What's Been Happening in Special Education Law?
The Year in Review

Julie J. Weatherly, Esq.
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, AL 36695
(251) 607-7377 (office)
(251) 607-7288 (fax)
JJWEsq@aol.com
Website: www.specialresolutions.com

North Carolina CASE
October 6, 2021

As is typically the case (pandemic or no pandemic), the past year has been another active one in the area of special education law! Even though IDEA and Section 504 have not changed in many years, there continues to be an enormous amount of litigation going on, as courts and agencies attempt to interpret and apply the provisions of these laws to individual cases. On top of that, there is a growing body of new case law addressing the mandate for FAPE during school closures and other disruptions due to COVID. In this session, I will update the audience on significant special education "legal happenings" so far in 2021, including an overview of relevant court decisions and federal agency interpretations.

DECISIONS AND GUIDANCE RELATED TO COVID-19 CHALLENGES AND ISSUES

U.S. DOE Guidance

A. "Strategies for Using American Rescue Plan Funding to Address the Impact of Lost Instructional Time", (U.S. DOE August 24, 2021). https://www2.ed.gov/documents/coronavirus/lost-instructional-time.pdf.
In this document, there is a section addressing "supporting students with disabilities," (pages 13 and 14) wherein the Department notes, among other things, that "[s]tates can also take important steps to support districts and schools in meeting the needs of students with disabilities, including following service disruption or changing service needs as students return to school." The Department specifically cites Minnesota and Washington guidance issued in 2021 that both provide information on determining the need for compensatory services.

B. Letter to Special Education and Early Intervention Partners, https://sites.ed.gov/idea/files/rts-idea-08-24-2021.pdf and "Return to School Roadmap: Child Find under Part B of the IDEA", https://sites.ed.gov/idea/files/rts-qa-child-find-part-b-08-24-2021.pdf (OSEP/OSERS August 24, 2021). The Roadmap document begins by saying that--

It is particularly important that we provide information about the IDEA Part B child find requirements at this time since, as a result of the COVID-19 pandemic, a number of children have not registered for school or have unenrolled from schools. Many others have received instruction only virtually. Given these challenges, as they prepare to return to full-time, in-person learning for the 2021-2022 school year, SEAs and LEAs may need to evaluate whether their current child find procedures are sufficiently robust to ensure the appropriate referral and evaluation of children who may have a disability under IDEA.

The document is apparently the first of a Q&A series to address the questions of a "diverse group of stakeholders" asking for new guidance from the U.S. DOE on IDEA in light of COVID-19 and is specifically "to reaffirm the importance of appropriate implementation of the child find obligations under Part B." It contains 13 questions. Perhaps the only two that provide us with anything we did not know already would be Questions C-3 and C-4:

Question C-3: If a student has received limited instruction due to educational disruptions as a result of the COVID-19 pandemic and also made little academic progress, should the student be referred for an evaluation to determine eligibility for special education and related services?

Answer: Not necessarily. Levels of student performance primarily attributable to limited instruction do not mean the student requires special education and related services under IDEA. IDEA's child find and eligibility procedures are designed to identify, locate, and evaluate students with a suspected disability to determine whether, as a result of the disability, the student requires special education and related services. IDEA's regulations in 34 C.F.R. § 300.306(b) specifically state that a child must not be determined to be a child with a disability if the determinant factor is due to a lack of appropriate instruction in reading or math. LEAs must examine individual referrals for special education and should work with families to determine additional general education supports and interventions that can appropriately meet the child's needs that are attributable to limited instruction as a result of the COVID-19 pandemic and not because the child is suspected of having a disability under IDEA. LEA staff should document these supports when they provide prior written notice to parents under 34 C.F.R. § 300.503, explaining the reasons why the LEA will not conduct an evaluation to determine eligibility for special education and related services for their child.

Question C-4: When a parent shares that their child contracted COVID-19, has long COVID, or has other post-COVID conditions, and the symptoms of the child's condition (such as fatigue, mood changes, or difficulty concentrating) are adversely impacting the child's ability to participate and learn in the general curriculum, must the child be referred for special education and related services?

Answer: Yes. If a child experiencing symptoms from long COVID is suspected of having a disability (e.g., other health impairment) and needs special education and related services under IDEA, they must be referred for an initial evaluation to determine the impact of the long COVID symptoms and the child's academic and functional needs.

C. "Long COVID under Section 504 and the IDEA: A Resource to Support Children, Students, Educators, Schools, Service Providers, and Families", https://sites.ed.gov/idea/files/ocr-factsheet-504-20210726.pdf (OCR/OSERS July 26, 2021). This document was issued by the U.S. DOE "to provide information about long COVID as a disability and about schools' and public agencies' responsibilities for the provision of services and reasonable modifications to children and students for whom long COVID is a disability." For all intents and purposes, this document establishes "long COVID" as a potential disability under IDEA (e.g., OHI) or 504. As noted, "long COVID" can produce a combination of symptoms, including:

- Tiredness or fatigue
- Difficulty thinking or concentrating (sometimes referred to as "brain fog")
- Headache
- Changes in smell or taste
- Dizziness on standing (lightheadedness)
- Fast-beating or pounding heart (also known as heart palpitations)
- Symptoms that get worse after physical or mental activities
- Chest or stomach pain
- Difficulty breathing or shortness of breath
- Cough
- Joint or muscle pain
- Mood changes
- Fever
- Pins-and-needles feeling
- Diarrhea
- Sleep problems
- Changes in period cycles
- Multiorgan effects or autoimmune conditions
- Rash

D. Press Release regarding OCR Investigations regarding State Prohibitions on Mandatory Indoor Masking - https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-opens-investigations-five-states-regarding-prohibitions-universal-indoor-masking. On August 31, 2021, U.S. DOE's Office for Civil Rights (OCR) opened directed investigations of Iowa, Oklahoma, South Carolina, Tennessee and Utah to explore whether statewide prohibitions on universal indoor masking discriminate against students with disabilities who are at heightened risk for severe illness from COVID-19 by preventing them from safely accessing in-person education. As of August 31, OCR noted that it had not opened investigations in Florida, Texas, Arkansas, or Arizona because those states' bans on universal indoor masking were not being enforced as a result of court orders or other state actions. Due to these rulings and actions, OCR noted that districts should be able to implement universal indoor masking in schools to protect the health and safety of their students and staff. However, OCR vowed to continue to closely monitor those states and noted that it is prepared to take action if state leaders prevent local schools or districts from implementing universal indoor masking or if the current court decisions were to be

reversed. In Florida, the current enforcement ban was lifted, so OCR opened its investigation of Florida on September 10, 2021.

E. OCR's Collection of Resources for Elementary and Secondary Schools -"Back to School: Supporting Educational Environments Free from Discrimination." https://www2.ed.gov/about/offices/list/ocr/docs/back-to-school-binder-elementary-secondary-sept-2021.pdf

On September 14, 2021, OCR issued this "virtual binder" where you can find collections of OCR guidance and resources on "all things discrimination." According to OCR's Acting Assistant Secretary's cover e-memo, "[a]s our nation's students return to school, these virtual "binders" offer easy access for schools, families, and students to OCR fact sheets, Q&A resources, and guidance documents, along with resources issued jointly with other federal offices and agencies. Each collection has mini-chapters covering discrimination based on race, color, national origin; sex; and disability....These virtual binders are part of OCR's continued efforts to make sure schools have the supports and resources they need to ensure equal access to education."

Student Privacy Policy Office Guidance

A. Letter to Anonymous, 121 LRP 19451 (SPPO 2021). While districts must generally obtain prior written parental consent before disclosing personally identifiable information from a student's education records to a third party, a teacher's disclosure of students' positive test results for COVID-19 to fellow staff and classmates without the parent's consent did not violate FERPA. Under FERPA's "health or safety emergency" exception to the parent consent rule, a district may disclose a student's education records to appropriate parties without parent consent if knowledge of that information is necessary to protect the health or safety of the student or other individuals. In making a determination of whether a health or safety emergency exists, a district may take into account the totality of the circumstances and where the district had a rational basis to conclude that disclosing the students' positive COVID-19 status was necessary to protect the health and safety of school staff and other students, this agency will not substitute its judgment for that of the district. Therefore, the investigation of this matter is closed and no violation of FERPA is found.

Court Decisions

- **General Summary of Current Status of Decisional Law**

  - So far, there has been no real definitive or binding court case law reported nationally regarding FAPE obligations during COVID times. This is primarily because IDEA student-specific FAPE cases must travel through due process proceedings first pursuant to the legal doctrine of "exhaustion of administrative remedies."

  - Guidance is slowly emerging regarding school obligations during the 2020-21 school year in the form of hearing officer decisions and SEA Complaint resolutions and findings. More precedential guidance with respect to individual student situations will come from the

courts as aggrieved parties in due process proceedings seek court review. While we will more than likely have a good bit of "COVID case law" in the future, it will be some time before a solid, reliable body of COVID special education case law has developed. Will it be too little, too late?

- Most of the reported due process and State complaint decisions to date address an alleged failure to implement an IEP or some other denial of FAPE during the Spring/Summer of 2020. However, hearing decisions nationwide began to emerge in the late Fall of 2020 addressing challenges to services provided during the 2020-21 school year and have continued. For the most part, the FAPE standard in Spring/Summer 2020 appeared as IEP/DLP implementation "to the extent possible." As time is progressing, however, more has been expected as "possible" in light of the circumstances.

- Where a "material IEP implementation failure" is found, compensatory education services are being awarded in the form of either: 1) direct service delivery by the school; or 2) reimbursement for private in-person services obtained by the parents. Direct services awards typically are in the form of an order for the district to provide a certain amount of services or for the student's IEP team to meet and determine what, if any, compensatory services are appropriate.

- Districts or schools that maintained a flat "no in-person services to anyone" position during the 2020-21 school year and refused to consider individualized possibilities for in-person services appear to be the most vulnerable in FAPE cases.

- Some of the COVID decisions involve alleged procedural violations (inappropriate "change of placement" procedures or violation of stay-put; no "prior written notice," etc.), but most rulings have relied upon a 9th Circuit Court of Appeals decision, N.D. v. State of Hawaii Dept. of Educ., 600 F.3d 1104, 54 IDELR 11 (9th Cir. 2010) to find that: "Congress did not intend for the IDEA to apply to system-wide administrative decisions." As schools continue to open back up over time, however, procedural compliance has been and will continue to be more important.

