

# TABLE OF CONTENTS

## **Special Education Law Update: Judicial and Administrative Decisions**

**Written Materials to Accompany  
A Presentation for the  
Missouri Administrative Hearing Commission  
July 18- 19, 2016  
Jefferson City, Missouri  
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I.	Statutes/ regulations	2
II.	U. S. Supreme Court	6
III.	Other Key Recent Judicial and Administrative Decisions	7
	A. Due Process Hearing Issues	
	1. IDEA'04 Issues	
	a. Resolution Session	7
	b. Sufficiency	8
	c. Statute of Limitations	8
	d. Time Limit/ Appeals	11
	e. HO Training & Qualifications	12
	f. Amendment/ Complaint	12
	g. Response to Complaint	13
	h. Atty Fees Against Parents	13
	i. Response to Intervention	15
	j. Peer Reviewed Research	15
	k. IEP Amendment	16
	2. Difficult Parties/ Lawyers	16
	3. HO Bias	25
	4. HO Authority	26

5. Evidence	33
6. Hearing Procedures	
a. In General	39
b. Burden of Persuasion	48
c. Parties	49
d. Record of Hearing	55
e. Timelines/45 day rule	56
f. dp Hearing System In General	59
g. Five Day Disclosures	61
h. No Right to Effective Assistance of Counsel	62
i. Mootness (dph level)	62
j. Res Judicata/Collateral Estpl	63
7. Stay Put	63
8. HO Decision	69
9. Relief	
a. In General	79
b. Compensatory Education	85
c. Reimbrsmnt/Unilat Placement	88
d. Direct Payment	98
d. Prospective Relief	98
e. Creative Relief	98
c. Other Relief	102
10. Enforcement of HO Decision	103
11. Appeal Issues	
a. Exhaustion Admin Remedies	104
b. Deference to HO Decision	111
c. HO Immunity	117
d. Representation by Lawyer	117
e. Jury Trial	120
f. Insurance	120
g. Appeal Issues In General	121

B. Selected Hot Button Issues	
1. Seclusion & Restraints	122
2. Educational vs Medical/Other Needs	126
3. Recession/ Bad Economy	127
4. Incarcerated/ Juvenile Students	128
5. IEP Implementation	133
6. Predetermination	137
7. Bullying/ Harassment/ Safety	141
8. Methodology	151
9. Parent Right to Participate	152
10. Least Restrictive Environment	157
11. Discipline/ Manifestation	163
12. Extended School Year	169
13. Mediation & Settlement	170
C. Other IDEA Issues	
1. Child Find	179
2. Eligibility	182
3. Evaluation	187
4. Other IEP Issues	
a. <u>Rowley Standard</u>	192
b. IEPs In General	193
c. IEPs and FAPE	196
d. Retrospective vs. Prospective	197
e. IEP Team	199
f. Related Services	203
g. Other Placement Issues	207
h. Transition	210
i. IEPs & Behavior/BIP/FBA	212
j. Services Not Categorical	215

k. Assistive Technology	216
l. Transfer Students	218
m. Personnel decisions	220
n. No Atty Fees/ IEPT Meeting	220
o. Four Corners of IEP	220
p. Notice of IEPT Meeting	221
q. Extracurricular Activities	221
r. Specific School	222
s. Educational Needs Only	224
t. IEP Content Reflects Eval Data	224
u. Graduation/ Age Out	224
v. Generalization of Skills	226
w. Residential Placements	226
x. Residency of Student/Parent	227
y. Gap Analysis	227
z. Standard Not Potential Max	228
aa. Absenteeism/Truancy	230
bb. Evaluator May Not Prescribe	230
cc. Home Schooled Child	231
dd. Homebound Instruction	231
ee. IEP Goals	232
ff. Physical Education	235
gg. Accommodations	235
hh. Service Dogs	235
ii. English Language Learners	236
5. Other Procedural Safeguards	
a. In General	237
b. Independent Ed Evaluation	237
c. Prior Written Notice	240
d. Parental Consent and Revocation	240
e. Access Records/Cnfdntlty/Observe	240
f. Transfer of Rights	249
g. State Complaint Procedures	249
h. SEA Monitoring/Compliance	253
i. Other Procedural Safeguards	253
1. Surrogate Parents	253
2. Homeless Children	233

3. Foster Children	254
6. Procedural Violations	254
7. § 504, ADA, § 1983	260
8. NCLB/ESEA Issues	273
9. Disproportionality	273
10. Part C/ Early Intrvntn (selected cases)	274
11. Private Schools	275
12. Charter Schools	278
13. Attorney’s Fees (selected cases)	280
14. Parent Rts –Student Education	284
15. Maintenance of Effort	285
16. Technology	285
17. Collaborative Process	286
18. Court Issues	
a. Immunity	287
b. Mootness/Ripeness	288
c. Standing	290
d. Private Right of Action	290
e. Other Issues	
1)Removal	292
2)Pleading/Service	292
3)Collateral Estoppel /RJ	293
4)Pendant State c/a	294
5)Interlocutory Appeals	294
6)Class Certification	294
7)Supremacy Clause	296
8)Stay Pending Appeal	297
9) Injunction	298
10)Court Costs	298
11)Federal Jurisdiction	298
12)Discovery	299
19. Retaliation vs IDEA Staff	300
20. IDEA – In General	301
21. Other Causes of Action	304
22. Autism – Selected Cases	306
23. Systemic Issues	312
25. Funding	314
26. Abuse/Neglect/Mandatory Reporters	315
27. Medicaid/ Insurance	316
28. SEA/LEA Regulations	317
29. SEA Gen Supervisory Responsibility	318

# ***INTRODUCTION TO SPECIAL EDUCATION LAW***

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## **I. Introduction to Special Education Law**

### **A. Sources of Special Education Law**

The primary source of special education law is the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et. seq., hereafter sometimes referred to as "IDEA." (NOTE: many people refer to the sections of the act as beginning with § 600. Thus "§ 615" would be found at 20 U.S.C. § 1415, etc.) The regulations promulgated by the United States Department of Education to implement the IDEA are found at 34 C.F.R. Part 300. The statute and the federal regulations are available on a searchable website at <http://idea.ed.gov/explore/home> IDEA is a grant statute that provides funds for special education and attaches many specific conditions to the receipt of Federal IDEA funds.

Each state Department of Education also promulgates state regulations pertaining to special education. See the Missouri State Plan for Special Education which includes the state regulations available here: <https://dese.mo.gov/governmental-affairs/dese-administrative-rules/incorporated-reference-materials/IDEAPartB-2014>

Court decisions that interpret the IDEA issued by the courts of your state, by the United States Supreme Court, and by the federal Circuit Court of Appeals and the federal District Courts that cover your state or District are binding. Other court opinions and hearing officer decisions issued under the Act may be cited and used if you find their reasoning to be persuasive, but they are not binding precedent. Similarly, opinions issued by the federal Department of Education interpreting the Act provide helpful guidance, but they are also not binding precedent.

Although the IDEA and the federal regulations, and corresponding state regulations and policies, and the relevant decisions interpreting them are by far the most important sources of special education law, other statutes do sometimes become involved. The Rehabilitation Act of 1973, 29 U.S.C. § 794, et. seq., commonly referred to as "§ 504," prohibits discrimination on the basis of disability in certain federally funded programs, including education. The federal regulations that implement the statute are found at 34 C.F.R. Part 104. §504 is a civil rights law that prohibits discrimination on the basis of disability.

Finally, another law that pertains to educational records is the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, et. seq., hereafter sometimes referred to as "FERPA." The regulations implementing FERPA are found at 34 C.F.R. Part 99.

B. The Requirement of **FAPE (free and appropriate public education)**

1. FAPE

The basic requirement of the IDEA is that states and school districts must have in effect policies and procedures that ensure that children with a disability receive a **free and appropriate public education**, hereafter sometimes referred to as "FAPE." IDEA, § 612(a)(1).

The IDEA defines "child with a disability" as a child:

- (i) with mental retardation, 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
- (ii) who **by reason thereof**, needs special education and related services.

IDEA, § 602(3)

The IDEA defines "FAPE" as:

**special education and related services** that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school or secondary school education in the state involved; and
- (D) are provided in conformity with the **individualized education program** required (...hereunder.).

IDEA, § 602(9). See also 34 C.F.R. §§ 300.101 to 300.113.

The IDEA defines "special education" as:  
Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including  
(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and  
(B) instruction in physical education.  
IDEA, § 602(29).

The Supreme Court of the United States issued the seminal decision interpreting the provisions of the IDEA in the case of Board of Education of Hendrick Hudson Bd. of Ed. v. Rowley 455 U.S. 175, 102 S.Ct. 3034, 53 IDELR 656 (1982). The facts of the case were that the student had a hearing impairment. The parents requested that the schools provide a sign language interpreter for all of the student's academic classes. Although the child was performing better than the average child in her class and easily advancing from grade to grade, she was not performing consistent with her academic potential. Rowley, supra, 102 S.Ct at 3039-3040.

Holding that FAPE required a potential maximizing standard, the District Court ruled in favor of the student. The U. S. Court of Appeals for the Second Circuit affirmed. See, Rowley, 102 S.Ct. at 3040.

The Supreme Court reversed. Rowley, supra, 102 S.Ct at 3052. After a review of the legislative history of the Act and the cases leading to Congressional passage of the Act, the Supreme Court held that the Congress did not intend to impose a potential-maximizing standard, but rather, intended to open the door of education to disabled students by requiring a basic floor of opportunity. Rowley, supra, 102 S.Ct at 3043-3051.

The Supreme Court noted that the ***individualized Educational Program***, hereafter sometimes referred to as the "IEP," is the cornerstone of the Act's requirement of FAPE. Rowley, supra, 102 S.Ct at 3038, 3049. The Court also notes with approval the many procedural safeguards imposed upon the schools by the Act. Rowley, supra, 102 S.Ct at 3050-3051. The Court also cautioned the lower courts that they are not to substitute their "...own notions of sound educational policy for those of the school authorities which they review." Rowley, supra, 102 S.Ct at 3051.

The Supreme Court held that instead of requiring a potential maximizing standard, FAPE is satisfied where the education is sufficient to confer **some educational benefit** to the student with a disability. Rowley, supra, 102 S.Ct at 3048. Accordingly, the Court concludes that the IDEA requires "...access to specialized instruction and related services which are individually designed to provide educational benefit to the ..." child with a disability. Rowley, supra, 102 S.Ct at 3048.

The Supreme Court instructed lower courts that the inquiry in cases alleging denial of FAPE should be **twofold**: First, have the schools "...complied with the **procedures** set forth in the Act? And second, is the individualized educational program developed through the Act's procedures **reasonably calculated** to enable the child to receive **educational benefit**." Rowley, supra, 102 S.Ct. at 3051.

## 2. Some Hot Button FAPE Issues

In Deal v. Hamilton County 392 F.3d 840, 42 IDELR 109 (6th Cir. 1/16/04), the Sixth Circuit held that where the school district had already **predetermined** the student's program and services **before** the IEP Team meeting, the parents were denied the opportunity to meaningfully participate in the IEP process. Accordingly, the district denied FAPE for the student. In RL & SL ex rel OL v Miami-Dade County Sch Bd 757 F.3d 1173, 63 IDELR 182 (11<sup>th</sup> Cir 7/2/14) the Eleventh Circuit ruled that where IEPT meeting transcript showed that the district representative at the meeting **cut short** conversation regarding a smaller setting in the public high school, LEA had predetermined the child's placement. The school district's predetermination prevented them from raising the third prong (equities) of the Burlington etc analysis in order to defeat claim for reimbursement.

In Shore Regional High Sch. Bd. of Educ. v. P.S. 381 F.3d 194, 41 IDELR 234 (3d Cir. 8/30/04), the Third Circuit held that a school district's failure to stop **bullying** may constitute a denial of FAPE. Despite repeated complaints by the parents the bullying continued; the student became depressed and the school district developed an IEP. The harassment continued and the student attempted suicide. The Third Circuit agreed with the hearing officer that the unabated harassment and bullying made it impossible for the student to receive FAPE; In Lillbask ex rel Mauclaire v. State of Connecticut Dept. of Educ. 397 F.3d 77, 42 IDELR 230 (2d Cir. 2/2/05), the Second Circuit ruled that an IDEA hearing officer has the

authority to review IEP **safety** concerns. The court provided an expansive interpretation of the jurisdiction of the hearing officer, ruling that Congress intended the hearing officer to have authority over any subject matter that could involve a denial of or interference with a student's

A procedural violation is only actionable as a denial of FAPE under IDEA if it results in a loss of **educational** opportunity for the student or it seriously impairs the parent's **participation** in the IEP process. CF by RF & GF v New York City Dept of Educ 746 F.3d 68, 62 IDELR 281 (2d Cir 3/4/14)

### C. The Requirement of **LRE** (least restrictive environment)

The IDEA also requires that to the "...**maximum extent appropriate**, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." IDEA, § 612(a)(5). See, 34 C.F.R. §§ 300.114 to 300.119.

The Supreme Court has not yet ruled on the issue of LRE, but a number of Circuit Courts of appeal have provided some guidance. For example, the Fifth Circuit has developed a two pronged analysis: the first question is whether education of the student with a disability in the regular classroom, with the use of supplemental aids and services, can be satisfactorily achieved, and if it cannot, whether the school district has provided the student with interaction with non-disabled peers to the maximum extent appropriate. Daniel RR v. State Board of Education 874 F.2d 1036, 441 IDELR 433 (5th Cir. 1989).

The Ninth Circuit has developed four factors which must be balanced to determine the LRE placement: (1) the educational benefits available to the student in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of the student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the student in a

regular classroom. Sacramento City Sch Dist v. Rachel H by Holland 14 F.3d 1398, 20 IDELR 812 (9th Cir. 01/24/1994).

The Fourth Circuit has stated the rule this way: "The Act's language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child ...The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming... In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting." DeVries v. Fairfax County Sch Bd 882 F.2d 876, 441 IDELR 555 (Fourth Cir. 1989)

TM by AM & RM v Cornwall Central Sch Dist 752 F.3d 145, 63 IDELR 31 (2d Cir 4/2/14) an LRE violation is a substantive (not procedural) violation of IDEA.

## II. Common Issues in Due Process Hearings

Under the IDEA, a due process hearing may be requested with respect to any matter relating to the identification, evaluation or placement of the child, or of the provision of FAPE. IDEA, § 615(b)(6). The following are among the issues that are common in due process hearings.

### A. Identification & Eligibility

Issues pertaining to identification and eligibility are governed by IDEA § 612(a)(3) and 614 (b)(4)-(6). See, 34 C.F.R, § 300.121- 300.125, 300.300, 300.306, 300.307 – 300.311. To be **eligible** under IDEA, a child must have one of the enumerated disabilities {mental retardation, hearing impairments, (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance ... orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities} **and by reason thereof**, the student needs special education and related services. IDEA §602(3)(A)(i)and(ii).

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 found student eligible solely upon physician's opinion that the student could benefit from adaptive PE. The Seventh Circuit noted that a physician may not simply **prescribe** special education; IEPT must consider relevant factors.

Alvin Indep Sch Dist v. AD by Patricia F 503 F.3d 378, 48 IDELR 240 (5th Cir. 10/4/7) The Fifth Circuit affirmed a holding that despite a fifth grader's ADHD, he was not eligible for special education. The student consistently received passing **grades**, he succeeded on statewide tests and he was achieving in social situations. Accordingly, he did not by reason thereof "need special education and related services," and, therefore, he was not a child with a disability as defined by the IDEA

Hood v. Encinitas Union Sch Dist 47 IDELR 213 (9th Cir. 4/9/7) The Ninth Circuit applied the **Rowley standard** to an eligibility issue. Where the student consistently received above average grades despite her disability, she received educational benefit, and therefore, was not eligible for SpEd. **NOTE:** Some legal scholars have

questioned whether the *Rowley* test is too restrictive for eligibility purposes, Weber, Mark "The IDEA Eligibility Mess," [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1206202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1206202)

IDEA also places a **child find duty** upon school districts. A district has an affirmative duty to identify and evaluate children with disabilities. 34 C.F.R. §300.111. District of Columbia Public Schs (JG) 111 LRP 25934 (SEA DC 3/18/11) The standard for child find is suspicion of a disability rather than actual knowledge. District of Columbia Public Schs (JG) 111 LRP 25934 (SEA DC 3/18/11).

Compton Unified Sch Dist v. Addison 598 F.3d 1181, 54 IDELR 71 (9th Cir. 3/22/10) By a 2-1 vote, Ninth Circuit rejected school district argument that there is no child find duty because of language pertaining to prior written notice. The district argued that only an **action or refusal** is a violation. The Ninth Circuit held that a parent could file a dpc on any matter related to identification, evaluation, FAPE or placement, so, therefore, child find violations are actionable.

Ridley Sch Dist v. MR & JR ex rel ER 680 F.3d 260, 58 IDELR 271 (3d Cir 3/19/12) Third circuit conducted a detailed review of the law concerning Child Find, and concluded that the HO erred by failing to allow the school district a reasonable time to identify the student as disabled. Although a school district has a duty to identify students suspected of having a disability within a reasonable time, a reevaluation is **not** required **every time that a child posts a poor grade or misbehaves**.

## B. Evaluation

Issues pertaining to evaluations and reevaluations are governed by IDEA § 614(a)-(c). See, 34 C.F.R, § 300.301-300.305, 300.502. Initial evaluation must be within **60 days** of parental consent unless state has other timeframe. 34 CFR §300.301(c)(1). Reevaluation at least every **three years**. 34 CFR §300.303.

One frequent issue involves the **independent educational evaluation**. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section. If a parent requests

an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--File a due process complaint to request a hearing to show that its evaluation is appropriate; or provide the IEE at public expense. IDEA §615(d)(2)(A); 34 C.F.R. §300.502(b).

