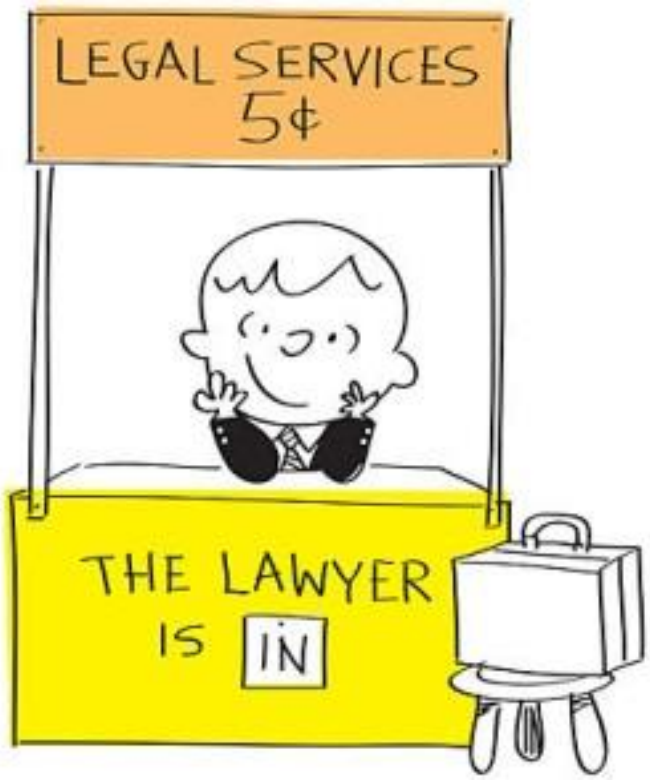
Special Education Legal Update: What Happened in 2016?



CASE Winter Hybrid Conference
February 24, 2017

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In this session, I will provide an overview of "legal happenings" in 2016, with a little bit of forecasting as to what may be yet to come in the area of special education law.

I. PENDING SUPREME COURT DECISIONS

Fry v. Napoleon Cmty. Schs., 65 IDELR 221, 788 F.3d 622 (6th Cir. 2015), cert. granted, 116 LRP 27666, 136 S. Ct. 2540 (2016) (No. 15-497). The parents filed for Supreme Court review, which was granted on June 28, 2016. Oral argument before the Supreme Court was held on Oct. 31, 2016, and we are awaiting a decision. The Sixth Circuit held that parents could not pursue their 504/ADA claims against the student's former district until they first exhausted their IDEA administrative remedies. If the IDEA's administrative procedures can provide some form of relief or if the claims relate to the provision of FAPE, then exhaustion is required. According to the Sixth Circuit, the parents were clearly disputing the appropriateness of their child's IDEA services, arguing that the presence of her service dog would allow her to be more independent and she would not have to rely upon a one-to-one aide for toileting assistance and retrieval of dropped items. They also maintained that the student needed her service dog in school so that she could form a stronger bond with the dog and feel more confident. The Sixth Circuit found that these allegations brought the case squarely within the scope of the IDEA and, therefore, required exhaustion. Thus, the parents were required to exhaust their administrative remedies prior to bringing their claims under 504/ADA to court. [Note: The dissenting judge opined that the wish to use a service dog at school had no relationship to the student's education and exhaustion should not have been required].

Endrew F. v. Douglas Co. Sch. Dist., 66 IDELR 31, 798 F.3d 1329 (10th Cir. 2015), cert. granted, 116 LRP 41846 (09/29/16) (No. 15-827). The parents' request for Supreme Court review was granted on Sept. 29, 2016, and oral argument was held on January 11, 2017. This is an important case that could have a significant impact on the FAPE standard first enunciated by the Supreme Court in 1982. The Tenth Circuit held that the school district provided FAPE to a 4th grader with autism when it took steps to address the student's increasingly severe behaviors, which included bolting from the classroom and urinating and defecating in a "calming room" on two occasions, climbing furniture, hitting computers and TV screens, yelling, kicking others, kicking walls, banging his head, and asking others to punish him. When the student's teacher was unable to determine the cause of his behaviors after charting the timing and circumstances of specific acts, she scheduled a meeting with the district's autism and behavior specialist. However, the meeting did not occur because the parents withdrew the student from the district, but the IEP team met to document their data and to formulate an initial plan regarding the student's behavioral issues. Because the district took steps to manage the behavior, the court could not find a denial of FAPE. Therefore, the Tenth Circuit held that the parents were not entitled to recover the costs of a unilateral private school placement where the student had received "some educational benefit" from the district's program. The Tenth Circuit refused to adopt a "meaningful educational benefit" standard.

G.G. v. Gloucester Co. Sch. Bd., 822 F.3d 709 (4th Cir. 2016). On October 28, 2016, the Supreme Court agreed to review the 4th Circuit's decision reversing a district court's dismissal of a transgender student's claims for injunctive relief under Title IX. Oral argument is scheduled for March 28, 2017. Here, the district offered, consistent with its policy, the use of single-stall unisex restrooms, but the high school student diagnosed with gender dysphoria (who had not had sex reassignment surgery), claimed that using either the girls' restroom or a unisex one was psychologically damaging when the student wishes to use the boys' bathroom. Moreover, the unisex restrooms, the student argued, were a constant reminder that the school viewed the student as "different." Interpreting the Title IX regulation at issue, which permits the provision of separate restroom facilities "on the basis of sex," the Court noted that OCR had provided clarification in 2015 (Letter to Prince), that when a school elects to separate or treat students differently on the basis of sex…a school generally must treat transgender students consistent with their gender identity." The district court erred when it did not defer to OCR's interpretation, as the regulation is ambiguous as to transgender students and OCR's interpretation, therefore, was not plainly erroneous nor inconsistent with the regulation's text and was the result of its fair and considered judgment. Further, the district court relied upon an inappropriate standard when it declined to consider declarations from the student and a medical expert in determining whether a preliminary injunction was in order.

II. OTHER 2016 CASES AND AGENCY DECISIONS

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Domingo v. Kowalski, 66 IDELR 268 (6th Cir. 2016). The special education teacher's alleged actions, while misguided, do not entitle the parents of three students with disabilities to relief under Section 1983. While not passing judgment on the advisability of the alleged instructional methodologies (including belting a student with CP to the toilet to aid her balance; gagging an autistic student with a bandana to stop him from spitting; and toilet training an autistic child inside the classroom because of difficulties with transition), the district court's decision that these did not rise to the required level of "conscience-shocking" is affirmed. As required, the court considered 1) whether the teacher had pedagogical justification for her alleged actions; 2) whether the techniques were excessive in light of the teacher's goals; 3) whether the teacher acted in good faith; and 4) the severity of the students' injuries. Here, the teacher's "unorthodox" methods did reflect a pedagogical objective, involving attempts to address her students' undisputed educational or disciplinary needs. In addition, the teacher appeared only to have used the amount of force necessary to achieve her goals and she did not act with malice or deliberate indifference. Further, the parents did not show that their children suffered serious physical or psychological injury.

B. R.K. v. Board of Educ. of Scott Co., 67 IDELR 29 (6th Cir. 2016) (unpublished). Diabetic student is not entitled to money damages or injunctive relief based upon the fact that the district placed the student in an elementary school with a full-time nurse instead of his neighborhood school. The parents are not able to prove that the district acted with deliberate indifference in making this decision or knowingly acted in a manner to violate the student's rights. This is not a case where the district ignored a student's request for help. Rather, the parents simply disagreed with the district as to whether a nurse was necessary to provide the services that he needed. Where the Kentucky legislature took action since the filing of this action requiring all diabetic students to be placed in their neighborhood school, the parents are not entitled to injunctive relief, since it is not needed.

C. PlainsCapital Bank v. Keller Indep. Sch. Dist., 69 IDELR 36 (N.D. Tex. 2016). District's motion for judgment as a matter of law is granted and relieves it from paying a $1 million jury verdict awarded in 2013. To establish liability under Section 504/ADA, parents must show that a district's response to known teacher harassment is clearly unreasonable in light of known circumstances and constitutes deliberate indifference. The evidence at trial did not support the jury's conclusion that the district was deliberately indifferent where it showed that the middle school principal met with the special education teacher and the district's special education director after an aide reported that the teacher was mistreating students in the life skills class. The principal summarized the meeting in a memo which she emailed to the teacher and the district's human resources department and reminded him of expected behavioral standards. Though the same principal did not express concerns about the teacher after the life skills class moved to another middle school, the new principal promptly investigated several incidents in which the student at issue suffered injury. Those investigations resulted in the teacher's removal from the classroom and subsequent resignation. Though the parents argued that the district should not have allowed the teacher to transfer schools and continue working with their son, the action on the part of the principals was not clearly unreasonable under the circumstances.

D. T.G. v. Detroit Pub. Schs., 69 IDELR 7 (E.D. Mich. 2016). Section 1983 claims against special education teacher and two aides are dismissed where parent cannot show that their purported conduct was so brutal, demeaning and harmful that it amounted to a "conscience-shocking" abuse of power on their part. Although the student suffered cuts and bruises on his head and face after falling out of his wheelchair due

to an unfastened shoulder harness, the parent did not provide any evidence that suggested that the school personnel intentionally or maliciously allowed the student to remain unsecured in his wheelchair.

E. Williams v. Fulton Co. Sch. Dist., 67 IDELR 262 (N.D. Ga. 2016). If the allegations of the parent are true, the district could be liable for a former special education teacher's alleged treatment of a student with cerebral palsy and significant cognitive deficits. According to the parents, the teacher pushed their son when he walked too slowly, isolated him in dark rooms for extended periods of time, and slammed his head against lockers almost every day because he was not paying attention. In order to assert a violation of the Due Process Clause with the use of excessive corporal punishment, parents must allege behavior that is arbitrary and conscience-shocking. The parents' allegations, if true, meet that standard, as the reported amount of force used by the teacher was obviously excessive, in part, because it served no educational purpose. In addition, and although the student's alleged injuries, including PTSD, were primarily psychological, they were nevertheless severe. There are also allegations that the teacher called the student vulgar names, engaged in years of abuse and took action likely to cause serious injury. Thus, the parents' claims will not be dismissed against the district; nor will the claims that the district conspired to cover up the abuse.

F. Garza v. Lansing Sch. Dist., 68 IDELR 10 (W.D. Mich. 2016). Parents of autistic student may pursue their Section 1983 claims against three school administrators who allegedly failed to protect their son from abuse by a special education teacher. School administrators may be held liable under the 14th Amendment if they have knowledge of a teacher's propensity to abuse students and act deliberately indifferent to the safety of students. It is not enough for parents to show that they were sloppy, reckless or negligent in performing their duties. Here, the school principal received multiple complaints from staff that the teacher abused his students and additional evidence showed that the superintendent and director of special education had received numerous reports that the teacher physically and verbally abused the children under his care. Despite this, the administrators failed to initiate an investigation or take any other protective measures to ensure the safety of students when confronted with conduct that was obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.

G. Beam v. Western Wayne Sch. Dist., 67 IDELR 88, 165 F.Supp.3d 200 (M.D. Pa. 2016). Parents may seek money damages under Section 504 and ADA for a denial of educational benefits. The failure to implement a Section 504 Plan may qualify as a denial of access to district programs. Here, the parents allege that the district failed to modify the student's 504 Plan or implement key provisions of it, despite having knowledge of the student's ongoing academic difficulties. Thus, they adequately plead a denial of educational opportunities. In addition, the parents have sufficiently alleged deliberate indifference on the part of the district that knew the student was failing several classes, was seeing a therapist for emotional difficulties and had spoken and written about suicide. However, the district failed to address the student's academic concerns or email them about them, as required by the 504 Plan. However, the parents' claim under Section 1983 is dismissed because the student's suicide was not a foreseeable and fairly direct result of the district's alleged failure to implement the student's 504 Plan.

