UPDATE FROM THE COURTS THAT COUNT: OCTOBER 2013/OCTOBER 2014

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ELIGIBILITY/EVALUATION

Caldwell ISD v. Joe P., 114 LRP 2869 (W.D. Tex. 2012); affirmed, 62 IDELR 192 (5th Cir., Jan. 6, 2014) (Unpublished)

Issue: Can a District provide a free appropriate public education ("FAPE") if the teachers are unaware of one of the student's disabilities, specifically a cortical visual impairment?

Result: No. Held for the Parents.

Summary: The student's diagnoses included cortical visual impairment, cerebral palsy, and attention deficit disorder. These conditions were the result of a medication error following the student's birth that caused a series of strokes, congestive heart failure, and loss of oxygen to the brain. The hearing officer had ruled that the District denied the student a FAPE, and the district court affirmed. The Fifth Circuit summarily affirmed the district court's ruling in favor of the parent.

The finding of a denial of FAPE was largely due to the finding by the court that the school district failed to take into account the student's cortical visual impairment. Moreover, the court found that the teachers were not aware of the visual impairment. The district court stated, "Even if CISD is completely correct in its assessment of L.P.'s underlying mental abilities, the Court finds there is simply no way CISD could provide an appropriate education when L.P.'s teachers were so ignorant of his visual disability."

Blunt *et.al.* v. Lower Merion School District, 64 IDELR 32 (3rd Cir., Sept. 12, 2014)

Issue: Was the overrepresentation of minority students in special education racial discrimination and segregation in violation of federal law?

Result: No. Held for the District.

Summary: The Plaintiffs included many African American students who were placed in remedial classes after being identified as Learning Disabled under the IDEA, in addition to the Concerned Black Parents of Mainline Inc., and the Mainline Branch of the NAACP. The dispute centered on whether African American students were deprived of appropriate educational services due to racial discrimination and segregation. The difference between the percentage of black students in the district and the percentage of black students in special education classes ranged from 5.7 to 6.6 percent over a five–year period. The Court acknowledged that the IDEA required the District to evaluate all students suspected of having disabilities, determine whether those students required special education, and develop appropriate IEPs for those students found eligible. Key Quote:

> If by following this mandate a school district should make a special education placement for a particular student, the school district should not decline to make

> the placement merely because the application of the mandate leads to students of a particular group being statistically overrepresented in special education grouping."

The District conducted individualized assessments of each student's needs, and completed "a thorough and individualized IEP process" for each student found eligible. The Court found no evidence that the District intended to discriminate against the Plaintiffs, and no deliberate indifference to discriminatory practices against African American students as a form of intentional discrimination.

INDEPENDENT EDUCATIONAL EVALUATIONS ("IEEs")

Jefferson Co. Bd. of Ed. v. Lolita S., 64 IDELR 34 (11th Cir., Sept. 11, 2014) (Unpublished)

Issue: Was the District's denial of an IEE proper?

Result: No. Held for the Parents.

Summary: The Parents requested an IEE. The District argued that the IEE request was improper because it failed to identify a specific disagreement with the District's evaluation. The regulations specifically state that "the public agency may not require the parent to provide an explanation." The District did not timely file a request for a due process hearing to defend its evaluation or challenge the IEE. Therefore, the Court ordered reimbursement for the IEE.

ADMISSION, REVIEW, AND DISMISSAL ("ARD") COMMITTEE MEETING[1] PROCEDURAL REQUIREMENTS

K.A. v. Fulton County School District, 62 IDELR 161 (11th Cir., Dec. 20, 2013)

Issue: Can a district make changes to an Individual Education Program ("IEP") at an ARD committee meeting without parental consent?

Result: Yes, provided that proper notice is given. Held for the District.

Summary: After repeating kindergarten in a combination of general education and special education classes, the ARD committee agreed to a similar placement for first grade. Once first grade started, the teachers soon reported that she was disruptive and having difficulty keeping up with the curriculum. At an ARD committee meeting, the ARD committee decided, over the Parents' objections, to amend the IEP to place the student in a "mildly intellectually disabled" program at a different elementary school. The Parents requested a due process hearing, and the student remained in her current placement under stay-put through the end of the school year. The Parents only challenged the District's procedure, not the substance of the IEP.

[1] "ARD committee" will be used throughout this handout in reference to any IEP team meeting.

Changes to an IEP that are made outside of an IEP Team meeting expressly require written parent consent. The court noted that no such requirement applies when the change is made at the IEP Team meeting.

Luo v. Baldwin Union Free Sch. Dist., 62 IDELR 162 (2nd Cir., Dec. 23, 2013) (Unpublished)

Issue: Is failure to provide an evaluation report to the Parents more than two days prior to an ARD committee meeting a procedural error resulting in a denial of FAPE?

Result: No. Held for the District.

Summary: The District provided the parent with an evaluation report two days prior to an ARD committee meeting. The parent fully participated in the meeting despite the timing of his receipt of the evaluation report. Further, the evaluator solicited the parent's responses as part of the evaluation process, the parent prepared written responses to the portions of the report to which he objected, and the parent actively participated in discussing the report during the meeting, which lasted twice as long as normal. The district court found no IDEA violation, and any missteps by the District in the procedures did not deny the student a FAPE, deprive the student of educational benefits, or unlawfully preclude the parent from participating in the decision-making process concerning his son's education. The circuit court summarily affirmed the decision of the district court.

Caldwell ISD v. Joe P., 114 LRP 2869 (W.D. Tex. 2012); affirmed, 62 IDELR 192 (5th Cir., Jan. 6, 2014) (Unpublished)

Issue: Can the lack of "cooperative, interactive decision-making" with a parent, result in a denial of FAPE?

Result: Yes. Held for the Parents.

Summary: In addition to finding the teachers to be unaware of the student's cortical visual impairment, the court also found procedural errors that resulted in a denial of FAPE. The court found that "L.P. was denied the procedural guarantees of cooperative, interactive decision-making in formulation of L.P.'s IEPs before the ARD committee." The court stated:

> Far from being collaborative, the relationship between the CISD members of the ARD committee, and L.P.'s mother, Diana P. (who was the parent-member of the ARD committee), plainly became completely distrustful and confrontational. The record, and the hearing officer's decision, are replete with instances of this deplorable breakdown…

Further, the court found that the district impeded communication with the Parents by blocking outside experts from having contact with teachers and administratively overturning IEP team decisions. Regarding this conduct, the district court stated:

> The Court finds it rather more than concerning; it is indicative of an adversarial position taken by CISD during the IEP process, a position which precluded L.P.'s parents from having participatory input in the development of L.P.'s IEPs. Diana P.'s presence at IEP meetings does not necessarily mean she was afforded meaningful participation. Although the Court cannot determine the precise point in time when relations completely deteriorated, there can be no doubt CISD personnel came to view Diana P. as an adversary, and began blocking communications with or access by outside experts she had contacted, out of apparent contemplation of a due process hearing and this lawsuit.

The court also found that the Superintendent overstepped his bounds. The court described the situation as follows:

> The Court further agrees with the hearings officer's finding regarding the manner in which CISD's superintendent usurped the decision-making process which by law belongs to the ARD committee. The fact the ARD committee overrode the superintendent's opinions on some matters in no way cures the fact the superintendent made the final decision in other instances. [] (CISD vision teacher's testimony that a consultation with TSBVI was rejected because "There was no educational need after a conversation with the superintendent and the principal.").

