

The Year in Review: Litigation to Learn From (2008-09)

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Case Topics:

**FAPE & IEPs
Least Restrictive Environment
Behavior & Discipline
Eligibility & Identification**

**Money & Liability Issues
Private School Placement
Section 504/ADA
Procedural and Litigation**

A. FREE APPROPRIATE PUBLIC EDUCATION AND IEPs

1. T.P. V. MAMARONECK UNION FREE SCHOOL DISTRICT, 51 IDELR 176 (2^d Cir. 2009)

The parents of a kindergartner with autism could not prove that a New York district predetermined their son's IEP merely by showing that the district denied their request for in-home ABA services. Noting that the IEP incorporated several of the parents' recommendations, the 2d Circuit found insufficient evidence of a procedural violation. The dispute centered on a chart developed by the district's behavioral consultant in advance of an IEP meeting. The chart compared the recommendations of an independent evaluation with the consultant's own recommendations, which she labeled "School Respon." According to the parents, the chart demonstrated that the district did not intend to offer more than 10 hours of school-based ABA services each week. The 2d Circuit disagreed. The court explained that districts can discuss potential services and placements

in advance of an IEP meeting, so long as they arrive at the IEP meeting with an open mind. Although the chart reflected the consultant's belief that the child did not require intensive ABA services, there was no evidence that the district was unwilling to consider additional ABA therapy. "Both [the consultant] and the [head of the IEP team] testified that there was no pre-meeting agreement to accept [the consultant's] recommendations," the 2d Circuit wrote. Moreover, the court pointed out, the team adopted the parents' recommendations that the district staff observe the child over the summer, meet with his home providers, and receive training on how to educate the child. Concluding that the parents had a meaningful opportunity to participate in the development of their son's IEP, the 2d Circuit reversed a judgment in their favor.

2. SCHAFFER v. WEAST, 51 IDELR 177 (4th Cir. 2009)

The parents of a teenager with an auditory processing disorder could not use their son's 10th-grade IEP to prove that the IEP proposed for his eighth-grade year was inappropriate. Concluding that the eighth-grade IEP was appropriate at the time it was written, the 4th Circuit affirmed a ruling in the district's favor. The 4th Circuit rejected the parents' claim that the 10th-grade IEP, which offered a full-time special education placement, showed that the district erred in offering their son inclusion classes for eighth grade. The court explained that IEP teams must consider students' evolving needs when developing their educational programs. Although the information available in eighth grade showed that the student would make progress in an inclusion environment, the results of a subsequent reevaluation indicated that the student required more intensive services. "To interpret the tenth-grade IEP as an admission of fault as to the eighth-grade IEP would discourage [the district] and other school systems from reassessing and updating IEPs out of fear that any addition to the IEP would be seen as a concession of liability for an earlier one," U.S. Circuit Judge J. Harvie Wilkinson III wrote. The court pointed out that the eighth-grade IEP recognized the student's auditory processing difficulties and included substantial accommodations. In addition, the IEP offered 45 minutes of daily reading and writing support, as well as 15.3 hours of instruction each week in an inclusion environment. Determining that the eighth-grade IEP met the student's identified needs, the 4th Circuit affirmed a decision that denied the parents' request for tuition reimbursement.

3. J.G. v. ABINGTON SCHOOL DISTRICT, 51 IDELR 129 (E.D. Pa. 2008)

Although the IEP developed for a sixth-grader with an SLD and ADHD did not offer the best possible education, it offered sufficient services to provide a meaningful educational benefit. The District Court ruled that the proposed IEP was reasonably calculated to provide FAPE. The parents wanted the student to remain in the private school that he attended in fifth grade in accordance with a FAPE settlement. According to the parents, the proposed public school program did not adequately address the student's needs with regard to reading, handwriting and written expression. They also contended that the lack of social skills training and a behavioral intervention plan made the IEP inappropriate. The District Court disagreed. With regard to the student's academic needs, the court

noted that the IEP called for small-group reading instruction using the Wilson reading program. It also provided occupational therapy that would help the student to improve his handwriting. As for the lack of behavioral supports, the court observed there was no evidence that the student exhibited problem behaviors in school. “The Evaluation Report did state that the IEP should include a plan to ease [the student’s] transition back into the public school, and the proposed IEP included such a plan,” U.S. District Judge J. Curtis Joyner wrote. Concluding that the district offered the student FAPE, the court granted the district’s motion for judgment.

4. H.C. v. COLTON-PIERREPONT CENTRAL SCHOOL DISTRICT, 50 IDELR 252 (N.D.N.Y. 2008)

The parent of a child with mobility impairments and a latex allergy got a second chance to show that her daughter’s 2006-07 IEP was inappropriate. The District Court explained that the SRO should have examined the proposed program in light of a May 2006 FAPE settlement. Under the IDEA, the parent of a child with a disability can present a complaint with respect to “any matter relating to” the child’s identification, evaluation, placement, or receipt of FAPE. 20 USC 1415(b)(6)(A). So long as a settlement addresses a child’s identification, evaluation, placement, or services, the court observed, the hearing officer has the authority to enforce the settlement. The court noted that the settlement in this case was sufficiently related to the child’s 2006-07 IEP. “For example, in the settlement agreement, the district agreed to provide and install assistive technology equipment and software by certain deadlines, and agreed that [the child] must be in a latex-free environment,” U.S. District Judge David N. Hurd wrote. As such, the court explained, the IHO and SRO could not determine the appropriateness of the proposed IEP without first considering the district’s obligations under the settlement. The District Court vacated the SRO’s decision, reported at 48 IDELR 268 and 5 ECLPR 83, and remanded the case for further proceedings.

5. E.M. v. PAJARO VALLEY UNIFIED SCHOOL DISTRICT, 50 IDELR 162 (N.D. Cal. 2008)

Noting that educational decisions should not be reviewed in hindsight, the District Court denied a student’s motion to add a recent assessment and ADHD diagnosis to the administrative record in his FAPE action. The evidence was not relevant to the ALJ’s May 2006 decision that the student was ineligible for IDEA services. Relying on *Adams*, 31 IDELR 130, the court noted that educational programs should be evaluated in light of the evidence available at the time they were developed. Although the student claimed that the assessment and ADHD diagnosis would shed light on the correctness of the ALJ’s decision, the court disagreed. “Because the court concludes that the after-acquired evidence [the student] seeks to introduce is not necessary to evaluate the ALJ’s determination, it will not be admitted,” U.S. District Judge Jeremy Fogel wrote. The District Court nonetheless allowed the student to submit expert testimony on the

reliability of a particular IQ test, as the student claimed he was unaware that the district would address that issue at the due process hearing.

6. Romance BALLARD v. PHILADELPHIA SCHOOL DISTRICT, 50 IDELR 32 (3^d Cir. 2008)

The parent of a 13-year-old girl with Down syndrome had to abide by the terms of a settlement regarding her daughter's placement. The 3d Circuit found no evidence that the parent signed the settlement under duress. U.S. Circuit Judge Dolores Korman Sloviter explained that the parent's misgivings about the settlement did not render the agreement invalid. "[The parent] made no allegation that the school district or a third party threatened her," the judge wrote in an unpublished opinion. "That she felt pressured from her counsel or that she felt she was under time constraints does not amount to duress under the law." The 3d Circuit also rejected the parent's claim that the settlement failed to offer FAPE and was therefore void as a matter of public policy. Noting that a parent can waive a child's right to FAPE, the court explained that the parent could enter into any settlement she deemed appropriate. The court pointed out that the parent was represented by counsel throughout the settlement negotiations. Moreover, she knowingly agreed to the settlement's terms. Because there was no evidence to support the parent's claim of duress, the 3d Circuit concluded, the District Court did not err in refusing to vacate the settlement.

7. Daniel HILLS v. LAMAR COUNTY SCHOOL DISTRICT, 49 IDELR 188 (S.D. Miss. 2008)

A student's admission that he voluntarily dropped out of high school because he "just got sick of it" undermined his FAPE claim against a Mississippi district. Finding that the district had no obligation to award the student a diploma, the U.S. District Court, Southern District of Mississippi dismissed the student's suit. The court explained that the relief requested by the student was not available under the IDEA. U.S. District Judge Keith Starrett noted that the student did not seek an order permitting him to return to school and earn his high school diploma. Instead, the student requested that the district provide him with a completed transcript and a certificate of graduation. The court pointed out that the student's failure to graduate did not stem from the district's alleged IDEA violations, but from the student's decision to withdraw from high school during his senior year. "The record reveals that [the student] had excessive absences even before he quit," Judge Starrett wrote. "The fact that he simply desires his grades changed and to be given a diploma is not a remedy under the IDEA." The court also dismissed a Section 504 claim based on the student's exclusion from a sports program. Not only did the student fail to show that he had a disability, the court observed, but he failed to demonstrate that he was otherwise qualified to participate in high school sports.

8. Mikeisha BLACKMAN v. DISTRICT OF COLUMBIA, 49 IDELR 158 (D.D.C. 2008)

Noting that the District of Columbia dragged its feet in complying with an order that required it to reconvene a teenager's IEP team, the District Court nonetheless refused to issue an emergency injunction that would change the student's placement. The court concluded that the parent needed to file a proper FAPE appeal to challenge the substance of the IHO's decision. The case turned on the parent's participation in an IDEA class action. U.S. District Judge Paul L. Friedman observed that the class action involved the District of Columbia's failure to comply with due process decisions. However, the judge noted that the parent was not seeking to compel the district's compliance with the IHO's order. Instead, she was asking the court to review the substance of the IHO's conclusion that the student's placement in a school for students with emotional disturbances was appropriate. The court explained that it could not provide the relief the parent requested in the context of the class action. "If [the parent and the student] want to appeal the part of the [due process decision] that they were 'aggrieved by,' they should do so pursuant to 20 USC 1415(i)," Judge Friedman wrote. Although the judge indicated that he disapproved of the district's conduct, he explained that he could not reward the parent for attempting to bypass IDEA procedures.

9. COLBERT COUNTY BOARD OF EDUCATION v. B.R.T., 51 IDELR 16 (N.D. Ala. 2008)

Because a parent would not consent to a kindergartner's proposed placement in a self-contained classroom, an Alabama district could not be held liable for failing to provide IDEA services. The District Court concluded that the parent's refusal to consent relieved the district of liability for a FAPE violation. The court acknowledged the parent's belief that the proposed IEP was inappropriate. However, the court observed that a district cannot implement a proposed IEP without the parent's consent. If the parent refuses to consent to the provision of services or does not respond to the district's requests for consent, the district does not commit a FAPE violation by failing to provide those services. 34 CFR 300.300(b)(4)(i). Furthermore, the IDEA expressly forbids districts from using mediation or a due process hearing to compel the initial provision of services. 34 CFR 300.300(b)(3). "In this case, it is undisputed that [the parent] has never consented to the initial provision of services for [the child]," U.S. District Judge Inge Prytz Johnson wrote. Noting that the IDEA precluded the district from providing the child with services, the court reversed an ALJ's finding that the district denied the child FAPE. The court also concluded that the parties' failure to hold a resolution meeting prevented the ALJ from hearing the parent's due process complaint.

10. Mark LESSARD v. WILTON-LYNDEBOROUGH COOPERATIVE SCHOOL DISTRICT, 49 IDELR 180 (1st Cir. 2008)

A parent's insistence that her daughter's IEP was still "in the developing stage" when a New Hampshire district presented it for her approval undermined her claim that the district violated the IDEA's procedural safeguards. Concluding that a four-month implementation delay stemmed from the parent's lack of cooperation with the IEP process, the 1st Circuit determined that the district complied with the IDEA. The court based its decision on the parent's failure to identify specific deficiencies in the IEP developed for her then 18-year-old daughter. U.S. Circuit Judge Bruce M. Selya noted that the IEP proposed in August 2004 appeared to contain all of the instruction and services the student required to obtain a meaningful educational benefit. Although the student's mother refused to sign the IEP, she did not state specific objections. Instead, the judge observed, the mother informed the district that the IEP was not yet complete. The court pointed out that the district made several attempts to identify the source of the parents' concerns, but the mother would only state that she wanted additional meetings to discuss the IEP. Under such circumstances, Judge Selya explained, the parents clearly bore responsibility for the implementation delay. "Even in a regime in which parental assent is required before an IEP can become effective, it cannot be that a school system transgresses the IDEA whenever a parent — for whatever reason — refuses to sign a completed IEP before the school year commences," the judge wrote. "Otherwise, school systems would be at the mercy of obdurate parents — a result plainly at odds with the collaborative relationship fostered by the IDEA framework." The 1st Circuit also rejected the parents' substantive challenges to the proposed IEP, concluding that the IEP included appropriate transition services and called for the use of an appropriate reading methodology. In addition, the court concluded that the IEP did not need to include a behavioral plan when the student had never been disciplined for inappropriate behavior.

11. C.N. v. LOS ANGELES UNIFIED SCHOOL DISTRICT, 51 IDELR 98 (C.D. Cal. 2008)

Unsupported statements that a child required a particular type of gastrostomy tube feedings were not enough to support a claim that a California district denied the child FAPE. The U.S. District Court, Central District of California held that the district's proposed feeding method would meet the child's unique needs. The parent contended that the child, an 8-year-old boy with cerebral palsy and mental retardation, needed to be fed a prepared mixture of puréed foods using the "plunge" method. However, the parent never supplied evidence showing that the plunge method was necessary, or that the child could not be fed using the "gravity" method identified in state special education guidelines. Although the parent submitted a prescription for the child's gastrostomy tube feedings, the prescription did not require the district to use the plunge method. "[The parent's] expert witness ... testified that she interpreted the prescription as direct[ing] that [the student] be fed by hanging a syringe for delivery via the gravity method," U.S. District Judge Margaret M. Morrow wrote. Furthermore, the court pointed out, both the parent's and the district's medical experts testified that the plunge method was unsafe. Because the parent failed to show that the plunge method was necessary, the district had no obligation to use that method. The court affirmed a due process decision in the district's favor.

12. Nicholas SYTSEMA v. ACADEMY SCHOOL DISTRICT NO. 20, 50 IDELR 213 (10th Cir. 2008)

A Colorado district's failure to finalize an IEP for a 3-year-old boy did not entitle the child's parents to recover the cost of his private autism services. The 10th Circuit concluded that the parents' withdrawal from the IEP process made the district's procedural violation harmless. The court explained that a procedural violation of the IDEA is actionable only if it results in substantive harm. Although the 10th Circuit had not yet considered the effect of a parent's role in a procedural violation, the 4th and 7th Circuits have both held that a parent's refusal to participate in the IEP process effectively excuses any procedural defects in the IEP's formation. In this case, the 10th Circuit observed, the parents withdrew from the IEP process when they learned that the district intended to deliver services in an integrated preschool environment. "[The parents] made this decision in spite of the fact that the district had not yet finalized its offer for educational services," U.S. Circuit Judge David M. Ebel wrote. While the court recognized that the parents made a difficult choice, it noted that the decision to continue the child's home-based program effectively terminated the IEP process. The 10th Circuit remanded the case to the U.S. District Court, District of Colorado to determine whether the proposed IEP was substantively appropriate. In remanding the case, the 10th Circuit advised the District Court to consider only the written components of the draft IEP. Although the district had made a verbal offer to increase the child's services, the 10th Circuit concluded that the IDEA's requirement for IEPs to be in writing precluded the District Court from considering the district's oral promises. The 10th Circuit affirmed the District Court's decision, reported at 46 IDELR 71 and 4 ECLPR 740, insofar as it denied the parents' reimbursement request for the following school year.

13. L. M. v. CAPISTRANO UNIFIED SCHOOL DISTRICT, 50 IDELR 181 (9th Cir. 2008)

The fact that a California district allowed an independent psychologist to observe a child's proposed placement for only 20 minutes did not require it to pay for the child's private services. The 9th Circuit concluded that the district's violation of the state education code did not amount to a denial of FAPE. California's education code requires a district to give independent evaluators "an equivalent opportunity" to observe a child's proposed educational placement. Although the district erred in limiting the psychologist's observations of the public school placement to 20-minute increments, the 9th Circuit observed that the limitation did not prevent the psychologist from forming an opinion about the appropriateness of the placement. "[The psychologist] could have gone back on other occasions for more twenty-minute visits," U.S. Circuit Judge Richard C. Tallman wrote. "[She] also conceded that she was able to provide the parents with an informed and independent opinion, and the parents presented the opinion of [the psychologist] during the due process hearing." The court acknowledged that the psychologist's

opportunity to observe the public school placement was not equivalent to the district's observations of the child in his home-based program. Nonetheless, the psychologist was able to provide expert testimony at a due process hearing on why she believed the proposed placement was inappropriate. Because the parents had a meaningful opportunity to present their views on the placement, the court concluded that the district's procedural error was harmless. The 9th Circuit reversed the District Court's decision to the extent that it ordered the district to reimburse the parents for the child's private services. However, the 9th Circuit affirmed the District Court's conclusion that the parents were not entitled to a stay-put order.

14. Jeff WINKELMAN v. PARMA CITY SCHOOL DISTRICT, 51 IDELR 92 (6th Cir. 2008)

Neither a district's delay in developing occupational therapy goals nor its failure to offer music therapy deprived a 7-year-old boy of his right to FAPE. In an unpublished opinion, the 6th Circuit upheld a decision reported at 43 IDELR 162 that the district complied with the IDEA. The underlying opinion by the U.S. District Court, Northern District of Ohio addressed the parents' procedural and substantive challenges to the child's IEP. Although the district delayed in developing OT goals, the court concluded that the delay was excusable given the child's need to adjust to a new environment. The parents also failed to show that the child required music therapy to receive FAPE, or that he required more than 60 minutes of speech-language therapy each week. The District Court also determined that the hearing officer did not err in discounting testimony from the child's pediatric neurologist. Because the neurologist was not an educator and had not observed the child in the classroom, he could not testify that the child required one-to-one instruction to receive an educational benefit. The 6th Circuit found no error with the District Court's analysis. Given the thoroughness and correctness of the District Court's opinion, the 6th Circuit explained, "[t]he issuance of a full written opinion by this court would serve no useful purpose." The court adopted the reasoning provided in the District Court's decision.

15. Sharon HUNTER v. DISTRICT OF COLUMBIA, 51 IDELR 34 (D.D.C. 2008)

A teenager's parent got a second chance to argue her FAPE claim before a hearing officer, thanks to an LEA's failure to submit evidence of the student's progress under a 2004 IEP. The IHO's failure to consider the student's alleged regression required the U.S. District Court, District of Columbia to remand the case for further proceedings. The court acknowledged that the parent, as the party challenging the IHO's decision, bore the burden of persuasion. However, the court pointed out, the LEA did not present any evidence to rebut the parent's claim that the student experienced significant regression. Because the student's 2006 IEP was nearly identical to his 2004 IEP, the IHO could not judge the efficacy of the 2006 IEP without considering evidence of the student's regression under the 2004 program. "It is impossible for an IEP to be considered

sufficient when the only evidence presented is of its insufficiency and that evidence is not rebutted by [the LEA] or explained by the hearing officer,” U.S. Magistrate Judge John M. Facciola wrote. The court explained that it could not review the case properly on the limited information contained in the hearing record. As such, the court ordered the IHO to consider on remand whether the student regressed under the 2004 IEP and, given the similarities between the 2004 and 2006 IEPs, whether the 2006 IEP was reasonably calculated to provide an educational benefit.

16. B.F. v. FULTON COUNTY SCHOOL DISTRICT, 51 IDELR 76 (N.D. Ga. 2008)

Allegations that a middle schooler suffered from post traumatic stress as a result of encounters with his case manager and one-to-one assistant did not oblige a Georgia district to change its personnel assignments. The U.S. District Court, Northern District of Georgia found no fault with the district’s choice of providers. The court pointed out that the parents requested the removal of the student’s case manager on several occasions after she denied the parents’ request for a different one-to-one aide. The parents’ relationship with the case manager continued to deteriorate. However, the parents did not inform the district that the student was afraid of the case manager and the aide until March of the student’s eighth-grade year — two months after the district denied their request for homebound services. The allegation came in the form of a letter from the student’s treating psychiatrist, who opined that neither the student nor the parents should be required to interact with the case manager. The court noted that it would not attempt to sort out whether the student was genuinely afraid of the case manager or whether the parents were attempting to justify their request for homebound services. Nonetheless, the court questioned the psychiatrist’s statement that the parents could not work with the case manager. “Even crediting [the psychiatrist’s] opinion that interaction with [the case manager] would be emotionally harmful to [the student], there is no basis in the record to show that interaction with [the case manager] could somehow physically or emotionally [harm the parents],” U.S. District Judge J. Owen Forrester wrote. Observing that the student made academic gains during his time in the district, the court concluded that the district offered FAPE.

17. Angelo GREGORY-RIVAS v. DISTRICT OF COLUMBIA, 51 IDELR 42 (D.D.C. 2008)

Without addressing whether a high school graduate received FAPE, a District Court concluded that the former student was not entitled to compensatory education. The court noted that the student failed to show any loss of educational benefits as a result of the district’s alleged IDEA violation. According to the student, the district failed to provide appropriate special education services in 11th and 12th grade. After the student filed his due process complaint, his IEP team reconvened to consider his need for compensatory education. The team found the student ineligible, noting that he chose to take general education electives instead of special education courses to assure his timely graduation. Moreover, the student graduated with passing grades in both general education and

special education courses. The IHO agreed that the student was not entitled to compensatory education and dismissed the student's complaint. Although the student argued that the IHO applied the wrong standard, the court disagreed. The court explained that compensatory education is designed to make up for harm resulting from inappropriate IDEA services. "[I]n order to craft an appropriate remedy, there must be a showing of the educational benefits denied to the student as a result of [the district's] failure to comply with [the IDEA]," U.S. District Judge Henry H. Kennedy Jr. wrote. Because the student failed to demonstrate educational harm, he was not entitled to compensatory education.

18. B.M. v. BOARD OF EDUCATION OF SCOTT COUNTY, KENTUCKY, 51 IDELR 5 (E.D. Ky. 2008)

Although a student with diabetes could have remained in her neighborhood school if her district hired a full-time nurse, the district had no obligation to do so. A District Court held that the district's proposal to transfer the student to another elementary school was not discriminatory. The court acknowledged that the district had a duty to reasonably accommodate students with disabilities. However, the district had no obligation to make substantial or fundamental modifications to its own programs in order to accommodate the student. Thus, the court observed, when the parent requested that the district hire a nurse to administer the student's insulin injections, it was not unreasonable for the district to offer a placement in a nearby school that already had a full-time nurse on staff. "As [the parent] has not averred that the educational program at [the other school] is neither free nor appropriate, she cannot demonstrate that [the district] failed to accommodate [the student] or discriminated against her on the basis of disability," U.S. District Judge Joseph M. Hood wrote. Even if the proposed accommodation was unreasonable, the court explained, the parent could not show that the district acted with deliberate indifference to the student's rights — a requirement for relief under Section 504 and Title II. The refusal to hire a nurse was based on economic concerns, and not a conscious disregard for the student's needs.

19. E.H. and K.H. v. BOARD OF EDUCATION OF THE SHENENDEHOWA CENTRAL SCHOOL DISTRICT, 51 IDELR 13 (N.D.N.Y. 2008)

Neither the failure to develop a timely transition plan nor the failure to develop specific IEP goals caused a New York district to run afoul of the IDEA. The U.S. District Court, Northern District of New York held that the parents' objection to all of the proposed IEPs made the district's errors harmless. The parents identified several flaws in their son's 2003-04 IEP. Not only did the district fail to have a final IEP in place at the start of the school year, the parents argued, but it also failed to conduct an FBA or develop a BIP or transition plan in a timely manner. In addition, the parents observed, the IEP's annual goals were vague and immeasurable. The court acknowledged that the IEP was not without errors, but explained that those errors did not affect the student's education. For example, while IDEA 1997 required the district to have an IEP in place at the beginning

of the school year, it did not require the district to implement the *final* version of the IEP. “At the time, the official commentary to the IDEA regulations explicitly recognized the use of interim placements and IEPs in contemplation of the creation of a final placement and IEP,” U.S. District Judge Gary L. Sharpe wrote. Although the IEP’s annual goals lacked specificity, the court noted that the short-term goals and objectives would allow district staff to determine whether the student was making progress. As for the behavior and transition plans, the court pointed out that the parents repeatedly refused to consent to a placement with more than six students. Thus, even if the district had timely completed an FBA and transition plan, the student still would have gone without the services identified in the IEPs.

20. Darlene HINSON v. MERRITT EDUCATIONAL CENTER, 51 IDELR 65 (D.D.C. 2008)

The parent of a 13-year-old boy with ADHD could not persuade a District Court that her son’s failing grades stemmed from the District of Columbia’s failure to provide a therapeutic placement. Noting that the parent offered no evidence in support of her claim, the court affirmed a due process decision in the LEA’s favor. The court pointed out that the parent actively participated in IEP meetings and fully agreed to the proposed IEP. Not only did the parent agree to the proposed placement, the court observed, but she urged the IEP team to place the student in the chosen school. “[The parent] now challenges the very same IEP she helped to craft,” U.S. District Judge Colleen Kollar-Kotelly wrote. “She fails, however, to provide any evidence — other than her own unsubstantiated beliefs — that the IEP is inappropriate.” The court acknowledged that the student received failing grades during the three months between the IEP’s formation and the due process hearing. However, the parent and the district agreed that the student had extensive absences during that time. “[The parent] has not shown that the student’s poor academic performance resulted from a lack of appropriate services rather than the student’s own extended absences,” Judge Kollar-Kotelly wrote. Absent evidence that the IEP was appropriate, the court explained, the parent did not have a right to relief under the IDEA.

