



*The National Academy for*

IDEA ADMINISTRATIVE LAW JUDGES AND IMPARTIAL HEARING OFFICERS

*Seattle University School of Law*

# 14th National Academy for IDEA Administrative Law Judges and Impartial Hearing Officers



Seattle University School of Law  
July 14-17, 2015



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## Seattle University School of Law

### 14<sup>th</sup> National IDEA Academy for Administrative Law Judges and Impartial Hearing Officers

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## Biographies of Presenters

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**Holly C. Almon, M.S., BCBA**  
**Assessment Specialist, Consultant**  
**blueprints**

24 Roy St., #434  
Seattle, WA 98109  
(206) 650-7951

[halmon@wcbblueprints.com](mailto:halmon@wcbblueprints.com)

Holly Almon is a Board Certified Behavior Analyst and Washington State Agency-Affiliated Counselor. She earned her Master of Science in Behavior Analysis from the University of North Texas. Holly has almost 20 years of experience in providing interventions to serve children with autism spectrum disorder and related disabilities, along with their families. Her experience also includes providing home and school based consultative services to children, families and school personnel, and managing her own private practice. Holly's passions as a practitioner include conducting multi-level assessments, teaching self-advocacy and pragmatic language skills, creating language programming and intervention for non-vocal students, developing strong functional assessments, and designing positive behavior support plans. Her depth of involvement and care is conveyed directly by her relationship with children and families as well as on a larger level by presenting her work at conferences at the local, national, and international level.

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**Bernadette House Bignon**  
**Senior Administrative Law Judge**  
**Oregon Office of Administrative Hearings**

7995 SW Mohawk St.  
Tualatin, OR 97062  
(503) 612-4296

[Bernadette.H.Bignon@oregon.gov](mailto:Bernadette.H.Bignon@oregon.gov)

Bernadette H. Bignon, currently a senior administrative law judge, is an active member of the Oregon State Bar and is an inactive member of the State Bar of Georgia. From her start as an intern and then as an assistant attorney general with Georgia's Department of Law, ALJ Bignon has worked the majority of her legal career in the public sector. After moving to Oregon, she became a municipal judge/justice of the peace, while raising kids, goats, llamas, and sundry other animals and hay in Oakridge. Next followed work in criminal prosecution and defense, before she started, in December 2000, in what was soon to be the Office of Administrative Hearings.

ALJ Bignon has presided over IDEA hearings since 2003, in addition to a mixed case load of the OAH's most complex hearing referrals. She has presented at legal education seminars on such topics as Conducting Hearings under the Administrative Procedures Act, Effective Communication with People who are Mentally Ill, The Nuts and Bolts of Administrative Law, Eliminating Socio-Economic Bias in Administrative Law – the ALJ's perspective, and as a panelist at the National IDEA Academy on "What Would You Do?" and "Practical Tips for New Hearing Officers," among others. She also authored

“Special Education Hearings and the OAH, A Good Idea” Oregon State Bar Administrative Law Newsletter, Vol. 12, No. 4 (Fall 2011).

**James D. Gerl****Scotti & Gerl**

216 South Jefferson Street

Lewisburg, WV 24901

(304) 645-7345

[jingerl@yahoo.com](mailto:jingerl@yahoo.com)

Blog: <http://specialeducationlawblog.blogspot.com/>

Jim Gerl is a lawyer, a special education law consultant, a trainer of hearing officers and mediators, a hearing officer, a mediator and a lawyer, and he is a frequent speaker on special education law topics. He is special education hearing officer and mediator for the West Virginia, Utah and Pennsylvania. He also was a hearing officer and mediator for special education cases in Washington DC for over two years. Jim serves as a consultant to a number of state education agencies, and he has trained hearing officers from all 50 states. He is also a hearing officer for the West Virginia Division of Rehabilitation, and he is engaged in the practice of law as a partner in the law firm of Scotti & Gerl.

Jim has presented at the hearing officer trainings at several national and regional trainings and at the National Association of Hearing Officials. Jim has served as a Faculty Advisor for the administrative law- fair hearing program offered at the National Judicial College. He has a law degree from the University of San Francisco, a Masters degree in public policy analysis from the University of Illinois- Chicago, and a BA from the University of Illinois at Urbana-Champaign. He is licensed to practice law in West Virginia, Illinois and Washington, DC.

**Carol J. Greta****Administrative Law Judge****Administrative Hearings Division**

Department of Inspections and Appeals

Wallace State Office Building

Des Moines, IA 50319

(515) 281-6065

[Carol.greta@dia.iowa.gov](mailto:Carol.greta@dia.iowa.gov)

After serving 12 years as general counsel to the Iowa Department of Education, Carol Greta was hired in October 2012 as an administrative law judge within the Appeals Division of the Iowa Department of Inspections and Appeals. In her present position, Carol hears appeals from the Departments of Transportation, Human Services, Natural Resources, Commerce, Workforce Development, Revenue, and Education.

In her 12 years at the Department of Education, Carol served as legal counsel for the State Board of Education, as well as for the agency's director, division administrators, and bureau chiefs. Her other

duties include serving as the Department's Administrative Law Judge, coordinator of administrative rules, and the Department's liaison to the governing boards of both the Iowa High School Athletic Association and the Iowa Girls High School Athletic Union.

A native of Iowa, Carol graduated from Forest City High School (1974), and obtained an A.A. degree from Waldorf College (1976), B.A. from the University of Iowa (1978), and J.D. from the University of Iowa College of Law (1981). Until the fall of 2000, she was in the private practice of law in Eldora and Newton, and was appointed Alternative District Associate Court Judge in Iowa Judicial District 5A, and presided over criminal, juvenile, and small claims court matters.

Carol is a member of the Iowa State Bar Association, the Iowa and National Associations of Administrative Law Judges, and is past president of the National Council of State Education Attorneys (NCOSEA).



### Christopher M. Henderson

Dussault Law Group

2722 Eastlake Ave. E.

Suite 200A

Seattle, WA 98102-3143

(206) 324-4300

[chrish@dussaultlaw.com](mailto:chrish@dussaultlaw.com)

Mr. Henderson was admitted to practice in the State of Washington in 2009. He received his undergraduate degree from Stanford University and his law degree from University of Washington School of Law, where he currently co-teaches the Disability Law course. Mr. Henderson's practice includes preparing appropriate planning and end-of-life documents; advising beneficiaries, professional fiduciaries and attorneys regarding settlements and trusts; advising individuals regarding guardianship, state and federal benefits, and special education; and representation of clients in related disputes or litigation.

Mr. Henderson's past experience includes academic work in disability rights and professional work in business and technology, in particular technology addressing the needs of those with disabilities. As Symposium Editor for the Washington Law Review, he worked closely with the late Professor and former EEOC Commissioner Paul Miller to bring together internationally renowned scholars in the field of disability law in a symposium culminating, *Framing Legal and Human Rights Strategies for Change: A Case Study of Disability Rights in Asia* 83 Wash. Law. Rev. 435 (2008).

Mr. Henderson has been an invited speaker on Guardianship, Medicaid, Elder Law, Special Education and Estate Planning issues to varied groups including other attorneys and a variety of advocacy groups and was named a Rising Star by SuperLawyers in 2014. He is a member of various county and state bar committees, where he has served in leadership positions. Mr. Henderson also serves on the Board of Alzheimer's Association, Western Washington Chapter, is on the Advisory Committee of Compassion & Choices of Washington, and was appointed by the Washington Department of Social and Health Services to serve on the State Alzheimer's Disease Working Group for 2014-2015. He lives in Seattle with his wife and their two children.



**Jose L. Martín**  
**Attorney at Law**  
**Richards Lindsay & Martin, LLP**  
13091 Pond Springs Road, Suite 300  
Austin, Texas 78729  
(512) 918-0051  
[jose@rlmedlaw.com](mailto:jose@rlmedlaw.com)

Jose Martin is a founding partner of Richards Lindsay & Martin, whose practice centers on disabilities law issues. In addition to litigation and consultation with public school districts, he has presented at local, regional, state and national in-services, seminars and conferences on special education law. He also serves as Contributing Editor for The Special Educator, a weekly newsletter, as well as Special Ed Connection, an online subscription publication.

Mr. Martin received his undergraduate and law degrees from the University of Texas at Austin. He previously worked with Henslee, Ryan and Groce, of Austin, Texas, and was employed at the University of Texas School of Law and the Texas Attorney General's Office. He has also authored articles on discipline issues under IDEA and Sec. 504, Sec. 504, OCR and other special education issues.



**Julie K. Waterstone**  
**Associate Dean for Experiential Learning**  
**Clinical Professor of Law**  
**Director, Children's Rights Clinic**  
**Southwestern Law School**  
3050 Wilshire Blvd., W-408  
Los Angeles, CA 90010  
(213) 738-5727  
[jwaterstone@swlaw.edu](mailto:jwaterstone@swlaw.edu)

In addition to directing the Children's Rights Clinic, which provides representation to children with disabilities in special education matters and children in school discipline proceedings, Professor Waterstone teaches a special education law seminar and writes on issues related to special education and school discipline. Prior to working at Southwestern, Professor Waterstone was a staff attorney at Public Counsel Law Center, where she provided legal assistance to parents in obtaining special education and related services for children with disabilities and represented children in school discipline proceedings. Before that, Professor Waterstone was a clinical professor at the University of Mississippi Law School, where she supervised law students in the Child Advocacy Clinic. Professor Waterstone began her legal career with the law firm of Milbank, Tweed, Hadley & McCloy, LLP, in Los Angeles, as a litigation associate in the area of business litigation.

Professor Waterstone earned her J.D. from Northwestern Law School and her B.A. in Law and Society from the University of California, Santa Barbara. She is a member of the California and Mississippi state bars.



**Mark C. Weber**  
**Vincent de Paul Professor of Law**  
**DePaul University College of Law**  
25 E. Jackson  
Chicago, IL 60604  
(312) 362-8808 (office)  
[mweber@depaul.edu](mailto:mweber@depaul.edu)

Mark C. Weber serves as Vincent DePaul Professor of Law at DePaul University. He is the author of *Special Education Law and Litigation Treatise* (LRP Pubs. 3d ed. 2008 & supps.), *Special Education Law Cases and Materials* (with Mawdsley and Redfield) (Lexis-Nexis 4th ed. 2013), *Disability Harassment* (NYU Press 2007), and *Understanding Disability Law* (Lexis-Nexis 2d ed. 2012). He was guest editor of the *Journal of Law and Education's* special issue on the thirtieth anniversary of *Board of Education v. Rowley* in 2012. Before joining the DePaul faculty, he conducted a clinical program at the University of Chicago Law School providing representation for parents of children with disabilities in special education cases.

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**For the National Academy for  
IDEA Administrative Law Judges and Impartial Hearing Officers**



**S. James Rosenfeld**  
**Distinguished Practitioner in Residence**  
**Seattle University School of Law**  
P.O. Box 222000, Sullivan Hall  
Seattle, WA 98122-1050  
(206) 922-3319  
[rosenfeld@seattleu.edu](mailto:rosenfeld@seattleu.edu)

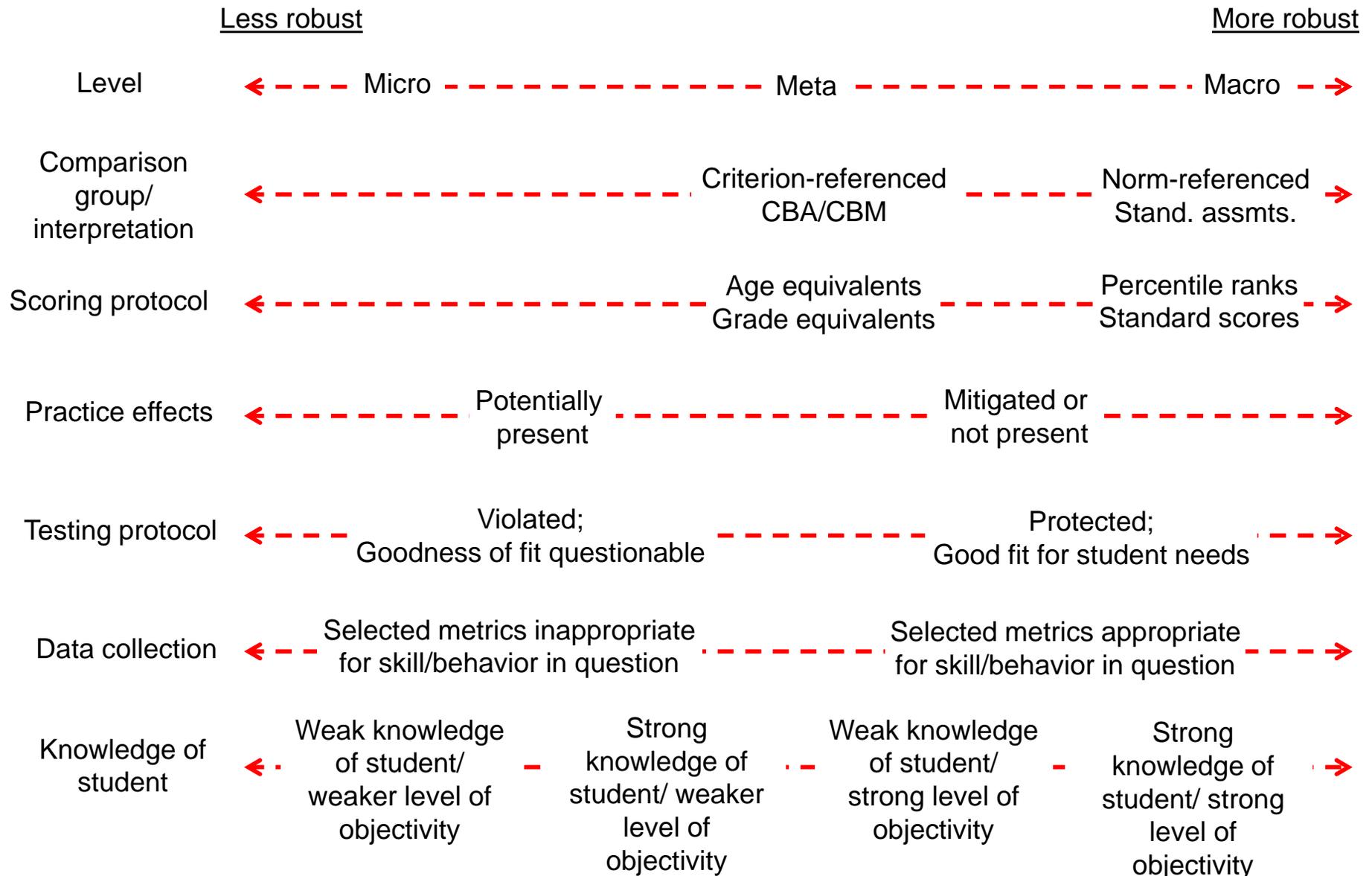
Jim joined the Law School in September 2001 as supervisor of the Special Education Clinical program until 2005. Thereafter, he served as Director of Continuing Legal Education until June 2009, following which he was appointed Distinguished Practitioner in Residence and became Director of Education Law Programs. In 2002, he established the National Academy of IDEA Administrative Law Judges and Hearing Officers, which has trained special education hearing officers from over 25 states.

Most recently, Jim drafted the feasibility study for the Washington State Office of the Education Ombuds on educational interpreter training and certification, "Providing Language Access Services for Limited English Proficient Parents in Washington Schools."

Previous activities include serving as Chair of the Special Education Section of the National Association of Administrative Law Judiciary (NAALJ). He is the founder of COPAA (The Council of Parent Attorneys and Advocates), established to improve the quality and increase the quantity of legal resources for parents of children with disabilities. In April 2002, Jim testified before the President's Commission on Excellence in Special Education. He also participated in the Monitoring Stakeholders Project convened by the U.S. Department of Education, Office of Special Education Programs (OSEP), to consider changes in OSEP's monitoring and compliance ("Focused Monitoring"). The Founding Managing Editor of EHLR (now IDELR, the *Individuals with Disabilities Education Law Report*), he has had a long interest in improving the IDEA hearing system and, in 1985, testified before Congress on suggested improvements.

**TAB 1**

## Beyond the Numbers ... Evaluating Assessment Features on a Continuum





**BEST PRACTICES IN ASSESSMENT: IMPLICATIONS FOR DETERMINATION**

Holly Almon,  
M.S., BCBA

Assessment Specialist,  
West Coast Behavioral Consultants, Inc.  
Seattle, WA

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**OUTLINE**

- **Critical assessment features and robustness of scoring**
  - Questions
  - Review types of assessments
  - Review types of scoring protocols
  - Answers
- **"Quality control" factors**
  - (Questions & Answers embedded)
  - Address other assessment-related "quality control" factors to incorporate into evaluation
    - Comparisons across assessments
    - Practice effects
    - Testing protocol
    - Appropriate data collection
    - "Knowing student best"

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**CRITICAL ASSESSMENT FEATURES/ ROBUST SCORING**

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# CRITICAL ASSESSMENT FEATURES

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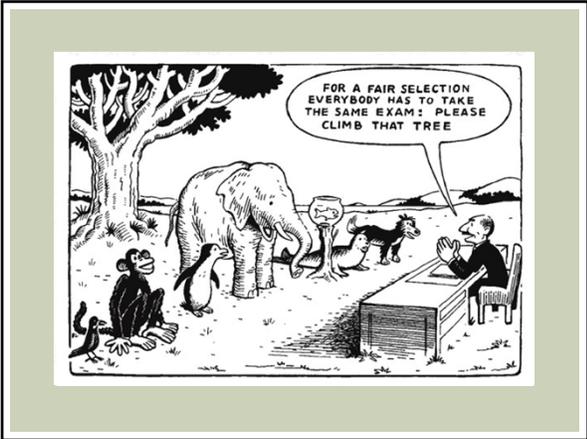
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### ASSESSMENT/SCORING QUESTIONS

- Assume that Racquel has particular academic goals and that her district and parents dispute the method of assessing Racquel's progress. The district wants to use curriculum-based assessment while the parents want to use standardized assessments.
  - What is the difference between the two types of assessments?
  - What are the potential pros/cons for using each type in assessing Racquel's progress on her goals?

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**ASSESSMENT/SCORING QUESTIONS**

- Assume the issue is Drew's progress relative to his peers.
  - What are pros and cons of using grade equivalencies v. other norm-referenced scores?
  - What does each score mean?

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**TYPES OF ASSESSMENTS**

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**PRIMARY DIFFERENTIATION**

- Macro v. meta v. micro level assessments →
  - differentiates frequency of assessment administration and
  - resulting depth/breadth of skills measured
- Norm-referenced v. criterion-referenced assessments →
  - refers to person/group to which results are compared and
  - resulting interpretation of assessment
- Curriculum-based assessment ("CBA")/measurement ("CBM") v. standardized assessments →
  - type of skill(s) being assessed and
  - resulting person/group to which results are compared

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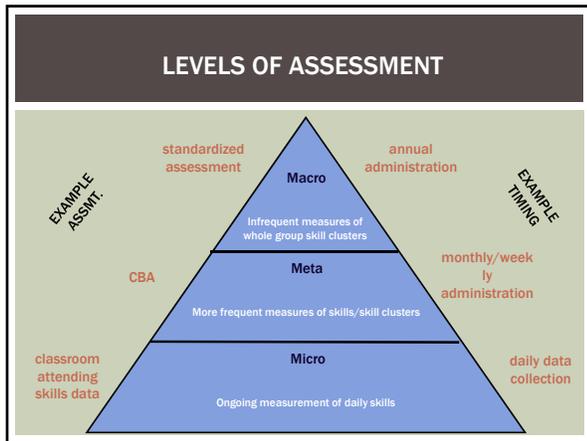
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### NORM-REFERENCED V. CRITERION-REFERENCED ASSESSMENTS

Dimension	Norm-referenced	Criterion-referenced
Purpose	To assess where student's performance falls in reference to same-aged peers	To determine if student has achieved particular skills over time
Question answered	Did the student answer more questions correctly than other students that completed the assessment?	How well did the student accurately answer the questions?
Skills assessed	Achievement across broad areas of knowledge	Achievement across particular skills/skill sets/curricula
Score comparison	To a larger group - others of same age/grade	To self
Administration bias	Have higher degrees of reliability and validity due to standardized administration procedures	May be subject to environmental and administrative differences
Measurement examples	Percentile ranks, standard scores, T-score, grade or age equivalent	Percentage of questions answered, rate of correct responses per minute
Strength of results	Items & scoring protocol empirically documented with research - hold more weight	Items and scoring protocol not usually empirically documented with research

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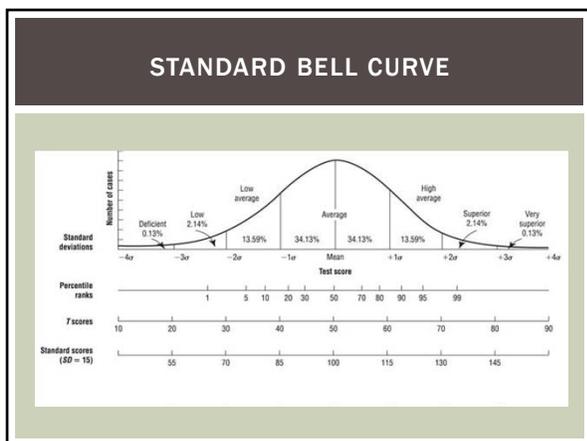
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### CBA/CBM

- CBA: the model of assessment that emphasizes a direct relationship to the student's curriculum
- CBM: the use of repeated measures from student's curriculum to assess growth/instructional effectiveness




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### CBA/CBM V. STANDARDIZED ASSESSMENT

Dimension	CBA/CBM	SA
Type of assessment interpretation	Criterion-referenced	Norm-referenced
Frequency of performance measurement	Continuous (e.g., weekly, monthly), repeated	Larger intervals (e.g., annual/semi-annual/quarterly)
Administration time	Quick (~2-5 minutes)	~20-60 minutes
Type of skills being measured	Primarily academic (words read per minute, subtraction facts)	Crosses developmental spectrum (social/behavioral, cognitive, functional living, academic, adaptive, etc.)
Skills measured against	Specific curriculum being taught	More broad, age-typical skill sets
Practice effects	May be present; often multiple copies of assessment exist to counteract frequent administration	Less likely to occur due to administration frequency
Robustness	Less robust due to lack of procedural and technical standards for administration	More robust: used for "higher stakes" decisions, due to meeting legal and acceptable professional and technical standards

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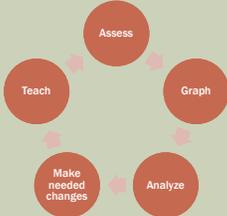
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### ASSESSING CBM PROGRESS/ LACK OF PROGRESS

- CBM allows for frequent assessment of progress
  - ...which results in frequent opportunities to make changes to curricula, teaching arrangement, intensity, etc.
- Therefore, a student should not go more than 2-3 administrations without either demonstrated progress OR a change ("intervention") should progress not be attained




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### PERCENTILE RANKS & STANDARD SCORES

- **Percentile ranks:**
  - range from 1 to 99
  - compare student's performance with other students at the same age or grade level
  - percentile rank of 50 is average and means that a student scored higher than 50 out of 100 same-aged peers
- **Standard scores:**
  - individual performance measure in comparison to same-aged or same-grade peers
  - more accurate measure of ability than grade or age equivalents
  - have a designated mean (average) of 100
  - occur in equal intervals (standard deviation); deviates in intervals of 15

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### STANDARD BELL CURVE

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### EXAMPLES

- Joey obtains a percentile rank of 30 on a social skills assessment →
  - Joey scored higher on that test than 30 out of 100 of his same-aged peers.
- On the Vineland Adaptive Behavior Scales assessment, Kaitlin scored in the 5<sup>th</sup> percentile in the communication domain →
  - Kaitlin scored higher in that domain than 5 out of 100 of her same-aged peers.
- Liam's broad independence score fell in the 67<sup>th</sup> percentile range on the Scales of Independent Behavior – Revised →
  - His score was higher than 67 out of 100 of his same-aged peers.

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### GRADE EQUIVALENCIES

- Grade-equivalent score
  - norm-referenced score
  - compares student's performance on grade-level material against the average performance of students at *other grade levels* on that same material
  - reported in terms of grade level and months
- GE scores are typically considered subordinate to percentile ranks; should be used sparingly

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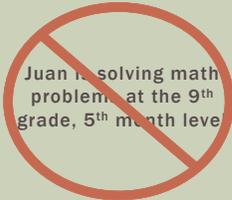
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### EXAMPLE

Juan, a 4<sup>th</sup> grader, achieves grade equivalent of "9.5" on standardized math test =



Juan is solving math problems at the 9<sup>th</sup> grade, 5<sup>th</sup> month level

OR

Juan is solving 4<sup>th</sup> grade math problems as well as the average student in the 9<sup>th</sup> grade, 5<sup>th</sup> month would solve 4<sup>th</sup> grade math problems

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### AGE EQUIVALENCIES

- Age-equivalent score:
  - norm-referenced score
  - indicates the age level at which the average person in the population performs at the same level as the individual who is being assessed
  - reported in terms of grade level and months
- AE scores are typically considered subordinate to percentile ranks; should be used sparingly

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**EXAMPLE**

- Marissa is 16 years, 3 months old, and performed at a level of 11 years, 9 months in the verbal comprehension scale of the Woodcock Johnson Tests of Cognitive Abilities →

**Marissa's raw score corresponds to the average raw score for individuals aged 11 years, 9 months in the standardization sample (representative of the general population)**

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**WARNINGS - AGE & GRADE EQUIVALENCIES**

- Be careful with conclusion of “\_\_\_ years’ growth” – children acquire skills in a year’s time much more rapidly in certain developmental areas/age groups than others
  - e.g., communication skills much more rapidly acquired between ages 2 to 3 than 10 to 11
- Small raw score point differences can result in large AE/GE score differences; relationship is erratic and depends on skills being assessed
- AE and GE are typically considered subordinate to percentile ranks; should be used sparingly
- Appropriate time to use AE or GE
  - To detect progress of students with severe or profound disabilities, or large discrepancies between chronological age and developmental age
  - Percentile rankings may not be sensitive enough to growth over time

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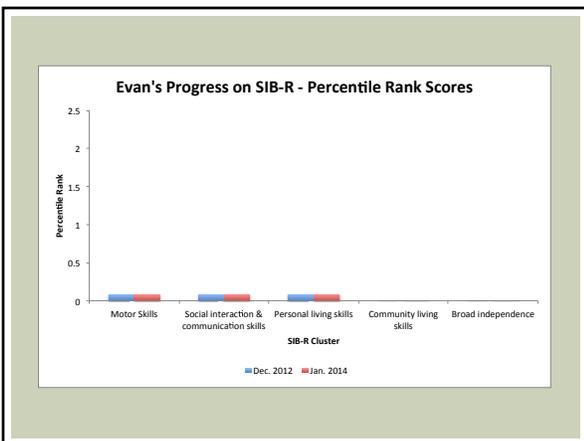
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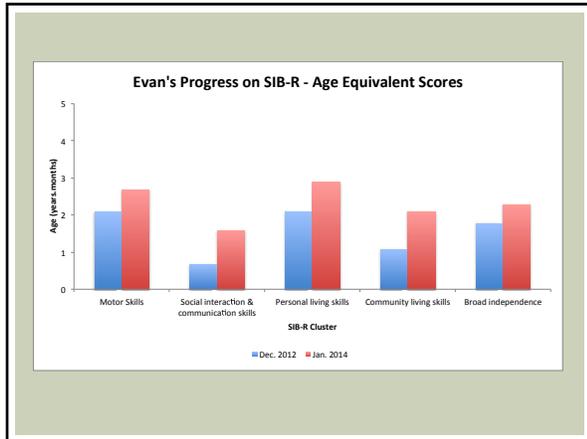
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**ASSESSMENT/SCORING ANSWERS**

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**QUALITY CONTROL FACTORS**

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**QUESTIONS**

- Will be addressed section by section
- Will cover:
  - Comparing results across assessments
  - Practice effect
  - Testing protocol
  - Appropriate data collection
  - "Knowing student best"/competing evaluations

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**COMPARISON ACROSS ASSESSMENTS**

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### COMPARISON ACROSS ASSESSMENTS: QUESTION

- Can comparisons be made on where a child scores on one standardized assessment v. another standardized assessment?

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### COMPARISON ACROSS ASSESSMENTS

- Relative comparisons can be made across some norm-referenced assessments, but not sound comparisons
  - E.g., Colton scored in the 21<sup>st</sup> percentile on the reading subtests of the *Woodcock Johnson Tests of Achievement*, but in the 35<sup>th</sup> percentile on the reading composite on the *Kaufman Test of Educational Achievement*.
- Have someone check assessment manual – it will mention any assessments that can be directly compared as supported through research
  - If questionable, call publisher
- Also consider other factors present at time of assessment contributing to difference in scores
  - E.g., assessor, time of day administered, level of focus

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**“PRACTICE EFFECT”**

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**PRACTICE EFFECT QUESTIONS**

- *What is the “practice effect”?*
- *What assessments might be affected by it?*
- *If so, what is the safe time between assessments?*

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**PRACTICE EFFECT**

- Gains in scores on assessments/tests that occur when a person is retested on the same instrument, or tested repeatedly on very similar ones
  - Gains are related to external factors related to test exposure (short test-retest interval) rather than actual growth in skill
- Confounds may be due to:
  - Familiarity with task/experience solving those exact tasks
    - Quicker response time (latency) may lead to higher score
    - Small number of test items/questions may lead to memorization of responses across assessment administrations, especially if administered frequently
  - Recall of strategies that worked during previous administration
  - Memory of test stimuli from previous tests



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**PRACTICE EFFECT**

- Research conducted on norm-referenced assessments should dictate appropriate amount of time between administrations
  - Common time frames:
    - 3 months
    - 6 months
    - 1 year
- Can mitigate by:
  - Reducing feedback provided during assessment
  - Using alternate forms when available (e.g., Woodcock-Johnson Tests of Achievement has 2 batteries "Form A" and "Form B")
  - Following publisher's recommended test-retest interval for specific assessment (they are variable)

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**PRACTICE EFFECT**

- "Know your learner!"
  - Do they have a strong aptitude for memorization of visual or auditory stimuli?
  - Are they prone to pick up on response patterns – whether appropriate or inappropriate - from previous exposure to identical material?
  - Etc.



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**TESTING PROTOCOL**

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**TESTING PROTOCOL QUESTIONS**

- *What is a protocol?*
  - *Do they vary for different assessments, and if so, how?*
  - *Why might they be important for various assessments?*
- *What should an ALJ/IHO be looking for and asking about in these protocols that might adversely affect the assessment results?*

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**TESTING PROTOCOL**

- **Test protocol:**
  - responses provided on an assessment, and corresponding explanations and interpretations related to the questions/responses
- Each protocol is unique to its own assessment
- Considered part of "educational record" once personally identifiable information is included




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**TESTING PROTOCOL CONCERNS**

- **Concerns re: protocol itself:**
  - Material/examples obsolete
  - Student's responses represent a valid estimate of their current ability (student usually knows \_\_\_\_; didn't show it, or v.v., therefore igniting concerns re: validity of test results)
    - Due to rapport, motivation, or other inaccuracy?
    - Did child understand what was being asked of him/her (language barriers)?
    - Unfamiliarity with formal test setting?
      - Level of distraction in testing environment?
    - Fatigue/illness/other physical factors present?
  - Match between evaluation of test performance (responses) v. educational recommendations made by members of IEP team
  - Appropriateness of response format (e.g., verbal or non-verbal)
  - Linguistic/cultural factors taken into account
- **Concerns re: sharing access to protocol:**
  - "Teaching to the test"
  - Sharing on larger scale across families
  - False interpretation by those other than trained professionals

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**TESTING PROTOCOL PRECAUTIONS**

- "Release" of testing protocol vs. "review" of testing protocols with parents/qualified professional (school psychologist)
  - Materials not directly related to child's protocol/record are exempt (testing manuals, materials, etc.)
- Release/review of testing protocols needs to be balanced with concerns of test security, copyright, laws, and test validity
- More often than not, school psychologist reviewing testing information with parents should teach and inform to the degree that testing protocols are "demystified" and requesting specific testing protocols is deemed unnecessary
  - *Proper communication between school/parents and implementation of best practices should prevent....*

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**APPROPRIATE DATA COLLECTION**

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Fine. Go ahead. Ask for actual data.



your e cards  
someecards.com

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**APPROPRIATE DATA COLLECTION:  
QUESTION**

- *Data are given so much emphasis today in determining and reporting on a student's progress. Granted, the goals will determine which data should be kept. But, what queries might an ALD/IHO make to determine whether the type and/or frequency of data collection is appropriate?*

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**APPROPRIATE DATA COLLECTION:  
FACTORS TO EXAMINE**

- Does test measure skill/behavior in a formal setting or a natural setting?
  - If natural setting → more representative, but unlikely to be standardized
    - Thus, can't soundly be compared to performance of same-aged peers to make judgments re: level of ability
- Is test qualitative or quantitative?
  - Generally, qualitative < quantitative
  - Semi-structured interview → introducing a third party
    - Pros: leads to conversation; respondent's responses are not controlled by scoring criteria; can often lead to more accurate descriptions of performance rather than being constrained by test question
    - Cons: inflation of ability based on individual's perspective or position; may be embellished or minimized depending on bias or feelings about student

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**APPROPRIATE DATA COLLECTION:  
FACTORS TO EXAMINE**

- Is the metric appropriate for the behavior/skill being measured?
  - Frequency
  - Percentage correct responses or opportunities
  - Duration
  - Latency
  - Percentage of intervals containing \_\_\_\_\_ behavior
- Are data sensitive to growth across time?
  - Collected frequently enough to detect change?
  - Collected and graphed in a way to facilitate data-based decision making and problem solving?




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**COMPETING EVALUATIONS/ "KNOWING STUDENT BEST"**

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**COMPETING EVALUATIONS: QUESTION**

- *Hearing officers are frequently faced with weighing "competing" evaluations – from school personnel, who usually have had far more "face time" with the student vs. one (or more) from independent evaluators, brought in by parents and with limited time (and potentially more narrow views) with the student. One consequence of this is the school's ability to contend that their personnel "know the student" "better" or "best," or what might be "in the student's best interest." What factors should a hearing officer consider/weigh in dealing with this contention and considering the respective evaluation data?*

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**COMPETING EVALUATIONS/ "KNOWING STUDENT BEST"**

- Consider objectivity vs. subjectivity of observer/assessor first
- Evaluating competing assessment results
  - Knowledge of and familiarity with student shouldn't play as large of a role if test is standardized
  - EXCEPTION: rapport between assessor & student
    - Properly trained assessors understand this as a critical component and will take measures to increase rapport before testing, or will report on lack of rapport as factor potentially impacting validity of results
- Evaluating competing recommendations for goals/treatment
  - Consider weight toward team member(s) able to best judge improvement in skill/behavior given context of where skill/behavior takes place
  - Consider weight toward team member(s) who have most frequent contact with skill/behavior
  - Consider weight toward team member(s) who are most greatly impacted by success or failure of this skill/behavior

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CLOSING THOUGHTS

- "In elementary or secondary education, a decision or characterization that will have a major impact on a test taker should not automatically be made on the basis of a single test score"
- *Standards for Educational and Psychological Measurement*  
- American Educational Research Association, the American Psychological Association, & the National Council on Measurement in Education



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**Beyond the Numbers ... Evaluating Assessment Features on a Continuum**

	Less robust	Meta	More robust
Level	← Micro	-----	Macro →
Comparison group/ interpretation	←	Criterion-referenced CBA/CBM	Norm-referenced Stand. assmts. →
Scoring protocol	←	Age equivalents Grade equivalents	Percentile ranks Standard scores →
Practice effects	←	Potentially present	Mitigated or not present →
Testing protocol	←	Violated; Goodness of fit questionable	Protected; Good fit for student needs →
Data collection	←	Selected metrics inappropriate for skill/behavior in question	Selected metrics appropriate for skill/behavior in question →
Knowledge of student	←	Weak knowledge of student/ weaker level of objectivity	Strong knowledge of student/ strong level of objectivity

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**TAB 2**

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## Allergies, § 504 Plans & the IDEA

Presented by:  
*Christopher M. Henderson*  
*Dussault Law Group*  
*(206) 324-4300*  
[ChrisH@dussaultlaw.com](mailto:ChrisH@dussaultlaw.com)

www.dussaultlaw.com

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## Roadmap

- I. Introduction: An Overview
  - A. Allergies
  - B. Rehabilitation Act of 1973, Section 504
  - C. Individuals with Disabilities Education Act ("IDEA")
  - D. Overlap between IDEA and Section 504
- II. District Fixes and Disputes
  - A. OSPI Guidelines
  - B. PDA
  - C. Issues
- III. How Allergy Issues Get to IDEA Hearing Officers
  - 1. How might it arrive directly
  - 2. As a related service
  - 3. IDEA's Requirements of Exhaustion of Procedural/Administrative Remedies

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## Allergies

- Note that when discussing severe allergies, we are generally discussing life-threatening anaphylaxis.
  - Can occur within seconds or minutes of exposure.
  - Symptoms include rash, nausea, vomiting, difficulty breathing, and shock.
  - Can result in unconsciousness or death.

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### Section 504 of the Rehabilitation Act of 1973

- Section 504 is a federal civil rights law designed to eliminate disability discrimination in programs and activities that receive federal funds.
- Denying a disabled student a FAPE constitutes disability discrimination.
- Uses the ADA definition of disability: “(1) a physical or mental impairment that *substantially limits a major life activity*; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 29 USC §705; 42 USC §12102(2)
  - Note that pursuant to the ADA Amendments Act (“ADAAA”), mitigating measures cannot be considered in determining whether an impairment is substantially limiting.
  - No impairment automatically results in Section 504 services, but impairments affecting the respiratory system is included under 34 CFR 104.3(j)(2)(i).

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### Section 504 Plan

- A Section 504 plan outlines the accommodations, aids, or services that a student with disability needs in order to use and fully participate in a free and appropriate public education.
- An individual health plan (IHP) or emergency/ nursing care plan may serve as a Section 504 Plan
- Enforcement: Office for Civil Rights reviews to ensure procedural requirements are complied with by the district. OCR can investigate School Districts and initiate proceedings to terminate federal financial assistance. 34 CFR § 100.8
- Section 504 Due Process Hearing: impartial hearing officer (not necessarily an ALJ)

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### Procedural Safeguards under § 504

- § 504 does not contain its own procedural safeguards, instead they are found in title VI of the Civil Rights Act of 1964.
- Title VI requires federal agencies and departments to promulgate rules and regulations for review
- Dept. of Education regulations require federal fund recipients to establish procedural safeguards, including an impartial hearing and a review procedure. See 34 CFR §104.36. It also provides that compliance with IDEA procedural safeguards is sufficient.
- Most states provide for review of §504 claims by a Hearing Officer, then review in federal or state court.

*M.J. v. Marion Independent School District*

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**IDEA Disability Overview**

- Disability is defined as: “a child (1) with intellectual disabilities, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, *other health impairments*, or specific learning disabilities; and (2) who by reason thereof, needs special education and *related services*.”
- Related Services includes many services, including school health services and school nurse services. *See* 20 USC § 1401(26); 34 CFR §300.34

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**IDEA Procedural Safeguards**

20 USC §1415 of IDEA: procedural safeguards provide for “an impartial due process hearing; the right for any party aggrieved by the hearing officer’s decision to bring a civil action with respect to the complaint presented in a federal court or state court of competent jurisdiction; and the ability of the court to review records from administrative proceedings, hear additional evidence, and issue a decision based on the preponderance of the evidence.”

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**IDEA & Section 504 Overlap**

20 USC § 1415(l) provides in relevant part:  
 “nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act..., title V of the Rehabilitation Act... *except that before filing of a civil action under such law seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*”

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Some Sample State & School District Policies on Allergies

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How Allergy Issues Get to IDEA Hearing Officers

1. How might it arrive directly
2. As a related service
3. Because of IDEA's requirements of Exhaustion of Procedural/Administrative Remedies

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Direct Claims:

*J.B. & T.B. o/b/o J.B., Jr. v. Manalapan-Englishtown Regional Board of Ed.*

- Petitioners sought relief with the Department of Ed., Office of Special Education Services.
- Dept. of Ed. then transmitted the claim to the Office of Administrative Law, where it was filed and scheduled for hearing.
- Section 504 claim for accommodation plan: Nurse aide to administer EpiPen on school Bus if student suffers reaction.
- ALJ compares the case to an IDEA claim for related services, noting that a student with allergies would fit that classification.

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### Direct Claim, Jurisdictional Issues

An ALJ, in a due process proceeding, lacks jurisdiction to resolve Section 504 or Section 504-related claims. *See Lodi Unified Sch. Dist. v. Parent*, CA OAH Case No. 2010040769  
\*footnote 2

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### Related Services

- “Among the categories of classification for Special Education and related services is “Other health impaired” and a student subject to severe allergies would seem appropriate for that classification.”
  - Note that this case was not brought under IDEA, but the ALJ thought reference to the IDEA was useful.

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### Exhaustion of IDEA Administrative Remedies

- Courts are divided on whether plaintiffs must exhaust IDEA administrative remedies:
  - Exhaustion of remedies required: 1<sup>st</sup> circuit; 2<sup>nd</sup> Circuit; 7<sup>th</sup> Circuit; 11<sup>th</sup> Circuit
  - If only seeking monetary damages (not available under IDEA), then exhaustion not required:
    - 3<sup>rd</sup> Circuit; 6<sup>th</sup> Circuit; 9<sup>th</sup> Circuit;

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**Exhausting Administrative Remedies - Required**

“Claims asserted under Section 504 and/or the ADA are subject to Section 1415(f)’s requirement that litigants exhaust the IDEA’s administrative procedures to obtain relief that is available under the IDEA before bringing suit under Section 504 and/or the ADA.” *Babicz by & Through Babicz v. School Bd.*, 135 F.3d 1420 (11<sup>th</sup> Cir. 1998)

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**Exhausting Administrative Remedies, Cont.**

- “When a plaintiff pleads Section 504 claims *in concert with IDEA claims*, requiring exhaustion of state administrative remedies is uncontroversial.” See *Weber v. Cranston Pub. Sch. Comm.*, 245 F. Supp.2d 401; *Charlie F. v. Board of Educ.*, 98 F.3d 989,991 (7<sup>th</sup> Cir. 1996)
- Exhaustion using IDEA procedures is required when plaintiffs make a claim that a student with disabilities was denied a FAPE. *Weber v. Cranston Pub. Sch. Comm.*, 245 F. Supp. 2d 401 (2013)

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# **Accommodating Allergies in Schools**

## **Background**

Generally, the context in which allergies arise in legal claims is only when those allergies are severe enough that exposure results in anaphylaxis: rash, nausea and difficulty breathing that can result in death if not treated rapidly. Treatment is often an epinephrine injection. Although this presentation applies equally to all allergies, a dramatic increase in the prevalence of food allergies over the past 20 years has resulting increased legal proceedings regarding these issues. Nonetheless, most allergies are not likely to qualify an individual for services under IDEA.

In order to qualify for services under IDEA, the claimed disability must require specially designed instruction to meet the unique needs resulting from the impairment to ensure access to the general curriculum. It is difficult to imagine an allergy that is likely to require the adaptation of content, methodology or delivery of instruction that is required under IDEA. So why discuss accommodating allergies at the National Academy for IDEA Administrative Law Judges and Impartial Hearing Officers? Because disputes involving allergies can make their way to an IDEA Hearing Officer in a variety of ways, and the increasing prevalence of students with severe allergies makes it likely that you will see more of these cases.

According to a 2013 study by the Centers for Disease Control and Prevention, food allergies increased nearly 50% from 1997 to 2011, and affects nearly 1 in 13 children under 18 years of age. In other words, most local educational agencies will have at least some children who have both an IEP *and* a food allergy. On average each classroom will have 1-2 students with an allergy that could be concerning. The result: there are in fact several ways allergies can and have come before hearing officers in IDEA proceedings. This is an opportunity to survey these circumstances and understand the legal issues raised under IDEA.

## **Section 504 and the IDEA**

To understand the fundamental jurisdictional issues to be addressed in these circumstances, we must first do a brief review of the most likely legal protections to be pursued for a student with a food allergy. Section 504 of the Rehabilitation of 1973 is the federal civil rights law designed to prevent discrimination in programs and activities that receive federal funds. Section 504 is broader than IDEA: it covers all discrimination and the definition of

disability doesn't require any educational impairment. A severe food allergy generally meets the definition of disability used by the act (the ADA definition: "(1) a physical or mental impairment that *substantially limits a major life activity*; (2) a record of such an impairment; or (3) being regarded as having such an impairment.") See 29 USC § 705; 42 USC §12102(1). Prior to the ADA Amendments Act, a student with a food allergy may not have been considered disabled, because of her ability to use measure to mitigate the impact of the disability. But the ADA definition mandates that mitigating measures not be considered in determining whether a condition results in a disability. Instead, one must show that the condition results in the claimed impairment. Conditions affecting the respiratory system are included as physical impairments under 34 CFR 104.3(j)(2)(i), and in most circumstances this is the definition under which a food allergy (resulting in anaphylaxis) would apply.

As a result, a student with a severe food allergy generally receives the protections of the ADA, state laws against discrimination and is specifically entitled to the safeguards against discrimination provided by Section 504: in an educational setting this includes accommodations, aids, and services in order to use and fully participate in a FAPE. Denying a disabled student Free Appropriate Public Education (FAPE). These protections are usually implemented with a written "504 Plan" outlining the accommodations, aids, and services to be provided. Like IDEA, the regulations implementing Section 504 require schools receiving federal funding to implement procedural safeguards to ensure students are given the opportunity for proper notice, examination of records, an impartial hearing, and a review procedure of their eligibility for Section 504 accommodations and the accommodations in place. See 34 CFR § 104.36. Under the applicable regulation, compliance with IDEA's procedural safeguards explicitly meets these requirements. Some states incorporate IDEA's procedural safeguards explicitly and some have separate safeguards. In some cases, a dispute is rooted in confusion about what the State's specific procedural safeguards are. See, e.g. *Weber v. Cranston*, 245 F. Supp. 2d 401 at 407-408.

It would seem that Section 504 would arguably be the statute of choice to ensure proper jurisdiction and a breadth of remedies for a student/parent bringing a claim that a school did not adequately accommodate for a student's allergies. However, if the claim can be brought as an IDEA claim, the student may be afforded better procedural protections. Moreover, if the relief requested is available under IDEA, the claim may have to be brought as an IDEA claim, as discussed in more detail below. In practice the issue may be moot in many states – IDEA

hearing officers are often authorized to hear Section 504 claims, and the Section 504 procedural safeguards are often implemented by reference to (and adoption of) IDEA's statutory and regulatory scheme.

IDEA procedural safeguards provide for more than just notice, right to examine records, an impartial hearing and a review procedure – by statute they add on the specific rights for any party aggrieved by the hearing officer's decision to bring a civil action with respect to the complaint presented in a federal court or state court of competent jurisdiction; and the ability of the court to review records from administrative proceedings, hear additional evidence, and issue a decision based on the preponderance of the evidence. Moreover, the federal regulations provide a specific details on how these safeguards are to be implemented – something unavailable under Section 504. Under the regulations an IDEA claimant is entitled to an impartial due process hearing; the right for any party aggrieved by the hearing officer's decision to bring a civil action with respect to the complaint presented in a federal court or state court of competent jurisdiction; and the ability of the court to review records from administrative proceedings, hear additional evidence, and issue a decision based on the preponderance of the evidence.

In addition to a distinction between the procedural safeguards available, of course, IDEA covers a much more specific topic than Section 504 - education. The IDEA definition of disability differs and applies only to those who by reason of a food allergy need special education and related services an unlikely group – and one for whom no published case law yet exists. However, there are a variety of circumstances in which food allergy claims legitimately come before the hearing officer, and how are they to be handled. The answer varies by how the claim is incorporated, and the circuit in which the hearing takes place. Claims may come indirectly as a 504 claim – for example if IDEA Hearing Officer is required by state law to adjudicate both types of claims, or where there is not clarity under state law; they may come as a claim for a related service under IDEA; or they may come as a result of IDEA's requirement that “that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [IDEA].” 20 USC 1415(l).

## **Direct Claims Under IDEA**

A review of case law revealed no cases of a successful claim and award under IDEA for a student whose sole claimed impairment was an allergy. Although students have attempted claims under IDEA, they typically face a jurisdictional hurdle to IDEA relief because the claimed impairment substantially limits a major life activity (the 504 definition), but does not require specially designed instruction to meet the unique needs resulting from the impairment – the IDEA definition. See, e.g. *Lodi Unified Sch. Dist. v. Parent*, California Office of Administrative Hearings, Case No. 20100404769 at footnote 2: “An ALJ, in a due process proceeding, lacks jurisdiction to resolve Section 504 or Section 504-related claims.” This is true even where the procedural protections for Section 504 are the procedural protections of IDEA (20 USC 1415) or the corresponding state law.

Where the two begin to overlap, hearing officers have expanded the reach of IDEA principles somewhat and analogized the protections which should be granted under 504 to those specifically provided for under IDEA. In so doing, rulings have shown promise for students who might bring an claim regarding their allergy accommodations where they have a separate disability qualifying them for the protections of IDEA.

## **Related Service**

In a New Jersey food allergy case brought under Section 504 of the Rehabilitation Act, a hearing officer noted a food allergy could qualify as “other health impairment” under IDEA and that transportation protections requested for a food allergy would be consider a “related service” under IDEA. See *J.B. & T.B. o/b/I J.B., Jr., Petitioners v Manalapan-Englishtown Regional Board of Education*, 2007 N.J. AGEN LEXIS 180. Relying on the analogy, the hearing officer determined that the 504 plan to be ordered was required to meet IDEA’s requirement that the student be “in the ‘least restrictive environment’ practicable to allow the student to mix with non-disabled peers.” *Id* at 15. Despite the apparently applicability of the IDEA concepts, the claim was still a 504 claim, and the relief provided was a 504 Plan. Nonetheless, the rationale behind the analogy mostly fits the structure of the underlying law.

It isn’t likely that the food allergy alone would in fact qualify as an “other health impairment” under IDEA. Unless the provision of education required exposure to the allergen in question, the mere existence of an allergy would not meet IDEA’s definition of disability.

However, there are contexts in which the related services covered would expand far beyond the transportation protections found in *J.B. v. Manalapan-Englishtown* would qualify as related services. Related services under IDEA include a long, and non-exhaustive, list of services from transportation to recreation to school health services. 34 CFR §300.320. There is little question that student with a food allergy is entitled to the protections of Section 504, because of the need to services to ensure her safety. The Department of Education explains that where a student “needs only *related services* to meet his or her educational needs as adequately as the needs of nondisabled individuals are met, the student is entitled [under Section 504] to those services even if the student is not eligible for special education and related services under the IDEA.” See *Questions and Answers on the ADA Amendments for Students with Disabilities Attending Public Elementary and Secondary Schools*, Office for Civil Rights, U.S. Department of Education, available at: <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>. Food allergy accommodations typically include.... All of these well within the settled definition of “related services” under *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 US 66 at 68 and *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 at 892-894.

Indeed related services are explicitly to be provided to enable the student to “participate in extracurricular and other nonacademic activities; and “participate with other children with disabilities and nondisabled children.” 34 CFR §300.320(a)(4). The protections necessary for a student with a severe food allergy to participate in various activities with other children should, in the context of a student who already has an Individualized Education Program (IEP), become a part of the IEP. Where a student with an IEP requires such services, they should be included in the IEP. Failure to incorporate them would result in an IEP in violation of 34 CFR §300.320; failure to create them is a substantive violation of IDEA ala *Garret* and *Tatro*.

To what extent, can an accommodation be considered a related service be provided? Courts grappling with this question have focused primarily on an analysis of the context with a healthy does of reason. Although costs or inconvenience alone clearly are not sufficient to relieve an educational agency of its obligation to provide a related service, some limitations as to reasonableness clearly apply. The DC Circuit expressed this analysis with clarity in *Petit v. USDE*:

An educational limit is not implied. It is imposed by the statute's context. For example, "transportation" is also listed as a related service. [20 USC

1401(26)(A).] The phrase is not expressly limited in any way. Surely, however, no plaintiff could argue that the IDEA unambiguously requires the relevant school district to provide his or her child with the best and most comfortable form of transportation to and from a specific school. Similarly, "psychological services" is listed as a related service, and it too is unqualified and unmodified. *Id.* But it seems to be at least ambiguous whether schools could ever be required to provide the full range of psychological services to children with disabilities, given the breadth of services available. One need only peruse the volumes of the *Psychological Review* and other materials published by the American Psychological Association to grasp this point. *Petit v. USDE*, 675 F.3d 769, 784 (D.C. Cir. 2012)

But the inverse also seems clear – where routine or mandated districts’ actions in one context include those that would, in another context, meet the requirements of a related service, it is reasonable for the district to provide such circumstances. A more thorough study of those factual scenarios (state and district policies, mandates and actions) follows below, and gives some insight into the *least* and educational agency might be required to provide under IDEA.

Another useful mode of considering the problem with such a dearth of case law, is to look at the reverse circumstance. What happens where a proposed accommodation or related service itself introduces common allergens into the school environment? Courts have been inconsistent on whether a student may introduce a common allergen to others in the form of a “related service” for themselves. For example, a service dog for a hearing impaired student was not found to be required, but a service dog for a student with CP was – under Section 504. See *Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 637, (E.D.N.Y. 2007); *Sullivan v. Vallejo City Unified School Dist.*, 731 F. Supp. 947, 962, (E.D. Cal. 1990). In both cases the Court considered the impact of the service dogs on other individuals who might have allergic reactions. The *Cave* court denied the request to bring the dog to the school at all; *Sullivan* granted the request, but left it to the IEP team to resolve whether placement needed to be adjusted to avoid an adverse impact on others with allergic reactions to the dog. The same cases demonstrate a similar division on whether IDEA exhaustion is required in a student request to use a service dog. The *Cave* Court found that a service dog was a related service under IDEA and therefore requires exhaustion; but the *Sullivan* Court noted that, properly construed, *Sullivan*’s claim was that whether or not the service dog is educationally necessary as a related service, the district had discriminated against her on the basis of her handicap by arbitrarily refusing her access if she is accompanied by her service dog.

## **Exhaustion Requirement**

By statute, IDEA is not to be construed to “restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act..., title V of the Rehabilitation Act... except that before filing of a civil action under such law seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” As a result of this requirement to exhaust IDEA’s administrative remedies, claimants may feel compelled to bring food allergy cases before an IDEA hearing officer where they might not otherwise wish to do so. However, these requirements are not as straightforward as they sound.

