

# Due Process Decisions & Formal Complaint Reports

## Annual Review by Kansas SEAC – 4/10/18

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Federal regulations, at 34 C.F.R. 300.514(c), require that findings and decisions of due process hearings be sent to the State Advisory Panel in redacted form. The actual decisions and findings in redacted form are available on the Kansas State Department of Education (KSDE) web site, on the bottom of the special education legal page. Some of these decisions are quite lengthy. If any member of the Special Education Advisory Council (SEAC) would like a hard copy of any of these decisions, please contact Mark Ward or Laura Jurgensen and request the copies you would like.

This presentation includes a summary of all of the due process decisions rendered in the past one-year period. For your convenience, we have summarized the points we wanted to emphasize in these due process hearing decisions. We have also included selected formal complaint reports from investigations of special education complaints over the last year. Underlined text indicates the issue(s) involved, and bold text is used for emphasis. All complaint decisions are also now on the KSDE special education, legal page, web site, in redacted form. We have also included some other selected materials at the end of this document.

### **DUE PROCESS**

17DP-001 aa

This case involved a student in the first grade, who was in general education settings for approximately 120 minutes per day. He was extremely disruptive in both settings. Behaviors included leaving his seat, running around the room, banging furniture against the wall, throwing things, laying on other student's desks, knocking over room dividers, hitting and kicking other students and staff, and elopement. Frequently, classrooms had to be cleared to work with this student during meltdowns. Due to these behavior difficulties, the school proposed a full-time special day school placement. The parents refused to consent to the day school placement, and the district requested this due process hearing. The hearing officer correctly used the **Daniel R.R. standard**, adopted by the 10th United States Circuit Court of Appeals. The Daniel R.R. standard is a standard for **Least Restrictive Environment (LRE)**. It has a **two prong analysis**:

**First**, consider whether education in a regular classroom can be achieved satisfactorily with the use of supplementary aids and services. To complete the analysis of this prong, the court considers **four factors**:

(1) The **steps the school has taken** to accommodate the student in a general education classroom.

The hearing officer noted numerous attempts to provide accommodations, including revisions to the behavior intervention plan, short periods in a general education room, and a shortened school day, none of which were successful;

(2) **Comparison of the academic benefits** the student will receive in the special education classroom versus the general education classroom.

The hearing officer noted substantial testimony that the student cannot receive the education he needs in a regular education classroom, and that the day school has a therapeutic component with services provided by a school psychologist, 1 to 4 staffing, access to a sensory room, an exercise area and a structured environment, all of which would help the student be more successful academically;

(3) the **overall educational experience** in regular education, including non-academic benefits.

The hearing officer noted the student was not making progress academically or socially in either general or special education settings. Socially, other students were afraid of this student and avoided him.

(4) the **effect on the regular education classroom** of the child's presence in that classroom.

The hearing officer noted frequent disruptions in the classrooms, often making education of the other children impossible. The hearing office concluded: "Such an environment is not conducive to learning for either [the student] or the other students."

The **second prong** of the Daniel R.R. standard is whether the district is **mainstreaming the student to the maximum extent appropriate**. The hearing officer noted that the student had not been successful in any of the settings the district had tried. Accordingly, the hearing officer ruled that the day school was the least restrictive environment for this student and authorized placement at the day school.

17DP-002 bb

This case involved a 10 year-old girl with a vision impairment. The student was attending a private school. From Kindergarten through third grade, the public school transcribed the private school's non-religious, general education curriculum materials into braille. The student's **IEP** stated that the district would **provide textbooks in braille**, transcribe readers and books not available in braille at the private school, and transcribe all printed worksheets from the private school, except those of a religious nature, if requested within time periods specified in the IEP. In January of 2016, the special education director informed the parents that beginning in the 2016-2017 school year, the district would no longer braille the private school materials, but would braille the district's materials for use at the private school, if desired. The IEP team was not involved in this decision. The parents were provided with a Prior Written Notice (PWN) regarding this change 13 days later.

The parents requested a due process hearing and then later withdrew their request. On January 20, 2017, the parent initiated this hearing, alleging that the refusal to provide the private school materials in braille, as specified in the IEP, was a material change in services that required consent. The district argued that state law, in K.S.A. 72-5393, gave the district the authority to determine the site for any special education or related services provided to a child in a private school. Part of this argument was that the district was never required to provide the braille services at the private school and so the school could administratively change course any time.

Without addressing whether the change from braille the private school materials to an offer to braille public school materials for use at the private school, the hearing officer ruled in favor of the parents.

The hearing officer said that the school did not follow the proper procedures in making this change because K.S.A. 72-5393 says: "The **site** for the provision of special education services under this section for an exceptional child **shall be determined by the school district in consultation with the parent or guardian of the child and with officials of the private, nonprofit elementary or secondary school.**" The hearing officer found that the school had failed to consult with the parents or private school officials before determining the new site for braille services. The hearing officer concluded, "This Decision does not in any way attempt to contest, dispute or nullify the authority that the legislature had clearly provided to the District in having the right to choose the site for services as contained in K.S.A. 72-5393. Neither does this Decision attempt to confer an obligation on the District to braille the private school curriculum, of which the decision to do so, remains within their authority as outlined in K.S.A. 5393. The hearing officer finds that the language, as was contained in the prior IEP's provided an implication that braille the private school curriculum was part of what the parties contemplated in its drafting. This hearing officer further finds that the District had demonstrated a continued prior pattern, of in fact, providing the service. Therefore, **although the District had the right to make the decision for the site of services, it did not have unilateral authority to make a change to what it had previously been providing pursuant to an IEP, without following the proper protocols of K.S.A. 72-5393 and 72-988. Had the district properly convened an IEP meeting to consult with and make such a change, and during such meeting the District announced its decision to change the site, and the Petitioner's disagreed, then the parties may very well be receiving a different outcome but that is not the case in this instance.**"

The hearing officer ordered **that the IEP offering the braille services at the private school and for private school materials would continue to remain in effect until properly modified, and the District must provide compensation to the parents for any braille costs incurred through the date of this order.**

This was **reversed on appeal**. The review officer focused on the change that was made. The public school said it would continue to braille text material, but it would only braille its own text books. The hearing officer said this was **not a change in services, but only a change in curriculum**, which the school has authority to do outside of the IEP and that this change of curriculum was not a change in anything in the IEP. This case has now been appealed to federal court.