### C. Other Placement Issues

See discussion of IEP issues, LRE, discipline and stay-put.

### D. IEP Issues

Issues pertaining to individualized education programs are governed by IDEA §§ 612(a)(4) and 614 (d)-(f). See, 34 C.F.R, §§ 300.320-300.323, 300.324 – 300.328.

L.B. & J.B. on behalf of K.B. v. Nebo Sch. Dist., Bd. of Educ., et al, 379 F.3d 966, 41 IDELR 206 (10<sup>th</sup> Cir. 8/11/2004). The IEP is the basic mechanism through which each child's individual goals are achieved.

D.F. & D.F. ex rel N.F. v. Ramapo Cent. Sch. Dist. 105 LRP 57524 (2d Cir. 11/23/05). The Court notes that the case raises an issue as to whether it is proper to utilize **prospective** or **retrospective** analysis of an IEP. The court stated that an IEP is a snapshot not a retrospective. In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, i.e., at the time the IEP was formulated. Contrast, MS by Simchick v. Fairfax County Sch Bd 553 F.3d 315, 51 IDELR 148 (4th Cir 1/14/09).

#### 1. Related Services

IDEA defines related services as follows:

- (A) IN GENERAL- The term '**related services**' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free and appropriate public

education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education...

- (B) EXCEPTION—The term does **not include** a medical device that is surgically implanted, or the replacement of such device. IDEA, § 602(26). See, 34 C.F.R. § 300.34.

The issue of related services has resulted in two decisions by the United States Supreme Court. The first decision was Irving Independent Sch. Dist. v. Tatro 468 U.S. 883, 104 S.Ct. 3371, 555 IDELR 511 (1984). The Court affirmed the Court of Appeals holding that a procedure known as clean intermittent catheterization was a related service because the student could not attend school without it and, therefore, without the procedure she could not benefit from special education. Tatro, supra. The Supreme Court also affirmed the holding of the Court of Appeals that clean intermittent catheterization is not exempted by the medical services provision because the procedure did not have to be performed by a doctor, it could be done by a layperson with an hour of training. Tatro, supra.

The second decision was Cedar Rapids Community Sch. Dist. v. Garret F. 526 U.S. 66, 119 S.Ct. 992, 29 IDELR 966 (1999). In this case, the Supreme Court held that urinary bladder catheterization and suctioning of tracheotomy plus various monitoring was a related service. Garret F., supra. Applying the "bright line" test of the Tatro decision, the Court held that because the related services did not have to be performed by a physician, the medical services exclusion did not apply and the schools were required to provide the services for the student. Garret F., supra. The Court specifically and emphatically rejected the argument raised by the schools that the **cost** of providing FAPE, including the related services at issue, was a defense. Garret F., supra.

In Marshall Joint Sch Dist No.2 v CD by Brian & Traci D 616 F. 3d 632, 54 IDELR 307 (7th Cir 8/2/10), the Seventh Circuit concluded that the student did not need specialized instruction. Any need for PT or OT, therefore, was not relevant.

## 2. Transition

The IDEA defines **transition** services as a coordinated set of activities designed to be a results oriented process that focuses upon the individual child's needs, strengths and preferences. IDEA, § 602 (34). Not later than the first IEP to be in effect when the child is 16 years old and each year thereafter, the IDEA requires that the IEP contain measurable postsecondary goals; the transition services needed to achieve those goals; and beginning at one year before the child reaches the age of majority, a statement that the student has been informed regarding transfer of rights. IDEA § 614 (d)(1)(A)(i)(VIII). 34 C.F.R. § 300.43, 300.320(b) Policy 2419, Ch. 5, § 2(F).

## 3. Other IEP Issues

Other common IEP issues include: alleged denial of FAPE, improper IEP team composition, improper IEP development and alleged failure to implement an IEP.

In Van Duyn ex rel Van Duyn v. Baker Sch Dist 5J 481 F.3d 770, 47 IDELR 182 (9th Cir. 4/3/7), the Ninth Circuit held that a school district's failure to **implement** an IEP must be **material** to constitute a violation of IDEA. Minor discrepancies between the services actually provided and those specified in the IEP do not constitute a violation. A material failure occurs when the services provided by a school fall significantly short of the IEP services. In MO & GO ex rel DO v NYC Dept of Educ 393 F.3d 236, 65 IDELR 283 (Second Cir 7/15/15) Second Circuit prohibited **speculative** challenges to a school's ability to implement an IEP.

In Lessard v. Wilton-Lyndeborough Coop Sch Dist 592 F.3d 267, 53 IDELR 279 (1st Cir 1/20/10) the First Circuit ruled that where student made progress FAPE provided despite IEPT refusal to use the **methodology** preferred by parents; choice of educational methodology is at discretion of school officials.

## E. Discipline Issues

The IDEA imposes **special rules** that govern the **discipline** of students with a disability. The basic rule is that a special education student may not have her **placement** changed (i.e., suspensions of more than 10 days or expulsion) for conduct that is a manifestation of her disability. IDEA, § 615(k)(1)(F). If the behavior is not a manifestation of the student's disability, the student may be disciplined in the same manner and for the same duration as children without disabilities. IDEA, § 615(k)(1)(C).

An exception is that, regardless of manifestation, the schools may remove a student to an interim alternative educational setting, hereafter sometimes referred to as "**IAES**," for up to 45 school days if (1) the student possesses a weapon at school; or (2) the student possesses or uses or sells illegal drugs at school; or (3) the student has inflicted "serious bodily injury" upon another person while at school. IDEA, § 615(k)(1)(G). The schools may also ask a hearing officer to change the placement of a student with a disability to an IAES if remaining in the current placement is substantially likely to result in injury to the student or others. IDEA, § 615(k)(3)(A) and (B).

Another cardinal rule in the discipline area is that regardless of whether the conduct of a student was a manifestation of the student's disability, where a student with a disability is removed from his current placement, the schools must continue to provide educational services to ensure FAPE for the student and to enable the student to continue to participate in the general curriculum although in another setting. IDEA, § 615(k)(1)(D). See generally regarding discipline issues, 34 C.F.R. §§ 300.530 – 300.537.

The Supreme Court dealt with discipline issues and endorsed the stay put provision in the case of Honig v. Doe 484 U.S. 305, 108 S.Ct. 594, 559 IDELR 231 (1988). In that decision, the Supreme Court, noting the Congressional intent in preventing the exclusion of disabled students and reiterating the importance of the procedural safeguards under the IDEA, refused to read a dangerousness exception into the stay put provision. The high Court outlines the history of abuses of the discipline provision in that decision.

NOTE: due process hearings involving discipline issues are **expedited hearings** with different timelines. The due process hearing must be convened within 20 school days of the complaint and

the hearing officer decision must be issued within 10 school days of the hearing. 34 CFR §300.532(c).

In District of Columbia v. Doe ex rel Doe 611 F.3d 888, 54 IDELR 275 (DC Cir 7/6/10) DC Circuit ruled that HO did not exceed his authority where he **reduced** a disciplinary **suspension**. HO reduced a 45 day suspension to an 11 day suspension noting the trivial nature of the infraction and finding that the more lengthy suspension denied FAPE to the student.

F. FAPE (See Discussion above)

G. Relief

Courts and hearing officers have broad authority to grant appropriate relief when there has been a violation of IDEA. Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 6/22/9). The **most common types of relief** are reimbursement for unilateral placements and compensatory education.

#### 1. Unilateral Placements

In the case of Burlington Sch. Comm. v. Dept. of Educ., et. al. 471 U.S. 359, 105 S.Ct. 1996, 556 IDELR 389 (1985), the Supreme Court was faced with the issue of whether the IDEA permitted courts to award reimbursement to parents when the IEP developed by the schools is not appropriate and the parent removes the student from public school and places him in a private school that does provide FAPE. Noting that the statutory provisions of the IDEA confer **broad equitable powers** upon the courts to fashion an **appropriate remedy**, and the fact that judicial review of IDEA cases often takes years, the Supreme Court held that the IDEA does empower courts to award such reimbursement. Burlington, supra.

In Florence County Sch. Dist. v. Shannon Carter, et. al. 510 U.S. 7, 114 S.Ct. 361, 20 IDELR 532 (1993), the Supreme Court was faced with a unilateral placement case in which the public schools provided an inappropriate education leading to a unilateral placement at a private school that provided an appropriate education for the student but that did not meet some of the requirements of the SEA (specifically

state approval of the private school.) The Supreme Court held that courts may award reimbursement in these cases. Carter, supra.

In Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 6/22/9) The Supreme Court held that it is not a prerequisite to reimbursement under IDEA that a child have been previously enrolled in and receive services from a public school. The Court noted that under its previous rulings in *Burlington* and *Carter*, courts have broad authority to grant appropriate relief when there has been a violation of IDEA. The Court held that the 1997 amendments do not limit that authority. The ambiguous language of the provision at issue was not sufficient to effectuate a repeal by implication of *Burlington* and *Carter*.

The **test** a parent must satisfy in order to receive reimbursement for a unilateral placement is: 1) the school district denied FAPE to the student or otherwise violated IDEA; 2) the parent private school placement is appropriate; and 3) equitable factors do not preclude the relief. Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 6/22/9).

Such reimbursement may be reduced or denied if the parents failed at the last IEP meeting to reject the proposed placement and state their intent to enroll the child in private school at public expense, IDEA, § 612 (a)(10)(C)(iii)(I)(aa); or if they fail to give written notice to the LEA of their rejection of the proposed placement and state their intent to enroll the child in private school at public expense 10 business days prior to removal, IDEA, § 612 (a)(10)(C)(iii)(I)(bb); or if the parents fail to make the student available for an evaluation, IDEA, § 612 (a)(10)(C)(iii)(II); or upon a judicial finding of unreasonableness with respect to the actions taken by the parents, IDEA, § 612 (a)(10)(C)(iii)(III). Reimbursement shall not be reduced or denied for failure to give notice if the school prevented the parent from providing such notice, IDEA, § 612 (a)(10)(C)(iv)(I)(aa); or if the parents were not provided with written procedural safeguards stating this notice requirement, IDEA, § 612 (a)(10)(C)(iv)(I)(bb); or if compliance with the notice clause would likely result in physical harm to the child, IDEA, § 612 (a)(10)(C)(iv)(I)(cc). Within the discretion of the hearing officer or court, reimbursement may or may not be reduced or denied if the parents are illiterate or cannot write in English, IDEA, § 612 (a)(10)(C)(iv)(II)(aa); or if compliance with this clause would likely result in serious emotional harm to the child, IDEA, § 612 (a)(10)(C)(iv)(II)(bb). See also, 34 C.F.R. § 300.148.

## 2. Compensatory Education

Reid ex rel Reid v. District of Columbia 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/05). The D.C Circuit developed a **qualitative** standard for awards of compensatory education in order to place disabled students in the same position they would have occupied but for the school district's violation of IDEA. The court rejected the hearing officer's calculation awarding one hour of compensatory education for each day of denial of FAPE. The court also rejected the parents' request of one hour of compensatory education for each hour of denial of FAPE. Instead, the court adopted a more flexible approach based upon the needs of the child who has been denied FAPE. For example some students might require only short intensive compensatory programs targeting specific deficiencies. Other students may require more extended programs, perhaps requiring even more hours than the number of hours of FAPE denied. Accordingly, the court remanded this matter for the submission of evidence as to the student's deficiencies resulting from the denial of FAPE.

Bd of Educ of Fayette County, KY v LM ex rel TD 478 F.3d 307, 47 IDELR 122 (6th Cir. 3/2/7) It is inappropriate for HO to **delegate** the type or amount of compensatory education to the IEP team.

Many recent compensatory education awards have been creative: Draper v. Atlanta Indep Sch System 518 F.3d 1275, 49 IDELR 211 (11th Cir. 3/6/8) The Eleventh Circuit specifically approved of a private school placement as a form of compensatory education where the school district continued to use an ineffective reading program for three years despite the student's failure to make progress. Park v. Anaheim Union High Sch. Dist. 106 LRP 23543 (9th Cir. 4/17/6). The Ninth Circuit affirmed an award of compensatory education by a hearing officer in the form of requiring training of two of the teachers who implemented the student's IEP. The hearing officer phrased the award as compensatory education for the student in the form of training for his teachers in order to meet the student's needs. P by Mr & Mrs P v. Newington Bd of Educ 546 F.3d 111, 51 IDELR 2 (2d Cir 10/9/8) The Second Circuit affirmed an award of compensatory ed by a HO that required the school district to hire an inclusion expert for a year and to permit him to participate in the development of an FBA for the student; District of Columbia Public Schs (JG) 111 LRP 71480 (SEA DC 5/22/11) Where violation was failure to update IEP and resulting behavioral issues HO awarded as comp ed school district funding of summer camp suited to address

emotional issues; District of Columbia Public Schs (JG) 111 LRP 75901 (SEA DC 8/21/11) Where psychologist testified that student needed behavior therapy, HO awarded behavioral support services as comp ed; District of Columbia Public Schs (JG) 111 LRP 25934 (SEA DC 3/18/11) HO awarded computer software and a speech/language evaluation in addition to tutoring as comp ed; Mifflinburg Area Sch Dist (JG) 114 LRP 17516 (SEA Penna 3/18/14) HO declined to order additional tutoring as compensatory ed where the student suffered from fatigue; Instead HO rewrote IEP to reflect evaluative data and awarded the use of a laptop computer and appropriate software as well as an AT evaluation; Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12) HO awarded compensatory service of counseling where special ed director ridiculed mom and severely impaired her right to meaningfully participate in IEPT process resulting in student not receiving counseling sessions with social worker.

#### H. Stay Put

§ 615 (j) provides that (except in certain discipline cases), during the pendency of any due process or court proceedings pursuant to this section, unless the parties agree otherwise, the student "...shall remain in the **then-current educational placement** of the child..." This is commonly referred to as the **stay put** provision. The stay put placement is the last agreed upon IEP, unless the parties agree otherwise. See 34 C.F.R. § 300.518.

The Supreme Court interpreted and endorsed the stay put decision in the case of Honig v. Doe 484 U.S. 305, 108 S.Ct. 594, 559 IDELR 231 (1988). In that decision, the Supreme Court, noting the Congressional intent in preventing the exclusion of disabled students and reiterating the importance of the procedural safeguards under the IDEA, refused to read a dangerousness exception into the stay put provision. Honig v. Doe, supra. (NOTE; please note that IDEA'04 now has provisions pertaining to danger/injury. See discussion above.)

John M. by Christine M & Michael M v. Bd of Educ of the Evanston Township HS Dist No. 202 502 F.3d 708, 48 IDELR 177 (7th Cir. 9/17/7) The Seventh Circuit noted that determining "then current educational placement" is an inexact science requiring a **fact driven** approach. Respect for the purpose of the stay put provision requires focus upon the child's educational needs so the educational status quo for a "growing, learning, young person" often makes rigid adherence to a particular educational methodology an impossibility. Stay put, therefore, requires **flexibility** in interpreting the educational

placement per the last agreed upon IEP and flexibility concerning the child's needs. DM & LM ex rel EM v New Jersey Dept of Educ 801 F.3d 205, 66 IDELR 93 (Third Cir 9/10/15) The question of what constitutes a change of educational placement for stay put purposes is necessarily **fact specific**.

In other recent Circuit Court decisions: KD by CL v. Dept of Educ, State of Hawaii 58 IDELR 2 (9th Cir 12/27/11) Ninth Circuit held that the language of a settlement agreement prevented a private school from being the "as agreed" stay put placement. The agreement provided that the LEA would pay for a private school program for a specific period of time rather than merely agreeing to place the child in a private school. Therefore, LEA had no obligation to pay for the private school after the period of time designated in the agreement lapsed; and in Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) Second Circuit held that the parent was entitled to the **full value** of the related services provided for in the IEP not as money damages for a stay put violation, but rather as a form of compensatory education. (Full value of services not yet paid for by the parent.)

## I. Appeal Issues

### 1.) Representation

In Winkelman by Winkelman v. Parma City Sch. Dist 550 U.S. 516, 127 S.Ct 1994, 47 IDELR 281 (5/21/2007) the Supreme Court ruled by a 7 to 2 margin that the IDEA grants independent enforceable rights to parents as well as students. Accordingly, the court concluded that parents may pursue certain IDEA appeals in federal court without being represented by an attorney. NOTE: This decision applies only to federal court appeals of due process decisions. All parties agreed that a parent may appear at a due process hearing without counsel.

## 2.) Attorney's fees

### a) Attorney's fees

A prevailing parent may receive an award of attorney's fees from a court. A hearing officer has no authority to award attorney's fees.

### b) Expenses-Expert witness fees

In Arlington Cent. Sch. Dist Bd. of Educ v. Murphy 540 U.S. 291, 126 S.Ct. 2455, 45 IDELR 267 (6/16/06) the Supreme Court ruled that a parent who prevails in an IDEA case is not entitled to recover expert witness fees under the Act's provision allowing recovery of reasonable attorney's fees and costs. The parents cited the legislative history of the Act- including the joint statement of the House/Senate Conference Committee which stated that "The conferees intend the term 'attorney's fees as part of the costs' to include reasonable expenses and fees of expert witnesses..." The 6-3 majority of the Court, however, rejected the parents' argument, holding that "costs" is a legal term of art which does not generally encompass expert witness fees. Because Congress used the legal term of art "costs," rather than "expenses," the Court found that there is no need to review the legislative history. Thus the Court held that a prevailing parent in an IDEA case is not entitled to be reimbursed for expert witness fees.