Courts attempting to determine whether claims are subject to exhaustion under IDEA have focused primarily on whether the claims are for injuries that can be redressed by IDEA’s administrative procedure. *See, e.g., Sagan v. Sumner County Bd. of Educ.*, 726 F. Supp. 2d 868 at 878 (M.D. Tenn. 2010); *Robb v. Bethel Sch. Dist. # 403*, 308 F.3d 1047, 1048 (9th Cir. 2002); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000). Often, this is framed as whether an injury is “educational” or “non-educational” based on “source and nature of the alleged injuries” in the complaint. *Padilla*, 233 F.3d at 1274. In making this determination, courts make an evaluation on a claim-by-claim basis – allowing them to distinguish those claims that are educationally-related from those that merely occur in on school grounds. Beyond that claim by claim analysis, however, the substance of review varies by circuit.

The 9th Circuit recently ruled En Banc that “IDEA’s exhaustion provision applies only in cases where the relief sought by a plaintiff in the pleadings is available under the IDEA. Non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA.” *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 871 (9th Cir. Wash. 2011). In other words, in the Ninth Circuit, a disabled student seeking redress for failure to comply with Section 504 vis-à-vis a food allergy could seek relief available under IDEA with all the benefits of IDEA’s procedural protections, but would be required to bring those claims to due process. If the same student sought relief not available under IDEA *and* the basis for the claim were another law, no exhaustion would be required. The *Sagan* court went so far as to say that it would be

useful to consider whether, if the plaintiff “were *not* a disabled student, there would be no administrative barrier to her pursuit of these claims” (emphasis in original). *Sagan* at 878.

These more recent decisions are consistent with the history of both rulings and the apparent intent of 1415 in the first place, which have noted that the determination of whether exhaustion under IDEA is require must consider the following:

(1) it would be futile to use the due process procedures ...; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)....

*Hoefl v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303-04 (9th Cir.1992) (emphasis omitted) (citing H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)).

Courts have also been reluctant to require exhaustion where students have sought damages for past physical injuries and emotional distress that occurred in schools – even where the claim is in part based on a food allergy. In *Witte v. Clark County School District*, tort allegations against the district included force-feeding a student oatmeal when he was allergic to it, among other things. 197 F.3d 1271, 1273 (9th Cir. 1999). The Ninth Circuit held the student’s claims of physical abuse and injuries did not have to be exhausted because these injuries were non-educational and other educational issues had been resolved through IEP process. *Id.* at 1276. Although the record in *Witte* indicates that the teacher knew of the food allergy, it is unclear from the record whether the student’s allergy was addressed in his IEP or in a 504 Plan. But similar cases have shown that even claims rooted in the specific disability for which the IEP was created needn’t be brought through due process if the injuries were not educational in nature and the IDEA does not provide a remedy for the harm. See, e.g. *McCormick v. Waukegan Sch. Dist. # 60*, 374 F.3d 564, 566-9 (7th Cir. 2004) (Student with Muscular Dystrophy injured by over-exertion. Injuries were non-educational in nature and the IDEA did not provide a remedy for his injuries because he was seeking a remedy for *past* physical and emotional harm.) Similarly, discrimination claims have been found not to require generally require IDEA exhaustion. For example, in *M.P.*, a student’s claims arose after the school nurse disclosed the student’s mental health disability, which led to other students verbally and physically harassing him. *M.P. v. Independent Sch. Dist. No. 721*, 439 F.3d 865, 866 (8th Cir. 2006). The Eighth Circuit held the school district’s failure to protect the student from

unlawful discrimination based on disability under Section 504 is a claim wholly unrelated to the IEP process, and did not require exhaustion. *Id.* at 868. *See also Witte*, 197 F.3d at 1275-76 (ADA and Rehabilitation Act claims related to physical, psychological and verbal abuse did not have to be exhausted under the IDEA).

The Tenth Circuit reached a similar conclusion in *Padilla*. In this case, a student placed in windowless closet and restrained in a stroller without supervision tipped over and hit her head, resulting in a skull fracture and exacerbation of seizure disorder. *Padilla*, 233 F.3d at 1271. She could not attend school the rest of the year and the district failed to provide any homeschooling. *Id.* The student's mother filed an ADA complaint for damages for excluding her child from participation in publicly funded general education and special education programs based on her disability. *Id.* The Tenth Circuit held that where the complaint was limited to redress for past harm for injuries, no exhaustion under IDEA was required. *Id.* at 1274-75. This is an interesting outcome given the availability of compensatory education under IDEA. The rationale, of course, is that any "compensatory education" that would have been due in *Padilla* would not have been the result of improperly determined or implemented educational programming, but for lost time due to injury.

### **Status of the Circuits on Exhaustion**

The circuits are not consistent in this regard however; the 11<sup>th</sup> Circuit in particular has taken a much stronger position that exhaustion is often required. In *Babicz by & Through Babicz v. School Bd.*, the Court found that a student who did not have an IEP but did require services of the type that would be "related services" under IDEA was required to pursue relief through due process. *See Babicz*, 135 F.3d 1420 (11<sup>th</sup> Cir. 1998) ("Claims asserted under Section 504 and/or the ADA are subject to Section 1415(f)'s requirement that litigants exhaust the IDEA's administrative procedures to obtain relief that is available under the IDEA before bringing suit under Section 504 and/or the ADA." ... "We find the Babicz' argument that they do not fit within the ambit of IDEA as they do not require 'special education and related services' as a result of their disabilities, just 'related services,' to be meritless." *Id.* at 1422, footnote 10 and 1420, respectively. In contrast, the 3<sup>rd</sup>, 6<sup>th</sup> and 9<sup>th</sup> Circuits make it easy: if the Plaintiff is only seeking monetary damages, which are not available under IDEA, then exhaustion of remedies is not required. *See, e.g. W.B. v. Matula*, 67 F.3d 484, 495-96 (3d Cir.

1995); *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000); *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999). In the 2<sup>nd</sup> Circuit the court will evaluate whether a claim could be redrafted to obtain relief under IDEA and if so, require exhaustion. *See Cave* at 247-48. But the 8<sup>th</sup> circuit is much more lenient - even when a plaintiff's IDEA claim would fail for lack of jurisdiction (and even where not claimed by the plaintiff), a Section 504 claim may still be considered. *See M.P. v. Indep. Sch. Dist. No. 721*, 439 F.3d 865, 867-68 (8th Cir. 2006).

### **What Does This Mean for the Hearing Officer**

First, all of the above means it is unlikely that you'll review a straightforward claim for a denial of FAPE under IDEA due solely to a student's allergy, despite their increasing prevalence. Instead, you'll more likely see one of the following: 1. Strict 504 claims, brought because your state utilizes the same process and hearing officers to hear these cases; 2. IDEA claims brought for a student with a separate qualifying disability but who is being restricted (perhaps constructively) access to the general and disabled student population due to a claimed insufficiency in allergy accommodating related services; or claims brought due solely to a concern that they *must* be exhausted under IDEA, even though the claim is stated in terms of the another statute. In the first claim, the hearing officer needs only to make the ruling under the applicable (non-IDEA statute). Claims brought under the third scenario may be brought for strategic reasons – if they are disposed on because they do not request relief available under IDEA, or the accommodations were not part of the discussed IEP, the litigant still wins – her goal is likely to exhaust her remedies under IDEA leaving her able to pursue the 504 or ADA claim in another venue. More challenging is the second (and probably most frequent) case – when the hearing officer must determine, based on the ruling in *Tatro* and confirmed in *Garret* whether the school has met its obligations to provide related services. As noted above,

### **State Policies**

The state and district policies, mandates and actions follows below, and gives some insight into the *least* and educational agency might be required to provide under IDEA. A brief summation of the law on related services as it relates to allergy accommodations is discussed above. It may be relevant to consider the state and local recommendations, standards, policies and laws regarding allergy accommodations to determine whether a particular requested

accommodation is required. As discussed above, these at least provide a backstop of the *least* an educational agency is required to provide.<sup>1</sup> To that end, we will close with a summary view of these recommendations, standards, policies and laws across select states.

### Select State Standards, Policies and Laws

A common treatment for allergies that result in anaphylaxis is the injection of epinephrine with a device commonly referred to as an “Epi-Pen.” Because of the prevalence of Epi-Pens as treatment devices, many states have passed laws regarding their use. Attached is the Network for Public Health Law’s Summary Matrix of State Laws Addressing Epi-Pen Use in Schools. Almost all states permit students to possess and self-administer an Epi-Pen if needed, require a written physician authorization, and waive liability for the person administering the medication. Most also provide for an individualized written treatment plan, school nurse administration, and even administration by another staff member. For citations and links to the applicable statutes in particular states, see the attachment.

A review of several states policies yield several commonalities.<sup>2</sup> Among the most common are the following:

- Establishing effective cleaning and sanitation procedures
- Promoting hand-washing
- Prohibiting meal/snack swapping, utensil swapping among students, and eating on school transportation.

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<sup>1</sup> But an indication that a particular accommodation has not previously been provided cannot be the basis for claiming that an accommodation or related service is unnecessary. *See, e.g. Garret.*

<sup>2</sup> Many state government have publicly available materials on best practices in handling allergies for all schools within their state. Portions of the preventative measures to be taken are sometimes identical verbatim between multiple states, indicating broad agreement. The measures cited herein are specifically taken from the Rhode Island, Pennsylvania, Arizona, Missouri and Washington State guides, for example, available at:

[http://www.thriveri.org/documents/Peanut\\_Allergy\\_Law\\_Guidance\\_Documents%20revised%202012.pdf](http://www.thriveri.org/documents/Peanut_Allergy_Law_Guidance_Documents%20revised%202012.pdf)  
<http://www.pears.ed.state.pa.us/forms/files/PDE032i.pdf>,  
<http://www.azed.gov/health-nutrition/files/2011/06/special-dietary-needs-manual-sept-2011.pdf>,  
[http://health.mo.gov/living/families/schoolhealth/pdf/mo\\_allergy\\_manual.pdf](http://health.mo.gov/living/families/schoolhealth/pdf/mo_allergy_manual.pdf), and  
<http://www.k12.wa.us/HealthServices/pubdocs/GuidelinesforCareofStudentswithAnaphylaxis2009.pdf>,  
respectively.

- Creating reduced allergen zones in classrooms, lunch rooms and other common spaces
- Training staff and implementing strategies to make sure that these students are always with at least one staff member who knows how to respond in an anaphylactic emergency.
- Plan for celebrations and special events (birthdays, school parties, holidays, and other school events) that may include alternatives to food for celebrations, provisions for allergy-free foods for celebrations, etc.
- Include in plan for fire drills, lockdowns, or shelter in place, considerations for access to medications or allergy-free foods, etc.
- Systematically identify and remove insect nests on or near school grounds before school starts and periodically throughout the school year.

It less common, but not unusual, for school/state policies to include the following:

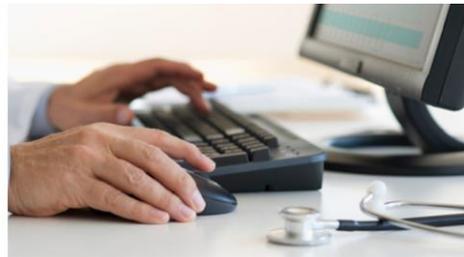
- Excluding foods from the school altogether if an allergy issue arises or prohibiting anyone from bringing foods with the concerning allergens to any school functions of any kind.
- Post a notice within the school at every point of entry and within the cafeteria providing notice that a student in the school has an allergy to peanuts/tree nuts;
- Parents/guardians of students with food allergies should be given advance notice of parties and events
- Consider, with school physician and school nurse, standing orders/protocols for licensed medical personnel to administer epinephrine auto-injectors to individuals with previously undiagnosed allergies.

### **Conclusion**

Most students with allergies are not likely to qualify for IDEA services for the sole reason of their allergy. Nonetheless, an increased prevalence in allergies in the general population greatly increase the probability that a student eligible on the basis of another impairment requires accommodations for his or her severe allergy as a related service under IDEA. The little legal guidance on what services must be required as “related services” indicates a broad scope for such services, particularly those specifically provided for by enumerated list under IDEA. However,

there are practical limitations on what courts are likely to find reasonable accommodations to be, and those limitations may well develop from the best practices being adopted in recent years by states and schools all over the country. Accordingly, it is important to have a sense of what those practices are. Moreover, it is important for a hearing officer to recognize the limits of jurisdiction in this area and that litigants may wish to bring these claims before an IDEA hearing officer as much to ensure that the claim is administratively exhausted as to obtain a favorable ruling on the merits.





## INJURY PREVENTION 50 State Compilation

### Summary Matrix of State Laws Addressing Epi-Pen Use in Schools

Enacted or adopted as of October 29, 2013

State	CITATION	STUDENT POSSESSION AND SELF-ADMINISTRATION	WRITTEN PHYSICIAN AUTHORIZATION	STUDENT COMPETENCY REQUIREMENT <sup>1</sup>	INDIVIDUALIZED WRITTEN TREATMENT PLAN	SCHOOL NURSE ADMINISTRATION	STAFF ADMINISTRATION	EMERGENCY STOCKPILE <sup>2</sup>	WAIVER/RELEASE FROM LIABILITY	ADDITIONAL COMMENTS
AL	Code of Ala. <a href="#">§ 16-1-39</a>	--	✓	✓	--	✓	✓	--	✓	- Personnel must have been recognized by the school nurse and have completed a twelve-hour course of instruction before administering EpiPen.
AK	Alaska Stat. Ann. <a href="#">§§ 14.30.141, 17.22.040</a>	✓	✓	✓	✓	--	--	✓	✓	-Trained individuals may obtain a prescription for auto-injectable epinephrine - without a diagnosis of an allergy - and may administer auto-injectable epinephrine in the event of an emergency -Trained individuals may and should include school nurses and specific staff members.
AZ	Ariz. Rev. Stat. Ann. <a href="#">§ 15-341</a>	✓	✓	--	--	✓	✓	--	✓	- Each school district has specific policies and procedures, but in general, schools require written or oral request or authorization of a parent or legal guardian for student or staff administration, and the student's name must appear on the prescription label attached to the medication.
AR	Ark. Code Ann. <a href="#">§ 6-18-707,</a>	✓	✓	✓	✓	✓	✓	✓	✓	- Effective January 2014, school nurses and trained personnel may administer epinephrine.
CA	Cal. Educ. Code <a href="#">§ 49423 &amp; 49414</a>	✓	✓	✓	--	✓	✓	✓	✓	





State	CITATION	STUDENT POSSESSION AND SELF-ADMINISTRATION	WRITTEN PHYSICIAN AUTHORIZATION	STUDENT COMPETENCY REQUIREMENT <sup>1</sup>	INDIVIDUALIZED WRITTEN TREATMENT PLAN	SCHOOL NURSE ADMINISTRATION	STAFF ADMINISTRATION	EMERGENCY STOCKPILE <sup>2</sup>	WAIVER/RELEASE FROM LIABILITY	ADDITIONAL COMMENTS
KY	Ky. Rev. Stat. Ann. §§ <a href="#">158.834</a> , <a href="#">158.836</a> , <a href="#">156.502</a>	✓	✓	✓	✓	✓	✓	✓	✓	- Each school is encouraged to keep an epinephrine auto-injector in at least two (2) locations in the school, including the school office and the school cafeteria.
LA	La. Rev. Stat. Ann. § <a href="#">17:436.1</a>	✓	✓	✓	✓	✓	✓	✓	✓	
ME	Me. Rev. Stat. <a href="#">tit. 20-A, § 254</a>	✓	✓	✓	--	--	✓	--	--	- All unlicensed personnel who administer medication receive training before receiving authorization to do so.
MD	Md. Code Ann., Educ. §§ <a href="#">7-426.1</a> , <a href="#">7-426.2</a> , <a href="#">7-426.3</a>	✓	✓	✓	--	✓	✓	✓	✓	-The school principal may establish a peanut-free and tree nut-free table in the cafeteria. - Stockpiling of auto-injectable epinephrine is required.
MA	<a href="#">105 Mass. Code Regs. 210.100</a> ; <a href="#">105 Mass. Code Regs. 210.006</a>	✓	✓	✓	✓	✓	✓	✓	--	
MI	Mich. Comp. Laws Ann. §§ <a href="#">380.1178</a> , <a href="#">380.1179</a>	✓	✓	--	✓	--	--	--	✓	
MN	Minn. Stat. Ann. § <a href="#">121A.2205</a>	✓	✓	✓	✓	--	✓	✓	✓	-Third parties and manufacturers may supply auto-injectors for free or at reduced prices to districts
MS	Miss. Code. Ann. §§ <a href="#">41-79-31</a> , <a href="#">41-79-1</a>	✓	✓	--	--	✓	--	--	✓	
MO	Mo. Ann. Stat. §§ <a href="#">167.627</a> , <a href="#">167.630</a>	✓	✓	✓	✓	✓	✓	✓	✓	- School board may authorize a school nurse to maintain a stockpile.
MT	Mont. Code Ann. § <a href="#">20-5-420</a>	✓	✓	✓	✓	✓	✓	✓	✓	- Administration to non-pupil permitted in emergencies.
NE	Neb. Rev. Stat. § <a href="#">79-224</a> ; <a href="#">92 NAC 59</a>	✓	✓	✓	✓	✓	✓	-	✓	



State	CITATION	STUDENT POSSESSION AND SELF-ADMINISTRATION	WRITTEN PHYSICIAN AUTHORIZATION	STUDENT COMPETENCY REQUIREMENT <sup>1</sup>	INDIVIDUALIZED WRITTEN TREATMENT PLAN	SCHOOL NURSE ADMINISTRATION	STAFF ADMINISTRATION	EMERGENCY STOCKPILE <sup>2</sup>	WAIVER/RELEASE FROM LIABILITY	ADDITIONAL COMMENTS
NV	Nev. Rev. Stat. Ann. <a href="#">§ 392.425</a>	✓	✓	✓	✓	✓	✓	✓	✓	- School nurses and trained school personnel are permitted to administer auto-injectable epinephrine to students thought to be experiencing anaphylaxis. Furthermore, schools are now required to store at least two doses of auto-injectable epinephrine at the school.
NH	N.H. Rev. Stat. Ann. §§ <a href="#">200:42</a> , <a href="#">200:43</a> , <a href="#">200:44</a> , <a href="#">200:45</a>	✓	✓	✓	✓	✓	--	--	✓	- Students must report to nurse or principal for follow-up care after self-administration.
NJ	N.J. Stat. Ann. §§ <a href="#">18A:40-12.3</a> , <a href="#">18A:40-12.5</a> , <a href="#">18A:40-12.6</a>	✓	✓	--	✓	✓	✓	--	✓	- School nurse shall designate employees who volunteer to administer.
NM	N.M. Stat. Ann. <a href="#">§ 22-5-4.3</a>	✓	✓	✓	✓	✓	✓	--	✓	
NY	N. Y. Public Health Law <a href="#">§2500-h</a> and <a href="#">3000-c</a> ; N.Y. Educ. Law <a href="#">§ 6909</a>	✓	✓	✓	✓	✓	✓	--	✓	-The Commissioner of Education must publish an anaphylaxis policy with guidelines and procedures, which all school boards are required to consider, but not adopt. - A certified nurse practitioner may prescribe and order a non-patient specific regimen to a registered professional nurse for the emergency treatment of anaphylaxis.
NC	N.C. Gen. Stat. Ann. <a href="#">§ 115C-375.2</a>	✓	✓	✓	✓	✓	✓	--	✓	
ND	N.D. Cent. Code Ann. §§ <a href="#">15.1-19-16</a> & <a href="#">CH. 33-37-01</a>	✓	✓	✓	--	--	--	✓	✓	
OH	Ohio Rev. Code Ann. §§ <a href="#">3313.713</a> , <a href="#">3313.718</a>	✓	✓	✓	--	✓	✓	--	✓	- School administrators must complete a drug administration program.
OK	Okla. Stat. Ann. <a href="#">tit. 70, § 1-116.3</a>	✓	✓	✓	--	✓	✓	✓	✓	





State	CITATION	STUDENT POSSESSION AND SELF-ADMINISTRATION	WRITTEN PHYSICIAN AUTHORIZATION	STUDENT COMPETENCY REQUIREMENT <sup>1</sup>	INDIVIDUALIZED WRITTEN TREATMENT PLAN	SCHOOL NURSE ADMINISTRATION	STAFF ADMINISTRATION	EMERGENCY STOCKPILE <sup>2</sup>	WAIVER/RELEASE FROM LIABILITY	ADDITIONAL COMMENTS
VA	VA Code Ann. §§ <a href="#">8.01-225</a> , <a href="#">22.1-274.2</a> , <a href="#">54.1-3408</a>	✓	✓	✓	✓	✓	✓	✓	✓	- Stockpiling of epinephrine auto-injectors is required.
WA	Wash. Rev. Code Ann. §§ <a href="#">28A.210.0001</a> , <a href="#">28A.210.370</a> , <a href="#">28A.210.380</a>	✓	✓	✓	✓	✓	✓	✓	✓	- Schools may maintain a supply of auto injectors of epinephrine based on the number of students enrolled.
WV	W. Va. Code Ann. §§ <a href="#">18-5-22a</a> , <a href="#">18-5-22c</a>	--	--	--	--	✓	✓	✓	✓	
WI	Wis. Stat. Ann. §§ <a href="#">118.29</a> , <a href="#">118.292</a>	✓	✓	--	--	✓	✓	--	✓	
WY	Wyo. Stat. Ann. § <a href="#">21-4-310</a>	✓	✓	✓	--	--	--	--	✓	

## SUPPORTERS



The Network for Public Health Law is a national initiative of the Robert Wood Johnson Foundation with direction and technical assistance by the Public Health Law Center at William Mitchell College of Law.

This document was developed by Brett Baulsir, J.D. and Blair Inniss, J.D. in the Public Health Law Clinic at the University of Maryland Carey School of Law with assistance from Mathew Swinburne, staff attorney, and Cristina Meneses, senior staff attorney with the Network for Public Health Law – Eastern Region. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.

<sup>1</sup>A majority of states that allow students to possess and self-administer epinephrine require a physician to confirm as part of written physician authorization either that the student has been instructed in the correct and responsible use of the medication, that the student has demonstrated competence to the physician and/or school nurse, or both.

<sup>2</sup>Emergency stockpiling as used in this survey refers to a law that allows a school to maintain non-student-specific epinephrine to be used on any student believed to be experiencing an anaphylactic emergency; states where the requirement is mandatory are noted in the comments section.

**THE ROLE OF PREHEARING CONFERENCES IN  
DUE PROCESS HEARINGS UNDER IDEA**

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**BERNADETTE HOUSE BIGNON**  
SENIOR ADMINISTRATIVE LAW JUDGE  
OREGON  
*BERNADETTE.H.BIGNON@OREGON.GOV*

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OUTLINE

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- Why hold a prehearing conference (PHC)?
- What is covered?
- When to hold PHC or take other preparatory action?
- Who are the participants?
- Where are they held?
- Questions to think about

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Remain Flexible

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**EXPECT THE UNEXPECTED**  
and  
**SET THE TONE**

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Why Hold a Prehearing Conference?

Remember: the focus of IDEA is a student's education.

Holding a well prepared and thorough prehearing can:

- Insure parties are given all the information required and needed
- Improve understanding of process for pro se participants as well as attorneys
- Anticipate and resolve matters that could affect timelines
- Create a foundation for a more focused, efficient, and thorough hearing
- Improve the final order
- Protect the rights of the parties

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❖ Pro Se Representatives

Are usually parent(s)

- Not legally trained
- Or may be legally trained
- Either way, may have impairments to communication or understanding

What is the ALJ/IHO's duty to inform the parties?

- Under the IDEA
- Under your state's rules

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Safeguards within the IDEA

**20 USC § 1415(h) Safeguards\***

- Any party to a hearing . . . shall be accorded—
  - (1) right to counsel; advised by individuals with special knowledge
  - (2) right to present evidence, cross-examine witnesses, compel attendance of witnesses;
  - (3) right to a written/electronic verbatim record of such hearing; and
  - (4) right to written/electronic findings of fact and decisions.

**34 CFR §300.512 Hearing rights.\***

*\*See full texts beginning on page 7*

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**State Rules**

- State rules may require pre-hearing conference  
*i.e.*, Oregon OAR 581-015-2360(3)
- State may have specific requirements for Notice of Hearing  
*i.e.*, OAR 581-0015-2360(4)

**Prehearing is an opportunity to address those protections and rights**

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**IHO/ALJ Competency**

- **Competency - What does "Google" think?**

**com·pe·tence**  
*/kämpədəns/*  
*noun*  
*noun: competency*

1. the ability to do something successfully or efficiently.
2. the legal authority of a court or other body to deal with a particular matter.

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**Competency under the IDEA**

**20 USC §1415(f)(3) Limitations on hearing**

(A) Person conducting hearing

A hearing officer conducting a hearing \* \* \* shall, at a minimum \* \* \* \* \*

- (ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;
- (iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
- (iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(added in 2004)

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State requirements

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**Oregon: OAR 581-015-2370**

**Conduct of Hearing**

- (1) by and under the control of the administrative law judge
- (2) conduct of hearing
- (3) right to question or cross-examine any witnesses
- (4) hearing may be continued with recesses
- (5) reasonable time limits for oral presentation; cumulative, repetitious or immaterial matter
- (6) exhibits
- (7) time and place of hearing

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State differences that may affect the due process hearing

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- Model Rules, state standards, case law  
Full and fair inquiry – more active role for an ALJ
- Recusal Rules – Oregon allows timely first recusal – no need for just cause
- Other jurisdictions

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Improving the Hearing Process

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- Reduce confusion
- Clear deadlines
- Clear issues
- Witness scheduling
- Handling exhibits, including reports of experts

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**When**

- Prehearing window
- Taking action before prehearing

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**What – Part I**

- Explain the process and your expectations
- Schedule the hearing and set deadlines
- Resolution Session
- Rights of parties
- Special accommodations
- Clarify case history to present if needed
- Additional clarification on process if party is pro se
- Clarify issues for hearing (including what will not be heard)
- Reminder – mediation is always available

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**Practice Tips**

**Consider a letter to parties prior to PHC outlining:**

- what will be covered
- ensuring parties are advised of rights in advance
- setting out your expectations

**Follow up PHC with documentation**

- An email immediately after
  - Reviewing the prehearing decisions and deadlines
  - Provide opportunity for immediate correction
- Prehearing Order (or at a minimum, a letter)
  - Sets out the prehearing decisions, deadlines, expectations
  - (this is not the Notice of Hearing)

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What – Part II

Subject matter jurisdiction

What we can hear and what we cannot

- Review the hearing request carefully and issue-spot.
- We have authority to hear and decide issues related to identification, evaluation, placement, provision of free appropriate public education, and certain discipline issues
- We do not have authority over issues arising outside of the SOL, allegations of civil rights violations not arising under IDEA, and other things (*Example*: two instances of parent wanting to sue the State regarding alleged failure to enforce LEA compliance with an IEP and the OAH for its handling of a prior due process complaint)

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Where

- Prehearing – by telephone in Oregon unless accommodations require otherwise

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We are given wide latitude - questions to ponder

- How much control or active planning do we exercise?
- What may act as a barrier to exercising more control over the process?

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## **Texts of statutes and regulations**

### **Slide 6**

#### **20 USC § 1415(h) Safeguards**

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions [.]

### **Slide 7**

#### **34 CFR §300.512 Hearing rights.**

(a) General. Any party to a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534, or an appeal conducted pursuant to §300.514, has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, except that whether parties have the right to be represented by non-attorneys at due process hearings is determined under State law;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) Additional disclosure of information. (1) At least five business days prior to a hearing conducted pursuant to §300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) Parental rights at hearings. Parents involved in hearings must be given the right to—

(1) Have the child who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents.

## **Slide 11**

### **20 USC §1415(f)(3) Limitations on hearing**

(A) Person conducting hearing

A hearing officer conducting a hearing \* \* \* shall, at a minimum—

\* \* \* \* \*

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(added in 2004)

## **Slide 12**

### **Oregon: OAR 581-015-2370**

#### **Conduct of Hearing**

- (1) The hearing will be conducted by and under the control of the administrative law judge appointed under 581-015-2360.
- (2) At the discretion of the administrative law judge, the hearing will be conducted in the following manner:
  - (a) Statement and evidence of the school district in support of its action;
  - (b) Statement and evidence of the parents disputing the school district action;
  - (c) Rebuttal testimony.
- (3) The administrative law judge, counsel or other representatives of the parties, and the parents if the parents are not represented, have the right to question or cross-examine any witnesses.
- (4) The hearing may be continued with recesses as determined by the administrative law judge.
- (5) The administrative law judge may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious or immaterial matter.
- (6) Exhibits must be marked, and the markings must identify the person offering the exhibits. The exhibits will be preserved by the Superintendent as part of the record of the proceedings.
- (7) Each hearing must be conducted at a time and place that is reasonably convenient to the parents and child involved



**TAB 4**

# ADMINISTRATIVE LAW ETHICS IN THE ELECTRONIC AGE\*

Carol Greta<sup>1</sup>

Administrative Law Judge, Iowa Department of Inspections and Appeals

## **General Overview**

The materials for this session will focus on how the administrative law judge or impartial hearing officer's ethical duties have changed in light of electronic communications, electronic social media, access to electronic research, and other modern communication technology, as well as how the Rules of Professional Conduct have been nimbly adapted to this new world. The latest ethics opinions will be presented, and then the matter will be opened up for in-depth discussion with a panel of hearing officers who will respond to various scenarios.

The terms ALJ and IHO are intentionally used interchangeably. Note that Canon 8 of the Model Code of Judicial Conduct for State ALJs states, "Anyone employed by ... an instrumentality of a state or municipal corporation, who is empowered to preside very statutory or regulatory factfinding hearings or appellant proceedings arising within, among or before public agencies, is a state administrative law judge for the purposes of this Code."

The IDEA does not establish standards for the ethical conduct of IHOs, leaving the details of an independent, fair, impartial hearing system to each state.<sup>2</sup> Thus, references to standards are to the Model Code of Judicial Conduct for State ALJs, adopted by the National Association of Administrative Law Judges (NAALJ) in November 1993, appended hereto.

## **"Modern Communications Technology"**

NC Eth. Op. RPC 215 (N.C.St.Bar.), 1995 WL 853887

### **MODERN COMMUNICATIONS TECHNOLOGY AND THE DUTY OF CONFIDENTIALITY**

**Published: April 13, 1995      Approved: July 21, 1995**

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\*With apologies to author and Des Moines native Bill Bryson, I'm a stranger here (in the electronic age) myself. Just ask my kids.

<sup>1</sup> Carol Greta is a native of Iowa who graduated from the University of Iowa College of Law in 1981. She has practiced law in Iowa since June, 1981, as a private practitioner (until 2000), part-time district associate court judge (1995 – 2000), general counsel to the Iowa Department of Education (2000 – 2012), and - as of October, 2012 – administrative law judge within the Appeals Division of the Iowa Department of Inspections and Appeals.

<sup>2</sup>Vol. 71, Federal Register, No. 156, Page 46705 (8/14/06).

This 1995 opinion from the North Carolina State Bar serves as a good reminder that “modern” is a relative term. Bearing the title “Modern Communications Technology and the Duty of Confidentiality”, the opinion stated as follows:

1. When a lawyer uses “a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.”
  - a. Citing Rule 4 of the North Carolina Rules of Professional Conduct (to protect and preserve the confidences of a client)<sup>3</sup>, that state Bar reasoned that while protecting and preserving a client’s confidences extends to the use of communications technology, this obligation “does not require that a lawyer use only infallibly secure methods of communication.” Returning to more comfortable territory, the Bar analogized that because lawyers are not required to use paper shredders to dispose of waste paper so long as the responsible lawyer ascertains that procedures are in place which “effectively minimize the risks that confidential information might be disclosed,” similarly, “a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via a cellular or cordless telephone.”
  - b. First, the lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication.
  - c. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost.
2. When using electronic mail or any other technological means of communication that is not secure to communicate confidential client information, a lawyer must take the same precautions as set forth in #1 above.

OBSERVATION: Most of us employ some written advisory in our e-mail communications. Examples:

Generic example 1:

This e-mail and any attachments to it is confidential and may be attorney-client privileged. It is intended only for the use of the individual or entity identified in the message. If the receiver of this message is not the intended recipient, you are hereby notified that reading, distribution, use, or copying of this message is

<sup>3</sup> Under the federal Model Rules of Professional Conduct, this would be rule 1.6.

strictly prohibited. If you have received this message in error, please immediately notify the sender by replying to the address noted above and delete the message.

#### Generic example 2:

This e-mail (including attachments) is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, is confidential and is legally privileged. This message and its attachments may also be privileged and attorney work product. They are intended for the individual or entity named above. If you are not the intended recipient, please do not read, copy, use or disclose this communication to others; also please notify the sender by replying to this message, and then delete it from your system. Any unauthorized review, use, disclosure of distribution is prohibited.

#### Public entity/employee example:

Notice to Recipient: This message and any response to it may constitute a public record, and therefore, may be available upon request in accordance with Iowa Public Records Law, Iowa Code Chapter 22.

#### Belt and suspenders example:

**CONFIDENTIALITY NOTICE:** This email, and any attachments hereto, contains information which may be CONFIDENTIAL and/or ATTORNEY CLIENT PRIVILEGED. The information is intended to be for the use of the individual or entity named above. If you are not the intended recipient, please note that any unauthorized disclosure, copying, distribution or use of the information is prohibited. If you have received this electronic transmission in error, please returned the e-mail to the sender and delete it from your computer. **NOT TAX ADVICE:** To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any U.S. federal tax advise contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal revenue Code or (2) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

## **Electronic Social Media (Facebook, LinkedIn, Twitter, etc.)**

Food for thought: A global survey of 19 countries, addressing online privacy issues, found that nearly half of the sample (47%), and a majority of millennials, “worry that friends or family will share inappropriate personal information about them online. Around one-third overall already regret posting personal information about themselves.” [*Social Media Privacy: A Contradiction in Terms?* Forbes, April 24, 2012]

### 1. ABA Committee on Codes of Conduct, Advisory Opinion # 14-112, **USE OF ELECTRONIC SOCIAL MEDIA BY JUDGES**

The use of social media by judges raises several ethical considerations, including:

- Confidentiality
  - Any posting on a social networking site that, for example, broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures or reveals any non-public information violates Canon 3D. Such communications need not be case-specific to implicate the Canon; even commenting vaguely on a legal issue without directly mentioning a particular case may raise confidentiality and impropriety concerns. Thus the Committee advises that in all online activities involving social media, the judge not reveal any confidential, sensitive, or non-public information obtained through the tribunal.
- Avoiding impropriety in all conduct
  - Concerns arise under Canon 2 regarding the exchange of frequent messages, “wall posts,” or “tweets” between a judge and a “friend” on a social network. These exchanges need not directly concern litigation to raise an appearance of impropriety. Any frequent interaction between a judge and a lawyer who appears before the judge may put into question the propriety of the judge’s conduct in carrying out the duties of the office by giving the impression that the other is in a special position to influence the judge.
- Not lending the prestige of the office
  - If a judge uses the prestige of the office in some manner in social media that could be viewed as advancing the private interest of another, Canon 2 is implicated. For example, if the judge is using the media to support a particular establishment known to be frequented by lawyers near the courthouse, and the judge identifies himself as the supporter, the judge has used his office to aid that particular cause. The Committee therefore cautions judges to analyze the post, comment, or blog in order to take into account the prohibitions from engaging in dialogue that demeans the prestige of the office, comments on issues that may arise before the

tribunal, or send the impression that another has unique access to the tribunal.

- Not detracting from the dignity of or reflecting adversely on the tribunal
- Not demonstrating special access to the tribunal or favoritism
- Not commenting on pending matters
- Avoiding association with certain social issues that may be litigated or with organizations that frequently litigate

## 2. Maryland Judicial Ethics Committee Op.# 2014-30 ((/25/14) **MAY A JUDGE PARTICIPATE IN THE “ICE BUCKET CHALLENGE?”**

One may quite reasonably wonder about the relevance of this opinion to our topic. Well, the aspects of the challenge, which is a fund raiser to benefit ALS research are as follows: (1) dousing oneself (or being doused) by icy water; (2) challenging other, specifically identified individuals to do the same or to make a contribution to the ALS Association (or both); (3) recording the dousing and the challenge; and (4) **posting the video on a social media website.**

Rule 1.3, in pertinent part, prohibits judges from “lend[ing] the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow[ing] others to do so.”

Rule 1.2, in turn, requires that judges “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” Comment [2] to Rule 1.2 states: “A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other persons, and must accept the restrictions imposed by this Code.”

In the Committee's view, the ice bucket challenge is inextricably linked with the ALS Association's extremely successful and highly-publicized fund-raising efforts, which have been “[l]argely driven by social media.” In the friend's challenge of the Requestor, the Requestor was *specifically identified* as a judge and the court on which he or she sits was identified. Consequently, for the Requestor to record his or her response to the challenge and to post the recording on a social media website would unavoidably and impermissibly lend the prestige of judicial office to the ALS Association's fund-raising campaign.

The Code does not prohibit a judge, having been challenged, from responding by making a donation and informing his or her challenger of that fact, without recourse to social media, and without publicly challenging others. Likewise, a judge might be challenged by a family member or friend in such a way that the judge's office is not disclosed. While responding to a challenge, under such circumstances, is not prohibited by the Code, a judge must exercise care not to disclose his or her judicial

status and not to permit others to do so, and must also refrain from “mak[ing] inappropriate use of court premises, staff, stationery, equipment, or other resources[,]” pursuant to Rule 3.1(e). Comment [4] to Rule 3.1 states: “While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge’s solicitation of contributions ... for an organization, even as permitted by Rule 3.7(a), might create the risk that the person solicited would feel obligated to respond favorably or would do so to curry favor with the judge.”

Broadly speaking, with respect to fund-raising activities, as with the use of social media, the ethics questions that arise typically do not involve *whether* a judge can participate, but rather, the *manner* in which he or she does so.

### 3. ABA Formal Op. 13-462 (February 21, 2013) **JUDGE’S USE OF ELECTRONIC SOCIAL NETWORKING MEDIA**

Opinion:

- A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.
- Although judges are fullfledged members of their communities, nevertheless, they “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens....” Model Code Rule 1.2 cmt. 2.
- All of a judge’s social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner “that promotes public confidence in the independence, integrity, and impartiality of the judiciary,” and must “avoid impropriety and the appearance of impropriety.” This requires that the judge be sensitive to the appearance of relationships with others. Model Code Rule 1.2. *But see* Dahlia Lithwick and Graham Vyse, “Tweet Justice,” Slate (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to “de-friend” her from their ESM page when they’re trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), *article available at* [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/04/tweet\\_justice.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html).

**[The following opinions are more relevant to judges who are subject to the Model Code of Judicial Conduct. However, some states (such as Iowa) are moving toward having their codes of conduct for ALJs mirror the code of judicial**

**conduct. And it never hurts to be aware of guidance regarding the Model Code of Judicial Conduct.]**

4. Connecticut Committee on Judicial Ethics, Informal Opinion Summaries 2013 WL 1556755 (March 22, 2013) **EXTRAJUDICIAL ACTIVITIES/ ELECTRONIC SOCIAL MEDIA/ FACEBOOK RULES**

Issue: May a judicial official participate in an ESM such as Facebook?

Opinion:

- In ABA Formal Opinion 462, the ABA recognizes that “[s]ocial interactions of all kinds, including [electronic social media], “can be beneficial to judges to prevent them from being thought of as isolated or out of touch.”
- Although participating in social networking sites and other ESM clearly is fraught with peril for Judicial Officials because of the risks of inappropriate contact with litigants, attorneys, and other persons unknown to the Judicial Officials and the ease of posting comments and opinions, the Code does not prohibit such participation. Accordingly, the Committee unanimously determined that a Judicial Official may participate in ESM (such as Facebook), subject to the following conditions:
  - (1) A Judicial Official must maintain dignity with respect to every comment, photograph and other information shared on a social networking site. Rule 1.2<sup>4</sup>
  - (2) A Judicial Official must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. Rule 1.2
  - (3) A Judicial Official should not post any material that could be construed as advancing the interests of the judge or others. For example, a Judicial Official's profile page should not link to, endorse or “like” commercial or advocacy websites. Rule 1.3<sup>5</sup>
  - (4) A Judicial Official should not form relationships with persons or organizations that may convey an impression that these persons or organizations are in a position to influence the Judicial Official. Rule 2.4<sup>6</sup>

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<sup>4</sup> All rules cited are from the Model Code of Judicial Conduct. Rule 1.2 of the Code states that a judge “should act at all times in a manner that promotes public confidence in the ... impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

<sup>5</sup> Rule 1.3 states that a “judge shall not use or attempt to use the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so.”

<sup>6</sup> Rule 2.4(b) states that a “judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.” 2.4(c) states a “judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”

- (5) A Judicial Official should not become a social networking “friend” of attorneys who may appear before the Judicial Official. Rule 1.2
- (6) A Judicial Official should not become a social networking “friend” of law enforcement officials, social workers or any other persons who regularly appear in court in an adversarial role, but may add court staff as “friends.” Rule 1.2
- (7) A Judicial Official should not make comments about any matters pending or impending before any court in accordance with Rule 2.10<sup>7</sup>
- (8) A Judicial Official should not view parties' or witnesses' pages on a social networking site and should not use such a site to obtain information regarding a matter before the judge. Rule 1.2
- (9) A Judicial Official should disqualify himself or herself from a proceeding when the Judicial Official's social networking relationship with a lawyer is likely to result in bias or prejudice concerning the lawyer for a party or the party. 2.11<sup>8</sup>
- (10) A Judicial Official may not give legal advice to others on a social networking site. Rule 3.10<sup>9</sup>
- (11) A Judicial Official should not engage in political activities on social networking sites. Some examples include, but are not limited to, the following: (a) a judicial official should not publicly endorse or oppose a candidate for public office, (b) a judicial official should not “like” a political organization's Facebook page or create links to political organizations' websites and (c) a judicial official should not post a comment on a proposed legislative measure or a controversial political topic. Rule 4.1<sup>10</sup>
- (12) A Judicial Official should be aware of the contents of his/her social networking profile page, be familiar with the site's policies and privacy controls, and stay abreast of new features and changes. To the extent that those features raise further ethical issues, a Judicial Official should consult the Committee for guidance.
- The Committee concluded that, if the Judicial Official chooses to participate in ESM, the best course of action would be for the Judicial Official to terminate permanently the existing account and start anew. If this course of action cannot be accomplished, the Judicial Official should edit his/her profile page upon reactivation to ensure that it is in compliance with the conditions of this opinion in every respect. This includes, but is not limited to, removing inappropriate contacts, photos, links, comments,

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<sup>7</sup> Rule 2.10 sets forth several restrictions on judicial speech.

<sup>8</sup> Rule 2.11 requires disqualification “in any proceeding in which the judge’s impartiality might reasonably be questioned including, but not limited to, the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer or personal knowledge of the facts that are in dispute in the proceeding... .”

<sup>9</sup> Rule 3.10 states that a judge shall not practice law.

<sup>10</sup> Rule 4.1 sets forth the limitations regarding political activities.

petitions, “friending,” and “Check In” postings. A Judicial Official should monitor closely new developments with respect to the ESM and keep abreast of applications instituted by the site managers. The Judicial Official also should monitor his/her participation with respect to maintaining appropriate dignity as well as insuring the precedence of the judicial office.

- The Committee noted, as a security concern as much as an ethical concern, that judges who choose to participate should be mindful of the significant security/privacy concerns that such participation entails. It has been reported that data collected using Facebook “likes” alone allows researchers to predict accurately certain qualities and traits concerning users. In addition, accessing Facebook via a mobile device without certain security features enabled, may let other participants know a user's physical location at any given time.

A Texas Supreme Court Justice who frequently tweets says of Twitter,  
“Succinctness is the enemy of nuance.”

5. AZ Jud. Adv. Op. 14-01 (Ariz. St. Bar), 2014 WL 2559546 (May 5, 2014)  
**EXTRAJUDICIAL ACTIVITIES/ ELECTRONIC SOCIAL MEDIA/ FACEBOOK RULES**

Issue: May a judicial official participate in an ESM such as Facebook? May they blog? Tweet? Use LinkedIn?

Opinion:

- Use of LinkedIn to make professional recommendations raises potential ethical issues for judges under Rule 1.2 and Rule 1.3. Citing Utah Informal Judicial Ethics Opinion 12-01 (8/31/12), Arizona’s State Bar determined that not only may a judge not use the site to recommend a lawyer, a judge may not recommend *any* professional by using the judge’s position or title. It would be OK to use the site to recommend a former law clerk, for instance, to a specific prospective employer as long as the recommendation clearly states it is for that purpose and is based on the judge’s personal knowledge of the person being recommended.
- A judge’s use of a blog may implicate Rule 2.10(A). Judges must ensure that any statements they make will not negatively affect judicial proceedings, and they must avoid making statements that could be perceived as prejudiced or biased under Rule 2.3(a). Also, Rule 3.1 prohibits judges from participating in activities that will necessitate frequent disqualification. Finally, a judge using such a platform (true of

twitter, also) must take steps to guard against attempts of litigants or lawyers to engage in *ex parte* communications.

- Concerns related to personal use of Facebook:
  - Avoid participating in or being associated with discussions about matters falling within the jurisdiction of one's court.
  - Do not "friend" present litigants or lawyers. If a preexisting "friendship" exists, disclose the relationship on the record even if the judge does not believe there is a basis for disqualification, citing Comment 5 to Rule 2.11. If a judge's jurisdiction is criminal, for instance, do not friend law enforcement officials who appear before the judge.

6. In the Matter of Henry P. Allred, District Judge, Alabama Judicial Inquiry Commission, 2013 WL 1281642 (March 22, 2013) **EXTRAJUDICIAL ACTIVITIES/ ELECTRONIC SOCIAL MEDIA/ FACEBOOK RULES**

Judge Allred was publicly censured after having been found to have violated Canon 1 ("A judge should ... observe high standards of conduct so that the integrity and independence of the judiciary may be preserved."), Canon 2B ("A judge should avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute."), and Canon 3A(6) ("A judge should abstain from public comment about a pending or impending proceeding in any court.")

Judge Allred was elected to the district court bench in Walker County, Alabama in 2008 and presides over small claims, among other duties. He used Facebook to post communications about an attorney who practiced before him and about pending contempt proceedings he initiated against the attorney. He also used his "Alacourt" email address to send an email to every circuit and district court judge in Alabama to ask that if the attorney showed up before any of them, they have her arrested and held.

A fourth charge against him [Canon 2A, "A judge should ... conduct himself at all times in a manner that promotes public confidence in the ... impartiality of the judiciary."] did not stick.

7. **Suggested guidelines for ESM usage**, Michael Crowell, *Judicial Ethics and Social Networking Sites*, U.N.C. Sch. Gov't (8/10/12).

- Judges may join online social networks
- Social networks create opportunities and temptations for *ex parte* communication that judges must be careful to avoid.
- Judges are still judges when posting materials on their social networking pages, and need to realize that the kinds of comments and photographs posted by others may not be appropriate for them.
- Judges need to avoid online ties to organizations that discriminate, just as they are prohibited from joining such organizations.

- Judges also need to avoid online ties to organizations that may be advocates before them.
- Judges need to avoid posting comments on social network sites or taking other actions on such sites that lend the prestige of the office to the advancement of a private interest.

### **Electronic “Answer Board”**

Connecticut Committee on Judicial Ethics Informal Opinion Summaries  
2011 WL 10923001 (June 24, 2011) **Website Answer Board Expert**

Issue: May a judicial officer serve and be listed as a subject matter expert for an electronic “answer board” operated by a nonprofit and non-partisan organization and, if so, may the Judicial Official (1) provide quotes and (2) include his or her judicial position as part of the personal description of the expert that is posted on the answer board?

Opinion:

- The Committee members in attendance unanimously determined that the Judicial Official may serve as a subject matter expert for the electronic “answer board” and may include his or her judicial position in his or her personal description on the answer board, subject to the following conditions:
  - the participation does not interfere with the Judicial Official's judicial duties (see Rule 3.1(1));<sup>11</sup>
  - the Judicial Official does not give opinions which would cast doubt on the Judicial Official's impartiality (see Rule 3.1(3));
  - the Judicial Official is careful not to express opinions or answer questions in a way that would indicate that the Judicial Official has a predisposition with respect to particular cases (see Rule 2.11(a));
  - the Judicial Official's responses are factual and instructive about the subject matter but do not include comments about any pending or impending matters (see Rule 2.10);
  - the Judicial Official does not provide legal advice (see Rule 3.10);
  - the Judicial Official monitors the website to ensure that it does not link to commercial (or advocacy group) websites (see Rule 1.3);
  - the Judicial Official stays abreast of the features of the answer board website for new developments that may impact his or her duties under the Code of Judicial Conduct; and
  - the Judicial Official retains the right to review and pre-approve the use of any biographical information about the Judicial Official listed on the answer board or used to promote it (see Rule 1.3).

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<sup>11</sup> Rule 3.1 regulates extrajudicial activities, and prohibits participation in activities that will interfere with the proper performance of judicial duties; participation in activities that will lead to frequent disqualification of the judge; participation in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality; and coercive conduct.

- Finally, with respect to the Judicial Official's inquiry about the propriety of providing quotes that are attributed to the Judicial Official, the Committee determined that the Judicial Official may do so provided that he or she complies with the above noted conditions.

### **Access to Electronic Research**

1. DE Jud. Eth. Adv. Comm., 2011 WL 7574998 (October 12, 2011) **Request for Opinion Regarding the Shared Use of the Department of Justice's LexisNexis Legal Research Services Agreement with the Judiciary**

Issue: “On behalf of the Chief Justice, you have requested an advisory opinion from the Judicial Ethics Advisory Committee (the “Committee”) on whether it is appropriate, under the Delaware Judges' Code of Judicial Conduct, for the Administrative Office of the Courts (“AOC”) to take advantage of an opportunity that would allow for access to LexisNexis electronic legal services for Delaware judges by sharing use with the Department of Justice (“DOJ”).

Opinion: After review your September 19, 2011 letter and the relevant Canons of the Delaware Judges' Code of Judicial Conduct and comments thereto, the Committee believes that the shared use of the DOJ's LexisNexis Legal Research Services Agreement with the Judiciary under the terms and circumstances set forth in your letter would not violate the Delaware Judges' Code of Judicial Conduct.

2. AK Comm. Jud. Cond., 2014 WL 4415399 (August 22, 2014) **What Internet Research can be Considered “Judicial Notice?” When does such Research Become Improper Factual Investigation?**

Issue: Per Canon 3 B(12), “Without prior notice to the parties and an opportunity to respond, a judge shall not engage in independent ex parte investigation of the facts of a case.” The commentary goes on to acknowledge that a judge is not prohibited “from exercising the judge’s authority to independently call witnesses if the judge believes that these witnesses might shed light on the issues being litigated or to take judicial notice of certain facts.” Where is the line?

Opinion: “The rules that apply to facts obtained from the Internet are no different from the rules that apply to any other facts for which judicial notice might be taken. The problem that arises in this context is that facts are more readily accessed on the Internet. . . . For example, while it is clear to judges that it is improper to drive to view a crime scene, it may appear less clear to bring up a view of the same scene on Google “street view” from the court computer on the bench. There are no unique rules for facts obtained through the ease of Internet accessibility. Judges should be diligent when using the Internet in court cases to ensure that the research is either purely legal research or judicial notice of public documents of which the judge may properly have taken judicial notice had those documents been obtained by the judge through more traditional means.

“Where facts are available on the Internet that can aid in deciding a factual dispute relating to issues in a case before the judge, the best practice is for the judge to inform the parties of the information upon which the judge proposes to rely, as well as how and when that information was obtained, and to allow the parties an opportunity to respond. In addition, where a judge is clearly taking judicial notice, Evidence Rule 203 requires that the judge give proper notice and the opportunity for parties to object and be heard. Because the difficult question arises in determining whether it is “factual” research, notice and a meaningful opportunity for parties to object remains a recommended safeguard.”

3. Nevada Standing Committee on Judicial Ethics, 2014 WL 2547687 (June 4, 2014)

**Propriety of a Judge Purchasing and Using Electronic Research Database Software Created and Managed by Attorney Practicing in Same Court.**

Opinion: The committee found no Rule explicitly prohibiting a judge or court from purchasing and using a case law research reference tool that is available to the public and which provides objective summaries of published case law.

### **Email**

1. ABA Formal Op. 11-459 (August 4, 2011) **DUTY TO PROTECT THE CONFIDENTIALITY OF E-MAIL COMMUNICATIONS WITH ONE’S CLIENT**

Issue: What is a lawyer’s obligation to warn a client when sending or receiving electronic communications where there is a significant risk that a third party may gain access? EXAMPLE: An employee has a computer assigned for her exclusive use in the course of her employment. The company's written internal policy provides that the company has a right of access to all employees' computers and e-mail files, including those relating to employees' personal matters. Notwithstanding this policy, employees sometimes make personal use of their computers, including for the purpose of sending personal e-mail messages from their personal or office e-mail accounts. Recently, the employee retained a lawyer to give advice about a potential claim against her employer. When the retained lawyer knows or reasonably should know that the employee may use a workplace device or system to communicate with the lawyer, does the lawyer have an ethical duty to warn the employee about the risks this practice entails?

Opinion:

- A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access.
- The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a

significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

2. Connecticut Bar Association Informal Op. 99-52, 1999 WL 33115202 (December 21, 1999) **PROPRIETY OF TRANSMITTING INFORMATION RELATING TO REPERSENTATION OF A CLIENT BY MEANS OF UNENCRYPTED E-MAIL**

Issue: Does a lawyer's use of unencrypted e-mail over the Internet to transmit information regarding the representation of a client violate Rule 1.6? Is the lawyer required to consult with the client prior to transmitting any such information?

Opinion:

- The Rules of Professional Conduct do not directly address this subject. A lawyer's fundamental duty to preserve client confidences is codified in Rule 1.6(a) of the Rules of Professional Conduct, which provides: "A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections (a), (b), (c) and (d)."
- A lawyer must make every effort practicable to prevent disclosure of information relating to representation of a client. A lawyer who possesses confidential client information must take "reasonable steps" to secure the information against "inappropriate disclosure." Confidential client information must be "stored, retrieved and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality." Restatement Of The Law Governing Lawyers, § 112, comment d (Proposed Final Draft No. 1. 1996).
- The use of e-mail in a manner consistent with these guidelines depends almost entirely upon the answer to a technical, non-legal question: "What is the likelihood of interception or inadvertent disclosure of the contents of an unencrypted e-mail message?" If interception or inadvertent disclosure of e-mail is likely to occur, then it is unreasonable and unethical to use Internet e-mail as a vehicle for communicating matters relating to representation of a client. In answer to the technical question, for the reasons set forth below, the committee is persuaded that, under ordinary circumstances, the risk of interception or inadvertent disclosure of the contents of an unencrypted e-mail transmission is minimal.
- Software programs are commercially available which permit e-mail messages to be "encrypted" and transmitted in code... . It cannot be disputed that "encrypting" e-mail would offer increased security and make it highly unlikely that an e-mail message could be read by anyone other than its intended

recipient, even if it were to be intercepted by a “sniffer” or system administrator. But the logistics involved in setting up an encryption system with every potential e-mail correspondent would all but eliminate the advantages of speed, efficiency, reduced cost and ease of use which have made e-mail such an attractive business communications tool. Under typical circumstances, such a high degree of security is not warranted. We do not, for example, expect that land-line phone conversations or facsimile transmissions involving client confidences should be routinely coded or “scrambled”... . Parallel reasoning should apply to the use of e-mail. This committee concludes that, while it may be technically feasible to intercept e-mail communications, there is relatively little risk of unauthorized disclosure associated with the use of unencrypted e-mail.

