Special Education Case Law: 2012

What Are the Court Saying About the IDEA and Section 504?

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I. BEHAVIOR AND DISCIPLINE

1. Sher v. Upper Moreland Sch. Dist., 112 LRP 22313 (3rd Cir. 2012). The court refused to dismiss the claims filed by the grandparents of a student with ADHD alleging that the district had improperly refused to consider the effects of their grandson's disability prior to imposing disciplinary sanctions.

- ***LEAs must "consider" the effects of a student's disability when conducting a manifestation determination.***

- ***What types of behavior can reasonably be attributed to ADD or ADHD?***

2. **W.K. v. Harrison Sch. District, 59 IDELR 103 (W.D. Ark. 2012).** Although an Arkansas district failed to properly notify the parents of a student with autism of an MD review, the procedural error did not cause a denial of FAPE. Reasoning that the parents had some idea that the student's recent suspension and assault of a paraprofessional would be on the table, the District Court rejected the notion that their opportunity to participate was seriously hampered. A Sept. 9, 2010, IEP meeting was moved up to Sept. 2 shortly after the student punched his paraprofessional in the neck, causing her to lose consciousness. The district informed the parents of the new meeting date, but did not tell them the meeting would address the student's behavior and a possible homebound placement. The parents objected to the latter recommendation, placed the student in private school, and sought reimbursement. The court pointed out that the decision to discuss changing the student's placement converted the meeting from a mere programming and placement IEP team meeting to an MD review. The district admittedly failed to notify the parents of that fact, causing them to feel "blindsided," and sparking the current litigation. At the same time, the parents knew about their son's recent assault, and that he had been suspended for four days as a result of the incident. "It is obvious that [the parents] must have been aware that their child's behavior was an issue," U.S. District Judge Paul Kinloch Holmes III wrote. Because the parents had enough information to provide some level of participation in the meeting, their ability to participate was not seriously impeded. Moreover, the district did not follow through with the homebound placement, but instead conducted a behavioral evaluation and attempted to work with the parents to identify an acceptable placement. However, the parents had apparently already decided to put the student in a private program. The court also held that there was no other evidence of a denial of FAPE, reasoning that the student had made progress under each of the IEPs that the district and parents developed for him since preschool.

   - ***Failure to notify parents of a manifestation determination is a procedural violation of the IDEA.***

3. **Bryant v. New York State Dept. of Education, 112 LRP 41997 (2nd Cir. 2012).** Despite alleging violations of the IDEA, Section 504, and the U.S. Constitution, the parents of a group of students with severe behavioral problems could not convince the 2d Circuit to reinstate their challenge of a New York regulation prohibiting the use of aversives. The 2d Circuit affirmed a decision at 55 IDELR 38 that the regulation did not violate federal law. The court rejected the notion that the regulatory ban on aversives, which prevented the students' out-of-state residential school from using electric skin shocks, effectively predetermined their children's programs and prevented their children from receiving individualized services. Not only did educators still have a wide range of options available for addressing the students' problem behaviors, the court observed, but the regulation reflected the IDEA's preference for positive behavioral interventions. "Nothing in the regulation prevents individualized assessment, predetermines the children's course of education, or precludes educators from considering a wide range of possible treatments," Chief U.S. Circuit Judge Dennis Jacobs wrote. The court similarly concluded that the regulation did not cause a substantive denial of FAPE. Although the parents contended that the children's behavior could not be managed with positive behavioral interventions, the 2d Circuit pointed out that the IDEA only entitles students to a basic floor of opportunity. The court further noted that it would not second-guess ED

policy, especially when that policy was based on information about potential health and safety concerns and follow-up site visits. With regard to the parents' Section 504 claim, the court found no evidence that the ED promulgated the regulation in bad faith or with gross misjudgment. As for the constitutional claims, the 2d Circuit found that the ban on aversives was reasonably related to the legitimate government purpose of protecting students' safety. The 2d Circuit thus affirmed the District Court's dismissal of the parents' lawsuit. U.S. District Judge Richard J. Sullivan, sitting with the 2d Circuit by designation, dissented from the two-judge majority with regard to the dismissal of the IDEA claim. Judge Sullivan questioned whether the state's ban on aversives was reasonable given the parents' claim that certain scientific studies support the use of aversives.

- ***Court uses "maximizing" analysis to review parents' demand for aversive therapy.***

- ***Court refused to "second guess" State policies banning the use of aversive therapy.***

II. BULLYING AND HARASSMENT

4. **M.S. v. Marple Newtown Sch. Dist., 112 LRP 8009 (D.N.J. 2012).** The parents of a young girl may be able to sue the school district for failing to prevent their daughter from being bullied by a classmate. The court directed the parents to amend their complaint to seek money damages against the school district rather than injunctive relief. The parents may be able to recover money damages pursuant to Section 504 if they can prove that district officials acted with "bad faith" or "gross misjudgment" by refusing to place their daughter and her antagonist is separate classes. The parents claimed that the girl was being traumatized by a male peer who had previously molested her sister, and who would leer at the girl and point a camera at her at school. The girl's academic had declined and she allegedly had developed anxiety and post-traumatic stress disorder. The court also stressed that the parents were required to prove a nexus between the girl's disability and the bullying in order to recover money damages against the school district.

- ***Parents claim that girl developed anxiety and PTSD as a result of being harassed by a male peer who had previously molested her sister.***

- ***Court refuses to dismiss case.***

5. **Preston v. Hilton Central Sch. District, 59 IDELR 99 (W.D.N.Y. 2012).** The reasons why employees of a New York district purportedly failed to investigate reports of peer harassment against a high school student with Asperger syndrome had no bearing on the parents' ability to seek relief under Section 504 and Title II. Because the parents alleged that the underlying harassment was based on the student's disability, the District Court held they could sue the district for disability harassment regardless of whether the employees acted with discriminatory intent. The court explained that a district can be held liable for peer-on-peer harassment if it

is "deliberately indifferent" to disability-related bullying. The failure to investigate reports of alleged harassment may qualify as deliberate indifference, even if that failure is not motivated by any discriminatory animus. In this case, the parents claimed that classmates in the student's basic electronics and construction courses repeatedly taunted the student with profanity-laden insults that included references to autism and intellectual disabilities. Although the parents maintained that they reported the comments to various district employees by phone, by email, and in sit-down meetings, they alleged that the district failed to investigate or attempt to stop the harassment. "In light of these allegations, I find that [the parents] have sufficiently stated a claim that [the district and its employees] acted with deliberate indifference to the harassment of [the student] by his peers because of his disability, and that [their] alleged conduct has had the effect of denying [the student] access to educational opportunities," U.S. District Judge David G. Larimer wrote. The court thus denied the district's motion to dismiss the parents' Section 504 and Title II claims. However, the court dismissed the parents' Title IX claims for gender-based harassment, finding no evidence that the classmates' embarrassing sexual questions or use of terms with sexual connotations demonstrated an anti-male bias.

- ***LEA can be held liable for peer-on-peer harassment if found to be "deliberately indifferent" to disability-based bullying.***

- ***Parents alleged that their son with Asperger Syndrome was repeatedly verbally taunted with profanity-laden insults referring to his autism.***

6. **Long v. Murray County Schools, 59 IDELR 76 (N.D. Ga. 2012).** While a Georgia district should have done more to protect a student with Asperger syndrome who committed suicide, the District Court found insufficient evidence of deliberate indifference. Finding that the district responded to the complaints it received in a manner that was not clearly unreasonable, and that it neither caused additional harassment nor made an official decision to ignore it, the court dismissed the parents' Section 504 case. The court noted that there was little question that the student was severely harassed based on his disability and that the district should have done more to stop it and prevent future incidents. However, applying the analysis articulated in *Davis v. Monroe County Board of Education*, 103 LRP 20059, 526 U.S. 629 (U.S. 1999), the District Court found insufficient evidence that the district deliberately ignored specific complaints. In some cases, it disciplined the perpetrators. It also developed a safety plan that allowed the student to avoid crowds in the hallways and to sit near the bus driver. The court also determined that the district's decision on at least two occasions to meet with the perpetrators and victim together was not clearly unreasonable. In addition, it pointed out that there were numerous cameras and teachers monitoring the hallways. Although the parents claimed that the student continued to be harassed despite those efforts, there was no evidence that any single harasser repeated his conduct once the district addressed it. The parents pointed out that the day after the student's suicide, students wore nooses to school and wrote messages in the bathroom stating "it was your own fault" and "we will not miss you." They argued those actions were an indication of the culture of harassment and of the district's failure to address it. The court observed that although the district never held any assemblies to discuss bullying and harassment, it took several steps to address the school climate. First, its code of conduct contained an anti-bullying policy that

staff members were expected to read. It also conducted a program in which teachers met with small groups of students to instruct them on peer relationships and review the code of conduct. Finally, it participated in a school tolerance program, and implemented a program aimed at improving overall student behavior. Without evidence of deliberate indifference, the parents' claim could not proceed.

- ***Teen with Asperger Syndrome committed suicide after repeated harassment at school by peers.***

- ***Following the boy's suicide, students wore nooses to school and wrote messages in the bathroom stating "we will not miss you."***

- ***Court found abhorrent behavior by students, but no evidence that LEA was "deliberately indifferent."***

III. CONFIDENTIALITY AND STUDENT RECORDS

7. L.S. v. Mount Olive Bd of Education, 56 IDELR 99 (D.N.J. 2011). This case arose when a special education "inclusion" teacher tried to assist special education students with a literature assignment by providing to them a copy of a classmate's psychiatric evaluation report. The 11th grade general education teacher had assigned students to create a psychological profile of the protagonist in J.D. Salinger's novel, *The Catcher in the Rye*. The special education teacher asked the school's social worker for a sample psychiatric evaluation report to use with his students. The social worker provided a copy of a classmate's psychiatric report, but reminded the teacher to redact the personally identifiable information. In what the court later described as "a feeble attempt to conceal the student's identity," the teacher redacted the student's name, but left his age/religion/grade/names of family members, and his physical condition (diabetes and anxiety), and passed out copies of the report to the class. The student was easily identifiable, and one student in the class asked if the report was for "S.S." The special education teacher affirmed that it was, and directed the class to continue with their assignment. The court dismissed the claims against the school district, and the IDEA/Section 504 claims, but allowed the negligence claims against the special education teacher and the social worker to continue.

- ***Special education teacher distributed copies of a student's psychiatric evaluation report without redacting his age/grade/religion and names of the student's family members.***

- ***Court allowed negligence claims against the teacher and a school social worker to proceed.***

IV. COMPENSATORY EDUCATION AND OTHER REMEDIES

8. Brooks v. District of Columbia, 58 IDELR 103 (D.D.C. 2012). A former student with a learning disability who had graduated with a regular high school diploma could proceed with her lawsuit alleging that she had been denied FAPE while in

school. The court held that the receipt of a high school diploma did not bar the student from suing her former school district. According to the court, students with disabilities retain their right to seek compensatory education services if they can prove a denial of FAPE.

9. **Dudley v. Lower Merion Sch. Dist., 58 IDELR 12 (E.D. Pa. 2011).** A twenty-year-old student with a learning disability and an emotional disability returned to public school after being released from a juvenile detention facility. He was incarcerated on charges of robbery, assault, and criminal conspiracy. The student's mother initiated a due process hearing and was awarded compensatory education services in the form of a specialized reading program and counseling with an escort to ensure his attendance. However, the young man refused to attend the compensatory education sessions, with or without his escort, and was subsequently arrested for burglary and re-incarcerated. The student's mother sued the district for failure to comply with an administrative order. The court refused to impose liability on the school district for what the court characterized as "an exercise in futility." The federal judge wrote, "The school district cannot use physical force on [the student] aside from escorting him to class, which it attempted to do."

   - ***LEA was not liable when student refused to participate in court-awarded compensatory education program.***

   - ***Court characterized the parents' demand that the LEA force the student to participate as an "exercise in futility."***

10. **Woods v. Northport Public Schools, 59 IDELR 64, <u>unpublished</u> (6th Cir. 2012).** The fact that a grade school student obtained some benefit during two years in which he received drastically inadequate autism services from his Michigan district was not enough to undo a massive compensatory education award. Pointing to the student's academic regression, the 6th U.S. Circuit Court of Appeals, in an unpublished ruling, affirmed a District Court's determination that the district denied the student FAPE. In the underlying decision, the District Court reasoned that the district failed to provide the resource room and autism consultant services set forth in the student's IEPs. On appeal, the district asserted that the student in fact received some meaningful benefit. However, whether benefit is meaningful is gauged in relation to a child's potential, the court noted. Trivial benefit is not sufficient. Here, the district did not dispute that it failed to provide the services it promised, and that these were a significant part of the student's program. The student consequently regressed in reading, writing, and mathematics. It was true that several witnesses stated that the child made some progress in the second grade. "Nevertheless, the testimony also supports the finding that such progress was not meaningful in light of [the child's] potential," the 6th Circuit wrote. Moreover, the student had the ability to make significant gains had he received appropriate services. Noting that the student's services were further reduced during the third grade, the 6th Circuit held that the district denied FAPE that year as well. In addition, it denied the child FAPE by insisting on developing goals and objectives outside of the IEP meetings and without the parents' presence, thus impeding parental participation. The court, however, held that to the extent that a revised IEP was ordered as part of the child's relief, it should not have been

conditioned upon the child reenrolling in the district. The requirement to make FAPE available is not limited to publicly enrolled children, the court ruled.

- ***Sixth Circuit rules that progress must be judged in view of student's potential.***

- ***Progress is meaningless when it is "trivial" compared to the student's potential.***

- ***LEA failed to provide a resource room and autism consultant as provided in student's IEP.***

11. **Corpus Christi Independent Sch. Dist. v. B.C., 59 IDELR 42 (S.D. Texas 2012).** A Texas district may have failed to provide the full amount of general education instruction required by a student's IEP, but that shortfall did not entitle the student to compensatory education. The District Court held that the student's progress during the 2010-11 school year made any implementation failure harmless. The court observed that the student's IEP required him to receive 189 minutes of general education instruction each day. However, the student received only 145 minutes of general education instruction on Tuesdays and Wednesdays, when he received speech and fine arts instruction instead of PE. The court explained that the deficit did not amount to a material implementation failure that required remedial action by the district. "The loss of 44 minutes of general education time two days per week represents 9% of [the student's] weekly required general education minutes, and less than 5% of [his] total instructional time each week," U.S. District Judge Nelva Gonzales Ramos wrote. Although the parent claimed that the district did not always provide a one-to-one professional to assist the student -- a service the court deemed "essential" to the student's participation in mainstream classes -- the court noted that the student "was not frequently removed" from the general education setting because of his aide's schedule. Furthermore, the court pointed out that the student made academic and social progress during the school year. Concluding that the district provided FAPE in the LRE, the court reversed an administrative decision in the parent's favor.

