



**“JUST A SPOONFUL OF SUGAR HELPS THE ESE LAW GO DOWN”**

**ISRD MID-YEAR CONFERENCE FOR ESE ADMINISTRATORS**

**Gainesville, Florida  
January 27, 2010**

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## **SPECIFIC TOPICS: DISCIPLINE, LRE AND TRANSITION CONCERNS**

### **I. DISCIPLINE ISSUES: SUSPENSION/EXPULSION, RESTRAINT & SECLUSION**

#### **A. Bus Suspension: Does it Constitute a Change of Placement?**

In the commentary issued with the 2006 IDEA regulations, the U.S. Department of Education commented that “[w]hether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child’s IEP. If the bus transportation were a part of the child’s IEP, a bus suspension would be treated as a suspension...unless the public agency provides the bus service in some other way.” US DOE goes on to note that where the bus transportation is not a part of the child’s IEP, it is not a suspension. “In those cases, the child and the child’s parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether behavior on the bus is similar to behavior in the classroom that is addressed in an IEP and whether the child’s behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child.” 71 Fed. Reg. 46715.

#### **B. What about In-School Suspension?**

Again, in the commentary to the 2006 IDEA regulations, the U.S. DOE reiterated its “long term policy” that an in-school suspension would not be considered a part of the days of suspension toward a change in placement “as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.” 71 Fed. Reg. 46715.

1. What if the ESE teacher is providing work for the student via the paraprofessional who supervises the in-school suspension room and the ESE teacher monitors the completion of work to ensure the student is progressing on IEP goals?

#### **C. Separate Schools for Students who are Discipline Problems (a/k/a “Disciplinary Centers”**

1. Any cases where school board is sued for forcing removal of ESE students to such centers?
2. Parents are unhappy with school’s code of conduct related to appropriate dress and student evidences defiance, continued arrival at school with body piercings, refusing to comply with rules, verbal confrontations, etc., for which he has been suspended. A pattern of suspensions has developed...manifestation is done and conduct is found not to be a manifestation of disability. Parent disagrees and student continues to wear piercings. Pursuant to an IEP meeting, school offers

change of placement to home instruction or alternative campus. If parent won't consent, what's next?

**D. “Special Circumstances”: Weapons, Drugs, Serious Bodily Injury**

1. Scenario: ESE student is expelled for possession of drugs on campus; manifestation determination done on the 8<sup>th</sup> day; student remained suspended until school board hearing, at which time he was advised that he would receive “home instruction” the remainder of the year. Were appropriate steps taken?

**E. Making Manifestation Determinations (MDs)**

1. How do we ensure that the MD is made on an objective basis? Is a MD a good reason to add additional “labels,” i.e., adding EBD for a student who is SLD?

With respect to the MD, the IDEA provides that “within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent and relevant members of the IEP Team (as determined by the parent and local educational agency) shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine:

- (i) If the conduct in question was **caused by, or had a direct and substantial relationship to**, the child’s disability; or
- (ii) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

If the local educational agency, the parent, and relevant members of the IEP Team determine that either [(i) or (ii) above] is applicable for the child, the conduct shall be determined to be a manifestation of the disability. 20 U.S.C. § 1415(k)(1)(E).

The IDEA regulations further provide that, if the LEA, the parent, and members of the child’s IEP Team determine that the child’s behavior was the direct result of the LEA’s failure to implement the child’s IEP, the LEA must take immediate steps to remedy those deficiencies. 34 C.F.R. § 300.530(e)(3).

**F. What about Corporal Punishment?**

In federal cases and under relevant federal authority, reasonable corporal punishment does not violate the U.S. Constitution. See Fee v. Herndon, 900 F.2d 804 (5th Cir.), cert. denied, 499 U.S 908 (1990).

Florida law contemplates the use of corporal punishment “according to school board policy” (which must be reviewed every 3 years) and at least the following procedures, if a teacher feels that corporal punishment is necessary:

1. The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used. The principal shall prepare guidelines for administering such punishment which identify the types of punishable offenses, the conditions under which the punishment shall be administered, and the specific personnel on the school staff authorized to administer the punishment.
2. A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.
3. A teacher or principal who has administered punishment shall, upon request, provide the student's parent with a written explanation of the reason for the punishment and the name of the other adult who was present. §1003.32, F.S.

There have also been a couple of rulings from OCR on the topic of corporal punishment:

1. Nash County (N.C.) School Dist., 352 EHLR 37 (OCR 1985). School district discriminated against disabled student with emotional problems when it administered corporal punishment without determining whether the misconduct was related to his emotional problems or whether it was an appropriate sanction.
2. Cooke County (TN) School Dist., 353 EHLR 169 (OCR 1988). School district did not discriminate against student where it imposed corporal punishment before student was identified as disabled, but once the student was identified as disabled, the district incorporated the methods to be used to impose disciplinary sanctions into IEP.

## **G. What about Restraint/Seclusion?**

### **1. Legislative action: Federal and Florida**

The use of restraint/seclusion in schools rose to the level of being a national/federal concern in 2008. In January of 2009, Congressman George Miller (D-CA) asked the U.S. Government Accountability Office (GAO) to investigate allegations of deadly and abusive seclusion and restraint in schools. At that time, The Stop Child Abuse in Residential Programs for Teens Act of 2009 was already in the works and was ultimately passed by the House on February 23, 2009 (HR 911).

On May 19, 2009, the Government Accountability Office (GAO) issued the requested study of its examination of the use of seclusion and restraint in schools and a hearing was held by the House Education & Labor Committee, chaired by Congressman Miller. At the hearing, the testimony of the author of the GAO report was heard, along with testimony from several parents whose children were injured or died from the use of restraints in school.

The GAO report indicates that hundreds of cases of alleged abuse and death exist based upon the use of seclusion and restraint in schools, but that there is no federal legislation to prevent these deaths and abuses from happening. At the hearing, there was apparent consensus among the Committee members that uniform standards are needed across the country with respect to how and when to use seclusion/restraint, if ever. Still others countered that additional federal laws may not be necessary, since states already have laws in place addressing the use of seclusion/restraint in schools.

On May 20, 2009, Education Secretary Arne Duncan reportedly told the House Education & Labor Committee that he would be asking states to submit plans by the fall of 2009 for ensuring that children are not necessarily restrained or secluded. That seemed to indicate that current state plans, laws, procedures, etc. would be reviewed before any federal or further Congressional action would be taken.

In Florida, House Bill 81 (HB 81) was introduced and provides, among other things, that manual physical restraint shall be used only in emergencies when there is imminent risk of serious injury or death to a student or others; provides restrictions on the use of manual physical restraint; prohibits use of manual physical restraint by school personnel who are not trained and certified to use district-approved methods for applying physical restraint techniques; prohibits school personnel from placing students in seclusion; provides requirements for the use of time-out; requires schools to prepare incident reports after student restraint; and requires development and revision of school district policies and procedures. The bill is currently in PreK-12 Policy Committee as of October 1, 2009.

Notwithstanding the fact that it appeared that Congress was going to hold off on federal legislation, Congressman Miller introduced H.R. 4247 in the House known as the "Preventing Harmful Restraint and Seclusion in Schools Act." It is expected that this bill will go through numerous revisions before it is a final statute.

## **2. Legal Claims/Cases regarding the use of seclusion/restraints**

Even though there are not yet specific federal laws concerning the use of seclusion/restraint in public schools, there have been arguments made and cases brought alleging that the use of certain procedures is a violation of a student's constitutional rights. In addition, an argument could be made in appropriate circumstances that some uses of seclusion/restraint violated a child's overall right to a free appropriate public education (FAPE) under the IDEA. Even in the absence of a state law regulating the use of restraint/seclusion, there are causes of action that may be sustainable based upon federally protected rights.

### **a. Constitutional claims/cases**

There have been several reported cases alleging that the use of seclusion or restraint was unconstitutional. Many of these cases are based upon the Fourteenth Amendment's guarantee of due process, the Fifth Amendment's liberty interest and the

Fourth Amendment's prohibition against unreasonable seizures. Still others have been brought under the theory that the use of such techniques is "cruel and unusual punishment" in violation of the Eighth Amendment. In all of the cases, money damages (i.e., damages for "pain and suffering," "emotional distress," "wrongful death," punitive damages) are sought via 42 U.S.C. § 1983 and, typically, violations of state personal injury laws.

**i. Fourteenth/Fifth Amendment cases**

With respect to the use of seclusion/restraint in schools, liberty interest and due process challenges are typically rejected if their use is deemed "reasonable" under the circumstances. In addition, where individual educators have been sued, they may be entitled to the defense of qualified immunity in appropriate cases.

- a. Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452 (1982). An individual has a constitutionally protected liberty interest in reasonably safe conditions of confinement and freedom from unreasonable bodily restraint. In determining what is "reasonable," the Court will defer to the judgment of qualified professionals. [Note: Case involved restraint of an intellectually impaired adult confined to a state hospital].
- b. Honig v. Doe, 108 S.Ct. 592, 484 U.S. 305 (1988). With respect to students with disabilities who are considered dangerous or disruptive, they may be disciplined with the use of study carrels, timeouts, detention or the restriction of privileges, as well as suspension for up to ten days. The Court also noted that these procedures allow school administrators to protect the safety of other students and provide for a "cooling down" period during which school officials can initiate an IEP review and seek to persuade parents to agree to a change in placement.
- c. Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303 (5<sup>th</sup> Cir. 1987). Teacher and principal do not have qualified immunity in a case where a second grade student was tied to a chair for the entire school day and for a substantial portion of the second day as an "educational exercise," with no suggested justification such as punishment or discipline. The student was denied access to the bathroom and no other student received such treatment. If these facts are proved, this would implicate the student's Fifth and Fourteenth Amendment rights to substantive due process, specifically the right to be free from bodily restraint. "We are persuaded that in January 1985, a competent teacher knew or should have known that to tie a second grade student to a chair for an entire school day...was constitutionally impermissible."
- d. Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988). A decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child's Fifth Amendment liberty interest in his personal security and a violation of the substantive due process prohibited by the Fourteenth Amendment. Where it is alleged that the coach put his arm around the

- neck and shoulders of the student while verbally admonishing him over the use of foul language (and the student lost consciousness and fell to the floor), a reasonable jury could find that the restraints employed exceeded the degree of force needed to correct the behavior and that the injuries served no legitimate disciplinary purpose.
- e. Heidemann v. Rother, 24 IDELR 167, 84 F.3d 1021 (8<sup>th</sup> Cir. 1996). The use of a “blanket wrapping” technique with a 9-year-old student with severe mental and physical disabilities was not an unreasonable bodily restraint which violated the student’s constitutional rights to due process. Since the school employees were following the recommendations of a licensed professional therapist in the implementation of the technique, the school professionals are entitled to qualified immunity.
  - f. Brown v. Ramsey, 33 IDELR 216, 121 F.Supp.2d 911 (E.D. Va. 2000). Case is decided in favor of teachers who used “basket hold” on a 6-year-old student with Asperger Syndrome. The hold was performed "by clasping the (student) at his wrists, crossing his arms in front of his body, and pushing his head into his chest." The parent claimed that the teachers used the hold approximately 40 times and that its use suffocated the student, but the teachers stated that they performed the hold only when the student posed a danger to himself or others. At times, the student threw items around the classroom, jumped onto desks and tables, and scratched or struck other students. Clearly, the student did not suffer the requisite severe injury and the parent never took the student to a doctor for treatment of any injuries caused by the alleged abuse. The parent also failed to show that the use of the 'basket hold' was not appropriate to address the student's actions. It "was not administered arbitrarily but instead only occurred in connection with his being placed in time-out." Further, the student's IEP contained a behavior management plan that allowed for restraint in some instances. Finally, the court determined that the teachers' use of the hold was not "so inspired by malice or sadism" that it was "literally shocking to the conscience."
  - g. M.H. v. Bristol Bd. of Educ., 169 F.Supp.2d 21 (D. Conn. 2001). In denying the school district’s motion for summary judgment in a case alleging inappropriate use of physical and mechanical restraints, the court found that it was without facts concerning the circumstances of when restraint was necessary for the safety of the student or others; whether each of the individual school defendants followed the prescribed rules for using restraints, and whether they received adequate training to use such restraints in an appropriate manner. In addition, the school defendants have not provided the court with sufficient information about their level of expertise and experience for the court to conclude that they were each “competent,” whether by education, training, or experience, to make the particular decision [regarding the use of restraint with M.H.]”
  - h. Doe v. State of Nevada, 46 IDELR 124 (D. Nev. 2006). Case alleging negligence on the part of a teacher and an aide will not be dismissed where parents alleged

that both assaulted a 3 year-old student with autism. The parents alleged a violation of due process rights when school staff, among other things, allegedly twisted the child's arm behind his back, lifted him up and threw him toward a wall and grabbed his wrists. When viewed in the light most favorable to the parents, the allegations supported the parents' negligence claim and, therefore, would not be dismissed. However, the claims against the school district under Section 504, the ADA and Section 1983 were dismissed because there was no evidence that the district acted with deliberate indifference; rather, the evidence showed that teachers and staff were trained by the district in behavior management and education of students with autism.

- i. Colon v. Colonial Intermed. Unit 20, 46 IDELR 75, 443 F.Supp.2d 659 (M.D. Pa. 2006). Where complaint alleged that teacher used physical restraints; placement in a "time out" room for an entire day; and deprivation of benefits generally available to students in the program, such as hot lunches, bathroom privileges and regular breaks, cause of action against teacher may proceed under Section 1983 for alleged IDEA violations. The evidence was inconclusive as to whether the teacher used these strategies for safety reasons or for punishment for behavior that was a manifestation of the student's disability. Punitive damages may also be sought by the parent because of the possibility that the teacher acted with reckless or callous disregard of, or indifference to, the student's rights.
- j. W.E.T. v. Mitchell, 49 IDELR 130 (M.D. N.C. 2008). Although educators can use reasonable force to restrain or correct students and maintain order, 10-year-old student with severe asthma, partial blindness and CP has sufficiently plead a cause of action under Section 1983 for extensive mental and emotional damages. Student's special education teacher is not entitled to qualified immunity where it is alleged that she sharply rebuked the student for talking to a classmate, taped his mouth shut with masking tape and ripped it off when he tried to speak to her through the tape. A reasonable educator would have known that forcefully taping the mouth of a child with asthma amounted to a constitutional violation.
- k. O.H. v. Volusia County Sch. Bd., 50 IDELR 255 (M.D. Fla. 2008). Allegations that an autistic student was confined to a dark bathroom as punishment for off-task behaviors were sufficient to support a Section 1983 claim against a special education teacher. The teacher's alleged actions of strapping the student into a classmate's wheelchair and confining him to the dark bathroom may have been out of proportion to his conduct and could support a claim that excessive force was used.
- l. King v. Pioneer Regional Educational Service Agency, 109 LRP 4988 (Ga. Sup'r Ct. 2009). Lawsuit filed under Section 1983 is dismissed where student's death was not the result of a constitutional violation and no "special relationship" existed and, therefore, no affirmative duty was owed to the student. While the decision of certain employees to allow the student to keep a makeshift rope used as a belt when he was locked in a timeout room may have amounted to

negligence, the parents have pointed to no policy, procedure or custom on the part of the school agency that violated a privilege under Section 1983.