- The committee believes it is also unreasonable and unnecessary to expect a lawyer to encrypt every e-mail message as a protection against those who may, intentionally or in violation of the law, chance to intercept that e-mail transmission. Therefore, in the committee's view a lawyer may, under ordinary circumstances, use unencrypted electronic mail for communicating matters relating to representation of a client without violating Rule 1.6 of the Rules of Professional Conduct. *Accord*, ABA Committee on Ethics and Prof. Responsibility. Opinion 99-413.
- But, for purposes of the Rules of Professional Conduct, the ultimate responsibility for evaluating which methods of communication should be used to maintain client confidentiality remains with the lawyer. Therefore, if circumstances exist which would place a lawyer on notice that there is a greater than ordinary risk of interception or unauthorized disclosure (such as an e-mail “mailbox” which is accessible to persons other than the intended recipient), regardless of the relative sophistication of the e-mail recipient, use of e-mail to transmit confidential information without the express authorization and consent of the client would be unwise and unethical. In a similar fashion, where the information sought to be communicated is of an extraordinarily sensitive or highly confidential nature, such that any unauthorized disclosure could cause serious injury to the interests of the client, the lawyer should choose a means of communication that provides a level of security proportional to the heightened need to avoid any threat of disclosure of the information. Because of this, the consent of the client should be obtained before transmitting any e-mail containing information of an extraordinarily sensitive or highly confidential nature, just as a wise and prudent lawyer would obtain the consent of the client before communicating significant, consequential, and extremely sensitive privileged matters through telephone lines, fax machines, or even regular mail.

## **Electronic Storage of Information**

Cal. State Bar Committee on Professional Responsibility, Eth. Op. 2010-179, 2010 WL 5579444 (December 21, 1999) **PROPRIETY OF USING TECHNOLOGY TO STORE CONFIDENTIAL CLIENT INFORMATION WHEN THE TECHNOLOGY MAY BE SUSCEPTIBLE TO UNAUTHORIZED ACCESS BY THIRD PARTIES**

Issue: Does a lawyer violate the duties of confidentiality and competence owed to a client by using technology to store confidential client information when the technology may be susceptible to unauthorized access by third parties?

Opinion:

- Whether an attorney violates his or her duties of confidentiality and competence when using technology to store confidential client information will depend on the particular technology being used and the circumstances surrounding such use.
- Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.

## **Cloud Computing**

1. Fl. Eth. Op. 12-3 (Fla. St. Bar Assn.), 2013 WL 6845049 (January 25, 2013)

Opinion: Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used. Note: This opinion was affirmed by the Board of Governors with slight modification on July 26, 2013.

2. AK Eth. Op. 2014-3 (Alaska Bar Assn. Eth. Comm.), 2014 WL 3362072 (May 5, 2014)

Opinion: A lawyer may use cloud computing for file storage as long as he or she takes reasonable steps to ensure that sensitive client information remains confidential and safeguarded. With the issuance of this opinion, Alaska joins the

community of bar associations concluding that cloud computing is permissible so long as reasonable steps to protect the client are taken.

## **Metadata**

### 1. ABA Formal Op. 06-442 (2006) **PROPRIETY OF A LAWYER VIEWING AND USING METADATA**

Issue: May a lawyer properly review and use information embedded in electronic documents (i.e., metadata) received from opposing counsel or an adverse party?

Opinion:

- Rule 4.4(b) does not apply because the documents were not inadvertently sent.
  - Other law might prevent the receiving lawyer from retaining and using the materials, and that the lawyer might be subject to sanction for doing so, but this was “a matter of law beyond the scope of Rule 4.4(b). As Comment [2] to Rule 4.4(b) observes, “this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.”
  - Pursuant to their supervisory authority, courts may require lawyers in litigation to notify the opposing counsel when their clients provide an opposing party's attorney-client confidential communications that were retrieved from a computer or other device owned or possessed by the client. Alternatively, the civil procedure rules governing discovery in the litigation may require the employer to notify the employee that it has gained possession of the employee's attorney-client communications. Insofar as courts recognize a legal duty in this situation, as the court in *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 665 (N.J. 2010), *supra*, has done, a lawyer may be subject to discipline, not just litigation sanction, for knowingly violating it. However, the Model Rules do not independently impose an ethical duty to notify opposing counsel of the receipt of private, potentially privileged e-mail communications between the opposing party and his or her counsel.
2. MN Eth. Op. 22 (Minn. Law Prof. Resp. Bd.), 2010 WL 7378367 (March 26, 2010) **ETHICAL OBLIATIONS OF A LAWYER REGARDING METADATA**

Opinion:

- A lawyer has a duty under the Minnesota Rules of Professional Conduct (MRPC), not to knowingly reveal information relating to the representation of a client, except as otherwise provided by the Rules, and a duty to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure. See Rules 1.1, 1.6, MRPC. The lawyer's duties with respect to such information extends to and includes

metadata in electronic documents. Accordingly, a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents.

- If a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC.

3. 2009 NC Eth. Op 1 (N.C.St.Bar.), 2010 WL 610306 (January 15, 2010)  
**REVIEW AND USE OF METADATA**

Opinion:

- A lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication.
- A lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

4. PA Eth. Op 2007-500 (Pa. Bar Assn Comm. Leg. Eth. Prof. Resp.) 2007 WL 5314341 (2007) **MINING METADATA**

Issue: "This Formal Opinion provides ethical guidance to lawyers on the subject of metadata received from opposing counsel in electronic materials, including documents, spreadsheets and PowerPoint presentations under circumstances in which it is clear that the materials were not intended for the receiving lawyer.

Opinion:

- There is no specific Pennsylvania Rule of Professional Conduct determining the ethical obligations of a lawyer receiving inadvertently transmitted metadata from another lawyer, his client or other third person; and, there is no specific Pennsylvania Rule of Professional Conduct requiring the receiving lawyer to assess whether the opposing lawyer has violated any ethical obligation to the lawyer's client.
- Each attorney must "resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules" and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation.
- In reaching this conclusion, the Committee notes that Thus, the decision of how or whether a lawyer may use the information contained in the metadata will depend upon many factors, including:

- The judgment of the lawyer;
  - The particular facts applicable to the situation;
  - The lawyer's view of his or her obligations to the client under Rule of Professional Conduct 1.3, and the relevant Comments to this Rule;
  - The nature of the information received;
  - How and from whom the information was received;
  - Attorney-client privilege and work product rules; and,
  - Common sense, reciprocity and professional courtesy.
- Although the waiver of the attorney-client privilege with respect to privileged and confidential materials is a matter for judicial determination, the Committee believes that the inadvertent transmissions of such materials should not constitute a waiver of the privilege, except in the case of extreme carelessness or indifference.

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## **APPENDICES**

### **A.**

#### **Model Code of Judicial Conduct for State Administrative Law Judges© (Adopted by NAALJ Board of Governors November 1993)**

##### **PREAMBLE**

Our state administrative legal system is based on the principle that an independent, fair and competent administrative judiciary will interpret and apply the laws that govern consistent with American concepts of justice. Intrinsic to all sections of this Code are the precepts that state administrative law judges, individually and collectively, must respect and honor their office as a public trust and strive to enhance and maintain confidence in our legal system. The state administrative law judge decides questions of fact and law for the resolution of disputes and is a highly visible symbol of government under the rule of law.

...

The Code of Judicial Conduct for State Administrative Law Judges is not intended as an exhaustive guide for the conduct of state administrative law judges. They should also be governed in their official judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist such judges in establishing and maintaining high standards of judicial and personal conduct.

Except where modified, this Code follows the language of the American Bar Association Model Code of Judicial Conduct for Federal Administrative Law Judges. This Code is also based upon the American Bar Association Model Code of Judicial Conduct (1990). The American Bar Association's codes are copyrighted by the American Bar Association and are used with permission.

**CANON 1****A State Administrative Law Judge Shall Uphold the Integrity and Independence of the Administrative Judiciary**

An independent and honorable administrative judiciary is indispensable to justice in our society. A state administrative law judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this Code should be construed and applied to further that objective.

**CANON 2****A State Administrative Law Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities**

A. A state administrative law judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

B. A state administrative law judge shall not allow family, social, political or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of the office to advance the private interests of the judge or others, nor convey or permit others to convey the impression that they are in a special position of influence.

...  
...

**CANON 3****A State Administrative Law Judge Shall Perform the Duties of the Office Impartially and Diligently**

The judicial duties of a state administrative law judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

**A. ADJUDICATIVE RESPONSIBILITIES**

...

4. A state administrative law judge shall accord to all persons who are legally interested in a proceeding, or their representatives, full right to be heard according to law. A state administrative law judge shall not initiate, permit or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

...

b. A judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

c. A judge may consult other judges and support personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

d. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

...

f. Decisions of a state administrative law judge shall be based exclusively on evidence in the record of the proceeding and material that has been officially noticed.

...

8. A state administrative law judge shall not, while a proceeding is pending or impending, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair hearing. ... This Section does not prohibit state administrative law judges from making public statements in the course of their official duties or from explaining for public information the procedures of the agency. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

9. A state administrative law judge shall not disclose or use, for any purpose unrelated to judicial duties, information acquired in a judicial capacity that by law is not available to the general public.

...

#### **CANON 4**

##### **A State Administrative Law Judge May Engage in Activities to Improve the Law, the Legal System and the Administration of Justice**

...

#### **CANON 5**

##### **A State Administrative Law Judge Shall Regulate the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties**

###### **A. EXTRA-JUDICIAL ACTIVITIES IN GENERAL**

A state administrative law judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
2. demean the judge's office; or
3. interfere with the proper performance of the judge's duties.

...

###### **C. CIVIC AND CHARITABLE ACTIVITIES**

A state administrative law judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

...

2. A state administrative law judge should not use or permit the use of the prestige of the judge's office for the purpose of soliciting funds for any educational, religious, charitable, fraternal or civic organization, but the judge may be listed as an officer, director or trustee of such an organization. The judge should not be a speaker or the guest of honor at an organization's fund raising events, but may attend such events.

...

**CANON 6****A State Administrative Law Judge Shall Limit Compensation Received for Quasi-Judicial and Extra-Judicial Activities**

...

**CANON 7****A State Administrative Law Judge Shall Refrain from Political Activity Inappropriate to the Judicial Office**

...

**CANON 8****Compliance with the Code of Judicial Conduct for State Administrative Law Judges**

Anyone employed by a state governmental agency or an instrumentality of a state or municipal corporation, who is empowered to preside over statutory or regulatory factfinding hearings or appellate proceedings arising within, among or before public agencies, is a state administrative law judge for the purposes of this Code.

**B.****Model Code of Ethics, National Association of Hearing Officials****Section I: Scope**

This Code of Ethics is a guide to ethical behavior for hearing officials. Hearing officials include persons who conduct or review administrative hearings or who supervise hearing officials. NAHO had adopted this model code in recognition of the importance of the integrity of hearing officials. It is intended to supplement but not overrule, any existing statutes, codes, policies or regulations setting out ethical requirements for hearing officials and public employees in a particular agency or jurisdiction.

**Section II: Competence**

Hearing officials should know the substantive and procedural law, including the principles of due process, to be applied in the hearings over which they preside, and should understand the principles of its application and interpretation. Hearing officials should be skilled in conducting hearings efficiently and fairly. ... Hearing officials should regularly participate in continuing education to improve their competence and to stay current in their knowledge of the law.

### **Section III: Impartiality**

...

Hearing officials should act in such a way that no one could reasonably believe that any person or agency could improperly influence them in the performance of their duties. Hearing officials should not conduct or participate in deciding the outcome of any proceeding in which their impartiality might be reasonably questioned. Personal knowledge of the facts in a case is an appropriate ground for disqualification of the hearing official. Hearing officials should promptly disclose to the parties any prior personal knowledge of or involvement in the matter. Hearing officials should always withdraw from any proceeding in which their impartiality becomes compromised for any reason. However, the hearing official should not withdraw from a proceeding if the hearing officials' impartiality is challenged solely on the basis that the hearing officials are employed by an agency appearing in the proceeding. The parties may agree to allow the hearing official to preside after full disclosure has been made. Hearing officials should preside without bias or prejudice and without discrimination on any prohibited basis against any person involved in the proceeding, and should control the proceedings to prevent such discriminatory behavior by any other person involved.

### **Section IV: Independence**

The administrative hearing process requires re-examination and reappraisal of determinations made by an administrative agency. Regardless of the hearing official's employment relationship with a party agency, the hearing official should exercise independence of action and judgment to protect the due process rights of parties and to achieve the most legally correct result in a case, maintaining decisional independence from agency management and programs. Supervisors may provide consultation to hearing officials, except as prohibited by law, but may not alter the hearing officials' decisions or substitute their judgment for that of the hearing officials.

### **Section V: Ex Parte Communication**

Hearing officials should have a strong working knowledge of their jurisdiction's definitions and restrictions on ex parte contact. Generally, "ex parte" refers to communication between a hearing official and fewer than all parties to an administrative hearing. Hearing officials should not receive information from any party without sharing that information with all parties. If hearing officials are authorized to consult with an expert, the nature of the consultation and the substance of the expert's advice must be disclosed to all parties. Hearing officials should also give all parties an opportunity to respond.

### **Section VI: Dignity and Decorum of the Forum**

Hearing officials should promote the dignity and decorum of the administrative

hearing process and tribunal. Hearing officials should exercise their lawful authority in any proceeding to ensure that all persons involved conduct themselves with the proper decorum.

### **Section VII: Professional Conduct**

Hearing officials should: always act in a manner that promotes public confidence in the integrity, impartiality and efficiency of the hearing process; maintain high standards of professional conduct and encourage other hearing officials to do the same; be temperate and dignified; be courteous to all in the performance of their duties; follow procedural formalities, making exceptions only in the interest of fairness; and punctually fulfill their professional commitments.

### **Section VIII: Personal Conduct**

Hearing officials should refrain from all illegal or ethically reprehensible conduct. Hearing officials should not accept any gifts or favors from parties to any proceeding before them. Hearing officials should not engage in activities which may bring their own personal or professional interests into conflict with the performance of their official duties. Hearing officials should not give the impression that any party is in a special position to personally influence them, nor should they permit anyone, including friends and relatives, to convey such an impression to others. Hearing officials should treat all participants with equal courtesy and dignity and require the same treatment of the hearing officials by participants. For example, before, during and after a hearing, hearing officials should restrict their contacts regarding the matter such as social conversation, with agency staff or representatives, and should address agency participants as they would address any other hearing participant, using last names and courtesy or professional titles. During the hearing process, hearing officials should politely discourage all participants from referring to a hearing official on a first name or casual basis.

### **Section IX: Confidentiality**

Hearing officials should not disclose confidential or private information obtained by reason of official position or authority except as required by law. Hearing officials should never seek to use such confidential information to further their personal interests. Hearing officials should follow their agency's rules or policies regarding media contacts. In any permitted contact with the media, hearing officials should limit the sharing of information to that which does not identify individuals and should never discuss the merits of any specific case. Hearing officials should avoid ex parte communications about a case with anyone (including family, friends and agency staff and associates) unless authorized by statute or agency regulations. However, hearing officials may in confidence discuss cases with other hearing officials.

## Section X: Compliance with Ethical Rules

Hearing officials must comply with all applicable statutes, administrative rules, codes of conduct, policies, and ordinances regarding ethics in their jurisdiction, and work to ensure that persons involved in the proceedings also comply. Hearing officials have a duty to report ethical violations.

### C. Social Media Primer

(This primer is from the “Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees” published by the Committee on Codes of Conduct, Judicial Conference of the United States, <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/code-conduct-judicial-employees>.)

#### Vocabulary

- **Facebook:**  
Facebook is a social networking website originally designed for college students not open to anyone of at least 13 years of age. FB makes it easy to upload pictures, videos, a customized profile, etc. Friends can browse the profiles of other friends or any profiles with unrestricted access and write messages on a page known as a “wall” that constitutes a publicly visible thread of discussion, but each user may set his/her own privacy settings.
- **LinkedIn:**  
LinkedIn is a business-oriented social networking site used mainly for professional networking. It enables people to build, maintain and track professional contacts and offers a means of self-promotion. The site has a “gated-access approach” where contact with any professional requires either a preexisting relationship or the intervention of a contact of theirs. Other features allow users to ask questions for the community to answer and establish relevant groups by subject.
- **Blogs:**  
A contraction of the term “weblog,” a blog is a website that is maintained with regular entries of commentary, descriptions of events, or other material such as text and links to other media related to its topic. The ability for readers to leave comments in an interactive format is an important part of many blogs.
- **Twitter (a/k/a Micro-blogging):**  
Twitter is a micro-blogging application that combines instant messaging and blogging, and has become a popular tool for communicating news market trends, questions and answers and links. Twitter enables users to send and read messages known as tweets, text-based posts of up to 140 characters. Senders can restrict delivery to those in their circle of friends or, by default, allow open access.

- **Wiki:**  
A wiki (Hawaiian for “fast”) refers to a website that allows the user (as opposed to a centralized site manager) to control the content by adding or correcting the text of the site. The most common example is Wikipedia.
- **Social Bookmarking:**  
Social bookmarking sites allow users to save and share website bookmarks online instead of to a web browser’s favorites list. Examples are Delicious and Digg (which don’t look much different to me from, say, Windows Explorer, but what do I know?!).
- **Video Sharing:**  
Video sharing sites allow registered users to upload video clips that can be searched, viewed and shared by other users. YouTube is an example. Of course, Facebook enables direct sharing of videos posted.
- **Threaded Discussion or Chat Room:**  
A “threaded discussion” is a running exchange of messages between two or more people in an online discussion group about a particular topic.

## Key Ethics Concerns

### Confidentiality (Canon 3):

E.g., posting a status update that broadly hints at the likely outcome in a pending case or making a comment on a blog that reveals confidential information.

### Avoiding impropriety in all conduct (Canons 2 & 4):

E.g., exchanging frequent “wall posts” with a social networking friend who is also counsel in a case pending before the tribunal.

### Not lending prestige of office (Canon 2):

E.g., affiliating oneself on a site as a “fan” of an organization that frequently litigates in the tribunal.

### Not detracting from the dignity of or reflecting adversely on the tribunal (Canon 4):

E.g., posting inappropriate photos or videos.

### Not demonstrating special access or favoritism (Canons 1 & 2):

E.g., commenting favorably or unfavorably on a legal blog about the competence of a particular law firm or attorney.

### Not commenting on pending matters (Canon 3):

E.g., posting a comment on a legal blog that pertains to issues in a pending case, even if the case is not directly mentioned.

# ADMINISTRATIVE LAW ETHICS IN THE ELECTRONIC AGE

Carol Greta<sup>1</sup>

Administrative Law Judge, Iowa Department of Inspections and Appeals

## **Scenarios**

NOTE: For purposes of this presentation, the terms Administrative Law Judge and Impartial Hearing Officer are used interchangeably.

1. A State Education Agency informed Bambi, one of the ALJs with whom the SEA contracts for due process hearings, that she would no longer be assigned due process hearings because the SEA became aware of a photo posted on Facebook showing Bambi sitting on the lap of a male stripper at a bachelorette party. Bambi had not posted the picture, nor had she given permission to be “tagged” (have her name associated with the photo). She was fully clothed; the stripper was earning his money (i.e., he was not fully clothed).
  - a. If the person who posted the picture did not tag (mention Bambi by name) the ALJ, what, if any, duty might Bambi have? To whom?
  - b. Should we all just forget about electronic social media (ESM) as a form of staying in touch with friends?
  - c. It’s not exactly a surprise what might occur at a bachelor/bachelorette party. Do the attendees need to do more than “pinky swear” that no one will post anything about the party on ESM?
  - d. If Bambi fights the adverse action by the SEA, what are her chances of prevailing?
  - e. How many of you based your answers on the name Bambi?

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\*With apologies to author and Des Moines native Bill Bryson, I’m a stranger here (in the electronic age) myself. Just ask my kids.

<sup>1</sup> Carol Greta is a native of Iowa who graduated from the University of Iowa College of Law in 1981. She has practiced law in Iowa since June, 1981, as a private practitioner (until 2000), part-time district associate court judge (1995 – 2000), general counsel to the Iowa Department of Education (2000 – 2012), and - as of October, 2012 – administrative law judge within the Appeals Division of the Iowa Department of Inspections and Appeals.

2. A veteran Hearing Officer, Ethel, who also serves formally as a mentor to new IHOs under a program initiated by the State Education Agency that contracts with the IHOs created a public blog on her own time and using her own equipment. Ethel blogged quite recklessly about her colleagues (using pseudonyms, but thinly veiled) and about her very low opinion of the SEA and its administration. The IHO she was mentoring asked for another mentor, citing loss of confidence in the mentor.
  - a. Should the SEA assign a new mentor to the fledgling IHO?
  - b. If the SEA takes more adverse action against Ethel, up to severing the contract with Ethel, would the SEA be legally justified in doing so?
  
3. IHO Sandy is a public employee and uses her employer-provided email (the one that ends in .state.gov) to conduct all routine IDEA communication. Sandy scrupulously avoids ex parte communication by using the “reply all” button for all but mundane housekeeping matters.
  - a. What disclaimer about the availability of communications to and from Sandy’s email should Sandy include as boilerplate language?
  - b. Is the answer different if Sandy is contracted by the SEA, but the SEA requires Sandy to use its email server?
  - c. Is the answer different if Sandy is contracted by the SEA and the SEA does not provide Sandy with an email server, so all communications to and from Sandy are on Sandy’s private email account?
  - d. How should Sandy respond to a party who (inadvertently or not) does not use “reply all?”

4. ALJ Perry notices that a complainant's attorney has sent to Perry an email in which the attorney inadvertently forwarded confidential attorney/client information. What is Perry's ethical duty now?
5. IHO Pat is a public employee. Pat's public employer's email server has been hacked. The employer is taking steps to give notice of the breach, such as posting notice on the employer's web site.
  - a. Does Pat have an ethical duty to do more?
  - b. Does it depend on whether emails to Pat are considered a public record in Pat's state?
6. ALJ Linn uses first (and sometimes second and third) drafts of decisions as invaluable cathartic devices. Linn often indulges in venting in these drafts, expelling all frustrations and unflattering, but understandable, baser human reactions to the participants in some of the more taxing hearings. One party is tech savvy enough to review the metadata (track changes, comments) in the final Word document Linn sends out.
  - a. Is Linn's failure to take steps to hide the metadata an ethical breach?
  - b. If Linn becomes aware that one of the attorneys deliberately mined the metadata, must/may Linn report the attorney's conduct to the appropriate committee on professional responsibility?
7. The hearing room used by ALJ Dillon for prehearing conferences and due process hearings is equipped with a new smart TV. [A smart TV, sometimes referred to as connected TV or hybrid TV, is a television set with integrated Internet features. Put bluntly, a smart TV can spy on anyone in the same room with it.] Dillon is aware that the TV effectively operates as a 24/7 intercom, and that "lobotomizing" it to make it a dumb TV is not foolproof.

- a. Are there any ethical implications for not removing the smart TV from the room?
  - b. Short of removal, is an advisory to parties and witnesses sufficient?
8. IHO Madison has an active Facebook account. What are the ethical implications if Madison trolls Facebook (or any forms of ESM) looking for information that might provide insight into the parties or attorneys?
9. What technology augments your hearings? Is it/are they forces of good or evil for the most part?
10. Do you agree or disagree with the Executive Director of Alaska's Commission on Judicial Conduct (since 1989) who advocates that the effectiveness of a judge and public confidence in the tribunal require technological literacy.
11. Do you have any rules (formal or informal) for parties that bring to hearings their own electronic devices?
12. What is a good balance of keeping up with technology vs. crossing the line of liberally using search engines to conduct independent research?

**TAB 5**

***MAKING AND WRITING A DECISION  
IN ACCORDANCE WITH APPROPRIATE,  
STANDARD LEGAL PRACTICE  
PART II\****

Jim Gerl  
Scotti & Gerl

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**\* NOTE: This document, and any discussion thereof, is intended for educational purposes only. Nothing stated or implied in this document, or in any discussion thereof, should be construed to constitute legal advice or analysis of any particular factual situation.**

## *I. INTRODUCTION*

A reasoned decision is a constitutional requirement for an administrative proceeding. Goldberg v. Kelly 397 U.S. 254, 271 (1970). The hearing officer's decision also fulfills the judicially mandated requirement that government provide reasons for its actions. Wichita R. & Light Co. v. Pub. Util. Comm. 260 U. S. 57-59 (1922). The requirement of a reasoned explanation in the form of a decision helps ensure a fair and careful consideration of the evidence and provides assistance to the reviewing courts. Citizens to Preserve Overton Park v. Volpe 401 U. S. 402 (1971).

The decision of the hearing officer is the only portion of our work that many people ever see. Our decisions should reflect well upon us; they are our **professional product**. It is extremely important, therefore, that our decisions be well reasoned and well written. Reviewing courts and officers receive no other communications from us. Our decisions represent us to the rest of the world. Our reputations as hearing officers depend upon **high quality** written decisions.

The decision is also the final administrative ruling for the parent/student and for the school district. It is imperative that they be able to understand the result of the hearing by reading the decision

Despite the critical importance of the hearing officer decision, there is very little guidance in the statute or regulations concerning the hearing officer's decision. The IDEA provides only that parties have the right to a written, or at the option on the parents an electronic, decision with findings of fact, and that the decision is final subject to appeal. Sections 615(h) and 615(i)(1)(A). The IDEA'04 amendments add that the hearing officer must be able to write decisions in accordance with appropriate, standard legal practice; that a decision about FAPE must be made upon substantive grounds; and that a decision based upon a procedural violation denying FAPE must find that the procedural inadequacy impeded FAPE or the parents' right to participate or caused a deprivation of educational benefits; and that despite the restriction on procedural rulings, a hearing officer may order a district to comply with IDEA requirements. Sections 615(f)(3)(A)(iv), and 615(f)(3)(E). The federal regulations paraphrase the statutory requirements. 34 C.F.R. Sections 300.512 (a)(5), 300.513, and 300.514(a). In addition, the federal regulations add the timelines for the hearing officer decision- requiring a decision within 45 days of the end of any resolution period, pending various potential adjustments. 34 C.F.R. Sections 300.515. In discussing the new federal regulations, the U. S. Department of Education has clarified that a hearing officer still has the authority to issue a decision upon the issue of LRE despite the IDEA'04 amendments. The analysis of comments states that although IDEA'04 and the new regulations impose a new requirement that determinations as to whether a child

has received FAPE must be on substantive grounds, “hearing officers continue to have the discretion to ...make rulings on matters in addition to those concerning the provision of FAPE...” Federal Register, Vol. 71, No. 156 at p. 46706-7 (August 14, 2006).

Here is a recent Q & A document from OSEP on Dispute Resolution Procedures under IDEA Part B. For decisions, see Q C-21 to C-23 and C-25 to C-27.

[http://www.directionservice.org/cadre/pdf/OSEP\\_Q&A\\_memo7-23-13.pdf](http://www.directionservice.org/cadre/pdf/OSEP_Q&A_memo7-23-13.pdf)

Some states have regulations, policies, rules or manuals that provide further guidance on the matter of hearing officer decisions. Hearing officers should be aware of any such regulations or policies and apply them in their decisions.

## ***II. Top Eight General Rules for Writing a Decision***

Although the style of decision writing by hearing officers varies widely, there are some general rules that apply to good decisions. The following eight general rules have been derived from my experience as a hearing officer. These general rules provide some basic guidance on decision writing.

1. **Be Fair**
2. **Appear to be Fair**
3. **Be Careful, Thorough and Thoughtful**
4. **Find Facts**
5. **Apply the Rule of Law: Make and Explain Conclusions**
6. **Resolve All Issues/ State Reasons**
7. **Make a Clear Order/ Award Relief**
8. **Be Clear and Concise**

### **Rule Number One: Be Fair**

The most important thing about being a hearing officer is to be fair. This is far and away the most crucial aspect of our work. Moreover, the policy underlying the due process clause is fairness. The reasoning of the Supreme Court in the seminal cases of Goldberg v. Kelly, supra, and Matthews v. Eldridge, 424 U.S. 319 (1976), focused upon the concept of fairness. Thus, fairness in our decisions is a constitutional mandate.

A fair and impartial decision-maker is at the core of procedural due process. Wong Yang Sun v. McGrath 339 U.S. 33, 45 (1950); Marshall v. Jerrico, Inc. 446 U.S. 238, 242 (1980). If we are to be fair and impartial, this must be reflected in our decisions.

Accordingly, fairness must be the guiding principle for decision writing. A fair decision is constitutionally required, and a fair decision is a good decision.

## **Rule Number Two: Appear to be Fair**

Lawyers are required under their Canons of Ethics to “avoid even the appearance of impropriety.” See, Clinard v. Blackwood 46 S.W.3d 177 (Tenn. 2001). The philosophy underlying the rule prohibiting conduct which might have the appearance of impropriety is that public confidence in the system requires the belief that the system is fair. Respect for the rule of law cannot exist in the absence of such public confidence.

Under certain circumstances, the appearance of unfairness by the decision-maker may in itself violate procedural due process. See, Caperton et al v. Massey Coal Co, Inc, et al 556 U.S. 868, 129 S.Ct. 2252 (2009).

For those who write hearing decisions, giving the appearance of being fair is almost as critical as being fair. Receiving the fairest decision in the world means nothing to the party who believes that the decision was issued by a kangaroo court. By the time that parties get to a hearing, they are often angry. If the decision does not seem to be fair, these emotions will be inflamed.

In order to avoid even the appearance of unfairness, the hearing officer should take extraordinary steps to make it abundantly clear in her decision that she does not favor one party or attorney over the other. In this regard, the language of the decision should not be unduly harsh toward either party. There may well be occasions where it is appropriate to reprimand a party in the decision, but the tone should be restrained.

Similarly, the decision should avoid unnecessary criticism of the witnesses who testify on behalf of a party. It is preferable to say, for example, that “Witness X was not credible,” rather than “Witness X lied.”

The appearance of fairness is obviously not a shortcut to avoid the cardinal requirement that the decision be fair. The appearance of fairness is not meant to be a disguise for an unfair decision. Rather, the requirement of the appearance of fairness is an additional requirement. The decision must itself be fair, and the parties must have no reasonable basis to believe otherwise. The two rules work in tandem. By paying attention to both, the hearing officer’s decision meets the mandate of the due process clause.

### **Rule Number Three: Be Careful, Thorough and Thoughtful**

A number of courts have stated that they will accord more deference upon review to a hearing officer decision that is careful, thorough and thoughtful. See, *County Sch. Bd. of Henrico County v. Z.P. by R.P.* 42 IDELR 229 (4th Cir 2/11/05). Indeed, because hearing officers are professional writers and because the decision is our professional product, a good decision ought to be careful, thorough and thoughtful.

Being careful requires that you read any briefs and proposed findings of fact. It means that you have paid attention to witness testimony and that you have read the documentary evidence. The key arguments and evidence should be discussed in your decision. Your reasoning should be clear to anyone reading your decision. Failure to address important evidence or significant arguments is a certain way to get reversed. See, *Scott ex rel CS v NY City Dept of Educ* 63 IDELR 43 (SDNY 3/25/14).

Your reasoning should be clear to anyone reading your decision. If not, courts will not hesitate to remand. See, *MO v Dist of Columbia* 62 IDELR 6(DDC 6/30/13); *Suggs v. District of Columbia* 679 F.Supp.2d 43, 53 IDELR 321 (D DC 1/19/10).

Being thorough includes giving the reasons why you decided the matter as you have. It also requires a discussion of why you discredited or discounted contrary evidence. A thorough decision demonstrates that the hearing officer understands and is familiar with the documentary evidence and the testimony of witnesses.

Being thoughtful includes choosing your audience. If you think an appeal is unlikely and you really want to get the attention of the parties (e.g. to cooperate in the future as to the education of the child), avoid legalese and school jargon. Use plain English to the extent possible. You must still cite the law to explain your conclusions of law, but try to use simple language if possible. If you suspect an appeal or if you are seeking to have the courts extend the law in a particular direction, a more legalistic tone may be appropriate.

It is important that a reviewing court be able to tell from your decision that you have considered everything submitted and argued. It is advisable to affirmatively state that you have done so. Consider placing a boilerplate statement similar to the following near the beginning of your decision:

### PRELIMINARY MATTERS

Subsequent to the hearing, each party submitted proposed findings of fact and a post-hearing brief. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

### **Rule Number Four: Find Facts**

Your findings of fact should be written as facts; they are not contentions, they are facts. You should include only facts of decisional significance. Despite our solid rulings on relevance during the hearing, every hearing includes testimony that we don't need for our decision. Findings of fact should be limited to matters of decisional significance. (Although there are many good ways to write a decision, if you are having trouble determining which facts are decisionally significant, consider writing the findings of fact last.)

Findings should be carefully prepared. If a court disagrees with your legal conclusions or analysis, that is a part of the job. Where a court is critical of your findings, however, it is implicitly criticizing the hearing officer. Your findings must absolutely be based upon and consistent with evidence in the hearing record. South Kingston Sch Committee v Joanna S ex rel PJS 64 IDELR 191 (1<sup>st</sup> Cir 12/9/14); Pointe Educ Services v AT 63 IDELR 279 (D Ariz 8/14/14).

Findings of fact should not simply regurgitate testimony. That is the function of the transcript or hearing record. The danger in restating testimony contrary to your findings is that it could be mistaken for findings of fact. A court could also conclude that your conclusions are contrary to the evidence if regurgitated testimony is mistaken for findings of fact.

Because they are facts, findings should also not be inferences. You can explain your logic in the discussion section of your decision. Similarly, findings are no place for contentions of the parties. The contentions or issues should be in a separate section, preferably earlier in the decision.

Generally findings should be stated in the past tense. The facts being found almost always have happened prior to the hearing. Definite language is preferred

over uncertain language. Findings should be stated as simple facts and not qualified unless necessary to reflect the record accurately. For example, findings should not include...“it appears that,” “it seems that” or “tends to be.”

There are two schools of thought concerning whether to provide citations to the record in your findings of fact. The benefit is that you show that your decision is thorough and that your findings are supported by the record evidence. The downside is that if your typist makes a mistake as to the page number, a reviewing court could conclude that your decision is not careful or that it is not supported by the evidence.

Consider requiring the attorneys to submit proposed findings of fact, anchored to specific record citations. Carefully check the citations to the record as lawyers can sometimes be creative with the meaning of exhibits or testimony. When utilizing proposed findings, impose your own judgment as to which proposed facts, if any, warrant inclusion in your decision. Even where proposed findings are correct, they may need to be restated to ensure accuracy and completeness. Never accept all of the findings from one party; a reviewing court could consider this to be evidence of bias or a lack of due care.

### **Rule Number Five: Apply the Rule of Law: Make and Explain Conclusions**

The conclusions of law, and the discussion thereof, are the portion of the decision in which the hearing officer states the rule of law. Specific sections of IDEA and the federal regulations and any relevant state regulations should be cited. Every legal conclusion should include a citation of legal authority. Conclusions of law should be crisp and clear.

Remember that certain decisions are binding precedent. Other judicial or administrative special education decisions may be cited as helpful and relevant authority, but they are not binding, and they may be used as you so determine in the exercise of your discretion.

Prehearing legal research conducted by the hearing officer should be useful in the decisional phase of the proceeding. Additional research on specific legal questions should be conducted in preparing the decision. By providing caselaw, a hearing officer provides solid support for his legal conclusions.

Apply the legal standard with care. Explain how you have arrived at your conclusions given the legal standard, but be true to the legal standard. See, Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7<sup>th</sup> Cir 8/2/10); Forest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14).

Where the losing party has cited legal authority that would appear to be controlling, state the reasons why you distinguish the facts of the case before you. If the losing party provides non-binding legal authority, explain why you found the cases to be unpersuasive. Such explanations should be in the decision, but they should not be included in the conclusions of law.

### **Rule Number Six: Resolve All Issues/ State Reasons**

Before the discussion of the merits of the case, the decision should address any preliminary matters. Such matters might include any evidentiary issues, motions, deferred rulings, problems with non-record evidence attached to a brief, or other non-dispositive issues.

One of the functions of the decision is to notify the parties of the outcome of the case. Another is to permit meaningful review by courts and review officers. To accomplish these purposes, the decision must state why the decision turned out the way it did. The good work done by the hearing officer to narrow and simplify the issues during the prehearing phase of the proceeding should bear fruit in the decisional phase. The decision should decide and address each issue raised at the hearing. You should explain what evidence in the record lead you to conclude as you have. State the reasons why you ruled as you have ruled. Explain why you found certain evidence more persuasive than other evidence. If you permit posthearing briefs, discuss all key arguments and why you accept or reject them.

Due process requires that the decision maker must provide an explanation for his determination, including the reasons for the decision and a statement of the evidence relied upon. Wichita R. & Light Co. v. Pub. Util. Comn. 260 U.S. 48, 57-59 (1922).

If the key theme underlying the hearing is the right to be heard, the theme underlying the decision is the right to know why. Both are critical components of due process. Explain your ruling in your decision.

Where credibility is in issue, and it often is in issue, explain why you believe one witness over another. Witness demeanor is one factor you can consider, but be aware that it is an inexact science. For example, the difference between a liar and a nervous witness is very difficult to ascertain. If you use demeanor, try to add at least one other factor such as inconsistencies, unfamiliarity with the child, changes in testimony, bad memory, leading questions by the attorney, inability to testify without documents... etc. Credibility is one area where courts are extremely reluctant to reverse the hearing officer who observed the testimony first hand. It is advisable to include a careful analysis of the credibility of witnesses in your decision.

It is very helpful during the decision phase if the hearing officer has taken good notes during the hearing itself. Notes should be taken as to all issues, including credibility, and each key piece of evidence relating to each issue. It helps to keep separate notes or else to use various different colored pens for these purposes.

The decision must be that of the hearing officer. This is one area in which we cannot solicit help from friends or colleagues. One question we cannot ask is “how should I decide?”

### **Rule Number Seven: Make a Clear Order/ Award Relief**

It is important that your Order be clear. If you rule in favor of the district and award no relief, say so. If any relief is awarded, clearly specify what you are requiring the school district to do. Timeframes should also be clearly specified. Note: if you are requiring evaluations, including an IEE, be aware that the evaluators may take time to complete their report, and they can be difficult for a district or a parent to control.

Even a carefully worded Order can sometimes result in additional litigation. For example, in Gumm by Gumm v. Nevada State Department of Education 113 P.3d 853, 43 IDELR 198 (Nev. S.Ct. 6/23/05), the parents of an autistic child prevailed at the due process hearing, and the hearing officer ordered the LEA to reimburse the parents for “all out of pocket expenses” related to the private placement, including “mileage for one round trip each day...” the student attended the program. The SRO affirmed. The LEA paid the parents more than \$60,000. The parents then filed a state complaint seeking an additional \$26,000 which constituted reimbursement for the mom’s lost salary and benefits for the one year that she transported the student to and from the program. The state resolved the complaint in favor of the LEA, and the parents filed for mandamus. The Nevada Supreme Court upheld the state’s determination and ruled that the mother was not entitled to reimbursement for her salary under the IDEA.

Before the order, explain in detail the relief being awarded and the reasons for the particular forms of relief. Where there has been a violation of the IDEA, the hearing officer has broad equitable powers to fashion the appropriate relief. See, Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 2009); Burlington Sch Committee, et al v. Dept of Educ, et al 471 U.S. 359, 105 S.Ct. 1996, 2002, 556 IDELR 389 (1985). A hearing officer should be careful, however, not to order relief that is unavailable under the statute.

### **Rule Number Eight: Be Clear and Concise**

The decision should be long enough to do its job: set forth all decisionally significant findings of fact; state the rule of law; and discuss why the hearing officer

made this decision. This may take a few pages. It is clear, however, that nobody wants to read a telephone book.

Be concise. Avoid excessive verbiage. Economy of words is appreciated by the parties as well as reviewing officers and courts. Say what must be said so that the parties understand the outcome, so that it is clear that record only evidence was considered, and so that a reviewing court may conduct a meaningful review, and then stop.

Be clear. Unless it is necessary for clarity, don't use charts, footnotes, or graphs. Try to make sure that your decision will be understood by its readers. Avoid Latin and other foreign language words or phrases. Simple and plain language is preferable. If the timelines permit, a good technique is to prepare a draft, sleep on it, redraft it, sleep on it again, and then finalize it. Courts do not tolerate unclear decisions by hearing officers. LJ by VJ & ZJ v. Audubon Bd of Educ 49 IDELR 6 (D.NJ 11/5/7); Gail A ex rel Zachary A v. Marinette Sch Dist 48 IDELR 73 (E.D. Wisc. 3/22/7).

Remember to date and sign the decision. In the prehearing phase, the hearing officer should have determined if the parent desired a written or electronic decision. Section 615(h)(4). In my experience, the written decision is nearly always preferred.

### III. *Recent Caselaw Re: Hearing Officer Decision*

- a) JP by Peterson v. County Sch Bd of Hanover County, VA 516 F.3d 254, 49 IDELR 150 (4th Cir 2/14/8). The Fourth Circuit noted that the HO could have offered a more thorough explanation as why he denied a request for tuition reimbursement, but the Court reversed the district court for according no **deference** to the HO decision or its findings of fact. The HO's findings of fact were regularly made and not the result of flipping a coin, throwing a dart, etc... Although the HO found all witnesses to be credible, the court held that he sufficiently identified his reasoning in reaching his decision. Contrast, KS by PS & MS v. Freemont Unified Sch Dist 545 F.Supp.2d 995, 49 IDELR 182 (N.D. Calif 2/22/8) The court found the HO decision to be thorough and careful and afforded it considerable deference. Nonetheless, the court rejected the HO's findings of fact because of faulty reasoning. HO's reasoning in bolstering credibility of district witnesses because of consistent district records and in reducing the parents' credibility because parent was advocating for the student were inconsistent with IDEA's philosophy; and Hansen ex rel JH v Republic R-III Sch Dist 632 F.3d 1024, 56 IDELR 2 (8th Cir. 1/21/11) After parent's case, school district elected not to put on any evidence and moved for a directed finding. HO panel granted the motion and issued a one paragraph decision in the school district's favor without any findings of fact.

Eighth Circuit found that HO panel decision was entitled to **no deference** because no facts were found.

- b) LO by DO & DO v East Allen County Sch Corp 64 IDELR 147 (ND Ind 9/30/14) Court reversed and vacated **inconsistent** HO decision. HO found that student was clearly not eligible in 09-10 school year and that SD had failed to implement 10-11 IEP and awarded compensatory education. After SD pointed to certain evidence, HO issued an amended decision ordering compensatory education for failing to find the student eligible in 09-10 school year. Court found that the change to the decision was contradicted by the remainder of the decision. Also HO order requiring AT assessment was inconsistent w findings of fact re student did not need AT. HO order for SD to take reasonable steps to prevent bullying was not supported by the record evidence that showed that SD had taken reasonable corrective actions. **{surprise ending never good};** IS by Sepiol v Sch Town of Munster 64 IDELR 40 (ND Ind 9/10/14) Court criticized HO decision as **inconsistent** where SD would continue to use a methodology that wasn't working for a second school year after HO had found that it denied FAPE for the same thing in first school year.
- c) Scott ex rel CS v NY City Dept of Educ 63 IDELR 43 (SDNY 3/25/14) conclusions **not supported** by record; SRO failed to consider significant evidence; failed to **address** obvious weaknesses and gaps in evidence; **mischaracterized** evidence; and improperly substituted credibility determinations for those of ho who observed testimony; Howard G ex rel Joshua G v State of Hawaii, Dept of Educ 62 IDELR 292 (D Haw 2/24/14) HO decision not supported by the record; Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 200 (ND Calif 12/2/14) Court remanded where HO award of compensatory education was not supported by the record; ho's award was hour-for-hour with no analysis of educational harm; Pointe Educ Services v AT 63 IDELR 279 (D Ariz 8/14/14) Court ruled that HO's findings were **not supported** by the evidence and disagreed with ho's credibility analysis. See, Forest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14)(ignored contradictory evidence).
- d) WW ex rel MC v NY City Dept of Educ 63 IDELR 66 (SDNY 3/31/14) SRO decision **failed to address** two issues (composition of IEPT & whether school too large) therefore court remanded; Rodriguez & Lopez ex rel CL v Independent Sch Dist of Boise City # 1 63 IDELR 36 (D Idaho 3/28/14) Court declined to defer to ho decision that was **sparse and conclusory** on one issue; MO v Dist of Columbia 62 IDELR 6(DDC 6/30/13) Court remanded case to HO where decision **failed to explain** his reasoning for concluding that LEA considered information provided by parents to IEPT. Conclusory statements were insufficient.
- e) Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7<sup>th</sup> Cir 8/2/10) Seventh Circuit reversed HO who had applied the **wrong** legal

**standard** for eligibility (HO determined that disability could affect ed performance not that it did affect performance); See, Forest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14) Mgst gives little deference where ho findings were not careful (no **discussion** of witness testimony) and little deference to ho conclusions of law where ho failed to support them with **caselaw** and where ho ignored contradictory evidence and where ho imposed an arbitrarily high **legal standard** despite decades of court interpretations of IDEA.

- f) Rachel H v Dept of Educ, State of Hawaii 63 IDELR 155 (D Haw 6/18/14) Court gives more deference where ho's findings are thorough and careful; here substantial deference where ho gave **careful consideration** to post hearing briefs and ho participated in **questioning** witnesses and showed strong familiarity with the evidence.
- g) SD ex rel HV v Portland Public Schs 64 IDELR 74 (D Maine 9/19/14) Court reversed HO's conclusion that the parent was to blame for IEP implementation failure because of her **demanding, blaming and insistent** attitude. Instead the court found that the **HO overstated** the parent's culpability and held that the denial of FAPE was the result of a badly drafted IEP with improper PLEPs.
- h) Sch Union No. 37 v. Mrs C ex rel DB 518 F.3d 31, 49 IDELR 179 (1st Cir 2/26/8) First Circuit upheld the district court conclusion that HO decision lacked **persuasiveness** where it erroneously failed to find a six year delay in bringing a complaint to be unreasonable. Las Virgienes Unified Sch Dist v SK by JK & BK 54 IDELR 289 (CD Calif 6/14/10) HO decision was **not** entitled to deference because it was not careful and thorough. (no references to testimony or exhibits; serious errors re facts , eg time draft IEP was written); KE by KE & TE v. Independent Sch Dist # 15 54 IDELR 215 (D Minn 5/24/10) Court reversed HO where a number of the HO's findings were **not supported by evidence** in the record; Suggs v. District of Columbia 679 F.Supp.2d 43, 53 IDELR 321 (D DC 1/19/10) Court remanded case to HO where Ho did **not explain his reasoning**; HO cannot simply **disregard evidence**, HO must consider it, evaluate it and explain its impact upon his decision; Fort Osage R-1 Sch Dist v. Sims ex rel BS 55 IDELR 127 (WD Missouri 9/30/10) Court found that HO panel's findings of fact were not **supported by the evidence** and reversed the decision; Marc M ex rel Aidan M v. Dept of Educ, State of Hawaii 762 F.Supp.2d 1235, 56 IDELR 9 (D Haw 1/24/11) Court declined to give deference to HO decision where conclusions were **sparse and cursory** and **not linked to the facts developed at hearing**; SF & YD ex rel GFD v. New York City Dept of Educ 57 IDELR 287 (SDNY 11/9/11) Court found that HO analysis was not entitled to deference where he did **not carefully consider** the evidence (3/4 of a page double spaced in decision), but did give deference to SRO who carefully considered the evidence (nearly 3 single spaced pages); R-RK by CK v. Dept of Educ, State of Hawaii 57 IDELR 70 (D Haw 8/1/11) Court did not give deference to HO decision that was not carefully **reasoned**. SB

by Dilip B & Anita B v. Ponomo Unified Sch Dist 50 IDELR 72 (C.D. Calif 4/15/8) HO decision was careful, impartial and sensitive to the complexities of the issues, but the court reversed where it disagreed as to the key conclusions of law. P by Peyman v. Santa-Monica Malibu Unified Sch Dist 50 IDELR 220 (C.D. Calif 7/6/8) Court reversed HO where the decision **ignored crucial** undisputed **testimony** by the parent's expert and where HO's reasons for discounting the expert were **not persuasive**. Cranston Sch Dist v. QD by Mr & Mrs D 51 IDELR 41 (D. RI 9/8/8) The court noted that the HO's decision was flawed by a number of **inconsistencies and mistakes**, most notably misattribution of the sources of evidence for the facts found. Hunter v. District of Columbia 51 IDELR 34 (D. DC 9/17/8) Court remanded a due process hearing to a HO where decision concluded no denial of FAPE without discussing parent's unrebutted testimony that the student regressed under his 2004 IEP, yet 2006 IEP was nearly identical. EM by EM & EM v. Pajaro Valley Unified Sch Dist 51 IDELR 105 (N.D. Calif 10/17/8) HO decisions should be supported by fairly detailed factual findings to permit judicial review. Here court **remanded** the matter back to the HO for further explanation of why he favored one intelligence test over another and **how he evaluated** all of the mixed test data in concluding that the student was not eligible for special education.

- i) DF by AC v. Collingswood Borough Bd of Educ 694 F.3d 488, 59 IDELR 211 (3d Cir 12/12/12) Court reversed HO and lower court criticizing their reliance on an **unpublished court decision**.
- j) CL & GW ex rel CL v Scarsdale Union Free Sch Dist 744 F.3d 826, 63 IDELR 1 (2d Cir 3/11/14) Second Circuit does not give deference to SRO decision where not sufficiently reasoned or carefully considered; MW by SW & EW v NY City Dept of Educ 725 F.3d 131, 61 IDELR 151 (2d Cir 7/29/13) Second Circuit stated that courts will defer to HO decision where it is **well reasoned**, the HO shows **familiarity** with the evidence, and where the HO has a good **command of the evidence**; Hardison ex rel ANH v Bd of Educ of the Oneota City Sch Dist 773 F.3d 372, 64 IDELR 161 (2d Cir 12/3/14) IDEA HOs have greater institutional **competence** in matters of **educational policy** and therefore federal courts must give due weight to the administrative proceedings because the judiciary lacks the specialized knowledge and experience. In deciding what weight is due, the analysis will hinge upon considerations that normally determine whether any particular judgment is persuasive such as the **quality and thoroughness of the reasoning**, the **type of** determination under review, and whether the decision is based upon **familiarity with the evidence and witnesses**. Here district court failed to give sufficient deference to SRO's conclusion that parents' private school was inappropriate where SRO decision was sufficiently reasoned and supported by the record.

- k) South Kingston Sch Committee v Joanna S ex rel PJS 64 IDELR 191 (1<sup>st</sup> Cir 12/9/14) First Circuit ruled that district courts must give due deference to the host superior educational expertise. Level of review is “**involved oversight**” i.e., somewhere in between the highly deferential “clear error” standard and the non-deferential “de novo” standard. Here the court rejected four findings of fact as not **supported by the record**.
- l) MW by SW & EW v NY City Dept of Educ 725 F.3d 131, 61 IDELR151 (2d Cir 7/29/13) Second Circuit stated that courts will defer to HO decision where it is well reasoned, the HO shows familiarity with the evidence, and where the HO has a good command of the evidence; RE ex rel JE v. New York City Dept of Educ 694 F.3d 167, 59 IDELR 241 (2d Cir 9/20/12) Deference to the HO decision depends upon the **quality and reasoning** of the decision tempered by the following principles: [D]eterminations regarding the **substantive** adequacy of an IEP should be afforded more weight than determinations concerning whether the IEP was developed according to the proper procedures. Decisions involving a dispute over an appropriate educational **methodology** should be afforded more deference than determinations concerning whether there have been objective indications of progress. Determinations grounded in **thorough and logical reasoning** should be provided more deference than decisions that are not. And the district court should afford more deference when its review is based entirely on the same evidence as that before the SRO than when the district court has before it additional evidence that was not considered by the state agency; MH & EK ex rel PH v. New York City Dept of Educ 685 F.3d 217, 59 IDELR 62 (2d Cir 6/29/12) (same re principles; more deference is due to decisions that are careful and thorough and well-reasoned and to findings that are supported by record evidence.
- m) Hansen ex rel JH v Republic R-III Sch Dist 632 F.3d 1024, 56 IDELR 2 (8th Cir. 1/21/11) After parent’s case, school district elected not to put on any evidence and moved for a directed finding. HO panel granted the motion and issued a one paragraph decision in the school district’s favor without any findings of fact. Eighth Circuit found that HO panel decision was entitled to no deference because **no facts** were found.
- n) DS & AS ex rel DS v. Bayonne Bd of Educ 54 IDELR 141 (3d Cir 4/22/10) The Third Circuit held that the District Court erred in overturning HO’s **credibility** without showing a good reason for doing so; Marshall Joint Sch Dist No 2 v. CD by Brian & Traci D 616 F.3d 632, 54 IDELR 307 (7<sup>th</sup> Cir 8/2/10) Seventh Circuit rejected HO’s credibility findings as not supported by the record; Sebastian M by Lisa M & Michael M v King Phillip Regional Sch Dist 685 F.3d 79, 59 IDELR 61 (1st Cir 7/16/12) First Circuit held that District Court properly deferred to HO’s weighing of the testimony of expert witnesses and school personnel. HO **properly discounted** the testimony of experts who had not seen the child or conducted

formal assessments of him. HO chose instead to credit the testimony of educators who **worked with** the student and observed his daily progress.

