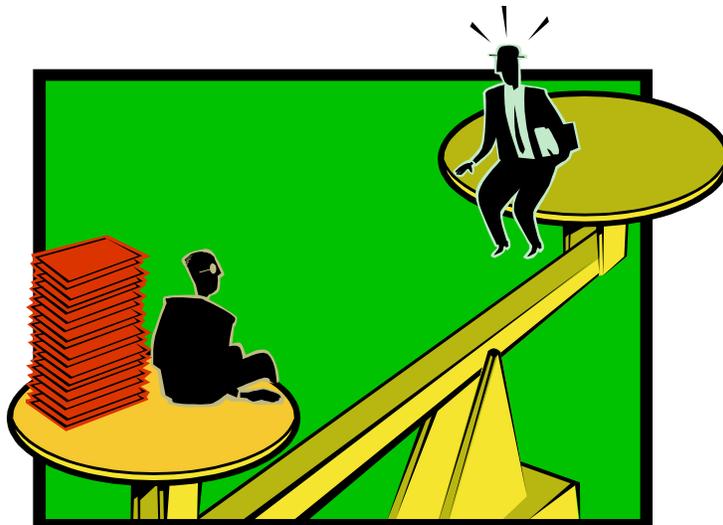


**SPECIAL EDUCATION LAW UPDATE:**  
**THE YEAR IN REVIEW**



**NEBRASKA/KANSAS REGIONAL SPECIAL EDUCATION CONFERENCE**

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**Julie J. Weatherly**  
**Resolutions in Special Education, Inc.**  
**6420 Tokeneak Trail**  
**Mobile, AL 36695**  
**(404) 791-2256**  
**[JJWEsq@aol.com](mailto:JJWEsq@aol.com)**

**Web site: [www.specialresolutions.com](http://www.specialresolutions.com)**

**&**

**The Weatherly Law Firm, LLP**  
**3414 Peachtree Rd., NE**  
**Suite 1550**  
**Atlanta, GA 30326**

## THE YEAR IN REVIEW

This year has already been an extremely active one in IDEA litigation! Below are summaries of some relevant court decisions issued thus far in 2008 and some agency opinions issued in 2007 but not reported until this year.

### DAMAGES AND LIABILITY

- A. Mark H. v. Lemahieu, 49 IDELR 91, 513 F.3d 922 (9<sup>th</sup> Cir. 2008). Although money damages are not available under the IDEA for allegations of a denial of FAPE, money damages may be sought under Section 504 for a denial of FAPE.
- B. K.F. v. Francis Howell R-III Sch. Dist., 49 IDELR 244, 2008 WL 723751 (E.D. Mo. 2008). Parents of an autistic student who was dismissed from school three hours earlier than nondisabled students have standing to sue for damages under Section 504 to compensate them for financial losses they incurred in caring for the student an additional three hours per week. In addition, parents were not required to exhaust administrative remedies because the shortened school day was not a decision that resulted from any student's IEP process and applied universally to all students placed in the program at issue.
- C. Robinson v. District of Columbia, 49 IDELR 222, 535 F.Supp.2d 38 (D. D.C. 2008). Denial of FAPE claims under Section 504 are dismissed because the complaint fails to suggest allegations of bad faith or gross misjudgment sufficient to support a Section 504 claim.
- D. Small v. Shelby County Schs., 49 IDELR 195 (Tenn. Ct. App. 2008). School district must pay \$130,000 (the original award was \$3 million) in hospital bills of a student with severe asthma because of its failure to provide notice of the student's medical condition to the PE teacher. The student's injury caused him to be hospitalized for 6 months and, where the district had a procedure for disseminating the medical concerns of students to all of a student's respective teachers and did not follow it, the district was liable. However, the parent was 20% responsible for the injury because she did not request an adapted PE program for the student.
- E. Ward v. Barnes, 49 IDELR 220, 545 F.Supp.2d 400 (D. N.J. 2008). A teenager with cerebral palsy who claims to have been assaulted by fellow students in his high school gym class at the direction of his teacher may pursue a negligence claim against the school district. Under New Jersey law, employers whose employees have contact with the public must exercise reasonable care in the selection and retention of employees. The student sufficiently alleged a violation of this duty of care as he argued that the school district failed to fire the teacher after another incident involving physical confrontation with a student.

- F. W.E.T. v. Mitchell, 49 IDELR 130 (M.D. N.C. 2008). Although educators can use reasonable force to restrain or correct students and maintain order, 10-year-old student with severe asthma, partial blindness and CP has sufficiently plead a cause of action under Section 1983 for extensive mental and emotional damages. Student's special education teacher is not entitled to qualified immunity where it is alleged that she sharply rebuked the student for talking to a classmate, taped his mouth shut with masking tape and ripped it off when he tried to speak to her through the tape. A reasonable educator would have known that forcefully taping the mouth of a child with asthma amounted to a constitutional violation.

### **RETALIATION/DISABILITY HARASSMENT**

- A. Jenkins v. Rock Hill Local Sch. Dist., 49 IDELR 94, 513 F.3d 580 (6<sup>th</sup> Cir. 2008). Superintendent's alleged decisions to exclude the student from school, report the parent to child protective services and to refuse to provide home-based tutoring were all intended to prevent the parent from exercising free speech. In addition, his purported admission that the parent's complaints prompted him to report to child welfare authorities established a causal connection between the parent's complaints about the child's educational program and the superintendent's alleged misconduct. Thus, the parent established all elements of retaliation and may pursue her Section 1983 claim. However, the school district itself can not be held liable for the superintendent's purported actions as there is no evidence that a government custom or policy led to any adverse action against the parent.
- B. S.S. v. Eastern Kentucky University, 50 IDELR 91 (6<sup>th</sup> Cir. 2008). For a finding of liability for student-on-student harassment, it is required that 1) the student is an individual with a disability; 2) he was harassed based on his disability; 3) the harassment "was sufficiently severe or pervasive;" 4) the school agency knew of the harassment; and 5) the school was deliberately indifferent to the harassment. In this case, evidence of the LEA's actions in response to the harassment indicated that the allegations were investigated and that the students involved were disciplined; that interviews were conducted; that the student was monitored and separated from his harassers; that mediation sessions were held; that the LEA communicated with the parents; and that training was provided to the student body about name-calling. On that basis, proof was lacking as to what the LEA could have or should have done differently in order to bring the harassment to a stop.
- C. Herring v. Chichester Sch. Dist., 49 IDELR 186, 2008 WL 436910 (E.D. Pa. 2008). Attorney who represents students at IEP meetings and in due process hearings has made sufficient allegations of retaliation to proceed with her Section 504 and Section 1983 claims. According to the amended complaint, the attorney's actions prompted the District to act to attempt to interfere with her advocacy efforts. Specifically, she alleged that the day after the District learned that she would be filing more complaints for due process, the District sent her a trespass notice that she would be considered a trespasser anytime she entered the

District's property without its prior approval. When she appeared at an IEP meeting later, the District called the police to issue trespass citations to the attorney. Therefore, the District's motion to dismiss the case is denied.

### **USE OF AVERSIVE INTERVENTIONS**

- A. Alleyne v. New York State Educ. Dept., 49 IDELR 149, 516 F.3d 96 (2d Cir. 2008). The Second Circuit vacated an injunction issued by the district court and remanded the case for the district court to make specific factual findings regarding the need for injunctive relief. As a result, a Massachusetts residential facility must comply with a New York regulation, at least for now, that restricts the use of aversive interventions on students with disabilities. The district court must make findings that there will be irreparable harm to the students if the behavioral treatments are interrupted and their ultimate likelihood of success on the merits of the case.

