THE YEAR IN REVIEW:
WHAT'S BEEN GOING ON IN SPECIAL EDUCATION LAW?

NC CASE 2023 Conference

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There has been a lot going on in special education law since last year's Conference, including a special education decision by the U.S. Supreme Court. In this session, I will provide an update on significant special education "legal happenings," including an overview of relevant court decisions and agency interpretations—a few that are COVID-related and most that are not.

DECISIONS AND GUIDANCE RELATED TO COVID-19 CHALLENGES AND ISSUES

U.S. DOE Action/Guidance

A. Fairfax Co. (VA) Pub. Schs (OCR 2022). On November 30, 2022 and after having completed a "directed investigation" initiated by OCR on January 12, 2021, OCR announced that it reached a resolution agreement with Fairfax County Public Schools requiring the Division to take steps necessary to ensure that students with disabilities receive educational services, including compensatory services, resulting from COVID-19. It is highly suggested that school districts familiarize themselves with relevant documents related to this investigation and its outcomes for the largest school district in Virginia and one of the largest in the country, serving over 25,000 students with disabilities.

The 23-page letter from OCR notifying Fairfax County Public Schools' Superintendent of the disposition of this investigation and OCR's analysis of the evidence and conclusions reached can be found online at the following link: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11215901-a.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= The 10-page resolution agreement signed by and attached to the letter to the Superintendent can be found online at the following link: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11215901-b.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

OCR's General Findings

In summary, OCR found that the School Division failed to provide thousands of students with services identified in their IEPs and 504 Plans during remote learning beginning in the Spring of 2020 through March 2021. More specifically, OCR found that the Division:

- Reduced and placed limits on services and special education instruction provided to students with disabilities based on considerations other than the students' individual educational needs
- Inaccurately informed staff that the Division was not required to provide compensatory education to students with disabilities who did not receive FAPE during the COVID-19 pandemic because the Division was not at fault
- Failed to develop and implement a Compensatory Services Plan adequate to remedy the instances in which students with disabilities were not provided FAPE during remote learning
- Failed to provide FAPE due to staffing shortages and other administrative obstacles
- Failed to accurately track services provided to students with disabilities

What the Division Agreed to Do Pursuant to the Resolution Agreement

- Develop and implement a Plan for Compensatory Education to appropriately assess and provide compensatory education to students with disabilities who did not receive a FAPE during the COVID-19 "pandemic period" (April 14, 2020 through June 10, 2022)
- Designate a Plan Administrator who will oversee the creation and implementation of the Plan
- Convene IEP and Section 504 teams to determine whether students were not provided the regular or special education and related aids and services designed to meet their individual needs during remote learning and determine compensatory education
- Track and report to OCR the implementation of the Plan
- Provide written guidance and/or training about the Plan to all Division staff with responsibilities under Section 504 and ADA
- Conduct outreach to parents, guardians, students, and other stakeholders to publicize the Plan

COVID-Related Court Decisions

- **Status of Class Action Lawsuits Challenging 2020 School Closures**

A. K.M. v. Adams, 81 IDELR 214 (2d Cir. 2022) (unpublished) (formerly known as and titled J.T. v. de Blasio) and cert. denied, 123 LRP 18971 (June 26, 2023). The district court's denial of judgment under IDEA for a preliminary judgment to a class of school-aged children and their parents is affirmed. This case involves 104 parents of students with disabilities enrolled in public school between March and July of 2020 in New York and fourteen other states left in the suit. The original suit was brought against all 13,821 school districts in the United States, as well as the State DOEs of all 50 states, the District of

Columbia and Puerto Rico. The principal allegation is that the shift from in-person to remote instruction constituted a per se deprivation of FAPE under IDEA. Where the parents argue that it would have been futile for them to exhaust administrative remedies because of the delay caused by COVID closures, compounded by the delays caused generally by New York City and the administrative processes, these arguments are rejected. The parents have failed to show that any such delays actually existed...much less that they were persistent. The second argument—that the hearing officers do not have authority to order public schools to reopen—was not made to the district court and, therefore, is waived.

B. Martinez v. Newsom, 81 IDELR 181 (9th Cir. 2022), cert. denied, 123 LRP 13525 (April 23, 2023). The district court's dismissal of the federal court action alleging that two school districts denied FAPE to students with IEPs when they transitioned to distance learning without assessing each student's individual needs is affirmed. Here, the parents failed to plead an exception to IDEA's requirement that parents first exhaust administrative remedies before pursuing FAPE claims in court. While an exception to the exhaustion requirement exists when parents seek systemic or structural relief, widespread issues alone do not trigger the "systemic" exception. To bypass the exhaustion requirement, parents must identify an agency decision, regulation, or other binding policy that caused an alleged injury. The parents here have not identified any such practice or policy on the part of the school districts. Essentially, the parents are asserting a negligence claim alleging that the districts failed to adequately accommodate their children after the transition to remote instruction. As such, the "systemic" exception does not apply. In addition, the parents' argument that IDEA's exhaustion requirement does not apply to their 14th Amendment claims is rejected. Because the parents are clearly seeking relief for a denial of FAPE, they must exhaust their administrative remedies regardless of how they framed their claims. The district court's ruling addressing claims against the state ED and claims that have been rendered moot by the return to in-person learning are vacated.

C. Brach v. Newsom, 81 IDELR 62 (9th Cir. 2022), cert. denied, 123 LRP 5727 (February 21, 2023). The opening section of this opinion says it all:

> Much has changed since the COVID-19 pandemic began. One thing that has stayed the same is that federal courts may not rule on moot or hypothetical questions. Here, a group of parents and one student ask us to pass judgment on whether California state officials violated federal law when they ordered schools to suspend in-person instruction in 2020 and early 2021, at a time when California was taking its first steps navigating the largest public health crisis since the Great Influenza Epidemic of 1918.
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> Fortunately, the situation in California has changed dramatically with the introduction of vaccines and other measures. The State of California has rescinded its orders, students have been back in the classroom for a year, and the parties agree there is "currently no longer any state-imposed barrier to reopening for in-person instruction." The parents urge us to decide this case anyway, suggesting that California might, maybe one day, close its schools again. In effect, the parents seek an insurance policy that the schools

> will never ever close, even in the face of yet another unexpected emergency or contingency. The law does not require California to meet that virtually unattainable goal; our jurisdiction is limited to live controversies and not speculative contingencies. Joining the reasoning of the many other circuits that have recently considered challenges to early COVID-19 related restrictions, we conclude that the mere possibility that California might again suspend in-person instruction is too remote to save this case. We dismiss the appeal as moot.

D. Carmona v. New Jersey Dept. of Educ., 2023 WL 5814677 (3d Cir. 2023) (unpublished). Where the parents allege that they have exhausted their administrative remedies because they are "in the process of exhausting their administrative remedies" by initiating due process proceedings is rejected. To satisfy exhaustion, parents must have the "findings and decision" from a due process hearing in hand before filing their lawsuit in court. Merely beginning the process is not enough. Further, the systemic exception to exhaustion does not apply here, and IDEA's "stay put" provision does not apply to a system-wide administrative decision, such as an order shutting schools to all students during an unprecedented and life-threatening health crisis (citing J.T. v. de Blasio). Here, the transition to distance learning applied to all students regardless of disability.

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

A. In re: Special Education Complaint 22-027C on behalf of V.S., L.S., and G.S., 82 IDELR 11 (Minn. Ct. App. 2022). State complaint decision ordering the district to provide compensatory education services to three siblings is reversed on October 10, 2022. Here, the district proposed various service delivery models to the students during the 2021-22 school year to address their parent's concerns related to COVID-19 and returning them to in-person services without mandatory masking. Minnesota's special education code and the corresponding IDEA regulation that require districts to ensure that all students with disabilities "are provided" FAPE does not require that students actually "receive" special education services. The term "provide" ordinarily means to offer or to make available. Here, the State DOE not only disregarded the parent's "reciprocal obligation" to cooperate with the IEP process, but the SEA's position would also make districts responsible for denials of FAPE based on circumstances beyond their control. The plain language of the law requires that districts make FAPE available to a student with a disability, and the district did so here. For example, the district met with the parent to discuss her concerns about the district's optional masking and contact-tracing policies and attempted to address those concerns by offering homebound services, distance learning, and site-based instruction in a protected environment, all of which the parent rejected when insisting on virtual instruction without any direct contact with district personnel. The district's offers fulfilled its duty to make FAPE available. The parent's decision to deny the students services is not evidence that the district did not provide them. The SEA's position that the district's good faith and parent's lack of cooperation did not change the fact that the students did not receive the instruction and services they needed is rejected.

B. Skaro v. Waconia Pub. Schs., 82 IDELR 66 (D. Minn. 2022). In this *pro se* case filed by the parents of the same students in the case above, the court ruled on November 7, 2022 that it did not have jurisdiction over their claims seeking $20,360,000.00 in money damages for the district's failure to provide FAPE to their children. Where the parents unsuccessfully filed a charge of discrimination with the Minnesota Department of Human Rights, have unsuccessfully brought their claims in a due process hearing where the ALJ determined the district's controlled classroom was the LRE, and where the state court of appeals reversed the decision of the SEA on the State Complaint (above), the parents' claims cannot be relitigated in this court. The claims here involve the same facts and parties as the other proceedings and the parents have had a full and fair opportunity to litigate the matter in those forums. Where they have failed to demonstrate entitlement for any remedy before this court, the district's motion to dismiss is granted. NOTE: On November 15, 2022, the parents filed their Notice of Appeal with the Eighth Circuit Court of Appeals.

C. Abigail P. v. Old Forge Sch. Dist., 82 IDELR 227 (M.D. Pa. 2023). Hearing officer's decision that 12 year-old student with autism was provided FAPE during the 2020-21 school year is upheld. The IEP was reasonably calculated to enable the student to make progress in light of her circumstances when it was modified to reflect that she would receive virtual instruction. All of the other aspects of the IEP were the same as the pre-pandemic IEP, including the annual goals and related services. In addition, during virtual instruction, the student received 5 sessions per week of specialized instruction, along with optional Google classroom assignments 4 days per week for enrichment and extra practice. In addition, the district funded at-home nursing services, three 30-minute speech sessions per week, three 30-minute OT sessions per week, and one 30-minute PT session per week, along with services of a BCBA. In addition, an evaluation submitted by the parent reflected that the student does well and had a preference for learning on devices/tablets. Where the district was able to implement the student's IEP services in the virtual setting and the student made progress during school closures, she was provided FAPE.

D. M.B. v. Fairfax Co. Sch. Bd., 123 LRP 25649 (E.D. Va. 2023). Among other things, the parents challenge the services provided during school closures to the student with ADHD, dyslexia, and behavior problems. The hearing officer's decision in favor of the district is affirmed in its entirety and private school reimbursement is denied because the district offered FAPE in the LRE. Notably, the parents' assertion that the hearing officer erred in finding that the district did not violate IDEA during the COVID-19 pandemic is rejected. During the pandemic, the district implemented reasonable measures to ensure that the student continued to make progress under the circumstances presented. For example, the district developed Temporary Learning Plans for students, including this student, to promote voluntary participation in virtual learning activities while schools were closed. In addition, after the initial school closures during the first months of the pandemic, the district offered recovery services to the student to address learning loss from the pandemic, including 21 weeks of recovery services to support math goals. Thus, the record reflects that the district "devised and implemented measures during the COVID-19 pandemic designed to ensure that M.B. made reasonable progress given the difficult circumstances. Of course, it is impossible to overstate the impact of the pandemic and the hardships imposed on parents, students, teachers, and administrators alike by virtual learning. In this

respect, the Fourth Circuit has explained that the IDEA is a 'flexible' and 'practical' standard which 'must be applied in the day-to-day vortex of an up-and-down school year.'" (citing *Bouabid*, 62 F.4th at 860). Thus, the record supports that the hearing officer properly concluded that the district acted reasonably during the pandemic and the parents' argument that the hearing officer improperly excused the district's failures during the pandemic must be rejected.

- **Challenges Regarding Masking Mandates**

A. G.S. v. Lee, 123 LRP 24593 (6th Cir. 2023). District court's determination that the parents are prevailing parties under Section 504/ADA in their litigation where the district court enjoined Tennessee's governor from allowing students to opt out of mask mandates is affirmed. Thus, they may seek to recover attorney's fees for that litigation. While preliminary injunctions generally do not confer prevailing party status, an exception exists when the injunction results in a material, enduring, and court-ordered change in the parties' legal relationship. Here, the injunction met that standard when the district court prohibited the governor from enforcing his August 2021 executive order that allowed K-12 students to opt out of mask mandates on school grounds. The county government's ability to enforce its mask mandate allowed medically vulnerable students to attend in-person classes for as long as the injunction was in place, which was for two months here. While the governor argues that two months was not "enduring," he has not cited any case law requiring a mathematical approach to determining that.