G.W. v. Rye City Sch. Dist., 62 IDELR 254 (2nd Cir., Feb. 11, 2014) (Unpublished)

Issue: Did the District failure to have representatives from the student's private school physically present at the ARD committee meeting result in a predetermination of the student's IEP?

Result: Not when the ARD committee considered the information the representatives offered by phone. Held for the District

Summary: The private school's IEP liaison and the child's science teacher from the private school participated in two ARD committee meetings by telephone. Additionally, the ARD committee incorporated many of the private school employees' suggestions into the IEP, and the ARD committee added ESY services based on the private school representatives' concerns about regression. Given the participation of the private school representatives, the district court held that the District did not predetermine the child's placement or services. The circuit court summarily adopted the district court's analysis in its entirety.

A.G. v. Paso Robles Joint Unified Sch. Dist., 63 IDELR 2 (9th Cir., March 12, 2014) (Unpublished)

Issue: Did the failure to have a general education teacher at an ARD committee meeting result in a denial of FAPE?

Result: No. Held for the District.

Summary: Although the court agreed that the general education teacher should have attended the ARD committee meeting, the court found this to be harmless error because the procedural violation did not result in the loss of an educational opportunity, seriously infringe the Parents' opportunity to participate in the IEP formulation process or cause a deprivation of education benefits.

R.L. v. Miami-Dade Co. Sch. Bd., 63 IDELR 182 (11th Cir., July 2, 2014)

Issue: Did the District predetermine the Student's placement?

Result: Yes. Held for the Student.

Summary: The Student was diagnosed at various times with Asperger Syndrome, Autism Spectrum Disorder, ADHD, and Gastroseophagel Reflux Disease. He experiences sensory overload when there is too much going on in his surrounding environment. The Student's symptoms of extreme fatigue, headaches, stomach aches, vomiting, muscle tics, and behavioral problems began in his last year of elementary school, where about 700 students attended. The Student's symptoms got worse the next year at the middle school where there were 1700 students. He did not progress much in the eighth grade.

Before the ARD committee met to discuss transition to the high school, which had 3600 students, the Parents made it clear that they strongly favored placement at a small magnet school, but the Parents had not followed the application process for the magnet school. A representative of the magnet school attended the ARD committee meeting. During the meeting, the Parents requested the magnet school. After a number of interruptions in the Parents' placement presentation, they complained that they had "not presented to the team yet," and asked for the opportunity to do so. "The Board representative running the meeting cut this conversation short, saying that the magnet school "was not an option that's on the table as far as [the District] is concerned. What our option is, is that he go to his home school." The ARD committee rejected placement at the magnet school and told the Parents that the Student would attend the high school and no other site would be considered. The Court said that ""This explicit statement that the Board was considering placement only at Palmetto Senior High School, and that bureaucratic policies precluded an alternative placement weighs strongly in favor of finding predetermination."

At a subsequent ARD committee meeting, after the Parents said that the Student would benefit from small inclusion classes, the District rejected the request, saying that the high school did not have any such classes and that "we're trying to create as much as we can within the limits of the school." The Court said that "This statement encapsulates the problem with predetermination – the Board relied on the limitations of the predetermined placement to dictate O.L.'s services."

The Student began attending the high school, but by the third day he had a moderate muscle tic and was vomiting. His symptoms continued to worsen, and the Parents withdrew him after eleven days to several hours per day of one-on-one instruction in the home with speech and OT. The District requested a hearing to determine whether the District's IEP was appropriate, and the Parents filed a cross-complaint. Key Quote:

> Predetermination occurs when the state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team…. The state cannot come into an IEP meeting with closed minds, having already decided material aspects of the child's educational program without parental input…. This is not to say that a state may not have any pre-formed opinions abut what is appropriate for a child's education. But any pre-formed opinion the state might have must not obstruct the parents' participation in the planning process. Parental participation must be more than a mere form; it must be meaningful.

The Court found that the transcript of the IEP meetings made it clear that the District entered the IEP meetings with a closed mind about where the Student would attend school and was unwilling to consider other options.

Marcus I. v. Dept. of Ed., State of Hawaii, 63 IDELR 245 (9th Cir., July 23, 2014) (Unpublished)

Issue: Did the alleged deficiencies in the District's Prior Written Notice impede the Parent's participation in the IEP process?

Result: No. Held for the District.

Summary: The Parent alleged that the District's Prior Written Notice did not sufficiently specify a formal placement offer; however, the Court found that the ARD committee's discussions were sufficient to put the Parent on notice of the proposed placement at the high school. The District convened the meeting at the high school that the Parent's other children attended. Only those teachers and staff members who worked at the school participated in the ARD committee meeting on the District's behalf. The committee discussed how to implement the Student's IEP at the high school. Safety concerns were discussed because the campus was not fully fenced, and the Student had attempted to run away from his private school on one occasion. Key Quotes:

> Procedural flaws do not automatically require a finding of a denial of FAPE…. Here, even if the May 16, 2008, prior written notice did not make a sufficiently specific formal placement offer, that procedural error did not significantly restrict Karen's ability to participate in the development of his educational program.

DISCIPLINE/RESTRAINT/FBAs and BIPs

F.L. v. New York City Dept. of Ed., 62 IDELR 191 (2nd Cir., Jan. 8, 2014) (Unpublished)

Issue: Does the failure to conduct an FBA automatically result in an inadequate BIP?

Result: No. Held for the District.

Summary: The ARD committee considered the student's behavioral concerns by reviewing extensive materials from the student's private school and recommendations from the private school teachers. The ARD committee then developed a BIP to address those behaviors, including a full-time 1:1 behavioral management paraprofessional. The court found that, in these circumstances, there is no basis to conclude that the ARD committee's failure to conduct its own FBA denied the student a FAPE.

C.F. by R.F. and G.F. v. New York City Dep't of Educ., 62 IDELR 281 (2d Cir., Mar. 4, 2014)

Issue: Does the lack of an FBA result in a denial of FAPE?

Result: Yes, when the resulting BIP in inadequate. Held for the Parents.

Summary: C.F. is an 11-year-old student with autism. His behaviors, including maladaptive and self-stimulatory behaviors, significantly interfered with learning. During the previous two years, C.F. attended a private school for children with autism, and received 1:1 Applied Behavioral Analysis ("ABA"). Prior to that, C.F. participated in a home-based 1:1 ABA program. When the family moved from New Jersey to New York, they sought an IEP and services from the public school. However, after the IEP was developed, the Parents rejected the IEP, and enrolled C.F. in a private school, and requested a due process hearing seeking reimbursement. The hearing officer and state review officer ("SRO") ruled in favor of the Parents and ordered reimbursement.

The court affirmed the hearing officer and SRO's ruling, and held that the district denied C.F. a FAPE, in part because the IEP lacked an appropriate BIP. The district did not conduct a FBA, and the court found that this, by itself, was not a violation of law. However, with regard to the BIP, the court stated:

> Here, we hold that the Department failed to adequately create and implement behavioral strategies in its behavioral intervention plan. The plan failed to match

> strategies with specific behaviors, instead simply listing behaviors and strategies. Department psychologist Check admitted that the plan was vague compared to standards in the field. The failure to produce an appropriate behavioral intervention plan was the procedural violation. The lack of a functional behavioral assessment is relevant only to the extent that it led to this failure.