21. Carrie WILKINS, v. DISTRICT OF COLUMBIA, 50 IDELR 276 (D.D.C. 2008)

Letters from a student’s physician proved to be a poor substitute for the medical documentation requested by an IHO in a due process hearing. Because the parent failed to establish a need for homebound services, the District Court affirmed the IHO’s finding that the district offered FAPE. The parent filed a due process complaint after the district denied her request for homebound services. Without deciding the merits of the request, the IHO ordered the district to convene an IEP meeting. The IHO also required the parent to provide relevant medical documentation to the district 48 hours before the meeting. “At this meeting, it became clear that [the parent] had not provided the necessary materials for [the district] to make a determination about whether [the student] required homebound services,” U.S. District Judge John D. Bates wrote. “These medical

documents were still missing by the September 19, 2006 [IEP] meeting, almost four months later.” The court observed that the parent submitted two letters from the physician, both of which stated that the student’s asthma was moderate and intermittent, in response to the IHO’s subsequent request for all available documentation. Although the district made a final request for medical documentation in November 2006, the parent did not provide additional information. The court pointed out that the physician’s letters did not indicate a need for homebound services. Given the parent’s failure to submit the requested medical information, the IHO did not err in determining that the district offered the student FAPE.

22. M.M. v. NEW YORK CITY DEPARTMENT OF EDUCATION, 51 IDELR 128 (S.D.N.Y. 2008)

A New York district did not have to pay for early intervention services that a 3-year-old girl received from a private provider during a dispute over her initial IEP. The District Court held that the IDEA’s stay-put provision does not apply to Individualized Family Service Plans. The 2d U.S. Circuit Court of Appeals has not addressed whether stay-put applies to children transitioning from Part C to Part B of the IDEA. However, the 11th U.S. Circuit Court of Appeals has held that the stay-put provision does not require a district to continue a child’s early intervention services when the parent contests the child’s initial IEP. *D.P.*, 47 IDELR 181. The District Court noted that the 11th Circuit’s holding matched OSEP’s interpretation of the statute. In its official comments to the 2006 Part B regulations, OSEP indicated that districts have no obligation to fund Part C services when a parent disputes services to be provided under Part B. “In doing so, [OSEP] noted that ... a child transitioning between Parts [C and B] does not have a ‘current educational placement’ for the purposes of the pendency provision,” U.S. District Judge Robert W. Sweet wrote. The court pointed out that the child in this case had aged out of Part C. Adopting the 11th Circuit’s view in *D.P.*, the court ruled that the district had no obligation to pay for continued IFSP services.

23. Alba SOMOZA v. NEW YORK CITY DEPARTMENT OF EDUCATION, 50 IDELR 182 (2^d Cir. 2008)

A New York district did not preserve a parent’s FAPE claim by funding three years of postgraduate educational services for a student with multiple, severe disabilities. Determining that the IDEA action accrued in the spring of 2003, the 2d Circuit concluded that the parent’s March 2006 filing was untimely. The 2d Circuit rejected the District Court’s decision, reported at 47 IDELR 127, that the FAPE action was not “ripe” until the district stopped funding the student’s private program. “The fact [that the district] voluntarily provided the requested educational services beyond the term of [the student’s] statutory entitlement does not ‘deprive a federal court [or administrative agency] of its power to determine’ the nature of the entitlement at issue,” U.S. Circuit Judge José A. Cabranes wrote. The 2d Circuit noted that the student made rapid progress in the private program during the 2002-03 school year, the year following her graduation from high

school. This progress, coupled with a special education expert's statement that the student had not previously received FAPE, should have alerted the parent that she had an IDEA claim against the district. The court pointed out that the parent did not file a due process complaint until March 2006, after the district denied her request for a fourth year of postgraduate services. Concluding that the FAPE claim was untimely, the 2d Circuit reversed an order requiring the district to continue funding the program for the duration of the parent's FAPE appeal.

24. Mike ASTOURIAN v. BLUE SPRINGS R-IV SCHOOL DISTRICT, 50 IDELR 282 (W.D. Mo. 2008)

The parents of a child with autism could not recover the costs of their son's home-school program from a Missouri district. Determining that the child's IEPs were both substantively and procedurally appropriate, the District Court denied the parents' request for relief. The court rejected the parents' argument that the IEPs failed to address the student's unique needs. "Both IEPs listed and described such components as the educational and functional goals for the child, the child's present level educational performance, and the child's communication needs," U.S. District Judge Fernando J. Gaitan Jr. wrote. Furthermore, the court pointed out that the parents participated in all of the child's IEP meetings. Not only did the IEP include observations by the parent's consultant, but the district allowed the consultant to observe the student in class. The court acknowledged that the IEP developed in December 2003 did not contain a behavioral intervention plan. However, the court observed that the deficiency did not impede the student's receipt of FAPE. On the contrary, the evidence showed that the student made progress in the district's program. Because the district offered the child FAPE, the parents were not entitled to reimbursement for their son's home-school program.

25. Vanessa BROWN v. DISTRICT OF COLUMBIA, 50 IDELR 249 (D.D.C. 2008)

A parent got a second chance to prove that a 12-year-old boy with a learning disability required 633 hours of tutoring to make up for an LEA's long-term denial of FAPE. Concluding that the student was entitled to compensatory education, the District Court reversed a decision in the district's favor and remanded the case for further proceedings. The IHO based his decision on the parent's "formulaic" calculation of the student's compensatory education needs: three hours for each day that the student was denied appropriate services. Relying on *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005), the IHO explained that compensatory education awards must be based on students' unique needs. The District Court agreed that a "cookie-cutter" approach to compensatory education was inappropriate. However, the court observed that hour-for-hour awards are not invalid if they reflect the student's individual needs. "Although [the parent's expert] did rely in part on a calculation, she similarly offered an individually tailored assessment of E.M. and his compensatory education needs," U.S. District Judge John D. Bates wrote. The court noted that the expert's calculation went beyond the four

months that the student went without and appropriate placement, and included 2004-05 and 2005-06 school years. Because the IHO limited his review to the 2006-07 school year, the court could not award compensatory services on the existing evidentiary record. The court instructed the IHO to consider on remand whether the LEA denied FAPE in the 2004-05 and 2005-06 school years.

26. L.Z. v. SPRINGFIELD BOARD OF EDUCATION, 50 IDELR 257 (D.N.J. 2008)

A factual dispute prevented a District Court from entering judgment in a FAPE appeal for either a New Jersey district or the parents of a child with Asperger syndrome. Noting that the parents disputed seven of the 14 material facts asserted by the district, the U.S. District Court, District of New Jersey denied both parties' motion for judgment. The case arose out of the formation of the child's initial IEP. After the IEP team found the child eligible for IDEA services, it offered to provide 15 hours of services each week in a special education preschool class. The district claimed that it also offered a part-time placement in a general education pre-Kindergarten class. However, the parents maintained that the district never made such an offer. The parents also contended that the proposed IEP goals were vague and immeasurable. Although the district claimed that the parents did not object to the proposed IEP during the IEP meeting, the parents denied the district's allegation. The parties also disputed whether the parents canceled a follow-up IEP meeting that purportedly was scheduled after the parents filed their due process complaint. The District Court explained that it could not enter judgment for either party without resolving the underlying factual dispute. "[O]f the fourteen material facts [the district] cites, [the parents] only truly agree with seven, thereby leaving genuine issues of material fact in dispute," the court wrote in an unpublished opinion. The court thus denied both parties' motions for judgment.

27. S.S. v. HOWARD ROAD ACADEMY, 50 IDELR 191 (D.D.C. 2008)

The parent of a teenager with learning disabilities could sue a D.C. charter school for denial of FAPE despite her son's subsequent success in a private program. By alleging that her son went without appropriate services for two years, the parent stated a viable claim for compensatory education. The court acknowledged that the charter school referred the student to the District of Columbia when it realized that it could not provide a full-time educational placement. However, the court observed, the parent claimed that the school failed to provide the student FAPE between August 2005 and August 2007. "Even if [the school was] correct that [its] responsibility to provide [the student] with a FAPE terminated with [its] referral request, that would not necessarily alleviate [the school] of [its] responsibility for his education for the previous two years," U.S. District Judge Ellen Segal Huvelle wrote. The court explained that compensatory education is intended to remedy past denials of FAPE. Thus, while the student's current program was appropriate,

the parent could seek relief for the charter school's earlier failure to provide appropriate services. The District Court denied the charter school's motion to dismiss.

28. D.W. v. DISTRICT OF COLUMBIA, 50 IDELR 193 (D.D.C. 2008)

The District of Columbia could not rely on a student's progress in an LD program to offset its obligation to provide compensatory education. The U.S. District Court, District of Columbia explained that the student's recent success did not negate the district's previous denial of FAPE. Relying on *Reid*, 43 IDELR 32, the court noted that prospective relief may not be sufficient to meet the needs of a student whose prior services were lacking. "Contrary to [the district's] assertions, a presently appropriate educational program does not abate the need for compensatory education," U.S. District Judge Royce C. Lamberth wrote. On the contrary, the court observed, compensatory programs are intended to yield tangible results. While an IEP must allow a student to make some progress, compensatory services must place the student in the position he would have attained but for the district's failure to provide FAPE. The district contended that its failure to provide compensatory education was a procedural error that did not cause substantive harm. The District Court disagreed. Concluding that the lack of compensatory education threatened the student's educational success, the court reinstated an April 2005 order that required the district to provide compensatory services.

29. FOREST GROVE SCHOOL DISTRICT v. T.A., 50 IDELR 1 (9th Cir. 2008), cert. granted, 109 LRP 13478, 129 S.Ct. 987 (U.S. 2009) (No. 08-305).

Noting that the IDEA grants extensive equitable powers to the courts, the 9th Circuit reversed a District Court's determination that a former student was ineligible for tuition reimbursement. The 9th Circuit explained that its authority to award appropriate relief, found at 20 USC 1415(i)(2)(C), trumped the ambiguous reimbursement provision found at 20 USC 1412(a)(10)(C). The court adopted the 2d Circuit's view in *Frank G. v. Board of Educ. of Hyde Park*, 46 IDELR 33 (2006), that conditioning reimbursement on a child's prior receipt of special education services would lead to "absurd results." Noting that the purpose of the IDEA is to provide FAPE to all children with disabilities, the 9th Circuit explained that reimbursement was a necessary component of the FAPE obligation. "Interpreting the 1997 amendments to prohibit [categorical] reimbursement to students who have not yet received special education and related services runs contrary to this express purpose," U.S. Circuit Judge Susan P. Graber wrote. The 9th Circuit determined that Section 1412(a)(10)(C) established reimbursement requirements for children who previously received special education services through the public school system. With regard to all other students, the provision was inapplicable. The 9th Circuit remanded the case for further consideration of whether the equities of the case entitled the student to reimbursement. U.S. Circuit Judge Pamela Ann Rymer dissented from the majority's opinion. She noted that the student's parents had not requested an IEP before withdrawing their son from the district.

30. RICHARDSON INDEPENDENT SCHOOL DISTRICT v. MICHAEL Z., 50 IDELR 69 (N.D. Tex. 2008)

The fact that a teenager with bipolar disorder, ODD and ADHD received educational services at a public high school did not let a Texas district off the hook for the cost of the student's residential placement. The services provided in the residential facility, which included therapeutic services and neurological diagnostics, were "inextricably intertwined" with the student's educational progress. The court rejected the district's argument that it was only responsible for related services identified in the student's IEP. "The [U.S.] Supreme Court has held that private placements are exempt from [20 USC 1401(9)], which defines the requirements of a 'free appropriate *public* education,'" U.S. District Judge Barbara M.G. Lynn wrote. "Thus, services provided in a residential setting that are necessary to enable a child to benefit from special education are reimbursable, notwithstanding their omission from the child's IEP." In a previous opinion, reported at 48 IDELR 149, the court determined that the student's "hybrid" placement was appropriate. As such, the parents were entitled to recover for the student's room and board. The court further noted that the student's defiant and aggressive behaviors interfered with her learning — a factor that made counseling and therapeutic services a necessity. Similarly, the student required nursing services to manage the psychiatric and behavioral problems that impeded her classroom function. Finally, the court observed that the neurological testing performed at the residential facility allowed for a more complete diagnosis and helped doctors to develop an appropriate treatment plan. Concluding that the student required the services to receive FAPE, the court ordered the district to reimburse the parents.

31. S.B. v. POMONA UNIFIED SCHOOL DISTRICT, 50 IDELR 72 (C.D. Cal. 2008)

A California district violated the IDEA when it failed to invite a child's regular education preschool teacher to a series of IEP meetings. Concluding that the procedural violation resulted in a denial of FAPE, the court ordered the district to pay for the child's home-based services. The IDEA requires an IEP team to include at least one regular education teacher of the child if it is possible that the child will participate in the regular education environment. Although the district maintained that preschool programs are not regular education environments under the IDEA, the District Court pointed out that the IDEA defines FAPE to include an appropriate preschool education. As such, the IDEA required the district to include the child's preschool teacher on his IEP team. 34 CFR 300.321(a)(2). The court noted that the district obtained some information from the teacher through interviews and questionnaires. However, those comments did not reflect the full scope of the teacher's experiences with the child. "The court is unable to determine whether [the teacher] would have persuaded the other team members to

formulate a different IEP had she attended the November 2004 IEP meeting,” U.S. District Judge A. Howard Matz wrote. “But she would have had the opportunity to do so.” Because the IEP did not address the child’s behavioral or occupational therapy needs — issues that the teacher likely would have addressed — the court determined that the teacher’s absence from the IEP meetings amounted to a denial of FAPE.

32. MR. & MRS. M v. RIDGEFIELD BOARD OF EDUCATION, 50 IDELR 10 (D. Conn. 2008)

A Connecticut district’s lackluster efforts to secure the presence of a second-grader’s parents at an IEP meeting proved to be a costly error. In addition to paying \$17,314 for the child’s private school expenses, the district had to reimburse the parents for \$39,825 in attorney’s fees. While the district’s financial liability for its procedural blunder was substantial, it was tempered somewhat by the parents’ own conduct during the IEP process. The parents notified the district of their intent to place their daughter in a private school several weeks before the IEP meeting. When the IEP team met one month later, it developed a program that could be implemented in the public school system. The District Court observed that the parents’ absence from the IEP meeting did not substantially impact the contents of the proposed IEP. “In the hearing officer’s view, the parents would not have agreed to any IEP that did not include a placement outside the public schools,” U.S. District Judge Robert N. Chatigny wrote. The court thus concluded that full reimbursement for the child’s private placement was not appropriate. However, because the hearing officer found that the district denied the child FAPE, the parents qualified as prevailing parties under the IDEA. The court determined that the parents could recover reasonable attorney’s fees incurred in their FAPE action.

33. GARCIA v. BOARD OF EDUCATION OF ALBUQUERQUE PUBLIC SCHOOLS, 49 IDELR 241 (10th Cir. 2008)

A New Mexico district may have violated its FAPE obligations by failing to review a ninth-grader’s IEP, but that lapse did not entitle the student to compensatory education. The 10th Circuit determined that the student’s truancy justified the District Court’s decision to deny her request for relief. The 10th Circuit declined to decide whether the district’s belated review of the student’s IEP amounted to a substantive denial of FAPE. Instead, it considered whether the District Court could deny relief based on the student’s failure to attend school for more than two years. Noting that the IDEA permits a court to “grant such relief as [it] determines is appropriate,” the 10th Circuit ruled that courts can also withhold relief based on equitable principles. The 10th Circuit explained that the District Court’s decision did not interfere with the IDEA’s stated purpose of providing FAPE to students with disabilities. “[The student] is, after all, *already* guaranteed the provision of a FAPE at any time she chooses to return to school, so long as she remains eligible to receive benefits under the IDEA,” U.S. Circuit Judge Neil M. Gorsuch wrote. Based on the student’s previous rejection of IDEA services, it was not unreasonable to conclude that she would fail to take advantage of any compensatory services awarded.

34. MR. and MRS. C. v. MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 6, 49 IDELR 281 (D. Maine 2008)

The fact that a teenager's amended IEP offered a meaningful educational benefit did not excuse a district's failure to implement his last-agreed-upon IEP while an administrative proceeding was pending. The District Court determined that the district's stay-put violation entitled the student to compensatory education. The court first rejected the parent's claim that the IDEA amendments imposed a higher standard of FAPE than the one identified in *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). Because the amended IEP met the student's educational and behavioral needs, it was reasonably calculated to provide FAPE. However, the parent filed a due process complaint to challenge that IEP. Until the IEP dispute was resolved, the district was required to implement the student's last agreed-upon IEP. The court noted that there was little case law addressing the availability of compensatory education for stay-put violations. Given the importance of the parent's participation in the IEP process, however, the court concluded that compensatory education was an appropriate remedy.

35. TRAVIS G. v. NEW HOPE-SOLEBURY SCHOOL DISTRICT, 49 IDELR 248 (E.D. Pa. 2008)

Evidence of regression will not necessarily establish a denial of FAPE, as a kindergartner's parents discovered when they disputed their son's proposed IEP. The District Court found no reason to disturb an appellate panel's conclusion that the program was appropriate despite a reduction in ABA and OT services. The parents contended that the child's behavior and functional communication deteriorated when his individualized ABA services were reduced by five hours per week. However, the district's experts testified that the child could not generalize his skills in an inclusion setting if his program focused on one-to-one instruction. As such, district did not err in offering a combination of one-to-one and inclusion services. Furthermore, while the parents' expert objected to the location of OT services, she agreed that the amount of services was appropriate. The parents' evidence was insufficient to show that the district denied the child FAPE.

36. JOSHUA A. v. ROCKLIN UNIFIED SCHOOL DISTRICT, 49 IDELR 249 (E.D. Cal. 2008)

A California district did not have to develop an ABA-based program for a child with autism to comply with the IDEA's peer-reviewed research provision. Noting that the provision was not an absolute mandate, the U.S. District Court, Eastern District of California determined that the child's eclectic program was appropriate. Under *Rowley*, a district has discretion to use any methodology that will allow a child to receive an educational benefit. This discretion survived the enactment of IDEA 2004 and its call for services based on peer-reviewed research. "It does not appear that Congress intended that the service with the greatest body of research be used in order to provide FAPE," the

court wrote. Similarly, nothing in the IDEA suggests that the failure to offer services based on peer-reviewed research is an automatic denial of FAPE.

37. J.R. v. SYLVAN UNION SCHOOL DISTRICT, 49 IDELR 253 (E.D. Cal. 2008)

An ALJ had to revisit her decision on the appropriateness of a 9-year-old boy's IEP, all because of a recording error on the final hearing date. A magistrate judge explained that the District Court could not review the ALJ's decision without a complete record of the hearing. The gap in the record, which the ALJ attributed to an unknown recording failure, spanned almost an entire day of testimony. The missing testimony included the special education director's view that the district offered the child FAPE in the LRE. It also included an ABA provider's opinion that a special day class would provide the child with greater benefits than an inclusion class — a recommendation that the ALJ "substantially adopted" in her decision. Given the significant gaps in the record, the court could not determine whether the ALJ properly assessed the experts' testimony or merely "rubber stamped" their recommendations. The magistrate judge advised the court to remand the case for further proceedings.

38. L.J. v. BROWARD COUNTY SCHOOL BOARD, 49 IDELR 216 (S.D. Fla. 2008)

It takes more than a suggestion of impropriety to overcome an unfavorable due process decision, as a parent discovered when a District Court affirmed an ALJ's finding that a Florida district offered her son FAPE. The court found no evidence that the ALJ's decision, issued after a 26-day hearing, was contrary to the facts or the applicable law. Although the parent maintained that the student did not receive an impartial hearing, the court noted that the ALJ "conducted a thorough and careful investigation" of the evidence. "The due process hearing, involving 60 witnesses and numerous exhibits, took 26 days and resulted in 6,390 pages of transcript," U.S. District Judge K. Michael Moore wrote. "The ALJ's 191-page final order shows careful consideration of the evidence and [a] firm grasp of the facts and circumstances at issue." The District Court also denied the parent's request for attorney's fees. Noting that the parent's counsel terminated her representation just four days into the administrative hearing, the court explained that it could not discern what portion of the parent's limited success, if any, was attributable to the attorney's work on the case.

39. K.S. v. FREMONT UNIFIED SCHOOL DISTRICT, 49 IDELR 182 (N.D. Cal. 2008)

An ALJ's refusal to credit the testimony of experts testifying on a child's behalf had a domino effect on his finding that the child received FAPE. The District Court reversed a decision in favor of a California district, concluding that the ALJ's credibility

determinations were improper. The court noted that the ALJ applied different standards to each party's witnesses. Although the ALJ discounted the testimony of the parents' experts based on their limited contact with the child, he credited the testimony of a district expert who had no contact with the child. "The ALJ's rationalization for this inconsistency — that the [analysis of the district's expert] was consistent with the record created by the district and the opinions of other district witnesses — is illegitimate," U.S. District Judge Susan Illston wrote. Because the dispute turned on the child's cognitive abilities, the court explained, the ALJ could not base credibility determinations on the substance of the experts' opinions. The court pointed out that the ALJ's unsupported credibility findings also cast doubt on his conclusion that the district provided the child FAPE. On remand, the court explained, the ALJ needed to conduct appropriate credibility determinations and reconsider whether, in light of those revised findings, the child's IEP was reasonably calculated to provide a meaningful educational benefit.

40. JALLOH v. DISTRICT OF COLUMBIA, 49 IDELR 190 (D.D.C. 2008)

The fact that the District of Columbia issued a general denial of wrongdoing in response to a parent's due process complaint did not entitle the parent to a default judgment on her FAPE claim. The U.S. District Court, District of Columbia concluded that the district response, while clearly inadequate under the IDEA, did not result in a denial of FAPE. When a parent requests a due process hearing to challenge a proposed IEP, the district must state the underlying reasoning for the IEP team's decision and describe the information on which the decision was based. The court noted that the district's response ignored two of the parent's claims. With regard to the remaining IDEA claims, the district broadly denied that it committed an IDEA violation or failed to provide the student FAPE. "There can be no serious question that [the district's] response in this case was inadequate as measured against [the IDEA's] statutory commands," U.S. District Judge Rosemary M. Collyer wrote. However, the court pointed out that a procedural violation of the IDEA does not amount to a denial of FAPE unless it affects the student's substantive rights or the parent's right to participate in the IEP process. Finding no evidence that the parent or the student suffered prejudice as a result of the deficient response, the court determined that the IHO did not err in denying the parent's request for a default judgment.

41. BOARD OF EDUCATION OF OTTAWA TOWNSHIP HIGH SCHOOL DISTRICT 140 v. Margaret SPELLINGS, 49 IDELR 152 (7th Cir. 2008)

Acknowledging that Congress reauthorized the IDEA three years after it enacted the NCLB, the 7th Circuit nonetheless affirmed a decision that prevented two Illinois districts from challenging the NCLB's enforceability. The court concluded that any conflicts between the two statutes would resolve in favor of the later-enacted NCLB. The 7th Circuit rejected the District Court's conclusion, found in a decision reported at 47 IDELR 255, that the districts lacked standing to seek a declaratory judgment. Because the NCLB requires districts to pay for more tests than they would otherwise administer to monitor students' progress, the 7th Circuit explained, the districts had a right to challenge

the portions of the NCLB that they found objectionable. However, the 7th Circuit concluded that the districts could not succeed on the merits of their case. U.S. Circuit Judge Frank Hoover Easterbrook noted that the original incarnation of the IDEA dated back to 1970. The NCLB, in contrast, was not enacted until 2001. If the two statutes did in fact conflict, the court explained, the provisions of the later-enacted NCLB would control. The court explained that the subsequent reauthorizations of the IDEA, including the latest reauthorization in 2004, did not change that result. “[The districts] do not contend that any of the amendments made in 2004 supersedes any aspect of the [NCLB] that matters to this litigation,” Judge Easterbrook wrote. “To the contrary, the 2004 amendments were designed in part to conform the [IDEA] to the 2001, not to displace it.” Determining that the IDEA amendments would not invalidate any conflicting provisions of the NCLB, the 7th Circuit concluded that the districts could not seek a declaratory judgment that the NCLB was unenforceable. However, the court cautioned that the ruling does not eliminate “the possibility that some state or federal regulations that purport to rely on the [NCLB] are not authorized by that law, and are disallowed by the [IDEA].”

42. J.N. v. PITTSBURGH CITY SCHOOL DISTRICT, 50 IDELR 74 (W.D. Pa. 2008)

A Pennsylvania district did not have to provide compensatory education to an 8-year-old boy who sustained multiple injuries in a classroom for students with autism. Because the child did not suffer an educational loss as a result of his injuries, his parents could not establish a denial of FAPE. The District Court acknowledged that the child suffered six injuries — five at the hands of his classmates — over a six-month period. However, the court explained that procedural violations of the IDEA are not actionable unless they affect the child’s substantive rights. The court noted there was no evidence that the child suffered more than a *de minimis* loss of educational services as a result of the peer assaults. “On the contrary, even his parents indicated that he progressed rather well in spite of them,” U.S. District Judge Terrence F. McVerry wrote. Absent a loss of educational opportunities, the parents could not demonstrate a right to compensatory education. The court also rejected arguments that the child’s injuries resulted from a lack of proper supervision. Not only did the school increase the number of support staff for the classroom, but it relocated the child’s violent classmate to another classroom. The evidence showed that the child’s mother met with the teacher after each incident and approved of all remedial actions taken.