DECISIONS AND OTHER GUIDANCE RELATED TO NON-COVID-19 CHALLENGES AND ISSUES

BEING POLITICALLY CORRECT

A. On April 28, 2023, the House reintroduced the "Words Matter Act of 2022" seeking to replace outdated language, such as "mentally retarded" and "mental retardation" and replacing it with "individual with an intellectual disability" and "intellectual disability" in nine federal statutes, including the Rehabilitation Act of 1973. The language changes would not affect coverage, eligibility, or rights set forth in the laws themselves. H.R. 8863 can be found at: https://www.congress.gov/117/bills/hr8863/BILLS-117hr8863ih.pdf.

TRANSGENDER STUDENTS

- **Title IX Discrimination**

A. Adams v. School Bd. of St. Johns Co., Case No. 18-13592 (11th Cir. 2022). On December 30, 2022, the Eleventh Circuit Court of Appeals held that the student's Equal Protection Clause claim must fail because, as to the sex discrimination claim, the district's bathroom policy clears the hurdle of intermediate scrutiny and because the bathroom policy does not discriminate against transgender students. The Title IX claim must fail because Title IX allows schools to separate bathrooms by biological sex. In summary, the court held that—

commensurate with the plain and ordinary meaning of "sex" in 1972, Title IX allows schools to provide separate bathrooms on the basis of biological sex. That is exactly what the School Board has done in this case; it has provided separate bathrooms for each of the biological sexes. And to accommodate transgender students, the School Board has provided single-stall, sex-neutral bathrooms, which Title IX neither requires nor prohibits. Nothing about this bathroom policy violates Title IX. Moreover, under the Spending Clause's clear-statement rule, the term "sex," as used within Title IX, must unambiguously mean something other than biological sex—which it does not—in order to conclude that the School Board violated Title IX. The district court's contrary conclusion is not supported by the plain and ordinary meaning of the word "sex" and provides ample support for subsequent litigants to transform schools' living facilities, locker rooms, showers, and sports teams into sex-neutral areas and activities. Whether Title IX should be amended to equate "gender identity" and "transgender status" with "sex" should be left to Congress—not the courts.

- **Disability Discrimination**

A. Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022). District court's dismissal of a former inmate's claims of mistreatment and disability discrimination against a county sheriff under ADA/504 is reversed and remanded for further proceedings. Plaintiff, a transgender woman diagnosed with gender dysphoria, is an individual with a disability under the provisions of ADA and Section 504, as the definition of disability is to be construed in favor of broad coverage. The definition of "gender dysphoria" differs dramatically from that of the now non-existent diagnosis of "gender identity disorder" used by the ADA as an exception to its protections that was removed from the DSM-5. Gender dysphoria is defined by DSM-5 as the clinically significant distress felt by some of those who are transgender who experience an incongruence between their gender identity and their assigned sex. Further, DMS-5 explains that the discomfort or distress caused by gender dysphoria may result in intense anxiety, depression, suicidal ideation, and even suicide. In short, being trans alone cannot sustain a diagnosis of gender dysphoria as it could for a diagnosis of gender identity disorder under earlier versions of DSM. Reflecting this shift in medical understanding, we and other courts have thus explained that a diagnosis of gender dysphoria, unlike that of gender identity disorder, concerns itself primarily with distinct and other disabling symptoms, rather than simply being transgender. Nothing in ADA compels the conclusion that gender dysphoria constitutes a gender identity disorder excluded from ADA protection. Thus, ADA does not foreclose the plaintiff's ADA claim. Update: On June 30, 2023, the Supreme Court denied review of the opinion by the Fourth Circuit and Justices Thomas joined Justice Alito's dissent from the denial of certiorari. In the dissent, it is noted that, among other things:

> This case presents a question of great national importance that calls out for prompt review. The Fourth Circuit has effectively invalidated a major provision of the Americans with Disabilities Act (ADA), and that decision is certain to have far-reaching and highly controversial effects.

The dissent can be found at https://www.supremecourt.gov/opinions/22pdf/22-633_1cok.pdf

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Perez v. Sturgis Pub. Schs., 143 S. Ct. 859, 82 IDELR 213 (2023). The Sixth Circuit's decision affirming the district court's dismissal of the student's ADA claims for failure to first exhaust IDEA's administrative remedies is reversed and remanded for further proceedings. IDEA's requirement that students must exhaust the statute's administrative (due process) remedies before filing claims in court does not preclude this ADA lawsuit. This is so because the relief Perez seeks in the lawsuit (i.e., compensatory damages for emotional distress) is not something IDEA can provide. While IDEA sets forth the general rule that "[n]othing [in IDEA] shall be construed to restrict" the ability of litigants to seek "remedies" under "other federal laws protecting the rights of children with disabilities," there is an exception to that. IDEA expressly states that before filing a civil action under other federal laws for relief "that is also available" under IDEA, IDEA's procedures shall be exhausted. In Perez' case, the 23 year-old deaf student seeks money damages under the ADA for the district's alleged failure to provide qualified sign language interpreters or accurate reports of his educational progress and his movement toward graduation. The district argues that the case should be dismissed for failure to first exhaust IDEA's administrative remedies because the student's complaint involves a denial of FAPE. The district's position unanimously is rejected because the remedies or relief sought by Perez is compensatory damages—"a form of relief everyone agrees IDEA does not provide." The Court also rejects the notion that its prior ruling in Fry v. Napoleon Community Schools prevents it from interpreting IDEA's exhaustion requirement in this way, noting that the Fry Court expressly declined to decide whether a request for money damages brings a Section 504 claim outside the scope of the IDEA's exhaustion requirement. "In both cases, the question is whether a [student] must exhaust administrative processes under IDEA that cannot supply what he seeks" and "we answer in the negative."

B. Doe v. Knox Co. Bd. of Educ., 82 IDELR 103 (6th Cir. 2023). District court's dismissal of student's 504/ADA claims is reversed and remanded for further proceedings before the district court. Here, the 504-only 9th-grade gifted student alleges that the district has failed to accommodate her misophonia (a disorder of decreased tolerance to specific sounds or their associated stimuli which causes an extreme reaction to hearing normal sounds of chewing gum or eating food). The student is requesting that the district institute a ban on eating and chewing in all of her academic classes and is seeking accommodations that will allow her to attend an elective called "Genius Hour" which overlaps with lunchtime. In this situation, the parents are not seeking relief for a denial of "FAPE" under the IDEA and, therefore, are not required to exhaust IDEA's administrative remedies prior to bringing their 504/ADA claims to court. The text of the IDEA defines FAPE to mean the provision of special education and related services to a child with a disability. Thus, a request for FAPE under IDEA must involve a request for specialized instruction—a change to the content, methodology, or delivery of instruction. The accommodation requested here does not meet that standard and "[n]o ordinary speaker would describe this ban as 'specially designed instruction'...because there is nothing innately instructional about the ban." Because the student has requested an accommodation to access her general education

classes, she is not seeking relief for a denial of FAPE under the IDEA and the district court must consider the parents' request for a preliminary injunction on remand.

C. Z.W. v. Horry Co. Sch. Dist., 68 F.4th 915, 83 IDELR 75 (4th Cir. 2023). District court's dismissal of student's complaint for failure to exhaust administrative remedies is reversed and remanded. Here, the parent of a student with autism has filed a complaint alleging violations of the ADA and Section 504 for refusing to allow the student to have his private ABA therapist accompany him at school. While the district argues that the claim should be dismissed because ABA services can be available under IDEA, this does not render the claims here FAPE claims that must be exhausted under IDEA. The gravamen of the complaint is not FAPE because the "essence" of the student's "beef" with the school district is its refusal to permit him to bring his privately supplied and funded ABA therapist to school with him. In addition, when a plaintiff sues under ADA and 504, exhaustion is required only if the plaintiff is "seeking relief that is also available under IDEA." Because the parent here requests nothing that would be provided at public expense, this case does not concern a denial of FAPE. "We offer no opinion about whether Z.W. has valid claims under the ADA or the Rehabilitation Act or what defenses the school district may have to them. We hold only that the district court erred in dismissing the complaint because Z.W. failed to exhaust administrative remedies under the IDEA."

D. Heston v. Austin Indep. Sch. Dist., 71 F.4th 355, 123 LRP 18885 (5th Cir. 2023). Previous decision is vacated and remanded to the district court for further consideration in light of the Supreme Court's decision in Perez. Where the parent is seeking compensatory damages that the IDEA does not provide as a remedy, the parent is not required to first exhaust administrative remedies prior to bringing her 504/ADA claims related to the district's assignment of an aide that allegedly harassed and injured the student with autism, ADHD, and bipolar disorder.

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Baker v. Bentonville Sch. Dist., 75 F.4th 810, 123 LRP 22497 (8th Cir. 2023). District court's dismissal of disability discrimination claims under Section 504/ADA is affirmed. Where the parents are seeking money damages as a remedy for disability discrimination, they must show that the district's alleged failure to accommodate their child's disability amounted to bad faith or gross misjudgment. Here, the child's visual impairment was mild enough to place her in the normal range of visual acuity, but the district developed a 504 Plan to ensure the student's safety. The Plan included supervision during classroom transitions, a "buddy" assigned for errands and bathroom breaks, and specialized transportation. After some accidents on the playground where she collided with another student on a slide, got a splinter, was kicked in the face by a student crossing the monkey bars, and tripped on a concrete slab, the district amended her 504 Plan three times to include additional safety-related accommodations. The parent agreed to the revisions and the child did not experience any injuries after the third Plan was implemented. While the district refused to provide a 1:1 aide requested by the parent, given that the district took steps to ensure the child's safety, there was no evidence of bad faith or gross misjudgment as required to sustain a cause of action.

B. Wagnon v. Rocklin Unif. Sch. Dist., 123 LRP 20669 (E.D. Cal. 2023). Bus driver's motion for summary judgment is denied where evidence reflects that driver pushed a nonverbal high schooler with CP forcefully enough to cause bruising, calling into question whether the driver violated the student's constitutional rights under the Fourth Amendment. District personnel may use only an amount of force that is objectively reasonable in a given situation based upon the totality of the circumstances. Here, the student wore a harness to prevent falling from or leaving his seat during a 1-hour bus ride. While the driver maintains that he pushed the student back into his seat for safety reasons, the circumstances are not clear cut. This is so where a large bruise appeared on the student's upper thigh shortly after the driver stopped the bus and pushed the student back into his seat. In addition, a BCBA who viewed bus surveillance camera footage testified that she could not identify any safety-related reason for the driver's actions. Further, the driver stated that he could not recall receiving any training on how to manage disability-related behaviors. Clearly, certain portions of the record reveal that there are facts that are genuinely in dispute and a jury will need to decide whether the driver's actions violated the student's 4th Amendment rights.

C. Barnett v. Clark Co. Sch. Dist., 123 LRP 29769 (D. Nev. 2023). District's motion for summary judgment on the parent's Fourth Amendment claim against the district is granted. The special education teacher's alleged use of excessive force does not automatically make the district liable for any injury to a student. Rather, parents must show that alleged abuse stemmed from a district practice or policy of ignoring such abuse. The fact that the teacher had known difficulties with creating lesson plans and completing service schedules did not put the district on notice of potential abuse or other misconduct toward students. Importantly, the district took action as soon as it became aware that the teacher may be mistreating students in his classroom when a classroom observer reported that the students called the teacher's ruler a "palo palo," which is Tagalog-language for a striking stick. After interviewing students and learning that the teacher used the ruler to hit them, school administrators suspended the teacher and contacted police and child welfare authorities. The administrators then contacted the students' parents and told them that the teacher had been removed from the classroom pending investigation. Thus, the parents cannot show that the district was deliberately indifferent to the alleged abuse.

D. M.P. v. Jones, 123 LRP 29711 (D. Colo. 2023). Motion to dismiss Fourth Amendment claims brought against two School Resource Officers is denied and they are not entitled to a qualified immunity defense. While law enforcement officers have some protection from lawsuits, the doctrine of "qualified immunity" applies when they perform their duties reasonably. Here, the parents were able to show that the SROs violated constitutional rights that were clearly established when they arrested the 11 year-old ED student for "interfering with educational activities" under Colorado law. The student's alleged misconduct of noncompliance with a teacher directive and swinging his jacket when being escorted to the counselor's office did not evidence an intent to disrupt learning. In addition, the student's struggling while being restrained by the SROs did not amount to obstruction of the officer's duties. As such, the parents sufficiently plead an unlawful seizure. As for excessive force, the argument that it was reasonable for the SROs to force the student to the ground and handcuff him behind his back is rejected. The teachers were in the process of calming the student using the de-escalation techniques outlined in his BIP and there are

no allegations that the student threatened the teachers or the SROs. Thus, the SROs' motion to dismiss is denied at this juncture.

E. Myers v. Boardman Local Sch. Dist. Bd. of Educ., 81 IDELR 97 (N.D. Ohio 2022). Where it is alleged that a special education teacher failed to report a classroom aide for berating an 11-year-old student with autism, threatening him with bodily harm, and stapling a note to his head, this is sufficient to support claims that the teacher herself violated the student's constitutional right to bodily integrity. Thus, the teacher's motion to dismiss the parent's 14th Amendment claim is denied at this juncture. The teacher's argument that the aide's conduct did not amount to a constitutional violation for which she could be held responsible is rejected where the parent claims to have notified the teacher about each incident. According to the parent, the aide's verbal and physical abuse continued despite the teacher's assurances that she would speak with the aide about it. Further, the teacher failed to address the parent's claim that she admitted to digging staples out of the student's head, but later said that the aide only stapled the note to the student's hair. The teacher does not explain how this could not be construed as the type of active involvement in the alleged excessive force that would be sufficient to state a claim.