H. Disability Rights New York v. North Colonie Cent. Schs., 67 IDELR 152 (N.D. N.Y. 2016). Protection and advocacy group has the right to investigate reports of abuse and neglect against students in a separate day class, because the students placed there are clearly students with disabilities. Both the Developmental Disabilities and Bill of Rights Act and the Protection and Advocacy for Individuals with Mental Illness Act contain a specific definition under which the children fall and a third statute at issue, the Protection and Advocacy for Individual Rights Act does not define "disability" at all. As such, the court rejects the district's argument that the P&A group must first prove that the group of students meet the definitions under those laws. The group has provided "substantial evidence" of the students' disability status—specifically, the district's decision to place them in a separate day class. This allows for an inference that the students have disabilities as defined by these statutes. Here, however, no injunctive relief is necessary

because the district has now allowed the group to access the classroom and has provided approximately 805 pages of student records.

L. Fernandez v. City of New York, 68 IDELR 50 (N.Y. Supreme Ct. 2016) (unpublished). District's motion for judgment is denied and it must defend a negligence action brought by a bus aide allegedly injured by a 5-year old child being transported to and from a private special education school by a third-party provider. The aide alleged that the child injured her neck, back, shoulder and knee when she interrupted his attack on another student, requiring her to use a wheelchair and undergo multiple surgeries. Not only did the child's BIP note that he had a tendency to act out physically for no apparent reason, but it also noted that he became more violent when he rode the bus with his brother. In addition, the bus aide had reported two incidents of "very violent" and aggressive behavior a few weeks before the child attacked her on the bus. Even though the district had knowledge of the child's violent tendencies, the district did not remove the child from the bus. The district's argument that it was not responsible for injuries to the aide that occurred while the child was under the supervision of a third-party provider is rejected, because it is clear that the private school and the district owed a duty to the bus aide based upon their specific knowledge of the child's dangerous conduct and the probability that his acts could cause injury that was reasonably anticipated.

J. Conklin v. Jefferson Co. Bd. of Educ., 68 IDELR 122 (N.D. W. Va. 2016). Parent stated a valid claim for relief under Section 504/ADA based upon the school district's placement of her son on a home instruction program to separate him from his teacher who allegedly grabbed him by the neck, choked him and pushed him into a bookcase after he spoke to or about a classmate. The parent alleged that his removal from the school community resulted in feelings of sadness, isolation and humiliation and caused him to lose transition services to increase his independence and employability. If these allegations are true, the parent could demonstrate that the district discriminated against the student on the basis of disability. Thus, the district's motion to dismiss is denied.

K. K.T. v. Pittsburg Unif. Sch. Dist.,, 68 IDELR 272 (N.D. Cal. 2016). Parents sufficiently alleged a claim for relief under Section 1983 for the elementary school principal's deliberate indifference and failure to train or control special education personnel at his school. Here, the parents alleged numerous incidents where the principal failed to act when he had knowledge that a special education aide was abusing students. According to the complaint, the principal did not take any action after a bus driver reported the aide for screaming at the child and when the parents of schoolmates reported the aide for pushing, slapping and kicking their daughter, the principal allowed the aide to remain in the classroom for another two days. It is also unclear whether the principal called the police, which is required by California's mandatory reporter law.

BULLYING AND DISABILITY HARASSMENT

A. T.K. v. New York City Dept. of Educ., 810 F.2d 869, 67 IDELR 1 (2d Cir. 2016). The district's denial of the parents' request for their daughter's IEP team to discuss peer bullying is a denial of FAPE. This refusal significantly impeded the parents' participation in the IEP process and the denial of the opportunity to discuss bullying during the creation of the IEP not only potentially impaired the substance of the IEP, but also prevented the parents from assessing the adequacy of it. Thus, the district court's decision that the parents could recover the cost of private school placement is affirmed. The parents had good reason to believe that peer harassment was interfering with their daughter's ability to make educational progress. According to the student's one-to-one special education instructors, she had difficulty concentrating and staying on task based upon her classmates' verbal and physical harassment. Three of the instructors testified that the constant peer teasing and exclusion created a hostile environment, and additional evidence showed that the student dreaded going to school, was frequently tardy and began to carry dolls for emotional support.

B. J.M. v. Hawaii Dept. of Educ., 69 IDELR 31 (D. Haw. 2016). Court affirms decision of hearing officer that the district's proposed IEP afforded the student FAPE. While the student suffered "horrifying and inexcusable" bullying while he was in public school, an LEA cannot promise a parent that a student will not experience further bullying, as that type of guarantee is not required to provide FAPE. Here, the student's IEP team took adequate steps to address the possibility of peer bullying when the IEP required the constant presence of a one-to-one aide and included a crisis plan that addressed any negative interactions with peers. The crisis plan included a specific definition of "bullying," both real and perceived, and required school staff to remove the student from the situation and take him to support personnel for immediate assessment and assistance. While the plan did not guarantee protection from bullying, it was reasonably calculated to ensure that the student would receive educational benefit in the public school system.

C. Landon B. v. Hamburg Area Sch. Dist., 67 IDELR 203 (E.D. Pa. 2016). Tuition reimbursement for private schooling is denied where the district's proposal to return the student to public school is appropriate. The parents' assertion that the student's fear of bullying would impede his progress if he returned to public school (where the parents testified he was previously called names and struck in the head with a blunt object on one occasion) is rejected based upon the conclusion that the student would be able to overcome those obstacles. The hearing officer had found no evidence that the student suffered any lasting psychological harm from the prior attack and that he demonstrated the ability to interact positively with teachers and peers when he returned to the school for reevaluation. In addition, the student demonstrated composure at the due process hearing. While the parents' concerns are understandable, on balance and particularly in view of the student's demonstrated emotional maturity and social skills, the student will be able to receive an appropriate education at the public school.

D. S.B. v. Board of Educ. of Harford Co., 819 F.3d 69, 67 IDELR 165 (4th Cir. 2016). Parent cannot demonstrate an entitlement to relief under Section 504 where none of the reported incidents of harassment related to the student's disabilities. In addition, the district investigated every incident of bullying that the parent or student reported and, in almost every instance, the district disciplined the bullies with measures ranging from parent phone calls to suspension. Further, the district assigned a para-educator to the student during his junior year who accompanied the student during the school day to ensure his safety and to serve as an objective witness to alleged incidents of bullying. Thus, the district is entitled to judgment on the parent's 504 claim.

E. Doe v. Torrington Bd. of Educ., 67 IDELR 182, 179 F.Supp.3d 179 (D. Conn. 2016). A student does not state a claim for relief under Section 504/ADA without connecting alleged bullying to his disability. High schooler's claim that the district was aware of his SLD and knew that it made him more vulnerable to harassment did not establish the necessary link. Because the student did not sufficiently allege that anyone actually harassed, bullied or assaulted him because of his disability or perceived disability, rather than some other reason (such as personal animus), claims are dismissed. In addition, the student failed to allege deliberate indifference on the part of the school district, which is required for a recovery of money damages under Section 504/ADA. While the student may not have been satisfied with the district's response, he could not show a complete failure to address bullying.

F. Krebs v. New Kensington-Arnold Sch. Dist., 69 IDELR 9 (W.D. Pa. 2016). Parents' child find and discrimination claims under Section 504, ADA and the IDEA will not be dismissed. According to the complaint, the parents claim that they had informed the school district that their daughter had been diagnosed with multiple emotional disorders as a result of the severe and persistent bullying she was experiencing at school. In addition, the parents alleged that the student's teachers were aware of the impact of the student's conditions, including the fact that she lost 30 pounds and began making F's instead of her usual A's and B's. These statements in the complaint indicate the existence of a disability under

Section 504/ADA. In addition, the parents adequately alleged IDEA child find violations, as the district's purported knowledge of the student's difficulties raised questions as to why the district did not evaluate her earlier. The parents are not required to exhaust administrative remedies, since the student committed suicide in February 2015, making exhaustion futile.

RETALIATION

A. Pollack v. Regional Sch. Unit 75, 67 IDELR 40 (D. Me. 2016). Superintendent's motion for qualified immunity on the First Amendment claim and district's motion for judgment on 504 and ADA claims are denied where the district allegedly provided the parents with copies of hundreds of staff emails about their student before they filed for due process. After they filed for due process, the Superintendent requested $2,600 for the production of certain emails, which could have been considered retaliatory. The question of the Superintendent's intent is a matter for a jury to decide.

B. Jenkins v. Butts Co. Sch. Dist., 67 IDELR 90 (M.D. Ga. 2016). Judgment is granted for the district on the parent's claim of retaliation where it could not be held liable when a teacher reported the parent to child welfare authorities legitimately and for a non-retaliatory reason. Not only was the teacher a mandatory reporter of suspected child abuse or neglect under Georgia law, she testified that she was concerned about possible harm to the child. The parent offered no evidence beyond conclusory statements and testimony to show that the district's reasons for its action were pretext for retaliation for the parent's filing of a due process hearing complaint.

C. Falash v. Inspire Academics, Inc., 68 IDELR 163 (D. Idaho 2016). Special education program manager for an online charter school program may proceed with his claims for retaliation based upon equipment recommendations made for students with disabilities. To prevail on retaliation claims under Section 504/ADA, the program manager must show that 1) he engaged in a protected activity; 2) he suffered a materially adverse employment action; and 3) the school took the adverse action in response to the protected activity. Where the scope of the program manager's job duties were not clear, the court cannot determine whether his advocacy amounted to protected activity under 504/ADA. In addition, the timing of the advocacy—specifically his August and September 2013 recommendations that students with disabilities have certain computer equipment—and the subsequent notice of administrative leave suggest that the events are connected. Further factual development is needed; therefore, the school's motion for judgment is denied.

D. Hicks v. Benton Co. Bd. of Educ., 69 IDELR 32 (W.D. Tenn. 2016). A principal's statement that he might have kept a special education aide on his staff if she had not informed parents of deficiencies in the services being provided to their children could signal retaliation in violation of Section 504 and the ADA. Thus, the district's motion for judgment is denied. Not only could the aide's conversations with parents about implementation failure constitute advocacy on their behalf, the district's decision not to renew her for the following school year could be adverse action. The district conceded its knowledge or the aide's discussions with parents and the principal's deposition testimony included statements about the aide "stirring up" trouble, all of which could support a finding that the district did not renew her based upon her advocacy on behalf of her students.

RESTRAINT/SECLUSION

A. Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, 116 LRP 53792 (OCR 2016). Although school districts are not prohibited by Section 504 or the ADA from using restraint and seclusion, they must determine whether their use is impacting on the provision of FAPE to a student with a disability. Restraint and seclusion could deny a student FAPE where it has a traumatic impact or results in the student not receiving needed services, and where use could violate Section 504 where it: 1)

constitutes unnecessary different treatment; 2) is based on a policy, practice, procedure or criterion that has a discriminatory effect on students with disabilities; or 3) denies a student's right to FAPE. There are multiple ways in which restraint or seclusion may deny a student FAPE, and "[d]epending on the nature of his or her disability, a student with a disability may be especially physically or emotionally sensitive to the use of such techniques." For example, a student might develop new behavioral or academic difficulties as a result of the use of restraint or seclusion that, if not addressed, could result in a denial of FAPE. Further, a student may be denied FAPE as a result of the cumulative impact of repeated seclusion that deprives the student of educational instruction or services. If there is reason to believe that the use of seclusion or restraint has adversely affected the provision of Section 504 FAPE services to a particular student, such that the student's needs are not being met, the district must respond, in part, by determining what additional or different interventions or support and services the student needs, including positive behavioral interventions. The district must also determine if current interventions are being implemented, ensure that needed changes are made promptly and remedy any denial of FAPE. With respect to unidentified general education students, the use of restraint could be a sign that unidentified student may have a disability and may need to be evaluated. With respect to a student who has already been identified, it could be an indication that the student needs to be reevaluated and that the student's 504 plan needs to be revised.