18EP-001 cc

This case was settled through a **mediation agreement**. The agreement included this provision:

**Dismissal of Action:** Each party's attorney shall promptly file with all courts and agencies having jurisdiction, an executed copy of this Agreement or otherwise **cause all claims, charges and matters to be dismissed with prejudice or withdrawn** and deliver, in addition, all other forms of separate written dismissal and withdrawal as may be required.

18DP-001 dd

The parent had previously filed numerous complaints regarding two incidents of seclusion of her son at school, including complaints to the Department for Children and Families (DCF), the police, the Office for Civil Rights (OCR), and the Kansas State Department of Education. This request for due process came in just under the two-year timeline for filing a due process hearing. The student had not attended school in the district for over one year. The parent did not want to disclose the location of the student to the district and so filed this notice of due process without providing the name of the child, the address of the residence of the child and the name of the school the child was attending. The hearing office **dismissed** the case, finding that the request for due process was insufficient as a matter of law because it did not provide this information. The parent appealed but the **review officer dismissed the appeal** because it was not filed within the time period specified by law. This is now on appeal in federal court.

18DP-002 ee

This case involved a third grade student with disruptive behaviors, such as screaming, running round, clearing of tables with the sweep of an arm, kicking other students, taking things away from other students, throwing toys on the floor or at other students, destroying other students' property or projects, hitting, kicking, biting, pulling hair, choking, eloping, and head banging. He was frequently restrained, and placed in seclusion and in in-school suspension. He was placed in a self-contained room during his Kindergarten year. His first grade year was much better. Second grade, however, was not successful. Seclusion and restraints and in-school suspensions mounted. During the third grade year, the parents consented to placement in a special day school. In this hearing the parents alleged that the district's failure to identify the child under the category of autism denied a FAPE to the child because without that identified category, the student could not receive appropriate services. The child had been diagnosed with autism by the child's doctor, but the **parents would not consent to a reevaluation.** The parents requested that the hearing officer authorize a residential placement. The **hearing officer ruled the child was not denied FAPE because the district created an IEP with appropriate goals and appropriate services, based on the needs of the student, not on the category of disability.** The hearing officer also said that **because the parents did not consent to a reevaluation offered by the district, the child's parents were estopped from arguing that an inaccurate category of disability was a denial of FAPE.** This hearing was very lengthy. It covered **nine days, twenty seven witnesses, and 2,253 pages of transcript.** It was **appealed to a state review officer.** In a three-page decision, the review officer affirmed the hearing officer on all issues. The review officer noted the **hearing officer correctly ruled that when the parents refused to consent to the district's request to re-evaluate the student, the parents were estopped from arguing that the student's designated disability denied him FAPE.** The hearing officer continued, saying "**the label is immaterial so long as the services needed for [the student's] individual needs are being addressed by the terms of the IEP.**" [EDITORS NOTE: Federal Regulations, at **34 C.F.R. 300.111(d)**, addressing "child find," state that the **IDEA does not require children to be classified by their disability as long as all eligible children are regarded as being a child with a disability, although an IDEA category does need to be reported**) The review officer also noted that **the student is functioning at or near grade level academically and continues to make academic progress, although that progress may not be as much as the parents prefer.**

## FORMAL COMPLAINTS:

17FC-001 ff

This complaint involved a case in which there was an appeal of a due process hearing decision. The complaint alleged that the district was not maintaining the "stay put" placement. The district had sent the parents a letter stating that the student was being moved to another attendance center, located in a different school building and would receive services in a "Functional Applied Academics" classroom instead of the "interrelated classroom" where she had been receiving services. The investigator made these findings:

1. The regulation regarding "stay put" is **34 C.F.R. 300.518**. It says, unless the state or LEA and the parents agree otherwise, during the pendency of any administrative or judicial proceeding regarding special education, the child must remain in his or her current educational placement.
2. The term "current educational placement" is not defined by this regulation. But, in Erickson v. Albuquerque Public Schools, 199 F.3d 1116 (10th Cir. 1999), the United States Circuit Court of Appeals for the Tenth Circuit said that, for "stay put" purposes, an **educational placement is changed when a fundamental change in, or elimination of, a basic element of the educational program has occurred.** Thus, for "stay put" purposes, the term "**current educational placement**" **refers to both the educational setting and the educational services the child is receiving.** However, this court said there **remains some flexibility.** In this case, a transfer student's IEP specified that the student was to receive two hours of occupational therapy (OT) per week. One of those hours each week consisted of hippotherapy (occupational therapy involving horses). The parents agreed to a proposal reducing OT to one hour per week, but disagreed with a proposal to eliminate hippotherapy. The district eliminated hippotherapy and proposed to provide traditional OT one hour per week. The parents requested a due process hearing, and alleged that hippotherapy was the "stay put" therapy because it was the therapy actually being provided when the parents requested due process. The Tenth Circuit disagreed, saying "**stay put**" **requires that the IEP in place at the time must continue to operate throughout the litigation**, but the change from hippotherapy to traditional methods of OT did not contravene the IEP. The **IEP only stated that the student was to receive OT, and did not specify the modality or method of the OT** the student was to receive. **The key to "stay put" is the IEP itself.**
3. With regard to the **change in the kind of service** this child was to receive, the investigator said: "The "stay put" **IEP for this student does not specify a particular type of classroom.** Where it says the student will be in a general education setting, it simply says the student will receive services "in a **regular education classroom,**" and where it says the student will be in a special education setting, it simply says services will be provided in "**a special education classroom.**" A special education classroom includes both an interrelated room and a functional applied academics classroom. Nothing in this student's IEP indicates that the student needs to be educated in an interrelated classroom. Therefore, the **move from an interrelated room to a functional applied academics classroom is a change only in the type of special education room. Instructional methodology will likely change as a result of the move to a different type of room, but the student will continue to receive the same amount of special education services and will work toward attaining the same goals.** In other words, there may well be a change in educational modality, but **that change does not contravene, in any manner, the content of this student's IEP.** Accordingly, this change from an interrelated classroom to a functional applied academic classroom is not a violation of the "stay put" requirement."