F. Myers v. Boardman Local Sch Dist. Bd. of Educ., 82 IDELR 58 (N.D. Ohio 2022). In this case involving a classroom aide's stapling of a note to a student's head, the district's motion for judgment on the pleadings is granted. The parent failed to establish that the district had a custom, policy, or practice of abuse or was deliberately indifferent to, or tolerant of, misconduct that violated the student's constitutional rights under 42 U.S.C. §1983. A district cannot be liable for abuse of which it is not aware. Here, the evidence reflects that the teacher never reported the aide's misconduct, and it first learned of it when the parent informed a school official, who warned the aide about her behavior once reported. In addition, the parent failed to allege any facts establishing an official district policy of discrimination or mistreatment of students, or that school officials ratified unconstitutional conduct, as the teacher was not an official with final decision-making authority. The parent has also failed to state a claim for failure to train, as she has not alleged any prior instances of unconstitutional conduct demonstrating that the district ignored a history of abuse. There were also no allegations that others raised concerns which would have put the district on notice of the aide's inappropriate conduct and admitted that the district had no such knowledge until after the "stapling event" was reported.

LIABILITY FOR INJURIES TO STAFF

A. Sims v. Dallas Indep. Sch. Dist., 123 LRP 22647 (N.D. Tex. 2023). Because there is no evidence that the incident at issue was the result of a district custom or policy, claims brought under the 14th Amendment by the sons of a special education teaching assistant who was attacked by a 17 year-old student with disabilities and died are dismissed. The fact that the student's IEP team decided to maintain the student's special education placement did not make the district responsible for the assistant's death. Districts are not liable for the conduct of their employees, such as IEP team members, unless those violations resulted from district policy or custom. The teaching assistant's sons' argument that the IEP team's placement decision qualifies as district policy is rejected. Texas law

designates a district's board of trustees as the final policymaker and the sons have not identified a state or local law that permits the board to delegate official policymaking authority to an IEP team. The argument that statements made during an IEP meeting 4 days after the teaching assistant died established district policy is also rejected. Even if the district representative on the team emphasized the importance of inclusion and peer interaction, there is no evidence that the representative spoke as the board's representative. Thus, the employee's sons could not show that the district maintained a policy of providing inclusive placements at the expense of staff safety.

BULLYING/DISABILITY HARASSMENT OR ABUSE/HOSTILE ENVIRONMENT

A. Allegheny Valley Sch. Dist. (OCR 2023). On September 21, 2023, OCR announced that it had resolved a disability harassment investigation where it had determined that the Pennsylvania district subjected the student to harassment so pervasive that it constituted a hostile environment and that the district failed to take steps to protect the student, end the harassment, and assess whether the harassment impeded the student's ability to access the district's educational program. Over a six-month period, classmates repeatedly directed disability-based slurs at the student and both threatened to and did physically attack him based upon his disability, all of which the parent and school staff reported to a district principal. One of the attacks was captured on a school security camera video and the principal still did not treat it as disability-based harassment. OCR found that the district did not investigate all of the incidents reported and, when it did, the investigations were very limited. For example, they disregarded an eyewitness report and did not seek information from relevant witnesses. In addition, the district treated each report of harassment as an isolated incident, instead of an accumulation of evidence that the student was experiencing persistent disability-related harassment. Further, although the student's parent reported that the harassing behavior was impacting the student's ability to access his educational program and requested modifications to the student's IEP to add support, the district failed to convene a formal IEP meeting for over six months after the student's parent first reported the harassment. Even when the IEP team convened, there was no evidence that the team considered whether the harassment resulted in a denial of FAPE to the student and whether adjustments to the student's IEP were necessary.

The district has committed to take steps to ensure nondiscrimination in its education programs, including, among other things:

- Distribute a memo to all district staff affirming its obligations pursuant to 504/ADA;
- Train all school staff on their obligations under 504/ADA;
- Provide individual remedies to the student, such as counseling, academic, or other therapeutic services to remedy the effects of the harassment;
- Convene the student's IEP team to determine whether the student experienced a denial of FAPE due to the harassment;
- Review all bullying incidents for a 3-year period at the school to determine the need for additional remedies; and
- Perform a climate assessment to evaluate needed additional supports to ensure a nondiscriminatory school environment for students.

The heavily redacted 11-page Letter of Findings to the Superintendent can be found at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03221240-a.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= and the 8-page Resolution Agreement can be found at: https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03221240-b.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

B. A.R. v. Cape Henlopen Sch. Dist., 83 IDELR 32 (D. Del. 2023). The school district did not fail to appropriately accommodate the fourth grader with ADHD in response to peer bullying under Section 504. Districts must take prompt and effective steps that are reasonably calculated to end harassment, eliminate any hostile environment, and prevent it from recurring when the district becomes aware of severe and pervasive bullying. Here, there were five incidents of minor peer bullying of the student spread over two years. In response, the teacher and assistant principal responded with a plan to prevent recurrence of the incidents, that included use of recess monitors and discipline of the bully. When the student experienced an incident of severe bullying in fourth grade, the district suspended the bully, separated him from the victim, and created a safety plan to keep them separate. The school also added new anti-bullying accommodations to the student's 504 plan, including bringing friends to lunch. The incidents were handled appropriately and were not serious enough to create a hostile environment or to trigger the district's obligation to make systemic changes to combat bullying or add anti-bullying accommodations to the student's 504 plan. This duty is only triggered when the bullying is so severe, pervasive, and objectively offensive that it denies its victim equal access to education. The district responded appropriately to the incidents, quickly, materially, and in a manner reasonably calculated to end the harassment.

C. B.D. v. Eldred Cent. Sch. Dist., 83 IDELR 31 (S.D.N.Y. 2023). State review officer's decision that the safety plan developed by the district to address peer bullying of an eighth grader with autism, ADHD, and kidney disease was appropriate is upheld. Thus, the parents' request for reimbursement for private schooling is rejected. While a district can be found to have denied FAPE by failing to respond appropriately to peer bullying, parents must show that the district was deliberately indifferent to the bullying and failed to take reasonable steps to prevent it. Here, the district held a meeting to address the parents' concerns about bullying and to develop a safety plan for the student. The plan stated that its purpose was "to provide a safe and secure learning environment free from harassment, intimidation, or bullying," indicating that the district was not deliberately indifferent. In addition, the plan contained appropriate measures to protect the student from bullying. Although the plan contemplated some action on the part of the student, such as leaving class early and reporting bullying incidents when they occurred, the plan imposed 11 obligations on school staff. These included things such as allowing the student the opportunity to leave class, call family, or contact other school staff members; letting him out of class early and sending him to eat lunch separately to avoid contact with other students; mandatory monitoring and reporting of potentially problematic situations involving the student in the school's common areas; separating him from offending

students during class and extra-curricular activities; and informing the school body at large about bullying policies and related issues. As such, the state review officer's finding that the safety plan was appropriate is upheld.

D. D.M. v. East Allegheny Sch. Dist., 82 IDELR 171 (W.D. Pa. 2023). District's motion to dismiss 504/ADA discrimination claims is partially denied. Here, the parents allege that their child with SLD began skipping class and struggling academically because of bullying-related anxiety and depression. They also allege that the district responded to the student's mental health issues (difficulty concentrating in class, struggling academically, experiencing suicidal ideations) by placing her in a cyber school program that offered no direct instruction rather than reassessing whether the student needed additional supports to address her mental impairments. These allegations, taken as true, are enough to support a claim that the district discriminated against the student because of her mental health needs.

RETALIATION

A. Palmer v. Elmore Co. Bd. of Educ., 82 IDELR 160 (M.D. Ala. 2023). Parent has failed to establish that the district retaliated against her for advocating on behalf of her student with severe disabilities via her due process complaints against the district. To establish a claim of retaliation under the ADA, a parent must show that: 1) she engaged in a protected activity (i.e., advocacy on behalf of a student with a disability); 2) she suffered adverse action by the district; and 3) the adverse action was causally related to the protected activity. Here, the parent has not shown that the adverse action in the form of two truancy letters from the district and one from the county district attorney's office were causally related to her filing of the due process complaints. While the district's special education director knew about the parent's due process activity in support of her child, the parent did not show that the director played a role in sending the truancy letters. In fact, the director's office was not responsible for sending the truancy letters and none of the letters mentioned the director's name. Further, the parent failed to show that any district employees involved in sending the letters knew about the parent's advocacy. Thus, the district's motion for judgment is granted.

B. Rae v. Woburn Pub. Schs., 83 IDELR 61 (D. Mass. 2023). School district's motion to dismiss the claims of a school nurse brought against the district and the school principal is granted. Here, the disciplinary hearings that the middle school nurse was required to attend and her principal's unusual participation in her yearly review were not shown to be connected to her speaking out on behalf of students with diabetes. In order to establish retaliation under Section 504/ADA, the nurse must show that 1) she engaged in protected conduct; 2) she was subjected to adverse action; and 3) there is a causal connection between the protected conduct and the adverse action. While the nurse engaged in protected conduct when she advocated for more support for students with diabetes and the principal's unexpected participation in her yearly review is arguably adverse action, the nurse has shown no evidence that there is a causal connection between that action and the nurse's advocacy. While the principal did require the nurse to attend disciplinary hearings, the hearings involved legitimate concerns--a parent complaint, a t-shirt that a student obtained from the nurse's office, and another incident where the nurse did not respond to a page that

was made over the school's public announcement system because she was outside. The hearings were not held because of her advocacy, and the nurse's claims are dismissed.

RESTRAINT/SECLUSION

A. Davis Joint (CA) Sch. Dist. (OCR 2022). After completing a "compliance review," OCR announced on December 7, 2022 that the Davis Joint Unified School District in California has entered into a resolution agreement to ensure that its restraint and seclusion policies and practices do not deny FAPE to students with disabilities. It is highly suggested that school districts familiarize themselves with relevant documents related to this investigation and its outcomes related to the use of restraint and seclusion with disabilities in schools, including those placed by the district in a non-public school for FAPE. The 34-page letter to the Superintendent can be found at the following link:

https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09195001-a.pdf
and the 15-page resolution agreement can be found at the following link:
https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09195001-b.pdf

A summary of OCR's findings:

During the 2017-2018 and 2018-2019 school years, the District's policies prohibited the use of seclusion, allowed the use of restraint as an emergency intervention, and permitted students with disabilities to be placed in two nonpublic schools (NPS), NPS A and NPS B, both of which used restraints and the latter of which used seclusion. OCR found that in those two school years, two District students without disabilities were subjected to physical restraint in District elementary schools, and four District students with disabilities were subject to physical restraint in such schools. OCR did not find any evidence in the voluminous records it reviewed or the 39 interviews it conducted that District schools used seclusion in the 2017-18 or 2018-19 school years.

OCR found that the District placed one student with disabilities (Student A) at NPS A where the student was subjected to multiple restraints and died after being subjected to a 90-minute prone restraint in [redacted content] 2018. OCR further found that two students with disabilities placed at NPS B (Students B and C) were subject to multiple restraints and seclusions. NPS B physically restrained Student B at least 17 times, as documented in 11 emergency reports, and placed him in the Time Away room 11 times, as documented in nine emergency reports, all of which reported this Time Away as "seclusion." As a result of these "seclusions" and restraints, OCR determined that Student B spent at least 4.57 school days outside of the classroom. He likely missed more school days because the District's and NPS B's records failed to record all of the time spent in a restraint or Time Away, and interviews revealed other restraints and times in the Time Away room for which the District lacked records. OCR also found that NPS B physically restrained Student C 15 times, as documented in 11 emergency reports, and placed him in "Time Away" 12 times, as documented in 12 emergency reports. OCR determined that Student C spent at least 5.77 school days outside of the classroom and likely more because there were 11 reports that did not record the time.

With regard to the three students with disabilities whom the District placed at NPS A and NPS B (Students A, B, and C), OCR found that the District committed three procedural violations of the Section 504 regulations. First, the District failed to ensure that District staff making placement decisions for these students had access to and carefully considered information obtained about the use of physical restraint and/or seclusion with these students, as required by 34 C.F.R. §104.35(c)(2). Second, the District failed to ensure that the group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options made the placement decisions regarding behavioral interventions for these students, as required by 34 C.F.R. §104.35(c)(3). Third, the District failed to reevaluate these students to determine whether NPS A's and NPS B's repeated use of restraint and seclusion for these students denied them a FAPE and if additional aids and services were appropriate to reduce the use of restraint and seclusion and to provide a FAPE, as required by 34 C.F.R. §104.35(b). OCR further found that these procedural violations resulted in denials of a FAPE to Students A, B, and C under 34 C.F.R. §104.33(b)(1)(ii), in violation of Section 504 and Title II.