**ii. Fourth Amendment cases**

- a. Rasmus v. Arizona, 24 IDELR 824, 939 F. Supp. 709 (D. Ariz. 1996). Where an eighth grade student with attention deficit disorder and an emotional disability was assigned to a "time out room" by a teacher's aide for about ten minutes, this was sufficient to constitute a "seizure" under the Fourth Amendment, since the student was required to enter the time out room. In addition, the claims may proceed to trial as to whether the district's time out practices were reasonable, where the room was a small, lighted, unfurnished, converted closet which could be locked from the exterior and was used for disciplinary purposes. Reviewing recommendations from state agencies regarding time out rooms that suggested that the school develop a written behavior management plan as part of the IEP that governs the use of time out, that schools use time out only with the written consent of the parents and never use locked time out rooms, the court denied the district's motion for summary judgment.
- b. Doe v. State of Hawaii Dept. of Educ., 334 F.3d 906 (9<sup>th</sup> Cir. 2003). Vice principal is not entitled to defense of qualified immunity where he taped the student's head to a tree for disciplinary purposes and the student's only offense had been "horsing around" and refusing to stand still. Taping his head to a tree for 5 minutes was so intrusive that even a 5<sup>th</sup> grader observed that it was inappropriate. There was no indication that the student was fighting or imposed a danger to others and there is sufficient evidence for a fact finder to conclude that the vice principal's behavior was objectively unreasonable in violation of the Fourth Amendment.
- c. A.C. v. Indep. Sch. Dist. No. 152, 46 IDELR 242 (D. Minn. 2006). Claims for general and punitive damages for the types of injuries alleged by student are not available under the IDEA. Therefore, IDEA cannot serve as a basis for a § 1983 claim for such damages. However, student's Fourth Amendment claims based upon confinement against his will may proceed relative to the alleged inappropriate use of a 70 square-foot, window-less "storage closet" as the student's classroom.
- d. Couture v. Board of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243 (10<sup>th</sup> Cir. 2008). The repeated use of a timeout room as punishment for the student's behavior did not violate the Fourth Amendment, as the timeout room was justified at its inception, the length in timeouts were reasonably related to the school's objective of behavior modification, and placement in the timeout room did not implicate procedural due process requirements. Assuming that the use of time-out is a "seizure" under the Constitution, the use of time-out in this case was not unreasonable. Based upon the student's behavior, which included repeatedly swearing at teacher and classmates, physically attacking them and threatening

bodily harm, “temporarily removing [the child] given the threat he often posed to the emotional, psychological and physical safety of the students and teachers, was eminently reasonable” and did not rise to the level of a constitutional violation. In addition, timeouts were expressly prescribed by his IEP as a mechanism to teach him behavioral control. Thus, the Section 1983 claims against the teacher should be dismissed.

- e. C.N. v. Willmar Pub. Schs., 50 IDELR 274 (D. Minn. 2008), aff’d, 110 LRP 1305 (8<sup>th</sup> Cir. 2010). Where it was alleged that a teacher overzealously applied the seclusion and restraint provisions of a third-grader's BIP, this was not enough to sustain a Section 1983 claim for Fourth Amendment violations. Because the teacher's conduct was reasonable, the court held she was entitled to qualified immunity. The qualified immunity defense turns on the reasonableness of an official's conduct at the time of the alleged offense. If a teacher's treatment of a student with a disability does not substantially depart from accepted professional judgment, practice or standards, her actions are reasonable. In this case, the standard for accepted practice was set by the student's IEP. Because the IEP expressly permitted the teacher to use seclusion and restraint as behavior management techniques, the teacher did not depart from accepted professional judgment when she used those techniques with the student. "Indeed, [the teacher] was required to follow the IEP and use these techniques to help manage [the student's] behavior." [It is important to note that a state investigation did find “maltreatment” of the student when she denied access to the bathroom].

**iii. Eighth Amendment cases**

- a. Hayes v. Unified Sch. Dist., 559 IDELR 249, 669 F. Supp. 1519 (D. Kan. 1987). Parents can not use the Eighth Amendment to challenge the school’s imposition of time-out.

**b. FAPE claims/cases**

While the IDEA does not address the use of restraint/seclusion specifically, there could be claims brought that the use of such violates the IDEA and its requirement to provide FAPE.

**i. OSEP guidance**

- a. Letter to Trader, 48 IDELR 47 (OSEP 2006). New York’s state regulations allowing for the use of aversive behavioral techniques do not conflict with the IDEA. While the IDEA requires a student’s IEP team to consider the use of positive behavioral intervention supports and strategies, neither the IDEA nor its regulations contain a “flat prohibition on the use of aversive behavioral interventions. Whether to allow IEP Teams to consider the use of aversive behavioral interventions is a decision left to each State.”

- b. Letter to Anonymous, 50 IDELR 228 (OSEP 2008). If Alaska law would permit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities, the critical inquiry is whether their use can be implemented consistent with the child’s IEP and the requirement that IEP Teams consider the use of positive behavioral interventions and supports when the child’s behavior impedes the child’s learning or that of others.

ii. **OCR guidance**

- a. Portland (ME) Sch. Dist., 352 IDELR 492 (OCR 1987). Although OCR rarely intervenes in individual cases, this was justified by “extraordinary” conduct, where a teacher who unilaterally decided to strap a profoundly disabled student into a chair without disciplinary action or an IEP meeting. This violated the student’s right to FAPE.
- b. Oakland (CA) Unif. Sch. Dist., 20 IDELR 1338 (OCR 1990). Since evaluations and assessments had determined that the student’s behavior was related to his disability, taping shut the mouth of an 18-year-old student with mental retardation for excessive talking was a violation of Section 504 and the ADA.

iii. **Court cases**

- a. CJN v. Minneapolis Pub. Schs., 38 IDELR 208, 323 F.3d 630 (8<sup>th</sup> Cir. 2003). While the Court expressed regret that CJN was subjected to an increased amount of restraint in his third-grade year, that fact alone did not make his education inappropriate within the meaning of the IDEA. “Because the appropriate use of restraint may help prevent bad behavior from escalating to a level where a suspension is required, we refuse to create a rule prohibiting its use, even if its frequency is increasing.”
- b. Melissa S. v. School Dist. of Pittsburgh, 45 IDELR 271 (3d Cir. 2006), unpublished disposition. Where the student “sat on the floor kicking and screaming, struck other students, spit at and grabbed the breast of a teacher, refused to go to class, and once had to be chased by her aide after running out of the school building,” the school’s use of a time out area in an unused office where her aide and others would give her work did not violate IDEA. This did not constitute a change in placement and was within normal procedures for dealing with children endangering themselves or others.
- c. P.T. v. Jefferson County Bd. of Educ., 46 IDELR 3 (11<sup>th</sup> Cir. 2006), unpublished disposition. An Alabama district appropriately considered the safety of the students on the school bus when it used a safety harness with an 11-year-old nonverbal student with autism. The district did not deny FAPE to the student by using a harness to restrain her on the bus because her behavioral outbursts were a safety concern that posed a serious risk of bodily injury to all of the passengers.

- d. Mallory v. Knox County Sch. Dist., 46 IDELR 276 (E.D. Tenn. 2006). Action for compensatory and punitive damages under 42 U.S.C. § 1983 are dismissed for failure to exhaust administrative remedies. Action brought concerning use of physical restraint clearly includes claims addressing the student's IEP, the treatment of the student as a special education student, and the district's alleged failures in dealing with the educational environment of the student—all of which should be addressed first in a due process hearing. The fact that the parents are seeking damages does not take this case out of the IDEA nor does it excuse the exhaustion of remedies requirement. Further, the contention that the use of the restraint system was abusive does not take this case out of the IDEA's purview.
- e. Payne v. Peninsula Sch. Dist., 47 IDELR 35 (W.D. Wash. 2007). Parent's suit for money damages and injunctive relief over student's being allegedly locked in a 63-inch by 68-inch "safe room" on a regular basis is dismissed. A parent can not avoid the IDEA's exhaustion requirement simply by limiting the prayer for relief to money or services that are not available under the IDEA. The parent must seek a due process hearing and remedies under IDEA before filing in federal court.
- f. Waukee Community Sch. Dist. v. Douglas and Eva L., 51 IDELR 15 (S.D. Iowa 2008). The fact that the parents agreed to the use of time-outs and hand-over hand interventions to manage their daughter's problem behaviors did not excuse a district's over-reliance on those techniques, where the behavior interventions were excessive and inappropriate. While the district made "considerable effort" to address the child's behavioral needs, the interventions applied were not reasonably calculated to manage the student's behavioral problems. The student's noncompliant behaviors were escapist in nature, while her aggression against peers was an effort to seek attention. "Both parties' experts...testified that the use of break time activity in response to non-compliance--an escape-based behavior--and the use of hand-over-hand intervention in response to peer aggression--an attention seeking behavior- would serve to reinforce the problem behavior and was contraindicated by the research." In addition, the interventions were excessive and inappropriate as applied. Although the district indicated that it would apply "age-appropriate" time-outs, lasting one minute for each year of the student's age, the evidence showed that the student sometimes spent several hours in isolation. The parents were also unaware that district staffers regularly used restraint when applying hand-over hand interventions and the district was required to provide prior written notice of its use. By failing to develop and implement appropriate behavioral interventions, the district denied the student FAPE.

## **II. LEAST RESTRICTIVE ENVIRONMENT**

A number of questions were posed relative to the issue of LRE. In looking at the questions, it appears that an overall review of LRE provisions may be helpful. While most of the Circuit Courts of Appeal have established a legal standard for making a determination of what is the LRE for students with disabilities generally, recent key decisions seem to reflect an emerging trend of upholding more restrictive settings for

autistic children, particularly when it is the *school district* proposing the more restrictive setting. Regardless of the restrictiveness of the environment for placement that is being proposed, educators should be aware of how to make defensible recommendations when faced with placement questions and LRE determinations.

**A. The IDEA’s LRE Provision**

The IDEA’s LRE provision is one that has not changed since its original enactment in 1975. Specifically, the IDEA provides that each State must establish procedures to assure that—

to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5).

**B. The IDEA Regulations**

The IDEA regulations generally restate the statutory LRE provision at 34 C.F.R. § 114 but also add somewhat to it. For instance, the regulations require school districts to ensure that a “continuum of alternative placements” is available to meet the needs of children with disabilities for special education and related services. The continuum must include—

the alternative placements listed in the definition of special education under [the regulations] (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. § 300.115.

When determining the educational placement of a child with a disability, the regulations also require school districts to ensure that placement decisions are made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). In addition, a child’s placement is to be determined at least annually; be based upon the child’s IEP; and be as close as possible to the child’s home. 34 C.F.R. § 116(b).

The regulations further provide that unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school that he or she

would attend if nondisabled and that consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs when selecting the LRE. 34 C.F.R. § 300.116(c) and (d). Finally, placement teams must also ensure that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. § 300.116.<sup>1</sup>

### C. Court-created LRE Standards Generally

Several Circuit Courts of Appeal have established certain standards and/or factors that IEP Teams are to follow/use generally in making LRE decisions, and the standards are very similar. As an initial matter and depending upon the jurisdiction of the school district, relevant standards should be followed when determining what the LRE is for a student with a disability.

The generally applicable court-created LRE standards enunciated thus far are as follows:

Second Circuit: *P. v. Newington Bd. of Educ.*, 51 IDELR 2, 546 F.3d 111 (2d Cir. 2008). “We conclude today that the two-pronged approach adopted by the Third, Fifth, Ninth, Tenth, and Eleventh Circuits provides appropriate guidance to the district courts without ‘too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials.’ *Daniel R.R.*, 874 F.2d at 1046. Pursuant to that test, a court should consider, first, ‘whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,’ and, if not, then ‘whether the school has mainstreamed the child to the maximum extent appropriate.’”

Third Circuit: *Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 19 IDELR 908, 995 F.2d 1204 (3d Cir. 1993). Adopts the Fifth Circuit’s test in *Daniel R.R.* and notes that in looking at the first prong of the two-part mainstreaming test, the court should consider several factors, including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class. “If, after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider the

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<sup>1</sup> It is important to note that there is also an LRE “nonacademic settings” provision in the IDEA regulations. Specifically, 34 C.F.R. § 300.117 provides that school districts must ensure that each child with a disability participates with nondisabled children in extracurricular services and activities to the maximum extent appropriate to the needs of that child and that the child has the supplementary aids and services determined by the child’s IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. Issues concerning children with disabilities and their participation in nonacademic and extracurricular activities are extremely common.

second prong of the mainstreaming test whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate.”

Fourth Circuit: *DeVries v. Fairfax County Sch. Bd.*, 441 IDELR 555, 882 F.2d 876 (4<sup>th</sup> Cir. 1989). While not actually enunciating an LRE “standard” per se, the court held that mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting.

Fifth Circuit: *Daniel R.R. v. State Bd. Educ.*, 411 IDELR 433, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989). First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Sixth Circuit: *Roncker v. Walter*, 554 IDELR 381, 700 F.2d 1058 (6<sup>th</sup> Cir.), *cert. denied*, *Cincinnati City Sch. Dist. v. Roncker*, 464 U.S. 864 (1983). In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Removing a child from the mainstream setting is permissible when “the handicapped child would not benefit from mainstreaming,” when “any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting,” and when “the handicapped child is a disruptive force to the non-segregated setting.”

Seventh Circuit: *Beth B. v. Van Clay*, 36 IDELR 121, 282 F.3d 492 (7<sup>th</sup> Cir. 2002). “We find it unnecessary at this point in time to adopt a formal test for district courts uniformly to apply when deciding LRE cases. The Act itself provides enough of a framework for our discussion: if Beth’s education at Lake Bluff Middle School was satisfactory, the school district would be in violation of the Act by removing her. If not, if its recommended placement will mainstream her to the maximum appropriate extent, no violation occurs.”

Eighth Circuit: *A.W. v. Northwest R-1 Sch. Dist.*, 558 IDELR 294, 813 F.2d 158 (8<sup>th</sup> Cir. 1987). Adopts Sixth Circuit’s standard in *Roncker* but emphasizes that the statutory language “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate’... and that it is inapplicable where education in a mainstream environment ‘cannot be achieved satisfactorily’....”

Ninth Circuit: *Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Holland*, 20 IDELR 812, 14 F.3d 1398 (9<sup>th</sup> Cir. 1994). District court’s use of four factor balancing test

is affirmed, where court considered (1) the educational benefits of placing the child in a full-time regular education program, (2) the non-academic benefits of such a placement, (3) the effect the child would have on the teacher and the other students in the class, and (4) the costs associated with this placement.

Tenth Circuit: *L.B. v. Nebo Sch. Dist.*, 41 IDELR 206, 379 F.3d 966 (10<sup>th</sup> Cir. 2004). Because the Sixth Circuit's *Roncker* test is most apposite in cases where the more restrictive placement is considered a superior educational choice, it is unsuitable in cases where the least restrictive placement is also the superior educational choice. For that reason, the *Roncker* test is not appropriate in all cases. The Fifth Circuit's *Daniel R.R.* test, on the other hand, better tracks the language of the IDEA's least restrictive environment requirement and is applicable in all cases.

Eleventh Circuit: *Greer v. Rome City Sch. Dist.*, 18 IDELR 412, 950 F.2d 688 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025 (11th Cir. 1992), *reinstated*, 967 F.2d 470 (11th Cir. 1992). Adopts the Fifth Circuit's standard in *Daniel R.R.*

#### **D. Recent Case Trends in LRE Cases Involving Students with Autism**

While there are recent LRE cases involving students with a variety of disabilities, there is a notable number involving students with autism and an interesting trend seems to be appearing in these cases.

Overall, a couple of interesting trends are noted in cases where the issue is LRE for an autistic student:

1. Courts and hearing officers clearly utilize the LRE standards enunciated by the courts when determining the LRE for autistic students, just as they do in cases involving students with other disabilities;
2. Schools generally prevail when seeking to change an autistic student's placement from a less restrictive to a more restrictive setting within the public school environment;
3. Parents seldom prevail in LRE cases generally but, when they do, they are seeking a more restrictive placement in the form of private schooling.