### **CHILD-FIND/EVALUATION OBLIGATIONS**

- A. Hawkins v. District of Columbia, 49 IDELR 213, 539 F.Supp.2d 108 (D. D.C. 2008). Where district made no effort to locate a child referred by the Head Start program, even after being ordered to do so by a hearing officer, the district denied FAPE to the child. "The sad truth is that if [the district] had complied with the July 2006 [administrative order] by contacting [the parent's] counsel to coordinate a meeting, it is entirely possible—indeed likely—that [the child] could have been 'located' then." The child find provision applies to all children, regardless of whether they are enrolled in school. The parent's failure to enroll the child in his neighborhood school did not excuse the district's failure to comply with child find obligations.
- B. Los Angeles Unif. Sch. Dist. v. D.L., 49 IDELR 252, 548 F.Supp.2d 815 (C.D. Ca. 2008). Although the LAUSD did not conduct its own evaluation of the student before he moved to another district and, therefore, was not required to pay for an IEE conducted by the new school district on that basis, LAUSD is still ordered to fund the evaluation conducted by the new school district. This is so based upon the fact that the ALJ found it significant that between October 17 and 25, 2005, the student was disciplined by his teacher on 4 occasions and her notes show that he engaged in significant disruptive behavior, including roaming the playground, falling out of his chair, making noise, failing to follow directions, walking on tables, and tearing up other students' work. Although the court did not reach the legal issue of whether LAUSD was "duty-bound" to assess the student upon the parent's request, the parties have not challenged the factual findings of the ALJ. Based on the facts pertaining to behavior while attending school at LAUSD, the repeated requests of his mother for an assessment, his diagnosis of ADD, and the new school district's determination that the student should be assessed, it appears at least arguable that LAUSD should have performed an assessment while he was a student there. Thus, LAUSD must make

arrangements for payment of the assessment done after the student moved to the new school district.

- C. N.G. v. District of Columbia, 50 IDELR 7 (D. D.C. 2008). Where student exhibited at least two of the five characteristics of SED (pervasive depression and inappropriate types of behaviors), her academic performance was adversely affected as a result, and DCPS knew it, the school district should have evaluated her, particularly after being informed of her ADHD diagnosis. In addition, she failed four of her seven classes when she had previously been an A/B student. In addition, based upon the evidence, DCPS improperly found the student ineligible for services. Therefore, the parents are entitled to private school tuition reimbursement.
- D. Strock v. Indep. Sch. Dist. No. 281, 49 IDELR 273, 2008 WL 782346 (D. Minn. 2008). The mere existence of ADHD does not demand special education services. When the student actually completed required work, he received average or above-average grades. “Children having ADHD who graduate with no special education or any §504 accommodation are commonplace.” The fact that the student was required to take remedial courses when beginning at the community college is “neither unusual or evidence of ‘unsuccessful transition,’ an entirely undefined term.”
- E. Richardson v. District of Columbia, 50 IDELR 6, 541 F.Supp.2d 346 (D. D.C. 2008). Where district made repeated efforts to obtain the student’s psychiatric records from this private psychiatrist, the district had no obligation to conduct its own evaluation when the information it needed to determine eligibility was available from the private psychiatrist. The parent’s refusal to release the student’s existing psychiatric records amounted to a failure to cooperate with the IEP process. In addition, there was no fault in the district’s decision that the student was not eligible under the IDEA, absent the private evaluative information.

### **ELIGIBILITY/RTI ISSUES**

- A. Jaime S. v. Milwaukee Pub. Schs., 2008 WL 2340362 (E.D. Wis. 2008). On June 6, 2008, the court approved a settlement agreement between the plaintiff class and the State Department of Public Instruction that calls for, among other things, that the School District will refer 95% of students in kindergarten through fifth grade who are suspended 10 or more days during a school year and 95% of students in sixth through twelfth grades who are suspended 20 days or more in a school year to a “system of early intervention services...designed to address the students’ behavior issues that resulted in suspensions and which shall include the possibility of referral of the student for an evaluation to determine if the student is a student with a disability.” (Note: On August 15, 2008, the court awarded attorneys’ fees to the parents of \$934,000).

- B. Letter to Zirkel, 50 IDELR 49 (OSEP 2008). When asked to clarify whether an SLD evaluation team must consider continuous progress monitoring, regardless of whether the approach used is RTI, OSEP responded that the eligibility group must consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child’s parents, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. “The regulation does not use the term ‘continuous progress monitoring.’” “A critical hallmark of appropriate instruction is that data documenting a child’s progress are systematically collected and analyzed and that parents are kept informed of the child’s progress.’ We believe that this information is necessary to ensure that a child’s underachievement is not due to lack of appropriate instruction.”
- C. M.P. v. Santa Monica-Malibu Unif. Sch. Dist., 50 IDELR 220, 2008 WL 2783194 (C.D. Cal. 2008). Where everyone agreed that the student could perform well academically when motivated, the “Court agrees that the evidence shows that M.P. is capable of completing independent school work when motivated, but the evidence also shows that because of his ADHD he is not capable, without help, of being motivated. This is the very definition of a discrepancy between ability and achievement.” Therefore, the student has demonstrated the requisite severe discrepancy in ability and achievement to become eligible for services as an SLD student.
- D. Letter to Brumbaugh, 50 IDELR 107 (OSEP 2008). Under the IDEA, a child cannot be considered an eligible child with a disability solely because the child has a record of an impairment. “Record of impairment,” which is used in Section 504 and the ADA is not a term used in IDEA’s Part B regulations. Rather, under Part B, the child’s current need for special education and related services is the relevant consideration.

### **STATE RESPONSIBILITY**

- A. Orange County Dept. of Educ. v. A.S., 50 IDELR 222 (C.D. Cal. 2008). In a situation where state law does not designate an entity responsible for “parentless dependents” placed in out-of-state residential treatment centers by a local health care agency, the California Department of Education must retain responsibility for implementing and funding the IEP and program for the student.

### **RESIDENTIAL/PRIVATE PLACEMENT**

- A. C.G. v. Five Town Community Sch. Dist., 49 IDELR 93, 513 F.3d 279 (1<sup>st</sup> Cir. 2008). Where the parents made a unilateral choice to abandon the collaborative IEP process without allowing the process to run its course and for the school district to finalize a proposed IEP, they are precluded from obtaining reimbursement for the costs of the Chamberlain School placement. The district

was continuing its efforts to develop an IEP when the parents filed their due process complaint. In addition, the IEP team was continuing to work with an independent evaluator to develop a crisis plan and other positive behavioral supports for the student.