    - ***Court ruled that LEA provided FAPE even though the student's IEP was not followed.***

    - ***Student missed 5% of his instructional time per week.***

12. **Pennsbury Sch. District v. C.E., 59 IDELR 13 (Pa. Cmmnwlth Ct. 2012).** The decision to continue using unsuccessful behavioral interventions for a grade schooler with a speech-language impairment, an SLD, and severe attentional difficulties proved to be an expensive mistake for one Pennsylvania district. Determining that the district denied the student FAPE, the Pennsylvania Commonwealth Court upheld an IHO's awards of compensatory education and tuition reimbursement. According to a reevaluation conducted at the end of the student's second-grade year, the student's problems with inattention and distractibility seriously impacted his ability to learn. Nonetheless, the student's third-grade IEP indicated that the student's behaviors did not impede his education. The court rejected the district's argument that the behavioral interventions already in place, which included preferential seating,

repetition of instructions, and pre-teaching, were adequate to meet the student's behavioral needs. "Although these interventions and supports were already being used, the school district's supervisor of elementary special education admitted that, with respect to writing, [the student] 'was not making meaningful progress,'" Judge James Gardner Colins wrote in an unpublished decision. The court held that the district's failure to conduct an FBA and develop a BIP resulted in a denial of FAPE. As such, the IHO did not err in awarding the student compensatory education. The court also upheld the IHO's award of tuition reimbursement, holding that neither the restrictiveness of the student's private school placement nor the parents' failure to provide prior written notice each year after the student's initial removal from public school precluded them from recovering tuition payments.

- ***IEP failed to address student's documented problems with inattention and distractibility.***

- ***LEA's failure to conduct an FBA and develop a BIP constituted a denial of FAPE.***

ELIGIBILITY AND IDENTIFICATION

13. **Lamkin v. Lone Jack C-6 Sch. Dist., 112 LRP 13571 (W.D. Mo. 2012).** The court held that parents of students with disabilities cannot revoke consent for special education and related services under the IDEA, and subsequently demand a Section 504 plan.

    - ***Court ruled that parents who revoke consent for special education and related services under the IDEA simultaneously revoke consent for a Section 504 plan.***

14. **M. M. v. Layfayette Sch. Dist., 112 LRP 6947 (N.D. Cal. 2012).** A California school district had no obligation to use RTI data collected prior to a student's referral for evaluation to determine initial eligibility for special education and related services when it based its determination on a "severe discrepancy" formula.

    * ***A California court ruled that LEAs are not required by law to use RTI to make eligibility determinations.***

15. **I.H. v. Cumberland Valley Sch. Dist., 58 IDELR 94 (M.D. Pa. 2012).** A middle school boy with anxiety and learning difficulties who was enrolled in a cyber charter school remained entitled to have an IEP developed by his home school district. Even though the child had been formally withdrawn from the public school, he was still a resident of the public school district. Thus, the school district was still responsible for drafting and proposing an IEP for the student should he be re-enrolled in the public school. The court held that the public school's obligation to develop an IEP for the boy was independent of the cyber charter school's responsibility to provide FAPE.

    ***** ***LEA was still required to develop and propose IEPs for student who was enrolled in a cyber charter school.***

16. **I.T. v. Department of Education, State of Hawaii, 112 LRP 39015 (D. Hawaii 2012).** The prior written notice sent to a grade school student's parent more than four weeks before an IEP meeting undermined the Hawaii ED's claim that it had no reason to evaluate the student for a central auditory processing disorder. Concluding the ED had knowledge of a potential disability, the District Court held that its failure to evaluate amounted to a procedural violation of the IDEA. The notice, prepared 33 days before the March 3, 2009, IEP meeting, stated that the ED would perform a language assessment because of a "[P]ossibility of auditory processing." Although the district's speech-language pathologist evaluated the student the following week, she did not specifically assess the student for an auditory processing disorder. The court rejected the ED's claim that the parent's failure to submit the results of a private neuropsychological evaluation, which suggested that the student might have a central auditory processing disorder, relieved it of any duty to consider additional diagnoses or services. "[T]he information available to the [ED] by the March 3, 2009, IEP team meeting triggered [its] duty to assess the student for [central auditory processing disorder] as an area of suspected disability," U.S. District Judge Leslie E. Kobayashi wrote. Because a subsequent evaluation revealed that the student did not have a central auditory processing disorder, the court held that the ED's procedural violation was harmless. However, the court observed that neither the March 2009 IEP nor the student's February 2010 IEP included the speech-language services the district's pathologist had recommended in her evaluation report. Concluding that the lack of speech-language services amounted to a substantive denial of FAPE, the court ordered both parties to submit supplemental briefs on the student's need for compensatory education.

    * ***LEA's "prior written notice" indicated its knowledge of a possible auditory processing deficit that should have been considered in the eligibility determination.***

17. **Jackson Johnson v. District of Columbia, 59 IDELR 101 (D.D.C. 2012).** Evidence that a teenager with an intellectual disability failed to make progress under her IEP did not prove that the District of Columbia erred in failing to offer ESY services. Noting that ESY services would not remedy the student's truancy, which was the underlying reason for her lack of progress, the District Court held she did not need ESY services to receive FAPE. The court rejected the notion that the parent's absence from a February 2010 IEP meeting made the resulting IEP procedurally deficient. Not only did the parent sign the IEP, the court observed, but she and her advocate participated in a subsequent meeting to amend the IEP. Neither the parent nor the advocate objected to the lack of ESY services in the student's program. As such, the parent failed to demonstrate that her failure to attend the February 2010 meeting significantly impeded her participation in the IEP process. Turning to the substance of the IEPs, the court found no evidence that the student needed ESY services to receive FAPE. The court explained that ESY services are necessary only when an interruption in a student's educational programming during the summer months will significantly jeopardize the gains she made during the school year. "Unfortunately, the record does not establish either that the student was making gains, or that gains would be significantly jeopardized (or even partially jeopardized) without the reinforcement that a summer program would provide," U.S. District Judge Amy Berman Jackson wrote. The court pointed out that the student's lack of progress was "largely attributable to her truancy." Because the parent did not submit any evidence showing that ESY services would address the student's problems with

attendance, she failed to demonstrate the student's need for ESY services. The court granted the district's motion for judgment.

- ***A student's truancy was the underlying cause of her failure to make progress.***

- ***ESY was not warranted for a student whose academic failure was caused by her truancy.***

18. **D.G. v. Flour Bluff Independent Sch. District, 59 IDELR 2 (5th Cir. 2012).** A Texas district's failure to evaluate a high school student's need for IDEA services did not in itself entitle the student to compensatory education. Concluding that a district cannot be liable for a child find violation unless the student has a need for special education, the 5th Circuit vacated a decision reported at 56 IDELR 255 and entered a judgment for the district. The 5th Circuit observed that no Circuit Courts had specifically addressed whether a child find violation is contingent on the student's eligibility for IDEA services. However, the 5th Circuit previously held in *Alvin Independent School District v. A.D.*, 48 IDELR 240 (5th Cir. 2007), that a student's ineligibility for IDEA services prevented him from recovering for any procedural violations. "Although child find was not at issue in *A.D.*, the decision is nevertheless persuasive because it involved the preliminary question at issue here: whether the student was eligible for special education under [the] IDEA," the three-judge panel wrote in an unpublished decision. The 5th Circuit pointed out that while the District Court found the district liable for a child find violation, it never determined that the student was eligible for IDEA services. Moreover, the evidence on the record showed that the student performed well for several years after being diagnosed with ADHD. His severe behavioral problems, which formed the basis for the parent's child find claim, began only after his parents got divorced. Determining that the district took prompt action in response to the parent's request for an IDEA evaluation at the end of the student's ninth-grade year, the 5th Circuit held that the district did not violate its child find duty. The 5th Circuit also vacated an award of attorney's fees, reasoning that the parent could not be a prevailing party when the district did not violate the IDEA.

- ***LEA cannot be liable for a failure to identify a student unless the student has a need for special education.***

- ***Student's severe behavior problems were not caused by ADHD, but began after his parent's divorce.***

19. **R.T.D. v. Dept. of Education, State of Hawaii, 58 IDELR 280 (D. Hawaii 2012).** The similarities between a 20-year-old student's IDEA claim and a recent class action challenging Hawaii's age limit for public education helped the District Court to determine that the student was no longer entitled to special education. Agreeing with the reasoning of *R.P.-K. v. Department of Education*, 58 IDELR 214 (D. Hawaii 2012), the court held that the student exceeded the maximum age of IDEA eligibility. The court offered no new analysis of the student's claim. Instead, it relied on U.S. District Judge David Alan Ezra's holding in *R.P.-K.* that the Hawaii ED had no obligation to make FAPE available to students with disabilities ages 20 and older when it did not make public education available to nondisabled students in that same

age range. Although the students in *R.P.-K.* argued that the ED allowed nondisabled students ages 20 and older to continue their high school education through publicly funded adult education programs, the court held that the GED and competency-based diploma programs were not the functional equivalent of a high school education. U.S. District Judge Leslie E. Kobayashi pointed out that the issues raised in the student's case were identical to those raised in *R.P.-K.* Finding no reason to depart from *R-P.-K.*'s reasoning, the court affirmed an IHO's decision that the student's eligibility for IDEA services terminated at the end of the school year during which he turned 20.

* ***Hawaii court ruled that the LEA was not obligated to provide FAPE to students over the age of 20 years when state law imposed an age limit of 20 years for public education.***

V. EVALUATION

20. K.B. v. Pearl River Union Free Sch. Dist., 58 IDELR 108 (S.D.N.Y. 2012). The court ruled that the school district was not responsible for reimbursing the costs of a private evaluation obtained by the mother of a child with autism. In April of 2007 the mother objected to the results of the school district's psycho-educational evaluation of her son and requested an independent educational evaluation, or "IEE." The school district denied her request for an IEE and requested a due process hearing to defend the appropriateness of its own evaluation. The parent withdrew her request for the IEE, and then privately obtained a neuropsychological evaluation costing $3,500. The school district agreed to reimburse her $3,000 rather than to fight another request for reimbursement of an IEE. The mother pursued her claim for the whole $3,500. The district argued that the neuropsychological evaluation could not be an IEE because it was a different type of evaluation than that performed by the district's school psychologist. The court ruled that the mother was barred from seeking reimbursement because she failed to "disagree" with the district's evaluation, and because she had failed to litigate her reimbursement claim in 2007.

* ***Mother was barred from seeking reimbursement for an IEE because she failed to litigate her previously-ripe claim for an IEE and because she failed to "disagree" with the LEA's evaluation.***

21. C.W. v. Capistrano Unified Sch. District, 112 LRP 39913 (C.D. Calif. 2012). A parent's vague objections to her 11-year-old daughter's triennial reevaluation justified a California district's extended review of the evaluation report. Concluding that the district did not unreasonably delay in taking 41 days to request a due process hearing, the District Court denied the parent's request for an IEE at public expense. The court noted that the parent did not challenge any specific component of the district's evaluation report. Rather, she told the IEP team that the report was "stupid" and noted her disagreement with it in her IEE request. Because the parent did not make any specific objections, the court explained, the district had to review the entire report. "Such detailed review obviously takes time and money," U.S. District Judge David O. Carter wrote. "[The parent] could have reduced this time and money by identifying her specific objections to the disputed report." The court

also pointed out that the shortest period of time deemed to constitute "unnecessary delay" in a California case was 74 days. *Los Angeles Unified Sch. Dist.*, 48 IDELR 293 (SEA CA 2007). More recently, the court observed, a district was found to have complied with the IDEA despite taking more than two months to file a due process complaint. *J.P. v. Ripon Unified Sch. Dist.*, 52 IDELR 125 (E.D. Cal. 2009). Determining that the delay in this case was not unreasonable given the parent's vague objections, the court affirmed a decision at 56 IDELR 279 that the parent was not entitled to relief. The court also held that the district did not violate the IDEA by failing to ensure that the evaluation report expressly stated the student's need for special education services. Not only did the report refer to the student's status as a child with an OHI, but her eligibility was never in dispute.

- ***Court refused to award reimbursement for an IEE to a mother who called the LEA's evaluation report "stupid" and failed to specify her objections to the report.***

- ***LEA's delay of 41 days to respond to mother's request for an IEE was reasonable due to her failure to specify objections to the LEA's evaluation report.***

22. **Council Rock Sch. District v. M.W., 112 LRP 38641 (M.D. Pa. 2012).** A Pennsylvania district paid a high price for failing to evaluate the emerging behavioral problems of a student with a chromosomal disorder. Concluding that the district denied the student FAPE for two school years, the court awarded the parents tuition reimbursement. The student's condition, called 22Q Deletion syndrome, was characterized by multiple brain and physical atypicalities. It also tended to result in behavioral issues. In early 2009, the student, who had long battled anxiety, began to show some new behaviors that teachers deemed inappropriate, including stealing, purportedly in order to attract attention to himself. He also exhibited some hostility toward peers and an inappropriately intense interest in a female classmate. After placing the student in private school in Aug. 2009, the parents filed a due process complaint alleging the student was denied FAPE for the 2009-10 and 2010-11 school years. An IHO agreed, and awarded partial tuition reimbursement. On appeal, the court observed that the question of whether the district adequately addressed the student's behavioral needs was "very close." Nevertheless, it was clear that teachers were aware of and concerned about the behavior when it surfaced, even if, in the IHO's view, they minimized the severity of the behaviors during the due process hearing. The student's autistic support class teacher even described the behavior as "worrisome" in her communications with the parents, and urged the parents to seek psychiatric help for the student. "Despite this, the IEP for 2009 did not address these issues and there was no behavior management plan in place for [the student], nor was one recommended by his teachers," U.S. District Judge Mary A. McLaughlin wrote. Moreover, the district never addressed the student's existing anxiety, although it was documented in numerous reports. Because the district failed to address the student's behavioral needs, it denied the student FAPE.

    - ***IEP failed to address student's escalating behavior problems at school.***

    - ***Court awarded tuition reimbursement for private schooling.***

23. **L.R. v. Bellflower Unified Sch. District, 59 IDELR 105 (C.D. Cal. 2012).** A California district offered FAPE to a preschooler by providing him group, instead of individual, therapy sessions to address his speech delays, the District Court held. The court concluded that an ALJ did not err by giving little weight to a private evaluator's statement, made nearly a year after the IEP was designed, that the student needed one-to-one therapy. The district's evaluator determined the student's speech skills were at the 12-month to 18-month level. It developed a 2009 IEP that placed the student in a special class and offered the student two sessions per week of small-group speech therapy. The parents filed for due process, and the ALJ sided with the district. Challenging the ALJ's ruling, the parents asserted, based on a private evaluation, that the district should have offered at least two hours of weekly individual speech therapy sessions. First, the court pointed out that every aspect of the student's special class was focused on language enrichment. In addition, his group speech sessions involved just two or three students. Moreover, the parents' evaluator's report was issued well after the IEP team meeting. An IEP is a snapshot, not a retrospective, the court observed. "While it is possible that [the expert's] opinions may have yielded a different IEP, that information was not available at the May 21, 2010 IEP meeting," U.S. District Judge R. Gary Klausner wrote. Finally, the district's decision to provide group therapy was based partly on the student's expected attention span, and on a goal to encourage the student's interaction with peers. Thus, the decision to offer group sessions was reasonable at the time. The court also rejected the parents' contention that the student's 2009 IEP should have offered individual APE services. It was reasonable for the team to conclude that the student's APE needs could be addressed during group sessions provided to the entire class.