## III. Procedural Aspects of Special Education Due Process Hearings

### A. Due Process Hearings

IDEA, § 615(f); 34 C.F.R. § 300.507 to .515

#### 1. Burden of Persuasion

Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (2005). The Court held that the **burden of persuasion** in an IDEA due process hearing is upon the party challenging the IEP. The "burden of persuasion" involves which party loses if the evidence is closely balanced. In any civil legal proceeding, if the evidence for both sides is equal, the party with the burden of persuasion loses. The Court exempted from its decision, however, the burden of persuasion applicable in those states that have laws or regulations placing the burden upon the school district.

Concerning the IDEA due process hearing process, the Court noted that such hearings are deliberately informal. The Court went on to note that the IDEA due process hearing was set up by Congress with the intention of giving the hearing officers the flexibility they need to ensure that each side can fairly present its evidence.

B. Impartial Due Process Hearing Officers  
IDEA, § 615(f)(3)(A); 34 C.F.R. § 300.511(c).

C. Representation

Whether a party may be represented by a non-lawyer at a due process hearing is determined by state law. 34 C.F.R. §300.152

C. Stay Put

IDEA, § 615(j); 34 C.F.R. § 300.518; § 3(J); Honig v. Doe decision. See previous discussion.

D. Pre-hearing Conferences

MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit approved of **HO reframing** the issues at the **PHC**.

E. Hearing Procedures

Memo to Chief Sch Officers Re Dispute Resolution Procedures Under Part B of IDEA 61 IDELR. 232 (OSEP 7/23/13) The 64 page Q & A attachment includes a section on due process hearings.

#### 1. Five day Disclosure Rule

This rule provides that where a party does not disclose its evidence (generally at least an exchange of exhibits and list of witnesses) at least **five business days** prior to the due process hearing, such evidence may not be admitted. 34 C.F.R. § 300.512(a)(3), & (b)(1)-(2); IDEA, § 615(f)(2) (evaluations only).

#### 2. Sufficiency of Due Process Complaint

IDEA provides that a party receiving a due process complaint may challenge the **sufficiency** of the complaint within 15 days of receipt. The due process hearing officer must make a determination on the face of the complaint (and notice) concerning sufficiency within 5 days. IDEA, § 615 (c)(2); 34 C.F.R. § 300.508 (d).

### 3. Resolution Session

IDEA provides that where a parent requests a due process hearing, the school district must convene a **resolution session** within 15 days of receipt. The school district may not bring their lawyer unless the parent does so. An agreement resulting from a resolution session is legally binding and enforceable in court, but either party may void such an agreement within 3 business days. The federal regulations provide that if a parent does not participate in the resolution session the district may request that the HO dismiss the complaint. IDEA, § 615 (f)(1)(B); 34 C.F.R. § 300.510.

### 4. Statute of Limitations

Two Years- (e) Timeline for requesting a hearing. A parent or agency must request an impartial hearing on their due process complaint within **two years** of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--

- (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
- (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

34 CFR §300.507(a)(2); §300.511(e) and (f); IDEA §615(b)(6)(B); IDEA §615(f)(3)(C)and(D)

GL by Mr GL & Mrs EL v Ligonier Valley Sch Dist Authority 66 IDELR 91 (Third Cir 9/22/15) IDEA's statute of limitations for filing a dpc is **2 years** and not 4 years as parent had argued. Dpc must be filed within 2 years of the date parent knew or reasonably should have known of the basis for the complaint. The IDEA statute of limitations **does not**, however, **limit the period of time for compensatory education**. If the dpc is timely filed, then the court/ho has broad equitable powers to remedy for the entire period of the violation even if it extends beyond two years;

DK by Stephen K & Lisa K v. Abington Sch Dist 696 F.3d 233, 59 IDELR 271 (3d Cir 10/11/12) The Third Circuit ruled that for either exception to the statute of limitations to apply, there is a **causation** requirement; ie, the parent must show that the misrepresentation or withholding caused the parent to fail to request a dph on a timely basis. Concerning the first exception, the parent must show a misrepresentation akin to **intent**, deceit or egregious misstatement and that the school officials had **knowledge** that its representations were untrue or

inconsistent with its own assessments; in other words, a parent must show that the school officials intentionally misled them or knowingly deceived them regarding the child's progress. Concerning the second exception, the withholding must relate to information that **IDEA requires** be disclosed to the parents. Common law **equitable tolling** doctrines do **not** apply to the IDEA statute of limitations

5. Evidence

IDEA, § 615(h)(2); 34 C.F.R. § 300.512(a)(2)

6. Representation

IDEA, § 615(h)(1); 34 C.F.R. § 300.512(a)(1).

7. Other procedures

IDEA, § 615(h)(3); 34 C.F.R. § 300.512(a)(4)&(5) and 300.512(c)(1)-(3).

BS by KS & MS v Anoka Hennepin Public Schs 66 IDELR 61 (Eighth Cir 9/2/15) Eighth Circuit ruled that an IDEA HO did not abuse his considerable discretion by enforcing a nine hour **time limit** for each side to present its evidence At the PHC, HO had asked each party how much time they needed and they said a day and a half. HO has a duty to oversee and manage the proceedings

F. 45 day Rule/ Deadline for Decision

The hearing officer's decision is due within **45 days** after the conclusion of the 30 day resolution period, subject to various possible adjustments. 34 C.F.R. § 300.511(e) and (f).

NOTE: due process hearings involving discipline issues are **expedited** hearings with different timelines. The due process hearing must be convened within 20 school days of the complaint and the hearing officer decision must be issued within 10 school days of the hearing. 34 CFR §300.532(c).

G. Decision

IDEA, § 615(h)(4); 34 C.F.R. §§300.512(a)(5), 300.513.

- i. (Introduction/Procedural History etc)
- ii. Findings of Fact
- iii. (Conclusions of Law)
- iii. Discussion/ Reasoning
- iv. Order- including Relief Issues

NOTE: IDEA'04 provides that the decision of the hearing officer must be on substantive grounds, and that a procedural violation may only result in a finding of denial of FAPE where the procedural violation significantly impedes the parent's opportunity to participate or causes a deprivation of educational benefit.  
IDEA, § 615 (f)(3)(E); 34 C.F.R. § 300.513.

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.

# **Special Education Law Update: Judicial and Administrative Decisions**

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**Written Materials to Accompany  
A Presentation for the  
Missouri Administrative Hearing Commission  
July 18- 19, 2016  
Jefferson City, Missouri**

## *I. Statutes and Regulations*

President Obama signed the Every Child Succeeds Act (S. 1177) into law in early December, 2015. This law is the reauthorization of the Elementary and Secondary Education Act, until recently also known as No Child Left Behind. You can read the text here. You may read the entire report of the House-Senate [Conference Committee](#) here. The Department of Education website has a wealth of [information](#) about the new law here. The White House [fact sheet](#) about the new law is available here. Even more resources about the law are available on the [Policy Insider blog](#) of our friends at the CEC.

On January 28, 2016, the Department of Education issued guidance to states on the transition to the new ESEA. The guidance is available here: <http://www2.ed.gov/policy/elsec/leg/essa/transitionsy1617-dcl.pdf> A previous Dear Colleague Letter by the Department of Education was issued on December 18, 2015 and is available here: <http://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf>

There are a few big changes that concern the education of students with disabilities. One is that the **highly qualified teacher** requirement is removed. Another is that the **adequate yearly progress** requirements are removed and replaced by a statewide accountability system.

The following chart compiled by the Council for Exceptional Children lists the other major changes in the law: CEC's Summary of Selected Provisions in Every Student Succeeds Act (ESSA) - In December 2015, the U.S. Congress passed the Every Student Succeeds Act (ESSA), which reauthorizes the Elementary and Secondary Education Act / No Child left Behind (ESEA/NCLB). This summary of selected provisions in ESSA is intended to provide information on issues relevant to children and youth with disabilities and gifts and talents. The summary includes new provisions as well as those provisions eliminated.

This summary is not intended to be exhaustive of all the provisions.

### **General**

- Transfers authority for accountability, educator evaluations and school improvement from the **federal government to the states** and local districts.

### **Assessments and Accountability**

- Maintains annual, statewide assessments in reading and math in grades 3 through 8 and once in high school, as well as science tests given three times between grades 3 and 12.
- Repeals adequate yearly progress and replaces it with a statewide accountability system.
- Includes the use of multiple measures in school performance.
- Maintains annual reporting of data disaggregate by subgroups of children including students with disabilities.
- Maintains with some modifications provisions for a cap of 1% of students with the most significant cognitive disabilities who can take the alternate assessment aligned to the alternate academic achievements standards.
- Helps states to improve low performing schools (bottom of 5% of schools). Actions will be determined locally not federally.
- Authorizes the use of federal funds for states and local school districts to conduct audits of state and local assessment systems to eliminate assessments that do not contribute to student learning.

### **Standards**

- Ensures States are able to choose their challenging academic standards in reading and math aligned to higher education in the state without interference from the federal government. The federal government may not mandate or incentivize states to adapt or maintain any particular set of standards, including Common Core.

### **Funding**

- Provides \$15+ billion a year to states in formula funding, as well as additional funds through competitive grants.
- Maintains maintenance of effort and supplement not supplant, with additional flexibility for States and local school districts.

### **Choice for Parents**

- Improves the Charter Schools Program by investing in new charter school models, as well as allowing for the replication and expansion of high quality charter school models.

### **Early Childhood**

- Authorizes the Preschool Development Grants program. This competitive grant program will use existing funding to support states that propose to improve coordination, quality and access for early childhood education and will be administered by the U.S. Department of Health and Human Services with the Department of Education.

### **Teacher Effectiveness**

- **Eliminates highly qualified.**
- **Eliminates** federally mandated **teacher evaluation system.**
- Includes an option to transfer unlimited amounts of professional development funds out of Title II.
- Encourages states and local school districts to develop teacher and principal residency and induction programs, support teachers and principals through professional learning and growth systems and leadership opportunities.
- Provides for the allowable use of funds for establishing or expanding teacher preparation academies.

### **Portability**

- Rejects “portability” provisions that would have allowed states to shift federal funds away from schools that need them most.

### **Vouchers**

- Rejects vouchers.

### **Pay for Success**

- Adds a pay for success initiative that is defined as a performance – based grant, contract, or cooperative agreement awarded by a public entity in which a commitment is made to pay for improved outcomes that result in social benefit and direct cost savings or cost avoidance to the public sector.

### **Mental Health**

- Requires consultation with school psychologists and other specialized instructional personnel in the development of state and local plans.

- Recognizes school – based mental health services as an evidence – based whole – school improvement and targeted intervention strategy.
- Authorizes significant investments for states and districts to implement: comprehensive school mental health services, efforts to improve school climate and school safety, strategies to reduce bullying and harassment, and activities to improve collaboration between school, family and the community.

### **Gifted and Talented**

- Authorizes the Javits Gifted and Talented Students Education Act supporting high ability learners and learning.
- Includes strong provisions for the disaggregation of student achievement data by subgroup at each achievement level on state and local report cards.
- Provides options to include the identification of and service to students with gifts and talents in local education agency plans.
- Provides options to include professional development plans for gifted and talented educators in Title II.

### **Children with Disabilities**

- Ensures access to the general education curriculum.
- Ensures access to accommodations on assessments.
- Ensures concepts of Universal Design for Learning,
- Includes provisions that require local education agencies to provide evidence – based interventions in schools with consistently underperforming subgroups.
- Requires states in **Title I plans** to address how they will improve conditions for learning including reducing incidents of bullying and harassment in schools, overuse of discipline practices and reduce the use of aversive behavioral interventions (such as restraints and seclusion).

## *II. The United States Supreme Court*

The U S Supreme court finally decided not to consider Ridley School District v. M. R., ex rel E. R., Docket No 13-1547. 135 S.Ct 2309, 115 LRP 21644 (S.Ct. 5/18/15). The issue was whether operation of a “stay-put” provision in 20 U.S.C. § 1415(j) – which requires that a child whose educational program under the Individuals with Disabilities Education Act is under dispute to remain in his or her then-current placement while statutory “proceedings” to resolve the dispute are pending – terminates upon entry of a final judgment by a state or federal trial court in favor of the school district, as the D.C. and Sixth Circuits have held, or whether it continues until completion of any subsequent appeal of that judgment, as the Third and Ninth Circuits have held. After requesting a brief from the Solicitor General, the Court denied cert. See my [blog post](#).

The high court has also declined review of a number of other potential cases. The primary examples are the following:

A. Jordan v Fairfax County Sch Bd 134 S.Ct 1538, 114 LRP 13487 (3/24/14) cert den re Fourth Cir decision.

B. Tustin Unified Sch Dist v KM 134 S.Ct 1493, 114 LRP 9688 (3/3/14) cert den. (9th Cir had held that IEPs for hearing impaired students must consider ADA effective communication requirements.)

C. Poway Unified Sch Dist v DH by KH 134 S.Ct 1494, 114 LRP 9909 (3/3/14) cert den (9<sup>th</sup> Cir had ruled that IEPTs for hearing impaired students must consider whether they need real time captioning to benefit)

D. Mastery Charter Sch v RB 134 S.Ct 1280, 114 LRP 8801 (2/24/14) cert den on unpublished 3d Cir decision

E. AK v Gwinnett County Sch Dist 135 S.Ct 78, 114 LRP 43723 (10/6/14) cert den.

### *III Other Key Judicial and Administrative Decisions*

#### *A. Due Process Hearing Issues*

##### **1. IDEA'04 Issues**

###### **a. Resolution Session**

1. FH by Hall v Memphis City Schs 764 F.3d 638, 64 IDELR 2 (6<sup>th</sup> Cir 9/4/14) A 97 day gap between the resolution meeting and the parties signing a settlement agreement did not prevent a 20 year old former student from suing to enforce the settlement. There is no time limit on enforcing resolution session agreements, and a resolution agreement is enforceable in court.

2. Letter to Savitt 64 IDELR 250 (OSEP 2/10/14) The same principles concerning the **tape recording** of IEPT meetings applies to **resolution sessions**: an SEA or LEA may require, prohibit, limit or otherwise regulate the use of recording devices at IEPT meetings, except as may be necessary for a parent to understand the IEP or the process.

3. JY by EY & GY v. Dothan City Bd of Educ 63 IDELR 33 (MD Ala 3/31/14) SD violated IDEA by not having a person with **decision making authority** present at a resolution session. Court ruled that this was a procedural violation that was **harmless** where no settlement was reached at the resolution session.

4. Charlene R v Solomon Charter Sch 64 IDELR 208 (ED Penna 11/21/14) Where parent had reached an agreement with a charter school that later went insolvent, court required SEA to step in and defend breach of contract suit to ensure FAPE provided.

5. Bd of Educ Evanston Skokie Community Dist 65 v. Risen 63 IDELR 191 (ND Ill 6/24/14) Court ruled that the IDEA'04 restriction against attorney fees for resolution sessions did not apply to mediations. Court awarded fees.

*b. Sufficiency of Complaint*

1. Anello v. Indian River Sch Dist 107 LRP 7179 (Del. Family Ct. 1/19/07) Citing the Weast Supreme Court decision, the court held that the IDEA pleading standard requires only **minimal** specificity. The court reversed the HO panel that required too much specificity;

*c. Statute of Limitations (2 years)*

1. DK by Stephen K & Lisa K v. Abington Sch Dist 696 F.3d 233, 59 IDELR 271 (3d Cir 10/11/12) The Third Circuit ruled that for either exception to the statute of limitations to apply, there is a **causation** requirement; ie, the parent must show that the misrepresentation or withholding caused the parent to fail to request a dph on a timely basis. Concerning the first exception, the parent must show a misrepresentation akin to **intent**, deceit or egregious misstatement and that the school officials had **knowledge** that its representations were untrue or inconsistent with its own assessments; in other words, a parent must show that the school officials intentionally misled them or knowingly deceived them regarding the child's progress. Concerning the second exception, the withholding must relate to information that **IDEA requires** be disclosed to the parents. Common law **equitable tolling** doctrines do **not** apply to the IDEA statute of limitations; Mr S ex rel BS v Regional Sch Unit 72 64 IDELR 202 (D Maine 11/29/14) Court ruled that exception did not apply where parents could not show specific misrepresentation.

2. GL by Mr GL & Mrs EL v Ligonier Valley Sch Dist Authority 66 IDELR 91 (Third Cir 9/22/15) IDEA's statute of limitations for filing a dpc is **2 years** and not 4 years as parent had argued. Dpc must be filed within 2 years of the date parent knew or reasonably should have known of the basis for the complaint. The IDEA statute of limitations **does not**, however, **limit the period of time for compensatory education**. If the dpc is timely filed, then the court/ho has broad equitable powers to remedy for the entire period of the violation even if it extends beyond two years. In the Third Circuit, a child who is denied FAPE is entitled to compensatory education for the full period of deprivation excluding the time reasonably required by the district to remedy the situation; Ms S ex rel BB v Regional Sch Unit #72 65 IDELR 140 (D Maine 3/31/15) adopting 64 IDELR 202. Court adopted Mgst recommendation and ruled that two contradictory state regulations re dph S/L (4 and 2 years) should be read consistent with the legislature's intent as being a 2 year statute; Contrast, (??) Jana K by Tim K v Annville Cleona Sch Dist 63 IDELR 278 (MD Penna 8/18/14) Court stated that IDEA statute of limitations is **potentially four years** (stacking two distinct S/Ls in IDEA).(??)

3. TP by JP & BP v Bryan County Sch Dist 792 F.3d 1284, 65 IDELR 254 (Eleventh Cir 7/2/15) Eleventh Circuit ruled that parents request for an IEE was **moot** as LEA evaluation was **no longer current** because of triennial reevaluation process. Court rejected analysis of HO and lower court that the 2 year statute of limitations barred the request. SD evaluated second grader with autism in September 2010. In November 2012, parents requested an IEE. In January 2013, parents filed suit for an IEE. Eleventh Circuit declined to address the statute of limitations, instead ruling the request was moot.