#### **E. Cases where School District is Proposing a Move to a More Restrictive Environment**

As noted above, a current trend in the case law involving the LRE for autistic students appears to be that schools have prevailed when seeking to change an autistic student's placement from a less restrictive public school placement to a more restrictive public school setting. In many of the cases, the focus is upon the student's complex needs, including that for intensive, one-to-one direct instruction.

*B.S. v. Placentia-Yorba Linda Unified Sch. Dist.*, 51 IDELR 237 (9<sup>th</sup> Cir. 2009) (unpublished). School district's recommended placement of 4<sup>th</sup> grader with autism in the more restrictive SDC placement for language arts instruction, rather than in general education language arts class, is appropriate as necessary to meet student's unique abilities and needs. School district had no obligation to offer mainstream placement, since educational and non-academic benefits to be derived from mainstream program were minimal.

*E.G. and M.G. v. City School District of New Rochelle*, 52 IDELR 228, 606 F. Supp.2d 384 (S.D.N.Y. 2009): Parents' claim for reimbursement is denied on grounds that they failed to show kindergarten student with autism was denied FAPE in least restrictive environment. School district's proposed program, which includes only five half days of regular classroom time is appropriate in light of student's educational needs requiring highly structured environment to develop social and language skills. Parents' desire for additional time in regular classroom with 1:1 aide is not appropriate.

*Laura P. v. Haverford Sch. Dist.*, 51 IDELR 183 (E.D. Pa. 2008). The parents' demand for a full-time general education placement rather than a part-time learning support placement offered by the district is rejected. Where the student tests at the beginning kindergarten level in math and reading, she requires intensive instruction in those subjects and can not receive that level of instruction in the general education classroom, even with the use of supplemental aids and services. "[This student] has significant language, attention and sensory needs, requiring intensive, systematic and direct instruction with multiple opportunities for guided practice and repetition in a [small], structured learning environment." Where the district proposes that the student will attend general education classes for homeroom, lunch, recess, special subjects, science and social studies, the district has mainstreamed the student to the maximum extent appropriate.

*J.S. v. North Colonie Cent. Sch. Dist.*, 51 IDELR 150 (N.D. N.Y. 2008). While it is true that the high schooler with autism made progress in a Regents-level Global History course, the district's decision to transfer the student to a self-contained special education class is upheld. Clearly, information obtained at the time of the IEP's development, including the results of an independent evaluation, indicates that a mainstream placement is not appropriate where the student had significant deficiencies in language, reading, writing and social skills. The student continued to struggle in the general education courses, despite the "myriad of services and accommodations" provided by the district. "It is undisputed that [the school district] has provided a long list of services, aids and accommodations in an effort to help [the student] succeed in the mainstream environment before seeking to remove him to a self-contained special education classroom." The fact that the student received passing grades in the general education history class while the parents' appeal was pending did not negate his earlier struggles, and the district's psychologist testified that the student needed to spend more time on developing functional skills.

*S.K. v. Parsippany-Troy Hills Bd. of Educ.*, 51 IDELR 106 (D. N.J. 2008). District's decision to place a student in a self-contained class for students with autism is appropriate, where the ABA-based class offered intensive instruction and mainstreaming opportunities and was the student's LRE. Although the student received numerous supports and accommodations in the general education classroom, including a one-to-one aide, the student was unable to acquire basic skills in math, language and reading comprehension. In addition, the parent's expert testified that the student would fall further behind if he continued to receive instruction in a large group. The parent's attempt to characterize this testimony as an opinion only that the student would get "superior" academic benefits in the self-contained classroom is misplaced. The opinion was that the student needed the self-contained placement to develop fundamental skills that he has failed to develop in the several years he has spent in a regular classroom.

*M.W. v. Clarke County Sch. Dist.*, 51 IDELR 63 (M.D. Ga. 2008). Self-contained program for 3-year-old boy with autism is the LRE because the private general education preschool program desired by the parents did not offer one-to-one instruction. "School professionals believed that [the child's] ABA training 'would be almost impossible in a regular setting' and that [the child] would require 'a truckload of pull-out' from a regular education classroom to obtain all of the services he needed..." Because the self-contained program offered a low student-to-teacher ratio and was staffed by personnel certified in ABA methodology and the child would have regular opportunities to interact with typically developing peer, the self-contained placement is the child's LRE.

*Yates v. Washoe County Sch. Dist.*, 51 IDELR 7 (D. Nev. 2008), *reconsideration denied*, 52 IDELR 219 (D. Nev. 2009). The school district's proposal for a high schooler with autism to receive math instruction in a resource room, rather than a general education classroom, is appropriate. As the autism specialist testified, the student needs a setting where he can receive direct instruction from a classroom teacher. Because the student requires one-to-one verbal instruction to receive an educational benefit, the proposed resource room placement for math instruction is appropriate.

*L.E. and E.S. v. Ramsey Bd. of Educ.*, 44 IDELR 269 (3d Cir. 2006). School district's program providing for a half-day in a self-contained classroom is appropriate placement in the LRE for 7-year old with autism. School district reasonably believed that student required segregated placement to receive educational benefit, and student can not receive satisfactory educational opportunity in the less restrictive setting advocated by the parent.

*G.W. v. New Haven Unified Sch. Dist.*, 46 IDELR 103 (N.D. Cal. 2006). School district's proposal to place 8-year-old student with form of autism in special day class at private facility is appropriate, rather than in public elementary school program advocated by parent. School district's proposed placement was LRE in which student could be placed, as prior efforts to place him in public school program had been unsuccessful because of his behavior problems. In special day class at private facility, student's behavior and educational development were "slowly but surely improving."

*Pachl v. School Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11*, 46 IDELR 1, 453 F.3d 1064 (8<sup>th</sup> Cir. 2006). School district provided FAPE in the LRE to a sixth-grade student with developmental and physical disabilities, including autism, when it developed an IEP that provided that she spend two hours per day in a segregated classroom. Placing student in small structured classroom for 30 percent of the school day and in selected general education programs for 70 percent of the day provided appropriate balance from which she would receive meaningful educational benefit along with social interaction with her typically-developing peers. In addition, student will receive greater benefit from small structure of segregated class rather than large, lecture-driven general education classroom for which the parents advocate.

*Schoenbach v. District of Columbia*, 46 IDELR 67 (D. D.C. 2006). School district's proposed placement of high school student with Asperger's Syndrome in public school's newly developed special education program for students with Asperger's Syndrome, which had no more than 6 students per class, along with special education teacher and 2 teacher assistants is appropriate. The proposed program is reasonably calculated to provide educational benefit to student, even though high school itself is large with 400 students. Parents' claim for reimbursement for placement at a small private school is rejected because it does not offer special education services, even though it is a smaller school setting and his parents believe that he can be educated in a mainstream setting. The parents are not "entitled to reimbursement for private school just because the private placement is less restrictive than the public school placement; placement must also provide educational benefit..." Parents' requested placement did not offer student services he required in accordance with IEP and therefore, was not appropriate.

**F. Cases where School District is Proposing Less Restrictive Program than Placement Parents Desire**

Particularly in cases where the school district can show that its program offers FAPE (and that no fatal procedural violations occurred), parents are seldom prevailing in current cases where they are seeking a more restrictive placement for their autistic child. Where parents have prevail recently, it is typically in cases where the parent is seeking placement in a private school setting and have been able to show that the school district's placement denied FAPE.

*M.S. v. Fairfax County Sch. Bd.*, 51 IDELR 148, 553 F.3d 315 (4<sup>th</sup> Cir. 2009). District court's denial of reimbursement and conclusion that parents' placement of teenager with mild to moderate autism at private Lindamood-Bell facility was highly restrictive is affirmed. Issue of least restrictive environment was proper for consideration in determining appropriateness of parental placement for purposes of reimbursement award. "Although we have never held that parental placements must meet the least restrictive environment requirement, the district court's consideration of Lindamood-Bell's restrictive nature was proper because it considered the restrictive nature only as a factor in determining whether the placement was appropriate under the IDEA, not as a dispositive requirement."

*E.H. and K.H. v. Board of Educ. of Shenendehowa Central Sch. Dist.*, 53 IDELR 141 (2d Cir. 2009) (unpublished). School district's proposed placement of grade-school student with autism in 12:1 student-to-teacher ratio class is appropriate. Based upon testimony of independent psychologist and on data regarding other students in the classroom, the six-person classroom requested by the parents (based on a state regulation that capped class size at six for students with "highly intensive" needs "requiring a high degree of individualized attention and intervention") would not have been the LRE required by the IDEA.

*Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 53 IDELR 153 (S.D. Ohio 2009). School district satisfied its obligation to provide FAPE in the least restrictive environment to 6-year-old autistic student, where IEP proposed that student would receive special education in public school program by teacher and aides outside of regular education classroom for more than 60% of school day. While some students with autism may require extensive ABA services, neither IDEA nor judicial decisions require a set amount of ABA (such as 30 to 40 hours per week of ABA).

*Richard Paul E. v. Plainfield Community Consol. Sch. Dist. 202*, 52 IDELR 130 (N.D. Ill. 2009). Student's academic and social progress demonstrate that public school placement, not therapeutic private placement sought by guardian, is the LRE for 12-year-old student with multiple disabilities, including Asperger's Syndrome. Two incidents at school with other students, while "unfortunate," do not establish that school district failed to provide FAPE in LRE. "Incidents at school, whether they are physical encounters or emotional embarrassments, are an inevitable byproduct of peer interaction."

*G.B. and D.B. v. Bridgewater-Raritan Regional Bd. of Educ.*, 52 IDELR 39 (D. N.J. 2009). Parents' claim for reimbursement for private school placement is rejected where school district's proposed program for preschool autistic student is appropriate. School district's proposed program calls for student to start with 1:1 student-to-teacher ratio in school district's preschool program and, after initial period, for IEP team to discuss his program further to determine whether 1:1 ratio remains necessary.

*M.P. v. South Brunswick Bd. of Educ.*, 51 IDELR 219 (D. N.J. 2008) (unpublished). District offered 6<sup>th</sup> grade student with autism and other disabilities FAPE in the least restrictive environment and, accordingly, court need not reach issue of whether parents' unilateral private placement was proper. Nevertheless, "given the IDEA's requirement that children falling under its provisions be educated in the least restrictive environment and the IDEA's preference for mainstreaming, the [c]ourt would be hard pressed to determine that placement of [the student], a high functioning autistic/multiply disabled child, who successfully completed fifth-grade in the top one-third to one-fourth of his mainstream class, and who successfully passed both major content areas of [a state standardized test], at [a] private [school] ... attended solely by students with disabilities, was proper."

*R.V. v. Simi Valley Sch. Dist.*, 109 LRP 44928 (C.D. Cal. 2008). School district's decision is upheld that adolescent autistic student does not require self-contained,

specialized program for students with autism, such as non-public school type program where social and emotional skills are incorporated into school curriculum, in order to receive FAPE. Proposed placement in general education setting provided student with the opportunity to be in classes with typically developing peers, whereas in non-public school's self-contained program sought by parents, almost all of the student's classmates would have an autism diagnosis and, because non-public program lacked female students, student would have little opportunity to establish friendships with other females.

*D.B. v. Houston Indep. Sch. Dist.*, 48 IDELR 246 (S.D. Tex. 2007). School district's proposed placement of 6<sup>th</sup> grader diagnosed by private evaluators as autistic in behavioral support class for children with emotional disturbances provides FAPE in the LRE. Special education and related services provided by the school district specifically targeted behavioral difficulties, and behavioral support classroom allowed student to attend public school while accommodating his need for behavioral interventions and increased supervision. The fact that the student's evaluators did not reach consensus on his diagnosis, such that private evaluators indicated student had autism, while school district's psychologists concluded student had emotional disturbance, was not determinative of whether IEP provided FAPE in LRE. "The IDEA does not require that children be classified by their disability so long as each eligible child is regarded as a child with a disability under the Act." Failure to identify (or agree with) the identification of the particular disorder is not a per se denial of FAPE as long as individualized services are provided.

*T.F. v. Special Sch. Dist. of St. Louis County*, 45 IDELR 237, 449 F.3d 816 (8<sup>th</sup> Cir. 2006). School district's proposed placement of 9<sup>th</sup> grade student with disabling psychological conditions and learning disabilities, including "educational autism," is upheld in program at neighborhood high school that offered "unique services tailored to [student's] needs," including small classes, 1:1 instruction and therapeutic elements. Parents claim that student required residential program is rejected, as they provided no evidence to support their argument that student required residential placement and, moreover, the school district's program focused on the student's individual needs and provided an opportunity to be included with typically-developing peers. "That may not have satisfied [student's parents], but it satisfied the requirements of IDEA." Although "[t]here was no guarantee that the programs proposed by [school district] would have accommodated [student] ... the school district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement."

*Marc V. v. North East Indep. Sch. Dist.*, 48 IDELR 41, 445 F. Supp.2d 577 (W.D. Tex. 2006). District's IEP for preschool student with autism was reasonably calculated to provide student with FAPE in the LRE and parents were not denied FAPE by school district's refusal to honor request for homebound instruction. Student's dual placement in special education preschool class and general education pre-kindergarten program balanced the need for structure with the need to work on social skills. Moreover, the court noted that "[m]any of [the child's] IEP goals would be practically impossible to implement in a homebound setting."

*W.S. v. Rye City Sch. Dist.*, 46 IDELR 285, 454 F. Supp.2d 134 (S.D.N.Y. 2006). Parents' claim for reimbursement is denied because school district proposed appropriate placement for first grade student with autism. Student was making academic progress in public school, spending half-day in special education program and half-day mainstreamed with an aide. Moreover, the evidence showed that student had made friends in kindergarten, was starting to imitate behavior of non-disabled peers and could read--something many "regular" kindergartners could not do. Student "is exactly the sort of student for whom IDEA mandates education in the public setting--and for whom extensive or premature consideration of schooling in an exclusively disabled student environment ... would be inappropriate as a matter of law."

*Corpus Christi Indep. Sch. Dist. v. Christopher N.*, 45 IDELR 221 (S.D. Tx. 2006). District's proposal to address multiply-disabled high schooler's increasing academic difficulties by revising his IEP to provide for a more restrictive class setting, a one-to-one aide and counseling was appropriate. The district's proposals were "untested" and were the LRE for the student. Therefore, residential placement is not appropriate.

#### **G. What about One-to-One Aides and LRE?**

Some situations where a school district assigns a one-to-one aide to a student with autism could actually create the most restrictive environment for the student. IEP teams must be very careful to craft a plan for "weaning" or "fading" the aide from the student to ensure that skills of independence are developed, where appropriate.

*A.C. v. Board of Educ. of the Chappaqua Cent. Sch. Dist.*, 51 IDELR 147, 553 F.3d 165 (2d Cir. 2009). District court's decision that school district's program was inappropriate because the provision of a one-to-one aide promoted "learned helplessness" is overturned. Clearly, the State Review Officer's findings should have been affirmed, as the evidence identified ways in which the school district developed M.C.'s independence, for example, by decreasing the level of prompting where it was no longer needed. In addition, the IEP stressed independence in following daily routines and the application of reading and math skills. The student with autism also made progress toward independence in co-taught classes and a progress report indicated that he had mastered the goal of independently following classroom routines. Among other things, the student no longer needed prompting and an escort to use the bathroom.

#### **H. Tips for Making Defensible LRE Determinations**

1. Remember that the LRE mandate does not trump FAPE. The pertinent overall question for every student is "what is the least restrictive environment where this student can receive *meaningful* (rather than minimal or de minimis) educational benefit?"
  - a. Education with nondisabled peers is required to the "maximum extent *appropriate*," not to the "maximum extent *possible*."