- ***Court upheld IEP team's decision to provide small-group speech therapy instead of 1:1 therapy.***

- ***Court rejected the opinion of a private evaluator whose report was submitted a year after the development of the student's IEP.***

VI. FAPE and IEPs

24. **L.F. v. Houston Ind. Sch. Dist., 58 IDELR 63 (5th Cir. 2012).** The IEP notes taken by a Texas school district proved that the parent was actively involved in the development of her child's IEP. The parent of a fifth grade student with an emotional disturbance alleged that the district failed to develop strategies to address her child's behavior problems at school and violated the "least restrictive environment" provisions of the IDEA by placing the student in a self-contained behavior classroom. However, the evidence showed that the IEP team considered several alternative placements before recommending the behavior classroom and conducted an FBA prior to developing a Behavior Intervention Plan.

- ***IEP notes proved that parent was actively involved in the IEP decision-making.***

- ***IEP team considered several different placement options before recommending placement in a behavior classroom.***

25. **T.G. v. Midland Sch. Dist., 58 IDELR 104 (C.D. Ill. 2012).** The parent of a high school girl with a speech/language impairment alleged that her daughter's IEP goals were inappropriate and not measurable. However, the court held that the IEP goals met the standards of the IDEA. The evidence showed that the girl's reading comprehension increased after the IEP was implemented. Also, the court found that it was appropriate for the teacher to determine the girl's progress in writing by using a numerical scale based on the teacher's opinion rather than the use of objective testing. "It is not unreasonable to provide for a teacher to qualitatively measure a student's writing, and, indeed, the Court does not see any other means of measuring progress in writing skills," U.S. District Judge Joe Billy McDade wrote.

- ***High school girl made adequate progress under her IEP.***

- ***Teacher's measurement of girl's progress in writing using a numerical scale based on the teacher's opinion was appropriate.***

26. **B.P. v. New York City Dept. of Education, 58 IDELR 74 (E.D.N.Y. 2012).** The "regular education teacher of the child" serving as a member of an elementary school student's IEP team was not required to be the child's actual teacher, held the New York court. The parents alleged that the regular education teacher was not a valid member of the IEP team because she was not teaching fourth or fifth grade at the time of her IEP meeting participation. The court rejected the parents' claims, noting that the IDEA does not require the regular education teacher to be teaching any particular grade level.

- ***The "regular education teacher of the child" in an IEP meeting does not have to be the child's "actual" teacher.***

- ***IDEA does not require the IEP team to include a regular education teacher of any particular grade level.***

27. **J.M. v. Morris Sch. Dist., 58 IDELR 48 (D.N.J. 2012).** The parent of a twelve-year-old girl with dyslexia alleged that their daughter was not making meaningful progress in reading. In the fourth grade, the girl's reading skills were measuring below the 1st percentile on standardized assessments. The school district proved that the student was making measurable progress in reading based on the statewide achievement testing. However, the court rejected the district's contention that this progress was sufficient to meet the FAPE standard of the IDEA. The court noted that the girl was provided several accommodations on the statewide assessments that overshadowed her actual progress in reading. For example, the student was not required to write on the writing assessment, and was not required to read on the assessment of reading comprehension skills. "The accommodations rendered the assessment a poor indicator of [the student's] reading and writing skills progress," U.S. District Judge Susan D. Wigenton wrote. The school district was ordered to provide the girl with compensatory reading instruction.

- ***Girl's progress on a statewide standardized assessment was not adequate proof of FAPE where she was provided accommodations in reading and writing.***

- ***Court ordered the LEA to provide compensatory reading instruction.***

28. **M.P. v. Hamilton Southeastern Schs, 58 IDELR 92 (7th Cir. 2012).** The Seventh Circuit Court of Appeals affirmed an earlier decision of a federal court in Indiana, holding that a kindergarten child with a traumatic brain injury (and a FSIQ of 112) was not entitled to attend "double" Kindergarten sessions in order to receive FAPE. The child's treating neuropsychologist opined that attending duplicate sessions (morning and afternoon) of Kindergarten would be "optimal" for the child. However, the court noted that the IDEA does not require the provision of educational services that are superior, optimal, or "maximizing." "Given that [the child] was making progress ... while receiving half-day, early-childhood services, it was reasonable ... to conclude that [he] did not require double-session kindergarten to meet his needs," the 7th Circuit wrote. The testimony of the child's pediatrician was also discredited when the physician admitted that he had signed a letter "strongly recommending" full-day Kindergarten that was actually composed by the parents. The court denied the parents request for public funding for private school placement.

- ***Kindergartener with traumatic brain injury is not entitled to "double Kindergarten" (attending both a.m. and p.m. sessions) in order to receive FAPE.***

- ***Court discredited the testimony of the child's pediatrician because he had signed a letter that was actually written by the parents "strongly recommending" full-day Kindergarten.***

29. **Madeline P. v. Anchorage Sch. Dist., 58 IDELR 17 (D. Alaska 2011).** The school district temporarily assigned a second-grade boy with a disability to receive his writing instruction in a special education resource room while his general education classroom teacher was on an emergency medical leave. The trouble began when the district failed to return the child to his general education classroom following the teacher's return from medical leave. The child missed approximately six weeks of writing instruction in his regular classroom due to this mistake. Therefore, the court awarded fifteen hours of compensatory education services for the district's failure to follow-up and return the child to his previously agreed placement. The court did, however, approve the change in placement on a temporary basis due to a medical emergency of the child's teacher.

- ***Court awarded fifteen hours of compensatory education services due to LEA's failure to return child to his previous classroom after his teacher returned from a medical leave.***

- ***LEA's placement of a child in a special education classroom during his regular classroom teacher's medical leave was appropriate***.

30. **D.S. v. Dept. of Education, State of Hawaii, 112 LRP 58 (D. Hawaii 2011).** The parent of a 14-year-old with autism failed to show that a mere change in terminology to refer to a child's dedicated aide rendered the student's IEP inadequate. The District Court noted that the parent fully participated in the IEP process and comprehended that "adult support" referred to a dedicated aide. The new IEP proposed to transition the student from a private to a public school. It continued to offer 2,250 minutes of weekly support from a dedicated aide, but changed the terminology it used to refer to the aide from "paraprofessional" to "adult support." The draft IEP included a clarification section stating, "paraprofessional services" would be supplied throughout the school day. The parent claimed the ED denied the student FAPE, and sought private school reimbursement, because the IEP didn't clarify that it was offering a dedicated aide. An IEP must include a statement of the special education and related services to be provided to a child to advance her goals. 20 USC 1414(d)(1)(A). The court observed that the IEP adequately identified the services, and the frequency and duration of the services. Moreover, the testimony of other IEP team members clearly showed that the parent, who herself worked in special education, fully participated in the IEP team meeting at which the draft IEP was discussed, that she voiced no concerns about the issue, and that she understood the student would be receiving services from a one-to-one paraprofessional, even though the ED was now using a new term. This was not a case in which services were left completely undefined or were so lacking in specificity as to fail to convey what aids and services were needed. Because the parent failed to show that the IEP was inappropriate, she was not entitled to reimbursement.

* ***Use of the term "adult support" in an IEP, rather than the term "paraprofessional" did not render the IEP inappropriate where the evidence showed that the parent understood that her child would receive a dedicated aide.***

31. **E.W.K. v. Board of Education of Chappaqua Central Sch. District, 112 LRP 39684 (S.D.N.Y. 2012).** The parents of a student with an SLD could not convince a District Court that a New York district erred in offering their son only two sessions of reading instruction each week. Finding no evidence that the student required five weekly hours of one-to-one instruction, as the parents claimed, the court held that the student's fifth, sixth, and seventh-grade IEPs offered FAPE. The court explained that the district had no obligation to maximize the student's potential. Instead, it only had to ensure that the proposed IEPs offered some educational benefit. The court observed that the proposed IEPs met that standard. Because evaluations and report cards showed that the student made progress under prior IEPs that did not specifically include reading instruction, the district did not need to include reading instruction in the student's fifth-grade IEP. Teachers indicated that the student performed adequately with the services he received in a skills seminar. "Indeed, there was testimony that [the student] was already receiving reading help in his regular education classes, including Social Studies, Writing, and Language Arts," U.S. District Judge Kenneth M. Karas wrote. Furthermore, the court pointed out that the district added small-group reading instruction to the student's sixth- and seventh-grade IEPs based on his declining score on a reading comprehension test and reports from his private school teacher. Although the parents contended that two 40-minute

sessions a week would not be enough to address the student's needs, the court noted that the IEP team had an "extensive conversation" about the student's reading services. The team determined that additional services were not necessary given that the student would receive reading instruction in classes throughout the school day. In addition, the team believed that having the student spend too much time apart from nondisabled peers would be detrimental to his progress. Concluding that the district offered the student FAPE, the court denied the parents' request for tuition reimbursement.

- ***The LEA's proposal to provide reading instruction was appropriate and constituted FAPE.***

- ***The parents' request for five hours per week of 1:1 reading instruction was not warranted given the student's progress in his current program.***

32. **Torda v. Fairfax County Sch. Board, 59 IDELR 71 (E.D. Va. 2012).** Testimony that a Virginia district offered intensive services to help a teenager with Down syndrome make progress in reading, writing, math, and oral communication skills undermined a parent's claim that the student's 2007-08 IEP was inappropriate. Concluding that the IEP addressed all of the student's disability-related needs, the District Court granted the district's motion for judgment. The court rejected the parent's claim that the district's failure to evaluate the student for an auditory processing disorder made the IEP defective. Not only did the parent deny consent for a new evaluation, the court observed, but there was no evidence that the student had an auditory processing disorder. The court found that an independent evaluation showing the student had an auditory processing disorder was unreliable because it was conducted two years after the school year in question had ended, and because the evaluator administered tests that were not normed for students with intellectual disabilities. "[The student's] significant cognitive and intellectual impairment presents a well-recognized hurdle to proper assessment and diagnosis of [auditory processing disorder]," U.S. District Judge Gerald Bruce Lee wrote. Furthermore, the court pointed out that the IEP addressed all of the needs identified in the independent evaluation. Teachers gave detailed testimony on how they simplified lessons, paired visual material with oral instruction, and checked for comprehension. "By the end of January 2008, [the student] met the criteria for or made sufficient progress toward achieving several goals identified in his IEP ...," Judge Lee wrote. Based on the services offered and the student's progress, the court determined that the district provided the student FAPE.

33.

- ***Court rejected parent's claim that the LEA failed to evaluate a teen with Down Syndrome for an auditory processing disorder.***

- ***Independent evaluator administered tests that were not normed for students with intellectual impairments.***

34. **S.H. v. Fairfax County Board of Education, 59 IDELR 73 (E.D. Va. 2012).** The progress that a student with SLDs made during her fourth-grade year helped persuade a District Court that subsequent IEPs would have met the student's needs. Noting that the district offered an increased amount of special education services as the student advanced through the general education curriculum, the court held that the proposed IEPs were appropriate. The court noted that the student received average to above-average grades in fourth grade. She also made steady progress in reading, writing, spelling, and math, the content areas most affected by her SLDs. Although the parents enrolled the student in a special education school for fifth grade, the district continued to evaluate her special education needs. The IEPs the district developed for fifth, sixth, seventh, and eighth grades steadily increased the student's specialized instruction in reading, writing, and math, and offered new services as needed. Notably, the district recommended adding speech-language therapy and adapted PE to the student's IEP after she developed motor and neurological difficulties. "This fact is telling to the Court, and indicative of [the district's] efforts to satisfy the IDEA and tailor services to [the student's] individual needs," U.S. District Judge Liam O'Grady wrote. Given the student's success with the amount of services she received in fourth grade, the court explained, it was not unreasonable to believe she would have made similar progress in subsequent grades with the additional services offered by the district. Furthermore, the court pointed out that the proposed public school placement would allow the student to receive the specialized instruction she needed to benefit from the curriculum while providing opportunities to interact with nondisabled peers. Determining that the district offered FAPE in the LRE, the court denied the parents' reimbursement claim.

- ***Girl who earned average to above-average grades and made steady progress in reading, writing, spelling, and math was receiving FAPE.***

- ***Parents were not entitled to reimbursement for the costs of private schooling***.

35. **I.M. v. Northampton Public Schools, 59 IDELR 38 (D. Mass. 2012).** Reductions in the services listed in a 10-year-old's IEP as he moved from a public school to a school for the blind reflected the latter program's highly integrated nature, not a denial of FAPE, a District Court held. The court concluded that the program addressed all of the student's needs arising from his cerebral palsy, visual impairment, and speech-language deficits. The student initially attended a public elementary school until his parents withdrew him and applied for his admission into the school for the blind. The district developed an IEP that called for the student to attend the program on a residential basis for the 2010-11 school year and provided 32.5 hours of related services. The parents alleged that the district denied the student FAPE by reducing the child's speech-language and other services and by placing him in a residential program. The court observed that while the parents objected to the "drastic" reduction in services, any change in the listed services had to be understood in context of the new environment the student was entering. Services at the school for the blind were extremely integrated, and the staff members highly trained. In addition, the student-staff ratio was very low. As a result, services that were delivered separately in public school were incorporated into the private school's classes throughout the day. "Given the substantially different environment for which the prior ... IEP was created, it was ... reasonable and appropriate that the ... IEP for the 2010-2011 school year represented a departure from the service delivery grid of its predecessor," U.S. Magistrate Judge Kenneth P. Neiman wrote. Moreover, the IEP

was a work in progress, which the parents knew. The court also rejected the parents' assertion that there was no documentation that the student needed a residential placement. The argument ignored the fact that the parents themselves requested placement in the school, and overlooked the time and effort the IEP team devoted to developing an acceptable program for the child.

- ***Placement of student in a residential school for the blind necessitated changes in his IEP.***

- ***The IEP developed for a residential placement must be viewed within the context of the residential environment.***

36. **R.S. v. Montgomery Township Bd. Of Education, 59 IDELR 47 (D.N.J. 2012).** A special education director's written recommendation that a fifth-grader with bipolar disorder and ADHD undergo an independent psychiatric evaluation undermined a New Jersey district's claim that the student behaved appropriately in the classroom. Determining that the recommendation raised questions as to whether the student made progress in the district's program, the District Court remanded the case to the ALJ for further evidentiary findings. The court recognized its obligation to give "due weight" to the ALJ s factual findings, but noted that the ALJ did not address certain key pieces of evidence. In particular, the ALJ did not discuss the director's written statement regarding the student's classroom behaviors. That statement indicated that school staff continued to observe inconsistencies in the student's behavior, and noted that the student engaged in inappropriate behaviors that hindered her learning. U.S. District Judge Anne E. Thompson pointed out that the director's statement, which ended with a recommendation for an independent psychiatric evaluation, contradicted statements on report cards and weekly progress reports that the student's behavior had no adverse impact on her education. "Taken together, the court is left with the impression that the factual record needs to be further developed to determine whether [the district's] proposed IEP would provide a FAPE," Judge Thompson wrote in an unpublished decision. The court thus ordered the ALJ to reconsider his finding that the district offered the student FAPE in the LRE. If, on remand, the ALJ determined that the evidence was inconclusive, he was to hear more evidence from the parties.