43. FAIRFAX COUNTY SCHOOL DISTRICT v. Joyce KNIGHT, 49 IDELR 122 (4th Cir. 2008)

The parents of a ninth-grader with dyslexia and other LDs might have believed that their daughter required a Lindamood-Bell program to obtain a meaningful educational benefit, but that did not entitle them to reimbursement for their daughter’s private placements. The 4th Circuit affirmed a decision that the district’s program, which utilized a different educational methodology, was reasonably calculated to provide FAPE. The case turned in

large part on the testimony offered by both parties' experts. According to the parents' experts, who had extensive practical experience in reading difficulties, the IEPs developed for the student's eighth-grade and 10th-grade years would provide only a trivial educational benefit. However, the 4th Circuit pointed out that the parents' experts did not have degrees in reading, education, or special education. The district's experts, in contrast, had extensive experience in special education, as well as post-baccalaureate degrees in the field. The 4th Circuit agreed with the District Court that the district's experts were more credible. "While not opining upon the relative merits of educational theories and methodologies, ... the District Court found that the educational approach proposed in the eighth- and tenth-grade IEPs was appropriate and would provide an appropriate curriculum for [the student]," the 4th Circuit wrote in an unpublished decision. Finding no fault with the District Court's reasoning, the 4th Circuit upheld the judgment in the district's favor.

44. INDEPENDENT SCHOOL DISTRICT NO. 281 v. MINNESOTA DEPARTMENT OF EDUCATION, 49 IDELR 133 (Minn. Ct. App. 2008)

Although a third-grader with an OHI did not need extended school year services to receive FAPE, a Minnesota district's decision to deny ESY services based on the child's enrollment in a nonpublic school landed it in hot water just the same. The Minnesota Court of Appeals upheld an order by the state ED that required the district to notify all parents of nonpublic school students with disabilities of their children's right to FAPE. Judge Gordon W. Shumaker acknowledged that the IDEA does not require districts to provide FAPE to students with disabilities who voluntarily attend nonpublic schools. However, the judge pointed out that states are free to impose additional requirements on districts regarding the provision of special education and related services. Noting that Minnesota's "shared-time" statute prevents districts from denying special education and related services to students with disabilities who attended nonpublic schools, the court rejected the district's claim that the provision was inapplicable to ESY services. "Special instruction and services' means a FAPE," Judge Shumaker wrote. "And, if necessary to ensure a FAPE, the school district must provide ESY services to students with disabilities." The IDEA authorized the Minnesota ED to monitor the district's policies to ensure compliance with state law. By notifying parents of their right to request an IEP meeting and discuss special education services, the district would resolve any confusion about its obligation to serve parentally placed private school students.

45. Thomas H. LOCH v. BOARD OF EDUCATION OF EDWARDSVILLE COMMUNITY SCHOOL DISTRICT # 7, 49 IDELR 131 (S.D. Ill. 2008)

An Illinois district did not have to provide parents with information regarding the number of IEPs it developed for students with diabetes and emotional disturbances over a three-year period. Nor did it need to supply information about students other than the parents' 18-year-old daughter. Not only was the IEP data irrelevant to the parents' FAPE claim, but FERPA precluded the district from releasing other students' identifying information. The court rejected the parents' claim that they needed to know the number of IEPs that

the district developed between 2002 and 2005, broken down by disability classification, in order to show that the district denied their daughter FAPE. U.S. District Judge Michael J. Reagan agreed with a federal magistrate judge that the information would not tend to prove or disprove any of the facts at issue. FERPA prevented the district from releasing identifying information about other students. Nonetheless, the court observed that the district devised an appropriate solution to the parents' discovery request. "The court finds that the [district] reasonably and appropriately provided relevant information, within the bounds of [FERPA], by identifying students by number rather than by name," Judge Reagan wrote. The court affirmed a decision that denied the parents' motion to compel, and warned the parents that any further attempts to seek the information could subject them to sanctions.

46. M.M. v. SPECIAL SCHOOL DISTRICT NO. 1, 49 IDELR 61 (8th Cir. 2008)

A Minnesota district did not deny FAPE to a middle schooler with an emotional disturbance by suspending her on multiple occasions for assaulting teachers and schoolmates, carrying weapons to school, and engaging in threatening and disruptive behavior. The 8th Circuit determined that the district fulfilled its FAPE obligation by offering a placement in an alternative educational setting. As a preliminary matter, the court determined that the parents bore the burden of persuasion. Although Minnesota law requires school districts to prove their compliance with the IDEA, the 8th Circuit echoed its holding in *School Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 45 IDELR 117 (8th Cir. 2006), that the burden of persuasion falls on the party bringing the action. The 8th Circuit thus overturned the District Court's determination that the district bore the burden of persuasion. Turning to the merits of the claim, the court noted that the members of the student's IEP team, including the parent, agreed that the student could not receive an educational benefit in her current setting. However, the parent declined the district's offer to place the student in a more restrictive program at another school and requested mediation. Under the IDEA's stay-put provision, the court explained, the district had to maintain the student's current setting until the parties agreed on an alternative. "The parties have agreed that a change of placement is needed; only their failure to agree on an interim change, combined with the school district's stay-put obligations, have left the child in a setting that is not successfully controlling her dangerous misbehavior," U.S. Circuit Judge James B. Loken wrote. Judge Loken further observed that the student's lack of educational services during her suspensions stemmed from the parent's refusal to accept the district's offer of home schooling services. Moreover, the evidence showed that the student received "some educational benefit" during her eighth-grade year. Determining that the district offered the student FAPE, the 8th Circuit reversed an award of compensatory education and attorney's fees.

47. BOARD OF EDUCATION OF FAYETTE COUNTY, KENTUCKY v. L.M., 49 IDELR 97 (E.D. Ky. 2008)

Noting that a seventh-grader with an undisclosed disability had gone without certain IDEA services for the four years his FAPE dispute was pending, the U.S. District Court, Eastern District of Kentucky ordered the due process appellate board to determine an appropriate award of compensatory education for the student. The appellate board “would render the fastest final decision without compromising any party’s ability to have all of its arguments and evidence considered.” The latest delay in the case stemmed from the 6th Circuit’s ruling in a decision reported at 47 IDELR 122 that the board improperly delegated its power to calculate awards of compensatory education. In criticizing the board’s decision to allow the IEP team to decide the student’s compensatory services, the 6th Circuit remanded the case “with instructions to have the appropriate administrative body craft a remedy that complies with the IDEA.” Although the parent argued that the Kentucky ED was the appropriate administrative body, the District Court agreed with the district that the appellate board would provide a faster resolution. However, the court stated that it would not order the board to adopt certain directives advanced by the district, such as a requirement that the board identify a minimum threshold of compensatory education hours. “Many of the specific requests by the [district] ... intrude into areas where the court should yield to the [board’s] expertise,” U.S. District Judge Jennifer B. Coffman wrote. The court instead advised the board to use its best judgment in determining an appropriate amount of compensatory services.

48. GREENWOOD v. WISSAHICKON SCHOOL DISTRICT, 50 IDELR 280 (E.D. Pa. 2008)

Although a parent wanted her 17-year-old daughter to attend regular education classes, a Pennsylvania district had no obligation to offer a mainstream placement. The District Court concluded that the student’s cognitive limitations and inability to communicate effectively made a general education placement inappropriate. The court pointed out that the district went to great lengths to accommodate the student in the general education environment. In addition to modifying the content and quantity of the general education curriculum, the district provided materials such as flash cards to assist the student’s learning. The district also assigned a one-to-one aide to assist the student in all of her classes. Despite the supports, however, the student did not benefit from her mainstream placement. The court observed that the student did not understand the general education curriculum, and required considerable prompting to interact with others. Moreover, the student could not work on the life skills goals set forth in her IEP. “Certain of [the student’s] goals, such as dressing and toileting, are simply not appropriate tasks in a regular academic setting,” U.S. District Judge Timothy J. Savage wrote. The court further noted that the student’s presence in the general education classroom interfered with the learning of others. Not only did the student engage in frequent, loud vocalizations, but one teacher reported that he devoted 90 percent of class time to individualized work with the student. Concluding that the student required a more restrictive setting to receive FAPE, the court denied the parent’s request for a general education placement.

B. LEAST RESTRICTIVE ENVIRONMENT

49. B.S. v. PLACENTIA-YORBA LINDA UNIFIED SCHOOL DISTRICT, 51 IDELR 237 (9th Cir. 2009)

Because a student with autism would receive little benefit from a general education language arts class, a California did not err in recommending an SDC placement for language arts instruction. In an unpublished decision, the 9th Circuit affirmed a ruling that the district offered the student FAPE in the LRE. The court acknowledged that the IDEA expresses a strong preference for mainstreaming, but explained that a district's primary duty is to ensure that students with disabilities receive FAPE. "We noted nearly 25 years ago that mainstreaming 'is a policy which must be balanced with the primary objective of providing [students with disabilities] with an appropriate education,'" the court wrote, quoting its opinion in *Wilson v. Marana Unified Sch. Dist. No. 6*, 556 IDELR 101 (9th Cir. 1984). The court observed that the student in this case would receive only minimal benefit from a mainstream language arts placement. The SDC placement, on the other hand, would address the student's unique needs. Concluding that the SDC placement was necessary to provide the student FAPE, the 9th Circuit held that the district had no obligation to offer a mainstream placement.

50. C.R.R. v. WATER VALLEY SCHOOL DISTRICT, 49 IDELR 243 (N.D. Miss. 2008)

The IDEA's preference for educating students with disabilities in their neighborhood schools did not prohibit a Mississippi district from placing a 9-year-old girl in a neighboring LEA's special education center. Given the severity of the child's disabilities and the extent of the center's resources, the court found no error with the district's placement decision. The child's parents claimed that the staff at the neighborhood school was capable of implementing the child's IEP. However, the district had discretion to decide the physical location of the child's services. The district had an interagency agreement with the neighboring LEA that allowed it to take advantage of the center's more sophisticated resources. Absent evidence that the child could not receive FAPE in the special education center, the parents could not show that the placement was inappropriate.

51. GREENWOOD v. WISSAHICKON SCHOOL DISTRICT, 50 IDELR 280 (E.D. Pa. 2008)

Although a parent wanted her 17-year-old daughter to attend regular education classes, a Pennsylvania district had no obligation to offer a mainstream placement. The District Court concluded that the student's cognitive limitations and inability to communicate effectively made a general education placement inappropriate. The court pointed out that

the district went to great lengths to accommodate the student in the general education environment. In addition to modifying the content and quantity of the general education curriculum, the district provided materials such as flash cards to assist the student's learning. The district also assigned a one-to-one aide to assist the student in all of her classes. Despite the supports, however, the student did not benefit from her mainstream placement. The court observed that the student did not understand the general education curriculum, and required considerable prompting to interact with others. Moreover, the student could not work on the life skills goals set forth in her IEP. "Certain of [the student's] goals, such as dressing and toileting, are simply not appropriate tasks in a regular academic setting," U.S. District Judge Timothy J. Savage wrote. The court further noted that the student's presence in the general education classroom interfered with the learning of others. Not only did the student engage in frequent, loud vocalizations, but one teacher reported that he devoted 90 percent of class time to individualized work with the student. Concluding that the student required a more restrictive setting to receive FAPE, the court denied the parent's request for a general education placement.

52. P. v. NEWINGTON BOARD OF EDUCATION, 51 IDELR 2 (2^d Cir. 2008)

The parents of a child with Down syndrome may have wanted their son to spend at least 80 percent of each school day in a general education classroom, but a Connecticut district did not violate the IDEA by failing to honor their request. The 2d Circuit held that the district's offer to mainstream the student for 74 percent of the time — a difference of only two or three hours a week — was appropriate. The court noted that the district "made significant efforts" to include the student in general education classes. In addition to providing a variety of supplemental aids and services, the district modified the general education curriculum to allow the student to participate. It also hired consultants on behavior, inclusion, hearing impairments, and assistive technology. Because the student no longer engaged in disruptive or problem behaviors, his presence would not have a negative impact on teachers and classmates. However, the court observed that the student required pull-out services for reading, math, and speech therapy. The court determined that the IEP's call for 74 percent inclusion was appropriate given the student's need for specialized instruction. "While including students in the regular classroom as much as is practicable is undoubtedly a central goal of the IDEA, schools must attempt to achieve that goal in light of the equally important objective of providing an education appropriately tailored to each student's particular needs," U.S. Circuit Judge Robert A. Katzmann wrote. The 2d Circuit affirmed the District Court's decision, reported at 48 IDELR 280, that the district offered FAPE in the LRE.

53. PETIT v. UNITED STATES DEPARTMENT OF EDUCATION, 51 IDELR 66 (D.D.C. 2008)

Finding no evidence that the ED arbitrarily excluded cochlear mapping from the definition of "related services" in the Part B regulations, the U.S. District Court, District of Columbia ruled that the ED did not violate the Administrative Procedure Act. The

District Court granted the ED's motion for judgment. The claim was brought by the parents of children with cochlear implants who received services under the IDEA. They contended that the statute's use of the term "audiology services" was broad enough to encompass mapping services, which must be performed by an audiologist. The District Court disagreed. Noting that the IDEA's definition of related services excludes surgically implanted medical devices, the court determined that the statute was ambiguous. As such, the court considered whether the ED's interpretation of the related services provision was reasonable. The ED pointed out that mapping is an expensive procedure that must be performed by an individual with specialized technical expertise. Moreover, mapping does not need to be completed during the school day or on school grounds. The court found no fault with the district's interpretation of the provision. "Although [the parents] would prefer a broader interpretation of the statute, one that covers services regardless of whether they occur at school or at other locations, that fact does not render [the ED's] chosen interpretation unreasonable," U.S. District Judge Ricardo M. Urbina wrote. The court granted judgment for the ED on the APA claim. It refused to dismiss the parents' related IDEA claim, however, as the ED only opposed the claim on jurisdictional grounds.

54. M.W. v. CLARKE COUNTY SCHOOL DISTRICT, 51 IDELR 63 (M.D. Ga. 2008)

Allegations that a 3-year-old boy had begun imitating the behaviors of his classmates in a self-contained autism program failed to cinch the parents' request for a mainstream placement. The U.S. District Court, Middle District of Georgia determined that the requested placement, a private general education preschool, could not meet the child's unique needs. The court pointed out that the child's IEP team considered the private preschool when determining the child's placement. Because the school did not offer one-to-one instruction, however, the team decided to place the student in the smaller, self-contained program. "School professionals believed that [the child's] ABA training 'would be almost impossible in the regular setting' and that [the child] would require 'a truckload of pull-out' from a regular education classroom to obtain all of the services he needed and [the parents] desired," U.S. District Judge Clay D. Land wrote. The court pointed out that the self-contained program offered a low student-to-teacher ratio and was staffed by personnel certified in ABA methodology. In addition, the child would have regular opportunities to interact with typically developing peers. Although the parents maintained that the child had adopted his classmates' maladaptive behaviors, the court observed that the student did not exhibit any behavioral problems in the classroom. Concluding that the self-contained placement was the child's LRE, the court affirmed a due process decision that denied the parents' reimbursement request.

55. YATES v. WASHOE COUNTY SCHOOL DISTRICT, 51 IDELR 7 (D. Nev. 2008)

A Nevada district did not violate the IDEA when it proposed that a high schooler receive math instruction in a resource room rather than a general education classroom. Noting that the student made minimal progress in the mainstream setting, the District Court concluded that the district offered FAPE in the LRE. The court afforded little weight to the non-academic benefits of a mainstream placement, as the proposed IEP called for the student to spend 60 percent of each school day with non-disabled peers. Furthermore, the student did not engage in any problem behaviors that would disrupt the class. However, the court pointed out that the student was not benefiting from general education math classes. Although the parent submitted progress supports showing that the student was working toward his goals, the district's autism specialist testified that the student was not making meaningful gains. "[The autism specialist] opined that [the student] needs a setting where he can have direct instruction from a classroom teacher," U.S. District Judge Larry R. Hicks wrote. Because the student required one-to-one verbal instruction to receive an educational benefit, the court held that the proposed resource room placement for math instruction was appropriate. The court affirmed an SRO's decision that the resource room was the student's LRE.

56. C.N. v. WILLMAR PUBLIC SCHOOLS, ISD NO. 347, 50 IDELR 274 (D. Minn. 2008)

Allegations that a teacher overzealously applied the seclusion and restraint provisions of a third-grader's BIP were not enough to sustain a Section 1983 claim for Fourth Amendment violations. Determining that the teacher's conduct was reasonable, the District Court held she was entitled to qualified immunity. The qualified immunity defense turns on the reasonableness of an official's conduct at the time of the alleged offense. If a teacher's treatment of a student with a disability does not substantially depart from accepted professional judgment, practice or standards, the court explained, her actions are reasonable. In this case, the court observed, the standard for accepted practice was set by the student's IEP. Because the IEP expressly permitted the teacher to use seclusion and restraint as behavior management techniques, the teacher did not depart from accepted professional judgment when she used those techniques on the student. "Indeed, [the teacher] was required to follow the IEP and use these techniques to help manage [the student's] behavior," U.S. District Judge David S. Doty wrote. The court also dismissed the parent's claim for 14th Amendment violations. Because the teacher's conduct was reasonable, the court explained, the parent could not show that her actions "shocked the conscience" and deprived the student of her due process rights.

57. NEW JERSEY PROTECTION & ADVOCACY, INC. v. NEW JERSEY DEPARTMENT OF EDUCATION, 50 IDELR 188 (D.N.J. 2008)

By alleging that the New Jersey ED systematically segregated students with disabilities from the general education population, three disability rights groups established their right to sue for IDEA and Section 504 violations. The District Court determined that the

groups had representational standing to sue on behalf of students throughout the state. The court noted that the groups advocated on behalf of individuals with disabilities. Thus, said the court, students with disabilities were the direct and primary beneficiaries of any legal actions taken by the group. Not only did the litigation serve the groups' purpose, protecting the rights of individuals with disabilities, but it did not require participation by the individual students. "[The groups'] claims do not focus on individual injuries, but instead they allege that [the ED] systematically failed to comply with the inclusion mandate of the IDEA," U.S. District Judge Mary L. Cooper wrote. The court pointed out that the groups alleged a statewide, systematic violation of the LRE requirement. As such, they did not need to exhaust their administrative remedies under the IDEA before filing suit. Moreover, the court concluded that the IDEA's provisions on compliance and monitoring allowed the group to sue the ED for its alleged compliance failures.

58. Christina McCOMISH v. UNDERWOOD PUBLIC SCHOOLS, 49 IDELR 215 (D.N.D. 2008)

A teenager's deficiencies in academics, social interaction and independent living skills bolstered a district's decision to place her in an out-of-state residential facility for the blind. Determining that the district was not equipped to meet the student's needs, the District Court concluded that the district offered FAPE in the LRE. The court pointed out that the district considered multiple placements on the LRE continuum before opting for residential placement. Because the district's ongoing 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. While other districts in the state could meet the student's needs, the court noted that those districts did not have space available in their programs. The court added that the residential school offered the academic instruction the student needed to fulfill her career goals. Furthermore, the program's residential component would help the student to develop her independent living skills and improve her social interaction. The court rejected the student's claim that the absence of typically developing peers made the placement inappropriate. "Although the [residential] placement includes several less than ideal factors, that placement is clearly superior overall to [the public school], the only other option available at that time," U.S. Magistrate Judge Karen K. Klein wrote.

C. BEHAVIOR AND DISCIPLINE

59. M.S.-G. v. LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, 51 IDELR 236 (3^d Cir. 2009)

A student's failure to provide details about his 10 suspensions during the 2005-06 school year kept him from challenging the appropriateness of those suspensions. Determining that the student failed to plead a claim under the IDEA, the 3d Circuit affirmed a decision

reported at 47 IDELR 72 that dismissed his complaint. The student argued that the U.S. Supreme Court's description of the IDEA's pleading requirements as "minimal" in *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005), relieved him of the obligation to allege specific facts. The 3d Circuit disagreed. The court observed that both the IDEA and the Part B regulations require a complaint to describe the nature of the student's problem, including any facts relating to the problem. In addition, the complaint must include a proposed resolution to the problem. While the student here provided the dates and duration of each suspension, he did not state the reasons for each suspension. Nor did he indicate that his disciplinary offenses were a manifestation of his disability. "[The student] failed to provide a description of the nature of the problem that included facts; he merely identified the problem, in this case, his multiple suspensions," the court wrote in an unpublished opinion. Without more information about the suspensions and the student's underlying offenses, the court could not determine whether the removals were appropriate.

60. DAMIAN J. v. SCHOOL DISTRICT OF PHILADELPHIA, 49 IDELR 161 (E.D. Pa. 2008)

Although a Pennsylvania district did not violate the IDEA by restraining a 12-year-old boy during behavioral outbursts, it denied the student FAPE when it failed to implement his IEP. The U.S. District Court, Eastern District of Pennsylvania concluded that the district's failure to assign a qualified teacher to the student's emotional support class amounted to a denial of FAPE. The court pointed out that the teacher did not have a degree in education, was not certified or licensed to teach in any state, and had no prior experience teaching a special education class. Nonetheless, the court observed, the district assigned her to teach students who had significant emotional and behavioral problems. The court noted that the district provided little training to the teacher. "It was left to [the teacher] to structure the classroom and establish a behavior management system," U.S. District Judge Juan R. Sanchez wrote. Not only was the teacher unqualified to instruct children with emotional disturbances, the court observed, but she had no training on IEP implementation. The court added that the teacher did not provide daily progress reports, as she believed it would be unfair to single the student out. Moreover, the teacher continued implementing an old IEP after the district developed a new IEP to address the student's ongoing behavioral problems. Judge Sanchez pointed out that district staffers had to restrain the student three times due to behavioral outbursts. Concluding that the district's failure to implement substantial portions of the student's IEP amounted to a denial of FAPE, the court ordered the district to provide compensatory education.

61. K.R. v. SCHOOL DISTRICT OF PHILADELPHIA, 50 IDELR 190 (E.D. Pa. 2008)

Employees of a Pennsylvania school district did not have to defend claims that they violated a student's constitutional rights by failing to prevent verbal and physical assaults

by the student's classmates. The District Court concluded that the employees had qualified immunity from the parents' Section 1983 claim. The parents claimed that the employees improperly classified their daughter's autism as a learning disability. When the student was in first grade, the district eliminated her one-to-one support services and placed her in a classroom with an uncertified teacher. According to the parents, classmates assaulted the student on numerous occasions during her first-grade year. The District Court acknowledged that the student had a clearly established constitutional right to be free from physical harm while attending school. However, the court found no evidence that the employees' actions were unreasonable. Based on evaluation reports and the student's progress, the district and its employees made certain changes to the student's program. "One result of [the IEP changes] was that [the student] was placed in a classroom with other students," U.S. District Judge Michael M. Baylson wrote. "[The employees] had no reason to believe that [the student] would suffer her injury as she unfortunately did." The court thus determined that the employees were entitled to qualified immunity. However, the court allowed the parents to pursue Section 504 and Title II claims against the district.

62. WAUKEE COMMUNITY SCHOOL DISTRICT v. DOUGLAS and EVA L., 51 IDELR 15 (S.D. Iowa 2008)

The fact that a student's parents agreed to the use of time-outs and hand-over hand interventions to manage their daughter's problem behaviors did not excuse a district's over-reliance on those techniques. The District Court ruled that the behavior interventions were excessive and inappropriate. The court recognized that the district made a "considerable effort" to address the child's behavioral needs. Nonetheless, the interventions applied were not reasonably calculated to manage the student's behavioral problems. The court pointed out that the student's noncompliant behaviors were escapist in nature, while her aggression against peers was an effort to seek attention. "Both parties' experts ... testified that the use of break time activity in response to non-compliance — an escape-based behavior — and the use of hand-over-hand intervention in response to peer aggression — an attention seeking behavior — would serve to reinforce the problem behavior and was contraindicated by the research," U.S. District Judge Ronald E. Longstaff wrote. Moreover, the interventions were excessive and inappropriate as applied. Although the district indicated that it would apply "age-appropriate" time-outs, lasting one minute for each year of the student's age, the evidence showed that the student sometimes spent several hours in isolation. The parents were also unaware that district staffers regularly used restraint when applying hand-over hand interventions. By failing to develop and implement appropriate behavioral interventions, the district denied the student FAPE.

63. STANCOURT v. WORTHINGTON CITY SCHOOL DISTRICT, 51 IDELR 19 (Ohio Ct. App. 2008)

An Ohio district could implement an addendum to a sixth-grader's IEP even after his parents filed a due process complaint to challenge the new provision. Because the addendum, which called for a discontinuation of behavioral reinforcers, did not change the student's placement, it did not implicate the stay-put protections of the IDEA. The stay-put provision requires a district to keep a student in his then-current educational placement while a due process proceeding or subsequent appeal is pending. As the Court of Appeals observed, however, neither the IDEA nor the Part B regulations define "educational placement." Relying on *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992), the Court of Appeals explained that an IEP modification does not qualify as a change in placement unless it eliminates or fundamentally alters a basic element of a student's educational program. The court pointed out that the behavioral plan called for a gradual "thinning" of reinforcers once the student mastered his target behaviors. Furthermore, the district's psychologist testified that the behavioral plan would not be effective without a thinning of reinforcers. The psychologist opined that the addendum was not an IEP modification, but rather a method of implementing an existing IEP provision. Moreover, the court noted that the IEP expressly called for the district to reinstate the behavior plan if the student's target behaviors lapsed. Determining that the addendum did not fundamentally alter the student's program, the court ruled that the district was not required to continue the behavioral reinforcers under the stay-put provision.