4. Sam K by Diane C & George K v State of Hawaii, Dept of Educ 788 F.3d 1033, 65 IDELR 222 (Ninth Cir 6/5/15) Ninth Circuit ruled that parent claim for reimbursement for a private placement was not barred by state 180 day statute of limitations for reimbursement where LEA tacitly agreed to a private placement where it did not propose a public placement for the 2010-11 school year after a settlement agreement required LEA to pay for the private placement for 2009-10 school year.

5. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit affirmed dismissal of claims outside two year statute of limitations. The exceptions did not apply.

6. Letter to Zirkel 66 IDELR 288 (OSEP 12/9/15) OSEP stated that it is **considering further guidance** concerning IDEA's **statute of limitations**. In comments to 2006 regulations, OSEP had opined that the S/L is two years and not four years (71 Fed Reg 46706) similar to decision by Third Circuit in GL. (although GL ruled that relief may extend beyond two years.)

7. In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) HO ruled that where counsel for the school district did not argue the statute of limitations as a defense in its written post hearing brief, the defense was **waived**.

8. In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) HO ruled that where counsel for the school district did not argue the statute of limitations as a defense in its written post hearing brief, the defense was **waived**.

9. Independent Sch Dist #413, Marshall v AJ by MN 66 IDELR 41 (D Minn 8/11/15) HO did not err in **considering evidence** more than two years before dpc- only the violation must be within two years.

10. Holden v Miller-Smith 63 IDELR 154 (WD Mich 6/20/14) Court has previously dismissed parent IDEA lawsuit re misuse of mechanical restraints for failure to exhaust where no dph first; Parent action for events 5 years ago was also barred by statute of limitations. Equitable tolling does not apply to IDEA, but even if it did, not applicable here where parents were aware of the two year statute of limitations yet unreasonably insisted that the exhaustion was futile.

11. TP by JP & RP v Bryan County Sch Dist 63 IDELR 45 (SD Ga 3/24/14) Court applied IDEA two year statute of limitations to **IEE request** and affirmed HO who had dismissed a request for an IEE 2 years and 2 months after an SD evaluation as untimely.

12. Pagan-Melendez v Commonwealth of Puerto Rico 64 IDELR 111 (DPR 9/16/14) Court applied a three-year statute of limitations to IDEA **attorney's fee** claims using a similar territory statute of limitations; Suarez Martinez ex rel FSM v Commonwealth of Puerto Rico 63 IDELR 221 (DPR 7/16/14) (same)

*d. Time Limit for Appeals*

1. DG by Catisha T v New Caney Independent Sch Dist 66 IDELR 209 (5th Cir 11/10/15) Fifth Circuit ruled that a parent's **claim for attorney's fees need not** be filed within **IDEA's time limit for appeals.**; Meridian Joint Sch Dist No. 2 v. DA ex rel MA 792 F.3d 1054, 65 IDELR 253 (Ninth Cir. 7/6/15)(same); Doe v Boston Public Schs 64 IDELR 296 (D Mass 1/23/15) Court reversed its previous decision and ruled that S/L = 3 yrs). Contrast, Brittany O ex rel L v Bentonville Sch Dist 64 IDELR299 (ED Ark 1/22/15) 90 day time limit applies to attorney's fees petitions

2. JH by Sarah H v Nevada City Sch Dist 65 IDELR 77 (ED Calif 3/6/15)

Court dismissed parent appeal of a decision on parent's state complaint in favor of SD as untimely. Borrowing IDEA's **90 day** statute of limitations for appeals, this case untimely where 127 days after decision.

*e. Hearing Officer Training and Qualifications*

1. (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13)

Ct rejected as baseless parent allegations that HO was incompetent. HO did not act inappropriately by keeping witness testimony to the issues stated at the PHC.

2. Florida Dept of Educ 114 LRP 47196 (SEA FL 5/13/14) State complaint investigator ruled that SEA had properly trained hos regarding 45 day rule/ deadline for issuance of decision; Lofisa S ex rel SS v State of Hawaii, Dept of Educ 64 IDELR 163 (D Haw 11/14/14) Court rejected allegations that HOs were not qualified as unfounded.

*f. Amendment of Complaint/ Limitation of Issues*

1. HW & HG ex rel MW v NY State Educ Dept 65 IDELR 136 (EDNY 3/31/15)

Court ruled that HO did **not exceed** her authority by considering a 1:1 aide where dpc did not raise the issue because direct 1:1 intervention was required for this child.

2. LWL & EL ex rel CL v Pelham Union Free Schs 66 IDELR 241 (SDNY 12/9/15) **HO exceeded** her jurisdiction by addressing 3 issues not in dpc; Dixon v Dist of Columbia 65 IDELR 67 (DDC 3/18/15) Predetermination claim was not properly before the court where not in dpc and not an issue considered by HO; AT & CT ex rel LT v Fife Sch Dist 66 IDELR 104 (WD Wash 9/9/15) Where parents did not raise issues before HO concerning paraeducator support or appropriateness of prior year IEP, the issues were not properly before the court. McAllister v Dist of Columbia 63 IDELR 130 (DDC 5/21/14)

adopting *Mgst @ 62 IDELR 294*. Parent was not permitted to raise issue of alleged denial of FAPE during 46 day period of incarceration where parent's dpc did not raise this issue.

***g. Response to Complaint*** (no significant cases)

***h. Attorney's Fees against Parents***

1. CW by KS v Capistrano Unified Sch Dist 784 F.3d 1237, 65 IDELR 31 (Ninth Cir 3/2/15) Ninth Circuit held that parent's IDEA and §504 claims were **not frivolous** and therefore SD could not recover attorney fees vs parent. Court reasoned that a claim is not frivolous for fee shifting purposes unless it is wholly without merit. Here HO carefully considered parent's arguments and district evaluation and that careful analysis showed parent claims were serious. \$95K award reversed and remanded re ADA and §1983 claims, but record evidence did not support that ADA claim was for an improper purpose (to extort settlement money from SD); Held v Northshore Sch Dist 65 IDELR 139 (WD Wash 3/31/15) No fees vs parent; **just because parent did not prevail** on IDEA issues does not mean frivolous, unreasonable or for improper purpose; AL & PLB v Jackson County Sch Bd 64 IDELR 266 (ND Fla 1/6/15) (same); Shadie v Hazelton Area Sch Dist 66 IDELR 106 (MD Penna 9/8/15) (same) AA & LA ex rel AA,Jr v Clovis Unified Sch Dist 65 IDELR 18 (ED Calif 1/27/15) (no fees vs parents because of a pleading error); Bobby v. Sch Bd of City of Norfolk 64 IDELR 175 (ED Va 10/20/14) Court denied SD request for attorney fees against parent attorney where not frivolous;

2. Jackson County Sch Bd v PLB 66 IDELR 127 (ND Fla 9/29/15) Court denied SD motion for atty fees vs parents lawyer. While dph pending parents filed 2d dpc over cancellation of subsequent IEPT meeting. HO dismissed because of stay put. Court

disagreed noting that although SD cannot compel a new IEP while dph pending, parties can agree so stay put did not bar the meeting. @d dpc was not frivolous or unreasonable.

3. AL by PLB v Jackson County Sch Bd 63 IDELR 168 (ND Fla 5/22/14)

Court adopted Mgst recommendation @ 63 IDELR 136, and sanctioned parent's lawyer at \$6,000 for SD attorney fees where parent brought a claim similar to one previously denied by the 11<sup>th</sup> Circuit where same attorney brought the case decided by the 11<sup>th</sup> Circuit, therefore **frivolous** but no intent to harm therefore middle ground sanction; . AL by PLB v Jackson County Sch Bd 60 IDELR 187 (ND Fla 2/15/13) Court awarded attorney's fees against parent lawyer where he participated in a case with very similar facts in 2007 so he knew that arguments in current case were frivolous; Capital City Charter Sch v Gambale 63 IDELR 6 (DDC 3/20/14) Where parent lawyer filed a frivolous dpc without foundation alleging a four month delay when any delay was caused by parent and her lawyer, court awarded more than \$11,000 to charter school as attorney's fees; MM & CM ex rel BM v Plano Indep Sch Dist 63 IDELR 49 (ED Tex 3/19/14) Court awarded \$4,000 attorney's fees against parent lawyer removed part of a settlement agreement before providing it to the court for its review; Turton v Virginia Dept of Educ 64 IDELR 305 (ED Va 1/15/15) Court imposed sanctions vs parent's lawyer where he sued SD lawyers. No legal research where under state law SD lawyers have no duty to parents of SpEd students and no factual research where complaint alleged that SD lawyers represented 4 SDs when they only represented two.

4. Bethlehem Area Sch Dist v Zhou 63 IDELR 186 (ED Penna 7/1/14)

Court referred to parent's dpc as an abuse of the administrative process and directed both parties to pare down their large requests for attorney's fees.

5. Northport Public Schs v Woods ex rel TW 63 IDELR 134 (WD Mich 5/14/14) Court denied parent motion to dismiss SD claim for attorney fees alleging that parent claim was frivolous, unreasonable and for improper purpose.

*i. Response to Intervention/ SLD*

1. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) 2-1 majority of Ninth Circuit held that a school district denied FAPE by failing to share more than a year's worth of **RtI data** with a student's parents. Although the district used the severe discrepancy model to conclude that the student was eligible, without the RtI data, the parents were denied meaningful opportunity to participate. The procedural violation was actionable because without the data, the parents, unlike other IEPT members were unable to decipher the student's unique needs.

*j. Peer-reviewed Research to the Extent Practicable*

1. Ridley Sch Dist v. MR & JR ex rel ER 680 F.3d 260, 58 IDELR 271 (3d Cir 5/17/12) Although a school should strive to base a student's specially designed instruction on peer-reviewed research to the maximum extent possible, the student's IEPT retains flexibility to devise an appropriate program, in light of available research. The team need not select the service with the greatest body of research, and the law does not provide that a failure to provide services based upon peer-reviewed research automatically results in a denial of FAPE. Methodology choice remains within the discretion of school officials.

2. District of Columbia Public Schs (JG) 111 LRP 23798 (SEA DC 1/28/11) Although schools should strive to base a student's specially designed instruction on peer-reviewed research to the maximum extent possible, the student's IEP team

retains flexibility to devise an appropriate program in light of the available research. The method with the greatest body of research need not be selected and nothing in the law provides that a failure to provide services based upon peer-reviewed research automatically results in a denial of FAPE. The final decision about the special education and related services to be provided must be made by the IEP team based upon the child's individual needs.

*k. IEP Amendment* (no significant cases)

*2. Difficult Parties/Lawyers*

a. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WV 11/4/9), aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (4th Cir. 4/27/10) NB: **UNPUBLISHED**, Pro se parent requested **indefinite continuance** and HO requested more information. Parent refused to provide more information as to parent's medical conditions on privacy grounds. HO granted a short continuance but denied request for an indefinite continuance as not permitted under IDEA. Parent did not appear at hearing. HO denied motion to dismiss, but **imposed** the **sanction** of proceeding to hearing without the parent being present. Ct affirmed HO rulings no abuse of discretion as hearing procedures are within the discretion of the HO; Student v Preston Bd of Educ, et al (JJ)(SEA CT 7/9/14) After the first day of dph, parent requested a continuance for unspecified medical reasons without a corresponding motion to extend the decision deadline. HO refused to grant continuance and dismissed dph. You can read the decision [here](#).

b. Utah Schs for the Deaf & Blind (JG) 111 LRP 29590 (SEA UT 4/8/11) Ho has wide discretion to regulate hearing procedures for a dph –including the power to require

compliance with HO's reasonable directives. Where parent **failed to comply** with HO's directives by failing to cease giving details of settlement negotiations and failing to provide dates for PHC, HO **dismissed dpc**.

c. Dist of Columbia Public Schs (JG) 111 LRP 77405 (SEA DC 7/20/11)

Where the attorneys **failed to notify** the HO of the resolution meeting agreement not to agree for weeks after it happened, HO imposed **sanction** on both attorneys **limiting** their presentations at dph to 4 hours each plus a reasonable time for closing argument. Appropriate sanctions may be imposed where counsel fail to follow the reasonable directives of the HO.

d. Shikellamy Sch Dist 112 LRP 9604 (JG) (SEA Penna 1/28/12) HO ruled that the student's mother was not a "parent" for purposes of IDEA where a state court had terminated her educational decision-making authority. The issue was not custody but rather educational decision-making authority. HO rejected mom's argument that the fact that she had such authority at the time of filing the dpc was controlling; noting that the mom had no authority to pursue the dph or obtain relief under IDEA.

e. Student v Hartford Bd of Educ No. 15-0384 (JJ) (SEA CT 9/15/16). Where a pro se parent refused to provide witness and exhibit information after numerous instructions from the hearing officer, failed to request an extension, and otherwise failed to comply with HO orders, HO dismissed parent dpc with prejudice for failure to prosecute. The decision is [available here](#).

f. Bd of Educ of the County of Boone WV v KM 65 IDELR 138 (SD WV 3/31/15) Court denied SD motion to stay enforcement of HO decision pending appeal. HO ordered SD to pay for private ABA services and when HO ordered that relief it

became stay put. The fact that **SD failed to pay** does not justify stay; Doe v Boston Public Schs 64 IDELR 296 (D Mass 1/23/15) Because of foot-dragging by SD causing parent attorney to focus on services for the child rather than attorneys fees petition, court changed its previous ruling and allowed 3 years to file fee petition.

g. Oconee County Sch Dist v AB by LB 65 IDELR 297 (MD Ga 7/1/15) Court affd HO remedy, including **reduction** of reimbursement for transportation by **50%** where both parties derailed the **collaborative** process. @n.5: Court encourages the parties to **work together** in the interest of the student.

h. Tyler J by Cheryl Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDELR 45 (D Haw 2/24/15) @n.6 Court rebuked parents for **presenting** the court with a **draft settlement** agreement where the parties never agreed to a settlement. Court did not consider the draft.

i. Jackson County Sch Bd v PLB 66 IDELR 127 (ND Fla 9/29/15) Court noted that the **conduct** of parent's attorney "left much to be **desired**," and that the fact that SD lost patience is understandable, but that does not make the dpc frivolous or for an improper purpose.

j. FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15) Equities favored parent for reimbursement purposes where they cooperated throughout and where LEA **ignored several inquiries** by parents;

k. North Kingston Sch Committee v Justine R ex rel MR 65 IDELR 105 (DRI 3/12/15) mostly adopting MGST @ 65 IDELR 79. Court reduced parent's attorney's fees because of unreasonable **protraction** of litigation; Turton v Virginia Dept of Educ 64 IDELR 305 (ED Va 1/15/15) Court imposed sanctions vs parent's lawyer where he sued

SD lawyers. No legal research where under state law SD lawyers have no duty to parents of SpEd students and no factual research where complaint alleged that SD lawyers represented 4 SDs when they only represented two.

l. WS v Wilmington Area Sch Dist 66 IDELR 249 (WD Penna 11/30/15) Court found non-custodial mom's inconsistent pleading statement to have been made in **bad faith**; GK & CB ex rel TK v Montgomery County Intermediate Unit 66 IDELR 288 (ED Penna 7/17/15) Court upheld HO finding that **obstructive** conduct by the parent interfered with the implementation of the student's IEP.

m. Lee v Natomas Unified Sch Dist 65 IDELR 41 (ED Calif 2/25/15) Court permitted parent §504/ADA claim to continue where SD required that all communications from parent **go through SD lawyer**. Court had also denied SD request for a **TRO** keeping parent away.

n. Crawford v San Marcos Consolidated Independent Sch Dist 64 IDELR 306 (WD Tex 1/15/15) Mgst recommended dismissal of parent 504/ADA claims where parent settled previous IDEA suit and signed waiver agreeing to dismiss all claims that were or could have been brought against SD to date. Second suit was dismissed because of waiver. Third suit was dismissed because of res judicata.

o. Dervishi ex rel TD v Stamford Bd of Educ 66 IDELR 60 (D Conn 8/5/15) No violation of IDEA where SD held two **IEPT meetings without parents** where parents were offered numerous dates and failed to avail themselves of the opportunity. Not a violation where parents are **intransigent**; Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 200 (ND Calif 12/2/14) Where parents attended IEPT meeting that was suspended to be reconvened after members reviewed evaluative data, but while

suspended parents filed dph and informed SD that it **would not attend** further IEPT meetings until HO ruled, SD did not violate IDEA by developing an IEP without additional meetings; AL by PLB v Jackson County 64 IDELR 173 (ND Fla 10/30/14) No IDEA violation where SD held IEPT meeting without parent, where exclusion was the result of the parent's own actions: meeting had been rescheduled multiple times, and parent refused to participate by telephone;

p. Edward S & Virginia S ex rel TS v West Noble Sch Corp 63 IDELR 34 (ND Ind 3/31/14) Although **dismissal with prejudice** is an especially harsh **sanction of last resort**, court affirmed ho dismissal of grandparents dpc where their attorney disregarded ho's order that PHCs not be recorded Although court was troubled that ho showed disrespect to grandparents' attorney at the beginning of the first PHC, ho's **edginess** receded after 10-15 minutes. Court found that dismissal with prejudice was **not an abuse of discretion** where attorney acted in direct contravention of ho's orders four times. Under IDEA and state law, a party has an opportunity for a dph in a timely manner, but they can forfeit that right; Silva v Dist of Columbia 63 IDELR 217 (DDC 7/21/14) An IDEA HO has the authority to dismiss dpcs **with and without** prejudice. Although with prejudice is a **harsh sanction**, no abuse of discretion where parent failed to comply with HO's directive.

