


**SOUTH DAKOTA
SPRING LEGAL
UPDATE: A Dose of
Legal Reality**

2023
Lenore Knudtson, Pingora Consulting
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Pingora Consulting, LLC



Lenore Knudtson
Special education attorney. Former school psychologist. Life-long learner.

What We Do
Pingora provides professional development, consultation, and dispute resolution services across the country.

Why We Do It
Improve outcomes for students with disabilities. It is our obligation. It is our commitment.

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Case law refines our knowledge of the IDEA and federal regulations. Through federal court decisions, we gain a deep understanding of how judges interpret the law. Whether a decision is binding or persuasive in your jurisdiction, it all matters.

3

The Supreme Court

The ultimate authority.

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Perez v. Sturgis Public Schools, 123 LRP 10045 (U.S. 2023).

Districts will no longer be able to use the IDEA's exhaustion requirements to shield themselves from Section 504 and ADA claims for money damages in some cases.

The U.S. Supreme Court ruled that the IDEA's exhaustion requirement does not apply to federal claims that only seek money damages as a remedy.

The Court noted that the IDEA does not limit the remedies available under other federal statutes, such as Section 504 and the ADA.

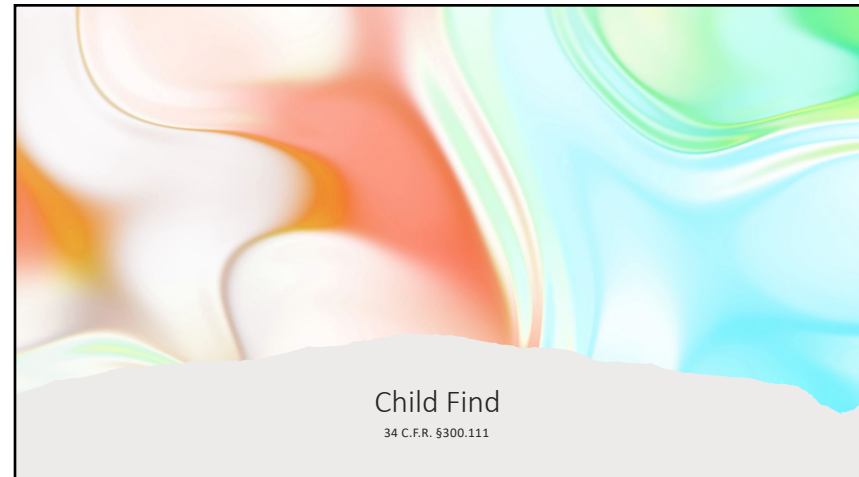
If a student is "seeking relief that is also available under [the IDEA]," he must try to obtain relief in an IDEA administrative proceeding before suing his district in court.

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Child Find

34 C.F.R. §300.111

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Child Find

- When does the obligation "mature?"
- The LEA has a mature child find obligation when it has reason to:
 - Suspect that the student has an IDEA disability, AND
 - Suspect that the student needs specially designed instruction.

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D. T. v. Cherry Creek Sch. Dist. No. 5, 82 IDELR 78 (10th Cir. 2022).

- A Colorado district had no reason to suspect a teen had an emotional disturbance prior to his threat to "shoot up the school."
- During his freshman year, the parent expressed concerns for the teen's well-being and indicated he was depressed and had suicidal ideations.
- The district conducted a suicide risk assessment, concluded that he was of high concern, and referred him for mental health counseling.
- He began abusing drugs and his grades declined. He was then hospitalized for mental health treatment.

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D. T. v. Cherry Creek Sch. Dist. No. 5, 82 IDELR 78 (10th Cir. 2022).

- During his junior year, the teen threatened to "shoot up the school." He was expelled and evaluated for special education services. The district found him eligible with ED. The teen sued alleging the district should have suspected he had a disability earlier.
- The 10th Circuit disagreed. It explained that the IDEA's child find obligation requires schools to proactively identify, locate, and evaluate students with disabilities who need special education. The duty is triggered when the district has reasonable suspicion to believe the student has a disability.

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Ja.B. v. Wilson County Bd. of Educ., 123 LRP 8526 (6th Cir. 2023).