64. R.C. v. YORK SCHOOL DEPARTMENT, 51 IDELR 68 (D. Me. 2008)

A teenager's substance abuse and self-injurious behaviors may have strained her relationship with her parents, but they did not qualify her as a "child with a disability" under the IDEA. A federal magistrate judge determined that the student's solid academic performance made her ineligible for special education and related services. The magistrate judge acknowledged that the student had pervasive depression to a marked degree that had persisted for several years. However, the magistrate judge explained, the parents also needed to show that the student's depression had an adverse affect on her educational performance. The parents failed to do so. Recognizing that the student received several disciplinary referrals in seventh and eighth grade, the magistrate judge pointed out that those offenses were minor. Furthermore, the student's teachers praised both the quality of her work and her ability to work with different peer groups. "It is clear that [the student] consistently performed strongly across all spheres in school, including academics, conduct, communication, citizenship, leadership, and social skills," U.S. Magistrate Judge John H. Rich III wrote. "Whatever the extent and scope of her needs generally, she did not need special education to benefit from the education offered her in public school." The magistrate judge advised the District Court to affirm a due process decision in the school district's favor.

65. Rosella HUNT v. SYCAMORE COMMUNITY SCHOOL DISTRICT BOARD OF EDUCATION, 108 LRP 52374, 542 F.3d 529 (6th Cir. 2008)

An Ohio district did not violate a teacher's aide's substantive due process rights to personal security and bodily integrity when it permitted an eighth-grader with autism to attend a school field trip, despite her history of assaultive behavior. After the aide was injured by the student, she sued the district under Section 1983 for "failing to provide or maintain a workplace that was free of foreseeable and unreasonable risks of physical harm." A district can be held responsible for decisions that are so arbitrary that they shock the conscience. In view of the aide's voluntary undertaking of hazardous employment and the district's duty under the IDEA to educate a student with autism, the court reasoned that the district's actions were not constitutionally arbitrary.

The aide volunteered to chaperone an extracurricular field trip to a bowling alley where the 5'8", 150-pound female student was present. When the student ventured into another lane and began trying to hit a child from another school, the aide intervened. The student allegedly hit the aide in the chest and pulled a lanyard around her neck, choking her. The aide sustained ruptured discs in her neck. Before the incident occurred, there were approximately 30 reports of the student biting, kicking, hitting and scratching her caregivers. The student had hit the aide in the back and bit her on the hand two months earlier.

The court relied on *Upsher v. Grosse Pointe Public Sch. Sys.*, 108 LRP 52534, 285 F.3d 448 (6th Cir. 2002); *cert. denied*, 537 U.S. 880 (U.S. 2002), to illustrate that a government agency's provision of an unsafe workplace to its employees is "particularly unlikely to shock the conscience." In *Upsher*, a district used its custodians to rip up carpet from asbestos tile after a contractor deemed the work too hazardous. The custodians were exposed to asbestos because the district took virtually no safety precautions. Their substantive due process claims were dismissed because they failed to show that the district intentionally injured them or acted arbitrarily in the constitutional sense.

The aide's constitutional claim failed, the court explained, because: 1) the district did not intentionally harm her; 2) the aide voluntarily signed up for an assignment that was risky; and 3) the risk resulted from the district's attempt to carry out its mandatory duty to educate students with disabilities.

66. RIVERA v. JONES, WEBB CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, 51 IDELR 75 (S.D. Tex. 2008)

Neither a district's refusal to enroll a student absent proof of residency nor its alleged hostility toward the student's special education advocate established a violation of Section 504. The District Court determined there was no evidence that the student's expulsion for fondling a female schoolmate was retaliatory. Although the student's complaint was not clear, the court surmised that he provided details of the district's prior

conduct as evidence of discriminatory intent. The court concluded that the allegations did not demonstrate discrimination or retaliation. With regard to the district's refusal to enroll the student, the court noted that Texas law required students to establish residency in the district prior to enrollment. Thus, the district did not err in requiring the student to prove that his aunt, a district resident, was his legal guardian. As for the district's alleged hostility during IEP meetings, the district maintained that its staffers always treated the advocate respectfully despite their professional disagreements. "In addition, [the district] presents evidence showing that, of the sixteen special education meetings held for [the student] over three years, [the advocate] agreed with the outcomes of all but the expulsion [meeting]," U.S. District Judge George P. Kazen wrote. The court granted judgment for the district, finding no evidence that the student's expulsion amounted to a Section 504 violation.

67. DISTRICT OF COLUMBIA v. Jane DOE, 51 IDELR 8 (D.D.C. 2008)

An IHO may have believed that a 45-day suspension for classroom misbehavior was excessive, but that did not permit him to reduce a sixth-grader's suspension to 11 days. The IHO exceeded his authority by modifying the disciplinary sanction imposed by the district superintendent. The case hinged on the finding that the student's misconduct — the failure to behave for a substitute teacher — was not a manifestation of his ADHD. Under the IDEA, the District Court observed, the IHO had an obligation to determine: 1) whether the student's misconduct was a manifestation of his disability; and, if not, 2) whether the district denied the student FAPE. Although the IHO agreed with the results of the district's MD review, he also determined that a 45-day suspension was excessive. The District Court observed that the IDEA did not permit the IHO to alter the student's suspension. "Once [the manifestation determination] was reached, [the district] was entitled to discipline [the student] the same as any other student who was not diagnosed with disabilities, so long as the student was not denied a FAPE," U.S. District Judge Emmet G. Sullivan wrote. The court pointed out that the student had been disciplined several times for classroom misconduct. Because the disciplinary code allowed the district to treat those repeated incidents as a more serious offense, the superintendent was free to impose a 45-day suspension.

68. TORRANCE UNIFIED SCHOOL DISTRICT v. E.M., 51 IDELR 11 (C.D. Cal. 2008)

Noting that a middle schooler had a lengthy history of attacking her schoolmates out of frustration, a District Court agreed with an ALJ that the student had an emotional disturbance. The court affirmed an order requiring a California district to fund the student's private placement and reimburse the parent for an IEE. The court found the student eligible under 34 CFR 300.8(c)(4)(i)(C), which defines an emotional disturbance to include the exhibition of inappropriate behavior or feelings under normal circumstances. This behavior must persist for a long period of time to a marked degree,

and must have an adverse affect on the student's educational progress. The court concluded that the student's behavior fit the regulatory criteria. "There is evidence that [the student] had been suspended and/or disciplined on multiple occasions for punching, tripping, bullying, and otherwise physically harming her classmates," U.S. District Judge Christina A. Snyder wrote. "Even at [the middle school], where [the student] had been for only fifteen days before her expulsion, students complained that [the student] kicked and hit her classmates if she was upset." The court observed that the behaviors did not appear to result from social maladjustment, as the student had problems with aggression as early as kindergarten. Moreover, the district was unable to curb the student's disproportionate responses through the use of behavioral interventions. Noting that the student was unable to attend school because of her aggressive behaviors, the court determined that she had an emotional disturbance.

69. P.K.W.G. v. INDEPENDENT SCHOOL DISTRICT NO. 11, 50 IDELR 158 (D. Minn. 2008)

A Minnesota district did not violate the IDEA when it elected to fine-tune a student's existing IEP to address his increasing behavioral problems. Although the student regressed significantly during the school year, both behaviorally and academically, the District Court concluded that the district offered the student FAPE. The court acknowledged that the district did not formally revise the student's IEP during the student's 10th-grade year. However, when the student's behavior began to decline, the district made several attempts to adjust the services offered under his then-current IEP. "Some examples are the addition of a mentor advocate in February 2006, the increased involvement of [the behavior intervention specialist] in February 2006, the shift in March 2006 to begin the student's day with one-to-one instruction, and the student's shift to a schedule with different classrooms in May 2006," the court wrote. The court pointed out that the IEP was based on recent educational and behavioral evaluations. Moreover, the student made great strides with regard to his behavior during the first quarter of the school year. Noting that the IEP and BIP addressed the problem behaviors that the student experienced later in the year, the court held that it was not unreasonable for the district to work within the framework of the existing IEP instead of formally revising his program.

70. DANIELLE G. v. NEW YORK CITY DEPARTMENT OF EDUCATION, 50 IDELR 247 (E.D.N.Y. 2008)

The fact that a special education itinerant teacher was able to redirect a grade schooler with autism when her focus strayed from classroom lessons did not excuse a district's failure to conduct an FBA. The District Court concluded that the student's hyperactivity and self-stimulatory behaviors impeded her learning. According to a district evaluator, the court observed, the student frequently became lost in her own thoughts and finger play. The evaluator testified that the student's need to be "brought back" from her self-stimulatory behavior interfered with her listening comprehension. The SEIT provided

additional evidence of the student's behavioral difficulties. "[The student] may scream out at the teacher when asked a question," U.S. District Judge Carol Bagley Amon wrote. "[The] SEIT also testified regarding [the student's] stimulatory behaviors, explaining that [the student] may engage in finger play during class until the point where she's bleeding." Although the SEIT was able to manage the student's behavior and help her to refocus, the student still had difficulty completing assignments and organizing her books. The District Court determined that the student's problematic behaviors triggered the district's duty to conduct an FBA. The court reversed an SRO's decision that an FBA was not necessary.

71. FITZGERALD v. FAIRFAX COUNTY SCHOOL BOARD, 50 IDELR 165 (E.D. Va. 2008)

The parents of an 11th-grader with anxiety issues may have objected to the manner in which an MD review was conducted, but that did not invalidate the district's decision to suspend the student for the remainder of the school year. The U.S. District Court, Eastern District of Virginia held that the district conducted a proper MD review before determining the student's punishment. The court rejected the parents' argument that they had an "equal right" to determine the members of the student's MD team. While parents have the right to invite additional participants to an MD review, they do not have the right to veto a district's choice of team members. Nor did the parents have the right to veto the MD team's finding that the student's weekend paintball raid on the high school was unrelated to his emotional disability. "Consensus may be desirable as a goal, but cannot always be reached and is not statutorily required," U.S. District Judge T.S. Ellis III wrote. The court acknowledged that the student's special education teacher prepared a draft IEP in advance of the MD review that recommended a home placement. However, noting that the MD team thoroughly discussed the nature of the student's disability, the student's educational records, and the conduct at issue, the court found insufficient evidence of predetermination. The court also pointed out that the student orchestrated the incident, and was not swayed by his friends to engage in inappropriate behavior. Based on the nature of the incident and the student's disability, the court concluded that the extended suspension was appropriate.

D. ELIGIBILITY AND IDENTIFICATION

72. HARRIS v. DISTRICT OF COLUMBIA, 50 IDELR 194 (D.D.C. 2008)

An LEA's belief that FBAs are intended to address behavioral rather than educational problems did not excuse its failure to act on a parent's request for an independent FBA. Concluding that FBAs qualify as "educational evaluations," the District Court determined that the regulatory provisions on IEEs also applied to the parent's FBA request. The court noted that the Part B regulations broadly define "evaluation" to include the procedures

used to identify the specialized instruction and related services required by a child with a disability. By requiring IEP teams to consider the use of positive behavioral interventions and supports for children whose behavior interferes with learning, the court observed, the IDEA recognizes that education is “inextricably linked” to a child’s behavior. “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,” U.S. District Judge Royce C. Lamberth wrote. The court also rejected the LEA’s claim that its development of an effective IEP made an independent FBA unnecessary. Noting that districts must review IEPs at least once a year and revise them as needed, the court pointed out that the LEA had not conducted an FBA in more than two years. As such, the LEA failed to monitor the student’s progress and revise her IEP accordingly. The court reversed a due process decision in the district’s favor and granted the parent’s request for an independent FBA.

73. LOCH v. BOARD OF EDUCATION OF EDWARDSVILLE COMMUNITY SCHOOL DISTRICT #7, 50 IDELR 221 (S.D. Ill. 2008)

An Illinois district did not err when it concluded that a former student was ineligible for IDEA services. The student’s passing grades, coupled with her ability to complete makeup work successfully, showed that she did not require special education. The U.S. District Court, Southern District of Illinois recognized that the student was frequently absent during her sophomore year of high school. However, there was no evidence that those absences were related to her diabetes or her emotional problems. Furthermore, the student did not qualify as a student with a disability. The district’s psychologist testified that while the student missed a significant amount of instruction as a result of her absences, she completed all of the required work and received passing grades in her classes. The District Court agreed with an IHO’s conclusion that the student “just quit going” to high school. “Until [the student] stopped attending classes and stopped making up her work, she was achieving well and did not need specialized instruction,” U.S. District Judge Michael J. Reagan wrote. Thus, the parents failed to show that the student was eligible for IDEA services. The District Court refused to consider the parents’ claim that the student’s evaluations were inadequate, incomplete and nonobjective. Because the parents did not challenge the evaluation procedures in their due process hearing, they did not exhaust their administrative remedies on that issue.

74. EL PASO INDEPENDENT SCHOOL DISTRICT v. RICHARD R., 50 IDELR 256 (W.D. Tex. 2008)

Noting that a Texas district repeatedly referred a student with ADHD for interventions rather than evaluating the student’s IDEA needs, a District Court concluded that the district violated its child find obligations. The court upheld a due process decision in the student’s favor. The IDEA requires districts to evaluate students who are suspected of having disabilities that require special education services. Thus, when a district has reason to believe that a student has a disability, it must evaluate the student within a reasonable time. The district maintained that it fulfilled its child find obligations by

providing interventions recommended by its Student Teacher Assessment Team. Those interventions included Section 504 accommodations, additional tutoring, and Saturday tutoring camps. However, the court pointed out that the interventions did not demonstrate positive academic benefits. Not only did the student continue to struggle in reading, math and science, but he failed the Texas Assessment of Knowledge and Skills test for three years in a row. “Why [the district’s] STAT committee would have suggested these measures, knowing that [the student] had undertaken each of these steps in the past three years and that none had helped him achieve passing TAKS scores, simply baffles this court,” U.S. District Judge Kathleen Cardone wrote. Although the district eventually offered to evaluate the student, that offer was made 13 months after the initial evaluation request as part of a proposed FAPE settlement. By failing to evaluate the student in a timely manner, the district violated its child find obligation.

75. ST. JOSEPH-OGDEN COMMUNITY HIGH SCHOOL DISTRICT NO. 305 v. JANET W., 49 IDELR 125 (C.D. Ill. 2008)

Acknowledging that a high school student who once suffered from depression had attempted suicide on two occasions in his freshman year, the District Court nonetheless determined that he was ineligible for special education services. It reversed a due process decision in the student’s favor, concluding that the student did not have an emotional disturbance as defined under the IDEA. U.S. District Judge Michael P. McCuskey pointed out that the student’s own psychiatrist considered the student’s depression to be in remission. In addition, the majority of the student’s responses on the district’s behavioral assessment were within the average range, and the few answers that fell outside the norm were not clinically significant. The court explained that the student’s isolated incidents of threatening behavior did not in themselves entitle the student to special education services. “This court certainly agrees that [the student] exhibited some serious inappropriate behaviors,” Judge McCuskey wrote. However, a child does not have an emotional disturbance unless his behavior problems are unusually serious as compared to those of the majority of his peers and present a significant impediment to learning. Noting that the student earned above-average grades in his junior year and had no difficulties with teachers or peers, the court concluded that the IHO erred in finding the student had an emotional disturbance.

76. LOS ANGELES UNIFIED SCHOOL DISTRICT v. D.L., 49 IDELR 252 (C.D. Cal. 2008)

Although the parent of a kindergartner did not have a statutory right to an IEE, a California district had to pay for a private evaluation just the same. The District Court concluded that the district’s failure to evaluate the child required it to fund the assessment. The decision turned on court’s broad authority to grant relief that it deemed appropriate. Because the district did not evaluate the child, the parent could not meet the IDEA’s requirement that she dispute the district’s assessment. However, the court noted that the child was frequently disciplined for problem behaviors such as falling out of his

chair, roaming the playground, and tearing up his classmates' work. In addition, the parent specifically requested an initial evaluation. Because the district should have evaluated the child, the parent was entitled to an IEE regardless of her failure to meet the statutory requirements.

77. N.G. v. DISTRICT OF COLUMBIA, 50 IDELR 7 (D.D.C. 2008)

A high school student with depression and ADHD was eligible for special education services despite her academic success in two boarding schools. The U.S. District Court, District of Columbia concluded that the student's disabilities adversely affected her educational performance. The court observed that the student's success at boarding school stemmed from the accommodations she received there. Those accommodations included small classes, a structured environment, and teachers who developed close relationships with their students. The court explained that the district could not consider the student's success without also considering the effect of the accommodations she received. "Were this the standard methodology, [students with disabilities] who are making progress in an appropriate program could be automatically disqualified from receiving the very services enabling their successes," U.S. District Judge Emmet G. Sullivan wrote. Noting that the student failed four courses while attending a district high school, the court held that the district improperly limited the scope of its eligibility determination. The court also criticized the district's failure to evaluate the student two years earlier when she was first diagnosed with ADHD and depression. Because the parents notified the district in writing about the student's falling grades, psychiatric hospitalizations and suicide attempts, the district had reason to suspect a qualifying disability. The court concluded that the child find violation, coupled with the improper eligibility determination, entitled the parents to reimbursement for the student's private placements.

78. HAWKINS v. DISTRICT OF COLUMBIA, 49 IDELR 213 (D.D.C. 2008)

The District of Columbia's failure to comply with an administrative order unveiled far greater concerns about the district's child find practices. Determining that the district made no effort to locate a child referred by his Head Start program, the District Court determined that the district denied the child FAPE. The district contended that it was unable to locate the child after he aged out of Head Start. As a result, it could not comply with an administrative order requiring it to complete its evaluations and determine the child's eligibility. The District Court rejected the district's argument. U.S. District Judge John D. Bates noted that the district produced no evidence of its attempts to locate 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 judge wrote. The court pointed out that the IDEA's child find provision applies to all children between the ages of 3 and 21, regardless of whether they are enrolled in school. As such, the parent's failure to enroll the child in his neighborhood school did not excuse

the district's failure to comply with its child find obligations. The court ordered the district to contact the parent's attorney and schedule a team meeting within 30 days.

79. RICHARDSON v. DISTRICT OF COLUMBIA, 50 IDELR 6 (D.D.C. 2008)

Noting that the district made repeated efforts to obtain an 11-year-old boy's psychiatric records, the District Court found no fault with the district's conclusion that he was ineligible for IDEA services. The court granted the district's motion to dismiss the parent's FAPE appeal. The parent claimed that the district did not need additional information to find that her son had an emotional disturbance. The court disagreed, noting that the parent's own advocate acknowledged the need for additional psychiatric evaluations. Furthermore, the district had no obligation to conduct its own evaluation when the information it needed to determine the student's eligibility was available from his private psychiatrist. The court rejected the parent's argument that the district should conduct its own assessment. "That position is inexplicable, as a review of the already-existing records may have been sufficient for the [multidisciplinary team] to find that [the student] was emotionally disturbed, or the records may have provided a basis for additional examinations," the court wrote. The court concluded that the parent's refusal to release the student's existing psychiatric records amounted to a failure to cooperate with the IEP process.

80. FRIENDSHIP EDISON PUBLIC CHARTER SCHOOL v. Ebony SMITH, 50 IDELR 192 (D.D.C. 2008)

A charter school got a second chance to argue that it was not responsible for a delay in a student's IDEA eligibility evaluation. Concluding that a hearing officer wrongfully excluded evidence from a resolution session, the District Court reversed an order that required the school to pay for an IEE. The court rejected the IHO's conclusion that the resolution session involved confidential settlement discussions. While the IDEA sets forth guidelines for resolution sessions, the court observed, it does not state that the information discussed during those sessions must be kept confidential. "[The school] contends that the parties never contemplated their discussions at the resolution meeting would be confidential," U.S. Magistrate Judge Deborah A. Robinson wrote. Moreover, the parent did not identify any legal authority stating that resolution sessions are confidential settlement discussions. The court further concluded that Fed. R. Evid. 408, which prohibits parties from introducing evidence of settlement negotiations, does not apply to resolution sessions conducted under the IDEA. According to the school, the notes from the resolution session showed that the parent refused its offer to evaluate the student and determine his eligibility within 30 days. Noting that the parent had no obligation to accept the district's offer, the District Court nonetheless directed the IHO to consider whether the parent's conduct impeded the student's receipt of services.

81. S. v. WISSAHICKON SCHOOL DISTRICT, 50 IDELR 216 (E.D. Pa. 2008)

A Pennsylvania district did not violate the IDEA by failing to evaluate a middle schooler with ADHD. Concluding that the student was not eligible for services in seventh and eighth grade, the District Court reversed an award of compensatory education services. The decision turned in large part on the student's in-class performance. Although the student had been diagnosed with ADHD in second grade, he earned A's and B's throughout elementary school. The court noted that the student's grades slipped when he entered middle school. According to his teachers, however, the student was attentive in class and performed well on quizzes and tests. The teachers testified that the student's poor performance stemmed from a lack of motivation rather than his ADHD. "[The student's] poor attitude toward school was evidenced in his frequent absences and failure to complete homework assignments, both of which significantly affected his grades," U.S. District Judge Bruce W. Kauffman wrote. The court observed that the district devised strategies to help the student, which included the use of progress reports, an agenda book, and parent conferences. Absent evidence that the student needed specialized instruction to receive FAPE, the court explained, the district could not be faulted for failing to evaluate the student. The court noted that the district found the student eligible for IDEA services in ninth grade, after his parents requested an evaluation. Although the parents claimed that the student's high school IEPs were inadequate, the court ruled that the IEPs were reasonably calculated to provide FAPE.

82. WEISSBURG v. LANCASTER SCHOOL DISTRICT, 50 IDELR 11 (C.D. Cal. 2008)

Because an ALJ's modification to a child's IDEA eligibility had no effect on the substance of the child's proposed program, the parent was not a "prevailing party" in the due process hearing. The U.S. District Court, Central District of California denied the parent's request for attorney's fees. To qualify as a prevailing party, the court observed, the parent needed to obtain a material change in his legal relationship with the district. The court acknowledged that the ALJ modified the child's IDEA classification to include autism as well as mental retardation. However, the ALJ specifically stated that the child was not eligible for additional services. "In other words, the Due Process hearings did not entitle [the child] to any educational services he was not entitled to before," U.S. District Judge R. Gary Klausner wrote. The court pointed out that the label affixed to a student's disability is not important so long as the student is classified as a child with a disability and receives all services needed to obtain a meaningful educational benefit. The district properly identified the child's special education needs and developed an IEP that was reasonably calculated to provide FAPE. Thus, the parent's success in changing the child's classification did not amount to a material change in his legal relationship with the district.

83. A.P. v. WOODSTOCK BOARD OF EDUCATION, 50 IDELR 275 (D. Conn. 2008)

Because an elementary school student made progress with the use of general education interventions, a Connecticut district did not err in failing to refer him for a special education evaluation. The U.S. District Court, District of Connecticut denied the parents' request for tuition reimbursement. The IDEA's child find requirement applies to students who are suspected of having a qualifying disability *and* being in need of special education as a result. 34 CFR 300.111. The student in this case did not fulfill the second requirement. Although the student had some difficulties in the classroom, the evidence showed that he responded well to interventions. The court pointed out that the student received A's, B's, and C's on his report card, and performed "on goal" on a statewide assessment without any accommodations. Moreover, the teacher had regular contact with the parent about the student's progress. "This is decidedly not a case in which a school turned a blind eye to a child in need," U.S. District Judge Mark. R. Kravitz wrote. "To the contrary, [the teacher] acted conscientiously, communicating regularly with [the mother] and utilizing special strategies to help [the student] succeed." The court acknowledged that the student was found eligible for IDEA services in sixth grade under the category of nonverbal learning disability. Given the student's response to interventions, however, the district did not err in failing to evaluate him sooner.

84. INTEGRATED DESIGN AND ELECTRONICS ACADEMY PUBLIC CHARTER SCHOOL v. MCKINLEY, 50 IDELR 244 (D.D.C. 2008)

Neither allegations that a parent obstructed the evaluation process nor claims that she enrolled her daughter in another LEA relieved a charter school of its duty to evaluate the student within 120 days. The District Court held that the district's failure to comply with the District of Columbia's 120-day timeline amounted to a denial of FAPE. The charter school contended that the parent frustrated its attempts to evaluate the student by failing to provide medical documentation and delaying critical meetings. However, the court pointed out that the parent supplied the school with medical information on Oct. 30, 2005, just two weeks after her daughter's on-campus suicide attempt. Furthermore, the evidence did not support the school's claim that the parent was uncooperative. "[The] mother and educational advocate were in regular contact with the school in order to schedule the evaluation," U.S. District Judge Emmet G. Sullivan wrote. "There were miscommunications and rescheduled meetings, but the school still had the affirmative duty to evaluate [the student]." The court acknowledged that the parent attempted to enroll the student in another LEA. However, the court observed that the parent was unable to do so because the student was still enrolled in the charter school. The court further noted that the school would not be relieved of its duty to evaluate the student unless the new LEA made "sufficient progress to ensure a prompt completion of the evaluation." 34 CFR 300.301(e). Finding no reason to toll the 120-day evaluation timeline, the District Court affirmed a due process decision that required the school to pay for a series of IEEs.

85. N.B. v. HELLGATE ELEMENTARY SCHOOL DISTRICT, 50 IDELR 241 (9th Cir. 2008)

A district could not fulfill its duty to evaluate a preschooler with autism by referring the parents to a child development center. Because the IEP team could not develop an appropriate program without evaluative data, the procedural violation amounted to a denial of FAPE. The 9th Circuit observed that the parents disclosed the child's medical diagnosis of autism at a September 2003 IEP meeting. At that time, the district recommended that the parents obtain a general evaluation from the child development center. The district maintained that because the parents failed to obtain the suggested evaluation, it could not develop an appropriate IEP. The 9th Circuit disagreed. Under the IDEA, the court explained, the district had an obligation to "ensure that ... the child is assessed in all areas of suspected disability." 20 USC 1414(b)(3)(B). "[W]ithout evaluative information that [the child] has autism spectrum disorder, it was not possible for the IEP team to develop a plan reasonably calculated to provide [the child] with a meaningful educational benefit throughout the 2003-04 school year," U.S. Circuit Judge Arthur L. Alarcon wrote. Although the district did not have to conduct an evaluation with its own personnel, it did have an obligation to arrange for an evaluation at no cost to the parents. The 9th Circuit held that the district's failure to evaluate the child required it to pay for the parent's private services and legal expenses. It affirmed the District Court's decision that the child did not need ESY services to obtain a meaningful educational benefit.

