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Please note that citations contained within Key Quotes have sometimes been omitted to enhance readability.

This handout summarizes reported decisions from 2014-15. We have not attempted to summarize every case, but rather, those that are particularly important and/or instructive. The handout also includes italicized “*Comments*” designed to focus on the practical implications of some of the cases. The Comments sometimes include personal opinions of the author of the handout.

ADA/SECTION 504

Estate of Montana Lance v. Lewisville ISD, 62 IDELR 282 (5th Cir. 2014)

In a bullying/suicide case, the court held that there could be no cause of action for denial of FAPE under 504 when the student was served under IDEA and the parent did not allege a denial of FAPE under IDEA. The court cited the 504 regulation that says that implementing an appropriate IEP under IDEA is valid means of satisfying 504 obligations: 34 CFR 104.33(b)(2). That being the case, if a student has an IEP which is not being challenged under IDEA, there can be no 504 claim for failure to provide FAPE. This does not, however, preclude other claims under 504.

Thus the court also addressed the peer-to-peer disability harassment claim under 504. Here, the court ruled in favor of the district due to the lack of evidence of deliberate indifference. Key Quote:

Judges make poor vice principals, and as *Davis* instructs, “courts should refrain from second-guessing the disciplinary decisions made by school principals.”

Re: Gates-Chili Central School District, 65 IDELR 152 (DOJ, 2015)

This is an investigation by the Department of Justice regarding a school district’s refusal to allow a student to bring a service dog to school unless the parent provided an adult handler for the dog. The DOJ found the school in violation of the ADA and ordered it to modify its policies and practices to permit the student to use the dog, even though it would require some assistance from school staff.

Comment: This report includes a detailed analysis of the facts, which makes the school’s position seem pretty unreasonable. The dog required minimal attention and the child already had a 1:1 aide accompanying her all day long who could assist with the dog. There was no question that the dog was helpful, including detecting seizures in advance. Moreover, the child had had the dog with her at school for four years without incident. In pre-school, the dog accompanied the child without an adult handler. When the child went to kindergarten, the district insisted on an adult handler. It’s dangerous for a district to discontinue providing an accommodation unless there is an obvious reason for the change.

Alboniga v. School Board of Broward County, Florida, 65 IDELR 7 (S.D. Fla. 2015)

The school district argued that the DOJ exceeded its authority in promulgating its regulations pertaining to service animals. The court disagreed, noting that regulations are entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Since Congress has not spoken directly to the issue of service animals, the regulations are entitled to deference “if they are reasonable in light of the language and purpose of the ADA and unless they are arbitrary, capricious, or manifestly contrary to the ADA.” The court further held that the school violated the law by requiring the parent to provide liability insurance and proof of vaccinations that exceeded state law requirements. The court also held that the severely disabled child was serving as “handler” of the dog by having it tethered to his wheelchair. The school was ordered to have someone accompany the boy and the dog when the dog needed to urinate. This was not considered “care and supervision.” The court held that that term refers to “routine or daily overall maintenance of a service animal.” This dog did not eat or drink during the school day, and required no “care or supervision” beyond having someone accompany the boy when he took the dog out to urinate. The court acknowledged that this was a close call, but held that this was considered an accommodation of the boy, rather than “care or supervision” of the dog.

Comment: We are sure to hear about this case. It includes a very thorough analysis, with cites to many cases.

FAQ on Effective Communication, 64 IDELR 180 (OSERS, 2014)

In these FAQs, OSERS notes that meeting the FAPE standard under IDEA may not be sufficient for students with hearing, visual or speech impairments. Such students are entitled to “effective communication” under Title II of the ADA. This requires auxiliary aids and services to ensure that communication with such students is “as effective” as communication with the non-disabled. Moreover, districts must give “primary consideration” to the aids and services requested by the student and/or parents.

Comment: An Alabama district denied FAPE to a deaf student by failing to provide CART services. The FAQ cited above is about ADA standards, but the case from Alabama relies on IDEA for its holding. The court held that the district denied FAPE under IDEA when the evidence showed that the student needed CART to receive FAPE. DeKalb County Board of Education v. Manifold, 65 IDELR 268 (N.D. Ala. 2015).

NSBA pushed back on the original FAQ issued by OSERS, but OSERS responded by reaffirming its position at 65 IDELR 304 (2015).

K.R.S. v. Bedford Community School District, 65 IDELR 272 (S.D. Iowa 2015)

The court denied the district’s motion for judgment in its favor, holding that the allegations in the suit were sufficient to allege a plausible case of disability-based harassment. The plaintiff alleged that football players ridiculed him with names like “idiot” “moron” and “stupid” which

were sufficient to show a connection with the student’s disability. The bullying allegedly caused the student to be hospitalized for a head injury after teammates threw footballs at his head.

Zdrowski v. Rieck, 66 IDELR 42 (E.D. Mich. 2015)

The court held that a “dragging incident” did not indicate bad faith or gross misjudgment by the school district. The parents argued that the teachers used the “transport hold” when they should not have. Key Quote:

The Court finds that in the context of the case, where C.R. was threatening to harm himself, had a history of violent outbursts, and might have become more agitated by being restrained in the control hold, no reasonable jury could find that Defendants acted with bad faith or gross misjudgment by using the transport hold to take him to the office even though he was resisting.