- The noncompliant, disrespectful, and disruptive behaviors that an eighth-grader experienced at school after moving from Illinois to Tennessee did not require his new district to evaluate him for IDEA services.
- Finding no fault with the district's decision to try classroom-level interventions first, the 6th Circuit upheld a District Court's ruling for the district on the parents' child find claim.

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Ja.B. v. Wilson County Bd. of Educ., 123 LRP 8526 (6th Cir. 2023).

- The IDEA requires a district to identify, locate, and evaluate all resident students suspected of having disabilities and needing special education as a result.
- The Court noted that the student had no history of receiving special education services in all the years he attended school in Illinois. Furthermore, the student had recently moved across state lines -- a factor that the parents conceded might have an impact on his behavior.
- District staff also testified that the student's behaviors, while concerning, were not unusual or severe enough to suggest they might stem from a disability.

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D.O. v. Escondido Union Sch. Dist., 82 IDELR 125 (9th Cir. 2023).

- Although a district learned of an IDEA-eligible student's autism diagnosis in December 2016, it did not err in waiting until April 2017 to propose a reevaluation.
- The 9th Circuit held that the parent's failure to provide a copy of the private evaluation report despite the district's requests justified the four-month delay. The district learned of the student's private autism diagnosis during December 2016 IEP meeting.
- At that point, the district was on notice of the need to evaluate the student for autism.

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D.O. v. Escondido Union Sch. Dist., 82 IDELR 125 (9th Cir. 2023).

- However, the district could not create an assessment plan until it knew which autism tests the private evaluator had administered. "Indeed, if tests are duplicated within a certain time frame, the tests can be considered null and void."
- The district asked the parent for the evaluation report on the date of the IEP meeting -- the first time it learned of the report's existence. Furthermore, the district renewed its request in April 2017 when it sent the parent an autism assessment plan.
- Given that the district evaluated the student promptly after receiving the assessment report and the parent's consent, the majority rejected the District Court's holding that the evaluation was untimely.

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Letter to State Directors of Special Education, 82 IDELR 69 (OSEP & OSERS 2022).

In a letter to state special education directors, OSERS and OSEP addressed concerns relating to ensuring highly mobile children with disabilities receive prompt evaluations and services under the IDEA.

OSERS and OSEP noted that highly mobile students, such as military-connected children, migratory children, children who are homeless, and children in the foster care system, typically experience repeated educational disruptions and challenges.

The agencies urged states to ensure districts expedite an initial evaluation of incoming highly mobile transfer students and to provide the full gamut of their comparable services, when applicable, including extended school year services.

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Letter to Sharpless, 82 IDELR 39 (OSEP 2022).

- School personnel should offer additional assistance and explanation to a parent who has trouble requesting an initial evaluation in writing or otherwise has difficulty complying with a state's or district's referral procedures.
- OSEP encouraged states and districts to determine whether their child find rules create barriers for a parent to request an evaluation under the IDEA and to ensure their child find procedures "offer fair and equitable opportunities for all parents to request an initial evaluation."

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Letter to Sharpless, 82 IDELR 39 (OSEP 2022).

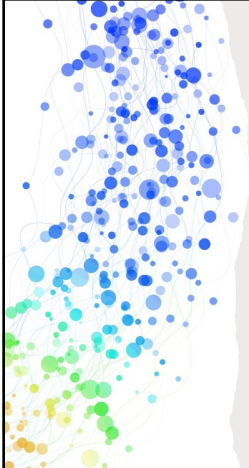
- Education agencies must evaluate students suspected of having a disability and needing special education services, and therefore must respond when a parent requests an initial evaluation.
- OSEP acknowledged that states may require parents to submit requests in writing or to follow other specific procedures.
- "In the Department's view, when these additional steps pose a substantial limitation for certain parents to access an initial evaluation for their child under IDEA, the failure to provide additional information or assistance could potentially violate [child find]."

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IEP Implementation

34 C.F.R. §300.17

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IEP Implementation

- Services must be provided in conformity with the IEP.
- Any deviation from the IEP is a violation.
- However, material violations rise to a denial of FAPE.