B. J.V. v. Albuquerque Pub. Schs., 67 IDELR 55 (10th Cir. 2016). School district did not violate the ADA when it briefly used mechanical restraint to manage the child's behavior. In order to prove disability discrimination, the parents needed to show that: 1) the child has a disability; 2) the district discriminated against the child; and 3) the discrimination was based on the child's disability. Here, the parents failed to meet the second and third requirements. This court has held that a law enforcement officer does not violate the ADA if her actions are based on the student's conduct rather than his disability. Here, the school safety officer handcuffed the child based on his conduct consisting of two hours of disruptive behavior, including running from room to room, kicking the officer and a social worker and refusing to stop, not based upon the student's disability. The parents also failed to prove that discrimination occurred where they promptly enrolled the child in another school district and could not show that the handcuffing resulted in a denial of educational benefits. In addition, they failed to show that the district failed to accommodate the child or disregarded an obvious need for staff training. In addition, the school safety officer contacted the child's mother during the behavioral incident and requested permission to restrain the child if necessary.

C. Phipps v. Clark Co. Sch. Dist., 67 IDELR 91 (D. Nev. 2016). Parties' motion to dismiss Section 1983 claims are denied where school district refuted the aide's description of her classroom conduct and use of physical restraint with a nonverbal student with autism. School officials testified that the aide's physical interactions with the student were not appropriate crisis management techniques where the aide's testimony suggested that she was acting in accordance with district policy and training. Where sufficient evidence exists for a reasonable jury to find either that the aide restrained the student in the way she was trained or that her actions were in defiance of the district's training and policies, motions to dismiss are denied. School districts can be held liable under Section 1983 for an employee's violation of a student's constitutional rights if the employee acted in accordance with district policy, custom or practice. The district here did not contest the parents' claim that the aide violated the student's constitutional rights when she dragged him from under a table by the wrist, pinned him to the floor with her knees and elbows, and shoved another student into him. Police arrested the aide on the date of the restraints in question after seeing her conduct on live-feed surveillance after they had installed hidden cameras in the classroom based upon 2 reports of suspected physical abuse from parents of other students.

D. Beckwith v. District of Columbia, 68 IDELR 155 (D. D.C. 2016). Court adopted Magistrate's recommendation finding a denial of FAPE when the district repeatedly failed to follow its own established policies and procedures regarding the use of restraint. Here, there was evidence that the district restrained

a 9 year-old at least six times and that its non-compliance with its own requirements impeded the parent's participation in the IEP decision-making process. Specifically, school staff failed to contact the parent within one hour of restraining the student, failed to give the parent a written report of restraint within one school day, and failed to convene an IEP meeting within five days of each incident. Every time a restraint occurred, school staff would only send the written report when the parent's counsel insisted on it. In addition and instead of receiving notice of restraint within one hour, the parent often learned about it from the student after she returned home. Even though the district convened an IEP meeting after the sixth incident, the team did not include the staff members who restrained the student, which is a key component of the district's policy.

CHILD FIND/EVALUATIONS

A. Memorandum to State Directors of Special Education, 67 IDELR 272 (OSEP 2016). It is critical for agencies to timely identify preschoolers with disabilities who may be in need of special education services. Districts may not use a private or public preschool program's failure to implement an RTI process as a basis for denying or delaying an evaluation of a child who is suspected of having a disability and need for services. While the use of RTI strategies is supported, a district that receives a referral from an outside preschool program must initiate a child's evaluation within a reasonable period of time when there is reason to believe the child is disabled and in need of services and regardless of whether the child has ever engaged in the RTI process. LEAs may not reject a referral solely on the basis that the preschool program must first monitor the child's developmental progress using RTI. Where there is no reason to suspect that a referred child has a disability, the LEA may refuse an initial evaluation but must provide the parent a written notice of refusal.

B. Artichoker v. Todd Co. Sch. Dist., 69 IDELR 58 (D. S.D. 2016). Where there is reason to suspect that a student is a child with a disability in need of special education and related services, a district must obtain parental consent and conduct an evaluation, regardless of whether the district is also implementing RTI with the student. Here, the student was involved in a number of behavioral incidents during the first month of school and her guardian requested an evaluation for special education services. The district responded by initiating the RTI process, but the behavioral issues persisted. In February, the student was suspended for the remainder of the year after posting a picture of herself on social media at school holding a 4-inch knife with a marijuana leaf on it. The guardian filed for due process on the basis that the district failed to evaluate in a timely manner. The hearing officer's decision in favor of the student is upheld, where the IDEA's discipline provisions provide that a district is deemed to have knowledge that a child has a disability if the parent has requested an evaluation. In addition, the district did not have to wait until its RTI process was completed to conduct an initial evaluation earlier.

C. Dear Colleague Letter, 68 IDELR 52 (OCR 2016). OCR notes that approximately 1 of 9 OCR complaints received during fiscal years 2011-15 involved allegations of discrimination against students with ADHD. Thus, this DCL and accompanying Resource Guide are issued to explain how districts can meet the requirements of Section 504 and the ADA for students with ADHD. Most problems stem from districts not adequately evaluating students with ADHD for special education or related services in a timely manner. Districts are reminded that 504 and ADA require districts to conduct evaluations when a student needs or is believed to need special education or related services. In addition, districts must ensure that qualified students with disabilities receive appropriate services based on their needs and not costs, stereotypes or generalized misunderstandings about disabilities. In the accompanying Resource Guide, OCR notes that under broadened standards via the ADA Amendments Act of 2008, districts should understand that the definition of "major life activities" is expansive and that the helpful effects of any mitigating measures cannot be considered when determining whether a student with ADHD is disabled. While a student who is identified as eligible under the IDEA is a student with a disability under Section 504, even if the student is found ineligible under the IDEA, districts must still consider whether the student

could be covered under Section 504. While students with ADHD may develop coping skills to allow them to achieve academic success, good academic performance does not mean that a student does not have a substantial limitation in a major life activity nor does it eliminate a district's need to evaluate the student under Section 504. Districts are urged to use evidence-based interventions to address learning and behavior challenges at the earliest opportunity but not to the point of failing to conduct a timely evaluation.

D. R.E. v. Brewster Cent. Sch. Dist., 67 IDELR 214 (S.D. N.Y. 2016). The district did not violate its child-find duty to evaluate a student earlier under the IDEA because the preponderance of the evidence indicates that, during the fall of 2011, the student did not need special education services. Although the district later found the student eligible for services in January 2012 based upon new diagnoses of ADHD and OCD, the district had no reason to evaluate the student prior to his parents' request for an assessment in December 2011. The student had made progress under his Section 504 plan, which called for modified homework assignments, testing accommodations, preferential seating and time to visit the nurse's office to relieve tics, when needed. Although the parent alleged that the student was consistently performing below grade level in math and reading, his report cards and standardized test scores showed otherwise. In addition, the mother commented during a meeting in April 2011 that the student was doing "exceptionally well" and that she credited the district for going "above and beyond" in developing a 504 plan.

E. Greenwich Bd. of Educ. v. G.M., 68 IDELR 8 (D. Conn. 2016). Districts have an affirmative duty to locate, identify and evaluate all students who may need special education due to a disability. Here, the district refused to conduct an evaluation, even though the parents reported that the grade schooler struggled in reading. The district's position that it had no reason to believe that the child would be IDEA-eligible is rejected, based upon the fact that the parents provided the district with an independent evaluation report showing that the student's lack of progress in reading stemmed from a specific reading disorder and anxiety related to it. Because the district failed to conduct its own evaluation to verify or disprove the results of the private evaluation, the district erred in disregarding the evaluator's conclusions. The district's contention that its decision to enroll the child in its RTI program addressed the student's reading needs is also rejected. According to several progress reports and report cards, the student made insufficient progress in reading to catch her up to the rest of her class. In fact, the evidence showed that the district decided to increase the level of the child's RTI interventions because "the initial phases of [RTI] were not sufficiently corrective." Thus, the parents are entitled to reimbursement for the child's private school placement.

F. D.L. v. District of Columbia, 67 IDELR 238, 187 F.Supp.3d 1 (D. D.C. 2016). In this ongoing class action lawsuit, a significant number of preschoolers with disabilities were not timely evaluated or appropriately transitioned from Part C to Part B programs. Thus, the district denied FAPE to these children and is ordered to ensure that at least 95 percent of all of its Part C graduates receive a smooth transition to Part B by their third birthdays, that at least 8.5 percent of its children between ages 3 and 5 are enrolled in special education, and that at least 95 percent of its preschoolers referred to Part B receive a timely eligibility determination. The plaintiffs' complaint here alleged that the district's actions violated the IDEA from April 6, 2011 to the present and violated Section 504 up to March 22, 2010. The district, among other missteps, failed to timely implement Part B services for almost 30 percent of children with disabilities in the district. Although the district's data indicated otherwise, the data recorded children as receiving a smooth transition even if they did not receive services by their third birthday, which was based on the district's view that it was merely required to have an IEP and classroom assignment in place by that date, rather than services delivered by that date. However, the IDEA regulations require that a child's services commence by his third birthday -- not that they are merely "available" on that day. Though the district has made some progress and demonstrated good faith since 2011, "[e]ven the best of intentions, however, will not bring a state or jurisdiction into compliance with the IDEA's affirmative obligations." "The District's lack of effective Child Find and transition polices is particularly troubling in light of the intense scrutiny and seemingly constant admonishment it has received over the last decade." The district

also violated Section 504 because it demonstrated bad faith and gross misjudgment with respect to its child find, evaluation and transition obligations prior to March 23, 2010. However, the district should have another chance to achieve compliance before the court takes more intrusive steps, such as appointing a special master to oversee its child find activities.

G. Timothy O. v. Paso Robles Unif. Sch. Dist., 822 F.3d 1105, 67 IDELR 227 (9th Cir. 2016). When a district has reason to suspect that a child has a disability, it must conduct a full and individual initial evaluation that ensures the child is assessed in all areas of suspected disability using a variety of reliable and technically sound instruments. Here, the district was aware that the student displayed signs of autistic behavior at the time of the initial evaluation. However, the district chose not to formally assess him for autism because a psychologist, who observed the student for 30 to 40 minutes, concluded that the student merely had an expressive language delay and that he could not diagnose the student with autism "off the top of my head." As a result, the district was unable to design an IEP that addressed the student's needs and, therefore, denied FAPE to the student. The district's fundamental procedural violations in this regard deprived the IEP team of critical evaluative information about the student's developmental disabilities as a child with autism and it was impossible for the team to consider and recommend appropriate services necessary to address his individual needs. Thus, the district deprived the student of critical educational opportunities and substantially impaired his parents' ability to fully participate in the IEP process.