2. Specifically identify the individual needs/target skills of the student and prioritize them, taking into consideration the nature/severity of the student's disability and the student's age<sup>2</sup>:
  - a. Academic needs/skills
  - b. Nonacademic needs/skills (behavioral, socialization or interpersonal, communication, motor, modeling language/behavior, skills of independence or personal responsibility, generalization)
3. Determine what level of services/supports is necessary to meet the defined needs and to support progress on goals/objectives.
  - a. Intensive/one-to-one instruction
  - b. Supplementary aids and services
    - i. resource room
    - ii. itinerant instruction
    - iii. modification of curriculum
    - iv. teacher training
    - v. behavior management
    - vi. classroom aide
    - vii. personal aide
    - viii. assistive technology devices/services

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<sup>2</sup> Although no court has included age of the student as a factor, the nonacademic benefits of placement in less restrictive environments tend to be greater for younger students. Indeed, The National Autism Center's "National Standards Report" issued in September 2009 reminds us that "treatment providers" should continue to follow the recommendations for intensity of services provided by the National Research Council regarding children less than 8 years of age. Specifically:

The committee recommends that educational services begin as soon as a child is suspected of having an autistic spectrum disorder. Those services should include a minimum of 25 hours a week, 12 months a year, in which the child is engaged in systematically planned, and developmentally appropriate educational activity toward identified objectives. What constitutes those hours, however, will vary according to a child's chronological age, developmental level, specific strengths and weaknesses, and family needs. Each child must receive sufficient individualized attention on a daily basis so that adequate implementation of objectives can be carried out effectively. The priorities of focus include functional spontaneous communication, social instruction delivered throughout the day in various settings, cognitive development and play skills, and proactive approaches to behavior problems. To the extent that it leads to the acquisition of children's educational goals, young children with autistic spectrum disorder should receive specialized instruction in a setting in which ongoing interactions occur with typically developing children.

"National Standards Report," p. 81.

4. Determine whether the student's needs can be met *satisfactorily* in the regular education classroom with/without supplementary aids and services.
  - a. Level of disruption in the regular education environment
    - i. Acting out behavior(s)
    - ii. Deprivation of benefit to other students in class
  - b. Cost
  - c. Harmful effects upon autistic student
  - d. Meaningful educational benefit
5. Identify what efforts the school has made to educate in the regular education classroom/try less restrictive options.
  - a. Identify efforts made/supplemental services provided
  - b. Review data regarding progress/meaningful benefit
6. If needs can not be/have not been *satisfactorily* met in the regular education classroom, slowly move along the continuum of alternative placements beginning with less restrictive options and moving to the most restrictive to determine where meaningful benefit can be received:
  - a. regular classroom instruction for the entire school day, with modifications to the regular instructional program;
  - b. regular classroom instruction for the entire school day, with individualization of instruction by the classroom teacher for part of the school day;
  - c. regular classroom instruction for the entire school day, with individualized instruction services by a special education teacher or related service staff member for part of the school day;
  - d. regular classroom instruction for most of the school day, with individualized instruction or services provided in another setting for part of the school day;
  - e. regular classroom instruction for most of the school day, with special education instruction in basic skills areas and/or related services provided in a resource room for part of the school day;

- f. resource room instruction for part of the school day, with instruction in the regular classroom for part of the school day;
  - g. self-contained classroom instruction, with instruction in the regular classroom for part of the school day;
  - h. full-time instruction in self-contained classroom with opportunities for participation with non-eligible students in non-academic and extracurricular activities;
  - i. full-time instruction in a self-contained (separate) school;
  - j. instruction provided in a hospital or residential facility settings on an individual or group basis;
  - k. homebound instruction.
7. If the parent disputes the school's LRE recommendation, using a contrast/compare approach, define the academic and nonacademic benefits of the proposed placement versus the parents' desired placement.
8. If removal from the regular classroom is determined to be appropriate, determine what alternative mainstreaming opportunities to the maximum extent appropriate can be made available.
- i. P.E., Art, Music, Electives
  - ii. Lunch
  - iii. Nonacademic and extracurricular activities
  - iv. Reverse mainstreaming

**I. Miscellaneous LRE Questions Posed**

- 1. Do inclusive classrooms need to have a general *and* special education teacher present at all times?
- 2. Does the continuum of alternative placements mandate apply to public charter schools?
- 3. With respect to homebound placements, what is the district's legal obligation when addressing eligibility, determining ESE services, students with communicable diseases, etc.?

**III. TRANSITION SERVICES QUESTIONS**

The following questions were posed with respect to the issue of transitioning students with disabilities:

1. How much is enough?
2. When a student is placed on home instruction as expulsion, how does transition planning apply on the IEP for change of placement? Is a transition IEP required?

The answer to this question necessary requires a determination of what constitutes FAPE for an “expelled” ESE student. The IDEA regulations provide that after a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement, school personnel, in consultation with at least one of the child’s teachers, determine the extent to which services are needed so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP. 34 C.F.R. § 300.530(d)(3).

So, what level of services constitutes FAPE for the student who is “expelled” or removed when there is no manifestation? There has not been much case law on this issue, but the U.S. DOE clarified in the commentary to the 2006 regulations that services so as to enable the child “to continue to participate in the general educational curriculum” does not mean “that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom, as these classes generally are taught using a hands-on component or specialized equipment or facilities.” 71 Fed. Reg. 46716.

In subsequent commentary, DOE clarified further that:

while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child’s IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child’s IEP.

71 Fed. Reg. 46716.

3. What is the district’s obligation to place a student on a job when the student is severely disabled (severe CP, low cognitively, wheelchair bound, requires assistance in toileting and eating, limited understandable speech)?

4. Student has been taken on site visits and given jobs at the school with the assistance of a paraprofessional, but no employer has been located that will accept the student. Is this the district's fault?
5. Have there been any due process hearing in Florida or elsewhere regarding the inability of a student to obtain a job due to lack of training in high school or lack of transition services?
6. What are the legal obligations to high school-aged students as they prepare for life after school?

#### **IV. OTHER QUESTIONS/CONCERNS**

##### **A. RTI and Eligibility Questions**

1. In the context of RtI, what are districts to do when a parent states, "test now!"
2. Is there an increase in hearings/cases due to RtI "slowing down" eligibility decisions?
3. How do you determine eligibility for home school/private school students with the requirement for RtI?
4. Any cases involving SLD eligibility?

E.M. v. Pajaro Valley Unif. Sch. Dist., 53 IDELR 41 (N.D. Cal. 2009). Where the student performed very well in class with the use of general education interventions, the district's determination that he is not SLD is upheld and the administrative decision in the district's favor is upheld. The student's performance showed that he did not require specialized instruction to receive an educational benefit. Though the student was distractible and failed to complete homework assignments, his performance improved when his teacher used interventions, such as small group settings. "When viewed as a whole, the observational and anecdotal evidence describes a student who was distracted easily but who also responded to various forms of classroom intervention."

M.P. v. Santa Monica-Malibu Unif. Sch. Dist., 50 IDELR 220, 2008 WL 2783194 (C.D. Cal. 2008). Where everyone agreed that the student could perform well academically when motivated, the "Court agrees that the evidence shows that M.P. is capable of completing independent school work when motivated, but the evidence also shows that because of his ADHD he is not capable, without help, of being motivated. This is the very definition of a discrepancy between ability and achievement." Therefore, the student has demonstrated the requisite severe discrepancy in ability and achievement to become eligible for services as an SLD student.

5. School psychologist's opinion is that student is not eligible, but the teacher's RtI data shows a need for services. What to do?
6. Are we expecting RtI to be used in other eligibility areas? If so, when?
7. When is it proper for the RtI problem solving team to exempt a child from interventions and go ahead with an ESE referral?
8. Since eligibility for SLD will not be discrepancy-based after July 2010, have you seen or do you expect to see more litigation as a result?
9. What is a school district's child-find obligation in the RtI arena with students who have been parentally placed in private school?
10. Guidance needed regarding RtI implementation and labor concerns – collective bargaining, teacher re-training, staff evaluation for fidelity, school scheduling changes, etc.
11. Can we disregard RtI when it is apparent that 504 is appropriate? (Student has documented illness). Can we just do a 504 meeting and determine eligibility in this case?
12. When is it legal for a school psychologist to see a child without the parent's permission?

**B. Autism Questions**

1. Parents want the moon and the stars! How much is adequate?
2. How is autism diagnosed?
3. Is it acceptable for teachers and paraprofessionals to file charges against a student with ASD when hitting and biting are a manifestation of disability? How should administrators respond to the teacher and union representatives?
4. At what point could it be consider negligence if a parent refuses to sign consent for evaluation when the school knows a child needs services?

Scenario: A non-identified/non-placed kindergarten student enters school for the first time this school year. The student is clearly ASD. School team begins RtI process and the school psychologist recommends and evaluation. The parents do not agree to the evaluation, saying that the child is just frustrated and not used to the new routine. (Parent is an attorney). Parent does not follow through with any of the team's recommendations and the child is so disruptive that he is a hindrance to the other children's learning in the regular kindergarten program. What are the district's options?

5. In our district, we determine services and strategies through the IEP process. We have not adopted a commercial program for ASD. Would it be beneficial for us to have a “Quality Assurance” classroom checklist to use to ensure delivery and fidelity of services?

**C. 504 Questions**

1. Do we provide related services, including equipment, to 504 students? Where does FDOE stand on this?
2. Assistance with responding to OCR – adding new procedures?

**D. FERPA/Records Questions**

1. What do you do when a parent requests copies of emails as education records? Do you provide only those that have been placed in the student’s permanent file?
2. What should we be doing to prevent unauthorized access to or disclosure of education records?
3. What if a parent requests records to review services that other ESE students are receiving?

**E. Outside Private Evaluators**

1. Can a private psychologist observe a student in a general education setting? Are there any good guidelines out there for this?

School Bd. of Manatee County v. L.H., 53 IDELR 149 (M.D. Fla. 2009). District was required to allow a private psychologist to conduct an in-school observation of a student with Asperger’s syndrome. The district violated the IDEA when it imposed restrictions on the independent evaluation where it allowed its own evaluators to observe in the classroom.

**F. Revocation of Consent Questions**

1. Legal issues? Any guidance?

## **2009 CASES AND OTHER HAPPENINGS**

2009 is over and what a Supercalifragilisticexpialidocious year it was for special education law! As usual, the litigation in special education did not slow down and continues to be hotter than ever! Below is a listing of relevant case decisions from 2009.

### **MONEY DAMAGES AND LIABILITY**

- A. H.H. v. Moffett, 52 IDELR 242 (4<sup>th</sup> Cir. 2009) (unpublished). Parent has sufficiently pled a violation of her daughter's constitutional rights where the kindergartner's confinement to a wheelchair appeared to be rooted in malice rather than educational need. Thus, a special education teacher and her assistant are not entitled to qualified immunity. Although the student's program required her to spend part of the day out of her wheelchair, a secret audio recording suggests that the child spent the entire day strapped in the chair without educational services. In addition, the parent claims that the employees mocked the child's appearance and discussed ways to sabotage an upcoming IEP meeting. The situation described by the parents is unconscionable. Because a reasonable teacher would know that malicious restraint was unlawful, these employees can not maintain that they were unaware of the alleged constitutional violation. As such, the employees are not immune from the parent's Section 1983 claim.
- B. Chambers v. School Dist. of Philadelphia Bd. of Educ., 109 LRP 14015 (3d Cir. 2009). Where parents sought damages for the district's failure to provide FAPE that obstructed the intellectual growth of their daughter, parents lacked standing to assert an IDEA claim, as compensatory damages are not available under the IDEA. "We agree with our sister circuits, and now hold, that compensatory and punitive damages are not an available remedy under the IDEA." However, there is a genuine issue of fact as to the parents' ADA and Section 504 claims.
- C. Vicky M. v. Northeastern Educ. Intermed. Unit, 53 IDELR 75 (M.D. Pa. 2009). Based upon statements by two teacher's aides regarding the district's "code of silence," Section 1983 claim brought by the parents of a child with autism will not be dismissed. Because the parents alleged constitutional violations by the teacher and the district, their respective motions for judgment are rejected. According to the parents, the teacher used bungee cords and Rifton chairs to restrain students in her class, grabbed and struck students, deprived a non-verbal student of a communication device and withheld food as punishment. This conduct, if proven, would amount to a violation of the students' constitutional right to bodily integrity. "The evidence of continuous abuse over a two-year period could reasonably satisfy the standard of 'shocking the conscience.'" Clearly, a reasonable teacher would know she was violating the students' rights, so the teacher's claim of qualified immunity is denied. As to the claims against the district, the aides claimed to have reported the teacher's abusive conduct to the district's executive director and that they overheard the director telling the teacher not to worry about the allegations. In addition, the district did not interview

- important witnesses during its investigation of the teacher. Thus, the aides' statements suggest that the district did not take the reports of abuse seriously, and "[a] jury could reasonably find that the culture of encouraging silence and the failure to react to the warnings of the parents, particularly in light of the vulnerability of these students, 'shocks to the conscience.'"
- D. Doe v. Westerville City Sch. Dist., 51 IDELR 245 (S.D. Ohio 2009). Plaintiffs are limited to the remedies that are available under the IDEA for violations of the law. Those remedies include funds to reimburse parents for expenses on special education that a school board should have, but did not provide. However, general compensatory damages, including damages for emotional injuries are not available. Thus, there is no right to a jury trial in a case alleging IDEA violations. In addition, there is no private right of action under the NCLB Act.
- E. King v. Pioneer Regional Educational Service Agency, 109 LRP 70817 (Ga. Ct. App. 2009). Neither the Georgia board of education nor the program operator of a psychoeducational center can be held liable by the parents of a student who hanged himself in the school's time-out room. The student was placed in the time-out room after he displayed violent behavior toward a schoolmate, where he hanged himself with a rope that he had been using as a belt. The Court rejected the parents' claims against the program's operator under Section 1983 that he had an affirmative duty, under the Due Process Clause of the 14th Amendment, to prevent the student from harming himself. Compulsory school attendance laws do not create a constitutional duty for a school operator to protect a student from harming himself. The parents' argument that confining the student to the time-out room constituted a restraint on his liberty that was more analogous to that of an incarcerated inmate or an involuntarily committed mental patient is also rejected. To establish liability for a prisoner's suicide under Section 1983, a plaintiff must show that the jail official displayed deliberate indifference to the prisoner's taking of his own life. Even assuming that the student was in a prison-like environment at the center, the parents failed to show that the employees responsible for placing him in the time-out room acted with deliberate indifference. Because neither employee was made aware of alleged suicide threats the student made when he was confined to the time-out room a few weeks earlier, neither of them deliberately disregarded the possibility that the student would harm himself.
- F. Annika T. v. Unionville-Chadds Ford Sch. Dist., 52 IDELR 68 (E.D. Pa. 2009). Monetary damages are not available under the IDEA for an alleged failure to provide FAPE. However, such damages *are* available under the Rehabilitation Act.
- G. Horen v. Board of Educ. of the Toledo City Sch. Dist., 51 IDELR 273, 594 F.Supp.2d 833 (N.D. Ohio 2009). Attorney/parent's claims against school district's law firm and individual lawyer under Section 1983 are without merit. Defendants are not state actors and they do not become state actors by representing state or local governments; nor can an attorney "conspire" within the