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Plotkin v. Montgomery County Pub. Schs., 81 IDELR 252 (D. Md. 2022).

- Although a Maryland district violated the IDEA by failing to provide "pullout" instruction in math as required by a third-grader's IEP, it did not have to provide compensatory education.
- The District Court upheld an administrative law judge's decision that the student's progress in math made the district's procedural violation harmless.
- Every deviation from a student's IEP, no matter how well intentioned, increases the possibility that the student will miss out on services deemed necessary for FAPE.

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Plotkin v. Montgomery County Pub. Schs., 81 IDELR 252 (D. Md. 2022).

- Districts should remind classroom personnel that while they can report concerns about a student's placement or services, they must implement the student's IEP as written.
- Here, the district argued that the student received a greater benefit from receiving math instruction in the general education classroom with his nondisabled peers.
- Had the unilateral change impeded the student's progress, the student would be entitled to a remedy.

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Connor J. v. Kennett Cons. Sch. Dist., 82 IDELR 159 (E.D. Pa. 2023).

- The district knew the student was "really struggling with getting online" and was not participating in virtual learning.
- The IHO awarded more than 400 hours of compensatory education based on the student's inability to participate in virtual instruction without a one-to-one aide.
- "[The student's] plan conferred no meaningful educational benefit during this time because he could not work remotely without an in-person [assistant]," the judge wrote.

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Connor J. v. Kennett Cons. Sch. Dist., 82 IDELR 159 (E.D. Pa. 2023).

- The student was not attending virtual class meetings and was "really struggling with getting online" and "struggling with participating in virtual learning."
- The court agreed that the student was entitled to five hours of compensatory education for each day school was in session between May 1, 2020, and the student's return to in-person learning in mid-November.

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FAPE

The *Endrew F.* Standard

FAPE

- An IEP must be reasonably calculated to provide educational benefit appropriate in light of a child's unique circumstance.
- *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (2017).



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Washington v. Katy Indep. Sch. Dist., 82 IDELR 218 (5th Cir. 2023).

- An IEP team's efforts to address a high schooler's lost credits and the roots of his absenteeism after he was tased by an SRO helped establish that the Texas district offered the student with ED and intellectual disability FAPE.
- The 5th Circuit rejected the student's mother's contention that the district failed to timely address the student's absences.
- After an SRO allegedly tased the student, the student's mother withdrew her son from school for the Spring term. The student continued to struggle with absenteeism the following Fall. The parent challenged a District Court's ruling that the district provided the student FAPE.

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Washington v. Katy Indep. Sch. Dist., 82 IDELR 218 (5th Cir. 2023).

- The court pointed out that the IEP team discussed attendance, attendance expectations, and the student's return. The team, the 5th Circuit remarked, also adjusted the student's BIP to address the underlying causes of his attendance problems, offered the student ESY services so that he could recoup lost credits, and recommended an FBA to determine further ways the district could support the student.
- The court noted that the student achieved passing grades when he returned to school, demonstrated an ability to learn, engaged with others, and accrued enough credits to graduate.

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Beer v. USD 512 Shawnee Mission, 82 IDELR 223 (D. Kan. 2023).

- Under the IDEA, a district must develop an IEP that is reasonably calculated to enable the student to make educational progress that is appropriate in light of his circumstances. The district failed to satisfy this requirement, resulting in a denial of FAPE.
- The first-grader's IEP had "numerous substantial defects." First, the court noted that the district developed the student's February 2019 IEP, including the statement of present levels of performance, using data from a fall 2018 evaluation.
- The district then improperly carried over the same PLAAFPs to the student's October 2019 IEP without integrating data from a May 2019 reevaluation.

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Beer v. USD 512 Shawnee Mission, 82 IDELR 223 (D. Kan. 2023).

- The court noted, the district failed to include a reading goal in the IEP even though the student demonstrated no progress in reading between September 2018 and December 2019.
- The court observed that the IEP contained vague provisions that confused staffers and contributed to a material implementation failure. The evidence showed that due to the IEP's unclear language, staffers improperly removed the student from the general education classroom to a special education classroom for math instruction.
- The ambiguous IEP language also resulted in inconsistent progress monitoring, missing progress reports, and improper implementation of the student's behavioral interventions.