ELIGIBILITY

A. Letter to Morath, 68 IDELR 231 (OSERS 2016). The Texas Education Agency is ordered to provide evidence that its 8.5% identification target is not resulting in IDEA violations. "Indicator 10" in TEA's monitoring system is used to determine whether districts identify more than 8.5% of students. OSERS received a copy of an investigative report from the Houston Chronicle noting that at least some districts viewed the indicator as a limit on the number of students it could identify as students with disabilities, which lead to a dramatic decrease in identification over the past decade. According to the article, dozens of teachers and administrators acknowledged delays or denial of special education to students with disabilities in order to stay under the 8.5% rate. In addition, a TEA official noted that when a district fails to stay under the rate, the state will examine the district's policies and procedures to ensure that it is not over-identifying students. Thus, TEA's approach to monitoring may be resulting in the failure to identify and evaluate all students suspected of having a disability and who need special education and related services. Thus, TEA must take several steps, including ceasing its use of the indicator, unless it can provide evidence that its use was not leading districts to violate the IDEA's child-find requirements. TEA must also determine which districts may have failed to appropriately identify student in order to achieve the 8.5% identification rate and to take remedial action with respect to those districts.

B. Mr. and Mrs. Doe v. Cape Elizabeth Sch. Dist., 68 IDELR 61 (1st Cir. 2016). The district court erred when relying solely upon report cards and performance on statewide assessments in determining that the student was not SLD. While a student's grades, classroom performance and standardized test scores are relevant in determining whether a student is SLD, the eligibility team cannot focus solely on academic measures. The team must consider the relationship between those academic measures and the alleged area of deficiency. Just as no single measurement or assessment can support a finding of SLD, neither can it be found to undermine a finding of a reading fluency deficiency when other evidence supports such a finding. This student received low or very low scores on assessments of reading fluency and, given that information, the district court erred in relying on her excellent grades and above-average performance on statewide assessments in determining that she did not have an SLD. The court, however, will not consider whether the student needs special education to receive educational benefit, as the district court did not address that question. This decision focuses only on whether the student has an SLD as defined by the IDEA. In order to be eligible for services, however, the student must also prove that she requires special education and related services as a result.

C. L.J. v. Pittsburg Unif. Sch. Dist., 68 IDELR 121, 835 F.3d 1168 (9th Cir. 2016). While the district's argument that IDEA services are available only for students who demonstrate a need for special education services, the district's characterization of the student's classroom services as general education interventions is rejected. Here, the district provided the fourth grader with SLD, OHI and ED specially designed mental health services, a one-to-one behavioral aide and accommodations such as shortened assignments and the right to leave the classroom at will—services that were not available to nondisabled classmates. In addition, the student's psychiatric hospitalizations and suicide attempts interfered with his attendance and demonstrated a need for special education, even though they did not occur at school. The case is remanded to the district court for further proceedings.

D. M.P. v. Aransas Pass Indep. Sch. Dist., 67 IDELR 58 (S.D. Tex. 2016). Where student was diagnosed privately with ADHD and a mood disorder, an impairment alone will not qualify a student for special education. A parent must also show that the student needs special education services to receive educational benefit. Prior services provided pursuant to a 504 Plan and diagnosis of Asperger's appeared to be roughly the same as the efforts made for the general student population and the student was abundantly successful. Without evidence that the student needs specialized instruction, the student is not eligible under the IDEA.

REEVALUATION

A. James v. District of Columbia, 68 IDELR 11 (D. D.C. 2016). In response to a guardian's request for a reevaluation in the form of a psychological assessment of a teenager with an intellectual disability, preparation of a "Summary of Existing Data" did not fulfill the district's requirement to conduct a reevaluation. The IEP team needed more extensive information about the student's current needs rather than merely a review of a psychological assessment completed in 2011. In addition, the reevaluation did not include any new testing of the student's academic abilities, social-emotional skills or personality functioning, which was all necessary to ensure the student received FAPE. The failure to conduct a new comprehensive evaluation meant that the student's IEP might not be sufficiently tailored to her special and evolving needs. Thus, the district is ordered to provide and fund a comprehensive psychological evaluation.

B. Horne v. Potomac Preparatory Charter Sch., 68 IDELR 38 (D. D.C. 2016). Even though the charter school evaluated the 6 year-old boy and found him ineligible two months earlier, the school should have reconsidered eligibility after multiple incidents of inappropriate and violent behavior. When the school psychologist evaluated the student in November 2013, she expressly noted that an increase in his behavioral problems would warrant a reevaluation. However, the school did not reevaluate him after he attempted to kill himself by jumping out of a school window, telling school staff that he "wanted to die." The suicide attempt in itself amounted to inappropriate behavior under normal circumstances that, coupled with subsequent violence against teachers and classmates, should have prompted the school to reevaluate the child and reconsider eligibility for special education and related services.

INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs)

A. Seth B. v. Orleans Parish Sch. Bd., 67 IDELR 2 (5th Cir. 2016). In a case of first impression, a "substantial compliance" standard applies to the question of whether parents are entitled to reimbursement for an IEE. While the IDEA provides that a district is not required to pay for an IEE if it can demonstrate at a hearing that it does not "meet agency criteria," it does not define this phrase. Since a "substantial compliance" standard as already been applied in other FAPE disputes, such as those involving IEP implementation, it should apply to IEE instances as well. The adoption of such a standard would safeguard parental rights

to participate in the IEP process, especially in states that have adopted complex evaluation criteria. If districts are allowed to deny reimbursement based upon ambiguities or inconsequential nonconformities with such criteria, they will be effectively able to treat the parental right to an IEE as a privilege to be granted at their discretion. While the district's concern that some judges or hearing officers might adopt an "unreasonably low standard" for substantial compliance is recognized, that risk is acceptable given the strong interest in preserving the parental right to an IEE. Thus, the case is remanded to the district court for a determination of whether the parents' privately-obtained IEE substantially complied with Louisiana's evaluation requirements. However, the possible amount of reimbursement is limited to $3,000, based upon the parents' failure to request an exemption from the district's reasonable cost criteria. (Note: The dissenting opinion notes that the substantial compliance standard usurps regulatory authority and invites courts and hearing officers to participate in arbitrary decision-making).

B. Shafi A. v. Lewisville Indep. Sch. Dist., 116 LRP 52891 (E.D. Tex. 2016). The district had the authority to deny the parents' IEE request where the cost of the IEE they requested was substantially more than the cost parameters established by the district. Where a child's parents disagree with a district evaluation, they are entitled to request an IEE at public expense. However, the district has the discretion to limit the cost of the IEE, as long as the cap does not prevent the parents from obtaining a private assessment. Here, the district conducted a comprehensive evaluation of the student, the parents disagreed with the evaluation report, and sought an independent speech-language evaluation by a private SLP. However, the district declined to fund it because it exceeded the cost parameters for reimbursing parents for private evaluations. Although the parents argued that the district's refusal denied FAPE to their child, the private SLP's fee significantly exceeded the district's "maximum fee schedule" for IEEs, which was based upon customary rates in the area. Further, the parents failed to establish unique circumstances that would justify the excessive costs of the requested IEE. Parents' complaint appealing the hearing officer's decision in favor of the district is dismissed.

C. Haddon Township Sch. Dist. v. New Jersey Dept. of Educ., 67 IDELR 44 (N.J. Sup'r Ct. 2016) (unpublished). Where reevaluation consisted of review of existing data only, and the parent disagreed with the failure to conduct additional assessments, they are entitled to an independent FBA of a 6th grade OHI student. District's review of existing data qualified as an evaluation with which the parent disagreed, triggering the right to an IEE.

D. Fullmore v. District of Columbia, 67 IDELR 144 (D. D.C. 2016). An unreasonable delay in authorizing payment for an IEE is a procedural violation of the IDEA. As such, a parent is not entitled to relief, unless she is able to show that the alleged delay caused substantive educational harm to the child. Thus, the parent here was required to show that the student made marked improvements as a result of the IEE that was conducted—improvements that he would have made earlier if the district had granted the request for an IEE in a timely manner. Although progress reports indicated that the student's grades and behavior slightly improved in the spring of 2013 and the fall of 2014, those improvements were unrelated to the December 2012 IEE. Absent any evidence that the student improved as a result of the IEE, the parent did not show that any delay in the IEE authorization resulted in a denial of FAPE. (In fact, the district authorized the IEE just 13 days after the parent's request for it).

E. Genn v. New Haven Bd. of Educ., 69 IDELR 35 (D. Conn. 2016). When a parent requested reading assessments during an IEP team's discussion of a recent district psychoeducational evaluation of her daughter, that was sufficient to evidence disagreement with the district's evaluation which would trigger the right to request an IEE. Thus, the district violated the IDEA when it denied the parent's request for an IEE without requesting a due process hearing to defend its own evaluation. The hearing officer's finding that the parent did not disagree with the district's assessment of the student's reading skills is rejected, because the parent objected to the student's reevaluation when she expressed her concern that the district's reading tests were not sensitive enough to identify her daughter's phonological awareness

issues. The court is not persuaded that a parent must formally announce disagreement with an assessment. Here, the parent's disagreement and request left the district with two options: 1) pay for the requested IEE or 2) request a due process hearing to show that its evaluation is appropriate. Because the district did neither, the parent is entitled to reimbursement for the cost of the independent reading assessment she obtained.

F. Letter to Carroll, 68 IDELR 279 (OSEP 2016). The question posed to OSEP was whether, once a district's evaluation is complete and the parent then communicates a desire for a child to be assessed in a particular area in which the parent has not previously expressed concern, would the district have the opportunity to conduct an evaluation in the given area before a parent invokes the right to an IEE? A parent has the right to invoke the right to an IEE even if the reason for the parent's disagreement is that the district did not assess the child in all areas related to the child's disability. Once a parent requests an IEE, a district must either defend its evaluation in a due process hearing or fund an IEE (assuming the IEE meets agency criteria). There is no third option that allows the district to simply conduct the missing assessments. Thus, it would be inconsistent with IDEA to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either grating the parents' request for an IEE or filing a due process complaint to show that its evaluation was appropriate.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Letter to Andel, 67 IDELR 156 (OSEP 2016). While the school district must inform parents in advance of an IEP meeting as to who will be in attendance, there is no similar requirement for the parent to inform the school district, in advance, if he/she intends to be accompanied by an individual with knowledge or special expertise regarding the child, including an attorney. "We believe in the spirit of cooperation and working together as partners in the child's education, a parent should provide advance notice to the public agency if he or she intends to bring an attorney to the IEP meeting. However, there is nothing in the IDEA or its implementing regulations that would permit the public agency to conduct the IEP meeting on the condition that the parent's attorney not participate, and to do so would interfere with the parent's right…." It would be, however, permissible for the public agency to reschedule the meeting to another date and time "if the parent agrees so long as the postponement does not result in a delay or denial of a free appropriate public education to the child."

B. Letter to Savit, 67 IDELR 216 (OSEP 2016). States have the discretion to put criteria in place regarding audio or video recording of IEP team meetings, which may include a requirement for parents to notify the district a certain number of days in advance of the meeting that he/she plans to record it. However, a district will need to take such a requirement into account when deciding how much notice to provide a parent of an IEP meeting in order to schedule the meeting at a time that allows the parent to meet the notice requirement and fully participate in the meeting. In addition, a school district may suspend the recording of an IEP meeting it if determines that it is not necessary in order for the parent to fully understand the meeting. However, it must ensure that doing so will not interfere with the parent's understanding of the IEP, the IEP process, or other procedural safeguards under the IDEA.