Before the IHO, the Department offered evidence, based on testimony by Check and by special education teacher Silverman, that a functional behavioral assessment and more specific behavioral intervention plan would be created in C.F.'s placement classroom. However, such evidence cannot be offered retrospectively to cure errors in an IEP or its documents.

A.G. v. Paso Robles Joint Unified Sch. Dist., 63 IDELR 2 (9th Cir., March 12, 2014) (Unpublished)

Issue: Did the District fail to provide a FAPE by not providing a FBA and BIP?

Result: No. Held for the District.

Summary: At the time of the development of the challenged IEP, California law required the District to conduct an FBA and develop a BIP for any child who exhibited a "serious behavior problem" as defined to mean a pervasive behavior that is self-injurious, assaultive, or seriously damaging to property, and that the student's IEP had not been effective in treating. Although the child once held a pair of scissors to his throat and threatened to kill himself, the single incident did not amount to a pervasive behavior issue. The student's only pervasive behaviors were noncompliance and calling out in class. Further, the student made progress toward his IEP goals. The court found no need for an FBA and BIP.

Coleman v. Pottstown Sch. Dist., 64 IDELR 33 (3rd Cir., Sept. 15, 2014) (Unpublished)

Issue: Did the Student require an FBA when his behavior started to decline?

Result: No. Held for the District.

Summary: The Student's IEP contained a BIP on a generic form on which the Student's name was handwritten. Because the Student was "at risk for emotional problems" and exhibited behaviors that impeded his learning or that of others, the IEP provided thirty minutes of counseling each week, and stated that an FBA would be done if behavioral problems arose. During the school year, the Student exhibited disruptive behavior, but it was not severe enough to warrant anything beyond counseling as he was producing passing work. Further, according to the District's LSSP, the District believed that an FBA was unnecessary because the Student's behavior was the result of missing his family. Moreover, the Student's behavioral incidents did not result in any lost instructional time. However, the Parents' expert testified that an FBA and additional therapy sessions would allow the Student to learn more appropriate behaviors and coping skills.

The Court found that, although the Student's behavior did appear to decline over the course of two years such that an FBA may have been required prior to developing the next year's IEP, the issue was moot because of the Student's withdrawal prior to the school year.

FAPE/ SUFFICIENCY OF THE IEP

F.L. v. New York City Dept. of Ed., 62 IDELR 191 (2nd Cir., Jan. 8, 2014) (Unpublished)

Issue: Does a District's history of problems implementing related services for other students in the past, and the provision of 1:1 paraprofessional support within a classroom of six students, result in a denial of FAPE prior to implementation of a student's proposed IEP?

Result: No. Held for the District.

Summary: The student's IEP included daily OT and speech therapy on a one-to-one basis. The Parents argued that the school had a history of problems implementing such services as illustrated by the fact that 6.2 percent of the students at the school requiring speech therapy and 20.6 percent of students needing OT didn't receive those services in the school setting. The Parents rejected the proposed IEP and placed the student in a private school, alleging that the District failed to provide a FAPE.

The school's vice principal testified that the student's services would have been arranged through outside providers if necessary, and if outsider providers were unavailable, the school gave vouchers to secure services from private providers. The parents challenged this testimony as improper retrospective testimony. The court disagreed because this was not a case where the District was testifying that it would have provided services in addition to those listed in the IEP. Rather, the District's testimony "merely explains how [it] intended to satisfy the IEP's related services requirements." The court stated that speculation that a District won't adhere to a student's IEP isn't an appropriate basis for a unilateral placement.

Regarding the need for a 1:1 teaching ratio, the Parents believed that the student required a 1:1 teaching ratio. The District agreed that the student needed 1:1 support to make progress, but the District believed that the 1:1 support could be provided by a paraprofessional within a small group environment. Based on the recommendation of the school psychologist, the court found that it was not unreasonable to conclude that, with dedicated 1:1 support by a behavioral management paraprofessional, the student could make meaningful educational progress in a classroom with a 6:1:1 teaching ratio. *But see C.L. v. New York City Dept. of Ed. below…*

C.L. v. New York City Dept. of Ed., 62 IDELR 224 (2nd Cir., Jan. 27, 2014) (Unpublished)

Issue: Does a District's proposed provision of 1:1 paraprofessional support within a classroom of six students result in a denial of FAPE prior to implementation of a student's proposed IEP?

Result: Yes. Held for the Parents.

Summary: The Independent Hearing Officer ("IHO") ruled that the *District failed to demonstrate* that its proposed program, a 6:1:1 student-teacher-behavior management paraprofessional and other related services, would enable the student to learn new material. The State Review Officer ("SRO") reversed, focusing on the student's ability to functional in a group setting rather than his ability to learn. The district court disagreed with the SRO and ruled against the District. The circuit court summarily affirmed the decision of the district court and ordered the District to reimburse the Parents $125, 000 for the student's private placement.

C.F. by R.F. and G.F. v. New York City Dep't of Educ., 62 IDELR 281 (2d Cir., Mar. 4, 2014)

Issue: Must the written IEP contain all of the elements of FAPE, or is subsequent testimony of what the District would have provided sufficient?

Result: The IEP must contain all of the required elements. Held for the Parents.

Summary: C.F. is an 11-year-old student with autism. His behaviors, including maladaptive and self-stimulatory behaviors, significantly interfered with learning. During the previous two years, C.F. attended a private school for children with autism, and received 1:1 ABA. Prior to that, C.F. participated in a home-based 1:1 ABA program. When the family moved from New Jersey to New York, they sought an IEP and services from the public school. However, after the IEP was developed, the Parents rejected the IEP, and enrolled C.F. in a private school, and requested a due process hearing seeking reimbursement. The hearing officer and state review officer ("SRO") ruled in favor of the Parents and ordered reimbursement.

The court affirmed the hearing officer and SRO's ruling, and held that the district denied C.F. a FAPE, in part because the IEP lacked parent counseling and training, which was required under state law for students with autism, and failed to provide the 1:1 setting that witnesses overwhelmingly testified the student needed. With regard to the parent counseling and training, the court noted that the district cannot "cure such violations by offering testimony that counseling and training would have been offered."

A.G. v. Paso Robles Joint Unified Sch. Dist., 63 IDELR 2 (9th Cir., March 12, 2014) (Unpublished)

Issue: Does the IDEA require a statement of "quantifiable baselines" as part of the IEP?

Result: No. Held for the District.

Summary: The parent asserted that there was no way to measure progress or determine the receipt of a FAPE because the school did not identify a measurable baseline of the student's abilities. For example, the IEP stated that the student has "some difficult forming age

appropriate sentences," and "often" shouted out off-topic answers, but the IEP did not define "some" or "often." The court stated that "Although the IDEA requires 'a statement of measurable annual goals,' it does not require a statement of quantifiable baselines. Rather the IDEA requires baselines to contain 'a statement of the child's present levels of academic achievement and functional performance.'" Because the parent did not demonstrate that statement of PLAAFP was inaccurate, the student did not carry his burden to prove a denial of FAPE.