- B. Forest Grove Sch. Dist. v. T.A., 50 IDELR 1, 523 F.3d 1078 (9<sup>th</sup> Cir. 2008). Agreeing with the Second Circuit, a student is not barred as a matter of law from receiving private school tuition or reimbursement, even though the student has never received special education and related services from the school district. The 1997 IDEA provisions do not create a categorical bar to reimbursement of private school tuition for students who have not “previously received special education and related services.” Case is remanded to district court to utilize correct standard and consider equitable factors to determine whether tuition reimbursement is warranted.
- C. Fairfax County Sch. Bd. v. Knight, 49 IDELR 122, 261 Fed.Appx. 606 (4<sup>th</sup> Cir. 2008). The district’s experts, who testified that the school district had offered FAPE to a ninth-grader with dyslexia and other learning disabilities, were entitled to more deference. They had extensive experience in special education, as well as post-baccalaureate degrees in the field, whereas the parents’ experts did not have degrees in reading, education or special education. Thus, reimbursement for private schooling was not warranted.
- D. Deal v. Hamilton County Dept. of Educ., 49 IDELR 123, 258 Fed.Appx. 863, 2008 WL 77788 (6<sup>th</sup> Cir. 2008). Based upon equitable considerations and procedural irregularities, the district court’s decision is affirmed that the District must pay only half the cost of in-home programming because the District Court concluded that the District’s proposed eclectic program was substantively appropriate. There is no reason to disturb the District Court’s conclusions.
- E. Draper v. Atlanta Indep. Sch. Sys., 49 IDELR 211, 518 F.3d 1275 (11<sup>th</sup> Cir. 2008). The district court did not abuse its discretion in ordering the School District to pay up to \$38,000 per year for private placement as a remedy. The relief awarded was not disproportionate to the IDEA violations, as the district failed to identify the student’s SLD for five years and transferred him from a self-contained class to a regular education program without considering his severe reading deficiencies. In addition, the District continued to use an ineffective reading program for three years, despite the student’s clear lack of progress.
- F. Richardson Indep. Sch. Dist. v. Michael Z., 50 IDELR 69 (N.D. Tex. 2008). In a case where residential placement at the Texas NeuroRehab Center has been found necessary for the student to receive FAPE, the parents are entitled to reimbursement for room and board. In addition, they are entitled to reimbursement for comprehensive therapy services, including individual, family and group psychological therapy, and occupational, recreational, speech and other therapies received at the facility because student’s psychiatric stabilization is a

necessary part of her educational program. Without diagnosis, evaluation, counseling and monitoring, the educational process could not take place. Similarly, nursing services were a part of an integrated approach to managing the student's psychiatric and behavioral problems and improving her classroom function. Finally, the neurological diagnostics performed enabled more precise diagnosis of the student's behavioral and emotional disorders and enabled the facility to develop an effective treatment regimen to improve functioning in the classroom. However, the costs of blood diagnostics to assess the potential side effects of drugs are not reimbursable.

- G. McComish v. Underwood Pub. Schs., 49 IDELR 215, 2008 WL 660113 (D. N.D. 2008). Because the school district's continuous efforts to hire a certified vision impaired instructor had been unsuccessful, the district could not meet the student's needs in any of its high schools. In addition, other districts in the State that could meet the student's needs did not have space available in their programs. Thus, residential placement of the student at the South Dakota School for the Blind is appropriate.
- H. J.S. v. South Orange/Maplewood Bd. of Educ., 49 IDELR 285 (D. N.J. 2008). Previous receipt of services from the school district is not required for the court to order private school tuition. The parents need only prove that the school district denied FAPE. Where the parents gave the district a private psychological report and the district waited a full year before it determined that the student was eligible for special education, the school district denied FAPE.
- I. Green v. New York City Dept. of Educ., 50 IDELR 40, 2008 WL 919609 (S.D. N.Y. 2008). Parent did not meet the burden of proving that the private placement unilaterally chosen for her daughter, who is SED, is appropriate. Although it was agreed that the student needed a "full-time residential treatment program," the parent's unilateral choice did not specialize in meeting the needs of students with IEPs, did not provide specially-designed instruction or programs and did not provide the student with any clinical or psychological services to address her social and emotional needs.
- J. Mr. and Mrs. M. v. Ridgefield Bd. of Educ., 50 IDELR 10, 2008 WL 926518 (D. Conn. 2008). Though the parents did not act unreasonably, equitable factors counseled in favor of reducing the amount of reimbursement for private school tuition. While it was a procedural violation to proceed with the IEP meeting without the parents, the hearing officer found that they would not have agreed to any IEP that did not include a placement outside the public schools anyway. Therefore, the parents are entitled to ½ of the amount of tuition they are seeking.

### **PARENTALLY-PLACED PRIVATE SCHOOL STUDENTS**

- A. Letter to Menelson, 49 IDELR 198 (OSEP 2007). While districts cannot refuse to consider the needs of parentally placed private school students with disabilities,

they can, after a meaningful consultation, decide not to serve those students. LEAs need to develop services plans only for those private school students whom they chose to serve.

- B. Letter to Chapman, 49 IDELR 163 (OSEP 2007). Because the IDEA regulations define elementary and secondary schools to include only nonprofit institutions, students who attend for-profit institutions do not qualify as parentally placed private school students with disabilities. Thus, they would not be included in the proportionate share calculation or be eligible for equitable services under IDEA. However, states still have an obligation to identify all children who may have qualifying disabilities, including those who attend for-profit private schools.
- C. Letter to Warne, 107 LRP 45666 (OSEP 2007). Because most states assign the responsibility for making FAPE available to the LEA in which the child's parents reside, if the parents of the privately-placed child wish to have FAPE made available, they would need to contact the LEA where they reside. Once the parents make clear their intention to keep the child in the private school located in another LEA, the LEA of residence need not provide FAPE to that child. The school district where the private school is located is not responsible for making FAPE available to a child whose parents reside in another school district, but must include the child in the population of children considered for equitable services. The LEA where the private school is located must develop and implement a services plan for a child who has been designated to receive special education and related services from the LEA.
- D. Letter to Mittnacht, 48 IDELR 194 (OSEP 2007). As to the State of Massachusetts issuing a document that advised LEAs to refer nonresident private school districts to their home districts for special education evaluations, OSEP opined that such language appears to suggest that Massachusetts school districts have no child find responsibility for out-of-state residents attending private schools located in school districts in Massachusetts. Thus, the State has 60 days to clarify its stance on the identification and evaluation of private school students in this regard.
- E. Board of Educ. of the Appoquinimink Sch. Dist. v. Johnson, 50 IDELR 33, 543 F.Supp.2d 351 (D. Del. 2008). Administrative panel's decision that the school district abused its discretion when it refused to provide a full-time ASL interpreter to a deaf student as a private Episcopal School is reversed. The decision was erroneous as a matter of law because IDEA imposes no obligation on the district to provide related services to a parentally-placed private school student. In addition, evidence indicated that the district's proportional share allocated for private school students was \$3,639.00 and the cost for the interpreter was over \$37,000 per year.

