defects that did not deprive the student of a FAPE. The court did not agree. The court noted that the hearing officer’s decision was largely based on the testimony from the teacher about what could be provided to the student—rather than what services the IEP actually called for. Key Quote:

Defendants contend that as long as [the school] was “willing and able” to provide N.S. with appropriate services to meet his educational needs, any errors or deficiencies in the IEP are harmless. However, the IDEA requires that a school

district do more than simply provide services adequate to meet the needs of disabled students; it requires school districts to involve parents in the creation of individualized education programs tailored to address the specific needs of each disabled student.

H.Berry v. Las Virgenes USD, 54 IDELR 73 (9th Cir. 2010)

In a 2007 decision, the Ninth Circuit concluded that the district court correctly stated the standard for “predetermination” prior to the IEP meeting. However, the court remanded back to district court because that court failed to “make specific factual findings regarding the School District’s intent or state of mind prior to and during the IEP meeting.” In 2008, the district court made those findings, and concluded that the district had improperly “predetermined” placement. In a brief, unpublished opinion, the 9th Circuit affirmed that ruling. The district court’s analysis largely hinged on statements from the assistant superintendent at the start of the meeting: “Okay, so what we’ll be doing today is going through the assessment results and then we will talk about those goals and objectives. And we’ll talk about how we can meet those goals and objectives, program services—that discussion—*then we’ll talk about a transition plan.*” (Emphasis in the court’s opinion). The court concluded that this statement indicated a predetermined mind set by the district to transition the student back to the public school from the private school.

Hjortness v. Neenah Joint School District, 48 IDELR 119; 508 F.3d 851 (7th Cir. 2007)

The Circuit Court ruled for the school, holding that the IEP was properly developed despite the fact that the school added goals to the IEP after the meeting. Moreover, the district had not “predetermined” placement. The IHO ruled against the school on the “predetermination” issue, but the court reversed. Key Quotes:

Considerable time was spent in multiple IEP conferences at which Joel’s parents and their advocate participated. At several times during these conferences, the team attempted to set specific goals and objectives, but the Hjortnesses insisted that ‘the issue on the table [was whether the school district would] pay for [Joel] to be at Sonia Shankman where he needs to be.’ The school district arguably should have held a second IEP meeting to review the goals and objectives that were not discussed at the meeting. However, this procedural violation does not rise to the level of a denial of a free appropriate public education. The record does not support a finding that Joel’s parents’ rights were in any meaningful way infringed.

In this case, it is not that Joel’s parents were denied the opportunity to actively and meaningfully participate in the development of Joel’s IEP; it was that they chose not to avail themselves of it. Instead of actively and meaningfully participating in the discussions at multiple IEP meetings, the Hjortnesses refused to talk about anything other than ‘[whether the school district would pay for [Joel] to be at Sonia Shankman where he needs to be.’ As a result, the school district was left with no choice but to devise a plan without the meaningful input of Joel’s parents. Under these circumstances, the parents’ intransigence to block an IEP that yields a result contrary to the one they seek does not amount to a violation of

the procedural requirements of the IDEA. To hold otherwise would allow parents to hold school districts hostage during the IEP meetings until the IEP yields the placement determination they desire.

Predetermination?

Recognizing that we owe great deference to the ALJ's factual findings, we find that the IDEA actually required that the school district assume public placement for Joel. Thus, the school district did not need to consider private placement once it determined that public placement was appropriate.

Comment: Reading this case, it is difficult to escape the conclusion that the court simply did not approve of the way the parents pursued this matter. The court clearly believed that the parents were unreasonable and intransigent.

There was a dissenting opinion. That judge relied on the factual findings of the ALJ and concluded they were not clearly erroneous. Those findings were 1) that the district had its mind made up about placement before the IEP meeting; and 2) that most of the IEP goals were added to the IEP after the meeting, thus depriving the parents of meaningful input.

Horen v. Board of Education of City of Toledo Public School District, 53 IDELR 79; 655 F.Supp.2d 794 (N.D.Ohio 2009)

The parties had reached an impasse and no IEP was developed for the student because the parents insisted on tape recording IEP Team meetings and the district did not permit it. The district wanted its lawyer to attend the meetings, and the parent objected. The court upheld the school's position on both issues. The court cited an OSEP memorandum to the effect that "if a public agency has a policy that prohibits or limits the use of recording devices at IEP meetings that policy must provide for exceptions if they are necessary to ensure that the parent understands the IEP or the IEP process or to implement other parental rights guaranteed under Part B." The district did have a policy prohibiting tape recording, and the parents failed to show that they were entitled to an exception. As to the attorney: "Plaintiffs have no legal basis on which to refuse to participate in an IEP session simply because one of TPS's attorneys is present."