- **Challenges Seeking In-person Services for the 2020-21 School Year**

A. Borishkevich v. Springfield Pub. Schs. Bd. of Educ., 78 IDELR 277 (W.D. Mo. 2021). After the extended school closures due to COVID and in preparation of returning to school, the school board created and implemented a school reentry plan requiring schools to contact parents of students with IEPs near the beginning of the 2020-21 school year to develop a plan for addressing student needs. A group of parents brought suit under IDEA, ADA and 504 challenging the plan. The case is dismissed for failure on the part of the parents to exhaust administrative remedies prior to seeking relief in court.

B. Charles H. v. District of Columbia, 79 IDELR 14 (D. D.C. 2021). Plaintiffs' motion for a Preliminary Injunction and provisional certification of a putative class of about forty 18 to 22 year-old students is granted where the school district is not providing FAPE to students with disabilities who are incarcerated and enrolled in the district's Inspiring Youth Program

for court-involved students aged 17 to 22. The district's contention that it has done and will continue to do the best it can given the constraints imposed by COVID is rejected where from March 2020 to very recently, the district offered almost no direct instruction, whether virtual or in-person, to disabled IYP students. Thus, the district and the State Superintendent are ordered to provide the plaintiffs, and all other members of the provisionally certified class (i.e., every student enrolled in the IYP program) with the full hours of all services in their IEPs through direct, teacher-or-counselor led group classes and/or 1:1 sessions delivered via live videoconference calls and/or in-person interactions. Further, defendants are to report every 30 days on the implementation of special education and related services for every class member, beginning no later than 15 days after the date of the order and must file under seal copies of the IEPs of all class members, along with a 2 to 5-page consolidated summary of the special education and related service hours mandated by each student's IEP so that the court may ensure that defendants' representations in the periodic status reports match the hours listed in those IEPs. Interestingly, as part of its public interest and balance of the equities analysis, the court rejected the district's arguments and noted that "[i]ndeed, the District has already received $386 million to safely reopen schools and meet student's needs during the pandemic. U.S. Dept. of Ed. Press Release, March 24, 2021, available at https://perma.cc/LFU6-WVF6; see also Statement of Interest at 13. If, as Defendants say, the IYP really is comprised of a comparatively 'small number of students,' the Court trusts that Defendants will find a way to financially accommodate the public's interest in ensuring that District residents receive 'special education and related services ... in accordance with applicable law.'"

C. R.Z. v. Cincinnati Pub. Schs., 121 LRP 27947 (S.D. Ohio 2021). The Magistrate recommends to the district court that this case be dismissed for failure to exhaust administrative remedies where the plaintiff alleges that the school district failed to provide FAPE to a high schooler with cancer-related cognitive impairments during the time period in which the high school operated 100% remote learning in response to COVID. Specifically, the parent alleges that the district ignored the effects of remote online learning on the student's IEP, refused to reopen the high school and made absolutely no efforts for the provision of compensatory services.

D. Brach v. Newsom, 77 IDELR 189 (C.D. Cal. 2020). Request of parents of seven unrelated students for a restraining order against state officials for adopting a school reopening framework for the 2020-21 school year that prohibited in-person instruction in counties on the state's COVID-19 monitoring list is denied. On December 1, 2020, judgment was granted for the state officials on the parents' FAPE claims on the basis that they must first exhaust administrative remedies. 77 IDELR 285. On July 23, 2021, the 9th Circuit Court of Appeals affirmed the court's ruling as to public schools and held that because State officials had a legitimate interest in abating COVID-19, they did not violate the 14th Amendment rights of public school students when prohibiting in-person learning in communities with high infection rates. However, the district court's decision as to private school operations and their students is reversed and remanded to the district court for further proceedings. 6 F.4th 904, 79 IDELR 61 (9th Cir. 2021).

- **Cases Regarding FAPE to Individual Students during COVID**

A. Rabel v. New Glarus Sch. Dist., 79 IDELR 71 (W.D. Wis. 2021). ALJ's decision is upheld where the school district offered FAPE when it proposed that the 14-year-old student with Down syndrome and autism be served in a private therapeutic virtual setting for the 2020-21 school year rather than in the district's virtual program. Where the question is whether the student can receive a satisfactory education in a mainstream virtual setting at the middle school as requested by the parent, the evidence is clear that she cannot. There, all of the lessons were prerecorded and the parents' refusal to consider an in-person program for 2020-21--which was selected by all of her would-be classmates with disabilities--would have left this student by herself. However, the virtual instruction provided by the private therapeutic school would provide the student with synchronous live instruction in a small group setting with other students with disabilities. Given that the private setting's virtual program offers the live instruction, feedback and peer interaction that the student needs to make progress, the district's proposal is appropriate. As the ALJ explained, this student has not interacted with non-disabled students for more than two years, and her parents failed to cite any evidence in the record showing that the student was ready to interact with her non-disabled peers in a virtual or in-person setting or that placement in a regular education setting was appropriate to meet the student's needs. Although the parents disagree with the ALJ's conclusion, "it is not the court's role to independently assess [the student's] case." The court can only decide whether the ALJ came to a rational conclusion, which the ALJ did.

- **Challenges Regarding Masking Mandates**

A. The ARC of Iowa v. Reynolds, 79 IDELR 153 (S.D. Iowa 2021). Motion of the parents of 13 unrelated medically fragile students for a temporary restraining order against state officials prohibiting them from enforcing a ban on mask mandates is granted where all of the necessary elements for obtaining a TRO have been shown: 1) the requested relief is necessary to prevent irreparable harm; 2) there is a substantial likelihood of success on the merits; 3) the harm to the students outweighs the harm to the state or districts; and 4) the TRO would serve the public interest. Iowa's statutory ban on mask mandates forces medically fragile students to choose between attending school where they are potentially exposed to severe illness and attending school remotely and receiving subpar instruction—irreparable harm. The parents are substantially likely to prevail on their claim that Iowa law undermines protections to the children provided by Section 504/ADA, because the mask mandate ban prevents districts from making a reasonable modification for medically fragile students and from delivering their programs, services and activities in the most integrated setting appropriate like that which is afforded to their nondisabled peers. In addition, allowing districts to decide whether to adopt mask mandates will not harm the state and the public interest in enforcing ADA outweighs the state's interest in enforcing the ban. The TRO is in place until such time as the court can rule on the parents' motion for preliminary injunction.

B. Hayes v. DeSantis, 2021 WL 4236698, 121 LRP 31712 (S.D. Fla. 2021). Request for a preliminary injunction on behalf of 16 students with disabilities asserting a FAPE-based

challenge to the Governor's ban on mask mandates is denied. The parents are not likely to succeed on the merits because they have failed to exhaust IDEA's administrative remedies. To prevail on their request for injunctive relief, the parents must show that 1) they are substantially likely to succeed on the merits of their claims; 2) their children would suffer irreparable harm in the absence of the injunctive relief; 3) the harm to the students outweigh the harm to the state; and 4) the requested relief would serve the public interest. Clearly, the claims set forth in the complaint address issues of FAPE and exhaustion is required under IDEA. An administrative law judge in an administrative hearing may be able to order a more limited mask mandate as a disability accommodation for a particular student, and "there is nothing in [the Governor's order] that would prevent a school from implementing mask requirements in specific classrooms." Not only have the parents failed to show that they are likely to succeed on the merits of their case, they have also failed to show irreparable harm in the absence of an injunction. Indeed, all but one of the students' school districts adopted mask mandates in violation of the Governor's order, so the requested injunction would not have any meaningful impact.

C. G.S. v. Lee, 79 IDELR 159 (W.D. Tenn. 2021). Based upon the parents' assertion that their medically fragile children can no longer interact with peers or attend certain classes because the Governor issued an executive order that allows public school students to opt out of wearing face masks, they are likely to prevail on their case, have demonstrated irreparable harm, and issuing a TRO would serve the public interest. Thus, the school district can no longer grant exceptions to the mask mandate for two weeks. Note: On September 17, 2021, the court granted the parents' motion for preliminary injunction against enforcement of the ban on mandatory masking. 2021 WL 4268285 (W.D. Tenn. 2021).

There have been cases like this also filed in Texas and South Carolina (and others as well).

NON-COVID-RELATED DECISIONS AND GUIDANCE

TITLE IX – THE BATHROOM CASES

- Title IX Discrimination – Sexual Orientation and Gender Identity Issues

On June 28, 2021, the Supreme Court declined to hear the Virginia transgender school bathroom case of Grimm v. Gloucester Co. Sch. Bd., 972 F.3d 586, 120 LRP 25290 (4th Cir. 2020), leaving intact a decision wherein the 4th Circuit Court of Appeals joined the 3d, 7th, 9th and 11th Circuits in striking down as discriminatory school board bathroom policies excluding transgender students from using the bathroom that matches their gender identity. It has been reported that the parties have settled the Grimm matter for $1.3 million, so the case has effectively ended.

On August 23, 2021, the Eleventh Circuit Court of Appeals granted the school district's request for rehearing en banc, vacating its decision on July 14, 2021, wherein it was found that the student's Equal Protection rights were violated by the school board's restroom policy. This may bring another chance for the issue to be decided by the Supreme Court,

particularly if the Eleventh Circuit rules upon rehearing in favor of the school district. Adams v. School Bd. of St. Johns Co., Case No. 18-13592 (11th Cir. 2021). https://media.ca11.uscourts.gov/opinions/pub/files/201813592.1.pdf

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Harrison v. Klein Indep. Sch. Dist., 78 IDELR 212 (5th Cir. 2021) (unpublished). District court's summary judgment ruling in favor of the district on the parent's 504 hostile environment claim is affirmed. Where the parent of an elementary school student with multiple disabilities alleges that the district is responsible for the mistreatment of her son by a special education teacher, an aide and a bus driver, the parent did not show the required elements for her claim. In this Circuit (and others), districts are not automatically liable for the misconduct on the part of their employees. Rather, the parent must show that district persons of authority (i.e., Superintendents, principals, assistant principals, etc.) knew about the alleged abuse or misconduct and were deliberately indifferent to it by failing to take appropriate action in light of the known circumstances. Here, school administrators engaged in thorough investigation of each incident of misconduct as soon as it was reported and terminated the student's teacher and aide, as well as reassigning the bus driver who reportedly screamed at the student on the bus. In addition, the parent was promptly apprised of the resolution of each of the incidents and has identified nothing more that the district should have done in response. Finally, there was no evidence that the district knew that the teacher had hit, injured or otherwise mistreated students in the past. The district's response to its employees' misconduct was reasonable in light of what was known and done.