K.P. v. City of Chicago School District #299, 65 IDELR 42 (N.D. Ill. 2015)

The court ruled for the school district in a case where a student sought an injunction to permit her to use a handheld calculator during a math test that would be used in determining her eligibility for certain selective high schools in the district. The math test was done on a computer, and for some of the questions, an on-screen calculator was available. For other questions, students were expected to do their own computation. The court held that allowing the plaintiff to use a calculator for the entire test would give her an unfair advantage and would invalidate her test results. Key Quote:

That is not a reasonable accommodation but a substitution of artificial intelligence for the very skill the Test seeks to measure.

ATTORNEYS’ FEES

J.L. v. Harrison Township Board of Education, 66 IDELR 80 (D.N.J. 2015)

The court held that the parents’ were prevailing parties, based on a settlement that was approved by the hearing officer. The school made an “offer of judgment” that generally included all of the relief obtained, but since it omitted the payment of reasonable attorneys’ fees, the offer did not bar recovery of fees. However, the bad faith conduct of the parents’ attorney in prolonging the dispute was grounds for a reduction of fees, which the court would determine after a hearing. Key Quotes:

During the hearing, this Court labored to get a straight answer from Mr. Epstein [parents’ attorney] as to why he simply did not respond to Mr. Gorman’s [school attorney] requests for a resolution. Mr. Epstein’s persiflage impeded the Court’s task.

IDEA was passed to reverse the history of neglect where disabled children in America sat idly in regular classrooms biding time until they were old enough to “drop out.” It was not meant to be a windfall for lawyers.

Even turning to the merits of the argument, however, Plaintiffs’ argument is pure pettifoggery.

Comment: Upon receipt of the request for hearing the school sought mediation and requested to know what relief the parents wanted. The response was: “We’ll see after we get Answers and discovery from BOTH respondents.” The paper and e-trail is illuminating—the school trying to find out what it would take to resolve the matter; the parents’ attorney balking.

BULLYING/ HARASSMENT

Zdrowski v. Rieck, 66 IDELR 42 (E.D. Mich. 2015)

There was no evidence of deliberate indifference, or severe or pervasive bullying. Moreover, there was no evidence that the incidents that occurred were based on disability.

J.R. v. NYC DOE, 66 IDELR 32 (E.D.N.Y. 2015)

As an example of the type of evidence that might show “deliberate indifference” the court cited the principal’s response to the student’s request to transfer to another bus to avoid bullying. The principal indicated that the student population was violent, and therefore, bullying was likely to occur on any bus. Key Quote:

Although the “deliberate indifference” standard does not require that teachers and school administrators successfully prevent or eradicate all bullying behavior, surely some effort to discourage that conduct and announce its unacceptability is required.

Title IX does not protect against bullying based solely on homosexuality, but it does apply to bullying based on the failure to conform to gender stereotypes.

DISCIPLINE

Dear Colleague Letter, 114 LRP 1091 (OCR/DOJ 2014)

This letter addresses racial disparities in the use of “exclusionary” discipline practices, such as expulsion, suspension and ISS. OCR states that it will apply both a “different treatment” and a “disparate impact” analysis to claims of racial discrimination. Disparate impact may be found even when the rules are neutral on their face, if they disproportionately impact minority students. The key questions are: 1) Has the discipline policy resulted in an adverse impact on students of a

particular race? 2) Is the discipline policy necessary to meet an important educational goal? 3) Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately impacted racial group, or is the school's proffered justification a pretext for discrimination?

Wayne-Westland Community Schools v. V.S., 65 IDELR 13 (E.D. Mich. 2015)

Wayne-Westland got a TRO (Temporary Restraining Order) on October 9, 2014, followed by a Temporary Injunction on October 16. The Injunction will keep the student away from any school facility until the IEP Team can meet and discuss a change of placement. The evidence showed that the student was a big kid—6 feet tall, 250 pounds. In one month in the spring of 2014 he 1) physically attacked a student and several staff members, spitting at and kicking them; 2) “menaced” two staff members with a pen held in a stabbing position and refusing to put it down when told to do so; 3) punched a student; 4) punched the principal; 5) threatened to rape a female staff member; 6) punched another staff member in the face. Later in the semester, the student attacked a security liaison. He was told to leave the building. When he attempted to return, four staff members held the door closed to keep him out. Since the student would not leave the school grounds, the entire school was placed on lockdown. When school resumed in the fall of 2014, the student 1) threatened to bring guns to school to kill staff members; 2) made racist comments toward African American staff members; and 3) punched the director of special education in the face.

That was enough to convince the court that maintaining the student in the current placement posed an imminent threat. The school had plans to continue the boy's education through Virtual Academy, with a staff member available to help him and answer questions by phone or email. The court found that plan to be sufficient.

Comment: It helped the school's case that neither the parent nor the student contested the motion or appeared in court. The evidence was primarily in the form of an affidavit from the director of special education. Even though this court case was “uncontested” it is still a good indication of the kind of evidence schools need to produce when requesting an expedited hearing to show that the student's continued presence on campus is dangerous.

Prior to the adoption of federal special education laws a student like this one would probably have been expelled from school. That is no longer an option. The school has a continuing duty to provide a FAPE—Free Appropriate Public Education. But as this case indicates, the school can seek immediate assistance from a court to move a dangerous student off campus.

Z.H. v. Lewisville ISD, 65 IDELR 106 (E.D. Tex. 2015)

The court concluded that the student's behavior was not a manifestation of his disability, thus overturning the hearing officer's decision. The student's pediatrician testified that the behavior of making a “shooting list” was a manifestation of the student's autism and ADHD. But the court cited the testimony of the school psychologist, “a member of the ARD Committee [IEP Team] who actually observed Z.H. in a classroom setting.”