- attorney-client relationship. In addition, the parent did not show that they had any due process right to exclude the school district's counsel from IEP meetings or to record the proceedings. Rather, the school district filed a due process hearing on the issues and that proceeding afforded both parties adequate due process rights on both issues.
- H. Blanchard v. Morton Sch. Dist., 52 IDELR 3 (W.D. Wash. 2009). "This is a sad case of parental advocacy to assert rights on behalf of their son Daniel who suffers from autism and other severe limitations." The decision that FAPE was made available is affirmed. In addition, claims under the ADA and 504 require a showing of deliberate indifference and the plaintiff must establish that 1) the defendants had knowledge from which an inference could be drawn that harm to a federally protected right is substantially likely, and 2) the defendant actually draws that inference and fails to act upon the likelihood. There is no evidence here that remotely reaches the level of deliberate indifference. In fact, there is no evidence that would even reach the level of negligence.
- I. B.L. v. Boyertown Area Sch. Dist., 52 IDELR 42 (E.D. Pa. 2009). School district's and principal's motion to dismiss action for damages under Section 1983, 504 and the ADA is granted. Where the student's BIP provided that the Principal had broad discretion when the student hurt or threatened others or used profanity, the principal's action of calling the Pennsylvania State Police was within the provisions of the BIP when the student called his one-to-one aide a "f\*ing bitch." Telephoning the police to deal with the child does not constitute a clear violation of the child's constitutional rights and it was reasonable for the principal to assume that this action was in compliance with the law.
- J. T.W. v. School Bd. of Seminole Co., 52 IDELR 155 (M.D. Fla. 2009) [one of 14 cases filed regarding alleged abuse of autistic students in this teacher's class]. Though not optimal, the use of a bathroom as a "cool down" location for timeouts is not unconstitutional. While verbal abuse is normally not a constitutional violation, physical abuse may rise to that level when it is tantamount to arbitrary, egregious and conscience-shocking behavior. While the conscience-shocking threshold is more quickly reached in cases where the victim is particularly vulnerable to abuse and is otherwise defenseless, the facts presented in this case do not meet the threshold with respect to this particular student. Focusing on the fact that the use of restraint inflicted physical abuse that "is minimal at best" and given the minimal physical injuries inflicted upon T.W., the court cannot find an injury that literally shocks the Court's conscience and amounts to a deprivation of constitutional rights. "The Fourteenth Amendment is not a "font of tort law" that can be used, through section 1983, to convert state tort claims into federal causes of action."
- K. D.N. v. School Bd. of Seminole Co., 52 IDELR 282 (M.D. Fla. 2009). Teacher is immune from Section 1983 claims where teacher's treatment of student was in response to incidents wherein the student clawed at her or tried to disrobe and

where the student had a history of aggressive behavior dating back to preschool that included pinching, grabbing, scratching, hitting, kicking and headbutting. While the teacher's use of force (grabbing the student's thumb, placing her arms behind her back and tying her shirt to her chair) was not the best response to the student's misconduct, the teacher's actions did not violate the student's constitutional rights.

- L. M.S. v. Seminole County Sch. Bd., 52 IDELR 286 (M.D. Fla. 2009). Section 1983 claim against special education teacher is not dismissed where teacher allegedly hit the student for disability-related behaviors, which could be viewed as a violation of the student's constitutional rights. Classroom aides testified that the teacher struck the student violently and swore at him for behaviors that included pinching her and wetting his pants.
- M. Lopez v. Metropolitan Gov't of Nashville and Davidson Co., 52 IDELR 291 (M.D. Tenn. 2009). Where district failed to provide a monitor on a special education bus, this could be an affirmative "state-created danger," where younger student was sexually assaulted by a teenager who had a lengthy history of sexually inappropriate behavior about which the district had knowledge. The district was well-aware of the teen's sexual misconduct, as it previously had developed a BIP and safety plan that called for him to be segregated from all other students but placed the student on the teen's special education bus despite warnings that the teen should not be around young children. Although both students' mothers requested a bus monitor, the district disregarded their requests and allowed the students to ride together unsupervised.

### **DISABILITY HARASSMENT/RETALIATION**

- A. Wilbourne v. Forsyth County Sch. Dist., 38 NDLR 89, 36 F. App'x 473 (11<sup>th</sup> Cir. 2009). Dismissal of case is affirmed where teacher argued that district retaliated against her by issuing a "letter of directive" to be placed in her personnel file and filing a complaint against her with the Professional Standards Commission for "unprofessional conduct" after she filed a complaint with PSC regarding an incident involving a teacher abusing her disabled son and confronted an administrator at her son's school about the school's projected discipline of her son. To establish a case of ADA retaliation, a plaintiff must show: (1) that she engaged in statutorily protected activity; (2) that she suffered an adverse employment action; and (3) a causal link between the protected activity and the adverse action. Once a plaintiff has established a case of retaliation, the employer has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action. If this is accomplished, the plaintiff then bears the burden of showing that the reason provided by the employer is a pretext for prohibited, retaliatory conduct. Here, the teacher presented insufficient evidence to establish that the district's reasons for taking adverse action against her were pretext for discrimination.

- B. Patterson v. Hudson Area Schs., 109 LRP 351, 551 F.3d 438 (6<sup>th</sup> Cir. 2009). This case will not be dismissed where a jury must decide whether the school district was deliberately indifferent to the harassment of the ED student. At some point, the response of the district, which knew that its verbal reprimands were not affective against the mistreatment, clearly became unreasonable. “We cannot say that a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student.” The student claimed that throughout his middle and high school year classmates called him names referencing his sexual orientation and pushed him in the hallways. While a staff member would verbally reprimand individual perpetrators and the student would stop the conduct, the maltreatment by the student body as a whole continued. In addition, the district placed him in a resource room in middle school but the high school principal would not allow him to continue there and the harassment intensified, culminating in a sexual assault. A district may be liable for student-on-student sexual harassment if 1) the harassment was so severe, pervasive and offensive as to deprive the victim of educational benefits; 2) the district knew about the harassment; and 3) the district was deliberately indifferent to the harassment (i.e., if its response is clearly unreasonable in light of known circumstances).
- C. Stengle v. Office of Dispute Resolution, Stengle v. Office of Dispute Resolution, 109 LRP 24455 (M.D. Pa. 2009). Case alleging violations of the First Amendment and retaliation under Section 504/ADA is decided on summary judgment in favor of all the ODR and State Department of Education defendants. Defendants clearly articulated non-discriminatory reasons for non-renewing plaintiff’s contract as a due process hearing officer. She was not non-renewed because of the mere fact that she maintained a blog or because she criticized or “bashed” ODR on that blog. Rather, defendants have shown that she was non-renewed because the content of the blog caused members of the public, some of whom were parties in cases she heard as a hearing officer, to question her impartiality, which ultimately inhibited the effective administration of the hearing officer system. “Simply put, Plaintiff has failed to adduce any evidence that calls into question the legitimacy of ODR Defendants’ first non-retaliatory reason, the perceived compromise of her impartiality occasioned by her blog.”
- D. Rodriguez v. Clinton, 109 LRP 8413 (N.D. N.Y. 2009). School district did not retaliate against a parent of a student with a disability who spoke against the district at a board meeting and wrote a letter to the editor on institutional racism in school elections when it filed an “educational neglect” report against him. Prior to the student’s withdrawal from school, he was found eligible for special education and the special education coordinator attempted to work with his parents to arrange for home tutoring or residential placement. The student’s psychiatrist had recommended a residential placement for the student because he was at risk for self harm and drug use. When the coordinator had not heard from

the parents for almost a month, she recommended to the child study team that a CPS report be filed and this had nothing to do with the parent's speech activities.

- E. Pinellas County (FL) Sch. Dist., 52 IDELR 23 (OCR 2009). Where district's meeting minutes showed that staff discussed not placing the student in a German class because there was a pending OCR Complaint, this is sufficient to reflect retaliation.

### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

- A. Huson v. Simi Valley Unif. Sch. Dist., 53 IDELR 38 (9<sup>th</sup> Cir. 2009) (unpublished). Parents can not sue under Section 504, the ADA and Section 1983 without first exhausting administrative remedies under the IDEA. This is so, even though they claim their child is not eligible for IDEA services because their disagreement over the student's education relates to identification, evaluation, placement and services. Thus, the IDEA due process procedures must be exhausted before the parents may bring other claims.

### **RIGHTS OF NON-CUSTODIAL PARENTS**

- A. Fuentes v. Board of Educ. of the City of New York, 52 IDELR 152 (2d Cir. 2009). Father who is non-custodial parent does not have the right to make decisions about the student's education where the parents' divorce agreement did not address the right to make decisions about the student's education. Because neither the divorce decree nor the custody order gave the father the right to make educational decisions, he lacked standing to challenge IDEA services through a due process hearing request. Under New York law, a non-custodial parent lacks the decision-making authority to "control" a child's education where the custodial parent is granted exclusive custody of the child and the divorce decree and custody order are silent as to the right to control such decisions.

### **CHILD-FIND/IDENTIFICATION**

- A. Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 53 IDELR 8 (D. Conn. 2009). Where district violated its child find obligation, it must reimburse the parents for the student's therapeutic placements. Although the student's hospitalization did not in itself qualify her as a child with an emotional disturbance, "[t]he standard for triggering the child find duty is suspicion of a disability rather than factual knowledge of a qualifying disability." The parent completed a health assessment form just one week before the student's hospitalization, when she enrolled the student in her local high school. The form stated that the student had been diagnosed with depression the previous year and was taking an antidepressant. Those statements, combined with the student's subsequent hospitalization, should have raised a suspicion that the student suffered from an emotional disturbance over a long period of time. Based upon

private evaluations, the student is eligible for IDEA services and her parents are entitled to reimbursement.

- B. Pohorecki v. Anthony Wayne Local Sch. Dist., 53 IDELR 22 (N.D. Ohio 2009). The IDEA does not require children be classified by their disability. Rather, it requires that a child who needs special education and related services be regarded as a child with a disability and receive an appropriate education. The label assigned merely assists in developing the appropriate education provided. In addition, there was ample evidence that the student met the IDEA's definition of ED and that classification was a reasonable one.
- C. Richard S. v. Wissahickon Sch. Dist., 52 IDELR 245 (3d Cir. 2009). District court's ruling that district did not fail to timely identify student as disabled prior to the eighth grade is affirmed. The district court did not focus solely upon the ability/achievement analysis to determine that there was no evidence of LD at the relevant time, the district court also considered the testimony of the student's teachers that the student was not one who had problems with attention, impulsivity, or hyperactivity during the relevant period. Indeed, the district court pointed to extensive evidence that, in the seventh and eighth grades, the student was perceived by professional educators to be an average student who was making meaningful progress, but whose increasing difficulty in school was attributable to low motivation, frequent absences and failure to complete homework.
- D. Jamie S. v. Milwaukee Pub. Schs., 52 IDELR 257 (E.D. Wis. 2009). Where district has made only minimal efforts to remedy its systemic child find violations, additional interventions are necessary, including the appointment of a special education professional to monitor the district's review of each student's compensatory education needs. The independent monitor will establish guidelines for deciding which individuals qualify as class members, evaluating each class member's eligibility for compensatory services and determining the amount, type and duration of the services. In addition, a "hybrid IEP team" will apply those guidelines in assessing each student's right to compensatory education. The hybrid IEP team will include at least four permanent members, selected from district personnel, and "rotating" members who are knowledgeable about each student's unique needs. In addition, the district must notify potential class members of the remedial scheme and students whose evaluations were delayed during the relevant time period are to receive individualized notice of the class action, and for all other potential class members, the district can provide a general notice on its Web site.

## **ELIGIBILITY**

- A. C.B. v. Department of Educ. of the City of New York, 52 IDELR 121 (2d Cir. 2009). Though there is no dispute that the student has co-morbid bipolar disorder and ADHD, the conditions do not make her eligible as an OHI student because

- they do not adversely affect her educational performance. The student's grades and test results demonstrate that she continuously performed well both in public school before she was diagnosed, and at the private school thereafter. Relevant evaluations indicate that she tested above grade-level and do not find that her educational performance has suffered. Thus, the evidence is insufficient to show that she has suffered an adverse impact on her educational performance.
- B. Loch v. Edwardsville Sch. Dist. No. 7, 52 IDELR 244 (7<sup>th</sup> Cir. 2009). Student's claim that her anxiety prevented her from attending classes at a public high school and that she was, therefore, disabled under the IDEA is rejected, as there is no evidence that the student required special education or related services. The student was not taking medication for her anxiety and had not seen her psychiatrist or her therapist in the previous six months. Moreover, the student received satisfactory grades until she stopped attending class in her sophomore year. There was no medical evidence that the student's anxiety or diabetes had progressed to the point that she was unable to attend school. "Indeed, [the student's] doctors reported that when she was not attending classes, her health was good and should not have interfered with her school attendance." In addition, the student left high school to enroll in community college courses, where she received A's and B's. Given the student's performance at the community college, she could not demonstrate that she needed special education services at the high school level to receive an educational benefit.
- C. Marshall Joint Sch. Dist. No. 2 v. C.D., 51 IDELR 242, 592 F.Supp.2d 1059 (W.D. Wis. 2009). School district's determination that student with Ehlers-Danlos Syndrome was no longer eligible for services as OHI is rejected. The evidence is clear that the student's condition adversely affects educational performance, as *any* effect is sufficient.
- D. Williamson County Bd. of Educ. v. C.K., 52 IDELR 40 (M.D. Tenn. 2009). Gifted student with ADHD should have been made eligible for special education services as Other Health Impaired. "Under the law, it is not enough that C. managed to earn average to above average grades overall by the end of each school year in order to advance to the next grade level. Each state 'must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.'"
- E. Eschenasy v. New York City Dept. of Educ., 604 F. Supp. 2d 639 (S.D. N.Y. 2009). Teenager diagnosed with mood disorder, conduct disorder, trichotillomania, borderline personality features and expressive language disorder should have been found eligible for special education services as an SED student. Clearly, the student exhibits inappropriate types of behavior or feelings under normal circumstances and has a generally pervasive mood of unhappiness or depression. Her symptoms clearly adversely affect her educational performance, as she had failing grades, repeated expulsions and suspensions and a need for

tutors and summer school. The school district's assertion that her inappropriate behavior is just bad behavior is rejected. While it is undisputed that the student repeatedly misbehaved in school by cutting class, taking drugs and stealing, she also engages in hair pulling and cutting herself, was diagnosed with a mood disorder, diagnosed with personality disorder and attempted to commit suicide. Thus, it is more likely than not that all of the student's problems, not just her misconduct, underlie her erratic grades, expulsions and need for tutoring and summer school. Thus, parents are entitled to reimbursement for placement at the Elan School, which was appropriate for her.

- F. E.M. v. Pajaro Valley Unif. Sch. Dist., 53 IDELR 41 (N.D. Cal. 2009). Where the student performed very well in class with the use of general education interventions, the district's determination that he is not SLD is upheld and the administrative decision in the district's favor is upheld. The student's performance showed that he did not require specialized instruction to receive an educational benefit. Though the student was distractible and failed to complete homework assignments, his performance improved when his teacher used interventions, such as small group settings. "When viewed as a whole, the observational and anecdotal evidence describes a student who was distracted easily but who also responded to various forms of classroom intervention."
- G. Department of Educ. v. Zachary B., 52 IDELR 213 (D. Hawaii 2009). Although 10-year-old with ADHD received average scores on some standardized tests and made "some progress" in the regular classroom, the student is eligible for IDEA services. The student's inability to access the general education curriculum makes him a "child with a disability." It is important that the student took the standardized tests in a one-to-one setting. In addition, the student performed below average in a number of academic areas and, even with accommodations provided under a general education "action plan," the student made only limited progress in spelling, reading, writing and math, and he made no progress in science or social studies. Although the ED attributed the student's difficulties to a lack of motivation, this belief reflects ED's "fundamental misunderstanding of ADHD." Thus, the hearing officer's finding that the student is eligible for IDEA services under the category of OHI is affirmed.

