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

NC CASE 2024 Conference

October 1, 2024

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

As always, there has been a whole lot going on in special education law since last year's Conference. In this session, I will provide an update on significant special education "legal happenings" across the country, including an overview of relevant court decisions and agency interpretations issued in late 2023 and so far in 2024.

DECISIONS AND GUIDANCE RELATED TO COVID-19 CHALLENGES/ISSUES

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

Lee v. Board of Educ. for Prince George's Co., 124 LRP 3463 (D. Md. 2024). Among other things, the ALJ did not err in finding that the district did not violate IDEA by changing the SLD middle schooler's placement during COVID times without allowing the parent to participate meaningfully. Even if the student's individualized continuity of learning plan (ICLP) provided for fewer goals, accommodations, and hours of special education services than specified in his IEP, US DOE guidance acknowledged that "exceptional circumstances" could necessitate a school district not providing services in full accordance with a child's IEP despite "every effort" (citing U.S. DOE Q&A document (March 2020)). The parent has not argued that the COVID pandemic did not present exceptional circumstances or that the school district did not make every effort to comply with the student's IEP. More importantly, federal and state agencies explicitly instructed that the change to virtual instruction necessitated by the COVID pandemic did not effect a change in placement and that school districts did not need to hold an IEP team meeting to discuss how to provide FAPE during the period of virtual instruction. Where the parent has not shown that the district changed the student's placement under IDEA, the district had no obligation to hold an IEP team meeting or provide her with an opportunity to participate in the decision to shift to remote learning. Accordingly, no procedural error occurred. Even if a procedural violation did occur, the parent has not shown that the procedural violation impeded the student's right to FAPE, significantly impeded her opportunity to participate in the decision- making process regarding the provision of FAPE or caused a deprivation of educational benefits. Although the student's grades did not improve from fifth to sixth grade, he did progress on IEP goals during the period of remote learning. Indeed, he made sufficient progress on his IEP goals during eight of ten measurable

progress periods throughout his sixth-grade year, and his consistent progress toward IEP goals shows that the received at least some educational benefit during the period of remote learning (citing, Endrew F. and Rowley – "[T]he achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit."). In addition, the parent has not shown that the district impeded her opportunity to participate in the decision-making process when the district instituted the ICLP. Rather, the record shows that the student's special education teacher called her to discuss a shift to remote learning, emailed a copy of the ICLP, and attached a copy of the ICLP to the class's communication portal. The special education teacher also testified that when she talked to the parent about the ICLP, she did not object to converting to remote learning. Accordingly, the parent has not shown that the district procedurally or substantively erred in switching to virtual instruction without holding an IEP team meeting.

Abigail P. v. Old Forge Sch. Dist., 82 IDELR 227 (M.D. Pa. 2023), aff'd, 124 LRP 21769 (3d Cir. 2024). Hearing officer's decision that 12 year-old student with autism was provided FAPE during the 2020-21 school year during COVID-necessitated remote learning was upheld by the district court and that decision is affirmed. As the district court noted, the IEP provided was reasonably calculated to enable the student to make progress in light of her circumstances when it was modified to reflect that she would receive virtual instruction. All of the other aspects of the IEP were the same as the pre-pandemic IEP, including the annual goals and related services. In addition, during virtual instruction, the student received 5 sessions per week of specialized instruction, along with optional Google classroom assignments 4 days per week for enrichment and extra practice. In addition, the district funded at-home nursing services, three 30-minute speech sessions per week, three 30-minute OT sessions per week, and one 30-minute PT session per week, along with services of a BCBA. In addition, an evaluation submitted by the parent reflected that the student does well and had a preference for learning on devices/tablets. Where the district was able to implement the student's IEP services in the virtual setting and the student made progress during school closures, she was provided FAPE. In response to the parent's argument that the district implemented "drastic changes to the frequency and duration" of the student's special education and related services, the record does not support this argument. "None of this suggests that Abigail's remote learning program was ideal; it was inferior to in-person instruction. But Abigail has failed to identify a failure by Old Forge to implement substantial or significant provisions of her IEP. So her challenge to the implementation thereof must fail." In closing and in response to the assertion made that the district court's decision suggested the "perverse result" that a school district may provide remote instruction under any circumstances:

> Our holding today does not give school districts carte blanche to reduce a disabled student's school day for any reason...or no reason at all. Rather, school officials may do so only if they continue to offer an educational program reasonably calculated to confer meaningful educational benefits in light of the child's circumstances. As counsel acknowledged at oral argument, such circumstances can surely be affected by a global pandemic.

NON-COVID-RELATED DECISIONS AND GUIDANCE

APPLICABILITY OF US DOE REGULATIONS AND GUIDANCE

Loper Bright Enterprises v. Raimondo, 124 LRP 22422 (2024). On June 28, 2024, the US Supreme Court issued a 6-3 opinion that could have great impact on the world of special education and the applicability of regulations under IDEA, Section 504, and the ADA (and other interpretive guidance potentially). In this case, a group of commercial fishermen participating in the Atlantic herring fishery sued the National Marine Fisheries Service based upon the Service's promulgation of a rule that required the industry to fund at-sea monitoring programs at approximately $710 per day. The fishermen argued that the applicable statute did not authorize the Service to create these requirements and that the Service failed to follow proper rulemaking procedures. The federal district court ruled (and the D.C. Circuit affirmed) that the Service's rule was a reasonable interpretation of its authority and that it was adopted appropriately. The questions presented to the Supreme Court were: 1) whether the applicable statute (the Magnuson-Stevens Act) authorized the Service to promulgate the rule that it did; and 2) whether the Court should overrule the 1984 case of Chevron v. Natural Resources Council (and the "Chevron doctrine" created by the case) or at least clarify whether statutory silence on controversial powers creates an ambiguity requiring deference to the federal agency. The Loper Bright Court ruled that the Administrative Procedure Act requires courts to exercise "independent judgment" in deciding whether an agency has acted within its statutory authority and that courts may not defer to an agency interpretation of the law simply because a statute is ambiguous. Where Chevron required courts to defer to agency interpretations of ambiguous statutes if those interpretations were reasonable, Chevron was based upon a flawed assumption that Congress intends to delegate interpretive authority to agencies when the law is ambiguous. This assumption does not reflect reality and goes against the traditional role of courts, has been difficult to apply, and has led to confusion in lower courts. Bottom line: It is up to the courts "to decide whether the law means what the agency says." Courts, not agencies, will decide all relevant questions of law arising on review of agency action, even those involving ambiguous laws. [Note: Currently, there is an OCR administrative federal fund termination hearing pending before the U.S. DOE against the Michigan Department of Education (MDE) regarding an OCR finding that MDE violated Section 504 when it gave incorrect guidance to school districts as to their obligations related to compensatory services to students for services missed during COVID school closures. The Michigan Attorney General's response brief and motion to dismiss the action states that "Loper casts a long shadow on all of the precedents cited by OCR in its brief and removes any deference this Tribunal should afford to OCR's interpretation of Section 504" and that "OCR is still operating in a pre-Loper world." In addition, MDE argues that Section 504 contains no requirement that it has a responsibility under Section 504 to ensure that its districts were compliant with the law and that OCR has no jurisdiction to enforce IDEA].

APPROPRIATE/TIMELY EVALUATION

M.D. v. Vineland City Bd. of Educ., 124 LRP 1847 (D. N.J. 2024). Parents' motion for judgment on their IDEA child find claim based upon a delayed evaluation is denied. While the district's evaluation was overdue by 63 days and led to a delay in developing an initial IEP for the 6th grader, the delay does not automatically entitle the parents to relief. While New Jersey law gives districts 90 days to evaluate a student, determine eligibility, and develop and implement an IEP and the

district took 153 days to do so, the delay may not entitle the student to relief. The 90-day timeframe to complete the process expired on June 14, 2017, shortly before the end of the student's 5th grade year. In addition, the district finalized the student's initial IEP on August 16, 2017. As such, the district completed the evaluation, found him eligible, and developed an IEP before the first day of his 6th grade year. Where the parents have not explained how a procedural delay that spanned the summer months resulted in a loss of educational benefit, relief is not warranted at this time.

Zion M. v. Upper Darby Sch. Dist., 123 LRP 30277 (E.D. Pa. 2023). While the district's 6-month delay in evaluating the high schooler with ADHD, anxiety, and mood disorder was a violation of IDEA, it did not entitle the parent to reimbursement for placement of the student in a private placement. Here, the district waited almost six months from the date of the parent's request for an IDEA evaluation in February 2020 to seek consent to evaluate due to COVID-19 school closures. While the delayed response to the request was not reasonable and therefore constituted a procedural violation, the parent is not entitled to private school reimbursement unless she can show that the procedural violation caused educational harm or impeded her participation in the decision-making process. As demonstrated by the results of evaluations that were actually conducted, the district's evaluation delay was harmless. The student's low score in math computation did not in itself establish an SLD, especially when other evaluative data reflects that the student performed well. Further, the evaluation data reflects that the student does not need specially designed instruction to address his ADHD-related difficulties. Given that the evaluation delay did not result in substantive harm, the parent could not establish a denial of FAPE that would entitle her to reimbursement for the cost of the private placement. In addition, the parent participated fully in all stages of the IDEA decision-making process.

ELIGIBILITY/CLASSIFICATION

G.M. v. Barnes, 124 LRP 32983 (4th Cir. 2024). District court's ruling is affirmed that second grader with diagnoses of dyslexia and ADHD who exhibits average performance in reading and math is not eligible for services under IDEA. The parents' assertion that their son is a child with SLD is rejected where the eligibility team, in accordance with Maryland law, considered whether the student exhibited a pattern of strengths and weaknesses in performance, achievement, or both relative to age and state-approved grade-level standards. The fact that the student is strong in math does not turn his reading and writing difficulties into a weakness for purposes of determining SLD eligibility. Rather, the evidence points to the fact that the student maintains average performance in reading and writing, notwithstanding the private evaluations that indicate deficiencies in reading and writing. While it is true that the student's reading and writing assessment scores dropped from the previous year, the scores remained in the average range and the student met grade-level standards while performing in the middle of this class in both areas. Thus, there is no pattern of strengths and weaknesses to support eligibility for SLD. While the court recognizes that the student's ADHD may qualify as OHI, the existence of a disability is not sufficient for eligibility under IDEA. The parents also must show that the student needs special education because of his ADHD. Given the evidence of the student's solid average performance in the general education classroom and his progression from grade to grade, however, the student does not need special education in order to receive an appropriate education.

Mason G. v. Western Wayne Sch. Dist., 124 LRP 33186 (M.D. Pa. 2024). Parent's challenge to the hearing officer's decision is rejected. While the grade schooler with dyslexia was ultimately found eligible for special education services during the 2020-21 school year, the district did not violate its child find duty in finding that the student was not eligible earlier. From December 2017 to February 2020 and in response to parent concerns about their child's deficits in speech, language and reading, the district evaluated the student. It also agreed to fund multiple IEEs, including a speech and language IEE in 2020. None of the district's evaluation nor the IEEs that it funded prior to the 2020-21 school year indicated that the student was in need of special education due to a disability. Rather, the data reflected that the student earned good grades and average test scores and made progress in the general curriculum without special education services. In addition, the district provided the student with reading interventions, placed him in a co-taught classroom, and offered other supports until it found him eligible for an IEP in 2020.

Zayas v. New York City Dept. of Educ., 124 LRP 1849 (S.D.N.Y. 2024). District did not deny FAPE to the teenager with CP when it changed his disability classification from TBI to multiple disabilities. While the parents of the student disagreed with the change in classification, they did not show that the district's proposed IEP was inappropriate. Thus, they are not entitled to reimbursement for their unilateral private placement of the student at iBrain. IDEA provides that recommendations in a student's IEP may not rely solely on the student's disability classification. Rather, they must be based on the student's unique educational needs. Here, the district's school psychologist testified that the student's disability classification did not change anything in terms of the discussions had at IEP meetings or the recommendations that were made. As such, the SRO's finding that the change in the student's classification had no bearing on the district's offer of FAPE is upheld. Because the district offered FAPE, the parents are not entitled to private school reimbursement.

Mason v. New York City Dept. of Educ., 123 LRP 29905 (E.D.N.Y. 2023). SHO's decision that the district is not required to reimburse the parents for placement of their 10 year-old son in a private TBI school is upheld. Whether the student actually has TBI or not, the classification of the student's disability has little bearing on whether the district offered FAPE. Where the SRO found that the IEP was correctly tailored to meet the student's needs regardless of his classification, any district error in classifying the student as one with multiple disabilities as opposed to TBI is of no consequence. While the parent's wish for a TBI classification stems from concerns about the student's placement at a private TBI school, the proposed district class has a similar child-to-adult ratio while offering a greater variety of school personnel. In addition, the presence of additional adults as proposed would better protect the student from injuries, such as aspiration and exposure to allergens. While the parent may prefer a smaller class size, the district's offered placement addressed the student's unique needs.