- ***ALJ failed to address certain key pieces of evidence, such as the LEA's written recommendation that a fifth grade student have a psychiatric evaluation, in reaching his final decision.***

- ***Court remanded the case back to the Administrative Law Judge for further evidentiary findings.***

37. **H.C. v. Katonah-Lewisboro Union Free School District, 59 IDELR 108 (S.D.N.Y. 2012).** The fact that the IDEA lacks specific administrative procedures for children with disabilities who are victims of peer harassment does not allow parents of bullied students to bring their FAPE claims directly to court. Concluding that the parents of a student with autism had to exhaust claims arising out of their son's alleged harassment by a classmate, the District Court granted a Maryland district's

motion to dismiss. The case turned on the broad scope of the IDEA's remedial scheme. The parents pointed out that the IDEA offers special protections to students who violate school rules, as evidenced by the provisions regarding manifestation determinations and disciplinary removals. They argued that, because the IDEA does not offer similar protections to students with disabilities who are victims of disciplinary offenders, the exhaustion of administrative remedies would be futile in their case. The court disagreed. U.S. District Judge Ellen Lipton Hollander explained that the IDEA's administrative procedures apply to all students with disabilities who allege a statutory violation. "[The parents'] contention as to the statutory scheme that governs student offenders does not demonstrate futility with respect to the statutory scheme available to protect [students with disabilities]," Judge Hollander wrote. Determining that some form of relief was available under the IDEA, the court held that the parents had to exhaust their administrative remedies before seeking relief in court.

* ***Parents of a student with autism were required to exhaust their administrative remedies before filing a federal lawsuit alleging disability-based peer harassment.***

38. **Ridley v. Cenname, 58 IDELR 271 (3rd Cir. 2012).** Despite claiming that their preferred reading program was a better match for their daughter's unique needs, the parents of a grade school student with SLDs could not show that a Pennsylvania district denied the child FAPE by using a different methodology. The 3d Circuit affirmed a decision at 56 IDELR 74 that the district's program was adequately supported by peer-reviewed research. The court did not address whether a methodology unsupported by research may be appropriate under the IDEA. Instead, it held that the IDEA does not require a district to choose the program supported by the optimum level of peer-reviewed research. "Rather, the peer-reviewed specially designed instruction in an IEP must be 'reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential,'" U.S. Circuit Judge D. Michael Fisher wrote for the three-judge panel. The court pointed out that an organization devoted to literacy research had reviewed the district's chosen method, and found that the program aligned with current research. Although the studies cited by the organization did not test the program's effectiveness for students with the child's unique combination of disabilities, the court noted that the research involved students in the same age group who struggled with reading. Because the research indicated the child would benefit from the district's chosen reading program, the 3d Circuit held that the district offered the child FAPE. The 3d Circuit also affirmed the District Court's decision that the district did not violate its child find obligation by failing to evaluate the child at the start of first grade. The fact that the child previously had been found ineligible for IDEA services, coupled with her need to adjust to test-taking procedures, showed that the district did not act unreasonably in delaying the evaluation until later in the school year.

* ***The IDEA does not require LEAs to provide a reading program that is supported by an "optimum" level of peer-reviewed research.***

39. **West Virginia Schools for the Deaf and Blind v. A.V., 58 IDELR 275 (N.D. W. Va. 2012).** A West Virginia law that limited enrollment in a state school for the deaf and the blind did not justify the school's decision to return a grade school student with verbal apraxia and other disabilities to her home district. Noting that the school was the only placement that could provide the total communication environment the student needed to receive FAPE, the District Court affirmed an order requiring the school to continue the student's placement. The court rejected the school's argument that the student's home district could meet her needs. Although the district's speech therapist was able to communicate in sign language, the court pointed out that the therapist would only be available to assist the student for one hour each week. "As the Hearing Officer concluded, '[t]here is a great discrepancy between providing a teacher with signing capabilities 240 minutes per month ... and a total communication school building where all teachers and students are familiar with signing as well as other non-verbal methods of communication,'" U.S. District Judge Gina M. Groh wrote. Determining that enforcement of the state law would deprive the student of FAPE, the court held that the student could attend the school regardless of her disability classification. The court also affirmed the IHO's decision that the student's most recent IEP was substantively deficient. Not only was the document internally inconsistent, providing for 96 percent mainstreaming and a full-time special education placement, but the placement was based on the school's directive to return the student to her home district rather than the student's unique needs.

- ***Enforcement of a state law limiting enrollment in the state school for the deaf and blind would deprive an elementary school student of FAPE.***

- ***Girl needed the "total communication" environment available at the state school for the deaf and blind.***

40. **Dzugas-Smith v. Southold Union Free Sch. District, 59 IDELR 8 (E.D. N.Y. 2012).** Because a seventh-grader with learning disabilities made meaningful progress the prior year, a New York district satisfied its obligation to offer FAPE by proposing similar supports and services for the student's next IEP. Concluding that the IEP was likely to enable the student to continue to progress academically in a mainstream setting, the District Court declined to reimburse the child's parent for unilaterally placing her in a special school. The student had a history of reading and other learning deficits. However, during the 2005-06 school year, she performed average in nearly all areas in a mainstream environment, with supports and services, including a graphic organizer and resource room services. She also successfully completed state assessments without using accommodations. Nevertheless, her parent wanted the district to place her in a special school for students with language-based learning disabilities. The district instead offered to continue the student's public school placement. After an IHO and SRO ruled in the district's favor, the parent filed an action in federal court, seeking tuition reimbursement. The court found that the student was likely to progress in the district's offered program. The court noted that the services and supports targeted her areas of need. Moreover, they were "essentially similar, or more, than the services that had been provided to her during the previous academic year and from which [the student] had received significant educational benefit," U.S. District Judge Sandra J. Feuerstein wrote. During the prior year, the student performed at or above grade level in almost every area tested, and while

attending a mainstream placement. Accordingly, the new IEP, which increased the frequency of resource room services and added daily tutoring, was likely to produce continued nontrivial progress. Moreover, the proposed placement aligned with LRE, while the private school was unnecessarily restrictive. Because the latest IEP offered the student FAPE, the parent was not entitled to recoup tuition payments.

- ***Services that were "essentially similar" to services that were successful the previous year were "appropriate."***

- ***Proposed IEP was likely to produce "nontrivial" benefit."***

41. Dept. of Education, State of Hawaii v. C.B., 58 IDELR 279 (D. Hawaii 2012). Recognizing that transition services might be "highly important" for some students with disabilities, the District Court nonetheless held that the Hawaii ED's failure to include transition services in a preschooler's IEP did not amount to a denial of FAPE. The court reversed an IHO's decision that the IEP's failure to mention transition services or the specific amount of time the child would spend with his one-to-one paraprofessional entitled the parents to reimbursement for the child's private autism program. The court noted that neither the IDEA nor the Part B regulations require an IEP to include transition services designed to ease a child's move from private school to public school. Although the IHO identified difficulties with transition as one of the child's "unique needs," she did not identify any support for her conclusion that the IEP team's failure to discuss transition services or include a transition plan in the child's program amounted to a denial of FAPE. The court pointed out that the IDEA sets forth specific components for IEPs, and precludes courts and IHOs from construing the statute as requiring additional information. "[T]o the extent [Section 1414] bars requiring an IEP to include information not expressly required by law, requiring a transition plan in an IEP would be an end-run around that bar," U.S. District Judge Susan Oki Mollway wrote. The court also observed that the ED developed a separate transition plan for the child after the IEP meeting. As such, the ED addressed the child's transition needs. With regard to the IEP's failure to state the specific number of hours the student would work with the paraprofessional, the court noted that the alleged procedural violation did not deprive the student of FAPE or impede the parents' participation in the IEP process. Thus, even if the IEP should have included that information, the omission did not require the ED to fund the child's private program.

* ***Nothing in the IDEA requires LEAs to develop transition plans for students moving from private school to public school.***

* ***The IDEA specifically prohibits requiring more than specified by law in an IEP.***

VII. LEAST RESTRICTIVE ENVIRONMENT

41. J.P. v. New York City Dept. of Education, 58 IDELR 96 (E.D.N.Y. 2012). A New York court upheld the district's proposal to place a twelve-year-old boy with an emotional disturbance in a self-contained special education classroom based on the

level of the boy's disruptiveness in general education settings. The student called out answers, made inappropriate comments, and cried when he became frustrated. In addition, he had frequent difficulties with peer interaction and required excessive attention from his teachers during instructional time. The court recognized that disruptiveness in the general education classroom is a factor in determining the least restrictive environment for a student, and approved the district's proposed to remove the boy from general education classes.

- ***Disruptiveness in a general education classroom may justify placement of a student in a special education classroom.***

- ***Student who called out answers, made inappropriate comments, and cried when he became frustrated should be placed in a self-contained special education classroom due to the level of disruptiveness he caused in his regular class.***

42. **D.F. v. Red Lion Sch. Dist., 58 IDELR 65 (M.D. Pa. 2012).** The court upheld the school district's proposal to provide ESY services to a deaf-blind student by enrolling him in a summer camp for students with disabilities. The parents wanted their son enrolled in a summer camp where the majority of campers were nondisabled. The court found that the camp preferred by the parents could not provide appropriate services for the student because its staff was not trained to deal with the student's level of needs and did not provide same-age peers. The summer camp offered by the school district met the requirements of the law because it offered appropriate supports for the student and nondisabled "peer buddies" to accompany him.

- ***LEA's proposal to provide ESY services by enrolling a deaf-blind student in a summer camp for students with disabilities was appropriate.***

- ***Parent's preference for enrolling student in a summer camp for nondisabled students would not be appropriate because camp staffers were not trained to deal with this student's level of needs.***

43. **N.T. v. District of Columbia, 58 IDELR 69 (D.D.C. 2012).** The court refused to order the school district to pay for a private placement that served students with moderate and severe disabilities on the grounds that it was not the least restrictive environment for an elementary school student. The LRE requirements do not apply to private schools, but a court may consider a private placement's restrictiveness in determining whether reimbursement is warranted. In this case, the court determined that the school district was "ready, willing, and able" to provide appropriate educational services to the student that offered her the opportunity to be integrated with her nondisabled peers.

- ***Private placement in a school that serves students with moderate and severe disabilities would not be appropriate for an elementary student.***

- ***Student's least restrictive environment is his regular school setting***.

44. **Klein Independent Sch. Dist. v. Hovem, 112 LRP 39704 (5th Cir. 2012).** Noting it was "regrettable" that a Texas district failed to address the source of a former student's writing difficulties earlier in his educational career, the 5th Circuit nonetheless found that the accommodations set forth in the student's IEPs allowed him to receive FAPE. The 5th Circuit reversed a decision reported at 55 IDELR 92 that the district's failure to provide more intensive services amounted to an IDEA violation. The 5th Circuit pointed out that *Rowley*, 553 IDELR 656, only requires districts to ensure that students with disabilities receive some educational benefit. As such, the District Court erred in focusing on the student's ongoing deficits rather than his overall academic record. "Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child's disability," U.S. Circuit Judge Edith H. Jones wrote for the two-judge majority. So long as the student's program met the four requirements set forth in *Cypress-Fairbanks Independent School District v. Michael F.*, 26 IDELR 303 (5th Cir. 1997), the district would satisfy its FAPE obligation. The court determined that the student's IEPs satisfied the *Michael F.* factors. Not only were the IEPs customized on the basis of the student's assessments and performance, they were implemented in the student's LRE -- the general education classroom. The district also ensured that staffers provided the student's services in a collaborative and coordinated manner. Most notably, the 5th Circuit observed, the student earned above-average grades in the general education curriculum by using a spell checker and a computer for written assignments. "Viewed from the holistic *Rowley* perspective, rather than the District Court's narrow perspective of disability remediation, [the student] obtained a high school level education that would have been sufficient for graduation," Judge Jones wrote. The 5th Circuit thus concluded that the district offered the student FAPE. U.S. Circuit Judge Carl E. Stewart dissented from the majority's opinion, contending that the decision could be interpreted as allowing districts to circumvent the IDEA's requirements by promoting students with disabilities from grade to grade without addressing their individual needs.

- ***IDEA does not require LEAs to "remediate" or "correct" a student's disability.***
- ***Provision of IEP services for a gifted student with a learning disability in written expression was appropriate.***
- ***Student made above-average grades in the general education curriculum by using a spell checker and a computer for written assignments.***

45. **J.H. v. Fort Bend Ind. Sch. District, 112 LRP 38635 (5th Cir. 2012).** Evidence that a sixth-grader with an intellectual disability struggled in his general education science and social studies courses despite receiving instruction in a modified curriculum undermined his parents' claim that a special education placement would be unnecessarily restrictive. Concluding that the student did not receive any benefit from the general education placement, the 5th Circuit upheld a Texas district's decision to place the student in a special education setting for both classes. The court acknowledged that the student did not disrupt lessons the general education classroom, and was at most "an occasional distraction" to classmates. However, the court pointed out that the student did not receive any educational or non-educational benefits from the placement. Although the district accommodated the student by

providing aides and modifying the curriculum, the student often refused to work due to frustration with his inability to grasp increasingly difficult concepts. Furthermore, because the student received instruction separately from tutors and teaching assistants, his ability to interact with nondisabled peers was "seriously limited." The 5th Circuit held that the student's lack of progress, evinced by the failing marks he received on several report cards, demonstrated his need for a more restrictive setting. "The fact that [the student] did not disrupt his peers in those classes, while relevant, was much less important than the fact that he received no educational benefit," the three-judge panel wrote in an unpublished decision. Concluding that the district did not err in proposing a special education placement for science and social studies, the 5th Circuit affirmed a judgment in the district's favor.

- ***Sixth-grade student with an intellectual disability received no academic benefit from his placement in a general education classroom despite receiving a modified curriculum.***

- ***Student received no non-academic benefits even though he was not disruptive in the general education classroom.***

* ***Student's interaction with his nondisabled peers was "seriously limited" due to the necessity of separating him from his peers within the classroom for one-to-one academic instruction.***

47. L.G. v. Fair Lawn Board of Education, 59 IDELR 65 (3rd Cir. 2012). A video showing that a preschooler with autism had difficulty following directions, engaged in self-stimulatory behaviors, and failed to notice other children in an inclusion program undermined the parents' claim that the child's placement in an autism preschool program was overly restrictive. Concluding that the autism preschool was the child's LRE, the 3d Circuit affirmed a decision in the district's favor. The parents maintained that the child had the skills needed to participate in an inclusion preschool and would benefit from interaction with typically developing peers. The 3d Circuit disagreed. According to the ALJ, the 3d Circuit observed, the child exhibited "inappropriate and stigmatizing behaviors" and did not have the skills needed to benefit from an inclusion placement. "The ALJ's independent review of the video provided by [the] parents 'generally confirmed' the interpretation offered by [the district] that [the child] 'is unable to engage with her peers' rather than the opposite conclusion that was offered by an expert hired by [the] parents," U.S. Circuit Judge Dolores K. Sloviter wrote in an unpublished decision. The court noted that the district's autism preschool offered intensive one-to-one ABA services and provided opportunities to interact with peers as the child acquired the necessary skills. Furthermore, the addition of a "reverse inclusion" component to the child's program demonstrated the district's efforts to expose the child to typically developing peers. Finding no fault with the district's placement offer, the 3d Circuit held the parents were not entitled to reimbursement for the child's placement in a private inclusion preschool.

* ***Autism preschool was the least restrictive environment for a preschool student with autism who had difficulty following directions, engaged in self-stimulatory behaviors, and failed to interact with other children.***

* ***Child with autism had "inappropriate and stigmatizing behaviors" and did not have the skills to benefit from placement with his nondisabled peers.***

VIII. MONEY AND LIABILITY ISSUES

48. Mark H. v. Hamamoto, 58 IDELR 101 (D. Hawaii 2012). To recover money damages for its denial of appropriate educational services, the parents of two sisters with autism needed to prove that the Department of Education officials were deliberately indifferent to their daughters' needs. The evidence supported a finding of negligence, but the court could not substantiate the parents' claim that the DOE officials intentionally violated the girls' rights.