86. G.B. v. SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, 51 IDELR 35 (N.D. Cal. 2008)

Despite offering numerous objections to a district's proposed evaluation plan, the parents of a high schooler with a speech-language impairment could not stop the district from conducting a reevaluation. The District Court ruled that the triennial reassessment was necessary to identify the student's current needs. The parents raised concerns about the district's choice of evaluators, the specific assessment tools to be used, and the timeliness of the evaluations. The court, however, focused on two key questions: whether the student was due for a triennial reassessment, and whether a triennial reassessment was necessary. U.S. District Judge Elizabeth D. Laporte answered both questions in the affirmative. The court pointed out that the district had not assessed the student's sensory or speech language needs in three years. Noting that the student had made academic progress since his last assessment, the court explained that the district needed to identify the student's current sensory and speech-language needs. Furthermore, the IDEA required the district to evaluate the teenager's vocational needs and develop a transition plan. "Although [the student] does not believe that an assessment is necessary ..., none of the evidence or facts cited by [the student] demonstrates that the ALJ erred in determining that the District could conduct its reassessment," Judge Laporte wrote. The court affirmed a due process decision that allowed the district to conduct the triennial reevaluation without parental consent.

87. Joanne M. MILLAY v. SURRY SCHOOL DEPARTMENT, 51 IDELR 159 (D. Me. 2008)

An administrative decision by the Maine ED ended a parent's bid to have her 14-year-old daughter attend a life skills class at a public high school. The decision, which required a Maine district to implement the student's residential IEP at her local elementary school, identified the student's stay-put placement. The parent had withdrawn the student from her out-of-state residential program, which she attended under her fifth-grade IEP, due to concerns about her health. Although the student returned to the local elementary school for sixth grade, the parent withdrew the student early in the school year and filed a complaint with the state ED. The ED found that the district denied the student FAPE. In addition to ordering the district to convene an IEP meeting, the ED directed it to implement the student's residential IEP at the local elementary school. The parent sought an injunction placing the student in a high school life skills program, contending that any school capable of implementing the student's IEP was an appropriate stay-put placement. The court disagreed. "[The parent] is not seeking a stay-put order; she is instead seeking to alter the *status quo*," U.S. District Judge John A. Woodcock Jr. wrote. Concluding that the ED's decision was binding on both the district and the parent, the court denied the parent's motion for an injunction.

88. E.M. v. PAJARO VALLEY UNIFIED SCHOOL DISTRICT, 51 IDELR 105 (N.D. Cal. 2008)

An ALJ's decision to focus on the results of a single IQ test in determining a student's eligibility for IDEA services sent him back to the due process drawing board. The District Court explained that it could not review the ALJ's eligibility determination without a complete record of the hearing. The court observed that the due process decision did not provide sufficient information about a California district's assessment of a student. Instead of addressing indicators such as test scores, report card comments and teacher testimony, the decision only addressed the student's score on the Wechsler Intelligence Scale for Children. Moreover, the ALJ did not address the scores the student received on other IQ tests, including the Kaufman Assessment Battery for Children. The court explained that the ALJ erred in failing to discuss all of the evaluative data. "While a verbatim discussion of all the evidence heard is not required ..., the ALJ should set forth more completely his reasoning as to why the WISC test was favored over the K-ABC, as well as his approach to evaluating all of the quantitative test data in light of the mixed results of that data," U.S. District Judge Jeremy Fogel wrote. The court remanded the case for further development of the administrative record.

89. L.R. v. MANHEIM TOWNSHIP SCHOOL DISTRICT, 49 IDELR 272 (E.D. Pa. 2008)

An evaluation report detailing the severity of a student's speech-language impairment did not invalidate an IEP developed almost a year earlier. The District Court denied the student's request for private school expenses, concluding that her eighth-grade IEP offered FAPE. According to the student, the district's failure to conduct a "comprehensive" language evaluation amounted to a procedural denial of FAPE. The court disagreed. Because the district had substantial information available from other sources, it did not need to conduct its own speech-language evaluation. Moreover, the evaluations conducted in preparation for the IEP meeting included a language component. Nor did the independent speech-language evaluations, conducted in the student's ninth-grade year, establish that her eighth-grade IEP was inadequate. Based on the information available at the time of the IEP's formation, the district's offer of one-to-one assistance in the student's English and Math courses addressed both her speech-language impairment and her learning disability. The court granted the district's motion for judgment on the student's reimbursement claim.

E. MONEY DAMAGES AND LIABILITY

90. EDWARDS v. SCHOOL DISTRICT OF BARABOO, 50 IDELR 283 (W.D. Wis. 2008)

A teacher may have exercised poor judgment when she allowed a student with fragile bones to walk across a school playground on a winter day, but that did not make a Wisconsin district liable for the student's slip-and-fall accident. The District Court dismissed the parents' IDEA, ADA and constitutional claims against the district. The court noted that the purpose of the IDEA is to ensure that students with disabilities receive FAPE. Thus, even if the student had been eligible for special education, she could not use the IDEA to obtain relief for a playground accident. Nor could the student obtain relief under Title II of the ADA. The court pointed out that Title II prevents districts from excluding students with disabilities from school activities. However, the parents claimed that the student's injury resulted from *inclusion*, specifically, her participation in recess with the rest of the class. Turning to the due process claim, the court observed that districts generally have no duty to protect students from dangerous conditions. An exception exists when the district creates the danger that harms the student. The parents claimed that the teacher created a danger by allowing the student to go outside for recess. The court disagreed. "One way to keep the [student] safe would be to prevent her from going anywhere, but that would cut directly against one of the primary purposes of statutes such as the IDEA and the ADA, which is to *include* [individuals with disabilities] in the activities of others rather than segregate them," U.S. District Judge Barbara B. Crabb wrote. While the teacher could have exercised more caution, the court observed, a mistake in judgment did not amount to a constitutional violation.

91. REUTHER v. SHILOH SCHOOL DISTRICT NO. 85, 49 IDELR 124 (S.D. Ill. 2008)

An Illinois district accused of failing to provide a qualified aide to assist a blind child with cerebral palsy could not persuade a District Court to regard the parents' personal injury claim as a federal IDEA action. Determining that neither the IDEA nor the ADA provided adequate relief for the child's physical injuries, the U.S. District Court, Southern District of Illinois granted the parents' motion to remand the case to state court. The parents invoked the IDEA to show that the district had an obligation to provide appropriate special education services. However, the parents claimed that the lack of appropriate relief under the IDEA and the ADA prevented the court from exercising jurisdiction over their case. U.S. District Judge J. Phil Gilbert agreed. "The IDEA does provide a federal cause of action, but only for violations of its provisions that have 'both an educational source and an adverse educational consequence,'" the judge wrote. The court pointed out that the child's physical injuries, which included burns, a concussion, and an allergic reaction, could not be remedied by a modification to his IEP or the provision of compensatory education services. As such, the parents were entitled to pursue a state-law claim for monetary damages.

92. Sara BASSMAN v. CHICAGO PUBLIC SCHOOLS, DISTRICT #299, 51 IDELR 123 (N.D. Ill. 2008)

A private settlement may have provided all of the relief that a student sought in a due process proceeding, but that did not allow the student to recover attorney's fees from an Illinois district. The District Court ruled that the settlement's lack of judicial approval prevented the student from asserting prevailing party status. The court explained that students and parents can recover attorney's fees based on relief obtained in a FAPE settlement only if that settlement has some form of judicial approval. "The [7th Circuit] has ... specifically indicated that '[p]rivate settlement agreements do not entail the judicial approval and oversight involved in consent decrees' and that 'private settlements do not involve sufficient judicial sanction to confer "prevailing party" status,'" U.S. District Judge Samuel Der-Yeghiayan wrote. The court acknowledged that the district agreed to pay for an independent educational evaluation, the very remedy that the student sought in her due process petition. Without a judicially sanctioned agreement, however, the student did not qualify as a prevailing party under the IDEA.

93. L.S. v. ABINGTON SCHOOL DISTRICT, 50 IDELR 37 (E.D. Pa. 2008)

Even if a District Court misstated the date on which a district denied the parents' request for an IEE, it did not have to reconsider its denial of the parents' reimbursement claim. The court held that an additional three-week delay did not make the district's notice untimely. According to the parents, the district did not issue a Notice of Recommended Educational Placement until May 3, 2006 — 23 days after the date reflected in the court records. However, the court explained that the alleged defect in the factual record did not affect the outcome of the parents' claim. "The additional time it took for the district to issue a NOREP in writing does not become 'unnecessary delay,' and is not effected [sic] by the parents' subjective beliefs," U.S. District Judge Cynthia M. Rufe wrote. Similarly,

the parents could not prevail on their motion for reconsideration by showing that they received the IEE report more than two weeks after an IEP meeting. The factual record stated that the parents received the report four days before the IEP meeting. Judge Rufe acknowledged that the record was technically erroneous, but noted that the parents reviewed the contents of the IEE on the date stated in the record. As such, the fact that they did not possess a tangible copy of the report at the time of the meeting did not impede their participation in the IEP process.

94. J.L. v. AMBRIDGE AREA SCHOOL DISTRICT, 50 IDELR 4 (W.D. Pa. 2008)

The U.S. District Court, Western District of Pennsylvania denied the parents' motion to certify their IDEA claims for immediate appeal. Because the parents' IDEA, ADA and Section 504 claims addressed a single issue — the district's failure to provide FAPE — it was better for the courts to address the parents' lawsuit as a whole. The court noted that the parents attempted to sever their IDEA claims based on the type of relief requested. "[The parents] have offered no authority to support their contention ... that a claim for monetary damages under the IDEA is severable from their appeal of a state tribunal's grant of compensatory education under the IDEA ...," U.S. District Judge Nora Barry Fisher wrote. Regardless of whether the parents sought monetary damages or compensatory education, the judge observed, their IDEA claims still addressed the student's right to FAPE. Furthermore, the 3d Circuit recently overruled its long-held position that parents can use Section 1983 to seek monetary relief for IDEA violations. See *A.W. v. Jersey City Pub. Schs.*, 47 IDELR 282 (3d Cir. 2007). Because it was highly unlikely that the 3d Circuit would recognize the parents' claim for monetary damages, there was no pressing reason for the District Court to certify the issue for immediate appeal.

95. GREEN v. NEW YORK CITY DEPARTMENT OF EDUCATION, 50 IDELR 40 (S.D.N.Y. 2008)

The parent of a teenager with an emotional disturbance could not recover the cost of her daughter's placement in a residential facility. The U.S. District Court, Southern District of New York determined that the placement did not meet the student's special education needs. The court based its decision on the facility's failure to offer specialized instruction and services. Although the student devoted six hours a day to academics, all instruction was provided through a computer program. That program was used by all residents of the facility and did not address the student's need for math instruction. The court noted that the student made academic progress only because her parent hired an independent tutor to supplement the computerized instruction she received at the facility. The facility also failed to offer counseling services for its residents. Instead, the student received therapy from a counseling group that rented space in the facility. "[The parent] does not dispute that the math tutor and the [independent] counselors were significant contributors to [the student's] success," U.S. District Judge P. Kevin Castel wrote. Because the facility did

not offer the special education services that the student required, the court concluded that the private placement was inappropriate. The court affirmed a due process decision in the district's favor.

96. J.P. v. COUNTY SCHOOL BOARD OF HANOVER COUNTY, VIRGINIA, 49 IDELR 150 (4th Cir. 2008)

Noting that an IHO could have offered a more thorough explanation as to why he denied a request for tuition reimbursement, the 4th Circuit nonetheless determined that a District Court erred in rejecting the IHO's decision. The 4th Circuit vacated a decision reported at 46 IDELR 133 that a Virginia district denied FAPE to a child with autism and remanded the case for further proceedings. The 4th Circuit rejected the District Court's belief that severe deficiencies in the IHO's decision allowed it to make its own findings of fact. So long as the IHO's findings were made through normal fact-finding procedures, the 4th Circuit explained, the District Court had to defer to those findings. U.S. Circuit Judge William B. Traxler Jr. noted there was no indication that the IHO deviated from appropriate procedures. "That is, the hearing officer conducted a proper hearing, allowing the parents and the [district] to present evidence and make arguments, and the hearing officer 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," Judge Traxler wrote. In addition, the 4th Circuit observed, the IHO sufficiently explained his assessment of each witnesses' credibility. Although the IHO did not provide extensive details to support his findings of fact, the 4th Circuit pointed out that neither the IDEA nor the Part B regulations require hearing officers to issue highly detailed decisions. Acknowledging that the IHO could have provided more support for his conclusions, the 4th Circuit explained that the opinion allowed the District Court to identify the basis for the decision. In addition to ordering the District Court to reconsider its decision at 46 IDELR 133, the 4th Circuit vacated a decision reported at 47 IDELR 187 that awarded the parents more than \$179,000 in attorney's fees.

97. M.Z. v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, 51 IDELR 45 (C.D. Cal. 2008)

The assertion of a First Amendment violation gave a parent a second chance to pursue a Section 1983 claim against a California district, but a corresponding charge of IDEA violations required the claim's immediate dismissal. The District Court held that the retaliation claim was too closely tied to the district's purported denial of FAPE. In granting the parent's motion for reconsideration, the court corrected its previous finding that the parent failed to allege a constitutional violation. The amended Section 1983 claim clearly stated that the district took adverse action against the student in response to the parent's public criticism of the district. However, the "adverse action" described in the complaint was the district's alleged violation of the student's IDEA rights. Relying on *Blanchard v. Morton Sch. Dist.*, 49 IDELR 96 (9th Cir. 2007), the court explained that Section 1983 claims cannot be premised on IDEA violations. "[The parent's amended

complaint] alleges that, in retaliation for her speech activities, [the district] ‘denied [the student] access to public education to which she is entitled,’” U.S. District Judge Virginia A. Phillips wrote. “[The complaint] does not allege any acts of retaliation other than this denial of IDEA-guaranteed rights.” Concluding that the Section 1983 claim was based on purported IDEA violations, the court granted the district’s motion to dismiss.

98. A.M. v. WESTSIDE UNION SCHOOL DISTRICT, 51 IDELR 47 (C.D. Cal. 2008)

Allegations that a California district deprived a 12-year-old boy of his constitutional rights were not enough to sustain a Section 1983 claim. The parents’ complaint failed to state how the district’s purported breach of a FAPE settlement amounted to a constitutional violation. The U.S. District Court, Central District of California observed that the district was immune from suit under the 11th Amendment. Thus, while the parents could sue the district’s superintendent and special education director, they could not pursue a Section 1983 claim against the district. Even if the district had been subject to suit, however, the parents would not have prevailed on their claim. The court pointed out that Section 1983 does not create rights in itself, but merely provides a means of seeking relief for violations of federal rights. Although the parents claimed that the district employees deprived the student of his due process rights under the 14th Amendment and his “rights, liberties and privileges” under the Constitution, they did not identify any specific violations. “It is not apparent how [the student’s] due process rights could have been violated, nor is it clear what other of [the student’s] constitutional rights [the parents] intend to invoke,” U.S. District Judge Christina A. Snyder wrote. The court dismissed the parents’ Section 1983 claim in its entirety for failure to state a claim. However, the court denied the district’s motion to dismiss the parent’s breach of settlement claim under the IDEA.

99. WOODRUFF v. HAMILTON TOWNSHIP PUBLIC SCHOOLS, 50 IDELR 38 (D.N.J. 2008)

The fact that a student with ADHD no longer attended school in a New Jersey district did not entitle his parents to seek monetary damages for denial of FAPE. Because the district could provide compensatory services at the student’s new LEA, the parents had to exhaust their administrative remedies before filing suit. The District Court rejected the parents’ claim that exhaustion would be futile. Recognizing that monetary damages are not available under the IDEA, the court noted that the parents could request compensatory education for the district’s alleged failure to provide appropriate services. Moreover, the 3d U.S. Circuit Court of Appeals recently overruled its decision in *W.B. v. Matula*, 23 IDELR 411 (3d Cir. 1995), that Section 1983 can be used to seek monetary damages under the IDEA. See *A.W. v. Jersey City Pub. Schs.*, 47 IDELR 282 (3d Cir. 2007). The court explained that the student’s enrollment in another LEA did not make administrative relief unavailable. “[The student] could be provided future compensatory education if it were determined that the school district did violate the IDEA,” U.S. District Judge Noel L. Hillman wrote. The court also ruled that the district’s purported

failure to notify the parents of their procedural safeguards did not allow the parents to bypass the exhaustion requirement. While a procedural violation might excuse the failure to exhaust in some circumstances, the parents did not provide any facts to establish a procedural violation.

100. J.L. vs. AMBRIDGE AREA SCHOOL DISTRICT, 49 IDELR 224 (W.D. Pa. 2008)

Although a Pennsylvania district conceded that it failed to provide FAPE to a teenager with multiple disabilities, it had little trouble defeating the parents' request for monetary damages. The District Court determined that the relief sought by the student's parents was not available under the IDEA. U.S. District Judge Nora Barry Fischer observed that the 1st, 2d, 4th, 6th, 7th, and 9th Circuits have all refused to recognize IDEA claims for monetary damages. While the 3d Circuit had not addressed the issue, the judge noted that the U.S. District Courts for the Eastern, Western and Middle Districts of Pennsylvania have consistently held that the IDEA does not authorize monetary relief for FAPE violations. "This Court ... is persuaded by the overwhelming authority rejecting claims for money damages under the IDEA," Judge Fischer wrote. Offering no opinion on how the 3d Circuit would decide the issue, the District Court dismissed the parents' claim for monetary damages. The court also concluded that the parents failed to establish an exception to the IDEA's two-year statute of limitations. However, noting that it could not determine when the limitations period began without delving further into the facts of the case, the court denied the district's motion to dismiss the parents' lawsuit as untimely.

101. STRECK v. BOARD OF EDUCATION OF THE EAST GREENBUSH SCHOOL DISTRICT, 50 IDELR 122 (2^d Cir. 2008)

The parents of a high school graduate with a learning disability could not persuade the 2d Circuit to reinstate their Section 1983 claim against a New York district. Because the parents did not allege a denial of procedural safeguards or a lack of administrative remedies, they could not recover monetary damages under Section 1983. The 2d Circuit acknowledged that it had previously recognized Section 1983 claims based on IDEA violations. See, e.g., *Quackenbush v. Johnson City Sch. Dist.*, 555 IDELR 151 (2d Cir. 1983); *Taylor v. Vermont Dep't of Educ.*, 38 IDELR 32 (2d Cir. 2002). However, the court noted that those cases involved either a denial of procedural safeguards or an inability to obtain administrative relief. The parents in this case did not meet those requirements. "[The parents] fail to allege a denial of procedural safeguards or administrative remedies: they were afforded a hearing before an impartial hearing officer and review by a state review officer," the court wrote in an unpublished decision. The 2d Circuit thus affirmed the dismissal of the parents' Section 1983 claim. The court also reviewed an order that required the district to pay \$4,700 for compensatory reading program. Because the District Court did not consider evidence regarding the program's implementation, the 2d Circuit could not determine whether the award was appropriate.

The 2d Circuit vacated the compensatory education order and remanded the case for further proceedings.

F. PRIVATE SCHOOL PLACEMENT

102. LAUREN P. v. WISSAHICKON SCHOOL DISTRICT, 51 IDELR 206 (3^d Cir. 2009).

The parents of a teenager with ADHD could not recover the costs of their daughter's private placement from a Pennsylvania district. Noting that the private school did not address the student's key behavioral needs, the 3d Circuit reversed a decision reported at 48 IDELR 99 that awarded tuition reimbursement for the student's 11th-grade year. The 3d Circuit observed that the U.S. District Court, Eastern District of Pennsylvania failed to give due weight to the findings of an appellate panel. Although the panel found that the private placement was inappropriate, the District Court held that the behavioral supports offered by the private school met the student's needs. The 3d Circuit acknowledged that the private school addressed the student's lack of confidence and auditory processing difficulties. Nonetheless, the lower court should not have overlooked the school's failure to address the student's distractibility and failure to complete assignments. "The failure of [the private school's] educational plan to address these problems could not be overcome by a recognition of [the student's] low self-esteem and a generalized school curriculum built around small class sizes," U.S. Circuit Judge D. Brooks Smith wrote in an unpublished decision. Because the private program had the same flaws that made the student's IEP inappropriate, the 3d Circuit held that the parents were not entitled to tuition reimbursement. However, the 3d Circuit affirmed the District Court's ruling that the district's failure to address the student's behavioral needs entitled the student to compensatory education.

103. A.C. V. BOARD OF EDUCATION OF THE CHAPPAQUA CENTRAL SCHOOL DISTRICT, 51 IDELR 147 (2^d Cir. 2009).

Despite claiming that a district promoted "learned helplessness" by providing their son with a one-to-one aide, the parents of a grade schooler with autism could not recover the cost of their son's private schooling. The 2d U.S. Circuit Court of Appeals ruled that the student's fifth-grade IEP was both procedurally and substantively appropriate. The 2d Circuit rejected the notion that the aide's constant presence prevented the student from learning how to function on his own. According to the state review officer, the 2d Circuit observed, the proposed IEP addressed the student's need to develop independence. For example, the IEP called for the aide to decrease the level of prompting and redirection provided to the student when he improved his ability to focus and stay on task. "The IEP also provided for team meetings with the parents every four to six weeks to discuss [the student's] progress, including the level of prompting required, and stressed independence in the following of daily routines and the application of reading and math skills," U.S. Circuit Judge Joseph M. McLaughlin wrote. The court further noted that the student

made progress toward independence in his fourth-grade year. Not only did he learn to recognize and alleviate distractions by asking classmates to stop making noise, but he learned to use the bathroom by himself without prompting. The 2d Circuit observed that the District Court should have deferred to the SRO's findings on the appropriateness of the proposed IEP. Finding no fault with the SRO's decision, the 2d Circuit reversed a reimbursement order in the parents' favor and remanded the case with instructions to enter judgment for the district.

104. M.S. v. FAIRFAX COUNTY SCHOOL BOARD, 51 IDELR 148 (4th Cir. 2009).

A Virginia district could end up paying for some of the services a teenager received at a private Lindamood-Bell facility, even if the student did not receive appropriate services throughout his three years of attendance. The 4th U.S. Circuit Court of Appeals held that the District Court needed to consider the educational benefit received during each individual school year. In a decision reported at 47 IDELR 289, the U.S. District Court, Eastern District of Virginia denied the parents' request for reimbursement. The District Court reviewed the private services the student received between 2002 and 2005 and concluded that they were not reasonably calculated to provide some educational benefit. The parents argued that the District Court erred in evaluating the appropriateness of the student's services as a whole. The 4th Circuit agreed. "[B]ecause the finding of an invalid IEP for a particular school year is a necessary precursor to reimbursement for a parental placement, we necessarily must also consider the appropriateness of a particular [private] placement on the same year-by-year basis," U.S. Circuit Judge Karen J. Williams wrote. The 4th Circuit noted that the services provided to the student during one school year would not necessarily be appropriate at other points in his education. Thus, the parents' right to reimbursement would turn on whether the services provided during any one school year were appropriate. The 4th Circuit vacated a decision denying the parents' request for reimbursement and remanded the case for further proceedings. However, the 4th Circuit affirmed the District Court's ruling that the IEP developed for the 2005-06 school year was appropriate.

105. HOWARD v. FELICIANO, 50 IDELR 245 (D.P.R. 2008)

By waiting 17 months to file an IDEA claim against the Puerto Rico ED, a seventh-grader's parents lost the opportunity to seek reimbursement for their son's private school costs. The District Court held that the one-year statute of limitations in effect at the time of the district's alleged violation barred the parents' claim. The court noted that the parents were aware of their son's academic struggles by April 1, 2004, when they received their son's report card. Although the parents filed a complaint against the student's math teacher, accusing him of race discrimination, they did not raise any concerns about the ED's failure to provide special education and related services. In fact, the court observed, the parents did not allege any FAPE violations until Sept. 1, 2005, when they filed an IDEA lawsuit against the ED. "At no time [was the ED] put on notice regarding any possible IDEA violations until the instant complaint was filed which, for

the first time, adduced such claims,” U.S. District Judge Raymond L. Acosta wrote. The court explained that before the 2004 IDEA amendments took effect, IDEA claims were subject to the one-year statute of limitations used for personal injury claims. Because the parents failed to file their complaint by April 1, 2005 — one year after they had notice of the ED’s failure to provide IDEA services — their FAPE claim was untimely. The District Court granted the ED’s motion to dismiss.