## **PROCEDURAL VIOLATIONS/SAFEGUARDS**

- A. N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241 (9<sup>th</sup> Cir. 2008). Where the parent's had disclosed that the student had been privately diagnosed with autism but school district suggested that the parents arrange for an evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.
- B. L.M. v. Capistrano Unif. Sch. Dist., 50 IDELR 181 (9<sup>th</sup> Cir. 2008). The fact that the school district allowed an independent psychologist to observe an autistic child's proposed placement for only 20 minutes did not amount to a procedural violation that is a denial of FAPE. Even though California's Code requires a district to give "an equivalent opportunity" for a parent's expert to observe a proposed placement, the limitation did not prevent the psychologist from forming an opinion and testifying about the appropriateness of the placement.
- C. Systema v. Academy Sch. Dist. No. 20, 50 IDELR 213 (10<sup>th</sup> Cir. 2008). A parents' refusal to participate in the IEP process effectively excuses any procedural defects in the IEP's development, including the failure to have a final IEP in place by the beginning of the school year. The parents had withdrawn from the IEP process when they learned that the district intended to propose services in an integrated preschool environment in spite of the fact that the district had not yet formalized its offer. Case remanded to consider whether the district's proposed draft IEP was appropriate but no verbal offers are to be considered.
- D. Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist., 49 IDELR 180, 518 F.3d 18 (1<sup>st</sup> Cir. 2008). The IDEA does not necessarily require a stand-alone transition plan as part of an IEP. Rather, it requires that IEPs contain statements of transition services "under the applicable components of the child's IEP." The transition services were integrated throughout the IEP's various components. With respect to the argument regarding a missing BIP, the IDEA does not require, necessarily, a BIP as part of an IEP. Finally, the failure to have a signed IEP in place by the beginning of the school year is "fairly laid at the parents' doorstep," because she would not identify her specific concerns with the IEP.
- E. B.V. v. Education Dept. of the State of Hawaii, 49 IDELR 151, 514 F.3d 1384 (9<sup>th</sup> Cir. 2008). A teacher's "misjudgment" does not constitute a denial of FAPE or dictate a change in personnel. Although the District Court acknowledged that the teacher was unprofessional when she wrote the student's name on the blackboard every time he misbehaved, the teacher was fully qualified to implement IEPs for students with Asperger Syndrome and she had an excellent reputation. "The court is unwilling to conclude that one misjudgment on the part of an otherwise outstanding teacher completely undermines an IEP." Thus, the denial of the parent's request for a new teacher was not a denial of FAPE.

- F. Garcia v. Board of Educ. of Albuquerque Pub. Schs., 49 IDELR 241, 520 F.3d 1116 (10<sup>th</sup> Cir. 2008). Although the school district committed some procedural violations, including failing to have and implement a current IEP at the beginning of the 2003 school year, student was not denied access to FAPE because the record failed to show that the irregularities would have made any difference to, or imposed any harm on, the student. This is because she was significantly truant from school, often skipped classes and used drugs and alcohol.
- G. Melodee H. v. Dept. of Educ., 50 IDELR 94, 2008 WL 2051757 (D. Haw. 2008). Where the school district had no one at the pivotal IEP meeting that knew the child, except for the parents; there was no discussion of where the student was going to school; and the parents were not given any information about the proposed elementary school, these were sufficient procedural violations to find a denial of FAPE. The ALJ also erred in discounting the uncontroverted testimony regarding an appropriate setting for the student provided by the parents' expert, who testified about the harmful effect on the child if placed at the elementary school. In fact, the district erred in not inviting this expert to the IEP meeting, where she could have given the IEP Team psychological information relevant to determining the appropriate physical location of the student's placement.
- H. S.B. v. Pomona Unified Sch. Dist., 50 IDELR 72, 2008 WL 1766953 (C.D. Cal. 2008). The district's failure to include the student's private preschool teacher (the regular education teacher) was a procedural violation that resulted in a loss of educational opportunity for the student. Had the teacher been at the important IEP meeting, she could have shared her observations of the student's abilities and special needs from the year that the student was in her classroom. "At the very least, she could have elaborated on what she had told the transdisciplinary assessment team." A preponderance of the evidence shows that the teacher's participation at the November 2004 IEP meeting, as mandated by the IDEA, "would have assisted the IEP team in devising a program that was better tailored to Student's abilities and special needs. Accordingly, the District's procedural violation of the IDEA resulted in Student's loss of an educational opportunity and his denial of FAPE."
- I. A.K. v. Alexandria City Sch. Bd., 50 IDELR 13, 544 F.Supp.2d 487 (E.D. Va. 2008). On remand from the 4<sup>th</sup> Circuit and with the directive that the school district had violated FAPE by not identifying a specific private residential school in the IEP, the parents' choice was an appropriate placement. Thus, parents are entitled to reimbursement for the cost of the private school for the periods of time that the IEP did not designate the particular private school for the student.
- J. J.R. v. Sylvan Union Sch. Dist., 49 IDELR 253, 2008 WL 682595 (E.D. Cal. 2008). Fact that the hearing transcript was incomplete and missing the testimony of two of the District's four "expert" witnesses requires a remand to the administrative law judge to retry the third day of the hearing and issue a new decision. The lack of a complete transcript renders the court unable to assess

whether the administrative decision was supported by a preponderance of the evidence.

- K. Jalloh v. District of Columbia, 49 IDELR 190, 535 F.Supp.2d 13 (D. D.C. 2008). Although the District did not file a sufficient response to the parents' complaint, this does not amount to a denial of FAPE unless it affected the student's substantive right to FAPE or the parents' right to participate in the IEP process. Since there is no evidence that the parent or the student suffered prejudice as a result of the insufficient response to the parents' due process complaint, the hearing officer did not err in denying the parents' request for a default judgment.
- L. C.H. v. The Cape Henlopen Sch. Dist., 50 IDELR 217 (D. Del. 2008). Where an IEP was not in place by the first day of the beginning of the school year, this was at least in part the fault of the student's mother. Had the IEP Team and the student's mother met on September 11, an IEP could have been in place less than a week after classes began. "While the court does not recommend having a disabled child attend school without an IEP, it finds the week delay to be a minor procedural error. Consequently, the absence of an IEP on the first day of school does not equate to a denial of FAPE."
- M. Letter to Boswell, 49 IDELR 196 (OSEP 2007). While written translations of IEP documents may not be a *requirement* under the IDEA, they could provide significant benefits to districts that choose to provide them. IEP documents translated into a parent's native language could help a district prove parental consent for evaluation or services if the issue were ever to arise. For parents who read in their native language, providing them with written translations of the IEP documents may be one way for a school district to show that the parent has been fully informed of their child's educational program. If, however, the parents are unable to read in their native language, written translations may not show that the parent was fully informed. In those instances, the school district should ensure that there is another mechanism in place to make certain that these parents are fully informed of all relevant information about the activity to which they are consenting.
- N. Letter to Connelly, 49 IDELR 135 (OSEP 2007). The expiration of the appeals timeline on a parent's claim does not abrogate the State's requirement to provide a verbatim record of the due process hearing to the parent.
- O. Letter to Maldonado, 49 IDELR 257 (OSEP 2007). The IDEA does not entitle parents to both a written and electronic transcript of a due process hearing and agencies are only required to provide one verbatim record for each hearing. Once the parents have requested either a written or electronic verbatim record, there is no obligation to provide a second copy but the agency can choose to provide the second copy, either without charge or for a reasonable fee.

## **PARENT CONSENT**

- A. Letter to Combs, 49 IDELR 107 (OSEP 2007). The U.S. DOE intends to propose regulations to permit parents who previously consented to the initiation of special education services, to withdraw their consent for their child to receive, or continue to receive, special education services. This would preclude a public agency from using due process procedures to override a parent's revocation of consent. Because this is a change in the Department's position, we will provide the public the opportunity to comment. Until the final regulations are published, there would be no bar to a public agency using due process procedures to override a parent's revocation of consent.

As promised, the U.S. Department of Education issued new proposed regulations on May 13, 2008. In relevant part, these proposed regulations provide as follows: Proposed regulation § 300.9 adds that:

- (3) If the parents revoke consent for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

In addition, proposed regulation § 300.300 adds to parental consent requirements by providing that:

- (4) If at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent for the continued provision of special education and related services, the public agency—
- (i) May not continue to provide special education and related services to the child;
  - (ii) May not use the procedures in subpart E (mediation/due process) in order to obtain agreement or a ruling that the services may be provided to the child;
  - (iii) Will not be considered to be in violation of the requirement to make available FAPE to the child because of the failure to provide the child with further special education and related services; and
  - (iv) Is not required to convene an IEP Team meeting or develop an IEP under [the regulations] for the child for further provision of special education and related services.