#### **INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs)**

- A. C.S. v. Governing Bd. of Riverside Unif. Sch. Dist., 52 IDELR 122 (9<sup>th</sup> Cir. 2009) (unpublished). Request for IEE reimbursement was made before receiving an assessment from the school district and after obtaining the IEE. Thus, denying reimbursement to the parents for the IEE was not an abuse of discretion by the district court.
- B. J.P. v. Ripon Unif. Sch. Dist., 52 IDELR 125 (E.D. Cal. 2009). Parent's argument that school district was tardy in its request for a due process hearing to show that its evaluations were appropriate is rejected. Though the parent

requested the IEEs on December 21, 2006, the parties discussed the provision of the IEEs through a series of letters and did not reach a final impasse until February 7, 2007, less than three weeks before the district's request for a hearing. In addition, the district's Winter break began immediately after the parent's IEE request, which is a factor that must also be considered in determining the timeliness of the district's due process request. Given the circumstances here, the Court cannot find that "unnecessary delay" was present that would invalidate the underlying request made by the district.

### **RIGHT/DUTY TO EVALUATE OR REEVALUATE**

- A. M.L. v. El Paso Indep. Sch. Dist., 52 IDELR 159, 610 F.Supp.2d 582 (W.D. Tex. 2009). While the IDEA permits a reevaluation only one time per year unless the parties agree otherwise, this does not restrict a hearing officer or reviewing court from overriding lack of parental consent to a reevaluation. Under the circumstances and where the parent wants the child to continue to receive special education services, the district is entitled, indeed obligated, to conduct a reevaluation, because it has determined that the student warrants one. Plaintiff may not continue to assert that the student is entitled to special education services while simultaneously refusing to allow the district to evaluate A.L. to determine what those services may be.

### **STATE COMPLAINT PROCESS**

- A. S.A. v. Tulare County Office of Educ., 51 IDELR 244 (E.D. Cal. 2009). Action challenging ruling of State Department of Education on SEA Complaint can be filed in federal court, especially since the CDE wrote that "any further disagreement with the report can be appropriately addressed in a court of competent jurisdiction."

### **PROCEDURAL SAFEGUARDS/VIOLATIONS**

- A. Drobnicki v. Poway Unif. Sch. Dist., 109 LRP 73255 (9<sup>th</sup> Cir. 2009) (unpublished). Where the district scheduled an IEP meeting without asking the parents about their availability and did not contact them to arrange an alternative date when the parents informed the district that they were unavailable on the scheduled date, the district denied FAPE. Though the district offered to let the parents participate by speakerphone, the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time and place. "The use of [a phone conference] to ensure parent participation is available only 'if neither parent can attend an IEP meeting.'" Further, the fact that the student's mother asked the district to reschedule the meeting undermined claims that the parents affirmatively refused to participate--a circumstance that would allow the district to proceed in the parents' absence. Although the mother attended two other IEP meetings that year, the student's IEP was developed in the parents' absence. As such, the district's procedural violation deprived the parents

of the opportunity to participate in the IEP process and, therefore, denied the student FAPE.

- B. T.Y. v. New York City Dept. of Educ., 53 IDELR 69 (2d Cir. 2009). A provision in the IDEA that requires IEPs to include the anticipated location of a child's services does not refer to the specific school site. Therefore, the IEP developed for a preschooler with autism was appropriate where it stated that the child would attend a 6:1+1 class in a school for students with disabilities. Although the parents argued that the IDEA required the IEP to identify a specific school, the term "educational placement," as used in the IDEA regulations, refers to the type of program a student will attend, rather than a specific school. This interpretation is supported not only by the official comments to the 1999 Part B regulations, but also by the Senate commentary on the IDEA. "Because there is no requirement in the IDEA that the IEP name a specific school location, [the preschooler's] IEP was not procedurally deficient for that reason."
- C. T.P. v. Mamaroneck Union Free Sch. Dist., 51 IDELR 176, 554 F.3d 247 (2d Cir. 2009). There was insufficient evidence of a "predetermination of placement" where the parents failed to show that the school district did not have an open mind as to the content of the autistic student's IEP. There was no premeeting agreement to adopt the recommendations of the consultant to the school district and there was evidence that the parents meaningfully participated in the IEP meeting, where the Committee adopted some of the recommendations of the parents.
- D. A.G. v. Placentia-Yorba Linda Unif. Sch. Dist., 52 IDELR 63, 320 F. App'x 519 (9<sup>th</sup> Cir. 2009) (unpublished). An IEP team meeting is procedurally valid as long as it includes a special education teacher or provider "who has actually taught the student." It is not required that the student's current teacher or provider be present.
- E. G.N. v. Board of Educ. of the Township of Livingston, 52 IDELR 2, 309 F. App'x 542 (3d Cir. 2009). Pursuant to the IDEA, a procedural violation committed during the formulation of a child's IEP is actionable only if that violation: 1) impedes the child's right to a free appropriate public education; 2) significantly impedes the parents' opportunity to participate in the decisionmaking process; or 3) causes a deprivation of benefits. After carefully reviewing the administrative record, the district court determined that the January 2004 IEP was the product of a collaborative effort between school personnel and the parents and was designed to address the student's needs. The parents' "frustration with the end-product of that collaboration does not diminish the fact that the IEP – had [the parents] agreed to its implementation – would have conferred a meaningful educational benefit. Therefore, the district court was correct in denying private tuition and other declaratory relief.

- F. School Bd. of Manatee County v. L.H., 53 IDELR 149 (M.D. Fla. 2009). District was required to allow a private psychologist to conduct an in-school observation of a student with Asperger's syndrome. The district violated the IDEA when it imposed restrictions on the independent evaluation.
- G. Horen v. Board of Educ. of City of Toledo Pub. Sch. Dist., 53 IDELR 79 (N.D. Ohio 2009). Parents' claim that they were entitled to tape record their daughter's IEP sessions is rejected. As OSEP has indicated, if a public agency has a policy that prohibits or limits the use of recording devices at IEP meetings, that policy must provide for exceptions only if they are necessary to ensure that the parent understands the IEP or the IEP process or to ensure other parental rights under the IDEA. Where these parents have not contended that they fall within an exception to the district's no-recording rule, the district did not violate IDEA when it refused to proceed with an IEP meeting unless the parents agreed not to record the discussions.
- H. Caitlin W. v. Rose Tree Media Sch. Dist., 52 IDELR 223 (E.D. Pa. 2009). Private school funding is not warranted where IEP was determined to be appropriate, notwithstanding the fact that the school district committed a procedural violation when the parents requested a due process hearing in September 2001 and the district did not respond. Where the parents requested a hearing the second time in November 2002 and a hearing was ultimately held in February 2003, the hearing officer did not err in finding that the procedural violation did not result in a denial of educational benefit to Caitlin because she had already been enrolled in a parentally-chosen unilateral placement that her parents deemed appropriate when the first hearing was requested and the due process hearing would have resulted in a finding that the district's IEP was appropriate anyway.
- I. Omidian v. Board of Educ. of the New Hartford Cent. Sch. Dist., 52 IDELR 95 (N.D. N.Y. 2009). The absence of a regular education teacher at the IEP Team meeting did not render the IEP inadequate because at least one parent and their attorney were present at every meeting and the evidence is clear that the only IEP proposal the parents would have accepted was placement at a private residential school.
- J. Anderson v. District of Columbia, 52 IDELR 100, 606 F.Supp.2d 86 (D. D.C. 2009). While it is true that the student's regular and special education teachers did not participate in IEP sessions, the last IEP meeting did include a placement specialist who had observed the student in the classroom, a speech pathologist and a special education teacher at the CARE Center. In addition, the Team had written reports from the student's special education teacher, indicating that the student was not making progress, which supported the proposed change in placement. Given the information provided to the Team, "the Court does not see how the teachers' absence directly resulted in an IEP that was 'inappropriate,' and therefore a loss of educational opportunity."

- K. Mahoney v. Carlsbad Unif. Sch. Dist., 52 IDELR 131 (S.D. Cal. 2009). Following the 2004 IDEA Amendments, the 9<sup>th</sup> Circuit has held that the IDEA no longer requires the presence of a student's current regular or special education teacher on the IEP Team. Rather, it is sufficient for a teacher to be one who is, or will be, responsible for implementing the IEP to attend.
- L. Laddie C. v. Dept. of Educ., 52 IDELR 102 (D. Haw. 2009). The mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the DOE's determination that the student should return to a public school placement was incorrect. However, the court remands to the hearing officer the issue of at which meeting the placement decision was actually made, who was involved in that decision, and whether those persons were sufficiently knowledgeable of the student's needs to make the decision. In addition, the hearing officer is asked to examine whether the DOE violated the IDEA in making the placement decision and, if so, whether this violation resulted in a denial of FAPE.
- M. Anello v. Indian River Sch. Dist., 52 IDELR 11 (D. Del. 2009). Where parental consent was implicit in the parental request for an evaluation, which was made on February 3, 2004, the district had until April 7, 2004 to evaluate the student and hold an eligibility meeting under the state's 45-day timeline. Where the district did not hold the eligibility meeting until June 14, 2004, the district is responsible for private services the parents obtained during the time between April 7 and June 14. (Court interpreted Delaware law to require parental consent only when the IST refers a student for an initial evaluation but not where a parent initiates the referral).

### **IEP CONTENT**

- A. Bougades v. Pine Plains Cent. Sch. Dist., 53 IDELR 42 (S.D. N.Y. 2009). Where the district's IEP developed for a sixth-grader failed to correct deficiencies in the previous program, the district denied the student FAPE and must reimburse the parents for the placement in a school for LD children. The evidence reflects that the student did not make progress toward any of his 27 goals related to reading and writing in his 2002-03 IEP. In addition, the results of a standardized test showed that he regressed in reading. Although the student's 2003-04 IEP increased reading instruction, it provided for him to receive writing instruction every other day, which was the same writing program he had the previous year. "This provision was included even though the [IEP team] had recommended a daily writing intervention class for [the student] in 2003-04." Thus, the IEP was not reasonably calculated to provide benefit in the area of writing. Further, the student did not complete assignments the previous year which caused him to fail two core classes and prevented his promotion to seventh grade. However, the district did not offer any services or modifications to address the student's

difficulty with completing assignments. This deficiency, coupled with the inadequate writing services, made the IEP substantively inappropriate.

### **PARENT CONSENT**

- A. In the matter of J.H. v. Northfield Pub. Sch. Dist., 52 IDELR 165 (Minn. Ct. App. 2009). Where Congress has left the issue of consent when parents are divorced or separated to the individual states, Minnesota law provides that districts may not override written refusal of a parent to consent to an evaluation. Thus, where one parent has provided consent for an evaluation but the other parent has provided written refusal to consent to an initial evaluation, the school district may not proceed with the evaluation.

### **STAY-PUT**

- A. Joshua A. v. Rocklin Unif. Sch. Dist., 52 IDELR 1, 559 F.3d 1036 (9<sup>th</sup> Cir. 2009). The IDEA's "stay-put" provision applies to all pending judicial proceedings, including appeals to a federal circuit court of appeals. Had Congress meant to exclude circuit court proceedings from the "stay-put" provision, it could have specifically included such language in the IDEA.
- B. Houston Indep. Sch. Dist. v. V.P., 53 IDELR 1 (replacing 52 IDELR 62, 566 F.3d 459) (5<sup>th</sup> Cir. 2009). Although parents did not expressly ask for private school tuition reimbursement in response to the school district's complaint, the parents can still recover private school costs for the 2005-06 school year, as the district was on notice of the reimbursement claim. Where the hearing officer had ruled that the private school was an appropriate placement and the district failed to provide FAPE, the private school became the student's stay-put placement until the litigation was complete.
- C. J.R. v. Mars Area Sch. Dist., 52 IDELR 91, 318 F. App'x 113 (3d Cir. 2009). Providing "itinerant" learning support or learning support provided primarily in the regular classroom, in place of the daily hour of resource room support specified in the student's IEP was not a change of placement and, therefore, did not violate the IDEA's stay-put provision. "[i]n determining whether a given modification in a child's school day should be considered a "change in educational placement," the "touchstone" is whether the modification "is likely to affect in some significant way the child's learning experience.'" In this case, the school district provided the same educational services to the student on a daily basis, with the same special education teacher, but in a different room. Thus, the district court did not err in concluding that J.R.'s relocation did not amount to a change in his educational placement within the meaning of the stay-put provision.
- D. W.R. v. Union Beach Bd. of Educ., 109 LRP 73752 (D. N.J. 2009). A minor change in how a 10-year-old student was to receive language instruction was not sufficient to trigger the IDEA's stay-put provision, as there was little difference in

whether the student received the instruction on a one-on-one basis, as his parents preferred, or with two other students in a small resource room. The student was receiving one-on-one language arts literacy to address his reading deficits and an ALJ rejected the proposed new IEP providing that he receive that instruction in a resource room. When the ALJ ordered the district to provide one-on-one instruction for two periods per day, the district sought reversal of the decision, and the parents asked the court to order one-on-one instruction while the case was pending. While a parent may invoke the stay put provision when a district proposes a fundamental change in, or elimination of, a basic element of a student's current educational placement, no change in placement occurs when, as in this case, a student's IEP and classes remain substantially similar. Here, one-on-one instruction, as opposed to a small group resource room setting where two teachers taught six students, did not amount to a fundamental change in or elimination of the child's educational placement. The student would be attending the same school and his proposed program was substantially similar to his prior IEPs.

## **DISCIPLINE**

- A. George A. v. Wallingford Swarthmore Sch. Dist., 53 IDELR 84 (E.D. Pa. 2009). Parent's motion for a temporary restraining order allowing non-resident hearing impaired student to return to his high school is granted. The temporary alternative school placement to which the parent agreed is not the "stay-put" placement; rather, the high school program where he was served when the altercations at issue arose is his "stay-put" placement. The school's attempt to return him to his neighborhood school in his resident district is a change of placement and the current district's attempt to change it is in violation of the IDEA. The proposed change to his neighborhood high school is not equivalent to the current placement, particularly where the proposed IEP notes that "Special Education supports and services required in the student's IEP cannot be provided in the neighborhood school." Furthermore, the decision to remove the student from the current high school was done as a disciplinary measure, not to provide him with the services and support he needs. Finally, the district's contention that the "stay-put" provision does not apply because the non-resident district is not the LEA charged with providing FAPE to the student is rejected. "This attempt by WSSD to wash its hands of Ricky is detached from the reality of his situation."

## **SERVICES TO STUDENTS WITH AUTISM**

- A. A.G. v. Frieden, 52 IDELR 65 (S.D. N.Y. 2009). An IFSP is adequate in the context of IDEA if it is reasonably calculated to provide some non-trivial educational benefit. It need not maximize the student's potential; nor need it be the best program possible. Although the parents' witnesses all believed that 20 hours of ABA therapy per week would neither be the optimal treatment level for N.G. nor maximize his development and that more hours were desirable, none

testified that 20 hours of ABA therapy per week offered by the agency would provide no or only trivial benefit.