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M.G. v. Monifa B. McKnight, 82 IDELR 128 (D. Md. 2023).

- Delays in IEP development are not "harmless" simply because the parents arrange for the student to receive private special education services in the interim.
- Because a district must provide FAPE "at no cost" to the parents, it may be responsible for any private services the student receives after the IEP deadline.
- The district in this case took an additional 79 days after the expiration of the state's 30-day timeframe to develop the student's initial IEP. Had the district convened the IEP team in a timely manner, it might have avoided paying for five months' worth of educational and clinical services.
- Although the district proposed an appropriate placement for a teenager with an emotional disturbance, it denied the student FAPE by delaying the development of his initial IEP.
- The District Court ordered the district to reimburse the parents \$44,500 for the student's unilateral residential placement.

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N.R. v. Katonah Lewisboro Union Free Sch. Dist., 82 IDELR 91 (S.D.N.Y. 2022).

- Despite repeating goals from a previous IEP, a district did not deny a teen with ADHD and dyslexia FAPE.
- Before eighth grade, the district proposed "mainstreaming" the student, but the parents enrolled him in private school.
- The next year, the district proposed placement in the district's high school in the special education classroom. The IEP included 18 annual goals; seven of the goals matched the previous year's IEP, four goals were similar, and seven goals were new.

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N.R. v. Katonah Lewisboro Union Free Sch. Dist., 82 IDELR 91 (S.D.N.Y. 2022).

- Any recycled goals did not automatically constitute a denial of FAPE, the court decided. It agreed that repeated goals aligned with the student's needs and appropriately reflected his progress.
- Moreover, the court noted that the parties reassessed the student's needs and refined his goals from the private school to create closely tailored goals that matched his individual circumstances and needs.

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Steckelberg v. Chamberlain Sch. Dist., 82 IDELR 55 (D.S.D. 2022).

- After a series of sexual behavioral issues, the IEP team placed the student on homebound instruction. He struggled on homebound instruction.
- He enrolled in a residential facility treating adolescents with problematic sexual behaviors. The parents filed a due process complaint against the district, seeking reimbursement for the residential placement.
- The hearing officer determined the district failed to provide FAPE, entitling the parents to \$90,375 in tuition and \$11,686 for transportation. The district appealed.

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Steckelberg v. Chamberlain Sch. Dist., 82 IDELR 55 (D.S.D. 2022).

- The court affirmed the hearing officer's decision. First, it found the district ignored the student's academic and behavioral needs.
- The court also pointed out that the district knew home placement was not working and that he likely required a specialized placement.
- Even though the facility's primary function was to treat sexual behaviors, the district failed to identify any other alternative placement. Therefore, the hearing officer's decision was affirmed.

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Educational Benefit

The *Andrew F. Standard*

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D.C. International Charter Sch. v. Lemus, 123 LRP 10853 (D.D.C. 2023).

- The district couldn't justify the drastic reduction in services for a seventh-grader with an intellectual disability in light of his deteriorating academic achievement.
- The child's IEP prescribed 19 hours per week of special education services. The district amended the IEP seven times between December 2017 and August 2019.
- Nearly three years later, the child's skills stayed the same or had worsened, but it reduced his services to 5.6 hours per week.

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D.C. International Charter Sch. v. Lemus, 123 LRP 10853 (D.D.C. 2023).

- Assessments showed that the child's skills had only developed to a second-grade level, his reading skills hadn't improved, his math skills deteriorated one grade level, he made limited progress on IEP goals, and he received grades of mostly zero in written expression, it observed.
- His test scores year-over-year showed a consistent lack of overall progress and a plateau of decline, the court added. Nevertheless, the district didn't alter the child's prescription for specialized instruction and prescribed the same type and quantity of SDI as his previous IEP.
- The district failed to demonstrate why reducing the child's intensive services by over 70 percent was appropriate, the court held. The district denied the student FAPE.

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D.R. v. Redondo Beach Unified Sch. Dist., 82 IDELR 77 (9th Cir. 2022).