Drobnicki v. Poway USD, 53 IDELR 210 (9th Cir. 2009)

The District scheduled the IEP meeting without asking the parents about their availability. The parents informed the District that they were unavailable on the scheduled date and wanted to reschedule. The District did not contact the parents to arrange an alternative date; however, the District offered to let the parents participate by speakerphone. Whether the parents actually had a conflict does not matter, according to the Court. The Court found that the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time. Key Quote:

The use of [a phone conference] to ensure parent participation is available only “if neither parent can attend an IEP meeting.” The District’s procedural violation deprived the parents of the opportunity to participate in the IEP process and denied the student FAPE.

J.N. v. District of Columbia, 53 IDELR 326 (D.C. 2010)

The court held that the district denied the parent the opportunity to have meaningful participation at the IEP Team meeting by conducting the meeting without the parent and at a time the parent had objected to. The district sent three notices, proposing alternate dates, and received no response from the first two. So the third notice stated when the meeting would be held. The parent responded to the third notice with phone calls asking that the meeting be rescheduled, but the district did not do so. The federal district court pointed out that 1) the September 21 date was never agreed to; 2) there was no evidence that the parent could not be convinced to attend the meeting; and 3) the parent made “timely, diligent and reasonable efforts to reschedule” the meeting. The court thus concluded that the school had effectively eliminated the parent’s ability to participate. The court noted that this was a procedural error that “undermine[s] the very essence of the IDEA.”

J.G. v. Briarcliff Manor Union Free School District, 54 IDELR 20; 682 F.Supp.2d 387 (S.D.N.Y. 2010)

The parents were not denied the opportunity for meaningful participation, even though the school held a meeting without them. As soon as the school found out that the parents were dissatisfied with the proposed IEP the school attempted to set up an IEP Team meeting. The parents asked that the meeting be postponed, but the district was unwilling to do so due to the pending start of school and the requirement to have an IEP in place at that time, but the school offered to include the parents by telephone and to have another meeting in September. The court found that the school acted reasonably and did not deny the parents the opportunity to participate.

Comment: The court also noted that the parents had made the decision to put the child in private school prior to informing the school of the dissatisfaction with the proposed IEP. It is also interesting to note that the IEP in question was discussed at an IEP Team meeting attended by the parents on June 13, but the proposed written IEP was not actually developed at that time. It was done after the meeting and then sent to the parents on July 22. The court pointed out that “there is no legal authority requiring parental presence during the actual drafting of the written IEP document.”

K.L.A. v. Windham Southeast Supervisory Union, Dummerston School District, 54 IDELR 112 (2nd Cir. 2010) (Unpublished)

The parents claimed that they were excluded from discussions about their daughter’s placement. The Court explained that the term “educational placement” only encompasses the student’s placement on the LRE continuum. The IEP determined placement in a public high school’s life education program. The district had the exclusive right to decide the specific location of the student’s services. Key Quote:

We also remain unpersuaded by the parents' argument that they were not afforded the opportunity to weigh in on K.L.A.'s educational placement. The record amply reflects the tremendous amount of access and input the parents enjoyed throughout the IEP-development process. It also starkly demonstrates – as both the Hearing Officer and the district court found – that it was the parents themselves who, by categorically opposing any placement at BUHS ... and developing a completing IEP, rendered impossible a fully collaborative experience.

The parents also argued that the IEP meetings were procedurally defective on account of the absence of the student's regular education teacher at some of the IEP meetings. The Court found that the IDEA required at least one regular education teacher of the student be part of the IEP team, and that the regular education "shall, to the extent appropriate, participate in the review and revision of the IEP of the student." Key Quote:

Thus, the mere absence of a regular educator at any given IEP meeting is not a *per se* procedural violation. Rather, the inquiry is whether Mr. Achenbach had attended K.L.A.'s IEP meetings "to the extent appropriate." In concluding that Mr. Achenbach's participation was appropriate under the circumstances, we decline the parents' invitation to reduce the analysis to a strict counting exercise. Notwithstanding the fact that Mr. Achenbach appears to have attended more meetings than the singular meeting the parents would have this Court believe he attended, we do not find persuasive the parents' speculative argument that Mr. Achenbach's increased presence could have led to a different educational placement for K.L.A.

B.H. v. Joliet School District No. 86, 54 IDELR 121 (N.D.Ill. 2010)

The court held that the school district's refusal to hold an IEP Team meeting after school hours did not violate IDEA or Section 504. Key Quotes:

Regarding issue (d) [scheduling of IEP Team meeting], federal regulations clearly provide that IEP meetings are to be scheduled at a "*mutually* agreed on time and place." 34 CFR 300.322(a)(2) (emphasis added). The IHO correctly found that the concept of mutual agreement does not encompass one party's unilateral insistence that an IEP meeting be held at a particular time, especially when that time is after school hours.

The parties agree that District 86 refused to schedule an IEP meeting after school hours; however, 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.