q. DS by Clarence S v Dept of Educ, State of Hawaii 63 IDELR 135 (D Haw 5/5/14) Mgst found SD (also SEA) in **civil contempt** for failure to comply with previous stay put order requiring it to pay for student's private placement through conclusion of the case and awarded parent's attorney fees as a **sanction**;

r. Card ex rel JD v Citrus County Sch Bd 65 IDELR 3 (MD Fla 2/12/15)

Although **pro se** parties are held to less stringent standards and their pleadings must be liberally construed, they must still comply with the rules. Here failure to specify facts and failure to include or describe administrative record caused court to dismiss, with leave to amend; Horen v Bd of Educ of the City of Toledo Public Schs 63 IDELR 290 (ND OH 8/1/14) Court imposed Rule 11 sanctions vs **pro se** parent for > \$32K in attorney fees. Parent had filed three previous complaints which the court had dismissed, warning on two occasions of future sanctions. Court concluded that **sanction** is only way to **deter** this **misbehavior**. (@n.3: Parent response to SD motion to dismiss was **5,500 pages** long.); Aaron v Gwinnett County Sch Dist 64 IDELR 16 (ND GA 8/19/14) Court noted that although pleadings by **pro se parties** are entitled to **liberal** construction, such generosity does **not excuse** them from complying with the court's **procedural rules** Finley v Shelby County Schs 114 LRP 3705(WD Tenn 1/22/14) adopts Mgst @ 114 LRP 3712. Court dismissed complaint of pro se parents where they failed to amend complaint within time allowed; Hinton ex rel MWH v Lenoire County Public Sch Bd 66 IDELR 76 (EDNC 8/6/15) adopted in part @66 IDELR 109. Mgst recommended dismissal of **pro se** parents complaint where parent had disregarded court order requiring her to state how she had exhausted administrative remedies.

s. MC v Starr 64 IDELR 273 (D Md 12/29/14) Parents acted in bad faith by refusing to consider other placement options at IEPT meeting.

t. Colon Vazquez v Dept of Educ of Puerto Rico 64 IDELR 244 (DPR 12/4/14) Because of **repeated failure** of LEA (=SEA) to develop and implement an IEP for the student, the court issued an injunction with strict deadlines. The court concluded

that court oversight is necessary because only the threat of contempt would persuade the LEA to fulfill its legal obligations. {See 64 IDELR 108 (same case) and Colon Vazquez v Dept of Educ of Puerto Rico 64 IDELR 312 (DPR 1/31/15) Court refused to reconsider 64 IDELR 244.}; Fortes-Cortes v Garcia-Padilla 66 IDELR 18 (DPR 7/23/15) Because of SEA's **history of non-compliance with HO decisions** in parents' favor, court allowed parent to forego exhaustion with dph to enforce a settlement agreement reached at IEPT meeting by going directly to court. Exhaustion was futile given SEA willingness to disobey judicial and administrative orders; Rivera-Quinones ex rel AVR v Dept of Education of Puerto Rico 65 IDELR 202 (DPR 5/4/15) In view of SEA's (also = LEA) **history of not acting with urgency** when it comes to the rights of SpEd students, court ordered SEA to provide the covered ramps needed by this student and to inform the court of its execution of the ramp project despite parent's failure to exhaust;

u. Blackman v Dist of Columbia 64 IDELR 169 (DDC 11/4/14) Court deplored the egregious conduct by SD lawyer who had directed school staff to call **police** who **removed** parent's lawyer from an IEPT meeting. SD also contacted parent and offered alternative compensatory education if parent attended IEPT meeting without her attorney. Parent had a right to have her lawyer at an IEPT as a discretionary team member; Grasmick ex rel AG v Matanuska Susitna Borough Sch Dist 64 IDELR 68 (D Alaska 4/23/14) Court found that while teachers and providers were at the parent's home to provide homebound instruction they were **verbally abused, threatened and denied access** to the student. Court affirmed HO order for IEPT to obtain an opinion from the student's physician concerning whether a location outside the home might be appropriate, but in the meantime court ordered SD to provide homebound services and ordered the

parents to cooperate with providers.; Canders v Jefferson County Public Schs 64 IDELR 36 (WD KY 9/15/14) Court dismissed Parent's IDEA claim for failure to exhaust. SD had parent cited for criminal **trespass** but that did not excuse failure to file dpc. Court dismissed parent defamation action where parent requested resources for the student's behaviors and SD personnel suggested spanking them, psychiatric care and child protective services but parent could not show damage to reputation.

v. Brianna v Pittsburg Unified Sch Dist 63 IDELR 287 (ND Calif 8/4/14) SD sought a stay pending appeal of court's order that it evaluate the needs of student with MS, calling it a **waste of time and money**. Court refused stay.

w. Capital City Charter Sch v Gambale 63 IDELR 6 (DDC 3/20/14) Where parent lawyer filed a frivolous dpc without foundation alleging a four month delay when any delay was caused by parent and her lawyer, court awarded more than \$11,000 to charter school as attorney's fees; MM & CM ex rel BM v Plano Indep Sch Dist 63 IDELR 49 (ED Tex 3/19/14) Court awarded \$4,000 attorney's fees against parent lawyer removed part of a settlement agreement before providing it to the court for its review; Oakstone Community Sch v Williams 63 IDELR 258 (SD OH 7/23/14) Court awarded \$7,500 in Rule 11 **sanctions** vs SD lawyer who cited outdated legal authority; repeatedly filed unsealed and unredacted copies of the student's educational records and asserted non-existent First Amendment rights; AL by PLB v Jackson County Sch Bd 63 IDELR 168 (ND Fla 5/22/14) Court adopted Mgst recommendation @ 63 IDELR 136 sanctioned parent's lawyer at \$6,000 for SD attorney fees where parent brought a claim similar to one previously denied by the 11<sup>th</sup> Circuit where same attorney brought the case decided

by the 11<sup>th</sup> Circuit, therefore frivolous but no intent to harm therefore middle ground sanction.

x. Intravaia by Intravaia v Rocky Point Union Free Sch Dist 64 IDELR 274 (EDNY 12/22/14) Court dismissed SD lawyer's motion for sanctions vs parent lawyer for naming SD lawyer as a party in an IDEA appeal. Motion of SD lawyer failed to be filed separately from other motions and it did not allow 21 days to withdraw or correct defective pleading as required by Rule 11©.

y. Luo v Baldwin Union Free Sch Dist 62 IDELR 260 (ED NY 2/12/14) Court dismissed counterclaim by hearing officer for abuse of process against parent who had sued him after a dph because in 2d Cir, abuse of process requires more than filing a lawsuit (which was promptly dismissed). Parent's motion for sanctions against ho was dismissed because the counterclaim was not frivolous. @n2, court reprimanded parent for continuing to use improper language in court filings, including calling ho an **“asshole kisser.”**

z. Tripp v Imbusch 62 IDELR 162 (D Mass 2/11/14) Court dismissed parent action against principal where principal had qualified immunity; parent had alleged defamation and First Amendment violation when principal sent parent a letter instructing her **not to contact teacher** without first scheduling a meeting.

aa. Retamar-Lopez v Bd of Educ of the Dublin City Sch Dist 62 IDELR 196 (SD Ohio 1/21/14) Court dismissed for failure to exhaust administrative remedies. HO had dismissed after parent **failed to show** up for dph. Court ruled by failing to show, parent had not exhausted.

bb. Sch Bd of City Of Suffolk v Rose ex rel CAR 66 IDELR 137 (ED Va 9/22/15) Although as a general rule services are far more important than disability category, here misidentification violated IDEA because it affected the student's inappropriate placement and was done because of **acrimonious relationship** with parent advocate.

### 3. *Hearing Officer Bias*

a. (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Ct rejected as baseless parent allegations that HO was biased and incompetent. An IDEA HO enjoys a **presumption** of honesty and integrity that may be overcome only by a showing of bias. Here no such evidence offered by parent.

b. Warrior Run Sch Dist (JG) 113 LRP 39220 (SEA Penna 9/10/13) An IDEA HO enjoys a **presumption** of honesty, integrity and freedom from bias that may be overcome only by a showing that HO has a conflict of interest or actual bias.

c. JN & JN ex rel JN v South Western Sch Dist 64 IDELR 65 (MD Penna 9/24/14) Court rejected parent request to supplement record on appeal with evidence of HO bias. Parent did not sufficiently allege bias where she claimed that lawyer for SD also represented ODR (the agency that supervises hos) in a lawsuit by a former ho. A past working relationship with a party or counsel does not render HO biased.

d. Williams by Williams v Milwaukee Public Schs 64 IDELR 237 (ED Wisc 12/12/14) Court rejected allegations of HO bias as baseless and the result of the parents' longstanding dissatisfaction with SD and the administrative process; Lofisa S ex rel SS v State of Hawaii, Dept of Educ 64 IDELR 163 (D Haw 11/14/14) Court rejected allegations of HO bias as unfounded; Avila v Spokane Sch Dist #81 64 IDELR 171 (ED

Wash 11/3/14) Court rejected allegations of ho bias where no evidence suggested that HO was biased or dph unfair.

#### ***4. Hearing Officer Authority***

a. BS by KS & MS v Anoka Hennepin Public Schs 66 IDELR 61 (Eighth Cir 9/2/15) Eighth Circuit ruled that an IDEA HO did not abuse his considerable discretion by enforcing a nine hour **time limit** for each side to present its evidence At the PHC, HO had asked each party how much time they needed and they said a day and a half. HO has a duty to oversee and manage the proceedings; Letter to Kane 65 IDELR 20 (OSEP 1/7/15) OSEP ruled that a state “best practice” procedure that **limited dphs** to 3 days of 6 hours each was **consistent with IDEA** requirements, where HO had the authority to expand the time period and where a party has the ability to appeal to court; LS by Julia V v Bd of Educ, Lansing Sch Dist 65 IDELR 225 (ND Ill 6/11/15) HO properly managed dph by keeping the testimony **moving along** and did not impose arbitrary time limits; TM v Dist of Columbia 64 IDELR 197 (DDC 12/3/14) Court upheld HO’s placing **time limits** on direct and cross examination of witnesses on the third and final day of a dph as a reasonable exercise of discretion;

b. SL by Loof v Upland United Sch Dist 747 F.3d 1155, 63 IDELR 32 (9<sup>th</sup> Cir 4/2/14) @n.2 Ninth Circuit reversed District Court holding that an IDEA hearing officer has the authority to **review or enforce a settlement agreement**; Note that in South Kingston Sch Committee v Joanna S ex rel PJS 64 IDELR 191 (1<sup>st</sup> Cir 12/9/14)@n3 First Circuit did not address whether an IDEA HO has the authority to enforce or interpret a settlement agreement but noted that **courts are split** on the issue; District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) HO held that

an IDEA HO has the authority to **enforce** a settlement agreement pertaining to the issues of identification, evaluation, placement or FAPE.

c. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit ruled that the state department of education has **no power** to **review HO decisions** or to **supervise the HO's management** of a dph. Ninth Circuit approved of HO reframing the issues at the **PHC**; (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) HO did not act inappropriately by keeping witness testimony to the **issues stated at the PHC**; Warrior Run Sch Dist 114 LRP 37530 (JG) (SEA Penna 3/17/14) an IDEA HO clearly has the authority to control the hearing process and require a clear statement of the issues at the **PHC**; Edward S & Virginia S ex rel TS v West Noble Sch Corp 63 IDELR 34 (ND Ind 3/31/14) A party has no right to a record of a PHC under IDEA (unlike the dph itself), and ho did not abuse discretion by **dismissing** with prejudice when lawyer for parent four times disregarded ho order to not record PHC; SS by Street v Dist of Columbia 64 IDELR 72 (DDC 9/19/14) Court rejected argument that ho had no authority to frame the issues in a **PHC** order. Contrast, JL ex rel JR v NYC Dept of Educ 66 IDELR 239 (SDNY 12/16/15) Court reversed HO who excluded evidence through inconsistent enforcement of prehearing Order.

d. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WV 11/4/9), *aff'd* on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (4th Cir. 4/27/10) NB: **UNPUBLISHED** Magistrate Judge had ruled that HO had not abused his discretion by denying a **continuance** and imposing **sanctions** upon a pro se parent who refused to comply with HO's instructions. District court affirmed when

parent did not file a timely objection to the Magistrate's recommendation. Parent appealed, but Fourth Circuit ruled that failure to file objections to District Court precluded further review; Student v Preston Bd of Educ, et al (JJ)(SEA CT 7/9/14) After the first day of dph, parent requested a **continuance** for unspecified medical reasons without a corresponding motion to extend the decision deadline. HO refused to grant continuance and dismissed dph. You can read the decision [here](#); AS v William Penn Sch Dist 63 IDELR 62 (ED Penna 4/11/14) Court affirmed ho dismissal of dpc where parent requested a **continuance** for a family emergency but parent attorney failed to identify the emergency or say how long the parent would be unavailable. **HOs have discretion** to regulate the hearing process (per state code) and courts will not intervene absent bad faith, fraud, capricious action or abuse of discretion.

e. (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Court ruled that it was appropriate for HO to **control the hearing process** by **interrupting** witness who was testifying to issues that were **not identified** in prehearing memo or prehearing conference.

f. Utah Schs for the Deaf & Blind (JG) 111 LRP 29590 (SEA UT 4/8/11) HO has wide discretion to **regulate hearing procedures** for a dph –including the power to require compliance with HO's reasonable directives;

g. Edward S & Virginia S ex rel TS v West Noble Sch Corp 63 IDELR 34 (ND Ind 3/31/14) @n.1 HO's dismissal with prejudice for failure to comply with four ho directives was akin to a **sanction** pursuant to the **inherent power** of a court. (!!);District of Columbia Public Schs (JS) 112 LRP 47415 (SEA DC 6/28/12) HO ruled that in IDEA cases, HO has the power to **develop** the administrative record, including the ability to

depart from the adversary process so long as the HO remains impartial; Hiawatha Sch Dist # 426 (JS) 58 IDELR 269 (SEA Ill 2/27/12) HO has a duty to make a complete record (including the power to ask questions of Ws) and to ensure a fair process. Under principles of administrative law, a HO may depart from the adversarial model, but must remain impartial; In re Student with a Disability 103 LRP 20843 (SEA WV 2002). A hearing officer has the inherent authority to regulate the conduct of a hearing. In Stancourt v. Worthington City Sch. Dist. Bd. of Educ. 44 IDELR 166 (Ohio App. Ct. 10/27/05), the state appellate court held that a special ed hearing officer has broad discretion in accepting and rejecting evidence and in conducting a hearing. Noting that a hearing officer has **implied powers** similar to those of a court, the court ruled that the hearing officer has the implied power to impose "... silence, respect, and decorum... and submission to his lawful mandates. See also Clark Co. Sch. Dist 102 LRP 18829 (SEA NV 1998) (authority to reduce the number of witnesses from 50), In Re Student with a Disability 103 LRP 21076 (SEA MI 2001) (inherent authority to rule on motions during hearing.); San Dieguito Union High Sch. Dist. 104 LRP 4706 (SEA Calif. 2003).

h. Cano-Angeles v Commonwealth of Puerto Rico, Dept of Educ 66 IDELR 154 (DPR 10/14/15) Court ruled that **HO erred** by dismissing parent dpc. HO ruled that he did **not have authority** to consider any **statute** other than IDEA- here a state law re transportation rates in considering parent claim for transportation reimbursement under IDEA. Court ruled that HO has such authority and that the opposite conclusion would cause absurd results requiring dismissal any time a party claims that a state law is implicated in an IDEA claim.

i. Student v Sch Dist of Philadelphia 115 LRP 2848 (ED Penna 4/3/15) Court ruled that HO had the authority to issue a **declaratory judgment** that IEP provided FAPE

j. Sch Dist of Philadelphia v Williams ex rel LH 66 IDELR 214 (ED Penna 11/20/15) **Compensatory education** aims to place student in the position he would have occupied but for SD violation of IDEA, but comp ed is not the only remedy. Rather a court or **HO can order any equitable relief** that is **appropriate** given the purpose of IDEA including tuition reimbursement, a prospective injunction and declaratory relief. Here HO did not exceed her authority by ordering **remedy** longer than one year denial of FAPE especially given prior litigation; HW & HG ex rel MW v NY State Educ Dept 65 IDELR 136 (EDNY 3/31/15) Court ruled that HO did not exceed her authority by considering a 1:1 aide where dpc did not raise the issue because direct 1:1 intervention was required for this child; Oconee County Sch Dist v AB by LB 65 IDELR 297 (MD Ga 7/1/15) Court affd HO remedy, including **reduction** of reimbursement for transportation by **50%** where both parties derailed the collaborative process. @n.5: Court encourages the parties to work together in the interest of the student.

k. CC by Cripps v Hurst-Euleless-Bedford Independent Sch Dist 65 IDELR 195 (ND Tex 5/21/15) Court did **not address** arguments that HO exceeded his authority by determining that the student's actions constituted a felony because the finding was not relevant to the issues he was deciding in a discipline case.

l. AB v Baltimore City Bod of Sch Commissioners 66 IDELR 40 (D Md 8/13/15) Court criticized HO stay put order in part because HO **incorrectly questioned his authority** to make SD pay for stay put placement.

m. Morton v Bossier Parish Sch Bd 63 IDELR96 (WD Louisiana 5/6/14) Court upheld the validity of an interrogatory by parents of a teen who allegedly committed suicide after disability-based harassment. Interrogatory sought the names, addresses and phone numbers of all students who attended class with the student for two years before his death. Mgst noted that before complying with the interrogatory, SD must notify classmates and parents of the court order to permit them to seek protective order under FERPA.