B. Henry v. School Dist. of Philadelphia, 78 IDELR 41 (E.D. Pa. 2021). Districts are not generally responsible for injuries inflicted on students by others, including other students. Though an exception may exist where a district has created a situation that makes a particular student more vulnerable to danger, this "state-created danger" theory only applies when parents identify affirmative conduct on the part of the district that placed the injured student in harm's way. Here, the district did not act to create a dangerous situation for the fifth-grader with multiple disabilities who was allegedly repeatedly attacked by a classmate with autism who was moved from a self-contained classroom and placed in an inclusion class with her. Placing a student in a classroom with another student is not an affirmative act by which a "state actor" can be liable for creating danger for students under the law. Because the parents cannot identify any affirmative conduct by the district that increased their daughter's risk of personal injury, they cannot prevail on their 14th Amendment claim. However, the parents may proceed with their Title VI claim of race-based hostile environment where they have pled a viable claim that the classmate who was white had attacked other students of color at the school but had not attacked any white students.

C. L.J. v. Baltimore Curriculum Project, 78 IDELR 38 (D. Md. 2021). Parent's 4th Amendment, 504 and conspiracy claims against a tutor and the school's principal will not be dismissed at this juncture, where there is evidence that the tutor improperly slung a 7-year-old boy with ADHD and an intellectual disability over his shoulder, smashing the

student's face into a wall during a disciplinary incident. The evidence reflects that when the student misbehaved during class, the teacher called the tutor to escort the student to the principal's office. On the way, the tutor grabbed the student, threw him over his shoulder and smashed his face into the wall as he went downstairs to the first floor. According to the record, two school employees witnessed the incident. Because these factual allegations suggest that the tutor's "seizure" of the student exceeded its reasonable scope and there is no apparent justification for the tutor's handling the student in this way, there is a plausible constitutional claim. In addition, there are sufficient factual allegations indicating that the principal conspired with the tutor to cover up the tutor's misconduct where the principal and tutor allegedly told police that the tutor lost his footing and the child hit himself on the wall.

D. Boykins v. Trinity, Inc., 78 IDELR 278 (E.D. Mich. 2021). District's motion to dismiss constitutional claims is denied. Where districts generally are not liable for constitutional violations committed by employees or third-party contractors, an exception exists when the alleged violation of law stems from an official policy maintained by the district. Here, the student's estate has sufficiently linked his seizure on the school bus and his death at the hospital several hours later to two district policies: 1) that all students with disabilities are transported on general education buses regardless of their individual needs and 2) students with disabilities are required to remain on the bus until the school is "ready to receive them." In this case, these policies could have contributed to the 20-year-old autistic student's death, as he was required to remain on a hot bus with poor ventilation on a morning in July and suffered a seizure while on the bus.

MONEY DAMAGES FOR FAILURE TO IMPLEMENT EDUCATIONAL PLANS

A. Bryant v. Dayton Indep. Sch. Dist., 79 IDELR 99 (S.D. Tex. 2021). District's motion to dismiss the parents' 504/ADA intentional discrimination claim is denied. Here, the parents allege that they complained constantly about the fact that their dyslexic high schooler's math teacher refused to provide printed classroom notes and extended time on tests and assignments as required in their child's 504 plan, told their child that dyslexia was not a "real disability," and told other students that he cheated on his homework. Clearly, the parents have stated a plausible claim of intentional discrimination based upon the teacher's refusal to provide accommodations and the parents are not required to exhaust IDEA remedies where the claim is harassment on the basis of disability, not a denial of FAPE.

B. R.D. v. Lake Washington Sch. Dist., 78 IDELR 61 (9th Cir. 2021) (unpublished). The lower court's granting of summary judgment on the parents' ADA/504 disability discrimination claims is reversed where issues of material fact remain and recess is considered a part of FAPE for this student with a medical condition. A plaintiff bringing a lawsuit under ADA/504 must show 1) she is a qualified individual with a disability; 2) she was denied a reasonable accommodation that she needs in order to enjoy meaningful access to the benefits of public services; and 3) the program providing the benefit receives federal financial assistance. Here, plaintiff must show that the school denied her services that she needed to enjoy meaningful access to the benefits of public education and that were available as reasonable accommodations or by showing that the program denied her

meaningful access to public education through another means, such as by violating a 504 regulation. Here, the student's 504 Plan provided, among other things, that she was to stay inside, due to her medical condition, when it is damp or raining and when the high temperature of the day is below 60 degrees. In addition, the Plan provides that she should have adult-supervised inside recess that includes a variety of activities, including gross motor. However, it is alleged that gross motor activities were not provided. The parents have offered evidence that recess is a part of FAPE and includes gross motor activity and supervision and there are disputes over whether the student was supervised to ensure she stayed inside when it was unsafe for her to be outside and whether she was provided gross motor activities when inside. As to the damages claims, the plaintiff has established the potential for deliberate indifference on the part of the district, based upon the school's knowledge that she needed the accommodations, especially where the 504 Plan explicitly provided for them.

C. S.C. v. Round Rock Indep. Sch. Dist., 78 IDELR 40 (W.D. Tex. 2021). School district's motion for judgment in its favor on the parents' 504/ADA discrimination claims on behalf of their daughter with Anorexia Nervosa is denied. Since the parents are seeking money damages, they must show that the district intentionally discriminated against the student on the basis of her disability, and they can meet that requirement by demonstrating that the district refused to provide the student with reasonable accommodations. The journalism teacher's sworn affidavit could support a finding of intentional discrimination, where it indicates that the teacher was a member of the student's 504 team and was well aware of its provision barring staff members from discussing dieting, body image or related topics in the student's presence. Despite the plan's provision, the teacher stated that when yearbook editors asked if she knew anyone with an eating disorder, she approached the student about being interviewed and photographed for a yearbook story and did not ask her parents for permission to do so. This clearly creates an issue of fact as to whether the teacher intentionally discriminated against the student by knowingly denying the accommodations set out in her 504 plan. As noted in a previous order, the district is liable for any discriminatory actions of its employees.

D. Swogger v. Erie Sch. Dist., 517 F.Supp.3d 414, 78 IDELR 67 (W.D. Pa. 2021). While the Third Circuit Court of Appeals has not ruled on whether emotional distress damages are available under 504/ADA, this court adopts the view of the First, Second, Seventh and Eleventh Circuits that they are. Thus, the school district's motion to dismiss the parent's claim for money damages in the amount of $75,000 for her child's emotional distress is denied. Here, the student allegedly suffered emotional distress caused by school administrators who, after the student had a "meltdown," "gently but firmly" pushed him out of the school building and told him to go home, leaving him to find his way home 2.8 miles away. The parent alleges that this was a failure to implement the student's Behavior Support Plan and to ensure that he was provided the transportation to/from school as reflected in his IEP. While not addressing the merits of the case, these kinds of damages are available for this kind of alleged violation under 504/ADA.

BULLYING/DISABILITY HARASSMENT OR ABUSE/HOSTILE ENVIRONMENT

A. Csutoras v. Paradise High Sch., 79 IDELR 152 (9th Cir. 2021). Teenager with ADHD cannot recover money damages under 504/ADA against the district where he was struck in the face and seriously injured by a classmate at a football game and the district failed to provide him with "active adult supervision" at the game. Relying upon two *Dear Colleague Letters* (issued in 2013 and 2014) issued by the U.S. DOE about peer bullying, the student argues that the district is responsible where U.S. DOE suggested that a district does not need to have actual knowledge of disability harassment to be liable for its failure to respond. In fact, the 2014 letter contradicts this Circuit's rule that a student seeking money damages for disability harassment must prove that the district had actual knowledge of the harassment (rather than "reason to know") but failed to appropriately respond to it. "The Letters themselves disclaim any binding authority and explicitly state that they don't apply to private suits for money damages." While the student could still pursue his claims by showing that a need for a harassment-related accommodation was obvious, neither the student nor his mother requested such an accommodation or reported any previous incidents of bullying to school personnel.

B. Duncan v. Eugene Sch. Dist. 4J, 79 IDELR 67 (D. Ore. 2021). School district's motion for summary judgment on the high school student's 504/ADA hostile environment claims is denied. While the 9th Circuit has not specifically found that hostile environment educational claims can be brought under 504/ADA, this court finds that they can where a student can show 1) disability-based harassment occurred; 2) the harassment was not welcomed; 3) the harassment was sufficiently severe and pervasive such that it altered the condition of education and created an abusive educational environment. Here, there is evidence that the French teacher (who has been the subject of another case), often said things like "ADHD is not a real disability" and the student just needed to "try harder." In addition, the school's Assistant Principal witnessed how the student's classmates picked up on the teacher's disdain for the student and his need for accommodations in his classroom and when suspending the teacher, a letter from the district noted that the teacher continued to display bias against disabled students and resisted providing accommodations to them. In addition, the classmates staged a walkout to protest the French teacher's reassignment to an elementary school, created commemorative sweatshirts honoring the teacher (without inviting this student to purchase one), and referenced these activities during the class's graduation ceremony. Thus, a reasonable jury could find that the district allowed a disability-based hostile environment to exist by not properly addressing the incidents.

C. B.D. v. Cornwall Lebanon Sch. Dist., 78 IDELR 184 (M.D. Pa. 2021). District's motion to dismiss the parents' Section 504/ADA claims is denied. It is alleged that he was subjected to pervasive and outrageous bullying at school by his peers, based on his race and his disabilities, beginning during the student's fifth grade year. According to the parents, the student was called names based on his race and academic deficits and in September 2018, the student's teacher asked students to trade their completed tests and peer grade them. When another student finished grading this student's test, the other student openly mocked and ridiculed him for his failing grade on the assignment. In addition, it is alleged that this other student frequently called the student "dumb" or "retarded" when he struggled with an assignment in class. Plaintiffs further asserted that,

after the peer grading incident in the fall of 2018, the parents informed the district about the incident and made the district aware of the continuing bullying. This prompted a November 2018 meeting between Parents and the district to address the situation and the parents were informed that their child would need to stay home from school for two days following the meeting while administration determined a better way to address the bullying. In addition, the middle school principal told them that they could not keep him safe. It is also alleged that the bullying continued and that in September of 2019, the other student passed him in the hallway and called him a "faggot," and the parents reported the incident to the district. The school then reviewed hallway security footage and confirmed that the incident occurred, but there was no further investigation. In response, the district adjusted the student's 504 Plan to provide that he stay away from the bully, placing the onus on the victim to avoid the bully. It is also alleged that the bully used the required separation of the two students as a device to further bully because on more than one occasion, the bully moved his seat at lunch to get closer to the student and his companions so that the student would be forced to leave his chosen lunch table. It is alleged that the parents informed the district of these incidents, which continued and were witnessed by several teachers, who did not take any corrective action. If the district's failure to respond to all of this appropriately is true, it could support an award of compensatory damages based upon an inference of deliberate indifference on the part of the district.