4. With regard to the change in **attendance center**, this was not a change in placement. And, the investigator added that the **change from an interrelated room to a functional applied academics room** was also not a change in placement. The Office of Special Education Programs (OSEP) has offered this succinct explanation of the difference between the terms "location" and "placement:"

**Historically we have referred to 'placement' as points along the continuum of placement options available for a child with a disability and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services.**  
Letter to Trigg, 50 IDELR 48 (OSEP 2007)

That is, **placement refers to the extent to which a child with a disability is educated in an environment with children who do not have a disability.** Thus, the **least restrictive environment (or placement) starts with general education classroom** where children with disabilities are fully integrated with children who do not have disabilities. The **next option** on the continuum of placement options is the **special education classroom**, regardless of the type of classroom, or the name it is given. Children with disabilities in a variety of special education classrooms have the same access to children who do not have disabilities, through attending some general education classrooms, or association with general education students at lunch, recess, etc. The **continuum of placement options** to which OSEP referred is specified in federal regulations at 34 C.F.R. 300.115, and includes "**regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions.** Each of these points along the continuum become more restrictive placements because each affords fewer opportunities for the student to be with the general education population [Taken from Wilson v. Fairfax County Sch. Bd., 104 LRP 30556 (4<sup>th</sup> Cir. 2004)]. There **could be other points** along the continuum if a school fashions a more restrictive setting. An example would be a **self-contained room**, where a student does not leave the room during the school day. **However, in this complaint, this student still had the same access to general education students in the functional applied academics classroom as she had in the interrelated room. She continued to be in a general education setting for opening, music, physical education, adapted physical education, recess, lunch, library, field trips, assemblies, centers/guided reading and independent reading work. She is on exactly the same point along the continuum of placement options in either setting.** The investigator also noted that, In Letter to Trigg, OSEP summed up the issue of a district's authority to change a student's "location" as opposed to "placement" by stating:

A public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

This is exactly what the school district did in this case. The change of attendance center, and the change to a different type of special education classroom, was not made by this student's IEP team, and did not change this student's IEP. Rather, **these were administrative decisions**, and were made to assign this student to a building and to a classroom where the school district had the resources to implement the student's IEP. School administration has this authority. **Neither change was a change of placement and neither change contravened the student's "stay put" IEP. Had the IEP stated otherwise on either of these issues, however, the outcome would have been different.**

In a separate allegation in this complaint, the parents also alleged that the "stay put" provision was being violated because the district held an annual IEP review meeting and sent the parents a prior written notice (PWN) proposing a number of changes. The investigator said the district had an on-going obligation to conduct an annual IEP meeting, even though "stay put" was in place. In Letter to Watson, 48 IDELR 284 (OSEP 2007), OSEP confirmed this duty, stating that the **annual IEP review must be conducted even when due process proceedings are pending and the student's placement is in "stay put."** "Stay put" is, after all, subject to the exception that changes to the "stay put" IEP may be made if both sides agree to the change. The district cannot know if there will be some agreement to change the IEP if it does not conduct the annual review. The investigator also found that none of the proposed changes have been implemented, and the district did not intend to implement any of the proposed changes unless the parent agreed by providing written consent. To assure that no changes were made to the "stay put" IEP, the district printed on the front page of the "stay put" IEP, in capital letters: "STAY PUT IEP." In addition, the district has put the same statement in its electronic version of the "stay put" IEP in **WebKIDSS**, and has added a statement that the **"IEP has been locked."**

The investigator concluded that no violations of the IDEA had occurred. The parent appealed the decision of the investigator and the ECSETS Appeal Committee upheld all parts of the decision.

18FC-001 gg

The parents alleged that the student's teacher could not implement the IEP because the teacher was not sufficiently trained and did not have sufficient experience to provide reading instruction in an evidence-based methodology preferred by the parents (Orton-Gillingham). The investigator cited the Every Student Succeeds Act (ESSA), Sec. 9214(d), which amended the IDEA to say that special education teachers must have obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator), or passed the State special education teacher licensing examination, and holds a **license to teach in the State as a special education teacher**, and K.S.A. 72-962(j), which defines the term "special teacher" as a "person, employed by or under contract with a school district or a state institution to provide special education or related services, who is: (1) Qualified to provide special education or related services to exceptional children as determined pursuant to standards established by the state board..." State Board teacher standards are met for teachers of children with a disability by holding an endorsement in either Adaptive Special Education or Functional Special Education [See Kansas Licensed Personnel Guide, p. 31]. Thus, for any teacher holding such a special education endorsement, there is a presumption of qualification to provide special education services.