C. L.O. v. New York City Dept. of Educ., 822 F.3d 95, 67 IDELR 225 (2d Cir. 2016). District court's conclusion that the student received FAPE is reversed based upon multiple procedural violations that cumulatively resulted in a denial of FAPE, even if the individual violations did not. There were four procedural errors with respect to each of the IEPs for three years. First, there was no evidence that the IEP teams reviewed the evaluation data in the development of the IEPs. In fact, the student's teacher testified that she could not recall reviewing any evaluative material at the 2011 IEP meeting. While the hearing officer found that each IEP was consistent with the evaluative material that was available to the IEP team at the time, the real question was whether the team actually based its decisions on that information. Second, the IEP team failed to conduct an FBA, which would have allowed the team to

identify the root causes of the student's ongoing behavioral issues and to address them. Third, each IEP provided an insufficient amount of speech-language instruction, given that the student's communication skills were not improving. Lastly, the IEPs lacked parent counseling and training as required by New York law. These violations, when taken together, amount to a denial of FAPE.

D. Y.A. v. New York City Dept. of Educ., 69 IDELR 76 (S.D. N.Y. 2016). Where a district is required to ensure that it provides due process notices in a parent's native language, unless clearly not feasible to do so, FAPE was denied when the district did not provide an interpreter to the parent at IEP meetings or provide a Russian translation of its notice of procedural safeguards. Just because the parent spoke some English, this was not a waiver of her right to receive notices in Russian. Clearly, the parent's written communications demonstrated a lack of fluency in English, and the parent testified that she had requested an interpreter for IEP meetings and that she used online translation services to convert her Russian-language correspondence into English. This procedural error was harmful, as the parent was denied the ability to understand her rights or meaningfully participate in the IEP process.

E. Conway v. Board of Educ. of Northport-East Northport Sch. Dist., 67 IDELR 16 (E.D. N.Y. 2016). In a failure to exhaust administrative remedies case, the parent could not claim that she never received notice of her right to file for a due process hearing where the evidence showed that the district provided such notice. Indeed, the district documented each instance in which it provided the parent a copy of her procedural safeguards under the IDEA. The first notice accompanied a prior written notice form regarding a referral for an evaluation and request for consent, and another was provided along with April 2013 IEP team findings regarding the student's eligibility for services. Because the parent had adequate notice of her rights, her argument that exhaustion of administrative remedies would be futile is rejected.

F. R.B. v. New York City Dept. of Educ., 67 IDELR 241 (S.D. N.Y. 2016). Predetermination of placement did not occur with respect to preparations the district made in proposing two IEPs for a 17 year-old student with autism and significant developmental delays. Rather, the district considered several different classroom options for placement at the IEP meetings, heard the parents' concerns about the setting proposed and approached drafting of the IEPs with an open mind. The options considered included those that incorporated parents' comments and concerns, but the district decided against a 6:1:1 setting because it believed that the student would have difficulty remaining focused in that setting. In addition, at least one parent was in attendance at IEP meetings each year and had the opportunity to voice concerns. The fact that the district rejected the parents' request did not mean that the district categorically rejected their request without due consideration. Thus, the parents' request for private school tuition reimbursement is denied.

G. J.E. v. Chappaqua Cent. Sch. Dist., 68 IDELR 48 (S.D. N.Y. 2016). Although the parents of a student with autism disagreed with the annual goals and BIP in their child's IEP, there was no evidence of predetermination of placement by the district. Rather, the evidence reflected that both parents were actively involved and engaged in the IEP meeting and that the district addressed the majority of their concerns during the meeting. For example, when the parents indicated that quarterly meetings were insufficient to discuss the student's needs, the district planned monthly meetings to do so. Merely because the IEP did not incorporate every request made by the parents did not make them "passive observers" or evidence any predetermination on the part of the district. Thus, the hearing officer's decision denying reimbursement for private school tuition is upheld.

IEP CONTENT/IMPLEMENTATION ISSUES

A. L.M.H. v. Arizona Department of Educ., 68 IDELR 41 (D. Ariz. 2016). While a preschooler with a speech impairment made some progress with his December 2011 IEP, the IEP was not substantively appropriate. The school district's failure to consider any peer-reviewed research when deciding the number of speech

service minutes denied FAPE to the student. While the district was not required to provide three to five individual sessions of speech therapy per week as recommended by the American Speech-Language Hearing Association, the district should have considered some peer-reviewed evaluative data in determining an appropriate amount of services for the student. However, the IEP team based its decision solely on the speech therapist's professional knowledge and coursework. "[B]y not following the suggested standards under any peer-reviewed research, [the district] only provided an opportunity for minimal academic advancement, which violates the IDEA." Thus, the ALJ's decision finding the amount of speech services appropriate is reversed and the case is remanded for consideration of reimbursement for private services and compensatory education.

B. Damarcus S. v. District of Columbia, 67 IDELR 239, 190 F.Supp.3d 35 (D. D.C. 2016). District denied FAPE to intellectually impaired student when it failed to address the student's lack of progress through his IEPs. An IEP must be designed to produce meaningful educational benefit, but there were two major flaws in this student's IEPs. First, annual goals were repeated in a wholesale fashion across multiple IEPs, and "an alarming number of goals and objectives were simply cut-and-pasted (typos and all) from one IEP to the next." Having the same goals year after year not only caused the student anxiety and frustration, but was also a sign that the IEPs needed to be revised. However, rather than raising an alarm and working to devise a new approach—such as one that accounted for the student's noted weaknesses in processing and working memory—it appears that the district persisted in following the same ineffectual path. The second flaw in the IEPs is that, despite the student's lack of progress, the IEPs dramatically decreased his monthly SLP services. It appeared that the IEP team, relying solely on the student's IQ, made that decision based on its view that the student had "plateaued," when there was evidence that the student was capable of improving his skills, according to statements of the SLP.

C. E.H. v. New York City Dept. of Educ., 67 IDELR 61, 164 F.Supp.3d 539 (S.D. N.Y. 2016). The district has not shown that the IEP was likely to produce progress because it contained goals that were designed to expire by the time the new IEP was to begin implementing them. Here, the district erred in relying on 6-month goals contained in a December 2011 progress report from a private school in developing goals for the 2012-13 school year's IEP. The progress report, developed by the private school that the child attended for 3 years, included goals that the school expected the student to meet by June 2012, which the parent and the private school teacher testified that the child had progressed on. Nonetheless, the school district relied on the December 2011 report when it convened in June 2012. Thus, the goals in the proposed IEP for the 2012-13 school year did not reflect the child's present levels of academic achievement and functional performance and, therefore, denied FAPE.

D. S.B. v. Murfreesboro City Schs., 67 IDELR 117 (M.D. Tenn. 2016). Parents' motion for judgment for the cost of the student's unilateral residential placement is granted where district assigned a substitute teacher without special education certification to a full-time special education setting when the regularly-assigned special education behavior management teacher was out on maternity leave. The student's IEP focused solely on the student's severe behavioral problems, and the IEP team had determined that the student, although very intelligent, struggled to make progress because of frequent outbursts and "rage episodes." However, the district failed to ensure that he received behavioral services—the sole reason for his full-time special education placement—while the teacher was out on leave. The district's assignment of a substitute who was not certified in special education had more than a trivial impact on the student's education. In addition, residential placement was educationally necessary because the IEP's focus on behavioral issues showed that his emotional and behavioral problems were not separate from his learning.

E. Singletary v. Cumberland Co. Schs., 67 IDELR 115 (E.D. N.C. 2016). The district's omission of tricycle riding from the IEP of a preschooler with quadriplegic CP was not a denial of FAPE, where evidence reflected that the child would not have benefited from it. Instead, physical therapists who had worked with the child testified that riding a tricycle would have been detrimental to her. One of the PTs (also the

district's special education director) discussed the child's inability to operate a tricycle based upon her limited neck and trunk control. In addition, adaptive tricycle training would interfere with the child's progress toward dynamic sitting. Although the parents had testified that the child had ridden adaptive tricycles in the past and that learning to ride a tricycle was a curriculum goal for preschoolers, the PT who worked with the child during the school year at issue stated that she could only operate a tricycle by using muscles that she should not be using and that a video of the child using an adaptive tricycle at home confirmed his view that the child did not have the necessary prerequisite skills to use it.

F. Oskowis v. Sedona-Oak Creek Unif. Sch. Dist. #9, 67 IDELR 150 (D. Az. 2016). District is required to provide 212 hours of compensatory education to a nonverbal 10 year-old boy with autism where it waited too long between working on short-term objectives on three of his annual IEP goals. For the only goals that correlated with basic reading skills—color-matching and photo-matching—the IEP allotted 200 minutes per week. However, the district's 2-month delay in advancing the student between the first and second short-term objectives for those goals entitled him to 93 hours of compensatory education. Similarly, the district's 2-month delay in advancing the student between objectives on his shape-matching goal—the only one that correlated with basic math skills—required it to provide 84 hours of compensatory education. Finally, where the district did not provide the modeling that the student needed to work on related short-term objectives for the "object motor action" goal, an award of 23 hours of compensatory education for listening skills and 12 hours of OT are awarded. As the ALJ noted, the district did not begin working with the student on his second short-term objectives related to color-matching, photo-matching and shape-matching until November 2012, despite the fact that the student had mastered the first short-term objectives for all three of those goals in September 2012.

G. Kent Sch. Dist. v. N.H., 68 IDELR 276 (W.D. Wash. 2016). Where the record reflects that the issue before the ALJ was whether the district had failed to implement an IEP requirement for 1:1 nursing care on the days that the nurse was absent, the due process decision partially in favor of the parents is reversed. The evidence indicated that the nurse missed only two days of work prior to the parents' request for a due process hearing and that the child missed only one day of school as a result. Because the evidence did not show that those absences impeded the child's educational progress, they did not constitute a material implementation failure sufficient to entitle the child to relief.

THE FAPE STANDARD

A. Bohn v. Cedar Rapids Comm. Sch. Dist., 69 IDELR 8 (N.D. Iowa 2016). Although the student's IEPs were not without flaws and the team could have drafted goals that targeted sub-skill deficits and been more precise when describing monitoring methods, there was clear evidence that the student made educational progress and that the defects in the IEP did not deprive him of educational benefit. The IEPs were substantively adequate where they allowed the student to make nontrivial educational progress. Not only did the student have a GPA of at least 2.1 for each year in question, he also consistently scored proficient in reading and math on statewide assessments. Thus, the record contains "ample evidence" that the student made adequate progress in academics and on his IEP goals.

B. Reyes v. Manor Indep. Sch. Dist., 67 IDELR 33 (W.D. Tex. 2016). The parents' argument that FAPE was denied because the 19 year-old failed to master any of his IEP goals is rejected. The district took extensive measures to address the student's aggression and self-injurious behaviors, and the district could not help the student with functional skills until it addressed his unpredictable aggression toward staff members. The district consulted with a board certified behavior analyst, who remained with the student all day in his separate classroom and trained two full-time aides with respect to the student's behavior. Those staff members monitored and recorded the student's behavior every 5 to 15 minutes in an effort to identify the precursors to his aggression. In addition, the behavioral interventions employed allowed staff to work toward progress on the student's IEP goals. For example, the district introduced a tablet into the

student's routine and attempted to teach him to say "yes" or "no" to reflect his desires; the student began to tolerate the sound of an electronic razor near his face; and, on occasion, the student did fold towels of different sizes. While the student's progress was slow and not always consistent, there was progress nonetheless sufficient to constitute FAPE.