OCR also identified a compliance concern that the District did not document all restraints of students with disabilities in its schools or all restraints and seclusions in NPS settings and therefore may have failed to identify all students subjected to restraints or seclusions or all incidents of restraint and seclusion for a given student, which may have resulted in students being denied a FAPE. Relatedly, the District's inadequate documentation of restraints and seclusions and failures to ensure that District staff making placement decisions had access to complete information about restraints and seclusions raises a concern that the District did not consistently give parents sufficient information to have a meaningful opportunity to participate on IEP teams for their children.

A summary of the steps that the District has agreed to take as reflected in the resolution agreement includes the following:

- Revising its restraint and seclusion policies to promote compliance with 504, ADA and their regulations
- Distributing the revised policies to parents, faculty, administrators, staff, and nonpublic school employees serving district students
- Developing and implementing a process and form to create and maintain records about the use of restraint and seclusion of district students
- Providing training on the revised policies and FAPE-related requirements to all teachers, administrators and other district members of IEP and 504 teams
- Ensuring staff at nonpublic schools where districts are placed receive training on the district's policies and FAPE requirements of 504
- Providing an individual remedy for a student subjected to multiple instances of restraint and seclusion by convening a properly constituted team to determine what compensatory services are appropriate for the student and timely providing those services
- Conducting a review to identify any district students restrained or secluded by staff at nonpublic schools from 2019 to present and implement responsive remedies based on this review

- Implementing a program to monitor the use of restraint and seclusion of students in district and nonpublic schools

B. Doe v. Aberdeen Sch. Dist., 81 IDELR 121 (8th Cir. 2022). District court's ruling allowing parents of three elementary school students with significant disabilities to bring their 4th Amendment unreasonable search and seizure claims against their former special education teacher is affirmed. While educators generally have immunity from 14th Amendment claims if their actions are not a substantial departure from accepted professional judgment, practice or standards, applying this same rule to 4th Amendment claims, this teacher cannot use the defense of "qualified immunity" to avoid claims in this case. Among other things, the teacher seized two of the students when she barricaded them in the "little room"—a 10' x 10' room at the school—for behavioral issues such as hanging up a coat incorrectly or pushing a cabinet. In addition, the teacher and/or aides regularly picked up and carried students from class to the "little room" for minor behaviors. Further, the teacher seized one student who did not want to swim and pushed him into the swimming pool and seized a third student by pinning him down and forcibly removing his clothing to put on a bathing suit. These actions could not be viewed as reasonable, especially in light of U.S. DOE guidance classifying seclusion and restraint as emergency behavioral interventions to be used only to prevent imminent physical harm. Where the record lacks any disciplinary infractions by these students—much less the kind of violations that would call for restraint and seclusion responses—the former special education teacher cannot use qualified immunity as a bar to the parents' 4th Amendment claims. However the district court's denial of qualified immunity on the parents' 14th Amendment claims against the teacher is reversed because the parents cannot seek relief under both the 4th and 14th Amendments in this case.

C. Reintroduction of the "Keeping All Students Safe Act" – This Act was first introduced by Congress in May of 2021 but did not pass and died. It is no longer dead, as the Senate and House reintroduced it on May 18, 2023. The Act would make it illegal for any school receiving taxpayer money to seclude children and would ban dangerous restraint practices that restrict children's breathing, such as prone or supine restraint. It would also prohibit schools from physically restraining children, except when necessary to protect the safety of students and staff. It also contains training for school personnel, state monitoring of the law's implementation, and increased transparency and oversight. The bill also provides that a student who has been subjected to unlawful seclusion or restraint under the law, or the parent of such student, may file a civil action against the program under which the violation is alleged to have occurred in an appropriate U.S. district court or in State court for declaratory judgment, injunctive relief, compensatory relief, attorneys' fees, or expert fees. The full text of the bill can be found at: https://www.murphy.senate.gov/imo/media/doc/kassa_118.pdf.

D. S.G. v. Shawnee Mission Sch. Dist., 82 IDELR 107 (D. Kan. 2023). The school district's motion for summary judgment on the parent's 14th Amendment "failure-to-train" and "failure-to-supervise" claims is granted. Clearly, districts are not automatically responsible for violations of student constitutional rights by their employees. For there to be responsibility, parents need to show that the district knew that its employee training was

not adequate and disregarded the risk of harm to students as a result. Here, there is no evidence that the district had reason to believe that its behavior management training, which included training on de-escalation techniques and the appropriate use of restraint, was deficient. In addition, the parent has not identified any defects in the training that the district provided to the teacher that would have prevented the teacher from kicking the child while the child was lying on the floor of the library (which was caught on video). In fact, the teacher should not have needed training to know that she should not do that. This case does not involve a teacher making a wrong decision regarding the level of physical restraint to use with a kindergartner or whether to use restraint at all. Rather, the teacher's physical interaction with the student was "improper under any circumstances." Because the parent did not show that additional or different training provided to the teacher would have prevented her from kicking the student, the district is not responsible for the teacher's constitutional violation.

WHO CAN ACT AS PARENT

A. Q.T. v. Pottsgrove Sch. Dist., 123 LRP 18151 (3d Cir. 2023). In this case of first impression, the student's adult cousin with whom the student lives within the district meets IDEA's definition of "parent" for purposes of bringing a due process action against the district. It does not matter that a 2008 court order grants primary physical and legal custody of the student to the student's grandmother who lives in another district while preserving the biological father's educational rights. The adult cousin has been making educational decisions for the student for several years, including providing consent for an evaluation that concluded that the student was not eligible for IDEA services. The cousin also requested an IEE, where it was found that the student qualified as OHI. The district, however, proposed a 504 plan instead of an IEP, and the adult cousin filed for due process on the student's behalf seeking IDEA services. The hearing officer's decision, based upon the court order granting the grandmother custody, follows the language of the IDEA regulations that give priority to biological parents and court-appointed educational decisionmakers. The U.S. Supreme Court has ruled that "[w]e must ask whether 'Congress has directly spoken to the precise question at issue....If we can discern congressional intent using the plain text and traditional tools of statutory construction, our inquiry ends: we give effect to Congress's intent.'" Only if the statute "is silent or ambiguous with respect to the specific issue," will the court look to the regulations. Under IDEA, the term "parent" clearly includes "an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare." Congress has spoken and there is ample evidence in the record that the cousin was acting in the place of the student's natural parent. The evidence shows that the student has lived with the cousin for two years and that she has been supporting the student and assumed all personal obligations related to school requirements. In addition, the cousin receives Supplement Nutrition Assistance Program payments on behalf of the student and the student is listed on the student's HUD paperwork. Accordingly, under IDEA, the cousin qualifies as a parent for purposes of IDEA as the individual with whom the student lives and who is legally responsible for her welfare.

CHILD FIND DUTY TO APPROPRIATELY/TIMELY EVALUATE

A. Dear Part B Directors and 619 Coordinators (OSERS/OSEP 2023).

On March 14, 2023, Dr. Gregg Corr, OSEP's Director of Monitoring & State Improvement Planning Division sent the following email:

Dear Part B Directors and 619 Coordinators:

It has come to our attention that initial evaluations have sometimes been delayed or denied by local educational agencies (LEAs) until a child goes through the multi-tiered system of supports (MTSS) process, sometimes referred to as Response to Intervention (RTI). Although the term RTI is no longer commonly used to describe a State's multi-tiered system of supports, the attached memoranda apply to all tiered systems of support, whether the State uses a RTI. MTSS or a unique State name. The basis for these memoranda is the child find requirements in Section 612(a)(3) of the IDEA. Each IDEA Part B and Part C grantee must ensure it has a system in place for meeting the child find requirements as a condition for funding.

OSEP reminds State educational agencies and LEAs that the Part B regulations at 34 C.F.R. §300.301(b) allow a parent to request an initial evaluation *at any time* to determine if a child is a child with a disability under IDEA. As OSEP Memorandum 11-07 states, MTSS/RTI may not be used to delay or deny a full and individual evaluation under 34 C.F.R. §§300.304-300.311 for a child suspected of having a disability. With respect to preschool children, IDEA does not require or encourage a local or preschool program to use a MTSS approach prior to referral for evaluation or as part of determining whether a 3-, 4-, or 5-year-old is eligible for special education and related services. Once an LEA receives a referral from a preschool program, the LEA must initiate an evaluation process to determine if the child is a child with a disability. See: 34 C.F.R. §300.301(b).

OSEP recommends that you review the attached memoranda and distribute them to LEAs and intermediate education units within your State. Please let them know that because the content of these memoranda reflects IDEA statutory and regulatory requirements, they are still in effect.

If you have any questions regarding this email, please contact your OSEP State Lead.

1. OSEP Memorandum 11-07--A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA) (January 21, 2011); and
2. OSEP Memorandum 16-07--A Response to Intervention Process Cannot be Used to Delay-Deny an Evaluation for Preschool Education Services under the Individuals with Disabilities Education Act (April 29, 2016).

B. Letter to Sharpless, 82 IDELR 39 (OSEP 2022). In response to an inquiry concerning whether a parent's request for "testing" triggers a district's child find obligations, it is noted that districts must respond when a parent requests an initial evaluation. While states may require parents to submit such requests in writing or to follow other specific procedures, IDEA does not directly address whether a district may overlook a verbal request because it is not in writing or otherwise does not meet state or district requirements. It is the Department's view that when these additional steps pose a substantial limitation for certain parents to access an initial evaluation for their child, the failure to provide additional information or assistance could potentially violate IDEA's child find requirement. States and districts must respond properly when it is reasonable to believe that the parent is seeking an initial evaluation. For example, school personnel could provide a parent with a procedural safeguards notice, further explain the parent's right to and procedures for initiating an evaluation and offer to provide any assistance the parent needs to submit the request for an evaluation. Education agencies are encouraged to review their child find procedures to make sure that they offer "fair and equitable opportunities" for all parents to request an evaluation.

C. P.W. v. Leander Indep. Sch. Dist., 83 IDELR 71 (W.D. Tex. 2023). School district's motion to dismiss the 504/ADA disability discrimination claims of a parent of an elementary student with dyslexia and ADHD is denied at this juncture. Here, the parents allege disability discrimination occurred based upon the district's prolonged failure to evaluate for IDEA services. While parents seeking relief for disability discrimination must allege more than a denial of FAPE under IDEA, these parents state a viable claim for disability discrimination because they allege and may be able to show that the district acted in bad faith or with gross misjudgment. According to the complaint, the student first showed signs of dyslexia in kindergarten. In addition, the parents allege that they requested an evaluation in first grade for dyslexia because the student was still reversing letters and numbers. They also allege that the principal talked them into withdrawing their request until the district determined whether RTI strategies were working. Allegedly, the district did not evaluate the student for dyslexia until the second grade but, even then, only offered the student a 504 Plan. Only after an evaluation of the student reflected that the student also had ADHD did the district develop an IEP for the student. The district's continued use of RTI strategies despite the student's lack of progress, if true, could qualify as "gross misjudgment," where Texas law provides that when dyslexia is suspected by school personnel an evaluation must be done and RTI procedures may not delay such an evaluation. The parents also plausibly allege gross misjudgment based upon the fact that district staff repeatedly told them that "dyslexia is separate from special education" and "dyslexia is not under special education...just 504."

D. J.Z. v. Catalina Foothills Sch. Dist., 83 IDELR 62 (D. Ariz. 2023). ALJ's decision finding that the school district did not violate IDEA when refusing to conduct an evaluation of a student with ADHD and a 504 Plan is partially reversed. While IDEA does not require a district to conduct an evaluation upon parent request, the district should have evaluated here not merely because the parents asked, but because their request, communication with district staff, and documentation of hospitalizations for depression and suicidal ideation put the district on notice that the student had been diagnosed for new suspected disabilities

beyond ADHD. In addition, when district staff met via the school study team (SST) to review data and decided that the parent's request for evaluation was refused, the district denied the parents meaningful participation in the IEP process. Because the district did not include the parents in discussions about the need for an IDEA evaluation or share the student's recent diagnoses with the SST, the district impeded parent participation in decision-making and denied FAPE.

E. Ja.B. v. Wilson Co. Bd. of Educ., 82 IDELR 191 (6th Cir. 2023). District court's ruling in favor of the district on the parents' child find claim is affirmed. On the record in this case, the court cannot say that district officials "overlooked clear signs of disability and were negligent in failing to order testing, or [had] no rational justification for not deciding to evaluate" (citing 6th Circuit authority). While the 8th grade transfer student displayed noncompliant, disrespectful and disruptive behaviors upon his transfer from Illinois to Tennessee in August 2017, this did not require the new district to immediately evaluate him for IDEA services and trying the use of interventions as part of a multi-tiered system of supports was not unreasonable to address the student's behavioral problems. "To be sure, this is not a license for school districts to delay identification or evaluation of students, or otherwise drag their feet with respect to their IDEA obligations when presented with clear signs that a student--even one who is enrolled for only a short time--may have a disability. Rather, we conclude only that on these facts, especially given [the student's] general education background and recent move, the school district did not violate its statutory child-find responsibility." Of particular note is that the student was only at the middle school from August to November 2017. In addition, he had no history of receiving special education services in all of the years he attended school in Illinois. Further, district staff testified that the student's behaviors, while concerning, were not unusual or severe enough to suggest they may stem from a disability. Finally, the parents conceded that the student's recent move across state lines may have had an impact on his behavior.