## EVALUATIONS/IEE'S

- A. Letter to Sarzynski, 49 IDELR 228 (OSEP 2007). As to whether evaluations of student progress are “evaluations” requiring consent, OSEP responds that evaluations of student progress occur as a regular part of instruction for all students in all schools. If such evaluations are designed to assess whether the child has mastered the information in, for example, chapter 10 of the social studies text, and are the same or similar to such evaluations for all children studying chapter 10, parental consent would not be required for such an evaluation. If, however, the evaluation specific to an individual child is “crucial to determining a child’s continuing eligibility for services or changes in those services,” such evaluations would require parental consent.
- B. Letter to Christiansen, 48 IDELR 161 (OSEP 2007). If an FBA is being conducted for the purpose of determining whether the positive behavioral interventions and supports set out in the current IEP for a particular child with a disability would be effective in enabling the child to make progress toward the child’s IEP goals/objectives, or to determine whether the behavioral component of the child’s IEP would need to be revised, OSEP believes that the FBA would be a reevaluation. However, if the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole, parental consent would generally not be applicable to such an FBA because it would not be focused on the educational and behavioral needs of an individual child.
- C. Harris v. District of Columbia, 50 IDELR 194, 561 F.Supp.2d 63 (D. D.C. 2008). For purposes of seeking an IEE, a functional behavioral assessment is an educational evaluation under IDEA and the parent can seek an independent FBA if she disagrees with one conducted by the school district. “The FBA is essential to addressing a child’s behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.” In addition, failure to act on a request for an IEE is “certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress’ objectives in enacting the IDEA....D.H. has languished for over two years with an IEP that may not be sufficiently tailored to her special needs. The intransigence of DCPS as exhibited in its failure to respond quickly to plaintiff’s simple request has certainly compromised the effectiveness of the IDEA as applied to D.H. and it thereby constitutes a deprivation of FAPE.”
- D. School Bd. of Lee County v. Andrews, 49 IDELR 251, 2008 WL 687259 (M.D. Fla. 2008). Parent’s letter simply requesting “independent evaluations,” without specifying what evaluations were being sought was too vague to trigger any obligation concerning an IEE by the School Board. The School Board’s request for clarification and asking parent’s counsel to specify the evaluations being requested was both reasonable and necessary and not a procedural violation. The Court also rejects the ALJ’s view that a mere request for an IEE triggers the right to have the School Board comply with the request or seek a due process hearing.

Rather, if the School Board does not comply with the request, the burden is on the parents to present a complaint and to request a due process hearing.

- E. Letter to LoDolce, 50 IDELR 106 (OSEP 2007). A school district does not have the right to dictate policies to independent educational evaluators that restrict the use of age and grade level scores in their reports because, in some cases and depending on a child's individual needs, it may be necessary for an evaluator to conduct an assessment that includes age and grade level scores in order to gather relevant information about the child that may assist in determining the content of the child's IEP, including information related to enabling the child to participate in the general education curriculum. Because a public agency cannot prohibit its own evaluators from including age and grade level scores in evaluation reports, it cannot prohibit independent evaluators from doing so. Similarly, if a public agency prohibits its own evaluators from making recommendations pertaining to specific methodologies and/or use of materials, it could preclude independent evaluators from doing so.

#### **STAY-PUT/CURRENT PLACEMENT**

- A. P.R. v. Roxbury Township Bd. of Educ., 49 IDELR 155 (D. N.J. 2008). Where hearing officer ruled in favor of parents' desired private school placement, the private school placement is the "stay-put" placement and continuation there must be funded by the school district pending resolution of the dispute over the recently proposed IEP.
- B. Letter to Watson, 48 IDELR 284 (OSEP 2007). School districts must timely review all IEPs even though they are being challenged in administrative or judicial proceedings. Nothing in the IDEA relieves districts of the duty to convene an IEP team "not less than annually" and to revise the IEP as needed, including review and revision of the child's present levels and modification of annual goals, if appropriate.

#### **COMPENSATORY EDUCATION AND OTHER REMEDIES**

- A. Friendship Edison Pub. Charter Sch. v. Nesbitt, 49 IDELR 159, 532 F.Supp.2d 121 (D. D.C. 2008). Hearing officer's compensatory education award of 3,300 hours of tutoring that was based on a calculation of 27.5 hours per week for 40 weeks over three years can not be affirmed. The hearing officer's order lacked any explanation or factual support for this formula-based award.
- B. Hills v. Lamar Co. Sch. Dist., 49 IDELR 188, 2008 WL 427775 (S.D. Miss. 2008). The adult student's request for a "true and rightful transcript and accompanying certificate of graduation" is not an appropriate request under the IDEA. The fact that he simply desires his grades changed and to be given a diploma is not a remedy available under the IDEA, particularly where he

voluntarily quit school mid-way through his Senior year because he “just got sick of it. I didn’t want to go. I hated it” and school was not “fun” anymore.

- C. Damian J. v. School Dist. of Philadelphia, 49 IDELR 161, 2008 WL 191176 (E.D. Pa. 2008). Full days of compensatory education ordered for the time that student was under the instruction of two untrained and unqualified teachers. In addition to being unqualified, the teachers obviously lacked training under the IDEA, its requirements, and how to implement the student’s IEP.
- D. Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6, 49 IDELR 281, 538 F.Supp.2d 298 (D. Me. 2008). There can be a compensatory education remedy when a school violates the statutory “stay-put” requirement, even though it otherwise provided FAPE to the student. The case is remanded to the state to determine the proper type and amount of compensatory education.
- E. Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland, 50 IDELR 134, 534 F.Supp.2d 109 (D. D.C. 2008). After being remanded to the hearing officer to reconsider a compensatory education award of 375 hours for an explanation as to why the child required these hours, the award based on an hour-for-hour approach was not necessarily invalid. On remand, the hearing officer conducted a fact-specific inquiry and tailed the award to the student’s individual needs by taking into account the results of the Qualitative Reading Inventory, 4<sup>th</sup> Edition, and the recommendations of the Sylvan Learning Center for the provision of tutoring services.
- F. L.J. v. Audubon Bd. of Educ., 49 IDELR 184 (D. N.J. 2008). Parents’ request to fine the school district \$10,000 per day and to incarcerate the district’s Superintendent is denied. However, a fine of \$250 per day was appropriate for each day of noncompliance and failure to provide ordered services to an autistic child.

### **THE FAPE STANDARD**

- A. Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist., 49 IDELR 180, 518 F.3d 18 (1<sup>st</sup> Cir. 2008). The parents’ assertion that the 1997 IDEA raised the bar for the provision of IEP transition services and directs that those services must result in actual and substantial progress toward integrating disabled children into society is rejected. The Court refused to defenestrate the Rowley standard for FAPE.
- B. Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6, 49 IDELR 281, 538 F.Supp.2d 298 (D. Me. 2008). The parents’ argument that the 2004 IDEA amendments increased the substantive goals for the education of disabled students (namely in the field of outcome-oriented academic and transition services) so that the goals now go beyond simply opening the door to public education is rejected. Given the ubiquity of Rowley in the context of IDEA proceedings, one would expect

Congress (or the Department of Education) to speak clearly if the intent were to supersede it.