- o) Contrast, Ridley Sch Dist v. MR & JR ex rel ER 680 F.3d 260, 58 IDELR 271 (3d Cir 5/17/12) Third Circuit refused to give deference to HO's **credibility findings** where there was strong non-testimonial evidence to contrary; (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Court ruled that HO credibility findings were supported by the evidence in the record; KC v. Nazareth Area Sch Dist 57 IDELR 92 (ED Penna 8/26/11) Court accepted HO's credibility findings noting that HO credibility determinations will be overturned only when nontestimonial evidence in the record justifies a contrary finding. PC & MC ex rel KC v. Oceanside Union Free Sch Dist 56 IDELR 252 (EDNY 5/24/11) Court accepted HO's credibility determinations that were thoroughly discussed. Court rejected implication that SRO's credibility determinations were biased where the decision was a lucid and well reasoned opinion; Marcus C by Karen C v. Dept of Educ, State of Hawaii 56 IDELR 219 (D Haw 5/9/11) Court upheld HO credibility determinations upon conflicting evidence Bd of Educ of the Hicksville Union Free Sch Dist v. Schaefer 933 N.Y.S.2d 579, 84 A.D.3d 795, 56 IDELR 234 (NY Sup. Ct, App Div 5/3/11) Court held that SRO was not bound by HO credibility determinations when there was non-testimonial evidence to support a contrary conclusion; AC by CC v. Chicago Public Sch Dist # 299 57 IDELR 276 (ND Ill 11/18/11) Because courts give great deference to HO's credibility determinations, Court deferred to HO decision to credit the testimony of district expert that the student would not benefit from assistive technology; Sundbury Public Schs v. Mass Dept of Elementary & Secondary Schs 55 IDELR 284 (D Mass 12/23/10) Court ruled that credibility determinations are the province of the HO; SA by LA v. Exeter Union Sch Dist 110 LRP 69145 (ED Calif 11/24/10) Court rejected arguments that HO improperly determined credibility and ignored certain evidence favorable to parents; CN by Newman v. Los Angeles Unified Sch Dist 51 IDELR 98 (C.D. Calif 10/9/8) Credibility determinations in a HO decision are given great deference and are generally accepted unless the non-testimonial evidence in the record would compel an opposite conclusion. MV ex rel AV v. Shenandoah Central Sch Dist 49 IDELR 98 (N.D. NY 1/2/8) SRO who did not observe witnesses testify, erred when he did not accept HO's credibility determinations. Cincinnati Public Sch Dist 108 LRP 71134 (SEA OH 10/17/8) Because HO who had observed testimony was in a better position to evaluate the credibility of witnesses, SRO deferred to HO's credibility judgments. See also, Jaffess v. Council Rock Sch Dist 46 IDELR 246 (E.D.PA 10/26/6) Reviewing courts will give much deference to HO's findings of fact where the case turns on competing expert witnesses; Council Rock Sch. Dist. 106 LRP 20193 (SEA Pa. 3/27/6)(SRO panel will not overturn HO credibility determinations in the absence of evidence in the record compelling a contrary conclusion.); Ambridge Area Sch Dist 106 LRP 60446 (SEA PA 10/2/6) (SRO panel held that it would reverse HO findings and credibility determination and weighing of the evidence only where

the whole record or non-testimonial extrinsic evidence compels a contrary conclusion.) KS by PS & MS v. Fremont Unified Sch Dist 545 F.Supp.2d 995, 49 IDELR 182 (N.D. Calif 2/22/8) Ho erred by crediting school district expert who had no contact with the student while discrediting parent expert because he had had no contact with the student; WH v Schuylkill Sch Dist 61 IDELR 133 (ED Penna 6/20/13) Court will accept HO **credibility** findings unless non-testimonial evidence justifies a contrary conclusion; Marcus I by Karen I v Dept of Educ, state of Hawaii 61 IDELR 98 (D Haw. 6/10/13) Court refused to disturb HO's credibility findings; TB & CB ex rel TB v Havershaw-Strong Point Central Sch Dist 933 F.Supp.2d 554, 60 IDELR 279 (SD NY 3/21/13) at n.11 Court agreed with SRO (& not HO) finding that a witnesses testimony was credible. SRO decision satisfactorily explained an apparent discrepancy in her testimony in response to a question by HO; Presely ex rel KP v Friendship Charter Sch 60 IDELR 224 (DDC 2/7/13) Court gives particular deference to HO findings involving credibility; Andrew F By Joseph F & Jennifer F v Douglas County Sch Dist RE-1 64 IDELR 38 (D Colo 9/15/14) Court criticized HO decision that lacked references to the **record**, did not address **credibility** issues or **inconsistencies** in the evidence. Nonetheless the court gave deference because the HO explained his reasoning; McAllister v Dist of Columbia 63 IDELR 130 (DDC 5/21/14) adopting Mgst @ 62 IDELR 294. Court upheld ho's adverse **credibility** assessment of the testimony of parent's advocate. HO is not bound to accept testimony as true and correct merely because he admits it into evidence or because there was no contradictory evidence. HOs are required to weigh and interpret the evidence. Fact based or credibility HO findings are entitled to greater deference; MA v Jersey City Bd of Educ 63 IDELR 9 (DNJ 3/18/14)@ n.6 and 7 Court gives special weight to ho's credibility findings even if ho did not hear the testimony; TE v Cumberland Valley Sch Dist 62 IDELR 204 (MD Penna 1/7/14) It is within the discretion of the ho to **weigh testimony** and decide which evidence to credit or find credible; Contrast, Dept of Educ, State of Hawaii v Rita L by Rita L 64 IDELR 236 (D Haw 12/15/14) Court rejected ho's credibility findings where ho found two witnesses not credible in cursory fashion mentioning only that there testimony was riddled with inconsistencies without further elaboration.

- p) Sumner County Sch Dist 17 v. Heffernan ex rel TH 672 F.3d 478, 56 IDELR 186 (4th Cir 4/27/11) Fourth Circuit gave deference to HO findings of fact that were regularly made but disagreed with his conclusions and reversed a decision for the school district; CC v Fairfax County Bd of Educ 59 IDELR 95 (ED VA 7/19/12) Court found HO decision to have been regularly made. Court endorsed HO's weighing of the evidence and expert testimony and his conclusion that school personnel testimony was entitled to greater weight because they were more familiar with the student; SA v. Weast 59 IDELR 243 (D. MD 9/26/12) Although a more detailed analysis is always valuable – no particular **level of detail** is required for a HO decision in the 4th Circuit. An IDEA HO is not required to offer a detailed analysis of his credibility findings.

- q) P by Mr & Mrs P v. Newington Bd of Educ 546 F.3d 111, 51 IDELR 2 (2d Cir 10/9/8) IDEA allows HO and the reviewing courts wide latitude in fashioning an **appropriate remedy** where there has been a violation of IDEA. Here an award of compensatory education requiring the district to hire an inclusion expert and have him participate in an FBA for the student was appropriate. In Re: Student With a Disability 108 LRP 45824 (SEA WV 6/4/8) A special ed HO has broad authority to fashion an appropriate remedy where there has been a violation of IDEA. Here a combination of compensatory education and a thorough behavioral evaluation is the appropriate remedy. Helsing v. Avon Grove Sch Dist 47 IDELR 256 (E.D. PA 3/30/7) Court found that a due process HO has the authority to grant declaratory relief in his decision; Dist of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) HO has **broad equitable authority** to fashion an appropriate remedy for a violation of IDEA- here awarding comp ed plus a thorough behavioral **evaluation**; In re Student with a Disability 111 LRP 40544 (SEA WV 5/31/11) (same re authority); Letter to Miller 110LRP 73646 (OSEP 5/10/10) (HOs have broad authority to determine reimbursement for a unilateral placement.)
- r) Allen by Bailey v. Altheimer Unified Sch Dist 48 IDELR 95 (E.D. Ark. 7/6/7). The SEA is required to implement and enforce the school district's compliance with a HO decision; Bd of Educ of the County of Nicholas v HA by Monica A 56 IDELR 136 (SDWVa 3/9/11) Court rejected LEA argument that a letter from SEA stating that school district was in compliance with HO decision based upon documents submitted negated later HO decision after taking evidence. Court held that LEA violated spirit and letter of IDEA when it refused to comply with HO decision requiring it to choose one of three evaluators selected by the parent. (adopting Mgst recommendation at 56 IDELR 103).
- s) Options Public Charter Sch v. Howe ex rel AH 48 IDELR 282 (D.DC 9/26/7) Court rejected HO decision as **inadequate** where it stated the issues ambiguously, relied upon speculation and contained no findings of fact or conclusions of law. Instead of finding facts, HO's language included "it is entirely conceivable that," and it is most probable that the provision of FAPE...might have required...; York County Sch Dist 49 IDELR 178 (SEA SC 1/24/8) SRO criticized HO decision that contained numerous errors, but upheld the decision where the ultimate finding (FAPE provided) was correct. Upper Perkiomen Sch. Dist. 106 LRP 20190 (SEA Pa. 3/13/6) Although merely **reciting** testimony instead of finding facts is clearly not the best practice, credibility determinations of the hearing officer should ordinarily receive deference. Dist of Columbia v. Nelson ex rel CP 57 IDELR 192 (DDC 9/21/11) Court reversed HO who exceeded her authority by taking actions in decision inconsistent with IDEA.; removing LEA from IEP process leaving it to parents and a private school; restricting ability of LEA to object to IEPs for the student; ordering LEA to ensure that student received a diploma by age 21-IDEA

does not guarantee outcomes- and by ordering to keep the student in special education =inconsistent with LRE principles.

- t) LJ by VJ & ZJ v. Audubon Bd of Educ 49 IDELR 6 (D.NJ 11/5/7). Court criticized HO decision as **unclear**. Because the order did not specify the relief to be awarded, the court looked to the reasoning of the HO and the findings to fashion an order granting relief; Bd of Educ of the Scarsdale Union Free Sch Dist 49 IDELR 85 (SEA NY 9/19/7). HO erred by granting relief in her decision that was not sought by the dp complaint.
- u) NR by BR v San Ramon Valley United Sch Dist 107 LRP 7500 (N.D. Calif 1/25/7) Where HO decision omitted key findings of fact, and the HO ignored certain evidence and the HO's conclusions were **not based** upon record evidence, the court considered the evidence de novo; See also, Alfonso v. District of Columbia 45 IDELR 118 (D.DC 2/16/6) HO's decision reversed where he failed to consider undisputed evidence; Bd of Educ of the E. Islip Union Free Sch Dist 106 LRP 71800 (SEA NY 11/21/6) SRO reversed HO who had ruled IEP inappropriate without making any findings concerning the development of the IEP; Pittsburgh Sch Dist 46 IDELR 233 (SEA PA 10/27/6) SRO panel reversed HO who failed to make findings of fact and conclusions of law specific to FAPE; Lakeview Lochl Sch Dist 107 LRP 11268 (SEA Ohio 10/11/6) SRO reversed HO decision that was against the weight of the evidence and which **lacked adequate findings** of fact and **conclusions** of law. Gail A ex rel Zachary A v. Marinette Sch Dist 48 IDELR 73 (E.D. Wisc. 3/22/7). HO decision was so **unclear** regarding the arguments raised that the court remanded the case to the HO.
- v) East Penn Sch Dist 106 LRP 53549 (SEA PA 8/30/6) SRO panel substituted its own legal conclusions where HO decision was long on facts but short on law, containing **no legal citations** other than to non-binding state guidelines; New York City Dept of Educ 46 IDELR 114 (SEA NY 8/4/6) SRO reversed HO decision placing an arbitrary \$34,000 cap on reimbursement where the decision did not provide any rationale or other support for the cap. Pennsbury Sch Dist 107 LRP 63404 (SEA PA 9/25/7) SRO Panel criticized HO decision for relying upon SpEd literature concerning best practices and upon unpublished decisions from other jurisdictions rather than published opinions decisions setting forth the law. In re: Student with a Disability 108 LRP 40156 (SEA NY 6/4/8) SRO reversed HO who lacked authority to reopen a case and issue a decision with the opposite conclusion (no FAPE.)
- w) BO & PS ex rel KO v. Cold Spring Harbor Central Sch Dist 57 IDELR 130 (EDNY 9/1/11) Court criticizes HO for stating that he must defer to the judgment of **professional educators** as inconsistent with IDEA. This statement from Rowley applies only to court review of SEA proceedings. Court notes that HO has the authority to decide a case upon substantive grounds and render a decision using

his own best judgment in light of the evidence. No harm found where odd statement did not affect outcome

- x) Bd of Educ of Fayette County, KY v. LM ex rel TD 107 LRP 10801 (6th Cir. 3/2/7). The Sixth Circuit held that it is improper for a HO to remand a case to the IEP team for determination of compensatory education. The court reasoned that a hearing officer may not be employed by an LEA, and, therefore, IEP teams, which include LEA employees, cannot be **delegated** the duty of fashioning relief. HO must determine the remedy for an IDEA violation. Contrast, Bd of Educ of the South Huntington Union Free Sch Dist 47 IDELR 60 (SEA NY 12/7/6). SRO remanded the matter to the IEP team when HO improperly intervened in a question of methodology; and Bd of Educ of New York City 46 IDELR 299 (SEA NY 11/9/6) SRO remanded the issue of placement to the IEP team where HO had not developed a sufficient record. New York City Dept of Educ 106 LRP 65685 (SEA NY 10/30/6) SRO reversed HO who improperly found student eligible because eligibility committee lacked a regular ed teacher. Instead, the SRO remanded the matter back to the eligibility committee for a determination re eligibility; New York City Dept of Educ 48 IDELR 116 (SEA NY 5/30/7) (remand to IEPT); Fulton County Sch Dist 49 IDELR 30 (SEA Ga 7/11/7) (remand for a new manifestation determination); Hacienda La Puente Unified Sch Dist 48 IDELR 237 (SEA Calif 7/23/7); Fallbrook Union High Sch Dist 107 LRP 69374 (SEA Calif 11/20/7) (HO remanded matter to IEPT to determine correct placement).
- y) Friendship-Edison Public Charter Sch Collegiate Campus v. Nesbitt 534 F.Supp.2d 61, 49 IDELR 159 (D. DC 1/31/8) Court vacated HO decision where HO **failed to explain** a compensatory education calculation. Mary McLeod Bethune Academy Public Charter Sch v. Bland ex rel TB 534 F.Supp.2d 109, 49 IDELR 183 (D. DC 2/20/9) Court remanded case to HO where the decision provided no explanation of the award of 37.5 hours of compensatory education or of the HO's reasoning in getting to that conclusion NOTE On remand, the court approved the HO's explanation of the calculation, 108 LRP 31400 (D.DC 5/27/8)..
- z) Leticia H ex rel RH v. Yselta Indep Sch Dist 47 IDELR 13 (W.D. Tex. 12/14/6) HO had found that FAPE had been provided, but issued order requiring district to correct **procedural** errors regarding IEP. The Court reversed holding that there can be no relief where there is no violation of IDEA (???); Kirby by Kirby v. Cabell County Bd of Educ 46 IDELR 156 (S.D. WV 9/19/6) Court held that HO decision's directive for implementation requiring better present levels was inconsistent with HO's conclusion that FAPE had been offered by the district.
- aa) Scott v. District of Columbia 106 LRP 19073 (D.DC 3/31/6) HO's findings of fact were **not supported** by the record evidence; Bd of Educ of New York City 47 IDELR 30 (SEA NY 11/9/6) It is the responsibility of the HO to ensure that there is

an adequate record to support her decision and to permit meaningful review of her decision.

- bb) SG v. District of Columbia 533 F.Supp.2d 105, 49 IDELR 284 (D.DC 2/5/8) Where HO incorporated a **settlement** agreement into his decision, parents were prevailing parties for purposes of attorneys fees. VM & KM ex rel DM v. Brookland Sch Dist 50 IDELR 100 (E.D. Ark. 5/6/8) (same).
- cc) IEC by JC v Minneapolis Public Schs SSD #1 61 IDELR 288 (D Minn 8/26/13) Court rejected parent argument that SEA should have stopped HO from dismissing two dpcs. SEA has no such authority.
- dd) FB & FB ex rel LB v NY City Dept of Educ 923 F.Supp.2d 570, 60 IDELR 189 (SD NY 2/14/13) Court remanded to SRO for ruling on issues raised by dpc but not addressed in first tier HO decision; Lofisa S ex rel SS v State of Hawaii, Dept of Educ 60 IDELR 191 (D Haw 2/13/13) Court reversed HO who ruled on issues not raised by dpc; Dist of Columbia v. Pearson ex rel JP 60 IDELR 194 (DDC 2/8/13) Ct ruled that HO erred by raising the issue of student's truancy on her own volition where not in dpc or amendment thereto; AM by YN v NY City Dept of Educ 61 IDELR 214 (SD NY 8/9/13) Court refused to consider issue re ESY not stated in dpc; GI by GI & KI v Lewisville Independent Sch Dist 61 IDELR 298 (ED Tex 7/30/13) Parent was not allowed to raise an assistive technology argument on appeal where not in dpc and not mentioned at PHC where ho went over each issue.
- ee) Gwinnett County Schs 108 LRP 1263 (SEA Ga. 11/14/7) NOTE- HO refers to himself in decision as "the Court." Very confusing.

**BEFORE THE HEARING OFFICER FOR THE  
IDAHO DEPARTMENT OF EDUCATION**

D.A and J.A. on behalf of  
Themselves and as legal guardians  
And parents of M.A. a minor,

Student, Petitioners,

v.

Meridian Joint School District No. 2,

Respondent.

SDE CASE H-12-03-20

**AMENDED  
FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND DECISION**

**INTRODUCTION**

The original Findings of Fact Conclusions of Law and Decision were entered July 5, 2012. Amended Findings of Fact, Conclusions of Law and Decision were entered on July 17, 2012 to delete personal identifiable information and to attach a Personally Identifiable Information Coversheet.

An IDEA Due Process Hearing was conducted by Hearing Officer, Edwin L. Litteneker over a period of ten days, April 24, 2012 - April 27, 2012, May 24, 2012, May 25, 2012, June 7, 2012, June 8, 2012, June 20, 2012 and June 21, 2012 at the Meridian School District Office.

The Parents and Student were represented by Charlene Quade, Quade Law Offices who was accompanied by the Mother throughout the proceedings. The Meridian School District was

**AMENDED  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND DECISION**

represented by Elaine Eberharter-Maki of the firm Eberharter-Maki & Tappen and was accompanied by the Special Education Director.

### **PROCEDURAL HISTORY**

A Request for a Due Process Hearing was received by the Meridian School District on behalf of the Student on January 20, 2012. Generally the January request for Due Process Hearing alleged that the Meridian School District (hereafter the District) had not timely assessed the Student based on a request for referral to Special Education which the Parents asserted was received by the District on September 14, 2011.

That Due Process Hearing Request was assigned Case No. H-12-01-20 and assigned to Hearing Officer Rich Carlson.

On behalf of the Student, a Petition for Disqualification of the Hearing Officer was filed. Hearing Officer Carlson entered an order disqualifying himself. Case No. H-12-01-20 was then assigned to this Hearing Officer.

Several Pre-Hearing Motions were made on behalf of the Student. The District moved to dismiss or alternatively stay the proceedings in H-12-01-20 until the District had completed its eligibility determination.

Upon completion of the District's eligibility determination, the Parents filed a second request for Due Process Hearing which was assigned as Case No. H-12-03-20.

The Parents requested consolidation of H-12-01-20 with the newly filed H-12-03-20. Based upon the Record in Case No. H-12-03-20 this Hearing Officer declined to consolidate the two cases.

However, upon hearing from the parties in connection with Pre-Hearing matters in H-12-01-20 including the consideration of the District's Motion to Dismiss or Alternatively Stay the

Proceedings pending the eligibility determination, this Hearing Officer reconsidered the appropriateness of consolidation and consolidated H-12-01-20 into H-12-03-20. The two requests for Due Process Hearing then proceeded to hearing in one case identified as H-12-03-20.

A Pre-Hearing Order was then entered in the consolidated cases, setting Hearing dates by the request and agreement of counsel. The entirety of the Record in both Due Process Hearing Requests are transmitted separately to the Idaho Department of Education.

The Request for a Due Process Hearing Complaint in H-12-01-20 alleged eight issues;

- 1) Meridian School District failed to comply with the IDEA Child Find Obligations,
- 2) Meridian School District failed to evaluate Student in all areas of disability,
- 3) Meridian School District failed to address transition services,
- 4) Meridian School District failed to complete a timely review and issue a timely decision regarding IDEA eligibility,
- 5) Meridian School Predetermined that the Student did not qualify for IDEA eligibility,
- 6) Meridian School District committed procedural violations including;
  - a. An erroneous decision finding the Student ineligible for Special Education Related Services under IDEA, and
  - b. serious infringement on the parents ability to participate in the Student's educational program,
- 7) Meridian School District failed to make educational decisions based on the individual needs of the Student,
- 8) Meridian School District failed to develop an appropriate Individual Education Program (IEP) for Student calculated to enable the Student to receive education benefits.

The issues in H-12-03-20 were not as clearly identified. However, for these purposes the following issues are identified:

- 1) The Meridian School District's determination that the Student was not eligible for Special Education was in error.
- 2) The Meridian School District failed to consider relevant independent educational evaluations diagnosing and documenting the Student's autism, the severity of the Student's disability and the adverse effect on the Student's educational performance and the need for Special Education and related services,
- 3) The Meridian School District failed to meet its obligation to provide the services the Student is entitled to under IDEA,
- 4) The Meridian School District failed to provide supplementary aides and services necessary to allow the Student to participate in extracurricular and non academic activities,
- 5) The Meridian School District failed to address and provide to the Student transition services.

#### **WITNESSES, EXHIBITS AND THE RECORD**

Both parties called witnesses whose testimony was transcribed by an Idaho Certified Court Reporter. The original transcript of the hearing is transmitted separately to the State Department of Education.

The Petitioners called as witnesses in their case in chief, the Private Speech Language Specialist, Speech Language Specialist in private practice, the History Teacher, the English Teacher, a peer of the Student, the Math Teacher, the Math Tutor, Retired Math Teacher providing Math tutoring to the Student, the School Psychologist, Centennial High School

Psychologist, the Clinical Psychologist in private practice providing counseling services to the Student, the Behavioral Specialist in private practice, the District's Special Programs Director, the Meridian School District Special Programs Director and the Parent.

The District called as witnesses, the School Principal, the History Teacher, the District Guidance Counselor, Meridian High School Guidance Counselor, Thomas Berry, Centennial High School creative writing teacher, the Private Clinical Neuropsychologist, the Mass Media and Broadcasting Teacher, Centennial High School Mass Media and Broadcasting teacher, the District Speech Language Pathologist, the District Occupational Therapist, The District Consulting teacher, District Consulting Teacher, the District Special Education Supervisor, the District Special Programs Director, Meridian School District Director of Special Programs.

In Rebuttal, the Student called the School Psychologist and the Parent.

The Parents requested that this Hearing Officer consider the testimony and exhibits from prior administrative and state court proceedings involving this District and the Student's prior District, asking that the Record of this Hearing be supplemented with the testimony and exhibits from prior administrative hearings brought under IDEA and Section 504 of the Rehabilitation Act.

The Motion was conditionally denied with the Parents being given an opportunity to supply briefing and a proposed identification of the exhibits and witnesses that would be considered in that supplementation of the Record. In response the Parents asked that the testimony of the Private Neuropsychologist and the Private Educational Consultant be considered. The Private Neuropsychologist had evaluated the Student in connection with criminal proceedings in 2009 which were unrelated to any behavior of the Student at school and the Private Educational Consultant had conducted an Independent Education file review. The

Parent did not sufficiently identify the relationship of that proposed testimony to the issues raised in connection with the District's actions to consider and deny the Student's eligibility for Special Education in February 2012. The Motion to Supplement the Record was denied.

Near the close of the parent's case, the parents requested again that the Hearing Officer consider the prior testimony of the Private Educational Consultant and the Private Neuropsychologist and made an offer of proof as to the relevance and appropriateness of their prior testimony in other proceedings involving the parties and another District to this matter. There continued to be no showing of a factual or legal relationship between testimony that was presented in proceedings the fall of 2011 and the timeliness and the appropriateness of the District's eligibility determination made in February of 2012.

The parents also requested that prior testimony of the Behavioral Specialist, the Clinical Psychologist, the Parent's Witness 1, the Private Speech Language Specialist, the Private Occupational Therapist, the Private Developmental Therapist, the Private Physician and the Parents Witness 2 be made part of the Record as well. That request was denied. The Behavioral Specialist, the Clinical Psychologist and the Private Speech Language Specialist testified here and there was no showing that any of the other witnesses were unavailable for testimony. Further, the reports of the Private Speech Language Specialist, the Private Occupational Therapist and the Private Developmental Therapist were considered by the eligibility team and are specifically referred to in the eligibility team determination (Exhibit 708).

During rebuttal testimony the Parent moved to compel the production of the Vineland Scales of Adaptive Behavior testing protocols administered by the School Psychologist. The District did not agree to produce the testing protocols and response forms, but did permit the parent to physically review the protocol and response forms. Neither the IDEA nor the Idaho

Administrative Rules of Procedure provide for discovery in this setting unless otherwise agreed to by the parties. IDEA does require that the parties exchange witnesses and exhibits five days prior to the hearing. This is consistent with the idea that an IDEA hearing should be held within a maximum of 75 days unless otherwise agreed to by the parties. There was no offer as to why the Vineland protocols documents would be relevant or how the protocols would be used to impeach the School Psychologist who had interpreted the Vineland results.

The test protocol documents would add nothing to the Record for purposes of evaluating the timeliness of the District's actions or the appropriateness of the District's Eligibility Determination.

Exhibits were made part of the Record and are transmitted separately with the Transmittal of the Record.

The Hearing Officer entered an Order in regards to post hearing matters including the anticipated date of the decision and the status of the Record.

### **CLOSING ARGUMENTS**

The parties submitted oral closing arguments intended to emphasize the specific issues raised for the Hearing Officer's determination. The matter was fully submitted on June 21, 2012.

The Parents highlighted a Child Find violation in closing arguments. Further, the parents argued that the eligibility evaluation was not timely and was incomplete since the evaluation did not include assistive technology and prevocational or vocational skills were not evaluated. Additionally, the Parents argued that the District had predetermined that the Student would not be eligible for special education and that the eligibility decision was not consistent with the requirements of IDEA and the Idaho Special Education Manual.

The District responded that the Record indicated that the District had timely responded to the parents request for a referral for a special education evaluation under the circumstances. The District argued that the eligibility determination was based on the Record, was not predetermined and that the District had appropriately considered the information supplied by the Parents and the Parent's independent evaluators.

### **FINDINGS REGARDING THE STUDENT**

The Student at the time of the conclusion of the Hearing is a High School graduate from Centennial High School. The Student is 18 years of age.

The parents have guardianship of the Student as permitted by Idaho Law.

The Student is diagnosed as having autism. There was no dispute and no factual question as to the diagnosis of the Student as having autism.

The Student qualified for High School graduation based upon the accumulation of credits and grade point.

The Student was also proficient in Math and Language usage and was advanced in Reading in the tenth grade according to the ISAT test.

The Student received accommodations through a 504 Plan adopted September 15, 2011. The 504 Plan provides that the Student has the option to leave class early, receive preferential seating, has immediate access to familiar school personnel to assist with school related issues problem solving situations and two choice decision making. Additionally, when demonstrable signs of stress are observed including journaling, sighing, blowing, slumping, facial drooping, rocking, knee shaking, shifting of body freezing or other signs of shutting down, redirection strategies will be utilized. Additionally, text books would be available at home and at school. A use of a calculator if computation is not being assessed and extended time for assignments with a

due date negotiated between the teacher and the Student would be available. The Student could orally demonstrate understanding, utilize shortened assignments, use alternate assignments, parts of the curriculum could be reduced that would not alter the standards, provide the Student notes when given oral information and receive a course outline prior to instruction in all courses (Exhibit 506).

The Parents describe the Student as not being able to grasp the big picture, for example, having difficulties in thinking of the future and how to reach the Student's goals. The Student was reported by the Parent to have difficulty in timely completing homework assignments and that assignments would take twice the amount of time estimated. The Student worries about the completion of school work which results in anxiety. That anxiety would be demonstrated in any number of sensory release or behavior inappropriate in the school setting. The Student was described as having a rigid, cognitive process demonstrated by the necessity of routines, being rule bound, having limited flexibility and thought process and a too literal understanding of communication and human behavior. The parents reported that the Student had no adult living skills. The parents also reported the Student suffered from hyper sensitivity to sound.

In social settings, the Parents observed that the Student did not have good relations or react well with peers.

The Student did not attend or testify at the Due Process Hearing.

### **FINDINGS REGARDING ELIGIBILITY PROCEEDINGS**

In prior IDEA hearing processes between the parties, an IDEA Hearing Officer had ordered that the Parents were entitled to Independent Educational Evaluations regarding the ongoing dispute as to the Student's eligibility for special education. That Hearing Officer's decision is presently on appeal to Federal Court.

As a result of that Hearing Officer's Order, the Parents solicited Independent Educational Evaluations at their own expense. The evaluations included an a) educational needs assessment for Student by the Behavioral Specialist dated March 9 and 10, 2011; an Independent Educational File review of the Student, Private Educational Consultant 3-14-2011, Amended Independent Educational Evaluation 3-21-11, and amended September 13, 2011, Speech Language Pathology Initial Evaluation and Plan of Care, the Private Speech Language Specialist, August 23, 2011, Scale of Independent Behavior Revised Report (SIB-R) of adaptive behavior, Health and Welfare, July 9, 2010, Occupational Therapy Evaluation Report, the Private Occupational Therapist, August 18-25, 2011. All of the Independent Evaluations were made part of the District's Eligibility Report (Exhibit 708).

On September 14<sup>th</sup>, 2011 the District received the Independent Educational Evaluations and the Parents request for an eligibility meeting to discuss the Student's diagnosis and need for specialized education (Exhibit 146).

On September 15<sup>th</sup>, the District convened a 504 Team meeting for purposes of reviewing the Student's current 504 Plan and the Independent Evaluations that had been completed (Exhibit 151).

The Mother also presented a Proposed 504 Plan dated September 15, 2011 (Exhibit 150). The District provided written notice pursuant to Section 504 reviewing the Independent Educational Evaluations provided by the Parents and the proposed specific 504 accommodations (Exhibit 156).

On October 5, 2011 a written notice regarding Section 504 was provided indicating that a meeting was to be scheduled for October 20<sup>th</sup> or October 21<sup>st</sup> to review the Educational Evaluations (Exhibit 158).

On November 10<sup>th</sup>, 2011 a meeting was held and parent meeting notes were prepared. The notes indicated that the District would be requesting consent to gather more information, including considering the additional assessments and sharing of information (Exhibit 162).

The Transcript of the November 11, 2011 meeting facilitated by a State Department of Education Special Education Facilitator indicated a professional and often spirited exchange and the participation of all of the eligibility team members (Exhibit 164).

An additional meeting was to be held to consider the Student's eligibility for special education and the results of the information collected by the District as well as the ongoing review of the 504 Plan. The parents requested that the District also consider the Student's vocational needs.

On November 11, 2011 the District provided the parents with a Consent to Assessment and an Individual Assessment Plan identifying the assessments to be performed by the District including classroom observation and assessments of the Student's communication, motor development, adaptive behavior, emotional and social behavior skills (Exhibit 166).

The parents responded by changing the date of consent and changing the specific information to be included in the Release of information and limiting the term of the release (Exhibit 167).

The District provided a written notice responding to the Parent's modification and concerns about the consent to assessment (Exhibit 182).

On December 1, 2011 the District forwarded to the Parents another notice of a referral to consider a Special Education Evaluation including the District's conclusion that it needed to assess communication (Speech Language), motor development (fine and gross), emotional, social, behavioral development. Included in the referral were the Student's grades and the ISAT

results indicating that the Student was advanced in reading and proficient in math and language as of the tenth grade (Exhibit 186).

The Parents through Counsel responded to the referral to consider a Special Education Evaluation and consent contesting the representations made in the referral and consent (Exhibit 187).

On December 8, 2011 the parents provided a signed Individual Assessment Plan again amending the District's Individual Assessment Plan by eliminating classroom observations, communication assessments, motor development assessments and by providing District members of the evaluation team. The Parents consented to an Emotional, Social and Behavioral Assessment if performed only by the School Psychologist. The parents also modified the description for the assessment procedures. Additionally, the parents indicated that there would be no contact with the Student to gather information for purposes of completion of the individual assessment plan (Exhibit 189).

The District responded to the Parent conditions on the Assessments with written notice dated December 12, 2011. The District declined to accept the changes to the consent and the Individual Assessment Plan. The District proposed that if consents were received by December 14, 2011 preliminary results of assessments and observations would be shared by January 13, 2012 and a meeting would be scheduled the week of January 16, 2012 to review the new assessment information and determine eligibility (Exhibit 191).

On December 14, 2011 Mother appeared at Centennial High School representing that she was there to sign the consents to assessment. The consent to assessments were not signed by the Parent after a dispute with the Principal occurred.

The parents through Counsel again reiterated the circumstances under which the Parents would consent to assessments and approve the individual assessment plan (Exhibit 200).

The District provided written notice dated December 19, 2011 that the District was going to accept the signed modified consents received on December 8, 2011 as sufficient consent to conduct formal observations as outlined in the original evaluation plan. The assessments were to be conducted by appropriate and qualified District staff as described in the original assessment plan. The District also advised the parents that the parents did not have the right to limit the formal observations to one District employee (Exhibit 206).

Additional reports and assessments were received from the Private Speech Language Specialist, the Private Occupational Therapist, the District Occupational Therapist, the Private Developmental Therapist, the School Psychologist, the Private Educational Supervisor, The District Consulting teacher and the District Speech Language Pathologist for purposes of considering the eligibility of the Student for Special Education.

A facilitated 504 Team meeting was held on January 26, 2012 and a Transcript of the meeting was prepared. Again there was a thorough and unrestricted participation by all of the team members.

The Student attended a portion of the January 26, 2012 meeting and participated in the team meeting.

A facilitated eligibility team meeting was held on February 2, 2012. The Transcript of the meeting indicated again the opportunity for all attendees at the meeting to participate, ask questions and gather information (Exhibit 244).

The eligibility team continued to meet on February 16, 2012, February 17, 2012, and finally on February 29, 2012. The Record of the February meetings which were facilitated

indicates that all of the team members were given an opportunity to fully participate in each of the meetings.

A draft eligibility report was prepared by the District and presented at the February 29, 2012 eligibility meeting (Exhibit 269).

During the February 29, 2012 eligibility meeting, the team was unable to reach consensus to determine eligibility. The members of the School team made the determination that the Student did not qualify for Special Education Services.

Written notice was provided by the District as to the eligibility determination and to correct pages in the eligibility report, Exhibits 274 and 275.

The Second Due Process Hearing Request, Case No. H-12-03-20 was filed on March 20, 2012. The District provided written notice in response the Due Process Hearing Request (Exhibit 280).

#### **FINDINGS REGARDING THE ELIGIBILITY DETERMINATION**

The Eligibility Report prepared for the February 29, 2012 meeting contained a Summary of Findings and adverse effects on the educational performance of the Student including the assessment information supplied by the parents. The entirety of the report of the Parent was included in the Eligibility Report (Exhibit 708).

A review of the Boise School District Records, specifically a February 18, 2010 Eligibility Report from the Boise School District and a chronology of events beginning with the Student's release from juvenile detention in the fall of 2010 including a review of the Records since that time was prepared by The District Consulting teacher.

The School Psychologist assessed the cognitive areas and adaptive behavior.

Vineland II Adaptive Behaviors Skills Survey Interview Form had been administered by the Private Education Consultant to the parent and by the School Psychologist of the Centennial High School Guitar, Economic, Psychology, Broadcast teachers. In addition to the classroom teachers, the School Psychologist included the parent and developmental therapist scores in his Vineland reporting.

The classroom teacher results of the Vineland included that the Student's overall adaptive abilities are in the average range when compared to age peers. In stark contrast, parent and developmental therapist scores were at or below the first percentile when compared to same age peers indicating substantial deficits.

The School Psychologist also conducted a records review of the Student's autism and assessment of the Student's social, emotional behavior and executive functioning.

The District Speech Language Pathologist did a communication assessment including tests of pragmatic language, tests of problem solving, clinical evaluation of language fundamentals, social language development tests. The District Speech Language Pathologist also conducted informal and formal classroom evaluations observing that the Student did not have any speech dysfluency or stuttering.

The Private Speech Language Specialist conducted an Independent Education Evaluation observing that the Student demonstrated limited social interaction, lack of turn taking and interrupting, limited dysfluency, inability to complete home work assignments, momentary loss of focus, inflexible thinking, socially awkward behavior, difficulty having a balanced conversation, difficulty summarizing a short article, decreased attention to task at hand (reports and observations are included in Exhibit 708).

The District Occupational Therapist, District Occupational Therapist conducted a review of the records assessing the Students motor and sensory functioning reporting no difficulties with functional fine motor skills, sensory modulation or performance functional tasks.

The Private Developmental Therapist, Independent Development Therapist conducted a classroom observation as well as the Behavioral Specialist.

In March 2011 the Behavioral Specialist observed the Student for seven hours both in a classroom as well as a community setting. She reported that the Student had little interaction with peers concluding that the Student does not have the skills to have casual conversations with classmates or build social relationships.

The Behavioral Specialist observed that the Student was unable to participate in cooperative groups in the classroom setting, that the Student did not use pragmatic language skills, that the Student was unable to engage in the classroom, that the Student was easily distracted and was using a journal to withdraw from the classroom environment, that the Student was unable to complete homework assignments within time constraints, unable to process auditory information, take notes in class or follow a class lesson. She concluded that the Student does not have the ability to learn independent learning skills and is not receiving *any* instruction to improve those skills and could not succeed in the classroom setting.

She observed that the Student's autism was very subtle and the classroom teacher would miss how the Student's autism affected classroom performance unless they were watching the Student very closely.

The Special Education Supervisor for the School District observed the Student on several occasions presenting as a typical Student and on one specific occasion appeared to appropriately read other Student.

The District Consulting Teacher observed the Student in each classroom settings. The Student was observed to be using peer typical strategies in the classroom setting. The District Consulting teacher also reported on the Student's grades, historically for English in the B range, historically in Math from F in Algebra II to a B range.

Also reported were transition assessments from the parents and counsel regarding the Student's inability to use public transportation and inability to complete a job application.

Also attached to the eligibility report was a report from the District Consulting teacher and the Student's Math Teacher. The Student was failing in Algebra II in the fall semester of the 2011/2012 School Year. The report set out the District's contention that the Student was misplaced and had remained in the Algebra II class at the parents insistence and that placement in a math modeling class would be more appropriate for the Student.

A Skills of Adaptive Behavior Revised (SIB-R) was prepared by the Parent in December of 2011. The Report prepared by the Idaho Department of Health and Welfare based on the parents responses concluded that the Student had limitations in fourteen adaptive skills areas, including community living skills. It was concluded that the Student demonstrated marginally serious problem behaviors and moderately serious internalized maladaptive behaviors and marginally serious asocial maladaptive behaviors based on the Parent's report.

The Private Occupational Therapist conducted an occupational therapy evaluation and supplied a report based on his August of 2011 observations. The Private Occupational Therapist's report concluded that the Student had deficits in fine motor skills, specifically those requiring bilateral hand use or tasks that were time based, sensory processing issues, auditory processing issues and functional skills deficits including sequencing organization and problem solving.

The Private Speech Language Specialist observation report dated, January 19, 2012 and an initial evaluation and plan of care dated August of 2011 indicating that the Student had a receptive expressive language delay and pediatric dysfluency disorder was included in the eligibility determination.

A report from the Student's hair stylist, notes from the Student's mother and developmental therapist were also made part of the Eligibility Report (Exhibit 706).

The Private Educational Consultant prepared a review of educational records. Her initial report of August 29, 2011 indicated that she considered the assessments she had done as well as the reports from the Private Occupational Therapist and the Private Speech Language Specialist. Additionally, that she had reviewed reports, meeting transcriptions and data from March of 2002 – March 2011.

In the Private Educational Consultant's initial Report she analyzed the compensatory services necessary to bring the Student to the level the Student would have been had the School District provided the Student a Free and Appropriate Public Education (FAPE). She opined that the Student needed 250 hours of academic intervention, primarily therapy for developing organizational and study skills. The Student required 540 hours of social support to replace counterproductive strategies. The Student required individual behavioral therapy, one hour per week for 150 hours per year for three years, one hour of family behavioral therapy per week for 150 hours a year, one hour of group behavioral therapy per week for 150 hours a year. She further opined that the Student required Speech Language Therapy one hour per week for 150 hours a year. Occupational therapy for one hour a week for 150 hours a year, adaptive behavior and prevocational skills of 750 hours a year, assistive technology including personal devices,

laptops and training of 50 hours annually and intervention coordinator for 12 hours per school quarter for a minimum of 48 hours a year was also recommended.

The Private Educational Consultant's recommended compensatory services for three years totaled 4,084 hours. Assuming six contact hours in a school day, the Private Educational Consultant indicated the Student would need 226 days per year of compensatory education for the next three years in addition to any academic instruction.

The Private Educational Consultant provided an amended Independent Education Evaluation on September 13, 2011 wherein she added some compensatory services including participation in team meeting, training of high school teachers and staff and parent training.

The Private Educational Consultant then added to her Independent Educational Evaluation by interpreting a Vineland Adaptive Behavior scale responded to by the Private Developmental Therapist, the Student's Developmental Therapist. The Private Educational Consultant also submitted on January 16, 2012 a review of Social Responsiveness Scales (SRS) submitted by the Student's teachers and the Parent.

There was a marked disparity between the reported SRS scores of the teachers showing no significant scores including no observations outside the normal range and the Parent's reports of significant negative and maladaptive behavior by the Student.

The District provided the parents with written notice of the eligibility determination detailing the District's responses to the parents information (Exhibit 271).

The District's eligibility determination concluded that the Student demonstrated certain characteristics consistent with an Autism and Asberger's diagnosis. While the Student at times demonstrated behaviors that may include interruptions, rigid thinking and issues with prospective thinking, the District's eligibility team concluded that those behaviors did not interfere with the

Students ability to participate fully in the educational environment. The District also advised that the Student was on track to meet all graduation requirements and performed at a level similar to the Student's typical peers.

The notice indicated that the information generated by the District including classroom performance updates, the District's Consulting Teacher and the Math Teacher's response to parent questions, the School Psychologist's adaptive behavior assessments, the District Speech Language Pathologist's Speech Language Pathology Report, the District Occupational Therapist's, Occupational Therapy Report, he District Consulting Teacher, Observation Report, and the District Special Education Supervisor's observation report were considered.

The District also noted that it considered the outside evaluations, observations and reports from the Parent dated February 16, 2012, The Private Educational Consultant's six reports, a private observation, observations of the Private Developmental Therapist, the Private Speech Language Specialist's report, the Private Occupational Therapist's Occupational Therapy Evaluation, the Behavioral Specialist's assessment report, two SIB-R result reports and the Boise School District's Eligibility Report.

## **FINDINGS OF THE STUDENTS PARTICIPATION IN THE GENERAL EDUCATION CURRICULUM**

Seniors at Centennial High School complete a senior project, required for graduation and coordinated by the Government Teacher and the English Teacher.

The Government Teacher did not observe the Student demonstrate any counterproductive or sensory responsive behavior except during the senior project, however, the anxiety about the senior project was no worse than other Students. The History Teacher did not observe the Student to have any problem refocusing or redirecting when requested. The History Teacher

observed the Student made peer appropriate comments and participated appropriately within peer activities in class. The Student appeared to enjoy Government class. The Student engaged in some negotiations about the timeliness of assignments to be handed in.

In American Government the Student was graded on the same material that other Students were graded. The Student received a 'B'. Where quizzes proceeded a summative test, the Student was permitted to demonstrate understanding and knowledge of the content by satisfactorily completing the summative test without being required to take the preparatory quiz.

The Parent reported specific instances where the Student was frustrated with what had happened in American Government. The History Teacher never observed an inappropriate amount of frustration or frustration that wasn't similar to what the Student's peers experienced. The History Teacher did not observe the Student to be distractible or anxious, did not observe the Student to demonstrate any memory or expressive issues, did not have any difficulties staying awake and attentive in class, did not observe the Student to withdraw, chew on clothing, disengage, sigh or blow. The History Teacher did observe the Student appropriately ask for help and did not observe the Student as one that was going to fail.

The Creative Writing Teacher described the Student's work in his Creative Writing class.

The Student authored a nonfiction piece entitled the 'Manifesto of an Innovative Mind' (Exhibit 677) for which the Student received a B.

The Student prepared two poems when set side by side would produce a third poem.

The creative writing teacher found the Student's poetry incredibly complex. The Creative Writing Teacher observed no rocking or perching or any behavior which demonstrated that the Student was having any behavioral issues or difficulty regulating emotion or senses. The Student was described by the Creative Writing Instructor as "incredibly brilliant". The Creative

Writing Teacher observed the Student to be unwilling at times to collaborate with other Students, which in the Creative Writing setting, the Creative Writing Teacher did not find unusual or inappropriate for high school seniors.

The Creative Writing Teacher did not make any modifications in the assignments for the Student. The Student earned the grade based on the Student's work consistent with peers.

The Student participated in the Mass Media and Broadcasting Teacher's Advanced Broadcasting class. The Student presented daily News broadcasts on the School television station as a News Anchor, completed news projects, public service announcements (PSA) and edited broadcasts.

No curriculum modifications were made for the Student in the Broadcast class. The Student showed no scripting or inappropriate behavior in the Broadcasting class. The Student had demonstrated to the Mass Media and Broadcasting Teacher a substantial number of the skills necessary to be employed in a broadcast or production setting. The Student was able to regulate emotions, demonstrate creativity and engage in peer appropriate conversation. The Student was observed to be focused on a project and able to work from beginning to end on the project.

Several clips of News Broadcasts, PSA and edited work by the Student were part of the Record. The Student appeared to be appropriate when on the air, successfully reading the news. The Student was able to create, execute and complete the necessary steps to complete broadcasting projects (Exhibit 667).

The Private Speech Language Specialist did an in classroom observation, reporting that the Student had little or no regard for other Students engaged in the classroom activity. The Private Speech Language Specialist reported that the Student did not stutter, the Student responded appropriately when asked and made appropriate inquiry. The Student grunted, blew

air loudly in disagreement to a statement but then the Student supplied a vocabulary word for another Student struggling to come up with a specific word. The Student was observed to complete a classroom assignment in a timely and appropriate fashion. The Private Speech Language Specialist did observe that the Student was not happy with seeing her there. The Private Speech Language Specialist concluded based upon her observations that the Student's disability adversely affected the Student's education and that her observations were similar to what she saw in the Student's private weekly Speech Therapy Sessions.

The Student participated in the Senior English Class. The English Teacher had made some accommodations giving the Student time to complete assignments and full credit for assignments that were not turned in on time. To the English Teacher's satisfaction the Student had demonstrated an understanding of the content of the assignments.

A peer was assigned to the Student by the Parents as a mentor. She observed the difficulty the Student had in what she characterized as normal peer relationships. The Peer observed the Student to perch, sitting on the back of a chair with feet on the seat of the chair at lunch time. The peer believed that the Student did not have a good understanding of personal space issues. The peer believed that it was difficult for the Student to participate in extracurricular activities and that often times the Student appeared isolated in social settings. The peer characterized the Student's view of the world as doom and gloom, that the Student was not moving on and did not have a future. The peer did not have any classes with the Student in the 2010/2011 School Year and in the 2011/2012 School Year.

The Math Teacher opined that the Student was misplaced in Algebra II in the 2011/2012 School Year. It was not unusual for Students who were misplaced in Algebra II to struggle with Algebra concepts. The Math Teacher indicated that the math modeling class was more

appropriate for the Student, particularly because the Student did not have sufficient math preparation to move from an integrated math class into Algebra II. The Math Teacher did not believe that a negative connotation would be attached to participation in math modeling instead of Algebra II.

The Math Tutor believed that the Parent wanted the Student wanted to participate in Algebra II because it would make the Student more competitive for college admission. The Math Tutor had no specific information about the Meridian School District's Math Program. The Math Tutor was aware that the Student was proficient in math based on the ISAT scores and that the Student had met the standards of Centennial High School for purposes of graduation.

It was the Math Tutor's experience that it was not unusual for students to be misplaced in Advanced Math classes in High School and she would not have recommended Algebra II for the Student based upon her contact with the Student.

The School Psychologist administered several education assessments including assessments of the classroom teachers as had been administered to the parents and to some of the Students private service providers. The School Psychologist was a participant in the evaluation team meetings and considered the information provided on behalf of the Student for purposes of determining whether the Student was eligible for Special Education. Based on his assessments he did not believe that the Student had a qualifying disability as emotionally disturbed particularly because there had been no evidence of problematic or maladaptive behavior or any evidence of depression.

The Student's Clinical Psychologist opined as to the characteristics of autism that had been demonstrated by the Student either in report or based upon his observation. The Clinical Psychologist's therapy was a condition of the Student's court ordered probation as a result of the

Student's criminal prosecution. The Clinical Psychologist opined how those conditions and circumstances could affect the Student in the educational setting. The Clinical Psychologist had not observed the Student in the classroom setting. The Clinical Psychologist was not optimistic that the Student would be successful in the classroom setting.

The Behavioral Specialist observed the Student in the spring of 2011 at the Centennial High School, prior to the referral and request for an Eligibility Evaluation. The Behavioral Specialist also reviewed for purposes of her testimony the reports of the Private Speech Language Specialist, the District Special Education Supervisor's, the District's Consulting Teacher, the District Speech Language Pathologist, the District Occupational Therapist and the Private Educational Consultant. The Behavioral Specialist had not seen the Student since April of 2011.

The Behavioral Specialist opined that the Student demonstrated counterproductive sensory regulation efforts based on the Student's journaling, rocking and perching and loud vocals and stilted verbal and facial affect. The Behavioral Specialist disagreed with the conclusions of the observations made by The District Consulting Teacher and the District Special Education Supervisor as to what the Student's behavior actually meant. The Behavioral Specialist opined that the Student's behavior affected other Students and that often times the Student did not understand social cues and did not have the ability to use positive cognitive processes to address any anxiety.

The Behavioral Specialist opined that there was absolutely no way that the Student would be able to get assignments done in a timely and appropriate fashion. The Behavioral Specialist also opined that the Student failure in the Algebra II class was indicative of an adverse academic affect as a result of the Student's autism.

The Student's Mother testified about the numerous deficiencies she had observed as a result of the Student's autism. Mother was not optimistic that the Student could function independently from her or in any kind of work environment. She believed that the District did not believe her reports of how the Student acted at home or in the community.

She corresponded frequently with the Student teachers about the completion of individual assignment or how assignments had been graded (for example Exhibit 218). She (and not the Student) regularly checked the online Powerschool to determine what school work had not been completed. She did not consider herself an equal team member since the team did not accept her reports of the Student's behavior.

The Private Clinical Neuropsychologist and Autism Practitioner conducted a records review at the District's request. The Private Clinical Neuropsychologist opined that the Student had continued to make educational progress and had improved language fluency.

The Private Clinical Neuropsychologist commented about the inconsistencies reported between the teacher's reports of the Students classroom behavior and the Parent's reports of the Student's behavior. The Private Clinical Neuropsychologist did not find that inconsistency to be surprising and more importantly that inconsistency was not clinically significant. The Private Clinical Neuropsychologist disagreed with the conclusions drawn by the Behavioral Specialist and the Private Educational Consultant based upon their reports. Specifically, the Private Clinical Neuropsychologist opined that some of the sensory strategies employed by the Student, for example, the journaling, were not counterproductive particularly when the Student was reported able to respond appropriately upon being instructed to set aside the journaling.

The Private Clinical Neuropsychologist described the Student based upon his review of the reports and records as being "quirky". The Private Clinical Neuropsychologist had no

question that the Student's autism diagnosis was appropriate. The Private Clinical Neuropsychologist opined that by focusing on the Student's assets instead of pigeon holing the Student in autistic thinking would be a more appropriate strategy for dealing with the Student. The Private Clinical Neuropsychologist observed that the Student had been highly tested and had been exposed to every psychometric testing instrument imaginable.

The Private Clinical Neuropsychologist demonstrated that there were a number of different ways to look at autism from its most severe form to a high functioning individual on the Asberger Spectrum.

The Private Clinical Neuropsychologist also testified that the Student had demonstrated academic and personal growth based on comparing the SIB-R results from July of 2010 to December of 2011.

Because there were no reported maladaptive, disruptive, harmful issues in school, the Private Clinical Neuropsychologist opined that the Student was finding age and peer appropriate ways to deal with whatever anxiety the Student may have suffered in acceptable ways.

A classroom observation was conducted by the District Speech Language Pathologist in March and September of 2011 and January of 2012. The Student was consistently observed to demonstrate functional communication skills similar to classroom peers, asked appropriate questions, commented on the statements or actions of others appropriately.

The District Speech Language Pathologist also observed the Student's participation in the eligibility meeting of February 17, 2012. She observed some dysfluency when speaking at the meeting but such dysfluencies did not appear to interfere with the Student's ability to be understood or successfully communicate a message. The Student did not appear to be upset or

frustrated by the speech dysfluency's when they occurred and the Student continued to speak through them.

The District Occupational Therapist, the District's Occupational Therapist reported on her observations of the Student on January 10<sup>th</sup> & 11<sup>th</sup>, 2012. She observed no visual motor, fine motor, spacial motor or gross motor skill deficits. The Student was able to participate in the Guitar and Broadcasting classes without requiring any accommodations or demonstrating any deficiencies.

The District's Consulting Teacher observed the Student in the classroom setting on three different days in January 2012. The District's Consulting Teacher observed that the Student strategies in the classroom were typical to the Student's peers in the school environment. The District's Consulting Teacher observed that the Student struggles with tasks that require the Student to work quickly and accurately and that the 504 Accommodation Plan addresses that concern.

The District's Consulting Teacher also opined in response to cross examination that she did not believe that the Private Educational Consultant's IEE met the requirements of the Idaho State Special Education Manual.

The District Special Education Supervisor's, the Special Education Supervisor for High School in the District conducted formal evaluations observing the Student in February and September of 2011 and in January of 2012. The District Special Education Supervisor anticipated from the reported observations of the Student at the eligibility team meetings and the parents and the Independent Evaluators that she would find a very dysfunctional Student who would display problematic and maladaptive behavior while in the classroom.

Instead the District Special Education Supervisor observed the Student to be very typical in participation and actions and reactions within the classroom. The Student displayed some of the autistic characterizations that had been reported. However, she observed the Student to be able to redirect and participate in the classroom activities without prompting, made socially appropriate interpretations and conversation with peers. The District Special Education Supervisor was surprised at the successes the Student was demonstrating in the classroom and the lack of problematic, maladaptive or inappropriate behavior.

## **CONCLUSIONS**

### **GENERAL CONCLUSIONS**

The Burden of Proof lies with the Parents as the parties requesting the Due Process Hearing, *Schaffer v. Weast*, 546 US 462 (2009).

IDEA requires that the District provide a Free and Appropriate Public Education to all students that qualify for Special Education Services, 20 USC §1412.

*In Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dis. V. Rowley*, 458 U.S. 176 (1982), the Supreme Court stated the congressional purposes in enacting the IDEA was the provision of a Free and Appropriate Public Education to children with disabilities. The Court stated that implicit in this purposes was a requirement that the education to which access is provided is sufficient to “confer some education benefit upon the handicapped child. 458 U.S. at 200. The Court identified the basic inquiry as twofold: first, has the education agency complied with procedures set forth in the IDEA; and second, was the child’s IEP, developed through IDEA procedures, “reasonably calculated to enable the child to receive education benefits?” If the two requirements are met, the requirements of IDEA have been met. 458 U.S. at 206-207.