INDEPENDENT EDUCATIONAL EVALUATIONS

Alex W. v. Poudre Sch. Dist. R-1, 94 F.4th 1176, 124 LRP 7692 (10th Cir. 2024). District court's ruling requiring the district to reimburse the parents for a second IEE is reversed. Under IDEA regulations, a parent is entitled to only one IEE at public expense each time the district conducts an evaluation with which the parent disagrees. If a parent requests such an IEE, a school district must, without unnecessary delay, either file a due process complaint to request a hearing to

show that its evaluation is appropriate or ensure that an IEE is provided at public expense. Here, the district conducted a reevaluation in 2017 and reassessed the student's vision and hearing, general intelligence, cognitive and adaptive functioning, academic performance, and social and emotional abilities. Based upon the reevaluation results, the district reduced direct speech-language and OT services. The parents challenged the 2017 reevaluation results, specifically disagreeing with the conclusions concerning speech-language and OT and in February 2018, requested an IEE in those areas. The district agreed to fund the IEE and the IEP team met in April 2018 to discuss the results. In the summer of 2018, the parents continued to challenge the results of the 2017 reevaluation and requested another IEE--this time in the area of neuropsychology. The district refused, and the parents paid $5,500 for the independent neuropsychological evaluation. The district court and ALJ erred by requiring the district to pay the $5,500 because the plain text of the regulation supports the district's position. The regulations make it clear that the parents were entitled to "only one" IEE at public expense per school district evaluation. Under these circumstances, where the parents had no right to request or receive a second IEE at public expense, the district also had no obligation to respond to the request either by bearing the cost of the IEE or filing a due process complaint to show that its evaluation was appropriate.

Zachary J. v. Colonial Sch. Dist., 124 LRP 3915 (3d Cir. 2024) (unpublished). For several reasons, the district court's ruling that the district afforded FAPE to the SLD student with ADHD during third and fourth grade is affirmed. Thus, reimbursement for private schooling is denied. The parents' contention that the district substantively violated IDEA when it "failed to consider the IEE, failed to amend Zachary's IEP, and failed to offer him a FAPE in response to the family's IEE" is rejected. While the parents correctly point out that IDEA regulations require a district to "consider" the results of an evaluation obtained by parents, the district actually did consider the IEE and offered the student FAPE. Although the parents did not give the IEP team a copy of the IEE until the day before the May 2017 annual IEP meeting, the district and parents discussed the IEE's recommendations at the meeting, how the district could address some of the concerns of the evaluator, and ways in which other concerns were already being addressed in the IEP. In addition, after the IEP team had more time to review the IEE, the district proposed another IEP in July 2017 and modified the May 2017 IEP, adding services such as participation in a small social and executive functioning skills group two to three times per week and addressed concerns about focus and attention. The parents rejected the July 2017 IEP, withdrew the student from public school, and enrolled him in a private school. In any event, the parents here were not denied participation rights, they were offered FAPE, and indeed were "intimately involved" in the process of crafting their child's IEP.

THE FAPE STANDARD

L.S. v. Union Free Sch. Dist. of the Tarrytowns, 124 LRP 13418 (S.D.N.Y. 2024). State hearing officer's denial of reimbursement for unilateral private placement to the parents of a middle schooler with learning disabilities is upheld. While the student's quarterly grades in three academic classes declined during sixth grade, it is important to consider all evaluative data as a whole to determine whether the student was provided FAPE. Here, the student made appropriate progress toward meeting his IEP goals, despite the decline in grades as reflected on his report cards. For example, the student mastered one of his math goals and made expected progress on another. The parent's argument that the student's IEP progress reports were inconsistent and not

objective is rejected in that "[the progress report on which [the SRO] relied provides progress updates for each goal on [the student's] 2017-18 IEP and, in many instances includes comments providing context for the observed progress (or lack thereof)." In addition, the student's IEP team considered sufficient evaluative data when developing the IEPs for seventh and eighth grade and the proposal to place the student in special education classes for academic subjects was appropriate in light of the student's previous struggles in integrated co-teaching classes.

FAPE AND THE USE OF ARTIFICIAL INTELLIGENCE

W.A. v. Clarksville-Montgomery Co. Sch. Sys., 124 LRP 16411 (M.D. Tenn. 2024). ALJ's decision that the district denied FAPE to a high schooler with dyslexia is upheld, and the student is entitled to 888 hours of tutoring from a reading interventionist trained in the Wilson Reading System (but not necessarily by a private provider unless the district is unable or unwilling to provide it). The district's argument that the ALJ erred when relying on Tennessee's "Say Dyslexia Act" is rejected where the IDEA defines FAPE as services that are provided in accordance with "state standards." Although the student was not able to read, he made passing grades, had a 3.4 GPA, and was on track to graduate. However, this success is attributed to the student's use of work-arounds via technology, text-to-speech programs, and AI software for reading and writing, as opposed to real improvement in his reading abilities. The IEPs provided to the student fell fall short of state standards that require districts to provide dyslexia-specific interventions to any student suspected of having dyslexia. It is notable that the student's teachers in 9th and 11th grade repeatedly expressed concerns about his inability to read or even spell his name consistently, thus putting into question the district's decision to continue the IEP's focus on fluency and expression instead of basic reading concepts like phonetics and letter recognition. The ALJ's decision was appropriately not specific to the student's dyslexia but focused on the district's failure to address the student's individual need for special education services that target foundational skills in reading, guided by an awareness of his dyslexia.

FAPE AND MODIFIED CURRICULUM

Irvine Unif. Sch. Dist. v. Gagliano, 124 LRP 1 (9th Cir. 2023) (unpublished). District court's decision upholding a hearing decision that the district denied FAPE to an 8th grade student with ADHD, anxiety disorder, dysthymic disorder, dyscalculia, and dyslexia is affirmed. Where the parents have demonstrated that the district's IEPs did not offer FAPE and that placement of their child at a private school for students with SLD was proper, they are entitled to reimbursement for private school tuition and costs. Both expert psychologists testified credibly that the student's cognitive level was high enough to successfully participate in the general curriculum with her peers. Thus, the district's IEPs providing for a modified curriculum in math and reading below grade-level standards was inappropriate. The modified curriculum was not focused on the student's progression from grade-to-grade; nor did it allow her to access the general education curriculum and standards. "Moving a student from the general education

curriculum to a modified curriculum is a last resort." (citing 20 U.S.C. §1400(c)(5)(A).[1] The student did not make progress with the modified curriculum where her assessment scores dropped. Thus, there was no reliable evidence that the modified curriculum offered in the IEPs provided meaningful benefit for the student. Because she progressed academically and socially in the private placement, an award of tuition for such placement was proper.

PROCEDURAL SAFEGUARDS/VIOLATIONS

Letter to McAndrews and Ramirez, 124 LRP 33702 (OSEP 2024). In response to a question that asserts that Delaware school districts are outlining very minimal amounts of time for the provision of specially designed instruction on student IEPs but then are verbally claiming that the students, in reality, are receiving much more than is listed in the IEP, if this is indeed the practice, it may have implications for parental participation provisions under IDEA. Even if a student is actually receiving more services than provided for in the IEP, if the IEP does not sufficiently provide notice to parents of what the student is actually receiving, that would be in violation of IDEA provisions requiring the provision of informed parent consent for services and the requirement that parents receive sufficient notice of what services their children are actually receiving.

Pitta v. Medeiros, 124 LRP 521 (1st Cir. 2024). District court's decision that the district did not violate the First Amendment when it denied the father's request to make a video recording of a virtual IEP meeting held through Google Meet is affirmed. While the First Circuit has recognized a right to record public officials who are performing their job duties in a public space, this does not apply here. Districts do not generally convene and hold IEP meetings in public spaces. Here, the district held the meeting in a password-protected virtual meeting room controlled by the district's special education director and the general public was not "free to walk into a school and enter a meeting of educators." The parent also could not show that the district team qualified as "public officials" for purposes of the First Amendment and recordings of such are only protected when they serve the public interest. It is important that the parent did not plan to share the recording with the general public and specifically stated that he wanted the recording so he could challenge statements made in the IEP meeting notes. Thus, the recordings that the parent asked to be made did not qualify as protected speech under the First Amendment. [Note: In footnote 11, the Court points out that the father (allegedly relying on a DOE guidance document), argues for the first time in his reply brief that he needed to video record his child's IEP Team Meeting to meaningfully assert his parent rights protected by IDEA. "In any event, this is not a First Amendment claim and is waived. His belated claim is an administrative claim subject under the IDEA to exhaustion before it may be brought as a civil action in federal court"].

[1] This cited section is in IDEA's Preamble and reads as follows: "Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—
(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—
(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and
(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible."

AAA v. Clark Co. Sch. Dist., 124 LRP 24303 (9th Cir. 2024) (unpublished). The district court's granting of the district's motion for summary judgment on the parents' FAPE claims is upheld. Despite the district's delay in its annual review and revision of the hearing impaired student's IEP for several months and after the receipt of an independent evaluation, FAPE was provided. A procedural violation under IDEA denies FAPE only if the violation 1) impedes the child's right to FAPE; 2) significantly impedes the parents' opportunity to participate in decision-making regarding the provision of FAPE; or 3) deprives the child of educational benefit. Here, although the district concedes that it failed to conduct the annual review of the student's IEP, the child made appropriate progress in the general education setting while receiving the same services under her prior (or "expired") IEP. For example, her skills in handling and overcoming her hearing impairment and her academic skills improved, where she earned a position on the honor roll. Thus, the parents failed to show any of the harms that would support their position that she had been denied FAPE.

J.R.B. v. Quakertown Comm. Sch. Dist., 124 LRP 24449 (E.D. Pa. 2024). Hearing officer's decision that the district did not deny FAPE when it moved the kindergartner with an emotional disturbance to a more restrictive setting on a "wait-and-see" trial basis is upheld. While the placement change clearly violated IDEA procedural requirements because an IEP meeting was not convened with the parent to discuss the proposal and prior written notice of the change of placement was not provided to the parent, not every procedural violation is actionable as a denial of FAPE unless it impeded the child's right to FAPE, caused a deprivation of educational benefits, or significantly impeded the parent's participation in the decision-making process. Here, the trial placement was fairly short, lasting only a few weeks. In addition, the district informed the parent on the first day of the trial that the student was working outside of the general education classroom. Further, the student received additional services in the trial placement and appeared to benefit from them. Importantly, once the student was given the option to return to the regular classroom full-time, he chose to continue working one-on-one in the behavioral support classroom or hallway for all or part of the school day.

Etiwanda Sch. Dist. v. D.P., 124 LRP 1299 (C.D. Cal. 2024). ALJ's decision that the district denied FAPE is upheld where, among other things, the student's annual IEP review was held on December 8, 2021 without the parent. Thus the parent was denied meaningful participation in the development of the IEP. While the district proposed multiple dates to the parent via written correspondence and the parent failed to respond to most of those invitations, the district did not change its process of unilaterally proposing dates. The district did not show that the parent refused to attend where the parent made three attempts to reschedule the IEP team meeting, even though for two of the alternative dates the parent suggested, the district was not able to gather the required school attendees. In addition, the parent responded to an email with a Zoom link for the December 8, 2021 IEP meeting and informed the district that she would check in with her advocate about it. When the parent did not attend the meeting, the district did not follow up with the parent and chose to proceed. "To be sure, the Court understands the frustrations caused by Parent and Parent's advocate, who were, as the ALJ described, 'largely uncooperative, largely unresponsive, and difficult to work with.' In certain circumstances, it would be reasonable for the District to have moved forward with the IEP team meeting without Parent. But here, where Parent had expressed interest in participating and offered dates for a potential meeting, the District must do more than present an ultimatum and proceed. Had the District engaged in a similarly persistent but less

unilateral method of proposing potential meeting dates or waited to hear from Parent regarding the December 8, 2021 date after receiving Parent's response to the Zoom invitation, the Court may have reached a different result."

K.O. v. San Dieguito Union High Sch. Dist., 124 LRP 13134 (S.D. Cal. 2024). ALJ's decision in favor of the parents of a 7th grader with epilepsy, ADHD, and anxiety and awarding them reimbursement for private schooling is affirmed where the district denied FAPE when it declined to consider any other placement than a therapeutic nonpublic school (NPS) for students with behavioral issues. Here, the parents had requested placement at a different NPS that was not a therapeutic school for students with significant behavioral problems. The court agrees with the ALJ's conclusion that the district predetermined its offer of the therapeutic school and, therefore, denied FAPE. Indeed, the ALJ reasonably inferred that the district's case manager decided before the IEP meeting to offer placement at the therapeutic NPS because no one else on the team even mentioned the need for an embedded therapeutic program for the student. The ALJ further supported her conclusion regarding predetermination with the fact that when the IEP team unanimously expressed an opinion that the proposed placement at the therapeutic school was inappropriate for the student, the case manager did not offer or suggest other placements for the team's consideration, including the parents' preferred NPS. This fact reasonably supports the conclusion that the district was "impermissibly wedded" to placing the student at the therapeutic NPS. Further, at the January 24, 2022 IEP meeting, the case manager failed to respond to the IEP team's concerns regarding the student's anxiety and the fact that placement at the therapeutic NPS with students with behavioral issues may increase her anxiety. The case manager did not waiver on his decision to offer the placement even when confronted with these facts regarding the student's disabilities. Accordingly, the ALJ properly found that the district's offer was a "take it or leave it" offer and was a procedural violation of the IDEA that denied FAPE. In addition, the ALJ did not err when she did not examine whether the proposed IEP was reasonably calculated to provide appropriate progress, because the procedural violation in and of itself constitutes denial of FAPE.