n. Silva v Dist of Columbia 63 IDELR 217 (DDC 7/21/14) An IDEA HO has the authority to **dismiss** dpcs **with and without** prejudice. Although with prejudice is a harsh sanction, no abuse of discretion where parent failed to comply with HO's directive; Student v Hartford Bd of Educ No. 15-0384 (JJ) (SEA CT 9/15/16). Where a pro se parent refused to provide witness and exhibit information after numerous instructions from the hearing officer, failed to request an extension, and otherwise failed to comply with HO orders, HO dismissed parent dpc with prejudice for failure to prosecute. The decision is [available here](#).

o. Smith v Dist of Columbia 63 IDELR 77 (DDC 3/14/14) Mgst rejected parent arguments that HO erred in her manner in conducting dph. Mgst ruled that HO did not "improperly **inject herself** into the proceeding;" that HO did not improperly limit **testimony**;" that HO did not fail to follow Shaffer v Weast (informal hearings); and that HO did not err in considering and weighing expert testimony.

p. McAllister v Dist of Columbia 63 IDELR 130 (DDC 5/21/14) adopting Mgst @ 62 IDELR 294. HOs are **required to weigh and interpret** the evidence.

q. AS & RS ex rel SS v Office for Dispute Resolution, Quakertown Community Sch Dist 62 IDELR 239 (Penna Commonwealth Ct 1/24/14) Majority of state court held that an IDEA ho has the **authority** to determine whether a **valid settlement** of IDEA claims exists.

r. LWL & EL ex rel CL v Pelham Union Free Schs 66 IDELR 241 (SDNY 12/9/15) HO exceeded her jurisdiction by addressing 3 issues not in dpc;

s. Douglas v Calif Office of Admin Hearings 64 IDELR 300 (ND Calif 1/21/15) Court found that HO exceeded his authority by ordering an increase from a district in OT hours for a student as a medical necessity where **state law** and an interagency agreement gave state Department of Health responsibility for providing OT that is medically necessary and gave **Health department sole authority** to determine medical necessity. (LEA provides OT that is educationally needed but not medically necessary) HO lacked authority to review health department's determination concerning medical necessity. (?? Supremacy clause)

t. MG & VM ex rel YT v City of NY Dept of Educ 62 IDELR 195 (SDNY 1/21/14) HO has authority to award wide-ranging relief, but no authority to award systemic relief; In Re Student With a Disability 108 LRP 45824 (SEA WV 6/4/8) HO has **broad equitable authority** to fashion an appropriate remedy for a violation of IDEA- here awarding comp ed plus a thorough behavioral evaluation; Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12); Dist of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) (same re authority); In re Student with a Disability 111 LRP 40544 (SEA WV 5/31/11) (same re authority); Kelsey v Dist of Columbia 115 LRP 14802 (DDC 1/13/15) (same). {See also cases on relief.}

## *5. Evidence*

a. Sneitzer v Iowa Dept of Educ, et al 796 F.3d 942, 66 IDELR 1 (8th Cir 8/7/15) Eighth Circuit held that HO properly credited the testimony of LEA staff who were very **familiar with the student** over the testimony of a medical witness.

b. MO & GO ex rel DO v NYC Dept of Educ 393 F.3d 236, 65 IDELR 283 (Second Cir 7/15/15) Second Circuit clarified its previous ruling in RE decision. That decision did not require a student to physically attend a proposed school before parent could challenge the school's ability to implement an IEP; rather it prohibited **speculative** challenges to a school's ability to implement an IEP. {See **additional cases** in section on IEP implementation }

c. BS by KS & MS v Anoka Hennepin Public Schs 66 IDELR 61 (Eighth Cir 9/2/15) Eighth Circuit ruled that an IDEA HO did not abuse his considerable discretion by enforcing a nine hour **time limit** for each side to present its evidence At the PHC, HO had asked each party how much time they needed and they said a day and a half. HO has a duty to oversee and manage the proceedings; Letter to Kane 65 IDELR 303 (OSEP 4/13/15) OSEP opined that once a factual determination has been made that an LEA is unable to establish or maintain programs that provide FAPE, an SEA has the responsibility to use payments that would have been available to the LEA or a state agency to provide SpEd and related services directly to the children residing in the LEA; LS by Julia V v Bd of Educ, Lansing Sch Dist 65 IDELR 225 (ND Ill 6/11/15) HO properly managed dph by keeping the testimony moving along and did not impose arbitrary time limits; TM v Dist of Columbia 64 IDELR 197 (DDC 12/3/14) Court

upheld HO's placing **time limits** on direct and cross examination of witnesses on the third and final day of a dph as a reasonable exercise of discretion.

d Reyes ex rel RP v New York City Dept of Educ 760 F.3d 211, 63 IDELR 244 (2d Cir 7/25/14) Second Circuit refused to consider **retrospective testimony** to the effect that the parties had an agreement that the IEP would later be modified to include a full-time 1:1 aide; EM ex rel NM v. New York City Dept of Educ 63 IDELR 181 (2d Cir 7/11/14) SRO erred by considering retrospective testimony that additional supervision beyond that specified in IEP would have been provided so remanded to determine whether 6:1:1 classroom provides FAPE; Contrast, Jalen Z v Sch Dist of Philadelphia 65 IDELR 198 (ED Penna 5/15/15) Court ruled although an IEP should be judged at the time it was written, and retrospective testimony that services not listed on IEP would actually have been provided, here HO properly admitted and considered testimony that explains or justifies the services listed on the IEP; KC ex rel CR v NYC Dept of Educ 65 IDELR 142 (SDNY 5/30/15) Court held that SD failure to list OT and speech on IEP as related services was a harmless procedural error where the IEP included speech and OT goals and where the related services were discussed at IEPT meeting. Discussions at IEPT meeting are not improper retrospective testimony; DN & JN ex rel DN v Bd of Educ of Center Moriches Union Free Sch Dist 66 IDELR 163 (EDNY 9/28/15) HO & SRO impermissibly relied upon retrospective testimony re intent of 8:1:1 placement.

e. (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Court ruled that it was appropriate for HO to **control the hearing process** by interrupting witness who was testifying to **issues** that were **not identified** in prehearing memo or prehearing conference.

f. Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} Court found that HO properly explained and justified his **credibility findings** where he found testimony of mom less credible than the testimony of SD witnesses where there were serious inconsistencies in mom's testimony, where she overstated student's injuries and where she contradicted the parties' stipulations; Stepp ex rel MS v Midd West Sch Dist (JG) 65 IDELR 46 (MD Penna 2/23/15) {affirming HO decisions @112 LRP 45128 and 113 LRP 16891} Court affirmed HO determination that the testimony of parent's **expert school psychologist** was **entitled to no weight** where his testimony was not credible or persuasive and contained contradictions; In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14) HO ruled that the testimony of parents' advocate was not **credible** where marred by poor memory only on cross-examination, and where there were inconsistencies in his testimony and where he had an extremely evasive demeanor on cross. Ho ruled that where parents failed to share their expert psychologist's report with the eligibility team, the report was **irrelevant** to the issue of eligibility; 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; 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; EF v Newport

Mesa Unified Sch Dist 65 IDELR 265 (CD Calif 6/22/15) HO gave due **credit** to parent's expert testimony re IEP goals and fba.; Kelsey v Dist of Columbia 115 LRP 14802 (DDC 1/13/15) Court ruled that HO properly discounted the testimony of parent's expert where he used the wrong legal standard. He gave the amount of compensatory education needed to raise the student to grade level. IDEA does not guarantee any particular result; ST ex rel SJPT and IT v Howard County Public Sch System 64 IDELR 268 (D Mich 1/5/15) aff'd by 4<sup>th</sup> Cir in UNPUBLISHED decision @ 66 IDELR 270 (Fourth Cir 1/5/16). HO properly weighed expert testimony and determined credibility of witnesses appropriately. HO did not automatically credit SD witnesses as parent alleged. Ho properly weighed the credibility and persuasiveness of all witnesses- parents' witnesses had little first-hand knowledge of student's needs; Oakland Unified Sch Dist v NS by Genning & Sandahl 66 IDELR 221 (ND Calif 11/10/15) Court defers to HO credibility findings because HO is in a better position to assess; Gohl ex rel JG v Livonia Public Schs 66 IDELR 122 (ED Mich 9/30/15) Court gave expert testimony little weight where focus was effects of abuse in general rather than this child's experience; TO & KO ex rel JO v Summit City Bd of Educ 66 IDELR 16 (DNJ 7/27/15) Court **rejected** SD argument that HO decision should be reversed because **every time** she considered **contradictory evidence** about a preschooler's needs, she **sided with the parent**. Where there are two permissible views of evidence, HO's choice between them is not clearly erroneous and unless there is non-testimonial evidence that would render the credibility determination unreasonable, court will defer.

g. LS by Julia V v Bd of Educ, Lansing Sch Dist 65 IDELR 225 (ND Ill 6/11/15)

HO did not err by **refusing** to permit an **expert** to testify where the testimony would have

been cumulative and duplicative of previous testimony. However, HO did **err** by considering in his decision an **affidavit** from the SD that contradicted witness who testified at dph without giving parent an opportunity to provide evidence rebutting the **affidavit**; JL ex rel JR v NYC Dept of Educ 66 IDELR 239 (SDNY 12/16/15) HO erred by ordering parties to submit **affidavits** for all direct testimony to be followed by live cross and by excluding some of parent affidavits; Contrast, Copeland v Dist of Columbia 65 IDELR 71 (DDC 3/11/15) HO **erroneously** failed to qualify student's tutor as an expert witness in compensatory education.(??)

h. Independent Sch Dist #413, Marshall v AJ by MN 66 IDELR 41 (D Minn 8/11/15) HO did **not err** in considering **evidence more than two years before** dpc- only the violation must be within two years.

i. Dist of Columbia v Walker 65 IDELR 271 (DDC 6/12/15) Court found that HO erred by considering **irrelevant evidence**- a psychiatrist's report that was made four weeks after IEPT meeting. HOs and courts must evaluate whether an IEP was reasonably calculated to confer educational benefit at the time of its formation. No Monday morning quarterbacking. (**snapshot rule**); TO & KO ex rel JO v Summit City Bd of Educ 66 IDELR 16 (DNJ 7/27/15) @n.13: HO should not consider after acquired evidence that was not available to IEPT at the time. Here ok); Contrast, Dist of Columbia v Masucci 62 IDELR 229 (DDC 1/30/14) @n.2 court considered evidence excluded by HO as **irrelevant** because it came into existence after dpc because it was relevant to issue of whether IEP was appropriate{???**snapshot rule**?}

j. JL ex rel JR v NYC Dept of Educ 66 IDELR 239 (SDNY 12/16/15) Court reversed HO who excluded evidence through **inconsistent** enforcement of prehearing Order.

k. Glenn ex rel Glenn v New Haven Bd of Educ 65 IDELR 73 (D Conn 3/11/15) Court ruled that HO did not err in excluding **telephone testimony** because IDEA gives parties the right to confront and cross-examine.(?)

l. JK v Hudson City Sch Dist Bd of Educ 66 IDELR 142 (ND Ohio 9/9/15) HO & SRO did not err by considering evidence **created after IEP** in question. Nothing in IDEA precludes such evidence.

m. Smith v Dist of Columbia 63 IDELR 77 (DDC 3/14/14) Mgst rejected parent arguments that HO erred in her manner in conducting dph. Mgst ruled that HO did not “improperly inject herself into the proceeding;” that HO did **not improperly limit testimony**; that HO did not fail to follow *Shaffer v Weast* (informal hearings); and that HO did not err in considering and weighing expert testimony; Avila v Spokane Sch Dist #81 64 IDELR 171 (ED Wash 11/3/14) Court upheld **HO evidentiary rulings** at dph.

n. GW & DW ex rel BW v Rye City Sch Dist 61 IDELR 14 (SD NY 3/29/13) Court affirmed HO and SRO who ruled that school district policy of purging emails over six months old did not constitute **spoliation** of evidence.

o. Ricci C & Karen C ex rel LC v Beech Grove City Schs 64 IDELR 204 (SD Ind 11/26/14) Court ruled that HO properly excluded at dph testimony from **two prior dphs** regarding earlier IEPs because not **relevant**.

## ***6. Hearing Procedures***

### ***a. In General***

1. DB by CB v. Houston Independent Sch Dist 48 IDELR 246 (D.Tex. 9/28/07). Court rejected a claim by the parent that the dp HO denied them a fair hearing by **sleeping through the hearing**. The court did not credit the allegations where the hearing transcript revealed that the HO appeared to be awake while asking questions of witnesses and when ruling on objections and where the parents failed to preserve their objection by objecting to the alleged napping on the record. But NB déjà vu all over again: <http://www.myfoxboston.com//dpp/news/local/120210-sleeping-special-education-judge-resigns-under-fire>

2. Déjà vu Rides Again: (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Parent allegations that HO fell **asleep** during dph were not supported by the record. Court noted HO actively participated, ruled on objections, etc.

3. BS by KS & MS v Anoka Hennepin Public Schs 66 IDELR 61 (Eighth Cir 9/2/15) Eighth Circuit ruled that an IDEA HO did not abuse his considerable discretion by enforcing a nine hour **time limit** for each side to present its evidence At the PHC, HO had asked each party how much time they needed and they said a day and a half. HO has a duty to oversee and manage the proceedings; Letter to Kane 65 IDELR 303 (OSEP 4/13/15) OSEP opined that once a factual determination has been made that an LEA is unable to establish or maintain programs that provide FAPE, an SEA has the responsibility to use payments that would have been available to the LEA or a state agency to provide SpEd and related services directly to the children residing in the LEA; LS by Julia V v Bd of Educ, Lansing Sch Dist 65 IDELR 225 (ND Ill 6/11/15) HO

properly managed dph by keeping the testimony moving along and did not impose arbitrary time limits; TM v Dist of Columbia 64 IDELR 197 (DDC 12/3/14) Court upheld HO's placing **time limits** on direct and cross examination of witnesses on the third and final day of a dph as a reasonable exercise of discretion.

4. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit approved of **HO reframing** the issues at the **PHC**; (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) HO did not act inappropriately by keeping witness testimony to the **issues stated** at the **PHC**; Kelsey v Dist of Columbia 63 IDELR 95 (DDC 5/6/14) Counsel for parent mischaracterizes the ho ruling at dph, ho did not prevent parent expert from testifying about compensatory services. Instead ho merely required both parties to comply with the three issues specified in **PHC** order.; Edward S & Virginia S ex rel TS v West Noble Sch Corp 63 IDELR 34 (ND Ind 3/31/14) A party has no right to a record of a **PHC** under IDEA (unlike the dph itself.); SS by Street v Dist of Columbia 64 IDELR 72 (DDC 9/19/14) Court rejected argument that ho had no authority to frame the issues in a **PHC** order.

5. DE by English & Shefy v Central Dauphin Sch Dist 765 F.3d 260, 64 IDELR 1 (3d Cir 8/27/14) Where a school district fails to comply with a ho's decision, the student is an aggrieved party and may **sue under IDEA** to **enforce** the decision. In a two tier dph system, a party who prevails at the first level need not exhaust the second level before seeking to enforce the ho's order in court; BD by Davis v Dist of Columbia 64 IDELR 201 (DDC 12/2/14) Court ruled that parent was not an aggrieved party where parent sought to enforce a favorable HO decision and therefore dismissed complaint; KP v Dist of Columbia 66 IDELR 96 (DDC 9/18/15) (same)

6. Dear Colleague Letter 65 IDELR 151 (OSEP 4/15/15) OSEP has learned that some SDs are **filing dpcs** based upon the same issues after parents file **state complaints** to prevent SEA investigation. Although this is permissible under IDEA, OSEP strongly encourages LEAs to respect the parent's choice to use state complaint procedures rather than dph. Likewise before pursuing dph, LEA should attempt to engage parent in mediation or other informal dispute resolution mechanisms.

7. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WV 11/4/9) HO has **discretion** to control hearing procedures (including imposing **sanctions**) and absent an abuse of discretion, HO will be upheld, aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (4th Cir. 4/27/10) NB: **UNPUBLISHED** Magistrate Judge had ruled that HO had not abused his discretion by denying a continuance and imposing **sanctions** upon a pro se parent who refused to comply with HO's instructions. District court affirmed when parent did not file a timely objection to the Magistrate's recommendation. Parent appealed, but Fourth Circuit ruled that failure to file objections to District Court precluded further review; Utah Schs for the Deaf & Blind (JG) 111 LRP 29590 (SEA UT 4/8/11) HO has wide **discretion** to regulate hearing procedures for a dph –including the power to require compliance with HO's reasonable directives. Where parent failed to comply with HO's directives by failing to cease giving details of settlement negotiations and failing to provide dates for PHC, HO dismissed dpc; Student v Preston Bd of Educ, et al (JJ)(SEA CT 7/9/14) After the first day of dph, parent requested a continuance for unspecified medical reasons without a corresponding motion to extend the decision deadline. HO refused to grant continuance and dismissed dph. You can read the decision [here](#); AS v William Penn Sch Dist 63

IDELR 62 (ED Penna 4/11/14) Court affirmed ho dismissal of dpc where parent requested a continuance for a family emergency but parent attorney failed to identify the emergency or say how long the parent would be unavailable. HOs have discretion to regulate the hearing process (per state code) and courts will not intervene absent bad faith, fraud, capricious action or abuse of discretion; Student v Hartford Bd of Educ No. 15-0384 (JJ) (SEA CT 9/15/16). Where a pro se parent refused to provide witness and exhibit information after numerous instructions from the hearing officer, HO dismissed parent dpc with prejudice for failure to prosecute. The decision is [available here](#).

