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

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It's been another active year in the area of special education law, and things don't appear to be slowing down! Even though IDEA and Section 504 have not changed in many years, there continues to be an enormous amount of litigation going on, as courts and agencies attempt to interpret and apply the provisions of these laws to individual cases. On top of that, there is a growing body of case law addressing the mandate for FAPE during school closures and other disruptions due to COVID. In this session, I will update the audience on significant special education "legal happenings" so far in 2022, including an overview of relevant court decisions and federal agency interpretations.

COVID-RELATED AGENCY GUIDANCE AND COURT DECISIONS

U.S. DOE COVID-Related Action/Guidance

A. Lessons from the Field Virtual Session: "Providing Required Compensatory Services that Help Students with Disabilities in Response to the COVID-19 Pandemic" This is a Webinar provided by U.S. DOE (OCR/OSEP) Leaders on July 27, 2022. You can find all materials related to this Webinar and other resources at https://safesupportivelearning.ed.gov/events/webinar/lessons-field-providing-required-compensatory-services-help-students-disabilities.

B. Los Angeles (CA) Unif. Sch. Dist. (OCR 2022). On April 28, 2022 and having completed a "directed investigation" initiated by OCR on January 12, 2021, OCR announced that it reached a resolution agreement with L.A. Unified School District. The investigation was primarily geared toward the systemic failure to provide services identified in IEPs and 504 Plans to students with disabilities during the COVID-19 pandemic and times of remote learning, as well as the district's plan for addressing the provision of compensatory services to students for whom services were not provided. It is highly suggested that school districts familiarize themselves with relevant documents related to this investigation and its outcomes for the second largest school district in the country. The 21-page letter from OCR notifying L.A. Unified's 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/09215901-a.pdf The 9-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/09215901-b.pdf

Some "take aways" from these documents include the following:

OCR's General Findings:

During remote learning, the District (among other things):

(1) limited the services provided to students with disabilities based on considerations other than the students' individual educational needs, did not conduct evaluations of students with disabilities prior to making significant changes to their placements, and did not ensure that the placement decisions were made by a group of persons knowledgeable about the students' needs;
(2) failed to accurately or sufficiently track services provided to students with disabilities; and
(3) failed to develop and implement a comprehensive plan adequate to remedy the instances in which students with disabilities were not provided FAPE during remote learning (i.e., an appropriate compensatory services plan).

Some Evidence Supporting the General Findings:

(1) While the district developed a "recoupment services program," to address "learning loss" due to pandemic-related school closures, it included a "significant loss of learning" standard (too stringent and not defined) and it did not require individualized decisions by IEP or 504 teams for students with disabilities. In addition, the program was intended to consider academic and enrichment programs and services for all students and, therefore, did not allow for individual decisions to be made about the need for compensatory services by IEP/504 teams with the opportunity for parent participation in the decision-making. (While the district has made some amendments to its process, those are not found to be completely sufficient);
(2) In tracking the provision of services during COVID, staff was instructed to include attempts to communicate with students and parents as the delivery of actual services;
(3) Staff was informed that the district was not responsible for providing compensatory education to students who did not receive FAPE during school closures because the school closures were not the district's fault. In addition, local regional special education directors all stated that the district had reserved compensatory education for circumstances where the district was at fault for the non-provision of services;
(4) The district communicated to staff a policy that it was not obligated during remote learning to provide services in the same level or amount (by service minutes) that was specified in each student's IEP;

(5) While the district is in the process of conducting approximately 6,000 assessments of students with disabilities and providing compensatory services when an IEP team determines that a new or increased service is required (pursuant to corrective action ordered by the California Department of Education), this does not address the needs of *all* students with disabilities who may be entitled to compensatory education.

Action that the District Will Take Under the Agreement:

The resolution agreement focuses on the development of the district's plan for compensatory education for students with disabilities impacted by remote learning during the COVID-19 pandemic only, which will be implemented in addition to its existing processes of compensatory education and recoupment and resources for addressing and tracking issues arising from the delivery of a FAPE during the Pandemic Period (from the time the district was either providing remote learning instruction and/or hybrid in-person and remote learning instruction, starting March 17, 2020 through the end of the 2021-22 school year due to COVID). The district has agreed to:

(1) Designate a Plan Administrator (its Deputy General Counsel) to oversee the creation of the compensatory education plan and support the Administrator with sufficient district-level staff to ensure effective implementation of the Plan;
(2) Create a Plan for compensatory education that will describe what efforts the district will undertake to support the district's current recoupment or compensatory education determinations for all students with disabilities within the district. The Plan will describe:
    - Criteria for determining for each student whether the student did not receive FAPE during the Pandemic Period and the method for determining compensatory education for them;
    - Tracking for each student whether the decision has been made, the amount, nature of, and timeframe for compensatory education (if any) to be provided; and how the district will monitor the provision of the services to those who are to receive it;
    - Staff training and outreach to parent/guardians and stakeholders regarding the Plan; and
    - Reporting requirements regarding training about the Plan.
(3) For determining Compensatory Education, use the following criteria and process:
    - IEP/504 teams will make the compensatory education determinations using appropriate meeting processes and will make and document compensatory education determinations;
    - In making the determinations, IEP/504 teams will consider the following factors:
        - the regular or special education and related services required by the student's 504 plan or IEP that was in effect at the beginning of March 2020;
        - the frequency and duration of missed instruction and related services;

- whether special education and/or related services that were provided during the Pandemic Period were appropriate based on the student's individual needs;
- a student's present level of performance;
- previous rates of progress;
- the results of updated evaluations;
- whether evaluations were delayed; and
- any other relevant information.

(4) Provide a student's parents access to information recorded by the district regarding the amount of special education, related aids or services provided during the Pandemic Period, including the option to review IEP service logs or discuss implementation of 504 Plan accommodations;

(5) If parents dispute the determination regarding services that were provided during the Pandemic Period, notify them of the process to challenge the determination consistent with procedural safeguards requirements that includes a process for reimbursement for out-of-pocket expenses incurred by parents to provide services required by an IEP/504 Plan during the Pandemic Period. District will also continue to provide appropriate notices of procedural safeguards, including the right to challenge the team's decision through an impartial due process hearing.

(6) For students for whom a recoupment determination has been made and is being implemented, IEP teams may consider those services, as appropriate, when determining the amount of compensatory education needed.

(7) IEP/504 teams will document (among other things) the compensatory education determinations made, including whether compensatory education is owed or not and the appropriate and reasonable timeframe for the completion of the agreed upon compensatory services.

(8) Comply with other significant reporting, data tracking, staff training and parent/guardian/stakeholder outreach requirements set forth in the Agreement.

C. Fact Sheet: Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504 (OCR February 17, 2022). This "Fact Sheet" can be found at https://www2.ed.gov/about/offices/list/ocr/docs/factsheet-504.html. The stated purpose: "to remind elementary and secondary public schools of their obligations under Section 504...to provide appropriate evaluations and services to students with disabilities during the COVID-19 pandemic, including schools' responsibility to provide compensatory services."

Some important excerpts:

> If a student with a disability did not receive appropriate evaluations or services, including the services that the school had previously determined they were entitled to, then the school must convene a group of persons knowledgeable about the student to make an individualized determination whether, and to what extent, compensatory services are required. Unlike the FAPE inquiry, which requires the group to determine appropriate

services going forward, the compensatory services inquiry requires looking backwards to determine the educational and other benefits that likely would have accrued from services the student should have received in the first place.

Compensatory services are required to remedy any educational or other deficits that result from the student with a disability not receiving the evaluations or services to which they were entitled. For example, a school may need to provide compensatory services for a student who did not receive physical therapy during school closures or for a student who did not receive a timely evaluation. Providing compensatory services to a student does not draw into question a school's good faith efforts during these difficult circumstances. It is a remedy that recognizes the reality that students experience injury when they do not receive appropriate and timely initial evaluations, re-evaluations, or services, including the services that the school had previously determined they were entitled to, regardless of the reason.

In general, the individualized determinations of whether, and to what extent, compensatory services are required must be made by a group of persons knowledgeable about the student, including, for example, school nurses, teachers, counselors, psychologists, school administrators, social workers, doctors and/or family members. The following factors may be relevant for the group of knowledgeable persons to consider in determining the appropriate type and amount of compensatory services:

- the frequency and duration of missed instruction and related services;
- whether special education and/or related services that were provided during the pandemic were appropriate based on the student's individual needs;
- a student's present level of performance;
- previous rates of progress;
- the results of updated evaluations;
- whether evaluations were delayed; and
- any other relevant information.

Ideally, the team of knowledgeable persons will come to a mutually acceptable decision regarding compensatory services to mitigate the impact of the COVID-19 pandemic on the child's receipt of services.

OCR goes on to suggest that a parent or guardian who believes that their child did not receive or is not receiving appropriate compensatory services may seek a hearing under the school's 504 procedures or file a complaint with OCR. "A school's agreement to provide compensatory services is one way OCR remedies disability compliance issues when appropriate."

Court COVID-Related Decisions

- **Early 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). 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). 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). 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.
>
> 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.

- **Class Action for Pandemic-Related Compensatory Services**

A. Z.Q. v. New York City Dept. of Educ., 80 IDELR 251 (S.D.N.Y. 2022). District's motion to dismiss class action complaint filed by the parents of students with disabilities is granted for lack of subject matter jurisdiction. Seeking to compel the district to develop a process for providing prompt make-up services to stem further educational harm caused by the pandemic's interruption to services, the parents must first exhaust their administrative remedies. Neither exception to the exhaustion requirement—futility or the unavailability of adequate relief via due process procedures—applies to the parents' claims here. While administrative delays or backlogs may rise to the level of futility, that does not apply because none of the parents have initiated due process. Further, IDEA's administrative hearing process explicitly provides for the parents' requested remedy and the fact that they want to "speed up the process of obtaining compensatory education does not change the fact that the administrative process provides the exact relief sought." In addition, the due process hearing system is an effective tool for determining whether and to what extent a student requires compensatory education. If the parents exhaust the process, "each student will reap the benefits of agency expertise" that will develop reasonable compensatory services fit for each individual student.