Davis v. Banks, 123 LRP 29915 (E.D.N.Y. 2023). District violated IDEA when it developed the 9 year-old student's IEP in the absence of her elderly guardian and offered her only the opportunity to participate in the IEP meeting by cellphone on a noisy subway. The hearing officer's order is reversed and the guardian is awarded reimbursement for private school placement where the district's actions effectively excluded the guardian from the IEP process. While the district invited the guardian, her advocate, and representatives from the private school to the on-site IEP meeting, the guardian got on the wrong subway train on her way to the meeting and ended up traveling far out of the way. The district's argument that the guardian made an "active choice" to skip the meeting when she refused to participate by cellphone is rejected. Aside from the fact that participation was impossible technologically on the subway, "it clearly would have been inappropriate to require [the guardian] to participate remotely in the meeting while traveling underground in a subway car." In addition, the guardian would not have had access to any documents discussed by other team members had she participated by phone. Given the guardian's difficulties with technology and her expressed wish to attend the meeting in person, the district's refusal to reschedule was unreasonable.

I.S. v. Fulton Co. Sch. Dist., 123 LRP 33063 (N.D. Ga. 2023). ALJ's decision that the IEP team came to IEP meetings with an open mind and considered the parents' input is affirmed. Here, the student's IEP team genuinely considered the parents' concerns and entered the meeting with an open mind when proposing placement for a high schooler with autism, severe anxiety, and social skills deficits. A district has engaged in "predetermination" when it comes to an IEP meeting with a closed mind and has already decided material aspects of the IEP without parent input. The IEP team repeatedly provided the parents with the opportunity to express their input, and the parents did so. The parents' argument that they frequently raised concerns that the district ignored about the student's school refusal, his need for peer interactions, and his social skills deficits is rejected. The district actually agreed with the parents' concerns and, in response to them, developed a strategy for addressing them. While the parents may have believed that they were not truly listened to, there is no evidence that the district ignored their input, prevented them from expressing their viewpoints, or failed to approach the meetings with an open mind. With respect to the parents' desire for residential placement, the district considered their preference and engaged in a long discussion concerning the need for it, as well as other placement options.

IEP CONTENT ISSUES

Hilyer v. Elmore Co. Bd. of Educ., 124 LRP 5422 (M.D. Ala. 2024). District's motion for summary judgment is granted and the hearing officer's decision that the district offered FAPE to the 10-year-old student with autism is upheld. IDEA's reference to "peer-reviewed research" with respect to the provision of services does not require an IEP team to consider only those services and supports that are research-based. The student's proposed IEP that was based on peer-reviewed research to the extent practicable offered FAPE. Under IDEA, the extent of the "peer-reviewed research" language is not entirely clear. However, the notion that an IEP team may only offer services and supports that have the greatest backing in research is rejected. In fact, the US DOE has noted that IEP teams must base all decisions regarding services on the individual needs of the student. Here, the special education services in the student's proposed IEP were appropriate where the district showed that the curriculum used for the student's reading instruction was based on research and used throughout the district (Unique Learning). While the record does not indicate whether the program is specifically based on peer-reviewed research, there is also insufficient evidence to conclude that the methods used were not based on peer-reviewed research "to the extent practicable" or otherwise not based upon reliable evidence. Although no discussion of peer-reviewed research was included in the IEP or meeting notes, the US DOE's guidance indicates that this sort of discussion is not required for FAPE.

S.K. v. Township Bd. of Educ., 124 LRP 6845 (D. N.J. 2024). The ALJ's denial of private school reimbursement to the parents of the 17-year-old high school student with autism and SLD is upheld. The parents argue that the student's IEPs developed in 2019, 2020, and 2021 were not appropriate and that his progress was stagnant due to his failure to master some of the goals and the fact that several annual goals and objectives were repeated from year to year. "'[T]he mere fact that a student's IEP goals are continued does not necessarily mean that the similar IEPs were not reasonably calculated to confer educational benefit.' *James D. v. Bd. of Educ. of Aptakisic- Tripp Cmty. Consol. Sch. Dist. No. 102*, 642 F. Supp. 2d 804, 827 (N.D. Ill. 2009) (*citing Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995)); *c.f. Damarcus S. v. D.C.*, 190 F. Supp. 3d 35, 53 n.7 (D.D.C. 2016) (admonishing that a 'wholesale, cut-and-paste repetition is symptomatic

of a larger, more concerning failure by the District to adapt its approach in the face of [the plaintiff's] continued frustration and lack of progress')." On this point, district witnesses cogently and rationally explained the need to repeat some IEP goals and objectives in the IEPs. For instance, the district's LD teacher consultant explained that the student's ongoing challenges required that he continue to work on certain goals and objectives and that the district would not "omit [a goal or objective] from the document if it still needs to be addressed." In addition, the district's school psychologist testified that "[i]t was not unusual for a student's goals to be repeated from one IEP to another, as they were for S.K., especially considering the impact of the COVID-19 pandemic closures on class instruction and S.K.'s transition from middle school to high school." The psychologist also testified that "[s]ome goals and objectives were carried over from the prior IEP (2019-2020 school year) because it had been developed late in the school year due to S.K. having recently moved to the school district," and that while the student made progress in a number of areas, some goals had not been achieved and were still being addressed. The psychologist also explained that "[c]ontinuation of the objectives in the next IEP was intended to reinforce the skills." As to achievement-reporting inconsistencies, the district's SLP testified that "for students with autism, like S.K., inconsistencies are inherent" and although the student may have mastered a goal at one time, he did not necessarily generalize the skill. The SLP distinguished mastery—which demonstrates when a student meets a goal's criteria over two sessions—from generalization, when a student consistently and independently demonstrates the act or function in a variety of settings. Finally, contrary to the parents' argument, the ALJ did not "ignore" that the student continued receiving instruction in concepts that he had already worked on. Rather, the ALJ found that although several goals and objectives were repeated in the IEP, the student was "learning and progressing" but there remained room for further progress, and the student still needed to generalize his skills in many areas. The ALJ also credited the SLP's testimony where the SLP documented the student's inconsistency in progress and that it was "routine among students with autism." Thus, the ALJ's decision to credit the testimony of district witnesses was "thorough and well-reasoned" and is upheld.

Edward M.-R. v. District of Columbia, 123 LRP 30413 (D. D.C. 2023). Hearing officer's decision that the district did not deny FAPE to a middle schooler with autism and ADHD when it developed his IEPs is affirmed. Simply because an IEP contained some recycled IEP goals from a previous IEP does not make it inappropriate. Courts and hearing officers are to evaluate IEPs based on the information available to the IEP team at the time the IEP is developed. The key question is whether the IEP will allow the student to make progress appropriate in light of the student's circumstances. Here, the IEPs met this standard, even though some of the goals in the student's 2018 and 2019 IEPs were carried over from the previous IEP. Importantly, the student had not yet mastered those goals. In addition, several district personnel testified that the student struggled to remember lessons he had previously learned and needed to repeat them "over and over" to achieve mastery, which the parents did not refute was his way of learning. Further, most of the goals in the November 2019 IEP that were developed approximately 8 months after the student moved to a different school were new. Given the severity of the student's needs and his "slow-but-steady progress" since his last reevaluation, the student received FAPE.

IEP IMPLEMENTATION FAILURE

Plotkin v. Montgomery Co. Pub. Schs., 123 LRP 33167 (4th Cir. 2023) (unpublished). District court's affirmation of ALJ's decision that the failure to implement the IEP for a third grader with autism did not deny FAPE is affirmed. 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. "On this record, we conclude that the district court did not err in holding that [the student] was not denied a FAPE."

G.W. v. Ringwood Bd. of Educ., 124 LRP 15327 (D. N.J. 2024). The ALJ's decision that the 8th grader received FAPE is upheld, even though the district failed to send a quarterly progress report to the parents who would not allow the district to enter the student's IEP into its data management system used to track special education services. Though the technology-related hurdles related to monitoring the student's progress do not relieve the district of its duty to provide a progress report to the parents, the student's teachers instead emailed the parents regularly, sent notes home in the student's backpack, and used self-monitoring behavioral charts. Thus, the teachers communicated with the parents daily and regularly informed them of the student's progress. Thus, this "minor deviation" from the IEP was harmless.

Banta v. Hayashi, 124 LRP 14401 (D. Haw. 2024). Hearing officer's decision that the Department did not deny FAPE to a teenager with autism and intellectual disability is upheld and the parent's request for placement of the student in a residential treatment facility is denied. Here, when the student's dedicated 1:1 RBT was out on maternity leave for about two and ½ months at the beginning of the student's sophomore year in 2022, the Department was unable to find a replacement due to a shortage of RBTs on Kauai. While it is true that the IEP was not implemented, the parent is required to show that a material implementation failure occurred. However, the parent was not able to show that because other special education staff at the school, including other RBTs at times, pitched in to ensure that the student always had individual support and that appropriate data collection continued during his RBT's absence. While the student had a few incidents of aggression during that time, those appear to relate to the student's home life and did not impede or otherwise affect his educational progress. Further, it is clear that the parent seeks residential placement largely because of the student's increased aggression in the home, not because the student has an educational need for residential placement for FAPE. Indeed, the evidence indicates that the student has made slow and steady progress for several years. While it may have been the preferred course to reconvene the IEP team once it became apparent that the student's RBT would be on leave and that finding a replacement would be challenging, the parent

has not shown that failing to do so here amounted to a violation of IDEA. The parent does not offer any argument or evidence that the hearing officer erred when she relied on evidence that the student continued to make academic progress during this time. Nor does the parent suggest that the hearing officer should not have relied on the fact that there was no evidence that any aggressive episodes at school during this time were the result of the failure to provide RBT services as opposed to issues with the student's home life. Indeed, the student was admitted to the hospital after fall break, which his father noted had been a "rough [time] at home" with the student experiencing multiple episodes of aggression. This occurred less than two weeks after the student's father dropped him off at his mother's home unannounced (despite her statement she was giving up physical custody of the student), resulting in the student's acting out aggressively within two hours of arrival and causing the mother to call the police. While the parent attempts to vaguely suggest a material failure by pointing to the student's hospitalization, the father himself confirmed with social workers at the medical center after the student's admission that the aggression started after the student's mother "left," rather than tracing it to the absence of certain RBT services at school. Finally, there was no evidence that the student's aggressive behaviors at school increased during the RBT's maternity leave. Therefore, the parent has not met the burden of demonstrating that the hearing officer erred when she determined there was no material failure to implement the student's IEP.

TRANSPORTATION

Pierre-Noel v. Bridges Pub. Charter Sch., 124 LRP 32461 (D.C. Cir. 2024). The district court's decision that the district is not required to carry the medically fragile, non-verbal, 8 year-old boy who uses a wheelchair and weighs approximately 40 pounds up and down the stairs of his non-accessible apartment building is reversed and remanded for further proceedings. The district denied the request based upon its policy that staff will only retrieve students from the outermost door of their dwelling and do not physically lift or carry students to/from their apartment door to the school bus. The term "transportation" under IDEA includes moving a student from their apartment door to the vehicle that will take them to school as a related service needed to benefit from special education services. This is broad enough to include porter services for non-ambulatory students living in inaccessible buildings, and the district's view that "transportation" is limited to using a vehicle to transport students to and from school is rejected. This student clearly needs in-home transportation to access his school-based program where a narrow interpretation of transportation would "leave some [children] unable to leave their homes and join their classmates at school." Where it is agreed that the child cannot get to the school bus without someone's help with getting him up and down the stairs of his building, he needs this service in order to receive FAPE.

J.L. v. New York City Dept. of Educ., 124 LRP 16389 (S.D.N.Y. 2024). The court adopts the report and recommendation of the magistrate judge finding that IDEA, 504, and ADA do not require a district to provide "porter services" to medically fragile children who live in inaccessible facilities. J.L.'s argument that the district is required to do so because the district's operations manual recognizes that students with disabilities may be provided with porter services is rejected. While the district may expand its services beyond those required by federal law, it is not required under ADA or IDEA that a district supply porters to lift and carry students up and down stairs within their "inaccessible" apartments or other facilities. IDEA defines transportation as travel to

and from school and between schools. It can also include specialized equipment, if required to provide special transportation to a child with a disability. ADA defines "public school transportation" as transportation by school bus vehicles of school children, personnel, and equipment to and from school or school-related activities. Neither law defines transportation "so expansively to include a human being carrying a student with a disability within his building of residence." Thus, the district is not required to provide a porter to physically remove a child from or place a child into a wheelchair and physically carry him up and down stairs. Thus, the IDEA, 504, and ADA claims for such are dismissed.