8. Edward S & Virginia S ex rel TS v West Noble Sch Corp 63 IDELR 34 (ND Ind 3/31/14) Although dismissal with prejudice is an especially harsh **sanction of last resort**, court affirmed ho dismissal of grandparents dpc where their attorney disregarded ho's order that PHCs not be recorded Although **court was troubled** that ho showed **disrespect** to grandparents' attorney at the beginning of the first PHC, ho's **edginess** receded after 10-15 minutes. Court found that dismissal with prejudice was **not an abuse of discretion** where attorney acted in direct contravention of ho's orders four times. Under IDEA and state law, a party has an opportunity for a dph in a timely manner, but they can forfeit that right.

9. The federal regulations were amended effective December 31, 2008 to make an important change to the policy interpretation by OSEP regarding the representation of parties (primarily parents) by **non-lawyers** in due process hearings-making it a matter of state law. Prior to the change, it had been the long-standing interpretation of OSEP that a non-lawyer could represent parents at a due process hearing

in much the same way that a lawyer could represent a party. 34 C.F.R. §300.152; (See decisions in section on representation)

10. Cano-Angeles v Commonwealth of Puerto Rico, Dept of Educ 66 IDELR 154 (DPR 10/14/15) Court ruled that HO **erred by dismissing** parent dpc. HO ruled that he did not have **authority to consider** any **statute** other than IDEA- here a state law re transportation rates i n considering parent claim for transportation reimbursement under IDEA. Court ruled that HO has such authority and that the opposite conclusion would cause absurd results requiring dismissal any time a party claims that a state law is implicated in an IDEA claim.

11. Glenn ex rel Glenn v New Haven Bd of Educ 65 IDELR 73 (D Conn 3/11/15) Court ruled that HO did not err in excluding **telephone** testimony because IDEA gives parties the right to confront and cross-examine. (?)

12. CC, Jr v Beaumont Independent Sch Dist 65 IDELR 109 (ED Tex 3/23/15) Court ruled that an IDEA HO has no obligation or authority to hear **motions to reconsider** after the final decision is issued; ZH ex rel ZH v NYC Dept of Educ 65 IDELR 235 (SDNY 5/28/15) Court affirmed HO who refused to grant a **rehearing** after the close of dph at the request of parent.

13. Smith v Dist of Columbia 63 IDELR 77 (DDC 3/14/14) Mgst rejected parent arguments that HO erred in **her manner in conducting dph**. Mgst ruled that HO did not “improperly inject herself into the proceeding;” that HO did not improperly limit testimony;” that HO did not fail to follow Shaffer v Weast (informal hearings); and that HO did not err in considering and weighing expert testimony.

14. West Baton Rouge Parish Sch Bd v Deshotel ex rel TD 63 IDELR 35 (MD Louisiana 3/31/14) Court reversed ho dismissal of SD dpc; court ruled that a SD **could appeal an unfavorable state complaint decision with a dph**. State complaint investigator had ruled against SD and ordered reimbursement for privately obtained services. Because the state complaint procedure could not satisfy the exhaustion requirements, the only way that the SD could bring a civil action was to first have a dph.; Southfield Public Schs v Dept of Educ 64 IDELR 50 (Mich Ct App 9/16/14) State appellate court ruled that an LEA could only **challenge a state complaint** investigation **in court if** it first exhausted its administrative remedies by filing a **dph**.

15. 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.

16. BG v Ocean City Bd of Educ 64 IDELR 105 (DNJ 9/26/14) Under NJ rules, student petitioned for emergent relief for stay put. HO noticed a hearing on the emergent relief motion, but HO erred by holding the dph itself instead of the noticed emergent relief hearing. Student had **no notice of dph**. HO also violated five business day **disclosure rule** where HO permitted SD to call an undisclosed witness who testified that student was frequently absent from a vocational program. Student contended that the absences were excused but was unable to rebut because no disclosure of witness.

17. Morton v Bossier Parish Sch Bd 63 IDELR96 (WD Louisiana 5/6/14) Court upheld the validity of an interrogatory by parents of a teen who allegedly committed suicide after disability-based harassment. Interrogatory sought the names,

addresses and phone numbers of all students who attended class with the student for two years before his death. Mgst noted that before complying with the interrogatory, SD must notify classmates and parents of the court order to permit them to seek protective order under FERPA; Letter to Soukup 115 LRP 18668 (FPCO 2/9/15) Consistent with the long-standing view of the Department of Education, FPCO ruled that **FERPA permits** a school to disclose to the parent of a **harassed** student information about the disciplinary sanctions imposed upon the perpetrators of the harassment (including stay away from the student; stay out of the school; or transfer to another class) FPCO noted that where any **civil rights laws** conflict with FERPA, the civil rights law **override** any conflicting provisions of FERPA.

18. Card ex rel JD v Citrus County Sch Bd 65 IDELR 3 (MD Fla 2/12/15) Although **pro se parties** are held to less stringent standards and their pleadings must be liberally construed, they must still comply with the rules. Here failure to specify facts and failure to include or describe administrative record caused court to dismiss, with leave to amend; Aaron v Gwinnett County Sch Dist 64 IDELR 16 (ND GA 8/19/14) Court noted that although pleadings by **pro se parties** are entitled to **liberal** construction, such generosity does **not excuse** them from complying with the court's **procedural rules**; informed the court that it had put money aside for this purpose; Horen v Bd of Educ of the City of Toledo Public Schs 63 IDELR 290 (ND OH 8/1/14) Court imposed Rule 11 sanctions vs **pro se** parent for > \$32K in attorney fees. Parent had filed three previous complaints which the court had dismissed, warning on two occasions of future sanctions. Court concluded that **sanction** is only way to **deter** this **misbehavior**. (@n.3: Parent response to SD motion to dismiss was **5,500 pages** long.) Finley v Shelby County Schs

114 LRP 3705(WD Tenn 1/22/14) adopts Mgst @ 114 LRP 3712. Court dismissed complaint of pro se parents where they failed to amend complaint within time allowed; Hinton ex rel MWH v Lenoire County Public Sch Bd 66 IDELR 76 (EDNC 8/6/15) adopted in part @66 IDELR 109. Mgst recommended dismissal of **pro se** parents complaint where parent had disregarded court order requiring her to state how she had exhausted administrative remedies.

19. EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit **upheld** the NC **two-tier dph** system even though the first tier was not held by the LEAs (1<sup>st</sup> tier = OAH; 2d tier = SROs for SEA). The court noted that the state has the primary role in setting educational policy and in resolving disputes under IDEA. **However** court noted that the result might be different if the state system in question had **numerous steps or onerous levels** of review as such would violate IDEA, but NC system was ok'ed; {affirming EL by GL v Chapel Hill-Carrboro Bd of Educ 62 IDELR 4 (MD NC 9/30/13) Court rejected parent argument that NC 2 tier dph system was invalid

20. Luo v Baldwin Union Free Sch Dist 62 IDELR 260 (ED NY 2/12/14) Court dismissed counterclaim by hearing officer for abuse of process against parent who had sued him after a dph because in 2d Cir, abuse of process requires more than filing a lawsuit (which was promptly dismissed).

#### 21 Other Resources:

a. Law Review Article: “**In Defense of IDEA Due Process,**” Mark C. Weber 29 Ohio State Journal on Dispute Resolution (2014) Due process hearings under IDEA, the primary special education law, are under attack on many fronts. In recent years the special ed hearing system has come under attack. School district lawyers and a few academics have squared off against it. In 2013, the AASA, the school superintendent's association, issued a report calling on Congress to do away with due

process hearings. Even some parents don't like the hearing process. In this context of attacks upon the due process hearing system, a new law review article provides some important insights. Professor Mark Weber has written a law review article that defends the IDEA due process hearing system. He writes that "...some criticisms of hearing rights are flat-out wrong and that others are badly overblown. The system is, on the whole, fair to the various classes of parents..." He goes on to propose some modest reforms to the due process hearing system while defending the system in general. He concludes with the phrase "Don't dis due process." You can read the article on SSRN [here](#).

b. **GAO REPORT:** The Government Accountability Office issued a study of **dispute resolution in special education** on September 24, 2014. The report concludes that the U. S. Department of Education could enhance oversight of special ed dispute resolution. The study found that: from 2004 through 2012, the number of due process hearings—a formal dispute resolution method and a key indicator of serious disputes between parents and school districts under the Individuals with Disabilities Education Act (IDEA)—substantially decreased nationwide as a result of steep declines in New York, Puerto Rico, and the District of Columbia. Officials in these locations largely attributed these declines to greater use of mediation and resolution meetings—methods that IDEA requires states to implement. Despite the declines, officials in these locations said that higher rates of hearings persisted because of disputes over private school placements or special education services. GAO did not find noteworthy trends in the use of other IDEA dispute resolution methods, including state complaints, mediation, and resolution meetings. States and territories reported on GAO's survey that they used mediation, resolution meetings, and other methods they voluntarily implemented to facilitate early resolution of disputes and to avoid potentially adversarial due process hearings.

States, territories, and other stakeholders generally reported on GAO's survey or in interviews that alternative methods are important to resolving disputes earlier. Some stakeholders cited the potential of these methods to improve communication and trust between parents and educators. Some state officials said that a lack of public awareness about the methods they have voluntarily implemented was a challenge to expanding their use, but they were addressing this with various kinds of outreach, such as disseminating information through parent organizations.

The Department of Education (Education) uses several measures to assess states' performance on dispute resolution but lacks complete information on timeliness and comparable data on parental involvement. Education requires all states to report the number of due process hearing decisions that were made within 45 days or were extended; however, it does not direct states to report the total amount of time that extensions add to due process hearing decisions. Similarly, Education collects data from states on parental involvement—a key to dispute prevention—but does not require consistent collection and reporting, so the data are not comparable nationwide. Leading performance measurement practices state that successful performance measures should be clearly stated and provide unambiguous information. Without more transparent timeliness data and comparable parental involvement data, Education cannot effectively target its oversight of states' dispute resolution activities.

GAO recommends that Education improve measures for overseeing states' dispute resolution performance, including more transparent data on due process hearing decisions and comparable parental involvement data. Education neither agreed nor disagreed with the recommendations and proposed alternative actions. GAO does not believe these proposals will address the weaknesses in Education's performance measures and continues to believe the recommendations remain valid.

You can read a [summary](#) by the GAO here. A one page [highlights sheet](#) is available here. You can read the 43 page [report](#) here.

c. CADRE Webinar: At a webinar in February 2014, CADRE reported on data for the last eight years in special education dispute resolution. You can view the [power point here](#). The eight years of data can be presented by state or nationally, and you can view activity in the various dispute resolution mechanisms over the last eight years. The report presents some interesting facts. Some of the big picture trends that CADE has identified are:

- State complaints are down by 15%;
- Mediation requests are up; Mediations held are up 15% in the last 7 years;
- Due process hearings held are down 58%

For the 2011-2012 school year, Washington DC once again led the league in dispute resolution activity (per 10K child count). In fact, they pretty much lapped the field. Puerto Rico was next followed by New York, Massachusetts, California, Connecticut, Virgin Islands, New Jersey, Vermont, Hawaii, Maryland & Maine. On the other end of the spectrum for the least dispute resolution activity (per 10K child count) was American Samoa followed by Utah, North Dakota, Oklahoma, Nebraska & South Carolina. NOTE: an updated graph on dispute resolution data is available on the CADRE website and [here](#).

### ***b. Burden of Persuasion***

1. Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5).

The Supreme Court held that the burden of persuasion in an IDEA due process hearing is upon the party challenging the IEP. The “**burden of persuasion**” involves which party loses if the evidence is closely balanced. In any civil legal proceeding, if the evidence for both sides is equal, the party with the burden of persuasion loses. Concerning the IDEA due process hearing process, the Court noted that such hearings are deliberately informal. The Court went on to note that the IDEA due process hearing was set up by Congress with the intention of giving the hearing officers the flexibility they need to ensure that each side can fairly present its evidence.

*c. Parties*

1. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit ruled that SEA could not interfere with HO's management of dph or review HO's decisions; Florida Dept of Educ 114 LRP 47196 (SEA FL 5/13/14); Everett H by Harvey v Dry Creek Joint Sch Elementary Sch Dist 63 IDELR 39 (ED Calif 3/26/14){same case Everett H by Harvey v Dry Creek Joint Sch Elementary Sch Dist 66 IDELR 68 (ED Calif 9/1/15) Court refused to reconsider previous ruling.}; Bd of Educ of Plainfield Community Council Sch Dist 202 v Ill State Bd of Educ 63 IDELR 40 (D Ill 3/26/14); MH by KH v Mount Vernon City Sch Dist 63 IDELR 17 (SDNY 3/3/14) Court refused to dismiss SEA because it is responsible for LEA compliance with IDEA; Hudson City Schs 63 IDELR 26 (SEA OH 2/7/14); Porter v Illinois State Board of Educ 62 IDELR 267 (Ill App CT 2/10/14); AS v Harrison Township Bd of Educ 64 IDELR 239 (DNJ 12/11/14); Charlene R v Solomon Charter Sch 64 IDELR 208 (ED Penna 11/21/14); LH v Hamilton County Dept of Educ 64 IDELR 207 (ED Tenn 11/24/14) Both SEA and LEA have duty to ensure FAPE; Southfield Public Schs v Dept of Educ 64 IDELR 50 (Mich Ct App 9/16/14) State appellate court ruled that an LEA could only challenge a state complaint investigation in court if it first exhausted its administrative remedies by filing a dph; Emma C v Eastin 64 IDELR 12 (ND Calif 8/25/14) Court denied stay pending appeal in 18 year old class action order requiring SEA to comply with court monitored corrective action plan to correct flawed SEA oversight & monitoring; Everett H by Harvey v Dry Creek Joint Elementary Sch Dist 63 IDELR 288 (ED Calif 5/4/14) Before a parent could sue the State Superintendent he would have to show that he knew that the SD was denying FAPE and failed to take appropriate

corrective actions. Parents sent letters to Superintendent, but in a state with >6.2 M students and >1000 SDs, it is unlikely that he read the letters. Court dismissed IDEA and §504 claims; Letter to Erquiaga 114 LRP 50728 (FPCO 7/28/14); Emma C v Eastin 63 IDELR 226 (ND Calif 7/2/14);

2. DM & LM ex rel EM v New Jersey Dept of Educ 801 F.3d 205, 66 IDELR 93 (Third Cir 9/10/15); BS by KS & MS v Anoka Hennepin Public Schs 66 IDELR 61 (Eighth Cir 9/2/15) Eighth Circuit dismissed SEA as party where the evidence did not support that a HO's imposition of a time limit at dph was based upon an arbitrary SEA policy or manual; Fairfield-Suisun Unified Sch Dist v State of Calif, Dept of Educ 780 F.3d 968, 65 IDELR 61 (Ninth Cir 3/16/15) Ninth Circuit ruled that an LEA does not have an implied private right of action to sue SEA for alleged mishandling of a state complaint investigation; DM & LM ex rel EM v New Jersey Dept of Educ 66 IDELR 226 (DNJ 11/17/15) Court denied SEA motion to dismiss ruling that parents have a right to challenge SEA regulatory activities under IDEA; KS v Rhode Island Bd of Educ 115 LRP 55545 (D RI 6/30/15); Zilberman v Gateway Sch Dist 65 IDELR 261 (WD Penna 6/29/15); ; East Ramapo Central Sch Dist v King 65 IDELR 239 (NY Supreme Ct, App Div 6/4/15); Rivera-Quinones ex rel AVR v Dept of Education of Puerto Rico 65 IDELR 202 (DPR 5/4/15); LL by KL v Hastings on Hudson Union Free Sch Dist 65 IDELR 168 (SDNY 4/21/15); Graven & Briggs ex rel DGB v Greene Central Sch Dist 65 IDELR 144 (NDNY 3/31/15); Brittany O ex rel L v Bentonville Sch Dist 64 IDELR299 (ED Ark 1/22/15); Turton v Virginia Dept of Educ 64 IDELR 305 (ED Va 1/15/15); KJ & TJ ex rel KJ, Jr v Greater Egg Harbor Regional HS Dist, et al 65 IDELR 179 (DNJ 4/2/15)(unpublished); Torres-Serrant v Dept of Educ of Puerto Rico 65 IDELR 171 (DPR

4/20/15); Emma C v Eastin 65 IDELR 130 (ND Calif 4/10/15); {same case: Emma C v Eastin 66 IDELR 245 (ND Calif 12/5/15); Emma C v Eastin 66 IDELR 72 (ND Calif 8/20/15)}; WR v State of Ohio, Dept of Health 66 IDELR 69 (ND OH 8/27/15); Fortes-Cortes v Garcia-Padilla 66 IDELR 18 (DPR 7/23/15) Exhaustion was futile given **SEA willingness to disobey judicial and administrative orders**; Letter to Deal & Olens 115 LRP 31132 (DOJ 7/15/15) and Letter to Deal & Olens 115 LRP 31259 (DOJ 7/15/15);

3. Shikellamy Sch Dist 112 LRP 9604 (JG) (SEA Penna 1/28/12) HO ruled that the student's mother was not a **"parent"** for purposes of IDEA where a state court had terminated her educational decision-making authority. The issue was not custody but rather educational decision-making authority. HO rejected mom's argument that the fact that she had such authority at the time of filing the dpc was controlling; noting that the mom had no authority to pursue the dph or obtain relief under IDEA; District of Columbia Public Schs (JG) 111 LRP 23798 (SEA DC 1/28/11) Student's sister with court ordered power to make educational decisions for the student was "parent" under IDEA; District of Columbia Public Schs (JG) 111 LRP 70750 (SEA DC 5/21/11) Where grandmother was student's; In the Matter of CS 63 IDELR 21 320 P.2d 981, 63 IDELR 21 (Montana S Ct 3/18/14) Noting that a **foster parent** can be a "parent" under IDEA, state supreme court criticized trial court for appointing a surrogate parent below when the foster parent had been attending IEPT meetings, etc. Although IDEA requires a SD to appoint a surrogate parent where it cannot identify or locate a parent or where the student is a ward of the state, IDEA and state law permit a foster parent to act for the child.