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

A. Carmona v. New Jersey Dept. of Educ., 81 IDELR 50 (D.N.J. 2022) (unpublished). Parents of 15 unrelated students with disabilities cannot show that the State violated IDEA's stay-put provision when every public and private school student in New Jersey switched to remote learning at the beginning of the pandemic. Thus, the parents' motion for an order requiring districts to provide in-person learning while their putative class action is pending

is denied. The parents have not demonstrated a reasonable probability of success on the merits of their case sufficient to warrant the injunctive relief sought. While IDEA's stay-put provision requires districts to maintain a student's then-current placement while an administrative or judicial dispute is pending, the statewide school closures in 2019-20 and 2020-21 did not constitute a proposed change of educational placement as contemplated by IDEA. Rather (and based upon the decision in *J.T. v. de Blasio*), stay-put only applies to individualized placement changes. Here, "the pivot to virtual instruction in New Jersey impacted schools throughout the state and affected all students." Thus, IDEA's stay-put provision does not apply to this situation.

B. Charles H. v. District of Columbia, 80 IDELR 163 (D.D.C. 2022). The District of Columbia is in contempt of court for the failure to comply with the court's Preliminary Injunction issued in June 2021 calling for implementation of the IEPs for 44 incarcerated students and status reports to the court every 30 days. "While things have improved for the month of January, every student currently enrolled in the [IYP] Program remains at an inexcusable educational deficit for this school year—a failure all the more baffling given that the Court entered its Preliminary Injunction months before the school year began." Because the district has failed to comply with the court's order and has not sought relief from the order due to any change in circumstances, the district is in contempt and has four weeks to submit an individualized plan for each student that describes how it will remedy the implementation failures for each student. The needs of each student must be identified and each must be provided with technology needed to participate in remote learning.

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

A. Beebe Sch. Dist. v. Does J.H. and R.H., 80 IDELR 289 (E.D. Ark. 2022). Due process decision requiring the district to reimburse the parents for one year of placement of their child in a private school specializing in dyslexia is reversed. While the third-grader's performance regressed by the end of third grade during the 2019-20 SY and during the COVID-19 pandemic, the district has demonstrated and documented its significant efforts to provide FAPE to the student during that time. From the beginning of the pandemic, the district supported the student and her parents through the "unexpected transition." For example, her teachers offered options for delivering her instruction: sending hard-copy work packets home; offering asynchronous video lessons to watch; and utilizing Google Classroom and other similar platforms to provide live instruction with students. The parents chose packets over the other methods of instruction. While the parents contend that the district stopped providing special education services and dyslexia intervention during the pandemic and that the instruction given through packets sent home every two weeks did not allow their daughter to make any meaningful progress, the record reflects that the student's teachers and other service providers tried to accommodate each student and family by offering various methods of remote instruction. In addition to packets, the student's dyslexia interventionist offered one-on-one time to her students through Google Hangouts and her speech therapist gave parents the options of packets to be sent home, assignments over Google Classroom, or tele-therapy over Google Meet but these parents never got back to the therapist about which option they preferred. "The District was flexible; [the student's] teachers were willing to make changes if things weren't working.

Her teachers testified that they regularly contacted [the student's] parents in telephone calls, text messages, and emails, but seldom received any response. [The district's dyslexia coordinator and special education supervisor] even went so far as to visit [the student's] home one evening after the district hadn't heard from [the student's parents in about two weeks." Notwithstanding the many challenges, adequate programs continued during remote instruction forced by COVID-19, and the district made a "significant effort to enable [the student] to make appropriate progress in light of her circumstances."

B. White v. District of Columbia, 80 IDELR 284 (D.D.C. 2022). In a case challenging several years of programming for the student with OHI, the hearing officer's finding that the parent failed to establish a denial of FAPE during April and May of 2020 is rejected. While the hearing officer found that the parent did not point to any authority that a district must provide a student with a computer or hotspot during a pandemic where remote instruction was necessary, this court notes that IDEA contains "no exception that would allow suspending special education services because a global pandemic forced schools online." In fact, the court is well-aware that the district made computers and other technology available to at least some children who needed it during the pandemic, and the student's specialized instruction should not have been suspended because his family did not have the means to acquire the requisite technology. Accordingly, judgment is entered in favor of the student with respect to the failure to implement claim for the 2019-20 school year. The case is remanded to the hearing officer to fashion a compensatory education award for this failure (as well as others), since the hearing officer is in a better position than the court to craft an appropriate remedy.

C. Aja N. v. Upper Merion Area Sch. Dist., 81 IDELR 198 (E.D. Pa. 2022). The relief ordered by a hearing officer to a high schooler for a denial of FAPE of 5.5 hours of compensatory education for each day school was in session from December 24, 2018 to February 12, 2021, including during virtual learning due to COVID, is affirmed. The student's IEPs for 9th, 10th and 11th grades were based on existing records as opposed to updated assessment data and failed to address his difficulties with memory, receptive language, and executive functioning. During that time, the district also repeatedly placed the student in classes far exceeding his academic abilities. The district's argument that it should not have to provide compensatory education for the days the school only offered virtual learning due to COVID is rejected. The district's argument based on U.S. DOE's March 2020 Q&A where it said that services to students with disabilities were not required during school closures if services were not provided to nondisabled students during that time is also rejected where the U.S. DOE issued clarifying guidance nine days later to clear up the "serious misunderstanding" about FAPE obligations during school closures. Further, "because neither the IDEA nor Department of Education guidance exempts schools from providing FAPEs to students with IEPs during the COVID-19 Pandemic, we conclude that the District was not exempted from delivering a FAPE to J.H." Thus, those days during virtual learning will not be excluded from the student's compensatory education award.

- **Challenges Regarding Masking Mandates**

A. E.T. v. Paxton, 41 F.4th 709, 81 IDELR 126 (5th Cir. 2022). Parents who alleged that a statewide ban on mask mandates in public schools prevented Texas school districts from accommodating medically vulnerable students during the COVID-19 pandemic do not have standing to challenge the governor's July 2021 executive order. Thus, the district court's ruling prohibiting the attorney general from enforcing the ban on mask mandates is vacated. Here, the parents can only challenge the ban on mandatory masking if they alleged an actual or imminent injury that was fairly traceable to the state officials' conduct and was likely to be redressed by a favorable decision. None of these requirements was satisfied. In addition, school districts are free to adopt policies about vaccines, plexiglass, hand sanitizer, and social distancing, so there is no support for the argument that mask mandates are necessary to prevent imminent injury. Indeed, the parents have not even attempted to show that one or any combination of these accommodations is insufficient to mitigate the risks of COVID-19 to a level low enough that their children could attend school. Further, some districts kept their mask mandates in place despite threats of enforcement action by the attorney general. Thus, the parents cannot show a connection between the ban and their children's risk of COVID-19 infection. It is also important that a ruling in the parents' favor would not require their school districts to adopt mask mandates; rather, it would only prevent the attorney general from enforcing the statewide ban. Given all of those factors, the parents do not have standing to challenge the executive order. Note: The dissenting Justice criticized the majority's view that the parents had brought a "fear of COVID-19" case as opposed to a disability discrimination lawsuit and stated that the district court's injunction was necessary to allow districts to accommodate medically vulnerable students.

B. The ARC of Iowa v. Reynolds, 81 IDELR 1 (8th Cir. 2022). District court's preliminary injunction against enforcement of the state's ban on mask mandates in public schools is vacated as moot. "The issues surrounding the preliminary injunction are moot because the current conditions differ vastly from those prevailing when the district court addressed it. COVID-19 vaccines are now available to children and adolescents over the age of four, greatly decreasing Plaintiffs' children's risk of serious bodily injury or death from contracting COVID-19 at school. Further, when Plaintiffs sought a preliminary injunction, delta was the dominant variant, producing high transmission rates and caseloads throughout the country. Now, omicron has become dominant and subsided, leaving markedly lower transmission rates and caseloads throughout Iowa and the country. The passage of time and acts of third parties have mooted the preliminary injunction." It is also noted, however, that the state law's language on banning mask mandates contains an exception for "any other provision of law" and states that the law does not apply where "any other provision of law" requires masks. "Any" makes "provision of law" a broad category that does not distinguish between state or federal law.

C. Douglas Co. Sch. Dist. RE-1 v. Douglas Co. Health Dept., 80 IDELR 194 (D. Colo. 2022). Where the county health department modified its public health order that had allowed for parental opt-out of mask mandates in response to a TRO, the school district that brought the action is a prevailing party in its Section 504/ADA actions. As a prevailing party in a 504/ADA action, the district is entitled to $95,134 in attorney's fees and costs.

D. Seaman v. Commonwealth of Virginia, 80 IDELR 260 (W.D. Va. 2022). State officials are preliminarily enjoined from enforcing the state's ban on mask mandates against 10 school districts who are now allowed to consider universal indoor masking as an accommodation for 12 unrelated students with medical conditions that place them at high risk for serious infection from COVID. In order to obtain injunctive relief, the parents needed to show that 1) they were likely to succeed on the merits of their 504/ADA claims; 2) injunctive relief is necessary to prevent irreparable harm to the students; 3) the balance of equities tips in their favor; and 4) an injunction is in the public's best interest. Here, the parents have met all four requirements. Because state law allowed all parents to opt their children out of mask mandates for any reason, these parents of vulnerable students with disabilities are likely to prevail on their claim that the state has unlawfully prevented districts from providing reasonable accommodations to their children. This is so because federal law requires that schools be able to provide reasonable modifications to general policies, and state law cannot prohibit an otherwise reasonable modification to state law. The parents have also shown irreparable harm where they are forced to choose between exposing their medically vulnerable children to a life-threatening illness and accepting subpar educational services. In addition, the community will benefit from greater protections against COVID and from upholding the ADA. However, the parental "opt-out" law is not invalidated. Instead, state officials simply cannot enforce state law in a way that will prevent districts from offering universal masking as a reasonable modification if determined needed for a specific student based upon a fact-specific inquiry.