* ***Parents of siblings with autism must prove that LEA was "deliberately indifferent" to their daughter's needs in order to support a claim for money damages.***

49. C.O. v. Portland Public Schools, 58 IDELR 272 (9th Cir. 2012). The IDEA's directive that courts grant "appropriate" relief did not justify one District Court's decision to award $1 in damages to the parent of a former student with a disability. The 9th Circuit reversed the award, reported at 54 IDELR 6, concluding that nominal damages are not an available remedy under the IDEA. The court observed that the plain language of the IDEA does not indicate the availability of compensatory or nominal damages. While the statute does allow District Courts to award "appropriate relief," the 9th Circuit pointed out that the phrase refers to the court's jurisdiction rather than a license to award retrospective damages. The 9th Circuit rejected the District Court's rationale that awards of nominal damages would promote statutory compliance. Noting that the IDEA is a funding statute, the court pointed out that the remedy for noncompliance is the loss of federal funds. "Without some indication that Congress intended 'to create not just a private right but also a private remedy ... a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute,'" U.S. Circuit Judge Diarmuid F. O'Scannlain wrote for the three-judge panel. Nor was the parent entitled to damages under Section 1983. Because the parent sought relief that was available through a due process proceeding, her Section 1983 claim was the functional equivalent of an IDEA claim. As such, the parent was limited to the relief available under the IDEA.

* ***Nominal damages of $1.00 are not an appropriate remedy under the IDEA.***

IX. PARENT ISSUES

50. J.S. v. Scarsdale Union Free Sch. Dist., 58 IDELR 16 (S.D.N.Y. 2011). Parents who refused to cooperate with the school district's efforts to evaluate and place their daughter were denied 75 percent of their request for private school

tuition reimbursement. Their daughter, an honors student, began experiencing academic and emotional difficulties near the end of her freshman year and progressed for the next two years. The parents made a unilateral private placement and, afterwards, requested an initial evaluation to determine her eligibility for special education and related services. They refused to produce their daughter for an interview with the private school proposed by the district. The court found that the district had failed to identify the girl, but reduced the award of placement by 75 percent due to the parents' obvious lack of seriousness about obtaining a district placement and their failure to give the district a legitimate opportunity to provide an appropriate placement for their daughter.

* ***Parents who refused to produce their daughter for an interview with the private school proposed by the LEA were denied 75% of their demand for private tuition.***

51. **Ravenna Sch. District v. Williams, 112 LRP 40307 (N.D. Ohio 2012).** An IHO's belief that the U.S. Supreme Court's decision in *Winkelman v. Parma City School District*, 47 IDELR 281 (U.S. 2007), allowed a parent to pursue an IDEA claim for events that occurred after her daughter's 18th birthday proved to be misplaced. Determining that the parent's IDEA rights transferred to the student when she reached the age of majority, the District Court dismissed the parent's IEP challenge. In *Winkelman,* the Supreme Court held that parents have both substantive and procedural rights under the IDEA. Thus, while unrepresented parents cannot bring IDEA claims on behalf of a minor child, they can pursue IDEA claims on their own behalf without an attorney. Although the IHO stated that *Winkelman* preserved parents' rights to bring IDEA claims even after their children reach the age of majority under state law, the District Court disagreed. The court pointed out that such an interpretation would negate a provision in Ohio law that transfers all of the parent's IDEA rights to the student at age 18. "Under the analysis of the hearing officer, no rights could ever be transferred because the parents always retain their rights," U.S. District Judge John R. Adams wrote. The court noted that the IDEA rights of the parent in this case transferred to the student on Aug. 6, 2010, the student's 18th birthday. As such, the parent could not bring an IDEA claim for the district's failure to offer ESY services for the summer of 2011.

* ***Parent was barred from filing a federal lawsuit on behalf of her daughter after the girl reached the age of majority.***

* ***All rights under the IDEA transfer from the parent to the student upon reaching the age of majority (unless the student is legally declared to be incompetent according to state law).***

52. **N.T. v. Baltimore City Schools, 112 LRP 38279 (D. Maryland 2012).** Although a Maryland district continues to defend against the IDEA claim of a high school senior with an unspecified disability, there's a chance that the claim will become moot. A District Court dispensed with the student's Section 504 and ADA claims but held that his claim that the district denied him FAPE remained in controversy because the district failed to move for summary judgment on that

count. The court explained, however, that if the student moves out-of-state as his mother claimed his family intended to do, some of the relief he requested would become unavailable, even if the district did deprive him of meaningful educational benefit. A district's duty to provide FAPE extends to qualified students with disabilities who reside in the district's jurisdiction. 34 CFR 104.33(a). The term "free appropriate public education" means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved. 20 USC 1401(9). Based on the regulation and statute, the court pointed out that ordering the district to provide FAPE to a child no longer residing within its jurisdiction would be legally unjustified. Thus, the student's claim for injunctive relief would be moot if he moved. Furthermore, because the child's parent did not assert a claim for reimbursement of private educational expenses, the only stated relief the student would be entitled to, if he prevailed on his FAPE claim, is injunctive relief for correction of his educational file, the court ruled.

* ***Claims under the IDEA become "moot" if the parents move out-of-state during the litigation.***

53. P.R. v. Shawnee Mission Unified Sch. District, 58 IDELR 283 (D. Kan. 2012). The parents of a student with autism who dismissed their lawyer and failed to introduce witnesses in a due process hearing were not entitled to flesh out their case in federal court. The District Court rejected the parents' contention that they were denied their procedural due process rights at the hearing, or that any such denial would open the door to additional evidence. The district proposed a self-contained classroom placement after the student began engaging in physical aggression in his general education class. When the parents objected, the district filed a due process complaint seeking a determination that its offer was appropriate. An IHO and SRO found in the district's favor, and the parents filed an action in federal court. The parents argued that the IHO deprived them of their procedural due process rights under the Constitution, and thus the court should allow them to supplement the record with testimony and exhibits. The court noted that if there had been a due process violation, the appropriate remedy would be to remand the case. Nevertheless, there was no such violation. The court observed that with respect to due process hearings, the IDEA affords parents the right to be accompanied and advised by counsel, and the right to present evidence and witnesses. The court noted that the IHO did not violate the parents' rights by allowing their lawyer to withdraw. "Indeed, the parents discharged their counsel days before the hearing while knowing the schedule of proceedings and knowing that a continuance likely would not be granted," U.S. District Judge Carlos Murguia wrote. Moreover, the IHO informed the parents that they could testify or bring witnesses. But the parents declined to do that. "Although the parents may now regret their decisions, they were afforded every opportunity that due process required," Judge Murguia wrote. The court thus rejected their request to present additional evidence.

* ***Parents who fired their lawyer days before a due process hearing may not "flesh out" their case with new evidence on appeal.***

* ***Parents failed to introduce witnesses at the due process hearing after dismissing their lawyer.***

X. PRIVATE SCHOOL PLACEMENT

54. **T.B. v. St. Joseph Sch. Dist., 58 IDELR 242 (8th Cir. 2012).** The parents of a child with autism could not recover the costs of the home-based autism program they procured after withdrawing their son from public school. The court concluded that the home-based autism program did not provide "appropriate" educational services because it focused on social and self-help skills with a minimal amount of academic instruction.

* ***Home-based autism program failed to provide child with "appropriate" services because it did not provide sufficient academic instruction.***

* ***Home-based autism program that focused on social and self-help skills did not provide an "appropriate" education and could not be reimbursed by the LEA.***

55. **K.S. v. New York City Dept. of Education, 112 LRP 41156 (S.D.N.Y. 2012).** A New York district may have to pay for its mistakes in failing to provide FAPE to a 6-year-old with Angelman syndrome. But, a District Court ruled that the district's penalty did not include having to reimburse the child's parents for the hefty sum of $76,750 in tuition costs for a private school that was unproven to have met the student's needs. Although an IHO decided in the parents' favor, concluding that the district was on the hook for the tuition costs for failing to develop an appropriate IEP for the child, an SRO reversed that decision. The SRO concluded that the parents failed to establish the appropriateness of their school selection. On appeal, a District Court clarified that a district is required to pay for a program selected by parents only if 1) the IEP proposed by the school district was inappropriate, 2) the private placement was appropriate for the child's needs, and 3) the equities support the parents' claim. Noting that neither party was contesting the issue of whether the district's proposed IEP was appropriate, the District Court agreed with the SRO that the parents' failure to establish the appropriateness of their chosen school blocked their entitlement to tuition reimbursement. Through testimony from OT, PT, and speech-language therapy providers it hired to serve the student, the district established that the child needed a certain level of these services in order to progress. The private school, the court observed, offered the student reduced amounts of those services, and the parents failed to show that the student received educational benefits with those lower levels of services. The court noted that the SRO decided that the absence of a full-time aide for the student at the private placement made the program inappropriate given the child's extremely limited motor skills. Deferring to the SRO's finding, the District Court did not have to reach the question of whether the equities supported tuition reimbursement before it denied the parents' claim.

* ***Parent's failure to prove the appropriateness of private school could not recover tuition reimbursement for the costs of the private placement.***

56. Mt. Vernon Sch. Corp. v. A.M., 59 IDELR 100 (S.D. Ind. 2012). An IEP team's refusal to consider a residential placement for a teenager with severe autism could cost an Indiana district a pretty penny. In addition to recommending that the District Court grant judgment for the parents' on their FAPE claim, a federal magistrate judge advised the court to affirm an order for a publicly funded residential placement and two years of compensatory education. The magistrate judge pointed out that the student had significant behavioral issues, including physical aggression, hyperactivity, sexual touching, spitting, and difficulties with transitions that interfered with his learning and required him to receive around-the-clock support. However, the IEP team did not consider the parents' requests for a residential placement. Instead, the district offered to provide home instruction. The magistrate judge noted that the goals identified in the student's September 2010 IEP, which included keeping his hands to himself in groups of two or more in a school setting and learning to go through a cafeteria line, could not be accomplished at home. Although the district convened an IEP meeting in January 2011 to address the parents' concerns with home instruction, the magistrate judge observed that the proposed school-based program was inappropriate. "Despite the January IEP tailoring services and goals to many of [the student's] individualized needs, the IEP was not reasonably calculated to confer education benefits because [the student] required a residential placement," U.S. Magistrate Judge Tim A. Baker wrote. Determining that a residential placement was critical to the student's learning, the magistrate judge concluded that the district's refusal to consider a residential placement amounted to a denial of FAPE.

* ***Proposed home-based instruction program was not appropriate to meet the needs of a student with significant behavioral problems, including physical aggression, sexual touching, spitting, and difficulties with transitions.***

* ***Student with severe behavioral needs required a publicly-funded residential placement to meet his educational needs.***

* ***IEP goals such as "learning to go through a cafeteria line" appropriately could not possibly be implemented in a home setting.***

57. E.S. v. Katonah-Lewisboro Sch. District, 59 IDELR 63 (2nd Cir. 2012). The parents of a student with cognitive deficits may have been unjustified in removing the student from his New York district in the first place, but that didn't mean the district could simply reissue the same IEP when he returned the following year. Because the student progressed in the interim while attending private school, the district was required to consider that progress when developing the new IEP, the 2d U.S. Circuit Court of Appeals held. The parents withdrew the student from the district in 2006. The student made substantial progress in a private program. The district subsequently offered an IEP for the 2007-08 school year that reiterated the prior year's IEP. The parents claimed the district denied the child FAPE for both school years, and sought tuition reimbursement. A District Court denied it for the 2006-07 school year, but awarded it for the following school year. The 2d Circuit, in an unpublished ruling, noted that to provide FAPE, an IEP must afford a student an opportunity for more than just trivial advancement. *Cerra v. Pawling Cent. Sch. Dist.*, 44 IDELR 89 (2d Cir. 2005). The court concluded that there was evidence the child was progressing in

public school and would have continued to do so had he stayed there. Thus, the District Court was warranted in denying the parents any relief for that year. However, teacher progress reports, standardized test scores, and evaluations all indicated that the student improved at the private school in communication skills, social skills, and in almost every academic area. Yet, the district did not take those things into account when developing the new IEP. "Consequently, having been designed without regard for any of the progress [the student] did make at [the private school], the 2007-2008 IEP was likely to cause [the student] to regress or make only trivial advancement," the court wrote. The 2d Circuit affirmed the District Court's award of tuition reimbursement for the 2007-08 school year.

* ***LEA must consider returning student's progress in private school and revise his IEP upon re-enrollment***.

58. **R.S. v. Lakeland Central Sch. District, 59 IDELR 32 (2nd Cir. 2012).** The parents of a 12-year-old boy with an SLD could not recover the cost of the student's private school placement from a New York district that denied their son FAPE. In an unpublished decision, the 2d Circuit affirmed a District Court's ruling at 56 IDELR 211 that the private school failed to meet the student's needs. The case turned in large part on the school's failure to provide the services that a private evaluator had identified as critical to the student's learning. Although the evaluator, a pediatric neuropsychologist, recommended the use of an Orton-Gillingham methodology, the parents did not show how that methodology was used in the classroom. More importantly, the school did not provide the speech-language therapy or opportunities to read out loud that the student required to address his decoding and fluency problems. The District Court rejected the parents' claim that the private school's program was "so language based and immersive" that additional speech-language services were unnecessary. "[The parents] cite no testimony from [the neuropsychologist] that actually supports that proposition," U.S. District Judge John G. Koeltl wrote in his March 30, 2011, decision. Furthermore, the parents did not demonstrate that the student read out loud in his classes. Because the private school placement was inappropriate, the District Court held that the district did not have to reimburse the parents for the cost of the program. The 2d Circuit adopted the District Court's ruling in its entirety without further analysis.

* ***Parents failed to prove that their son's private school placement was appropriate.***

* ***Private school failed to provide services that parent's private evaluator had identified as critical for his needs.***

59. **Munir v. Pottsville Area Sch. District, 59 IDELR 35 (M.D. Pa. 2012).** Just because a 17-year-old boy with severe depression made progress in a therapeutic residential program didn't mean that a Pennsylvania district had to reimburse the parents for the program's cost. Concluding that the placement stemmed from the student's emotional needs, rather than any deficiencies in his public school education, the District Court upheld an administrative decision in the district's favor. The court

recognized that educational and emotional needs may sometimes intertwine. Nonetheless, the court pointed out that a district is not responsible for placements that are unnecessary for educational purposes. In this case, the evidence showed that the student earned above-average grades in school. Testimony showed that the parents placed the student in the residential program because he had threatened to harm himself and they feared for his safety. "Although [the student] undoubtedly benefited from the educational opportunities offered by the residential placements, these educational benefits were subsidiary to the therapeutic and emotional benefits [he] received in an effort to prevent another suicide attempt," U.S. District Judge Robert D. Mariani wrote. Because the placement was intended to address the student's emotional rather than educational needs, the parents were not entitled to reimbursement. The court also held that the district did not violate its child find obligations by failing to identify the student as a child with an emotional disturbance after his initial psychiatric hospitalizations. Given the student's success at school, the district had no reason to suspect at that time that the student required special education because of an emotional disturbance.