B.P. v. Charlotte-Mecklenburg Board of Education, 54 IDELR 167 (W.D.N.C. 2009)

The court held that parents were entitled to tuition reimbursement for a school year due to the failure to come to closure on a definitive placement for the student. Despite the fact that there were seven IEP Team meetings during the school year, the district kept postponing a final decision about placement. Key Quotes:

The result of that meeting, the July 2004 IEP, called for B.P.'s placement in an Early Childhood Special Education setting five days per week with speech, physical, and occupational therapy services. This placement, however, was never implemented during the 2004-05 school year. In fact, no final placement decision was ever implemented during this school year, as the Team repeatedly agreed to defer making a final decision regarding placement while more data was gathered about B.P. and the types of services that he required. While CMS's efforts in this regard appear to be well-intentioned, the end result was that B.P. was never offered a definitive placement or program in a public school setting at any time during the school year. The Court agrees with the ALJ's assessment that CMS's failure to timely implement a specific public school placement for the 2004-05 school year denied B.P. a free appropriate public education in violation of the IDEA.

Comment: Some will classify this as an example of the maxim that "no good deed goes unpunished."

C.G. v. Five Town Community School District, 49 IDELR 93; 513 F.3d 279 (1st Cir. 2008)

The court denied a parental claim for reimbursement, largely on the basis of "obstructive conduct" by the parents. Key Quotes:

The district court supportably found that the parents' actions disrupted the IEP process, stalling its consummation and preventing the development of a final IEP. Moreover, the court found, the parents did so despite their knowledge that the School District planned to complete the unfinished portions with the parents' help. Tellingly, the court determined that the cause of the disruption was the parents' single-minded refusal to consider any placement other than a residential one. Such Boulwarism, whether or not well-intentioned, constitutes an unreasonable approach to the collaborative process envisioned by IDEA. Here, that attitude sufficed to undermine the process.

Comment: "Boulwarism" refers to Lemuel Boulware, former VP of GE who was known to present "take it or leave it" offers to the union during negotiations.

Jenkins v. Rock Hill Local School District, 49 IDELR 94; 513 F.3d 580 (6th Cir. 2008)

The Circuit Court reinstated a 1983 suit for retaliation against the superintendent. The parent alleged that the superintendent reported her to child welfare authorities, excluded the child from

school and refused to provide homebound tutoring, all in retaliation for the parent's letter to the local newspaper and complaints to school and other government officials. The court held that these activities were "protected speech" under the First Amendment and that the parent had alleged the elements of a legitimate claim of retaliation. The district was dismissed from the case as there was no evidence of a policy or custom of retaliation. Other claims asserted by the parent were rejected by the court. There was no invasion of privacy nor was there an infringement of the right to liberty in raising children.

C.H. v. Cape Henlopen School District, 54 IDELR 212 (3rd Cir. 2010)

The court held that the district's failure to have an IEP in place at the start of the school year was a harmless error. The court observed that the school demonstrated "consistent willingness" to evaluate the student and develop an IEP. The process was on track until the parents delayed the IEP Team meeting until after classes began. Key Quote:

Like the court in *Greenville*, [M.M. v. Greenville School District of Greenville County, 303 F.3d 523 (4th Cir. 2002)] we decline to hold a school district liable for procedural violations that are thrust upon it by uncooperative parents.

There was no evidence that the lack of an IEP on the first day of school caused a deprivation, especially since the parents had already enrolled the student in a private school. Key Quote:

While we do not sanction a school district's failure to provide an IEP for even a *de minimis* period, we decline to hold as a matter of law that any specific period of time without an IEP is a denial of FAPE in the absence of specific evidence of an educational deprivation.

Alternatively, the court held that equitable considerations barred the parents from recovery of tuition. Key Quotes:

The stay-put provision was never intended to suspend or otherwise frustrate the ongoing cooperation of parents and the school district to reach an amenable resolution of a disagreement over educational services.

The Parents here have disregarded their obligation to cooperate and assist in the formulation of an IEP, and failed to timely notify the District of their intent to seek private school tuition reimbursement.

The IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations.

T.S. v. Weast, 54 IDELR 249 (D.C.Md. 2010)

The court affirmed an ALJ ruling in favor of the school district. Parents claimed procedural errors, in part because of an IEP Team meeting held without them. The ALJ concluded that the

parents had “abandoned” the IEP process. The court came to much the same conclusion. Key Quote:

The Parents, however, refused to attend because [the school] did not give them a copy of [the school’s psychologist’s] review before the meeting. Although it was their right to refrain from attending, as the ALJ noted, the law does not require that evaluations be provided in advance. The Parents then postponed the next IEP team meeting which was to occur on July 25, 2007 and did not attend the meeting scheduled on August 14, 2007.