NON-COVID-RELATED AGENCY GUIDANCE AND COURT DECISIONS

TITLE IX AND APPLICATION TO STUDENTS WITH DISABILITIES

A. L.K.M. v. Bethel Sch. Dist. 78 IDELR 217 (W.D. Wash. 2021). District's motion for judgment on the parents' 14th Amendment equal protection claim is denied where the district expelled their 9th grade student with an intellectual disability for "vulgar or lewd conduct" after an alleged assault by a special education classmate. Here, the district's sexual harassment policy is in question where it focuses on "unwanted" sexual behavior and could be viewed as a violation of the student's equal protection rights where some students cannot vocally articulate their objection to unwanted behavior on the part of other students. Pointing to the vice principal's statement that he did not regard the classmate's inappropriate touching as sexual harassment because the student did not object to it, it is unclear whether the district's policy equally protects those that are unable to object due to a disability. The policy only covers some students and not others (specifically those who cannot vocally articulate their objection), necessarily discriminating against a protected class. Thus, the district's motion for judgment is denied at this juncture. Update: Berg v. Bethel Sch. Dist., 80 IDELR 222 (W.D. Wash. 2022). Jury's $500,000 verdict in the student's favor is upheld.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Doe v. Knox Co. Bd. of Educ., 80 IDELR 276 (N.D. Tenn. 2022). Student's 504/ADA claims are dismissed for failure to exhaust IDEA's administrative remedies. Here, the 9th-

grade gifted student alleges that she is missing approximately half of her educational time at the Stem Academy due to 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. It is alleged that this relief is necessary for the student "to safely access her education in the academic classrooms." While the student does not have an IEP, it is alleged that the sounds of classmates chewing and eating during class prevents the student from concentrating on academic instruction. Therefore, the plaintiff is seeking relief for a denial of FAPE. Because the harm the student alleges is a denial of public education, her lawsuit falls within the scope of IDEA's exhaustion requirement. Though the student does not have an IEP, her "heightened alertness to environmental stimuli" appears to meet IDEA's definition of other health impairment. In addition, the relief being sought—a ban on chewing and eating in academic classrooms—amounts to a request for a change in the delivery of instruction that could qualify as "special education." Therefore, the student meets IDEA's definition of a "student with a disability" even though she does not have an IEP and the student must first bring these FAPE claims to a due process hearing proceeding.

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Harris v. Autry, 80 IDELR 121 (11th Cir. 2022) (unpublished). While the court does not approve of the conduct that occurred here, the paraprofessional did not violate the 5-year-old's 14th Amendment rights when hanging him from the chalkboard by his belt loops when he acted out in class (which, the paraprofessional said was just "the normal procedure" for calming the child down). To plead a viable 14th Amendment claim for excessive corporal punishment, the child's grandmother needed to allege that 1) the paraprofessional intentionally used an amount of force that was obviously excessive under the circumstances; and 2) the force used presented a foreseeable risk of serious bodily injury. The 11th Circuit has upheld an educator's use of force when done for "pedagogical purposes," such as restoring order or maintaining discipline, when the amount of force is not excessive and when the child does not suffer serious injuries. Here, the paraprofessional intervened after the child screamed, kicked his bookbag across the floor, and threw his chair across the room. The child "defiantly disobeyed" his teacher's instructions leading up to the incident, so the amount of force used was not completely unrelated to maintaining order. While the child was diagnosed with PTSD as a result of the incident, he did not suffer any physical injury, so there was no violation of the child's constitutional rights, and the complaint is dismissed for failure to state a claim.

B. Nation v. Piedmont Indep. Sch. Dist. No. 22, 81 IDELR 213 (10th Cir. 2022) (unpublished). The district court's ruling granting judgment for the school district on the parent's 14th Amendment claim is affirmed. Districts are not automatically liable for the constitutional violations of their employees. To recover against the district, the parents of the nonverbal student with autism who was allegedly verbally and physically abused must show that relevant policy makers disregarded an obvious need for additional or different staff training and supervision despite knowing of potential harm to students. Here, the principal first

learned of the special education teacher's mistreatment of students in her class in September 2017 as reported by a paraprofessional. Though the principal expressed doubt about the allegations, he met with the teacher to discuss them. In addition, the principal developed written policies to increase supervision in the teacher's classroom and visited the classroom on multiple occasions. In January 2018, the district suspended the teacher after she dragged another student down the hall, but the notion that the principal's response to the 2017 reported conduct was not adequate is rejected. The principal received no other complaints until January, school administrators did not observe any inappropriate behavior, and the teacher received high marks on her evaluations. Thus, because the principal had no reason to believe employees were not reporting the teacher's abuse, the parents could not hold the district liable.

C. Baker v. Bentonville Sch. Dist., 81 IDELR 100 (W.D. Ark. 2022). School district's motion for judgment on the parents' 504/ADA claims for damages is granted, where there was no evidence that the district intentionally disregarded the visually impaired kindergartner's needs on the school playground. While the child did suffer multiple injuries at recess during the first 11 weeks of school (i.e., a collision with another student on the slide, a splinter, contusions after being kicked by another student on the monkey bars, and lacerations from tripping on a concrete slab), the injuries alone do not establish a failure to accommodate claim. The parents are required to show for purposes of their 504/ADA claims that the district acted in bad faith or with gross misjudgment. Here, the parents had approved the child's first two 504 plans that required staff members to be near the child during recess and to be on notice of where she intended to play. After the child tripped on the concrete slab, the district amended her 504 plan to require the recess duty teacher to wear a colored lanyard so that the child could easily identify the teacher. After the third 504 plan was enacted, the child did not have any injuries at school. Thus, no juror could find that the district substantially deviated from acceptable professional judgment, which is the standard required for proving bad faith or gross misjudgment.

D. 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.

E. A.V. v. Douglas Co. Sch. Dist. RE-1, 80 IDELR 160 (D. Colo. 2022). Parent's ADA, 504 and 4th Amendment excessive force claims against the district are dismissed, though they

are not dismissed against the sheriff's office. Here, it is alleged that an 11-year-old student with autism was handcuffed, arrested, charged and detained by SROs after the student's behaviors escalated when a classmate wrote on him with a marker and he, in turn, stabbed the classmate with a pencil, leaving a small cut on the classmate's arm. A paraprofessional asked for administrative help and the school's Principal and Dean went to the classroom, where the student complied when asked to leave the class to de-escalate. The student successfully de-escalated with the school psychologist but the Principal contacted the SRO about the injury to the classmate. When the SRO arrived and asked the student to go to the SRO office, the student refused but sat quietly. However, two SROs abruptly handcuffed the student, who remained handcuffed for more than two hours, was placed in a police vehicle (where he banged his head on the plexiglass), charged with crimes, and held at a juvenile detention center. Where the parent alleges that the sheriff's office and the district failed to accommodate the student's disability and used excessive force, these claims are dismissed against the district because school staff informed the SROs about the student's disability and his related responses and history of self-harm, yet the SROs arrested him anyway and failed to take action to de-escalate him. It was the SROs that did not consider asking staff or contacting the parent for assistance and instead opted for an approach "that would surely cause [the student] to become re-escalated." Where the district did not have sufficient control over the SROs' actions as a joint employer with the sheriff's office, the district is not liable for the actions of the SROs. In addition, the parent has not established any duty on the part of school personnel to intervene in an arrest; nor did she properly allege excessive force under the circumstances.

MONEY DAMAGES AS A REMEDY FOR VIOLATIONS OF SECTION 504

A. Cummings v. Premier Rehab Keller, 142 S. Ct. 1562, 65 NDLR 52 (2022). In a 6 to 3 decision, the Court affirms the Fifth Circuit Court of Appeals' decision that awards of damages for emotional distress are not permitted under the Rehabilitation Act or the Affordable Care Act (ACA). Thus, the dismissal of the claims brought by a physical therapy patient who is deaf who was denied a request for an American Sign Language interpreter for her treatment at a rehabilitation facility was not in error. Both the Rehabilitation Act and ACA are laws created pursuant to the Spending Clause of the Constitution. As the Court has previously held, Spending Clause legislation is analogous to contract law in that, in return for federal funds, fund recipients agree to comply with federally imposed conditions. In this case, it is important to determine whether a prospective federal fund recipient deciding whether to accept federal funds would have had "clear notice" that it may be liable for emotional distress damages if noncompliant with the law. Pursuant to a previous ruling in Barnes v. Gorman in 2002, a federal fund recipient may be considered "on notice that it is subject...to those remedies traditionally available in suits for breach of contract." Because emotional distress damages are generally not compensable in contract cases, federal fund recipients could not be considered to have consented to being subjected to damages for emotional distress. Accordingly, such damages are not recoverable. The petitioner's argument that an exception to the general rule exists where, as in the case of discrimination, a contractual breach is particularly likely to result in emotional disturbance is rejected. According to the Court's previous ruling, federal fund recipients are aware only that they may face the "usual" contract remedies in

private suits, not "that they will know the contours of every contract doctrine, no matter how idiosyncratic or exceptional." Therefore, courts may only imply to Spending Clause legislation those remedies "that are normally available for contract actions, which does not include emotional distress damages." The Court cannot conclude that federal fund recipients have "clear notice" that they would face such a remedy in private actions to enforce the Rehabilitation Act or the ACA.

MONEY DAMAGES FOR FAILURE TO IMPLEMENT EDUCATIONAL PLANS

A. Doe v. Dennis-Yarmouth Regional Sch. Dist., 578 F.Supp.3d 164, 80 IDELR 72 (D. Mass. 2022). Parents of a 16-year-old with an intellectual disability whose IEP called for a one-on-one aide may move forward with their 504 claim against the district based upon a sexual assault of their child in the high school's restroom by a classmate with Down syndrome who also required the supervision of an aide. Here, the parents' Complaint alleges that the school's Assistant Principal was on notice that the students both required one-on-one aides, that the substitute for the classmate's aide was absent on the day of the assault and was not replaced, and that the students were provided no supervision during a contractual thirty-minute lunch break when the alleged sexual assault occurred. "[R]efusal to make an accommodation" is the type of harm that Section 504 protects against. Therefore, if the allegations are true, the district could be liable under Section 504 for damages. The parents' claims under Title IX and state law will also proceed.