* ***LEAs are not responsible for placements made for non-educational reasons.***

* ***Parents placed their son in a residential facility due to their fears for the family's safety after his threats to harm them.***

* ***Student was making above-average grades in public school prior to his private placement.***

60. **Orange Unified Sch. District v. C.K., 59 IDELR 74 (C.D. Cal. 2012).** A district that was on notice a child exhibited autistic-like behaviors prior to his first IEP meeting will have to foot the bill of his private placement and a one-to-one aide. The child's parents approached the district about their 6-year-old's toilet-training issues, lack of eye contact, and limited vocabulary. They mentioned autism. The district's speech-language pathologist administered a speech and language preschool assessment, which lead to an IEP meeting. At the meeting, the student was deemed eligible for special education on the basis of speech or language impairment. The district offered two group speech and language therapy sessions per week. After delays in finding their son eligible under the category of autism and in providing behavior therapy, the parents informed the district they were placing him in a private school and seeking reimbursement. The ALJ determined that the district denied the student FAPE by failing to assess him in all areas of suspected disability, and by failing to offer appropriate behavior support therapy and appropriate speech and language services. The ALJ ordered the district to fund the services of an ABA-trained, "one-to-one" behavioral aid to accompany the student and reimburse the parents their private placement costs. The district appealed. U.S. District Judge James V. Selna explained that in determining if a district has failed to assess for a suspected disability, "the inquiry is not whether the student actually qualifies for special education services, but whether the student should be referred for an evaluation." Here, the court found there was ample evidence to suggest an assessment for autism was needed. First, the parents indicated both orally and in writing that the student displayed autistic-like symptoms. Also, the district's speech and language pathologist's notes taken a month before the initial IEP meeting indicated that the

child required frequent prompts, was largely non-responsive, and had poor attention and motivation. She even referred him for a complete psycho-educational assessment that was not completed before the IEP meeting. The court agreed with the ALJ that the district was required to assess the student at the first warning sign of a potential disability and before any placement was offered. However, its failure to conduct a complete evaluation before the initial IEP meeting resulted in a placement that did not address the student's autism. The IEP lacked any behavioral support therapy to tackle his autistic-like behavior. The court ruled that the district denied the student FAPE.

* ***LEA denied the student FAPE by failing to assess him in all areas of suspected disability, and by failing to offer appropriate behavior support therapy and appropriate speech and language services.***

* ***LEA ignored evidence suggesting a need to assess the student for autism.***

XI. PROCEDURAL AND LITIGATION ISSUES

a. Attorney's Fees

61. C.O. v. Portland Public Schools, 112 LRP 24761 (9th Cir. 2012). The court reversed a district court's award of $1.00 in damages to the parent of a child with learning disabilities. The court held that the IDEA does not provide for recovery of "nominal" damages, and dismissed the parent's claims. The damages were based on the lower court's finding that the school's attorney and the district had violated the parent's rights by unnecessary delay in providing educational records, refusal to allow the parent to discuss litigation issues without the permission of the school attorney, and refusal to participate in discovery. The appellate court held that no private right of action exists in the IDEA, no matter how much the lower court might want to create such a right.

* ***IDEA does not provide for recovery of nominal money damages.***

62. A.L. v. Chicago Public Sch. District, 112 LRP 38265 (N.D. Ill. 2012). Cutting and pasting analysis from prior judicial opinions when drafting their pleadings didn't pay off for the attorneys of a parent of a high school student with a cognitive impairment. The U.S. District Court, Northern District of Illinois cut the award for the work performed in the fee litigation by 90 percent. The parents sought $132,020 in attorney's fees and prejudgment interest for legal services pertaining to the due process hearing, and $27,111 for services supplied during the attorney's fee action itself. At the underlying hearing, an IHO found for the parents on most of their claims, and awarded most, but not all, of the relief they requested. First, the District Court awarded the parents 75 percent of their fees for the underlying due process hearing, based on their incomplete success. It rejected the district's claim that the fees should be reduced by 60 percent, observing that the district provided little support

for its argument beyond tallying up the number of successful versus unsuccessful claims -- an approach which the 7th U.S. Circuit Court of Appeals has rejected. Second, the court slashed the $27,117 the parents sought for the fee action, explaining that their attorneys copied large portions of the precise language for the brief from prior legal cases, including verbatim text, without proper attribution. "Not only does Plaintiffs' counsel lift the legal standards set forth in these decisions, but counsel additionally presents unaltered case specific analysis from those cases without attribution, including application of law to fact and distinguishing of authority," U.S. District Judge Amy J. St. Eve wrote. Observing that many courts have condemned the practice of "cutting and pasting" from judicial opinions without proper attribution, the court exercised its discretion and awarded just 10 percent of the requested fees pertaining to the fee action. The court denied prejudgment interest on the same basis. Adding $2,130 in costs, the court awarded a total of $82,544 in fees and costs.

* ***Court reduced award of attorney's fees by 90% because attorneys "cut and pasted" legal analysis from judicial opinions in writing their briefs***.

63. Santos-Dias v. Commonwealth of Puerto Rico, 58 IDELR 274 (D. Puerto Rico 2012). Challenging a parent attorney's charge for two hours of travel time did not result in a big savings for the Puerto Rico ED, but it did reduce the ED's fee payment by $135. The District Court held that the attorney could only recover fees for travel time at one-half of his hourly rate. The court pointed out that the ED did not dispute the parent's status as a prevailing party in an IDEA administrative action. Nor did the ED argue that the attorney's $135-an-hour rate was unreasonable. Instead, the ED requested deductions for the attorney's travel time, the time spent on legal research, and the attorney's costs. The court observed that an attorney's travel time is recoverable where appropriate. However, the court noted that the common practice is to award fees for travel time at half of the attorney's hourly rate. Because the attorney here sought $135 an hour for two hours of travel, the court reduced the award for travel time by $135. The court allowed the attorney to recover for time spent on legal research, finding "nothing unreasonable" about the charge. In addition, the court held that the attorney sufficiently documented his request for $464 in costs. After deducting $135 for travel time, the court awarded the parent $6,233 in fees and costs, plus interest.

***** ***Court reduced fees for attorney's travel time by one-half.***

b. <u>Exhaustion of Administrative Remedies</u>

64. Wright v. Carroll Co. Bd. Of Education, 59 IDELR 5 (D. Maryland 2012). The fact that the IDEA lacks specific

administrative procedures for children with disabilities who are victims of peer harassment does not allow parents of bullied students to bring their FAPE claims directly to court. Concluding that the parents of a student with autism had to exhaust claims arising out of their son's alleged harassment by a classmate, the District Court granted a Maryland district's motion to dismiss. The case turned on the broad scope of the IDEA's remedial scheme. The parents pointed out that the IDEA offers special protections to students who violate school rules, as evidenced by the provisions regarding manifestation determinations and disciplinary removals. They argued that, because the IDEA does not offer similar protections to students with disabilities who are victims of disciplinary offenders, the exhaustion of administrative remedies would be futile in their case. The court disagreed. U.S. District Judge Ellen Lipton Hollander explained that the IDEA's administrative procedures apply to all students with disabilities who allege a statutory violation. "[The parents'] contention as to the statutory scheme that governs student offenders does not demonstrate futility with respect to the statutory scheme available to protect [students with disabilities]," Judge Hollander wrote. Determining that some form of relief was available under the IDEA, the court held that the parents had to exhaust their administrative remedies before seeking relief in court.

* ***Parents of student with disabilities who was allegedly bullied at school must exhaust their administrative remedies under the IDEA before proceeding.***

65. Jenkins v. Butts County Sch. District, 58 IDELR 282 (M.D. Ga. 2012). A parent may have misunderstood the procedures for filing IDEA claims, but she still could not bring a federal lawsuit against the Georgia district that purportedly denied her daughter FAPE. The District Court dismissed the parent's complaint based on her failure to exhaust her administrative remedies. The court acknowledged that the parent filed a complaint with the Georgia ED, and that the ED investigated her claim and issued a final decision in the district's favor. However, the court explained that the state complaint did not fulfill the exhaustion requirement. U.S. District Judge Marc T. Treadwell observed that Georgia law sets forth distinct processes for state complaints and due process hearings. "The two processes are distinguishable in many respects, primarily in that a due process hearing is significantly more comprehensive and is presided over by an impartial ALJ, as opposed to an employee of the [ED]," Judge Treadwell wrote. More importantly, the court pointed out that the state complaint did not produce an administrative record for judicial review. Noting that it could not resolve the matter without detailed factual findings from the ALJ, the court held that the parent needed to request a due process hearing if she wished to remedy the alleged denial of FAPE. The court denied the district's request for attorney's

fees, however, determining that the parent made an honest mistake and did not file her claim for any improper purpose.

* ***State complaint procedures do not constitute exhaustion of administrative remedies under the IDEA.***

c. <u>IEP Meetings</u>

66. B.P. v. New York City Dep't. of Education, 112 LRP 1297 (E.D. N.Y. 2012). The court rejected the parent's contention that the school district had violated the IDEA by selecting a general education teacher as a member of an IEP team who did not currently teach their child. The court held that the IDEA does not require the general education teacher who serves as a member of an IEP team to be currently teaching a particular grade level. The IEP contained measurable goals and the team reviewed all current assessment data prior to developing the child's IEP.

* ***The IDEA does not require the general education teacher in an IEP team to be teaching a particular grade level.***

67. L.I. v. State of Hawaii Dept. of Education, 58 IDELR 8 (D. Hawaii 2011). The mother of a student with a disability could not voluntarily leave an IEP meeting in progress and subsequently allege a denial of her right to participate in the development of her child's IEP. Moreover, the school district offered to disband the IEP meeting and reconvene at a later date. "[The parent] expressly consented to [the ED's] completing of the IEP without her," Chief U.S. District Judge Susan Oki Mollway wrote. "Yet now, without challenging any factual findings, she asks the court to find [the ED] liable for having done exactly what she said it could do."

* ***Parent who voluntarily left IEP meeting before completion of the IEP could not complain that the team continued its work after she left.***

68. B.W. v. Durham Public Schools, 59 IDELR 72 (M.D. N.C. 2012). Noting that a North Carolina district was willing to consider the need for additional staff after a preschooler with autism began attending a partial inclusion program, a District Court held that the district's refusal to consider the parents' request for a one-to-one aide during an IEP meeting was harmless. The court held the district did not have to reimburse the parents for the child's private program. The court acknowledged that the district's refusal to discuss the possibility of a one-to-one aide, based on its belief that the administration was

responsible for all staffing decisions, was a procedural violation of the IDEA. However, the court rejected the notion that district members of the IEP team failed to address the parents' concerns. The court pointed out that the district accommodated the parents' request for additional assistance by arranging for the child to attend a general education preschool class in the afternoon, when the teaching assistant from his special education preschool class could accompany him. Evidence showed the district also planned to provide instruction in groups of no more than three students. "While these details were not included in the IEP, it is undisputed that as a result of the IEP meeting, the [district] made some staffing changes to the way the IEP would be implemented," U.S. District Judge Catherine C. Eagles wrote. Furthermore, the court found no evidence that the child needed a one-to-one aide to receive FAPE. Concluding that the district adequately addressed the parents' staffing concerns, the court granted judgment for the district on the parents' reimbursement claim.

* ***LEA's refusal to consider provision of a 1:1 aide for a preschool student with autism was a procedural violation of the IDEA.***

69. R.B. v. Bd. Of Education of the City of New York, 59 IDELR 104 (S.D.N.Y. 2012). Despite claiming that a New York district had never provided him with a copy of its procedural safeguard notice, the parent of a 12-year-old girl with a traumatic brain injury could not convince a District Court to excuse his belated due process filing. The court reaffirmed its decision at 57 IDELR 155 that the parent's reimbursement request was untimely. The court acknowledged that the parent modified his argument in his motion for reconsideration. While the parent previously argued that the district failed to provide him with a copy of its procedural safeguards during a June 2006 IEP meeting -- a circumstance the court deemed acceptable so long as the district provided notice once a year -- he now claimed that the district never provided him with such notice. However, the court pointed out that the parent's failure to make such a claim at the administrative level prevented it from considering that argument on appeal. "Although [the parent] now asserts that '[i]t is undisputed in the record that the district failed to adhere to [its] obligations by failing to provide [him] with [his] procedural safeguards notice' ..., the record is in fact bare one way or the other," U.S. District Judge Richard J. Sullivan wrote. Because the parent did not identify any facts or legal rulings that would require the court to alter its previous decision that the reimbursement claim was untimely, the court denied the parent's motion for reconsideration.

* ***Parent's claim that LEA failed to provide him notice of his procedural rights was unsupported by evidence.***

70. M.W. v. New York City Dept. of Education, 59 IDELR 36 (S.D.N.Y. 2012). A New York district may have failed to adhere to the letter of state law when developing an IEP for a grade school student with autism, but it still did not have to reimburse the parents for the child's private placement. The District Court held that the IEP's inclusion of positive behavioral supports and interventions, coupled with the availability of parent counseling and training at the child's proposed school, made those errors harmless. New York law requires districts to conduct FBAs of students with disabilities whose behavior impedes their own learning or the learning of others. However, the court observed that the failure to conduct an FBA is harmless if the IEP team considers the use of positive interventions and supports. Not only did the child's IEP note the need for positive reinforcement, but it included a behavioral plan that identified strategies to encourage positive behavior. As such, the district's failure to conduct an FBA did not result in any harm to the student. As for the IEP's failure to recommend parent training and counseling -- a state law requirement for IEPs developed for children with autism -- the court pointed out that the parents had counseling and training opportunities available. "The school at which [the child] was offered a placement provided numerous workshops and other opportunities to help train parents and to assist them in dealing with their child's educational needs," Senior U.S. District Judge Jack B. Weinstein wrote. Noting that the mother, a certified special education teacher, was able to evaluate and take advantage of the parent training services the school made available, the court determined that the failure to mention those services in the child's IEP did not amount to a substantive denial of FAPE.

* ***LEA's failure to conduct an FBA is harmless if the IEP team considers the use of positive interventions and supports.***

71. J.T. v. Dept. of Education, State of Hawaii, 59 IDELR 4 (D. Hawaii 2012). The Hawaii ED's belief that it had to hold an IEP meeting for a grade school student with SLDs by March 3, 2010, did not excuse its decision to proceed without the parent. Concluding that the ED impeded the parent's participation in the IEP process, the District Court partially reversed an administrative decision in the ED's favor and remanded the case for further proceedings. The court rejected the notion that the ED's internal deadline for annual IEP reviews took precedence over the parent's right to participate. Citing *Drobnicki v. Poway Unified School District,* 53 IDELR 210 (9th Cir. 2009, *unpublished*), the District Court explained that a district must include the student's parent in an IEP meeting unless the parent affirmatively refuses to attend. In this case, the court observed, the parent did not refuse to attend the meeting. Rather, she informed the ED that she was unable to attend the meeting, which was scheduled

for the following day, and asked if the team could meet later that week. The court recognized that the district held two follow-up meetings, both of which the parent attended, but determined that the parent's after-the-fact participation did not remedy her initial exclusion. "Indeed, ... [the parent] testified that the IEP team ignored her concerns and did not let her contribute her input," U.S. District Judge Leslie E. Kobayashi wrote. The court also determined that the team erred in failing to consider an independent evaluation report and the parent's concerns about the student's mental health and communication skills. Concluding that an award of compensatory education was the best way to compensate the student for the ED's procedural violations, the court ordered the parties to arrange for an evaluation of the student to determine his compensatory education needs.