C.B. v. Garden Grove Unified Sch. Dist., 114 LRP 23998 (9th Cir., May 28, 2014) (Unpublished)

Issue: Did the District's alleged procedural flaws result in the denial of FAPE?

Result: No. Held for the District

Summary: The circuit court found the following:

> Any failure by the District to assess or set goals with regard to C.B.'s anxiety did not result in a denial of FAPE because the District's offer of placement adequately addressed C.B.'s anxiety through weekly counseling sessions and the opportunity to reevaluate after the District was able to observe C.B. in the new setting. Second, the lack of a specific goal for reading comprehension alone did not render the IEP inadequate, as the District was required to provide only some educational benefit, not necessarily the ideal or maximum benefit to that student. … Third, the baselines for C.B.'s goals in the IEP met the requirements of the IDEA… and provided sufficient information upon which to measure C.B.'s progress toward goals; any lack of greater specificity in the baselines did not amount to a denial of FAPE. Fourth, the lack of a designated section in the IEP listing accommodations did not result in the loss of an educational opportunity because the IEP team discussed and the IEP included (at least in the meeting notes) accommodations appropriate for C.B. Fifth, any inadequacies in the transition services portion of the IEP did not result in the denial of a FAPE because, in 2010, C.B. had several more years to receive services and work towards individualized transition goals.

The court also found that the District presented the placement offer during the ARD committee meeting after listening to the parent's preferred providers discuss the student's abilities and collaborating with those providers in developing individualized goals for the student, suggesting that District personnel had an open mind about the student's placement. The parent was not deprived of an opportunity to meaningfully participate in the IEP.

A.S. v. New York City Dept. of Ed., 63 IDELR 245 (2nd Cir., July 29, 2014) (Unpublished)

Issue: Was the District's choice of TEACCH rather than ABA a denial of FAPE?

Result: No. Held for the District.

Summary: The Student with autism attended a private school that implemented the Developmental, Individual Difference, Relationship ("DIR") methodology. The Student regressed in the program and was moved to public school, which used a collaborative team teaching ("CTT") method for one year. The ARD committee met and recommended a placement of six students, one teacher, and one aide in a classroom that used the Treatment and Education of Autistic and Communication Related handicapped Children ("TEACCH") methodology, which is a group teaching method similar to CTT. The Parents rejected the proposed placement, enrolled the Student in a private school, and requested a due process hearing asserting multiple procedural and substantive errors in the IEP.

The Parents argued that the TEACCH methodology was inappropriate and that the Student required a placement using Applied Behavior Analysis ("ABA"). The District's witnesses testified that TEACCH was an appropriate instructional method for the Student. The Court deferred to the District's educational authorities on the issue of methodology and found that "on this record it cannot be said that A.S. could only progress in an ABA program."

Jefferson Co. Bd. of Ed. v. Lolita S., 64 IDELR 34 (11th Cir., Sept. 11, 2014) (Unpublished)

Issue: Was the use of "stock goals," not designed to meet the needs of the Student in the areas of reading and transition services a denial of FAPE?

Result: Yes. Held for the Parent.

Summary: The Student's reading skills were assessed to be at the first-grade level; however, his reading goal "was derived from the state standard for ninth-grade students." "This goal was set without any evidence showing that M.S.' reading comprehension had increased from a first-grade level to a ninth-grade level during the prior school year." Further, the narratives for reading, math, and personal management in the IEP appeared with another child's name printed on the form, which was crossed out and replaced with M.S.' name on three different pages. Key Quote:

> The school's apparent use of boilerplate IEPs, with goals far above M.S.' reading level, indicate that the reading goals of M.S.' IEPs did not provide him with any educational benefits beyond those he would have received if he never had the IEPs.

The Court also found that the postsecondary goals and transition services fell below the FAPE standard. Though the IEP indicated that assessments were used to determine the Student's transition goals *(i.e.* checked box next to "Transition Planning Assessments"), the court found that no Transition Planning Assessment had been done. Further, the Student's postsecondary goals – "student will be prepared to participate in post-secondary education" – did not match

the Student's diploma track. The Student was not on a track for receiving a post-secondary education as he was unlikely to go to college. Therefore, the postsecondary goals and transition services in the Student's IEP were not created in compliance with the IDEA. Key Quote:

> M.S. received the same vocational and career-based training that the rest of his peers received, without any insight or determination as to whether that would be appropriate for M.S.

Coleman v. Pottstown Sch. Dist., 64 IDELR 33 (3rd Cir., Sept. 15, 2014) (Unpublished)

Issue: Was the Student's IEP designed to provide educational benefit when it contained minimal goals that did not address all areas of recognized need, there was minimal evidence of progress, and the Student did better in reading at a subsequent private school?

Result: Yes. Held for the District.

Summary: The District developed an IEP using school records from a prior District and the Student's performance during the first month of tenth grade. The Parents alleged that the District's failure to adopt each of the accommodations recommended by a prior District was a denial of FAPE. The Court disagreed and found that the District's accommodations were reasonably calculated to provide the Student with meaningful benefit.

The Student's identified areas of need included reading fluency, written expression, math calculation, and math reasoning, but the IEP provided a single measurable annual goal for reading, writing, and math. The Parents' expert testified that the IEPs were "among the most inadequate [she] had ever reviewed," and that there should have been additional goals for decoding, reading comprehension, writing, and math. The Court disagreed, finding that the District was not required to create "distinct measurable goals for each recognized need of a disabled student to provide a FAPE." While acknowledging that the District certainly could have been more comprehensive, the Court stated that the expert did not explain how the presence of additional goals was necessary to ensure the Student received a FAPE.

The Parents also alleged that the Student's documented progress in reading fluency alone was not sufficient for FAPE. Although the Court acknowledged that the record was "devoid of evidence" of the Student's progress in math and writing, the Court considered the fact that the Student received passing grades in his math and writing special education classes.

Finally, the Parents asserted that the District failed to account for the Student's individual potential since the Student's reading improved significantly in a private program once he left the District, but the private school focused only on reading. The Court found that "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date."

LEAST RESTRICTIVE ENVIRONMENT/PLACEMENT

S.M. v. Taconic Hills Central Sch. Dist., 62 IDELR 223 (2nd Cir., Jan. 30, 2014) (Unpublished)

Issue: Did the District's placement in a private school that was already full deny the student a FAPE?

Result: Not when the District was willing to implement an appropriate IEP within the District. Held for the District.

Summary: In June 2010, the ARD committee placed a student with autism in a private school whose roster was already full. The Parents declined to apply to the school based on this information and asked the District to continue implementing the student's IEP developed in January 2010, which was the pendency placement in an earlier due process hearing. The circuit court affirmed the district court's conclusion that despite the District's admitted procedural error, it did not deny the student a FAPE because the District was prepared to implement the student's January 2010 IEP. "[N]otwithstanding a May 28, 2010, letter in which [the District's] superintendent of schools stated that 'we are unable to provide an appropriate program for this student,' the record includes e-mails from the school principal on September 4 and 7, 2010, informing [the student] that [the District] was prepared by the first day of school, September 8, 2010, to implement the January IEP."