- The 9th Circuit held that the District Court erred by focusing on the student's grade-level performance in determining that he didn't receive sufficient benefit in the general education classroom.
- Whether a general education classroom was an appropriate setting for a child with autism depended, not on whether the student was meeting grade level standards, but on whether he was progressing toward the academic goals in his IEP.

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D.R. v. Redondo Beach Unified Sch. Dist., 82 IDELR 77 (9th Cir. 2022).

- Grade-level performance isn't the appropriate benchmark for all children with disabilities.
- "For children whose developmental disabilities preclude them from achieving at the same academic level as their non-disabled peers, the appropriate benchmark for measuring the academic benefits they receive is progress toward [their IEP goals]."
- Here, the student was making significant progress toward IEP goals.

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Placement Decisions

- Made by the IEP team based on the unique needs of the student.
- Keep in mind the LRE mandate.
- Do not maintain a placement that is not successful.

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Knox County, TN v. M.Q., 82 IDELR 214 (6th Cir. 2023).

- A district's claim that a kindergartner with autism would achieve greater academic success in a self-contained classroom did not justify its failure to offer the child a full-time general education placement.
- The 6th Circuit held that the general education kindergarten class was the child's LRE. The 6th Circuit follows the LRE test set forth in *Roncker v. Walter*, 554 IDELR 381 (6th Cir. 1983). That test allows a district to remove an IDEA-eligible student from the general education setting if a more restrictive placement would provide far greater benefits.
- However, the panel explained, the district first must consider whether the services and supports that make the self-contained placement superior can be provided in the general education setting.

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Knox County, TN v. M.Q., 82 IDELR 214 (6th Cir. 2023).

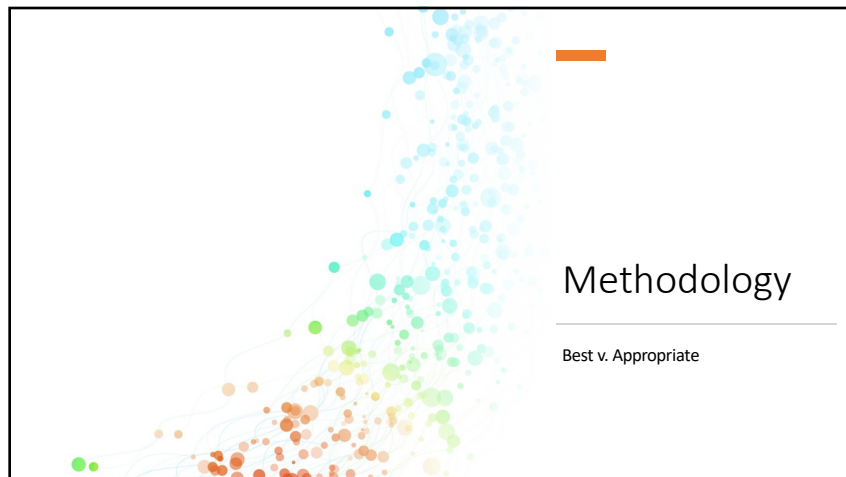
- The panel rejected this district's argument that the child needed too many supports to benefit from a general education placement. It pointed out that the child had made good progress in an inclusion preschool program with the use of supplementary aids and services.
- Furthermore, the panel observed, the child's preschool teacher testified that he could work on all of his IEP goals in the general education classroom.
- As such, the panel found that the district could modify the general education kindergarten class to accommodate the child's needs.
- "This conclusion survives even if it requires [the district] to exercise some creativity (e.g., by implementing co-teaching or introducing a paraprofessional to the classroom)."

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Methodology

- Methodology is typically left to the discretion of the education experts.
- However, if a child is not receiving benefit, that discretion may be in jeopardy.



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Kass v. Western Dubuque Comm. Sch. Dist., 82 IDELR 67 (N.D. Iowa 2022).

- A district has no obligation to choose the educational methodology that will maximize an IDEA-student's potential. The court observed that the district did not have to use the most effective methodology available.
- The district must ensure that whatever methodology it uses allows the student to make progress that is appropriate in light of his circumstances.
- Progress-monitoring data showed that the district's methodologies were appropriate even if the student would have had even greater success using a different methodology.