C.C. v. Hurst-Eules-Bedford ISD, 65 IDELR 195 (N.D. Tex. 2015)

The court upheld the district's decision to place the student in the DAEP due to a violation of the code of conduct that was not a manifestation of disability. The parents argued that the student was not guilty of a code violation. The court held that this was "not relevant" because the court was reviewing the decision of the IEP Team, not the principal.

Valdez Hernandez v. Board of Education of Albuquerque Public Schools, 66 IDELR 78 (D.N.M. 2015)

The court held that APS did not discriminate against student with disabilities in connection with the use of physical restraint. APS policy allows for physical restraint of any student under emergency circumstances, and allows additional restraint of a student with a disability only if spelled out in the IEP. A "Best Practices Manual" that spelled out suggestions pertinent to the restraint of students with disabilities did not mean that the district was singling out such students for restraint, or otherwise discriminating. The court noted that distinctions based on disability can be justified when "predicated on specific or particularized safety concerns" or when it "genuinely benefits the disabled."

Comment: This has implications for how physical restraint is addressed in a student's BIP. Note that the policy allows for restraint of any student in an emergency, which SPS identifies as falling into four categories. The policy then says: "any restraint used beyond the four specific situations listed above shall be identified on the student's IEP as part of the student's behavior plan."

ELIGIBILITY

D.A. v. Meridian Joint School District, 62 IDELR 205 (D.C. Id. 2014)

The court upheld the decision by the ALJ that the student with Asperger's was not eligible for special education services. The student's disability did not adversely affect his performance in the general curriculum and did not result in a need for specially designed instruction. Key Quotes:

[Parents] rely on a definition of "adverse effect" that is in tension with the teaching of *Rowley*. Indeed, a finding that any weakness in any academic or nonacademic area constitutes an adverse effect on educational performance would turn the IDEA's floor into a ceiling over the heads of all but the most gifted children.

And while the record indicates that M.A. has significant social and pragmatic difficulties, he also has overcome those difficulties to the extent necessary to navigate a 1700-student high school and meet all graduation requirements.

While it is true that Parents' third-party experts have extensive, specialized experience with autism, their contact with M.A. was limited compared to that of MSD personnel.

Comment: The eligibility report was 268 pages. The eligibility team consisted of 17 people. The hearing was 10 days, with 2000 pages of transcript and over 100 exhibits from each side. The parents also had a jury trial that lasted nine days over 504. The jury ruled that they were not denied FAPE under 504. Of course, the parents claimed they were denied meaningful participation. The court rejected this, in part because of the four-page verbatim transcript of the mother's input regarding the boy's strengths and weaknesses. Note: this decision was upheld by the 9th Circuit at 65 IDELR 286.

Q.W. v. Board of Education of Fayette County, Kentucky, 64 IDELR 308 (E.D. Ky. 2015)

The court affirmed a hearing officer decision in favor of the school district. The student has autism but is not eligible for special education. The evidence did not show that his autism adversely affected educational performance. The student was achieving above grade level academically and school officials reported appropriate social and behavioral interaction at school. Key Quote:

While "educational performance" may be understood to extend beyond the four corners of a report card to include a student's classroom experience, it does not include the child's behavior at home. Social and behavioral deficits will be considered only insofar as they interfere with a student's education. Here, they do not.

Comment: Very interesting case. Parents produced a lot of expert testimony, but the hearing officer was more persuaded by educators with classroom experience with the student. The court pointed out that one parent expert had never met the student, and the others had limited or no experience with the student in the school setting.

Letter to Kotler, 65 IDELR 21 (OSEP 2014)

OSEP points out that eligibility based on a visual impairment can be based on "any impairment in vision, regardless of severity...provided that such impairment, even with correction, adversely affects a child's educational performance." In contrast, terms like "intellectual disability" and "orthopedic impairment" allow some discretion by the states to establish levels of severity. However, the definition of VI "does not contain a vague modifier."

Memorandum to State Directors of Special Education, 65 IDELR 181 (OSEP 2015)

This is a reminder from OSEP that students with high IQs should not be automatically excluded from consideration for special education services. In particular, the letter encourages state directors to re-distribute *Letter to Delisle*, from 2013 (62 IDELR 240).

EVALUATIONS

Letter to Baus, 65 IDELR 81 (OSEP 2015)

OSEP was asked if a parent can request an IEE in an area that was not previously assessed by the school district's evaluation. Key Quote:

When an evaluation is conducted...and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area...

The letter goes on to say that the district must respond to such a request by promptly requesting a due process hearing or arranging for the IEE.

Comment: What the OSEP letter does not address is whether the district can and/or should respond to the request by offering to do its own evaluation in the omitted area.

A.A. v. NYC DOE, 66 IDELR 73 (S.D.N.Y. 2015)

The district conceded that it failed to do the three-year re-evaluation, but still prevailed in litigation over FAPE and private placement. The hearing officer, the state review officer and the federal court all held that the failure to conduct the re-evaluation was a procedural error that did not cause harm. The IEP Team had abundant information available to it when devising the IEP, and the parent did not question its accuracy. No harm. No foul.

Comment: We put this in the "don't try this at home" category.

Student R.A. v. West Contra Costa Unified School District, 66 IDELR 36 (N.D. Cal. 2015)

The parent asked to sit in and observe when the school conducted a psychoeducational and behavioral assessment. The school balked, citing concerns that the parent's presence in the room would skew the evaluation. The evaluation was never completed and the parent claimed a denial of FAPE. The hearing officer and the federal court sided with the district on this one. Key Quote:

The court finds that parents' condition that they be allowed to see and hear the assessment was unreasonable, and they effectively withdrew their consent by insisting on that condition. The [hearing officer] accurately concluded that the District's failure to complete the required assessments was caused by Parents' interference and denial of consent, and that the request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate.