106. STUDENT X v. NEW YORK CITY DEPARTMENT OF EDUCATION, 51 IDELR 122 (E.D.N.Y. 2008)

Failing to appeal a first-tier administrative decision regarding a student’s right to in-home services proved to be a costly error for one New York district. Concluding that the district violated the IDEA’s stay-put provision when it discontinued the child’s services, the District Court ordered the district to provide 57 weeks of compensatory education. The court determined that the IHO’s decision, issued in June 2005, became final after both parties failed to appeal. Relying on *Letter to Hampden*, 49 IDELR 197 (OSEP 2007), the court explained that an unappealed first-tier decision becomes a student’s current educational placement. “Because [the district] did not appeal [the IHO’s] decision for the 2005-06 school year, that decision became a final decision on the merits under 34 CFR 300.514(a) and constituted [the student’s] pendency placement at the time this lawsuit was filed,” U.S. District Judge Nicholas G. Garaufis wrote. As such, the district had to continue the student’s in-home services during the parent’s ongoing challenge of an IEP developed in March 2006. However, the district was not the only party that failed to appeal a due process decision. Although the parent challenged the lack of in-home services in the student’s November 2006 IEP, she failed to appeal the SRO’s November 2007 decision that the IEP was reasonably calculated to provide FAPE. The court determined that the student’s stay-put placement changed a second time in March 2008, when the deadline for appealing the SRO’s decision expired. The court ordered the district to provide compensatory in-home services for each week it missed between March 1, 2007 — the date that it terminated the student’s in-home services — and March 31, 2008.

107. M.H. v. MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, 51 IDELR 91 (2^d Cir. 2008)

Although a teenager’s parents were “understandably worried” about their daughter’s mental health, the 2d Circuit found no evidence that the student required a residential placement to receive FAPE. The 2d Circuit ruled that the therapeutic day placement proposed by a New York district was appropriate. As a general rule, the court explained, a residential placement is not required under the IDEA unless there is objective evidence that the student is regressing in a day program. The student in this case made progress in the therapeutic day program. “Not only do her grades reflect that she was achieving academically, but reports from certified counselors demonstrate that she was making improvements in her social and emotional problems as well,” the 2d Circuit wrote in an

unpublished opinion. The court acknowledged that the student's parents were concerned about potential relapses that could disrupt her education. Absent evidence that such a relapse was likely, however, the district had no obligation to fund a residential placement. The 2d Circuit reversed a District Court decision that the day program was inappropriate.

108. CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION v. FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, 51 IDELR 62 (3^d Cir. 2008)

Although a student with multiple, severe disabilities never lived within the boundaries of a New Jersey district, the district had to bear 50 percent of the cost of the student's residential placement. The 3d Circuit held that the mother's move to the district following the parents' divorce required the district to provide IDEA services. The court based its decision on the parents' shared custody arrangement. Under New Jersey law, the court explained, a student is a resident of the district in which her parents reside. If the parents are divorced, the student's domicile is the domicile of the parent with whom she lives. "A child's domicile is not as clear, however, in a case such as this where the child's parents are divorced and share legal and physical custody," the 3d Circuit wrote in an unpublished opinion. The court acknowledged that the student was living in a residential facility at the time of the parents' divorce. Nonetheless, the court held that the principles of equity required the mother's new district of residence to fund half of the student's services. "If anything, we believe that a finding of dual domicile is *more* justified in a case such as this when the child has more or less lived full-time at an out-of-district school since before the parents were divorced," the 3d Circuit wrote. The 3d Circuit affirmed a decision that found the parents' respective districts jointly liable for the student's residential placement.

109. R.P. v. RAMSEY BOARD OF EDUCATION, 51 IDELR 48 (D.N.J. 2008)

A letter of admission from a private school undermined two parents' efforts to obtain reimbursement for their son's high school placement. Concluding that the placement had nothing to do with alleged defects in the student's ninth-grade IEP, the District Court entered a judgment in the district's favor. The court found that the parents acted in bad faith by failing to notify the district of their intent to enroll the student in a private school. Although the parents maintained that they were merely considering the possibility of a private placement, the evidence showed that they received the letter of admission several months before the proposed IEP was developed. Moreover, the parents hired tutors to prepare the student for his admission into the private school, which they hoped would better his chances of getting accepted into college. The court explained that the parents' failure to disclose their plans impeded the district's ability to develop an appropriate IEP. "Had [the district] known of [the parents'] intentions to enroll [the student] in a private school and their reasons for the same, [the district] may have amended the proposed ninth-grade IEP; further discussed with [the parents] the benefits of an in-district placement; and, possibly considered whether an out-of-district placement was appropriate," U.S. District Judge Dennis M. Cavanaugh wrote in an unpublished opinion.

Characterizing the parents' conduct as "unreasonable," the court ruled that they were not entitled to reimbursement.

110. CRANSTON SCHOOL DISTRICT v. Q.D., 51 IDELR 41 (D.R.I. 2008)

A Rhode Island district could not avoid paying for a student's unilateral private placement merely by showing that he made progress on his social and emotional skills during his time in a self-contained classroom. Because the student made no academic progress, the District Court determined that his IEP was inappropriate. The court recognized that the question of whether the student made progress under the IEP was a "close case." Citing the 1st U.S. Circuit Court of Appeals' decision in *Lenn v. Portland Sch. Comm.*, 20 IDELR 342 (1st Cir. 1993), the District Court observed that the IDEA addresses social, emotional and physical needs, as well as academic needs. The evidence showed that the student made some progress with regard to his social and emotional skills in his self-contained program. However, the court pointed out that the student's problem behaviors persisted. Furthermore, the program was not meeting the student's academic needs. The court noted that the student's standardized test scores suggested academic regression. "[The student's] consistently low grades also belie evidence of significant progress," U.S. District Judge Mary M. Lisi wrote. The private school, on the other hand, offered all of the services the student required in an inclusion environment. Finding that the private placement was appropriate, the court affirmed a hearing officer's reimbursement order.

111. A.K. v. ALEXANDRIA CITY SCHOOL BOARD, 50 IDELR 13 (E.D. Va. 2008)

A Virginia district may have addressed the merits of a particular day school in a letter to a student's parents, but that did not fulfill its obligation to identify a specific placement in the student's IEP. The District Court concluded that the district's IDEA violation allowed the parents to recover more than \$136,000 in tuition and transportation expenses. The 4th U.S. Circuit Court of Appeals previously held in a decision reported at 47 IDELR 245 that the district's failure to identify a specific placement in the student's 2004-05 IEP amounted to a denial of FAPE. On remand, the District Court noted that the student's 2005-06 and 2006-07 IEPs were similarly defective. Rather than identify a specific placement, the IEPs stated that the student would attend a "private day school." The court explained that the vague provision did not allow the parents to evaluate the appropriateness of the proposed IEP. "As in the 2004-05 school year at issue in the [4th Circuit ruling], the parents continued to express doubt concerning the existence of a particular school that could provide services for these subsequent periods," the court wrote. Although the district recommended a particular day school in a letter to the parents, the court noted that the information was not included in the proposed IEPs. As such, the district failed to make an offer of FAPE.

112. B.T. v. DEPARTMENT OF EDUCATION, STATE OF HAWAII, 51 IDELR 12 (D. Hawaii 2008)

The parent of a 20-year-old student with autism could compel the Hawaii ED to pay for her son's residential placement while she challenged the ED's age limitation on IDEA services. The District Court granted the parent's motion for a preliminary injunction. The injunction hinged on two elements: the parent's claim that the student was entitled to IDEA services beyond age 20, and the likelihood that the student would suffer harm if removed from his residential placement. With regard to the age limit, the District Court noted that Hawaii law allowed students without disabilities to attend high school through age 21. "Accordingly, a strict age limit for [students with disabilities] without room for exceptions, where such room is provided for non-disabled students, shows that the 20-year-old age limit [for IDEA services] is not consistent with state law," U.S. District Judge David Alan Ezra wrote. As for the possibility of harm to the student, the court observed that the student suffered "setbacks" when his routine was disrupted. The court acknowledged that the parent decided to continue the student's residential placement beyond age 20. However, the ED did not notify the parent that it was terminating the student's services until the day before his 20th birthday. While the parent may have exercised poor judgment in returning the student to his residential placement, the court explained, the fact remained that the student would likely suffer harm if removed. The court ordered the district to fund the residential placement until the matter was resolved or the student turned 21, whichever came first.

113. P.K. v. BEDFORD CENTRAL SCHOOL DISTRICT, 50 IDELR 251 (S.D.N.Y. 2008)

A New York district did not have to reimburse a teenager's parents for the student's placement in a residential program. The District Court found that the student's difficulties in the district's therapeutic program resulted from substance abuse rather than an inappropriate placement. The parents contended that the student's drug and alcohol problems were "inextricably intertwined" with his emotional disturbance. As such, the parents argued, the IEP team should have offered a placement that addressed both the student's emotional needs and substance abuse issues. The court disagreed. U.S. District Judge William C. Conner pointed out that the student made significant progress in the district's therapeutic program during the 2004-05 school year. The IEP team decided to continue the student's placement in the therapeutic program for the 2005-06 school year. However, the student's performance deteriorated after he began abusing drugs and alcohol. "It was ... reasonable for the district to attribute [the student's] difficulties during the 2005-06 school year to his substance abuse, and not to his disability or any shortcomings of the [therapeutic] program," Judge Conner wrote. The court noted that districts have no obligation to fund private substance abuse programs. Because the therapeutic program met the student's needs when he was not abusing drugs and alcohol, the District Court ruled that the student did not need a residential placement to receive FAPE.

114. ORANGE COUNTY DEPARTMENT OF EDUCATION v. A.S., 50 IDELR 222 (C.D. Cal. 2008)

A gap in California's residency statutes required the state ED to fund the out-of-state placement of a "parentless" student with a disability. Because the law did not state which local educational agency was responsible for the student's IDEA services, that responsibility fell to the state educational agency. The student had been placed in various shelters, treatment centers and educational facilities throughout California after a juvenile court terminated the parental rights of his natural parents. Although the state's welfare code indicated that the student was a resident of the county in which the juvenile court was located, the District Court found no evidence that the law applied to the provision of special education services. Nor did the California ED identify any other residency statute that would make a particular district responsible for the student's IEP. Citing *Honig v. Doe*, 559 IDELR 231 (U.S. 1988), the District Court observed that a court can order an SEA to provide special education services when an LEA has failed to do so. "Thus, there is ample authority to support [the notion] that, in the absence of a statute delegating responsibility for a student's education to a local entity, the state is, by default, the party most appropriately charged with the task," U.S. District Judge James V. Selna wrote. The court noted that OSEP reached a similar conclusion in *Letter to Covall*, 48 IDELR 106. Because California did not allocate responsibility to a specific LEA, the state ED was responsible for the student's residential placement.

115. Rochelle TARLOWE v. NEW YORK CITY BOARD OF EDUCATION, 50 IDELR 186 (S.D.N.Y. 2008)

Although the parents of a kindergartner with autism were not satisfied with a New York district's proposed IEP, they could not recover the cost of their son's private placement. The District Court concluded that the district offered the child FAPE. The parents identified several alleged flaws in the proposed IEP, from the team's refusal to consider a private evaluation report to its failure to offer an appropriate placement. Contrary to the parents' claims, the court observed, the IEP team did consider the results of the private evaluation. Because the evaluation used only a small number of subtests, the team determined it was "incomplete and inadequate." Furthermore, the report improperly focused on the child's potential rather than his current level of functioning. The court also observed that the IEP contained 14 annual goals, each of which had two to four short-term objectives. "While the goals themselves are generally stated, they contain sufficiently detailed information regarding 'the conditions under which each objective was to be performed and the frequency, duration and percentage of accuracy required for measurement of progress,'" the court wrote. As for the parents' challenge to the proposed placement — a class for children with autism — the court pointed out that the district had four such classes that addressed different levels of functioning. Determining that the IEP met the child's needs, the court dismissed the parent's FAPE appeal.

116. MELODEE H. v. DEPARTMENT OF EDUCATION, STATE OF HAWAII, 50 IDELR 94 (D. Hawaii 2008)

Failing to consider alternative educational settings for a student with mental retardation and velocardiofacial syndrome proved to be an expensive mistake for the Hawaii ED. Determining that student's needs could not be met in a large, public elementary school, the District Court ordered the ED to pay for the student's private placement. The court concluded that the ED predetermined the location of the student's services. Although the ED held an IEP meeting to discuss the specific educational setting, the parents were the only team members who knew the student. Moreover, the ED did not consider alternative settings for the student. "There was no team discussion about the physical location for [the student's] placement and no discussion about potential harmful effects," U.S. District Judge Helen Gillmor wrote. "There was not even a discussion as to the size of [the elementary school] at the October 2004 meeting." The court observed that the procedural errors were not the only flaw with the placement decision. According to the student's psychologist, the student lacked the social and emotional capabilities needed to tolerate large groups of children. In addition, the psychologist testified that the student's heart problems made the school physically unsafe. Concluding that the placement decision was both procedurally and substantively deficient, the court ruled that the district denied the student FAPE.

117. BOARD OF EDUCATION OF THE APPOQUINIMINK SCHOOL DISTRICT v. Julie JOHNSON, 50 IDELR 33 (D. Del. 2008)

A Delaware district did not have to provide a full-time ASL interpreter to assist a 12-year-old boy in his private school placement. The student was not entitled to services that exceeded the proportionate share of the Part B funds for private school students. The District Court noted that the parents elected to place the student in private school despite the district's offer of FAPE. As a parentally placed private school student with a disability, the court explained, the student did not have an individual right to IDEA services. The district's sole obligation was to ensure that it spent a proportionate share of its Part B funds on private school students. The district showed that the student's proportionate share of Part B funds allocated for private school services was \$3,693. However, the student's interpreter would cost \$37,000 — more than 10 times the amount allotted for all private school students. "This fact alone demonstrates the inequity that would arise with respect to the other parentally placed private school students if the district were required to fund a one-to-one ASL interpreter for the student," U.S. District Judge Joseph J. Farnan Jr. wrote. The court granted the district's motion for judgment, reversing a decision at 47 IDELR 179 that required the district to pay for an ASL interpreter.

118. JENNIFER D. v. NEW YORK CITY DEPARTMENT OF EDUCATION, 50 IDELR 9 (S.D.N.Y. 2008)

Although a student with ADHD required a structured program to receive an educational benefit, he did not need to be placed in a school for students with emotional and behavioral problems. The U.S. District Court, Southern District of New York concluded that the district's failure to offer FAPE in the LRE required it to pay for the student's private placement. The case arose out of the district's decision to place the student in a special education high school. Based on the student's behavioral problems in eighth grade, the IEP team offered a placement in a 12-to-1+1 class — the same type of class he attended in junior high. The court acknowledged that the student engaged in impulsive and disruptive behaviors at the beginning of his eighth-grade year, but noted that his behavior improved dramatically after the district assigned him a one-to-one paraprofessional. "This ... demonstrates that [the student] did not need to be removed from the community school environment because he was capable of being educated in a school that also educated nondisabled students," U.S. District Judge John G. Koeltl wrote. Given the significant improvement in the student's behavior, the court observed, the district should have considered a special day class in a community high school. The court pointed out that the private school, which also served general education students, offered 15-to-1 classes in a "very structured" environment. Noting that the student made significant progress in the private school program, the court concluded that the school was an appropriate placement.

119. Lorraine WANHAM v. EVERETT PUBLIC SCHOOLS, 50 IDELR 44 (D. Mass. 2008)

Despite its failure to provide the support services identified in a high schooler's IEP, a Massachusetts district did not have to place the student in a private school for students with learning disabilities. The District Court upheld an award of compensatory education services. The court rejected the parent's challenges to the hearing officer's decision. Even if the student regressed due to a lack of support services, the court explained, such regression would not entitle him to ESY services at the private school. "[The parent] has presented no indisputable facts that such a placement was warranted and, in fact, none of [the parent's] experts testified that services at [the private school] were needed," U.S. District Judge Nathaniel M. Gorton wrote. The court also concluded that the IHO did not err in requiring the parent to establish harm as a result of the district's implementation failures. Although the ALJ awarded compensatory education for the loss of support services, she concluded that the district did not deny the student FAPE by failing to ensure that his special education teachers monitored his progress. The court further noted that the parent provided no evidence that the private school would be an appropriate placement for her son. Determining that the parent failed to establish a need for a private placement, the court granted judgment for the district.

120. R.H. v. PLANO INDEPENDENT SCHOOL DISTRICT, 50 IDELR 8 (E.D. Tex. 2008)

The parents of a 4-year-old boy with an undisclosed disability could not recover the costs of their son's placement in a private preschool. Finding that the district offered FAPE in the LRE, the magistrate judge advised the District Court to deny the parents' reimbursement request. The placement identified in the child's IEP was a public preschool that served nondisabled students as well as students with disabilities. The parents noted that, depending on fluctuations in enrollment, up to 50 percent of their son's classmates might be children with disabilities. The private preschool, in contrast, served a greater percentage of typically developing students. U.S. Magistrate Judge Don D. Bush recognized that the private preschool might serve fewer students with disabilities. However, he explained that the relative percentage of students with disabilities in each classroom was irrelevant to the LRE analysis. "[T]here is no magic number of nondisabled peers a classroom must have in order to satisfy the IDEA," the magistrate judge wrote. By offering the child an opportunity to interact with typically developing peers, the district satisfied the LRE requirement. The magistrate judge also rejected the parents' argument that the district failed to consider the private preschool as a potential placement. Because an appropriate public program was available, the district had no obligation to consider a private program.

121. C.H. v. CAPE HENLOPEN SCHOOL DISTRICT, 50 IDELR 217 (D. Del. 2008)

Neither a district's failure to develop an IEP before the start of the school year nor its failure to give 10 days' notice of an IEP meeting required it to pay for a teenager's private placement. The technical violations of the IDEA did not deprive the student of educational opportunities. The District Court acknowledged that the district did not have an IEP prepared for the student by Sept. 6, 2006, the first day of the 2006-07 school year. However, the court noted that the parent was partially responsible for the lack of an IEP. When the IEP team failed to develop an IEP at an August 2006 meeting, the parent agreed to continue the meeting on Sept. 11, 2006. "The continued meeting did not occur because [the parent] refused to participate in future IEP meetings," U.S. Magistrate Judge Mary Pat Thyng wrote. Furthermore, the court concluded that a one-week delay in IEP development would not have caused the student to lose educational opportunities. As for the parent's claim that she did not receive proper notice of the August 2006 IEP meeting, the court pointed out that the parent waived her right to 10-day notice. The court explained that the district did not have to provide 10-day notice for the Sept. 11 meeting, as it was a continuation of the previous meeting. The court affirmed the IHO's decision that any procedural violations committed by the district were harmless.

122. O.O. v. DISTRICT OF COLUMBIA, 51 IDELR 9 (D.D.C. 2008)

Recognizing that a sixth-grader would age out of a public school program the following year, the District Court nonetheless concluded that the proposed placement was appropriate. The court denied the parent's request for reimbursement of private school expenses. The parent expressed concerns about the student's need to transfer schools for seventh grade. Because the student had difficulty with transitions, the parent contended,

he should not attend a placement that was valid for only one year. The District Court rejected the argument. Although the Part B regulations require IEP teams to consider “any potential harmful effect” when making an annual placement recommendation, the court noted that it was only considering the student’s placement for the 2006-07 school year. Furthermore, the parent failed to show that the lack of continuity would be harmful. “[The parent] made no evidentiary showing in the record beyond the mere assertion that [the student] would be harmed by the transition to a new school after one year,” U.S. District Judge John D. Bates wrote. The court pointed out that the proposed school was able to implement the student’s IEP as written. In addition, the school offered the small group and one-to-one instruction that the student received in his private school. Concluding that the district offered an appropriate placement, the court determined that it was not financially responsible for the student’s private placement.

123. OCONOMOWOC AREA SCHOOL DISTRICT v. Elizabeth BURMASTER, 49 IDELR 225 (Wis. Ct. App. 2008)

Neither a student’s age nor his unilateral placement in a residential facility relieved a Wisconsin district of its obligation to fund the student’s educational services. Determining that the 18-year-old student was a district resident, the Court of Appeals affirmed a decision requiring the district to pay for the student’s schooling. The court noted that the student began attending a private school located in another LEA after child welfare authorities placed him in a residential care center. When the student turned 18, his father allowed him to transfer to a residential facility located within the district. However, the student continued to attend the private school. The district maintained that the LEA in which the school was located remained responsible for the student’s educational services. The court disagreed. Relying on *State ex rel. Sch. Dist. No. 1 of Waukesha v. Thayer*, 41 N.W. 1014 (Wis. 1889), the Court of Appeals observed that a child is a resident of a district if he actually lives in the district and is not living there solely to obtain educational services. “*Thayer* remains the bright-line rule for determining school cost responsibility in Wisconsin for those, like [the student], entitled to a public education,” the court wrote. The court further noted that the law made no exception for students who had passed the age of compulsory school attendance or students who lived in residential care facilities.

124. SCHOOL UNION NO. 37 v. MS. C., 49 IDELR 179 (1st Cir. 2008)

Waiting six years to seek reimbursement for more than \$52,000 in private school expenses proved to be a costly mistake for the parent of a student with disabilities. Determining that the delay deprived an IEU of the opportunity to develop a less expensive program, the 1st Circuit concluded the parent could not recover her out-of-pocket expenses. The decision turned in large part on the reason for the delay. The parent maintained that the IEU failed to provide notice of her procedural safeguards, and that she was unaware of her right to seek reimbursement until 2004. However, the 1st Circuit pointed out that the IEU sent at least 25 procedural safeguard notices to the parent

between 1992 and 1999. According to the parent's own witness, the court observed, the parent chose not to seek reimbursement for miscellaneous expenses. Because the student's hometown was paying all tuition expenses pursuant to a local school choice law, the witness explained, the parent was afraid to "rock the boat" and seek additional payments until after her son had finished school. U.S. District Judge John R. Gibson noted that the parent's delayed reimbursement claim, seemingly motivated by her desire to continue her son's private placement, prevented the IEU from meeting the student's needs in a less restrictive setting. "Because [the parent] waited until [the student] had finished his education, this opportunity for the [IEU] to clarify both its role and [the student's] special education needs under federal law was missed," Judge Gibson wrote. Explaining that the parent, and not the IEU, was responsible for seeking a timely due process review of the IEU's obligations, the 1st Circuit affirmed a District Court decision that reversed a due process award in the parent's favor.

125. P.R. v. ROXBURY TOWNSHIP BOARD OF EDUCATION, 49 IDELR 155 (D.N.J. 2008)

Failing to develop an IEP for a student with learning disabilities proved to be a costly mistake for one New Jersey district. Because an ALJ determined that the student's private school was an appropriate placement, the district had no choice but to fund the student's placement for the duration of its appeal. The IDEA's stay-put provision requires a district to maintain a child's then-current educational placement while a FAPE action is pending, unless the district and the parents agree on a different placement. Under the Part B regulations, the court observed, a due process decision has the same effect as an agreement between the parents and the district. Noting that the ALJ approved of the student's placement in a school for children with learning disabilities, the court ruled that the school was the student's then-current educational placement for stay-put purposes. The court nonetheless held that the parent could not recover the costs of private placement for the entire 2007-08 school year. "It is settled law in the [3d U.S. Circuit Court of Appeals] that [the district] is liable for costs associated with [the student's] current educational placement beginning with the date of the 'agreement' established by [the ALJ's] October 31, 2007 decision ...," U.S. District Judge Faith S. Hochberg wrote. The court thus ordered the district to pay all private school expenses incurred on or after Oct. 31.

126. Jeffrey WINKELMAN v. PARMA CITY SCHOOL DISTRICT BOARD OF EDUCATION, 51 IDELR 126 (N.D. Ohio 2008)

The fact that a reimbursement order only addressed a student's placement for the 2007-08 school year did not let an Ohio district off the hook for subsequent tuition payments. Because the school was the student's stay-put placement, the district had to pay for the student's private schooling while his parents challenged his 2008-09 IEP. The district contended that the private school was not the student's pendency placement, as the parents had unilaterally placed the student in the private school after rejecting his 2007-

08 IEP. The District Court disagreed. The court explained that a unilateral placement can become a student's stay-put placement if a hearing officer or state review officer agrees that a change in placement is appropriate. 34 CFR 300.518(d). Noting that an SRO identified substantive defects in the proposed IEP and found the private school to be appropriate, the court observed that the school was the student's pendency placement. The court further rejected the district's contention that the reimbursement order was limited to the 2007-08 school year. "[L]imiting the award to reimbursement for one year does not effect [sic] the current educational placement of the child," U.S. District Judge Solomon Oliver Jr. wrote. The court concluded that the district would remain responsible for the student's private placement until the parents' due process complaint was resolved, or until the district reached an agreement with the parents on a new placement.

G. SECTION 504 AND ADA

127. DERRICK F. v. RED LION AREA SCHOOL DISTRICT, 51 IDELR 120 (M.D. Pa. 2008)

The parents of a student with visual and hearing impairments failed to show that a Pennsylvania district punished the student for their advocacy by placing his desk toward the rear of the classroom, failing to use a classroom amplification system, or denying their request to attend a field trip. Finding no evidence of a Section 504 or Title II violation, the District Court granted judgment for the district on the parents' retaliation claims. The court noted that the parents engaged in a protected activity when they filed a lawsuit regarding the district's alleged failure to implement the student's IEP. However, the parents failed to show that the district took adverse action against the student. The court observed that the actions described in the parents' complaint, which included the location of the student's desk and the district's decision to hire a particular deaf-blind intervener, were not materially adverse to the student. Even if the district's conduct qualified as adverse actions, the court explained, the district offered a legitimate, non-discriminatory reason for its conduct. For example, the court pointed out that the classroom amplification system interfered with the student's cochlear implant. Other actions, such as the district's limitation on the parents' classroom visits, were based on district policies that applied to all parents. "It is debatable whether the district has failed to implement [the student's] IEP from 2006 until the present, but one thing is clear — the record as a whole reveals no retaliatory animus against [the student]," U.S. District Judge Sylvia H. Rambo wrote. The court denied the district's motion for judgment on the parents' discrimination claim, however, noting that its decision would turn on the outcome of the IDEA claim.