D. Elsharkawy v. Chisago Lakes Sch. Dist. Bd. of Educ., 79 IDELR 104 (D. Minn. 2021). District's motion to dismiss parent's claims under 504/ADA and state law wrongful death is denied at this juncture. The parent has sufficiently stated a claim for disability-based bullying where her 15-year-old son with depression, anxiety and many other disabilities committed suicide based on the district's failure to respond to numerous physical assaults by classmates about which they clearly knew. The parent sufficiently has alleged that district officials acted in bad faith or with gross misjudgment when they did not appropriately respond to multiple incidents of bullying that she reported over a three-year period. The alleged incidents included classmates stabbing her son with a pencil, throwing him into a metal door frame, choking him and repeatedly punching him in the head. According to the parent, the district investigated only three of the reported incidents and disciplined her son for one of them, against the provisions in his IEP. The district also disciplined the student for minor infractions, such as fidgeting in his seat or missing classes to receive medical care needed for his bullying-related injuries. The district's purported failure to investigate the bullying incidents or to take steps to ensure the safety of her son supports the 504/ADA claims.

E. Doe v. Huntsville City Schs. Bd. of Educ., 79 IDELR 41 (N.D. Ala. 2021). Motions to dismiss constitutional claims under Section 1983 against the district and several named educators are denied where the educators allegedly ignored clear indications that bullies were physically injuring an 8-year-old disabled student's genitals and required the victim to meet with one of the bullies. Claims that the district violated the student's due process rights by refusing to intervene appropriately to stop classmates from bullying and injuring the student with Asperger Syndrome are actionable where it is alleged that the defendants acted in an arbitrary and conscience-shocking manner. Here, the parent alleges that the parent and student notified teachers, an assistant principal and other school personnel

numerous times that other students were repeatedly punching the student's genitals. In addition, the parent alleges that she provided the district with a doctor's letter noting that one of her child's testicles was not viable due to the assaults. Further, when the AP eventually intervened, instead of separating the student from the bullies, she required the student to meet with one of them "to encourage them to become friends." After that, the bully allegedly told the student that he should not report the bullying because friends do not tell on each other. Thus, the parent has sufficiently alleged a claim and it will not be dismissed at this juncture.

RETALIATION/FREEDOM OF SPEECH

A. Spivey v. Enterprise City Bd. of Educ., 121 LRP 32165 (M.D. Ala. 2021). While the special education teacher demonstrated two of the required elements of ADA retaliation in her against the district, she was not able to demonstrate that her termination was causally connected to her advocacy on behalf of students with disabilities. Here, the teacher did engage in protected advocacy when she challenged her school's removal of all students with disabilities from general education classrooms regardless of their educational needs. She has also shown that her termination with the district was adverse action against her. However, a causal connection has not been shown between the adverse action and the protected advocacy where there was an 18-month lapse between the teacher's advocacy and her termination, which suggests that the two events are not related. In addition, the district has offered a legitimate, nonretaliatory reason for terminating the teacher where she had a lengthy history of excessive absences. According to personnel records (which were not challenged at the teacher's termination hearing), the teacher was absent 43 days during her final year of employment and she missed between 22 and 51 days of work every year during the previous decade. Based upon this history of absenteeism, the district could legitimately terminate the teacher's employment.

B. McManus v. Aleutian Region Sch. Dist., 79 IDELR 105 (D. Alaska 2021). Retaliation claims brought under Section 504 by two former teachers will not be dismissed at this juncture because the teachers' complaint alleged the required elements: 1) a protected activity; 2) adverse action; and 3) causal connection. Here, the teachers allege that they complained to the district and others that students with disabilities were not receiving adequate monitoring or support and that at least one student was not allowed access to his enrolled classes. In addition, the teachers allege adverse action in that the district eliminated the position of one of the teachers and did not renew either of their teaching contracts. Though the district argues that the teachers cannot attribute the nonrenewal of their contracts to their advocacy on behalf of students with disabilities, the complaint sufficiently alleges a causal connection. While the claims against the district will not be dismissed, claims against individual district employees will be dismissed, as 504 does not contemplate individual liability.

C. Hamilton v. Oswego Cmty. Unit Sch. Dist. 308, 78 IDELR 97 (N.D. Ill. 2021). In order to bring a claim against a district for retaliation under 504/ADA, parents must be able to show that 1) they engaged in protected advocacy; 2) the district took adverse action against them; and 3) the adverse action was based upon the protected advocacy. Here, the parents

of a hearing impaired student claim, among other things, that a two-day contentious IEP meeting occurred where they pointed out to district team members that the district was violating the law by, among other things, using pre-populated forms at the meeting (apparently claiming "predetermination"). According to the complaint, school team representatives and a social worker became "defensive" and "combative," and the day after the IEP meeting, the social worker searched the student's body inappropriately and found a bruise on her hip. Based upon the search, the social worker reported suspected abuse/neglect to the DCFS and things "spiraled" from there. If these allegations are true, they are enough to sustain a claim of unlawful retaliation, particularly where the body search and reporting came one day after the contentious IEP meeting. Where suspicious timing can support a retaliation claim, the district's motion to dismiss the claims at this time is denied.

D. Schaeffer v. Fulton Co. Sch. Dist., 78 IDELR 250 (N.D. Ga. 2021). Where a school social worker may have retaliated against a student with severe anxiety, depression and ADHD and his parents by filing a CHINS petition with juvenile court based upon excessive absences, the district's motion for summary judgment is dismissed and a jury will hear the case at trial. To establish a viable claim under 504/ADA, the parents must show that 1) they engaged in a protected activity of advocacy; 2) the district acted adversely toward them; and 3) there is a causal connection between the protected activity and adverse action. Where the social worker initiated the truancy proceedings soon after the parents requested emergency IEP meetings to address their concerns about services, the social worker's claim that the proceedings were initiated for a legitimate reason of chronic unexcused absences is questionable. This is so particularly due to the inconsistent letters being written to the parents and the inconsistency in following school policy regarding the same. Considering the facts in the light most favorable to the parents/student, a reasonable jury could find that but for the parents' advocacy for their child's accommodations at school, the CHINS referral would not have been filed. Thus, the parents have offered sufficient evidence of pretext to overcome the district's proffered legitimate reason for filing the CHINS petition. Thus, the district is not entitled to summary judgment on this issue.

E. Cottrell v. Newport-Mesa Unif. Sch. Dist., 78 IDELR 286 (C. D. Cal. 2021). Where the district acted based upon legitimate nonretaliatory reasons when reassigning the former director of special education to a teaching position, the former director's 504 claim of retaliation because of advocacy on behalf of students with disabilities is decided in favor of the district. Here, the district had sent an email to an elementary school teacher about her "unwillingness to follow standard [504] procedures" and accusing the teacher of various Section 504 violations as the school's Section 504 coordinator. The former director failed to speak with the teacher or the elementary school principal about her concerns prior to sending the email and the teachers' union confronted the district over the director's handling of the situation. The email also prompted the teacher to step down as Section 504 coordinator, which impacted the services of the 12 students at her school who had 504 Plans. Although the former director argued that her history of positive performance reviews showed that the district's reassignment was retaliatory, her most recent evaluation addressed a need to work on communication skills. The fact that the former director received criticism of her communication style—in particular, her "email

correspondence"—prior to sending the email to the teacher strongly undercuts the former director's argument of pretext. The district reassigned the director not based upon her advocacy but based upon the manner in which she raised her 504 concerns.

RESTRAINT/SECLUSION

A. Washington v. Paley, 79 IDELR 3 (5th Cir. 2021) (unpublished). District court's ruling that a 17-year-old student who was tased by an School Resource Officer could pursue a 4th Amendment claim against the SRO for the use of excessive force is reversed. Where this court has allowed some students to proceed with these kinds of 4th Amendment claims for excessive discipline but disallowed such a claim in at least one other case, the student's claimed 4th Amendment right to be free from excessive discipline was not "clearly established" at the time the SRO tased the student, even after the student had fallen to his knees and stopped resisting the SRO. Thus, the SRO is entitled to immunity where the law was not clearly established in the Circuit.

B. Langley v. Guiding Hands School, 78 IDELR 191 (E.D. Cal. 2021). Parents of nine students with disabilities may proceed with their 504/ADA claims against the state DOE and a private school that contracted with the state DOE to provide special education services. Where a school staff member placed a 13-year-old student with autism and other disabilities in a prone, face-down restraint for nearly two hours, it resulted in the student's death. The allegation that the DOE discriminated against students with disabilities by failing to supervise and investigate the private school's disproportionate use of restraint on students with disabilities supports a cause of action. The parents have plausibly asserted that the state DOE, despite receiving numerous emergency behavioral forms from the school, never initiated an investigation of the school's practices, which is enough to meet the elements required for a discrimination claim.

C. Doe v. Aberdeen Sch. Dist., 121 LRP 32289 (D.S.D. 2021). District's motion for judgment on the 504/ADA discrimination claims on behalf of five unrelated students with disabilities is denied. For a district to be liable, parents are required to show that district administrators acted in bad faith or with gross misjudgment. Here, the district did not have an official policy regarding the use of seclusion and restraint in SY 2014-14 or 2015-16, the time of the alleged events at issue. At that time, the U.S. DOE had issued guidance two years before urging educational agencies to limit the use of seclusion and restraint. More significant is that the parents have presented evidence that suggests that district administrators did not appropriately investigate reported incidents. For example, the elementary school principal had not investigated reports that students were being carried, dragged, or walked to a small seclusion room and required to complete a "task basket" before leaving. In addition, when asked about the appropriateness of sending one of the students to the seclusion room 274 times in a 6-month period, the principal did not see any problem with "such extreme measures." Further, the superintendent admitted that she was aware of other alleged incidents but was assured by the special education director that the report was not accurate. Because this evidence could support a jury's finding that the administrators deviated from accepted professional judgment, practice or standards, the

students may pursue their 504/ADA claims against the district, as well as some of their constitutional claims against the district, administrators and the teacher.