Comment: It's important to point out that the district refused the parents' request not out of stubbornness or an attitude of "we've never done that before." The district cited legitimate

concerns about test integrity and security. The district took a stance because it is the district's responsibility to make sure that evaluation data is gathered properly. All decisions about IEP content and placement of the student must be based on evaluation data. Therefore, evaluation data must be valid and reliable.

ISD No. 413, Marshall v. H.M.J., 66 IDELR 41 (D. Minn. 2015)

The court held that the district failed to conduct a proper evaluation when it neglected to do a medical evaluation to determine the cause of the student's absenteeism. The student was diagnosed with General Anxiety Disorder and had other lingering health issues from undergoing chemotherapy as a toddler. The student missed 34 days of school in kindergarten; 35 days in 1st grade and 39 of 102 days in 2nd grade at the time of the hearing. The IEP Team concluded that the student was not eligible for special education services. The court held that it was improper to decide eligibility until the evaluation was complete.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Wellman v. Butler Area School District, 66 IDELR 65 (W.D. Pa. 2015)

The court dismissed the case without prejudice due to failure to exhaust. The case alleged that the student suffered a concussion at school sponsored events, and that the district failed to accommodate his subsequent educational needs. Even though the case was brought under ADA/504 and Section 1983, the court held that exhaustion was required because the suit was about the identification, evaluation, placement and provision of FAPE for a student. The court also held that the parties' earlier Settlement Agreement did not satisfy the exhaustion requirement because there was no administrative ruling.

Comment: The parents initially requested a special education hearing, and that's what led to the Settlement Agreement. That Agreement specified that all claims were released, including those under IDEA, ADA "or any other Federal or State statute." How do you turn around and file a suit under the ADA and 1983 after signing that Agreement?

K.J. v. Greater Egg Harbor Regional High School District Board of Education, 66 IDELR 79 (D.N.J. 2015)

The court held that exhaustion was not required because the claims under ADA and 504 sought relief not available under IDEA (damages). For the same reason, the settlement of the IDEA claim did not render the 504/ADA claims moot.

That's a minority point of view.

A.F. v. Espanola Public Schools, 115 LRP 43675 (10th Cir. 2015)

The court held that mediating an IDEA claim does not amount to exhaustion of administrative remedies. The plaintiff had mediated her IDEA claim and dismissed it with prejudice. Then she

sued under ADA/504 and Section 1983, alleging the same facts and injuries. Thus exhaustion was required, and was not completed. Case dismissed.

A.D. v. Haddon Heights Board of Education, 65 IDELR 37 (D.C.N.J. 2015)

The court dismissed the case due to failure to exhaust, even though the student was not identified under IDEA and made no claim under IDEA. The student had asthma and related health conditions and was served via 504. The suit alleged inadequate services along with retaliation. The court held that exhaustion was required because the “retaliation and discrimination claims are inextricably linked to the key benefit secured by the IDEA—a free and appropriate public education.” The fact that plaintiff sought relief not available under IDEA (\$\$\$) did not change the analysis.

Comment: This decision, and the 3rd Circuit cases it relies on, make a strong case for exhaustion, even when the student, like this one, was never served under IDEA and never cites IDEA in the pleadings.

J.A. v. Moorhead Public Schools ISD No. 152, 65 IDELR 47 (D.C. Minn. 2015)

The case was dismissed for failure to exhaust. The suit was based on 504 and ADA and did not cite IDEA. However, the student was in the special education program and the complaint was about the school’s use of a storage closet as the “quiet room” for the student. Since the IEP called for a quiet place, the suit was “not wholly unrelated” to the IEP process, and therefore, exhaustion was required.

FAPE

Andrew F. v. Douglas County School District RE-1, 115 LRP 39422 (10th Cir. 2015)

The court held that the district provided FAPE to a 4th grader with autism, despite his escalating behaviors. The parents argued that the standard for FAPE should be “meaningful educational benefit,” but the court, citing 10th Circuit authority, held that the standard was “some educational benefit.” The district satisfied this standard by showing that the student made some progress toward his academic and functional goals. Moreover, the short term goals and measuring criteria increased in difficulty from year to year. The fact that the student was “thriving” in the private placement obtained by his parents was not relevant.

Lainey C. v. DOE, State of Hawaii, 65 IDELR 32 (9th Cir. 2015)

The court summarily dismissed arguments that the IEP was flawed because the school “did not clarify exactly what its offer of 30 minutes per week of social skills training entailed.” Five arguments were dismissed for failure to exhaust, as the plaintiff could not point out in the record that they had been presented at the due process hearing.

IEEs

B. v. Orleans Parish School District, 64 IDELR 301 (E.D. La. 2015)

The court held that the district is not required to reimburse the parents for the cost of an IEE because the IEE did not satisfy agency criteria.

Comment: The parents requested an IEE at public expense and the district promptly approved the request. The district provided the parents with a copy of the state's Pupil Appraisal Handbook and informed the parents that the IEE must follow the criteria set out therein. The parents got the IEE done, paid for it, and sought reimbursement. The district turned down that request, citing 31 ways in which the IEE failed to satisfy criteria. The district did not request a hearing—the parents did. The IHO ruled for the school and the court affirmed. Parents argued that it is not proper for the district to require parents to front the costs, and that the district should have requested the hearing. Court rejected both arguments. The case is currently pending before the 5th Circuit.