128. S.E. v. GRANT COUNTY BOARD OF EDUCATION, 51 IDELR 3 (6th Cir. 2008)

In a case arising out of a middle schooler's distribution of a prescription medication, the 6th Circuit affirmed the dismissal of the parents' Sections 1983 and 504 claims. Not only did the parents fail to show that an assistant principal violated their daughter's constitutional rights, but they failed to exhaust their administrative remedies before filing suit. The student gave a classmate one of the pills that she took to control her ADHD. When the classmate's parent informed the assistant principal about the incident, the assistant principal informed the student's parent that a deputy sheriff would be investigating the matter. The student heard no more about the incident until the following school year, when the assistant principal summoned her to his office. She produced a signed statement about the incident, which the principal delivered to the deputy sheriff. The 6th Circuit acknowledged that the assistant principal obtained a confession from the student and reported her to law enforcement. However, the court observed, there was no evidence that the assistant principal was working with or at the behest of law enforcement — a circumstance that would have entitled the student additional protections under the Fourth Amendment. Because the assistant principal had information that the student violated a school rule, the court determined it was not unreasonable to question the student. "Summoning [the student and her classmate] to the office to take their respective information about what transpired the previous May, particularly in light of the fact that [the deputy sheriff] had been sick and had not performed the task, does not rise to the level of a Fourth Amendment violation in our view," U.S. Circuit Judge Ralph B. Guy Jr. wrote. The court also concluded that the assistant principal had no obligation to advise the student her *Miranda* rights before obtaining her statement. As for the Section 504 claim, the 6th Circuit observed that the student had not filed a due process complaint about the district's alleged failure to implement her 504 plan. Because the student requested compensatory education, a form of relief available under the IDEA, she had to exhaust her administrative remedies before filing suit.

129. ADAM C. v. SCRANTON SCHOOL DISTRICT, 51 IDELR 72 (M.D. Pa. 2008)

While a request for monetary damages allowed a student's parents to circumvent the IDEA's exhaustion requirement, it also resulted in the dismissal of their IDEA claim against a Pennsylvania district. The District Court ruled that monetary damages are not recoverable for IDEA violations. The court observed that the parents could not obtain monetary relief through the IDEA's administrative procedures. As such, they had no obligation to exhaust their administrative remedies before suing the district for injuries their son suffered after being attacked by a schoolmate. However, the court determined that the parents did not have the right to seek monetary damages. Although the 3d Circuit has not decided whether monetary damages are available for IDEA violations, at least seven Circuit Courts have answered that question in the negative. Furthermore, the court observed, other District Courts within the 3d Circuit had adopted the majority view. "Finding the weight of this authority to be compelling, this Court will likewise follow it and dismiss the claim for compensatory damages under the IDEA," U.S. District Judge Thomas I. Vanaskie wrote. The court also dismissed the parents' Section 1983 claims, explaining that 1983 claims cannot be based on violations of Section 504 or the IDEA.

However, the court allowed the parents to pursue Section 504 and negligence claims against the student's private school.

130. Angela CARNEY v. THE STATE OF NEVADA, 50 IDELR 253 (D. Nev. 2008)

A release provision in a mediation agreement did not stop a parent from suing a Nevada district for disability discrimination. The U.S. District Court, District of Nevada held that the Section 504 and ADA claims fell outside the scope of the release provision. The claims arose out of an incident in which a child's feeding tube was pulled out by his classmate. According to the parent, the district acted with deliberate indifference when it failed to protect the child from other students. The district maintained that its mediation agreement with the parent barred the Section 504 and ADA claims. The District Court disagreed. Although the parent released the district from all claims arising under federal and state education law, she specifically reserved the right to seek relief for any IDEA eligibility claims or tort claims arising out of a feeding tube incident. "[The parent's] claims under [Section 504 and the ADA] seek damages arising from a physical injury to [the child] when his G-tube was pulled out by another student," U.S. District Judge Larry R. Hicks wrote. "Such a cause of action sounds in tort." While the parent might not necessarily prevail on those claims, the court explained, the mediation agreement did not bar the claims. The court granted the district's motion to dismiss the parent's IDEA claims, however, concluding that the mediation did not satisfy the parent's duty to exhaust her administrative remedies.

131. J.W. v. FRESNO UNIFIED SCHOOL DISTRICT, 51 IDELR 133 (E.D. Cal. 2008)

The parents of an elementary school student with a hearing impairment could not plead a FAPE violation under Section 504 simply by restating their IDEA claim. Concluding that the parents failed to allege a Section 504 violation, the District Court granted the district's motion to dismiss. The court noted that the FAPE standard under the IDEA differs somewhat from the standard found in the Section 504 regulations. Rather than focusing on the needs of an individual student, Section 504 focuses on whether a child with a disability has meaningful access to educational programs. The parents' complaint failed to recognize this distinction. U.S. District Judge Lawrence J. O'Neill noted that the parents did not allege any facts showing that their son was denied meaningful access to educational services. Instead, they based their Section 504 claim on the same facts used to support their IDEA claim. Furthermore, the court observed, the parents did not allege any facts to show that the educational services provided to the child were not comparable to those received by typically developing students. "[The parents assert] that [the district] failed to provide a certain level of services to [their son], but [they do] not provide any facts to support a comparison between the treatment of [students with disabilities] and

non-disabled children in the district,” Judge O’Neill wrote. Absent such pleadings, the court explained, the parents could not pursue a FAPE claim under Section 504.

132. Chanda ALSTON v. DISTRICT OF COLUMBIA, 50 IDELR 152 (D.D.C. 2008)

In a case of first impression, the District Court concluded that state and local education officials could be held personally liable for retaliation under Section 504 and Title II of the ADA. The court denied the officials’ motion to dismiss the parent’s retaliation claims. The U.S. Circuit Court of Appeals, D.C. Circuit has not considered whether Section 504 and the ADA allow for personal liability in retaliation actions. However, the District Court noted that the plain language of the ADA’s retaliation provision suggests that individuals can be held liable for retaliation. “Indeed, [Section 12203] is the only section of the ADA that prohibits discrimination using ‘the unqualified term “person”’ rather than a more specific actor,” U.S. District Judge Ricardo M. Urbina wrote. The court thus adopted the 11th Circuit’s view in *Shotz v. Plantation, Fla., City of*, 103 LRP 39859, 26 NDLR 210 (11th Cir. 2003), that the ADA allows personal liability for retaliation. The District Court noted that the regulations implementing Section 504 prohibit retaliation by any “recipient or other person.” Turning to the parent’s allegations, the court observed that the parent attended multiple IEP meetings to advocate for her daughter and filed due process complaints to obtain necessary services. As such, she engaged in protected activities. The parent further contended that the LEA failed to provide appropriate services for two successive school years, and excluded the student from school entirely the following year. Finally, the parent alleged that the exclusions and denial of services were contemporaneous with her due process filings. The court concluded that the parent’s allegations, if true, suggested that the officials retaliated against her because of her advocacy. Noting that the LEA was responsible for the officials’ actions, the court also allowed the parent to pursue a retaliation claim against the LEA.

133. CENTENNIAL SCHOOL DISTRICT v. PHIL L., 50 IDELR 154 (E.D. Pa. 2008)

An IHO may have determined that a student with ADHD was eligible for Section 504 services, but that did not resolve the parent’s claim that the district failed to conduct a manifestation determination. The District Court dismissed the parents’ Section 504 claim, concluding that they failed to exhaust their administrative remedies with regard to the MD review. As a preliminary matter, the court noted that Section 504 does not require districts to conduct MD reviews in connection with disciplinary removals. Rather, the Section 504 regulations require districts to develop a system of procedural safeguards. “Although students qualifying under the Rehabilitation Act are afforded some procedural protections — namely, a Section 504 hearing — they are not afforded the specific protection of a ‘manifestation determination’ under the IDEA,” U.S. District Judge Eduardo C. Robreno wrote. Nonetheless, the court explained that the student was entitled

to the procedural protections offered under Section 504, including written notice and an impartial hearing. The court noted that the district conducted a pre-expulsion hearing, as well as a pre-expulsion evaluation. However, the IHO's decision did not reveal what those procedures entailed. Without a factual record of the procedural safeguards provided to the student, the court could not consider whether the district violated the student's due process rights.

134. JAMES S. v. SCHOOL DISTRICT OF PHILADELPHIA, 50 IDELR 160 (E.D. Pa. 2008)

The U.S. District Court, Eastern District of Pennsylvania denied a district's motion to dismiss Section 504 and ADA claims for monetary damages. Although the parent had not exhausted her administrative remedies under the IDEA, the court concluded that the nature of the relief requested made exhaustion unnecessary. The court noted that compensatory damages are not available in IDEA administrative proceedings. Because the plain language of Section 1415(l) requires exhaustion only when the parent is seeking relief that is "also available" under the IDEA, the court explained, the Section 504 and ADA claims for monetary damages did not fall within the scope of the exhaustion requirement. "[T]he court concludes that exhaustion would have been futile, because the hearing officer had no authority to grant such relief," U.S. District Judge Jan E. Dubois wrote. Furthermore, the court observed, the 3d U.S. Circuit Court of Appeals does not require a showing of bad faith or gross misjudgment for Section 504 claims. Because the parent alleged that the student was denied special education and related services solely because of his disability, she sufficiently pleaded claims for monetary damages under Section 504 and the ADA. The court dismissed the parent's Section 504 and ADA claims for compensatory education based on her failure to exhaust her administrative remedies.

135. Matthew FRASER v. TAMALPAIS UNION HIGH SCHOOL DISTRICT, 50 IDELR 151 (9th Cir. 2008)

Allegations that a California district intentionally misinformed parents and students about the availability of Section 504 accommodations did not save a former student's Section 504 claim. Concluding that the lawsuit was a FAPE action in disguise, the 9th Circuit ruled that the student could not sue the district without first exhausting his administrative remedies. The student contended that the district had a policy of misleading parents and students about Section 504 accommodations — a systematic violation that brought his Section 504 claim outside the scope of the IDEA's exhaustion requirement. The 9th Circuit disagreed. In an unpublished opinion, the court concluded that the student's claim was based on the district's failure to provide him with Section 504 services. The court explained that the student could not circumvent the exhaustion requirement by structuring his complaint as a widespread policy violation. Even if the student were challenging a local policy, he would still need to give the state educational agency an opportunity to fix the alleged problem. Thus, the court observed, the student had to exhaust his

administrative remedies to bring the purported policy violation to the attention of state authorities. The 9th Circuit affirmed the dismissal of the student's Section 504 complaint.

136. WIATT v. PRESCOTT UNIFIED SCHOOL DISTRICT, 50 IDELR 99 (D. Ariz. 2008)

Despite claiming that only monetary damages would compensate them for past denials of FAPE, the parents of two siblings with autism failed to show that exhaustion of their IDEA, ADA and Section 504 claims would be futile. The District Court held that the parents could obtain adequate relief through the IDEA's administrative procedures. According to the parents, the district admitted that it was unable to provide the education or services their children required. The court noted there was no evidence that the district's special education director ever made such a statement. Even if she had, however, the district's inability to educate the children would not make exhaustion futile. The court observed that the parents could still obtain relief in a due process proceeding. "For instance, if [the district] lacked the necessary resources, it might provide funding for attendance at a program such as [the private] program which the [parents] appear to have considered adequate for a time," the court wrote. Furthermore, the parents could request counseling as a related service to deal with the students' emotional distress. Although the parents maintained that their lawsuit addressed past wrongs, the court determined that the parents had many unresolved concerns about their children's education. As such, they had to exhaust their administrative remedies before filing suit.

137. CITY OF BOSTON v. BUREAU OF SPECIAL EDUCATION APPEALS, 50 IDELR 102 (D. Mass. 2008)

Allegations that a Massachusetts LEA failed to provide necessary accommodations to a student with Crohn's disease prevented the student's parents from seeking monetary damages under Section 504. Because the complaint addressed the student's IDEA rights, the parents needed to exhaust their administrative remedies before filing suit. It was the language of the complaint that swayed the District Court's decision. The parents claimed that the LEA failed to identify the student as a child with a disability despite the difficulties posed by his medical condition. Moreover, the parents maintained that the student's failure to complete ninth grade after two successive attempts resulted from the LEA's failure to accommodate his disability. Although the parents framed their lawsuit as a discrimination claim, the District Court pointed out that the complaint addressed the student's identification and receipt of FAPE — issues that should be addressed in a due process proceeding. "Indeed, the parents assert that '[t]he actions of [the LEA] have harmed the student and deprived him of a free and appropriate public education,' the very *raison d'être* of the IDEA," U.S. District Judge Rya W. Zobel wrote. Noting that the parents withdrew their due process complaint before it was resolved, the court explained that it could not hear their Section 504 claim.

138. Ann Kimball WILES v. DEPARTMENT OF EDUCATION, STATE OF HAWAII, 50 IDELR 64 (D. Hawaii 2008)

The Hawaii ED could not avoid a FAPE claim under Section 504 merely by pointing out the parents' failure to state a violation of the Section 504 regulations. Because the parents' suit addressed the implementation of their son's IEP, and not the ED's failure to design an appropriate program, they only needed to assert a violation of the statute. The District Court acknowledged that in *Mark H.*, the 9th Circuit suggested that a FAPE complaint under Section 504 must identify the specific regulations violated by the LEA. However, the District Court noted that *Mark H.* addressed a district's failure to design appropriate programs for the students. This case, in contrast, addressed the Hawaii ED's alleged failure to provide the services identified in a FAPE settlement. "In other words, this case focuses on the implementation phase of FAPE while *Mark H.* focused on the design phase of FAPE," U.S. District Judge Alan C. Kay wrote. According to the parents, the ED acted with deliberate indifference by excluding the student from participation in its programs, denying him the benefit of its programs, or subjecting him to discrimination on the basis of disability. Determining that the parents stated a valid claim under Section 504, the court denied the ED's motion to dismiss. The court further concluded that the parents did not need to exhaust their administrative remedies to pursue a retaliation claim under Section 504.

139. M. v. STAMFORD BOARD OF EDUCATION, 51 IDELR 40 (D. Conn. 2008)

Although a former student persuaded a District Court that her claim for physical and emotional injuries fell outside the IDEA's exhaustion requirement, she could not seek damages for an on-campus sexual assault. The U.S. District Court, District of Connecticut ruled that monetary relief is unavailable for injuries inflicted by third parties. The court reconsidered its previous decision, reported at 50 IDELR 223, that the IDEA's exhaustion requirement barred the student's claim. Noting that the student's alleged injuries could not be resolved through the IDEA's administrative procedures, the court agreed that exhaustion was not necessary. However, the court pointed out that all of the existing cases addressing monetary damages involve conduct by school officials. "[The student] cites to no cases wherein a plaintiff was awarded damages under the IDEA and Section 1983 against a school for the harms created by a third party," U.S. District Judge Warren W. Eginton wrote. The court observed that the student in this case did not seek damages for a denial of FAPE that resulted from the actions of school officials. Instead, she sought monetary relief for the physical and emotional injuries she allegedly suffered at the hands of a schoolmate. Determining that the IDEA does not allow damages for a "failure to protect," the District Court renewed its dismissal of the student's IDEA and Section 1983 claims.

140. D.G. v. SOMERSET HILLS SCHOOL DISTRICT, 50 IDELR 70 (D.N.J. 2008)

A former student could seek monetary damages from a New Jersey district that purportedly failed to take notice of his severe depression. The district's alleged refusal to evaluate the student's special education needs, if true, could amount to disability discrimination. The District Court noted that the student could not establish a Section 504 violation merely by showing that the district violated its child find obligation under the IDEA. Instead, the court observed, the student needed to prove that the district failed to provide educational services on the basis of his disability. The student maintained that his frequent absences and comments about suicide put the district on notice that he suffered from severe depression. Nonetheless, the district failed to offer accommodations or evaluate his special education needs. "The Court notes that Section 504 imposes a duty on the district to identify a [child with a disability] within a reasonable time after school officials are on notice of behavior indicating that the child has a disability," U.S. District Judge Mary L. Cooper wrote. According to the student, the district denied his parents' repeated requests for evaluations without advising them of their right to request a due process hearing. Determining that the student met the pleading requirements for a Section 504 claim, the court denied the district's motion to dismiss.

141. KOEHLER v. JUNIATA COUNTY SCHOOL DISTRICT, 50 IDELR 71 (M.D. Pa. 2008)

A teenager with autism could not sue a private service provider for Section 504 and IDEA violations, but that did not stop his district from pursuing a claim of its own. An indemnification clause in the parties' service agreement allowed the district to seek contribution from the provider. The case arose out of the student's alleged abuse at a private facility. According to the student, the provider's employees locked him in an unfurnished, plywood-covered room while requiring him to wear a thermally insulated jumpsuit. The student sued the district and the service provider for violating his IDEA and Section 504 rights. The district, in turn, filed a cross-claim against the provider. The U.S. District Court, Middle District of Pennsylvania recognized that the provider, as a private entity, had no obligation to comply with the IDEA. However, the court pointed out that the provider's service agreement with the district required the provider to "indemnify, defend, and hold harmless the School District" for any damages or loss resulting from its conduct. "The indemnification provision does not and cannot substitute [the provider] as a defendant in the IDEA or Section 504 claims of the amended complaint," U.S. District Judge Sylvia H. Rambo wrote. However, the judge explained that the district could sue the provider to recover any damages it might incur to the student as a result of the provider's conduct. The court thus denied the provider's motion to dismiss.

142. DISABILITY RIGHTS WISCONSIN, INC. v. WALWORTH COUNTY BOARD OF SUPERVISORS, 49 IDELR 271 (7th Cir. 2008)

By repeatedly stating that it was seeking relief on behalf of students with disabilities, an advocacy group doomed its discrimination suit against a county's board of supervisors. The 7th Circuit concluded that the group lacked standing to challenge the construction of a specialized school. The court based its decision on the group's failure to plead an injury-in-fact. To pursue an ADA or Section 504 claim, the group needed to show that the decision to expand a school for students with disabilities directly harmed the group or one of its members. The court noted that the group could satisfy this requirement by showing that it had to expend time, money and resources to advocate on behalf of students who were placed in an overly restrictive environment. However, the group made no such allegation in its complaint. "Instead, [the group] alleges how the new [school] will affect [students with disabilities in the county], and repeatedly claims to bring the suit 'on their behalf,'" U.S. Circuit Judge Daniel A. Manion wrote. The court observed that any parent who disagreed with a student's placement in the segregated school could seek relief in a due process hearing. While affected students were free to sue on their own behalf, the advocacy group could not make a pre-emptive strike against potentially inappropriate placements.

143. Peter AVOLETTA v. CITY OF TORRINGTON, 50 IDELR 5 (D. Conn. 2008)

An OCR complaint is not a substitute for a due process hearing, as a parent discovered when a District Court dismissed her discrimination lawsuit against a Connecticut district. The court explained that it could not exercise jurisdiction over the parent's IDEA, ADA and Section 504 claims until she exhausted her administrative remedies under the IDEA. The court acknowledged that the parent filed a series of complaints with OCR concerning the district's alleged refusal to evaluate her sons' eligibility for IDEA services. However, the court observed, the parent never requested a due process hearing to compel an evaluation and eligibility determination. The failure to seek administrative relief proved fatal to the parent's suit. "It is the exhaustion of the IDEA's administrative procedures, not procedures under Section 504, that is the prerequisite for bringing an action in federal or state court alleging the denial of a FAPE under the IDEA, Section 504, the ADA, Section 1983, or any other cause of action," U.S. District Judge Alan H. Nevas. Because the IDEA's administrative procedures provided some form of relief for the harm alleged, the parent had to exhaust her administrative remedies before filing suit.

144. J.W. v. FRESNO UNIFIED SCHOOL DISTRICT, 50 IDELR 42 (E.D. Cal. 2008)

A California district had little trouble convincing a District Court to dismiss a Section 504 claim based on its alleged failure to provide FAPE to a student with a hearing

impairment. Determining that the student did not plead a FAPE violation under Section 504, the District Court dismissed his complaint. The court noted that Section 504 and the IDEA have different standards for proving a denial of FAPE. While the IDEA focuses on the education and services provided to an individual child, Section 504 requires a comparison between services provided to students with disabilities and services provided to nondisabled students. “As defined by the [Section 504] regulations, a Section 504 FAPE requires education and services ‘*designed* to meet individual needs of [persons with disabilities] *as adequately* as the needs of [nondisabled] persons are met,’” U.S. District Judge Lawrence J. O’Neill wrote. The student’s complaint focused on the education and services provided under his IEPs — the standard required for a FAPE violation under the IDEA. While the student might be able to sustain a claim for IDEA violations, he did not state a claim under Section 504. The District Court granted the student leave to file an amended complaint that compared his access to educational services to that of his nondisabled peers.

145. J.M. v. EAST GREENWICH TOWNSHIP BOARD OF EDUCATION, 50 IDELR 136 (D.N.J. 2008)

A New Jersey district had to defend claims that it violated Section 504 and Title II by failing to consider a mainstream placement for a child with a genetic disorder. By alleging that their child was denied equal access to district programs and activities, the parents pleaded viable claims for disability discrimination. The District Court observed that the district’s alleged predetermination of the child’s placement, which served the basis for the parent’s IDEA claim, could also be the basis for claims under Section 504 and the ADA. However, the parents still needed to prove disability discrimination under each statute. Under Title II, the parents needed to show that the child had a disability, that he was a qualified individual, and that he suffered an adverse action because of his disability. The Section 504 standard required the parents to allege that the child had a disability, that he was otherwise qualified to participate in school activities, that the district received federal funds, and that he was excluded from participation in, denied the benefits of, or subjected to discrimination at the school. The parents contended that the district, an entity that received federal funds, denied their son “the benefits of receiving full and equal access to the public educational programs and activities offered within the school district, when such access could have been achieved with reasonable accommodations.” Determining that the parents satisfied the pleading requirements for Section 504 and Title II, the court denied the district’s motion to dismiss.

146. A.P. v. ANOKA-HENNEPIN INDEPENDENT SCHOOL DISTRICT NO. 11, 49 IDELR 245 (D. Minn. 2008)

A state law governing the administration of students’ injections helped a Minnesota district to avoid liability for Section 504 and ADA violations. Because the law discourages laypersons from administering injections, the district’s refusal to assist a 5-year-old boy with his glucagon injections was not clearly unreasonable. To recover

damages for disability discrimination, the parents needed to show that: 1) they requested the accommodation; 2) it was “plainly obvious” that the accommodation was necessary and reasonable; and 3) it was “plainly obvious” that the requested accommodation would not place an undue hardship on the district or fundamentally alter its programs. Because Minnesota guidelines suggest that school nurses supervise the administration of all injections, it was not plainly obvious that the parents’ request was reasonable. The District Court dismissed the discrimination claim insofar as it related to the administration of injections, but allowed the parents to seek damages based on the district’s refusal to assist with blood testing and insulin pump operation.

147. M.G. v. James A. CRISFIELD, 49 IDELR 217 (D.N.J. 2008)

A New Jersey district exposed itself to a discrimination claim when it allegedly conditioned a third-grader’s return to school on his parents’ acceptance of a special education placement. Although the parents denied that their son had a disability, the District Court determined that they could pursue a claim for Section 504 violations. The court explained that Section 504 protects not only individuals who have disabilities, but also individuals who are regarded as having disabilities. The parents maintained that the student, who was suspended indefinitely after committing an unspecified behavioral offense, was a member of the second category. “[The parents] do not seek special education and related services or accommodations under Section 504,” U.S. District Judge Freda L. Wolfson wrote. “Rather, they assert [the student’s] right against discrimination on the basis of a perceived disability, i.e., being barred from attending any [district] school because of such a perception.” The court noted that the parents sought to have their son returned to his general education placement. As a result, the district’s purported offer to provide special education and related services did not shield it from liability for Section 504 violations. The court denied the district’s motion to dismiss the parents’ Section 504 claim.

148. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION v. B.H., 51 IDELR 71 (W.D.N.C. 2008)

A North Carolina district’s alleged failure to identify and evaluate a child with a fatal neurological condition amounted to more than a mere FAPE violation — at least in the eyes of one District Court. Because the parents’ complaint suggested that the district acted in bad faith or with gross misjudgment, the court refused to dismiss the parents’ Section 504 claim. It was the nature of the district’s purported conduct that swayed the court’s decision. According to the parents, the district failed to take any action in response to the kindergarten teacher’s IDEA referral. When the child was unable to complete his work in first grade, his teacher allegedly sent him to the kindergarten classroom. The parents maintained that the district did not conduct the OHI evaluation recommended by the student’s pediatrician. They obtained private evaluations that uncovered a number of coordination and visual disorders. Those evaluations ultimately led to a diagnosis of juvenile Batten Disease — a fatal neurological disorder.

Nonetheless, the parents asserted, the district continued to find the student ineligible for IDEA services. Although the district eventually found the student eligible as a child with a visual impairment, the parents claimed that the district would not provide services unless they waived their legal rights under the IDEA. “All of these allegations, if proved to a trier of fact, would support a finding of bad faith, gross misjudgment, reckless indifference, purposeful indifference, and even a malignant arrogant indifference on the part of the [district],” U.S. District Judge Martin Reidinger wrote. The court thus held that the parents sufficiently pleaded a claim under Section 504.