A.K. v. Gwinnett County School District, 62 IDELR 253 (11th Cir., Feb. 14, 2014) (Unpublished)

Issue: Is a District required to provide homebound placement in order for a student to take nutritional supplements in a "low-stress environment?"

Result: No. Held for the District.

Summary: On February 18, 2010, the parent informed the school district that "A.K. was taking nutritional supplements every forty-five minutes and requested that A.K. be provided home-based services for three months (the duration of the regimen) so that she could be provided the diet in a low-stress environment." The District offered to provide the diet at school, but agreed to the in-home services until the end of the school year. "When the parties met again on May 14, 2010, the District suggested extended school year services in the home and a switch to in-school placement for the 2010/2011 school year. A.K.'s Parents requested that in-home schooling be continued and rejected a modified plan that would place A.K. in school for two hours per day and in her home for three. After another meeting on August 13, 2010, A.K.'s Parents once again rejected the modified placement. E.K. then filed a second due process complaint."

The administrative law judge ("ALJ") and district court ruled in favor of the school district. The Circuit Court affirmed rulings by the ALJ and the district court in favor of the school

district and its proposed placement in the public school. The parent sought homebound placement so that the student could continue to take dietary supplements in a less stressful atmosphere. The court noted that this diet was "not prescribed by a medical doctor" that the student "does not have a life threatening condition and she is not under the regular care of a medical doctor. Most importantly, though, [the parent] presents no evidence that GCSD will be unable to adequately supply A.K. with her special diet."

T.M. v. Cornwall Central Sch. Dist., 63 IDELR 31 (2nd Cir., April 2, 2014)

Issue: Does the LRE requirement apply to Extended School Year ("ESY") programs?

Result: Yes. Held for the Parents.

Summary: In preschool, the student with autism was educated in mainstream general education classrooms. When he turned five years old, the ARD committee determined that he needed a twelve-month educational program, including ESY services, in order to prevent substantial regression in his development. The ARD committee recommended a mainstream kindergarten classroom. The ARD committee considered two ESY placement options, which were both special education classes because the District did not operate any mainstream summer programs. The Parents rejected the District's proposed ESY services, enrolled the student in a private mainstream summer program, and requested a due process hearing seeking reimbursement.

The hearing officer determined that the ESY placement was overly restrictive resulting in a denial of FAPE. The District appealed, and the SRO reversed, finding that the District did not have any summer programs for non-disabled students in which the student could be placed. The district court agreed, stating that the Parents had "not shown that a less-restrictive placement option was available to T.M. but not offered."

The circuit court applied the *Daniel R.R.* LRE analysis and found that there was no dispute that the student was able to achieve satisfactorily in a regular classroom. Nothing in the record indicated that the student would obtain greater educational benefits from a more restrictive setting. Therefore, the IEP violated the LRE requirement because it placed the student in a more restrictive educational setting for ESY that his disability required. The court rejected the District's argument that the LRE requirement should apply differently to ESY than the regular school year, and that the LRE requirement is limited in the ESY context by what programs the District already offers. The court stated, "Under the IDEA, a disabled student's least restrictive environment refers to the least restrictive educational setting consistent with that student's needs, not the least restrictive setting that the school district chooses to make available." "In order to comply with the LRE requirement, for the ESY component of a twelve-month educational program as for the school-year component, a school district must consider an appropriate continuum of alternative placements, and then must offer the student the least restrictive placement from that continuum that is appropriate for the student's disabilities."

The court stated that "the statute's focus is on the child's abilities, not the school district's existing programs." In summary,

> We therefore conclude the IDEA's LRE requirement is not strictly limited by the range of ESY programs that the school district chooses to offer. Instead, the LRE requirement applies in the same way to ESY placements as it does to school-year placements. To meet that requirement, a school district first must consider an appropriate continuum of alternative placements; it then must offer the disabled student the least restrictive placement from that continuum that is appropriate for his or her needs.
>
> Of course, a school district need not itself operate all of the different educational programs on this continuum of alternative placements. The continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools…. Instead, the school district may choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity.

C.B. v. Garden Grove Unified Sch. Dist., 114 LRP 23998 (9th Cir., May 28, 2014) (Unpublished)

Issue: Did a transfer placement into a special education class rather than general education, following three years of 1:1 instruction, comply with the LRE requirements?

Result: Yes. Held for the District.

Summary: The student spent the past three years receiving 1:1 instruction. The District had no indication that a large group setting would be appropriate, the District personnel had only one opportunity to observe the student before the June ARD committee meeting, and the placement was an interim placement. Therefore, the District's proposal was a FAPE in the LRE.

UNILATERAL PRIVATE PLACEMENT

C.L. v. Scarsdale Union Free Sch. Dist., 63 IDELR 1 (2nd Cir., Mar. 11, 2014)

Issue: When a District fails to identify a student for special education and provide a FAPE, is a private school inappropriate merely because the environment is more restrictive than the public school alternative?

Result: No. Held for the Parents.

Summary: The student was diagnosed with ADHD, nonverbal learning disability, and executive function weakness. He exhibited problems with anxiety, stuttering, fine motor

development, and visual motor coordination, all of which inhibited his ability to learn. In kindergarten, a Section 504 plan was developed, which provided weekly occupational therapy, speech therapy, and pre-reading instruction twice a week in the Learning Resources Center ("LRC"). In first grade the Section 504 plan increased the LRC time to four times per week and the OT to twice a week.

In second grade, the Section 504 plan continued the same services, but noted that although his reading had improved, his level of disfluency had increased to stuttering, and he had begun to exhibit anxiety. The Parents obtained a private psychoeducational evaluation, which identified the student's intellectual functioning in the Low Average range, and found that his language and executive functioning abilities were week and that his reading and math skills were also limited. The Section 504 committee reviewed the evaluation and noted that, although the student had made overall progress, the teacher corroborated the findings of the private evaluation. The Section 504 plan was amended to add 15 hours a classroom aide time per week to assist with organization and execution of writing tasks.

During the summer, the Parents obtained another private evaluation, which diagnosed dyspraxia, which caused weaknesses in attention, organization and sequencing; handwriting difficulties; language processing difficulties; and noted concern about emotional well-being and self-esteem. In October of third grade, the Section 504 committee met and made no changes to the plan. The Parents made a referral for a special education evaluation, which the District conducted. The District's speech evaluation showed consistent performance in the average to significantly above average range. The Stanford Diagnostic Reading Test resulted in scores in the 82nd, 92nd, and 43rd percentiles in phonetic analysis, vocabulary, and comprehension respectively. On the first administration of the Stanford Diagnostic Mathematics Test, the student scored in the 9th and 3rd percentiles in concepts and applications and in computations, but the test administrator believed the scores did not reflect the student's abilities because he was not concentrating. On the second administration a few days later, he obtained scores in the 38th and 84th percentiles. The ARD committee reviewed the FIE and found no eligibility under the IDEA, and recommended reducing the time in LRC to twice a week to address writing skills.