In undertaking an evaluation to determine whether a student is eligible for special education, the Meridian School District must use procedures to determine whether the student has a disability and the student's educational needs, 34 CFR § 300.301(c)(2).

IDEA's regulations provide further guidance for conducting an evaluation.

In conducting the evaluation the public agency must i) use a variety of assessment tools and strategies to gather relevant functional development and academic information about the child including information provided by the Parent that may assist in determining 1) whether the child is a child with a disability under §300.8 and 2) the content of the child's IEP including information relating to enabling the child to be involved in and progress in the general education curriculum.

The District must not use any single measure assessment as a sole criteria for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. The District must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors in addition to the Student's physical and developmental factors, 34 CFR § 300.304(b).

The evaluation must assess a child in all areas related to the suspected disability including if appropriate health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities, 34 CFR § 300.304(c)(4).

The evaluation must be sufficiently comprehensive to identify all of the child's special education related service needs whether not commonly linked to the disability category in which the child has been classified and utilize the assessment tools and strategies that provide relevant information that directly assist persons in determining the educational needs of the child, 34 CFR § 300.304(c)(6) & (c)(7).

The eligibility team must also insure that it considers existing information about the child by reviewing existing evaluation data including evaluations and information provided by the parents of the child, current classroom based, local or state assessments and classroom based observations and observations by teachers and related service providers.

The Idaho State Department of Education has approved a Special Education Manual which has been adopted by the District.

The Special Education Manual anticipates that an initial evaluation to determine special education eligibility will consist of procedures to determine i) whether the student has a disability according to the established Idaho Criteria, ii) that the students condition adversely affects academic performance and iii) that the student needs special education, that is specially designed instruction and related services (Manual p. 31).

The eligibility evaluation team is to decide on an individual Student basis whether the Student meets an eligibility criteria for special education. The Student's present level of performance including academic achievement and related development needs, whether the student needs special education and related services or whether the additions to special education related services are needed to enable the student to meet goals and participate in the general education curriculum are to be considered (Manual p. 38).

The District is required to conduct an evaluation in all areas related to the suspected disability including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, motor abilities and transitional needs.

A variety of assessment tools and strategies are to be used to gather relevant academic, developmental and functional information about the student including information provided by

the parent and/or adult student and information related to enabling the student to be involved in a progress in the general education curriculum (Manual p. 39).

Assessments are used for the purpose for which the assessments are identified and are valid and reliable and are to be administered by trained and knowledgeable personnel in accordance with instructions provided by the producer of the tests. No single measure or assessment may be used as the sole criteria for determining whether a student is a student with a disability and for determining an appropriate educational program for the student.

The evaluation shall be sufficiently comprehensive to identify all of the child's special education related service needs, whether or not commonly linked to the disability category.

The Manual defines adverse effect as a "harmful or unfavorable influence" including both educational performance and performance in non academic areas including daily life activities, mobility, prevocational, vocational skills, social adaptation and self help skills. The District is responsible for determining whether any harmful or unfavorable influences result from the Student's disability affecting the Student's academic or daily life activities.

Additionally, the District is to determine whether specially designed instruction is necessary to meet the unique needs of a student with a disability. Specially designed instruction is defined to mean instruction adapted as appropriate to meet the needs of an eligible student, the content methodology or delivery of instruction to address the unique needs of the student, the result from the student's disability and to ensure access of the child to the general education curriculum so that he or she can meet Idaho content standards that apply to all Students (Manual pp. 44-45).

The District is required by the Idaho Special Education Manual to complete its initial assessment and implementation of the IEP within 60 calendar days excluding periods when the

regular school is not in session for five or more consecutive school days (Manual p. 36). The manual also addresses the District's use of independent educational evaluations indicating that the results of an independent educational evaluation cannot be the sole determining factor for eligibility and that the evaluation team has the responsibility to use existing evaluation data in addition to the IEE to determine whether the Student has a disability under IDEA (Manual p. 40).

### **CONCLUSIONS AS TO CHILD FIND**

34 CFR § 300.111 requires that the District create policies for purposes of insuring the children with disabilities who are in need of special education and related services are identified, located and evaluated. This is sometime referred to as the 'seek and serve' obligation. A School District has an obligation to determine even if a Student is making progress in the general education curriculum, whether the Student would benefit from specialized instruction and related services.

The Ninth Circuit has determined that an independent cause of action exists under child find.

Since a Hearing Officer has authority pursuant to 20 USC 1415(b)(6)(a) to consider any matter relating to the identification, evaluation or educational placement of the child, a parent has an opportunity to develop a claim under Child Find. *Compton Unified School District v. Addison et al*, 598 F3d 1181, 2010.

Here, the Child Find claim is essentially subsumed by the Parents claim that the Student was not properly evaluated. There is no question based on this Record that the District timely and appropriately located, identified and regularly evaluated the Student. The number of meetings and the volume of information provided to the Student's eligibility team indicates the

District fulfilled its obligation to identify, locate and evaluate the Student to determine whether the Student was entitled to Special Education and related services.

### **TIMELINESS OF EVALUATION**

For purposes of these conclusions regarding the timeliness of the District's evaluation, an initial evaluation must be conducted within sixty days of receiving parental consent for evaluation, 34 CFR § 300.301(c)(1)(1).

The parents contended that the sixty days commenced on September 14, 2011 when the parents in a letter to the Superintendent and the Special Education Director requested an eligibility meeting (Exhibit 146). The Parents and the District then met on September 15, 2011 and November 10, 2011. Based on the meeting on November 10, 2011, the District provided the Parents with a referral to consider a special education evaluation the plan for the assessment and consent on December 1, 2011.

That Consent and Plan for Assessment was modified by the parents on several different occasions. The District provided appropriate written responses to the modified consent and evaluation plan. The District did not receive an acceptable consent from the Parents and having been notified that the Parents would not consent to the contact with the Student, the District provided notice of its intent to proceed with the original assessment plan to the Parents on December 19, 2011.

The initial due process hearing request was filed on January 20, 2012 alleged that the District had not met its responsibility to evaluate the Student within sixty days. The District's contention was that it had timely evaluated the Student based upon the prior meetings and based upon the Parent's unwillingness to agree to the circumstances of the assessment and plan of evaluation to determine eligibility.

The District timely considered the evaluation of the Student commencing with its notice of December 19, 2011. Considering the Christmas Holiday, the evaluation was completed within sixty days on February 29, 2012.

Additionally, it would be unreasonable and inappropriate to hold the District to a sixty day time limit for the initial evaluation based upon the behavior of the Parents in modifying the District's request for Consent and Plan for Assessment. Without those actions by the Parents, it would not have been necessary for the District to advise the Parent that it was going to proceed with the evaluation without the Parents actual consent. The Parents unwillingness to consent to the District's plan of assessment was not reasonable. Specifically limiting the District's contact with the Student for assessment purposes was inappropriate.

It is therefore concluded that the District conducted a timely initial evaluation.

#### **FINDINGS REGARDING SUFFICIENCY OF THE EVALUATION**

The District clearly considered whether the unique components of the Student's disability affected the Student's academic performance.

The District considered whether the Student would be eligible for special education based on alternative disability categories including an emotional disability or a speech or language disorder. The District considered a number of different conditions that could result in eligibility. The District appropriately considered the relationship between the Student's medical condition regardless of how it was characterized and the Student's performance in the classroom and at school generally.

The District clearly evaluated the child in all areas of suspected disability.

The Record is clear that the District considered the Independent Educational Evaluations of the professionals selected by the Parents. The District attached to the eligibility determination

the reports of the Private Educational Consultant, the Behavioral Specialist, the Private Occupational Therapist, the Private Speech Language Specialist and the Private Developmental Therapist. Those individuals participated in the eligibility team meetings telephonically or personally and were permitted to observe the Student in the School setting. The deliberations of the eligibility team clearly indicate that the District members of the Team considered the information being provided by the Parent and the other members that the Parent had included in the Eligibility Team meetings.

Once the District accepted that the Student was diagnosed as autistic, the eligibility determination required an examination of whether the Student's condition adversely affected academic performance and whether the Student needed specially designed instruction and related services for purposes of the Student's participation in the General Education Curriculum.

As the Private Clinical Neuropsychologist indicated there was not a psychometric test that the Student had not either performed individually or that the Student's family and school team members had not participated in.

The testimony of the teachers is clear that the Student's autistic condition did not adversely affect academic performance and that no specially designed instruction was provided the Student. Specially designed instruction was not necessary for the Student to receive a meaningful educational benefit.

The Student did not demonstrate any behavioral issues with peers and other students. It is not the District's responsibility to create opportunities for the Student to be a good friend or to engage with other students in a particular socially acceptable fashion. The Student did not have any maladaptive or problematic behavior involving peers which required any special treatment of or adjustments to the Student's behavior.

The Parents contended that the fact that the Student related well with the adults in the classroom setting but did not relate well with the other Students adversely affect the Student's academic performance. However based on the ISAT results the Student had demonstrated on the Student's own proficiency in all required content areas.

There was no element of the manifestations of the Student's autism that was not observed, considered, reviewed and testified to by the classroom personnel and District professional staff at Centennial High.

Further, there was no problematic or maladjusted behavior which affected the Student's ability to participate in the general education curriculum. The quirkiness of the Student did not impeded the Student's participation in the general education curriculum.

The District's rejection of the evaluations conducted by the Private Educational Consultant and the Behavioral Specialist was appropriate. The reports of the Private Educational Consultant and the reports and testimony of the Behavioral Specialist continued to argue that the Student was autistic and displayed autistic behavior; not that there was any observable adverse effect based on the Student's autism on the Student's academic performance. The Private Educational Consultant, the Clinical Psychologist and the Behavioral Specialist essentially argued that because the Student demonstrated characteristics of autism that the existence of those characteristics meant the Student needed special education. There was no maladaptive or problematic behavior that suggested the Student had any difficulty adjusting appropriately to the classroom environment regardless of what was going on.

Additionally, the conclusions drawn by the Private Educational Consultant in interpreting the SRS are not supported by the reported T scores as set out in her report.

Neither was there a showing that the Student needed special education, that is, specially designed instruction and related services. Even though the Student had the benefit of a 504 Plan and even though the time to turn in assignments and the size of an assignment may have been adjusted, it was clear from the testimony of the teachers that no change in the curriculum and content was made, that is, there had not been any specially designed instruction provided the Student. The classroom teacher's observations were consistent. The classroom teacher's testimony is given greater weight than infrequent classroom observers, particularly those whose presence was not appreciated by the Student.

The Student's successful completion of the Senior project and the Student's participation in the Broadcasting class clearly indicated that the Student did not require specially designed instruction to be able to participate in Centennial High School's general education curriculum.

The Record clearly supports that the District conducted an initial evaluation to determine the Student's eligibility for Special Education consistent with the requirements of IDEA.

Neither did the eligibility team predetermine the eligibility of the Student for special education. Even though there was no consensus at the final eligibility team meeting on February 29, 2012, it was clear that all the District personnel supported the decision that the Student did not require specially designed instruction nor that the Student's autism adversely affected the Student's academic performance.

The District considered the Student's present levels of performance and used a variety of measures to assess the Student's performance and participation in the classroom.

It is clear that the eligibility team considered the Independent Educational Evaluation reports and encouraged the participation of the Parent's selected service providers at the extensive number of meetings. The eligibility decision made by the District members of the

eligibility team is supported by the eligibility report and the transcripts of the meetings that were held.

The District adequately assessed the Student's transitional skills and prevocational skills of the Student's general skills necessary to pursue a job or attend higher education.

The Parents contended that the District had infringed on their ability to participate in the Student's educational program. It was interesting from the testimony of the Parent that the biggest concern was that the District did not listen to her. It is clear that the District listened to her, but did not agree with her characterization of the Student. It is also clear that the District was looking for how the Student's disability affected the Student's ability to participate in the general education curriculum, not whether the individual elements of the Student's disability cumulatively meant that the Student needed more services.

The best example of how the Parents viewed the need for those services is found in the Private Educational Consultant's recommendation of the compensatory services that should be available to the Student. There was no showing that the therapy services described by the Private Educational Consultant would assist the Student in accessing the general education curriculum. Though the therapy may make the Student more comfortable, aware and insightful of the Student's disability, it is not clear that the Student would be able to perform better in school if the District had offered the kind of therapy services suggested by the Private Educational Consultant. Further, the remedy sought on behalf of the Student would have required the Student to attend High School, a high school from which the Student had graduated for three more years without any academic instruction if the Private Educational Consultant's recommendation was accepted.

Additionally, the Parents argued that teachers were unresponsive to them and that there were situations where District staff or teachers denied access to the Student's educational information. This Record clearly establishes that the classroom teachers of Centennial High School were respectful and responsive to the Parents and provided a substantial amount of information about the daily performance of the Student in the classroom. Little more could be expected of the Centennial High School teaching staff.

The three prong test for eligibility requires that the District document each of the individual eligibility criteria determinations.

Here there is no question that the student meets the eligibility requirements for purposes of a specific disability. The Student has a disability under the category of autism, however, the existence of a finding of a disability alone does not qualify a Student for special education.

It is then necessary to determine whether the Student's disability has an adverse impact on the Student's education and whether the Student needs special education in order to benefit from participation in the General Education Curriculum.

The District met the procedural requirements of the special education eligibility evaluation. The eligibility determination of the District even when made over the objection of the parents is supported by the substantial record generated by the District; particularly the volume and completeness of the information included in Exhibit 708.

It is clear that the Student's proficiency on the ISAT; meeting the District's graduation requirements, participation in the Broadcasting class, completion of the senior project and successful creative writing demonstrated that the Student received a meaningful educational benefit from participation in the District's general education curriculum without requiring specially designed instruction.

The District did not deny the Student a Free and Appropriate Education.

The Parents did not meet their burden.

The District has prevailed on every claim asserted by the Parents in the Due Process Hearing Requests and are the prevailing party.

### ORDER

IT IS HEREBY ORDERED that the Due Process Hearing Complaints in H-12-01-20 and H-12-03-20 shall be and are hereby dismissed.

DATED this \_\_\_\_\_ day of July, 2012.

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Edwin L. Litteneker  
Hearing Officer

### NOTICE

Any party aggrieved by the findings and decision herein has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 20 USCS Sec. 1415(i)(1). The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. (*See* 20 USCS Sec. 1415(1)(2)). 20 USCS Sec. 1415(i)(2)(a) provides that: Time limitation: The party bringing the action shall have 90 days from the date of this decision to file a civil action, **or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.** (Emphasis added.) IDAPA 08.02.03.109.05(g) provides that "An appeal to civil court must be filed within forty-two (42) calendar days from the date of issuance of the hearing officer's decision.

I DO HEREBY CERTIFY that a true  
And correct copy of the foregoing  
Document was:

\_\_\_\_\_ Mailed by regular first class mail,  
And deposited in the United States  
Post Office

\_\_\_\_\_ Sent by email to:

\_\_\_\_\_ Sent by facsimile.

\_\_\_\_\_ Sent by Federal Express, overnight  
Delivery

\_\_\_\_\_ Hand delivered

To:

On this \_\_\_\_ day of July 2012.

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Edwin L. Litteneker

**BEFORE A SPECIAL EDUCATION HEARING OFFICER  
STATE OF TEXAS**

**STUDENT.,**

**bnf S.B.,**

**Petitioner,**

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§

**v.**

**DOCKET NO. 012-SE-0913**

**A TEXAS INDEPENDENT**

**SCHOOL DISTRICT,**

**Respondent.**

**DECISION OF THE HEARING OFFICER**

Introduction

Petitioner, Student bnf S.B. (“Petitioner” or “the Student”) brings this action against the Respondent A Texas Independent School District (“Respondent,” or “the school district”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq. (IDEA) and its implementing state and federal regulations.

Party Representatives

Petitioner was represented by Chris Schulz and later on in the litigation by Daniel Garza, both attorneys with the law firm of Cirkiel & Associates. Respondent was represented by its legal counsel Nona Matthews with the law firm of Walsh, Anderson, Gallegos, Green & Trevino.

Resolution Session and Mediation

The parties waived the Resolution Session in writing on September 20, 2013 and agreed to attempt mediation instead. The parties met in mediation on November 4, 2013. Although the parties reached a tentative agreement in mediation the Board of Trustees for the school district was required to approve the proposed settlement. On November 19, 2013 the school district’s counsel confirmed the Board of Trustees did not approve the proposed mediation settlement.

Procedural History

Petitioner filed the initial request for a due process hearing on September 9, 2013. Petitioner was initially represented by Chris Schulz, an attorney with the law firm of Cirkiel & Associates. Daniel Garza, another attorney with Cirkiel & Associates, substituted in as Petitioner’s counsel on January 17, 2014. The case was first set for hearing on November 1, 2014 with the Decision of the Hearing Officer due November 24, 2013. The initial prehearing telephone conference was conducted in this case on October 18, 2014. The parties submitted a joint request for a continuance of the November

hearing date and an extension of the statutory decision deadline in order to attempt mediation before proceeding to hearing. The case was reset for hearing on December 10-11, 2013 with the Decision of the Hearing Officer extended to January 13, 2014. An Order was issued on November 3, 2014 that resolved a number of preliminary issues – including dismissal of Petitioner’s requests for monetary damages and attorney’s fees.

### Continuances and Extensions of Decision Due Date

The due process hearing was continued and the decision due date extended a number of times either at joint request of the parties or as unopposed motions. Scheduling conflicts for Petitioner’s counsel, the unavailability of a key witness for both parties, renewed settlement efforts, and a scheduling conflict with mandatory state-wide assessments were the basis for resetting the hearing and extending the decision deadline. When it was clear settlement negotiations were not successful the parties agreed to proceed with the due process hearing. An order was issued on March 31, 2014 resetting the due process hearing for May 19-20, 2014 and extending the decision of the hearing officer to July 11, 2014.

### Due Process Hearing

The hearing was conducted on May 19-20, 2014. Petitioner was represented by attorney Daniel Garza with Cirkiel & Associates assisted by Stephanie Dawson, Special Education Advocate. In addition, Student and Student’s parents also attended the due process hearing. Respondent was represented by its attorney Nona Matthews and her co-counsel Kelly Shook with Walsh, Anderson, Gallegos, Green & Trevino. The hearing was recorded and transcribed by a certified court reporter. The due process hearing was an open hearing at Petitioner’s request. The parties submitted their written closing arguments in a timely manner. The decision of the hearing officer is due July 11, 2014.

### Issues

The issues for decision in this case are:

1. Whether the school district failed to provide Student with a free, appropriate public education (FAPE) within the meaning of the Individuals with Disabilities Education Act (IDEA) when it failed to design an appropriate Individual Education Plan (IEP) that protected Student from bullying and harassment during the 2012-2013 school year;
2. Whether the school district failed to provide Student with a FAPE when it failed to provide Student with a meaningful transition plan that complied with the requirements under the IDEA as a component of her IEP during the 2012-2013 school year;
3. Whether the school district failed to provide Student with a FAPE when the school district failed to provide Student with appropriate related services, such as counseling and social

work services, during the 2012-2013 school year; and,

4. Whether the school district failed to provide Student's parents with the requisite prior written notice during the 2012-2013 school year; specifically when it failed to provide prior written notice that complied with IDEA requirements following Admission, Review & Dismissal Committee meetings (ARD) in January 2013 and May 2013 when the school district made certain proposals or refusals with regard to Student's IEP.

### Requested Relief

Petitioner requests the following items of relief:

1. Reimbursement for transportation to and from Student's new school district (Another Texas ISD) and to and from long-term psychological therapy Student received and continues to receive from a Licensed Professional Counselor (LPC) and prospective payment for continuing transportation costs to and from Another Texas ISD and to and from private psychological counseling;
2. Reimbursement for out of pocket expenses for the cost of outside assessments.

Petitioner's requests that the school district reimburse Student's parents for college costs and for parental lost wages were previously dismissed as monetary damages not available under the IDEA. (*Order on Respondent's Plea to the Jurisdiction and Partial Motion to Dismiss*)(November 3, 2013). See, *Walker v. Dist. of Columbia*, 969 F. Supp. 794 (D.C. D.C. 1997) (*IDEA only allows equitable remedies not monetary damages where 16 year old with intellectual disabilities was denied a FAPE*). Petitioner also requests attorney's fees and litigation costs that may be available to a prevailing party by a court of competent jurisdiction under the IDEA. However, these items are not forms of relief within the hearing officer's authority. See, 34 C.F.R. § 300.517.

### Findings of Fact

1. Student is eligible for special education services as a student with a speech impairment. Student has a fluency deficit – specifically a stuttering impairment. Student needs direct speech therapy services. (Respondent's Exhibit 1, pp. 1-5, 7, 10)(referred to hereafter as "R. Ex. \_\_\_\_")(R. Ex. 4, p. 2). At the time of the due process hearing Student was 14 years old and attending high school as a ninth grader in Another Texas ISD, a neighboring school district. (Petitioner's Exhibit 22)(referred to hereafter as "P. Ex. \_\_\_\_")(Transcript, Volume I, pp. 71-72)(referred to hereafter at "Tr. Vol. \_\_, p. \_\_\_\_").
2. Student's stuttering adversely affects Student's attitudes and feelings about participating in the classroom (specifically reading aloud and being called on to answer questions) and Student's willingness to communicate with authority figures and strangers. Student needs to learn specific strategies to assist Student in fluent speech as well as activities geared towards attitudes, emotions, acceptance, fears, and anxieties. (R. Ex. 1, p. 5).

Student's fluency decreases when Student is frustrated and at times Student's voice becomes louder when Student cannot produce the words Student is trying to say. (P. Ex. 3, p. 14). Student's emotional state can trigger fluency issues. (Tr. Vol. I., pp. 123, 266).

3. Student has been stuttering since age three. Student is more fluent at home than at school and expresses anxiety at home about speaking in the school environment. Student began attending A Texas ISD in kindergarten and has received speech services since then. (R. Ex. 1, p. 4) (Tr. Vol. I., p. 73). Student has friends at school and has no difficulty making or keeping friends. Student enjoys playing competitive [ ]ball. (P. Ex. 9, p. 1) (R. Ex. 20, p.1). Student is able to communicate effectively with Student's family and peers most of the time. (Tr. Vol. I., pp. 134-135).
4. Student began having trouble with peers and being "picked on" in fifth grade. Student was mocked and teased about the way Student talked. The teasing worsened in grades 6-8. (Tr. Vol. I., pp. 74, 81-82). Student's mother was aware Student was having minor peer issues here and there but was not overly concerned at first. However, as Student continued to report Student was the target of teasing the level of parental concern rose. (Tr. Vol. I, pp. 74, 117-118).
5. Student attempted to deal with the bullying by ignoring it, reporting it to Student's family, to teachers, the [ ]ball coach, the school counselor and, to school administrators. At times -- when Student felt picked on "over and over" -- Student would verbally explode and attempted to [self advocate] by talking back to the bullies. This was only temporarily effective. (Tr. Vol. I., pp. 95, 98-99, 101).
6. During junior high Student's mother observed that Student was socially withdrawn -- Student stopped visiting or spending the night with [ ] friends, used text messages instead of talking on the phone, and stayed in close proximity to [ ] family while attending sporting events. (Tr. Vol. I., pp. 143-144). Student's appetite also changed -- Student either ate too much or not enough -- and was irritable and snappish. (Tr. Vol. I., p. 146).
7. An ARD was conducted on August 17, 2011 prior to Student's entry onto the junior high school campus for seventh grade (the 2011-2012 school year). Student's mother requested the ARD to inform the junior high staff of the teasing Student experienced in sixth grade. (P. Ex. 3) (Tr. Vol. I., pp. 120-121). Student and Student's mother were concerned that Student's stuttering might result in teasing from teachers and peers. Student's mother was also concerned that teachers might avoid calling on Student in class. (P. Ex. 4, p. 1). Student's mother requested teachers be on the lookout for any teasing and intervene to prohibit it. Teachers were also requested not to punish Student because of [the] stuttering. (P. Ex. 4, p. 1).
8. The junior high school principal communicated with Student's teachers to address the parental concerns. (P. Ex. 4, p. 1) (Tr. Vol. I, p. 124). The principal advised the teachers that Student had problems with some classmates. (Tr. Vol. I., pp. 97-98). The teachers were receptive to the information, agreed to heighten their awareness, be sensitive to the concerns, and agreed to assist Student so [the] stuttering would not be an issue at school. (P. Ex. 4, p. 1).

9. Student has a history of some difficulty with substitute teachers. (P. Ex. 19, pp. 87-100). Student was reprimanded in eighth grade for Student's part in disrupting class with a substitute in charge. (P. Ex. 19, pp. 13, 131-132, 136-137, 139-143). In seventh grade Student was disciplined for using [a] cell phone to record a substitute teacher who was making fun of Student's speech. The use of cell phones in the school building is a violation of school district policy. (P. Ex. 6, p. 1) (Tr. Vol. I., pp. 77, 125-126) (Tr. Vol. II, pp. 363, 377, 380).
10. The assistant principal refused to view the recording of the substitute's remarks. Instead, Student was disciplined with an in-school suspension (ISS) for being disrespectful to the substitute teacher. (P. Ex. 19, pp. 87-100). (Tr. Vol. I., pp. 127-128)(Tr. Vol. II, pp. 346-48, 363) Student's parents removed Student from school because they were displeased with the administrator's actions. Student's mother was warned the school district would file truancy charges if Student did not return to school to serve [the] ISS. (Tr. Vol. I., p. 128).
11. Student was seen by a physician shortly after the incident with the substitute. (Tr. Vol. I., p. 128). Student's physician prepared a letter confirming Student was under his care and needed to be excused from attending school due to "severe anxiety and stress reaction." The physician recommended counseling for Student and that Student needed to be excused from school beginning on November 2, 2011 until such time as Student could be seen by a counselor for evaluation and a treatment plan was initiated. (P. Ex. 7, p. 1) (Tr. Vol. I., p 128).
12. An ARD meeting convened on November 18, 2011. (P. Ex. 8) (Tr. Vol. I., p. 128). Student's mother and a parent advocate expressed concerns that the school district was not adequately addressing the persistent teasing by peers and issues with substitute teachers. Student's mother requested Student be supported with some additional services. (Tr. Vol. I., p. 129).
13. The school district characterized Student's complaints about being teased and mocked as "difficulties" or "misunderstandings" while Student's mother viewed the conduct as bullying and harassment. (Tr. Vol. I., pp. 139, 141)(Tr. Vol. II, p. 399). Student's mother requested a counseling evaluation over concerns that Student was becoming depressed and anxious. At home Student spoke of the bullying with some anger but mostly with tears. (Tr. Vol. I., pp. 137-138). The November 2011 ARD agreed on the need for speech, counseling, and Assistive Technology assessments. (P. Ex. 8, pp.14, 17) (Tr. Vol. I., p. 129). The ARD also agreed to provide special instructions to inform substitute teachers regarding Student's IEP accommodations and modifications. Student's speech therapy services were also increased. (P. Ex. 8, pp. 14, 17).
14. The events in the fall of seventh grade led Student's mother to file a request for a due process hearing and an OCR Complaint. The matters were resolved in a Resolution Session and confirmed in a written Resolution Agreement dated December 9, 2011. (P. Ex. 19, pp. 17-20) (Tr. Vol. I., pp. 129-130). Administrators were aware of the complaints raised in the hearing request. (Tr. Vol. II, p. 381).
15. In the Resolution Agreement the school district agreed to conduct a counseling evaluation

- by a licensed specialist in school psychology (LSSP), to increase the frequency of Student's direct speech therapy services, provide additional outside speech therapy, and provide district wide training to all school district staff on the topic of bullying investigation and prevention by the end of the first semester of the 2012-2013 school year. (P. Ex. 19, pp. 17-19). The bullying prevention program selected by the school district was the Olweus Prevention Program – designed by Dan Olweus, Ph.D. (R. Ex. 17, p. 17) (Tr. Vol. I., p. 133) (Tr. Vol. II., p. 393).
16. The Resolution Agreement also included compensatory speech services to address a gap in speech services in sixth grade. (Tr. Vol. I., pp. 133-134). Student was excused from serving the in-school suspension, was allowed to re-take any tests that were not administered in a small group setting (as required by the accommodations stated in Student's IEP), and provided with an opportunity to receive math tutoring. An ARD meeting was scheduled within ten school days of the Resolution Agreement to implement its terms. (P. Ex. 19, pp. 17-19).
  17. Student's seventh grade science and English teachers reported Student's receptive and expressive language skills were average to above average with the exception of fluency in communicating orally due to her stuttering. Academically Student did well in both classes. (R. Ex. 1, p. 4). Student's year end grades for seventh grade (the 2011-2012 school year) were very good: English 81, Texas History 85, Math II 85, Science 89, Athletics 100, and Art 94.
  18. Teachers reported Student had some difficulty becoming discouraged by difficulties or minor setbacks, accepting responsibility for Student's own actions, noncompliance with teacher directives, adapting to new situations without becoming upset, being tolerant of irritating persons or situations, and responding appropriately to praise and correction. (R. Ex. 1, pp. 5-6).
  19. Student was assessed for counseling services in the seventh grade by a LSSP with the A Texas County Shared Services Arrangement (SSA). (P. Ex. 9) (R. Ex. 2) (Tr. Vol. I, p. 171). A Texas ISD is a member of the SSA. (Tr. Vol. II., p. 441). Student had four minor disciplinary incidents during the fall of seventh grade. Two were tardies and two involved disrespectful behavior to a substitute teacher. (P. Ex. 6, p. 1) (P. Ex. 19, pp. 89-90).
  20. However, Student was regarded as generally well-behaved and rarely got in trouble at home or school. (P. Ex. 9, p 1) (R. Ex. 2, p. 1). Student did not exhibit disruptive or impulsive behaviors, did not act aggressively, or demonstrate rule-breaking behaviors. (P. Ex. 9, p. 2) (R. Ex. 2, p. 2).
  21. Student became emotional when discussing school during the counseling evaluation. Student reported feeling that [ ] peers picked on Student due to [the] stuttering. Student often worried about Student's looks and felt sad when others teased Student. (P. Ex. 9, p. 1) (P. Ex. 20, p.1) (R. Ex. 2, p. 1). Student, Student's mother, and two of Student's classroom teachers completed questionnaires for the counseling evaluation. (Tr. Vol. I., pp. 133, 196)(P. Ex. 9) (R. Ex. 2).

22. Student scored in the clinically significant range during the counseling assessment in the area of “school problems.” Student’s responses indicated a dislike of school and a wish to be elsewhere. Student generally viewed teachers as unfair and/or uncaring. Student was “at risk” for depression and low self-esteem. Student reported feeling sad and misunderstood at times. (P. Ex. 9, pp. 1-2) (R. Ex. 2, pp. 1-2).
23. The seventh grade counseling assessment included parental information. Parental responses were reliable and valid. The parent responses were used to measure Student’s adaptive and problem behaviors in the home. Parent ratings for the “internalizing problems composite” (which includes anxiety, depression and somatization) fell within the clinically significant range. (P. Ex. 1, p. 2) (R. Ex. 2, p. 2) (Tr. Vol. I., p. 199). Parent ratings in the depression and somatization subscales also fell within the clinically significant range. Student was “at risk” for anxiety. (P. Ex. 9, p. 2) (R. Ex. 2, p. 2) (Tr. Vol. I., p. 199).
24. The seventh grade counseling assessment also included information from Student’s seventh grade science and English teachers. The teacher responses were reliable and valid. The science teacher’s ratings did not indicate any area of concern on composite scores but ratings in the social skills and leadership subscales fell within the “at risk” range. The English teacher’s ratings indicated a concern with “internalizing problems.” Anxiety, depression, and somatization ratings fell within the “at risk” range. (P. Ex. 9, p. 2) (R. Ex. 2, p. 2) (Tr. Vol. I., pp. 178, 199-200). Student was often absent from school around the period of time Student was being evaluated – frequently complaining of headaches and stomach aches. (Tr. Vol. I., p. 140). The responses from the teachers and from Student’s mother were remarkably similar. (Tr. Vol. I., pp. 138, 179).
25. The seventh grade counseling assessment also included a review of Student’s educational records. The counseling assessment concluded Student exhibited anxiety and worry over school problems that demonstrated a need for counseling. (R. Ex. 2) (Tr. Vol. I., p. 200). Student’s responses confirmed anxiety, nervousness and problems relating to peers. Student verbally expressed a need for counseling and a desire to talk to someone regarding her difficulties with peers at school. Areas of concern included Student’s attitude towards school and teachers and difficulties in the school setting that could affect academic performance. The counseling assessment recommended direct counseling to address Student’s attitude towards teacher/school, anxiety, depression, somatization, social skills, and peer relationships. (P. Ex. 9, pp. 3-4) (R. Ex. 2, pp. 3-4) (Tr. Vol. I., p. 180).
26. Student was also assessed by the SSA for assistive technology (AT). The AT assessment concluded Student did not need assistive technology because Student was able to communicate effectively in Student’s four core academic classes. Although teachers acknowledged Student’s stuttering it was not a major impediment in completing work. Student made academic progress in [all] seventh grade classes and was able to communicate with friends. Absences from school rather than [the] stuttering posed the difficulty in keeping up with school work. (R. Ex. 3) (Tr. Vol. I., p. 202).
27. An annual ARD convened in January 2012 following the assessments. The ARD

confirmed direct speech therapy two times every six weeks for 28 minutes per session and direct counseling services one time every 3 weeks for 25 minutes per session. (R. Ex. 4, pp. 9, 16) (Tr. Vol. I., pp. 202-203).

28. An Individual Educational Plan (IEP) was developed for both speech therapy and counseling in January 2012. (P. Ex. 10, pp. 5-7) (R. Ex. 4, pp. 5-7). The counseling IEP included goals related to Student's somatic complaints, Student's attitudes towards peers, peer relationships, social skills, anxiety, and depression. (R. Ex. 4, p. 7). (Tr. Vol. I., pp. 11, 140-141, 193-194)). The speech therapy goal addressed Student's need to develop appropriate fluency in spontaneous speech. (P. Ex.10, p. 6) (R. Ex. 4, p. 5).
29. A set of accommodations were included in Student's IEP including small group for testing situations, extra time for answering questions, written expression for communication when needed, and being excused from oral reading at Student's choice. Substitute teachers were to be informed of Student's modifications and accommodations in a folder. (R. Ex. 4, pp. 10, 16) (Tr. Vol. I., p. 204).
30. Counseling services at school began in the spring of seventh grade. (R. Ex. 10) (Tr. Vol. I., p. 205). The LSSP and Student discussed victim, aggressor, and bystander roles, Student's attitudes towards teachers and peers, ways to seek adult assistance, and --- on at least one occasion --- being picked on by another student. (Tr. Vol. I., pp. 206-210). Student had difficulty taking responsibility for Student's own actions. (Tr. Vol. I., p. 210).
31. Student also began private therapy in December 2011 of seventh grade. (P. Ex. 20, pp. 1-2B, 20) (Tr. Vol. I., pp. 25, 38). The primary focus of the therapy was learning strategies to cope with being bullied. Other typical issues for junior high [students] were also topics of discussion in therapy sessions including conflicts with Student's mother over school performance and the importance of making more than the minimum effort. There were some parental concerns Student was not putting forth Student's best efforts academically. (Tr. Vol. I., pp. 39-40, 46-48).
32. Student was diagnosed with an adjustment disorder w/ mixed anxiety and depressed mood. (P. Ex. 20, p. 2B) (Tr. Vol. I., pp. 30-31, 58-59). An adjustment disorder is when a person is having difficulty coping with changes in their life. An adjustment disorder is a mental/emotional/psychological disorder as opposed to an organic or chemical problem. (Tr. Vol. I, p. 59). A person with an adjustment disorder can overcome the disorder with appropriate treatment. (Tr. Vol. I., pp. 59-60). Student met the criteria for adjustment disorder with mixed anxiety and depressed mood. (Tr. Vol. I., pp. 58, 65, 67-68).
33. In treating Student the private therapist used "cognitive behavioral therapy." The focus of this kind of therapy is on reframing thoughts and working with the patient's thinking to learn new behaviors. The use of cognitive therapy was appropriate for Student. (Tr. Vol. I, pp. 35, 51). The LSSP also used cognitive therapy in the school counseling sessions. (Tr. Vol. I., pp. 239-240).
34. Student and the private therapist processed Student's feelings about being bullied and discussed various strategies to cope with it. It was difficult for Student to reframe [ ]

thoughts because Student continued to be in situations where Student was teased. (Tr. Vol. I., pp. 36, 51-52, 54-56,). The therapist found no reason to believe that Student was not being truthful in the therapy sessions. Student admitted that Student mouthed off and got in trouble with Student's mother at times – typical teenage [ ] behavior. (Tr. Vol. I., pp. 52-53).

35. Student exhibited a low self concept during private therapy. (P. Ex. 20, p. 2A). Student's mood was often sad, angry, and anxious. Student was tearful and had somatic complaints, fearful of some [ ] classmates, and, upset at what Student felt was a lack of help or support from teachers and school staff. (P. Ex. 20, p. 20) (Tr. Vol. I., pp. 26, 31). Student's stuttering worsened when Student described being teased about [the] stuttering at school. (Tr. Vol. I., pp. 28-29). As private counseling progressed Student reported things were somewhat better as Student began to attempt to use coping strategies. (P. Ex. 20, pp. 3-9) (Tr. Vol. I., pp. 46-47, 48).
36. The private therapist did not confer with any of the junior high staff nor did she observe Student at school. (Tr. Vol. I., pp. 44, 50-51). Although the private therapist reviewed some of Student's grade reports she did not review any disciplinary records or investigations of bullying made by the school. (Tr. Vol. I. p. 45). While it would have been helpful to confer with school staff it was the therapist's policy not to do so given the confidential nature of therapy and to preserve trust in the therapeutic relationship. (Tr. Vol. I., pp 61-64).
37. On April 2, 2012 Student and Student's mother complained to a junior high administrator that Student was being harassed by a student in [the] fourth period class who made inappropriate gestures towards Student. At parental request Student was reassigned to a study hall. (P. Ex. 19, p. 83) (Tr. Vol. II, pp. 364-365). The administrator also investigated a complaint that the same student made unwanted physical contact with Student in the hallway. The administrator was unable to confirm the incident when he reviewed video from hallway cameras. (Tr. Vol. II, p. 366).
38. By the end of seventh grade Student reported to the private therapist that things were "up and down" – that Student was bullied about [the] stuttering and didn't know what to do about it, that the principal seemed unresponsive, and that Student's mother's involvement only created anger towards Student by classmates. (P. Ex. 20, p. 10) (Tr. Vol. I., pp. 27-28, 40).
39. On August 27, 2012 the parties agreed to amend the ARD conducted on January 26, 2012 prior to the beginning of Student's eighth grade year (the 2012-2013 school year). The purpose of the amendment was to correct the counseling schedule. (P. Ex. 11, pp. 1-2, 4, 8) (R. Ex. 5, pp. 1-2, 4, 8). Direct counseling services were scheduled for one 25 minute session every 3 weeks. (P. Ex. 11, p. 3) (R. Ex. 5, p. 3) (Tr. Vol. I., pp. 242-243). Counseling services were not provided until October 2012 of eighth grade due to delays in securing the requisite parental consent. (Tr. Vol. I., pp. 211-214)(Tr. Vol. II, pp. 445-446, 453-454). Student demonstrated some improvement in conflict resolution with peers but peer relations continued to be an issue addressed in school counseling. (Tr. Vol. I., pp. 214-217).

40. The school district implemented the Olweus Program as agreed. (R. Ex. 15, 16, 17, 18) (Tr. Vol. II., p. 356, 408). The Olweus anti-bullying training for school staff was conducted on August 23, 2012. Some follow up training was incorporated into staff development meetings. (Tr. Vol. II, pp. 358, 397). Each campus formed a bullying committee to implement the training. (Tr. Vol. II, pp. 357-358, 393). The school district developed a protocol to follow after receiving a bullying report that included identifying the type of bullying, an investigation component, a set of interventions for the victim, and disciplinary action. (Tr. Vol. II, pp. 411-413). Bullying complaints are handled through the school district's administrative hierarchy as a component of the school district's overall discipline program. (Tr. Vol. II, pp. 349-350, 356-357).
41. Topics in the staff training included the definition of bullying, the bullying circle, school rules, interventions, a questionnaire and discussion of the results, the use of classroom meetings, and an opportunity for questions and answers. A set of weekly meetings in each junior high activity classroom was implemented that addressed various issues following the Olweus anti-bullying curriculum. The anti-bullying program was also explained to parents at a parent open house in early September 2012. (P. Ex. 19, pp. 22-79) (Tr. Vol. I., pp. 290-291) (Tr. Vol. II, pp. 396-398). Although Student's mother did not attend the Open House the principal met with her and explained how the junior high was using the Olweus program. (Tr. Vol. II, p. 397).
42. Student was the target of persistent teasing by a group of four students in eighth grade most often by two [ ] students in Student's English class -- one of whom was the primary instigator (Student X). (Tr. Vol. I., pp. 88, 101, 104-106, 111). The two [students] dropped by Student's activity period one day and threw markers and pencils at Student. On another occasion the same [students] swept Student's lunch onto the floor. Another time Student X popped Student on the head in the hallway causing some physical discomfort. (Tr. Vol. I., pp. 107-110, 112). The other [students] often joined in after Student X initiated the teasing. (Tr. Vol. I., p. 111).
43. Student was assigned to the same English teacher for seventh and eighth grades. (Tr. Vol. I., p. 281). One day Student and Student X got into a verbal confrontation in the English class. The English teacher conferenced with the students out in the hall, imposed appropriate disciplinary consequences on both, and conferred with the Assistant Principal who contacted Student X's parent. The teacher also changed Student X's seat. (R. Ex. 8, p. 11) (Tr. Vol. I. pp. 92, 97, 287-288, 313-314, 316-317).
44. Student's mother, Student, the English teacher, and the principal met later to discuss the incident. (P. Ex. 19, pp. 13-14, 285-286, 313-314). The English teacher claimed she did not hear the [other] student make fun of Student but agreed to pay closer attention in the future. The English teacher described the students in the class as feeding off one another with each one wanting to have the last word. (P. Ex. 19, pp. 13-14, 145) (Tr. Vol. I., pp. 285-286, 289).
45. During the meeting the principal advised Student that administrators may not know Student was being bullied unless Student reports it. The principal encouraged Student to come to him when Student felt Student was being bullied so that he could immediately

address it. The junior high administrators did not receive any reports from Student that Student was being bullied during eighth grade. (P. Ex.19, p. 13) (R. Ex. 11, pp. 1, 2-7) (Tr. Vol. I., pp. 314-315) (Tr. Vol II, pp. 375, 403).

46. Student was involved in an altercation with [another] student in the gym locker room in October 2012. The [students] traded insults and rude remarks. The principal counseled both [students], directed them to steer clear of one another, and warned them of stiffer consequences if they continued negative interactions. (P. Ex. 19, pp. 102-107) (R. Ex. 11, pp. 1, 2-7) (Tr. Vol. II, pp. 367-368).
47. Student's annual eighth grade ARD was conducted on January 24, 2013. (P. Ex. 12, p. 1) (R. Ex. 6, p. 1). Student's mother participated by phone. Student also attended this ARD. (P. Ex. 12, pp. 20, 26) (R. Ex. 6, pp. 21, 26) (Tr. Vol. I., p. 222). Student continued to meet eligibility criteria as a student with a speech impairment and need for special education services. (P. Ex. 12, p. 2). The Notice of Procedural Safeguards was provided to the parent. (R. Ex. 6, p. 2).
48. The January 13, 2013 ARD documents provided notice to Student's mother of Student's eligibility classification, the services proposed and agreed to, the options considered, and the assessments and other educational information that formed the basis for the proposed and agreed upon set of services. The Prior Written Notice inviting Student's mother to the ARD (ARD Notice) included a statement regarding parental procedural rights and the name and phone number of someone to contact for assistance in understanding the ARD Notice or the procedural rights. A full explanation of parental procedural rights was transmitted to the parent with the ARD Notice. The ARD paperwork was transmitted to the parent on January 28, 2013 by the LSSP. (Tr. Vol. II, pp. 450-451)(R. Ex. 6) (R. Ex. 19).
49. Graduation with a regular high school diploma will terminate Student's eligibility for special education services. Student plans to attend a four year university with the goal of pursuing a career in [the health field]. (Tr. Vol. I., pp. 142-143)(P. Ex. 12 p. 12(R. Ex. 6, p. 7). A Transition Supplement was completed as part of the January 2013 ARD meeting. (P. Ex. 12, pp. 5-6) (R. Ex. 6, pp. 5-6) (Tr. Vol. I., p. 222). Student was 13 years old at the time. (Tr. Vol. II., p. 455). The Transition Supplement noted Student was successfully integrated into the community, able to transfer skills beyond the classroom, and did not need specific instruction in adult living skills because Student demonstrated independent living and employability skills. (P. Ex. 12, p. 5) (R. Ex. 6, p. 5).
50. Student's prevocational/vocational competencies were assessed through teacher reports compiled by the LSSP and identified in the Transition Supplement ARD documents. (P. Ex. 12, p. 4) (R. Ex. 6, p. 4)(Tr. Vol. I., pp. 222-223). The competencies were listed under the following topics: General Learning Skills; Socialization Skills; Choice Making Skills; Pre-Employment Skills; Employment Skills; Self-Advocacy Skills; and Daily Living Skills. (P. Ex. 12, p. 4) (R. Ex. 6, p. 4) (Tr. Vol. I., p. 223). Student was graduating under the "Recommended High School Program" with an expected graduation date of May 2017. (P. Ex. 12, pp. 18, 21) (R. Ex. 6, pp. 7, 22).
51. Both Student and Student's mother participated in the transition plan portion of the ARD

and in identifying Student's transition needs. Student was to meet with the school district's Transition Specialist in Spring 2013. The transfer of rights was provided to Student and Student's mother at the January 2013 meeting as well. (P. Ex. 12, pp. 6, 21) (R. Ex. 6, pp. 6, 21) (Tr. Vol. II, p. 450).

52. Student's eighth grade teachers reported Student was motivated, inquisitive, pleasant to have in class, and got along with [ ] peers. Student's teachers reported Student put forth Student's best effort and was passing all [ ] classes. In school counseling sessions Student was no longer exhibiting physiological symptoms of anxiety or depression. Student was able to identify coping skills when feeling anxious or depressed although not always able to generalize those skills outside of counseling sessions. (P. Ex. 12, p. 20)(R. Ex. 6, p. 21) (Tr. Vol I., pp. 223-225).
53. An IEP for Independent Study Skills was added to Student's educational program at the January 2013 ARD. The short term objectives in meeting the study skills goal were that Student would pass all [ ] core academic classes with a 90% attendance in all core subjects. (P. Ex. 12, p. 11) (R. Ex. 6, p. 11). Student continued placement in all regular education classes with the same set of modifications and accommodations as before. (P. Ex. 12, pp. 20-21) (R. Ex. 6, pp. 21-22). IEP's for speech and counseling were updated at the January 2013 ARD with appropriate short terms goals. (P. Ex. 12, pp. 8-9, 12) (R. Ex. 6, pp. 12-14) (Tr. Vol. I., p. 274).
54. The LSSP reported Student seemed happier this year than last, was able to identify many positive traits about [ ] self, and was getting along better with peers and teachers. Student expressed a desire to continue counseling – Student needed a support system and someone to vent to. The counseling IEP was adjusted to add objectives to address Student's current needs. (P. Ex. 12, pp. 13-15, 20) (R. Ex. 6, pp. 13-14, 17, 21) (Tr. Vol. I., pp. 219-220, 225, 230).
55. Although Student and the LSSP often discussed Student as the object of teasing or being picked on the word "bullying" was not specifically used in counseling sessions. The LSSP felt Student was capable of standing up for [ ] self and therefore saw no imbalance of power in Student's peer relationships so she did not identify Student as a bullying victim. (Tr. Vol. I., pp. 185-186, 188-189, 200-201). Student engaged in inappropriate verbal attacks towards teachers and peers at times. The LSSP discussed this issue with Student's mother who took the position that Student was merely defending [ ] self. (Tr. Vol. I., pp. 225-226). Student expressed feelings about injustice and fairness at school. Student often over generalized and over exaggerated small issues. (Tr. Vol. I., pp. 227, 239-240).
56. The January 2013 ARD agreed Student continued to need direct counseling once a week for three weeks at 25 minutes per session with a focus on generalization of coping skills in the school environment. The revised counseling IEP included Student's ability to discuss and/or demonstrate how the words and behaviors of others affect Student's mood/disposition; identifying effective coping skills when feeling anxious or depressed; discussing and identifying attitudes towards teachers, school and peers that may affect academic outcomes; and, identifying adults who can support, help, or assist when Student

is experiencing stress due to peer/teacher conflicts, academics, or family stress. (P. Ex. 12, pp. 13-14) (R. Ex. 6, pp. 13-14).

57. In January 2013, at Student and parent request, Student was placed in another English class with a new teacher (P. Ex. 19, pp. 84-86) (R. Ex. 8, p. 11) (Tr. Vol. I., pp. 89-90, 93, 95) (Tr. Vol. II, pp. 390-392). The LSSP supported the request. (Tr. Vol. I., pp. 191-192)(Tr. Vol., II., p. 446). The daily teasing ceased as a result of the change in English classrooms. (Tr. Vol. I., p. 90). Student's English grades improved from an 80 to a 90 after the switch. (R. Ex. 13, p. 3) (Tr. Vol. I., pp. 102-103).
58. The new English teacher reported Student got along with [ ] peers and was performing academically. The new English teacher reported that Student used [a] cell phone in class when Student was not supposed to, talked too much, and, responded negatively when classmates said something to make Student mad. (R. Ex. 8, p. 11). Student received two office referrals in the new English class; one for making inappropriate noises and second for a provocative outburst. (P. Ex. 19, pp. 108-110).
59. Student violated the school policy against use of a cell phone on campus twice in eighth grade. Student's phone was confiscated and returned at the end of the day. Student also incurred a fine for the second violation. However, when Student's mother retrieved the cell phone from the office she did not pay the fine. (Tr. Vol. II, pp. 368-370)(R. Ex. 11).
60. During parent pick up on April 19, 2013 Student's mother became upset when Student received a negative text message from Student X using another student's phone. Student's mother approached the student about the text message on [the] cell phone. A teacher intervened to avoid a confrontation between the parent and student. The teacher advised the parent to bring her concerns to the office and suggested Student should be allowed to handle Student's own problems. Student's mother reacted angrily to the teacher's comments. The text message was not reported by Student or Student's mother to the administration as bullying. The owner of the cell phone later apologized to Student. (P. Ex. 13, p. 1) (P. Ex. 18) (P. 19, pp. 13, 126-130) (Tr. Vol. I. pp. 147-148). The teacher encouraged Student's mother to support Student but also to allow Student to solve Student's own problems in a Facebook posting which the parent found upsetting. (P. Ex. 19, pp. 9-10) (Tr. Vol. I, p. 84).
61. School administrators and the school's resource officer investigated the confrontation between the parent and the student. The resource officer advised Student's parent to refrain from further confrontations with students on campus or face possible trespassing charges. (P. Ex. 19, p. 13). Student's mother felt this was a threat by the school district. (Tr. Vol. I, p. 148).
62. Student described [the] eighth grade year as "really bumpy" and "up and down." Student felt it was more negative overall than positive. (Tr. Vol. I., pp. 87-88). In counseling sessions with the LSSP during eighth grade Student regularly discussed difficulties with peers and the counseling IEP targeted peer interactions. Finally, in a May 7, 2013 counseling session Student admitted refraining from talking about peer difficulties to avoid having to deal with the issue. Student also admitted Student acts tough "... because if I don't I will cry." Student was deeply distressed during this counseling

session and “cried pretty much the entire session.” (P. Ex. 13, pp. 4-5, 7) (Tr. Vol. I., pp. 181, 231-232, 242-243). The LSSP consulted campus staff but no one could identify a specific incident that might have triggered the outburst in the counseling session. However, in conferences with the parent, Student’s mother continued to contend Student was a bullying target. (Tr. Vol. I., pp. 232-233).

63. On May 20, 2013 Student’s physician advised the school district that Student needed homebound instructional services and psychological/psychiatric therapy due to a stress disorder. The physician stated Student could complete schoolwork with a homebound teacher and was permitted to participate in activities outside the home. (P. Ex. 16, p. 1) (R. Ex. 7, pp. 7-12). Private therapy resumed on May 28, 2013. (Tr. Vol. I., pp. 49-50, 57).
64. An ARD was conducted on May 22, 2013 to discuss Student’s need for homebound services and parental concerns that Student was being bullied and that the school district was not responding appropriately. Student’s problems in the English class were discussed at the ARD. Student’s English teacher for the fall semester was called into the ARD. (R. Ex. 8) (Tr. Vol. I., p. 294). The English teacher admitted the class was a stressful environment for Student. (R. Ex. 8, p. 11) (Tr. Vol. I., pp. 151, 296). The ARD was uncomfortable and intimidating for school staff. Student’s mother confronted school staff in an accusatory manner. (Tr. Vol. I., pp. 234-236, 243-244, 247, 252-253, 255, 296).
65. The May 2013 ARD documents included notice of Student’s eligibility classification, the services proposed and agreed to, the options considered, and the assessments and other educational information that formed the basis for the proposed and agreed upon set of services. The Prior Written Notice inviting Student’s mother to the ARD (ARD Notice) included a statement regarding parental procedural rights and the name and phone number of someone to contact for assistance in understanding the ARD Notice or the procedural rights. An explanation of procedural rights was included with the ARD Notice. The parent attended the ARD. (R. Ex. 8) (R. 19).
66. The LSSP provided Student with the requisite homebound services for the remainder of the eighth grade year. (Tr. Vol. I., pp. 149-150, 238-239). An IEP for the homebound services consisted primarily of providing Student with an opportunity to prepare for and then complete [ ] final exams. (R. Ex. 8, pp. 5, 11). Counseling services were a component of the homebound program. (R. Ex. 8, p. 11) (R. Ex. 10, p. 1) (Tr. Vol. I., pp. 232-233).
67. Student’s eighth grade year end grades were very good: English 85, American History 83, Math III 96, Science 86, Spanish 84, Art 95, and Athletics 100. Student made academic progress in eighth grade – Student passed [all] classes, passed the STARR test (the state mandated assessments) and Student’s fluency improved. (P. Ex. 19, p. 111). (Tr. Vol. I., p. 99, 258)(Tr. Vol. II, pp. 429-430, 449). Student was able to communicate in class and at times even volunteered to read aloud. (Tr. Vol. I., p. 308)(Tr. Vol. II, p. 429).
68. On May 24, 2013 Student’s mother filed a Level One Grievance against several

administrators and teachers. (P. Ex. 19). Student's mother contended the school district failed to utilize the Olweus bullying prevention program effectively and that the school district failed to adequately investigate Student's complaints of bullying. (Tr. Vol. I., pp. 152-153). Student's mother discussed the Level One Grievance with the principal on June 10, 2013. The principal was unable to substantiate the parent's claims, found parental behavior was problematic, and denied the parental requests for relief. (P. Ex. 19, pp. 157, 159) (Tr. Vol. I., p. 154).