BULLYING/DISABILITY HARASSMENT

A. Doe v. Huntsville City Schs. Bd. of Educ., 79 IDELR 41 (N.D. Ala. 2021). Motions to dismiss constitutional claims under Section 1983 against the district and several named educators are denied where the educators allegedly ignored clear indications that bullies were physically injuring an 8-year-old student's genitals and required the victim to meet with one of the bullies. Claims that the district violated the student's due process rights by refusing to intervene appropriately to stop classmates from bullying and injuring the student with Asperger Syndrome are actionable where it is alleged that the defendants acted in an arbitrary and conscience-shocking manner. Here, the parent alleges that the parent and student notified teachers, an assistant principal and other school personnel numerous times that other students were repeatedly punching the student's genitals. In addition, the parent alleges that she provided the district with a doctor's letter noting that one of her child's testicles was not viable due to the assaults. Further, when the AP eventually intervened, instead of separating the student from the bullies, she required the student to meet with one of them "to encourage them to become friends." After that, the bully allegedly told the student that he should not report the bullying because friends do not tell on each other. Thus, the parent has sufficiently alleged a claim and it will not be dismissed at this juncture. 2022 update: According to a news source, the school district has agreed to settle the lawsuit for $250,000.00. https://www.al.com/news/2022/07/huntsville-city-schools-to-pay-250000-to-settle-bullying-lawsuit.html

B. Ervins v. Sun Prairie Area Sch. Dist., 81 IDELR 105 (W.D. Wis. 2022). Judgment on behalf of the district is granted on the parent's disability discrimination claim brought under

ADA/504 where the parent did not link the peer bullying to the student's SLD. To establish such a claim, a parent must show that the student's disability was a motivating factor in the alleged harassment or mistreatment. The parent's assertion that the peers' use of the "n-word" was aimed at the student's disability because the use of the epithet connotes ignorance is rejected. There is no disability animus inherent in the "n-word." In addition, the fact that one of the bullies once saw the student meet with a special education teacher does not mean that the classmate bullied the student on that basis. Thus, where the parent has failed to show the student was harassed based on his SLD, judgment is awarded in favor of the district on the disability discrimination claim.

C. Funes v. Gardner Consolidated Sch. Dist. 72C, 81 IDELR 43 (N.D. Ill. 2022). District's motion to dismiss the seventh-grader's 504/ADA peer bullying claims is granted where the parent has failed to connect the bullying to the student's ADHD. Although the parent claims that the bully targeted students with disabilities, the complaint does not include any allegations that suggest that the bully was aware of the student's disability. In addition, the acts of bullying (including pulling violently on the student's ponytail, striking her during PE class, calling her vulgar names, and pushing her down causing serious injury) did not establish a connection to the student's ADHD as the reason for the harassment.

D. Spring v. Allegany-Limestone Cent. Sch. Dist., 81 IDELR 42 (W.D.N.Y. 2022). District's motion for summary judgment is denied where a reasonable juror could find in favor of the parents on their 504/ADA claims based upon their 17-year-old's suicide allegedly based on disability harassment. To hold a district responsible for damages arising from peer disability harassment, parents must show that 1) the student was harassed on the basis of disability; 2) the harassment was so severe, pervasive, and objectively offensive that it altered the student's education; 3) the district had actual notice of the harassment; and 4) the district's response to it was unreasonable in light of the circumstances. Here, the student's mother claims to have notified the principal about several incidents where classmates mocked the student or mimicked his verbal and physical tics. Based on that, a jury could find that the district had actual knowledge of the disability-based harassment. The court rejects the district's argument that it investigated alleged bullying and responded appropriately, where the investigation notes from one incident appeared to focus on the witnesses' interactions with the perpetrator as opposed to the acts of bullying against the student. The record does not contain any explanation of why the district apparently did nothing in light of this information. The court also denies the district's motion to dismiss discrimination claims based upon the student's purported removal from the baseball team for disability-related behaviors.

E. Doe v. Nelsonville-York Sch. Dist. Bd. of Educ., 81 IDELR 45 (S.D. Ohio 2022). Claims of two unrelated students for disability harassment under 504/ADA are dismissed. The district's prompt response to every incident of peer bullying about which it was aware entitles the district to judgment. With respect to the elementary student, the alleged injuries to the student on the playground were "immediately" investigated and the students who inflicted the student's injuries were immediately disciplined. Although the parent of this student argued that the district acted unreasonably because it did not provide a 1:1 aide to her child, the district had no obligation to respond in the parent's preferred manner and had

no reason to believe its actions were ineffective at stopping harassment. As for the other student who was a teenager, the guardian was only able to identify one specific incident of bullying that occurred when the student intervened in a fight on the school bus. Where the district expelled the bully from the bus for the remainder of the school year and revised this student's safety plan to prevent similar incidents in the future, the district's actions were not clearly unreasonable.

RETALIATION/FREEDOM OF SPEECH

A. Leone v. Caddo Parish Sch. Bd., 80 IDELR 167 (W.D. La. 2022). Section 504 specialist's claim that she was retaliated against under Section 504/ADA when the district took action against her because she spoke out on behalf of students with disabilities in September and October of 2017 is rejected. This is so because the district offered legitimate, nondiscriminatory reasons for reprimanding and ultimately creating a performance improvement plan for her. For example, the specialist admitted that she checked student responses on a statewide assessment for reasons other than ensuring that they were working on the correct section, violating standardized testing protocols, which warranted a reprimand. In addition, she maintained incomplete documentation in her student files, for which she was not formally reprimanded but was reminded of the district's expectations going forward with respect to appropriate documentation. Further, the 504 specialist engaged in hostile confrontations with the district's autism coordinator, which warranted the creation of the performance improvement plan. Where the specialist could not demonstrate that the district's reasons were pretextual, she cannot prevail on her retaliation claims.

B. Ford v. New York City Bd. of Educ., 80 IDELR 279 (S.D.N.Y. 2022). The district's motion to dismiss the 504 retaliation claim brought by a former social studies teacher is denied. The former employee has sufficiently pled all of the required elements of a retaliation claim that he: 1) participated in a protected activity; 2) that the district was aware of that activity; 3) that the district took adverse action; and 4) that there is a causal connection between the adverse action and the protected activity. Here, the teacher alleged that he advocated on behalf of students with disabilities when he challenged the district's failure to assign a special education teacher to their integrated co-teaching class. Further, the former teacher alleged that the district was aware of complaints he had filed with school administrators and counsel for the district. In addition, the district began disciplinary proceedings against the teacher five months after he filed a complaint with the principal. Finally, the teacher alleges other examples of retaliatory conduct throughout that five-month period, including refusal to provide him with an initial planning conference, a choice of observation options, or his own classroom and placed false information in his personnel file without his knowledge. This is sufficient to state a retaliation claim at this juncture.

RESTRAINT/SECLUSION

A. 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.

B. L.P. v. Wake Co. Bd. of Educ., 81 IDELR 132 (E.D.N.C. 2022). Parents of fifth grader with anxiety, communication disorders and learning disabilities may pursue 504/ADA discrimination claims against the district and several school officials based upon alleged improper use of restraint and seclusion on numerous occasions for minor, nonviolent behavior. To establish a valid claim under 504/ADA, parents must show that the district excluded the student from its program or activities solely on the basis of disability. Here, the parents allege that the district improperly restrained and secluded their child for asking repeated questions, yelling, arguing, tipping back in her chair and running, even though nondisabled students who exhibit the same behaviors are not subjected to restraint or seclusion. Though the district contends that the student hit a teacher, kicked a classmate and bit staff during one behavioral incident, video footage contradicts this. In addition, the evidence indicates that the repeated use of restraint and seclusion resulted in 15.67 hours of lost instructional time to the student and caused the student significant mental and emotional distress. For example, during one seclusion, the student was so distressed that she ripped her hair out, ripped off some of her scalp, pinched her toes in the door and peeled the closet's plastic wall coverings off. Despite the student's increased anxiety about going to school and the parents' complaints, there is no evidence that the district initiated an investigation or prohibited the use of restraint and seclusion. Since is it plausible that the district maintains a custom of allowing restraint and seclusion as a punishment for students with disabilities, the case will not be dismissed at this juncture against the district and school officials.

CHILD FIND DUTY TO APPROPRIATELY/TIMELY EVALUATE

A. N.N. v. Mountain View-Los Altos Union High Sch. Dist., 81 IDELR 161 (N.D. Cal. 2022). ALJ's decision that the district did not commit a child find violation is partially reversed and the parties are ordered to submit briefing on an appropriate remedy, if any, for the district's failure to timely conduct an IDEA evaluation. Where a school district must evaluate under IDEA when it has reason to suspect that the student has an IDEA disability and needs special education, the district's argument that it satisfied its child find duty when it developed a Section 504 Plan for the student is rejected. Adopting a 504 Plan and implementing accommodations for a student does not satisfy a district's obligation to conduct a special education evaluation under IDEA. Here, the parent notified the high school's Vice Principal in May 2017 that her daughter was receiving therapy for anxiety and depression. According to the Vice Principal's testimony at the due process hearing, the student's significant decline in academic performance was also evident by October 2017 during the student's 10th-grade year when the student's academic performance continued to decline even with the 504 Plan developed in November. Because the district, therefore, had reason to suspect a disability-related need for special education services in October, the district's decision to hold off on an IDEA evaluation for another 7 months when the parent formally made the request was not reasonable. However, the district correctly found after later conducting the IDEA evaluation that the student was not eligible for special education during her junior and senior years because she did not need special education services and the ALJ agreed. Thus, the parties must submit briefing on an appropriate remedy, if any, for the failure to conduct a timely IDEA evaluation in light of a correct finding that the student was not eligible.

B. Malloy v. District of Columbia, 80 IDELR 242 (D.D.C. 2022). District violated its affirmative child find duty under IDEA, and the hearing officer's decision finding no violation is vacated. Here, the district should have suspected that the 17-year-old had a disability based upon his excessive number of absences, poor test scores, failing grades and teachers' expressed concerns. In the eighth grade, the student began receiving low test scores and was failing classes. By tenth grade, behavioral issues increased, he failed all classes, and had 99 absences from school. Three teachers reached out to the parent out of concern and the parent requested an IEP. The district's special education director indicated during the hearing that she had no reason to suspect a disability, even though the student's number of absences were a "huge red flag." While the hearing officer found no child find violation, the hearing officer acknowledged the student's "extremely poor grades" and "alarming number of unexcused absences" but made no mention of the teachers' repeated concerns about academic performance. The hearing officer also failed to recognize a connection between truancy and disability and implied that it was the parent's duty to raise concerns about a suspected disability. Where the district was put on notice prior to April 2020 when the parent requested a hearing that the student might have a disability, a child find violation occurred for failure to timely evaluate the student years prior. The hearing officer is ordered to determine when the district first failed to meet its child find obligation and whether the student is entitled to compensatory education.

C. D.C. v. Pittsburgh Pub. Schs., 80 IDELR 95 (W.D. Pa. 2022). The court cannot determine whether, as a matter of law, the district adequately addressed the needs of the first grader when it waited almost a year before referring the student with ADHD and ODD for an IDEA evaluation. Thus, a jury will need to decide the issue and the parties' motions for judgment on the parent's 504 claim are denied. Here, district staff had multiple meetings amongst themselves and with the parent to discuss the student's behavioral difficulties, which included things like shouting, refusing to follow directions, eloping from the classroom when upset, throwing and damaging classroom items and hitting other students with a belt. While the district attempted to manage the behaviors with sensory breaks, emotion charts and a social skills group, the district continued to call the parent several times a week to pick the student up from school when his behaviors were unmanageable. In addition, the district suspended the student multiple times and did not refer him for an IDEA evaluation until after a school police officer handcuffed him on one occasion to keep him from hurting himself. Given this record, there is a genuine issue of material fact as to whether the district should have provided more behavioral supports earlier and referred him for an IDEA evaluation.