IEPs

M.S. v. Utah School for the Deaf and Blind, 64 IDELR 11 (D.C. Utah 2014)

The court held that the district properly implemented the IEP in one year, but not the second year. Critical to this holding was the unilateral decision of the teacher to discontinue the use of an FM System. Key Quote:

While some deference should be given to teachers, the IEP is created by a team of individuals with various areas of expertise and requires the classroom teacher to implement the components, even the ones that the teacher may not agree with or care to implement.

Comment: A great case for training teachers.

Jefferson County Board of Education v. Lolita S., 64 IDELR 34 (11th Cir. 2014)

The court held that the IEP denied the student FAPE because it was not individualized. The court pointed out that the student read at a 1st grade level, but his goal for reading was “derived from the state standard for ninth-grade students.” And there was no explanation in the IEP as to how this would be accomplished. It did not help the district’s case that the IEP had another student’s name on it, which was crossed out and replaced with this student. The transition section was also inappropriate, due to the use of “stock language.” For example, the goal was “student will be prepared to participate in post-secondary education” but this did not match the student’s diploma track. He was not on track for a regular diploma or post-secondary education.

Kimi R. v. DOE, Hawaii, 65 IDELR 12 (D.C. Ha. 2015)

The court affirmed a hearing officer's decision in favor of the district. One issue involved speech services. The speech pathologist testified that the IEP set no goals for articulation because of the low cognitive level of the student, who was 13:

[Cognitively] she's about a year and a half to two years old. She has all the articulation structures that a typical two-year old would have in place. And she actually had a couple that were beyond that two-year mark. So, you know, to teach a student with cognitive functioning as a two-year old, to teach them later developing sound, it doesn't make too much sense because they're not cognitively ready for those sounds yet.

That made sense to the court.

Joaquin v. Friendship Public Charter School, 66 IDELR 64 (D.D.C. 2015)

The court denied most relief sought by the parent, but ruled in her favor with regard to IEP implementation. The district completely failed to provide the transition services called for in the IEP. The IEP called for 45 minutes per day of college and career prep, along with 16 hours of field trips per year. None of that was done, which the school blamed on the student's sporadic attendance. The court said the student's attendance was not relevant, as the issue was not whether the student benefitted, but rather, whether the school had implemented the IEP.

Meares v. Rim of the World School District, 66 IDELR 39 (C.D. Cal. 2015)

The court held that the school failed to provide three hours of speech therapy—two sessions over the course of the year. This was deemed a minimal failure to implement the IEP that did not deny FAPE. The student's strong academic record was not dispositive on this issue, but it was supportive of the conclusion.

IEP TEAM MEETINGS

West-Linn Wilsonville School District v. Student, 63 IDELR 251 (D.C. Ore. 2014)

The court held that the absence of a regular education teacher from the meeting was not a procedural error, and even if it was, it caused no harm. The court noted that it was not anticipated that the student would be placed in a general education environment. Moreover, there was no general education teacher who was familiar with the student and could provide meaningful input. The court noted that 9th Circuit precedent on this issue does not make this procedural error an automatic denial of FAPE.

However, in a subsequent IEP Team meeting, the absence of a general education teacher was deemed significant enough to be a denial of FAPE. At the time of this meeting the student was more involved in the mainstream and there were general education teachers who could have

provided meaningful input. In particular, parent wanted the music teacher there and had questions about music. The music teacher was not present. The parent had signed the form excusing the music teacher, but the form required the music teacher to submit written input about the IEP. That didn't happen.

A.L. v. Jackson County School Board, 64 IDELR 173 (N.D. Fla. 2014)

The court affirmed the ALJ's ruling that the IEP Team meeting was properly held without the parents. The meeting had been rescheduled multiple times, the school had given proper notice each time, and the parent declined to participate by telephone.

LIABILITY

Rosenstein v. Clark County School District, 63 IDELR 185 (D.C. Nev. 2014)

Parents alleged physical mistreatment of a first grader by two teacher aides, and sued the aides, the district, the superintendent, deputy superintendent, principal and assistant principal. The court denied qualified immunity for the aides, but dismissed the other defendants. There were insufficient allegations to indicate that any of the administrators had personal knowledge or were deliberately indifferent.

K.M. v. Chichester School District, 65 IDELR 6 (E.D. Pa. 2015)

Two school officials were granted qualified immunity in a suit alleging that they locked a school bus overnight with a sleeping student with autism on the bus. The facts did not allege a violation of the 4th Amendment. While they did allege a violation of the 14th Amendment pursuant to the "state-created danger" theory, this was not "clearly established" at the time.

PARENTAL RIGHTS/RESPONSIBILITIES

Letter to Breton, 63 IDELR 111 (OSEP 2014)

OSEP advises that it is permissible to use email for communication with parents, including sending IEPs and progress reports. Consent from parents may be obtained electronically or digitally. However, the school must be able to show that the parent agreed to this form of communication, and there must be in place "appropriate safeguards to protect the integrity of the process."

T.M. v. District of Columbia, 64 IDELR 197 (D.C. D.C. 2014)

The parents complained that they and their attorney were denied the opportunity to observe the child in the classroom. The court held that this did not deprive the student of FAPE, nor did it deny parental rights:

However, plaintiffs do not cite any legal authority for this claim that classroom observations by parents and their attorneys are necessary to allow parents to participate meaningfully in the IEP process. In the absence of any authority to the contrary, the IDEA does not guarantee parents the right to observe on request.