J.S. v. West Morris Regional High Sch. Bd. of Educ., 124 LRP 20298 (D. N.J. 2024). ALJ's decision that the district is not required to provide curb-to-curb transportation to the 9th grader with major depressive disorder, dysgraphia, a nonverbal learning disorder, and a neurodevelopmental disorder is reversed and the district is ordered to provide the service and include it in her IEP for as long as the student is served by this LEA. While the student does not have any physical impairments that prevent her from walking the mountain road that is approximately 1/3 mile between her home and a municipal building where the bus stop is located, IDEA requires specialized transportation when necessary to allow a student to benefit from special education programming. The disability or limitation underlying the IEP, however, does not have to be the reason that the transportation is required. IDEA requires transportation if that service is necessary for a disabled child to benefit from special education, even if that child has no ambulatory impairment that directly causes a unique need for some form of specialized transport. Here, there is no question that the mountain road's steepness, blind curve, lack of sidewalks and poor visibility is unsafe for any pedestrian. In addition, the student's longtime therapist indicates that her psychological disabilities present their own hazard. This is not a case where the parents seek curb-to-curb transportation for their own convenience. In this case there is no nearby, walkable, safe bus stop available in any direction of the home. The district's argument that sending a bus directly to the student's home would be dangerous is rejected. Not only does every other student in the neighborhood receive curb-to-curb transportation, but this student had also received it previously at one time via the same provider when she was attending a different school in another district. The district must provide the service from home to school from this point forward and reimburse the parents for driving the student to and from the municipal building bus stop and, at times, to and from the school for a total of $1780.17.

OTHER RELATED SERVICES

Rivas v. Banks, 123 LRP 34269 (S.D.N.Y. 2023). SHO's decision that the district did not deny FAPE to the 11 year-old student with TBI is upheld and the parent is not entitled to recovery of private school costs. A district is not required to offer the best possible education. As long as the proposed IEP meets the student's needs and allows him to make progress, the district has fulfilled its obligation. Although the parent argues that the student needs music therapy to receive FAPE, the private school offered that service to address sensorimotor, cognitive, and communication goals. The district's psychologist, however, noted that the district could help the student meet those goals by providing OT, PT and speech and language services. While the record reflects that the student may have benefited from music therapy, there is no evidence that it is necessary for FAPE.

S.M. v. Freehold Regional Sch. Dist. Bd. of Educ., 124 LRP 1731 (D. N.J. 2024). ALJ's decision that the district did not deny FAPE to the adult student with autism when it refused to send staff into the home every morning to assist the student in getting ready for school. The requested assistance falls outside of the district's obligation to provide appropriate special education and related services under IDEA. While the student does need help getting dressed, eating breakfast, taking medications, and getting to the school bus, the IDEA does not require the district to do such things. While the district provides the student with door-to-door transportation and a 1:1 bus aide, the parents' position that the student also needs "home programming" as a related services is rejected, as their request stems from their work schedules as opposed to the student's educational needs. While the court is sympathetic to the parents' professional demands, the "touchstone" of a district's responsibilities under IDEA is the student's educational needs—not the parents' professional needs.

ASSISTIVE TECHNOLOGY

"Dear Colleague Letter on the Provision of Assistive Technology Devices and Services for Children with Disabilities under the IDEA" and "Myths and Facts Surrounding Assistive Technology Devices and Services". On January 22, 2024, the U.S. Office of Educational Technology and OSEP issued two documents concerning the provision of AT devices to students with disabilities. They can be found online at https://sites.ed.gov/idea/files/DCL-on-Myths- and-Facts-Surrounding-Assistive-Technology-Devices-01-22-2024.pdf and https://sites.ed.gov/idea/files/Myths-and-Facts-Surrounding-Assistive-Technology-Devices- 01-22-2024.pdf.

The stated purpose of the DCL and its accompanying 22-page Manual is to increase understanding of IDEA's AT requirements, dispel common misperceptions regarding AT, provide examples of the use of AT devices and services, and to highlight different requirements under Part C and Part B of IDEA. Reminders include, among others, the following:

- Each time an IEP Team develops, reviews, or revises any child's IEP, the IEP Team must consider whether the child requires AT devices and services (training technical assistance, etc.).
- AT evaluation can be included as an AT service but is not required under IDEA.
- IDEA's requirement to include a statement about a child's special education, related services, and supplementary aids in an IEP includes AT.
- AT should be considered for inclusion in a student's transition plan.
- Use of AT can be an appropriate accommodation for a student with a disability as part of State assessment.
- AT does not include only high-tech electronic devices—low-tech and mid-tech are included too.
- AT devices should be used across all environments—including at home if necessary for FAPE.
- AT devices and services must meet a child's individual needs.
- If a child does not want to use an AT device, it is critical that the IEP team work with the child to understand and address the root cause of the child's refusal.
- While the parent and LEA may agree that a child's AT device may be used, it is ultimately

the responsibility of the LEA to provide it if it is written into the IEP.

- The IEP team makes the determination on what AT device and service is necessary, not the LEA's IT department.
- Infants, toddlers, and their families can and often are supported with AT devices and services.

LEAST RESTRICTIVE ENVIRONMENT

Los Angeles Unif. Sch. Dist. v. A.O., 92 F.4th 1159, 124 LRP 5221 (9th Cir. 2024). District court's award of private school tuition reimbursement to the parents of a 3-year-old student with bilateral deafness and cochlear implants is affirmed. When proposing that the student be placed in a special preschool class for students with hearing impairments, the district did not offer FAPE in the LRE because the program was overly restrictive in that the student would not receive sufficient exposure to nondisabled peers. Further, the proposed program would deprive her of opportunities to model hearing peers' use of spoken language, which is her preferred mode of communication. Although assessment data shows that the child has an "excellent" chance of developing spoken language, the proposed IEP would not help her meet that goal where she would need significant interaction with typical hearing peers to develop spoken language. The district's proposed placement requires the child to spend 22.5 hours per week in a special education preschool class for children with hearing impairments. Opportunities for peer interaction during art, music, library, and recess are not enough. This child needs as much exposure to peer language models as possible so that she can catch up to her typical hearing peers. The child's private program, in contrast, blends deaf students with typical hearing peers, providing the requisite peer language modeling despite its smaller size. [Note: The majority of the court also noted that the proposed program was unclear concerning the frequency of services where it included a "frequency band" or range of speech and language services to be provided (e.g., between one and 10 times per week) rather than a single, clear number. This is too vague and leaves the parents uncertain as to both services their daughter would receive and whether they would even benefit her].

EXTENDED SCHOOL DAY SERVICES

Osseo Area Schs. v. A.J.T., 124 LRP 9021 (8th Cir. 2024). District court's finding is affirmed that the school district denied FAPE to the middle school student with a rare form of epilepsy when it refused to provide her with services outside of regular school hours. Here, the student's seizures are so severe in the morning that she cannot begin school until noon, so her parents asked that she be provided instruction via an extended day up until 6 p.m. so that her length of school day was more like that for other students. As an initial matter, the court rejects "the notion that the IDEA's reach is limited to the regular hours of the school day. Neither the District nor *amici* identify anything in the IDEA implying—let alone stating—that a school district is only obligated to provide a FAPE if it can do so between the bells." Turning to the student's IEPs and whether the student received FAPE despite the short day, several things convince the court that she did not. First, the student made *de minimis* progress overall. She regressed in toileting and, at one point, the district removed the toileting goal from her IEP because there was not enough time to work on it during the short school day. Indeed, the district's records clearly reflect that. In addition, the district cites only slight progress in a few areas and one of the district's experts agreed that the

student's progress was minimal. Progress reports reflect that the student met none of her annual goals in 2016 or 2017 and, by the end of 2018, she had met only a few short-term objectives. Finally, the record contains no progress reports for 2019. The court rejects the district's additional argument that the district court erred in considering expert testimony that the student would have benefited from evening instruction required the district because it imposes a requirement to "maximize the student's potential." Asking whether the student would have made more progress with evening instruction is not about maximizing potential—"it's about whether the District's purely administrative decision not to provide evening education caused her *de minimis* progress and regression." The expert testimony shows that the district's choice to prioritize its administrative concerns (such as avoiding unfavorable precedent for itself and other districts, state law does not require it) had a negative impact on the student's learning. Considering that the student made *de minimis* progress overall, that she regressed in toileting, and that she would have made more progress with evening instruction, the court sees no error in the district court's conclusion that the district denied FAPE.

FUNCTIONAL BEHAVIORAL ASSESSMENTS/BIPS

E.W. v. Department of Educ., 124 LRP 21115 (9th Cir. 2024) (unpublished). District court's ruling in favor of the Hawaii DOE is affirmed upholding the hearing officer's decision that the student's IEP team was not required to physically incorporate the student's BIP into the IEP. There is no legal requirement under IDEA that a BIP actually be included in an IEP. Here, the IEP's supplementary aids and services included several behavioral interventions and supports, such as daily sensory supports, visual support, and priming prior to transitions, based upon the student's individual needs and parent input. These supports were not unilaterally chosen by the school for the student. Rather, the record shows that the parent participated and conveyed her input and concerns to the team. In addition and in Hawaii, schools are required to obtain parent input when revising a BIP. Given that, the fact that the BIP was not incorporated fully into the IEP was not fatal to the parent's ability to meaningfully participate. Further, the Department provided the parent with a copy of the BIP and a BCBA explained each component of the plan with the parent. Thus, the development of a separate BIP did not impede the parent's IDEA rights.

Upper Darby Sch. Dist. v. K.W., 124 LRP 30821 (3rd Cir. 2024) (unpublished). District court's award of $128,635 for compensatory education to a student with autism is affirmed where the district denied the student FAPE by failing to appropriately conduct an FBA and develop a behavioral plan as recommended by several independent evaluators. From the beginning of the 2020-21 school year until the student withdrew from the publicly funded private school placement, the student increasingly exhibited behavioral issues, such as running around the class, becoming frustrated and yelling—often requiring de-escalation. Two independent evaluations conducted in 2020 and recommendations made by a behavioral analyst urging the district to conduct an FBA and develop a positive behavioral support plan (PBSP) were ignored. As a result, the student's behavior intensified and continued to interfere with his ability to make meaningful educational progress. The district court's compensatory education award was not an abuse of discretion where the record supports the conclusion that the student's behavioral challenges "pervaded his school days and inhibited meaningful educational progress." Further, the district was on notice for the entire period about the student's unmet needs and knew that the student needed a PBSP before he

started at the private school, and his mother repeatedly complained about his IEP while he was there.

W.A. v. Panama-Buena Vista Union Sch. Dist., 124 LRP 22428 (E.D. Cal. 2024). ALJ's decision that the district's IEP offered FAPE and that the parent is not entitled to an IEE is upheld. Where IDEA does not explicitly provide for required components or steps for conducting an FBA, the district's FBA satisfied IDEA. Here, the 8 year-old student with autism and ADHD engaged in severe, violent, and aggressive behaviors that included elbowing, head-butting, kicking, slapping, grabbing and twisting the hands of other student, flipping furniture, and throwing objects. The student also stabbed a paraprofessional with a pencil. In response, the district's BCBA conducted an FBA in order to develop a BIP. The BCBA reviewed the student's educational and behavioral history, interviewed family members and teachers, and observed the student on five different days. In addition, the BCBA collected specific data regarding the frequency and intensity of the student's specific behaviors and identified the antecedents and consequences of those behaviors. With this information, the BCBA appropriately and accurately determined that the student engaged in the violent behaviors in order to gain access to a preferred activity or item, such as his Chromebook. While the parent's expert witness opined that the FBA relied upon insufficient quantitative data and pointed out other issues, the fact that the expert disagreed with the results of the district's FBA does not make it deficient. In fact, the ALJ reasonably found that the expert's testimony generally lacked persuasive weight. For example, during his testimony, he conceded that: (i) his interview with the student's mother, grandmother, and student lasted only 30-45 minutes: (ii) in preparing his opinions, he did not reach out to the student's teachers or to the district's evaluators/assessors; (iii) the rate of behavior metric and underlying quantitative data upon that he viewed to be missing from the FBA, could be derived from data and information within in the FBA and its ABC chart; (iv) he had no reason to doubt the accuracy of the information in the FBA; (v) the behaviors which he labeled as "escape" also could be labeled "access," as there is room for disagreement regarding labeling incidents in terms of function of behavior; and (vi) the FBA's BIP strategies could be appropriate, and its behavioral goals could be achievable within the applicable one year term of the FBA. Thus, the ALJ reasonably concluded that "[the expert's] opinions did not carry enough weight to establish that [the district's] behavioral assessment was so procedurally deficient that it resulted in a denial of a FAPE."

Lee v. Board of Educ. for Prince George's Co., 124 LRP 3463 (D. Md. 2024). The ALJ's decision that the district did not violate IDEA when it failed to conduct an FBA for the SLD middle schooler with a history of poor attendance is upheld. This is so because the student's October 29, 2020 IEP adequately addressed what the parent describes as the root of the student's attendance issues—his anxiety. For example, it instructed teachers to use a "gentle" tone when redirecting the student and provided him an opportunity to signal a teacher privately if he needed to take a break due to anxiety. Citing *R.F. v. Cecil County Public Schools*, "[t]he law does not require a public school system to write a[n] FBA or a BIP every time a new interfering behavior is observed." *R.F.*, 2018 WL 3079700. When the parent expressed concern about the student's anxiety, the IEP team considered her concern and adjusted the IEP accordingly. Because the IEP team took sufficient measures to address anxiety, IDEA does not require the district to conduct an FBA, especially when several educators testified that they did not see signs of anxiety in the classroom and that neither the student nor the parent told them previously that the student suffered from anxiety. Finally, an IEP need not completely cure a problem behavior to be appropriate. Thus, the parent

has not shown that the district procedurally violated IDEA by failing to conduct an FBA or implement a BIP to address the student's attendance issues.