However, the investigator also cited federal regulations at 34 C.F.R. 300.156, which says that personnel necessary to carry out the purposes of Part B must be **"appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities."** In this case, the investigator stated that the teacher was qualified because the teacher **was licensed** as a special education teacher, has **had specific training** focused on research-based reading methodology and instruction, including a course on Literacy Intervention and a two-day, district-sponsored training on Orton-Gillingham. With regard to **instructional methodology**, the investigator noted that the United States

Supreme Court has said that **as long as a student is making appropriate progress**, decisions regarding instructional methodologies are best **left to school officials**. Hendrick Hudson Sch. Dist. Bd. Of Ed. v. Rowley, 458

18FC-002 hh

This case was filed to challenge a district's refusal to identify a child as gifted. The eligibility report stated that the child was not eligible under the gifted category because the student did not rank in the 97th percentile in an intelligence test. The parent alleged that the district denied eligibility based on a single assessment as the sole criterion. The investigator determined that the eligibility determination was proper and an appeal committee agreed. The ECSETS **Eligibility Indicator's guide document says the eligibility team must consider and have data to support at least 1 indicator from each of the listed categories**: (1) performance, or potential for performance, at significantly higher levels of accomplishment in one or more academic fields (achievement or potential for achievement); (2) evidence that the performance or potential for performance at significantly higher levels is due to intellectual ability; and (3) evidence that the performance or potential for performance at significantly higher levels is compared to other students of similar age, experience, and environment.

The investigator determined that the eligibility report documented that the district had considered data in each of the categories. **In category two, the district used only the listed indicator of having a composite rank of 97th percentile on a standardized test of intellectual ability**. That is allowed, as the ECSETS Eligibility Indicators guide says the district must use at least 1 indicator from each category. In this case the student did not meet the one indicator the district chose to use in category two, and the team determined the student was not eligible under the gifted category. However, both the investigator and appeal committee agreed that, although the refusal to identify was based on that single indicator, it was not the only assessment or criterion used by the district in evaluating the student. First, the school used both the Wechsler Intelligence Scale for Children and the Woodcock Johnson Test of Cognitive Ability for category 2, second, the district used Measures of Academic Progress (MAP) testing for consideration of category 1, and third, the district used coursework analysis for consideration under category 3. To avoid this kind of complaint, or misunderstanding, it might be advisable for a district to select more than one indicator in each category. Noteworthy, is that although an Eligibility Report was completed, the **school district did not provide the parents with a Prior Written Notice of the refusal to identify the child**. The investigator said this lapse was a violation of law. Schools must provide a Prior Written Notice anytime it refuses any proposal regarding identification, evaluation, placement, or FAPE. When providing this notice refusing to identify a child, as well as in the eligibility report, it is advisable to clearly state the various criteria that were considered in making the decision (especially if the refusal is based on one indicator in one category).

18FC-003 ii

Parents gave consent for an initial evaluation on September 6, 2016. An eligibility meeting was scheduled for December 7, within the 60 school-day timeline. Parents called to cancel that meeting. Another meeting was scheduled for December 12, but the parents could not attend on that date. The parents stated they would like to meet after Christmas break and the meeting was rescheduled for January 17, 2017 (77 school days after consent was received). The parents filed this complaint alleging a

violation of the timeline for completing an evaluation. The investigator said Kansas has established a 60 school-day timeline starting on the date consent is received, with only three exceptions:

1. The parent of the child repeatedly fails or refuses to produce the child for the evaluation; or,
2. If the child enrolls in a new district after the evaluation has begun and before determination of eligibility. However, the new district is required to make sufficient progress to ensure a prompt completion of the evaluation, and the parent and the school district must agree to a specific timeline for completion; or
3. If the parent and the school agree in writing to extend the timeline (34 C.F.R. 300.301). A violation of law was substantiated.

Since none of these exceptions applied, a violation was substantiated.

In another allegation, on September of 2017, a special education teacher proposed pulling the student out of general education English and Math classes to receive more support in the interrelated classroom. The teacher planned to make this proposal at an IEP meeting but went ahead with the changes because she wanted to try the change for a couple of weeks to see if it would work before attempting to change the IEP. No agreement of the team, no notice, and no consent were obtained before making these changes. A violation of law was substantiated.

18FC-004 jj

This complaint involved a student with Hunter's Syndrome, a very rare genetic disorder resulting in multiple physical deficiencies. The student's IEP required licensed nursing services at all times, throughout the school day. Due to occurrences in which a nurse was not available, the parents requested a due process hearing on November 18, 2016. The issues were resolved on December 19, 2016, through a mediation agreement. The agreement stated that if, on any day, a nurse was not available, the Cooperative would use its best efforts to find a teacher or para to provide homebound services for one hour. If it could not find a teacher or para, it would provide an additional hour of instruction at another time.

On the day before school was to start, August 16, 2017, the nurse assigned to this student resigned. That left the prospect of homebound services for an extended time. The parents filed this complaint stating that circumstances had changed, the student no longer needed a nurse level of service and the district should amend the IEP to use a regular teacher or para, supervised by the school nurse. **The parents further said they had entered into a mediation agreement they did not like, knowing at the next IEP meeting they would be able to discuss changes to nursing support. The school district countered that there was a written agreement that was enforceable in court, and they wished to enforce the agreement.**

The investigator noted that **federal regulations authorized districts and parents to enter into mediation agreements, and that those agreements are enforceable in court.** The investigator also noted federal regulation 34 C.F.R. 300.537, which says " notwithstanding the regulations which provide for judicial enforcement of written agreements reached as a result of mediation or a due process

resolution meeting, there is nothing that prevents a state department of education from using other mechanisms to seek enforcement of such agreements, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States." The investigator, however, noted that the state of **Kansas has not established any other mechanism for enforcement of these kinds of agreements.** Accordingly, **the investigator found: (1) the IEP team does not have authority to override these kinds of agreements; (2) the investigator did not have jurisdiction to make a decision in this dispute; and (3) any challenges to the agreement must be directed to a court.** In making this decision, the investigator cited The United States Circuit Court of Appeals for the 3rd Circuit in Ballard v. Philadelphia Sch. Dist., 108 LRP 22321, 276 F. App'x 184 (3<sup>rd</sup> Cir. 2008) where a parent claimed her settlement agreement should be voided because it denied her child a FAPE. The United States Circuit Court of Appeals said: "The fact that Ms. Ballard entered into a settlement agreement which she now contends falls short of providing her daughter with a FAPE, does not inherently violate law or public policy. Parties routinely enter into agreements to resolve litigation. An agreement is not void because a party settled for less than s/he later believes the law provides."