Comment: The court noted the identification of some specific rights that parents do have, such as the right to participate in the IEP process and the right to an IEE. Thus the silence of the law on classroom observation was deemed significant. This case probably goes the other way if the parents could produce evidence that parents of non-disabled students are allowed to observe in the classroom.

Letter to Savit, 64 IDELR 250 (OSEP 2014)

OSEP was asked about a directive from a school district that prohibited third parties (attorneys and advocates) from observing students in the classroom. OSEP said that such a directive does not violate IDEA:

...the IDEA and its implementing regulations do not provide a general entitlement for third parties, including attorneys and educational advocates, to observe children in their current classrooms or proposed educational placements. The determination of which individuals may have access to classrooms may be addressed by State and/or local policy.

OSEP was also asked about a directive that limited evaluator's observations of students to a two-hour window. In response, OSEP first noted that parents are entitled to an IEE and that access to the classroom for an observation may be necessary. In that context, OSEP said:

Therefore, it would be inconsistent with the IDEA for a public agency to have a policy giving third party evaluators only a two hour observation window, because such a limitation may restrict the scope of the IEE and prevent an independent evaluator from fulfilling his or her purpose, unless the LEA also limits its evaluators to a two hour period.

PLACEMENT

R.L. v. Miami-Dade County School Board, 63 IDELR 182 (11th Cir. 2014)

The court held that the district "predetermined" placement, based almost entirely on the comments of the chair of the IEP Team meeting. Despite three all-day meetings, and 59 PWNs documenting various decisions, the district denied FAPE by predetermining placement. The chair had said that the school requested by the parents was "not an option that's on the table as far as [the Board] is concerned: What our option is, is that he go to his home school." The Court:

This explicit statement that the Board was considering only placement at Palmetto Senior High School, and that bureaucratic policies precluded an alternative placement, weighs strongly in favor of finding predetermination.

West-Linn Wilsonville School District v. Student, 63 IDELR 251 (D.C. Ore. 2014)

Placement was not predetermined. The IEP paperwork listed several placement options, the parents participated in each meeting and had “ample opportunities to discuss the IEPs.”

However, the district changed placement improperly, by pulling the student out of music class, recess and PE without notice or agreement of the parents.

Cooper v. District of Columbia, 64 IDELR 271 (D.C. D.C. 2014)

The school committed a procedural error by changing placement before completing the IEP. However, this predetermination error was harmless. The possible change in placement was discussed at four IEP Team meetings, and the parent participated in each one. Key Quote:

At each meeting, plaintiff had substantial input into the IEP baselines, annual goals, special education and related services, requirements that the MDT developed on behalf of R.C. While plaintiff objects to R.C.’s ultimate placement, her disagreement does not constitute exclusion from the decision-making process.

Fort Bend ISD v. Douglas A., 65 IDELR 1 (5th Cir. 2015)

The court overturned the IHO and district court, holding that the school was not responsible for the costs of the residential placement. The court held that the parent failed to prove that the residential facility was appropriate. To be appropriate, a residential facility must be 1) essential in order for the child to receive a meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education. Key Quote:

Two factors are critical: “whether the child was placed at the facility for educational reasons and whether the child’s progress at the facility is primarily judged by educational achievement.”

The first factor is based on parental motivation. Here, the parents placed the student for non-educational reasons—concerns over drugs and possible suicide. As to the second factor, the evidence showed that discharge from the facility would be based on successful treatment of the disability, rather than educational achievement.

PRACTICE AND PROCEDURE

Letter to Kane, 65 IDELR 20 (OSEP 2015)

OSEP found no fault with Minnesota guidelines limiting due process hearings to three hearing days of six hours each. The guidelines identify this as a “best practice” that should apply in all but “exceptional circumstances.”

B.S. v. Anoka Hennepin Public Schools, 66 IDELR 61 (8th Cir. 2015)

The court found that it was not an abuse of discretion for the hearing officer to limit the parties to nine hours of testimony each. The hearing officer made this decision at a pre-hearing conference, after hearing from the parties about how long it would take them to present their cases. Minnesota statutes required hearing officers to limit a due process hearing to the time sufficient for each party, and to maintain control of the hearing. State regulations include a “best practices” manual which indicates that a hearing should not exceed three days, absent special circumstances. Key Quote:

And while B.S. spends much time and energy arguing about the due process rights of parents and children in an IDEA proceeding, we note that even in the criminal context, where a party’s liberty interest is at stake, the Supreme Court has rejected the idea that the accused has an unfettered right to present all relevant evidence.

PRIVATE SCHOOL STUDENTS

Letter to Sarzynski, 66 IDELR 51 (OSEP 2015)

This letter clarifies that “child find” applies to students who attend private schools located within the district, even if the parents reside in another country.

RELATED SERVICES

Ruby J. v. Jefferson County Board of Education, 66 IDELR 38 (N.D. Ala. 2015)

The court held that the district fulfilled its duty to provide special transportation by entering into a contract whereby the parent agreed to provide transportation and be reimbursed for mileage. This was a temporary arrangement until the district could retain the nurse that would be needed for the student to ride the bus. The court emphasized the parent’s agreement to the plan and the district’s diligence in hiring a nurse.

The parent alleged that the private transportation arrangement had the effect of causing her child to miss time at the beginning and end of each day, thus adding up to a full day lost. The court found this “disingenuous.” The parent claimed that the delay was due to the fact that she waited for her other children to board a school bus before taking this child to school; and she wanted to be home before the other children got home. The court noted that the delay, therefore, was due to the parent’s preferences and interests.