D. R.B. v. North East Indep. Sch. Dist., 80 IDELR 162 (W.D. Tex. 2022). Although the gifted teenager took advanced placement courses and maintained high academic performance, that does not necessarily mean that she should not be considered for special education services. Beginning in 9th grade, the student experienced increasing anxiety, was diagnosed with generalized anxiety and major depressive disorders, and exhibited self-injurious behavior and suicidal ideations. In response, her parents placed her in an outpatient treatment facility. When she returned to school, her grades declined, and she ultimately withdrew from school and was placed in a residential treatment facility. The parents filed for due process and the hearing officer found that the district violated its child find duty to identify a student suspected of having a disability. A district's child find obligation is not relieved by a student's high intelligence or consistent high academic performance; nor is it limited to students demonstrating learning gaps or deficiencies; and it extends to those not yet diagnosed and those who advance from grade to grade. A more accurate "barometer" is to determine whether a student is experiencing academic decline or experiencing difficulties that are unusual. Here, the child find duty was triggered when the student entered the residential treatment program in December, as the district had reason to evaluate since the parents had earlier reported the teen's increased anxiety in April, and her self-injurious behavior, suicidal ideations and placement at the outpatient facility in August.

APPROPRIATE EVALUATION

A. Crofts v. Issaquah Sch. Dist. No. 411, 80 IDELR 61, 22 F.4th 1048 (9th Cir. 2022). Where the district evaluated the second-grader's reading and writing difficulties appropriately and identified all of her disability-related needs, its evaluation and classification of the student as one with SLD, rather than specifically one with dyslexia, was appropriate. Thus, the district court's decision that the district had no obligation to evaluate the student specifically for dyslexia is affirmed. The district conducted a battery of assessments of the student's reading and writing skills and considered a private evaluator's assessments of the

student's difficulty with phonological processing. The fact that the evaluation did not use the term "dyslexia" in the way that the parents may have preferred does not make it deficient. Therefore, the district court correctly decided that the parents were not entitled to an IEE. In addition, the district was not required to use the parents' preferred Orton-Gillingham reading methodology where the evidence reflects that the student made appropriate progress toward her IEP goals (although not meeting them) using the district's research and evidence-based curriculum and methodologies designed to improve her reading comprehension and fluency.

ELIGIBILITY/CLASSIFICATION

A. Minnetonka Pub. Schs. v. M.L.K., 42 F.4th 847, 81 IDELR 123 (8th Cir. 2022). District court's ruling that district denied FAPE and is required to reimburse the parents for private reading instruction provided to their student with autism is reversed. Here, the student made appropriate progress in reading during second and third grade, and the district's failure to classify him as a child with dyslexia and ADHD did not result in a denial of FAPE. Under IDEA, the classification of a student's disability is largely immaterial. As long as the district evaluates the student in all areas of suspected disability and develops an IEP that is reasonably calculated to provide FAPE, the district has satisfied its obligations under IDEA. In this case, the district identified the student's struggles with reading and attention during his second year of kindergarten. By the time the student was in third grade, he was provided with 75 minutes of specialized reading instruction each day, and the district court's finding that the district failed to make "meaningful adjustments" to the student's IEP is rejected. Rather, the district continuously updated IEP goals and benchmarks for the student, tried out new curricula, and increased his small group and one-on-one instruction. While the student cannot yet read at grade level, IDEA does not require a district to maximize a student's potential. Since the student made appropriate progress in reading in light of his circumstances— albeit not to the extent his parents might have liked—the district provided FAPE. "While we are sympathetic to M.L.K.'s struggles, we find that his slow advancement in reading was not caused by the School District's misclassification of his primary disabilities." The fact that it did not put a formal diagnosis in his IEP is not a violation of IDEA.

B. J.M. v. Summit City Bd. of Educ., 39 F.4th 126, 81 IDELR 91 (3d Cir. 2022). The district court's decision that the school district did not violate its IDEA child find duty to the student during his first grade year is affirmed. When the student was in first grade, his positive response to interventions showed that he did not have a Specific Learning Disability that required special education services. During the first month in first grade, staff recognized that the student had behavioral difficulties and assembled a multidisciplinary team to develop an RTI plan to address the difficulties, to which academic interventions were soon added. The team closely monitored the effects of the interventions and met to evaluate them. When the parents provided an IEE which reflected a diagnosis of SLD, the district conducted five evaluations and determined that the student was not eligible at that time, based upon the fact that the student responded positively to interventions and did not need special education services. The district's "active response" to the child's behavior in the first grade and to his emerging academic difficulties allowed

for the child to make meaningful progress, interventions were successful, and he improved academically. By February of first grade, the district had collected an array of data and designated 14 staff members to consider it, all of whom agreed that the student was not eligible under IDEA (in spite of a severe discrepancy) and chose to continue to provide successful interventions in lieu of special education. The fact that the district found the student eligible during second grade after he was diagnosed with autism and ADHD does not mean that the district committed a child find violation during first grade.

C. Doe v. Brighton Sch. Dist. 27J, 81 IDELR 218 (D. Colo. 2022). ALJ's determination that the district did not violate IDEA's child find requirements with respect to a high school student who was sexually assaulted by a male student in 2018, which left the student anxious, depressed and suicidal is upheld. When the parent requested a due process hearing in 2019, the district conducted an evaluation and determined that while the student was sad and withdrawn, she was not eligible as a student with serious emotional disturbance and did not need an IEP. The eligibility team determined that the student could receive reasonable educational benefit from general education alone and that she could benefit from a 504 Plan. Where the credible evidence established that her "dysfunction" was a situational response to the assault and bullying that she endured from other students and that she could receive reasonable educational benefit, the student is not a student with a disability under IDEA. Indeed, the student completed the fall semester of her junior year with a grade point average of 2.8, which was higher than her grade point average for the spring semester of her freshman and sophomore years. While the student had difficulty with math and chemistry, the evidence reflects that she was able to make progress in those subjects in the general education setting without special education services. The parent's argument that the fact that the student has a 504 plan is reflective of a need for special education is rejected. "While the line between 'special education' and 'related services' may be murky, case law suggests that where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making progress, the child does not 'need' special education within the meaning of IDEA."

D. Mr. and Mrs. Doe v. Portland Pub. Schs., 81 IDELR 134 (D. Me. 2022). School district's motion for judgment on the parents' disability discrimination claims under 504/ADA is denied where a reasonable jury could find that the district acted with discriminatory animus when it found that their child was not eligible for IDEA services in December 2017 but found him eligible upon reevaluation in 2019. This is so because the school psychologist who evaluated the student in 2017 testified at the due process hearing that she had a "bias" for providing supports in the general education setting rather than finding students eligible for special education and preferred to address any student difficulties with regular classroom interventions. In addition, the school psychologist's 2017 evaluative data demonstrated a clear pattern of strengths and weaknesses, as well as a significant discrepancy between the student's high IQ and his low scores on achievement tests. While a "bias" in close cases toward not finding a student eligible for special education services arguably aligns with IDEA's purpose, the record here does not demonstrate that the student's diagnosis in 2017 was a close call. For that reason, a reasonable jury could conclude that the psychologist's stated "bias" was rooted in discriminatory animus. Therefore, the 504/ADA disability discrimination claims may proceed.

E. O.P. v. Weslaco Indep. Sch. Dist., 81 IDELR 187 (S.D. Tex. 2022). In spite of the school district's procedural violation in not timely conducting an IDEA evaluation, the district did not improperly find that the student was ineligible as a student with autism and, therefore, did not fail to provide FAPE. Thus, the district's motion for judgment is granted. Here, the parent of a middle schooler privately diagnosed with autism and ADHD with a 504 Plan failed to show that the district erred when it found the student was not eligible for special education under IDEA. The student's good social and communication skills and academic success support the district's determination that the student did not need special education and related services. To qualify under the autism category, a student must have a developmental disability that significantly affects verbal and nonverbal communication and social interaction that adversely affects educational performance. Here, the school psychologist testified that the student answered questions appropriately, held conversations, maintained good eye contact and facial expressions, and played games. The psychologist also testified that the student was cognizant of social cues, and the student's teacher testified that the student would often converse with him. The parent's contention that the district's eligibility determination under IDEA is inconsistent with its determination that the student was 504-eligible is also rejected. Section 504 and IDEA have vastly different eligibility standards, and Section 504's broad coverage means that many 504 students will not qualify under IDEA. While the district violated its child find duty by failing to evaluate the student earlier, given that the child ultimately did not qualify under IDEA, there was no denial of FAPE.

F. Rocklin Unif. Sch. Dist. v. J.H., 80 IDELR 165 (E.D. Cal. 2022). The ALJ's findings regarding the district's failure to timely identify a fifth grader diagnosed with ADHD and anxiety as a student with a disability under IDEA will not be disturbed. The district should have found the student eligible as an OHI student near the end of fifth grade based upon his negative social interactions and aggressive responses to peer bullying rather than focusing only upon his good academic performance. Even with the services provided in general education via a Section 504 Support Plan, the student's fourth-grade teacher noted difficulties with focus, organization, writing, and peer interactions and the school psychologist who evaluated the student near the end of fifth grade determined that the student needed services to address his social and emotional challenges. Clearly, the district erred in discounting the student's need for mental health services and assistance with interpersonal skills. While the student "was still achieving some level of academic success at the time, academic success alone does not determine whether special education services are necessary." Thus, the parent is entitled for reimbursement for private schooling for 6th grade.