F. Salinas v. IDEA Pub. Schs. Charter Dist., 82 IDELR 203 (S.D. Tex. 2023). The hearing officer's decision that the district did not violate IDEA when it failed to evaluate the student diagnosed with ADHD and autism until sixth grade when his math skills declined earlier in fifth grade is upheld. Here, the student's academic decline in math skills during virtual learning was temporary and the duty to evaluate is not triggered unless there is reason to suspect that a student has a disability under IDEA and that the student needs special education and related services. The parent's reliance on the fact that the student's math ability dropped two grade levels in fifth grade is misplaced. It is important to consider both the context in which that ability dropped and the overall trend in the student's progress. It is important that the drop occurred during a full year of remote learning due to COVID when, as the parent acknowledged, the student was tired of remote learning and sometimes did not log in for instruction. Thus, the hearing officer did not err in finding that the switch to online learning was significant in ascertaining when the child find duty to evaluate arose and in deciding not to impose that duty until the beginning of the student's sixth grade year when the parent officially asked for an evaluation. In addition, the decline was only temporary and the student soon bounced back. Finally, the student's academic performance was generally average to above average throughout his years at the school. Thus, the district's motion for summary judgment is granted.

ELIGIBILITY/CLASSIFICATION

A. Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., 64 F.4th 569, 83 IDELR 1 (4th Cir. 2023). The district court's ruling that the district conducted an appropriate evaluation of a seventh grader with a diagnosis of autism finding the student not eligible is affirmed. While IDEA requires school districts to identify, locate, and evaluate all resident students who have a disability-related need for special education services, IDEA does not require a district to provide an IEP to any student whose parent requests one. Rather, the district satisfies its child find duty by conducting a comprehensive evaluation and considering the student's need for IDEA services. Here, the district agreed to evaluate the student after learning of his private diagnosis and administered autism rating scales and assessments in the areas of adaptive behavior, vision, hearing, education, speech and language, and OT. It then reviewed the data and determined that the student was not eligible under state criteria. The parent's disagreement with the outcome of the evaluation does not amount to a failure to conduct an appropriate evaluation. The court also rejects the parent's claim that the IEP team acted wrongfully in failing to follow the recommendations of private evaluators in determining the student's eligibility for an IEP. IDEA does not require school districts to defer to the opinions of private evaluations procured by a parent. "To the contrary, the IDEA instructs school districts to rely on diverse tools and information sources in making an eligibility assessment."

B. Perez v. Weslaco Indep. Sch. Dist., 123 LRP 27639 (5th Cir. 2023) (unpublished). District court's decision in favor of the district's finding of IDEA ineligibility of identified 504 student is affirmed. "Recall that the IDEA is limited only to '*children with disabilities,*' not every student who is struggling with something." Thus, the district is required to provide special education to the student only if the student "(1) had a qualifying disability and (2) 'by reason thereof, need[ed] special education and related services.'" Here, the parent submitted lesser evidence demonstrating the student's disability. Her primary support was a private psychologist's evaluation, which diagnosed the student with ASD and ADHD but noted that the evaluation was not a substitute for a special education evaluation. In addition, the evaluation lacked educational context where the evaluator did not review education records, solicit feedback from the student's teachers, or observe the student in a classroom setting. Thus, her evaluation did not have a "proper foundation." In addition, the private psychologist did not herself recommend special education services but instructed the parent to consult with the district to determine eligibility. In any case and as courts have observed, IDEA does not require school districts to defer to the opinions of private evaluations procured by a parent. In contrast, the district's evaluation was based on more evidence. Though not perfect, it used "diverse tools and information sources " to assess the student's eligibility. Indeed, it solicited reports from a variety of professionals—a diagnostician, a licensed specialist in school psychology, and a speech pathologist—who assessed the student using multiple formal and informal tests, personally observed the student, interviewed the student's teachers, and carefully reviewed his cumulative school records.

D. Brooklyn S.-M. v. Upper Darby Sch. Dist., 82 IDELR 197 (E.D. Pa. 2023). Hearing officer's decision that the district was correct in finding the student ineligible under IDEA

is upheld. To establish a child find violation under IDEA in the Third Circuit, a parent must show that: 1) the child has a disability for which she needs special education and related services; 2) the district breached its child find duty; and 3) the violation impeded the child's right to FAPE, significantly impeded the parent participation, or caused a deprivation of educational benefits. Here, the student was evaluated by the district and the school psychologist found that the student was not an eligible student with SLD. While a private school psychologist concluded that the student was SLD, the psychologist only reviewed the district's records and briefly met with the student. Most importantly, the hearing officer correctly found that the testimony from the student's teachers "tips the scales" in favor of the district. For example, the student's third-grade teacher testified that, although the student would sometimes get upset and cry when class was challenging, the student eventually became a very good advocate for herself and had no problem raising her hand if she did not understand something or needed help. The teacher further testified that the student's behavior was "typical" of a third-grade student, and that given her eleven years of special education experience, she would have brought the student before the school's Student Support Team if she thought she needed extra support. The student's fourth grade teacher similarly testified that the student showed growth between her Fall and Spring MAPs assessment tests, with marked improvement once instruction switched from a completely virtual model to a hybrid model. Given her twenty-four years of special education experience, she also shared that she would have referred the student to the SST if she thought an evaluation for an IEP was needed. Both teachers' conclusions were supported by extensive in-class observation of student. The hearing officer gave the proper weight to the views of the experienced teachers who had the benefit of in-class observation of the student, and there is no evidence in the administrative record that would require a contrary conclusion. Indeed, the student's academic progress serves as further evidence that she has no need for specially designed instruction to benefit from education.

E. H.R. v. West Windsor-Plainsboro Bd. of Educ., 123 LRP 22517 (D. N.J. 2023). District did not violate IDEA when determining that the kindergartener with ADHD was no longer eligible for special education services. Where a third of the student's general education class required the same extra help with reading that he did and the student was making significant overall progress in reading, math and attentiveness, the child no longer needs an IEP. To be eligible under IDEA, a child must have not only a disability but also must need special education services because of the disability. The educators who know the student well testified that he made solid progress in phonemic awareness and math and generally made significant progress throughout his year in the general education setting. While the child's attention span would wane at times, this behavior was typical of five-year-old students. Moreover, the child's attention improved as the year progressed. The fact that the child qualified for supplemental reading instruction is not determinative of eligibility, where his general education teacher testified that more than a third of the students in the general education glass qualified for it too.

INDEPENDENT EDUCATIONAL EVALUATIONS

A. In the Matter of New Jersey Dept. of Educ. Complaint Investigation C2022-6524, 82 IDELR 184 (N.J. Super. Ct. App. Div. 2023). ALJ's decision that the district is required

to allow the parents' private evaluator to observe their child in the classroom is upheld. The district's position that the parents' private IEE evaluator may only observe after the district has conducted its own evaluation is rejected where a district evaluation is not a prerequisite for a private IEE under IDEA. While it may be a prerequisite to a publicly funded IEE, it is not required prior to parents obtaining an IEE at their own expense. Accordingly, the district must allow the parents' evaluator to observe the student in the classroom.

AGE OF ELIGIBILITY

A. K.O. v. Jett II, 123 LRP 25769 (D. Minn. 2023). Version of Minnesota law in effect until July 1, 2023 violated IDEA insofar as it denied special education to students with disabilities who had not received high-school diplomas and who had not yet reached the age of 22. As a result, the State is to provide compensatory education to class members who turned 21 years of age prior to July 1, 2022. The State's argument that the DOE's adult basic-education (ABE) programs offered to adults of any age are not "public education" is rejected. Generally, IDEA requires states to provide FAPE to eligible students with disabilities beginning with their third birthday and continuing until their 22nd birthday. However, a state need not provide FAPE from age 18 through 21 if doing so is "inconsistent with State law or practice...respecting the provision of public education to children in those age ranges." Here, the key question is whether Minnesota's adult education program qualifies as "public education." The term "public education" does not apply only to traditional, full-time educational programs provided on school grounds. Rather, "public education" means academic instruction designed to result in a high school diploma or its equivalent that is overseen and at least partially funded by the State. Limiting the definition of "public education" to traditional high school programs would prevent many students with disabilities ages 18 through 21 from receiving FAPE, which is not only illogical, but it also ignores IDEA's purpose. Here, the Minnesota DOE oversees the adult education program and provides federal and state funds for it. In addition, many of the programs are expressly designed to help adult students receive a regular high school diploma or a general equivalency diploma. Thus, the State provides "public education" to nondisabled adults of all ages, and the State erred in terminating IDEA eligibility before age 22 under its previous law.

B. Lawsuit filed: Pennsylvania School Boards Association v. Mumin, No. 409 M.D. 2023 (Pa. Comm. Ct., filed 9/11/23). On September 11, 2023, the Pennsylvania School Boards Association (PSBA) filed a lawsuit challenging the State of Pennsylvania's recent policy change as a result of settling a lawsuit that was filed against the State on July 11, 2023 on behalf of students with disabilities. That lawsuit alleged that the State was cutting short the IDEA eligibility of adult students by allowing districts to end IDEA services at the end of the school year in which they turned 21. In settlement, the State sent out a Memo on August 30th that IDEA-eligible students are now entitled to FAPE until their 22nd birthday because adult education programs throughout the State are available. The PSBA is challenging the State's announcement saying that the State does not have the authority to address a perceived violation of IDEA by amending, modifying, or repealing Pennsylvania law through an email or other form of administrative communication. LEAs in

Pennsylvania complain that they are now suddenly required to arrange services for 21 year-old students with disabilities on short notice and without additional funding.

PERSONNEL ISSUES/STAFFING SHORTAGES

A. Memorandum to State Directors of Special Education, (OSEP, October 4, 2022). In case State Directors of Special Education had forgotten, OSEP reiterated IDEA's personnel qualifications for teachers, related service providers, and paraprofessionals. This Memorandum can be found at https://sites.ed.gov/idea/idea-files/osep-memorandum-personnel-qualifications-under-part-b-of-the-individuals-with-disabilities-education-act-idea-osep-22-01-oct-4-2022/

As stated by OSEP, the Memo's purpose is:

> to clarify States' obligations regarding the IDEA Part B requirements related to personnel qualifications and alternate certifications. Based on media reports and discussions with States and advocates, OSEP is aware that some States currently have policies and procedures in place that may not be consistent with IDEA requirements. OSEP also recognizes that States are facing many challenges caused by the COVID-19 pandemic, including the impact it has had on exacerbating the shortage of special education teachers and related services providers across the country. Thus, OSEP believes it is critical to ensure that State educational agencies (SEAs) fully understand the IDEA requirements related to personnel qualifications and alternate certifications and are aware of available resources to support their efforts to meet them.

Among other things, the Memo states that FAPE includes the provision of special education and related services by providers who are appropriately and adequately prepared and trained and that SEAs may not waive qualification requirements simply because districts face severe personnel shortages. To meet IDEA requirements, a special education teacher must have 1) obtained full state certification as a special education teacher; or 2) passed the state special education teacher licensing examination and hold a license to teach in the state as a special education teacher. A public charter school teacher may qualify by meeting the certification or licensing requirements, if any, that are contained in the state's public charter school law.

While teachers may pursue an alternate route to certification, IDEA contains strict requirements governing those routes. They must:

> (1) receive high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;
> (2) participate in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

(3) assume the functions as a teacher only for a specified period of time not to exceed three years; and
(4) demonstrate satisfactory progress toward full certification as prescribed by the State. and, for example, a teacher must receive high-quality professional development that is sustained, intensive, and classroom-focused; they may teach for no more than three years; and must demonstrate satisfactory progress toward full certification.

Related service providers and paraprofessionals must meet qualifications consistent with any state-approved or state-recognized certification, and districts may use appropriately trained paraprofessionals to assist in the provision of special education and related services.

To address personnel shortages, the Memo also lists several resources that SEAs may use to address personnel shortages.

B. A.W. v. Loudon Co. Sch. Dist., 81 IDELR 281 (E.D. Tenn. 2022). The district significantly impeded a parent's participation in the IEP decision-making process when it failed to disclose to the parent of a 15 year-old girl with ADHD and an intellectual disability that the student's special education teacher did not have the appropriate endorsements to serve as a special education teacher. Thus, the ALJ's order requiring the district to train relevant personnel on TDOE's requirements is upheld, as well as the order requiring the district to create a checklist of all applicable state requirements that is to be reviewed and signed by personnel who are ultimately responsible for making any new hires (including, but not limited to, the special education supervisor, the principal, and the head of human resources or comparable department) to reflect their agreement that the new hire comports with state regulations. Here, there was no dispute that the teacher did not have the proper endorsements to serve as a special education teacher or that the district failed to disclose that to the parents. Where the district held the teacher out as a credentialed special education teacher, that deprived the parent of the opportunity to raise the issue as to whether the teacher should provide the special education instruction to the student. It is recognized, however, that the teacher's lack of a provisional special education endorsement did not affect the level of services the student received in the classroom. Therefore, while the ALJ's finding that the parent needed to prove a deprivation of educational benefit to obtain relief for the procedural violation is rejected, the ALJ was correct that an award of compensatory education services was not warranted. The ALJ's order requiring the district to train relevant staff on hiring requirements is appropriate relief for the procedural violation.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Guevara v. Chaffey Joint Union High Sch. Dist., 81 IDELR 277 (C.D. Cal. 2022). ALJ's decision that district did not deny FAPE to a 17 year-old student when it went forward with an IEP meeting after his parents and their attorney disconnected from their telephonic participation in the IEP meeting is upheld. Here, the parents failed to rebut evidence that their attorney intentionally hung up the phone. While IDEA requires districts to afford parents and their representatives with meaningful participation in IEP meetings, the efforts

the district made to reconnect were reasonable. For instance, the district made several attempts to reconnect with the attorney and the parents, checked to confirm that the district's phone system was working, and waited a reasonable time before deciding that the parents had intentionally left the meeting and deciding to proceed with it. In addition, there was evidence that the parents' attorney intentionally hung up, causing the parents who were connected to the call via his phone to also become disconnected. The parents did not present any evidence supporting their contention of technical difficulties or rebut evidence that the attorney was upset, hung up, and chose not to call back.