- C. Joshua A. v. Rocklin Unif. Sch. Dist., 49 IDELR 249, 2008 WL 906243 (E.D. Cal. 2008). The school district is not required to develop an ABA-based program for an autistic child to comply with the 2004 IDEA’s “peer-reviewed research” provision. Rather, its proposed eclectic methodology would provide educational benefit to the student. “It does not appear that Congress intended that the service with the greatest body of research be used in order to provide FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE.” If Congress intended to modify the Rowley standard, it would have said so.

### **MEANINGFUL BENEFIT**

- A. Ringwood Bd. of Educ. v. K.H.J., 49 IDELR 63, 258 Fed. Appx. 399 (3d Cir. 2008). Where it is undisputed that student has “above average” intelligence and ALJ made a factual finding that student had the “potential of performing *at least* in the average grade level in reading,” this hardly qualifies as “maximizing” the child’s potential. When students display considerable intellectual potential, IDEA requires a great deal more than negligible benefit. Because the student made only “negligible process” in the school district’s program was still one to two years behind grade level, the ALJ properly concluded that the Board had failed to provide FAPE.
- B. Thompson R2-J Sch. Dist. v. Luke P., 50 IDELR 212 (10<sup>th</sup> Cir. 2008). As a general rule, generalization of skills across settings is not necessary to establish educational benefit under the IDEA. As long as the student is making some progress in the classroom, the school district does not need to ensure that the autistic student is able to apply his newly learned skills outside of school.

### **NCLB**

- A. Sch. Dist. of the City of Pontiac v. Secretary of the U.S. Dept. of Educ., 108 LRP 792, 512 F.3d 252 (6<sup>th</sup> Cir. 2008), rehearing en banc granted and decision vacated, (6<sup>th</sup> Cir. 5/1/08). Statutes like NCLB that are enacted by Congress pursuant to the Constitution’s Spending Clause must provide clear notice to states of their liabilities should they decide to accept federal funding. Because NCLB fails to provide clear notice as to who bears the additional costs of compliance with its provisions, the case is remanded to determine whether states or school districts are required to spend any funds or to incur costs that are not paid for by NCLB.
- B. Board of Educ. of Ottawa Township High Sch. Dist. v. Spellings, 49 IDELR 152, 517 F.3d 992 (7<sup>th</sup> Cir. 2008). In an action challenging NCLB as it conflicts with IDEA, school districts have standing to challenge portions of NCLB that require

them to spend more money for tests than they would if left to their own devices. However, their claims must fail in terms of the statutory conflicts, as NCLB's provisions control because it is the later-enacted statute.

- C. State of Connecticut v. Spellings, 108 LRP 24542, 549 F.Supp.2d 161 (D. Conn. 2008). Connecticut's challenge of the Secretary of Education's decision to reject its request for more flexibility in conducting student assessments under NCLB is rejected. The court could find no basis for overturning the Secretary's decision, particularly on the basis of grounds that were not presented during the administrative proceedings (for instance, the challenge based upon NCLB's so-called "unfunded mandates" provision).

### **LEAST RESTRICTIVE ENVIRONMENT/HOME SCHOOL**

- A. Letter to Trigg, 50 IDELR 48 (OSEP 2007). Although IDEA does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the maximum extent appropriate. If a child's IEP requires services that are not available at the school closest to the child's home, the child may be placed in another school that can offer the services that are included in the IEP. Transportation, if needed for the child to benefit from special education, must be provided as a related service at no cost to the parent, to the location where the IEP services will be provided.
- B. C.R.R. v. Water Valley Sch. Dist., 49 IDELR 243, 2008 WL 723842 (N.D. Miss. 2008). Based upon the severity of the child's disabilities and the extent of the special education center's resources, the proposed placement in a neighboring school district's special center school was appropriate and the LRE for the child. "[N]o federal appellate court has recognized a right to a neighborhood school assignment under the IDEA."

### **DISCIPLINE**

- A. Couture v. Albuquerque Pub. Schs., 50 IDELR 183, 535 F.3d 1243 (10<sup>th</sup> Cir. 2008). Assuming that the use of time-out is a "seizure" under the Constitution, the use of time-out in this case was not unreasonable. Based upon the student's behavior, which included repeatedly swearing at teacher and classmates, physically attacking them and threatening bodily harm, "temporarily removing [the child] given the threat he often posed to the emotional, psychological and physical safety of the students and teachers, was eminently reasonable" and did not rise to the level of a constitutional violation. Thus, the Section 1983 claims against the teacher should be dismissed.

- B. Fitzgerald v. Fairfax County Sch. Bd., 50 IDELR 165 (E.D. Va. 2008). When determining the Team to make manifestation determinations, the parent does not have an “equal right” to determine the members and does not have the right to veto the district’s choice of members. Nor does the parent have the right to veto the Team’s finding that the student’s paintball raid on the high school was not related to his disability.
- C. Letter to Inhofe, 49 IDELR 286 (OSEP 2007). IDEA’s prohibition on mandatory medication applies to all children, regardless of their eligibility status. By extending the provision to all children, and not just disabled children, Congress ensured that the use of prescription medication is not a prerequisite for special education referrals, evaluations, or services.
- D. Letter to Anonymous, 49 IDELR 227 (OSEP 2007). Where a student has not been found eligible for special education services before the behavioral offense occurred, the student can not claim the protections of IDEA. Noting that the parties disagreed as to whether the district had reason to suspect that the student had a disability at an earlier date and the parent requested an expedited hearing to address the district’s prior knowledge, the due process hearing was not scheduled to occur until after the expulsion hearing. OSEP found no fault with the district’s plan to go ahead and hold the expulsion hearing as scheduled as “there is nothing in the IDEA or the Part B regulations that requires an LEA to put a disciplinary hearing on hold until a hearing officer determines whether...an LEA did or did not have knowledge that a child is a child with a disability.” Until the completion of the due process hearing or the student’s initial evaluation, the student must remain in the placement decided by the district at the expulsion hearing.

### **EXTENDED SCHOOL YEAR SERVICES**

- A. Letter to Copenhaver, 50 IDELR 16 (OSEP 2007). Under the IDEA regulations, no distinction is made between the personnel qualifications for special education and related service providers as part of the regular school program and those provided pursuant to an IEP as ESY services.

### **STANDARD OF REVIEW OF HEARING DECISIONS**

- A. J.P. v. County Sch. Bd. of Hanover Co., 49 IDELR 150, 516 F.3d 254 (4<sup>th</sup> Cir. 2008). Although the hearing officer could have provided a more thorough explanation as to why he denied the parents’ request for tuition reimbursement, the District Court must reconsider its decision to reverse the hearing officer’s ruling. It appeared that the hearing officer conducted a proper hearing, allowing the parties to present evidence and make arguments and, by all indications, resolved the factual questions in the normal way “without flipping a coin, throwing a dart, or otherwise abdicating his responsibility to decide the case.” The District Court must specifically identify the basis for the decision to overrule the hearing officer’s decision.

- B. L.J. v. Broward County Sch. Bd., 49 IDELR 216 (S.D. Fla. 2008). The ALJ clearly conducted a thorough and careful investigation of the evidence, particularly where the due process hearing involved 60 witnesses with numerous exhibits, took 26 days, resulted in 6,390 pages of transcript and a 191-page decision from the ALJ. The decision in favor of the district's program for an autistic teenager shows careful consideration of the evidence and a firm grasp of the facts and circumstances at issue and will not be overturned.