69. Student's mother appealed the Level One decision in a Level Two Grievance. (P. Ex. 19, p. 152). Student's mother alleged Student experienced constant harassment and bullying and that the school district failed to fully implement the Olweus bullying prevention program. In particular, Student's mother complained that the Olweus program required the school to investigate each and every claim of suspected bullying and that the school district failed to do so. Student's mother included the text messaging incident, the confrontation with the teacher, and the teacher's Facebook posting in the Level Two Grievance. (Tr. Vol. I., pp. 155-156).
70. Student's parents met with the Superintendent to resolve the Level Two Grievance on July 20, 2013. The Superintendent took corrective action in response to the Level Two Grievance. (P. Ex. 19, pp. 170-172) (Tr. Vol. I., p. 156). He ordered all principals to review school district policies regarding the use of social media. He acknowledged one of the substitutes was ineffective, had poor classroom management and was no longer employed in that role. The Superintendent planned to meet with all campus principals to ensure substitutes were properly trained and to review the importance of conflict resolution for all staff, including substitutes. He also ordered additional training for the junior high staff on the Olweus program. (P. Ex. 19, pp. 170-172). The Superintendent concluded the school district took appropriate steps to address the issues in the grievance. (Tr. Vol. I., pp. 156-157). Student's mother then filed a Level Three Grievance to the school board. (P. Ex. 18) (Tr. Vol. I., pp. 157-158).
71. By the end of eighth grade the family decided Student should transfer to Another Texas ISD after Student threatened suicide if Student returned to A Texas ISD for high school. (Tr. Vol. I., pp. 95-96, 113). Student previously mentioned plans to transfer to Another Texas ISD in both seventh and eighth grades in order to play on the other school district's [ ] team. (R. Ex. 10, p. 8) (Tr. Vol. II, pp. 229, 325). Student has not attended A Texas ISD since May 2013. (Tr. Vol. I., p. 152).
72. By June 2013 the transfer to Another Texas ISD High School was approved and Student was playing in the other school district's community-based summer [ ]ball program. In July 2013 Student reported things were going well. Student enjoyed [ ]ball and made new goals for school and for making friends. (P. Ex. 20, pp. 16) (Tr. Vol. I., p. 160-162). By November 2013 Student reported things were going "really good." Student viewed teachers and classmates were "much nicer" at the new school. (P. Ex. 20, p. 19). Student was excited about school, Student's classmates and school activities. The new school employed a "zero tolerance" rule and Student felt the overall school environment was more positive. (P. Ex. 20, p. 20) (Tr. Vol. I., p. 26). Student adjusted well in [the] new school and had no negative issues with peers. (P. Ex. 22).

73. On August 25, 2013 Student's mother contacted the Texas Town Police Department to report Student X continued to harass Student by sending a negative text message. The police investigated the complaint. Student X admitted making fun of Student due to [the] speech impairment and throwing erasers at Student. (P. Ex. 17). The police report confirmed the two students did not get along well in English class. At the time of the police report Student was no longer attending the school district. (P. Ex. 17). The matter was referred to the A Texas County District Attorney's Office for prosecution as a Class B misdemeanor of harassment. The school board did not review the police report as a component of the Level Three Grievance hearing. (Tr. Vol. I., p. 160).
74. Bullying occurs when a stronger or more powerful child hurts, threatens or torments a more vulnerable child. Bullying is purposeful, usually repeated with a marked imbalance of power between the bully and the target. Bullying can occur face to face or behind one's back. Bullying can be short-term or last a long time. Bullying can be done by a single student or by a group. Bullies are more likely to be male. Bullying can be verbal, psychological, and/or physical. (R. Ex. 16, p. 13) (R. Ex. 17, p. 16). Children with disabilities are at higher risk of being bullied. (R. Ex. 17, p. 5). Bullying may be physical (causing harm to another's body or property); emotional (causing harm to another's self-esteem), or social (causing harm to another's group acceptance.) (R. Ex. 16, pp. 13-14) (R. Ex. 17, pp. 4, 16).
75. Verbal forms of bullying include taunting, making insulting remarks, name calling, teasing about possessions or clothes, insulting family, gossiping, starting or spreading rumors, or verbal interference with friendships. Verbal bullying can escalate into threatening physical harm, verbal harassment, insulting the target's intelligence, athletic ability, race, or gender, spreading gossip or rumors, or undermining other relationships. (R. Ex. 16, p. 14).
76. Non-verbal forms of bullying include making threatening gestures, defacing property, taking small items, staring or mugging, pushing, shoving, giving dirty looks, making insulting gestures, or playing mean tricks. Non-verbal bullying can escalate into more serious forms of physical harm or property damage. (R. Ex. 16, p. 14). The effects on the bullying target can include lower self esteem, depression and anxiety, absenteeism, lowered school achievement, and/or thoughts of suicide or illness. (R. Ex. 17, pp. 4-5).

## Discussion

### Bullying as a Denial of FAPE

Bullying is the unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior must be repeated, or have the potential to be repeated, over time. Bullying includes actions such as making threats, spreading rumors, attacking someone physically or verbally and excluding someone from a group on purpose. *Government Accountability Office, Report on Bullying (June 2012)* (<http://www.gao.gov/assets/600/591202.pdf>).

A school district's failure to stop bullying may constitute a denial of a FAPE. *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004) (*unabated harassment and bullying of high school student made it impossible for student to receive FAPE where student became depressed, harassment continued, and student attempted suicide*); *Letter to Dear Colleague*, 113 LRP 33753 (OSERS Aug. 20, 2013) (*bullying that results in the student not receiving meaningful educational benefit constitutes a denial of a FAPE under the IDEA and must be remedied*).

Bullying may constitute a denial of a FAPE if school personnel were deliberately indifferent to, or failed to take reasonable steps, to prevent bullying that adversely affects or results in the regression of educational benefit or substantially restricts the student with a disability from accessing educational opportunities. *T.K. and S.K. ex rel K.K. v. New York City Dept. of Educ.*, 779 F. Supp. 2d 289, 316 (S.D. N.Y. 2011)(*school district's motion to dismiss denied where allegations that 12 year old with learning disabilities was denied a FAPE due to persistent bullying by peers – student was ostracized, pushed, peers refused to touch items student touched, and student was ridiculed daily*).

The bullying need not be outrageous but it must be sufficiently severe, persistent, or pervasive that it creates a hostile environment for the student with a disability. It is not necessary that Petitioner show the bullying prevented all opportunity for an appropriate education but only that it is likely to affect the opportunity of the student for an appropriate education. *T.K. v. New York City Dept. of Ed.*, 779 F. Supp. 2d at 317.

#### Student Was a Victim of Bullying

The facts in this case support the conclusion that Student was the victim of persistent bullying during the 2012-2013 eighth grade year primarily from [another] student who made fun of Student's stuttering and engaged in some physical acts such as throwing erasers at Student, dumping Student's lunch on the floor, and, popping Student on the head. The primary bully was supported by 3 other [ ] students who either joined in or were bystanders and did nothing or little to stop the behavior. While these acts were not necessarily "outrageous" they were sufficiently persistent to create a hostile environment for Student – especially in the eighth grade English class. The teasing was unwanted, somewhat aggressive, occurred repeatedly, and had the potential to continue over time.

School district staff did not see an imbalance in power between Student and Student's peers and so did not identify Student as a bullying victim. In their view Student was able to "stand up for [ ]self." However, the evidence established that Student was sensitive about [the] fluency deficit and prone to over exaggerate and react to minor incidents. The evidence showed that by the middle of seventh grade (following the counseling evaluation) the school district was well aware that Student was anxious and worried about school. While it is also true that Student could react angrily and engage in verbal attacks the evidence showed that this behavior was a coping mechanism Student used when Student felt insulted or teased. [A] difference [between the students was] also a factor that supports Student's perceived imbalance of power. In addition, Student had a stuttering

disability – the [other] students did not.

The imbalance in power can be either real or perceived. The record shows Student perceived an imbalance of power between [ ]self and Student X (in particular) and Student's X's friends. Therefore, Student proved Student was a victim of bullying. *See, Shore Regional High Sch. Bd. of Educ. v. P.S., 381 F. 3d at 195-196 (Appellate Court affirmed District Court's finding student was bullied when peers used insulting names, threw rocks, hit student with a padlock, moved away when student sat at the lunch table, and told other students not to socialize with student); GAO, Report on Bullying (June 2012), supra.*

#### Were School Staff Deliberately Indifferent to or Fail to Take Reasonable Steps?

The English teacher where some of the teasing took place mis-read the interactions between Student and the primary bully and [the bully's] friends. The English teacher minimized and disregarded the seriousness of the behavior. Instead, the teacher viewed the interactions as typical "back and forth" bantering between middle schoolers. The English teacher did not understand that Student's loud verbal interactions with the [other] student were Student's attempts to stop the teasing. However, the evidence also shows that the daily teasing ceased once Student was placed into another English class at parental request.

The school counselor was apparently unaware of the persistent nature of the bullying until Student finally broke down in tears in the counselor's office at the end of the eighth grade year. Although Student did not use the word "bullying" in [the] counseling sessions the LSSP knew that peer relations were an issue for Student. The evidence also shows that Student's own maladaptive thinking contributed to these problems. Using cognitive therapy the LSSP worked with Student to understand how the emotions and behavior of others affected her own behavior. They worked on strategies for coping with interpersonal conflicts in counseling sessions.

A school district must take prompt and appropriate action in responding to bullying. It must investigate when the bullying is reported and take appropriate steps to prevent it in the future. This duty exists even if the complained of conduct is covered by an anti-bullying policy and regardless of whether the student victim complained, asked the school district to take action, or identified the bullying as a form of discrimination. *T.K. v. New York City Dept. of Ed., 779 F. Supp. 2d at 317.*

The preponderance of the evidence showed the school district was on notice that Student felt picked on and teased and had some issues with peer relations as far back as sixth grade and certainly through seventh and eighth grades. Previous litigation resulted in a settlement agreement under which the school district implemented an anti-bullying program. The school district's efforts in that regard are to be commended and should continue.

Unfortunately, some school district staff were somewhat condescending and dismissive in addressing parental concerns that Student was a victim of bullying. Parental demands and conflicts contributed to a lack of understanding and effective communication between the parties. The law, and the school district's own anti-bullying program, do not require a student to use the word "bullying" in order to trigger the school district's duty where, as here, the student

has been subjected to teasing and harassment.

However, I do not find that the school district was deliberately indifferent or failed to take reasonable steps to prevent the bullying. The school district may not have characterized Student's issues as "bullying" but the evidence shows that it was responsive to Student's needs and complaints. Student's English class was changed and the benefits were noticeable. Student was provided with appropriate counseling services aimed at assisting Student to reframe and rethink the way Student viewed interactions with others and learn new ways to cope with [ ] feelings. The campus administration encouraged Student to report any bullying so that they could investigate and follow up.

The counseling IEP was adjusted mid-year to address Student's need to generalize the coping skills learned in counseling. The school district met its obligation under the seventh grade Resolution Agreement and implemented the Olweus anti-bullying program in eighth grade. School district administrators conferenced with Student and Student's mother in response to their complaints and concerns. Finally, the Superintendent took appropriate corrective action in resolving the parental grievance by making staff changes and implementing additional training for all staff, (including substitute teachers), in the use of social media, conflict resolution, and on the school district's bullying program.

Did the Bullying Adversely Affect Student's Educational Benefit or Substantially Restrict Student's Access to Educational Opportunity?

The evidence establishes that Student made academic progress and improved Student's fluency in eighth grade. Student also made progress in counseling by identifying coping strategies but continued to need to generalize those skills beyond the counseling sessions. There is some evidence that Student planned all along to transfer to the neighboring school district in order to play [ ]ball. The evidence shows Student's ability to interact with peers improved – there's no dispute that Student had friends at school and participated in the classroom.

The evidence showed that Student was unable to finish the last week of school, required homebound instruction to do so, expressed suicidal ideation if [ ] required to return to the school district, and ultimately transferred to a neighboring school district. The record is unclear as to whether a specific incident contributed to Student's meltdown in the counselor's office late in the eighth grade year or whether it was simply the accumulation of stress (by trying to "act tough" and avoid talking about being teased). Therefore, the preponderance of the evidence supports the reasonable inference that Student made progress but also continued to struggle emotionally and behaviorally in eighth grade.

Conclusion as the Bullying Issue

Although Student met [the] burden of proving Student was indeed a victim of bullying Student did not meet [the] burden of proving that the school district was deliberately indifferent or failed to take reasonable steps in response to Student's problems or that the bullying adversely affected Student's ability to gain an educational benefit or substantially restricted Student's access to educational

opportunity. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *T.K. v. New York City Dept. of Ed.*, *supra*. I agree with the school district's argument that much of Student's proof related to complaints that arose during sixth and seventh grades – outside the limitations period and resolved by the prior litigation. 34 C.F.R. §§ 300.507 (a) (2); 300.510 (ad) (d); 19 Tex. Admin. Code § 89.1151 (c).

While there is some evidence Student continued to exhibit emotional, social and/or behavioral needs in eighth grade the preponderance of the evidence established that Student received the requisite meaningful educational benefit from [the] educational program. Student made academic progress. Student's [fluency improved] and Student made progress on [the] counseling IEP with regard to peer relations and conflict resolution. The fact that Student continued to demonstrate some counseling needs does not lead to the conclusion that Student received no meaningful educational benefit – the evidence showed that the benefit was more than merely trivial. *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201-203(1982); *Polk v. Cent. Susquehanna Int. Unit 16*, 853 F. 2d 171, 180(3d Cir. 1988).

### Transition Plan

Beginning no later than when a student with a disability turns age 16 (or younger if appropriate) the student's IEP must be updated annually and include appropriate measureable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and (where appropriate) independent living skills. The IEP must also include the transition services needed to assist the student in reaching those goals. 34 C.F.R. § 300.320 (b)(1)(2).

Transition services are a coordinated set of activities designed within a results-oriented process, focused on improving the academic and functional achievement of the student to facilitate the student's movement from school to post-school activities, including post-secondary education and independent living. 34 C.F.R. § 300.43 (a)(1).

Transition services must be based on the student's individual needs, taking into account the student's strengths, preferences, and interests, and include instruction, related services, community experiences, development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and a functional vocational evaluation. 34 C.F.R. § 300.43 (a)(2). Transition services may be special education as specially designed instruction or related services. 34 C.F.R. § 300.43 (b).

Under Texas law the ARD Committee must consider transition needs and/or services in the development of the IEP for each student with a disability prior to the date the student turns age 16 (or earlier if the ARD Committee determines the need to do so). This duty includes: consideration of student involvement in transition to life outside the public school system, parental involvement in the student's transition, postsecondary education options, a functional vocational evaluation, employment goals and objectives, age-appropriate instructional environments, independent living goals and objectives, and, referral to a governmental agency for services. 19 Tex. Admin. Code § 89.1055 (g)(1)-(9).

The evidence showed the ARD Committee considered Student's transition needs and/or services in developing Student's IEP at Student's annual ARD in January 2013 of [the] eighth grade year. At the time of the ARD Student was not yet 14 years old but it made sense to consider Student's transition needs in anticipation of Student's promotion to high school the following school year.

Student expressed an interest in a [health field] career and attending a four year college or university. Student's competencies were assessed by the LSSP based upon teacher reports. This information was noted in the Transition Supplement -- a component of Student's IEP. The assessment showed Student was successfully integrated into [the] community, able to transfer skills beyond the classroom and demonstrated independent living and employability skills. The Transition Supplement noted Student would graduate high school under the "Recommended High School Program," Student was also scheduled to meet with a Transition Specialist in Spring 2013 although the record is not clear on whether Student did so. These facts, taken together, demonstrate the school district met its responsibilities in considering Student's transition needs as a component of Student's IEP. 34 C.F.R. § 300.320 (b)(1)(2); 19. Tex. Admin. Code § 89.1055 (g). Student did not meet [the] burden of proof on this issue. *Schaffer v. Weast, supra*.

#### Related Services

A related service is a supportive service that assists the student with a disability to benefit from special education. This includes speech therapy and counseling services. It may also include social work services. 34 C.F.R. § 300.34 (a).

The record conclusively demonstrates that Student was provided with appropriate counseling as a related service during the 2012-2013 school year. The counseling IEP addressed Student's self esteem, understanding how the moods and behaviors of others affected Student's own behavior, and coping skills to manage anxiety and stress. The counseling goals specifically targeted peer interactions even though the use of the term "bullying" was not specifically included. The record shows that the counseling services supported Student in managing [ ]self in the junior high school environment so that Student could attend class, do the work, and continue to develop more effective ways of interacting with peers and resolving conflicts. Student had friends and participated in the classroom and in athletics.

In addition, there is insufficient evidence in the record to show that Student needed social work services in order to benefit from [the] educational program. Student did not meet [the] burden of proof on this issue. *Schaffer v. Weast, supra*.

#### Prior Written Notice

Prior written notice is required before the school district proposes, or refuses to initiate or change, a student's identification, evaluation or placement or the provision of a FAPE. The notice must include the following:

- A description of the action proposed or refused

- An explanation of why the school district proposes or refused to take the action
- A description of each evaluation procedure, assessment, record, or report the school district used as the basis for the proposed or refused action
- A statement that the parents have protection under IDEA procedural safeguards
- Sources for parents to contact to obtain assistance in understanding IDEA notice provisions
- A description of other options the ARD Committee considered and the reasons why those options were rejected and,
- A description of other factors relevant to the school district's proposal or refusal.

*34 C.F.R. § 300.503.*

However, the IDEA does not require the Prior Written Notice be provided in any particular format or in a separate document. Prior Written Notice is required if the ARD Committee agrees to or refuses a parental proposal for a change in the student's services. Providing such notice following the ARD meeting where the change is proposed (or refused) allows the parent time to fully consider the change and determine whether the parent has additional suggestions, concerns or questions. *Letter to Lieberman, 52 IDELR 18 (OSEP 2008).*

The Prior Written Notice must be provided within a reasonable amount of time before the proposed or refused change is implemented. *Ohio Dept. of Educ., 62 IDELR 250 (SEA Ohio 2013); Letter to Atkins-Lieberman, 56 IDELR 141 (OSEP 2010); See also, Letter to Chandler, 59 IDELR 110 (OSEP 2012) (maintaining student's placement in an educational program that is substantially and materially similar to the former placement is not a change in placement that triggered prior written notice.).*

The evidence showed that whenever the school district proposed to initiate or change an aspect of Student's IEP (and thus the provision of a FAPE) all the elements required for Prior Written Notice were included in the ARD documents. The IDEA does not prohibit a school district from using the IEP as a component of Prior Written Notice as long as the document the parent receives meets the required regulatory elements. *34 C.F.R. § 300.503; Letter to Lieberman, 52 IDELR 18 (OSEP 2008); 71 Fed. Reg. 46691.* Notice of Procedural Rights, ARD meeting minutes, educational records, and, copies of the IEP may meet Prior Written Notice requirements. *K.A. v. Fulton Cnty. Sch. Dist., 2012 U.S. Dist. LEXIS 136327, 59 IDELR 248 (N.D. Ga. 2012), aff'd K.A. v. Fulton Cnty. Sch. Dist., 2013 U.S. App. LEXIS 25327, 62 IDELR 161 (11<sup>th</sup> Cir. 2013).* See also, *Ohio Educ. Dept., 62 IDELR 250 (SEA Ohio 2013)(when IEP form did not include all required elements of prior written notice parent signature on the form indicating agreement was not sufficient).*

A copy of the January 24, 2013 ARD documents was sent to Student's mother on January 28, 2013 – four days later. This is certainly a reasonable amount of time under the law. Student's mother personally attended the May 22, 2013 ARD but the record is silent as to whether those documents were provided to the parent at the conclusion of the meeting, sometime later, or not at all. In that regard Petitioner did not meet her burden of proof on this element of the prior written notice claim. *Shaffer v. Weast, supra.*

Even if all the elements of Prior Written Notice were not met the evidence showed Student's mother was an active, vocal member of ARD meetings and was an advocate for her child. The parent made proposals that were often agreed to. Therefore, any procedural errors related to prior written notice did not significantly impede the parent's opportunity to participate in educational decision-making. 34 C.F.R. § 300.513 (a) (2) (ii).

#### Conclusions of Law

1. Although Petitioner was bullied during the 2012-2013 school year the Respondent school district took reasonable steps and was not deliberately indifferent in addressing Petitioner's needs. The bullying did not adversely affect Petitioner's access to or substantially restrict Petitioner's educational opportunity; Petitioner derived a meaningful educational benefit from the educational program and therefore the Respondent school district provided Petitioner with a free, appropriate public education within the meaning of the IDEA. *T.K. and S.K. v. New York City Dept. of Educ.*, 779 F. Supp 2d 289 (S.D. N.Y. 2011); *Government Accountability Officer Report on Bullying (June 2012)*; 34 C.F.R. § 300.34.
2. Petitioner did not meet [the] burden of proof that the school district failed to provide Petitioner with a meaningful transition plan as a component of Petitioner's Individual Education Plan for 2012-2013 school year. A Transition Plan Supplement as a component of Petitioner's IEP and the discussion of transition needs during an ARD meeting met IDEA requirements. *Shaffer v. Weast*, 546 U.S. 49, 62 (2005); 34 C.F.R. §§ 300.43; 300.320 (a) (b).
3. Petitioner did not meet [the] burden of proof that the school district failed to provide Petitioner with appropriate related services such as counseling and social work services. The Respondent school district did provide appropriate counseling services during 2012-2013 school year. Petitioner did not meet [the] burden of proving Petitioner needed social work services in order to receive a free, appropriate public education. *Shaffer v. Weast*, *supra*; 34 C.F.R. § 300.34.
4. The Respondent school district provided Petitioner's parent with the requisite Prior Written Notice in a reasonable amount of time following ARD meetings in January and May 2013 of Petitioner's eighth grade year. Even if the school district made a procedural error in failing to meet all required regulatory elements for Prior Written Notice Petitioner did not meet [the] burden of proving the procedural error significantly impeded parental opportunity to participate in educational decision-making regarding a FAPE for Petitioner. *Shaffer v. Weast*, *supra*; *K.A. v. Fulton Cnty. Sch. Dist.*, 2012 U.S. Dist. LEXIS 136327, 59 IDELR 248 (N.D. Ga. 2012), *aff'd* *K.A. v. Fulton Cnty. Sch. Dist.*, 2013 U.S. App. LEXIS 25327, 62 IDELR 161 (11<sup>th</sup> Cir.2013); 34 C.F.R. §§ 300.503; 300.513(a) (2) (ii).

## **ORDERS**

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED** that Petitioner's claims for relief under the Individuals with Disabilities Education Act are hereby **DENIED**. All other relief not specifically stated herein is **DENIED**.

**SIGNED the 10th day of July 2014**

*/s/ Ann Vevier Lockwood*  
Ann Vevier Lockwood  
Special Education Hearing Officer

## **NOTICE TO THE PARTIES**

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *34 C.F.R. § 300.516; 19 Tex. Admin. Code Sec. 89.1185 (n).*

**TAB 6**

# IDEA & Children in Correctional Facilities

Julie K. Waterstone  
Southwestern Law School



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## Legal Protections for Incarcerated Children

- ◆ IDEA protections apply to all students with disabilities in “State and local juvenile and adult correctional facilities” (34 CFR § 300.2(b)(1)(iv))
- ◆ Rights also protected by:
  - ◆ Section 504 of the Rehabilitation Act
  - ◆ Title II of the ADA

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## IDEA and Children in Adult Facilities

- ◆ If State law does not require that special ed and related services be provided to students with disabilities who were not identified prior to incarceration or did not have an IEP, then no obligation to provide FAPE to students 18-21 in an adult correctional facilities. (34 CFR § 300.102(a)(2)(i))
- ◆ This exception does not apply if the student had been identified and had received services with an IEP but left school prior to incarceration or did not have an IEP in the last educational setting, but had been identified as a student with a disability. (34 CFR § 300.102(a)(2)(ii))

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### Shared Responsibility to Provide FAPE

- ◆ Agencies must work together to meet the needs of youth who are receiving education services while in confinement and that they must have procedures to communicate and coordinate between education and probation staff (34 CFR §§ 300.2(b)(1)(iv), 300.101 and 300.149(a))
- ◆ Public agencies can't avoid ADA and IDEA obligations by contracting, transferring them to, or sharing them with another entity.

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### Requirements for Interagency Coordination

- ◆ All agreements must include provisions relating to:
  - ◆ Financial Responsibility of each agency, including reimbursement terms
  - ◆ Resolution of interagency disputes
  - ◆ Coordination and delivery of special education and related services(34 CFR § 300.154(a))

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### Responsible Agency During Incarceration

- ◆ IDEA is silent about the responsible agency to provide special education during incarceration. This is an issue to be determined by State law.
- ◆ Students with disabilities in federal prison are under the jurisdiction of the Bureau of Prisons and the IDEA does not make provisions for funding educational services to students with disabilities under BOP. (Letter to Yudien, 39 IDELR 270 (OSEP 2003)).

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## SEA Responsibility: Personnel

- ◆ SEAs must monitor public agencies that are responsible for providing FAPE in correctional facilities (34 CFR § 300.156)
- ◆ State Advisory Panel must include representatives from the State juvenile and adult corrections agencies and other agencies involved in financing or delivery of services to students with special needs (34 CFR § 300.168)
- ◆ SEAs must monitor to ensure that there are appropriate “highly qualified” special ed teachers in schools and education programs within correctional facilities (34 CFR § 300.18 and 34 CFR § 300.156)

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## SEA Responsibility: Assessments

- ◆ SEAs must ensure that all students with disabilities in juvenile correctional facilities are appropriately included in general statewide and districtwide assessments
  - ◆ This includes all assessments pursuant to ESEA
  - ◆ Doesn't apply to students in correctional facilities who have been convicted as adults and are incarcerated in adult prisons (34 CFR §300.311(b)(1))

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## SEA Responsibility: Child Find and Evaluations

- ◆ States and public agencies must identify, locate, and evaluate students who are in correctional facilities. This includes students who have never been identified prior to entering the facility (34 CFR § 300.111(a)(1)(i))
- ◆ If suspected, they must be evaluated in a timely manner even if student will not be in the facility long enough to complete the evaluation

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## FAPE and Transfer of Records

- ◆ Every agency involved in provision of special education must ensure FAPE for students with disabilities in correctional facilities
- ◆ Must be policies and procedures to ensure that records of students with disabilities who move to and from correctional facilities are transferred as quickly as possible
- ◆ New public agency in which student enrolls must take reasonable steps to obtain the student's records promptly. (34 CFR §300.323(g)(2))

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## Incarcerated Students and IEPs

- ◆ When a student with an IEP transfers to a correctional facility in the same State, the facility must implement the existing IEP or hold a new IEP meeting to modify the content. (34 CFR § 300.323(e))
- ◆ If a student with an existing IEP arrives in a correctional facility from a different state, the new agency must conduct its own evaluation and make a new eligibility determination. (34 CFR § 300.323(f))
- ◆ All IEP content requirements apply to students in correctional facilities (present levels, goals, related services) (34 CFR § 300.320)

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## Additional IEP Obligations

- ◆ If new agency is unable to obtain IEP from parent or previous agency, at a minimum, the agency must:
  - ◆ Place the student in a regular school program
  - ◆ Conduct an evaluation
  - ◆ Make an eligibility determination(34 CFR §§300.304-300.306, 34 CFR §300.323(f)(1))
- ◆ Students identified with a disability before or during incarceration who did not transfer to the facility with an IEP or were not in school at time of incarceration, must have a meeting to develop IEP within 30 days of learning that the student needs special education (34 CFR § 300.323(c)(1))

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### Exceptions to IDEA in Correctional Facilities

- ◆ IEP Team may modify the IEP or placement if the State has shown a “bona fide security or compelling penological interest that cannot otherwise be accommodated” (34 CFR 300.324 (d)(2))

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### LRE in Correctional Facilities

- ◆ Even in correctional facilities there must be a continuum of alternative placements available to meet the needs of students with disabilities for special education and related services (34 CFR § 300.115)

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### Transition Services

- ◆ When the student turns 16, IEP must include:
  - ◆ Appropriate postsecondary goals
  - ◆ Transition services (34 CFR § 300.320(b))
- ◆ Agency must invite the following individuals to IEP:
  - ◆ Student
  - ◆ Representative from agency responsible for providing or paying for services (34 CFR § 300.321(b)(1)-(3))
- ◆ Transition planning and services not required if eligibility will end before they are released from prison (34 CFR § 300.324(d)(1)(ii))

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### Parental Considerations

- ◆ Parents do not lose their right under the IDEA when their child is placed in a correctional facility
- ◆ Correctional facilities may not assume the role of the parent under IDEA
- ◆ IDEA allows a judge overseeing a case of a student who is a ward of the State to appoint a surrogate parent (34 CFR § 300.519(c))

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### Transfer of Rights

- ◆ States may provide that parents of students serving time in either an adult or juvenile facility lose their IDEA rights when the student turns 18.
- ◆ The IDEA gives each state the option to decide which procedural rights, if any, should transfer from the parents to a student who has reached 18.
- ◆ States may also elect that "all rights accorded to parents under [Part B] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution." (34 CFR 300.520 (a)(2))

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### Due Process Protections

- ◆ Due process protections apply to students in correctional facilities and their parents including:
  - ◆ Right to prior written notice
  - ◆ Right to file due process(34 CFR §§ 300.500-300.521)

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## Disciplinary Procedures

- ◆ IDEA discipline protections apply to a student who violates a code of student conduct regardless of whether that student is subject to discipline in the facility or removed to a restricted setting. (34 CFR § 300.530(e))

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## Discipline Protections

- ◆ The IEP team must hold a MDR if there has been a change in placement (34 CFR § 300.530(e))
- ◆ When there has been a change in placement, the agency must continue to provide services to the student and conduct a functional behavioral assessment and provide behavioral intervention services and modifications that are designed to address the behavioral violation so that it does not reoccur (34 CFR § 300.530(d)(1)(ii)and (f)(1))

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**39 IDELR 270**

**103 LRP 37913**

**Letter to Yudien**

**Office of Special Education Programs**

N/A

**August 19, 2003**

**Related Index Numbers**

**281.005 Incarcerated Students**

**281.015 Responsibility for Educational Services**

**257. INCARCERATED STUDENTS**

**Judge / Administrative Officer**

**Patricia Guard for Stephanie Smith Lee, Director**

**Case Summary**

The provision of the IDEA regulations allowing the IEP team to modify the program or placement of a student convicted and incarcerated as an adult (if the state has demonstrated an security or penological interest that cannot otherwise be accommodated) contemplates post-conviction, and not pre-trial incarcerations, according to OSEP. It added that states and districts must include in their child find systems those incarcerated youth who would be eligible to receive FAPE. OSEP also noted that individuals in the federal correctional system fall under the jurisdiction of the Federal Bureau of Prisons. The IDEA makes no specific provision for funding educational services through the Bureau. Finally, OSEP stated that when a youth with disabilities in referred or placed by the state in an out-of-state facility, the referring state is generally responsible for ensuring FAPE is available during the course of the placement.

**Full Text**

**Appearances:**

Geoffrey A. Yudien, Esq.

Legal Counsel

Vermont Department of Education

120 State Street

Montpelier, Vermont 05620-2501

Dear Mr. Yudien,

This letter is in response to your questions regarding incarcerated youth that you asked of Jill Harris in an electronic message. Each of your questions is restated below, followed by the Office of Special Education Program's (OSEP's) response.

Question 1: You cite section 300.311 (c)(1) of the Individuals with Disabilities Education Act (IDEA) regulations which states that" ... the IEP [individualized education program] team of a student with a disability, who is *convicted* as an adult under State law and *incarcerated* in an adult prison, may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated." You ask, "Does this apply to people who are incarcerated pre-trial?" (Emphasis added).

Response. Because the statute 20 USC §1414(d)(6) and regulation use specific language referencing students with disabilities who are convicted as adults under State law and incarcerated in an adult prison, OSEP believes that this specific provision contemplates post-conviction incarcerations. This is in contrast to the provisions at 20 USC §1412(s)(1)(B) and 34 CFR §300,122(a)(2) stating that the obligation to make a free appropriate public education (FAPE) available does not apply with respect to children aged 18 through 21 where State law does not require that special education and related services be provided to those youth with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility were not actually identified as being a child with a disability under Part B and those who did not have an individualized education program under Part B.

Question 2: You ask whether there is a child find responsibility with respect to incarcerated students aged 18 through 21 who had not been previously identified as eligible for special education or who had not had an IEP.

Response: Under the IDEA, where State law creates an exception to FAPE for students with

disabilities, aged 18 through 21 who in their last educational placement prior to their incarceration in an adult correctional facility were not identified as being a child with a disability under the IDEA and did not have an IEP, there also is no obligation for States and LEAs to identify and evaluate such individuals under Part B. However, to the extent consistent with the age ranges established under State law, States must make FAPE available to students with disabilities in adult prisons who do not fall into that exception. Therefore, States and local educational agencies (LEAs) must include in its child find system, those incarcerated youth who would be eligible to receive FAPE.

Question 3: You state that Vermont's correctional system houses inmates from other states, and also, from the federal correctional system, and ask "What are Vermont's obligations, if any, to provide FAPE for the students who are in these groups?"

Response: Individuals in the federal correctional system fall under the jurisdiction of the Federal Bureau of Prisons (BOP) within the Department of Justice. The IDEA makes no specific provision for funding educational services for individuals with disabilities through the BOP. If you would like more information regarding education programs for individuals with disabilities through the BOP, you should contact:

Federal Bureau of Prisons  
320 First St., NW.  
Washington, DC 20534

Part B and its implementing regulations specifically apply to all subdivisions of the State involved in the education of children with disabilities, including State and local juvenile and adult correctional facilities. 34 CFR §300.2(b)(1)(iv). Each State must ensure that FAPE is available to all children with disabilities, of eligible ages under State law, who are residing in the State. 34 CFR §300.300(a). Generally, where the student is not emancipated or of the age of majority, residency is

determined by the State in which the parent or guardian resides or the State that has designated the youth as a ward of the State. Therefore, under Part B, when a youth with disabilities is referred or placed by the (State into an out-of-State facility, the referring State is generally responsible for ensuring that FAPE is available to the youth during the course of the youth's placement in that facility.

Two Federal laws that are also relevant to your inquiry are Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department, and Title II prohibits discrimination on the basis of disability by public entities, including public elementary and secondary school systems, regardless of receipt of Federal funds. The Department's Office for Civil Rights (OCR) enforces Section 504 and Title II, as it applies to public elementary and secondary school systems. For more information about Section 504 and Title II with respect to your inquiry, you can contact the OCR Boston Office at the following address and telephone number:

Boston Office  
Office for Civil Rights  
U.S. Department of Education  
J.W. McCormack Post Office and Courthouse  
Room 701, 01-0061  
Boston, MA 02109-4557  
Telephone: 617-223-9662  
FAX: 617-223-9669; TDD: 617-223-9695  
Email: OCR Boston@ed.gov

If you have any further questions, please feel free to contact Dr. Wendy Tada at 202-205-9094 or Dr. JoLeta Reynolds at 202-205-5507 (press 3).

**Statutes Cited**

20 USC 1414(d)(6)  
20 USC 1412(a)(1)(B)

**Regulations Cited**

34 CFR 300.122(a)(2)

34 CFR 300.2(b)(1)(iv)

34 CFR 300.300(a)

34 CFR 300.311(c)(1)



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Dec 05, 2014

Dear Colleague:

We are writing to focus your attention on the educational needs of students with disabilities who are in correctional facilities<sup>1</sup> and the requirements of Part B of the Individuals with Disabilities Education Act (IDEA or IDEA, Part B) as they apply to States, State educational agencies (SEAs), and public agencies (including local educational agencies (LEAs), and responsible noneducational public agencies<sup>2</sup>) in educating these students. Absent a specific exception, all IDEA protections apply to students with disabilities in correctional facilities and their parents.<sup>3</sup> Supporting effective and accountable education for incarcerated and at-risk youth can result in cost savings to the public and enable troubled youth to obtain an education and enhance their future employment options and life choices. As the U.S. Departments of Education (Department) and Justice recently stated, the fact that a student has been charged with or convicted of a crime does not diminish his or her substantive rights or the procedural safeguards and remedies provided under the IDEA to students with disabilities and their parents.<sup>4</sup> This letter also provides information regarding technical assistance and other relevant resources to enhance students' reintegration into the school setting or participation in programs.

Students with disabilities represent a large portion of students in correctional facilities, and it appears that not all students with disabilities are receiving the special education and related services to which they are entitled. National reports document that approximately one third of students in juvenile correctional facilities were receiving special education services, ranging

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<sup>1</sup> The definition of a correctional facility varies from State to State. For the purposes of this letter, "correctional institution" or "correctional facility" refers to juvenile justice facilities, detention facilities, jails, and prisons where students with disabilities are, or may be, confined. In addition, this letter uses the term "students with disabilities" to refer to children with disabilities, as that term is defined in 34 CFR §300.8.

<sup>2</sup> The requirements in 34 CFR §300.2(b)(1)(iv) and (2) and 34 CFR §300.154 govern the responsibilities of noneducational public agencies for the education of students with disabilities in correctional facilities.

<sup>3</sup> The rights of students with disabilities in correctional facilities are also protected by two other Federal laws: Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits disability discrimination in programs or activities of entities, such as public schools and correctional agencies, that receive Federal financial assistance (29 U.S.C. §794, 34 CFR part 104); and Title II of the Americans with Disabilities Act of 1990 (Title II), which prohibits disability discrimination by public entities, including public schools and correctional agencies, regardless of whether they receive Federal financial assistance (42 U.S.C. §§12131-12134, 28 CFR part 35). For more information about these civil rights laws, see the OCR Dear Colleague Letter (dated June 9, 2014), available at <http://www.ed.gov/blog/wp-content/uploads/2014/06/doj-dod-ltr.pdf>

<sup>4</sup> Statement of Interest for the United States, *G.F. v. Contra Costa County*, No. 3:13-cv-03667-MEJ (N.D. Cal.) (filed Feb. 13, 2014), available at [http://www.justice.gov/crt/about/spl/documents/contracosta\\_soi\\_2-13-14.pdf](http://www.justice.gov/crt/about/spl/documents/contracosta_soi_2-13-14.pdf).

from 9 percent to 78 percent across jurisdictions.<sup>5</sup> States reported that in 2012–2013, of the 5,823,844 students with disabilities, ages 6 through 21, served under IDEA, Part B, 16,157 received special education and related services in correctional facilities.<sup>6</sup> Evidence suggests that proper identification of students with disabilities and the quality of education services offered to students in these settings is often inadequate.<sup>7</sup> Challenges such as overcrowding, frequent transfers in and out of facilities, lack of qualified teachers,<sup>8</sup> inability to address gaps in students' education, and lack of collaboration with the LEA contribute to the problem.<sup>9</sup> Providing the students with disabilities in these facilities the free appropriate public education (FAPE) to which they are entitled under the IDEA should facilitate their successful reentry into the school, community, and home, and enable them to ultimately lead successful adult lives.

This letter is organized into three main areas. The first summarizes the key points in the letter. The second addresses States' and SEAs' responsibilities to students with disabilities in correctional facilities. The third addresses the responsibilities of public agencies, including LEAs, and correctional facilities that operate as LEAs, and noneducational public agencies that are responsible for providing education to students with disabilities in correctional facilities to carry out IDEA requirements. Because the responsibilities of these entities in certain areas overlap, some matters are discussed more than once.

The following are the key points made in this letter regarding IDEA, Part B requirements, as they pertain to students with disabilities:

- Absent a specific exception, all IDEA protections apply to students with disabilities in correctional facilities and their parents.

#### *Shared Responsibility to Provide FAPE*

- Every agency at any level of government that is involved in the provision of special education and related services to students in correctional facilities must ensure the provision of FAPE, even if other agencies share that responsibility.

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<sup>5</sup> Quinn, M., Rutherford, R., Leone, P., Osher, D., & Poirier, J. (2005); Center for Juvenile Justice Reform, Georgetown University, Addressing the Unmet Educational Needs of Children and Youth in the Juvenile Justice and Child Welfare Systems 2012 Edition <http://cjjr.georgetown.edu/resources2/cjirpublications/educationpaper.html>

<sup>6</sup> U.S. Department of Education, EDFacts Data Warehouse (EDW), OMB # 1875-0240: "IDEA, Part B Child Count and Educational Environments Collection," 2012. The definition of "correctional facilities" for this data collection is "children who received special education in correctional facilities. These data are intended to be an unduplicated count of all children receiving special education in short-term detention facilities (community-based or residential) or correctional facilities."

<sup>7</sup> Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, Annie E. Casey Foundation (2011).

<sup>8</sup> Mary M. Quinn, Robert B. Rutherford, Peter E. Levine, David M. Osher, and Jeffrey M. Poirier, *Youth with Disabilities in Juvenile Corrections: A National Survey*, Exceptional Children, Vol 71, No. 3, pp. 339-345 (2005).

<sup>9</sup> Robert Balfanz, Kurt Spiridakis, Ruth C. Neild, and Nettie Legters, *High-Poverty Secondary School and Juvenile Justice Systems: How Neither Helps the Other and How That Could Change*, 99 *New Directions for Youth Development* 71-89 (2003).

- States must have interagency agreements or other methods for ensuring interagency coordination in place so that it is clear which agency or agencies are responsible for providing or paying for services necessary to ensure FAPE for students with disabilities in correctional facilities.

#### *SEA Responsibility and Personnel Qualifications*

- SEAs must exercise general supervision over all educational programs for students with disabilities in correctional facilities (unless covered by an exception) to ensure that their educational programs meet State education standards and IDEA, Part B requirements. This responsibility includes monitoring public agencies that are responsible for providing FAPE to students with disabilities in correctional facilities.
- SEAs must make annual determinations on the performance of correctional facilities in their State if those facilities operate as their own LEAs.
- SEAs must ensure that students with disabilities, including those in correctional facilities, are appropriately included in general State and districtwide assessments, including assessments conducted under section 1111 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), to the extent that the ESEA requires that those students be included in those assessments.
- The State Advisory Panel must include representatives from the State juvenile and adult corrections agencies, and include other agencies involved in the financing or delivery of services to students with disabilities.
- States and their public agencies must establish and maintain qualifications to ensure that personnel providing special education and related services, including those serving students with disabilities in correctional facilities, are appropriately and adequately prepared and trained. Public school special education teachers in correctional facilities must be “highly qualified,” as defined by IDEA and its implementing regulations, and related services personnel and paraprofessionals in correctional facilities must meet State qualifications for those personnel, as described in IDEA and its implementing regulations. SEAs must monitor to ensure that there are appropriate special education teachers in schools and education programs within correctional facilities.

#### *Child Find and Evaluation*

- States and their public agencies must have child find policies and procedures in place to identify, locate, and evaluate students who are in correctional facilities who may have a disability under the IDEA and are in need of special education and related services, regardless of the severity of their disability and consistent with the State’s child find and eligibility standards. This responsibility includes students who have never been identified as a student with a disability prior to their entry into the facility.
- Students suspected of having a disability who need special education and related services must be evaluated, subject to applicable parental consent requirements, in a timely manner,

even if the student will not be in the facility long enough to complete the evaluation. If a student transfers from an LEA to a correctional facility in the same school year after the evaluation has begun, and the responsibility for FAPE transfers as well, both agencies must coordinate assessments to ensure that a timely evaluation occurs.

#### *FAPE in Least Restrictive Environment*

- When a student with an individualized education program (IEP) transfers to a correctional facility in the same State in the same school year, the new public agency (in consultation with the parents) must provide the student with FAPE through services that are comparable to those described in the student's IEP from the previous public agency until the new public agency either adopts the previous agency's IEP, or develops and implements a new IEP for the student.
- Unless there is a specific exception, all IEP content requirements apply to students with disabilities in correctional facilities, including, but not limited to, a statement of: (1) the student's present levels of academic achievement and functional performance; (2) measurable annual academic and functional goals; and (3) the special education and related services and supplementary aids and services that will be provided to the student to enable him or her to advance appropriately toward attaining his or her IEP goals and to be involved in and make progress in the general education curriculum—that is, the same curriculum as for nondisabled students.
- To ensure that students with disabilities in correctional facilities continue to receive FAPE, public agencies must have policies and procedures to ensure that the relevant records of students with disabilities who move to, and from, correctional facilities are transferred as expeditiously as possible," and also must take reasonable steps to appropriately transmit those records to facilitate the student's transition to or from the correctional facility.
- The IDEA requirements related to least restrictive environment (LRE) apply to the education of students with disabilities in correctional facilities. IEP teams or placement teams must make individualized placement decisions, and may not routinely place all students with disabilities in correctional facilities in classes that include only students with disabilities, even if this means creating placement options or using other arrangements, to the maximum extent appropriate to the student's needs. This may include, for example, having special education and general education teachers co-teach in the regular classroom.
- Public agencies must comply with all applicable IDEA secondary transition requirements to facilitate eligible students' movement from secondary education in the correctional facility to appropriate post-school activities.

#### *Due Process and Discipline*

- The IDEA due process protections apply to students in correctional facilities and their parents, including requirements related to providing any required written notices in

language understandable to the general public and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

- Any exclusion from the classroom is particularly harmful for students with disabilities in correctional facilities. In general, even in the presence of disciplinary concerns, because correctional facilities are run by public entities, their obligation to ensure that special education and related services are provided to eligible students with disabilities continues.
- A student with a disability in a correctional facility who violates a code of student conduct is entitled to the protections in the IDEA discipline procedures that must be afforded to all students with disabilities. These protections apply regardless of whether a student who violates a code of student conduct is subject to discipline in the facility or removed to restricted settings, such as confinement to the student's cell or "lockdown" units. In any event, a removal from the current educational placement that results in a denial of educational services for more than 10 consecutive school days, or a series of removals that constitute a pattern that total more than 10 school days in a school year is a change in placement, which, in turn, requires a manifestation determination under the IDEA.

## **States' and State Educational Agencies' Responsibilities**

### *Responsibility for Ensuring FAPE in Correctional Facilities*

Every agency at any level of government that is involved in the provision of special education and related services to students with disabilities in correctional settings must ensure the provision of FAPE, even if other agencies share that responsibility (34 CFR §300.2(b)(1)(iv)).<sup>10</sup>

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<sup>10</sup> There are some provisions of the IDEA that are not applicable to certain students with disabilities in correctional facilities. With respect to students with disabilities aged 18 through 21 in adult correctional facilities, the obligation to make FAPE available does not apply to the extent that State law does not require that special education and related services be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility were not actually identified as being a student with a disability under the IDEA and did not have an IEP under the IDEA (34 CFR §300.102(a)(2)(i)). However, this exception does not apply where: (1) the student with a disability, aged 18 through 21, had been identified as a student with a disability and had received services in accordance with an IEP, but left school prior to his or her incarceration, or (2) did not have an IEP in his or her last educational setting, but had been actually identified as a student with a disability (34 CFR §300.102(a)(2)(ii)).

In addition, under 34 CFR §300.324(d), for otherwise eligible students with disabilities who have been convicted as adults under State law and incarcerated in adult prisons: (1) States and LEAs are not required to include such students in State and districtwide assessments under section 612(a)(16) of the IDEA and §300.320(a)(6); (2) the requirements in §300.320(b) (relating to transition planning and transition services) do not apply with respect to the students whose eligibility under IDEA, Part B will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release; and (3) the IEP Team of a student with a disability may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated including the requirements of §§300.320 (relating to IEPs) and 300.112 (relating to LRE).

As referenced above, under 34 CFR §300.324(d), the requirements in §300.320(b) (relating to transition planning and transition services) do not apply with respect to the students whose eligibility under IDEA, Part B will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release that apply to otherwise eligible students with disabilities who have been convicted as adults under State law and incarcerated in adult prisons. In addition, the IDEA makes no specific provision for funding educational services for individuals with disabilities incarcerated in a Federal prison. See Letter to Yudien, (August 19, 2003).

<https://www2.ed.gov/policy/speced/guid/idea/letters/2003-3/yudien081903fape3q2003.pdf>

Regardless of the structure in a State, the State, as the IDEA, Part B grantee, has ultimate responsibility for ensuring FAPE is made available to all eligible students with disabilities residing in State and local juvenile and adult correctional facilities. This responsibility applies to correctional facilities with which the State contracts to provide education, including special education and related services (34 CFR §§300.2(b)(1)(iv), 300.101, and 300.149(a)). Indeed, the requirements in IDEA, Part B apply to all political subdivisions of a State<sup>11</sup> that provide special education and related services to students with disabilities, including State and local juvenile and adult correctional facilities, regardless of whether that agency receives funds under Part B (34 CFR §300.2(b)(1)(iv) and (2)).

States have different administrative structures or arrangements for providing education, including special education and related services, to students with disabilities in correctional facilities. These arrangements include assigning the responsibility for providing special education and related services in correctional facilities to: (1) the SEA; (2) the correctional facility as an LEA; (3) the LEA where the correctional facility is located or another LEA; (4) a noneducational public agency<sup>12</sup> through an interagency agreement or other mechanism for interagency coordination that meets the requirements in 34 CFR §300.154; and (5) a transfer of authority pursuant to 34 CFR §300.149(d).<sup>13</sup>

When the State assigns responsibility for providing FAPE to a noneducational public agency, the IDEA expressly requires the Chief Executive Officer of a State, or his or her designee, to ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each noneducational public agency and the SEA (34 CFR §300.154(a)). The purpose of this requirement is to ensure that the responsibility for the provision of FAPE for all students with disabilities is clear and that services necessary to ensure FAPE are provided in a timely and appropriate manner. This is particularly important in the context of correctional facilities, where it is not uncommon for multiple agencies to share responsibility for the operation of distinct functions within the same facility. The State may meet this requirement through a contract, or other methods, such as a State statute or regulation, or a signed interagency agreement, between

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<sup>11</sup> The definition of “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas (34 CFR §300.40).

<sup>12</sup> Under 34 CFR §300.154(b)(1)(i), a “noneducational public agency” is described as “any public agency that is otherwise obligated under Federal or State law, or assigned responsibility under State policy, or pursuant to [§300.154(a)] to provide or pay for any services that are also considered special education or related services.”

<sup>13</sup> The Governor, or another individual pursuant to State law, may assign to any public agency in the State the responsibility for ensuring that the requirements of IDEA are met with respect to students with disabilities who are convicted as adults under State law and incarcerated in an adult prison (34 CFR §300.149(d)). However, such an assignment does not relieve the State, or the assigned public agency, of its responsibility to meet all the requirements of IDEA, even if the public agency does not receive IDEA, Part B funds (34 CFR §300.2(b)(2)). This letter does not address the circumstances covered by 34 CFR §300.149(d).

respective agency officials that clearly identifies the responsibilities of each agency<sup>14</sup> (34 CFR §300.154(b) and (c)(1) and (2)).

Interagency agreements, or other mechanisms for interagency coordination, must include provisions relating to: (1) the financial responsibility of each agency for providing special education and related services,<sup>15</sup> including reimbursement terms;<sup>16</sup> (2) the resolution of interagency disputes; and (3) the coordination and delivery of special education and related services (34 CFR §300.154(a)). In addition to these required provisions, as a best practice, States are encouraged to include additional provisions in their interagency agreements or other mechanisms to ensure that the needs of students with disabilities will be properly identified and appropriately addressed so that these students timely receive the special education and related services to which they are entitled under the IDEA. For example, States should consider including provisions that identify the: (1) location of IEP Team meetings and, if not within the correctional facility, the responsibility for ensuring that the student is transported to the meeting, if appropriate for the student to attend<sup>17</sup>; and (2) where applicable, the responsibility of the correctional facility to ensure that it grants appropriate access to facilities to all personnel necessary to implement the IDEA requirements. Granting appropriate access may be essential to ensure that evaluations (including the administration of any necessary assessments or other evaluation materials), IEP Team meetings, and the provision of required special education and related services occur in a timely manner.

#### *Accountability, Data Collection, and Reporting*

SEAs must ensure that all students with disabilities, including those in correctional facilities, are appropriately included in all general State and districtwide assessment programs, including assessments described in section 1111 of the ESEA, to the extent that the ESEA requires that students in correctional facilities be included in those assessments.<sup>18</sup> Students with disabilities

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<sup>14</sup> A State may also meet this requirement through other appropriate written methods, as approved by the Chief Executive Officer of a State, or his or her designee and approved by the U.S. Department of Education (34 CFR §300.154(c)(3)).

<sup>15</sup> Under 34 CFR §300.154(b)(1)(i), a noneducational public agency, including the State Medicaid agency and other public insurers of children with disabilities, may be assigned the responsibility to pay for special education and related services. In that case, the financial responsibility of the noneducational public agency precedes the financial responsibility of the LEA (or the State agency responsible for developing the child's IEP) (34 CFR §300.154(a)(1)). Even though these statutory and regulatory provisions specifically refer to the State Medicaid agency or other public insurers of students with disabilities, they are equally applicable to any noneducational public agency that is otherwise obligated under State or Federal law to provide or pay for special education and related services. This requirement includes the corrections context where an agency other than an SEA or LEA is responsible for providing or paying for special education and related services.

<sup>16</sup> If a noneducational public agency fails to provide or pay for special education and related services, the LEA (or, if applicable, the State agency) responsible for developing the student's IEP must provide or pay for these services in a timely manner. The LEA or State agency may then claim reimbursement pursuant to the terms of the interagency agreement or other mechanism for interagency coordination (34 CFR §300.154(b)(2)).

<sup>17</sup> A parent and a public agency may agree to use alternative means of satisfying the IEP Team meeting participation requirements, such as through video conferences and conference calls. (34 CFR §300.328).

<sup>18</sup> This requirement does not apply to students in correctional facilities who have been convicted as adults under State law and incarcerated in adult prisons.

who are required to take any general State assessment during the time that they are confined to a correctional facility must be provided appropriate accommodations on the State assessment, or administered an appropriate alternate assessment, if determined to be necessary for the student by the student's IEP Team (34 CFR §§300.160(a) and 300.320(a)(6)). The SEA must also exercise general supervision over all educational programs for students with disabilities in correctional facilities (34 CFR §300.149) to ensure that such programs meet the education standards of the SEA and IDEA requirements. As part of this responsibility, the SEA must monitor public agencies that are responsible for providing FAPE in correctional facilities (34 CFR §300.149)).<sup>19</sup> Furthermore, SEAs must make annual determinations about the performance of each correctional facility that is its own LEA (34 CFR §300.600(a)(2)). States must include students with disabilities in correctional facilities when collecting and reporting data, including data reported in connection with IDEA section 618 data submissions and in the State's Annual Performance Report.