REMEDIES

K.J. v. Greater Egg Harbor Regional High School District Board of Education, 66 IDELR 79 (D.N.J. 2015)

The court noted that Section 1983 could not be used to remedy violations of IDEA. However, the Complaint also alleged constitutional violations that could be remedied under 1983.

Comment: This case is more about the 1st and 4th Amendments than special education issues. The case is noteworthy, in part, because it involves a 103-page complaint, outlining 25 possible causes of action against the district and 17 named individuals. Almost all of the claims were dismissed, but the court declined to dismiss the 1st Amendment claim.

Zdrowski v. Rieck, 66 IDELR 42 (E.D. Mich. 2015)

Two teachers physically transported an out of control student to the office. Parent alleged they used an improper technique and “dragged” him. The court said this was not even close to a “shock the conscience” substantive due process violation:

The teachers were faced with an urgent situation—an upset pupil with a history of violent outbursts who was threatening self-harm—that necessitated a swift physical response.

Ruby J. v. Jefferson County Board of Education, 66 IDELR 38 (N.D. Ala. 2015)

The parent had agreed to accept reimbursement for mileage to transport her child. But she refused to sign the contract offered by the school because it did not include hourly wages also. The court held that she was not entitled to wages. Key Quote:

What Plaintiff actually seeks is compensation. She is entitled to costs, not wages.

Comment: Plaintiff cited two Circuit Court cases in which parents were awarded compensation for their time and effort. This court distinguished those cases, noting that those awards were based on a denial of FAPE. If there is a denial of FAPE, the court has broad discretion to fashion an appropriate remedy. But here, there was no denial of FAPE.

RTI

M.M. v. Lafayette School District, 114 LRP 40327 (9th Cir. 2014)

The court held that the district denied FAPE by failing to provide the parents with the data collected during the RTI process, which impeded the ability of the parents to participate in the process. Key Quote:

Although the other members of C.M.'s IEP team were familiar with his RTI data because they participated in his Assessment Wall meetings three times a year, the parents were unfamiliar with the data, and, more importantly the picture the data painted of C.M.s deficits and his progress during his kindergarten through third grade years.

STATE RESPONSIBILITY

Letter to Reilly, 64 IDELR 219 (OSEP 2014)

Here, OSEP advises that states should not assign the “burden of proof” to either party in the complaint process. The letter explains that the complaint process is not the same as the due process hearing process. It is intended to be less adversarial, and does not include the same level of procedural requirements. The Supreme Court’s decision in *Weast* addresses the burden in a due process case, but not in the complaint process.

Fairfield-Suisun USD v. California DOE, 115 LRP 10958 (9th Cir. 2015)

Two school districts sued the state agency, alleging that the state was implementing the complaint process in a way that violated the IDEA. The court dismissed the complaint, holding that IDEA does not give LEAs the authority to sue the state agency in federal court.

Comment: Oh well. So much for that theory.

TRANSITION

Gibson v. Forest Hills District Board of Education, 62 IDELR 261 (S.D. Ohio 2014)

The court held that the school violated IDEA by not inviting the student to an IEP Team meeting at which transition would be discussed. School officials feared that the student would be frightened by the conflict between the parents and the school. The court noted that the failure to invite the student was a procedural error. However, it amounts to a substantive denial of FAPE only if the school also failed to take other steps to ensure that the student’s preferences and

interests were taken into account. Here, the school made informal efforts to take the student's views into account but the court deemed them insufficient. Thus the school denied FAPE by failing to invite or include the student in the meeting, and also by failing to conduct age appropriate assessments related to post-secondary goals.

Comment: This is a good case for training on transition.

R.R. v. Oakland Unified School District, 62 IDELR 287 (N.D. Cal. 2014)

The court held that the district did not violate IDEA's transition planning requirements. The student was still many months short of his 16th birthday. The district had ample time to call for a meeting and develop a transition plan. The court also held that Section 504 does not require transition planning.

Comment: What seems to be at the heart of this is a common misunderstanding. The parties were planning on a change of placement for the student and the parents wanted a "transition plan" to prepare for it. But as the court points out, "transition" in the law refers only to the transition to postsecondary life, and a plan does not have to be in place until the 16th birthday. The parents' complaint was premature.

D.C. v. Mount Olive Township Board of Education, 63 IDELR 78 (D.C. N.J. 2014)

The court rejected challenges to the transition plan. The court noted that there is nothing inherently wrong in repeating transition goals from one year to the next. Moreover, failure to achieve the goals of transition is not the key issue. Key Quote:

However, whether he has actually met the goals laid out for him is not dispositive, especially in light of the requirement that IEPs be judged prospectively and not retrospectively.

Comment: There is good language in this opinion from earlier cases about transition. To wit: "The floor set by the IDEA for adequate transition services appears to be low, focusing on whether opportunities are created for a disabled student to pursue independent living and a career, not just a promise of a particular result." And "a school district need not ensure that the student is successful in fulfilling transition goals."

UNILATERAL PLACEMENT/TUITION REIMBURSEMENT

C.L. v Scarsdale Union Free School District, 114 LRP 11239 (2nd Cir. 2014)

The court held that a parent can be reimbursed for private school tuition at a school that serves only students with disabilities. Key Quote:

Restrictiveness may be relevant in choosing between two or more otherwise appropriate private placement alternatives, or in considering whether a private

placement would be more restrictive than necessary to meet the child's needs, but where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option.

Comment: This is an important new wrinkle in the analysis of the appropriateness of a private placement.

E.M. v. NYC DOE, 63 IDELR 181 (2nd Cir. 2014)

The parent had standing to seek tuition payments from the public school despite the fact that she had not paid any of it. She signed a contract that provided that she and her husband “assume.....complete financial responsibility” for the tuition of \$85,000 for the year. This was five years earlier, and no payments had been made. The mother testified that “we don't have the money to pay the school.”