### **PRACTICE AND PROCEDURE**

- A. James S. v. School Dist. of Philadelphia, 50 IDELR 160, 2008 WL 2357190 (E.D. Penn. 2008). Where the parents have not alleged that they are "parties aggrieved" by either the hearing officer's decision or the school district's subsequent conduct, the district court has no jurisdiction to enforce the hearing officer's order.
- B. Paul K. v. State of Hawaii, 50 IDELR 187 (D. Haw. 2008). Hearing officer erred when he concluded that the 45-day due process hearing decision deadline divested him of jurisdiction once the period ended. Nothing in the IDEA indicates that the period is jurisdictional. Instead, this period protects the rights of children with disabilities and their parents under the IDEA. Therefore, case is remanded to the hearing officer for further proceedings on the merits.

### **RESOLUTION SESSIONS/CONFIDENTIALITY OF DISCUSSIONS**

- A. Friendship Edison Pub. Charter Sch. v. Smith, 50 IDELR 192, 561 F.Supp.2d 74 (D. D.C. 2008). The hearing officer erred as a matter of law when he failed to admit evidence regarding the resolution meeting as confidential settlement discussions under the IDEA or the Federal Rules of Evidence. There is no provision in the IDEA that suggests that information disclosed during the meeting will be kept confidential and the evidence that consisted of the school's offer and timeline to complete evaluations of the student and the parent's subsequent refusal to consent should have been admitted. In addition, the Rules of Evidence are inapplicable to resolution meeting notes, as the resolution meeting was not a settlement negotiation.

### **ATTORNEYS/ATTORNEYS' FEES**

- A. D.S. v. Neptune Tp. Bd. of Educ., 49 IDELR 181, 264 Fed.Appx. 186 (3d Cir. 2008). Although parents were successful in obtaining an ALJ order for the district to pay for an independent educational evaluation and to evaluate the student's need for special education and related services, the parents are not entitled to attorneys' fees. Under the plain language of the IDEA, an individual seeking fees must be a "prevailing party" and "the parent of a child with a disability." There must be a determination that the child needs special education for the child to be a child with a disability.

- B. Oscar v. Alaska Dept. of Educ., 50 IDELR 211 (9<sup>th</sup> Cir. 2008). Where the parents voluntarily dismissed their complaint without prejudice against the State Department of Education, the State was not a prevailing party for purposes of seeking fees.
- C. Pardini v. Allegheny Intermed. Unit, 50 IDELR 2, 524 F.3d 419 (3d Cir. 2008). The IDEA does not allow for the recovery of fees in the case of attorney-parents who represent their children in cases brought pursuant to the Act. It does not matter whether the representation is at the administrative or court level, because “attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that reason, rather than emotion will dictate the conduct of the litigation....”
- D. Deptford Township Sch. Dist. v. H.B., 50 IDELR 92, 2008 WL 2127458 (3d Cir. 2008). The fact that the parents were allowed to obtain and retain compensation for interim services pending the school district’s appeal of a finding that it had denied FAPE did not make them prevailing parties for the purpose of recovering fees. Rather, the ALJ’s decision was partially reversed and the district court ultimately ordered no relief to the parents. Thus, they were not the prevailing parties in the action.
- E. Robert K. v. Cobb County Sch. Dist., 50 IDELR 62, 2008 WL 2186418 (11<sup>th</sup> Cir. 2008). Where the parents prevailed only on a breach of settlement agreement claim before the ALJ, they were not “prevailing parties” under the IDEA because their claim did not require adjudication of any rights under the IDEA. Further, the parents requested only stay-put relief, which generally will not support an attorneys’ fees award because it is not merits based.
- F. Fisher v. District of Columbia, 49 IDELR 153, 517 F.3d 570 (D.C. Cir. 2008). Although the District of Columbia had adopted fee guidelines that required reimbursement of expert witness fees to prevailing parents, the Supreme Court’s intervening 2006 decision in Arlington eliminated this requirement. Expert fees are not “costs” that may be awarded under IDEA to prevailing parties.
- G. Traverse Bay Area Intermed. Sch. Dist. v. Michigan Dept. of Educ., 49 IDELR 156, 2008 WL 351651 (W.D. Mich. 2008). State Hearing Officer had no authority to incorporate the terms of the private settlement agreement reached between the parties into her order where local hearing officer had refused to do so.
- H. E.M. v. Marriott Hospitality Pub. Chartered High School, 50 IDELR 39, 541 F.Supp.2d 395 (D. D.C. 2008). An award of fees is not appropriate here, where the student’s case failed to contribute to the student’s well-being and “proved wasteful.” The appropriate fee for litigation that wastes “the time and energy of counsel, court, and client,” is no fee.” Even though the hearing officer had

ordered evaluations be conducted, the student never secured any further evaluations and instead elected to rely upon the evaluations that were initially rejected.

- I. Weissburg v. Lancaster Sch. Dist., 50 IDELR 11, 2008 WL 906199 (C.D. Cal. 2008). Where the only objective that the parent achieved in the due process hearing was the recognition that the student should be categorized as autistic in addition to mentally retarded, parent is not a “prevailing party” entitled to fees. IDEA does not require that a student be classified as autistic or mentally retarded, “as long as he is regarded as a child with a disability and receives necessary specialized educational services.”
- J. V.M. v. Brookland Sch. Dist., 50 IDELR 100, 2008 WL 2001733 (E.D. Ark. 2008). Parents were prevailing parties where the provisions of the settlement agreement were incorporated into the hearing officer’s decision, which is an enforceable order. However, the parents’ request for fees expended to bring their claim for fees is denied because the school district’s position that the parents did not prevail because an offer of settlement was made was not unreasonable and was based upon a legitimate legal theory.
- K. Amherst Exempted Village Sch. Dist. Bd. of Educ., 50 IDELR 218, 2008 WL 2810244 (N.D. Ohio 2008). In an action against the parent’s attorney to recover the school district’s fees and costs, the court adopts the findings of the magistrate that the attorney’s prosecution of the administrative action against the school district was frivolous, unreasonable and without legal foundation, thereby warranting an award of attorney’s fees to the district for defending against the parent’s appeal of the decision of the hearing officer. The demand for review of the hearing officer’s decision was made despite (1) offering no challenge to any of the school district’s procedures; (2) failing to challenge a single factual finding in the hearing officer’s decision; and (3) a clear record of some educational achievement by the student in his ninth and tenth grade years with the school district. The attorney’s continued prosecution of this action was “unconscionable.”
- L. E.U. v. Valparaiso Comm. Schs., 50 IDELR 189 (N.D. Ind. 2008). Where an IDEA hearing was held and student was found not disabled, a subsequent 504 hearing was held. Where the 504 hearing officer ruled that the student was disabled and entitled to transfer tuition to another high school, the parent is entitled to attorneys’ fees.
- M. Lewellyn v. Sarasota County Sch. Bd., 50 IDELR 66, 2008 WL 1913912 (M.D. Fla. 2008). Parents who are not attorneys can not bring a pro se action on their child’s behalf. This “helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents.”

## **STANDING**

- A. Disability Rights Wis. v. Walworth County Bd. of Supervisors, 49 IDELR 271, 522 F.3d 796 (7<sup>th</sup> Cir. 2008). Where advocacy group failed to plead a specific injury-in-fact, it lacked standing to challenge the construction of a new specialized school. In order to pursue its discrimination claim, the group is required to show that the decision to expand the school directly harmed the group or one of its members. Though the group could satisfy this requirement by showing that it would have to expend time, money and resources to advocate on behalf of students placed in an overly restrictive environment, they made no such allegation.
  