149. ROBINSON v. DISTRICT OF COLUMBIA, 49 IDELR 222 (D.D.C. 2008)

A parent seeking to hold a district responsible for its failure to comply with a FAPE settlement found little help in Sections 504 and 1983. The District Court concluded that the parent’s complaint, although framed as request for monetary damages, was nothing more than a garden-variety FAPE action. The court acknowledged that the U.S. Circuit Court, District of Columbia recognizes some Section 1983 claims premised on IDEA violations. However, the court noted that the parent needed to allege more than a denial of FAPE. She also needed to show that the district’s conduct frustrated her efforts to seek relief under the IDEA, that the IDEA violation resulted from a district policy or custom, and that typical IDEA remedies would not compensate for the harm suffered. Because the parent alleged nothing more than a denial of FAPE, she could not pursue a Section 1983 claim. The court identified similar flaws in the parent’s Section 504 claim. “Although [the parent’s] complaint includes allegations that [the district] failed to provide [the student] with a FAPE, ... [it] completely fails to suggest allegations of bad faith or gross misjudgment sufficient to support a Section 504 claim,” U.S. District Judge John D. Bates wrote. The court granted the district’s motion to dismiss, but granted the parent leave to amend her complaint.

150. TEREANCE D. v. SCHOOL DISTRICT OF PHILADELPHIA, 49 IDELR 187 (E.D. Pa. 2008)

Noting that a parent did not need to prove intentional discrimination to prevail on her Section 504 and ADA claims against a Pennsylvania district, the U.S. District Court, Eastern District of Pennsylvania denied the district’s motion to dismiss. The court concluded that the district’s alleged failure to provide the student FAPE, if true, would make the district liable for discrimination. According to the parent, the district failed to provide autistic support or ESY services, inappropriately regarded the student’s behavior as a manifestation of an emotional disturbance, and failed to conduct an appropriate evaluation. In addition, the parent claimed she was instructed to obtain a private evaluation to determine the scope of the student’s educational needs. The court acknowledged that the parent did not allege intentional discrimination by the district, but explained that such a showing was not necessary under *W.B. v. Matula*, 23 IDELR 411 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 47 IDELR 282 (3d Cir. 2007). “[The parent has] sufficiently alleged facts which, if proven, show

that the district excluded [the student] from participation in, denied him the benefits of, and subjected him to discrimination at school,” U.S. District Judge William H. Yohn Jr. wrote. The court also refused to dismiss the parent’s Section 1983 claim, determining that she sufficiently alleged a violation of the Equal Protection clause.

151. JOHN G. v. NORTHEASTERN EDUCATIONAL INTERMEDIATE UNIT 19, 49 IDELR 157 (M.D. Pa. 2008)

The parents of a student with autism got a second chance to pursue a Section 504 claim against a Pennsylvania district that allegedly failed to prevent their child’s abuse by a teacher. Concluding that the amended complaint stated a valid discrimination claim, the District Court granted the parents’ motion to amend. The court pointed out that district employees cannot be held individually liable for Section 504 violations. As a result, the court explained, the parents could not pursue a discrimination claim against the special education teacher who allegedly hit, grabbed, stepped on, verbally abused, and physically restrained students in her autism support class. “To the extent that [the parents] bring a claim against [the teacher], the motion to amend will be denied,” U.S. District Judge A. Richard Caputo wrote. However, the court noted that recipients of federal funds can be sued for violating Section 504. Because both the school district and the intermediate unit responsible for providing special education services received federal funds, the court concluded that the parents could sue them for disability discrimination. The court granted the parents’ motion to amend their complaint to add Section 504 claims against the district and the intermediate unit.

152. M.Y. v. SPECIAL SCHOOL DISTRICT NO. 1, 51 IDELR 1 (8th Cir. 2008)

A student who claimed she was sexually assaulted by a general education bus driver on the way home from summer school could not pursue a Section 504 claim against a Minnesota district. Although the student maintained that the assault would not have occurred if she had specialized transportation with trained personnel, the 8th Circuit found no evidence that the failure to provide specialized transportation was discriminatory. To prevail on a Section 504 claim, the student needed to show that the district, a recipient of federal funds, discriminated against her on the basis of her disability. In addition, the student had to demonstrate that the district acted with bad faith or gross misjudgment by departing substantially from accepted professional judgment, practice and standards. The student, who had an undisclosed disability, claimed that the general education summer program failed to meet the needs of students with disabilities, including the need for transportation services. However, the court observed, the student’s IEP expressly stated that she would not receive special education or related services over the summer. The IEP also stated that the student would not receive specialized transportation for general education activities. “Accordingly, denying [the student] ... special education transportation to and from summer school did not have the effect of denying her a free and appropriate public education under Section 504,” U.S. District Judge Lawrence L. Piersol wrote. The court noted that the district fully complied with the

terms of the student's IEP by providing general education transportation for summer school. Finding no evidence that the district acted in bad faith or with gross misjudgment in denying the student specialized transportation, the 8th Circuit affirmed the dismissal of her Section 504 claim. The court also dismissed the student's Section 1983 claim, finding no evidence that the district had a custom or practice of denying specialized transportation to students found ineligible for ESY services.

153. John CAVE v. EAST MEADOW UNION FREE SCHOOL DISTRICT, 49 IDELR 92 (2^d Cir. 2008)

Despite claiming that their son's request to bring his service dog to school had nothing to do with his IEP, the parents of a high schooler with a hearing impairment could not pursue Section 504 and ADA claims against a New York district. The 2d Circuit concluded that the parents' failure to exhaust their administrative remedies under the IDEA barred their discrimination suit. The dispute boiled down to a request for an IEP modification. Although the parents maintained that the district unlawfully prevented the student from accessing a public facility, the district would need to make changes to the student's IEP to accommodate the dog's presence. "It is hard to imagine, for example, how [the student] could still attend the physical education class while at the same time attending to the dog's needs, or how he could bring [the dog] to another class where another student with a certified allergic reaction to dogs would be present," U.S. Circuit Judge Wilfred Feinberg wrote. While the IDEA did not permit the parents to recover the \$150 million in compensatory and punitive damages that they sought, it did offer a remedy: The parents could request a due process hearing and seek to have the service dog identified as an accommodation in the student's IEP. As such, the parents had to exhaust their administrative remedies before filing suit. The 2d Circuit affirmed a decision in the district's favor, reported at 47 IDELR 162, and remanded the case with instructions to dismiss the case for lack of jurisdiction.

154. MARK H. v. Paul LEMAHIEU, 49 IDELR 91 (9th Cir. 2008)

The Hawaii ED will have to defend a suit for monetary damages based on its alleged failure to provide appropriate special education services to two sisters with autism. Recognizing that monetary damages are not available under the IDEA, the 9th Circuit concluded that the parents could pursue their claim under Section 504. The 9th Circuit thus joined the 3d Circuit Court of Appeal in holding that parents can seek monetary damages under Section 504 for a denial of FAPE. *W.B. v. Matula*, 23 IDELR 411 (3d Cir. 1995), overruled on other grounds by *A.W. v. Jersey City Pub. Schs.*, 47 IDELR 282 (3d Cir. 2007). The case turned on the definition of FAPE provided in both statutes. While the IDEA defines FAPE as special education and related services provided to a child with a disability, the Section 504 regulations define FAPE as "regular or special education and related aids and services" that are designed to meet the needs of students with disabilities as adequately as the needs of their nondisabled peers. U.S. Circuit Judge Marsha S. Berzon explained that the different standards carry different burdens of proof. "[Parents]

who allege a violation of the FAPE requirement contained in [the Section 504] regulations, consequently, may not obtain damages simply by proving that the IDEA FAPE requirements were not met,” Judge Berzon wrote. Section 1415(l) of the IDEA explicitly preserves parents’ rights under Section 504. This factor distinguishes the case from the court’s recent ruling in *Blanchard v. Morton Sch. Dist.*, 48 IDELR 207 (9th Cir. 2007), that parents cannot seek relief for IDEA violations under Section 1983. The 9th Circuit further held that parents have the right to sue districts for FAPE violations under Section 504, as the definition of FAPE provided in the Section 504 regulations further the statute’s nondiscriminatory aims. However, noting that the parents based their Section 504 claim on the faulty assumption that the definition of FAPE was identical under both statutes, the court declined to decide whether the parents alleged an actionable claim. The 9th Circuit reversed a decision reported at 44 IDELR 161 and remanded the case for further proceedings.

H. PROCEDURAL AND LITIGATION ISSUES

155. J.L. v. AMBRIDGE AREA SCHOOL DISTRICT, 50 IDELR 219 (W.D. Pa. 2008)

A student’s parents could submit evidence that a district delayed their due process failings by misrepresenting and withholding critical information. The District Court concluded that the parents’ failure to submit the evidence at their due process hearing did not prevent it from hearing the evidence on appeal. As a general rule, the court noted, a party cannot submit additional evidence in an IDEA action when that evidence could have been introduced at the administrative level. However, the court observed that the parents did not bear the burden of proving that their complaint was timely. Under *Schaffer*, the court explained, the burden of proving an affirmative defense may shift to the defendant. “The [district] was the party that asserted the statute of limitations as a defense at the administrative level,” U.S. District Judge Nora Barry Fischer wrote. “Thus, the court finds that the IDEA statute of limitations can be construed as an affirmative defense and, as such, the [district] would properly bear the burden of proof on this defense at the administrative level.” According to the parents, the district’s misrepresentations and omissions prevented them from requesting a due process hearing in a timely manner. Because the evidence would help the court to decide if parents’ FAPE claims were timely, the court ruled that they could submit the additional evidence. The court also permitted the district to submit rebuttal evidence on the misrepresentation issue.

156. K.I. v. MONTGOMERY PUBLIC SCHOOLS, 51 IDELR 104 (M.D. Ala. 2008)

The fact that a parent’s experts did not have the opportunity to observe a student in a self-contained school before they testified in a due process hearing did not allow them to testify in the parent’s FAPE appeal. A District Court held that the experts’ proposed

testimony, while based on new observations, was duplicative of their previous testimony. The parent pointed out that the student, who had limited movement due to several medical conditions, had been receiving homebound services at the time of the due process hearing. It was not after the hearing that the experts observed the student in a self-contained school for medically fragile students. Although the parent maintained that the circumstances warranted the introduction of supplemental testimony, the court disagreed. “The fact that [the expert’s] opinions will be based on different observations does not mean that the testimony will be substantively different,” U.S. District Judge Mark E. Fuller wrote with regard to an augmentative communication consultant. The court found similar defects with the testimony offered by two speech-language therapists. Concluding that the proposed testimony was merely a recap of the experts’ previous opinions, the court denied the parent’s motion to supplement the administrative record.

157. Derrick SHELTON v. MAYA ANGELOU PUBLIC CHARTER SCHOOL, 51 IDELR 31 (D.D.C. 2008)

A D.C. charter school narrowly avoided liability for its failure to conduct an IEP meeting in accordance with a due process decision. Finding no evidence that the student suffered substantive harm, the U.S. District Court, District of Columbia denied the student’s motion for judgment. The court rejected the notion that the charter school’s appeal of the IHO’s decision excused its noncompliance. Although students have “stay-put” rights under the IDEA, there is no corresponding provision that allows educational agencies to defer the implementation of an IHO’s decision. However, the court observed, the district’s procedural violation did not necessarily amount to a denial of FAPE. To obtain relief under the IDEA, the student needed to show that the school’s failure to implement the IHO’s decision affected his substantive rights. The court noted that when the charter school refused to implement the due process decision, the District of Columbia stepped in to fulfill the charter school’s obligations. In addition, the charter school subsequently agreed to provide five hours of weekly tutoring and accept assignments that the student missed after his expulsion. “At this point, ... the record is entirely unclear as to what services [the student] actually received, and thus whether [the charter school’s] failure to implement the [IHO’s decision] ultimately resulted in a denial of FAPE,” U.S. District Judge Colleen Kollar-Kotelly wrote. The court gave the student two weeks to provide a factual and legal basis for his FAPE claim.

158. D.L. v. WAUKEE COMMUNITY SCHOOL DISTRICT, 51 IDELR 67 (S.D. Iowa 2008)

The same conduct that gives rise to an IDEA claim may support a Section 1983 claim for constitutional violations — at least in one small part of the Midwest. The U.S. District Court, Southern District of Iowa held that Section 1983 may be used to remedy constitutional violations that mirror IDEA claims. The 8th U.S. Circuit Court of Appeals has issued conflicting opinions as to whether IDEA claims are actionable under Section 1983. Compare *Digre v. Roseville Sch. Indep. Dist. No. 623*, 559 IDELR 369 (8th Cir.

1988), with *Heidemann v. Rother*, 24 IDELR 167 (8th Cir. 1996). The District Court decided that *Heidemann*, which stated that Section 1983 is not an appropriate vehicle for IDEA claims, implicitly overruled the 8th Circuit's contradictory holding in *Digre*. However, *Heidemann* did not address whether Section 1983 can be used "to enforce constitutional rights offended by IDEA violations." Although Section 1415(l) of the IDEA is silent on the matter, the 4th U.S. Circuit Court of Appeals stated in *Sellers by Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. 1998), that Section 1415(l) "does permit plaintiffs to resort to [Section] 1983 for constitutional violations, notwithstanding the similarity of such claims to those stated directly under the IDEA." Adopting the 4th Circuit's view, the District Court denied the school district's motion to dismiss the parents' Section 1983 claim.

159. Amy FRENCH v. NEW YORK STATE DEPARTMENT OF EDUCATION, 51 IDELR 32 (N.D.N.Y. 2008)

Although the Supreme Court's ruling in *Winkelman* closed the door on a parent's *pro se* FAPE complaint, it opened a window for his IDEA lawsuit against a New York district. The District Court explained that the parent could pursue an IDEA claim without an attorney if he asserted the claim on his own behalf. *Winkelman* did not address whether non-attorney parents can represent their minor children in federal court. Thus, a parent must look to the law of his own jurisdiction to determine whether he can pursue a *pro se* IDEA complaint on his child's behalf. The District Court noted that the 2d U.S. Circuit Court of Appeals requires non-attorney parents to hire counsel to represent their children in IDEA actions. *Wenger v. Canastota Cent. Sch. Dist.*, 28 IDELR 846 (2d Cir. 1998). "Therefore, based upon the relevant case law, the Court concludes that [the parent] cannot pursue the claims in the complaint, all of which he asserted on behalf of his daughter, [the student], *pro se*," U.S. District Judge Frederick J. Scullin Jr. wrote. However, the court pointed out, *Winkelman* recognized that parents have substantive rights of their own under the IDEA. If the parent chose to do so, the court observed, he could file an amended complaint that framed the alleged FAPE violations as violations of his own substantive rights. The court gave the parent 45 days to hire an attorney to represent his daughter or file an amended complaint.

160. J.G. v. DOUGLAS COUNTY SCHOOL DISTRICT, 51 IDELR 119 (9th Cir. 2008)

A Nevada district avoided liability for its "delayed" evaluation of two preschoolers not because it complied with the state's evaluation timeline, but because it was unaware that the young twins might have autism. The 9th Circuit determined that the district's limited knowledge of the brothers' suspected disability made the delay reasonable. The court criticized the district's argument that the evaluation, conducted within 38 school days, fell within the state's evaluation timeline of 45 school days. While the state's timeline was not inconsistent with the former IDEA, the court explained, it did not provide the district with a "safe harbor" for conducting assessments. "Regardless of compliance with

a state regulatory requirement, [the] IDEA requires that districts act within a reasonable time to evaluate [children suspected of having disabilities],” U.S. Circuit Judge Ronald M. Gould wrote. Whether an evaluation is conducted within a reasonable time depends on the child’s circumstances, the court explained, and not whether the district complies with a state-established timeline. The court nonetheless concluded that the district’s evaluation of the twins was timely. Although the parents requested initial evaluations on May 5, 2003, and attended the district’s Child Find Day in June 2003, the district had no reason to suspect that the twins had autism until July 28, 2003 — the date that it was contacted by the twins’ private service provider. “The district began evaluating the twins one month later, and began administering tests for autism one month after that,” Judge Gould wrote. The court further noted that the district could not provide services to the twins before finding them eligible under the IDEA. Because the evaluations were timely, the 9th Circuit observed, the parents could not recover the cost of private services they obtained while the evaluations were pending. However, the 9th Circuit ruled that the district’s failure to provide timely notice of its intent to evaluate the twins entitled the parents to recover the \$1,670 they spent on private evaluations.

161. P.P. v. WEST CHESTER AREA SCHOOL DISTRICT, 50 IDELR 133 (E.D. Pa. 2008)

The fact that a Pennsylvania district took 136 days to seek permission for an initial eligibility evaluation did not require it to pay for a 10-year-old boy’s private schooling. The U.S. District Court, Eastern District of Pennsylvania held that the procedural violation did not result in a substantive denial of FAPE. As a preliminary matter, the court noted that IDEA 2004 includes a two-year statute of limitations. Because the parents filed their claim on Oct. 5, 2005, they could not seek relief for alleged child find violations that occurred before October 2003. Turning to the merits of the claim, the court acknowledged that the district should have sought permission to conduct an evaluation as soon as the parents requested an assessment. However, the court pointed out that the district eventually conducted an appropriate evaluation. “Although [the parents] disagreed with the [evaluation report] because it did not identify [the student] as having a learning disability in math computation and [because] no assessment of social/emotional functioning was done, those two areas were not identified as suspected disabilities and were thus properly excluded from the evaluation,” U.S. District Judge James T. Giles wrote. The court further noted that the parents participated in the subsequent IEP meeting, and that the proposed IEP met the student’s identified needs. Because the student did not suffer harm as a result of the procedural violation, the court denied the parents’ requests for tuition reimbursement and compensatory education.

162. C.S. v. CALIFORNIA DEPARTMENT OF EDUCATION, 50 IDELR 63 (S.D. Cal. 2008)

Because a parent failed to demonstrate that California’s ALJs were not qualified to conduct due process hearings, the District Court concluded she was unlikely to prevail on

her claim against the state ED. The court denied the parent's request for a temporary restraining order. The parent sought to prevent the ED from renewing its interagency contract with the Office of Administrative Hearings, the agency that conducted due process hearings throughout the state. According to the parent, the OAH failed to provide its ALJs with 80 hours of training in special education law as required under the contract. However, the court pointed out that the 80-hour training requirement was a contractual obligation — it did not appear in the IDEA. Because the parent was not a party to the contract, she could not challenge the OAH's alleged failure to provide the training. Moreover, the parent did not show that the ALJs failed to meet the IDEA's qualification requirements. "Simply, [the parent has] not offered sufficient evidence suggesting that ALJs are employed by state or local educational agencies, are conflicted, do not possess knowledge of special education law, and do not possess the written skills sufficient to render decisions in due process hearings," U.S. District Judge Thomas J. Whelan wrote. The court further noted that the issuance of a TRO would harm the state, as it would force the due process system to a halt and jeopardize the state's IDEA funding.

163. A.D. v. NEW YORK CITY DEPARTMENT OF EDUCATION, 51 IDELR 134 (S.D.N.Y. 2008)

A child's superior academic performance in a gifted and talented kindergarten class undermined his parents' claim that he required intensive ABA services to receive an educational benefit. The District Court upheld a due process decision that reduced the parents' reimbursement for ABA services by 60 percent. Because the district had conceded that the child's kindergarten IEP was "null and void," the court only needed to consider whether the private ABA services obtained by the parents were appropriate. The court agreed with an independent hearing officer and state review officer that the 25 hours a week of private ABA services was excessive. "Both the IHO and SRO found that some of these ABA services were addressing home behaviors and were aimed at inappropriately pre-teaching [the child] beyond even the level of the [gifted and talented] kindergarten classroom," U.S. District Judge Barbara S. Jones wrote. Given the child's solid academic performance and lack of problem behaviors, the court held that intensive ABA services were inappropriate. Furthermore, the court observed, the provision of intensive ABA services could harm the child by depriving him of independence and recreational time. The child might also become frustrated at being unable to perform beyond the kindergarten level. Finding that the level of private ABA services was excessive, the court upheld a decision reported at 46 IDELR 209 that the child required only 10 hours a week of ABA services.

164. FINCH v. TEXARKANA SCHOOL DISTRICT NO. 7 OF MILLER COUNTY, 50 IDELR 3 (W.D. Ark. 2008)

The parent of a high schooler who was sexually assaulted by a transfer student with mental retardation could pursue a Section 1983 claim against an Arkansas district. A reasonable jury could determine that the district's unilateral termination of the victim's

one-to-one aide, coupled with its failure to request a copy of the transfer student's BIP, needlessly placed the victim in danger. The victim was a high school student with autism and mental retardation. In the months prior to the attack, the school had provided the student with a one-to-one aide. The female aide accompanied the student at all times, except when he changed clothes in the locker room for gym class. According to the parent, the district terminated the aide's services without her knowledge or consent. Her son was subsequently assaulted by the transfer student when they were alone and unsupervised in the locker room. The District Court noted that the transfer student had sexually assaulted another student in his former district — an incident that prompted the former district to develop a BIP. Although the student's transfer documents included information about the assault, the new district did not seek additional information about the student's behavioral history. The District Court recognized that states have a duty to protect individuals from violence when it affirmatively places those individuals in a dangerous situation that they would not have otherwise encountered. Concluding that the parent sufficiently alleged the existence of a state-created danger, the District Court denied the district's motion for judgment.

165. BROOKE M. v. STATE OF ALASKA DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT, 50 IDELR 273 (9th Cir. 2008)

A student may have been dissatisfied with the outcome of her administrative complaint, but that did not permit her to sue the Alaska ED for IDEA violations. The 9th Circuit held that the IDEA's exhaustion requirement required dismissal of the student's lawsuit. According to the student, the court observed, the ED failed to ensure that her local educational agency supervised the delivery of her related services. The court noted that the ED's purported failure to supervise the district, if true, would amount to a violation of 20 USC 1412(a)(11)(A). Nonetheless, the court explained, the student could not sue the ED without first exhausting her administrative remedies. Although the student claimed that the ED had a policy of failing to enforce district compliance, the evidence showed that the ED properly investigated her administrative complaint. "The ED expressly concluded that [the district] 'provided qualified personnel, training, and supervision of those serving' [the student] and that there was 'insufficient evidence to support [her] allegation of noncompliance' with state and federal law," the court wrote in an unpublished opinion. Absent a showing that exhaustion would be futile or inadequate, the student could not bypass the IDEA's exhaustion requirement. The 9th Circuit affirmed the District Court's dismissal of the student's IDEA lawsuit.

166. Kathren MILLER v. WEST FELICIANA SCHOOL BOARD, 51 IDELR 46 (M.D. La. 2008)

The fact that the Louisiana ED had already considered a parent's IDEA claims did not allow the parent to sue her child's former district in federal court. Concluding that the parent failed to exhaust her administrative remedies, a federal magistrate judge recommended that the District Court dismiss her ADA and IDEA claims. The court relied

on the 5th U.S. Circuit Court of Appeals' decision in *Papania-Jones v. Dupree*, 50 IDELR 31 (5th Cir. 2008), that state complaints and due process hearings are not interchangeable. To exhaust her administrative remedies, the District Court observed, the parent needed to request a due process hearing. Only after the hearing officer issued a final decision would the parent have the right to appeal. The magistrate judge acknowledged that the parent could bypass the exhaustion requirement by showing that exhaustion was futile, but rejected the parent's claim that the ED's decision in the district's favor was proof of futility. "The parent has alleged no support for the proposition that an impartial hearing officer presiding over a due process hearing would have been required to agree, in whole or in part, with the [district's] position on the educational and related services appropriate for [the student]," U.S. Magistrate Judge Stephen C. Riedlinger wrote. However, the court denied the district's motion to dismiss the parent's Section 1983 claim. Because that claim arose out of the parent's allegedly unlawful arrest, the parent could not obtain relief under the IDEA.

167. TEREANCE D. v. SCHOOL DISTRICT OF PHILADELPHIA, 50 IDELR 248 (E.D. Pa. 2008)

Although a parent waited until December 2006 to file FAPE claims dating back to 2001, the District Court held that her due process complaint was timely. The District Court reversed an appellate panel's decision to dismiss all claims that accrued before December 2004. The court ruled that IDEA's two-year statute of limitations, which took effect in July 2005, does not apply retroactively. "There was no limitations period in the [3d U.S. Circuit Court of Appeals] for initiating compensatory education claims prior to the [IDEA's] 2005 amendments," U.S. District Judge William H. Yohn Jr. wrote. On the contrary, the judge observed, District Courts within the 3d Circuit had consistently held that there was no statute of limitations for compensatory education claims under the IDEA. The court explained that applying the two-year statute of limitations to the parent's claim would attach new legal consequences to the parent's delay. Furthermore, the court pointed out, nothing in the IDEA states that the two-year statute of limitations applied retroactively. The court thus determined that the limitations period did not apply to compensatory education claims that accrued before July 2005.

168. AMHERST EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION v. Alice CALABRESE, 50 IDELR 218 (N.D. Ohio 2008)

The U.S. District Court, Northern District of Ohio adopted a magistrate judge's recommendation to award a school district \$12,970 in attorney's fees, plus the costs associated with a series of FAPE appeals. The court agreed with the magistrate judge that the filing by the parent's attorney was "frivolous, unreasonable, and without legal foundation." It was the attorney's failure to offer supporting evidence that swayed the court's decision. The parent based her FAPE claim on the fact that her son, a student with ADHD and a specific learning disability, earned failing grades in his first two years of high school. Although she attributed those failures to deficiencies in the student's IEP,

neither she nor her attorney identified any procedural or substantive defects in the student's program. The IHO found that the parent failed to establish a denial of FAPE. The attorney did not challenge any of the district's procedures on appeal. Nor did he dispute the IHO's factual findings. Nonetheless, the attorney argued that the IHO erred in concluding that the district offered FAPE. The District Court held that the attorney's unsupported claim against the district was not a valid FAPE action. Thus, the court determined that the district was entitled to recover the attorney's fees it incurred to defend the parent's claim.