- B. Joshua A. v. Rocklin Unif. Sch. Dist., 52 IDELR 64 (9<sup>th</sup> Cir. 2009) (unpublished). The district's "eclectic" program for a child with autism is appropriate and, therefore, the district court's denial of the parent's request for an ABA-based program is denied. Although the district's program was not itself "peer reviewed," it was "based on peer-reviewed research to the extent practicable." The district's IEP targeted the child's unique needs, was administered by qualified personnel, and was implemented based upon accepted principles in the field of autism education.
- C. Kalbfleisch v. Columbia Comm. Unit Sch. Dist. No. 4, 53 IDELR 12 (S.D. Ill. 2009). Parents' motion to remand case back to state court is granted in a case alleging that the district violated Illinois law by refusing to allow a 5-year-old boy with autism to bring his service dog to school. The case does not present a federal question, even though the district might present a defense based on the IDEA. The parent's complaint does not mention the IDEA but, instead, only alleges violations of the Illinois school code. (Note: In August, the court temporarily ordered the district to allow the boy to attend school with his service dog; the district responded by transferring the boy to a special school, away from his neighborhood school, according to the newspaper).

#### **PRIVATE SERVICES/RESIDENTIAL PLACEMENT**

- A. Forest Grove Sch. Dist. v. T.A., 52 IDELR 151, 129 S. Ct. 2484 (2009). The prior receipt of special education services from the public school system is not required for parents to bring a lawsuit for private school tuition reimbursement. The language in the 1997 IDEA Amendments does not serve as an absolute bar to such lawsuits. However, parents are not entitled to reimbursement if the district makes FAPE available. Case is remanded to the district court for further proceedings.
- B. Forest Grove Sch. Dist. v. T.A., 109 LRP 77164 (D. Ore. 2009). The equities in the case prevent the parents from recovering the cost of residential placement, as they did not provide the district of notice of the student's residential placement until "well after" the student's enrollment. In addition, the parents placed the student in the first facility recommended by their physician without considering whether other, more suitable placements were available. More importantly, on the enrollment form for the placement, student's father indicated that the placement stemmed from the student's drug abuse and problem behaviors and nothing "about the one ADHD symptom for which the district could be liable— [the student's] trouble with his school work." Private placement was unrelated to the student's difficulties focusing in school.

- C. Ashland Sch. Dist. v. Parents of Student R.J., 53 IDELR 176 (9<sup>th</sup> Cir. 2009). Parents of high schooler with ADHD are not entitled to reimbursement for private placement because the placement was not educationally necessary. The student did not engage in disruptive behavior in class, was well-regarded by her teachers, and was able to learn in the general education environment. “Although [the student’s] teachers reported that she had difficulty turning in assignments on time, the record shows that she earned good grades when she managed to complete her work.” Clearly, the parents enrolled her in a residential facility because of her “risky” and “defiant” behaviors at home, including sneaking out of the house at night to see friends and having a relationship with a school custodian. Residential placement is not necessary for FAPE.
- D. Ashland Sch. Dist. v. Parents of Student E.H., 53 IDELR 177 (9<sup>th</sup> Cir. 2009). Evidence supported the district court’s conclusion that the student’s placement in a residential placement was medical in nature rather than educational in nature. “For example, [the student’s] case manager testified that [the parents] told him that they were searching for a residential placement because of problems at home, not at school,” and evidence of the student’s psychiatric hospitalizations further support the view that the residential placement was unrelated to the student’s education.
- E. Mary Courtney T. v. School Dist. of Philadelphia, 52 IDELR 211, (3d Cir. 2009). Although emotionally disturbed teenager is entitled to services under the IDEA, her parents are not entitled to funding for placement in a psychiatric residential facility. “Only those residential facilities that provide special education...qualify for reimbursement under *Kruelle* and IDEA.” Although the court acknowledged that some services received at the facility may have provided educational benefit, they are not “the sort of educational services that are cognizable under *Kruelle*.” At the facility, the child “received services that are not unlike programs that teach diabetic children how to manage their blood sugar levels and diets—both sorts of programs teach children to manage their conditions so that they can improve their own health and well being. However, because both programs are an outgrowth of a student’s medical needs and necessarily teach the student how to regulate his or her condition, they are neither intended nor designed to be responsive to the child’s distinct ‘learning needs.’” Clearly, the residential program is designed to address medical, rather than educational, conditions and the child’s admission there was necessitated, not by a need for special education, but by a need to address her acute medical condition. The residential placement here is also not a “related service;” rather, it is an excluded medical service. “[W]hile the Supreme Court stated that physician services other than those provided for diagnostic purposes are excluded, it also specifically excluded hospital services.” Note: The court also held that the school district acted promptly to propose services to the child (and provide her with tutoring) when notified of her hospitalization and her ability to be evaluated by the school district. On that basis, compensatory education was also denied.

- F. Richardson Indep. Sch. Dist. v. Michael Z., 52 IDELR 277 (5<sup>th</sup> Cir. 2009). The following test is applicable in determining whether residential placement is required: “In order for a residential placement to be appropriate under the IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education.” Unlike *Kruelle*, “this test does not make the reimbursement determination contingent on a court’s ability to conduct the arguably impossible task of segregating a child’s medical, social, emotional, and educational problems.” “IDEA, though broad in scope, does not require school districts to bear the costs of private residential services that are primarily aimed at treating a child’s medical difficulties or enabling the child to participate in non-educational activities....This is made clear in IDEA’s definition of ‘related services,’ which limit reimbursable medical services to those ‘for diagnostic and evaluation purposes only.’” While the district court did make the factual finding that residential placement was necessary for this student to receive a meaningful educational benefit and that she could achieve no educational progress short of residential placement, the case is remanded for the district court to make factual findings as to whether treatment at the particular residential facility was primarily designed for, and directed to, enabling her to receive a meaningful educational benefit.
- G. C.B. v. Garden Grove Unif. Sch. Dist., 53 IDELR 39 (C.D. Cal. 2009). Where the district contended that even if there was a denial of FAPE, it was not required to pay for the cost of education for a pupil attending an agency not certified by the State as a nonpublic school, the court rejected the district’s position. Under the IDEA, a district may be required to reimburse parents for the cost of a nonpublic or private school if the district failed to make a FAPE available to the student and the parent provides a placement or services that address the student’s needs and provides an educational benefit. The distinction between a nonpublic school and nonpublic agency is irrelevant. “The yardstick by which to determine whether reimbursement is proper is whether the placement affords the student educational benefits.” Based upon sufficient evidence that the student received educational benefits from the services he obtained at the nonpublic agency, the court ordered that the guardian be reimbursed for the full amount of services.
- H. Hunt v. Bureau of Special Educ. Appeals, 53 IDELR 83 (D. Mass. 2009). Because the student needs Occupational Therapy and the private placement does not provide OT services, parents’ reimbursement for private schooling is denied. Although the district’s Section 504 Plan did not meet all of his identified needs, a denial of FAPE will not in itself entitle a student’s parents to tuition reimbursement. The parents needed to show that the private placement was appropriate and while the private school offered small class size, frequent breaks and supportive prompts to complete tasks, it did not offer OT. Thus the private school fell short of what was deemed necessary by the evaluators.
- I. R.H. v. Fayette County Sch. Dist., 53 IDELR 86 (N.D. Ga. 2009). Where student with Reactive Attachment Disorder made consistent progress in her public school

program, she does not require residential placement in order to receive FAPE. Clearly, the student's behavioral problems at home do not impede her ability to learn. Although the student exhibits significant behavioral problems at home, she does not engage in those problem behaviors at school. Importantly, the evidence shows that she made steady progress during the previous five school years.

- J. Hogan v. Fairfax County Sch. Bd., 53 IDELR 14 (E.D. Va. 2009). The fact that the parent did not respond to phone calls about potential placements or requests to conduct new evaluations did not bar funding for student's private Lindamood-Bell services. The parent's lack of cooperation with the IEP process merited only a one-sixth reduction in tuition reimbursement. Although the parent's communications with the district were "preemptively adversarial in tone," the court noted that the district personnel bore ultimate responsibility for the student's loss of services. For example, the employee responsible for finding an appropriate placement did not respond to the parent's e-mail questions about the student's program and the district did not attempt other methods of communication when its phone calls to the parent went unanswered and its letters were returned as undeliverable. Because the district bears primary responsibility for the student's loss of services, the district must reimburse the parent \$23,399—or five-sixths of the cost of the Lindamood-Bell program.
- K. Z.D. v. Niskayuna Cent. Sch. Dist., 52 IDELR 250 (N.D. N.Y. 2009). Parent is not entitled to reimbursement for unilateral residential placement because the student made progress academically in the public school program and was able to answer questions and participate in classroom discussions despite his attentional difficulties. Specifically, "[the student] received the same material content and was graded using the same standards as regular education students and, in November 2004, received grades in the B to C range with positive comments." In addition, progress reports evidenced social interaction with his peers and independent use of his locker. Further, his reliance on his one-to-one aide decreased to the point that he was able to work cooperatively in groups. The parent's experts advocating for therapeutic placement focused only upon the benefits of the residential program.
- L. M.S. v. Fairfax County Sch. Bd., 51 IDELR 149, 553 F.3d 315 (4<sup>th</sup> Cir. 2009). District court erred in not considering the appropriateness of the private Lindamood-Bell facility on a year-by-year basis and determining whether the parents are entitled to reimbursement for some of the private placement. The case is remanded to the district court for a year-by-year analysis of whether the private program was appropriate and because the court found that the school district's IEPs were not appropriate, it may award reimbursement if it finds any year of instruction at Lindamood-Bell to be "reasonably calculated" to confer some educational benefit.
- M. A.C. v. Board of Educ. of the Chappaqua Cent. Sch. Dist., 51 IDELR 147, 553 F.3d 165 (2d Cir. 2009). District court's decision that school district's program was inappropriate because the provision of a one-to-one aide promoted "learned

- helplessness” is overturned. Clearly, the State Review Officer’s findings should have been affirmed, as the evidence identified ways in which the school district developed M.C.’s independence, for example, by decreasing the level of prompting where it was no longer needed. In addition, the IEP stressed independence in following daily routines and the application of reading and math skills. The student with autism also made progress toward independence in co-taught classes and a progress report indicated that he had mastered the goal of independently following classroom routines. Among other things, the student no longer needed prompting and an escort to use the bathroom.
- N. Schaffer v. Weast, 51 IDELR 177, 554 F.3d 470 (4<sup>th</sup> Cir. 2009). The parents’ claim that the IEP developed for the student’s 10<sup>th</sup> grade year, which offered full-time special education services, showed that the school district erred when it offered inclusion classes for 8<sup>th</sup> grade is rejected. IEP teams must consider a student’s evolving needs when developing educational programs. “To interpret the tenth-grade IEP as an admission of fault as to the eighth-grade IEP would discourage [the school district] and other school systems from reassessing and updating IEPs out of fear that any addition to the IEP would be seen as a concession of liability for an earlier one.”
- O. N.R. v. Department of Educ. of the City Sch. Dist. of New York, 52 IDELR 92 (S.D. N.Y. 2009). Parents are entitled to reimbursement for private school for autistic student because the school system did not have a complete IEP in place by the beginning of the school year, even though the parent had already applied for placement in the private school. The equities favor the parent in this matter.
- P. Regional Sch. Dist. No. 9 v. Mr. and Mrs. P., 51 IDELR 241 (D. Conn. 2009). School district’s program is inappropriate for the autistic student due to six deficiencies in the proposed IEPs: 1) failure to adequately plan for the student’s transition back to public school; 2) failure to provide mandatory and specific teacher training; 3) failure to provide a family training/communication component that would have provided, at a minimum, for a communication protocol between home and school to support the student’s functioning in school; 4) failure to include a component of formal, frequent follow-up team meetings to assess the student’s transition to public school; 5) failure to define a clear plan for assessing the student’s assistive technology needs; and 6) failure to define an appropriate plan for transportation issues. Thus, private placement is warranted.
- Q. G.B. v. Bridgewater-Raritan Regional Bd. of Educ., 52 IDELR 39 (D. N.J. 2009). School district’s IEP offers FAPE to preschooler with autism; therefore, the district is not required to fund private placement. “The Court notes that Plaintiffs enrolled J.B. at Somerset Hills before the proposed IEP for J.B. for 2005-06 was considered as an option or tested out, for that matter. Therefore, the District’s program for J.B. never had a chance to be fine tuned even further to fit his needs that become apparent after an initial period in the classroom....”

## **PARENTALLY-PLACED PRIVATE SCHOOL STUDENTS**

- A. Letter to Eig, 52 IDELR 136 (OSEP 2009). The home school district must evaluate a parentally placed private school student for FAPE upon parental request. If a parent asks the home district to evaluate a private school student's eligibility for IDEA services (rather than eligibility for "equitable services"), the home district can not refuse to do so on the grounds that the student attends private school in another LEA.

## **COMPENSATORY EDUCATION SERVICES**

- A. Ferren C. v. School Dist. of Philadelphia, 51 IDELR 272 (E.D. Pa. 2009). Merely paying for compensatory education services in a private setting for three years may not be enough. Because the district had denied the student FAPE for three years, it would be inappropriate to "limit [the district's] involvement to the role of a banker." Therefore, the district must reevaluate the student, develop an appropriate IEP and serve as her LEA until she receives all of the compensatory services to which she was entitled.
- B. Streck v. Board of Educ. of the E. Greenbush Cent. Sch. Dist., 52 IDELR 285 (N.D. N.Y. 2009). To remedy past denials of FAPE, district is required to fund the cost for three courses (a total of \$7,140) that the student took during his freshman year in college that focused upon the development of reading skills and addressed the deficiencies in the district's program. However, the district is not required to fund all of the student's college tuition.

## **VOUCHER PROGRAMS**

- A. Cain v. Horne, 109 LRP 16733, 202 P.3d 1178 (2009). The Arizona Supreme Court found two school voucher programs (the Arizona Scholarship for Pupils with Disabilities and The Displaced Pupils Grant Program) unconstitutional because the Arizona Constitution's Aid Clause prohibits the appropriation of public money to aid any private or sectarian school. Under the programs here, parents of eligible students select the private or sectarian school their child will attend and the state then disburses a check or warrant to an eligible student's parent who then "restrictively endorses" the check to the selected school for payment of tuition and fees. To allow the voucher programs to survive would allow appropriations of state funds to be used to support nonpublic schools in violation of the Aid Clause.

## **LEAST RESTRICTIVE ENVIRONMENT**

- A. Madison Metropolitan Sch. Dist. v. P.R., 51 IDELR 269 (W.D. Wis. 2009). ALJ's determination that the school district must fund a portion of the preschooler's tuition to attend the Little Red Preschool is upheld. Where school districts do not operate inclusive public preschool programs, paying for the

- placement in a private preschool with children without disabilities is an option, according to the U.S. Department of Education. Where the IEP team agreed that it was appropriate for this student to participate full-time with non-disabled peers in age-appropriate settings and that non-disabled peer interaction was important for this student, funding part of the tuition for the preschool program is appropriate.
- B. Geffre v. Leola Sch. Dist. 44-2, 109 LRP 60821 (D. S.D. 2009). Continued placement of student with ODD and significant behavioral problems in the past is inappropriate because the alternative school serving only students with behavioral problems is not the LRE. Clearly, there was evidence that the student progressed at the school and, according to the school's director and the student's teacher, he made significant behavioral changes there and did not have any behavioral problems. The IHO erred in failing to consider the student's behavioral progress, particularly in light of the IDEA's preference for mainstreaming. In addition, there is no evidence that the District is unable to educate the student in the general education setting with the use of supplementary aids and services. Rather, the teacher and director testified that the student could attend general education classes with appropriate supports. The District's rejection of the school's offer to train district staff in behavior management techniques showed that the District did not make a good-faith effort at mainstreaming.
- C. James and Lee Anne D. v. Board of Educ. of Aptakasic-Tripp Comm. Consol. Sch. Dist. No. 102, 52 IDELR 281 (N.D. Ill. 2009). Parents' contention that placement at the neighborhood school with one-to-one instruction in her neighborhood school would effectively isolate the student from others is rejected. Where student would spend 30% of her time with general education students, the district's program was less restrictive than the private school for students with learning disabilities desired by her parents.