B. Pitta v. Medieros, 83 IDELR 59 (D. Mass. 2023). Parent's First Amendment claim that he was denied the request to video record his child's IEP meetings is dismissed. To state a viable First Amendment claim, the parent was required to allege that he was seeking to record public officials who were engaged in their duties in a public place. While the First Circuit Court of Appeals has not defined "public place" in this context, an IEP meeting held on a videoconferencing platform that is only accessible to IEP team members is unlikely to be considered a "public place." It is also questionable as to whether the district members of an IEP team are "public officials" for purposes of the First Amendment. The purpose of the First Amendment in the context of this case is to promote free discussion of government affairs and to aid in uncovering abuses. Here, the parent in this case did not even intend to share the IEP team's discussions with the public and specifically stated that he wanted an accurate record of IEP team discussions in the event that he filed a due process complaint against the district. The First Amendment claim against the special education director who denied his request to video record IEP meetings is also dismissed.

C. C.K. v. Baltimore City Bd. of Comm'rs, 83 IDELR 81 (D. Md. 2023). The ALJ did not err when it found that the district offered FAPE to a teenager with ADHD, OCD, and anxiety. Where the parents of an eleventh grader who attended the Baltimore Lab School since first grade contacted the district about possible enrollment, the district evaluated the student and sent a draft IEP to the parents. The draft IEP provided for over 30 hours per week in general education classes with 25 students and five hours per week of special education support. The parents rejected the proposal based upon their belief that the district had predetermined placement. "Predetermination," however, "is not synonymous with preparation." Rather, IDEA requires the district to come to an IEP team table with an "open mind." While the district uses online IEP forms requiring selections from drop down menus for draft IEPs, the district representative credibly explained that it selected the general education teacher as the service provider because that was the default choice but that could be changed at the IEP meeting if the team agreed that the student needed a more restrictive setting as desired by the parents. However, the team actually decided that the general education teacher could provide the supplementary services set out in the IEP and that the IEP could be implemented in any district high school. The ALJ's decision that predetermination did not occur in this case is upheld, and the parents were not able to show that the student could not receive educational benefit from the proposed IEP and placement.

D. J.D. v. Rye Neck Union Free Sch. Dist., 82 IDELR 150 (S.D.N.Y. 2023). State review officer's decision that the SLD student's IEPs were appropriate for 3rd and 4th grade is upheld. The parents' argument that the district had predetermined placement because it

did not offer integrated co-teaching classes for science and social studies is rejected. Where the district demonstrated that the student only needed a more restrictive setting for math and language arts, the parents' disagreement with this does not in itself prove that the district predetermined the student's placement. Rather, the key question is whether school members of the IEP team considered the parents' input and request that the student receive a full-time special education placement. Here, the parents attended all IEP meetings and voiced concerns about the team's recommendations. In response, the team amended the student's IEP by including a teaching assistant in the student's science and social studies classes. The parents' argument that the district based its recommendation on the placement it had rather than the student's needs is rejected, where the district's special education director testified that it would have provided a special class for science and social studies if the student needed one. In addition, the evaluation data showed that the student was performing at grade level in science and social studies and did not require the support of a special education teacher in those subjects like she does for math and language arts. Thus, the parents are not entitled to reimbursement for the student's private placement.

E. Garcia v. Morath, 82 IDELR 106 (W.D. Tex. 2023). Court adopts Magistrate's Report and Recommendation of August 29, 2022 denying the Texas Education Agency's motion to dismiss IDEA claims brought by three Spanish-speaking parents of students with disabilities. The parents allege that the TEA has failed to ensure that they receive interpretation services in order to participate effectively in their children's IEP meetings. IDEA requires education agencies to "take whatever action is necessary" to ensure parents understand the proceedings at IEP meetings. This includes arranging for an interpreter for parents who are deaf or whose native language is not English. Further, IDEA defines "native language" as the language a parent normally uses. However, Texas' education code only requires interpretation or translation services where "the parent is unable to speak English." Here, the parents allege that they speak "enough English to get by" and that they, therefore, are not entitled to interpreters under Texas' education code. The Magistrate finds that plaintiffs have stated a claim that Texas' standard requiring inability to speak English "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the IDEA."

IEP IMPLEMENTATION FAILURE

A. Plotkin v. Montgomery Co. Pub. Schs., 81 IDELR 252 (D. Md. 2022). ALJ's decision that the failure to implement the IEP for a third grader with autism did not deny FAPE is upheld. In the Fourth Circuit, an IEP implementation failure is viewed as a procedural violation of IDEA, for which a parent can obtain relief only by showing that the procedural violation resulted in a loss of educational benefit to the student. Though the district failed to provide "pullout instruction" to the student for math as required by his IEP, it did not cause educational harm. Indeed, the student's general education teacher and the student's case manager testified that small group instruction in the general education classroom was a better fit for the student and allowed him to avoid a difficult transition between classrooms, giving him an opportunity to work on social skills. The decision to forgo the pull-out instruction was a conscious decision based on an individualized assessment of the student's performance and the benefits he would receive in the general education classroom. In

addition, the teachers found the student to be proficient in most areas of third-grade math by the end of the school year, and his performance on the math portion of standardized assessments improved significantly. Thus, there was no need for compensatory education services.

RELATED SERVICES

A. O.P. v. Jefferson Co. Bd. of Educ., 82 IDELR 152 (N.D. Ala. 2023). The hearing officer's decision that the IEP for a first grader with significant physical disabilities contained appropriate PT and OT services is upheld. At the due process hearing, the school's physical therapist testified that she had reviewed the parent's independent PT evaluation and noted that it was very similar to her own. However, she disagreed with the parents' evaluator's position that the school should provide two monthly sixty-minute sessions or pay for outpatient PT. While more PT would certainly benefit the student, the school-provided PT of one monthly thirty-minute visit was sufficient to allow the student to be safe and independent in the school environment, especially when considered in conjunction with her adapted PE program, which also focused on gross motor skills in the areas of balance, strength, and hand/eye coordination. Similarly, the district's occupational therapist testified that she had reviewed the parent's private OT evaluation and also concluded that it was similar to hers but disagreed with the extent of school-based OT services recommended. She testified that her recommendation of one sixty minute session per week, in conjunction with consultation with the classroom staff and special education case manager, was sufficient to address the student's educational needs. She testified that outpatient PT and OT are aimed at medical improvement, but school-based occupational therapy is directed at reaching the goals set out in the IEP. "The court is deeply sympathetic to [the student's] parents' wish for [the student] to receive services that will maximize her educational opportunities and cause her to progress in school at the same pace as her classmates. Unfortunately, the IDEA does not require a school district to maximize a child's potential, nor can it promise--or deliver--progress at any particular pace for any child. Because [the parents] have not shown that the Board denied [the student] a free appropriate public education based on its provision of occupational and physical therapy, the court will deny their motion for judgment on the administrative record and will grant the Board's motion for judgment on the administrative record.

EXTENDED SCHOOL DAY SERVICES

A. Osseo Area Schs. v. A.J.T., 81 IDELR 256 (D. Minn. 2022). Decision of the ALJ ordering the provision of instruction at school from noon to 4:15 and then services at home that include discrete trial training interventions between 4:30 pm and 6:00 pm each school day along with 495 hours of compensatory education to a student with a severe form of epilepsy called Lennox-Gastaut Syndrome is affirmed. Because the student's seizure activity kept her from attending school until after noon each day, ending her day at 3 p.m. because the middle school's day ended at 2:40 p.m. as proposed by the district is not FAPE and is not designed to enable this student to make appropriate progress in light of her circumstances. During a shortened school day, the evidence reflects that the student makes *de minimis* progress. In addition, the district categorically refused to extend her school day based upon

administrative convenience and availability of personnel rather than the individual needs of the student, which is "never an excuse for impermissibly shortening the instructional time that students with disabilities receive."

TRANSFER STUDENTS

A. West Orange Bd. of Educ. v. B.R., 81 IDELR 130 (D.N.J. 2022). ALJ's order requiring the school district to place two siblings who had transferred from New York—one with Social Language Delay and ADHD and one with Autism—in private schools pending the outcome of the parents' due process complaints is upheld. Placing the transfer students in large, mainstream classes violates IDEA's requirement to provide "comparable services" to the students. With respect to the first sibling, the prior district had placed the student in a small, private school in a 8:1+1 special class, but the new district proposed that the student attend a mainstream classroom consisting of approximately 20 students, many without IEPs. Further, the classes would have a higher student-to-teacher ratio compared to the ratio in the former IEP. The significant difference in class size, school size, student-teacher ratio and the proportion of students with disabilities per class indicate that the plans were not equivalent. The fact that certain services in the proposed IEP, such as speech therapy, were similar to the former IEP, does not mitigate the glaring differences between the IEPs. For nearly identical reasons, the same goes for the other sibling's IEP. The district's argument that the ALJ focused solely on comparing the two campuses, rather than the substance of the programming, is rejected.

B. Letter to State Directors of Special Education (OSEP/OSERS 2022). This letter was issued on November 10, 2022 to address the child find duty to conduct timely evaluations, especially of highly mobile students. It can be found at: https://sites.ed.gov/idea/files/Letter-to-State-Directors-of-Special-Education-on-Ensuring-a-High-Quality-Education-for-Highly-Mobile-Children-11-10-2022.pdf.
If the former district of a highly mobile student (such as a military, migratory, homeless, or foster care child) began but did not complete evaluating a student before the student transferred, the new district may not delay evaluating the student in favor of implementing MTSS/RTI. While IDEA requires a district to complete an initial evaluation within 60 days, districts are encouraged to evaluate incoming highly mobile students on an expedited basis. According to stakeholders, when some highly mobile children transfer after the previous district began an evaluation, the new district postpones evaluating the student so it can complete its own tiered intervention process. While a new district may choose to provide general education interventions while it is completing the evaluation, it may not delay evaluating on that basis. In addition, IDEA requires the provision of comparable services to transfer students until the new district adopts the prior IEP or develops its own. According to stakeholders, when some children transfer during the summer, the new district refuses to provide ESY services as comparable services, because the new district believes its obligation to provide comparable services is limited to services the child would receive during the normal year. "The new district may not refuse to provide ESY services to that child merely because the services would be provided during the summer." (Note: There is an ALJ opinion from California dated June 9, 2022 that held that when a student transfers over the summer (not during the same school year), comparable services are not

required, including ESY: Los Gatos-Saratoga Union High Sch. Dist. 122 LRP 22187 (SEA CA 2022)).

BEHAVIOR/FUNCTIONAL BEHAVIORAL ASSESSMENTS/BIPS

A. Upper Darby Sch. Dist. v. K.W., 123 LRP 22649 (E.D. Pa. 2023). Administrative decision finding that the district provided FAPE during the 2020-21 and 2021-22 school years is reversed and compensatory services for approximately 1800 hours is awarded. This is so where the behaviors of the student with autism deteriorated and the district failed to appropriately conduct an FBA and develop a BIP to address them. Districts are required to consider the use of positive behavioral interventions where a student's behaviors impede learning or that of others. During the 2019-20 school year, the student began to frequently exhibit severe behaviors, such as shouting obscenities, hitting and kicking others, and elopement. A 2019 IEE and testimony from school personnel described frequent hyperactivity, rule-breaking behavior, aggression, anxiety, depression, and inattention. However, there is no evidence that the district conducted an FBA, developed a BIP, or incorporated behavioral interventions into the student's IEPs. While the district pointed out that the student received supports through a "school-wide" behavioral support plan, this was not sufficient for FAPE, because the rewards-based supports were often ineffective. Further, teachers were required to "tweak" the plan to address the student's need for 1:1 behavioral services.