Also see, Foster v. Board of Education of the City of Chicago, 69 IDELR 205 (7th Cir. 2017) where a **parent's attorney signed a settlement agreement and the parent later said she had not authorized the attorney to sign.** The court noted that, at the hearing, the parent had admitted that she orally settled it. The court said that admission was a **valid oral agreement**, clarifying that: "Even if she believed that she had other claims she could bring against the defendants, Foster's subjective intent is irrelevant as long as her objective conduct reflected an intent to be bound by the agreement. The court held the agreement was enforceable. Also see, F.H. v. Memphis City Schools, 764 F.3d 638, 64 IDELR (6th Cir. 2014), saying that even though the **parties did not sign the resolution session agreement until after the resolution session** was conducted, the agreement is still enforceable in court and the action for breach of contract may go directly to court, and is **not subject to the IDEA exhaustion requirement.** In another case, Wellman v. Butler Area School District, 71 IDELR 51 (3rd Cir. 2017), the court said that when a **settlement agreement**, signed by a parent, **releases** a school district from "**all rights, claims, causes of action, and damages of any nature...**" which could have been pursued pursuant to IDEA, the ADA, or any other Federal or State statute...", the parents have **precluded both any action in court or in an administrative hearing because the parents have no claims to make in either venue.** Thus, there is **no jurisdiction for a special education hearing officer to hear such a case.**

18FC-005 kk

This was a systemic complaint presenting two allegations with eight sub-issues.

The first issue was that IEP services were not being provided consistently or with a high level of fidelity because district-level decision-making has undermined school level professionals' ability to perform their duties. Sub-issues included: (a) IEPs not being implemented because of understaffing - Substantiated; (b) No services were provided in several elementary buildings for the first three to four weeks of the school year - Substantiated; (c) Secondary student in the therapeutic day program are not receiving instruction from teachers who are certified in the subject area - Substantiated; (d) Some staff identified as behavioral specialists do not have the appropriate degrees or training to support their work in those positions - Not Substantiated; (e) Students who transfer into the district often experience a

significant lag between their first day at school and the onset of services - Not Substantiated; and (f) High School Gifted teachers have unmanageably large caseloads, denying FAPE to gifted students - Not Substantiated.

The second allegation was that the district allocates resources in inequitable ways, advantaging families with more resources and capital and disadvantaging families with fewer resources. The sub-issues were: (1) The percentage of students identified with disabilities is substantially below the state average and the percentage identified as gifted is significantly above state averages, so students with disabilities are not getting services and gifted services are being provided to students who do not need them - Not Substantiated; and (2) Support services such as social work services, art therapy, music therapy, functional physical education, occupational therapy, speech therapy, etc. are minimally specified in all IEPs, and they are disproportionately provided to students from resource-rich families - Not Substantiated.

18FC-006 mm

In this complaint, a unidentified 1st grade student was enrolled for regular classes for half a day and in a therapeutic program operated by a community mental health center for the other half of each school-day. He had been in a general education intervention (GEI) program for thirteen months when the parents filed this complaint alleging the school had failed its child find obligation by not evaluating the student, and violating his right to FAPE by frequently calling the parent to pick up the student due to behavior problems. The student had been diagnosed with multiple disabilities, and by March 2017 received a report from the GEI team indicating he had **missed an indeterminate number of school days due to the parent being called at 9 a.m. to come and get him**. The **school's attendance system did not record all of these days as days of suspension**. The GEI report also noted that the student's behavior had been "a concern all year long." The report stated the Behavior Chart did not work with the student because when he got a negative he would tear up the chart. He had been unable to reach a goal of obtaining two smiley faces, and was involved in a number of violent acts toward other students. The **investigator determined the district had "ample information" that this student had a disability and was in need of special education as of the March 2017 GEI report, that the district should have conducted an evaluation at that time, and that subsequent disciplinary removals were in excess of 10 school days**. The district appealed.

The **Appeal Committee agreed with the investigator**. The Committee cited state regulation at K.A.R. 91-40-7, which states, in part, that **a district may refer a child for an initial evaluation when " School personnel have data-based documentation indicating that general education interventions and strategies would be inadequate to address the areas of concern for the child."** However, the Committee stated that **general education interventions may not interfere with the district's legal "child find" obligation**. That obligation requires districts to take affirmative actions to ensure that all children with disabilities who reside in the district are identified, located and evaluated in a timely manner. The Committee said "There is **no definitive line** for judging the exact time when general education interventions should give way to a special education evaluation, and ECSETS is reluctant to impose its judgment over the judgment of the education professionals who are actually working with an individual child. In this case, however, the Committee believes the **district unreasonably delayed beginning evaluation procedures for this student.**"

In its appeal, the district stated that the investigator did not talk to all of the school personnel who were involved with the student, and who had information of which the investigator may not have been aware. To this statement, the Committee stated " That may well be. However, as in any investigation, **if the district wishes an investigator to have particular information, it must deliver that information to the investigator.** The Committee is aware that this complaint came just before the holiday break, but if the district believed members of the GEI team had critical information, the district should have made sure those members made contact with the investigator to provide that information."