* ***LEA must include the parent in their child's IEP team meeting unless the parent affirmatively refuses to attend.***

* ***LEA was obligated to reschedule the IEP meeting when the parent requested moving the originally scheduled date.***

72. S.H. v. Plano Independent Sch. District, 112 LRP 41886 (5th Cir. 2012). A Texas district had to pay $14,625 to the parents of a child with severe autism, all because it failed to invite a representative from the child's private program to his initial IEP meeting. Noting that the procedural violation resulted in a lack of ESY services, the 5th Circuit affirmed a decision reported at 54 IDELR 114 that the district denied the child FAPE. The court pointed out that the IEP team had to include at least one teacher of the child. Because the special education teacher who attended the IEP meeting had never worked with the child and was not his planned teacher, the court concluded that the team failed to include all mandatory members. The court rejected the district's argument that the failure to include a representative from the child's private early intervention program was harmless. "As the District Court found, the harm was [the child's] failure to receive ESY services for the summer of 2006 and [his] inappropriate initial placement in an integrated pre-kindergarten classroom during his initial weeks [in the district]," the three-judge panel wrote in an unpublished decision. The 5th Circuit observed that if the district had included a representative from the child's private program in the initial IEP meeting, it would have obtained information about the child's need for ESY services. The court thus concluded that the procedural violation resulted in a denial of FAPE. The 5th Circuit also affirmed a decision at 56 IDELR 156 that the parents were not entitled to attorney's fees. Because the district's settlement offer exceeded the final reimbursement award by $875 and the parents did not provide any explanation as to why they rejected

the settlement, the 5th Circuit upheld the District Court's finding that they unreasonably protracted the litigation.

* ***LEA failed to invite a representative from an autistic child's private school to participate in the development of an IEP.***

* ***Only the private school teachers had information which was needed to determine the student's need for ESY services.***

d. <u>Stay Put</u>

73. M.R. v. Ridley School District, 112 LRP 41157 (E.D. Pa. 2012). Just three months after the 3d Circuit held that it offered FAPE to a grade school student with SLDs, a Pennsylvania district learned it would have to pay for at least three years' worth of the student's private school services. The District Court held that the plain language of the IDEA made the district responsible for the student's stay-put placement until the judicial appeals process was complete. U.S. District Judge Mitchell S. Goldberg noted that federal courts are split as to how long the stay-put provision applies. Although the 6th Circuit, the D.C. Circuit, and at least two District Courts have held that stay-put does not extend beyond the District Court's ruling, the 9th Circuit ruled in *Joshua A.*, 52 IDELR 1, that stay-put protection applies through the Circuit Court level. Judge Goldberg observed that the IDEA, which expressly identifies a District Court action as a "proceeding," clearly contemplates appeals to Circuit Courts. In addition, requiring a district to continue a student's placement through the end of all judicial proceedings would fulfill the purpose of the stay-put provision: ensuring that the student's placement is not disturbed while the dispute is pending. "Indeed, refusing to enforce the stay-put provision after a district court ruling and during the appeals process could force parents to choose between maintaining their child in a private school at their own cost -- which may or may not be within their financial means -- or placing their child back into an educational setting which, depending on the outcome of appeal, could potentially fail to meet minimum legal standards," Judge Goldberg wrote. The court recognized that its ruling might create an "absurd result," requiring a district to pay for several years' worth of private school expenses despite being found in compliance with the IDEA. Nonetheless, the court held that the plain language of the IDEA and related policy considerations required the continued application of the stay-put provision through the end of the appeals process.

* ***The Third Circuit Court of Appeals ruled that "stay put" engages throughout the appellate process, including appeals to the Circuit Courts (6th Cir. and D.C. Cir. differ).***

* ***Court acknowledges this "absurd result," but holds that the plain language of the IDEA requires continuation of "stay put."***

74. D.S. v. Department of Education, State of Hawaii, 112 LRP 41460 (D. Hawaii 2012). In an amended version of a decision found at 112 LRP 39293, the District Court held that the Hawaii ED had to continue paying for a student's private school placement while the case was on remand. The fact that the case was not remanded on "substantive" issues had no bearing on the ED's liability under the stay-put provision.

* ***Court held that "stay put" continues even when case is remanded on non-substantive issues.***

d. <u>Miscellaneous</u>

75. H.A. v. Camden City Board of Education, 112 LRP 39294 (D.N.J. 2012). A procedural technicality shielded a New Jersey district from having to defend against the claims of a student with an unidentified disability. The student contended that the district violated the IDEA and Section 504 in the way it handled the development of her IEP. An ALJ rejected the student's claims after her attorney, despite having ample opportunity to do so, failed to comply with an order to furnish a copy an expert's report. In granting the district's motion for summary judgment when the student appealed, the District Court pointed out that the New Jersey Supreme Court has recognized an ALJ's power to impose sanctions on parties, if such a course of action does not constitute an abuse of discretion. Here, the ALJ issued an explicit pretrial order for the parties to provide copies of all exhibits before a hearing. The student's attorney failed to provide the ALJ with a copy of the expert report by an October 22 deadline, and again failed to do so on October 27 when afforded a last minute opportunity. The ALJ appropriately relied on New Jersey law when he decided that the student's attorney's failure to provide his client's expert report warranted the penalty of dismissal, the court observed. It also noted that the ALJ further found that the attorney's failure was unsupported by a good reason or excusable neglect. Finally, recognizing that the IDEA imposes strict time periods on hearing deadlines for due process petitions, the court ruled that the ALJ was not unreasonable in exercising the last resort sanction of dismissal.

* **Student's attorney who failed to comply with pretrial order of the Administrative Law Judge could be sanctioned by the ALJ.**

* ***Parents' attorney failed to comply with order to provide LEA with copy of expert's report.***

76. Yolo County Office of Education v. California Department of Education, 112 LRP 39481 (E.D. Cal. 2012). Although a California district disagreed with the state ED's finding that it failed to provide certain accommodations to a student with a hearing impairment, it could not pursue an IDEA action to challenge the ED's complaint resolution procedures. The District Court held that the IDEA does not give districts the right to sue state educational agencies for their alleged failure to comply with the statute's procedural safeguards. U.S. District Judge Morrison C. England Jr. explained that, while parents have the right to bring claims relating to the IDEA's procedural protections, that right does not extend to districts. As the 9th U.S. Circuit Court of Appeals held in *Lake Washington School District No. 414 v. Office of Superintendent of Public Instruction*, 56 IDELR 61 (9th Cir. 2011), the IDEA only allows districts to sue over matters that directly involve a student's IEP. The District Court pointed out that the district in this case was not contesting the issues raised in the parents' complaint. Rather, the district argued that the state ED exceeded its authority by issuing a decision that was not supported by the evidence. "This is exactly the type of challenge that the [9th Circuit] found was prohibited in Lake Washington," Judge England wrote. The District Court thus determined that the district did not have the right to bring an IDEA claim against the state ED. Furthermore, the court noted that the district did not file a due process complaint before bringing its claim to court. Thus, even if the district had the right to bring an IDEA action against the state ED, its failure to exhaust its administrative remedies would require dismissal. The court granted the state ED's motion to dismiss.

* ***IDEA does not give LEAs standing to sue SEAs for failure to comply with procedural requirements of the Act.***

77. M.H. v. New York City Dept. of Education, 59 IDELR 62 (2nd Cir. 2012). The amount of deference a District Court owes to an administrative decision in an IDEA action depends on the thoroughness of that decision -- at least according to the 2d Circuit. In affirming two judicial rulings involving children with autism, the 2d Circuit approved one judge's decision to defer to an IHO's decision and explained why another erred in giving the IHO's and SRO's opinions too much weight. With regard to the first case, the 2d Circuit acknowledged that courts in states with a two-tier administrative system generally must defer to the SRO's decision. However, the 2d Circuit observed that the SRO failed to address many of the issues raised in the IHO's decision. Because the SRO offered little analysis to support his reversal of the IHO's decision, stating only that the

district offered FAPE, the District Court did not err in relying on the IHO's findings and conclusions rather than those of the SRO. "This was not a situation in which the court credited the conclusions that were most consistent with its own subjective analysis," U.S. Circuit Judge Robert D. Sack wrote for the three-judge panel. "Rather, the court assessed whether the SRO's conclusions were grounded in a 'thorough and careful' analysis." The 2d Circuit thus affirmed the District Court's decision at 54 IDELR 221 that the district's failure to offer FAPE entitled the parents to reimbursement for the child's private autism program. Turning to the second case, the 2d Circuit explained that the magistrate judge erred in stating he had no choice but to adopt the decisions of the IHO and SRO. "Congress clearly intended for courts to have some independent ability to review the decisions of administrative officers," Judge Sack wrote, citing the U.S. Supreme Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (U.S. 1982). Nonetheless, the evidence supported the IHO's and SRO's conclusions that the district offered the child FAPE. The 2d Circuit thus affirmed the District Court's conclusion that the parents in that case were not entitled to reimbursement for the child's private autism program.

* ***Second Circuit Court of Appeals analyzes the amount of "due deference" to be given to opinions of administrative law judges and hearing officers in one-tier and two-tier systems***.

78. Fairfield-Suisun Unified Sch. District v. State of California Dept. of Education, 59 IDELR 106 (E.D. Cal. 2012). While it may have disagreed with the California ED's handling of a complaint that it failed to provide behavioral services to a child with an unidentified disability, the district was not entitled to take its dispute to federal court. Citing *Lake Washington School District No. 414 v. Office of Superintendent of Public Instruction*, 56 IDELR 61 (9th Cir. 2011), the District Court noted that a district has no private right under the IDEA to litigate any question aside from issues raised in a complaint filed by parents on behalf of a child. The parents filed a request for a compliance complaint investigation with the ED asserting that their child was denied behavioral supervision services. The ED initially found in the parents' favor. But following the district's request for reconsideration, it changed its position. The parents requested an additional reconsideration, and the ED again changed its position and ordered the district to provide compensatory services. The district sued the ED arguing that it exceeded its authority under state law by engaging in a second reconsideration. It sought declaratory relief to determine its rights and duties concerning state complaint review procedures, and injunctive relief requiring the ED to set aside its corrective action. The court pointed out that the district's lawsuit was

not related to the issues raised in the parent's complaint or request for reconsideration. Thus, it was not seeking a review of an administrative decision directly involving a child's right to FAPE. "Instead, [the district] challenges the [ED's] 'systemic and pervasive' issuance of second reconsideration reports," U.S. District Judge Lawrence K. Karlton wrote. Because it was seeking to dispute issues outside of the parents' complaint, it lacked standing to sue.

* ***LEAs do not have standing to sue SEAs under the IDEA for systemic procedural violations.***

* ***LEAs' right to sue under the IDEA is limited to actions directly involving a child's right to a "free appropriate public education."***

79. M.M. v. Lafayette Sch. Dist, 59 IDELR 31 (9th Cir. 2012). The fact that an ALJ had not yet conducted a hearing on a FAPE complaint when he dismissed six of the parent's 16 claims as untimely prevented the parent from challenging that ruling in federal court. Determining that the parent's lawsuit was premature, the 9th Circuit affirmed the District Court's dismissal of the parent's case reported at 54 IDELR 291. The 9th Circuit noted that the IDEA is silent as to whether a party may seek judicial review of a prehearing order before the IHO or ALJ issues a final decision. In deciding the issue of first impression, however, the 9th Circuit pointed out that the parent would not have been able to appeal a District Court's partial dismissal of his complaint until after the District Court issued a final decision. U.S. Circuit Judge Consuelo M. Callahan observed that the principles underlying the "final judgment rule" -- the promotion of judicial efficiency and avoidance of multiple lawsuits -- also applied to reviews of administrative decisions under the IDEA. "While the district court did not expressly rely on it, the rationale behind the final judgment rule seems to be the same as the rationale behind the district court's dismissal: 'Allowing [the parent] to appeal aspects of the due process proceedings in a piecemeal fashion would run counter to the IDEA and would hinder efficient resolution of the administrative proceedings,'" Judge Callahan wrote for the three-judge panel. The 9th Circuit further noted that the parent would have the opportunity to challenge the ALJ's ruling; the only consequence of the District Court's dismissal of his complaint was delayed review. The 9th Circuit thus held that a party aggrieved by a prehearing ruling or finding must wait for the final decision to seek judicial review.

* ***Ninth Circuit Court of Appeals rules that parties may not seek judicial review of an administrative law judge's preliminary order dismissing some of parent's claim.***

80. Carrie I. v. Dept. of Education, State of Hawaii, 59 IDELR 46 (D. Hawaii 2012). Even if a teenager with autism and Landau-Kleffner syndrome would have benefited from a public school placement, the Hawaii ED's failure to consider the potential harmful effects of that placement violated the IDEA. The District Court held that the ED's procedural violation, along with its failure to develop an appropriate postsecondary transition plan, required it to continue the student's private placement. Although the IEP team considered the benefits of a public school placement, most notably the opportunity to interact with nondisabled peers, it did not consider how it would address the student's behavioral problems, which included eloping, on a large high school campus situated near two major roads. The court noted that the IEP team's failure to discuss the matter impeded the parent's participation in the IEP process. Furthermore, the court pointed out that the team relied on a prior version of the IDEA when developing the student's transition plan. Instead of merely identifying the agencies responsible for providing transition services, the court explained, the ED should have conducted age-appropriate transition assessments, developed appropriate postsecondary goals, and identified the services needed to reach those goals. "The lack of assessments alone is enough to constitute a lost educational opportunity," U.S. District Judge J. Michael Seabright wrote. Moreover, because the state's vocational rehabilitation division was likely to be responsible for providing or funding the student's transition services, the ED should have invited a representative of that agency to attend the IEP meeting. Concluding that the ED's failure to comport with the IDEA's procedures resulted in a denial of FAPE, the court reversed an administrative decision in the ED's favor.

* ***ED's procedural violation, along with its failure to develop an appropriate postsecondary transition plan, required it to continue the student's private placement.***

* ***Although the IEP team considered the benefits of a public school placement, most notably the opportunity to interact with nondisabled peers, it did not consider how it would address the student's behavioral problems, which included eloping, on a large high school campus situated near two major roads***

81. Adam Wayne D. v. Beechwood Independent Sch. District, 59 IDELR 3 (6th Cir. 2012). A Kentucky district could not demonstrate that it lacked notice about an IEP challenge simply by pointing out that the parents never mentioned their son's 2004 IEP in their due process complaint. Noting that the due process complaint addressed the district's refusal to provide the fifth-grader with reading and writing services, the 6th Circuit held that the issue was properly before the IHO. The 6th Circuit acknowledged that the district was entitled to notice of all claims to be addressed in the administrative proceeding so that it would have the opportunity to prepare a defense.