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Kass v. Western Dubuque Comm. Sch. Dist., 82 IDELR 67 (N.D. Iowa 2022).

- The judge acknowledged an independent evaluator's opinion that the student would have made even greater progress if the district had used the Orton-Gillingham or Wilson reading programs. The district did not have to use the most effective methodology available.

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M.S. v. Downingtown Area Sch. Dist., 82 IDELR 32 (E.D. Pa. 2022).

- A district did not deny FAPE to an 8-year-old girl with developmental delays and childhood apraxia of speech when it failed to specify a methodology for speech and language therapy in her initial IEP.
- Concluding that the district's methodology was consistent with the parents' preferred approach, the District Court upheld an administrative decision in the district's favor.
- The IDEA does not require a district to specify an educational methodology in students' IEPs.

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M.S. v. Downingtown Area Sch. Dist., 82 IDELR 32 (E.D. Pa. 2022).

- The district had no obligation to include a provision in the child's IEP that would require its speech-language providers to use the Dynamic Temporal and Tactile Cueing approach recommended by the parents' expert.
- Furthermore, the judge noted, the district provided evidence that the method used by its own providers was consistent with DTTC.
- The judge rejected the parents' argument that the IEP failed to address the child's speech and language needs.

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Falmouth Sch. Dep't. v. Doe, 81 IDELR 151 (1st Cir. 2022).

- A Maine district denied FAPE to an elementary school student with orthographic dyslexia and ADHD when it failed to adjust his educational methodology in response to his lack of appropriate progress.
- The court acknowledged that districts have significant discretion in choosing which educational methodologies to use with students with disabilities.
- However, the chosen methodology must allow the student to make progress that is appropriate in light of his circumstances.

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Falmouth Sch. Dep't. v. Doe, 81 IDELR 151 (1st Cir. 2022).

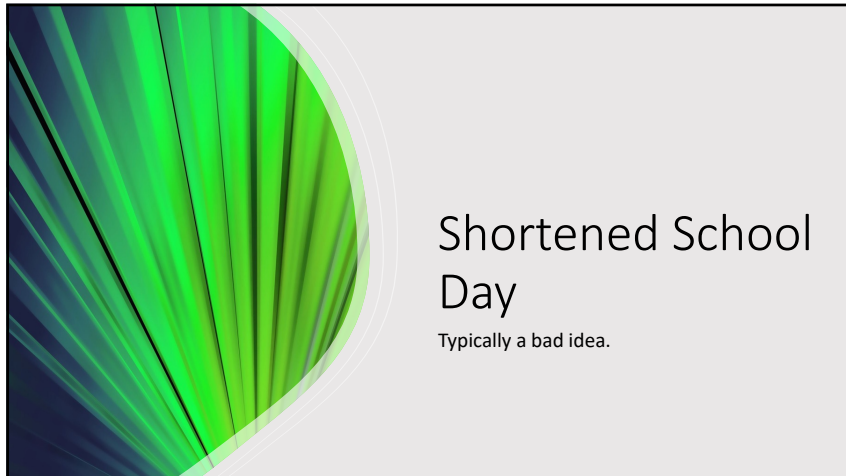
- The court held that the methodologies the district used with this student did not meet that standard.
- The student failed to make progress, and the resulting modifications to the student's IEP were not enough to ensure he received FAPE.
- "[The district] ... 'proposed only incremental increases in the amount of specialized instruction [the student] should receive and did not further evaluate [his] orthographic issues or reconsider the type of specialized reading instruction he might need.'"
- This methodology failure resulted in the district reimbursing the parent \$184,732 in attorneys fees and approximately \$150,000 in tuition reimbursement.

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Shortened School Day

- Starting point: Students with disabilities are entitled to the same school day as nondisabled students. *34 C.F.R. §300.11.*
- Vary the length of the school day BASED ON STUDENT NEEDS ONLY!
- Keep in mind that it is highly unlikely that high needs students will receive FAPE receiving less instruction than nondisabled students.