CHILD FIND DUTY TO APPROPRIATELY/TIMELY EVALUATE

A. D.C. v. Klein Indep. Sch. Dist., 79 IDELR 4 (5th Cir. 2021) (unpublished). School district's delay for several months in conducting an evaluation for SLD was not reasonable and denied FAPE. Districts are to evaluate students with suspected disabilities within a reasonable time after they have knowledge of facts that likely indicate that a disability exists. Here, there was extensive evidence that the district was or should have been aware of the student's disability during his fourth grade year by April 27, 2018. Among other things, the student had a 504 plan that indicated that he exhibited "characteristics of dyslexia evident in reading comprehension and written expression" and his performance substantially improved when assignments were administered orally. Despite receiving accommodations, however, the student's reading level did not improve from the beginning of his 4th-grade year through the middle of the year; therefore, the district should have known that its existing strategies were not working. The district's argument that the time period between April 27 and September 6, 2017, should not be considered because it included the summer break is rejected. Where school districts on summer break "need not move towards evaluation as expeditiously as they might during the school year," they "cannot get away with doing nothing, and here, the District did nothing." Further, the district delayed the evaluative process between early September, when the parents requested an evaluation, and late October, when the district obtained consent to evaluate.

B. D.T. v. Cherry Creek Sch. Dist. No. 5, 79 IDELR 74 (D. Colo. 2021). Where the high school student's significant social-emotional difficulties were not observable in the school environment until November 2017, the school district did not violate IDEA's child find requirement when it failed to evaluate him earlier than that. Here, the district had no reason to suspect that the student was a student with emotional disturbance who needed special education and related services until he made a comment at school about "shooting up the school." In addition and to qualify for services as an ED student, the student's emotional difficulties must be found to interfere with his ability to receive reasonable educational benefit. While the student was struggling in school in some areas by April 2017, including adjusting to his new, larger school and had a documented welfare check during his freshman year, "those issues did not adversely affect [the student's] educational performance...when he earned high grades." The parent's argument that the district had reason to suspect a disability and need for special education by September 2017 when the student was hospitalized for depression and anxiety is rejected. Although the student received a poor grade in an honors class during that time, he otherwise continued to perform well academically, and "it was not until his social-emotional functioning manifested in an academic setting in November of 2017 and interfered with his ability to receive reasonable educational benefit, that the District had reason to suspect a disability."

C. Mr. F. v. MSAD #35, 78 IDELR 282 (D. Me. 2021). District did not violate IDEA when it waited 20 months to evaluate a student for IDEA services where it had no reason to suspect a need for special education services until November 2018 during the student's 8th-grade year. Though the parent submitted medical documentation to the school indicating that the student was diagnosed with ADHD and an anxiety disorder in September 2017, the student's difficulties with organization and completing work were not atypical for

middle schoolers. In addition, throughout most of the student's 7th-grade year, he was reported to be doing well. Thus, it was reasonable for the district to try to address his issues by implementing a 504 plan. When the student's executive functioning and social skills deficits became more apparent in November 2018, the district referred the student for an IDEA evaluation, but conducted a 504 evaluation instead based upon the mother's repeated statements that the student did not need special education services. Where the student was evaluated and found eligible for IDEA services in May 2019, the district complied with its child find obligations.

D. D.S. v. Bainbridge Island Sch. Dist., 78 IDELR 242 (W.D. Wash. 2021). District is ordered to provide 60 hours of additional instruction in writing where it failed earlier to evaluate the elementary school student's writing difficulties in addition to his reading difficulties. The district's argument that the reading instruction that it was providing to address the student's dyslexia would ultimately help to resolve his writing difficulties is rejected where the district disregarded documented teacher concerns about writing. Where the key question is whether the district was on notice of the student's writing difficulties when it evaluated him in the area of reading, the district was on notice when the school counselor notified that district psychologist via email that the student's teacher and reading specialist expressed concerns in reading, writing and math. However, the district focused its evaluation on the student's difficulties in reading and did not evaluate the student in the area of writing until he was in second grade and after his parents provided a private evaluation reflecting that he had dysgraphia. This failure to appropriately evaluate in all areas of suspected need not only resulted in a loss of educational benefit but also impeded the parents' participation in the IEP process by depriving them of necessary information.

E. Jacksonville North Pulaski Sch. Dist. v. D.M., 78 IDELR 283 (E.D. Ark. 2021). While the kindergartner's diagnoses of ADHD, autism and a sensory processing disorder do not in themselves require IDEA services, the district erred in focusing on the child's good academic performance when determining whether an evaluation was necessary. Here, the district suspended the child for a total of 12 days during the first 7 weeks of school for behaviors that could have been related to disability, and the guardians had notified the district of a history of behavioral problems when they registered him for kindergarten. Indeed, the testimony in the record indicates that the district narrowly focused on the child's academic ability without considering the overall effect that his diagnoses were having on his education. Further, IDEA prohibits districts from using a single measure or assessment—such as academic performance—to determine whether a child needs special education services. Thus, the hearing officer's decision that that the district violated IDEA in refusing an evaluation based solely on academic proficiency is upheld.

EVALUATION OF PARENTALLY PLACED PRIVATE SCHOOL/HOME SCHOOL STUDENTS

A. A.B. v. Abington Sch. Dist., 440 F.Supp.3d 428, 76 IDELR 41 (E.D. Pa. 2020), aff'd, 78 IDELR 1 (3d Cir. 2021) (unpublished). While a district must make FAPE available to a parentally placed private school student with autism upon parent request--even if the student has not enrolled in a district school--the parent's general inquiries about the types

of services the district has to offer did not qualify as a request for FAPE. To prove an IDEA violation, parents must prove that they specifically asked the district for an evaluation and development of an IEP and the district refused. Here, the student services coordinator at the high school testified that the parent called him and, in a very brief conversation, asked about special education services available in the district. The parent ended the call by thanking him for the information and the coordinator noted that the person on the phone did not ask about an evaluation for her child. In addition, the parent did not request an evaluation or an IEP in her prior emails to the district. Thus, the hearing officer's decision that the district had no obligation to reevaluate the student is upheld.

ELIGIBILITY/CLASSIFICATION

A. Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., 79 IDELR 98 (W.D.N.C. 2021). Where the parent has submitted eight referrals to the district requesting that her 12-year-old son be evaluated and found eligible for special education services, the district's IEP team met and decided to conduct an evaluation on four of these occasions. On all four occasions, the student was not found eligible for services. With respect to the last evaluation, the parent presented a new diagnosis of ASD with language and cognitive impairment and the team determined that a comprehensive evaluation was needed. Upon completion of the evaluation, the team reviewed all relevant information and found that the student did not meet three out of four requirements for having ASD and that there was no disability that adversely affects educational performance. Further, the evidence did not reflect a need for specially designed instruction. Thus, the administrative decision dismissing the parent's FAPE claims is upheld.

B. G.M. v. Martirano, 78 IDELR 68 (D. Md. 2021). School district correctly found that the student with ADHD and dyslexia is not eligible for services under IDEA. A student is only eligible for services if he has a disability and a need for special education services as a result. While the student has a diagnosis of dyslexia, he does not have an IDEA disability because the student is meeting grade-level standards and does not exhibit a discernible pattern of strengths and weaknesses. In addition, while the student's ADHD may qualify as an "other health impairment" based on its adverse effect on his educational performance, the student has no need for specially designed instruction. Students who are progressing appropriately in general education classrooms do not need special education. Here, witnesses agree that notwithstanding the student's behavior problems, he is making progress comparable to same age peers and meeting state-approved grade-level standards. Further, the district's expert witnesses testified that the interventions and accommodations made available to the student in the general education setting do not qualify as special education or specialized instruction. Therefore, since the student does not need special education services, he is not eligible for special education under IDEA, and the ALJ's denial of reimbursement for private school placement to the student's parents is affirmed.

C. Minnetonka Pub. Schs. v. M.L.K., 78 IDELR 94 (D. Minn. 2021). Where the misclassification of a student's disability only amounts to a denial of FAPE if it results in a failure to identify and address all of the student's special education needs, FAPE was denied in this case. Here, the district's April 2018 reevaluation did not identify the

student's most significant disabilities: dyslexia and ADHD. Though the district argued that it was aware of the student's reading, attentional and focusing difficulties, the student's IEPs for grades 2-4 did not appropriately address the student's needs in those areas. In addition, the IEP reading goals were substantially the same for three school years, indicating a lack of progress in reading. The district's failure to accurately identify the student's dyslexia and ADHD was not harmless. Rather, it hindered the proper design of an IEP that would have met the student's needs. Thus, the hearing officer's award of reimbursement to the parents for private reading services and the cost of an IEE is upheld.

D. Gwendolynne S. v. West Chester Area Sch. Dist., 78 IDELR 125 (E.D. Pa. 2021). Hearing officer's decision that the district correctly found that the fourth-grader is not eligible for special education services is upheld. While the district's school psychologist found strengths and weaknesses in the student's academic skill levels, she was performing overall at an average grade level standard for fourth grade. In conducting an evaluation, the district's psychologist reviewed QRI test results, the Teacher's College Reading and Writing Assessment and a variety of other results. She also administered a number of assessments, including the WISC-V, Kaufman Test of Educational Achievement, the W-J Test of Achievement and the Fifer Assessment of Reading. Based upon these assessments, the student's IQ was found to be in the average range and her achievement results reflected average performance in phonological processing. In addition to test results, progress monitoring data, as well as grades (A's and B's), information provided from teachers and other school records were considered. While the parents' retained expert—a developmental neuropsychologist licensed and certified as a school psychologist—conducted a number of similar tests, they focused on age-normed standards rather than grade-level normed standards. The private expert concluded that the student had SLD and generalized anxiety disorder and made a number of recommendations for special education services and accommodations. The hearing officer's legal conclusion giving more weight to the evaluation conducted by the district because of its educational focus—rather than its medical focus—is accepted. Clearly, an educational focus is more appropriate for purposes of determining eligibility for special education and should be given more weight, particularly where the parents' expert failed to consider the student's school performance, grades, and the results of progress monitoring in the general education intervention process. In fact, there was very little in the private evaluation report concerning the student's overall school performance.