INDEPENDENT EDUCATIONAL EVALUATIONS

A. Heather H. v. Northwest Indep. Sch. Dist., 81 IDELR 32 (5th Cir. 2022) (unpublished). Parents are not entitled to reimbursement for a private IEE where the district has demonstrated that its evaluation for autism was appropriate. The district had no reason to evaluate the child for an emotional disturbance, even in light of the results of a private psychological evaluation conducted prior to the kindergartner's enrollment in the district diagnosing autism, general anxiety disorder, and separation anxiety. Teachers reported

that the child had a fairly normal transition to kindergarten and there was no evidence that he exhibited anxiety in the school setting. While a teacher report indicated that the student was sometimes "overly emotional," the report was accompanied by notes indicating that his emotional behavior was "otherwise typical." In addition, the district assessed the child's behavior and emotional functioning as part of the autism evaluation and chose appropriate assessments and administered them in accordance with instructions. Finally, the court rejects the parents' argument that the district was required to prove the appropriateness of its own evaluation and the inappropriateness of the parents' IEE. The statute is clear that the district was required to show one or the other.

REEVALUATION

A. W.S. v. Edmonds Sch. Dist., 81 IDELR 101 (W.D. Wash. 2022). Decision of the ALJ that the district offered FAPE and did not violate IDEA's reevaluation requirement is upheld. While IDEA requires a district to reevaluate a student every three years, when the parents ask for reevaluation, or when the district has reason to believe a reevaluation is necessary, none of these circumstances was present in May 2018. While the high schooler with ADHD, depression, and autism did develop some signs of post-traumatic stress disorder several weeks after he had encountered a peer with an airsoft gun in a school restroom in May 2018, the student's IEP team convened and did not believe a reevaluation was needed; nor did the parents specifically request a full reevaluation. Rather, the school psychologist determined that it would be time to consider a full reevaluation in the fall of 2018 if the additional counseling with the behavior specialist added to the student's IEP was not sufficient. In addition, the team had no reason to include anti-bullying measures in the IEP absent evidence that bullying had occurred. Finally, the temporary safety plan developed outside of the IEP process met the student's needs.

THE FAPE STANDARD

A. G.D. v. Swampscott Pub. Schs., 80 IDELR 149, 27 F.4th 1 (1st Cir. 2022). District court's decision that the district provided FAPE to a second grade student with severe dyslexia and dysgraphia is upheld. Under the Endrew decision, the district court was required to consider the student's unique circumstances when determining whether the IEP provided by the district was reasonably calculated to provide FAPE to her. Here, both the district court and the hearing officer noted that the student had not received any special education services in kindergarten or first grade when she attended private school, and after arriving to the district as a non-reader, the student acquired some phonemic awareness skills, progressed from being unable to blend syllables or recognize vowels to being able to identify some syllable types and digraphs, and from being able to read only at a mid-kindergarten level when she entered the district in August 2017 to being able to read a Grade 1-level text by January 2018. During 2017-2018, the student acquired knowledge of word sounds and recognized increasing numbers of sight words. In addition, it was found that there was no dispute that with support, the student acquired new math skills and, with accommodations for her reading and writing deficits, there was no evidence that the student could not absorb second-grade content in science and social studies. In addition, the district court relied appropriately upon "informal" evidence of slow gains made by the student

rather than upon standardized testing conducted by the parent's evaluator that showed regression. "A standardized test is, by definition, designed to measure a child's progress without regard to her individual circumstances." In fact, the parents did not indicate how much the child's standardized test scores would need to increase during the time period in question to show she made appropriate progress. Thus, the district court did not err in relying on informal evidence to determine the student's "slow gains" were appropriate in light of her circumstances.

B. Isabelle K. v. Manheim Tshp. Sch. Dist., 80 IDELR 100 (E.D. Pa. 2022). Hearing officer's decision that the district's August, October and November 2018 IEPs offered FAPE to a third grader with autism is affirmed. Courts and hearing officers are to assess the appropriateness of an IEP at the time of the development of the IEP. Thus, the key question is whether each of the three IEPs was reasonably calculated to address the student's behavioral needs as they were known at the time. When the parents raised concerns with the school about the student's stress at lunch, recess and during other high-sensory activities, the team added supports to address the increased stress. Two months later and based upon an observation by an autism support specialist, the team revised the student's IEP to include 240 minutes per month of direct instruction in "social thinking." In addition, the district responded to the student's ongoing behavioral regression by convening a third IEP meeting and developing a 6-step plan that included additional services and evaluations. Thus, the district made repeated attempts to address the student's ongoing behavioral issues, and the parents' claim that the district disregarded the student's behavioral issues is rejected.

IEP IMPLEMENTATION FAILURE

A. In the Matter of Elmira City Sch. Dist. v. New York State Educ. Dept., 166 N.Y.S.3d 710, 80 IDELR 294 (N.Y. App. Div. 2022). Where the medically fragile kindergartner's IEP requires 1:1 supervision from a registered nurse for suctioning, feeding, transfers, toileting and overall care, the failure to provide this care is a material implementation failure. Therefore, the State Review Officer's decision that the school district must provide compensatory education for the failure to provide the services is affirmed. While the district attempted to hire a 1:1 nurse for the student after its RN resigned in February 2019, the district's difficulty in finding a replacement did not relieve it of its FAPE obligations. Although there was testimony that the district posted job openings for the position and took additional steps to find a replacement, an "impossibility of performance" defense is generally "at odds with the purpose of IDEA" to ensure that the rights of students with disabilities and their parents are protected. In addition, the student's IEP team inappropriately offered residential placement for the child's first-grade year based upon her need for 1:1 nursing services. Not only did the evidence indicate that the child benefitted from being educated with peers, the proposed IEP stated that she needed interaction with peers who would engage her socially. Thus, the district violated IDEA when proposing residential placement based solely upon its difficulties in hiring a nurse.

B. Plotkin v. Montgomery Co. Pub. Schs., 122 LRP 24496 (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.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Kayla W. v. Chichester Sch. Dist., 80 IDELR 161 (E.D. Pa. 2022). District significantly impeded the parent's opportunity to participate in educational decision-making for a fifth grader with ADHD when it sent a consent for evaluation form home with the student knowing that the student was neither living at home nor with the parent because the family was temporarily homeless. In addition, the district violated its own policies by failing to follow up multiple times to ensure that the parent received and returned the form and followed up only once via email after two months had passed. During those two months, the student continued to fail her core classes and was suspended from school for three days and given eleven in-school or Saturday suspensions. Thus, the district is ordered to provide the student with 84 calendar days of compensatory education services and to pay the parent's attorney's fees.

B. G.A. v. Williamson Co. Bd. of Educ., 80 IDELR 255 (M.D. Tenn. 2022). Parent's motion for judgment on the record asking the Court to overturn the ALJ's decision in favor of the district's proposed IEP is denied. With respect to the parent's argument that the district predetermined placement for the seventh grader with autism and ED attending a private school, "predetermination" occurs where a district adheres to premature placement decisions regardless of any evidence concerning the student's individual needs. Predetermination also occurs if a district makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team. While this is not to say that a district cannot have any pre-formed opinions about what is appropriate for a student, any pre-formed opinion the district might have must not obstruct the parents' participation in the planning process. Here, the parent alleges that the district predetermined placement for the student at the middle school because many of the documents drafted in preparation for the IEP meeting listed the middle school as the educational setting for the student. While this does indicate that the district developed a pre-formed opinion that the middle school would be an appropriate placement for the student, that pre-formed opinion did not in any way obstruct the parent's participation in the planning process. Rather, it appears that the district

was attempting to respect the parent's wishes, because when she first emailed the principal of the middle school asking to have the student (who was attending private school) evaluated for special education services, the district made a logical inference that the parent wanted to enroll the student in the middle school. Thus, it was perfectly acceptable that the IEP documents were prepared with that inference in mind, as long as district officials came to the IEP meeting with "open minds" and were "willing to listen" to the parent's input. The record shows that they did so. For example, after the parent refused to sign the first IEP proposed by the district, the IEP team scheduled a second meeting with her to review her concerns and to specifically consider the private school as the appropriate placement. Therefore, the fact that the district prefilled forms listing the middle school as the student's educational setting does not mean that the district unlawfully predetermined placement.

D. C.M. v. Rutherford Co. Schs., 80 IDELR 239 (M.D. Tenn. 2022). Magistrate's finding that the district denied the parents meaningful participation in the IEP process is rejected. The district's creation of a draft IEP does not necessarily prove that the team predetermined the student's reading program. The real question is whether team members came to the meeting with an open mind. This was not a case where the district refused a parent's preferred reading methodology (Wilson) as a matter of policy. Instead, the district showed that it had a variety of reading methodologies available, including Wilson that the student had in elementary school. The district's chosen methodology of Language! appears to be comparable to Wilson as both programs "are structured reading programs that are designed to improve upon a student's weakness in reading. While the draft IEP included only 8 of the 30 accommodations the student had in 6th grade, audio recordings of the IEP meeting indicate that the team discussed the omitted accommodations and made several changes based upon the parent's input. Therefore, the parent did not show that the district developed the IEP without her input.

E. Neske v. Porter, 81 IDELR 157 (S.D.N.Y. 2022). "This is yet another lawsuit in the seemingly never-ending litigation growing out of the decisions of a number of parents to remove their children from iHope, a school serving brain-injured children, and enroll them in iBrain, also a school serving brain-injured children. In this iteration, [the parents] are seeking reimbursement" for the costs they incurred when they unilaterally enrolled their child at iBrain for the 2018-19 school year. The SRO's decision denying this reimbursement is upheld. The district's efforts to schedule an IEP meeting at a mutually agreeable time and place and the parents' unreasonableness in their "conspicuous" absence from the meeting after the district arranged to have a school physician attend in person supports the finding that the parents are not entitled to tuition reimbursement. Parents seeking tuition reimbursement under IDEA must meet three requirements. In addition to showing that the district denied FAPE and that the private placement is appropriate, parents must demonstrate that the equities favor reimbursement. The SRO was correct in finding that these parents failed to meet the last element. Indeed, the parents insisted on having a school physician attend the IEP meeting in person despite the fact that New York law expressly allows for virtual participation. After the district scheduled the meeting to accommodate the physician's attendance, the parents did not attend or otherwise participate in the meeting. The parents' argument that the SRO denied their reimbursement request to

punish them for their advocacy is rejected. Here the parents do not even attempt to explain why they could not vigorously advocate with a physician who appeared remotely. In addition, the parents did not explain their own failure to attend the meeting. While the parents did give the district 10 days' notice of the student's unilateral placement as required by IDEA, because of their overall lack of cooperation, the equities weigh against reimbursement.

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., 122 LRP 34492 (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."

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.