However, it rejected the district's claim that the parents' due process complaint failed to provide such notice. To the contrary, the court observed, the first three lines of the due process complaint described the district's determination that the student did not have an SLD, and its subsequent refusal to provide services to address the student's significant difficulties with memory, reading, writing, and spelling. "Although the phrase '2004 IEP' is not used, it is clear from the face of the complaint that the primary concern is [the district's] failure to provide [the student] services in certain academic areas," U.S. Circuit Judge Helene N. White wrote in an unpublished decision. The 6th Circuit thus affirmed the District Court's determination that the district had notice of the IEP challenge. The 6th Circuit reversed the District Court's dismissal of the parents' IDEA and Section 504 claims, however, concluding that the District Court did not give the parties an opportunity to present evidence about the merits of those claims.

* ***Due process complaint was sufficient notice because it addressed the LEA's refusal to provide a fifth grader with reading and writing services.***

* ***Due process complaint did not have to specify which IEP was being contested when the description of the issues made clear what was being challenged.***

XII. SECTION 504/TITLE II OF THE ADA

82. **Ridley Sch. Dist. v. M.R., 112 LRP 25613 (3rd Cir. 2012).** The school district did not fail to reasonably accommodate the needs of a young girl with learning problems and severe allergies to specific foods and materials. The court found that the school district attempted to include the child in all classroom activities to the level permitted by her disability. The school district was not required to provide alternative foods for the child so long as it allowed the parent to send alternative snacks and meals to school for her. She was also appropriately included in classroom activities even when she was unable to handle the same materials as her classmates (such as pebbles and sand).

* ***LEA was not required to provide alternative food choices for a student with severe allergies to specific foods as long as it allowed the parent to send alternative foods for the child.***

83. **T.B. v. San Diego Unified Sch. Dist., 112 LRP 23919 (S.D. Cal. 2012).** There was no evidence to support the allegations that school district officials discriminated against a medically fragile student who required gastronomy-tube feeding during the school day. The parent of the student objected to the district's assignment of a non-medical personnel to provide the feedings, and to the

district's refusal to specify a particular staff member responsible for the feedings in the student's IEP. The court found that the dispute was based on a difference of opinion between the parent and the school district. However, the evidence showed that district officials had acted reasonably to provide appropriate feeding services to the student. There was no evidence that the district staff had acted with deliberate indifference or to discriminate against the student on the basis of his disability. Moreover, 95 of the 100 students in the district receiving g-tube feeding were provided this service by non-medical personnel.

* ***LEA did not discriminate against a student who required gastro-tube feeding during the school day when it assigned non-medical personnel to administer the feedings.***

* ***LEAs must review their state law to determine whether non-medical personnel may provide gastro-tube feedings.***

84. **R.K. v. Board of Education of Scott County, Kentucky, 112 LRP 41587 (6th Cir. 2012).** Dueling affidavits from a district employee and the father of a kindergartner with Type I diabetes did little to clear up a dispute as to whether a Kentucky district excluded the child from his neighborhood school on the basis of his disability. Concluding that a District Court erred in granting judgment for the district on the parents' Section 504 and Title II claims, the 6th Circuit vacated the ruling in the district's favor and remanded the case for further proceedings. The 6th Circuit noted that the parents and the district offered contradictory accounts as to how the placement decision was made. Although the district submitted an affidavit from a member of its Section 504 committee identifying the factors the committee considered when reviewing the child's placement in the fall of 2009, the affidavit did not discuss the initial placement determination in August 2009. The father's affidavit simply stated that the district informed the parents "after several calls and many meetings" that the child could only attend a school that had a full-time nurse. "[The father] provided no information about what transpired at these meetings, where they occurred, whether they were [Section] 504 meetings, or who attended these meetings," U.S. Circuit Judge Danny J. Boggs wrote in an unpublished decision. Because the record did not include any depositions, the 6th Circuit could not determine whether the district followed Section 504's placement procedures or if, as the parents claimed, it simply enforced a blanket policy of requiring children with diabetes to attend schools that had full-time nurses on staff. The 6th Circuit sent the case back to the District Court with instructions that the parties obtain information as to precisely how the placement decision was made.

* ***Sixth Circuit Court of Appeals remands case back to district court for factual determination on whether LEA maintained a blanket policy of assigning students with diabetes to schools with full-time nurses.***

85. **Patrick B. v. Paradise Protectory and Agricultural Sch. District, 112 LRP 39793 (M.D. Pa. 2012).** A Pennsylvania IEU could not avoid a Section 504

claim arising out of educators' alleged use of physical restraint to manage a second-grader's behavior simply by arguing that claims for damages require proof of intentional discrimination. Concluding that the parent alleged intentional discrimination in her complaint, the District Court denied the IEU's motion to dismiss. The court agreed with the IEU that the parent could not recover compensatory damages under Section 504 without demonstrating bad faith, gross misjudgment, or deliberate indifference to the child's needs. While the 3d Circuit has not addressed the issue, District Courts within the Circuit consistently have held that a showing of intentional discrimination is necessary to support a Section 504 claim for monetary damages. However, the court determined that the parent pleaded intentional discrimination. In her complaint, the parent alleged that educators noted at least 12 incidents of escalating behavior. She claimed that the IEU "was clearly aware" of the incidents, as well as the child's potential to cause severe injury to himself or others, but "knowingly failed" to conduct a functional behavioral assessment or develop a BIP. "[The parent] also alleges that 'All defendants acted in bad faith, used gross misjudgment, and/or were deliberately indifferent to [the child's] rights,'" U.S. District Judge Sylvia H. Rambo wrote. Because the parent sufficiently pleaded intentional discrimination, the IEU was not entitled to a dismissal of the Section 504 claims on that ground. However, the court dismissed all claims predating May 13, 2009, as untimely.

* ***Parent seeking money damages for alleged violations of Section 504 must prove that the use of physical restraint on a second-grade student was done with "bad faith, gross misjudgment, or deliberate indifference***."

86. Brown v. Sch. District of Philadelphia, 112 LRP 38796 (E.D. Pa. 2012). Without deciding whether a Pennsylvania district repeatedly failed to evaluate a teenager with ADHD, the District Court denied the district's motion to dismiss the parent's Section 504 and Title II claims. The court held that the allegations in the parent's complaint, if true, suggested that the district acted with deliberate indifference to the student's needs. The court agreed that the parent could not pursue a claim for monetary damages under Section 504 unless she alleged that the district intentionally discriminated against her son. However, the court determined that the parent pleaded intentional discrimination. According to the parent, the court observed, the district waited two years to evaluate the student for IDEA services despite having knowledge of a private ADHD diagnosis and his difficulties with learning and reading. The parent also claimed that the district failed to inform her of her procedural safeguards after it developed a Section 504 plan to address the student's behavioral issues, and that the district conditioned the development of a subsequent IEP on the parent's agreement to release any existing IDEA or Section 504 claims. "The complaint contains numerous allegations suggesting that the district had notice of [the student's] need for accommodation and that it exhibited a pattern of conduct that was more than merely negligent," U.S. District Judge Michael M. Baylson wrote. Concluding that the parent pleaded intentional discrimination, the court denied the district's motion to dismiss her claim for monetary damages.

* ***LEA waited two years to evaluate a student for IDEA services despite having knowledge of a private ADHD diagnosis and academic difficulties.***

87. M.C. v. Arlington Central Sch. District, 112 LRP 38488 (S.D.N.Y. 2012). While staff members' questioning and removal of a high school student with Asperger syndrome they believed was suicidal may have appeared harsh, it was not sufficient to support an ADA or Section 504 case. The teen's parents couldn't establish that the staff members' interrogation of their son or decision to send him to the hospital were intentionally discriminatory. One question staff members asked when they confronted the student was, "What if both of your parents were killed tomorrow?" He said he would be very sad, not suicidal. However, six administrators at the school purportedly believed the student was suicidal. A sheriff's deputy was called in, who told the student he could either go to the hospital or be arrested. The student was taken to the hospital against his parents' wishes and released the same day after he was deemed not suicidal. His parents sued the district, administrators, and other staff members for disability discrimination. To state a viable ADA claim, the court observed, the parents not only had to show the student was denied the benefits of the school's programs or otherwise discriminated against. They also had to show that the defendants acted with bad faith or gross misjudgment. First, the court pointed out that removal from school for less than a half a day does not amount to deprivation of access to school programs. But the claim also failed because even if staff members were wrong about the student's suicidal tendencies and questioned him in an inappropriate manner, there was no evidence of bad faith, gross misjudgment, or that they were hostile toward him because of his Asperger syndrome. Significantly, the parents were not asserting that administrators did not believe the student was suicidal, simply that they were incorrect. But that wasn't enough to show gross misjudgment. "In fact, if [the staff members] truly believed [the student] to be suicidal, it is hard to see how their conduct does not amount to prudent behavior," U.S. District Judge Cathy Seibel wrote. In addition, the court rejected the parents' claims that the district retaliated, reasoning that they failed link the protected conduct and alleged reprisal. Finally, because there was no evidence of "conscience-shocking" behavior, the court dismissed the parents' substantive due process claims.

* ***LEA staff was not intentionally discriminating against a student with Asperger Syndrome when they involuntarily sent him to a hospital after the student expressed suicidal ideations.***

88. I.A. v. Sequin Indep. Sch. District, 112 LRP 38486 (W.D. Texas 2012). Employees of a Texas district may have made some errors in their attempts to include a student with a mobility impairment in certain classes and activities, but those mistakes did not entitle the student's guardian to relief under Section 504 and Title II. The District Court found insufficient evidence that the employees' actions amounted to bad faith or gross misjudgment. The court acknowledged that the student declined to participate in a band concert after arriving at the

concert location and discovering the stage was not wheelchair accessible. Furthermore, the student missed a PE swimming class because the bus used to transport students to the pool did not have a wheelchair lift. However, the court observed that both incidents reflected "a negligent lack of prior planning" rather than an intentional effort to exclude the student. As for the student's exclusion from a second swimming class due to concerns about his ability to participate safely, the court explained that the district had the right to seek information about any medical issues that might affect the student's participation. The fact that the district gave the guardian a form titled "Medical Excuse from Physical Education" rather than a general medical evaluation form did not in itself establish disability discrimination. "Although mistakes may have been made, they do not rise to the level of bad faith or gross misjudgment," U.S District Judge Xavier Rodriguez wrote. The court thus granted judgment for the district on the guardian's Section 504 and Title II claims.

* ***Mistakes in accommodating a student with mobility impairments did not rise to the level of "bad faith" or "gross misjudgment."***

89. Luciano v. East Central Bd. of Cooperative Educational Svcs., 59 IDELR 37 (D. Colo. 2012). The parents of a student with severe multiple disabilities could proceed with their claims that their child suffered emotionally and physically after a Colorado district transferred her to a new school that wasn't prepared to implement her IEP. The District Court permitted the parents to go forward with their discrimination lawsuit against the district. The student's disabilities included a mobility impairment, developmental disabilities, and other physical and psychological disabilities. According to the parents, the district moved the student to a newly established special school that failed to address the student's toileting and other needs. Because it lacked accessible toilet facilities, the student had to use diapers. The district also allegedly denied the student access to a swing she used at her previous school to aid her vestibular development and access to various other services. As a result, the student regressed. The district promised to address the problems over Christmas vacation. When it did not, the parents removed the student. They filed a due process complaint, and the parties settled some of the issues. The parents then sued the district for money damages under Section 504 and the ADA. To establish monetary liability under 504 and the ADA, plaintiffs must show intentional discrimination. Showing the district was deliberately indifferent to the child's needs was one way to do that. Noting that the parents produced numerous exhibits on the issue of whether the district was deliberately indifferent, the court rejected the district's assertion that there was no evidence that it intentionally discriminated. The court also held that the parties' settlement agreement did not prevent the parents from going forward with their damages claim arising from the failure to instruct the student in communication, life skills, and music. The release in the settlement agreement specifically excluded claims for monetary relief based on physical, medical, emotional, or psychological injuries. Finally, while the parents could not seek punitive damages, they could pursue damages based on the student's emotional suffering. "[W]here intentional discrimination is shown, noneconomic compensatory damages, including damages for emotional distress, may be recovered under Section 504," U.S. District Judge R. Brooke Jackson wrote.

* ***Parents of a child with severe multiple disabilities may proceed with lawsuit seeking money damages for emotional suffering after the LEA allegedly failed to accommodate the child's disabilities and she regressed.***

90. D.H. v. Poway Unified Sch. District, 59 IDELR 39 (S.D. Cal. 2012). The District Court's previous ruling at 56 IDELR 92 that a teenager with a bilateral hearing impairment did not need computer assisted real-time captioning services to benefit from her general education placement had a domino effect on the parent's Title II claim. Noting that the district's development of an appropriate IEP toppled any related claim that the district failed to meet the student's needs, the court granted the district's motion for judgment. The court explained that a district can satisfy its FAPE obligation under Section 504 by adopting and implementing a valid IEP. Because the same analysis applies to Section 504 and Title II claims, a parent's failure to show a denial of FAPE under the IDEA defeats related claims under Section 504 and Title II. U.S. District Judge M. James Lorenz pointed out that he previously reviewed the district's offer of services, which included an FM amplification system for classroom instruction and school assemblies, a pass-around microphone during class discussions so the student could hear her peers' input, access to classmates' and teachers' lecture notes, and preferential seating away from noise, and determined that they were sufficient to provide an educational benefit. Indeed, the court previously observed that the student earned A's and B's in her general education classes with the services the district provided. "[The student] simply has not shown that the district failed to give meaningful consideration to her needs," Judge Lorenz wrote with regard to the Title II claim. The court also declined to revisit its decision on the parent's IDEA claim, determining that neither the California Education Code nor the Title II regulations required the district to adopt the student's preferred form of accommodation.

* ***LEAs can satisfy their obligation under Section 504 to provide a "free appropriate public education" by adopting and implementing a valid IEP pursuant to the IDEA.***

91. T.B. v. San Diego Unified Sch. District, 58 IDELR 278 (S.D. Cal. 2012). While a district's failure to identify a qualified individual to assist a student with G-tube feedings may have violated the IDEA, the parents could not sue for money damages under Title II or Section 504. Noting that the California district was highly responsive to the parents' accommodation requests, the District Court found no evidence of intentional discrimination. The student with autism and phenylketonuria, a metabolic disorder, required a special formula ingested through a feeding tube. The student's IEP was silent as to who would assist him with the feeding process. In practice, the district assigned the student's behavioral support specialist to that duty. An ALJ ruled the district denied the student FAPE by failing to assign an individual with medical training, as required by state law, or a trained individual supervised by a school nurse. The parents subsequently sued for discrimination, seeking compensatory damages. The District Court,

observing that this was not a case where the district ignored accommodation requests, concluded that the evidence overwhelmingly refuted the parents' claim that it intended to discriminate. "At every turn, the School District responded in good faith to [the mother's] ongoing concerns and vacillating requests," U.S. District Judge Michael M. Anello wrote. Moreover, the district did not refuse to offer a qualified individual to assist the student. It simply took an approach that differed slightly from the parents' interpretation of the statute. In addition, the district made its accommodations offer after gathering information from several qualified staff members who were managing the student's case. "The parents disagreed with the opinion, but they have no proof that the School District acted with deliberate indifference to [the student's] health and safety needs," Judge Anello wrote. Finally, the court rejected the assertion that the district singled out the student for disparate treatment based on his disability. It noted that out of 100 students in the district with G-tubes, 95 of them were also assisted by non-nurses.

* ***LEA did not intentionally discriminate against a student who required tube feeding even though it failed to provide a trained assistant to deliver feedings to the student***.