- B. C.G. v. Commonwealth of Pennsylvania Dept. of Educ., 49 IDELR 223, 547 F.Supp.2d 422 (M.D. Pa. 2008). Parents of students in Lancaster and Reading School Districts have standing to bring this action on behalf of the minor children to challenge the method for delivering special education funds in Pennsylvania. The State's motion to dismiss is, therefore, denied because the parents' complaint "plainly suggests that the school districts have not provided essential special education services due to funding shortfalls created by inequities in the funding formula."

#### **STATUTES OF LIMITATIONS/LACHES**

- A. School Union No. 37 v. Ms. C., 49 IDELR 179, 518 F.3d 31 (1<sup>st</sup> Cir. 2008). Where the parent waited six years to seek reimbursement for more than \$52,000 in private school expenses, the doctrine of laches applies and she is not entitled to such reimbursement. According to the parent's witness, the parent chose not to seek reimbursement for these miscellaneous expenses because the student's hometown was paying all tuition expenses for out-of-state residential schooling and the parent was afraid to "rock the boat" and seek additional funding until after her son finished school. Her delay in seeking reimbursement caused the school union to suffer prejudice because it prevented the school union from the opportunity to proffer a less expensive acceptable alternative to the schools that the parent chose.
  
- B. Blunt v. Lower Merion Sch. Dist., 49 IDELR 185, 2008 WL 442109 (E.D. Pa. 2008). Student's appeal of the appellate panel's administrative decision is dismissed as it was not timely filed under the 2004 IDEA Amendments' 90-day time period. The date of the decision was August 31, 2005, some two months after the 2004 Amendments became effective and, therefore, the 90-day timeline for appeal applies.
  
- C. Vick v. Hancock County Bd. of Educ., 49 IDELR 218 (N.D. W.Va. 2008). Adult student who alleged violations of the IDEA "throughout the plaintiff's career in the defendant's school system," did not file within the two-year statute of limitations. As a general rule, the statute of limitations for IDEA claims is not tolled by a student's status as a minor. Even if the student's claims were tolled

until after he reached the age of majority, the student had only 2 years after his 18<sup>th</sup> birthday to file a complaint but he did not file until just before his 21<sup>st</sup> birthday.

- D. D.G. v. Somerset Hills Sch. Dist., 50 IDELR 70, 2008 WL 1790571 (D. N.J. 2008). Where parent continually asked for her son to be evaluated during his public school career but district did not provide written notice when it refused to evaluate, statute of limitations does not apply because the district “withheld information from the parent that it was required to provide.” In addition, the IDEA claim is not barred under the “continuing violations” doctrine, where the conduct complained of consists of a pattern that has only become cognizable as illegal over time. The district’s alleged actions and omissions were part of a continuing practice and the last act evidencing the continuing practice occurred in June 2006, within the IDEA’s 2-year statute of limitations.
- E. Brandon E. v. Dept. of Educ., 49 IDELR 219, 2008 WL 563478 (D. Haw. 2008). Although the circuit courts appear to be split as to how long a prevailing party may wait to file for attorney’s fees, this court adopts the position that fee litigation is not the same as an appeal of a hearing officer’s final decision. Thus, the 90-day appeal timeline does not apply.
- F. Jonathan H. v. Souderton Area Sch. Dist., 49 IDELR 277, 2008 WL 746823 (E.D. Pa. 2008). Although the parents filed their appeal of the final due process decision within the 90-day timeframe, the district did not file its answer and counterclaim until 160 days after the decision. Thus, the school district’s counterclaim seeking to review certain portions of the administrative decision is dismissed as untimely.

#### **SECTION 504/ADA DISCRIMINATION**

- A. J.W. v. Fresno Unified Sch. Dist., 50 IDELR 42, 2008 WL 850250 (E.D. Cal. 2008). Pursuant to the Ninth Circuit’s 2007 decision in Mark H., plaintiff fails to state a Section 504 claim because he asserted no allegations that the school district denied him a meaningful access to education as compared to non-handicapped persons. “Unlike FAPE under the IDEA, FAPE under [Section] 504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the ‘design’ of a child’s educational program.”
- B. Cave v. East Meadow Union Free Sch. Dist., 47 IDELR 162, 480 F.Supp.2d 610 (E.D. N.Y. 2007), aff’d, 49 IDELR 92, 514 F.3d 240 (2d Cir. 2008). Parents of hearing impaired student not entitled to injunctive relief to force district to allow student to bring his service dog to high school classes. First, the parents failed to exhaust administrative remedies under the IDEA, since the relief they seek is “in substance a modification of [the student’s] IEP.” In addition, the parents could not prevail under Section 504 or the ADA because those statutes entitle students

to “reasonable accommodations,” not all accommodations demanded. Because other individuals in the student’s classrooms had severe allergies to dogs and the student would have to drop two classes as a result, the disadvantages of the dog’s presence outweigh the potential benefits to the student.

- C. A.P. v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 49 IDELR 245, 538 F.Supp.2d 1125 (D. Minn. 2008). The parties will have to go to trial and present evidence as to whether the district must accommodate A.P.’s diabetes by doing three things: 1) checking his blood sugar, which requires operating his blood-glucose meter; 2) operating his insulin pump; and 3) giving glucagon injections in the event of a hypoglycemic emergency. The Court acknowledged that A.P. is likely to be able to establish at trial that it was reasonable to ask that staff be trained and willing to operate the blood-glucose meter and his insulin pump for him if he was unable to do so. The Court also believed that the District is unlikely to be able to establish to a jury’s satisfaction that granting either accommodation would have been an undue burden upon it or would have fundamentally altered the program. However, this must be decided at trial. As to the glucagon injections, the Court can not decide, without a trial, whether this accommodation is reasonable and necessary or whether it would fundamentally alter the program or place an undue burden on the District.
- D. M.G. v. Crisfield, 49 IDELR 217, 547 F.Supp.2d 399 (D. N.J. 2008). Where the parents alleged that the school district discriminated against a student based upon a “perceived disability,” claim will not be dismissed where the school district allegedly conditioned a third grader’s return to school on his parents’ acceptance of a special education placement.
- E. S.L.-M v. Dieringer Sch. Dist. No. 343, 50 IDELR 97, 2008 WL 1999756 (W.D. Wash. 2008). Although summary judgment to the school district is denied because there are legitimate issues of fact for a jury to decide, “parents of a disabled student cannot hide the contours of that disability from the student’s educators, and then bring suit under Section 504 for failure to accommodate—especially where, as here, the disability is intensely private in nature.”

### **CONFIDENTIALITY/EDUCATIONAL RECORDS**

- A. Letter to Anonymous, 107 LRP 47711 (FPCO 2007). FERPA’s consent requirements do not apply to a situation where a school official states information that is based upon opinion or hearsay rather than specific information in education records. On the other hand, if the official’s knowledge of the information is derived from the student’s education records or based upon actions that the official took, then that information would be protected from improper disclosure under FERPA. In addition, the concern that the school includes “mental health records” in the student’s education record is not a FERPA concern because a broad range of information may be contained in education records, which “are not

required to relate only to academic purpose or be used only for academic concerns....”

- B. Letter re: Pioneer School, 108 LRP 12926 (FPCO 2007). FPCO concluded that it did not appear that there was a disclosure of information in violation of FERPA where the school summoned emergency medical personnel when she appeared to be having a diabetic emergency and disclosed to the ambulance driver the names and relationship of several persons with the ability to make decisions on behalf of the student. FERPA regulations permit disclosure without consent to “appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student.”