C. M.H. v. Pelham Union Free Sch. Dist., 67 IDELR 154 (S.D. N.Y. 2016). Where the school district maintained detailed documentation of the student's progress in reading, math, comprehension and motor skills, the student's slow but steady progress during the previous two school years showed that he was receiving FAPE. The court was able to identify numerous gains that the student had made during the 2011-12 and 2012-13 school years, including reading words beginning with "th" and "sh" and progressing from reading 40 "consonant-vowel-consonant" words to reading every one that he encountered. The documentation also reflected that the student had learned to perform basic addition without using manipulatives, was following multi-step directions and answering reading comprehension questions. Further, progress reports showed that the student had mastered 10 of the 24 annual IEP goals and made varying degrees of progress toward another 10 of them. Thus, the student's progress demonstrates that the district's program was likely to yield progress, not regression, for the 2013-14 school year. Thus, the parents are not entitled to reimbursement for the student's unilateral private school placement.

D. Ricci v. Beech Grove City Schs., 68 IDELR 67 (S.D. Ind. 2016). Parents of student with TBI and other disabilities were not able to show that the district's proposed public program was inappropriate. Rather, the student's 2013-14 IEP would have allowed him to make educational progress. Here, the parents' arguments centered on their belief that the private program that the student was attending was better than the school district's proposed program. However, the IDEA does not require a court to compare the two programs and Seventh Circuit authority directs hearing officers and reviewing courts to consider whether the proposed IEP will confer an educational benefit, not the best education available, when determining the appropriateness of an IEP. Where the parents did not submit any evidence showing that the proposed public school program would not meet the student's needs, there were no grounds for reversing the hearing officer's decision in favor of the school district.

VIRTUAL/ONLINE SCHOOLS/PROGRAMS

A. Dear Colleague Letter, 68 IDELR 108 (OSERS/OSEP 2016). While students with disabilities in virtual schools may never interact with teachers outside of a virtual program, that does not mean that their IDEA rights, or those of their parents, cease. The IDEA and its child-find, monitoring and compliance provisions apply equally to virtual schools. Thus, SEAs and LEAs must have policies and procedures in effect to ensure that children with disabilities attending virtual schools who are in need of special education and related services are identified, located and evaluated. While this may present "unique challenges," a teacher is commonly the first person to suspect that a child may have a disability and a need for evaluation. Thus, where a virtual school's practices limit or prevent interactions with a child, an SEA's policies should suggested additional methods that LEAs can use to meet their child-find obligations. This might include screenings to identify children who might need to be referred and questionnaires completed by virtual school teachers, staff members and parents. Generally, reliance on referrals by parents should not be the primary vehicle for meeting IDEA's child-find requirements. In addition, LEAs should review their policies regarding monitoring of virtual schools and correction where there is noncompliance, conducting timely collection and data reporting, and establishing and maintaining appropriate personnel qualifications. Agencies are also reminded of the need to ensure that virtual schools comply with other key IDEA requirements, including those that pertain to the provision of FAPE, IEP team participants, review and revision of IEPs and LRE.

LEAST RESTRICTIVE ENVIRONMENT

A. A.R. v. Santa Monica Malibu Sch. Dist., 66 IDELR 269 (9th Cir. 2016) (unpublished). While the district has the obligation to educate a preschooler with autism with nondisabled peers to the maximum extent appropriate, its placement of the student in a collaborative class is the child's LRE. Given that the child required prompting to interact with other children, he would not benefit from a general education placement. In addition, the IEP team discussed a number of placement options and when the parents rejected one preschool collaborative class option due to the age of the other children in that class, the district offered an alternative in a pre-academic preschool class with more age-appropriate models. The district provided several options tailored to meet the needs of the child, including programs with non-disabled peers. Thus, the district complied with the IDEA's requirements and the parents are not entitled to reimbursement for their unilateral private school placement.

B. S.M. v. Gwinnett Co. Sch. Dist., 67 IDELR 137 (11th Cir. 2016) (unpublished). The district's documentation of the full range of supplementary aids and services considered for a second-grader with difficulties in reading, writing and math supported its decision to offer pull-out instruction in those academic classes. The district provided supplementary aids and services so that the child could remain in the regular classroom in other academic subjects. For example, co-teaching was provided in the regular classroom for science and social studies. Clearly, the child required direct, explicit, small-group instruction with drill and repetition to make progress in the areas of reading, writing and math, which was very different from that provided in the general education classroom. Thus, the district could not meet the child's needs in a mainstream setting even with supplementary aids and services and the district has mainstreamed the child to the maximum extent appropriate.

C. Smith v. Los Angeles Unif. Sch. Dist., 830 F.3d 843, 67 IDELR 226 (9th Cir. 2016). Group of parents who want their children to stay in separate special education settings may intervene in this case to challenge a settlement agreement entered into by a different group of parents and the school district that would lead to the elimination of special education centers. The settlement agreement, which was renegotiated, resulted in curriculum changes for the students in the centers whose IEPs previously recommended full-time placement in a special education center. Thus, challenging at this time is appropriate, even though the litigation has been going on for over 20 years. The parents' delay in intervening into the lawsuit is also justified because they did not appreciate the "full import" of the changes based upon the "rosy language in which the changes were portrayed" by the district. Thus, these factors weigh in favor of these parents' intervention in this case.

D. N.T. v. Garden Grove Unif. Sch. Dist., 67 IDELR 229 (C.D. Cal. 2016). District's decision to place student in a special day class rather than in a private at-home ABA program is appropriate and met the student's need for small-group and individual services that would allow him to receive significant individual attention either through the teacher or an IBI aide. In addition, the IEP included four 90-minute intensive behavioral intervention clinics per week, which would provide one-on-one instruction in various skill areas. The district developed this program after having reviewed numerous independent and district-affiliated evaluation reports, and several evaluators testified that the student learns better in a small group as opposed to a one-on-one setting.

E. Jason O. v. Manhattan Sch. Dist. No. 114, 67 IDELR 142, 173 F.Supp.3d 744 (N.D. Ill. 2016). The district's proposed self-contained classroom is the LRE for a kindergartner with persistent behavioral problems. The program will provide opportunities for the child to interact with nondisabled peers in art, music and gym, as well as in academic classes when appropriate. The district provided social emotional services, resource support and a BIP to support the student in the general education class, but his frequent aggression and non-compliance continued and his academics were on a "downward trajectory." The child's behavior was not improving and instances of non-compliance have increased. Meeting goals is not possible in the general education setting where the child could not receive immediate, frequent

correction to address his anger and insensitivity toward peers. Thus, the self-contained class is the LRE where the student can receive educational benefit.

F. L.H. v. Hamilton Co. Dept. of Educ., 68 IDELR 274 (E.D. Tenn. 2016). The ALJ erred in relying on the 10 year-old boy with Down syndrome's inability to meet grade-level standards and keep pace with his nondisabled peers when finding that the student required a special education placement to receive educational benefit. Under the test set out in the *Roncker* case, the critical question is whether the services that make the segregated program superior can be provided in a regular education setting. Here, the student's second grade teachers were able to provide the intensive instruction that he needed in a general education environment. In addition, while the student did not meet grade-level standards, the evidence showed that he made academic, behavioral and social progress during his time in the regular second grade class, which undercuts the district's argument that a mainstream placement is not appropriate for the student. However, the parents are not entitled to reimbursement for their unilateral placement of the student in a private Montessori school because its instructional approach does not provide the structure that the student needs to learn.

BEHAVIOR/FUNCTIONAL BEHAVIORAL ASSESSMENTS & BIPS

A. Dear Colleague Letter, 68 IDELR 76 (OSERS & OSEP 2016). In light of research about the detrimental impact of disciplinary removals, including short-term disciplinary removals, the Department is issuing this significant guidance to clarify that schools, charter schools, and educational programs in juvenile correctional facilities must provide appropriate behavioral supports to children with disabilities who require such supports in order to receive FAPE and placement in the LRE. "As a practical matter, providing appropriate behavioral supports helps to ensure that children with disabilities are best able to access and benefit from instruction." This letter serves to remind school personnel that the authority to implement disciplinary removals does not negate their obligation to consider the implications of a child's behavioral needs and the effects of the use of suspensions or other short-term removals when ensuring the provision of FAPE. To the extent a child's behavior, including its impact and consequences, impedes the child's learning or that of others, the IEP Team must consider when, whether, and what aspects of the child's IEP related to behavior need to be addressed or revised to ensure FAPE. If the child already has behavioral supports, upon repeated incidents of child misbehavior or classroom disruption, the IEP team should meet to consider whether the child's behavioral supports should be changed.

B. J.C. v. New York City Dept. of Educ., 67 IDELR 109 (2d Cir. 2016) (unpublished). District's failure to conduct an FBA and create a BIP separate from the student's IEP did not rise to the level of a denial of FAPE, even where New York law required it. The student's 2011-12 IEP appropriately addressed the student's behavioral issues. While New York law does require that an FBA be conducted when a student has behaviors that impede learning, the failure to do so will not be a violation of FAPE as long as the IEP adequately identifies the student's behavioral impediments and implements strategies to address the behavior. Here and according to the district court, teachers were able to reduce the student's disruptive classroom behaviors, such as jumping and squealing, by using interventions and supports outlined in the student's IEP. In addition, the student's behaviors occurred infrequently and did not usually impede his learning or that of others. Thus, the district's procedural violation did not constitute a denial of FAPE.

C. T.L. v. Lower Merion Sch. Dist., 68 IDELR 12 (E.D. Pa. 2016). Outside of the IDEA's discipline provisions, an FBA and BIP are not necessarily required by the law where a child's IEP provides other means for addressing behavioral issues. In this case, the district recognized that the SLD/ADHD student's behavior sometimes impeded his learning and it provided interventions and supports to address it. For instance, the child's 2012 IEPs included supports targeting attentional, hyperactivity and organizational deficits. In addition, subsequent IEPs retained those supports and added others, including modified tests, breaks and relaxation strategies. The December 2013 IEP added direct counseling and frequent check-ins

by an adult and a formal behavior support plan was included. Although an FBA was not conducted until August 2013, the district acted appropriately when it attempted to manage the behaviors through an array of positive behavioral interventions and other supports.

D. Garris v. District of Columbia, 68 IDELR 194 (D. D.C. 2016). Hearing officer's decision is upheld finding that the district offered FAPE. While the November 2014 BIP did not specifically address the impact of an on-campus assault that had occurred against the student a month earlier, the BIP was otherwise appropriate for the student. An FBA that was done in September 2014 recognized the student's low frustration level and her highly inappropriate verbal interactions with peers and indicated that she acted out to get attention. The BIP addressed those behaviors by identifying a support person the student trusted, offering instruction with problem-solving techniques, providing for verbal encouragement and positive affirmation and giving her opportunities to express her feelings. The BIP also included a goal related to attendance and provided for counseling to explore her lack of educational motivation. While the BIP failed to address the student's refusal to attend school after the October 2014 assault, the document as a whole was appropriate to address her truancy issues.

DISCIPLINE/MANIFESTATION

A. Bristol Township Sch. Dist. v. Z.B., 67 IDELR 9 (E.D. Pa. 2016). Determination that teenager's ADHD did not play any role in the alleged physical assault of a teacher is inappropriate and the hearing officer's order of compensatory education for one day for each day after 10 days the student was removed is affirmed. The manifestation team did not discuss whether the student actually assaulted the teacher or whether his alleged misconduct had a direct and substantial relationship to his disability. In fact, the special education supervisor testified that the team looked at it "more from a global picture," and did not look at what occurred during the specific incident. According to the supervisor, the team only considered whether ADHD generally has a connection to aggressive behavior. In addition, the team's failure to consider the student's horseplay in the school hallway and refusal to follow teacher's direction, both of which came before the alleged assault, made the manifestation decision deficient. Further, the supervisor's decision to complete the MDR report prior to the team's discussion was ill-advised, even though she gave team members an opportunity to object to it, which was not an appropriate substitute for meaningful discussion.