B. B.S. v. Waxahachie Indep. Sch. Dist., 83 IDELR 2 (5th Cir. 2023) (unpublished). District court's decision that the district provided FAPE is upheld. In the Fifth Circuit, an IEP is appropriate if it is based on the student's unique needs, administered in the LRE, implemented in a collaborative manner, and allows for academic and nonacademic progress. The failure on the part of the district to conduct an FBA and develop a BIP at the beginning of the year for the third grader with autism did not violate IDEA. Here, the student's special education teacher was well aware of the student's noncompliant, disruptive and sometimes violent behavior and recommended new behavioral goals for the student. In addition, the IEP team developed behavior management strategies that included frequent breaks and opportunities to walk or run with staff outside, and the student's teachers testified that those strategies were helping the student. While the student's behaviors deteriorated in February 2017 as he was adjusting medication changes and family-related issues, the district took steps to address the student's increasingly aggressive and violent behaviors by seeking consent to an FBA and scheduling an IEP meeting. The district also moved the student to a classroom that imposed fewer academic demands. "This type of responsiveness...is what IDEA requires to ensure that an IEP is sufficiently individualized."

C. E.W. v. Department of Educ., 83 IDELR 14 (D. Haw. 2023). Hearing officer's decision that the student's IEP team was not required to physically incorporate the student's BIP into the IEP is upheld. There is no legal requirement under IDEA that a BIP actually be included in an IEP. Here, the IEP's supplementary aids and services included several behavioral interventions and supports, such as daily sensory supports, visual support, and priming prior to transitions, based upon the student's individual needs and parent input.

These supports were not unilaterally chosen by the school for the student. Rather, the record shows that the parent participated and conveyed her input and concerns to the team. In addition and in Hawaii, schools are required to obtain parent input when revising a BIP. Given that, the fact that the BIP was not incorporated fully into the IEP was not fatal to the parent's ability to meaningfully participate. Further, the district provided the parent with a copy of the BIP and a BCBA explained each component of the plan with the parent.

D. H.L. v. Tri-Valley Sch. Dist., 82 IDELR 229 (M.D. Pa. 2023). Hearing officer was correct in finding that the district provided FAPE to the student with ADHD and ODD during the 2017-18, 2018-19 and 2019-20 school years based upon the extensive efforts the district made through timely and repeated assessments and the development and modification of appropriate IEPs in response to the student's changing behavioral needs. "[U]nderstanding the IDEA does not mandate an 'ideal IEP,' only one that was reasonable at the time [citing Endrew F.], the district fulfilled its obligation." The district was willing and able to review and revise the student's IEPs throughout his education and staff responded to his disruptive behaviors with strategies that were specifically targeted to address them, using incentives they reasonably believed would motivate him. "Over and over again, the district modified H.L.'s IEP to ensure it remained 'reasonably calculated to enable [him] to make progress appropriate in light of [his] circumstances.' That H.L.'s behaviors worsened does not mean they were not assessed or addressed."

DISCIPLINE/MANIFESTATION DETERMINATION

A. D.N. v. School Bd. of Bay Co., 83 IDELR 86 (Fla. 1st DCA 2023). Student's appeal of expulsion by the School Board for his participation in a riot involving more than 50 students in a school courtyard is affirmed, and he was not entitled to be treated as a student with a disability by the Board. At the time of the incident, the 15 year-old ninth grader was not identified as a student with a disability under IDEA; nor had his mother ever asked that he be evaluated for special education services until she was notified of the student's expulsion hearing and obtained assistance from an advocacy group. While the student had a history of 52 disciplinary referrals between 2013 and 2021 for things like fighting, drug use/possession, skipping school, defiance, physical attack, theft, class disruption and inappropriate behavior, IDEA's relevant regulations indicate that a school district is deemed to have knowledge that an unidentified student is a student with a disability if, prior to the incident: 1) the parent requests an IDEA evaluation or services; or 2) school personnel express concerns that student behaviors are caused by a disability. Although numerous school personnel reported this student's behavior problems, "there is no record that any of them viewed the behavior as disability-related or reported them as such to the school's or district's special education or other supervisory personnel." Thus, the school district's treatment of the student under the rules governing procedures where a district does *not* have knowledge that a student has a disability was appropriate and the district was authorized to impose disciplinary measures authorized for students without disabilities. Where the mother could not prove she ever asked for a disability evaluation or an IEP, and not a single trained educator or school counselor over the years expressed any concern that a disability was causing the student's behavior, the school board could not be expected to "leap to that conclusion on its own."

B. G.D. v. Utica Comm. Schs., 83 IDELR 12 (E.D. Mich. 2023). In order to remove a student to an IAES for up to 45 school days without regard to manifestation for possessing a "dangerous weapon" at school, this kindergartner with a disability was not in possession of a dangerous weapon. While the object's use by the student may be relevant to whether it is a "dangerous weapon" and has the capacity to endanger life or inflict serious bodily injury, this child did not possess dangerous weapons. It is difficult to imagine any instance where a kindergarten student could cause death to anyone by throwing objects like plastic phone receivers, books, or pieces of a broken thermometer (not matter how broken or jagged). These items were not readily capable of causing a substantial risk of death.

C. C.D. v. Atascadero Unif. Sch. Dist., 83 IDELR 80 (C.D. Cal. 2023). ALJ's decision that the student's physical aggression toward his teacher was not a manifestation of his disability is upheld. Although the parent attributes the student's behavior to poor impulse control and communication difficulties due to his disabilities, the ALJ's decision that the behavior was not a manifestation of his ADHD, intellectual disability, or speech and language impairment was correct. Based upon detailed documentation kept by involved staff about what happened before, during, and after the incident, it appears that the student's behavior of physical aggression was a choice. For example, the district's school psychologist testified that the student's conduct did not arise as a result of his ADHD or cognitive functioning and that the aggressive incidents for which the student was disciplined were separated by a period of time that gave the student sufficient "time to make a choice about what behavior he wanted to do." In fact, school staff accompanying the student for a distance from a construction site next to the administrator's office and then into the office area noted that the student could have engaged in aggression at any point in time during that distance but did not. Rather, the student waited until a preferred staff member left before engaging in the aggressive behavior toward his teacher. It is also notable that witness testimony and documentation showed that the student used functional communication to achieve his goal of being able to stay in the unsafe construction area and this is evidence of the student's cognitive understanding, as well as his receptive and expressive processing of what was going on. For example, in response to a request that he move away from the construction site, the student communicated that he was refusing to comply and that he felt he was safe. The student also put on his glasses to demonstrate that he was aware that flying debris could hurt his eyes. Further, in response to his teacher's statements that it looked like something was bothering him, he used functional language to communicate that he was not upset, that he was refusing to leave the construction area, and that he felt he was safe. Given the student's repeated use of functional language during the entire incident, it is more likely than not that the student engaged in deliberative planning in response to not being allowed to remain near the construction site. This conclusion is again further supported by the fact that he waited until preferred staff was not present before he became physically aggressive toward his teacher. As the ALJ noted, this is evidence that the student "knew what he was doing and how to differentiate between preferred and non-preferred staff." Thus, the ALJ was correct in concluding that the student's aggression toward the teacher was not impulsive, and that the student processed the situation and understood it.

D. Lemus v. District of Columbia International Charter Sch., 83 IDELR 18 (D. D.C. 2023). District's motion for summary judgment is granted and the hearing officer's decision in its favor is upheld where the parent of a student with TBI and a diagnosis of PTSD did not show that the district made an improper manifestation determination and expelled him for threatening to shoot his math teacher. First, the parent did not show that the district failed to implement the student's IEP or BIP. Second, with respect to the MDR team's decision that it was the student's relationship with gangs and not his TBI that caused him to threaten to shoot his math teacher after she reported the student's use of gang gestures during class, the parent did not show that the decision was incorrect. IDEA mandates that MDR teams review all relevant information in the student's file, including the IEP, any teacher observations, and any relevant information provided by the parents. "Relevant information" is information that is pertinent to whether the conduct is directly and substantially related to a disability. Here, the team reviewed the student's evaluations and diagnostic results, information from the student's mother, observations of the student, and other information. The parent's claim that the team was required to consider the student's PTSD is rejected where PTSD is not a recognized disability under IDEA. Accordingly, the team was not required to consider it. In addition, the hearing officer was correct in finding that the student's threat was not the product of his disability but instead was based upon his association with gang members. In a footnote rejecting another parent argument, the court also noted that "[f]urthermore, the IDEA requires that the MDR Team, whose actions the Hearing Officer reviewed, focus only on Orlin's documented disability under the IDEA, as the MDR Team must determine if Orlin's conduct was a manifestation of that disability."

METHODOLOGY

A. Falmouth Sch. Dept. v. Doe, 44 F.4th 23, 81 IDELR 151 (1st Cir. 2022). District court's decision ordering the school district to reimburse the parents for their unilateral placement of the student in a private school for students with disabilities is upheld where the reading and writing progress of the OHI student diagnosed with "double deficit dyslexia" (orthographic and phonological processing) was essentially "stagnant" from second to fourth grade. While districts have significant discretion to choose which educational methodologies to use when instructing students with disabilities, the district's chosen methodology must be shown to allow the student to make progress appropriate in light of the student's circumstances. The methodologies that the district used did not meet this standard. For instance, when the IEP team convened in the middle of the student's second grade year, the student was still reading and writing at the kindergarten level, despite having received a full year of specialized instruction using the SPIRE reading program. Further, the student's special education teacher identified orthographic processing as the student's "biggest challenge," but the resulting modifications to the student's IEP were not sufficient to ensure FAPE. Rather, the district proposed mere incremental increases in the amount of specialized instruction provided to the student and did not further evaluate his orthographic issues or reconsider the type of specialized reading instruction he might need. Although the IEP team amended the student's program to include Lindamood-Bell instruction after private evaluators indicated that methodology was needed for progress, the student's special education teacher could not implement Lindamood-Bell without

assistance. The district's argument that the private school is not the LRE because it only serves students with disabilities is rejected because the student made progress at the private school where the Lindamood-Bell method is used.

B. C.K. v. Board of Educ. of Sylvania City Sch. Dist., 81 IDELR 212 (6th Cir. 2022) (unpublished). District court's ruling that the IEP was reasonably calculated to provide appropriate progress to the student with autism and SLD is affirmed. Just because the fourth grader is not able to read at grade level does not mean that his 4th grade IEP was inadequate or that it denied FAPE because it failed to include intensive Lindamood-Bell reading instruction. IDEA does not guarantee grade-level advancement or require a specific educational outcome. Rather, the key question is whether the IEP will allow the student to make progress appropriate in light of the student's circumstances. Here, the student's 24-page IEP thoroughly documented his progress in reading since second grade. The IEP was "thoughtful, thorough, contained input from a wide range of sources, and was tailored to his needs as understood by all parties at the time." The parent's argument that the student's progress resulted from his participation in an intensive Lindamood-Bell private tutoring program is rejected because the student made progress in reading even when he was not receiving private tutoring. Further, the student's participation in the tutoring program, which required him to miss the first 90 minutes of school each day, impeded his progress in other areas, such as communication and socialization. "[I]n rejecting the intensive [Lindamood-Bell] programming as proposed by [the] parents, [the district appropriately balanced [the student's] then-five IEP goals...with its obligation to provide [the student] an overall education."

C. J.L. v. Lower Merion Sch. Dist., 81 IDELR 251 (E.D. Pa. 2022). Hearing officer's decision in favor of the school district is upheld, and the district's motion for judgment on the parents' claims is granted. The parents claim that the district denied FAPE to their nonverbal teenager with autism and a speech language impairment when it refused to allow him to use his preferred method of communication, Spelling to Communicate (S2C), in the classroom (S2C is a form of Facilitated Communication based on the Rapid Prompting Method). To use this method, the student needs a trained communication partner who can accompany him throughout the school day to hold the laminated letterboard he uses to spell. In declining to allow for the student to use S2C, the district has good reason for doing so. For example, the district found that S2C is not research-based, that there was danger of the student becoming overly dependent on a communication partner, and the student was in fact unable to communicate effectively with the letterboard unless his mother guided him to the correct answers, as observed by district personnel. The district met its obligation to address the student's communication needs by allowing him to use other communication methods, such as typing and unassisted letter boarding. Even were S2C effective, the district has the discretion to choose an appropriate methodology, and "it is not the parents', the Hearing Officer's, or this Court's role to second guess the communication methodologies the District chose to implement."

D. M.S. v. Downingtown Area Sch. Dist., 82 IDELR 32 (E.D. Pa. 2022). Independent hearing officer's decision that the district provided FAPE to an 8 year-old girl with developmental delays and childhood apraxia is upheld and the parents are not entitled to reimbursement

for private placement of their daughter at the Talk School. IDEA does not require a district to specify the use of any particular education methodology in a student's IEP. Thus, the district did not have any obligation to include the use of the Dynamic Temporal and Tactile Cueing (DTTC) approach recommended by the parents' expert. Here, the district's evidence reflects that the method used by its own providers was consistent with the DTTC method. The parents' concern that the district's therapists are not qualified to provide the speech language services their child needs in order to make appropriate progress is not warranted, as the district's SLP testified to her ability to offer services consistent with the DTTC method. In addition, the IEP includes annual goals and objectives in the areas of speech and language, which is counter to the parents' argument that the IEP does not meet their child's needs.