OBLIGATIONS TO PARENTALLY PLACED PRIVATE SCHOOL STUDENTS (PPPSS)

A. "Questions and Answers on Serving Children with Disabilities Placed by their Parents in Private Schools, OSEP QA 22-01, February 28, 2022. This Q&A document can be found at https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf. As stated by OSEP, this Q&A updates and supersedes the Department's guidance titled *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, which was first issued in April 2011 and includes additional questions and answers that address topics that have arisen "as the field continues to implement the applicable provisions of IDEA and its implementing regulations."

Importantly, U.S. DOE notes that there are three categories of "private school students with disabilities:" 1) those placed by their parents, who are not enrolled in the LEA, and for whom the provision of FAPE **is not** at issue; 2) those placed by their parents and who are, or previously were, enrolled in the LEA and the provision of FAPE **is** at issue; and 3) those placed by the LEA as the means of ensuring that FAPE is made available. It is noted that the phrase "FAPE is not at issue" means that there is no disagreement between the parent and LEA about the availability of a program to provide FAPE to the child, and the parent has placed the child in a private school and is not seeking financial reimbursement for the private school placement. The guidance document is intended only to provide guidance related to the first category of PPPSS.

The document is 55 pages long and contains Sections A-Q, and OSEP notes that "new topics" in this Q&A document include:

- Equitable Service Providers (Section G)—addressing personnel qualification requirements that apply to equitable services providers under IDEA
- Preschool Children with Disabilities (Section J)—addressing the use of IDEA Part B funds for equitable services for preschool children with disabilities for whom FAPE has been made available
- Children who Reside Out-of-State or Whose Parents Live in Other Countries (Section H)—clarifying the requirements that apply to PPPSS with disabilities from other states and other countries who attend private schools in the U.S.
- State-funded School Voucher and Scholarship Programs (Section K)—clarifying that children with disabilities who use State vouchers and scholarships to attend private schools are considered PPPSS under IDEA and are eligible for equitable services
- Extended Public School Closures (Section M)—addressing the responsibilities of LEAs to provide equitable services to PPPSS just as they have a responsibility to service children with disabilities in public schools, as appropriate, during an extend public school closure

As has been the case with all of these kinds of QA documents, it is noted that "[o]ther than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public."

LEAST RESTRICTIVE ENVIRONMENT

A. H.W. v. Comal Indep. Sch. Dist., 32 F.4th 454, 81 IDELR 2 (5th Cir. 2022). The district's proposed placement for a third grader with Down syndrome, ADHD, and a speech impairment in a blended placement is upheld as the student's LRE. The blended placement contemplates placement in a self-contained "essential academics" classroom for a majority of the day, and it includes 150 minutes per day (e.g., mainstreaming opportunities for 39% of the day) in the general education classroom for nonacademic and other activities. Even though the child mastered 11 of her 17 IEP goals, she could not receive FAPE in the general education setting. Based on the multi-factored LRE test in the Fifth (and other Circuits), progress toward IEP goals is just one factor that is to be considered when evaluating a student's educational progress and placement. Favoring an "overall academic record-based review," the student's overall academic record shows that she was not making appropriate progress in the general education setting and was regressing and falling behind in areas such as test scores and percentile ratings. In fact, she had failed every academic subject in second grade, despite the district's modification of the curriculum to a pre-K academic level. In addition, the student rarely interacted with her nondisabled peers and engaged in disruptive behaviors in the general education setting. Because there is a lack of meaningful academic and nonacademic benefit, as well as the student's behavioral challenges, the district court's decision upholding the district's proposed blended placement as FAPE in the LRE is affirmed.

B. J.P. v. Belton Sch. Dist. No. 124, 40 F.4th 887, 81 IDELR 124 (8th Cir. 2022). District court's decision that the district's proposal to place the 9-year-old student at the state school for students with severe disabilities as his LRE is upheld. While the IDEA requires districts to educate children with disabilities alongside their nondisabled peers to the maximum extent appropriate, the LRE requirement does not exist in isolation where the district must ensure that the student receives appropriate educational benefit. In other words, the IDEA does not allow a school to place a child in a less restrictive environment in which he or she makes little or no progress towards appropriate educational goals. Here, the evidence reflects that the student received minimal benefit when attending a special education program at his neighborhood elementary school. Not only was the student making minimal progress in meeting his IEP goals, but he ate lunch in his classroom and did not participate in music, art, PE or assemblies with nondisabled peers. Thus, the student was not receiving academic or social benefits from the current placement. The evidence is also clear that the student has a tendency to become overwhelmed by sensory input, and that he would be more available for learning in the state school's smaller, less chaotic environment. The district court was correct that the benefits of the state school far outweigh the benefits of the student's current placement. While the neighborhood school is a less restrictive environment on the placement continuum, the IDEA does not allow the district to sacrifice a student's access to FAPE to have him in a more integrated setting.

C. Q.C. v. Winston-Salem/Forsyth Co. Schs. Bd. of Educ., 81 IDELR 40 (M.D.N.C. 2022). Motions for judgment filed by both parties on the parents' 504/ADA claims are denied at this juncture where a reasonable juror could find that the district based its placement of the 6-year-old with Down syndrome on her IDEA classification rather than her individual

needs. While parents seeking relief for disability discrimination cannot simply allege a denial of FAPE and must show that the district acted with "bad faith" or "gross misjudgment," the evidence in this case could support that. According to the parents, the district initially recommended a full-time special education placement based on the results of a single assessment designed for older students. In addition, there is evidence that the district placed the child in the general education classroom without developing an IEP, removed the child from there for part of the school day without the parents' knowledge or consent, and then moved the child to a full-time special education placement without first attempting behavioral interventions. Finally, the parents' evidence also supports their claim that the district explicitly segregated the child and other children based upon their Down syndrome rather than their aptitude. Judgment will not be entered for the parents, however, because there is evidence that the child's behavioral problems could support a finding that the district's errors were a misguided effort to address the child's needs rather than reflective of bad faith or gross misjudgment.

D. Los Angeles Unif. Sch. Dist. v. A.O., 80 IDELR 98 (C.D. Cal. 2022). ALJ's award of private school tuition reimbursement to the parents of a student with bilateral deafness and cochlear implants is upheld. When proposing that the student be placed in a special class for students with hearing impairments, the district did not offer FAPE in the LRE where the class would insulate her from exposure to hearing peers. The ALJ correctly determined that this student would not receive sufficient exposure to nondisabled peers in the proposed special class at the elementary school because it would deprive her of opportunities to model her hearing peers' use of language. In contrast, the private program blends deaf students with typical hearing peers, providing the requisite peer language modeling. The proposed program violates IDEA's LRE requirement because it offered the student only 30 minutes per day and 90 additional minutes per week to interact with nondisabled students. In addition, the proposed program was unclear concerning the frequency of services where it included a "frequency band" or range of services to be provided (e.g., one to five times per week) rather than a single, clear number.

E. A.D. v. District of Columbia, 80 IDELR 184 (D.D.C. 2022). The administrative decision rejecting the parents' request for a full-time special education placement for their 15-year-old daughter with dyslexia and SLD is upheld where the school district offered FAPE in the LRE. The hearing officer's focus on the IDEA's LRE requirement was appropriate, since the parents were seeking funding for a full-time special education setting at the Lab School. Further, the proposed IEP would have met the student's needs where it called for her to receive all academic instruction from a certified special education teacher in a 12:2 setting and to participate in general education electives with nondisabled peers. The student would also receive OT, classroom accommodations, specific learning goals and behavioral supports for her anxiety and distractibility. The proposed IEP reflected the student's needs as identified in formal assessments, private school progress reports, teacher interviews, standardized test results and parent input. Thus, the parents are not entitled to reimbursement for their unilateral placement of the student in a private setting.

EXTENDED SCHOOL DAY SERVICES

A. Osseo Area Schs. v. A.J.T., 122 LRP 34295 (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."

DISCIPLINE

A. U.S. DOE Action: New Resources!

On July 19, 2022, the U.S. DOE issued extensive guidance and resources from its OCR and OSERS on the issue of discipline of students with disabilities. While the "new guidance" is really not all new, it is important that all school attorneys and educators are familiar with it. All of the U.S. DOE resources issued on July 19th can be found at this link:

https://www.ed.gov/news/press-releases/new-guidance-helps-schools-support-students-disabilities-and-avoid-discriminatory-use-discipline

These discipline resources include the following documents. As with all recent significant guidance documents that U.S. DOE issues, it is noted that "this significant guidance is nonbinding and does not create or impose new legal requirements."

Document #1:

There is a cover letter from Secretary Cardona "to our Nation's Educators, School Leaders, Parents, and Students" about the importance of supporting the needs of students with disabilities.

The statement that caught my attention the most in this cover letter (as well as in the other resource documents) is the following:

> The Department recognizes and appreciates school administrators, teachers, and educational staff across the nation who work to provide a safe, positive, and non-discriminatory education environment for all students, teachers, and other school staff. Schools need not choose between keeping their school community—including students and school staff—safe and complying with the law.

Documents #2 and #3:

Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973 and an accompanying Fact Sheet. This OCR document appears as a 32-page Manual with a 4-page Appendix A (a Glossary of "Key Terms and Acronyms"). The Fact Sheet is a 4-page summary of the extensive information contained in the Manual.

To begin, OCR makes it clear that, though it can enforce the rights of IDEA-eligible students pursuant to its authority under Section 504, the guidance document "addresses the rights and responsibilities concerning FAPE under Section 504 that apply to Section 504-only students," and that "FAPE" refers to FAPE under Section 504, unless otherwise stated." (Manual, p. 4).

The information provided in this Manual is extensive and virtually impossible to summarize. However, with respect to keeping the school community safe, the same type of language found in the Secretary's letter appears from OCR as follows:

> Section 504 FAPE requirements do not interfere with a school's ability to address those extraordinary situations in which a student's behavior, including disability-related behavior, is an immediate threat to their own or others' safety. For example, nothing in Section 504's FAPE requirements prohibits schools from contacting mental health crisis intervention specialists or law enforcement under such extraordinary circumstances, even if the result is that those professionals remove the student from school. Additionally, OCR recognizes that, in emergency circumstances, based on exigency and safety, a school may seek to impose an immediate short-term disciplinary removal of a student with a disability because the student's behavior presents a serious and immediate threat to the safety of the student or of others that cannot be mitigated by other means. Any OCR investigation would review the specific facts to determine whether the school's conduct was reasonably necessary to ensure safety, including circumstances where an immediate removal would result in a pattern of removals.

(OCR Manual, p. 16).