E. J.D. v. East Side Union High Sch., 78 IDELR 35 (N.D. Cal. 2021). District did not err when finding the student no longer eligible for special education services as a student with SLI on reevaluation. Thus, the district properly dismissed the student from special education and the decision of the ALJ is affirmed. Here, all of the student's teachers testified that the student has no speech/language difficulties, and the ALJ found that throughout the due process proceedings, no professional testified that the student was eligible for special education under any disability category. The father's argument that the student succeeded in general education classes and sustained a high grade-point average only because he was receiving special education services is rejected. The eligibility team and the ALJ properly considered the student's accommodations when assessing his continued eligibility and finding that he no longer qualified for special education services.

In addition, the ALJ's finding that the district afforded the parent meaningful opportunity to participate in the eligibility decision is upheld, where the father admitted that he zealously advocated on his son's behalf and frequently communicated with the district regarding his needs. Indeed, the parent was heavily involved at IEP meetings and spoke "scores if not hundreds of times" at a meeting in December 2018. The father took full advantage of the opportunity to participate in the decision-making process.

F. J.R. v. Board of Educ. for the Iroquois Cent. Sch. Dist., 78 IDELR 280 (W.D.N.Y. 2021). The district's determination that the student with dyslexia no longer needs special education and that she should be transitioned to a 504 plan to help with reading fluency is upheld. Magistrate's recommendation to deny tuition reimbursement to the parents who placed the teen in a private college preparatory school for SLD students is therefore adopted. A student continues to be eligible for special education only as long as the student needs special education because of a disability. Here, although the district violated the IDEA procedurally by not reevaluating the student before dismissing her from special education services, the district had sufficient information to identify her needs and make its decision. The student was earning superior grades in general education classes without any modifications and did not request any reading support in class. The special education teacher testified that the student did not need any support and the student earned a final grade of 97 in her general education English class.

INDEPENDENT EDUCATIONAL EVALUATIONS

A. L.C. v. Alta Loma Sch. Dist., 78 IDELR 271 (9th Cir. 2021) (unpublished). District court erred when concluding that the school district unnecessarily delayed providing an IEE or filing a due process complaint. Unnecessary delay is a "fact-specific inquiry" which is to focus on the circumstances surrounding the delay. In this case, the district exchanged numerous emails and letters with the student's parents from August 10, 2017, until it filed for a due process hearing on December 5, 2017. These communications reflect the parties' attempts to reach agreement on the evaluator's IEE and other issues. Indeed, the parties reached agreement on a contested issue as late as December 1, 2017. Further, the longest delay in communications, November 17–30, was largely due to the district's Thanksgiving break. The parties reached final impasse on the IEE issue on Thursday, November 30, and the district filed for a due process hearing the following Tuesday, December 5th. Thus, the court concludes that there was no unnecessary delay and reverses the district court's decision on its merits and vacates the fee award to the parents.

B. D.D. v. Garvey Sch. Dist., 79 IDELR 15 (C.D. Cal. 2021). Where the school district failed to respond at all to the parent's request for IEEs, it cannot challenge the appropriateness of the requests as part of the parent's request for due process hearing challenging the evaluation of her son. Under IDEA, parents are entitled to a district-funded IEE where the parent disagrees with an evaluation conducted by the district, unless the district files for a due process hearing to show that its evaluation was appropriate. Here, when the parent disagreed with the district's speech-language, OT, AT and behavioral evaluations and requested IEEs, the district did not fund them, file for due process or otherwise respond to her requests at all. While the ALJ correctly determined that the district denied FAPE when

it failed to respond, the ALJ erred by only ordering the district to fund a speech-language IEE on the basis that the parent failed to show that the district's other assessments were not appropriate. The district's silence in responding to the parent's request stands alone to warrant all of the requested IEEs and its unexplained delay in failing to respond to the IEE requests waived any right to contest them. Thus, all of the requested IEEs must be funded by the district.

C. MP v. Parkland Sch. Dist., 79 IDELR 126 (E.D. Pa. 2021). Where the school district did not fund a requested IEE or challenge the IEE request by initiating a due process hearing to show its evaluations were appropriate, the district violated IDEA. Specifically, when counsel for the student submitted an IEE request on April 8, 2019, the district's response was a letter from its counsel that improperly suggested that the request be withdrawn since the student was not attending school. While the court agrees with the hearing officer's decision that an IDEA violation occurred, the hearing officer erred in finding that it was a harmless procedural violation and merely ordering staff to be trained regarding properly responding to IEE requests. Even though the district made FAPE available and its evaluations were appropriate and consistent with IDEA requirements, the appropriateness of those evaluations is not pertinent to the question of whether the district was required to respond to the grandmother's request by agreeing to fund the IEE or initiating a due process hearing. Because the district failed to do either, the grandmother is entitled to an IEE at public expense and reasonable attorneys' fees.

THE FAPE STANDARD

A. D.H. v. Fairfax Co. Sch. Bd., 78 IDELR 39 (E.D. Va. 2021). Hearing decision denying reimbursement for private placement of a student with OHI (based upon ADHD and anxiety) is upheld where the IEP provided by the district was reasonably calculated to enable the student to continue to make progress in light of his circumstances in the LRE. An IEP is not required to offer the best possible educational program to a student with a disability. The student's good grades reflect his average to above-average abilities and he was advancing from grade to grade, mastered the reading and writing goals in his 4th grade IEP, and was close to mastering his two behavioral goals before his parents placed him in a private school. While the student's inability to pass the statewide reading assessment was of concern, the IEP team discussed the student's ongoing difficulties and increased his special education services from 10 to 22.5 hours per week. Based upon the student's academic and behavioral progress combined with continued struggles, the August 2018 IEP offered for the 5th grade was appropriate.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. William S. Hart Sch. Dist. v. Antillon, 79 IDELR 73 (C.D. Cal. 2021). Parents are entitled to reimbursement for the cost of placing their intellectually disabled teenager in a private parochial school where the district failed to identify a specific school when it proposed an IEP offering a "nonpublic school placement." This offer was too vague to enable the parents to determine whether to accept or challenge the offered placement and whether it was appropriate. While the 9th Circuit has not ruled that notice of proposed placement must

identify a specific school placement as part of an offer of FAPE, the 4th Circuit has done so.

B. Day v. Cedar Rapids Comm. Sch. Dist., 121 LRP 31807 (N.D. Iowa 2021). While the 11-year-old's IEP made reference to the student's individual health plan setting out an emergency seizure protocol, the district was not required to convene an IEP team meeting to make changes to the IHP. The changes made to the IHP with which the parent objects providing that the student would go home after the administration of Diastat did not alter the related services of health services and nursing services set forth in the IEP. Thus, no procedural violation of IDEA occurred when the IHP was revised to include a new requirement that the student would be taken home after Diastat administration. It is also important to note that the school nurse, the district's health services facilitator, the school principal and the student's special education teacher met with the parent to discuss her objections to the new requirement in compliance with Iowa rules governing the revision of IHPs.

C. Davis v. Carranza, 78 IDELR 167 (S.D.N.Y. 2021). State review officer's decision that guardian of a 10-year-old multiply disabled student is not entitled to private school reimbursement is upheld. The district made sufficient efforts to include the guardian in the IEP decision-making process. Thus, any procedural violation resulting from the guardian's absence at the student's annual IEP review is harmless. Parents are entitled to relief under IDEA where a procedural violation results in a denial of FAPE for the student or impedes the parent's participation in the decision-making process. Here, the district's documentation reflects that it repeatedly rescheduled the annual review meeting to accommodate the guardian's schedule, but the guardian could not remember why she was unable to attend the meeting. In addition, there is no indication that the guardian would have participated in a reconvened IEP meeting after "frustrating the attempts to schedule the IEP Meeting for months." Further, there is no evidence that the district's failure to reconvene the IEP team resulted in a denial of FAPE to the student. Finally, the SRO was also correct in deciding that the district's failure to include the names of the student's physician and an additional parent member in the final IEP notice was harmless.

D. E.C. v. Fullerton Sch. Dist., 79 IDELR 17 (C.D. Cal. 2021). The ALJ's decision that the district denied FAPE based upon a procedural violation is affirmed. Here, the district violated IDEA and the California Code when it refused to allow the parents' independent neurologist/evaluator to observe their child in his current or proposed educational placement, particularly when it allows its own evaluators to conduct classroom observations of IDEA-eligible students. The district's refusal to allow the classroom observation impeded the parents' participation in the IEP process and, therefore, amounted to a denial of FAPE. However, the ALJ's order requiring the district to fund an observation by the parents' expert in the future did not remedy the harm done, and the district is ordered instead to reimburse the parents for the cost of their child's unilateral private school placement.

TRANSFER STUDENTS

A. Y.B. v. Howell Tshp. Bd. of Educ., 79 IDELR 31 (3d Cir. 2021). Receiving New Jersey school district did not violate IDEA when it refused to fund a private placement arranged by the student's former New Jersey district when the student enrolled in the middle of the school year. The new district made FAPE available when it offered a placement to the elementary school student with Down syndrome in a public school program that offered services "comparable" to those at the private school. The district court's ruling is affirmed, rejecting the parents' argument that IDEA's stay-put provision requires the new district to continue the publicly-funded private placement. The IDEA has adopted a specific requirement for transfer students, requiring a new district to provide services "comparable" to those in an intrastate transfer student's IEP until such time as the new district adopts the IEP or develops and implements a new one. To apply the stay-put rule would nullify the IDEA's provisions applicable to transfer students. Here, the new district reviewed the student's IEP and determined it could provide all of the required services in its own schools. Thus, the decision of the district court that the parents are not entitled to reimbursement for private school costs is affirmed.

LEAST RESTRICTIVE ENVIRONMENT

A. O.V. v. Durham Pub. Schs. Bd. of Educ., 121 LRP 13684 (M.D.N.C. 2021). District's proposed placement removing the elementary school student with Down syndrome and apraxia from the regular education setting is not the LRE. In the 4th Circuit, districts are not required to place a student in the regular setting if 1) the student will not receive an educational benefit; 2) the marginal benefits of mainstreaming will be significantly outweighed by the benefits of a more restrictive placement; and 3) the student will disrupt others in the general education setting. Here, the district's argument that the student's prior experience in the general education classroom was not successful is based upon teacher statements that the student needed too much prompting in the general education setting. The teachers who made these observations have had no training on how to work with students with disabilities. In addition, the objective data shows that the student made greater progress in the inclusive setting than when he spent the entire day in a special education classroom. Thus, among other things, the district is to reconvene an IEP meeting to develop an IEP that offers placement in the LRE and to contract with an Inclusion Specialist to assist in determining and providing an appropriate placement. The parents will also be reimbursed for all expenses, including cost related to the student's placement in a Montessori program.