DISCIPLINE

J.N. v. Oregon Department of Education, 124 LRP 7205 (D. Ore. 2024). Where the Oregon legislature has passed Senate Bill 819, the court dismisses the parents' IDEA and 504/ADA claims on the basis that the court lacks subject matter jurisdiction over them because there is no existing case or controversy and the issues are moot. The parents in this case (along with advocacy groups) filed their Complaint in 2019 arguing that the SEA's failure to adopt appropriate policies and procedures resulted in the misuse of shortened school days across the State of Oregon. While that may have been the case as reflected in the report of a Neutral Factfinder, Senate Bill 819 was passed on July 13, 2023, and appropriately addressed the systemic issues outlined in the parents' Complaint. Among other things, the new law requires school districts to obtain informed parent consent before they shorten a student's school day and requires the SEA to investigate and resolve complaints regarding a student's placement in an abbreviated school day within 30 days. Further, the statute overhauled monitoring and accountability requirements by requiring the SEA to collect data from districts that impose shortened school days. Where the new statute incorporates the specific remedies requested by the parents in their Complaint, the court can provide no effective injunctive or declaratory relief at this time. The parents have "successfully obtained the relief they requested, but through the political process, rather than by a court order." In dismissing and closing this case it is noted that "Plaintiffs' lawyers embarked on a worthy path to make a difference--and they did--for all of Oregon's Public School Children attending school with disabilities. Plaintiffs' dogged advocacy to bring this landmark case caught the attention of the Oregon Legislature, and the legislative branch carried the baton over the finish line to enact the very protections plaintiffs zealously sought. Defendant's responsiveness to the allegations in this lawsuit and herculean effort to quickly implement SB 819 demonstrates its commitment to the public to correcting the systemic deficiencies identified by plaintiffs and the jointly retained expert. The Court commends the lawyers' diligent work in this important case."

G.T. v. Board of Educ. of the Co. of Kanawha, 124 LRP 32985 (4th Cir. 2024). District court's order certifying this case brought under IDEA, 504, and ADA as a class action is reversed. Just because two children with disabilities claim to have suffered a violation of the same laws does not mean that a class action lawsuit is warranted. Here, the district court certified a class of all Kanawha County School students with disabilities who need behavior supports and experienced disciplinary removals from any classroom. This was in error because the certified class failed to meet the requirement of Federal Rule 23 of commonality and did not identify a common contention central to the validity of all class members' claims. Rather, the claims are highly diverse and individualized and involve different practices at different stages of the special education process. Other circuits in IDEA cases have required parents to identify a uniform official policy or an unofficial but well-defined practice that caused the violation of student rights. There must be proof of a common driver or "glue" that holds all decisions made about all student members of the class in a way that they can productively be litigated all at once. Here, the two students did not identify a single policy or practice of improper disciplinary removals. Rather, they attributed the improper removals to various alleged district failures in managing student behavior appropriately. For

example, the students blamed some removals on the failure to identify students in need of behavioral supports and others on alleged failures to implement BIPs. Thus, the lack of common ground prevents a court from issuing a single ruling that affects all students who were subjected to disciplinary removal. The outcome, therefore, for any individual class member will depend on that student's unique needs and IEP goals. The case is remanded for further proceedings.

MANIFESTATION DETERMINATION

Kristina C. v. Klein Indep. Sch. Dist., 124 LRP 3961 (S.D. Tex. 2024). District's summary judgment motion is granted, and the hearing officer's decision is upheld that the student's bringing a clay cutter to school was not a manifestation of his disabilities (though the hearing officer's decision that the clay cutter is a weapon is questioned). Therefore, the district's placement of the gifted seventh grader with Autism, ADHD, and "vulnerability to emotional disturbances" in an alternative disciplinary program was not a violation of IDEA. While the record reflects that the student has difficulty interacting with others and responding to peer conflict in the moment, there is no evidence in his education file or in his recent behavior that would connect his disabilities to a premeditated decision to bring a clay cutter to school in self- defense. Rather, the record shows that in past stressful situations at school, the student would "shut down and begin exhibiting signs of frustration, such as grunting, clenching teeth and/or fists, and crying." There is no prior record showing that the student had possessed or displayed a sharp object that could be used as a weapon at school with the stated intent to use it to "defend himself" by physical force, and this behavior is different than the signs of disabilities that the student has previously exhibited. Thus, the hearing officer was correct in determining by a preponderance of the evidence that the acts involving the cutter were not a manifestation of disability. In addition, the court agrees with the parent that it is unlikely that the clay cutter falls into the definition of "weapon" under IDEA as an instrument capable of "causing death or serious bodily injury." However, since the school promptly and properly determined that the behavior was not a manifestation, whether the clay cutter is a weapon under IDEA does not change the outcome of this case.

C.D. v. Atascadero Unif. Sch. Dist., 83 IDELR 80 (C.D. Cal. 2023), aff'd, 124 LRP 11529 (9th Cir. 2024) (unpublished). District court's decision upholding the ALJ's decision that the 16-year-old's physical aggression toward his teacher was not a manifestation of his disability is affirmed. Although the parent attributed the student's behavior to poor impulse control and communication difficulties due to his disabilities, the ALJ's decision that the behavior was not a manifestation of his ADHD, intellectual disability, or speech and language impairment was correct. Here and based upon detailed documentation kept by involved staff about what happened before, during, and after the incident, it appears that the student's behavior of physical aggression was a choice. For example, the district's school psychologist testified that the student's conduct did not arise as a result of his ADHD or cognitive functioning and that the aggressive incidents for which the student was disciplined were separated by a period of time that gave the student sufficient "time to make a choice about what behavior he wanted to do." In fact, school staff accompanying the student for a distance from a construction site next to the administrator's office and then into the office area noted that the student could have engaged in aggression at any point in time during that distance but did not. Rather, the student waited until a preferred staff member left before engaging in the aggressive behavior toward his teacher. The court also noted that witness testimony and

documentation showed that the student used functional communication to achieve his goal of being able to stay in the unsafe construction area and this is evidence of the student's cognitive understanding, as well as his receptive and expressive processing of what was going on. For example, in response to a request that he move away from the construction site, the student communicated that he was refusing to comply and that he felt he was safe. The student also put on his glasses to demonstrate that he was aware that flying debris could hurt his eyes. Further, in response to his teacher's statements that it looked like something was bothering him, he used functional language to communicate that he was not upset, that he was refusing to leave the construction area, and that he felt he was safe. Given the student's repeated use of functional language during the entire incident, it is more likely than not that the student engaged in deliberative planning in response to not being allowed to remain near the construction site. This conclusion is again further supported by the fact that he waited until preferred staff was not present before he became physically aggressive toward his teacher and pushed her into a wall twice. As the ALJ noted, this is evidence that the student "knew what he was doing and how to differentiate between preferred and non-preferred staff." Thus, the district court's agreement with the ALJ in concluding that the student's aggression toward the teacher was not impulsive and that the student processed the situation and understood it is affirmed. Thus, the 22-day suspension of the student was not in violation of IDEA.

Sampson Co. Bd. of Educ. v. Torres, 124 LRP 8435 (E.D.N.C. 2024). ALJ's decision to vacate the student's long-term suspension is given great deference and is upheld. The ALJ's findings are entitled to deference that district violated IDEA when it suspended the 12 year-old male student with selective mutism, ADHD, and ODD for sexually assaulting a female schoolmate after she told him to "get away." The student's grabbing or "poking" the buttocks and breast of a female student was a manifestation of the student's disabilities. Specifically, the school's MDR team violated IDEA's procedural requirements when it failed to consider all relevant information when making the manifestation determination. The student, who did not speak in the school setting, had a documented school history of touching others to communicate with them or to get their attention. While the school conducted an FBA and developed a BIP, the MDR team did not consider any of that information contained in them. Rather, the MDR team's report actually indicated that the student did not have a BIP. The district's decision to classify the conduct as a "sexual assault" is also questioned, given the district's knowledge of his behavioral history. These procedural violations resulted in the loss of educational opportunity to the student and in light of all relevant information, the student's conduct was a manifestation of his disabilities. Not only does the student's selective mutism impede his communication at school, but his ADHD leads him to act impulsively. Further, the fact that the incident occurred during a transition time waiting for the bus when these behaviors were more likely to manifest suggests that the district failed to implement the student's BIP, where it is indicated that transition time is problematic for the student.

DANGEROUS STUDENTS

Norwood Pub. Schs., 124 LRP 32443 (SEA Mass. 2024). Removal of a teenager with ADHD (that the district should have evaluated prior to the May 29, 2024 incident and treated as a student with a disability) to an IAES for infliction of serious bodily injury on a staff member was in error. The district is ordered to provide compensatory services to make up for the time that the student

was excluded from school. While a staff member's leg was broken in two places as a result of the May incident and the staff member could not return to work for the rest of the school year, a video of the incident reveals that the staff member was injured when another educator pulled the student away from another and dragged the other staff member with her. The word "inflicted" indicates an intentional act on the part of the student. Here, it appears that the contact between the student and injured staff member was incidental, rather than intentional.

Schulenburg Indep. Sch. Dist. v. J.H., 124 LRP 8663 (S.D. Tex. 2024). The district has carried its "very heavy burden" of overcoming the "stay-put" requirement and proven its entitlement to a "Honig" injunction. Under Honig, school officials are entitled to seek injunctive relief to temporarily enjoin a dangerous child from attending school by showing that maintaining the child is his or her current placement when in stay-put is substantially likely to result in injury to the child or to others. Based upon the facts set out in the district's complaint and verified by the Superintendent and supplemental sworn testimony of the district's special education director, the court finds the student is dangerous and that for him to continue in the current placement pending the parent's request for a due process hearing is substantially likely to result in injury. Further, the district has done all that can reasonably be done to reduce the risk but teachers, staff, and other students face an extreme risk of suffering immediate and irreparable harm if the student is not restrained from entering any district premises or attending school related events. The district is likely to succeed on the merits of its claim for injunctive relief and there is a significant public interest in maintaining school safety and protecting the physical safety of school staff and students from J.H.'s threatening, violent, and assaultive behavior. The district is to fund the student's placement in a mental and behavioral health facility (which is being challenged by the parent through due process) in the interim.

METHODOLOGY

M.E. v. New York City Dept. of Educ., 124 LRP 11533 (S.D.N.Y. 2024). The SRO's decision is affirmed, and the parents of the child with autism are not entitled to reimbursement for private schooling where the district's proposed placement in a special class offered FAPE. This is so, notwithstanding the fact that the parents wanted a program that used the DIR/Floortime methodology. The IEP's failure to require the use of the DIR/Floortime methodology did not render it substantively inadequate. The private psychological report provided by the parents did not specifically recommend that the child be taught using DIR/Floortime; neither did it indicate that this or any particular pedagogical method was necessary for the child to make educational progress. Rather, the private psychologist only identified the DIR/Floortime methodology as an example of a methodology that the student could benefit from, as noted by the SRO. The SRO's decision that the March 2021 IEP "comprehensively described [G.E.'s] sensory, self-regulation and communication needs and recommended a variety of supports, strategies and services to address those needs" is supported and none of the evidence indicated that DIR/Floortime was required for the child. Thus, the SRO correctly found that the March 2021 IEP's omission of DIR/Floortime did not amount to a denial of FAPE.

H.R. v. District of Columbia, 124 LRP 28849 (D. D.C. 2024). District's motion for summary judgment is granted where the proposed IEPs for a 6th grade student with multiple disabilities is appropriate. The parents' argument that the IEPs denied FAPE because it did not specify that the

Orton-Gillingham reading program would be provided is rejected. The IEPs adequately specified how the student's reading instruction would be provided and offered the required level of specificity, including two reading goals and 15 hours per week of specialized instruction in a structured classroom setting with limited distractions. The IEP was not required to provide more detail, and questions about the methodology used for instruction are for resolution by the states and cannot be decided by a court. How the district sought to address executive functioning supports within the IEP is its prerogative, as long as the student's needs are adequately addressed. IEP accommodations including things such as chunking, visual timers, checklists, alternative seating options, and paper adjustments were appropriate.

UNILATERAL PRIVATE SCHOOL PLACEMENT/SERVICES

Hatboro-Horsham Sch. Dist. v. R.C., 124 LRP 31317 (E.D. Pa. 2024). Motion for immediate injunctive relief under IDEA's "stay-put" provision is granted and the school district is required to continue to fund the student's placement in the private school setting pending these court proceedings. In the fall of 2023, the middle schooler's parents filed a due process complaint seeking private school tuition reimbursement for prior academic year 2022-2023 and the then-current year, 2023-2024. After the hearing and on March 15, 2024, the hearing officer issued her decision and order finding that the school district's proposed December 2022 IEP was inappropriate and denied FAPE for the 2022-2023 academic year. She also determined that the private placement was appropriate for the 2022-2023 academic year and ruled that the district must reimburse the parents for that year's tuition. However, the hearing officer also found that the district's proposed August 2023 IEP provided FAPE to the student and that tuition reimbursement for the 2023-2024 academic year at the private school was not appropriate. Both parties sought review of the hearing officer's decision, and the district now claims that it should not have to pay to maintain the student's current placement in the private school since its most recent IEP was found appropriate. The district's position is rejected because, under IDEA, when the hearing officer ruled that the private placement for 2022-23 was appropriate and ordered the district to reimburse the parents for tuition, the private school became the "current placement" for the student that must be maintained during these proceedings. The hearing officer's finding that the district's most recent IEP was appropriate does not relieve the district of its stay-put obligations. The parents are "simply asking for the maintenance of the status quo" until the court decides the issues before it.