At the end of the year, the Parents withdrew the student and enrolled him in the Eagle Hill School, a private school for children with language-based learning disabilities, where he had an advisor who met with him daily to coordinate and oversee his academic program. The Eagle Hill School employs a diagnostic teaching model, and the student received a ratio of 3:1 in language arts tutorial class for two periods daily, and a 5-9:1 ratio in math, history, writing, literature, and modeling. The student made progress in all areas and became more active and enthusiastic over the school year and was better able to express his ideas and work independently.

The Parents then requested a due process hearing and requested reimbursement. The hearing officer found that at least by the third grade, if not before, the student was receiving such "a substantial array of test modifications, classroom accommodations, special education services

and related services" that the District was obligated to evaluate him under the IDEA and should have found eligibility. By failing to identify and develop an IEP, the District denied a FAPE. The hearing officer found the private school to be appropriate and ordered reimbursement.

The District appealed based on the lack of appropriateness of the private school due to LRE, but the District did not challenge the finding of a lack of FAPE. The SRO and district court reversed the decision of the IHO because the student made progress in the public school and did not require a special education environment like the Eagle Hill School, which provided no opportunity for the student to interact with nondisabled peers. The SRO and district court did not discuss any of the specific services provided at Eagle Hill other than to observe that the student was not receiving OT.

The circuit court held that, while the restrictiveness of a private placement is a factor in determining whether it is appropriate, it is "by no means dispositive." The court noted in a footnote:

> To be sure, there was substantial evidence in the record to support the SRO's conclusion that C.L. made progress [in the public school], including favorable test results and report cards. But overall, the results were decidedly mixed… Moreover, the progress that C.L. made [in the public school] was undoubtedly the result of the 'increasing amounts of special education services, programs, and accommodations' that he was receiving, including 'an aide for most of the day' and 'substantial 1:1 assistance from the regular education teacher.'

The court held that "Where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option." The court stated that "When the District determined – incorrectly – that C.L. was not entitled to special services under the IDEA, it was appropriate for the Parents to turn to a private placement."

S.L. v. Upland Unified Sch. Dist., 63 IDELR 32 (9th Cir., April 2, 2014)

Issue: Is a private school inappropriate if the school's services are not specially designed to address a student's intellectual disability?

Result: Not necessarily. Held for the Parents.

Summary: The student with an intellectual disability began attending kindergarten in the public school. The Parents became unhappy with the District's educational program and withdrew the student to a private parochial school, Our Lady of Assumption ("OLA"), where the Parent provided two 1:1 aides to assist the student. The Parents filed a due process hearing requesting reimbursement. The hearing officer found that the District denied a FAPE when it failed to comply with a previous settlement agreement's assessment requirements. The district court affirmed, and the District did not appeal this finding; however, the District appealed the

finding that the private school was appropriate. The District argued that, although the student received educational benefit from the aides provided by the parent, the private school did not provide the student with a sufficiently individualized educational benefit. The private school did provide instructional materials and curriculum, structure, support, and socialization, along with an accommodation plan under Section 504. The private school followed the state-approved curriculum, and the private aides followed that curriculum as presented by the classroom teacher. The court stated:

> [W]hile the placement at OLA was less than perfect, we are mindful that the [hearing officer] found the district denied S.L. a FAPE by failing to complete the agreed-upon assessments that were intended to ensure an appropriate placement for the 2007/2008 school year. The placement chosen by the mother, under these circumstances, was not unreasonable or inappropriate.

Ward v. Bd. of Ed. of the Enlarged City Sch. Dist. of Middletown, 63 IDELR 121 (2nd Cir., May 30, 2014) (Unpublished)

Issue: Was the Parent's private placement appropriate when it did not meet the unique disability-related needs of the Student?

Result: No. Held for the District.

Summary: The District recommended placement in the District; however, the Parent withdrew the Student to a private placement. The District revised its recommendation to home instruction pending placement in an approved residential facility "rather than futilely re-recommending continued placement [in the District] notwithstanding the reality of the circumstances with which the [ARD committee] was confronted…." The services in the District were consistent with the recommendations of a private evaluator, and the District's specialized curriculum had enabled the Student to achieve academic success and improve her behavior.

The Court found that the private school did not try to implement any new strategies to help the Student with her math deficiencies when prior strategies failed, and that the private school simply changed the Student to a lower math class rather than provide her with special instruction. The private school also failed to set goals for emotional regulation which was adversely affecting the Student's academic performance and interactions with others. Furthermore, the Learning Specialist at the private school testified that "we don't do behavior plans, that's not what we do here."

LIABILITY

Marquez v. Garnett, 63 IDELR 91 (5th Cir., May 6, 2014) (Unpublished)

Issue: Did the teacher's aide have qualified immunity when she allegedly engaged in assault causing bodily injury?

Result: Yes. Held for the paraprofessional.

Summary: C.M. was seven years old, severely autistic, physically disabled, and unable to speak. He required constant supervision in a special education classroom staffed by a teacher and three paraprofessionals, one of who was Garnett. The Plaintiff alleged that C.M. picked up a compact disc, belonging to Garnett, and began sliding the disc across the table. Garnett allegedly responded by cursing and yelling at C.M., grabbing him from behind in a forceful and frightening manner, shoving him to the side and repeatedly kicking him. Garnett was charged in state court with assault causing bodily injury, placed on administrative leave, and required to surrender her teaching certificate.

The parent sued Garnett, the Principal and the District asserting claims of assault and battery, negligence, intentional infliction of emotional distress, and Section 1983. This decision focused on the Section 1983 claims against Garnett alleging that, in assaulting C.M., Garnett deprived C.M. of his constitutionally recognized liberty interest to be free from abuse. Garnett asserted that she was entitled to qualified immunity. The district court found that Garnett's alleged conduct was not in furtherance of maintaining discipline, punishing C.M. for some kind of school related misconduct, or the legitimate goal of maintaining an atmosphere conducive to learning. The district court found that Garnett's alleged conduct violated C.M.s right to be free from bodily harm, which was a clearly established right. Therefore, the district court refused to dismiss the claim against Garnett on the basis of qualified immunity.

The circuit court reversed the decision of the district court. The court found that the student's sliding the CD across the table during class time, and Garnett's response, was in a pedagogical setting, and C.M.'s action was unwarranted. The court stated:

> The inference must be that Garnett acted to discipline C.M., even if she may have overacted. Because Marquez's pleadings demonstrate corporal punishment rather than a mere attack, the only remaining question is the sufficiency of state remedies…. Garnett was charged in state court with assault causing bodily injury, was placed on administrative leave, and was required to surrender her teaching certificate.

The court found that Garnett was entitled to qualified immunity.

SECTION 504/AMERICANS WITH DISABILITIES ACT ("ADA")

CTL v. Ashland School District, 62 IDELR 252 (7th Cir., Feb. 19, 2014)

Issue: Does any failure to follow a Section 504 plan result in disability discrimination?

Result: No. Held for the District.

Summary: The student has Type 1 diabetes, which is managed with an insulin pump, a personal diabetes manager, and a continuous glucose monitor. The Parents and District developed a Section 504 plan that incorporated the students' doctor's orders for how insulin doses and snacks were to be administered at school. The plan required the District to train three adult staff members as "Trained Diabetes Personnel," and train all staff who would interact with the student about diabetes and how to respond to certain situations. Prior to the student's first day of kindergarten, the District hired a LVN to perform the student's diabetes care. The Parents were mostly satisfied that school year, except they believed the LVN was the only staff member who had the proper training to be qualified as Trained Diabetes Personnel.