Importantly, while OCR indicates that a school could not administer a disciplinary removal for conduct that is found to be a manifestation of the student's disability (and OCR sets out the process for making this "evaluation" called a "manifestation determination"), the student's placement could be changed by the 504 team:

> In determining the appropriate placement for the student with a disability, the impact of the student's disability-based behavior on other students is a relevant factor. Where a student's disability-based behavior significantly impairs the education of others or otherwise threatens the safety of the student or others, the Section 504 team's placement determination could result in a change to the student's services, supports, or educational setting to more effectively address the behavior and attempt to prevent it from recurring.

(OCR Manual, p. 19).

OCR also notes that in looking at what constitutes a "significant change in placement" that counts toward the 10 days for purposes of discipline, 504's FAPE requirements (MDR, etc.) and nondiscrimination responsibilities apply to informal disciplinary removals. Specifically, "OCR is aware that some schools informally exclude students, or impose unreasonable conditions or limitations on a student's continued school participation, as a result of a student's disability-based behaviors in many ways, such as:

- Requiring a parent or guardian not to send their child to, or to pick up their child early from, school or a school-sponsored activity, such as a field trip;
- Placing a student on a shortened school-day schedule without first convening the Section 504 team to determine whether such a schedule is necessary to meet the student's disability-specific needs;
- Requiring a student to participate in a virtual learning program when other students are receiving in-person instruction;
- Excluding a student from accessing a virtual learning platform that all other students are using for their instruction;
- Informing a parent or guardian that the school will formally suspend or expel the student, or refer the student to law enforcement, if the parent or guardian does not: pick up the student from school; agree to transfer the student to another school, which may be an alternative school or part of a residential treatment program; agree to a shortened school day schedule; or agree to the use of restraint or seclusion; and
- Informing a parent or guardian that the student may not attend school for a specific period of time or indefinitely due to their disability-based behavior unless the parent or guardian is present in the classroom or otherwise helps manage the behavior (e.g., through administering medication to the child).

"Depending on the facts and circumstances, OCR could find that one or more of these practices violate Section 504." (Manual, p. 23).

Documents #4 and #5:

Questions and Answers Addressing the Needs of Children with Disabilities and the Individuals with Disabilities Education Act's (IDEA's) Discipline Provisions. This document is a 55-page Q&A document issued by the DOE's Office of Special Education and Rehabilitative Services (OSERS). Like OCR's document, it is extensive and is intended to supersede a Q&A document regarding Discipline that was issued in June 2009. For those who are well-versed in IDEA's disciplinary provisions, there is nothing surprising or new here.

Positive, Proactive Approaches to Supporting the Needs of Children with Disabilities: A Guide for Stakeholders. This document is, as it title reveals, a 17-page document issued by OSERS that suggests approaches that reveal "best practices" related to discipline for students with disabilities.

STUDENTS IN JUVENILE JUSTICE/CORRECTIONAL FACILITIES

A. Adam X. v. New Jersey Dept. of Corrections, 80 IDELR 195 (D.N.J. 2022). Settlement agreement between a class of incarcerated students with disabilities and the New Jersey Departments of Education and Corrections is approved. Here, the students alleged systemic failure to provide them with special education services and equal access in violation of their civil rights and rights under IDEA, ADA and Section 504. Under the agreement, the Departments have agreed to modify their policies and procedures to ensure appropriate development and implementation of IEPs and 504 Plan, to provide at least four hours of instruction per day, to provide teacher-led cell-side instruction and to develop a new compensatory education program. In addition, the Departments have agreed to pay $975,000 in attorney fees. It is determined that this settlement is fair to the class.

PRIVATE SCHOOL PLACEMENT/SERVICES

A. Clarfeld v. Department of Educ., 78 IDELR 42 (D. Haw. 2021), aff'd, 80 IDELR 210 (9th Cir. 2022) (unpublished). Parent of a 14-year-old student with autism cannot rely on IDEA's stay-put provision to recover the full cost of his son's private placement for the 13 weeks that the DOE did not have an IEP in place for the 2019-20 school year, because the parent could not invoke stay-put protections for the period before he filed his due process complaint. Thus, the district court decision awarding reimbursement for only seven weeks of services is affirmed. IDEA's stay-put provision requires a school district to maintain a student's current educational placement while a dispute over his identification, evaluation, placement or services is pending. Here, the parent filed his due process complaint on Oct. 29, 2019, which was one day before the team met to develop the student's IEP for the 2019-20 school year. It is also important that the district court awarded partial reimbursement on equitable grounds because the Department failed to have an IEP in place at the beginning of the school year -- a failure that stemmed in part from the Department's decision not to hold an IEP meeting while the parent's earlier-filed State Complaint was pending. Because the parent declined all four meeting dates that the Department proposed for September 2019, however, the parent's right to reimbursement ended at that point. Finally, the district court was correct when it ruled that the October 2019 meeting included all required participants, that the parent meaningfully participated in discussions about the student's proposed placement, and that proposed public school placement was appropriate. All members of the team, including the parent and the Maui Autism Center representatives were able to provide input, ask questions and raise concerns. Thus, the proposed placement at the public school program is appropriate.

B. L.C. v. Arlington Co. Sch. Bd., 81 IDELR 65 (E.D. Va. 2022). Hearing officer's decision that the school district offered FAPE to the 14-year-old student with SLD and OHI is upheld and the parents are not entitled to reimbursement for expenses related to the placement of their son in a private day school for students with disabilities an hour away from home. Only where a district cannot provide FAPE must it assume the cost of educating a student in a private school. Here, the district proposed placement at the neighborhood school, which was the closest possible placement. The private school, in contrast, is comprised of only students with learning disabilities and is an hour away. When

the parents provided an IEE, the district accepted the private diagnoses of ADHD, dyslexia, and dysgraphia, added OHI eligibility, updated IEP goals, incorporated accommodations consistent with the IEE's recommendations, significantly increased SDI and proposed ESY services. In addition, the IEP called for "evidence-based reading intervention," and the district was responsive to the parents' request for O-G instruction and capable of providing it, even though it was one of several possible approaches and the IEP typically would not list the specific methodology. Importantly, teachers observed the teenager in the private placement and testified that he was not receiving any services there that were not also available to him in the district's program.

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, 80 IDELR 288 (W.D.N.C. 2022). The state review officer's decision is affirmed finding that the district's failure to provide Prior Written Notice and a copy of the notice of 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.

ATTORNEY CONDUCT AND ATTORNEYS' FEES

A. H.W. v. New York City Dept. of Educ., 80 IDELR 156 (S.D.N.Y. 2022). Parent's request for fees of $109,639 for two due process hearings is reduced by 20 percent. Here, some of the law firm's billing entries were excessive. For instance, billing for 20 hours to draft two due process complaints is unreasonable where the firm had previously represented the student in due process hearings involving similar issues. In addition, one of the attorneys billed 11 hours for drafting a brief that was mostly copied and pasted from the firm's pleadings in other cases. In fact, the vast majority of the parent's opening brief in this case compared with those recently filed by the law firm in similar IDEA cases shows that approximately 17 of the 25 pages were copied and pasted from submissions in other cases.

B. Wesco Insurance Co. v. Belfance, LLP, 39 F.4th 326, 81 IDELR 92 (6th Cir. 2022). While a court may award reasonable attorney's fees to a school district that prevails in IDEA proceedings against a parent attorney who files a frivolous or unreasonable IDEA claim, the malpractice insurance of the two parent attorneys who were ordered to pay fees to four districts does not cover these kinds of awards. The malpractice insurance policy provides that the insurance company is required to defend and indemnify the attorneys when a plaintiff seeks or obtains damages against them due to their legal services, except in the case of sanctions. Although these parent attorneys argue that IDEA fee awards obtained by the four districts against them were not sanctions, the court disagrees. These fee awards meet the definition of "sanctions" against these attorneys and are, therefore, not covered by the insurance policies. Thus, the insurance company is not obligated to reimburse the attorneys for payment of these awards.

TRANSGENDER AND DISABILITY

A. Williams v. Kincaid, 45 F.4th 759, 122 LRP 27069 (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.

SECTION 504/ADA DISCRIMINATION GENERALLY

A. The U.S. DOE's Office for Civil Rights issued an updated "Case Processing Manual (CPM)" on July 18, 2022. The CPM provides OCR with the procedures "to promptly and effectively investigate and resolve complaints, compliance reviews, and directed investigations to ensure compliance with the civil rights laws OCR enforces." This document can be found at the following link: https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf

B. M.F. v. New York City Dept. of Educ., 80 IDELR 96 (E.D.N.Y. 2022). Summary judgment is granted to the class of students with Type 1 and Type 2 diabetes who have been denied transportation to school and during field trips due to the district's failure to have sufficient trip nurses to accompany certain children with diabetes on field trips and not assuring that there are trained adults available to administer glucagon on all buses transporting diabetic students. Where the parties dispute whether the district must provide as reasonable accommodations additional resources to ensure that trip nurses are more reliably available to accompany children with diabetes on school trips and training for bus drivers and bus attendants in the use of glucagon during a hypoglycemic emergency to ensure that there is always a trained adult who is capable of administering glucagon on school buses, the court rules in favor of the class of students. Clearly, the school district has discriminated against the students under 504/ADA. Districts discriminate if they provide services that are not equal to or as effective as those offered to nondisabled students, and reasonable accommodations must be made to enable students with disabilities to enjoy the same rights as others unless they would impose an undue hardship or require a fundamental alteration in the nature of the service. Here, district policy does not permit teachers, bus drivers, attendants, and unlicensed staff to administer insulin or glucagon, despite the serious risk of waiting for 911 services in diabetic emergencies. The district's policy denies students access to field trips when nurses are not available and not training bus drivers and attendants to administer glucagon in emergencies is unreasonable and ineffective. The district has also discriminated by not reasonably accommodating the medical needs of the students on field trips and regularly cancelling the trips only for classes with students who have disabilities. To address the discrimination, the class of student is entitled to an injunction directing the district to conduct a needs assessment of the estimated shortfall of trip nurses and to hire a sufficient number of "float pool nurses" to ensure that all field trip requests by the class members are fulfilled. In addition, plaintiffs are further entitled to an

injunction directing the district to train all bus drivers and bus attendants in the administration of glucagon in emergency situations in order to ensure that at least one adult on each bus is trained to administer glucagon in the event of a diabetic emergency.

SECTION 504 AND ACCOMMODATIONS ON ASSESSMENTS

A. Valles v. ACT, Inc., 2022 WL 2789900, 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.