J.H. v. Seattle Pub. Schs., 124 LRP 21369 (W.D. Wash. 2024). Court amends its prior decision reversing the ALJ's decision that the parents' unilateral placement of their son in a residential facility was appropriate and that the district was required to reimburse the parents for the placement. Not only is the ALJ's decision reversed, but the parents must also repay $445,132 in private school costs to the district that was required to be paid to comply with the ALJ's order. Where the district in seeking review of the ALJ's order asked the court "to reverse the ALJ's award of relief," the district properly sought reimbursement for its tuition payments and was an appropriate request. Note: The district did not seek to recover the $460,000 in additional tuition payments it made pursuant to IDEA's stay-put provision.

Landsman v. New York City Dept. of Educ., 124 LRP 28851 (S.D.N.Y. 2024). State review officer's decision denying parent reimbursement for TBI private school ("iBRAIN") expenses for

a student with Canavan disease is upheld. This is so because the parent acted unreasonably when failing to provide appropriate notice to the district before the student's withdrawal. IDEA and state law requires parents to provide a district with written notice of intent to place a student in a private school at least 10 days before withdrawing the student from public school. Here, the parent signed a contract with the TBI school on February 4, 2022 and the student was officially enrolled on February 8, 2022. In addition, the parent failed to provide evidence that she provided sufficient notice to the district. In light of the equities, even though the private placement was appropriate and the district's program was not, the required 10 day notice was not provided.

Fatima v. Banks, 124 LRP 3062 (S.D.N.Y. 2024). Where the parents of nine children seek a preliminary injunction requiring the district to immediately pay all outstanding invoices for private school tuition and transportation services at iBrain, the request is denied. To obtain a preliminary injunction, the parents must demonstrate (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest. Here, the parents have demonstrated neither irreparable harm nor a likelihood of success on the merits. The district does not dispute that it is obligated to pay for the students' placements at iBrain and has produced evidence that it has made most, if not all, of the payments in question. Nothing in IDEA's stay-put provision requires a district to pay the students' private school invoices immediately, especially since the parents have not provided any evidence of service interruptions for lack of payment. In fact, there is no indication that the amount of time the district takes to pay the school or vendors has, or even could, affect the education of the children. While the parents may prefer that the district speed up the payment process, it has no legal obligation to do so.

RESIDENTIAL PLACEMENT

L.B. v. San Diego Unif. Sch. Dist., 124 LRP 30637 (S.D. Cal. 2024). The Court agrees with the ALJ that the parents of the emotionally disturbed teenager did not provide evidence of the appropriateness of the residential treatment programs in which they placed their child in the Carolinas for purposes of recovering reimbursement for tuition and other expenses related to the student's placement in the facilities. Although it is not required that private facilities be approved or certified by the state for purposes of reimbursement under IDEA, "it still merits noting that [the parents] did not provide any evidence regarding the credentialing of staff or teachers working with L.B. at either placement. There was no evidence that an IEP was developed at either Trails or Whetstone directed to L.B.'s particular areas of educational deficit. Moreover, the evidence demonstrates that L.B.'s placements were primarily a response to his mental health issues, not his educational needs. Thus, based on the evidence provided to the Court, the expenses for which [the parents] request reimbursement are not recoverable under the IDEA."

R.J. v. Irvine Unif. Sch. Dist., 124 LRP 24747 (C.D. Cal. 2024). The ALJ's hearing decision that the emotionally disturbed fourth grader does not need residential placement is upheld. The district's proposed IEP offers FAPE in the LRE for the student where it was revised to include the services of a one-to-one behavioral aide after the student attacked and threatened peers and staff and ran through a busy intersection after fleeing school grounds, disrobed, and shouted obscenities at a random mother nearby with her baby. Importantly, the student's treating psychologist did not

speak with school staff, review the student's records, or observe her current program prior to recommending residential placement. In addition, the psychologist appeared to make the recommendation based upon the student's medical, social, and emotional needs that are separate from the student's learning. Here, the student performs well academically and generally complies with behavioral expectations and the proposed program offered FAPE.

OBLIGATIONS TO PARENTALLY PLACED PRIVATE SCHOOL STUDENTS (PPPSS)

Letter to Jenner, 123 LRP 33282 (OESE/OSERS 2023) (also can be found at https://sites.ed.gov/idea/files/OSEP-Policy-Letter-to-Jenner-11-07-2023.pdf).
In response to the Indiana Department of Education's question about how to determine the location of virtual private school students in order to provide equitable services under ESEA, the US DOE's Office of Elementary and Secondary Education and Rehabilitation Services has noted that States are required to determine which LEAs are responsible for providing equitable services to virtual private school students under ESEA Title VIII and IDEA. While Title I, Part A equitable services must be provided by the LEA in which a student resides, Title VIII and IDEA equitable services are usually provided by the LEA in which the private school is located. If an SEA establishes that a virtual private school meets the definition of a nonprofit elementary or secondary school, the SEA must determine which LEA is "responsible for providing equitable services to the school's eligible students and educators." A "reasonable option" is for equitable services to be provided to an eligible student attending a virtual school by the LEA in which the student is located while receiving their education (most often the LEA of residence if the student attends virtual private school at their home). Under this approach, it is possible that multiple LEAs, including LEAs in different States, would be responsible for providing equitable services to students enrolled in the virtual private school. In these circumstances, funding would come from each LEA's allocation under an applicable program. Given the number of LEAs that may be responsible for providing equitable services under this approach, "the SEA may wish to assist LEAs in coordinating the funding and delivery of ESEA and IDEA equitable services."

COMPENSATORY EDUCATION SERVICES

Kass v. Western Dubuque Comm. Sch. Dist., 101 F.4th 562, 124 LRP 15032 (8th Cir. 2024). The district provided FAPE to the blind 20-year-old student with multiple disabilities. Thus, the district's court's decision that the student is not entitled to compensatory education is affirmed. Even though the 12th grader earned the required credits to graduate from school, his IEP team determined that he should remain in school. The team proposed that he not attend general education classes but instead spend a half-day focusing on reading and math skills to support transition to a work environment, with two hours daily of specialized instruction at school or in the community, followed by work with a job coach at a business. In addressing the issue of mootness since the student had turned 22 during the pending litigation, the court joined the First, Third, Seventh and Eleventh Circuits in holding that compensatory education may be available beyond a student's 21st birthday or after they age out. Here, the parents continue to seek compensatory education for the 2020, 2021 and 2022 school years (the years in which the stay-put was in place) alleging that the student was denied FAPE throughout the pendency of the litigation and there remained a live controversy for compensatory education. As the First Circuit noted, if compensatory education is not an available remedy beyond a student's 21st birthday, "'school

districts simply could stop providing required services to older teenagers, relying on the Act's time-consuming review process to protect them from further obligations." While the case is not moot, however, the student was provided FAPE and compensatory education is not warranted.

Tilley v. Thomas Edison Charter Sch. North, 124 LRP 20931 (D. Utah 2024). Where parents were awarded 303 hours of compensatory education services for their child with dyslexia and a visual impairment, the court orders the charter school to place a total of $15,195 in an educational fund and maintain it for three years to reimburse the parents for private reading services, as well as speech services. The district's argument that the reading services should be reimbursed at the hourly rate it would cost to the school is rejected, and the $50/hour rate at the Dyslexia Center of Utah is granted for the provision of reading and writing services. The district will make payments to the parents within 30 days of receipt of invoices reflecting payments to the third party providers. Note: The parents are also awarded attorney fees in an amount of $47,639.

SECTION 504 DISCRIMINATION GENERALLY

On September 3, 2024, OCR's Assistant Secretary Catherine Lhamon issued a "back to school" document (referred to as an "up-to-date compendia") of OCR policy resources to support elementary and secondary schools, colleges, and universities as to their obligations to protect students' civil rights. See "Supporting Educational Environments Free from Discrimination: A Resource Collection for Elementary and Secondary Schools" which can be found at the following link:
https://www2.ed.gov/about/offices/list/ocr/docs/supporting-educational-environments-disc-free-ese-092024.pdf

Essentially, the document provides a "library" of links where OCR's guidance documents can be found on Title VI issues (race, color, national origin), Section 504/ADA, Title IX (sex), and CRDC Data (OCR's Civil Rights Data Collection). Special Education topics include race discrimination (p. 5); Section 504 topics (pp. 8-13), including accessibility of programs and facilities; bullying and harassment; charter schools; COVID-19; effective communication; equal access; FAPE; race discrimination; restraint and seclusion; retaliation; specific illnesses and medical conditions; and transition to postsecondary education. There are also some links to some videos that OCR has prepared. It is important that district and local Section 504 Coordinators/designees are familiar with all of the disability-related resources referenced in this document.

SECTION 504 ACCOMMODATIONS

Hyde v. Oliver, 124 LRP 6237 (W.D. Tex. 2024). In this suit involving "the grade point average of a 504 disabled former student...and the subsequent effects of that GPA on his eligibility for valedictorian status and collegiate scholarships," the student's 504/ADA claims against the district are dismissed for failure to exhaust administrative remedies and because of the unreasonable nature of the accommodation he has requested. To establish a failure to accommodate, a student must show that the district knew about the student's disability and resulting limitations but intentionally failed to make reasonable accommodations. Here, the high school graduate asked for the district to remove an "F" from his transcript that he made the first time he took a dual credit public speaking class and to declare him to be valedictorian (rather than salutatorian) retroactively and

alleges that although he was granted admission to his first choice of Texas A&M, he did not attend because his family could not afford the tuition without the scholarship he would have gotten. While the 5th Circuit Court of Appeals has not decided whether a modification of a high school transcript is a reasonable accommodation, the 5th Circuit has rejected "retroactive requests for leniency" in ADA employment cases. Further, other Circuits have ruled that changes to transcripts or disciplinary records are not reasonable requests for accommodations in the employment or higher education context. The same rationale applies to this student's requests where the parents are not seeking prospective accommodations to help the student benefit from public education but instead essentially seek remediation of a past unfavorable result. In addition, IDEA's exhaustion requirement applies to all claims for which the student seeks non-monetary relief because those claims center on the district's alleged failure to accommodate and, therefore, seeks relief for a denial of FAPE. [Note: The parents have been given leave to amend their Complaint and its allegations concerning the district's failure to provide a laptop to the student during the dual credit class for which he received the "F" and retaliation against him for his parent's advocacy when they took the "F" off of the transcript and then put it back on when his father requested nonrenewal of the Superintendent. However, leave to amend is denied as to the request to change the "F" on the student's transcript].

Doe v. Regional Sch. Unit 21, 124 LRP 33180 (D. Me. 2024). Parents' request for injunctive relief under Section 504/ADA is dismissed where they have not sufficiently alleged that the district discriminated against their sixth grader with anxiety. Here, the parents allege disability-based discrimination because the district denied their request that the student be allowed to use a telepresence robot to remotely access instruction. Instead, educational specialists with the district testified that the better path to providing FAPE to the student is for the child to work toward overcoming anxiety by slowly integrating her into the classroom without the aid of a robot. To establish a discrimination claim, the parents are required to show that the requested accommodation is reasonable and that the denial of it discriminates or prevents the child from participating in district services or programs. In order to obtain an injunction, the parents must also show that they are likely to succeed on their claim, that the child will suffer irreparable harm, that the equities weigh in favor of allowing for the use of the robot, and that allowing it is in the public interest. As to irreparable harm, a student whose disability limits her attendance to 15% of classroom hours may well be excluded from and denied the benefits of education. However, the district's specialists "plausibly" contend that the better path is for the student to overcome her anxiety by slowly integrating into the classroom. While the parents point to the use of a telepresence robot by another student in the district as evidence of discrimination, there is no evidence that the other student suffers from the same disability or that the district is required to extend the same benefits to this child. Thus, preliminary injunctive relief is denied.

504 DISABILITIES

On February 20, June 20, and September 24, 2024, the Office for Civil Rights (OCR) issued a total of 11 new resource documents. These resources address common medical or health conditions that OCR indicates could be disabilities for purposes of Section 504: asthma, diabetes, food allergies, gastroesophageal reflux disease (GERD), sickle cell anemia, epilepsy, cancer, anxiety, depression, eating disorder, and bipolar disorder. OCR notes that these resources, which are applicable to all levels of education, explain when these medical and health conditions trigger protections under

Section 504, what kind of modifications an educational institution may need to take to avoid unlawful discrimination, and what an institution may need to do to remedy past discrimination.

For the guidance document regarding students with asthma, see:
https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-asthma-202402.pdf

For the guidance document regarding students with diabetes, see:
https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-diabetes-202402.pdf

For the guidance document regarding students with food allergies, see:
https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-food-allergies-202402.pdf

For the guidance document regarding students with GERD, see:
https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-gerd-202402.pdf

For the guidance document regarding students with sickle cell disease (SCD), see:
https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-sickle-cell-202406.pdf

For the guidance document regarding students with epilepsy, see:
https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-epilepsy-202406.pdf

For the guidance document regarding students with cancer, see:
https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-cancer-202406.pdf

For the guidance document regarding students with Anxiety Disorders, see:
Section 504 Protections for Students with Anxiety Disorders

For the guidance document regarding students with Depression, see:
Section 504 Protections for Students with Depression

For the guidance document regarding students with Eating Disorders, see:
Section 504 Protections for Students with Eating Disorders

For the guidance document regarding students with Bipolar Disorder, see:
Section 504 Protections for Students with Bipolar Disorder

Each of the documents contains the following questions and OCR's answers:

- What is the condition?
- Can a student with the condition have a disability under Section 504?
- How can the condition affect a student's experience in school?
- What might a school need to do to address the student's condition?
- What remedies might a school need to provide if the school does not appropriately address the student's condition?
- What can be done if a student or parent believes a school is not meeting its obligations under Section 504?