### **RELATED SERVICES**

- A. J.T. v. Missouri State Bd. of Educ., 51 IDELR 270 (E.D. Mo. 2009). Court will not dismiss parental request to order the SEA to install 24-hour audio and video surveillance, or some other independent monitoring scheme, in all classrooms and hallways at State Schools for the Severely Handicapped, including the one plaintiff attends. Clearly, the court may order audiovisual monitoring of the student if the monitoring assists in providing him with special education and related services. Based upon the record now, the court cannot conclude as a matter of law that the requested surveillance would not provide student with a service calculated to assist him in receiving special education. (See also, C. v. Missouri State Bd. of Educ., 53 IDELR 81 (E.D. Mo. 2009).

## **THE FAPE STANDARD**

- A. J.L. v. Mercer Island Sch. Dist., 52 IDELR 241 (9<sup>th</sup> Cir. 2009). The district court’s determination that Congress superseded the Rowley decision in the 1997 IDEA Amendments is reversed. Had Congress sought to change the FAPE “educational benefit” standard—a standard that courts have followed vis-à-vis Rowley since 1982—it would have expressed a clear intent to do so. Instead, Congress did not change the definition of free appropriate public education in the law. In addition, Congress did not indicate in its definition of “transition services,” or elsewhere, that a disabled student could not receive FAPE absent the attainment of transition goals. Third, Congress did not express disagreement with the “educational benefit” standard or indicate that it sought to supersede Rowley. “In fact, Congress did not even mention Rowley.”
- B. K.C. v. Mansfield Indep. Sch. Dist., 52 IDELR 103, 618 F. Supp.2d 568 (N.D. Tex. 2009). The parents’ argument that the Rowley standard is no longer applicable to IDEA cases because the 1997 IDEA amendments embodied “high expectations for [disabled] children” is rejected. Rowley continues to provide the standard for deciding an action brought under the IDEA.

## **PRACTICE AND PROCEDURE**

- A. Lake Washington Sch. Dist. No. 414 v. Office of the Superintendent of Pub. Instruction, 51 IDELR 278 (W.D. Wash. 2009). School district’s request is denied for injunctive relief to prohibit the Administrative Law Judge from granting the parents’ attorney’s request for an extension of the 45-day due process hearing period to accommodate two vacations, two unrelated trials and trial preparations. First, it is not clear that the court has the authority to hear the issue and, secondly, if it is authorized to hear it, it is not convinced that it should do so in this case. The “prejudice” to the school district is vague and remediable and does not outweigh the prejudice to the parents in revoking a “good cause” continuance and rescheduling the hearing date to a date when their attorney is unavailable and/or unprepared.
- B. Lara v. Lynwood Unif. Sch. Dist., 53 IDELR 18 (C.D. Cal. 2009). Court lacks the authority to hear case to enforce provisions of private settlement agreement because the settlement agreement was not reached via the IDEA in a mediation or resolution session. Federal courts have jurisdiction over claims seeking enforcement of settlement agreements of due process complaints under the IDEA reached in IDEA mediations or resolution sessions only.

## **STATUTE OF LIMITATIONS**

- A. P.P. v. West Chester Area Sch. Dist., 53 IDELR 109 (3d Cir. 2009). Because Section 504 is closely related to the IDEA, the IDEA’s two-year statute of limitations should apply to Section 504 claims. Since Section 504 does not

include a statute of limitations, district courts are to apply the statute of limitations from analogous state laws to Section 504 claims but may borrow a limitations period from federal law when that law provides a closer analogy than the state statutes. Section 504 is more akin to the IDEA than the state law governing personal injury claims. “There are few federal statutes as closely related, and under which similar claims may be brought, as the IDEA and [Section 504].”

- B. Jonathan H. v. Souderton Area Sch. Dist., 52 IDELR 31, 562 F.3d 527 (3d Cir. 2009). The IDEA’s 90-day status of limitations for bringing a civil action challenging an administrative ruling does not apply to counterclaims. A counterclaim is a response to an IDEA lawsuit and not a claim in its own right. Thus, the district is not barred from filing its counterclaim 160 days after the administrative decision.
- C. School Dist. of Philadelphia v. Deborah A., 52 IDELR 67 (E.D. Pa. 2009). Although the law in this area is “unsettled” and other judges in this District have ruled that a court may not apply IDEA-2004’s statute of limitations retroactively to bar claims that existed prior to July 1, 2005, this Court disagrees. Thus, the hearing officer did not err when it barred the plaintiffs’ claims for compensatory education that arose prior to July 27, 2005, which was two years before plaintiffs requested a due process hearing. “The Third Circuit hopefully will soon shed light on this important question.”

#### **ATTORNEY’S FEES/COSTS**

- A. J.D. v. Kanawha Co. Bd. of Educ., 52 IDELR 182 (4<sup>th</sup> Cir. 2009). Where the school district referred to discussions and offers made at mediation in its letter offering settlement, “[the district] almost guaranteed that the mediation discussions would become part of a later civil proceeding: the dispute over attorneys’ fees.” The district could have renewed its settlement offer by restating the terms proposed at the mediation session without referencing the mediation itself. Because the district did mention the mediation, however, the court could not review the offer to determine whether it was more favorable than the relief granted by the hearing officer for purposes of determining whether the parents prevailed and were entitled to fees. Fees, therefore, are awarded.
- B. V.G. v. Auburn Enlarged Cent. Sch. Dist., 109 LRP 66743 (2d Cir. 2009) (unpublished opinion). Where hearing officer wrote “so ordered” on a consent decree reached by the parent and the school district, the parent may recover \$9,608 in attorney’s fees, because that made the parent a prevailing party. Parents are entitled to prevailing party status if they obtain some form of a consent decree from a hearing officer, and this rule applies regardless of whether the consent decree results from an agreement between the parties or administrative action. Even if some form of judicial imprimatur were required, the parent in this case met that standard. “The [hearing officer’s] intent to place imprimaturs on the consent decrees is beyond dispute here.”

- C. L.T. v. Mansfield Township Sch. Dist., 53 IDELR 7 (D. N.J. 2009). Expert fees are available to prevailing parents under Section 504; therefore, the parents are entitled to \$5,293.00 in expert witness costs. Although expert fees are not available under the IDEA, the district was in violation of the IDEA *and* Section 504. Although Section 504 does not mention expert witness fees, it does incorporate the remedies available under the Civil Rights Act, which allows a prevailing party to recover expert witness fees. “Thus, [the parents] are entitled to reimbursement of their expert fees for their prevailing party status on their Rehabilitation Act claim.”
- D. Board of Educ. of Montgomery Co. v. Shell II, 53 IDELR 53 (D. Md. 2009). Where a central issue in the case was whether, and to what extent, the medical costs at the private facility where the student was placed were segregable from the educational and related costs, the parents’ attorneys’ fees will be reduced one-third because they were ultimately awarded only two-thirds of the cost of the residential placement.
- E. Parenteau v. Prescott Unif. Sch. Dist., 53 IDELR 23 (D. Ariz. 2009). Where the school district clearly prevailed against the parent’s claim that FAPE had been denied and where the parent used this litigation for an improper purpose (because he was angry), the school district is entitled to an award against the parent and his attorney for \$129,951.50 in fees and \$11,260.21 in costs.
- F. District of Columbia v. Ijeabunwu, 52 IDELR 289 (D. D.C. 2009). The district’s written offer to fund independent evaluations of a student with multiple disabilities justifies order for fees against parent’s attorney of \$1,027.00. Clearly, the attorney had no reason to pursue the parent’s complaint for due process after the district offered all of the relief sought. Although the due process complaint was valid when filed, since the district failed to conduct evaluations recommended by the student’s IEP team, the district did send the attorney a letter nine days later in which it offered to pay for independent evaluations. When the parent’s attorney chose to continue to pursue the hearing, his actions were both unreasonable and without foundation.
- G. District of Columbia v. Straus, 52 IDELR 126, 607 F.Supp.2d 180 (D. D.C. 2009). The district was not the “prevailing party” for purposes of recovering its fees against the parents’ counsel, where its decision to fund an IEE only made the parent’s request for a due process hearing moot. Allowing a district to recover attorney’s fees merely because it voluntarily corrected the wrongs alleged by the parent would be inappropriate. “While it could, in theory, create an incentive for [districts] to engage in prompt corrective action, it would punish [parents] who were right to complaint about the wrongs [the districts] committed.” The hearing officer’s dismissal of the due process complaint did not make the district a prevailing party.

- H. E.K. v. Stamford Bd. of Educ., 52 IDELR 133 (D. Conn. 2009). In a case involving the suspension/expulsion of a student who had exited from special education over two years ago, plaintiff’s counsel “continued to litigate [the IDEA claim] after the litigation clearly became frivolous, unreasonable, or without foundation.” Thus, the school system is awarded \$15,972.50 in fees to be paid by the parents’ counsel.
- I. Mary Courtney T. v. School Dist. of Philadelphia, 51 IDELR 275 (E.D. Pa. 2009). While expert witness fees are not recoverable, prevailing parents may recover reasonable attorneys’ fees for the time their attorneys spent working with an expert witness to prepare for their case. It was not unreasonable for the attorneys to communicate with an independent evaluator, prepare documents for the evaluator and review an expert report.
- J. Wiles v. Department of Educ., 51 IDELR 274 (D. Haw. 2009). Though prevailing in a jury trial in a case brought under Section 504, the DOE could not recover \$110,000 in costs that it incurred in successfully defending the lawsuit. Such costs are only recoverable where the plaintiff’s case is “frivolous, unreasonable, or groundless.” Here, the plaintiff’s case survived various defense motions, including a motion for judgment on the pleadings and, therefore, was not frivolous, unreasonable or without foundation.

#### **NON-ATTORNEY PARENTS/STANDING**

- A. D.K. v. Huntington Beach Union High Sch. Dist., 51 IDELR 266 (9<sup>th</sup> Cir. 2009). Because parents have both substantive and procedural rights under the IDEA, non-attorney parents can bring substantive IDEA claims on their own behalf without representation by counsel, pursuant to the Supreme Court’s decision in Winkelman. “Unless and until the rights or interests of the parents diverge from those of the child, a ruling on this issue would be advisory.”

#### **NO CHILD LEFT BEHIND**

- A. School Dist. of City of Pontiac v. Secretary of the U.S. Dept. of Educ., 109 LRP 65523 (6<sup>th</sup> Cir. 2009). The full panel of the Sixth Circuit split 8-8 on the issue of whether the suit brought by 9 school districts in 3 states and 10 education associations, along with the National Education Association should be dismissed. Thus, the Court issued an order affirming the decision of a Michigan district court to dismiss the lawsuit, where the district court had rejected the contention that the law prevents the U.S. Department of Education from requiring states and local school districts to conduct annual standardized testing unless the federal government provides 100% of the funding necessary to pay for the testing.

## **DISCRIMINATION UNDER SECTION 504/ADA**

- A. Ellenberg v. New Mexico Military Inst., 52 IDELR 181, 572 F.3d 815 (10<sup>th</sup> Cir. 2009). The district court correctly determined that 504 and IDEA have different requirements for establishing a disability. Having an IEP under the IDEA does not automatically establish a disability under Section 504 for purposes of claims of discrimination. Eligibility for special education and having an IEP demonstrate a child's disability, but that disability is not necessarily on that "substantially limits" the major life activity of learning. As a matter of law, therefore, Ellenberg cannot rely on the IDEA alone to make her prima facie discrimination claim under Section 504. Instead, she must offer evidence and arguments based upon that evidence showing her disability is substantial in the context of major life activity as a whole.
- B. Jenkins v. National Bd. of Medical Examiners, 38 NDLR 156 (6<sup>th</sup> Cir. 2009). Case is remanded to the district court to reconsider, under the 2008 ADA Amendments, whether the student with a diagnosed reading disorder is an individual with a disability. The district court's initial conclusion that the student is not disabled was based upon the Supreme Court's 2002 decision in Toyota Motor Manufacturing and the student's failure to demonstrate how his reading difficulties limited his ability to perform tasks central to most people's daily lives. Congress specifically rejected this standard in the 2008 ADA Amendments, noting that it too narrowly limited the analysis of who is disabled under the law. Thus, the change in the law has undermined the district court's holding and the court must make a fresh application of the law to the facts.
- C. T.M. v. San Francisco Unif. Sch. Dist., 53 IDELR 85 (N.D. Cal. 2009). Where the student's guardian did not allege that the placement was based "solely" on the student's disability and, rather, alleged that it was based upon race and disability, the district's motion to dismiss is granted. Section 504 states that a district cannot exclude a qualified individual with a disability "solely by reason of her or his disability." At least two other Circuit Courts have held that plaintiffs cannot pursue Section 504 claims based on multiple forms of discrimination.
- D. Jakubowski v. Christ Hospital, 39 NDLR 183 (S.D. Ohio 2009). Hospital did not discriminate against a medical resident diagnosed with Asperger's disorder who experienced communication problems with patients and hospital staff. After receiving the diagnosis of Asperger's, the resident sought three accommodations: for all hospital staff to be informed of his diagnosis and its implications; the provision of training and behavior modification therapy to him; and allowing him to stay in the residency program until his condition sufficiently improved. Rather than providing the requested accommodations, the hospital offered to find him a position in the pathology department, where less interaction is required. The resident's case under Section 504 and the ADA is dismissed because he has not provided sufficient evidence that he was otherwise qualified to treat patients and the hospital raised legitimate concerns that the resident could be a direct threat to

the patients, as clear communication was essential to effective patient treatment and safety. Moreover, the resident's requested accommodations are not reasonable because they do not account for patient care and safety and do not include a timeframe in which improvement would be made; nor is there any evidence that the accommodations would be effective.

- E. C.D. v. New York City Dept. of Educ., 52 IDELR 8 (S.D. N.Y. 2009). Section 504 claims may proceed under disparate impact theory that LD students were denied free breakfast and lunch by virtue of the fact that the school system could not provide them FAPE and was funding private school placement for the students. This could be denial of services that would otherwise be available but for their disabilities.
  
- F. Los Angeles County (CA) Office of Educ., 52 IDELR 108 (OCR 2009). Where district operates two self-contained sites exclusively for students with severe disabilities and those students have a 5-hour school day, it is discriminatory where the district's regular education schools have average school days of 6 to 7 hours. If a school system operates a facility that for individuals with disabilities, it must ensure that the facility and services and activities are comparable to the other facilities, services and activities of the entire school system. Although there are circumstances when students with disabilities must receive different educational services than their nondisabled peers, unnecessarily different services are discriminatory. There was no evidence that the district made any individual determination that the students placed there were unable to attend school for the number of minutes offered in schools that provide education to nondisabled students.

### **FERPA/CONFIDENTIALITY**

- A. Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist., 53 IDELR 2 (9<sup>th</sup> Cir. 2009). FERPA and the provisions of the IDEA regarding confidentiality do not bar a Protection and Advocacy agency from obtaining from school officials contact information for the parents/guardians of disabled students when the P&A agency has probable cause to believe the students are being abused or neglected. Although FERPA prevents the release of personally identifiable information without parental consent or a court order, the U.S. DOE and the U.S. Department of Health and Human Services have interpreted the Developmental Disabilities Act as creating a limited exception to FERPA. "The agencies stated that 'if a school or other facility could refuse to provide the name and contact information, it could interfere substantially with [a protection and advocacy agency's] investigation of abuse or neglect, thereby thwarting Congress' intent that [protection and advocacy agencies] act to protect vulnerable populations from abuse or neglect.'" In addition, P&A agencies are required to maintain the confidentiality of any student records they receive.