TRANSITION SERVICES

A. Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ., 68 IDELR 33 (6th Cir. 2016) (unpublished). The district's failure to timely conduct transition assessments, in addition to its failure to consider the student's preferences and needs denied FAPE. The district's failure to invite the student to an IEP meeting for postsecondary transition planning was a harmless procedural violation, because even if the student had attended the confrontational meetings—a decision that would have exposed her to yelling, slamming doors and general animosity—she would not have been able to articulate her wishes. However, the failure to assess the student's transition needs resulted in a loss of educational opportunity, where the district's evaluation largely consisted of observing her performing assigned tasks, such as wiping tables and shredding documents, which offered little insight into her preferences and interests. In addition, a third-party vocational assessment conducted when the student was 19 recommended further evaluation of her interests, stamina and ability to improve with repetition, which was not done. Thus, the district failed to develop an appropriate transition plan. If the student had received additional training and assessments, she could have worked in a supported setting rather than attending a non-vocational program as suggested by the district.

B. L.B. v. New York City Dept. of Educ., 68 IDELR 95 (S.D. N.Y. 2016). While agreeing with the State hearing officer that the student's transition plan was "vague and generic," the student is still years away

from graduation and the details provided in other sections of the student's IEP mitigate the lack of detail in the postsecondary transition plan. For instance, the IEP includes goals and objectives in the areas of OT, speech and language and counseling that are expressly designed to help the student improve skills necessary for independence within the school, home and community, pragmatic language skills, self-advocacy skills and social reasoning and problem-solving. The transition plan also stated that the student would pursue and IEP diploma and identified four long-term adult outcomes. While the transition plan itself lacks measurable goals, details about the types of activities contemplated, the student's interests, strengths and needs and the parties responsible for implementation, other parts of the IEP mitigate these deficits.

C. C.W. v. City Sch. Dist. of the City of New York, 67 IDELR 186, 171 F.Supp.3d 126 (S.D. N.Y. 2016). The failure to invite 11th-grader with an intellectual impairment to his IEP meeting to address postsecondary goals and services is a harmless procedural error that did not deny FAPE. The IEP team's inclusion of the student's preferences and interests in the transition plan were sufficient. While the district had no excuse for its failure to invite the student to the meeting, the parents cannot obtain relief for this procedural violation without showing some form of substantive harm to the student. Here, the IEP team considered input from one of the parents and representatives from the student's private school, all of whom attended the IEP meeting. In addition, the plan addressed the student's interest and skill in art. While the failure to invite the student was "troubling," it did not result in the development of an inappropriate transition plan. In addition, the team's development of an IEP goal related to the student's work-related self-advocacy, communication and interpersonal skills made up for the team's failure to include objective measurement criteria for the student's single postsecondary goal.

METHODOLOGY

A. Forest Grove Sch. Dist., 69 IDELR 27 (9th Cir.2016) (unpublished). While it appeared that the high school student with autism and ADHD appeared to learn more effectively in her English and writing class where constant repetition and immediate checks for comprehension were used, the district was not required to use this instructional technique in all of her classes. The district's choice of methodology did not result in a denial of FAPE and the district had no obligation to maximize the student's potential. The fact that the student made more progress in the English class is not require all of her teachers to adopt the English teacher's practice of repeating small pieces of information, with immediate follow up and application. Indeed, the Magistrate had noted that using the parents' preferred technique in her general education classes would slow the pace of instruction and substantially reduce the amount of material that the class could cover in one semester. Thus, the district court's findings on educational methodology are adopted without further analysis.

CHARTER SCHOOLS

A. Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the IDEA, 117 LRP 97 (OSERS 2016). On December 28, 2016, OSERS issued a comprehensive FAQ regarding the obligations of charter schools to their students with disabilities under the IDEA.

B. Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under Section 504, 117 LRP 103 (OCR 2016). On December 28, 2016, OCR issued a comprehensive FAQ regarding the rights of students with disabilities in charter schools under Section 504.

PRIVATE SCHOOL/RESIDENTIAL PLACEMENT

A. Rockwall Indep. Sch. Dist. v. M.C., 816 F.3d 329, 67 IDELR 108 (5th Cir. 2016). The unreasonable nature of the parents' behavior justifies the denial of their request for tuition reimbursement for private schooling.

In this case, the evidence indisputably shows that the parents were not reasonable when they took an "all-or-nothing" approach and refused to attend a follow-up IEP meeting with the district unless the district agreed to their request to allow the student to remain in private school for the rest of the semester and to reimburse them for the cost of the private placement. At a December 2011 meeting, the IEP team discussed techniques that had benefited the student in her private school placement and agreed to incorporate many of those methods into the proposed public school program. The parents asked that the student remain in the private school for the rest of the semester while taking one or two public school classes and refused to attend a follow-up meeting to finalize the student's IEP, as evidence in their email correspondence with the district's special education director. According to them, all that was left for the district was to "let us know what their decision is" regarding their proposal to allow the student to remain in the private school. Later correspondence from the parents reflected their complete unwillingness to cooperate unless the district agreed to their proposal in full.

B. N.G. v. ABC Unif. Sch. Dist., 68 IDELR 270 (9th Cir. 2016) (unpublished). Under the California Education Code, the school district where a psychiatric hospital is located is responsible for providing FAPE to a student hospitalized there. However, upon discharge, the school district of residence is responsible for FAPE and that would be the LEA where the student's guardian resides, not where the hospital is located.

C. W.A. v. Hendrick Hudson Cent. Sch. Dist., 69 IDELR 4 (S.D. N.Y. 2016). The private boarding school's decision to provide an iPad to the teenager with chronic migraines and organizational difficulties is a significant factor in support of the parents' claim for reimbursement for the cost of the private school. The provision of AT, in addition to small class sizes and around-the-clock nursing services, makes the unilateral private placement appropriate. The student's difficulties with organization improved dramatically after he received the tablet and his teachers testified that the device's impact was "huge" and a "godsend" for the student. Further, the small class sizes, which reduced stress that caused the student's migraines, and the availability of nursing services dramatically improved the student's attendance. Looking at all of the factors together, the boarding school is an appropriate placement and the parents are entitled to reimbursement for its cost from the district.

D. R.C. v. Board of Educ. of the Wappingers Cent. Sch. Dist., 68 IDELR 187 (S.D. N.Y. 2016). School district's proposed therapeutic day school offered FAPE. Thus, the parents' request for reimbursement for the unilateral placement of their child with autism in a residential placement is denied. It was not unreasonable for the hearing officer to determine that the student's treating psychiatrist's concerns could be addressed in the district's day school program because of its small structured classes, therapeutically trained staff, school psychologists and counselors. The district's day school was also capable of implementing the psychiatrist's recommendation that the student check in with a counselor or psychologist every day at the same time. While the school might not be perfect, the IDEA only requires a placement capable of conferring educational benefit in the LRE.

E. D.B. v. Ithaca City Sch. Dist., 68 IDELR 161 (N.D. N.Y. 2016). Parent's request for reimbursement for the cost of placing student with a nonverbal learning disability at a residential school is denied. The Second Circuit Court of Appeals has advised courts to "proceed cautiously" when considering such a restrictive placement for a child with a disability. Thus, courts in the Second Circuit are reluctant to find that residential placement is required in the absence of clear evidence indicating that it is the child's only means of achieving academic progress. Here, none of the evaluative data demonstrates that the student has an educational need for residential placement. Rather, the data shows that the district can meet the student's needs in a public school setting by providing daily resource room services, individualized counseling for anxiety, and various other instructional strategies. While the parent may prefer placement at a therapeutic boarding school, the parent is not able to show that the district denied FAPE.

F. Zachary G. v. School Dist. No. 1, 68 IDELR 222 (D. Co. 2016). Parents may not recover the cost of placement of their ninth-grade student with Prader-Willi syndrome in a residential facility. While food security was vital to the student's ability to receive FAPE, the parents' claim that the district failed to provide "total food security" that their experts deemed necessary is rejected. Rather, the IEP team worked closely with the student's treating psychiatrists in developing its proposed food security plan and took steps to limit the student's unsupervised access and unnecessary exposure to food. These steps included educating the student in a smaller section of the school that could be monitored for food, assigning two paraprofessionals to accompany the student and clear hallways of food in advance, and training all relevant staff on how to support the student in the event of a food security breach. The fact that the IEP does not use the terms "total food security" does not mean that the district did not take it seriously and did not take reasonable steps to implement what was needed.

G. Sacramento City Unif. Sch. Dist., 68 IDELR 220 (E.D. Cal. 2016). Parents are entitled to reimbursement for placement of their 11th-grade child in a residential placement based upon the district's inadequate offer of mental health services, which required the student to split her time between two schools and receive services from two school-based therapists. While not finding that the student needed residential placement in order to receive FAPE, by making the student's social and emotional development part of her IEP, the district committed itself to providing the services she needed to make progress on goals related to improving her self-esteem, helping her to manage feelings of hopelessness and assisting with interpersonal communication.

H. Luo v. Baldwin Union Free Sch. Dist., 67 IDELR 15 (E.D. N.Y. 2016). Hearing officer's decision that the district offered FAPE is upheld, and the district is not required to provide an out-of-state private school placement for the student with autism. Parent's argument that he was denied meaningful opportunity to participate in the placement decision because the district refused to consider information about the out-of-state school is rejected. The right to participate in the placement process does not include the right to select the specific school that the student will attend. Further, New York regulations require IEP teams to consider in-state programs before approving out-of-state ones. Here, the parent did not appear willing to accept any placement other than the private special education school and refused to visit any other options. The IDEA, however, only guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents." The team considered a variety of evaluative data and identified multiple public school programs that could meet the student's needs. Thus, the district was not required to offer the out-of-state placement that the parent wanted.

I. W.W. v. New York City Dept. of Educ., 160 F.Supp.3d 618, 67 IDELR 66 (S.D. N.Y. 2016). Parent is entitled to private school funding because district did not present any evidence that the proposed assigned school was able to provide the types of services the student needed. In addition, the district failed to contradict information in a letter from the mother where she related that the school's parent coordinator had told her that the school would not and could not implement the student's IEP during a site visit. While parents who reject public school placements based upon information obtained during school site visits do so at their own risk if the district can demonstrate that the proposed school was capable of implementing a student's IEP, the district here did not demonstrate that and bore the burden of proving that. The parent coordinator purportedly told the mother that the school could provide a 12:1 class or integrated co-teaching classes but not the combination of the two settings as set forth in the student's IEP. In addition, she also allegedly stated that the school did not offer integrated co-teaching classes for art, music or P.E.

J. E.P. v. New York City Dept. of Educ., 68 IDELR 21 (S.D. N.Y. 2016). Parent's challenge to district's proposed program for teenager with autism was speculative. While the parent alleged that the unit coordinator for the proposed program indicated during a tour of the school that three of the children were nonverbal and that the other three had minimal verbal skills and that she observed students from the class running in the hallway, parents cannot challenge a proposed placement by merely arguing that an IEP

would not have been effectively implemented at the proposed school. The parent's only evidence regarding the verbal functioning of the members of the proposed classroom is her own account of the unit coordinator's characterization of the students. In addition, the parent's hypothesis relied on her erroneous assumption that the same students would be attending the class when her son joined it. Thus, tuition reimbursement for private schooling is denied.