Finally, it was objectively unreasonable for the Parents to refuse to attend any of the meetings scheduled to review their son’s IEP before the 2007-08 school year....Whether the Parents’ behavior is termed “abandonment” or “unreasonable,” it is clear that they were not engaged with the IEP team during the summer or fall of 2007.

Compton Unified School District v. Addison, 54 IDELR 71; 598 F.3d 1181 (9th Cir. 2010)

This case involved a 9th grader who scored below the first percentile in standardized testing. She failed every academic subject in the fall of 10th grade. Teachers described the girl as “like a stick of furniture” in the classroom. According to the court, the girl “sometimes refuses to enter the classroom, colored with crayons at her desk, played with dolls in class, and urinated on herself in class.” But because the mother did not want the child “looked at” the district decided not to “push.” However, the school did refer the child to a third-party mental health counselor, who recommended testing for special education. Still, the school did not conduct an evaluation, instead, promoting the student to the 11th grade. When the parent sought a due process hearing, alleging that the district failed to “find” the child in a timely fashion, the district argued that the hearing officer had no jurisdiction. The school focused on the statement in the law that schools must give notice of any “proposal” or “refusal” to do certain things, such as evaluating a child. Likewise, a parent can get a due process hearing over any such “proposal” or “refusal.” So the school argued that it never “refused.” When the parent asked the school to conduct an evaluation, it promptly did so. The 9th Circuit ruled for the parents, noting that it would “avoid statutory interpretations which would produce absurd results.” The court quoted the dictionary and found that “refuse” means “to show or express an unwillingness to do....” and noted that the district’s “willful inaction in the face of numerous ‘red flags’ is more than sufficient to demonstrate its unwillingness and refusal to evaluate Addison.” One judge dissented, pointing out that this holding does not strengthen “the role and responsibility” of parents, as IDEA intends to do, but rather, it “weakens the parents’ role by casting responsibility to monitor and identify children’s development solely on to the shoulders of our school system.”

Comment: This case presents an interesting public policy discussion about the roles and responsibilities of parents vis a vis school districts. But for practical purposes, there are two important points here. First, watch for those “red flags.” Second, be prepared to “push” when necessary to meet the needs of the student.

S.J. v. Issaquah School District No. 411, 52 IDELR 153; 326 F.App'x. 423 (9th Cir. 2009)

The court affirmed decisions by the hearing officer and the district court in favor of the school, denying a claim for reimbursement. The parents argued that the IEP was fatally flawed because certain pages in it were left blank. The court brushed this off, noting a lack of evidence of harm or prejudice to the student from this omission. The request for reimbursement was denied due to, among other reasons, lack of notice, and failure to give the district an opportunity to address objections to the IEP. The court found no problem with a provision in the BIP that allowed the school to provide medication to the student at school. The court distinguished an earlier case on a similar issue (Valerie J. v. Derry Co-op School District, 771 F.Supp. 483 (D.N.H. 1991)) because the parents agreed to this provision, whereas in the New Hampshire case, the parents had not.

Comment: With regard to the blank pages on the current IEP the court made a surprising observation, noting that “prior IEPs prepared by the District included the requisite statements and S.J.’s teachers could refer to those statements.” It would not be a good idea for educators to infer from this comment that it is OK to rely on out-of-date IEPs. It is the current IEP that matters.

Wiles v. DOE Hawaii, 51 IDELR 212; 593 F.Supp.2d 1176 (D.C. Ha. 2008)

Special education cases rarely go to a jury, but this one did. The jury concluded that the Department of Education did not violate 504 by denying services to the student, or by retaliating against the parents. Key points: First, even though only 75% of the IEP was implemented, this was acceptable in light of the fact that the IEP called for 68.5 hours per week of skills training, an amount that the parent’s expert called “ridiculous.” Second, the jury was provided plenty of evidence of how caring and professional the staff members were. Third, the court cited evidence to the effect that the school may have spent from \$244,000 to \$270,000 annually on services to the student.

Lewellyn v. Sarasota County School Board, 53 IDELR 288 (M.D.Fla. 2009)

The court ruled in favor of the school district in a case involving the discipline of two students, but the most noteworthy aspect of the case was the court’s comments about the case in general:

Mrs. Lewellyn, the mother of the two disabled students at issue, filed a single-spaced 33-page affidavit detailing school yard squabbles, progress reports, and other accounts of day-to-day school activities. She feels that her children were bullied and unfairly treated by Defendant. She describes meetings that she had with teachers as well as her analysis of other student’s hand-written letters concerning her children.

The court is sensitive to Mrs. Lewellyn’s desire to protect her children and to provide them with every advantage in life. However, it is not this federal tribunal’s role to agonize over who pushed whom down in the sandbox. Neither is

it the Court's role to determine if certain referrals to the Principal's office were, indeed, warranted.