Comment: You can tell the school is going down on this one from the court's opening line: “Plaintiff E.M. is a mother with limited financial means who is raising a severely disabled child in New York City.” This case gives the green light to the actual agreement that some private schools make with parents, which is: “we don't expect you to pay the tuition; we just expect you to seek it from the public school.” Thus, expect to see more of this.

West-Linn Wilsonville School District v. Student, 63 IDELR 251 (D.C. Ore. 2014)

The court found that the school denied FAPE but also denied the parent request for reimbursement. This was primarily based on the parents' failure to give notice:

The Parents did not give 10-days written notice to the District that they were rejecting the proposed placement in the new CRC before enrolling Student at Victory Academy and removing him from [the public school]. In fact, the Parents failed to raise the issue of reimbursement until filing the Due Process Complaint.

Constructive notice is simply not sufficient.

York School Department v. S.Z., 65 IDELR 39 (D.C. Me. 2015)

The district was ordered to reimburse the parents for two years of tuition at Eagle Hill School, a pricey boarding school serving only students with learning disabilities. The parents pulled him out of public school after 9th grade and placed him at Eagle Hill. The court held that the district denied FAPE, despite testimony from his teachers that he was passing all classes. The independent expert retained by the parent rebutted this testimony, his scores on standardized tests were not so good, and his mother was making a “nearly superhuman” effort at home to assist the student in school.

Comment: The 5th Circuit recently reaffirmed the notion that public schools are not responsible for the cost of a residential placement unless the placement is primarily due to educational need,

and primarily measured by educational outcomes. Fort Bend ISD v. Douglas A., 2015 WL 469018 (5th Cir. 2015). When students are placed in treatment centers, hospitals or psychiatric facilities, courts often determine—as in the Fort Bend case—that the placement was more about other things, such as drug use, or fears of suicide. Therefore, the parents bear that expense, or some other state agency, perhaps.

But Eagle Hill School is none of those things. It's a school. P.Z.'s parents put their son there for educational reasons, and his progress was measured by educational outcomes.

That's one of the reasons this case is particularly interesting. Many residential placement cases involve a more dramatic, urgent situation. Students are psychotic, extremely violent, circling down the drain of substance abuse, or suicidal—or all of the above. P.Z. is none of that. The independent expert in this case described P.Z. as having average to low average cognitive ability. He has very slow processing speed. He has language difficulties and finds reading difficult. All of this leads to anxiety. He is qualified for special education services.

But no one described this particular student as having any kind of unique problem. Learning disabilities are common. Public schools serve thousands of students like P.Z. He comes across in the court's decision as a student who certainly faces some challenges and needs some extra support and help. But a private boarding school at over \$65,000 per year? Is that why Congress passed this law? You have to wonder.

TRULY MISCELLANEOUS BUT INTERESTING

Phipps v. Clark County School District, 63 IDELR 100 (D.C. Nev. 2014)

What makes this case noteworthy is that the school installed hidden cameras in a classroom that served non-verbal students with autism. School officials monitored the classroom through an off-site video feed and were sued for failing to intervene when they witnessed abuse by a teacher. The court held that the pleadings were sufficient to state a claim against the district under Section 1983, and to deny qualified immunity to school officials.

Jason E. v. DOE Hawaii, 64 IDELR 211 (D.C. Ha. 2014)

This case presents no clear legal guidance on any significant issue, but is a poster child for the type of mess that can ensue when parents revoke consent for a student who clearly qualifies for and needs special education services. The student had Down Syndrome, a heart condition, ADHD and mild hearing loss. The school said the student is “aggressive, abusive, non-compliant, disruptive and experiences toileting issues.” The district was concerned about safety issues. Moreover, parents of other students, concerned about the situation, were threatening to withdraw from the school. Pursuant to 504, parent continued to seek one-to-one services along with a number of other services normally associated with IDEA. The court ends up ruling for the school on issues alleging discrimination.

Dear Colleague, 64 IDELR 249 (OSERS 2014)

This letter addresses the rights of students with disabilities who are incarcerated, or charged with a crime. The headline is simply that the general rule is that such students are still entitled to all of the protections of IDEA, including LRE and disciplinary protections.

Wenk v. O'Reilly, 65 IDELR 121 (6th Cir. 2015)

The court held that the making of a child abuse report is an “adverse action.” This is true whether the report is true or false. Thus if it is done in retaliation for the exercise of protected rights, it is an act of illegal retaliation. The critical question then becomes motivation. Key Quote:

Under this rule, then, a report of child abuse—even if it is not materially false and there is evidence in the record that could support a “reasonable basis” to suspect child abuse—is actionable if the reporter made the report “at least in part” for retaliatory motives.

The court noted that the complaint alleged that the report of child abuse was embellished and in some parts entirely fabricated. The court held that the complaint should not be dismissed. Moreover, since the law on this is “clearly established” the director of pupil services who reported the alleged abuse is not entitled to qualified immunity.

Meares v. Rim of the World School District, 66 IDELR 39 (C.D. Cal. 2015)

The court held that the district was not obligated to provide a one-to-one aide who was capable of keeping pace with the student on the mountain biking team. This was neither a failure to implement the IEP, a denial of FAPE nor a breach of contract. Key Quote:

The Court questions how far Plaintiffs’ logic might be extended; if Madison was the preeminent mountain biker in Southern California, would the District be required to somehow locate a biking aide to keep pace?