With regard to the allegations related to discipline, the Appeal Committee said "**Once a child has been referred for an evaluation, or, as in this case, should have been referred for an evaluation, the parent may assert any of the protections of special education law.** In its appeal, the district argues that the investigator incorrectly relied "more on the parent's memory and recollections of situations rather than the documentation provided by the school regarding absences." The Committee notes, however, on page 10 of the report, the investigator states that she cannot rely on the district's documentation because the district's own personnel stated that the information in Power School was inaccurate. From that, the investigator found that it was impossible to ascertain the dates the student was actually sent home early by school staff. It is the district that has the duty to keep accurate records, not the parent. The **district cannot produce inaccurate records and expect the investigator to give deference to those records.** In any event, the investigator determined that the more credible information regarding removals was the information provided by the parent and school staff. The Committee sees no reason to overturn that kind of credibility determination made by the person who conducted the investigation."

The Appeal Committee added: "**when a parent is called and asked to come to school to pick up their child, and to take him or her home due to disciplinary or behavior reasons, that is a suspension** (See Federal Register, Appendix A, Q. 38, March 12, 1999, p. 12479). The Committee encourages district staff to be transparent with parents when their child is exhibiting challenging behavior at school. However, district staff should be careful not to imply through these communications that the parent should consider picking up their child due to the child's behavior. Blurring the lines so that parents and district staff are not clear on what constitutes a disciplinary removal should be avoided."

The Appeal Committee sustained the investigator's conclusions on both issues.

18FC-007 nn

This complaint was filed by a non-resident student against the virtual school the student was attending. The investigator did not substantiate allegations that the virtual school was not providing the services in the student's IEP. The district stipulated that the IEP did not describe how the child's progress toward meeting IEP goals would be measured and that progress was not reported to parents at the times specified in the IEP.

Cases:

**Six month review of FAPE decisions after the Supreme Court ruling in Andrew F. \_oo**

Dr. Perry Zirkel, Professor Emeritus, Leigh University looked at 34 cases where FAPE was the issue. Of those 34 cases, 32 were upheld. One was remanded back for further consideration, and one was reversed, in favor of the school district. Dr. Zirkel commented on a recent article calling the Andrew F. decision a "Game-changer," as being "hyperbole."

Andrew F. v. Douglas County School District RE 1, 71 IDELR 144 (2018)

\*The Supreme Court remanded this case back to the 10th Circuit and the 10th Circuit remanded back to the original district court judge. On remand, the judge reversed his judgment and found in favor of the parents. This litigation began in 2010. The judge awarded private school tuition reimbursement and reasonable attorney fees. The judge said he relied on the 10th Circuit's "more than de minimis" standard in his original ruling. In applying the higher standard set by the Supreme Court, the judge said: **"the Supreme Court was clear that every child, including Petitioner, should have the chance to meet challenging objectives. In this case, Petitioner's past educational and functional progress -- as evidenced by the changes to his yearly IEPs after second grade -- was minimal at best. Those changes consisted of only updates and minor or slight increases in the objectives, or carrying over the same goals from year to year, or abandonment if they could not be meet. The April 2010 IEP was clearly just a continuation of the District's educational plan that had previously only resulted in minimal academic and functional progress."** [EDITOR'S NOTE: This does not appear to meet even the more than de minimus standard]. The judge was also persuaded by the district's failure to include a behavior intervention plan (BIP) in the student's IEP, saying, **"The District's inability to develop a formal plan or properly address Plaintiff's behaviors that had clearly disrupted his access to educational progress starting in his second grade year does, under the new standard articulated by the Supreme Court in this case, impact the assessment of whether the educational program it offered to Petitioner was or was not reasonably calculated to enable him to make progress appropriate in light of his circumstances. The District's inability to properly address Petitioner's behaviors that, in turn, negatively impacted his ability to make progress on his educational and functional goals, also cuts against the reasonableness of the April 2010 IEP."**

M.G. v. Williamson County Schools, 71 IDELR 102 (6<sup>th</sup> Cir. 2018) pp

Another Circuit recently agreed with the 7<sup>th</sup> Circuit in saying a doctor cannot prescribe special education. The court cited a district court decision with approval, saying "Nothing in the statute or regulations requires the [IEP] team to adopt the recommendation of a student's private physician or psychologist." Also see, C.D. v. Marshall Joint Sch. Dist, 54 IDELR 307 (7<sup>th</sup> Cir. 2010), With regard to **eligibility, a doctor's opinion is something which an eligibility team must consider, but is not required to adopt**. The court said "a physician cannot simply prescribe special education, rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local educational agency. The court added that the law does not mandate or even suggest that substantial weight be given to a physician's opinion.