The next year, the District hired an RN to be the school-nurse supervisor. The RN refused to deviate from doctor's orders as the LVN had done, even though those orders appeared to allow some flexibility. The RN enlisted the support of the state agency, which agreed with the RN's interpretation of the state law, which required strict adherence to doctors' orders and did not allow school nurses to follow Parents' instructions.

The Parents filed a complaint with the Office for Civil Rights, arguing that the school violated the Section 504 plan by failing to have three Trained Diabetes Personnel (the LVN agreed with this allegation) and refusing to allow the LVN to adjust insulin doses on a case-by-case basis. They also accused the RN of obstinacy and failing to communicate with them the about the student's treatment. The complaint was resolved with a mediation agreement requiring training for three nurses and requiring the District to follow the Section 504 plan.

The Parents believed that there were twenty-seven additional violations of the Section 504 plan between January 25 and February 12. The Parents, concerned about the health care provided at the school, removed the student to a Catholic school "with no nurses or medically trained staff and no formal plan for diabetes care for him."

The Parents filed suit alleging intentional discrimination and a failure to accommodate the student's diabetes. The court affirmed a summary judgment in favor of the District. The court held that, even if true, the alleged minor violations of the Section 504 plan were not legally significant: "So, for 504 plan violations to constitute disability discrimination, they must be significant enough to effectively deny a disabled child the benefit of a public education." The court noted that "Ashland's actions in this case…do not come anywhere near this line." The court also found that "the school's refusal to deviate from the dosage calculator was not unreasonable, and there is insufficient evidence that it made [the student] unsafe. The [Parents] could have resolved the dispute by obtaining more flexible doctor's orders."

In analyzing the Section 504 educational requirements, the court cites to Weber v. Cranston Pub. Sch. Comm., 245 F. Supp. 2d 401, 406 (D.R.I. 2003) ("[Section 504] is a bludgeon to the

IDEA's stiletto, protecting a broader swath of the population without describing a precise manner of compliance.")

Lance v. Lewisville Ind. Sch. Dist., 62 IDELR 282 (5th Cir., Feb. 28, 2014)

Issue: Did the District act with gross professional misjudgment by failing to provide a student in special education the educational services necessary to satisfy Section 504's FAPE requirement? Was the District deliberately indifferent in response to a student's allegations of bullying?

Result: No. Held for the District.

Summary: The student qualified for special education services based on a speech impairment, ADHD, and eventually an Emotional Disturbance. His peers picked on him at school. Following one altercation, the student "stormed off and sat by himself at an empty table." Later in the day, a substitute teacher sent the student and a classmate to the office for talking and using profanity. The student met with the assistant principal. He was allowed to use the nurse's bathroom. After a significant amount of time passed, the nurse checked on the student, and he said "he'd be right out," but he soon stopped responding to the nurse's inquiries. After locating a key and unlocking the door, the nurse and custodian found the student hanging from his belt. The Parents sued the District.

The Parents first claimed that the District acted with gross professional misjudgment by failing to provide the student educational services necessary to satisfy Section 504's FAPE requirement. This "failure-to-provide" claim required the Parents to show that the District "refused to provide reasonable accommodations for the handicapped plaintiff to receive the full benefits of the school program." However, the Parents did not assert a denial of FAPE under the IDEA. The court held that the Parents "are required to allege a denial of a FAPE under IDEA to sustain a §504 claim based on the denial of a §504 FAPE because §504 FAPE regulations distinctly state that adopting a valid IEP is sufficient but not necessary to satisfy the §504 FAPE requirements. The court found that the District implemented an IEP developed in accordance with the IDEA. Therefore, the claim failed.

The Parents also claimed that the District discriminated against the student because it was deliberately indifferent to the disability-based harassment that he suffered at the hands of his classmates. In order to prevail, the Parents must show 1) he was an individual with a disability, 2) he was harassed based on his disability, 3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, 4) the District knew about the harassment, and 5) the District was deliberately indifferent to the harassment. The circuit court focused on the final element.

The court stated that "Section 504 does not require that schools eradicate each instance of bullying from their hallways to avoid liability." The court found that the summary judgment evidence as to alleged bullying incidents demonstrates that the District responded in a manner

that precludes a jury finding of deliberate indifference. In the two documented altercations, the District both investigated the incidents and punished all of the students involved. The evidence also showed the District's pattern of responding to other incidents involving the student and promoting his relationship with other students. Further the District's anti-bullying policies were "appropriate and up to national standards" according to the Parents' expert. The District provided training to its employees and students regarding bullying. Therefore, the court found that the District's response was not clearly unreasonable.

The Parents also alleged a claim based on a "state-created danger." The court found that "this case does not sustain a state-created danger claim, even assuming that theory's validity."

Estrada v. San Antonio Ind. Sch. Dist., 63 IDELR 213 (5th Cir., July 23, 2014) (Unpublished)

Issue: Did a District's failure to always provide a two-person transfer to the restroom support a finding of intentional discrimination?

Result: No. Held for the Student.

Summary: The Student had cerebral palsy and used a wheelchair. The District conducted 28 ARD committee meetings from pre-K – 12th grade for the Student. The Student graduated high school and subsequently attended college.

In 2006, a number of years before the facts arising in this lawsuit, a District employee sexually abused three other students with disabilities in a school restroom. The District announced orally, but not in writing, a new policy that two employees were required to be in a restroom with a student with a disability at all times. However, one person transfers still occasionally occurred when other aides were not available. One-person transfers were also described in the District's special education handbook.

The District assigned a particular aide, Jernigan, to assist the Student with restroom visits. Jernigan attended most of the Student's restroom visits with a coworker; however, sometimes no other adult was available, and Jernigan accompanied the Student alone. Jernigan molested the Student on three of these occasions.

The Student alleged that the failure to provide a two-person transport constitute intentional discrimination that allows for compensatory damages under the ADA. The Court disagreed.

The Student also alleged that the District grossly mismanaged his IEP in violation of Section 504. The Court cited to *Lance*, stating:

> To 'establish a claim for disability discrimination, in the education context, something more than a mere failure to provide the free appropriate education required by IDEA must be shown…. That 'something more' is evidence of bad faith or gross mismanagement.

The Court found that any procedural errors in the Student's IEP, including missing or incomplete items on the IEP, a failure to specifically denote that the needed two-person transfers, and "a deficient check-the-box" approach, "amount to, at worst, procedural defects. Such procedural defects 'alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity."

Shadie v. Hazleton Area Sch. Dist., 64 IDELR 35 (3rd Cir., Sept. 10, 2014) (Unpublished)

Issue: Did the District intentionally discriminate against the Student on the basis of disability?

Result: No. Held for the District.