B. Ogden v. Belton Sch. Dist. 124, 79 IDELR 92 (W.D. Mo. 2021). Administrative hearing decision is upheld in favor of the district's proposal that the student be placed in a more restrictive placement at the state school for students with profound disabilities instead of at his neighborhood elementary school. The parent's argument that the student's "significant progress" made on his six IEP goals showed that he could receive FAPE in a special education classroom at his home school is rejected where the student's progress reports indicated little to no change in functional and communication skills. Though the student did master two goals related to gross motor skills, that progress appeared to stem

from the student's physical development rather than any services provided by the district. In addition, the student had no meaningful interaction with the other children in his special education class, where he received intensive 1:1 instruction from a rotating team of teachers and therapists. Further and in response to the parent's argument that the student could make appropriate progress if the district provided additional services, there is no reason to think that "layering a new room or a new employee on top of the aides already provided" would change the student's progress.

C. Knox Co. v. M.Q., 78 IDELR 255 (E.D. Tenn. 2021). The hearing officer's decision that the district's proposed placement of a five-year-old student with autism in a special education setting for two-thirds of the school day is not the LRE is upheld. The Sixth Circuit has developed a three-part categorical test to determine whether placement outside of the general education setting qualifies as a student's LRE. "[A] school may separate a disabled student from the regular class...when: (1) the student would not benefit from regular education; (2) any regular-class benefits would be far outweighed by the benefits of special education; or (3) the student would be a disruptive force in the regular class." (citing Roncker, 700 F.2d at 1063). Here, the student does not fall within the first or third category, because the evidence is clear that the student did and would continue to benefit from regular education, particularly where he is delayed in three areas--communication, prevocational and social skills. Based on expert testimony, young children with autism need as much social exposure to non-disabled peers as possible to develop communication and socialization skills. In addition, this student benefits from a routine, as changes to routine cause him discomfort and overstimulate him. Remaining in the general ed. environment, rather than transitioning back and forth between the general education classroom and the proposed special education program, will allow him to follow a regular routine in addition to modeling non-disabled peers. As to the third category, witnesses who have interacted with the student testified that he would not be a disruptive force in the regular class, as he does not have any behavioral issues. Rather, he is compliant, cooperative and responds well to redirection. As to the second category, the court must identify the supposedly superior services provided by the proposed non-mainstream setting and then determine whether those services can be provided in a mainstream setting. If the benefits of the non-mainstream setting are not portable to the non-segregated setting, the court must then determine whether those non-portable benefits far outweigh the benefits of mainstreaming. If the parents prevail on either of these two steps, they have established that the child does not fall within Roncker's second category of students for whom mainstreaming is not appropriate. Where two school witnesses testified that the supports offered in the proposed blended classroom can be provided in the general education kindergarten classroom, and the district's autism support team is available to assist and train paraprofessionals or other support staff to provide the student with needed supports and services, the general education classroom is the student's LRE.

BEHAVIOR/FUNCTIONAL BEHAVIORAL ASSESSMENTS/BIPS

A. G.T. v. Board of Educ. of the County of Kanawha, 79 IDELR 130 (S.D. W.Va. 2021). Motion for class certification filed by two elementary school students with disabilities alleging that repeated disciplinary removals are due to the district's failure to provide

appropriate behavioral supports is granted. The students meet all four requirements for class certification: 1) numerosity; 2) common questions of law or fact; 3) claims are typical of those of the class; and 4) the named plaintiffs can adequately protect the interests of the class members. Here, the case involves at least 390 students with disabilities in need of behavioral supports but were subjected to at least one disciplinary removal. In addition, there is statistical evidence that students with disabilities were subjected to disciplinary removals far more often than their nondisabled peers, which the students attribute to the district's failure to appropriately conduct FBAs and develop appropriate BIPs. Further, both students allege that they have been removed for disability-related behaviors that the district has failed to address. Finally, the families here and their attorneys have demonstrated their commitment to the litigation and that they would protect the interests of the class.

B. Lauren and Eric B. v. Frisco Indep. Sch. Dist., 78 IDELR 137 (E.D. Tex. 2021). Magistrate Judge's Report and Recommendation is adopted that the impartial hearing officer was correct in finding that the district offered FAPE to a student with Asperger Syndrome. Where the parents' argument is that the district should have conducted an FBA earlier than it did in October 2018, there is no general requirement under IDEA to conduct an FBA or to do so within a certain time period. Here, the district conducted an FBA two months after the student began third grade, when the student's behavior became much more of a concern. In addition, the student's initial IEP contained behavioral supports and the district took "extensive action" to address the student's behavioral issues, including the collection of data and providing intervention, support, goals, strategies and frequent meetings with the parents and district staff. While there were behavioral incidents that occurred, the student often met behavioral expectations and demonstrated progress on his IEP goals.

DISCIPLINE

A. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 121 LRP 21955 (2021). Judgment of the Third Circuit in favor of a high school student who was suspended from the junior varsity cheerleading squad for a year based upon vulgar Snapchat posts made off campus is affirmed. When the teenager did not make the school's varsity cheerleading squad, she posted two images on Snapchat while visiting a local convenience store over the weekend expressing frustration with the school and its cheerleading squad. The posts, one of which contained vulgar language and gestures (some F-bombs and the finger), though admittedly "crude," are protected by the First Amendment regardless of the use of profanity. However, while schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," the Third Circuit's distinction between on-campus speech v. off-campus speech when defining the parameters of a school's interest in regulating speech is rejected because schools continue to have an interest in regulating student speech while off campus in circumstances that involve "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." Having said that and from a student's perspective, regulation of off-campus

speech, when coupled with regulation of on-campus speech, means that everything a student says during a full 24-hour day may be regulated by a school. "That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." Putting this student's vulgar language aside, the Snapchat posts were mere criticism of the cheerleading team, the coaches and the school, which would in other circumstances have amounted to protected speech on matters of public concern. These posts were not fighting words; nor did they incite violence. In response to the district's argument that it was entitled to suspend the student based on its "interest in teaching good manners" and punishing the use of vulgar language aimed at part of the school community, while that may have been enough to justify punishment for behavior on school campus, the fact that she was off campus and spoke outside the school on her own time negates that justification. Thus, the school's punishment of the student violated the First Amendment where the posts did not cause a substantial disruption to school.

B. J.N. v. Oregon Department of Educ., 78 IDELR 66 (D. Ore. 2021). Parents' motion for class certification in their action against the State ED and state school officials is granted. The parents of four unrelated students allege that there were "uniformly-applicable state practices" that place all students with disabilities at risk of receiving shortened school days. Thus, the parents may pursue their IDEA and 504/ADA claims. The parents have established required commonality where they have alleged that a lack of monitoring, enforcement, and assistance from the State ED has led to "a statewide pattern among school districts of misusing shortened school day schedules for students with disability-related behaviors. Specifically, the parents have shown that 4 separate districts in different parts of the state repeatedly imposed shortened school days on their children for extended periods of time. In addition, they showed that the U.S. DOE investigated to other districts for systemic use of shortened school days.

MANIFESTATION DETERMINATION

A. Gloria V. v. Wimberley Indep. Sch. Dist., 78 IDELR 96 (W.D. Tex. 2021). Court adopts Magistrate Judge's report and recommendation supporting district's decision to move the student from the High School to an alternative placement where the district believed that his continued presence at the High School would be disruptive. The Magistrate found that the district made an appropriate determination that the SLD/OHI 17-year-old's felony theft of an all-terrain vehicle (belonging to another student at the High School) off campus and during summer break was not a manifestation of his ADHD. Based upon all relevant information available to the team, the crux of the team's decision was that the student's stealing of the ATV would "at least require some sort of planning for execution." In addition, the team's determination that the theft was not caused by the student's disability was made after discussing, for well over two hours, the student's past behaviors and diagnoses, including his impulsivity attributed to ADHD. The Magistrate also noted that the team considered the type of item stolen as important and that the team's decision might have differed had the student stolen a cookie rather than an ATV. Judgment in favor of the district is granted.

B. N.F. v. Antioch Unif. Sch. Dist., 78 IDELR 257 (N.D. Cal. 2021). District complied with IDEA when it conducted an MDR, even though the student's parents did not attend the MDR meeting. Here, the parents argue that the district violated IDEA when it improperly excluded them from the MDR meeting by scheduling it on short notice. The district's argument that it was scheduled on short notice because IDEA requires the MDR to occur within 10 days of the student's removal from his educational placement is accepted. The student was suspended for 5 days following a behavioral incident that occurred right before a school holiday. Because of the holiday, the district was required to conduct the MDR on the day after he returned from the removal and it did so. In addition, the district reached out to both parents and attempted to ensure that they could participate, though neither could do so on short notice. Even if the district committed a procedural violation, any such violation would have been harmless, since the district's detailed records showed that the team concluded that the behavior was a manifestation of disability and immediately returned him to his regular placement. Finally, the district attempted to conduct an FBA and to modify the student's BIP, but the parent's refusal to consent and subsequent removal of the student from school interfered with the district's effort to do so.

METHODOLOGY

A. C.K. v. Board of Educ. of Sylvania City Sch. Dist., 78 IDELR 65 (N.D. Ohio 2021). The State Review Officer's decision in favor of reimbursing the parent for private Lindamood-Bell tutoring services for an elementary school student with autism and significant reading disabilities is reversed. The district provided the student FAPE and provided an IEP that would allow the student to make progress appropriate in light of the student's circumstances. The private Lindamood-Bell tutoring in reading unilaterally obtained by the parent required the student to miss several hours of school each day, thereby impeding his progress in areas other than reading. Indeed, the student's IEP goals in the areas of social communication and executive functioning, for example, "are not advanced and likely harmed" by taking him out of the classroom to receive the tutoring services. In addition, the parent had rejected the district's offer to include Lindamood-Bell instruction in the student's 4th grade IEP based upon her preference for private tutoring.