### *Personnel Qualifications*

The IDEA personnel qualifications requirements continue to apply even though personnel are providing special education and related services to students with disabilities in a correctional facility. Accordingly, the SEA must: (1) establish and maintain qualifications to ensure that those personnel necessary to carry out the purposes of the IDEA are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve students with disabilities (34 CFR §300.156(a)); (2) ensure that qualifications of related services personnel and paraprofessionals are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services (34 CFR §300.156(b)); and (3) ensure that each person employed as a public school special education teacher in the State is "highly qualified" (34 CFR §§300.18 and 300.156(c)).

### *Child Find*

The SEA must have child find policies and procedures in effect that ensure that all age-eligible students with disabilities, including those in correctional facilities, who are in need of special education and related services, are identified, located, and evaluated, regardless of the severity of their disability (34 CFR §300.111(a)(1)(i)).<sup>20</sup> To meet these requirements, we strongly encourage SEAs to develop child find policies and procedures that address the unique challenges associated with identifying students with disabilities in correctional facilities. For example, State child find policies and procedures frequently focus on teachers and staff in traditional schools, as well as the local medical community. State child find policies and procedures should also include those

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<sup>19</sup> In addition, as the IDEA, Part B grantee, each State must provide auditors and Department officials with access to financial and programmatic records, supporting documents, statistical records, and other records under program regulations or the grant agreement, and maintain such records and documents to facilitate an audit and to demonstrate compliance with program requirements (34 CFR §§76.730 through 76.731). See also 2 CFR 200.302(b)(3).

<sup>20</sup> However, there is no obligation for States to identify and evaluate those students with disabilities in adult correctional facilities for whom the State is otherwise not required to provide FAPE.

individuals in the community who come in contact with students in the juvenile justice system, including intake staff, social workers, probation officers, truant officers, police, and medical and mental health professionals who treat students in correctional facilities, as well as other staff in the juvenile justice system and in correctional facilities.

### *Surrogate Parents*

In circumstances where the appointment of a surrogate parent is necessary, as described in 34 CFR §300.519(a), the SEA must make reasonable efforts to ensure the assignment of a qualified surrogate parent not more than 30 days after a public agency determines that the student needs a surrogate parent. The surrogate parent may represent the student in all matters relating to the identification, evaluation, and educational placement of the student, and the provision of FAPE. The surrogate parent must meet the knowledge, skills, impartiality, and other required criteria described in the IDEA and its implementing regulations. 34 CFR §300.519(d), (g), and (h).

### *Transfer of Parental Rights at Age of Majority*

The IDEA permits, but does not require, a State to transfer all rights accorded to parents under the IDEA to students who are in an adult or juvenile, State or local correctional facility when the student with a disability reaches the age of majority under State law, unless the student has been determined to be incompetent under State law (34 CFR §300.520). Once a student reaches the age of majority, questions regarding guardianship as an adult may arise. As a best practice, it is advisable for students, families, and the IEP Team to consider alternatives to guardianship first, in order to preserve a young person's legal independence to the maximum extent possible.

### *State Advisory Panel*

To implement the supports and interventions needed by students with disabilities entering, attending classes, and exiting the corrections system, requires significant collaboration and communication across agencies. The State Advisory Panel (SAP) is in a position to advise on such matters, particularly since it must include representatives from the State juvenile and adult corrections agencies, and other agencies involved in the financing or delivery of services to students with disabilities (34 CFR §300.168). As an advisory body, the SAP can work to address concerns regarding interagency record sharing, coordinated efforts between agencies, shared databases, and other related activities.<sup>21</sup>

## **Responsibilities of Public Agencies, Including LEAs, Correctional Facilities, and Noneducational Public Agencies, to Ensure a Free Appropriate Public Education**

As noted above, in *Responsibility for Ensuring FAPE in Correctional Facilities*, States have different methods for assigning responsibility for FAPE for students with disabilities in

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<sup>21</sup> For further information regarding collaborative efforts to support youth with disabilities in the juvenile justice system, see <http://csgjusticecenter.org/youth/publications/addressing-the-unmet-educational-needs-of-children-and-youth-in-the-juvenile-justice-and-child-welfare-systems-2/>

correctional facilities. In some cases, the correctional facility is itself an LEA or is a noneducational public agency with the responsibility for FAPE. For the purposes of this letter, we refer to public agency or LEA interchangeably when discussing specific responsibilities. However, these requirements apply to any public agency, LEA, correctional facility, and noneducational public agency responsible for providing FAPE to children with disabilities in correctional facilities.

### *FAPE and Transfer of Records*

The rules governing the responsibility for FAPE in connection to students with IEPs who transfer from one public agency to another apply when a student with a disability is in a correctional facility and the responsibility for the provision of FAPE transfers from one public agency (generally an LEA) to another public agency (generally another LEA that is, or includes, the correctional facility).<sup>22</sup> All agencies involved must have policies and procedures that ensure that the education records of students with disabilities who move to, and from, correctional facilities are transferred as expeditiously as possible.

The failure of a public agency to obtain educational records promptly can interfere with the student's ability to receive FAPE and to receive credits towards graduation. Therefore, it is critical that public agencies and correctional facilities have systems in place to ensure compliance with the transmittal of records requirements in 34 CFR §300.323(g). Public agencies are encouraged to assign specific staff the responsibility to work with correctional staff to promptly transfer education records to facilitate the student's timely connection to educational or training activities.

The new public agency in which the student enrolls must take reasonable steps to promptly obtain the student's records (including the IEP and supporting documents and any other records relating to the provision of special education or related services to the student) from the previous public agency in which the student was enrolled, pursuant to the Family Educational Rights and Privacy Act (FERPA)<sup>23</sup> (34 CFR §300.323(g)). The previous public agency in which the student

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<sup>22</sup> If a student with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the student (including services comparable to those described in the student's IEP from the previous public agency), until the new public agency either: (1) adopts the student's IEP from the previous public agency; or (2) develops, adopts, and implements a new IEP that meets the applicable requirements in 34 CFR §§300.320 through 300.324 (34 CFR §300.323(e)). If a student with a disability (who had an IEP that was in effect in a previous public agency in another State) is moved to a correctional facility in a new State within the same school year, the new public agency (in consultation with the parents) must provide the student with FAPE (including services comparable to those described in the student's IEP from the previous public agency), until the new public agency: (1) conducts an evaluation pursuant to 34 CFR §§300.304 through 300.306 (if determined to be necessary by the new public agency); and (2) develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in 34 CFR §§300.320 through 300.324 (34 CFR §300.323(f)).

<sup>23</sup> The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g; 34 CFR part 99, generally requires that school districts and schools obtain the prior written consent of a parent or eligible student (i.e., a student 18 years of age or older or enrolled in a postsecondary institution) before disclosing personally identifiable information from education records; however, there are a number of exceptions to this prior consent requirement. The IDEA also contains confidentiality of information provisions that require prior written consent for disclosure of personally

was enrolled must take reasonable steps to promptly respond to the request from the new public agency (34 CFR §300.323(g)(2)).<sup>24</sup> In addition, the parent of a student with a disability may provide a copy of the IEP directly to the new public agency.

However, if, after taking reasonable steps, the new public agency is not able to obtain the IEP from the parent or from the previous public agency, the new public agency must, at a minimum, place the student in the regular school program, conduct an evaluation, and make an eligibility determination pursuant to 34 CFR §§300.304 through 300.306, if the new public agency determines an evaluation is necessary (34 CFR §300.323(f)(1)). Although the new public agency is not required to provide special education and related services to the student because it would be unable to determine what constitutes comparable services for the student without an IEP from the previous public agency, excluding the student from all educational services is not permissible. Moreover, even if the new public agency is unable to obtain the student's IEP from the previous public agency, if the new public agency decides that an evaluation is necessary because it has reason to suspect that the student has a disability, nothing in the IDEA or its implementing regulations would prevent the agency from providing special education services to the student while the evaluation is pending, subject to an agreement between the parent and the agency.<sup>25</sup>

### *Child Find and Evaluations*

LEAs are responsible for implementing the SEA's child find policies. It is not sufficient to assume that a student that enters a correctional facility is not a student with a disability simply because he or she has not yet been identified as such. Therefore, LEAs should work with individuals who are most likely to come into contact with students in the juvenile justice system (see *Child Find* above) to identify students suspected of having a disability and ensure that a timely referral for an evaluation is made. To determine if a student has a disability, a parent or a public agency may initiate a request for an evaluation. Moreover, the evaluation of a student suspected of having a disability must occur once parental consent has been obtained even if the student will not be in the facility long enough to complete the process.

Generally, the IDEA requires completion of initial evaluations within 60 days of receiving parental consent for the evaluation or within the State-established time frame

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identifiable information from education records and that generally incorporate the FERPA exceptions to the prior consent requirement. 20 U.S.C. 1417(c) and 34 CFR §300.622. The FERPA exception to the prior consent requirement that would be most relevant to a school district's or school's disclosure of education records of students who are entering a correctional facility is in 34 CFR §§99.31(a)(2) and 99.34 of FERPA regulations, which permits schools and school districts that are subject to FERPA to disclose personally identifiable information from education records without prior written consent to officials of another school or school district, including a school or school district run by a juvenile justice agency, where a student is enrolled, or seeks or intends to enroll, so long as the disclosure is for purposes related to the student's enrollment or transfer. See <http://www2.ed.gov/policy/gen/guid/ptac/pdf/idea-ferpa.pdf> for further clarification regarding the IDEA and FERPA confidentiality provisions and the transmission of education records to the correctional facility.

<sup>24</sup> See *Reentry Myth Buster on Student Records*, Federal Interagency Reentry Council, June 2013. <http://csgjusticecenter.org/wp-content/uploads/2013/06/Student-Records.pdf>

<sup>25</sup> See Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations. Retrieved July 11, 2014, from <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C3%2C>

(34 CFR §300.301(c)(1) (procedures for initial evaluation) and 34 CFR §300.9 (definition of consent)). In addition, it is important to note that assessments and other evaluation materials used to assess a student must be selected and administered so as not to be discriminatory on a racial or cultural basis and must be provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information, unless it is clearly not feasible to so provide or administer (34 CFR §300.304(c)(1)(i) and (ii)).

If the student is transferred to a correctional facility in the same school year, in the same State or in a different State, after the previous LEA has begun but has not completed the evaluation, both public agencies must ensure that assessments are coordinated to ensure completion of the evaluation. This must occur as necessary and as expeditiously as possible (34 CFR §300.304(c)(5)). However, the relevant time frame does not apply when the following two conditions are present: (1) the new school district is making sufficient progress to ensure prompt completion of the evaluation; and (2) the parent and new school district agree to a specific time when the evaluation will be completed (34 CFR §300.301(d)(2) and (e)). As noted in *FAPE and Transfer of Records* above, 34 CFR §300.323(g) requires public agencies to take reasonable steps to promptly exchange relevant records when a child transfers to a new public agency and enrolls in a new school in the same school year, subject to FERPA. Relevant records could include existing evaluation data on the child, consistent with 34 CFR §300.305. Prompt exchange of any relevant records avoids duplicating previously conducted evaluations, and provides critical data to the new public agency to ensure the timely completion of the evaluation.<sup>26</sup>

### *Personnel Qualifications and Training*

The public agency must ensure that all personnel necessary to fulfill the requirements of the IDEA are appropriately and adequately prepared, subject to the requirements of 34 CFR §300.156, relating to personnel qualifications (34 CFR §300.207).<sup>27</sup> Public agencies should consider including noneducational correctional staff in professional development activities regarding the IDEA, including positive behavioral interventions and supports and discipline procedures, and provide opportunities for discussions across agency staff regarding any problems students with disabilities may experience in correctional facilities.

### *Individualized Education Programs*

All of the IEP content requirements apply to students with disabilities in correctional facilities (34 CFR §300.320),<sup>28</sup> including, but not limited to, a statement of: (1) the student's present levels

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<sup>26</sup> See Office of Special Education Programs' Dear Colleague Letter on Education for Highly Mobile Children, July 19, 2013, for a more thorough discussion of IDEA requirements applicable when students transfer. <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-0392dclhighlymobile.pdf>

<sup>27</sup> See the *Personnel Qualifications* section discussed above.

<sup>28</sup> In States that have opted to make available FAPE to students with disabilities convicted as an adult under State law and incarcerated in an adult prison, the LEA may modify an IEP for such a student if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated (34 CFR §300.324(d)(2)).

of academic achievement and functional performance (IEP Teams need to have the student's academic and other school records in order to determine the student's present levels of achievement and performance); (2) measurable annual academic and functional goals; and (3) the special education and related services and supplementary aids and services that will be provided to the student to enable him or her to advance appropriately toward attaining his or her IEP goals and to be involved in and make progress in the general education curriculum (the general education curriculum is the same curriculum provided to students without disabilities in the State).

When a student with an existing IEP from another public agency arrives in a correctional facility in the same State, the facility either must implement the existing IEP or hold an IEP Team meeting to modify the contents of the IEP (34 CFR §300.323(e)). If a student with an existing IEP from another public agency arrives in a correctional facility in a different State, the new public agency either must conduct its own evaluation and make a new eligibility determination pursuant to 34 CFR §§300.304-300.306, if determined to be necessary by the new public agency, or develop and implement a new IEP for the student (34 CFR §300.323(f)). However, as an initial matter, the new public agency, in consultation with the parents, must provide the student FAPE (including services comparable to those described in the student's IEP from the prior public agency) in accordance with 34 CFR §300.323(e) or (f), as appropriate.

When developing or modifying an IEP for a student in a correctional facility, IEP Teams should consider whether there has been an interruption in the provision of special education and related services during the student's transfer to the correctional facility, and how the break in services has affected the type or amount of special education and related services needed to provide FAPE to the student. In addition, the special factors that the IEP Team must consider in developing, reviewing, and revising the IEP of each student with a disability are particularly relevant to students with disabilities in correctional facilities. Among these special factors is the requirement for the IEP Team to consider the use of positive behavioral interventions and supports and other strategies to address behavior in the case of a student whose behavior impedes his or her learning or the learning of others (34 CFR §300.324(b)(2)). Appropriate implementation of these positive behavioral interventions and supports and other strategies to address behavior should ensure that the student is able to benefit from his or her educational program in the correctional facility, and hasten the student's transition from the facility and re-entry into the community.

Students identified with a disability either before or during incarceration in a correctional facility, who: (1) did not transfer to the correctional facility with an IEP; or (2) were not attending or enrolled in school at the time of incarceration, must have a meeting to develop an IEP within 30 days of the determination that the student needs special education and related services (34 CFR §300.323(c)(1)).<sup>29</sup> As soon as possible following the development of the IEP, the public agency must make available special education and related services to the student

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<sup>29</sup> Please see fn. 11 for a discussion of the responsibility to make FAPE available to students with disabilities aged 18 through 21 in adult correctional facilities

(34 CFR §300.323(c)(2)). IEP Teams should pay particular attention to those related services that are likely to be required for students in correctional facilities -- for example, counseling, parent counseling and training, psychological services, transportation, and social work services in schools (34 CFR §300.34(c)(2), (c)(8), (c)(10), (c)(14), and (c)(16)).

### *Least Restrictive Environment*

The IDEA emphasizes the importance of educating students with disabilities in regular classes and in extracurricular and other nonacademic activities with nondisabled students to the maximum extent appropriate (34 CFR §§300.114, 300.117, and 300.320(a)(4) and (5)). Therefore, each public agency must ensure that special classes, separate schooling, or other removal of students with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (34 CFR §300.114(a)(2)). If a determination is made that a student with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that student then could be placed in a setting other than the regular educational setting. Placement decisions must be made on an individual basis 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 CFR §300.116(a)). In addition, the IEP must also include an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular classroom or in extracurricular or other nonacademic activities (34 CFR §300.320(a)(5)).

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services (34 CFR §300.115). These options must be available to the extent necessary to implement the student's IEP. Any alternative placement selected for the student outside of the regular education environment (education with nondisabled peers) must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student. Accordingly, IEP Teams must make individualized placement decisions, and may not routinely place all students with disabilities in correctional facilities in classes that include only students with disabilities, even if this means creating a placement that is appropriate for the student, through methods such as having special education and general education teachers co-teach in the regular classroom (34 CFR §§300.116(a) and (b)).

### *Secondary Transition*

There are inherent difficulties associated with reentry from a correctional facility to home or another community environment. Therefore, it is particularly important that public agencies comply with the IDEA requirements related to secondary transition (34 CFR §300.320(b)).<sup>30</sup>

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<sup>30</sup> Transition services requirements are not applicable to students with disabilities in adult prisons and to students whose eligibility for IDEA services will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release (34 CFR §300.324(d)(1)(ii)).

Accordingly, beginning no later than the first IEP to be in effect when the student turns 16 (or younger if determined appropriate by the IEP Team), and updated annually thereafter, the IEP must include: (1) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) the transition services (including courses of study) needed to assist the student in reaching those goals. In addition, the public agency must invite the student with a disability to attend the student's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the student and the transition services needed to assist the student in reaching those goals, as required in 34 CFR §300.321(b).<sup>31</sup> If the student does not attend the IEP Team meeting, the public agency must take other steps to ensure that the student's preferences and interests are considered. Moreover, to the extent appropriate, with the consent of the parents or a student who has reached the age of majority, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services (34 CFR §300.321(b)(1)–(3)). Finally, beginning not later than one year before the student reaches the age of majority under State law, the IEP must document that the student has been informed of the student's rights under the IDEA, if any, that will transfer to the student on reaching the age of majority under 34 CFR §300.520 (34 CFR §300.320(c)).

#### *Due Process Protections*

All of the due process protections under the IDEA extend to eligible students with disabilities in correctional facilities and their parents. Parents remain required members of the IEP and placement teams and retain all rights under IDEA, Part B unless a court has limited their rights or parental rights have transferred to the student at the age of majority. A parent who disagrees with the public agency on matters arising under the IDEA, including matters arising prior to the filing of a due process complaint, must have the opportunity to resolve the dispute through the mediation process described in 34 CFR §300.506 (34 CFR §300.500). In addition, a parent has the right to file a due process complaint to request a due process hearing on any matter relating to the identification, evaluation, or educational placement of the student, or the provision of FAPE to the student, in accordance with procedures in 34 CFR §§300.507 through 300.518 (34 CFR §300.507(a)(1)). If a student has been assigned a surrogate parent, the due process rights that are available to parents are afforded to the surrogate parent, and the prior written notice and procedural safeguards notice must be provided to the surrogate parent (34 CFR 300.519(g)). Similarly, the surrogate parent may utilize mediation or exercise due process rights on behalf of the student or themselves. (See *Parental Engagement* below for a discussion of affording parents prior written notices in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.)

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<sup>31</sup> Students with disabilities in correctional facilities should already be participating as a member of the IEP Team, where appropriate (34 CFR §300.321(a)(7)). Because students with disabilities in a correctional facility are physically in the facility where the IEP Team is likely to be meeting, absent a significant medical or security concern that cannot be accommodated, the student should be participating as a member of the IEP Team, as such participation is likely to improve the student's cooperation and should assist the IEP Team in identifying the special education and related services that must be included in the IEP.

## *Discipline Procedures*

Any exclusion from the classroom is particularly harmful for students with disabilities in correctional facilities because they often have already lost instructional time due to their involvement in the juvenile justice system. Collaboration between the correctional facility and the public agency responsible for FAPE, if different, is essential to minimize behavioral incidents and avoid disciplinary exclusions from school. For students whose behavior impedes the student's learning, or that of others, the IEP Team must consider, behavioral intervention strategies, including the use of positive behavioral interventions and supports, when developing the initial IEP, or modifying an existing IEP, so as to reduce the need for discipline of students with disabilities (34 CFR §300.324(a)(2)(i)). Public agencies cannot avoid their IDEA obligations, including the discipline procedures, by contracting, transferring them to, or sharing them with another agency.<sup>32</sup> Therefore, we expect that correctional facilities will not use discipline methods that deprive eligible students with disabilities of FAPE.

A student with a disability in a correctional facility who violates a code of student conduct is entitled to the protections that must be afforded to all students with disabilities related to discipline procedures, including those related to a change of placement, manifestation determination, and provision of services beginning with the 11<sup>th</sup> cumulative day of removal in a school year (34 CFR §§300.530 through 300.536).<sup>33</sup> These disciplinary protections apply regardless of whether a student is subject to discipline in the facility or removed to restricted settings, such as confinement to the student's cell or living quarters or "lockdown" units. In any event, a removal that results in a denial of educational services for more than 10 consecutive school days, or a series of removals that constitute a pattern that total more than 10 school days in a school year, is a change in placement, which, in turn, requires a manifestation determination in accordance with 34 CFR §300.530(e).<sup>34</sup>

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<sup>32</sup> Statement of Interest for the United States, *G.F. v. Contra Costa County*, No. 3:13-cv-03667-MEJ (N.D. Cal.) (filed Feb. 13, 2014), available at [http://www.justice.gov/crt/about/spl/documents/contracosta\\_soi\\_2-13-14.pdf](http://www.justice.gov/crt/about/spl/documents/contracosta_soi_2-13-14.pdf).

<sup>33</sup> *Honig v. Doe*, 484 U.S. 305 (1988); see also Office of Special Education and Rehabilitative Services, Questions and Answers on Discipline Procedures, June 2009, <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C7%2C> for a detailed discussion of the discipline procedures applicable to children with disabilities, including the requirements related to functional behavioral assessments in 34 CFR §300.530(d)(1)(ii) and (f)(1)(i).

<sup>34</sup> Under 34 CFR §300.536, a change of placement because of disciplinary removals occurs if the removal from the child's current educational placement is for more than 10 consecutive school days, or if the public agency determines, on a case-by-case basis, that a pattern of removals constitutes a change of placement because the series of removals total more than 10 school days in a school year; the student's behavior is substantially similar to the behavior that resulted in the previous removals; and because of such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another. The public agency may consider any unique circumstances, on a case-by-case basis, when determining whether a pattern of removals constitutes a change in placement under 34 CFR §300.536 (34 CFR §300.530(a)). The Department believes that "unique circumstances" are best determined at the local level by school personnel who know the individual child and are familiar with the facts and circumstances regarding a child's behavior. "Factors such as a child's disciplinary history, ability to understand consequences, expression of remorse, and supports provided ... prior to the violation of a school code [of student conduct] could be unique circumstances considered by school personnel when determining whether a disciplinary change in placement is appropriate for a child with a disability." 71 Fed. Reg. 46540, 46714 (Aug 14, 2006).

Each time a student with a disability in a correctional facility is removed from his or her current educational placement for more than 10 consecutive school days, or each time that the public agency determines that a series of removals constitutes a change of placement, the public agency must: (1) provide services to the student as provided for in 34 CFR §300.530(d) to enable the student to continue to participate in the general education curriculum, although in another setting and to progress toward meeting the goals in the student’s IEP; and (2) conduct, as appropriate, a functional behavioral assessment and provide behavioral intervention services and modifications, that are designed to address the behavioral violation so that it does not recur (34 CFR §300.530(d)(1)(ii) and (f)(1)). In addition, within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the LEA, parent, and relevant members of the student’s IEP Team must conduct a manifestation determination (34 CFR §300.530(e)). Specifically, an IEP Team is required to hold a manifestation determination to determine whether the student’s conduct in question was caused by, or had a direct and substantial relationship to, the student’s disability, or if the conduct in question was the direct result of the failure to implement the IEP. It is particularly important for IEP Teams to review carefully whether the student has, in fact, received the special education and related services that are provided in the student’s IEP when making this determination, as the failure to implement an IEP may be more common in some correctional facilities than in traditional schools.

### *Parental Engagement*

Parental<sup>35</sup> engagement in a student’s education is particularly important when a student with a disability is in a correctional facility. Parents who remain involved with their child’s education while the student is in a correctional facility will be better equipped to provide needed support to the student when he or she exits the facility and returns to the community and/or school. Unless the State has opted to transfer parental rights at the age of majority under 34 CFR §300.520(a) (see *Transfer of Parental Rights at Age of Majority*, above), parents do not lose their rights under the IDEA when their child is placed in a correctional facility, even if the student has been convicted as an adult and incarcerated in an adult prison.

Parents of students in correctional facilities are entitled to receive all “prior written notice” and procedural safeguards notice documents, as required by 34 CFR §§300.503, 300.504, and 300.520(a)(1)(i). The LEA or other responsible public agency must provide the parents with a prior written notice, in accordance with 34 CFR §300.503, a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. These notices must be written in language understandable to the general public and provided in the native language

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<sup>35</sup> The definition of parent is in 34 CFR §300.30.

of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so (34 CFR §300.503(c)(1)).<sup>36</sup>

Furthermore, correctional facilities may not assume the role of a parent under the IDEA, and therefore may not, for example, provide or refuse consent for a student's initial evaluation or reevaluation, or provide, refuse, or revoke consent for services under the IDEA or serve as the parent on an IEP Team. It may be difficult for some parents to participate in person in IEP Team meetings if the correctional facility is not located near the parent's residence. Nevertheless, the parent participation requirements in 34 CFR §300.322 are fully applicable to public agencies that are responsible for educating students with disabilities in correctional facilities.<sup>37</sup> See footnote 18 for further discussion regarding use of video conferences and conference calls.

In many States, the public agency with the responsibility for the appointment of a surrogate parent is the LEA. In carrying out this responsibility, the LEA must have a method for determining whether a student needs a surrogate parent and for assigning a surrogate parent to the student (34 CFR §300.519(b)). The IDEA also permits a judge overseeing the case of a student who is a ward of the State to appoint a surrogate parent (34 CFR §300.519(c)). A surrogate parent must meet certain requirements, including that the individual not be an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the student (34 CFR §300.519(d) and (e)). However, public agencies must not assume that all students with disabilities in correctional facilities need a surrogate parent. Rather, a surrogate parent acts in place of a student's parent only when: (1) the parent cannot be identified; (2) the parent cannot be located after reasonable efforts; (3) the student is a ward of the State under the laws of that State; or (4) the student is an unaccompanied or homeless youth, as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. §11434(a)(6)) (34 CFR §300.519(a)).

If parental rights transfer to students with disabilities who have reached the age of majority under State law (except for a student with a disability determined to be incompetent under State law), the public agency must provide any notices required by the IDEA, Part B regulations to both the student and the parents, and all rights accorded to parents under IDEA, Part B transfer to the student (34 CFR §§300.320(c) and 300.520(a)(3)). Therefore, it is important that public agencies

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<sup>36</sup> If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure: (1) that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; (2) that the parent understands the content of the notice; and (3) that there is written evidence that these requirements have been met. (34 CFR §300.503(c)(2)).

<sup>37</sup> If neither parent can attend an IEP Team meeting, the LEA or other responsible public agency must use other methods to ensure parent participation, including individual or conference telephone calls consistent with §300.328 (related to alternative means of meeting participation) (34 CFR §300.322(c)), and the public agency must maintain required documentation when the IEP Team meeting is conducted without either parent in attendance if the public agency is unable to convince the parent to attend (34 CFR §300.322(d)). Moreover, the public agency must take whatever action is necessary to ensure that the parents understand IEP Team meeting proceedings, including arranging for an interpreter for parents with deafness or whose native language is other than English (34 CFR §300.322(e)).

are aware of the applicable law in their State governing whether parental rights transfer and provide the required notices to the student and his or her parents.

## **Reentry Considerations**

Reentry services promote the effective reintegration of students back to communities upon release from correctional facilities. Evidence strongly supports the notion that juvenile offenders, both with and without disabilities, are significantly more likely to experience successful reentry into their home schools and communities if appropriate programs and supports are in place and discussed with the student prior to his or her release.<sup>38</sup> Many experts in the field recommend a comprehensive approach to reentry that includes individualized reentry plans, vocational and life skills training, behavior management systems and direct academic instruction. Reentry planning supports the successful reentry of students into their communities and includes information about State reentry options that may include the student's school prior to commitment in the correctional facility, charter schools, virtual schools, evening schools, adult education programs, community colleges, alternative schools for students with specific needs, schools with a dual focus on diploma/GED and career and technical education, and dual enrollment high/school/college programs. Informing students of their options is an important part of the reentry process. Methods to disseminate information regarding reentry options may include: (1) home visits; (2) information sharing between schools; (3) collaboration with community-based organizations; (4) school expos/reengagement fairs; (5) reengagement/transition centers; (6) print and electronic media; (7) collaboration with probation and parole practitioners from both public and private sectors; and (8) community wide campaigns.<sup>39</sup> The IDEA's requirements related to parental engagement, records sharing among public agencies, and transition planning, discussed above, complement these efforts.

On June 9, 2014, the U.S. Department of Education and the U.S. Department of Justice issued a letter addressing the Administration's efforts related to the education of students in juvenile facilities. The letter includes information on Title I, Part D of the ESEA, which is administered by the Department's Office of Elementary and Secondary Education and, among other matters, includes requirements that support juvenile correctional education and reentry. We are providing a copy of that letter and its enclosure with this letter to ensure that you and your staff are aware of this information and the resources available on this topic.

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<sup>38</sup> Reentry Programs for Students with Disabilities in the Juvenile Justice System: Four State Approaches, National Association of State Directors of Special Education (NASDSE), December 2011. *See also* National Institute of Justice, Office of Justice Programs, for resources related to reentry. <http://www.crimesolutions.gov/TopicDetails.aspx?ID=2>

<sup>39</sup> For further information regarding strategies to reenroll youth with disabilities after exiting the correctional system, see Reentry Programs for Out of School Youth with Disabilities, Julia Wilkins, National Drop Out Center for Students with Disabilities, July 2011, and A Reentry Education Model Supporting Education and Career Advancement for Low-Skill Individuals in Corrections at <http://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/reentry-model.pdf>. For information regarding funding opportunities for reentry programs, see <http://www.ojjdp.gov/funding/FundingList.asp>

## Conclusion

The Department is committed to supporting all students in our nation's schools, including correctional facilities, to achieve positive educational outcomes. Ensuring that students in correctional facilities are receiving a high quality education will have a clear, positive effect in reducing recidivism and increasing post-release success in higher education, employment, and other life endeavors. Providing FAPE to students with disabilities in correctional facilities is not only required by law; it is critically important to ensuring successful outcomes.

The Department strongly encourages SEAs, LEAs, and other public agencies, and correctional facilities serving students with disabilities to review their policies, procedures, and practices to verify that they are in compliance with IDEA requirements with a focus on improved educational outcomes for these students. SEAs and LEAs must, as part of their monitoring responsibilities, ensure that identified noncompliance is timely corrected. 34 CFR §300.600(e). We encourage SEAs and LEAs and other stakeholders to review the resources enclosed with this letter. We look forward to continuing to work with you to ensure that all students with disabilities, including students with disabilities in correctional facilities, have access to high-quality educational services.

If you have any questions or comments, please contact Office of Special Education Programs Education Program Specialists, Dr. Curtis Kinnard at 202-245-7472 or [Curtis.Kinnard@ed.gov](mailto:Curtis.Kinnard@ed.gov) or Dr. Tony G. Williams at 202-245-7577 or [TonyG.Williams@ed.gov](mailto:TonyG.Williams@ed.gov).

Thank you for your support and your continued interest in improving results and ensuring equal access to educational services for students with disabilities.

Sincerely,

/s/

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Melody Musgrove, Ed.D.  
Director  
Office of Special Education Programs

/s/

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Michael K. Yudin  
Acting Assistant Secretary  
Office of Special Education and  
Rehabilitative Services

Enclosures

## RESOURCES

### U.S. Department of Education

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Individuals with Disabilities Education Act. Retrieved November 18, 2014 from <http://idea.ed.gov/explore/view/p/%2Croot%2Cstatute%2C>

Joint letter to Chief State School Officers and State Attorneys General with Attorney General Eric Holder regarding educational support for youth in the juvenile justice system, June 9, 2014. Retrieved July 11, 2014 from <http://www2.ed.gov/policy/elsec/guid/secletter/140609.html>

IDEA and FERPA Confidentiality Provisions. June 2014. Retrieved July 21, 2014 from <http://www2.ed.gov/policy/gen/guid/ptac/pdf/idea-ferpa.pdf>

Office of Special Education Programs Memorandum and Questions and Answers on Dispute Resolution, July 23, 2013. Retrieved July 11, 2014 from <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/accombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf>

Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, September 2011. Retrieved July 11, 2014, from <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C3%2C>

Questions and Answers on Discipline Procedures, June 2009. Retrieved November 18, 2014 from <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C7%2C>

Dear Colleague Letter on Education for Highly Mobile Children, July 19, 2013. Retrieved November 18, 2014 from <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-0392dclhighlymobile.pdf>

### U.S. Department of Justice

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U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. <http://www.ojjdp.gov>

U.S. Department of Justice, Civil Rights Division, Special Litigation Section. <http://www.justice.gov/crt/about/spl/juveniles.php>

U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section. <http://www.justice.gov/crt/about/edu/>.

Statement of Interest of the United States, *G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667-MEJ (N.D. Cal. Feb. 13, 2014). [http://www.justice.gov/crt/about/spl/documents/contracosta\\_soi\\_2-13-14.pdf](http://www.justice.gov/crt/about/spl/documents/contracosta_soi_2-13-14.pdf)

**TAB 7**

## Manifestation Determination Reviews: Modern Standard, Related Issues, and Review of Current Caselaw



Presented by  
**Jose Martín, Attorney at Law**  
Richards Lindsay & Martín, L.L.P.  
Austin, Texas

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## The 2004 MDR Reforms



- *Policy background*—Congress wanted a “raising of the bar” for MDRs
- Need for **causal, direct, or substantial** relation between behavior & disability
- Failures to implement IEP must **directly result** in behavior for a link finding

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## The 2004 MDR Reforms



- “*Attenuated*” relationships, like low-self esteem arguments, are not enough
- Also, a desire to *simplify* MDRs (quite complicated under IDEA ‘97)
- Analysis of behavior across settings and time (a new emphasis for MDRs)
- *Appropriateness* of IEP no longer an MDR issue, only implementation

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### Other Reforms

- **Burden of proof** on parents challenging MDR—now clear under DOE commentary and *Schaffer* (not so clear before...)  
  
See Pennsylvania, Massachusetts, and Maryland cases to illustrate prior confusion on burden of proof

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### Other Reforms

- Mainstream opinion on burden of proof: *Schaffer* means burden of persuasion is on **party seeking any type of relief**
- MDR decision-makers—no IEPT meeting required (but probably advisable! See *Philadelphia City* case)

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### Other Reforms

- **Return to placement if behavior related**  
  
Why? To avoid campus seeking educational changes in placement in lieu of disciplinary change in placement  
  
But, parents can agree on change of placement

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 **Other Reforms**

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- **Exception to “stay-put”**

In DP hearing requests challenging MDR or disciplinary placement “stay-put” setting is discipline placement

But, parents get expedited hearing on the discipline issues

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 **Other Reforms**

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- **Students suspected of disability**

Students suspected of having disability have IDEA discipline protections (really goes back to IDEA 1997...)

Criteria for “basis of knowledge” of disability is included in provision

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 **Other Reforms**

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- **Students suspected of disability**

*Anaheim Union High Sch. Dist.*  
(C.D.Cal. 2013)

504 committee discussed escalating behavior, private diagnoses, amidst placement in alternative school

HO found MDR was required

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**When is the MDR Required?**

- As with prior law, for disciplinary changes in placement (long-term removals of >10 consecutive school days)
- Also, when short-term removals go too far beyond 10 per year (pattern of exclusion)
- Multiple factors for determining “pattern”
- *Similarity of behaviors* added as a factor in 2006 regulation ( § 300.536(a)(2))

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**Modern MDR Standard**

- Closer logical relationship between behavior and disability required now
- Compare to IDEA ‘97 provision (even slight links could support link finding)
- And, 1997 provision was obtuse—new formulation is more straightforward
- Much harder to argue behavior related to IEP failures (“direct result” standard)

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**Modern MDs in Action:  
Impulsivity Claims**

**Z.H. v. Lewisville ISD (E.D.Tex. 2015)**

6<sup>th</sup>-grader drafts “shooting list”

PDD issue raised late, no symptoms

Court finds list crated over several days, not impulsive, not related to ADHD

Reverses HO’s decision

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### Impulsivity Claims

**Southington BOE (SEA CT 2013)**

18-year-old (ADHD) with 200 steroid pills

HO finds behavior was planned, involved multiple transactions

HO finds MDR deficient—conducted with little discussion or records review—but arrived at the correct answer

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### Los Angeles USD (SEA CA 2011)

Sale of Adderall at school by teen with ADHD not related to disability, as student planned the sale with others, went home, brought pills

A “planned and deliberate behavior,” not impulse related to disability (see similar facts in *San Diego USD (SEA CA 2009)*)

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### Fitzgerald v. Fairfax Co. (E.D.Va. 2008)

ED Student involved in paintball vandalism at school over span of hours at night

Notice parents’ procedural arguments...

Court agreed there was no link, noted student was the “planner,” and that he went back for ammo three times

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- **Medford Pub. Schs. (SEA Mass. 2010)**

Student involved in off-campus car break-in

Facts showed planning (disguise, alibi)

Private psych argued relation to “executive function deficits,” but without evaluation and limited contact with student

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### Modern MDs in Action: Valid Impulsivity Claims

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- **In re: Student (SEA W.Va. 2009)**

Student with ADHD, ODD, borderline IQ, took a pill given to him by older boy

Records indicated he was impulsive, susceptible to peer pressure

School’s brief MDR did not review key info above, predetermined MD

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### Modern MDs in Action: Valid Impulsivity Claims

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- **District of Columbia PS (SEA DC 2013)**

SED student lit fire in locker room

Parent had told school of history of arson

School psychologist did not know details of incident, had not reviewed records

HO overturns finding of no-link

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Modern MDs in Action:  
Faulty MDRs

■ **Renton Sch. Dist. (SEA WA 2011)**

Team failed to recognize recent change in behavior could be due to suspected autism and ID

Thus the team did not have the necessary evaluation data to properly conduct MDR

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Modern MDs in Action:  
Faulty MDRs

■ **Renton Sch. Dist. (SEA WA 2011)—**

**Discussion Point**—How should HOs deal with claims of new diagnoses raised by parents at the MDR?

What factors are relevant?

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Modern MDs in Action:  
Faulty MDRs

■ **San Diego USD (SEA CA 2009)**

13-year-old with ADHD was “middleman” in sale of pot seeds

Parent alleged he skipped meds

HO finds lack of meds, coupled with impulsivity while off meds, meant behavior was related to disability

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**Coolidge ISD (SEA TX 2011)**

ED student has it out with principal  
Kicks rock down hall, leaves note for Supt  
Was mostly mainstreamed  
IEPT meets, moves him to behavior unit  
Student did well in unit  
HO finds a MDR was needed and not done  
Finds a disciplinary change in placement

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HO finds behavior was related to disability  
But, no denial of FAPE, as student did well  
Why is this a *disciplinary* change in placement?  
What was the real problem here?  
(34 C.F.R. 300.530(f)(2))

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**Township HSD (SEA Illinois 2010)**

Facebook threat not related to teen's  
ADHD, Bipolar, borderline IQ

HO finds link, says student did not  
intentionally violate school rules because  
"he did not fully comprehend the potential  
consequences" and did not intend to carry  
out the threat

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**Fulton County SD (SEA GA 2007)**

OHI student threatens to kill teacher

Team only addresses link to ADHD without addressing ODD (which they knew about, but did not rise to level of separate ED eligibility)

And, there was evidence of history of similar threats...

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**Swansea Pub. Schs.**

Student with ADHD, ODD wanted to call mom to pick him up on his cellphone

Gets highly agitated, threatens staffperson who picks up phone off the floor (after he threw it in crowded hall)

Staff says he de-escalated in the past, aggression not part of ADHD, ODD

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HO holds behavior related, staff did not provide student an "opportunity to de-escalate"

HO relies on expert testimony, although expert never evaluated student, only reviewed records

Comments on analysis?...

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**Modern MDs in Action:  
Weapons Cases**

■ **Columbia Borough SD (SEA PA 2015)**

SED teen new to school brought “pointed object,” allegedly to protect himself on way to school and back

HO finds, social skills deficits, need for transportation to address social problems, problems with peers, were “backdrop”

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**Modern MDs in Action:  
Weapons Cases**

■ **Columbia Borough SD (SEA PA 2015)**

HO found link, ordered student back to school from IAES

*Question*—Had student served 45 days in IAES?

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**MaST Charter Sch. (SEA PA 2006)**

Student brings knife for protection, on various occasions

Parent submits new eval with new diagnoses of PTSD, ODD, Impulse Control Disorder (with scant support)

Panel finds behavior not impulsive or related to ADHD (the qualifying disability)

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Panel notes new diagnoses don't seem to meet *IDEA* eligibility model

Does a condition need to rise to level of *IDEA* eligibility, separately, to "count" for MDR purposes?...

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BTW, Why did it matter if behavior was related or not, if school only wanted a 45-day removal for the weapon offense? Is this not moot?

See *Pemberton* case

Also see *R. S. v. Corpus Christi ISD* (controlled substances, 30-day placement, HO finds mootness)

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***Pittsburgh SD (SEA PA 2015)***

Teen with AU brought knife to school (forgot it in pocket after camping trip)

Parent felt 45-day placement too harsh for unintentional possession

HO found special offense provision allowed 45-day placement, even if possession was unintentional

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***Situate Pub. Schs.***

Asperger's student having bad day,  
wants to go home, escalates by pulling  
on principal's necktie

School interprets tie as a "weapon"

HO says no dice—not readily capable of  
injury, and no "possession" (control)

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But, behavior not related to disability,  
since it was purposeful, calm escalation

HO says no evidence of lack of  
understanding of consequences... (back  
to pre-2004 thinking?...)

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# Manifestation Determinations Done Right: Caselaw Lessons and Compliant Practices

by

Jose L. Martín, Attorney at Law

Richards Lindsay & Martín, L.L.P.

## The 2004 Reform of the Manifestation Determination Standard

In 2004, the Congress undertook several reforms to the rules governing discipline of students with disabilities. Part of the changes touched on the requirement for manifestation determinations or manifestation determination reviews (MDRs) prior to disciplinary changes in placement of IDEA-eligible students. As seen below, the Congress revised and simplified the standard under which schools determine whether a behavior is a manifestation of the student's disability. Although an apparently subtle change, the new formulation was in fact a significant departure from the prior MDR inquiry.

*The revised statutory language* – Congress tightened the language and structure of the manifestation determination standard, in essence raising the bar of the standard required to show that a behavior is a manifestation of disability. If a school decides to change a student's placement due to a disciplinary offense, "the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the 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 –

**if the conduct in question was *caused by, or had a direct and substantial relationship to, the child's disability; or***

**if the conduct in question was the *direct result of the local educational agency's failure to implement the IEP.*"** 20 U.S.C. §1415(k)(1)(E)(i).

*Legislative Background* – The Conference Committee that addressed the 2004 IDEA reauthorization stated that its intention in reforming the provision was that schools determine whether "the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem, to the child's disability." *Conference Committee Report*, at 225. The commentary to the regulations cited and quoted this significant guidance. See 71 Fed. Reg. 46,720.

*The 2006 regulation*—The final regulation at 34 C.F.R. §300.530(e) restates the statutory language without further elaboration.

*A desire to simplify MDRs*—The USDOE also reads the reformed provision as an attempt to simplify the MDR process. The commentary to the regulation states “the revised manifestation determination provisions in section 615 of the Act provide a simplified, common-sense manifestation determination process that could be used by school personnel.” 71 Fed. Reg. 46,720 (August 2006)

*Guidance on making the determination under the new standard*—The Conference Committee report on IDEA 2004 also provides additional guidance that Congress intended that the manifestation determination “analyze the child’s behavior as demonstrated across settings and across time when determining whether the conduct in question is the direct result of the disability.” *Committee Report*, at 224. The USDOE commentary to the regulations in fact quotes this very language. *See* 71 Fed. Reg. 46,720. This suggests that it is appropriate to examine patterns of behavior, the lack thereof, and the setting where the behaviors take place, in making the determination. The rationale is that if a behavior is caused by or directly related to disability, one should expect to see it exhibited across different settings and times.

*Implementation of IEP vs. Appropriateness of IEP*—Unlike the 1997 law, the 2004 manifestation provision did not contain language about whether schools must examine the appropriateness of the child’s IEP when undertaking the MDR. This raised questions about whether the omission was intentional and/or meaningful from a substantive standpoint. In response to comments on this point, the USDOE clarified that “the Act no longer requires that the appropriateness of the child’s IEP and placement be considered while making a manifestation determination.” 71 Fed. Reg. 46,720. Rather, as part of the manifestation determination, schools must focus on whether there has been a failure of implementation of the IEP that directly resulted in the misbehavior. *Id.* And, if the manifestation determination decision-makers find that an implementation failure has directly resulted in the behavior, a new subsection requires that the school take “immediate steps” to remedy the deficiencies. 34 C.F.R. §300.530(e)(3); *see also* 71 Fed. Reg. 46,721.

*Burden of proof in challenges to manifestation determinations*—Several commenters asked USDOE to issue a regulation imposing the legal burden of proof on schools of showing a finding of “no link” was proper when parents challenge the determination. Referring to the Supreme Court’s decision in *Schaffer v. Weast*, 126 S.Ct. 528 (2005), the USDOE disagreed, stating that “the Supreme Court determined in *Schaffer* that the burden of proof ultimately is allocated to the moving party.” 71 Fed. Reg. 46,724. Thus, the position of the Department is that a parent who challenges a school’s findings in a manifestation determination (i.e., the party seeking relief, or the “moving” party) bears the burden of proof in administrative proceedings under the IDEA per the *Schaffer*

decision. This guidance will hopefully end caselaw inconsistencies among hearing officers in assigning burden of proof in cases of challenges to manifestation determinations.

*Prior burden of proof confusion*—Prior to the 2006 regulations and their accompanying clarifying commentary, there was some difference of opinion on the burden of proof formulation with respect to MDRs. Some hearing officers and review panels felt that the Supreme Court’s opinion in *Schaffer v. Weast*, which placed the burden of proof on parties challenging the existing educational program, was limited to challenges to IEPs. These administrative officers thus felt the issue of burden of proof in MD challenges was an “open question.” See, e.g. *MaST Comm. Charter Sch.*, 47 IDELR 23 (SEA Pennsylvania 2006); *Philadelphia City Sch. Dist.*, 47 IDELR 56 at n. 32 (SEA Pennsylvania 2007). The majority opinion in *Schaffer*, however, expressly states that “[a]bsent some reason to believe that Congress intended otherwise, ...we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.” Moreover, the opinion questioned any burden of proof formulation that would presume an inappropriate IEP or violation of IDEA unless proven otherwise. Thus, other hearing officers interpreted *Schaffer* as clarifying the burden of proof issue in IDEA cases in general, since it placed the burden of persuasion on the party seeking relief or change in status quo. *Baltimore County Pub. Schs.*, 46 IDELR 179 (SEA Maryland 2006)(noting that the IDEA provision on MDRs is silent on any unique treatment or shifting of burden of proof in MDR challenges); *Scituate Pub. Schs.*, 47 IDELR 113 at n. 4 (SEA Massachusetts 2007)(“party seeking relief with respect to a particular claim has the burden of persuasion regarding that claim”).

## Manifestation Determination Decision-Makers

*Decision-making process flexibility*—While IDEA ’97 required the IEP team and other qualified personnel to conduct the manifestation determination, the 2004 law stated that it is to be conducted by the school, the parent, and “relevant members” of the IEP team. 20 U.S.C. §1415(k)(1)(E)(i). There is no mention of a meeting requirement to actually undertake the MDR, although the law still requires the IEP team be convened to determine the interim alternative education setting and the services to be provided during the long-term removal. 20 U.S.C. §1415(k)(2). Legislatively, the origin of this provision is likely related to other provisions of IDEA 2004 reflecting Congress’ concern over the high numbers of IEP team meetings that take qualified staff away from their instructional assignments. The final regulation implementing this provision restates the statutory language, and emphasizes that the school and parents mutually determine the relevant members of the IEP team that must make the MDR. 34 C.F.R. §300.530(e).

*Practical considerations*—The flexibility offered by the Congress also means that there can be disputes over determining the “relevant” members of the IEP team. For example, in a Virginia case, parents of a child with emotional disability challenged the makeup of the MDR team, although both the hearing officer and a district court rejected their argument that they had an “equal right” to determine the members of the MDR team. *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D.Va. 2008). The court held that the provisions of the IDEA addressing the composition of the MDR team meant that the school determines the school staff’s members and the parents may determine whom else they wish to invite in addition. In the case of *Philadelphia City Sch. Dist.*, 47 IDELR 56 (SEA Pennsylvania 2007), an appellate panel overturned a school’s MD, in part due to the fact that “the District did not provide the parents with the opportunity to engage in a mutual determination of relevant members of the Student’s IEP team.” See also, *In re: Student with a Disability*, 107 LRP 63721 (SEA Virginia 2007)(dispute over selection of relevant members, degree of participation). In a more recent case, a parent successfully challenged a MDR on the basis that the notice did not properly notify her of her right to invite relevant members of the IEP team. *Cherry Creek Sch. Dist. #5*, 56 IDELR 149 (SEA Colorado 2011). Exactly how much opportunity must be provided to parents to provide input on members? What if there are disagreements on membership? To what degree must each member participate? To avoid problems and confusion, many schools have chosen to conduct MDRs in properly scheduled and constituted IEP team meetings.

## **Return to Placement If Behavior Related to Disability**

If the manifestation decision-makers determine that a child’s behavior was related to their disability, the IEP team is to “return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.” 20 U.S.C. §1415(k)(1)(F)(iii). The 2006 regulations restate this provision at section 300.530(f)(2). They also clarify that in situations of manifestation, IEP teams must conduct a functional behavioral assessment (FBA), if one has not been done already, and implement a behavior intervention plan (BIP). 34 C.F.R. §300.530(f)(1)(i). If a BIP is already a part of the child’s IEP, then the IEP team must review the BIP and “modify it, as necessary, to address the behavior.” 34 C.F.R. §300.530(f)(1)(ii).

## **“Stay-Put” Exception in Discipline Disputes**

Another reform included in the 2004 IDEA reauthorization was a change to the application of “stay-put” in discipline disputes. Generally, the “stay-put” provision of IDEA requires that a student’s current placement be maintained (i.e., “stay-put”) while

legal action is pending, unless the parties agree otherwise. 20 U.S.C. §1415(j); 34 C.F.R. §300.518. When applied to disputes over disciplinary placements prior to 2004, this meant that a school had to return a child to their pre-discipline placement while any litigation was pending regarding the manifestation determination or disciplinary placement. In 2004, the Congress modified the “stay-put” provision so that a student subject to disciplinary placement must now remain in the disciplinary placement while the legal action was pending, unless the parties agree otherwise, and until either the disciplinary term runs out. 20 U.S.C. §1415(k)(4)(A); 34 C.F.R. §300.533. A due process hearing to decide a dispute over disciplinary placement or manifestation determination, however, is subject to an expedited hearing procedure. 34 C.F.R. §300.532(c).

*Comment*—The creation of an exception to the “stay-put” provision in disciplinary placement situations has significantly changed the tactical landscape in IDEA discipline disputes and litigation. Under the old formulation, if parents of a student facing alternative placement or expulsion filed a due process hearing request, the filing acted as an automatic stay of the disciplinary action, at least until the hearing officer issued a decision. That tactical advantage is gone now, but replaced by the right to an expedited hearing process to challenge a MDR or disciplinary placement.

## Students Suspected of Being IDEA-Eligible

An IDEA provision indicates that students that are suspected of having a disability qualifying them or special education services enjoy the protections of the law with respect to disciplinary actions. 20 U.S.C. § 1415(k)(5)(A). There are three ways that a school can acquire a “basis of knowledge” sufficient to extend the IDEA's procedural protections to a child not yet identified as disabled: (1) “the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services,” (2) “the parent of the child has requested an evaluation of the child,” or (3) “the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.” 20 U.S.C. § 1415(k)(5)(B); *see also* 34 C.F.R. § 300.534.

Thus, in the case of *Anaheim Union High Sch. Dist. v. J. E.*, 61 IDELR 107 (C.D.Cal. 2013), the court held that a 10th-grader's failing grades, inability to remain in class, and hospitalization for attempted suicide, all of which were discussed in §504 meetings, were sufficient to invoke the IDEA protections. The court explained that a student who has not yet been found eligible under IDEA is still entitled to its procedural protections, including the right to an MDR, if the school had knowledge of the student's disability before the misconduct at issue occurred. That criteria was

satisfied here, as the student was diagnosed privately with ADHD and anxiety, was already determined eligible under §504, and had experienced a decline in behavioral functioning at the time of his disciplinary action and proposed placement in an alternative program. The §504 committee had discussed these problems in a meeting. “Based on the content of these communications, AUHSD had a ‘basis of knowledge’ that J.E. was a child with a disability under the IDEA. Indeed, J.E.’s emotional disturbance would be apparent to a lay person observing the meeting.” The court thus upheld a hearing officer’s decision ordering a MDR.

## When is the MDR Required?

**As under prior law, manifestation determinations are required before schools undertake disciplinary changes in placement of IDEA-eligible students.**

The point at which the manifestation determination requirement is triggered remained unchanged in the 2004 law – MDRs are still required when a school decides to engage in a disciplinary change in placement of an IDEA student. The most common form of disciplinary change in placement is a removal of more than 10 consecutive school days (usually in the form of a removal to an interim alternative educational setting or expulsion).

The requirement for a MDR in cases where a school recommends a long-term disciplinary removal (i.e., disciplinary change in placement), moreover, applies whether the behavior in question takes place on school grounds or not. See, e.g. *Delaware Dept. of Educ.*, 53 IDELR 340 (SEA Delaware)(MDR was required although underlying behavior that led to recommendation for disciplinary placement took place off school grounds). This can be important, as a variety of states have laws calling for school disciplinary actions for certain off-campus offenses.

*The “Pattern of Removal” Change in Placement*—The other form of disciplinary change in placement is a “pattern of exclusion” or “pattern of removal” change in placement, where a school engages in a series of short-term removals, each of which is less than 10 consecutive school days in length, but when viewed collectively, amount to a disciplinary change in placement. The problem with series of short-term removals is that it is not precisely clear when the next short-term removal—once the school has already removed a student more than 10 days in the school year—renders the overall series of removals a “pattern of exclusion.” A 2006 regulation addressed this issue.

*The 2006 regulation*—Under section 300.536(a)(2), a disciplinary change of placement on the basis of accumulated short-term removals occurs if—

the child has been subjected to a series of removals that constitute a pattern—(i)

because the series of removals total more than 10 school days in a school year; (ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

In subsection (iii), the regulation restates longstanding USDOE guidance on the factors that make a number of short-term removals "become" a pattern of removal that constitutes a long-term removal. But, in addition to the familiar factors in §300.536(a)(2)(iii), the new provision requires analysis of the similarity of the behaviors that have led to the series of removals. And, it appears that all the criteria in §300,536(a)(2) must be simultaneously present in order to support a finding that a series of removals amounts to a "pattern of exclusion" change in placement. In other words, a finding of a "pattern of exclusion" change in placement requires that (1) the series of removals total over 10 school days, (2) the behaviors in the series be substantially similar, and (3) the old factors (length of removals, total removal, and proximity of removals) are indicative of a pattern. The new regulation is also cleaner and clearer in language than its predecessor (or the cryptic proposed regulation). *See* 71 Fed. Reg. 46,729.