This case addressed the situation where a parent requested that a new IEP be developed, even though there were no current plans to enroll the child. In this case, the student stopped attending school and an IEP in effect until February was not reviewed. The following August, the parents indicated they were not going to send their child to school, but wanted a new IEP. The school responded by saying it would develop an IEP if the student enrolled. The court agreed with other court decisions it cited, that the **receipt of FAPE is predicated on enrollment, but the offer of FAPE is not**. The court cited the requirement to have an IEP in effect at the beginning of each school year. The court said this **school had an obligation to offer the student a FAPE in August, upon request by the parent**. The court added that this was **not merely a procedural violation**, even if the student did not ultimately enroll, by stating "**An educational opportunity is lost where, absent the error, there is a strong likelihood that alternative educational possibilities for the student would have been better considered**. Because Deer Valley provided Parents with no offer of an IEP to consider against alternative possibilities, the Court finds that Deer Valley's procedural error resulted in the loss of an educational opportunity and denied Student a FAPE (citations omitted)." Also see, Woods v. Northport Public School, 59 IDELR 64 (6<sup>th</sup> Cir. 2012) when a student is no longer enrolled at a school, it is **acceptable to condition the provision of FAPE on re-enrollment**. However, the **"availability" of FAPE is not conditioned on enrollment**. Rather, the "availability" of FAPE is conditioned on residency. Therefore, **a district may not require a student to re-enroll in order to receive a re-evaluation or to receive an amended IEP**. The court said "To hold otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights." Also see, Letter to Goldman, 53 IDELR 97 (OSEP 2009), **IEPs do not expire**. Once identified, a child remains a child with a disability until the child ages out, graduates with a regular education diploma, is determined to no longer be eligible through an evaluation or moves to another state (a later regulation added revocation of consent). So, a child who has an IEP within a state and then attends a private school or home school, even for a lengthy time, and then reenrolls in a public school in the same state, has a right to a FAPE. If the child's IEP is over one year old, the **school must conduct the annual review of the IEP**. The **LEA is required to conduct a re-evaluation of parentally placed private school children every three years** (with parent consent). If a re-evaluation has not been completed within the past three years, and the child re-enrolls in the public school, the LEA must conduct a re-evaluation (with parent consent or not, if the parent and the LEA agree that a re-evaluation is not needed).

This case dealt with a student with autism receiving 1:1 ABA services in a private school who enrolled in a public school. The public school refused to put 1:1 ABA services in the IEP. This court acknowledged that it should avoid impermissibly meddling in questions of methodology, but said where, as in this case, **all of the evaluative materials supported a 1:1 ABA program, and no evaluative materials suggested otherwise**, the school was required to, at minimum, require some level of ABA support in a 1:1 classroom, to develop an IEP that is reasonably calculated to provide educational benefit.

And see, N.B and C.B., ex rel, H.B. v. New York City Department of Education, 16-3652-cv, 70 IDELR 245 (2nd Cir. 2017), saying even when a Prior Written Notice and IEP goals imply that a specific methodology

will be used, that methodology is not required unless the IEP, or IEP: goals, specifically mandate the use of a particular methodology, or that a particular method of instruction is the only means of achieving the level of progress required by a FAPE. The court also acknowledged its obligation to deference to the expertise of administrative hearing officers.

Board of Education of Albuquerque Public Schools v. Maez, 70 IDELR 157 (D. N.M. 2017) ss

In a case where a student had both autism and significant cognitive disabilities, the court reversed a hearing officer decision that the student had been denied FAPE because the school had not adopted the ABA method the parents had performed in their home.

Progress included a **focus on basic skills**, such as being able to sit and work for 30 to 45 minutes, using the Picture Exchange Communication System to communicate, and learning his visual schedule, all of which he was not previously able to do.

The parent alleged that the district had low expectations and the **IEP goals were not appropriately ambitious**. The court ruled, however, that the student made progress that was meaningful in view of his combination of disabilities

The court cited Andrew in saying "Benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable at the other end, with infinite variations in between." The court said the student's "IEP was appropriately ambitious in light of his unique challenges."

"Moreover, **underlying this entire dispute is a reality that the Court cannot ignore**: Parents withdrew M.M. from school in the middle of the school year, well-before anyone could evaluate if M.M. met his IEP goals given the full year's opportunity in the ISP classroom." The court reasoned that the parents had not given the school "a chance to complete the educational programming it developed for M.M."

\* Judges and hearing officers are listening and thinking about reasonableness.

\*Not a significantly different standard. Not diminimus, but appropriate

J.P. v. City of New York Dept. of Ed., 71 IDELR 77 (2d Cir. December 19, 2017) tt

The parents alleged that the IEP team pre-determined the child's placement. The court said **parents are denied meaningful participation when the school district lacks an "open mind"** as to the contents of a child's IEP. However, in this case, the court said **the parents failed to make this showing because the record showed the IEP team heard the objections of the parents, considered materials they submitted, and convened a second meeting to address their objections and explain its reasoning, and the parents fully participated in the meetings**. Also see, Also see Nack v. Orange City Sch. Dist., 106 LRP 44290 (6<sup>th</sup> Cir. 2006), adding that **predetermination is not synonymous with preparation** and that the school may **draft an IEP in advance** as long as they are willing to listen to the parents and the parents have the opportunity to make objections and suggestions. And see, T.P. v. Mamaroneck Union Free Sch. Dist., 51 IDELR 176 (2<sup>nd</sup> Cir. 2009), school personnel may **meet and discuss potential services and placements in advance of an IEP meeting** so long as they arrive at the IEP meeting with an **open mind**. This preparation option also is in the **federal regulations, at 34 C.F.R. 300.501(b)(3)**. And see, T.W. v. USD No. 259, 43 IDELR 187 (10<sup>th</sup> Cir. 2005), which said: "*Certainly, it is improper for an IEP team to predetermine a child's placement, and then develop an IEP to justify that decision. See Spielberg ex rel. Spielberg v. Henrico County Pub. Sch., 853 F.2d 256, 259 (4th Cir. 1988). This does not mean, however,*

*that district personnel should arrive at the IEP meeting pretending to have no idea whatsoever of what an appropriate placement might be. "Spielberg makes clear that school officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind."*

The parents also argued that when the IEP team added significantly more services in the Kindergarten IEP, as opposed to the pre-school IEP, it was an admission by the district that the pre-school IEP was inadequate. The 2d Circuit said this: " We also reject the parents' contention that the District Court should have considered IEPs prepared for future school years as evidence that the 2013-2014 IEP was substantively inadequate. **"The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials."** *Andrew F.*, 137 S. Ct. at 999 (emphasis added). The District Court did not err in concluding that **subsequent IEPs had limited probative value in assessing whether, at the time the 2013-2014 IEP was prepared, school officials had a reasonable basis to conclude that the IEP was substantively adequate.**