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Osseo Area Schs., Indep. Sch. Dist. No. 279, 81 IDELR 256 (D. Minn. 2022).

- A 15-year-old student was denied FAPE because her educational program was not sufficiently ambitious.
- When the student who experienced severe seizures throughout the morning transferred into the district, the district agreed that she would attend school from noon until 4:15 p.m. For middle school, the district's proposed IEP ended her school day at 3 p.m. because the school day ended at 2:40 p.m.
- The parents rejected the IEP, contended that the district should educate the student from noon until 6:30 p.m. The ALJ agreed, and ordered remedial instruction and required the district to provide instruction at home from 4:30 to 6 p.m. The district appealed.

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Osseo Area Schs., Indep. Sch. Dist. No. 279, 81 IDELR 256 (D. Minn. 2022).

- The District Court cited the *Andrew F.* standard that a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.
- The court agreed that the student made de minimis progress during a shortened school day. It also considered that the district categorically refused to provide services outside of regular working hours.
- Although the evidence showed the teen learned best in the afternoon and evening, her educational programming was "constrained by limitations imposed upon, and outside of, the IEP Team."

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Reynolds v. George County Sch. Dist., 81 IDELR 282 (S.D. Miss. 2022).

- The student attended school for one hour a day, four days a week, and that he received all instruction and services in an administrative office.
- "[The student's] educational environment often consisted of him sitting in a chair for one hour a day, secluded from other children, still wearing his backpack, with little academic instruction, and the focus was on redirecting negative behaviors," the judge wrote.

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Reynolds v. George County Sch. Dist., 81 IDELR 282 (S.D. Miss. 2022).

- The Judge also cited progress reports stating that the student was unable to attempt certain IEP goals and was making little to no progress on others due to his escalating behavioral problems.
- Given the student's limited progress and IEP's failure to address the student's individual needs and the student's lack of appropriate progress, the court held that the district denied the student FAPE.
- The limited progress that the student with autism and an intellectual disability made after he district reduced his time at school to just four hours a week undercut an IHO's finding that the district provided the student FAPE.

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Round Rock Indep. Sch. Dist. v. Amy M., 81 IDELR 286 (W.D. Tex. 2022).

- The court held that the district denied the student with migraine headaches FAPE and that the student's unilateral private placement was appropriate.
- Holding that the student's IEPs were not individualized to her needs, the District Court largely adopted a magistrate judge's finding that the district denied the student FAPE.

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Round Rock Indep. Sch. Dist. v. Amy M., 81 IDELR 286 (W.D. Tex. 2022).


- The doctors, the court noted, opined that the student should receive one-on-one services in the school library or have a shortened school day with home instruction. Nevertheless, the district "remained rigidly committed to scheduling [the student] for a full day of courses,
- Instead, she was eventually offered one-on-one tutoring in one subject, and was expected to attend regular classes if she wished to receive any further instruction or course credit opportunities.

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Bullying

As it relates to FAPE

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Bullying

- Bullying becomes a special education problem if it interferes with a student's receipt of FAPE.

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D.M. v. East Allegheny Sch. Dist., 82 IDELR 171 (W.D. Pa. 2023).

- The parents of a ninth-grader with specific learning disabilities could sue a Pennsylvania district over its alleged failure to address the mental health issues their daughter developed as a result of peer bullying.
- If a district has information that peer bullying is affecting an IDEA-eligible student's performance, it must take steps to address the impact of that bullying.
- Such steps might include reevaluating the student to identify any changes in her needs, developing a safety plan, and providing counseling or other mental health supports.

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D.M. v. East Allegheny Sch. Dist., 82 IDELR 171 (W.D. Pa. 2023).

- This district responded to the student's frequent absences and declining grades by placing her in a cyber school program.
- Even if district staff meant well, the decision to remove the student instead of considering school-based supports raised questions about the district's response to the student's mental health needs.

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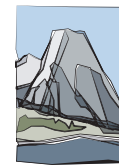
Wrap up

QUESTIONS

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SPECIAL EDUCATION + DISPUTE RESOLUTION + PROFESSIONAL DEVELOPMENT

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