SECTION 504 REGULATIONS GENERALLY

As we have discussed in past years, OCR announced on May 6, 2022 its intent to issue proposed revisions to the 45-year-old 504 regulations enacted in 1977. In the Fall of 2022, the Department included in the President's Regulatory Agenda the intent to have the proposed amended regulations out by May of 2023. That did not happen, and on June 14, 2023, the regulatory agenda was amended to reflect the intent to issue the proposed regulations in August 2023 and in December 2023 reflected a date of November 2023 (which had already passed). In early July, the "Spring" 2024 Agenda was published and indicates a date of November 2024 for issuance of the Notice of Proposed Rulemaking:
https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1870-AA18

SECTION 504 CHILD FIND

B.S.M. v. Upper Darby Sch. Dist., 103 F.4th 956, 124 LRP 17147 (3d Cir. 2024). The district court's ruling that the timely evaluation under IDEA established automatic compliance with 504 is reversed and remanded for further proceedings. Where Section 504 defines the term "disability" more broadly than IDEA, students who do not qualify for special education services under IDEA may still be entitled to services under Section 504. Here, the district evaluated the student's speech and language needs when she was in kindergarten (even though the parents asked that she receive a full psychoeducational evaluation at that time) and provided her with speech and language therapy until April of her second grade year as an SLI student. However, the IDEA evaluation did not necessarily meet the student's needs under 504 where the district did not evaluate the student's emotional needs or develop a 504 Plan to address her symptoms of depression until she was in fourth grade. As such, liability as to whether the district timely conducted a 504 evaluation will turn on whether it was reasonable not to evaluate earlier under the circumstances. There is "significant debate" about when the school was put on notice of the student's emotional struggles and whether the district should have evaluated the student earlier. The district court is directed to consider this on remand.

PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES

D.M. v. Oregon Scholastic Activities Ass'n, 124 LRP 15572 (D. Ore. 2024). Having already denied the student's requests for injunctive relief, this court rules that the student's ADA claims are rejected. Because no reasonable jury could conclude that the 17 year-old's requested accommodation that would have afforded him an opportunity to play football during his fifth and final year of high school was reasonable or that the student was discriminated against by reason of his disability under the ADA, the Activities Association's motion for summary judgment is granted. The student claims that the Association's policy that limits students to participation in sports for four consecutive years (8 semesters) after entering 9th grade is discriminatory. However, the fact that the student received Section 504 accommodations for stress and anxiety does not necessarily mean he was entitled to an exemption from the Association that would allow him to play football during his last year of high school. Here, the student must show that the Association improperly denied him a reasonable accommodation under the ADA. According to the Association's handbook and rules, IDEA-eligible students with disabilities with IEPs may receive a fifth-year waiver allowing them to participate in competitive sports during their fifth year of high school. However, this student does not meet this criteria because the school district did not find

him eligible under IDEA. The student's argument that the Association has improperly conditioned his receipt of reasonable accommodations on IDEA eligibility is rejected where IDEA eligibility is based on a comprehensive evaluation and "Section 504 ... provides a low-barrier mechanism for students to receive some special services or accommodations." Based upon the "significant difference" in eligibility standards between IDEA and Section 504, the Association's policy allowing fifth-year exemptions for IDEA-eligible students who have repeated a grade but not for 504-eligible students is rational. In addition, there is no evidence that the ADA requires exemptions for students with a 504 plan as a reasonable accommodation. The Association's 8-semester policy already provides an exception for those students whose disabilities, in accordance with their IEPs, prevented them from graduating in four years. Indeed, this student was considered for an IEP on two different occasions, but his IEP team concluded that he was not a "candidate for special education and chose not implement an IEP." Therefore, neither the Association's exemption policy nor its denial of an exemption to this student is discriminatory. NOTE: This decision was appealed to the 9th Circuit Court of Appeals on May 16, 2024, three days after it was decided.

EFFECTIVE COMMUNICATION UNDER ADA

Le Pape v. Lower Merion Sch. Dist., 124 LRP 17149 (3d Cir. 2024). While the district did not deny FAPE under IDEA to the former student with autism, it may have discriminated under the ADA when it refused to use Spelling to Communicate (S2C) with the nonverbal student (a communication technique wherein a non-speaker points at letters on a laminated alphabet board (letter board) held by a communication support person)) and have a person trained in S2C to work with the student at school every day. Under the ADA's "effective communication" requirements, a district must ensure that its communication with a student with a disability is as effective as its communication with nondisabled students. In doing so, a district is required to give "primary consideration" to the requests of the student, unless it can demonstrate that another effective means of communication exists. Here, there is a question of fact as to whether the district has denied the student "effective communication," and the district court erred in determining that the parents' prior FAPE claims incorporated and precluded their claims under ADA. Under IDEA, a district is not required to implement parent preferences in methodology as long as the student receives educational benefit. However, under ADA, its requirements impose a greater obligation than IDEA's FAPE requirement. Thus, the district court's granting of summary judgment on all claims is reversed and the ADA and 504 claims are remanded. In addition and under ADA/504, the parents' claims for compensatory damages should be addressed, even if they are based on the same facts as the FAPE-related claim. While the Court need not decide now whether S2C is effective communication, "[t]here is ample evidence from which a reasonable jury could conclude that the School District violated the ADA's effective communication requirement by denying Alex his preferred method of communication without providing an effective alternative. He testified that the letter board is effective for him and remains his preferred communication method. He is a non-speaker who for the first 16 years of his life had "very minimal communication," was able to say only a few words, and was unable to communicate clearly and as he wished. [citation omitted]. By typing, he could transcribe the speech of others but could not communicate his own thoughts. For example, he could not communicate with the school nurse or the guidance counselor about his college plans, course selection, testing, and accommodations; nor could he participate in class, extracurricular activities, or community-based instruction. In addition to Alex's own testimony,

seven treating clinicians and Dr. Barry Prizant--a speech pathologist and psycholinguist who has been awarded ASHA's highest honors, has practiced for nearly 50 years, and reviewed approximately 185 minutes of Alex communicating with the letter board and interviewed him--testified that the letter board is effective communication for him. And Alex's treating psychiatrist, Dr. Manley Ghaffari, who is board-certified in child and adolescent psychiatry and focuses her practice on neurodiverse patients, testified that the letter board was 'extremely effective in allowing [Alex] to express his thoughts and feelings.' [citation omitted]. Meanwhile, Vanessa von Hagen, a board-certified behavior analyst and the lead clinician on Alex's home team for several years, testified that he cannot orally communicate in sentences and can only type what he hears, not his own thoughts. She also testified that the letter board was effective communication for Alex. Indeed, as the School District's initial denial of the letter board turned almost exclusively on its concerns about the auxiliary aid's efficacy, that was the most material fact at issue." Thus, summary judgment was improper on the "effective communication" issue under ADA/504.

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A.W. v. Coweta Co. Sch. Dist., 110 F.4th 1309, 124 LRP 29777 (11th Cir. 2024). In this case alleging alleged abuse by a special education teacher, the district court's dismissal of the parents' claims for emotional distress damages under ADA is affirmed, but they may pursue other remedies under ADA. While the Supreme Court ruled in the Cummings (2022) case that emotional distress damages are not available under Section 504 (and ADA was not an issue), Title II of the ADA "expressly incorporates" Section 504's remedies. Thus, emotional distress damages are not recoverable under Title II of the ADA.

A.J.T. v. Osseo Area Schs., 124 LRP 9023 (8th Cir. 2024). While the district may have improperly refused to provide the student with instruction after school hours to accommodate her epilepsy and seizure disorder, its actions did not constitute intentional discrimination, which is required to substantiate a 504/ADA claim for disability discrimination. Thus, the district court's granting of summary judgment to the district on this claim is affirmed. To successfully assert a federal claim under 504/ADA, parents must prove that the district intentionally discriminated against the student by acting with bad faith or gross misjudgment. Here, the parents did not meet this standard where they requested that the district provide the student with additional instruction (since, due to her seizure disorder she did not start school until noon) that would provide her with a school day comparable to the length of the school day for other students. While the district's denial of the parents' request may have violated the student's educational rights and amounted to negligence or deliberate indifference and it appeared that the district's director of student services was not aware of policies permitting at-home schooling as an accommodation, this was not enough. The district did not ignore the student's needs nor did it delay efforts to address them. Rather, the district appropriately met with the parents and updated her IEP every school year, which included a variety of services, including intensive one-on-one instruction and a 15-minute extension of the school day so that the halls could clear of other students before she left school. Further, the district offered the student 16 three-hour instructional sessions at home each summer. This does not show wrongful intent for purposes of disability discrimination.

J.E. v. Board of Educ. of the City of Chicago, 124 LRP 10046 (N.D. Ill. 2024). Parent's ADA Title II claim for compensatory damages based upon the 5-year-old developmentally disabled

child's falling on the playground and fracturing her arm is dismissed. Here, the student's IEP noted that the child was able to play on a playground with "general supervision," and nothing indicated that this general supervision was an accommodation or modification for the student's disability. In addition, the parent did not allege that the student needed a different modification or accommodation for playground activities that the district did not provide.

A.S. v. Mamaroneck Union Free Sch. Dist., 124 LRP 2812 (S.D.N.Y. 2024). District's motion for summary judgment is granted on the parents' 504/ADA discrimination claims on behalf of their child with ADHD and ODD. To successfully assert an intentional discrimination claim under 504/ADA, a denial of FAPE or failure to provide appropriate services is not sufficient. Parents must establish that the district improperly excluded the student from its programs, services, and activities due to the student's disability. They must also show that the district acted with bad faith, gross misjudgment, or deliberate indifference. Here, the student presented severe, aggressive behaviors, including hitting, biting, threatening other children, harming staff, throwing objects, and attempting to stab others. The parents allege that the district failed to develop appropriate behavioral services and improperly used restraint and seclusion. In terms of whether they have demonstrated a denial of FAPE that rises to the level of intentional discrimination, the district restrained the student and placed him in a timeout room only when his behaviors posed a physical danger to others. In addition, the district made good faith efforts to address the student's needs, holding "constant" IEP meetings, frequently communicating with the parents, repeatedly adjusting the student's BIP, and proposing placement in a private therapeutic school. While the parents may have been frustrated with the IEPs and the student's continued behavioral concerns, that alone does not establish that the district acted with deliberate indifference sufficient to support their 504/ADA claims.

Haynes v. South Bend Comm. Sch. Corp., 124 LRP 7802 (N.D. Ind. 2024). District's motion for judgment on the parent's 504/ADA discrimination claims on behalf of her preschooler with CP is granted. Here, the parent seeks an order requiring the district to fix the landing and compensatory damages for the child's injuries. Where the district has already repaired the landing in accordance with ADA requirements, that relief is unnecessary and the issue is moot. With respect to the claim for compensatory damages, the parent must show that the district knew that risk of harm was likely and chose not to take action. While the landing was slightly steeper than what 2010 ADA standards allowed and the child did fall face first into concrete when his wheelchair rolled down the landing and crashed over a step, there was no evidence that the district was aware of any architectural defects that might result in injury to someone. In fact, the architect hired in 2012 by the district to review the school's ADA compliance did not identify the landing as an accessibility concern. Where no previous accidents occurred, the parent could not show that the district was aware of any potential for harm. Indeed, the district's repair of the landing immediately after the injury showed that it did not "bury its head in the sand" as alleged by the parent.

Estate of Jonny Torres v. Kennewick Sch. Dist. No. 17, 124 LRP 7201 (E.D. Wash. 2024). The district's motion for judgment is partially denied and the sixth grade asthmatic student's estate may move forward with its action for money damages under 504/ADA. The district may have been deliberately indifferent to the child's need to be excused from P.E. based upon his life-threatening asthma. Here, the school nurse maintained the student's inhaler and health plan on file

that indicated that his condition was life-threatening and triggered by exercise and smoke in the air. While the nurse emailed the child's teachers about the child's condition, she did not notify the P.E. teacher. On one occasion after running and exercising during P.E. at a time when wildfire smoke was in the air, the child visited the nurse's office to use his inhaler. While at home later that day, he had a severe asthma attack and died 18 days later. To hold the district liable, the student's estate must show that the child had a disability and that the district denied him a reasonable accommodation needed for meaningful access to education. In addition, because the estate seeks money damages, it must show that there was intentional discrimination in the refusal to accommodate in the form of deliberate indifference or knowledge that a harm to a federally protected right was substantially likely. Where the parties agreed that the child had a disability and needed accommodation to enjoy access to his education, the district was clearly aware of this, and the need for excusal from exercise had been documented since 2013, the district may have been deliberately indifferent to the child's needs. Thus, the 504/ADA claims against the district may proceed.