*Substantial similarity of behaviors in a series*—The commentary emphasizes the importance of determining whether the behaviors underlying a series of removals are substantially similar in nature. "We believe requiring the public agency to carefully review the child's previous behaviors to determine whether the behaviors, taken cumulatively, are substantially similar is an important step in determining whether a series of removals of a child constitutes a change in placement, and is necessary to ensure that public agencies appropriately apply the change in placement provisions." 71 Fed. Reg. 46,729. The Department concedes, however, that the provision requires a "subjective" determination. *Id.* The commentary includes no examples of an application of this provision to assist in ascertaining the level of specificity required in the analysis, and few cases have emerged on this point. In *East Metro Integration District #6067*, 110 LRP 34370 (SEA Minnesota 2010), the Minnesota Department of Education held that a district did not violate the IDEA in failing to hold a MDR for a series of removals because the underlying behaviors were not substantially similar (theft, weapon possession), and therefore, there was no pattern of removals.

*Additional guidance*—The final regulation also clarifies that it is the school that must determine, on a case-by-case basis, whether a pattern of removals constitutes a change of placement. 34 C.F.R. §300.536(b)(1). It also confirms that the determination is subject to review through due process and judicial proceedings. 34 C.F.R. §300.536(b)(2); *see also* 71 Fed. Reg. 46,729-30.

*Practical Guidance*—Based on the foregoing regulatory language and commentary, some schools may limit themselves to no more than 10 total school days of short-term removals per school year, if possible. Clearly, the regulations allow for more than 10 short-term removal days in a school year, but the determination of when removals past the 10-day mark reach the point of becoming a “pattern” depends on multiple factors, making for a potentially complicated analysis. The spirit of the regulations, moreover, supports continued review and revision of positive behavioral interventions and supports, other changes to IEP services, or consideration of educational placement options, rather than engaging in continued short-term removals.

## The Modern MDR Standard

**The 2004 manifestation determination questions require a closer logical relationship between behavior and disability to make a finding of manifestation than under the 1997 version of the law.**

Under IDEA 1997, for a behavior to be found related to disability, all that was required was for the disability to have impaired the child’s ability to understand the impact and consequences of the behavior, or to have impaired the child’s ability to control the behavior, to *some* degree. The 2004 Congress decided that this was too low of a threshold. Under the new law, a behavior is deemed related to disability only if *caused by* the disability, or *directly and substantially* related to the disability.

Similarly, a behavior is deemed related to a school’s failure to implement the IEP only if the implementation failure *directly resulted* in the misbehavior. This new formulation does not require consideration of the appropriateness of the IEP, only whether it has been implemented, and if not, whether the failure to implement directly resulted in the misbehavior in question.

Thus, modern MDs require use of updated forms that reflect the new manifestation determination questions. Schools should not use old MD forms that contain the old MD questions, which require a much lower degree of relationship for a finding of manifestation.

Modern MD forms must ask:

1. Was the misbehavior caused by, or directly and substantially related to, the student’s disabilities?
2. If the school failed to implement the student’s IEP, was the misbehavior the direct result of the school’s failure to implement the IEP?

*Ideas for parents and child advocates* – Parents and child advocates participating in MDs can ensure that the members consider the student’s evaluation data and full range of disabilities in making the MD. They may want to point out patterns of behavior similar to that subject to the MD. If an expert is utilized, it is best that they have a long-term knowledge of the child based on assessment and their opinion is grounded on full and accurate information regarding the behavior in question.

## Modern Manifestation Determination Caselaw

### Impulsivity Claims

A sixth-grader with possible PDD, ADHD, and depression claimed that his drafting of a “shooting list” of schoolmates he wanted to shoot was impulsive and thus related to his ADHD. *Z. H. v. Lewisville Independent Sch. Dist.*, 65 IDELR 106 (E.D.Tex. 2015). The court reversed a hearing officer’s finding that the behavior was related to disability, finding that the student did neither exhibited behaviors normally associated with PDD, nor was receiving services for such a disability by agreement with the parents. In fact, the parents had rejected the school’s offer to re-evaluate the student following the private diagnosis of PDD. With respect to the ADHD, the court noted that the student had developed the “shooting list” over a timeframe of several days, which supported the school psychologist’s opinion that the behavior was not impulsive or related to ADHD.

In *Southington Bd. of Educ.*, 113 LRP 42841 (SEA CONN 2013), parents claimed that possession of 200 anabolic steroid pills was impulsive, and thus related to their 18-year-old son’s ADHD. The hearing officer found that the offense in question, however, was not consistent with an impulsive behavior. “In order to obtain the controlled substance, Student had to find a source for the steroids online, identify a way to pay for the steroids which would be accepted by the distributor, obtain the money to purchase the steroids and convert the money to the form of payment accepted by the distributor. Student then found a way to arrange to receive the steroids without the knowledge of his Parents.... Student's actions in obtaining and consuming the steroids demonstrated planning and forethought, the opposite of impulsivity.” Although the hearing officer expressed concern that the MDR was conducted with little review of records or discussion of the student’s disability, he concluded the determination was nevertheless correct.

*Comment* – If a parent succeeds in showing that a MDR was procedurally flawed, is this not sufficient to invalidate the MDR and thus, the disciplinary action? Hearing officers certainly have broad remedial authority to redress procedural violations. If a school improperly conducts a MDR but happens to arrive at the

right answer, is there not a violation of IDEA? It might not be the type of procedural violation that denies FAPE, but it can lead a hearing officer to provide a remedy.

In another drug-related case, a 13-year-old girl with epilepsy, mood disorder, anxiety, and PTSD was found at school with marijuana and other contraband in her backpack. *In Re: Student with a Disability*, 62 IDELR 217 (SEA KAN 2013). Relying on a written report from the student's doctor, the parents argued that her epilepsy impacted her "executive decision-making." The hearing officer found, however, that text messages taken from the girl's phone indicated that she "was interested in purchasing marijuana from the first day she began school," which demonstrated that her course of action appeared to be "thought out and planned." Further, she concealed her illegal activity during the investigation and hid the contraband among other items in her backpack. The parents believed that their daughter did not realize that she should not bring drugs and paraphernalia to school, and that her epilepsy was responsible. But, the hearing officer found no objection evidence to support their position.

In the case of *Los Angeles Unified Sch. Dist.*, 111 LRP 60703 (SEA California 2011), a teen with ADHD was unable to convince a hearing officer that his sale of prescription drugs (Adderall) was related to his disability. Considering a variety of sources of information, the school found that the student initially planned the details of the sale with another student, went home, and brought the drugs back the next day to conduct the sale. The hearing officer agreed with the school staff that the behavior was not impulsive, but rather "planned and deliberate." The impulsive behavior seen by the school, moreover, involved fighting, outbursts, and disruption, rather than the behavior exhibited in this instance. "Student's conduct demonstrated poor judgment, but the evidence did not demonstrate that Student's poor judgment was a manifestation of his disability as opposed to a manifestation of Student's youth, or need for money, or of any other non-disability-related rationale for engaging in such conduct."

A student and a classmate talked and texted each other about sharing prescription sleep medication before taking pills at school, where they were caught. *San Diego Unified Sch. Dist.*, 109 LRP 54649 (SEA California 2009). The parents argued that the offense was an impulsive act related to their son's ADHD. The hearing officer rejected the argument in light of the long-term arrangements of the students over the course of days.

In the case of *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D.Va. 2008), a high-school student with emotional disability (diagnoses of Tourette's, ADHD, anxiety disorder, and OCD) planned and led an incident where he and some friends shot paintballs at school buildings and buses over a period of several hours. After he admitted to the offense, the school recommended expulsion, which was later changed to a suspension for the remainder of the school year. An MDR team found that the

behavior was not related to the student's emotional disability. The parents disagreed and initiated legal action, claiming that the team was improperly constituted, that they had an equal right to make the manifestation determination, and that the school staff had "predetermined" the MDR. The hearing officer rejected all claims, and the court agreed, finding that the parents had the right to invite other team members, but did not do so, and that the team members were appropriate and had relevant information, although some did not know the student well. The court disagreed with the parents' contention that each MDR member is required to read every piece of information in the student's file prior to the MDR meeting. It also disagreed with the allegation of pre-determination, finding that the MDR process was thorough and careful, even though staff had met informally prior to the MDR meeting itself. Finally, the court agreed with the hearing officer that the student's emotional disability neither caused, nor was substantially or directly related to, the paintball shooting incident. The student was not impulsively drawn into the incident by friends, as his parents argued, but was rather the predominant planner and leader of the event, going so far as to drive the friends to the school and return three times with more paintball guns and ammunition, all over a period of hours.

The impulsivity argument also did not help another high school student from Massachusetts who was facing additional removal due to an off-campus felony car break-in. *Medford Public Schs., 110 LRP 31566 (SEA Massachusetts 2010)*. The hearing officer agreed with school staff that the circumstances of the nighttime car break-in involved careful planning and preparation, including arranging for a disguise and attempting to set up an alibi. With respect to the school behaviors, staff indicated that he enjoyed the "drama" of misbehavior and often planned his conduct to achieve maximum exposure and effect. Although a private psychologist wrote to the school arguing that the behaviors were in fact related to executive function deficits, there was no evaluation record of such deficits, the psychologist had not conducted an evaluation, he had limited contact with the student, and no knowledge of the nature of the underlying behaviors.

After a 14-year-old boy with LD and ADHD was caught selling pot and trading it for food at school, and it was determined he had done it on several other occasions, the school recommended a disciplinary change in placement. *Okemos Pub. Schs., 45 IDELR 115 (SEA Michigan 2006)*. The parents claimed that the behavior was impulsive, and thus directly related to his ADHD. They also claimed the distinction between use and distribution of drugs was merely semantic. The hearing officer found that the spans of time involved in arranging for the various drug transactions gave the student "time to reflect on his actions at each step... In short, rather than being 'spur of the moment' or impulsive, the record evidences the student's conduct was more calculated." Moreover, the parents' expert was surprised on the witness stand to find out that the behavior involved not drug use, but sale and distribution. The hearing officer held that the distinction was not merely semantic, "either practically, behaviorally, or legally."

*Comment*—The hearing officer cites the case of *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F.Supp.2d 37, 35 IDELR 189 (D.Me. 2001) as an example of the proposition that if a behavior involves sufficient time, motor planning, and opportunity for thought, it cannot be considered impulsive and thus related to ADHD. When confronted with MDs on ADHD students' behavior, it is important for MDR/IEP teams to analyze behavior in terms of time involved and degree of planning required. In situations involving students with emotional or behavioral disorders, the claim that the behavior was impulsive and thus related to the disability is common. But, as the cases show, the argument is only effective where the behavior in questions is impulsive on its face. If the behavior involves a significant degree of planning, steps, or time, the argument rarely succeeds. See e.g., *Reeths-Puffer Schs.*, 52 IDELR 274 (SEA Michigan 2009)(possession of knife at school not spontaneous unreflective act indicative of impulsivity or another ADHD characteristic).

### **Impulsivity Claim Supported by Evidence**

At times, however, the impulsivity claim is supported by evidence. In the case of *In re: Student with a Disability*, 52 IDELR 239 (SEA West Virginia 2009), a 13-year-old with ADHD, oppositional defiant disorder (ODD), and borderline to low-average IQ apparently took a pill offered to him in the school bathroom after he felt pressured by a bigger boy. There was, moreover, evidence in the school records that the student was impulsive and easily manipulated into misbehavior. The hearing officer found the 20-minute, cursory MDR deficient in that it failed to evaluate all the pertinent information, particularly the reports that the student was easily manipulated into wrongdoing. In fact, the hearing officer found that the school staff had predetermined that there would be a finding that the behavior was not a manifestation of disability, and thus, the parents did not have a meaningful opportunity to participate.

Similarly, the hearing officer in *District of Columbia Pub. Schs.*, 114 LRP 3336 (SEA DC 2013), also found that the evidence supported the claim that a student's SED manifested in fire-setting and eloping behavior at school. An expert witness concluded that the student's mood disorder caused her to be impulsive and combative, which in turn triggered her to elope from class and start a fire on school grounds (she set a bag of chips on fire in a locker room). During the initial IEP meeting, moreover, the parents had informed the IEP team that the student had a history of engaging in arson behavior and requested that a psychiatric examination be conducted. The school's psychologist, moreover, conceded that he did not know the exact facts of the incident, and had not reviewed administrative records of the incident before taking the position that the behavior was not related to disability.

*Comment*—The fact that the student had a history of arson behavior is an indication that such behavior may be related to her disabilities, and such history should have been taken into consideration by the IEP team. Another lesson from the case is that MDR decision-makers are well-advised to review all documentation of the behavioral incident before conducting the MDR.

### Examples of Findings of Faulty MDRs

In *Renton Sch. Dist.*, 111 LRP 39470 (SEA Washington 2011), a hearing officer overturned the school's MDR, finding that it faulty because the team focused only on the student's recognized disabilities despite suspecting that the student also may have had Autism and an intellectual disability. Moreover, the student's behavior had recently changed significantly, as he began to display aggressive behavior. In light of the facts, the team should have suspected the presence of additional disabilities, thus giving rise to a duty to evaluate in those areas. The hearing officer allowed the change in placement to stand only because he found that placing the student back in his pre-discipline placement would create a substantial likelihood of injury to self or others.

*Comment*—Not uncommonly, parents of students with disabilities facing a serious disciplinary action may raise the question of possible unidentified additional disabilities that might bear relation to the behavior in question. At times, parents may seek out private experts to raise the previously unidentified disability. How should hearing officers handle such claims as part of a MDR dispute?

A California school was derailed in its attempt to discipline a student for his peripheral involvement in the sale of some marijuana seeds. *San Diego Unified Sch. Dist.*, 52 IDELR 301 (SEA California 2009). For several days prior to the sale, the student, a 13-year-old with ADHD, acted as a "middleman," but also skipped his ADHD medication. The hearing officer concluded that the fact that the student was not on medication, coupled with evidence confirming the student's impulsivity when not on medication, should have led the school team to find that the behavior was directly related to the ADHD.

*Comment*—Curiously, however, the behavior of involvement in sale of marijuana seeds appeared to have been well-planned and thought out over a significant period of time, which normally is inconsistent with a finding that the behavior was impulsive. The case also raises the thorny issue of the impact of missed medication on the MDR. Other than a student or parent's statement, schools or hearing officers usually will be unable to determine if a student in fact missed a medication dose during a behavioral incident. On the other hand, an argument can certainly be made that a missed medication dose might increase the possibility of behavior related to the disability.

In the Texas case of *Student v. Coolidge ISD*, 111 LRP 47328 (SEA Texas 2011), during a confrontation with the principal, a student with ED spoke disrespectfully to staff and the principal, kicked a rock down the hall, refused to comply with directives, and wrote a defiant letter (which he placed in the superintendent's desk). Although the student had been placed in mainstream setting with supports, as well as a self-paced academic program in the past, the ARDC met in response to the incident and decided to change his placement to a behavior unit. Although the student performed quite well in the behavior unit, the parent challenged the change in placement. The Hearing Officer found that the change in placement was procedurally deficient in that he considered it to be a disciplinary change in placement, and as such, required prior notice and manifestation determination review. He wrote that "the Student was clearly removed because of the disruptive, \*\*\* behaviors associated with the \*\*\* outbursts the week of \*\*\*, 2010. The ARDC should have made an exception for misbehavior that was related to or a manifestation of the Student's disability. Moreover, the parties generally concede that the Student's behaviors were a manifestation of the Student's disability." Nevertheless, the Hearing Officer found that the change in placement, although procedurally flawed, did not deprive the student of a FAPE. Thus, he awarded no relief.

*Commentary*—Is an IEP team's decision to change a child's placement to a more restrictive setting within the special ed continuum of placements a disciplinary change in placement within the meaning of IDEA? Generally, the IDEA disciplinary safeguards have been interpreted to provide additional protections for special education students with respect to regular disciplinary placements and removals, such as long-term removals to interim alternative settings or expulsions, which may be called for in local student codes of conduct. When placing a student with SED in a specialized special education setting, will the placement not always be effected in response to escalating behavior issues or a serious behavior incident that demonstrates the student's need for a more structured setting? It is likely, moreover, that such behavior is related to the student's disability. Here, the hearing officer may have been responding to the fact that the behavior unit placement was clearly a specific response to a one-time incident, rather than as a measured decision to make an educational change in placement to better meet a student's behavioral and emotional needs. This may be the reason why IDEA 2004 prohibits changes in placement upon a finding that the behavior is related to disability, unless the parent agrees. See 20 U.S.C. §1415(k)(1)(F)(iii); 34 C.F.R. 300.530(f)(2).

In an Illinois case, however, a hearing officer overturned a district's decision that a 17-year-old student's Facebook threat to another student was not related to his ADHD, Bipolar Disorder, borderline IQ, and poor executive functioning. *Township High Sch. Dist. 214*, 54 IDELR 107 (SEA Illinois 2010). The school team argued that planning was required for the student to log on to Facebook, enter the text of the threat ("when I come back to school I'm going to look for u and kill you for giving me hell"),

and then decide to send the message. The team thus found that the behavior was not related to the student's disabilities and the district proceeded with expulsion. The hearing officer reversed the team, agreeing with the student's treating psychologist that the student's deficits in executive and cognitive functioning meant he really could not have planned the threat. "Student did not engage in a deliberate violation of the school's code of conduct in that he did not fully comprehend the potential consequences of his actions. He did not understand that he could be suspended or expelled, not did he intend to carry out the threat."

*Comment*—Under the modern IDEA standard for manifestation determination reviews, is it relevant that a student "did not fully comprehend the potential consequences of his actions"? The hearing officer here neither cites the applicable IDEA standard, nor analyzes how the facts of the case should be applied to the standard.

The Georgia case of *Fulton County Sch. Dist.*, 49 IDELR 30 (SEA Georgia 2007), on the other hand, underscores the need to consider the full range of a student's disabilities in making the MD. After a student with ADHD and ODD verbally threatened to kill a teacher, the MD team only considered whether the threat behavior was related to ADHD, and refused to allow the parents to provide information or input on the effect of his ODD, even though the school psychologist noted that all of the child's disabilities had to be considered as part of the MD. The hearing officer thus overturned the school's MDR finding.

*Comment*—Aside from the fact that the school acknowledged the student's ODD, there was evidence that the student had engaged in previous verbal threats, which were never carried out. In this case, moreover, the student was eligible under IDEA only as a child with other health impairment (OHI), and not SED. But, unlike in other cases, this hearing officer did not feel that the school was free to limit the MDR only to the ADHD diagnosis simply because the student's ODD did not rise to the level of IDEA eligibility separately.

In a California case, a young lady with PTSD kicked a male student in the groin, and was recommended for disciplinary removal for the offense. *Manteca Unified Sch. Dist.*, 50 IDELR 298 (SEA California 2008). The hearing officer concluded that the student's treating psychiatrist was more knowledgeable about her PTSD than the school neuropsychologist, who found that the behavior was unrelated to her PTSD without further explanation. The treating psychiatrist's opinion was that the behavior was related to the PTSD because the boy was sexually harassing her, her original trauma was caused by a sexual assault, and persons with PTSD are "hypervigilant" and have difficulty regulating their emotions.

In another Massachusetts case, a 17-year-old with ADHD and ODD became upset and tried to call his mother on his cell phone so she would pick him up and take him home. *Swansea Pub. Schs.*, 47 IDELR 278 (SEA Massachusetts 2007). Because he was speaking in a highly agitated manner to his mother, a staffperson asked that he go into an office. He escalated, however, throwing his phone down. When the staffperson picked up the phone, he became irate and physically threatening, blocking the staffperson's ability to leave and lunging at her, to the point that he significantly frightened her. Relying significantly on the parent's expert, who testified that the student was unable to self-regulate once escalated, the hearing officer held that "the student was provided no such opportunity to avoid an escalation of the original confrontation with Ms. Ragland, with the result that a spiraling of confrontational, out-of-control behavior occurred."

*Comment*—School staff that worked with the student testified, however, that in other confrontation situations, he had demonstrated an ability to de-escalate and avoid extreme behavior. They added that violence and aggressive behavior are not generally associated with ODD and ADHD. The hearing officer, however, discounted their testimony in favor of the parent's expert, although the expert testified purely from a review of records and had not personally evaluated the child. It certainly appears, from the decision, moreover, that the hearing officer questioned the staffperson's actual handling of the incident. To what degree does such post-hoc inquiry bear into the legally-required MDR questions?

## Weapons Cases

In the matter of *Columbia Borough Sch. Dist.*, 115 LRP 10010 (SEA Pennsylvania 2015), a teen with SED who was new to the school brought a pointed object to school, allegedly to protect himself in light of previous incidents where peers were attacked on the way to school. The school proposed expulsion, and concluded that the possession of a weapon was not related to the student's disability. The hearing officer disagreed, finding that the student's history of needs for support in peer social interaction, of transportation to address problems in before/after school peer interaction, and of multiple incidents of inappropriate peer interaction were the "backdrop" for the weapons incident. "By the student's own admission to others, the student referenced both fear related to the afterschool altercation of the day before and fear of peers related to having money in school. Regardless of which reason, or both, that existed in the student's thinking, having a [pointed object] in school on December 12, 2014 had a direct and substantial relationship to the student's emotional disturbance." The hearing officer ordered the school to return the student back to his regular campus.

*Comment*—It is unclear from the decision whether the school had already implemented a 45 school day removal at the time of the hearing officer's decision to return him to his regular campus. This is an issue, because even if the MDR

was faulty, and the weapon possession was in fact related to disability, the IDEA's special offenses provision allows the school to remove the student to an interim alternative setting for up to 45 school days.

A Pennsylvania 11<sup>th</sup> grader with LDs and ADHD brought to school a hunting knife with a folding 3-inch blade, claiming that he needed it for "protection." Students indicated that he had threatened others while exhibiting the knife, and that he had brought it to school on various occasions and while walking to and from school. *MaST Comm. Charter Sch.*, 47 IDELR 23 (SEA Pennsylvania 2006). Before the school conducted the MD, the parent obtained an evaluation from an outpatient psychiatric facility that also diagnosed the student with post-traumatic stress disorder (PTSD), oppositional defiant disorder (ODD), and impulse control disorder. Nevertheless, the team determined the behavior was not a manifestation, and placed the student in a 45-day alternative education placement for the weapons violation. After a hearing officer found the behavior was related to disability, the school appealed to an appellate panel. The panel overturned the hearing decision, finding that the fact that the student brought the knife to school deliberately and regularly indicated the behavior was not impulsive or ADHD-related. The recent new diagnoses were not given serious weight, as their supporting evidence was "scant," and report was "cryptic" and brief, and the student's school conduct did not support the diagnoses.

*Comment*—The panel states that even if the student met the "medical-model" standards for the new diagnoses, "the evidence was lacking that that he met the legal-model criteria for any IDEA impairment, such as other health impairment (OHI), which all include an adverse effect on educational performance to the extent of requiring special education." In a footnote, the panel indicated that had the IEP team "accepted" these diagnoses, "we would have been faced with a different case." Does a disability have to meet IDEA eligibility criteria, standing alone, to merit consideration for MD purposes? In situations of mixed-condition disabilities, is it feasible practically to tease out each condition for either eligibility or MD purposes?

*Special Offenses*—Under the IDEA, schools can remove students to alternative settings for up to 45 days for offenses involving weapons, drugs/controlled substances, or serious bodily injury, even if the behavior is related to disability. 20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.530(g). Therefore, in the *MaST Comm. Charter School* case reviewed above, could not the school have argued that the MD dispute was moot, since whether the behavior was related to disability or not, it had the authority to remove the student up to 45 school days for either drugs, weapons, or serious bodily injury offenses? That was the ruling of a New Jersey federal court in *A.P. v. Pemberton Township Bd. of Educ.*, 45 IDELR 244 (D.N.J. 2006). There, the court found that it was immaterial that the school conducted the MD late, since regardless of the result the school could remove the

student up to 45 school days for the student's drug offense, and the untimely MD was partly due to the parent's refusal to attend the meeting earlier. See also, *R. S. v. Corpus Christi ISD*, 109 LRP 73736 (SEA TX 2008)(challenge to MD moot in case of 30-day alternative placement for controlled substances use/possession).

In the matter of *Pittsburgh Sch. Dist.*, 115 LRP 17342 (SEA Pennsylvania 2015), a teen with autism was found in possession of a knife at school, which he claimed to have mistakenly left in his pocket after a camping trip. The parent claimed that the school's decision to place him in an interim alternative setting for 45 school days for an unintentional possession of a weapon was too harsh. The hearing officer held that the school had the right to place the student in an interim setting for up to 45 school days regardless of any relationship between the behavior and disability. Moreover, the hearing officer found that the language of the statute indicated that such disciplinary action could be effected even if the weapons possession was unintentional.

In a case of bringing razor blades to school, a student ironically fared more poorly in the MDR process because he stated that he had simply forgotten they were in his pockets, rather than due to some impulse to bring a weapon to school. *Inland Lakes Pub. Schs.*, 110 LRP 20187 (SEA Michigan 2009). After going fishing the day before, a student with ADHD, oppositional defiant disorder, bipolar disorder, and LDs forgot that in his shorts' pockets were two single-sided razor blades he had been using to cut fishing line. When another student saw the blades, he tried to conceal them, but turned them over to adults when asked. The MDR team determined that the act was one of forgetfulness, not impulsivity, and that he was no more forgetful than any other student. The hearing officer agreed, finding that the student's momentary actions showed "an experience-based and rational judgment" that his only chance of avoiding discipline in this zero-tolerance district was to try to conceal the blades when he found them in his pocket.

A 6<sup>th</sup> grader with Asperger's who really wanted to go home when he was having a bad day at school pulled on his principal's necktie to escalate the incident. *Scituate Pub. Schs.*, 47 IDELR 113 (SEA Massachusetts 2007). The school decided that the use of the tie constituted a weapon, thus triggering the special offense provisions. First, the hearing officer decided that the tie did not constitute a weapon, since an attacker could not readily cause serious bodily injury if he attacked a person with a tie. Second, the student did not "possess" the tie because he held it only momentarily and did not have control of it. Third, although there was some relation between the combination of disabilities and the offense, it did not rise to the level of a direct or substantial relationship. The student's behavior was "calm, deliberate, voluntary, and calculated."

*Comment*—The school's argument that the pulling of the tie constituted use of a "weapon" was certainly a stretch, and one that did not withstand much legal scrutiny. The hearing officer also notes that there was no evidence that the

student “did not understand the seriousness or consequences of his actions...” Is this not, however, a throw-back to the pre-2004 MD analysis, which required a review of whether the student’s disability impaired their ability to understand the consequences of the behavior? See, e.g. *Reeths-Puffer Schs.*, 52 IDELR 274 (SEA Michigan 2009)(In ruling on MDR challenge, HO notes that student’s responses showed he understood the repercussions of his behavior and was able to understand the potential consequences of his action).



**TAB 8**

**Emerging Issues in IDEA Due  
Process Hearings**

Mark C. Weber  
DePaul University College of Law  
July, 2015

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**Introduction**

- Selection of Format
- Selection of Topics
- Selection of New Developments

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**Emerging Issues**

- Child Find
- Eligibility
- Scope of Compensatory Education Remedies
- Res Judicata and Collateral Estoppel
- Appropriate Education Under IDEA

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**Child Find Basics**

- 20 U.S.C. § 1412(a)(3)
- 34 C.F.R. § 300.111
- Compton Unified Sch. Dist. v. Addison
- D.K. v. Abington Sch. Dist.

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**Child Find New Developments**

- C.C. Jr. v. Beaumont
- A.W. v. Middletown
- Simmons v. Pittsburg

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**IDEA Eligibility Basics**

- 20 U.S.C. §§ 1401(3), 1412(a)(1)
- 34 C.F.R. §§ 300.8, .101, .102
- Timothy W. v. Rochester, New Hampshire Sch. Dist.
- Springer v. Fairfax Cnty. Sch. Bd.
- Mr. I v. Maine Sch. Admin. Dist. No. 55
- Hood v. Encinitas Union Sch. Dist.

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### Eligibility New Developments

- E.M. v. Pajaro
- H.M. v. Weakley
- Doe v. Cape Elizabeth
- V.M. v. Sparta
- M.M. v. New York City
- L.J. v. Pittsburg

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### Eligibility New Developments

- Blodgett
- Kotler

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### Scope of Compensatory Education - Basics

- 20 U.S.C. § 1415(i)(C)(iii)
- Jefferson Cnty. Bd. of Educ. v. Breen
- Lester H. v. Gilhool
- G. v. Fort Bragg Dependent Schs.
- Reid v. District of Columbia

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### Comp. Ed. New Developments

- Boose v. District of Columbia
- Kelsey v. District of Columbia
- Copeland v. District of Columbia
- S.D. v. Portland

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### Preclusion Basics

- Pace v. Bogalusa City Sch. Bd.
- Ross v. Board of Educ.
- K.M. v. Tustin Unified Sch. Dist.

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### Preclusion New Developments

- Blunt v. Lower Merion
- Crawford v. San Marcos
- Chadam v. Palo Alto

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**IDEA FAPE Basics**

- 20 U.S.C. §§ 1401(9), 1412(a)(1)
- Board of Educ. v. Rowley
- N.B. v. Hellgate Elem. Sch. Dist.
- J.L. v. Mercer Island Sch. Dist.

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**FAPE Developments - General**

- Reyes v. New York City
- R.L. v. Miami-Dade

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**FAPE Developments –  
Educational Placement**

- R.L. v. Miami-Dade
- District of Columbia v. Kirksey-Harrington
- V.S. v. New York City
- Eley v. District of Columbia
- C.U. v. New York City

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### FAPE Developments - Autism

- P.L. v. New York City
- V.S. v. New York City
- Millburn Twp. Bd. of Educ. v. J.S.O.

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# Emerging Issues in IDEA Due Process Hearings

*Mark C. Weber*  
*DePaul University College of Law*

## **Child Find**

### Some Basics

20 U.S.C. § 1412(a)(3)

34 C.F.R. § 300.111

*Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181 (9th Cir. 2010) (in case of high school student performing in first percentile and exhibiting problem behavior who had not been evaluated until parent made request in student's junior year in high school, upholding claim for compensatory education for failure to previously identify and evaluate)

*D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. 2012) (ruling that district did not violate child find obligations in light of behavior by child deemed not atypical during early primary school years, and when report cards and conference forms indicated intermittent progress and academic success in several areas)

### Current Developments

*C.C. Jr. v. Beaumont Indep. Sch. Dist.*, No. 1:13-cv-685, 65 IDELR 109 (E.D. Tex. Mar. 23, 2015) (unpublished) (denying motion to overturn hearing officer decision that district violated child-find obligation; ruling that mother's playing recording of child's speech to district speech-language pathologist gave district reason to suspect child had disability, triggering child find obligation)

*A.W. v. Middletown Area Sch. Dist.*, No. 1:13-CV-2379, 2015 WL 390864 (M.D. Pa. Jan. 28, 2015) (with hearing officer that although evidence of child's disability was present earlier, duty to evaluate was not triggered until Nov. 1, 2011 given that failing grades were not available earlier and mother did not contact district with specific concerns before then; also agreeing that district unduly delayed completion of evaluation and implementation of IEP by not undertaking comprehensive evaluation in November; finding that district delayed initiation of comprehensive evaluation until nearly four months after it suspected student qualified for special education, violating child find; further ruling that child find violation caused denial of appropriate education; reversing hearing officer's denial of compensatory education remedy)

*Simmons v. Pittsburg Unified Sch. Dist.*, No. 4:13-CV-04446-KAW, 2014 WL 2738214 (N.D. Cal. June 11, 2014) (in case of high schooler with multiple sclerosis, who was provided accommodations following two-month absence from classes by Antioch school district, but did not complete all assignments and examinations, resulting in lowered grades, then enrolled in

Pittsburg school district, where she received extensive accommodations and missed 58 school days in one school year and was hospitalized twice but obtained satisfactory grades, affirming determination of ALJ that Antioch district did not violate child-find obligation, noting short period of time there following diagnosis and reasons to believe accommodations were adequate, but holding that ALJ erred in determining that Pittsburg district's failure to assess student was harmless; further holding that availability of neuropsychological assessment was not substitute for psychoeducational assessment, stressing obligation to assess in all areas of suspected disability; further ruling that failure to assess deprived student of educational benefit)

*"All Areas of Suspected Disability"*, 59 Loy. L. Rev. 289 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2235090](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235090)

*Special Education Law and Litigation Treatise* ch. 10.

## **Eligibility Under IDEA**

### **Some Basics**

20 U.S.C. §§ 1401(3), 1412(a)(1)

34 C.F.R. §§ 300.8, .101, .102

*Timothy W. v. Rochester, New Hampshire Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989) (establishing right to appropriate education for child with multiple, severe disabilities whose responses to efforts at communication were limited to smiles and cries)

*Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998) (finding child not eligible, and distinguishing social maladjustment from emotional disturbance but noting potential overlap)

*Mr. I v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007) (defining education broadly, and holding that adverse effect on educational performance need not be significant)

*Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099 (9th Cir. 2007) (requiring that needs from learning disability be greater than those that can be accommodated in regular classroom services and other health impairment must adversely affect child's education to extent it could not be accommodated in general classroom education)

### **Current Developments**

*E.M. v. Pajaro Valley Unified Sch. Dist.*, 758 F.3d 1162 (9th Cir. 2014) (in case of child found eligible for special education on basis of auditory processing disorder or central auditory processing disorder in 2008, affirming district court decision that school district did not act unreasonably in 2005 in choosing middle score from among three IQ tests when district applied California severe discrepancy standard; noting that parents' evaluator had submitted score that district used and that test was well accepted; deferring to position of U.S. Department of Education and further holding that children may seek to qualify for special education benefits)

under more than one of disability categories listed in 20 U.S.C. § 1401(3)(A)(i); further holding that evidence regarding child's alertness did not support conclusion that district acted unreasonably in determining that child did not qualify under OHI in 2005), *cert. denied*, 135 S. Ct. 996 (2015)

*H.M. v. Weakley Cnty. Bd. of Educ.*, No. 13-1060, 2015 WL 1179615 (W.D. Tenn. Mar. 13, 2015) (in case of child with history of having been sexually assaulted, record of depression since age of nine, and diagnoses of post-traumatic stress disorder, reversing decision that child was merely socially maladjusted and ruling that she was emotionally disturbed)

*Doe v. Cape Elizabeth Sch. Dep't*, No. 2:13-CV-00407-JDL, 2014 WL 7369358 (D. Me. Dec. 29, 2014) (affirming hearing officer decision that child was no longer eligible under category of learning disability; declining to rule on validity of state requirement of empirical evidence of psychological processing disorder)

*V.M. v. Sparta Twp. Bd. of Educ.*, Civ. No. 12-892 (KM), 2014 WL 3020189, at \*20, (D.N.J. July 3, 2014) (holding that evidence showed school district found child not eligible for special education based solely on lack of sufficient discrepancy between achievement and aptitude under set formula requiring 1.5 standard deviations, even though evaluations were broad and multidisciplinary, stating, "[A]lthough a school district may lawfully utilize a severe discrepancy approach to determine whether a child has an SLD, and employ a statically sound formula to measure whether a child has a severe discrepancy between aptitude and actual achievement, that formula may not be the sole determinant of whether a child has a SLD.")

*M.M. v. New York City Dep't of Educ.*, 26 F. Supp. 3d 249 (S.D.N.Y., 2014) (ruling that review officer incorrectly found student not eligible on basis of good grades without considering evidence of her inability to attend school due to emotional problems; further noting inability to complete full credit load and decline in grades before entering private placement; deferring to hearing officer decision on eligibility issues and affirming hearing officer determination that defendant denied student appropriate education by not providing IEP)

*L.J. v. Pittsburg Unified Sch. Dist.*, No. 13-CV-03854-JSC, 2014 WL 1947115 (N.D. Cal. May 14, 2014) (holding that ALJ erred in finding student did not have specific learning disability, other health impairment in form of ADHD and mood disorder, and emotional disturbance, but affirming finding that child was not eligible under IDEA because he succeeded academically and behaviorally in general education even when accommodation of individual aide was faded back over time and other supports did not go beyond general education accommodations), *app. filed*, Nos. 14-16139 (9th Cir. June 13, 2014)

Blodgett, 65 IDELR 51 (OSEP Nov. 12, 2014) (noting that public agency must evaluate child with disability in accordance with 34 CFR §§ 300.304 through .311 before determining that the child is no longer eligible under IDEA, stating, "Even though a child may no longer meet the criteria for "child with a disability" under the "hearing impairment" category based on medically or surgically corrected hearing that is now in the normal range, the child may still meet the criteria for "child with a disability" under one of the other disability categories specified in 34 CFR § 300.8. In OSEP's view, the child's language needs and whether he or she qualifies under

the ‘speech or language impairment’ category would be important considerations when evaluating that child's continued eligibility for services, because hearing loss during the crucial early years can have a long-term impact on a child's speech and language acquisition and development.”)

Kotler, 65 IDELR 21 (OSEP Nov. 12, 2014) (stating, “State eligibility guidelines and definitions for visual impairment and blindness may not exclude a child with convergence insufficiency or other visual impairment from meeting the definition in the IDEA for visual impairment and blindness if that condition adversely affects that child’s educational performance.”)

*The IDEA Eligibility Mess*, 57 Buffalo L. Rev. 89 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1206202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1206202)

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### **Scope of Compensatory Education Remedies**

#### **Some Basics**

20 U.S.C. § 1415(i)(C)(iii) (“ . . . grant such relief as the court determines is appropriate.”)

*Jefferson Cnty. Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988) (awarding two years compensatory education plus reimbursement for private placement, reasoning that without availability of compensatory education poor families would be without remedies)

*Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990) (affirming award of 2½ years of eligibility beyond age 21 for 12-year old who did not receive adequate services for 2½-year period)

*G. v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir.2003) (“Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student. We agree with every circuit to have addressed the question that the IDEA permits an award of such relief in some circumstances.”)

*Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir.2005) (rejecting hour-per-day and one-hour-per-one-hour formulas for compensatory education, emphasizing flexibility of remedy and stating award should be calculated to provide benefits that would have accrued had appropriate education been provided)

#### **Current Developments**

*Boose v. District of Columbia*, No. 14–7086, 2015 WL 3371818 at \*3 (D.C. Cir. May 26, 2015) (in case in which parent alleged school failed to comply with child find obligations and evaluate child with ADD, ADHD, and other conditions, overturning dismissal of action challenging hearing officer decision and seeking compensatory education for delay in evaluation and delivery of services, reasoning that case was not moot and stating, “DCPS, moreover, conflates the

compensatory education Boose seeks with the evaluation and IEP it offered. Specifically, it argues that the evaluation and the IEP satisfied Boose's request for compensatory education. But that cannot be. As noted above, and as DCPS concedes, the IEP included no compensatory education. IEPs are forward looking and intended to “conform[ ] to ... [a] standard that looks to the child's present abilities,” whereas compensatory education is meant to “make up for prior deficiencies.” *Reid [v. District of Columbia]*, 401 F.3d at 522–23. Unlike compensatory education, therefore, an IEP “carries no guarantee of undoing damage done by prior violations,” *Reid*, 401 F.3d at 523, and that plan alone cannot do compensatory education's job. So the mere fact that DCPS offered A.G. an IEP cannot render moot Boose's request for compensatory education.”)

*Kelsey v. District of Columbia*, No. 13–1956, 2015 WL 1423620 (D.D.C. Mar. 30, 2015) (affirming decision of hearing officer awarding 96 hours of speech-language services by certified speech pathologist as compensatory education for period from March 19, 2007 to June 2008 when defendant failed to implement IEP calling for speech therapy; noting that hearing officer awarded 1.5 hours of services for every hour missed, in order to make up for lost services when student was younger)

*Copeland v. District of Columbia*, No. CV 13-00837, 2015 WL 1069785 (D.D.C. March 11, 2015) (ruling that acceptance of compensatory services offered in letter regarding settlement of previous due process proceeding did not constitute waiver of claims when dispute existed over what services compensated for, and when hearing officer made insufficient factual findings in determining that compensatory education that student received remediated appropriate education denial; also finding that hearing officer improperly disregarded opinion testimony of tutor on adequacy of compensatory education provided)

*S.D. v. Portland Pub. Schs.*, No. 2:13–cv–00152, 2014 WL 4681036 (D. Me. Sept. 19, 2014) (in case of child with anxiety and reading disorder who received specialized reading instruction from end of second grade through sixth grade and for whom private evaluation at end of sixth grade year showed regression in Wilson program level from level 7 to 2.5, affirming hearing officer decision that fifth grade program was appropriate, but disagreeing with hearing officer and finding that in sixth grade district presented parent with unsatisfactory option of dropping class in which child was successful or reducing reading instruction when parent was unaware of decline in reading abilities from level 7 to 2; also finding that parent's insistence on individual instruction was reasonable, and not only did failure to provide one of five weekly sessions of Wilson instruction per week, contrary to IEP, denied child appropriate education, but also evidence teachers had of decline in reading level to 2 early in sixth grade should have triggered reevaluation, so child was denied appropriate education; affirming decision that seventh grade IEP was adequate; granting compensatory education in form of reimbursement for expenses incurred in enrolling child in private school during seventh grade in addition to reimbursement for summer program and tutoring and transportation ordered by hearing officer), *order clarified*, 2014 WL 7038064, 64 IDELR 240 (D. Me. Dec. 11, 2014)

*Special Education Law and Litigation Treatise* § 22.3(6)

## **Res Judicata and Collateral Estoppel**

### Some Basics

*Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005) (holding that failure of IDEA accessibility claim precluded relitigation of accessibility under ADA and Section 504)

*Ross v. Board of Educ.*, 486 F. 3d 279 (7th Cir. 2007) (finding ADA and Section 504 claims barred when they arose out of same facts as previous suit brought under IDEA and that case reached final judgment before filing of second suit)

*K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099 (9th Cir. 2013) (“Because a school district’s provision of a FAPE under the IDEA meets Section 504 FAPE requirements, a claim predicated on finding a violation of the Section 504 FAPE standard will fail if the IDEA FAPE requirement has been met. Section 504 claims predicated on other theories of liability under that statute and its implementing regulations, however, are not precluded by a determination that the student has been provided an IDEA FAPE.”), *cert. denied*, 134 S. Ct. 1493, 1494 (2014)

### Current Developments

*Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247 (3d Cir. 2014) (ruling that settlement in previous class action barred claims against state education department for failure to supervise school district alleged to have failed to identify children with disabilities, even though present class action alleged racial discrimination and previous class action did not; relying with regard to preclusion on common nucleus of facts regarding alleged mishandling of identification and testing; further holding that equal protection and Title VI claims failed for lack of evidence of intentional race discrimination by school district or of knowledge that third parties under its control engaged in intentional discrimination), *cert. denied*, 135 S. Ct. 1738 (2015)

*Crawford v. San Marcos Consol. Indep. Sch. Dist.*, No. A-13-CV-206 LY, 2015 WL 236653 (W.D. Tex. Jan.15, 2015) (magistrate judge recommendation) (holding that claims of former student are barred by res judicata when mother, on her behalf, stipulated to dismissal of earlier action over head injury student incurred when school employees restrained her and over denial of educational rights, and stipulation covered all causes of action that were raised or could have been raised based on events occurring up to time of stipulation; rejecting argument that Section 504, ADA, and Fourteenth Amendment claims were not barred because action in first suit was brought only under IDEA, declaring that both suits were based on identical facts), [*adopted*, Feb. 3, 2015? ,] *app. filed*, No. 15-50175 (5th Cir. Mar. 3, 2015)

*Chadam v. Palo Alto Unified Sch. Dist.*, No. C 13-4129, 2014 WL 5694080 (N.D. Cal. Nov. 4, 2014) (in case of child whose medical history indicated genetic markers for cystic fibrosis but who did not have cystic fibrosis, whose medical information was disclosed, and who was threatened with transfer from middle school and then excluded from school for two weeks but resumed attendance after filing and settlement of suit in state court, denying motion to dismiss complaint based on previous state court litigation, noting that defendants failed to show existence of final judgment in state court action, dismissal with prejudice, or release of claims; granting

motion to dismiss damages claim against school district for violation of ADA and Section 504 and Section 1983 claim against school district for violation of federal right to privacy), *app. filed*, No. 14-17384 (9th Cir. Dec. 3, 2014)

*Special Education Law and Litigation Treatise* § 21.10

### **Appropriate Education Under IDEA**

#### **Some Basics**

20 U.S.C. §§ 1401(9), 1412(a)(1)

*Board of Educ. v. Rowley*, 458 U.S. 176 (1982) (establishing some-benefit standard; emphasizing meaningful access to services and rejecting commensurate-opportunities standard)

*N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008) (stating that 1997 IDEA Amendments require provision of meaningful benefit to students with disabilities, superseding *Rowley* standard)

*J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938 (9th Cir. 2009) (declaring that 1997 IDEA Amendments do not supersede *Rowley* some-benefit standard)

#### **Current Developments**

##### (1) In General

*Reyes v. New York City Dep't of Educ.*, 760 F.3d 211, 220 (2d Cir. 2014) (in case of child with autism and other disabilities who was 16 in relevant school year and was previously served in private school pursuant to due process decision, whom defendant proposed to move to 6:1:1 class at public school with three-month 1:1 paraprofessional for transition, ruling that review officer's reliance on testimony asserting IEP could have been modified to extend 1:1 paraprofessional services was improper; relying on hearing officer's determination that student required services of 1:1 paraprofessional for period longer than three months specified in IEP; not addressing adequacy of TEACCH methodology)

*R.L. v. Miami-Dade Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) (in case of child with Asperger Syndrome, ADHD, gastroesophageal reflux disease, obsessive-compulsive behavior, and other disabilities, prone to anxiety and being overwhelmed in crowded, noisy places, who experienced severe behavior problems at home and vomiting and muscle tic when moved to large high school setting in building with 3600 students, affirming conclusion that district failed to offer appropriate education due to shortcomings in reading comprehension and stress management, supporting reimbursement award; further affirming that parents' program was appropriate despite shortcomings regarding socialization and child's regression in some areas, noting tutor was special education teacher and used same books as used in public school; also ruling that program need not be at school or similar institution to be reimbursed; noting predetermination by district to place child at large high school, stating "To avoid a finding of

predetermination, there must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child.”)

*Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J. L. & Educ. 1 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1931068](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931068)

*Special Education Law and Litigation Treatise* ch. 3

## (2) Educational Placement

*R.L. v. Miami-Dade Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) (in case of child with Asperger Syndrome, ADHD, gastroesophageal reflux disease, obsessive compulsive behavior and other disabilities, prone to anxiety and being overwhelmed in crowded, noisy places, who experienced severe behavior problems at home and vomiting and muscle tic when moved to large high school setting in building with 3600 students, whose parents withdrew him from public school and set up home program with tutoring and services, affirming conclusion that district failed to offer appropriate education due to shortcomings in reading comprehension and stress management, supporting reimbursement award; further affirming that parents' program was appropriate despite shortcomings regarding socialization and child's regression in some areas, noting tutor was special education teacher and used same books as used in public school; ruling that fact services were characterized as medical by Medicaid did not render them non-educational; also ruling that program need not be at school or similar institution to be reimbursed; rejecting argument that parents acted unreasonably; affirming district court ruling that large school could not be appropriate for child even with support structures; affirming reimbursement award but also affirming denial of compensatory education, on ground of inadequacies in parental program)

*District of Columbia v. Kirksey-Harrington*, No. CV 14-180, 2015 WL 495013 (D.D.C. Feb. 4, 2015) (adopting recommendation of magistrate judge to affirm hearing officer decision that overturned school system's unilateral determination to move student from private school to public school, when system refused to place student in sole specific program discussed by IEP team when determination was made; agreeing with magistrate that hearing officer did not err in concluding that school system was unable to effectively evaluate whether particular public school was capable of implementing student's IEP, and that differences in educational programming favored private school)

*V.S. v. New York City Dep't of Educ.*, 25 F. Supp. 3d 295 (E.D.N.Y. 2014) (in case of 11-year-old with autism enrolled in private school for whom defendant proposed IEP in April, 2011, then in June, 2011 issued final notice of recommendation proposing placement at Marathon School, which parent visited and deemed unsatisfactory because, inter alia, students were nearly all 14 or above, but then at hearing defendant presented evidence that child would actually have been placed at different school with same public school number designation but different location, staff, student body, and facilities, overturning decision of review officer and holding that testimony about substituted school should have been excluded as retrospective beyond scope of IEP and its implementation, depriving parent of ability to meaningfully participate in school

selection process by evaluating suitability of school; determining that Marathon School was not appropriate and that private school in which parent maintained placement was appropriate)

*Eley v. District of Columbia*, 47 F. Supp. 3d 1 (D.D.C. June 4, 2014) (in action involving proposal by defendant to move child from private school from which he received instruction since 2010-2011 school year and place him in new private school, granting injunction in favor of plaintiff, ruling that physical location where services are to be implemented is vital portion of student's educational placement, distinguishing cases concerning discharge from or closing of private schools and holding that private school student attended rather than proposed one constituted child's then-current educational placement, noting that previous court decision found placement appropriate; further noting that current school differed from proposed one in being Internet school with no campus or physical classroom while proposed was specialized school for children with learning disabilities and small-group instruction; denying defendant's motion for injunction to bar application of stay-put provision)

*C.U. v. New York City Dep't of Educ.*, 23 F. Supp. 3d 210 (S.D.N.Y. 2014) (in case of 15-year-old child with autism, severe seizure disorder, and pattern of injurious behavior, holding that defendant violated parents' procedural rights by failing to provide copy of IEP before beginning of school year on July 5, 2011, which impeded parents' ability to participate in IEP process even though they attended IEP meeting, and that omission amounted to violation of appropriate education duty in light of designated placement's reliance on parents to provide IEP, and by failing to give parents opportunity to inquire whether assigned school had resources to implement IEP, which impeded right to participate in school selection process by obtaining adequate information, when notice of school assignment was provided on June 18 for July 5 start of school year and school did not respond to efforts to make contact; affirming determination that IEP calling for 6:1 student-teacher ratio with crisis paraprofessional was appropriate and not overly restrictive; ordering reimbursement despite fact parents sent notice only nine days before removing child)

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### (3) Autism Services

*P.L. v. New York City Dep't of Educ.*, 56 F. Supp. 3d 147 (E.D.N.Y. 2014) (in case of teen with autism, overturning review officer decision in favor of school district; finding that failure to conduct vocational assessment and functional behavioral assessment and failure to provide parent counseling and training did not deny child appropriate education, but that school system failed to show that 6:1:1 class would enable student to make meaningful educational gains, and instead student needed one-on-one instruction, that review officer impermissibly relied on retrospective testimony about supposed one-on-one services not listed on IEP, that private placement offered appropriate education, and equities favored reimbursement)

*V.S. v. New York City Dep't of Educ.*, 25 F. Supp. 3d 295 (E.D.N.Y. 2014) (in case of 11-year-old with autism enrolled in private school for whom defendant proposed IEP in April, 2011, then in June, 2011 issued final notice of recommendation proposing placement at Marathon School, which parent visited and deemed unsatisfactory because, inter alia, students were nearly

all 14 or above, but then at hearing defendant presented evidence that child would actually have been placed at different school with same public school number designation but different location, staff, student body, and facilities, overturning decision of review officer and holding that testimony about substituted school should have been excluded as retrospective beyond scope of IEP and its implementation, depriving parent of ability to meaningfully participate in school selection process by evaluating suitability of school; determining that Marathon School was not appropriate and that private school in which parent maintained placement was appropriate)

*Millburn Twp. Bd. of Educ. v. J.S.O.*, No. 13–1208, 2014 WL 3619979 (D.N.J. July 21, 2014) (unpublished) (affirming ruling of ALJ that child was not assessed in all areas of suspected disability when she exhibited clear signs of autism that should have put team on notice of potential diagnosis; further affirming determination that IEPs offering integrated program did not provide meaningful benefit when child lacked learning and social skills to interact with peers and evidence supported need for true ABA program; awarding full reimbursement for private program)

*Special Education Law and Litigation Treatise* § 3.1(1)



**AGENDA & SCHEDULE**  
**14<sup>TH</sup> NATIONAL IDEA ACADEMY**

<b>DATE</b>	<b>TIME</b>	<b>SESSION TOPIC</b>	<b>PRESENTER(S)</b>
<b>DAY 1: Tues/July 14</b>	Noon – 1:00	Sign in, distribution of materials, welcome	S. James Rosenfeld
	1:00 – 2:30	Evaluating Testimony About Evaluations	Holly C. Almon, M.S. BCBA
	2:30 – 2:45	BREAK	
	2:45 – 4:15	Accommodating Allergies in Schools	Christopher M. Henderson, Esq.
	4:15 – 5:30	RECEPTION	
<b>DAY 2: Wed/July 15</b>	8:00 – 9:00	Sign-in; complimentary continental breakfast	
	9:00 – 10:30	Pre-hearing Conference Strategies and Techniques (1)	Bernadette House Bignon, Senior Administrative Law Judge, OR
	10:30 – 10:45	BREAK	
	10:45 – NOON	Pre-hearing Conference Strategies and Techniques (2)	Judge Bignon and Panel
	Noon – 1:00	LUNCH	
	1:00 – 2:15	Ethical Guidance in the Electronic Age (1)	Carol J. Greta, Administrative Law Judge, IA
	2:15 – 2:30	BREAK	
	2:30 – 4:00	Ethical Guidance in the Electronic Age (2)	Judge Greta and panel
<b>DAY 3: Thurs/July 16</b>	8:00 – 9:00	Sign-in; complimentary continental breakfast	
	9:00 – 10:30	Decision Writing II- Part A	James D. Gerl, Esq., Scotti & Gerl
	10:30 – 10:45	BREAK	
	10:45 – NOON	Decision Writing II - Part B	Mr. Gerl and Panel
	Noon – 1:00	LUNCH	
	1:00 – 2:15	Children in Correctional Institutions	Julie K. Waterstone, Southwestern Law School
	2:15 – 2:30	BREAK	
	2:30 – 4:00	Manifestation Determinations	Jose L. Martin, Esq.
<b>DAY 4: Fri/July 17</b>	8:00 – 9:00	Sign-in; complimentary continental breakfast	
	9:00 – 10:30	Emerging Issues in DP Hearings	Mark C. Weber, DePaul University College of Law
	10:30 – 10:45	BREAK	
	10:45 – Noon	Judicialization of DP Hearings	Prof. Weber & Panel
	Noon	Adjournment	