POST-SECONDARY TRANSITION SERVICES

A. Perkiomen Valley Sch. Dist. v. R.B., 78 IDELR 222 (E.D. Pa. 2021). Parents of adult student are entitled to reimbursement for unilateral placement in a New York residential transition program (the Vocational Independence Program) for students with intellectual disabilities where none of the district's proposed transition programs would have met the student's needs. The district's obligation to develop an IEP with challenging objectives applies to postsecondary transition goals and services. However, the IEPs proposed for 2015-16 and 2016-17 did not adequately address the student's postsecondary needs. For instance, the district's proposed early childhood education program did not offer any instruction in transportation or independent living skills. Other suggested programs focused on preparing students for college, which was not a path this student intended or offered the same classroom-based instruction in independent living skills that the student had already been provided. Further, the residential transition program addressed the

student's unique needs and interests, allowing her to meet the challenging objective of learning to live independently. Indeed, the student learned to rely on the program-based supports less and learned to handle situations on her own by integrating the program's teachings into her daily life. Thus, the private program is appropriate and the parents are entitled to recover the full cost of the student's placement for the two years, including the residential component and necessary transportation costs.

RESIDENTIAL PLACEMENT

A. J.B. v. Tuolumne Co. Superintendent of Schs., 78 IDELR 188 (E.D. Cal. 2021). The recommendations of the Magistrate are partially adopted that the responsible LEAs failed to place the student in a residential facility in a timely fashion by May 2018. Among other things, the LEAs are ordered to provide compensatory services, fund a residential placement through the end of the 2020-21 school year and to provide a one-to-one aide to the student. In determining whether a residential placement is the LRE for a student, a court or hearing officer must look at factors such as the educational and nonacademic benefits of a full-time regular education placement, the effect the presence of the student has on the teacher and children in the regular classroom, and the cost of placing the student in a full-time regular classroom. Here, neither the Magistrate nor the ALJ presiding over the due process hearing erred in determining that the LEAs should have known that a residential placement was appropriate for the student as of May 2018. While the student previously presented certain maladaptive behaviors, they were appropriately addressed in the less restrictive day program. It was not until October 2017 that the student's behaviors began to escalate and between October 2017 and January 2018, the student engaged in behavior such as striking a teacher with a fire extinguisher, assaulting staff and other children, and bringing a pocketknife to school. By May 2018, the student's behaviors deteriorated to such an extent that the IEP team imposed daily searches of his pockets and socks to ensure he did not bring dangerous items to school. At that point, the LEAs were on notice that a residential placement was necessary but waited until December 2018 to offer it.

B. A.H. v. Arlington Sch. Bd., 78 IDELR 224 (E.D. Va. 2021). School district is not required to fund the cost of an emotionally disturbed student's unilateral placement in a residential facility in Utah. Here, a teenager diagnosed with Major Depressive Disorder, Social Anxiety Disorder, Autism, Parent-Child Relational Problem, Social Exclusion and PTSD with a history of mental health hospitalizations made academic, social, and emotional progress while attending the district's therapeutic day school. Thus, he does not need residential placement to receive FAPE, and the hearing officer's decision that the district's proposal to continue the student's therapeutic day program is affirmed. While the student's mental health began to deteriorate after he transitioned back to a public school program in the Spring of 2019 after being hospitalized for mental health reasons, the district has no obligation to fund future residential programming that is primarily geared toward addressing the student's mental health needs. The parents' argument that the student's social and emotional needs are intertwined with his educational needs is rejected where the student performed well academically during his time at the therapeutic day school despite dealing with the same mental health issues for which he was hospitalized. Not only did the

student earn grades in the mid to high 90s, but he also passed statewide assessments and took advantage of counseling and other therapeutic supports offered by the district. In addition, the hearing officer observed that during the student's nine months attending the district's therapeutic school, he experienced no suicidal episodes, no hospitalizations and no emotional breakdowns. Importantly, the parents' medical insurance paid a significant portion of the residential program's cost based upon the parents' argument that the mental health services were medically necessary. Because the residential placement was not based on educational need, the district is not required to fund it.

OBLIGATIONS TO STUDENTS IN CORRECTIONAL/JUVENILE FACILITIES

A. T.H. v. DeKalb Co. Sch. Dist., 121 LRP 31911 (N.D. Ga. 2021). In this class action lawsuit brought against the school district, state DOE and the county sheriff on behalf of two county jail detainees and those who are similarly situated, the sheriff's motion for summary judgment is denied in part where the sheriff clearly has a legal obligation to assist the school district with fulfilling its IDEA child find and FAPE obligations to the detainees. "[B]ecause of the unequivocal inclusion of correctional facilities in the IDEA's implementing regulations and the unique position the Sheriff holds with regards to the Plaintiffs' education, the Sheriff can be held liable for IDEA violations experienced by the Plaintiffs while detained at the Jail." While the court acknowledges the difficulty in managing a large pretrial detention facility, particularly in the middle of a global pandemic...these challenges do not alleviate the State's requirements to identify eligible students and provide FAPE in accordance with a student's IEP. While her precise role in the State's IDEA compliance must be determined by the State, her role is indisputably necessary as to eligible detainees at the Jail." Here, the jail does not have a formal intake process to assist with identification and evaluation of IDEA-eligible detainees, resulting in child-find delays for at least two incarcerated students with disabilities. In addition, the district was not able to provide the full amount of services required by the student's IEPs because the district was not allowed access to the students by the jail. Because the sheriff is responsible for facilitating access, she shares responsibility for the failure of the students to make appropriate progress.

COMPENSATORY EDUCATION

A. J.N. v. Jefferson Co. Bd. of Educ., 79 IDELR 151 (11th Cir. 2021). Compensatory education is not an automatic remedy for a child-find violation under IDEA. Rather, compensatory education is designed to counteract whatever educational setbacks a child encounters because of IDEA violations—"to bring her back where she would have been but for those violations." Here, the parent did not offer evidence that the procedural violation of failing to earlier evaluate the student caused a substantive educational harm to the student and what compensatory education services could remedy that past harm. Because the parent did not provide such evidence and took the position that the procedural violation assumes that compensatory relief will be provided, the district court was correct in denying compensatory education services. In addition, the parent is not a prevailing party for purposes of recovering attorney's fees because the district had already referred the student

for an evaluation when the parent initiated a due process hearing. Therefore, the eventual IEP was not the result of litigation.

B. McLaughlan v. Torrance Unif. Sch. Dist., 79 IDELR 75 (C.D. Cal. 2021). Even where the court has found a material IEP implementation failure, the parent has not shown that the adult student with Angelman syndrome suffered educational harm as a result of it that would support a compensatory education services award. Though the student's IEP did require that the district provide 314 minutes per day of group instruction to the student, but the student was actually placed in a 1:1 setting with a behavioral aide for the majority of the school day, the evidence shows that the student could not tolerate the group setting outlined in the IEP because he would become overstimulated and engage in behavioral outbursts within a short period of time. In addition, the district did continue to provide some small-group instruction as much as possible, including participation in a music class with peers at least once per week. Further, the special education teacher provided the student modified classwork and services in the separate classroom to the extent that he could tolerate her presence there and the activity. Since the evidence indicates that the student remained engaged throughout the day, even though his IEP was not implemented, the parent's request for compensatory services in the form of funding for 1,530 hours of specialized instruction to be placed in a trust account by the district is denied.

C. Spring Branch Indep. Sch. Dist. v. O.W., 79 IDELR 101 (S.D. Tex. 2021). On remand from the 5th Circuit Court of Appeals, this case involving a district's 99-day delay in referring a gifted student for an evaluation is remanded to the hearing officer to determine what compensatory services are needed to remedy the child find violation. Here, the court finds that the delay in evaluation denied FAPE and that the student is entitled to compensatory education. However, the administrative record from the due process hearing does not contain sufficient information for the court to calculate an appropriate award. In addition, the hearing officer's decision did not identify the specific educational harm to the student resulting from the denial of FAPE and the IHO's use of a cookie-cutter formula to award one year of compensatory education for one year of a FAPE denial without any other considerations is not consistent with IDEA's purpose that guarantees students with disabilities special education and related services designed to meet their needs.

D. K.N. v. Gloucester City Bd. of Educ., 78 IDELR 157 (D.N.J. 2021). District is ordered to place $26,017 in a trust fund for the benefit of an elementary school student with autism. This is an appropriate compensatory remedy where the district violated Section 504 by failing to provide a one-to-one aide supervised by a special education teacher to assist the child in an afterschool program. The district's argument that it should provide the services directly is rejected, as the trust fund is more appropriate than having the very entity that committed the discrimination in the first place create the remedy for the student. However, the parent's request for $97,200—an amount needed to hire two one-to-one ABA therapists for 810 hours—is rejected, since the court has ruled previously that the student needs a one-to-one aide supervised by a special education teacher, and the appropriate hourly rate is $16, rather than the $60 rate the parent seeks. In addition, the parent is entitled to attorneys' fees as the prevailing party in this proceeding and in the due process proceeding below.

ATTORNEY CONDUCT AND ATTORNEYS' FEES

A. Oskowis v. Sedona Oak-Creek Unif. Sch. Dist., 79 IDELR 91 (9th Cir. 2021) (unpublished). The district court did not abuse its discretion when ordering $41,244 in attorney's fees to the school district under IDEA's provision that permits a court to award reasonable attorney's fees to a prevailing educational agency against a parent whose complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. The findings of the district court that the district was the prevailing party at three due process proceedings and that the parent's action were frivolous and brought for the improper purpose of harassing the district and driving up litigation costs were "amply" supported by the record. (Note: The parent brought 43 legal actions against the district over a 9-year period).

B. J.S. v. New York State Dept. of Corrections and Comm'y Supervision, 79 IDELR 165 (W.D.N.Y. 2021). The recommendation of the Magistrate that the 20-year-old adult student is not entitled to attorneys' fees—even though he prevailed in a due process proceeding and received compensatory education—is adopted. The language of IDEA is clear that only a "prevailing party who is the parent of a child with a disability" can recover attorney's fees, not a student. Thus, the student's request for $71,542 in attorney's fees is denied. (Note: The Magistrate in making its recommended order said, "Congress may one day expand the scope of individuals entitled to recover attorneys' fees and costs under the IDEA. However, unless and until it does, this court's hands are tied." It is also important to note that in New York, IDEA parent rights do not transfer to adult students).

C. C.T. v. Elmore Co. Sch. Dist., 79 IDELR 123 (M.D. Ala. 2021). While the hearing officer did not order the district to find the student eligible for special education services, the hearing officer did order the eligibility team to reconvene and discuss the student's reevaluation results and to review information that the district's evaluator had refused to consider. The district understates the importance of that ruling and because the hearing officer's decision constituted a change in the legal relationship of the parties, the parents are prevailing parties and are entitled to attorney's fees. The fact that the district changed its mind on eligibility when it reconvened makes the hearing officer's ruling a victory for the parents.