Lagervall v Missoula County Public Schools, 117 LRP 3476 (D. Montana 2017) uu

School officials informed a parent in writing that the parent was not permitted on school premises unless he notified the school he wanted to come to the school and obtained permission to do so. This ban was due to disruptive and aggressive behaviors with staff members at the school. The parent sued under the ADA, alleging: (1) discrimination; (2) retaliation; and (3) a violation of the "effective communication" requirements of the ADA. The court granted summary judgement in favor of the school because the letter did not exclude the parent from activities, programs, or services, it only required the parent to get permission, and, **to the extent any discrimination or exclusion or discrimination did occur, it was due to the parent's failure to comply with school policy and his aggressive and disruptive actions while previously on the premises, and was not due to any disability of the parent.** The court also ruled this action by the school was **not retaliation because it was not imposed on the parent as the result of participation in a protected activity. Rather the action was imposed because of the parent's intimidating, aggressive, disruptive and angry behavior.** The court also said the action was **not in violation of the "effective communication" requirement because this was not a situation where a school district refused to make accommodations for a disability so as to make communications with him effective.** The court also noted that when the parent sought permission to come to school, he was permitted to enter. And see, H.C. and R.D.C. v. Fleming County Kentucky Board of Education, 70 IDELR 224 (E.D. Ken. 2017) where the **school barred a parent from visiting school property without prior approval shortly after the parent requested a 504 due process hearing.** When the parent ignored the ban, the school filed a criminal trespass complaint. The parent filed this action claiming the requirement was **retaliation** for her participation in a protected activity. The court said all of the **4 elements of retaliation:** (1) the parent had engaged in a **protected activity** (requesting a hearing); (2) the **district was aware** of the protected activity; (3) the district took an **adverse action** against the parent; (4) there is a **causal connection between the protected activity and the adverse action** (temporal proximity is a relevant consideration). When all elements are in existence, the burden shifts to the school district to show by a preponderance of the evidence, that there was a **legitimate, non-discriminatory reason for the adverse action.** In this case, the court said the school easily carried that burden with evidence of very aggressive behavior and frequent unpleasant encounters between the parent and school personnel.

OCR/OSEP/FPCO

Letter to Anonymous, 20 FAB 43 (FPCO 2017) ww

This was a complaint to the Family Policy Compliance Office (FPCO) in which a parent alleged that a teacher openly discussed a disciplinary situation involving a student. This complaint was dismissed by FPCO because the disclosure was a disclosure of information from a source other than education records. As indicated in previous letters, the FPCO said "**FERPA applies to the disclosure of tangible records and of information derived from tangible records**. FERPA does not protect the confidentiality of information in general, and, therefore, **does not apply to the disclosure of information derived from a source other than education records, even if education records exist which contain that information**. As a general rule, information that is obtained through personal knowledge or observation, and not from an education record, is not protected from disclosure under FERPA." However, the FPCO added this limitation to the general rule: "However, this **general rule does not necessarily apply where** the individual who discloses information about a student based on personal knowledge or observation had an **official role in making a determination that generated a protected education record**. For example, under FERPA a **teacher may not disclose a grade that the teacher issued to a student merely because the teacher has personal knowledge of the grade**. Similarly, under FERPA a **principal who took official action to suspend a student may not disclose that information absent** consent or some other exception to consent permitting disclosure."

Hendry County (FL) School District, 71 IDELR 46 (OCR 2017) xx

This complaint was filed with OCR alleging the district's **web site was not accessible** to students and adults with vision, print, physical, and hearing disabilities. The school entered into a resolution agreement with OCR to adopt the **World Wide Web District's (W3C's) Web Content Accessibility Guidelines (WCAG) 2.0 Level AA** and the **Web Accessibility Initiative-Accessible Rich Internet Applications Suite (WAI-ARIA) 1.0** techniques for web content. OCR said "Adherence to these accessible technology standards is one way to ensure compliance with the District's underlying legal obligations to ensure individuals with disabilities are able to acquire the same information, engage in the same interactions, and enjoy the same benefits and services within the same timeframe as their nondisabled peers, with substantially equivalent ease of use; that they are not excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any District programs, services, and activities delivered online, as required by Section 504 and Title II; and that they receive effective communications with District programs, services, and activities delivered online." NOTE: OCR is informing agencies that it has revised its complaint manual, and will not accept, and will dismiss existing complaints, which are a continuation of a pattern of previously filed complaints, or new complaints against multiple recipients that place an unreasonable burden on OCR resources: including complaints regarding web content accessibility (includes KSSB and KSDE). Note also that a civil action under the ADA or Section 504 remains available. \*And, one advocate, Marcie Lipsitt, a disability rights advocate in Michigan has filed approximately 2,400 OCR complaints in 15 months. She believes the OCR policy change is based, at least partially, on her advocacy.

DISPUTE RESOLUTION DATA:

(a) 7/01/2016 to 6/30/2017

(b) 7/01/2017 to 4/05/2018

(a) Due Process: 12 filed; 2 Adjudicated; 5 Resolution Sessions and 4 Resolutions; 3 Pending\*

(b) Due Process: 12 Filed; 0 Adjudicated; 8 Resolution Sessions and 4 Resolutions; 2 Pending\*

(a) Complaints: 24 Filed; 15 Investigated; 8 Found Non-Compliance; 0 Pending\*

(b) Complaints: 27 Filed: 14 Investigated; 5 Found Non-Compliance; 7 Pending\*

(a) Mediations: 16 Filed; 16 Held; 14 Agreements 87%

(b) Mediations: 15 Filed; 10 Held; 8 Agreements\* 80%

\* The rest were either withdrawn or dismissed. This includes complaints that were resolved by LEA or through mediation.