K. Q.C.-C. v. District of Columbia, 67 IDELR 60 (D. D.C. 2016). Student with ADHD and SLD could not benefit from district's proposed program and district is ordered to place the student in a private special education school for the remainder of the school year. Hearing officer's order requiring the district to modify the student's IEP to include regular education with 25 hours of specialized instruction each week (rather than the 5 hours in the proposed IEP) is not sufficient to provide the student FAPE. The evidence presented by experts demonstrates that the student would face potentially insurmountable difficulties if the hearing officer's proposed IEP were implemented. While the Act's LRE requirement is important, the first consideration is whether the district's proposed placement is capable of meeting the student's needs. Based upon testimony from numerous special education experts indicating that the student had significant difficulty with focus and overstimulation, the private school is the only environment capable of meeting the student's needs and providing FAPE.

L. J.M. v. New York City Dept. of Educ., 67 IDELR 153, 171 F.Supp.3d 236 (S.D. N.Y. 2016). Where 14 year-old's IEP did not require her to attend a small school or have a noise-free setting at all times, her parents' request for private school costs is rejected. The student's placement in a self-contained special education program on the campus of a large district high school was appropriate. While the IEP requires that the student be placed in a classroom with a 6:1:1 teaching ratio, it makes no mention of the size of the school that she must attend, whether with respect to the physical building itself or the number of other students in the school. In addition, the IEP did not require her to have a quiet environment at all times or to have opportunities to socialize with peers at lunch. Where class bells were not audible in the special education wing and the students there had the ability to eat lunch in a private cafeteria, the school was able to implement the student's proposed IEP.

M. Z.B. v. District of Columbia, 68 IDELR 136 (D. D.C. 2016). Parents are not entitled to reimbursement for private schooling where there was no evidence that the proposed public school program was inappropriate. As long as the proposed IEP is reasonably calculated to provide an educational benefit, the FAPE requirement has been met. The degree of progress that the student made at the private school is largely irrelevant, as none of the evaluations established the student's need for an out-of-district special education program. In addition, the district did not have the opportunity to implement its proposed IEP, because the parents withdrew the student from school just 4 days after it took effect. The student's progress at the private school is not persuasive evidence that a placement in the public school district would not have worked.

COMPENSATORY EDUCATION/OTHER REMEDIES

A. M.S. v. Utah Schools for the Deaf and Blind, 822 F.3d 1128, 67 IDELR 195 (10th Cir. 2016). District court erred in delegating its authority to the student's IEP team to determine an appropriate remedy for the team's discontinuation of the student's residential placement. District courts cannot delegate their authority to decide a remedy to IEP teams. Allowing the educational agency that failed or refused to provide the student with FAPE to determine the remedy for that violation is at odds with the review scheme set out under the IDEA and such an approach would create an "endless cycle" of litigation which would require parents to seek a due process hearing each time they disagreed with the proposed remedy. On remand, the district court is to consider an appropriate residential placement for the student.

B. Holman v. District of Columbia, 153 F.Supp.3d 386, 67 IDELR 39 (D. D.C. 2016). Even though 18 year-old student graduated from high school with a 2.23 GPA, she is entitled to compensatory education where the district's failure to implement her IEP was a "material implementation failure." The "crucial measure" under the materiality standard is the "proportion of services mandated to those provided and not the type of harm suffered by the student. Thus, the due process hearing officer's reliance on the fact that the student did not suffer harm based upon the fact that she graduated from high school in three years is irrelevant. The fact that the district only scheduled 28% of the service hours required by the student's IEP, as well as the fact that her special education teacher missed at least one class per week and did not stay for the entire class period denied FAPE. Even if the student needed to demonstrate educational harm for a finding of denial of FAPE, she still proved it here where she regressed in five core academic areas between 2010 and 2014 and was reading at a 4th grade level when she received her diploma. Thus, the district must convene an IEP meeting for the student who will remain eligible for compensatory education until age 22.

C. Stapleton v. Penns Valley Area Sch. Dist., 67 IDELR 268 (M.D. Pa. 2016). School district may need to fund a former student's college tuition based upon an 8 year-old due process order where the IDEA does not explicitly prohibit the use of compensatory education for postsecondary expenses. Thus, the parents' action to enforce the due process order and to use part of the relief to pay for college tuition will not be dismissed. In *Letter to Riffel* (OSEP 2000), the U.S. DOE recognized that compensatory education is an equitable remedy that could be appropriate beyond the period when a student is entitled to FAPE and stands for the proposition that no rule absolutely prohibits the use of compensatory education for postsecondary expenses. Thus, the court needs to conduct a fact-intensive inquiry to determine whether the student is entitled to the requested relief.

D. A.S. v. Harrison Township Bd. of Educ., 67 IDELR 207 (D. N.J. 2016). Although the parents were entitled to obtain additional reimbursement for mileage to transport their child to his private school because the hearing officer failed to use the standard IRS business mileage rate to calculate the award, the parents are not entitled to minimum wage compensation for their time and effort spent transporting their child. IDEA only requires districts to pay actual expenses of transportation and there is no case law or statutory precedent for awarding parents minimum wage or any other amount for driving their child to school where they already receive mileage reimbursement.

E. A.S. v. Harrison Township Bd. of Educ., 68 IDELR 96 (D. N.J. 2016). Ordering a district to establish a trust fund to pay for compensatory education to a child who went without services for 12 days can be an appropriate remedy in an IDEA case. There is court authority for doing so, and the IDEA authorizes a court to "grant such relief as [it] determines is appropriate."

SERVICE ANIMALS

A. Riley v. School Adm. Unit #23, 67 IDELR 8 (D. N.H. 2016). Parents' request for an injunction ordering the district to provide adult assistance to their child in handling the student's service dog is denied. In order to demonstrate likelihood of success on the merits, the parents are required to show that the assignment of a district employee to issue verbal commands and hold the dog's leash for the student is a reasonable request. The Magistrate Judge has noted, however, that the ADA regulation requires the service animal to be in control of its "handler." However, the student is not the dog's handler, because he is primarily nonverbal and because the student usually walks with assistance and requires hand-under-hand guidance during educational activities, it is clear that he would be unable to safely hold or grab the dog's leash. As a result, the parents here are not asking for the district to assign an employee to assist the student with the dog's care; rather, the parents are asking the district to assign a staff member to control and supervise the dog. This is not required under the ADA; thus, the Magistrate advised the court to deny the requested injunctive relief and the district court does so.

B. United States v. Gates-Chili Cent. Sch. Dist., 68 IDELR 70 (W.D. N.Y. 2016). In an ADA case brought by the federal government against a school district, the factual questions that exist over whether the 8 year-old student has the ability to handle her service dog at school and whether an adult handler is needed require a denial of the district's motion for judgment. The evidence is unclear as to whether the multiply disabled child is able to tether herself to and command her service dog. Although the government alleges that the child only requires assistance with untethering and occasional prompting, the school district alleges that the adult handler tethered and untethered the dog, assisted or directed the child when she tethered herself and issued commands to the dog. These facts need to be resolved before the court can determine whether the school district has violated the ADA. If the dog is tethered to the child and all she needs is to untether her from the dog, the child can be considered to be in control of the dog. However, if the child requires school district personnel to actually issue commands to the dog, as opposed to occasionally reminding her to do so, then she cannot be considered in control of her service dog. It is noted that the school district has conceded that it would have no issue helping the child untether herself from the dog.

C. A.P. v. Pennsbury Sch. Dist., 68 IDELR 132 (E.D. Pa. 2016). Parents' request for preliminary court injunction that would allow their child to bring his diabetic alert dog to school pending resolution of their 504 and ADA claims is denied. As noted by the magistrate judge, the parents are not likely to prevail on the merits of their discrimination claim where the obligation for the school district to make reasonable modifications in its policies, practices and procedures to accommodate the dog does not extend to an animal that has bitten another person. In fact, the ADA regulations clearly permit a school district to exclude a service dog that cannot be controlled by its handler and bites a member of the public. The dog, as a trained service animal, should not exhibit any aggressive behavior in a school setting—regardless of whether the bitten classmate taunted the dog or not. Further, while the classmate's injury was enough to establish that the animal posed a "direct threat," the dog's history of disruptive behavior on school grounds (multiple incidents of barking, growling, nipping and chewing on classroom supplies) showed that the biting behavior was not an aberration from normal behavior.

SECTION 504/ADA ISSUES GENERALLY

A. B.C. v. Mount Vernon Sch. Dist., 68 IDELR 151 (2d Cir. 2016). Joining the 10th Circuit Court of Appeals, the Second Circuit rejects the notion that a student who receives services under the IDEA is automatically considered an individual with a disability under Section 504 and the ADA for purposes of bringing a disability discrimination claim. The parents' statistical evidence that IDEA-eligible students are up to three times more likely to be placed in noncredit courses than were non-disabled students only addresses evidence of IDEA-eligible students, not necessarily students with disabilities under Section 504/ADA. The eligibility standards are not interchangeable under IDEA and Section 504. Rather, a child may need special education and related services by reason of an impairment under IDEA, even if that impairment does not substantially limit a major life activity. Thus, a parent seeking relief for disability discrimination must show that the student meets the definition of "individual with a disability" under Section 504/ADA and judgment for the district on the parents' 504/ADA disability discrimination claims is affirmed.

B. J.C. v. Cambrian Sch. Dist., 67 IDELR 199 (9th Cir. 2016) (unpublished). There is no evidence of discrimination under Section 504/ADA on the basis of the non-resident second-grader's ADHD. The charter school has consistently enforced its enrollment policy that explicitly gives preference on admission to existing students and the student's enrollment in the school for first grade did not guarantee continued admission. The definition of "existing students" under the school's enrollment policy reasonably excluded students like the student here who moved out of the district will attending the school. Further, the school did not admit any non-resident students for the 2011-12 school year, regardless of their disability status. Thus, there is no evidence of disability discrimination and the district court's dismissal of the parent's claims is affirmed.

C. C.V. v. Dudek, 54 NDLR 14 (S.D. Fla. 2016). In a lawsuit where the Department of Justice sued the State of Florida alleging discrimination in its administration of its Medicaid program, DOJ is dismissed as a plaintiff because DOJ lacks standing to sue under Title II of the ADA. While Titles I and III expressly confer standing upon the attorney general to initiate litigation, Title II does not. Where Congress has conferred standing on a particular actor in one section of a statutory scheme, but not in another, its silence must be read to preclude it.

D. ADA Title II Regulations, Federal Register, Volume 81, No. 155 at page 53204, became effective on October 11, 2016. These regulations were to incorporate changes made to the ADA via the 2008 ADA Amendments Act applicable to Title II entities, including public school districts. These regulations incorporate the broader definition of disability, including some conditions specifically that the DOJ automatically presumes to be "physical or mental impairments," such as dyslexia, "other specific learning disabilities," and ADHD (just to name a few). Listed major life activities were also expanded to include sitting, reaching, writing and interacting with others (again, just to name a few). All in all, it is much easier for an individual to establish the existence of a disability under the ADA (and, by analogy, Section 504).

E. "Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools," issued by the Office for Civil Rights on December 28, 2016 and can be found at: http://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf. In addition to serving as a sort of "procedural manual" for addressing 504 obligations in schools, it contains eleven scenarios well worth studying in terms of 504 guidance from the Office for Civil Rights.