POST-SECONDARY TRANSITION SERVICES

A. del Rosario v. Nashoba Regional Sch. Dist., 83 IDELR 11 (D. Mass. 2023). Hearing officer's decision that the district provided appropriate transition services to high functioning adult student with autism is upheld, and the student is not entitled to compensatory education services. The district's Transitions Program in which the adult student participated after she graduated in May 2016 provided appropriate transition services. While Transitions is where in-district students with disabilities are generally placed after they turn eighteen until they reach the age of 22. In the program, the students attend a variety of job sites during the week, but those job sites have not included commercial bakeries or kitchens. During the time the students are in the classroom, they focus on individual IEP objectives and the purpose of the program is to teach skills that can be applied to any occupation, as well as skills needed to increase independence in other aspects of adult life. The program is highly individualized and tied to the goals of each student's IEP and is not designed to prepare students to enter particular trades. While the guardian ultimately objects to the program because it did not adequately prepare her to achieve her long-term goals of obtaining employment in a commercial baking/cooking setting, IDEA does not require that for FAPE. Here, Transitions provided an opportunity for the student to bake and cook in a non-commercial setting and to develop a business where she sold baked goods to school employees, and learned how to buy ingredients, budget, take orders and payments, and package and distribute her goods. Importantly, she was also exposed to non-cooking related skills, such as working with others, completing assigned tasks, and other types of vocational skills and made progress in improving her "soft skill" deficiencies, such as accepting feedback, redirection, and interacting with other employees. While the IEPs and services provided did not expose the student to a commercial baking setting, "they did take her interests into account by exposing her to baking and cooking, food preparation, and the collateral skills necessary to achieve her goals." In addition, "the Court finds it of consequence that the IEPs put in place by [the district] provided [the student] with skills in 'interpersonal relations,' workplace behavior, self-regulation, and independence that would help her succeed in any employment situation." While the district was not able to find a bakery work site for the student, it did provide work sites that would assist in her vocational and emotional growth. The issue here was whether the district's IEP was inappropriate, not whether her parents preferred program might be a better fit for her needs and interests.

PRIVATE SCHOOL PLACEMENT/SERVICES

A. Steckelberg v. Chamberlain Sch. Dist., 77 F.4th 1167, 123 LRP 24587 (8th Cir. 2023). District court's award of reimbursement to the parents of a student diagnosed with PANDAS in the amount of $90,375 for placement at an out-of-state Academy and $9,221 in travel expenses is affirmed. To recover reimbursement for a unilateral private placement, parents must show that the school district did not provide FAPE in the form of an IEP that was reasonably calculated to enable the student to make appropriate progress in light of the student's circumstances. Here, when writing the student's IEP for her junior year in high school, the school did not consider the behavior support plan presented by a behavioral analyst, which contained "the nuts and bolts of the behavior change process" and detailed "how the school personnel w[ould] support [AMS's] developing/emerging appropriate behaviors." While the district's IEP set goals for the student, the expectation was near-perfect compliance. In addition, when the district placed the student at home to learn after behavioral issues occurred, the amended IEP lacked adequate information about how the student was going to make progress despite the change in learning environment. Even worse, the student was left at home without adequate academic support. In addition to the denial of FAPE, the parents are also required to show that the Academy placement was appropriate for their child. The district's suggestion that the Academy was not appropriate because it focused on the student's behavioral issues, not her educational ones, is rejected. The Academy was "specially designed" for the student, as it was equipped to handle her problematic behaviors and structured so that students could attend class and counseling during the week. In addition, the Academy partnered with an online school to allow students to focus on therapy and social skills outside of class. While there, the student completed different classes and, importantly, did well enough to graduate and move on to college. All things considered, the Academy was an appropriate placement, so reimbursement was not error. The district's argument that the district court erred in reimbursing the parents their cost of traveling to the Academy is rejected. Once a court holds that the public placement denied FAPE, "the court is authorized to grant such relief as the court determines is appropriate."

B. Autauga Co. Bd. of Educ., 83 IDELR 63 (M.D. Ala. 2023). Hearing officer's decision denying the parents' request for reimbursement of private school tuition for placement of their kindergartner with ADHD is upheld, but for different reasons. To obtain reimbursement for private schooling, parents must show that 1) the district denied FAPE; 2) the private placement was appropriate for the student; and 3) the equities favor reimbursement. Even where a district denies FAPE to a child under IDEA, parents must still show that the private placement was appropriate and met the child's disability-related needs. Here, the parents enrolled their child at Success Unlimited Academy after the district moved him to a behavioral unit at the alternative school. While the parents claim that the student's behaviors improved in the private school, one of the parents sat outside of the classroom at all times while class was in session to address his behavioral outbursts when needed. Further, the child's behavioral problems continued, in spite of his parents' interventions. After only 19 days at the private school, the child was moved from four days of schooling per week to a total of only two hours per week of off-site tutoring on behavior and academics based on its inability to manage the child's behaviors. In addition, the

school did not offer OT services to address the child's severe motor deficits. Thus, the parents are not entitled to reimbursement for the cost of the private schooling because the placement failed to meet the child's needs. While the hearing officer denied reimbursement because of the district's good faith efforts, this court is affirming the ruling based on the private school's failure to meet the child's needs.

STUDENT PARTICIPATION IN PRIVATE THERAPIES

A. Smith v. Orcutt Union Sch. Dist., 81 IDELR 153 (9th Cir. 2022) (unpublished). The district court's decision in favor of the school district's motion for judgment on partial findings is affirmed where the parent of a 10-year-old with autism was unable to show that private ABA therapy during the school day is necessary for the child to access his education. Here, the child struggles with significant behavioral issues and receives ABA therapy. His mother has requested that outside ABA therapists be allowed to accompany him during the school day as a reasonable accommodation under 504/ADA to afford the child access to his educational program. To establish a violation of 504/ADA, the parent must show that the district denied services to the child that he needs to enjoy meaningful access to the benefits of a public education. Although the child needs medical treatment for his autism, ABA therapy is the best treatment available, and he benefits from that treatment, there is insufficient evidence that he needs outside ABA therapists to accompany him at school to meaningfully access his education. There is no evidence of the extent to which the child's behavioral issues affect his ability to remain in the classroom and participate in instruction, how often he elopes, soils himself, or requires removal because of other behavioral problems. The parent has also failed to show how the child's significant behavioral issues keep him from accessing education or how ABA therapy would help. Although the parent's expert asserted the value of ABA therapy for children with autism generally, she did not mention the child's specific needs and did not opine that ABA therapy is universally necessary for children with autism to meaningfully access instruction or that this child requires that. While ABA therapy is medically necessary for the child, that is not enough to establish that it is necessary to allow outside ABA therapists to accompany him during the school day in order to access his education.

STATUTE OF LIMITATIONS

A. Charlotte-Mecklenburg Bd. of Educ. v. Brady, 66 F.4th 205, 83 IDELR 27 (4th Cir. 2023). District court's ruling upholding the state review officer's decision is affirmed finding that the district's failure to provide PWN and a copy of the notice of IDEA's procedural safeguards to the parents barred the application of North Carolina's one-year statute of limitations to due process hearing claims brought in 2018. In 2013, the student's father provided to the student's 504 team a copy of an email from the student's private psychologist seeking help for the student, asking about what resources the district could provide, and mentioning the possibility of the student qualifying for an IEP under IDEA as a student with OHI. The email did more than notify the district of the student's diagnoses. Specifically, the email said, "We understand that with her specific diagnoses, [A.B.] qualifies as OHI and is eligible for an IEP -- is tutoring covered by an IEP? Is there something that is covered by an IEP that can benefit her?" As such, the email constituted

an evaluation request, even though an explicit request for an evaluation was not made. Accordingly, because the district "withheld information" by failing to provide the parents with a copy of the procedural safeguards or a PWN following receipt of the February 2013 email, the withholding exception to the statute of limitations applies and prevents the student's claims from being time barred. Thus, the SRO's decision is confirmed.

SECTION 504 DISCIPLINE

A. W.G. v. Aristoi Classical Academy, 83 IDELR 43 (S.D. Tex. 2023). Charter school's motion to dismiss student's 504 and ADA claims is granted where Section 504 expressly permits LEAs to take disciplinary action against a student with a disability who "currently is engaging in the illegal use of drugs or in the use of alcohol" to the same extent that such disciplinary action is taken against nondisabled students. The facts are that the student was expelled for admittedly drinking a mixture of whiskey and soda from his water bottle throughout the school day.

PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES

A. Cody v. Kenton Co. Pub. Schs., 82 IDELR 182 (E.D. Ky. 2023). There is no evidence that the district discriminated against a high schooler with deficits in executive functioning and ADHD on the basis of disability when it suspended him from the basketball team. Therefore, the student's ADA/504 claims are dismissed. Here, the student is required to show that he 1) has a disability; 2) was otherwise qualified to participate in the district's program or activity; and 3) was excluded from participating in or denied the benefits of the district's program or activity by reason of his disability. With respect to the third element, there is no evidence that the high school's athletic personnel unfairly disciplined the student due to disability. Rather, the student's behavior and attitude over time warranted the consequences that were imposed when the student allegedly spoke to the basketball coach in a manner that was considered aggressive, disrespectful and agitated. In addition, the coach and athletic director did not dismiss the student from the team until the student made an inappropriate sexual comment to a cafeteria employee. The guardians' allegation that this was an excuse for discrimination on the part of the district is rejected. Indeed, bother guardians reported that the coach and athletic director were unaware that the student had a disability for the majority of the school year and, in fact, the student testified that he did not believe any person at the school intentionally discriminated against him because of his disability. There is simply no evidence that the district's disciplinary decisions were motivated "solely by reason of" the student's disability.

SECTION 504 REGULATIONS STATUS

A. As we discussed last year, the Office for Civil Rights announced on May 6, 2022 its intent to issue proposed revisions to the 45-year-old 504 regulations enacted in 1977. In the Fall of 2022, the Department included in the President's regulatory agenda the intent to have the proposed amended regulations out by May of 2023. That did not happen, and on June 14, 2023, the regulatory agenda was amended to reflect the intent to issue the proposed

regulations in August 2023. August 2023 has come and gone and K-12 Dive reports that the proposed regulations are probably months away. https://www.k12dive.com/news/section-504-rule-still-being-drafted/693882/ As of last Thursday evening, the President's Unified Agenda still reflects August 2023 as the expected date for the proposed 504 regulations to be published. To keep up on the status in the future, go to: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1870-AA18

SECTION 504/ADA AND ACCOMMODATIONS ON ASSESSMENTS

A. Valles v. ACT, Inc., 122 LRP 24349 (E.D. Tex. 2022). Eighteen year-old high school senior's emergency motion for TRO for accommodations on the July ACT is denied where he has not shown a likelihood of success on the merits of his claim that he has a disability under ADA/504. Plaintiff argues that he is entitled to ACT accommodations (e.g., preferential seating and 50% more time to take the test) because of his ADHD and other diagnosed conditions (Mild Specific Learning Disorder with Impairment in Mathematics; Moderate SLD with Impairment in Written Expression; Auditory Processing and Working Memory Deficits; Visual Processing Deficits; and Fine Motor/Handwriting Deficits). Under ADA, an impairment must substantially limit a major life activity only if it does so in comparison to "most people in the general population." Although concentrating and thinking are "major life activities" under ADA/504, the diagnosis of an impairment alone is not sufficient to show that a person is disabled. Even though a psychoeducational evaluation done in January of 2022 by a licensed psychologist shows that plaintiff demonstrates a significant weakness in both his short-term working memory abilities and his processing speed skills, even with these weaknesses, most of his abilities still fell within the average, above average or superior range. While plaintiff's conditions "may put him at a disadvantage compared to other test-takers, this is not the standard for assessing whether Valles is 'disabled' under the ADA. To succeed on his claims, Valles must show that he is substantially limited as compared to 'most people in the general population.'" While both of plaintiff's doctors note some difficulties with timed standardized tests, plaintiff's results never fell below the low average range, and neither doctor concluded that these difficulties substantially impaired plaintiff's abilities. "Moreover, Valles' long history of academic success weighs against a finding of disability." Thus, a TRO is not warranted in this case and relief is denied.

ASSOCIATIONAL DISCRIMINATION

A. Ambrose v. St. Johns Co. Sch. Bd., 83 IDELR 16 (M.D. Fla. 2023). School district's motion to dismiss the parent's 504/ADA claims for associational discrimination is denied. This parent, who has disabilities (lupus, rheumatoid arthritis, anxiety and panic disorder), is allowed to proceed with associational discrimination claims on behalf of her 5 year-old nondisabled son. The case focuses upon the district's transportation policy which limits bus transportation to students who live at least two miles from the school. This child's parent claims that her inability to drive or walk the 1.9 mile distance to and from school caused her child to miss school on the days that she cannot arrange transportation. In the Eleventh Circuit, nondisabled individuals can seek relief for harm they suffer because of

their association with an individual who has a disability. Further, Title II of the ADA provides a remedy to "any person alleging discrimination on the basis of disability." Thus, the child does not need to have a disability himself to sue the district for its failure to provide an exemption to its transportation policy. The district's alleged refusal to provide the child with bus service as an accommodation for his mother's disabilities impacts the child as well as the parent. Thus, the child has plausibly alleged that associational discrimination has denied him meaningful access to education. In addition, the parent's 504/ADA claims on her own behalf may proceed based upon the allegation that the district made exceptions to the "two-mile rule" for nondisabled parents.