LIABILITY FOR INJURIES TO STAFF

Sims v. Dallas Indep. Sch. Dist., 124 LRP 4577 (N.D. Tex. 2024). The district's motion to dismiss the 14th Amendment claim in the Second Amended Complaint filed by the sons of a special education teaching assistant who was fatally injured by a high schooler with a disability is granted. Where the sons assert a single cause of action against the district under 42 USC §1983 for violating their mother's 14th Amendment right to bodily integrity under the "state created danger and ratification theories," their claim is rejected. Here, the sons argue that the district's student code of conduct was the "moving force" behind the ARD's decision to keep the dangerous special education student in the classroom with their mother. To hold the district responsible for their mother's death, the sons must demonstrate that her death stemmed from an unconstitutional district policy. The argument that the district's policy—its code of conduct—is unconstitutional is rejected. Relying on an IDEA regulation that allows IEP teams to consider unique circumstances on a case-by-case basis when determining the need for a placement change following a violation of the student code of conduct, the court acknowledges that the district's policy does not include this provision. However, the absence of this provision did not prevent the student's IEP team from considering the student's unique circumstances when discussing his return to the classroom. In addition, the discipline code requires the student's return to his current placement if his misconduct was a manifestation of his disability. Absent evidence that the district knew its omission of the "unique circumstances" provision would result in injury, the sons could not establish a constitutional violation. Because plaintiffs have again failed to plead facts sufficient to state a claim, the court denies leave to file another complaint and dismisses plaintiff's claims against the district with prejudice.

BULLYING/DISABILITY HARASSMENT

Jordan v. Chatham Co. Bd. of Educ., 123 LRP 30861 (M.D.N.C. 2023). Where it is alleged that a school principal failed to address his own daughter's harassment of a student with autism, the district's motion to dismiss the alleged victim's 504/ADA claims is denied. While districts are not automatically liable for disability-based peer harassment, if a parent can show that the district's response to reported incidents of peer harassment was clearly unreasonable, there is a cause of

action. According to the parent here, the principal's daughter teamed up with another student to prevent her child from using school bathrooms. The parent of the alleged victim made repeated trips to the school each week to bring her child a change of clothes, which establishes the impact of the harassment. The parent's allegations that the bullies prevented her child from using the restroom at school to the point that she regularly soiled her clothing is "certainly" harassment that is sufficiently "severe, pervasive, and objectively offensive," such that the victim was deprived of educational opportunities and benefits at school. In addition, the parent claims that the harassment continued for years, notwithstanding her "weekly" conversations with the principal about his daughter's bullying behavior. If the parent's allegations are true, they could support a finding that the district's response to peer harassment was clearly unreasonable.

Pennington v. Community Unit Sch. Dist. No. 35, 124 LRP 9778 (S.D. Ill. 2024). District's motion for summary judgment on the parent's 504/ADA bullying claims is denied, and the parent may proceed with his claims on behalf of twins who are former students with autism. To establish disability-based harassment claims, the parent must show that 1) the former students have a disability; 2) they were harassed based upon their disability; 3) the harassment was so severe or pervasive that it altered the students' education and created an abusive environment; 4) the district knew about the harassment; and 5) the district was deliberately indifferent to it. Here, the district's arguments do not account for numerous occasions when the boys were called things like morons, stupid, retarded and challenged which could be sufficient to establish that the harassment was disability-based. The boys were bullied almost every day for more than two years and endured harassment, intimidation, public humiliation, beatings, and stabbing. In addition, they were hospitalized, arrested, and became suicidal. Therefore, the harassment may have been severe and pervasive. Further, there were many reported incidents where no action was taken by the district, and the district has not provided any evidence of efforts made, any explanation of why efforts were not necessary, or even a legally compliant bullying policy. Thus, a reasonable jury could find that the twins endured disability-based harassment in violation of 504/ADA. The case will, therefore, proceed.

RETALIATION/FREEDOM OF SPEECH

Rae v. Woburn Pub. Schs., 113 F.4th 86, 124 LRP 31325 (1st Cir. 2024). District court's granting of the school district's motion to dismiss the claims of a school nurse brought against the district and the school principal is affirmed. Here, the disciplinary hearings that the middle school nurse was required to attend and her principal's unusual participation in her yearly review were not shown to be connected to her speaking out on behalf of students with diabetes. In order to establish retaliation under Section 504/ADA, the nurse must show that 1) she engaged in protected conduct; 2) she was subjected to adverse action; and 3) there is a causal connection between the protected conduct and the adverse action. While the nurse engaged in protected conduct when she advocated for more support for students with diabetes and the principal's unexpected participation in her yearly review is arguably adverse action, the nurse has shown no evidence that there is a causal connection between that action and the nurse's advocacy. While the principal did require the nurse to attend disciplinary hearings, the hearings involved legitimate concerns--a parent complaint, a t-shirt that a student obtained from the nurse's office, and another incident where the nurse did not respond to a page that was made over the school's public announcement system because she was outside. The disciplinary hearings were not held because of her advocacy. In addition, to show a

claim of retaliatory adverse action in the form of a hostile work environment, the nurse is required to show that the harassment was sufficiently severe or pervasive. Where the nurse did not allege misconduct in the two years following her protected advocacy and the two disciplinary hearings in the six months following her advocacy were not sufficiently serious to constitute severe or pervasive harassment to support her claims, the dismissal of the claims is affirmed.

Morrow v. South Side Area Sch. Dist., 123 LRP 29917 (W.D. Pa. 2023). Former teacher allegedly forced to retire has established that the district may have retaliated against her under 504/ADA for her complaints to administration about disability discrimination against various students and staff members with disabilities. She asserted that she was subject to adverse actions including frequent change to her job description, assignment to conflicting job tasks, denial of paraprofessional support, a surprise observation, threatening a hearing and denial of equal opportunities. She claims that she met with the new Superintendent regarding the district's special education programs and her concerns that students were not receiving proper support from the district. In addition, she continually complained to the Superintendent, the principal, board members, and administrators about disability discrimination and the failure to provide required services to students. Thus, she has sufficiently asserted a protected activity and has contextually and temporally connect her disability-related complaints to the adverse conduct she claims forced her to retire.

Robinson v. New York City Dept. of Educ., 124 LRP 11 (E.D.N.Y. 2023). The district did not unlawfully retaliate against these parents and their 504/ADA claims are dismissed. During due process proceedings brought by the parents seeking and ultimately obtaining private school placement, the district learned from the student's mother that the child was not attending school. Based on New York law, the district reported child abuse and maltreatment while they were involved in the hearing against the parents. While the parents established that they engaged in the protected activity of advocacy and that the district took adverse action against them, the district articulated a genuine, legitimate, nondiscriminatory reason for making the report against the parents. School officials are mandatory reporters and are required to report suspected child abuse, including a parent's failure to supply the child with education as required by the state's compulsory attendance law, beginning at age 5. Thus, there was no retaliation on the part of the district based upon the parents' advocacy.

Hamilton v. Oswego Comm'y Unit Sch. Dist., 123 LRP 30461 (N.D. Ill. 2023). District's motion for judgment on the parents' retaliation claims under 504/ADA is granted. The circumstances surrounding the district's report of suspected child abuse to child welfare authorities could suggest unlawful retaliation since the report was made one day after a contentious IEP meeting when the parents asked for additional IDEA services. Not only did the parents engage in protected advocacy when they requested additional services, but the district contacted child welfare authorities just one day after denying the parents' request. However, the district offered a legitimate, nondiscriminatory reason for reporting the suspected abuse. According to school staff, the child did not want to enter the classroom the morning after the IEP meeting, and the principal and school psychologist reported that she lifted her arms while speaking to them and they saw a large bruise above her waistband. Though her parents said she banged into a coffee table while running in the house, the child was not able to explain the injury. Thus, the bruise, the child's unusual behavior, and her statement that her father tickled her when she was in bed gave the district reason to suspect abuse. Even without the state's mandatory reporting requirement], the evidence supports the notion

that the district made the report to child welfare authorities out of concern about potential child abuse. While child welfare authorities investigated and found no evidence of abuse or neglect, there is no evidence that the district sought to punish the parents for their advocacy.

Laquidara v. Westwood Regional Sch. Dist., 123 LRP 31965 (N.J. Sup. Ct. 2023) (unpublished). IDEA student's claim that the district filed a truancy petition against the parents to punish them for their advocacy is rejected. The student failed to attend school for more than a month after the IEP team changed his placement to a resource classroom and denied the parent's request for home instruction absent evidence of medical need. Further, New Jersey law requires districts to report truancy, which it defines as 10 or more unexcused absences. Considering that there was no question that the student was truant, school administrators were not free to "simply ignore the truancy laws."

RIGHTS OF ADVOCATES

Deabold v. Brennan, 124 LRP 30889 (E.D.N.Y. 2024). District's motion to dismiss the parent advocate's complaint is granted in its entirety. Here, the advocate brings claims under Section 504, IDEA and the First Amendment seeking (1) temporary emergency relief; (2) preliminary and permanent injunctive relief; and (3) $250,000 in damages for alleged defamation. In this case, the Superintendent sent the advocate a letter in December 2022 indicating that based on the advocate's "hostile statements and threatening remarks made while communicating with District administrators and employees," the advocate was "effective immediately, up through the end of the 2022-2023 school year, ... prohibited from entering the District's buildings and grounds at any time or participating in any District meeting, proceeding and/or hearing, without the express written approval of the Board of Education." In response, the advocate sent a "Due Process Complaint Notice" to the district seeking a due process hearing under section 504 and noting that the Due Process Notice served as his method of exhausting any of his required administrative remedies. In response to the Notice, the Superintendent noted that the district had determined that the requested hearing was not appropriate because the advocate lacks standing to request a hearing under IDEA or 504. In response, the advocate filed the instant action in federal court in April 2023. However, the advocate cannot demonstrate likelihood of success on his claims in support of injunctive relief because he has no right to sue the district under IDEA or 504, which only authorize actions by students (or individuals) with disabilities. It is also important to note that in a status report filed by the district, it is clear that the district sent the advocate a letter that it has, effective July 1, 2023, determined to lift any then-present restrictions prohibiting the advocate from being on district property or attending district meetings. Since that time, the advocate has attended several district meetings and has, in fact, been in attendance at a hearing being conducted on district premises and will appear in person again for a hearing on August 31. Thus, this case is dismissed.

RESTRAINT/SECLUSION

F.B. v. Francis Howell Sch. Dist., 124 LRP 15576 (E.D. Mo. 2024). District's motion to dismiss the parent's 4th Amendment claim based upon the alleged improper use of seclusion and restraint of an elementary school student with autism is denied. The district's position that its employees' use of seclusion and restraint was reasonable because the student's IEP authorized it is rejected. In fact, the IEP appears to limit the use of seclusion and restraint to crisis situations and underscores

that "it is extremely important that the procedures be documented" and that the parent "will be contacted immediately if such procedures are used." Here, the parent alleges that district staff did not limit the use of seclusion and restraint to crisis situations and restrained the student in response to insubordination and other minor behaviors. The parent also alleges that district staff did not document incidents of seclusion and restraint. Because the court cannot resolve the factual dispute, the 4th Amendment claim will not be dismissed at this juncture.

D.R. v. Downington Area Sch. Dist., 124 LRP 24451 (E.D. Pa. 2024). Parents' federal claims under the 14th Amendment and 504/ADA are dismissed. While the use of restraint of a first grader with ADHD and anxiety during emotional meltdowns may be concerning, it did not rise to the level of a constitutional violation that requires district action toward the student to "shock the conscience." Here, the parents allege that the district improperly restrained the student on at least 4 occasions and alleged that unapproved items were used to restrain the student, such as bean bag chairs and gym mats. On one occasion, it is alleged that the district held the student to the wall with a gym mat while staff attempted to calm her. While these incidents may have caused the student to develop separation anxiety and PTSD, this does not rise to the level of a constitutional due process violation. Because the evidence indicates that school staff restrained the student during behavior outbursts only to prevent injury to herself or others, these alleged incidence do not shock the conscience. Even if other methods may have sufficed, such an error in judgment on the part of school staff would, at most, support a claim for negligence.

Lambeth-Greer v. Farmington Pub. Schs., 123 LRP 31803 (E.D. Mich. 2023). Special education teacher's and district's motions for judgment on the parent's excessive force claim under the 14th Amendment are granted. In the Sixth Circuit, courts are to consider 4 factors when deciding such claims: 1) whether the teacher acted with a pedagogical purpose; 2) whether the amount of force used was excessive; 3) whether the teacher acted with malicious intent; and 4) whether the student suffered a serious injury. Here, all four factors weigh in favor of the teacher. Where the student resisted moving to the next workstation as directed and flailed his arms yelling, "no, no, no," testimony showed that the teacher held the student's wrist and walked with him to the next workstation. This action was aligned with the teacher's CPI training and the teacher confirmed her justification for using the hold technique in an email to the parent sent the same date of the incident. This single use of force, which lasted about 10 seconds, was part of the teacher's good faith effort to restore discipline. In addition, the minor abrasion that the student suffered after he wiggled free from the teacher's grasp did not qualify as serious injury. Because the teacher's use of the physical hold did not qualify as excessive force, the parent could not show that the teacher violated the student's rights under the 14th Amendment.