Summary: A Student with autism and mild intellectual disabilities was enrolled in special education classes. He routinely had episodes in which he entered "shut down mode," during which he became largely nonresponsive to efforts at instruction or communication. During three incidents, a teacher's aide misguidedly tried to rouse the Student from "shut down mode" with inappropriate verbal commands and physical contact. During the first incident, she knocked the Student's feet off of his chair. In the second incident, she grabbed the Student by the arm, shook him, and yelled at him. The District officials immediately met with the Student's mother and his teachers the next day, and they resolved to investigate further and consider remedial action. Three days later, while the investigation was pending, the third incident occurred when the aide yelled at the Student, shook him, and struck him in the forehead with the palm of her hand. Following the third incident, the District transferred the aide to another classroom. The Court found no evidence that the District ignored or otherwise minimized the situation. Key Quote:

> That [the aide] had not been removed from the classroom prior to [the third incident], under these circumstances, rises at most to the level of 'negligence or bureaucratic inaction,' which is insufficient to establish deliberate indifference.

K.K. v. Pittsburgh Public Schools, 114 LRP 41205 (3rd Cir., Sept. 22, 2014) (Unpublished)

Issue: Did the District engage in intentional discrimination/deliberate indifference?

Result: No. Held for the District.

Summary: The Student participated in rigorous coursework in advanced subjects for gifted students. During her junior year of high school, she was diagnosed with gastroparesis, which required intermittent hospitalization. She was identified as a Section 504 student and received an Accommodation Plan. Subsequently, she was also diagnosed with an anxiety disorder. The District revised her Section 504 Plan and requested consent to evaluate under the IDEA, but the Parents would not give consent. The school social worker advised the Student of student-assistance programs and the services of a mental health liaison, which the Student declined.

The Parents also would not consent to release of confidential information for the District to talk to the Student's psychologist.

The Student began to retreat to the school library rather than going to class. She misled the library attendants into believing that she was permitted to do so under the liberal provisions of her Section 504 Plan. "School officials, who demonstrated considerable confusion as to who was responsible for monitoring K.K.'s progress under the Plan, did not recognize that K.K.'s in-class attendance had plummeted." The Student graduate 21st out of 336 students, and she attended a well-known university that fall. She finished her first year on academic probation, and she ultimately withdrew on a medical leave during her second year. The Parents requested a special education due process hearing, and the hearing officer found that the record did not support a finding of a denial of FAPE. On appeal, the Parents sought an award of compensatory damages, which requires proof of intentional discrimination/deliberate indifference. Key Quotes:

> Virtually every interaction between K.K.'s parents and school administrators resulted in express steps being taken with the goal of addressing the challenges presented by K.K.'s difficult and unusual circumstances. And several further measures affirmatively suggested by the District were not accepted by K.K. and her parents…."
>
> On the whole, the District's efforts provided K.K. with a meaningful opportunity to obtain passing marks in several of the school's most advanced courses and to maintain a scholastic record that led to enrollment in a prestigious university.

Robinson v. North Pocono Sch. Dist.t, 114 LRP 42637 (3rd Cir., Sept. 29, 2014) (Unpublished)

Issue: Was the District deliberately indifferent?

Result: No. Held for the District.

Summary: A twelve-year-old Student with legal blindness and osteopetrosis exhibited significant physical limitations, which were address through his IEP. During a mandatory bus evacuation drill, the Student attempted to seat himself on the floor of the bus at the cusp of the exit door and jump down to the ground, which resulted in a broken femur. The bus driver was not the Student's usual bus driver and had not been told about the Student's disabilities. The driver made no effort to ascertain whether any disabled or injured students should be excused from participation in the mandatory drill. He further violated the School Bus Driver's Manual by remaining seated at the front door of the bus during the drill instead of supervising the students' exit from the rear emergency exit door.

The Parents contended that the District evidenced such deliberate indifference to the safety of their son that it violated his right to be free from abusive government action that infringes the

liberty interest in personal bodily integrity, a violation of the Fourteenth Amendment's Due Process Clause. The Court found insufficient evidence of deliberate indifference because the District was reasonable entitled to expect that an experienced bus driver would comply with his obligations under the Manual. Further, there was no evidence that the District intentionally decided not to provide the driver with a list of students with special needs. The omission was "the product of a bureaucratic oversight, akin to mere negligence – which is insufficient to establish deliberate indifference."

LEGAL PROCEDURE/ATTORNEYS' FEES

G.W. v. Rye City Sch. Dist., 62 IDELR 254 (2nd Cir., Feb. 11, 2014) (Unpublished)
Issue: Are spoliation claims cognizable in the context of IDEA appeals?

Result: Unknown.

Summary: In regards to spoliation, sanctions may be imposed if: 1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; 2) the records were destroyed with a culpable state of mind; and 3) the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. Because the court concluded that there was no evidence in the record to support the Parents' spoliation claim, the court did not decide whether spoliation claims are cognizable in the context of IDEA appeals.

M.R. v. Ridley School District, 62 IDELR 251 (3rd Cir., Feb. 20, 2014)

Issue: Does the stay-put rule require the District to potentially pay for private placement during the pendency of all appeals, which could be many years, even if the District is found to have provided a FAPE?

Result: Yes. Held for the Parents.

Summary: The court holds that stay put applies during the pendency of all appellate proceedings. Key Quote:

> Having now considered the question, we agree with the Ninth Circuit—and the district court in this case—that the statutory language and the "protective purposes" of the stay-put provision lead to the conclusion that Congress intended stay-put placement to remain in effect through the final resolution of the dispute.
>
> We are not insensitive to the financial burden our decision will impose on school districts, or the seeming incongruity of the ultimately prevailing party having to pay for a now-rejected placement. Despite two judicial determinations that Ridley did not deny E.R. a FAPE, the school district will be assessed the cost of her private school placement for a substantial period of time. It is impossible,

> however, to protect a child's educational status quo without sometimes taxing school districts for private education costs that ultimately will be deemed unnecessary by a court. We see this not as "an absurd result," but as an unavoidable consequence of the balance Congress struck to ensure stability for a vulnerable group of children.

Comment: We now have a Circuit Court split on this issue. This court carefully explains why it disagrees with the decision of the D.C. Circuit in Andersen v. District of Columbia, 877 F.2d 1018 (D.C.Cir. 1989). To be clear about what is going on here, the hearing officer ruled in favor of the parent, which created a new "current educational placement." Thus the district was obligated to fund that placement under the stay-put rule. But the district argued that this obligation should end when the federal district court reversed the hearing officer and ruled in favor of the school. Here, the Circuit Court says that the obligation not only did not end at that point, it also continued while the parent appealed to the Circuit Court. And the Circuit Court also ruled in favor of the school—no denial of FAPE here. If the case is further appealed to the Supreme Court, the logic of this decision is that the school would still be on the hook for private school tuition. The "substantial period of time" referred to by the court is now three years and running. For three years the school has had to pay private school tuition for a student who was not deprived of FAPE. The court says this is not an absurd result.

R.A.G. v. Buffalo City Sch. Dist., 63 IDELR 152 (2nd Cir., June 17, 2014) (Unpublished)

Issue: Can a Parent proceed with class certification when the issue was not raised in a due process hearing?

Result: Yes. Held for the Parent.

Summary: The Parents alleged systemic failures in the District to implement supplemental services for students from the beginning of the school year as a matter of District policy; however, the Parents did not raise this issue at a due process hearing. The Court held that an exception to the exhaustion of administrative remedies requirement may be a case where the plaintiff alleges broad systemic violations. The Circuit Court upheld the District Court's class certification.