4. Graham v Madaio DiStasio 64 IDELR 297 (EDNY 1/27/15) @n.2 As the non-custodial parent, plaintiff likely lacked educational decision-making authority. Under

state law, non-custodial parent only has IDEA standing if **divorce** order so provides; WS v Wilmington Area Sch Dist 66 IDELR 249 (WD Penna 11/30/15) Under Penna state law, the parent with sole legal custody has exclusive educational decision making authority; here complaint of non-custodial mom dismissed; Sheils v Pennsbury Sch Dist 64 IDELR 294 (ED Penna 1/26/15) Court ruled that stay put was the placement ordered by HO where mom was in agreement even though **divorced** father disagreed and requested previous placement; Letter to Anonymous 115 LRP 33158 (FPCO 5/1/15) There is nothing in FERPA that requires a SD to notify the other parent with **joint custody** of its intent to comply with a subpoena from the other parent with joint custody. SD is permitted to, but not required to, notify the second **divorced parent**; Shikellamy Sch Dist 112 LRP 9604 (JG) (SEA Penna 1/28/12) HO ruled that the student's mother was not a "**parent**" for purposes of IDEA where a state court had terminated her educational decision-making authority. The issue was not custody but rather educational decision-making authority.

5. Jeffries by Foster v City of Chicago Sch Dist #299 63 IDELR 280 (8/13/14) Court affirmed HO who ruled that under federal regs, a parent who never requested an IEE at public expense and who never disagreed with a SD evaluation could not claim reimbursement under IDEA for a private evaluation to establish eligibility. Because parent was **not an aggrieved party**, ho properly dismissed claim; Fresno Unified Sch Dist V KU 63 IDELR 250 (ED Calif 7/30/14) Court noted that the courts are split on whether parents can file a suit to enforce a HO decision, but **no court** has allowed a **SD** to file a **lawsuit to enforce** a HO decision. SD is **not an aggrieved party**; Contrast Douglas v Director, California Office of Admin Hearings 62 IDELR 258 (ND

Calif 2/14/14) Court agreed to hear an appeal by a state agency (Dept of Health Care Services) because it was an **aggrieved** party. IDEA permits parent to file dph for interagency disputes (here who would fund student's OT); Oconee County Sch Dist v AB by **LB** 64 IDELR 307 (MD Ga 1/15/15) Court denied SD motion to dismiss as parent was an aggrieved party where she lost on two issues even though she prevailed on all other issues.

6. Stanek by Stanek v. Saint Charles Unit Sch Dist # 303 783 F.3d 634, 65 IDELR 122 (Seventh Cir 4/9/15) Seventh Circuit held that a **school district** is a proper party under IDEA. Parent need not sue the school board; Fairfield-Suisun Unified Sch Dist v State of Calif, Dept of Educ 780 F.3d 968, 65 IDLER 61 (Ninth Cir 3/16/15) Ninth Circuit ruled that an **LEA** does not have an implied private right of action to sue LEA for alleged mishandling of a state complaint investigation; East Ramapo Central Sch Dist v King 65 IDELR 239 (NY Supreme Ct, App Div 6/4/15) State appellate court ruled that **LEA** could not sue SEA under IDEA for SEA's monitoring and compliance actions. IDEA does not provide a private right of action for LEAs; JL by O'Flaherty v Eastern Suffolk BOCES 65 IDELR 262 (EDNY 6/29/15) Court dismissed §1983 claims vs SD for mistreatment of a 14 year old with autism where the mistreatment was allegedly by employees of an intermediate unit who were not trained or supervised by the SD; District of Columbia Public Schs (JG) 111 LRP 25934 (SEA DC 3/18/11) School district = **LEA** where student was enrolled in its school system for a portion of the relevant timeframe, etc; District of Columbia Public Schs (JG) 111 LRP 77405 (SEA DC 7/20/11) The school district that has administrative control over the school system where the student is to receive FAPE = LEA for purposes of IDEA; Graven & Briggs ex rel

DGB v Greene Central Sch Dist 65 IDELR 144 (NDNY 3/31/15) Court dismissed parent complaint but allowed amendment where it was unclear whether LEA where residential school located or SEA was responsible for the student's education.

7. **charter school** See, ADDITIONAL RESOURCE: Weber, Mark C., Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System (October 12, 2009). Loyola Journal of Public Interest Law, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1487667>; See, "Charters, Students With Disabilities Need Not Apply," by Prof. Thomas Herir, (op-ed piece) Education Week online January 25, 2010, [http://www.edweek.org/ew/articles/2010/01/27/19hehir\\_ep.h29.html?tkn=QQNC6AY97%2B01O7%2Bu4nwLnioyJY%2BAvdDbAtIU](http://www.edweek.org/ew/articles/2010/01/27/19hehir_ep.h29.html?tkn=QQNC6AY97%2B01O7%2Bu4nwLnioyJY%2BAvdDbAtIU)

8. Card ex rel JD v Citrus County Sch Bd 65 IDELR 3 (MD Fla 2/12/15) Although **pro se parties** are held to less stringent standards and their pleadings must be liberally construed, they must still comply with the rules. Here failure to specify facts and failure to include or describe administrative record caused court to dismiss, with leave to amend; Horen v Bd of Educ of the City of Toledo Public Schs 63 IDELR 290 (ND OH 8/1/14) Court imposed Rule 11 sanctions vs **pro se** parent for > \$32K in attorney fees. Parent had filed three previous complaints which the court had dismissed, warning on two occasions of future sanctions. Court concluded that **sanction** is only way to **deter** this **misbehavior**. (@n.3: Parent response to SD motion to dismiss was **5,500 pages** long.); Aaron v Gwinnett County Sch Dist 64 IDELR 16 (ND GA 8/19/14) Court noted that although pleadings by **pro se parties** are entitled to **liberal** construction, such generosity does **not excuse** them from complying with the court's **procedural rules**

Finley v Shelby County Schs 114 LRP 3705(WD Tenn 1/22/14) adopts Mgst @ 114 LRP 3712. Court dismissed complaint of pro se parents where they failed to amend complaint within time allowed; Hinton ex rel MWH v Lenoire County Public Sch Bd 66 IDELR 76 (EDNC 8/6/15) adopted in part @66 IDELR 109. Mgst recommended dismissal of **pro se** parents complaint where parent had disregarded court order requiring her to state how she had exhausted administrative remedies.

9. Martha's Vineyard Public Schs (WL) 112 LRP 38658 (SEA Mass) Applying state regs, HO ruled that the school district that was responsible for the student before he became **homeless** is programmatically and financially responsible for the student until his parent enrolls him in a district where a shelter or temporary residence is located.

*d. Record of Hearing*

1. Edward S & Virginia S ex rel TS v West Noble Sch Corp 63 IDELR 34 (ND Ind 3/31/14) A party has **no right** to a record of a **PHC** under IDEA (unlike the dph itself.)

2. Avila v Spokane Sch Dist #81 64 IDELR 171 (ED Wash 11/3/14) Court rejected argument that **gaps** in the **tape recording** of the dph harmed the parent where ho properly considered all testimony.

3. Luo v Baldwin Union Free Sch Dist 63 IDELR 281 (EDNY 8/12/14) Court refused to allow parent to take deposition of **court reporter** who allegedly was influenced by SD to deny her a fair hearing where the accuracy of the transcript was not an issue on appeal.

4. Oskowis ex rel EO v Sedona-Oak Creek Unified Sch Dist No 9 65 IDELR 169 (D Ariz 4/21/15) Noting that an **erroneous record** is a valid basis for admitting additional evidence on appeal, Court ordered SD to search its records where parent claimed to have received a PWN by email that differed substantially in content from the PWN in evidence.

5. Torres-Serrant v Dept of Educ of Puerto Rico 65 IDELR 171 (DPR 4/20/15) Court ruled that because SEA had the duty of supplying a complete and accurate copy of the administrative **record on appeal**, SEA therefore was required to translate the Spanish language administrative record into an **English language** copy.

*e. Timelines/ 45 day rule*

1. Letter to Gerl 51 IDELR 166 (OSEP 5/1/8) In the scenario of an expedited hearing, the fifteen calendar day resolution period runs **concurrently** with the twenty school day limit for the convening of the hearing. Although the five business day rule for disclosure of evidence must also be factored in, DOE feels that there is nonetheless sufficient time to schedule the expedited hearing.

2. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WV 11/4/9) HO has **discretion** to control hearing procedures (including ruling on **continuances**) and absent an abuse of discretion, HO will be upheld, aff'd on other grounds, JD by Davis v. Kanawha County Bd of Educ 54 IDELR 184 (4th Cir. 4/27/10) NB: **UNPUBLISHED** Magistrate Judge had ruled that HO had not abused his discretion by denying a continuance and imposing sanctions upon a pro se parent who refused to comply with HO's instructions. District court affirmed when parent did not file a timely objection to the Magistrate's recommendation. Parent appealed, but Fourth Circuit ruled

that failure to file objections to District Court precluded further review; Student v Preston Bd of Educ, et al (JJ)(SEA CT 7/9/14) After the first day of dph, parent requested a **continuance** for unspecified medical reasons without a corresponding motion to extend the decision deadline. HO refused to grant continuance and dismissed dph. You can read the decision [here](#); AS v William Penn Sch Dist 63 IDELR 62 (ED Penna 4/11/14) Court affirmed ho dismissal of dpc where parent requested a **continuance** for a family emergency but parent attorney failed to identify the emergency or say how long the parent would be unavailable. HOs have discretion to regulate the hearing process (per state code) and courts will not intervene absent bad faith, fraud, capricious action or abuse of discretion.

3. RB &v NY City Dept of Educ 63 IDELR 74 (SDNY 3/26/14) Court rejected parent argument that a **late SRO decision** was a denial of FAPE. **Due 30 days** after appeal, SRO decision was **five months late**. Even if a procedural violation, no educational harm, not a FAPE violation; MG & VM ex rel YT v City of NY Dept of Educ 62 IDELR 195 (SDNY 1/21/14) Court excused exhaustion where SRO decision was more than 8 months late; Walsh ex rel VW v King 64 IDELR 39 (NDNY 9/12/14) Where SRO decision more than seven months late, court ordered SRO to decide within 14 days or exhaustion would be determined futile; Walsh ex rel VW v King 64 IDELR 138 (NDNY 10/10/14) Despite SRO taking 7 months to consider SD appeal, court could not order out-of-state residential placement as finally awarded in SRO decision where 30 days had not elapsed and state regs allow 30 days for SD to arrange an out-of-state placement; EE ex rel GE v NY City Dept of Educ 64 IDELR 15 (SDNY 8/21/14) SRO decision **not** entitled to **deference** because it was not timely issued; TL by AL & RL v

NY City Bd of Educ 63 IDELR 291 (EDNY 7/29/14) Where SRO had not considered a remand by the court 15 months earlier, court reconsidered its previous deference to SRO decision and awarded reimbursement instead giving deference to ho decision awarding reimbursement PS v NY City Dept of Educ 63 IDELR 255 (SDNY 7/24/14)@n.3 Court rejected parent argument that SRO decision should be given no deference because it was late although court agreed that delays by the SRO in rendering decisions is problematic.; HB & TB ex rel BB v Byram Hills Central Sch Dist 66 IDELR 47 (SDNY 7/20/15) Although SRO failed to issue a decision for **nearly two years** after dpc, court dismissed for exhaustion where new HO promised a decision by a date certain.

4. Miller ex rel TM v Monroe Sch Dist 66 IDELR 99 (WD Mich 9/16/15) Court required SD to pay private tuition for student for 142 days even though HO ruled in favor of SD where HO decision was **142 days past the 75 day limit**. (?? But HO could have granted requests for extension over parent objection???)

5. JR v Cox-Cruey 65 IDELR 294 (ED Ky 7/6/15) Court ruled that parent's request for second tier review of unfavorable HO decision was untimely because she sent request by regular mail and not certified mail as required by state rule. Because no timely appeal to second tier, parent had not exhausted administrative remedies.

6. Florida Dept of Educ 114 LRP 47196 (SEA FL 5/13/14) State complaint investigator ruled that SEA had **properly trained** hos regarding 45 day rule/ deadline for issuance of decision.

7. AS v Harrison Township Bd of Educ 64 IDELR 239 (DNJ 12/11/14) Court refused to issue injunction or declaratory judgment where HO had failed

to issue a decision within 45 days of end of resolution period. There was no evidence or allegation that there was a pattern or policy of late decisions.

8. NY City Dept of Educ v SH by DH & AB 62 IDELR 264 (SDNY 1/22/14) Court ruled that SD appeal of ho decision to SRO was untimely when served later than the 35 days permitted by state law.

*f. Due Process Hearing System in General*

1. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit ruled that the state department of education has **no power** to **review HO decisions** or to **supervise the HO's management** of a dph. Ninth Circuit approved of HO reframing the issues at the **PHC**.

2. EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit **upheld** the NC **two-tier dph** system even though the first tier was not held by the LEAs (1<sup>st</sup> tier = OAH; 2d tier = SROs for SEA). The court noted that the state has the primary role in setting educational policy and in resolving disputes under IDEA. **However** court noted that the result might be different if the state system in question had **numerous steps or onerous levels** of review as such would violate IDEA, but NC system was ok'ed.; {affirming EL by GL v Chapel Hill-Carrboro Bd of Educ 62 IDELR 4 (MD NC 9/30/13) Court rejected parent argument that NC 2 tier dph system was invalid};

3. SL by Loof v Upland United Sch Dist 747 F.3d 1155, 63 IDELR 32 (9<sup>th</sup> Cir 4/2/14) @n.2 Ninth Circuit reversed District Court holding that an IDEA hearing officer has the **authority to review or enforce a settlement agreement**. Note that in South Kingston Sch Committee v Joanna S ex rel PJS 64 IDELR 191 (1<sup>st</sup> Cir

12/9/14)@n3 First Circuit did not address whether an IDEA HO has the authority to enforce or interpret a settlement agreement but noted that courts are **split** on the issue.

4. Edward S & Virginia S ex rel TS v West Noble Sch Corp 63 IDELR 34 (ND Ind 3/31/14) @n.1 HO's dismissal with prejudice for failure to comply with four ho directives was akin to a sanction pursuant to the **inherent power** of a court. (!!);District of Columbia Public Schs (JS) 112 LRP 47415 (SEA DC 6/28/12) HO ruled that in IDEA cases, HO has the power to **develop** the administrative record , including the ability to depart from the adversary process so long as the HO remains impartial; Hiawatha Sch Dist # 426 (JS) 58 IDELR 269 (SEA Ill 2/27/12) HO has a duty to make a complete record (including the **power to ask questions** of Ws) and to ensure a fair process. Under principles of administrative law, a HO may depart from the adversarial model, but must remain impartial; In re Student with a Disability 103 LRP 20843 (SEA WV 2002). A hearing officer has the inherent authority to regulate the conduct of a hearing. In Stancourt v. Worthington City Sch. Dist. Bd. of Educ. 44 IDELR 166 (Ohio App. Ct. 10/27/05), the state appellate court held that a special ed hearing officer has broad discretion in accepting and rejecting evidence and in conducting a hearing. Noting that a hearing officer has **implied powers** similar to those of a court, the court ruled that the hearing officer has the implied power to impose "... silence, respect, and decorum... and submission to his lawful mandates. See also Clark Co. Sch. Dist 102 LRP 18829 (SEA NV 1998) (authority to reduce the number of witnesses from 50), In Re Student with a Disability 103 LRP 21076 (SEA MI 2001) (inherent authority to rule on motions during hearing.); San Dieguito Union High Sch. Dist. 104 LRP 4706 (SEA Calif. 2003).

*g. Five Day Disclosures*

1. Cooper v Dist of Columbia 64 IDELR 271 (DDC 12/30/14) Court held that HO has **discretion** to determine whether to exclude or permit evidence not disclosed five business days before a dph. Here HO properly exercised his discretion in permitting the testimony; Independent Sch Dist #413, Marshall v AJ by MN 66 IDELR 41 (D Minn 8/11/15) @n.3 Court rejected SD argument that HO should be reversed because he **allowed** parents to present evidence that was disclosed one day late (**five day** rule) where SD could show no prejudice as a result in its ability to present its case.

2. BG v Ocean City Bd of Educ 64 IDELR 105 (DNJ 9/26/14) Under NJ rules, student petitioned for emergent relief for stay put. HO noticed a hearing on the emergent relief motion, but HO erred by holding the dph itself instead of the noticed emergent relief hearing. Student had no notice of dph. HO also violated five business day **disclosure rule** where HO permitted SD to call an undisclosed witness who testified that student was frequently absent from a vocational program. Student contended that the absences were excused but was unable to rebut because no disclosure of witness.

2. Avila v Spokane Sch Dist #81 64 IDELR 171 (ED Wash 11/3/14) Court upheld HO rulings at dph in applying five day disclosure rule; . Student v Hartford Bd of Educ No. 15-0384 (JJ) (SEA CT 9/15/16). Where a pro se parent refused to provide witness and exhibit information after numerous instructions from the hearing officer, failed to request an extension, and otherwise failed to comply with HO orders, HO dismissed parent dpc with prejudice for failure to prosecute. The decision is [available here](#).

4. JL ex rel JR v NYC Dept of Educ 66 IDELR 239 (SDNY 12/16/15) Court reversed HO who excluded evidence for failure to disclose where prehearing order was not clear about disclosure deadline.

*h. No Right to Effective Assistance of Counsel* (no significant cases)

*i. Mootness (dph level)*

1. TP by JP & BP v Bryan County Sch Dist 792 F.3d 1284, 65 IDELR 254 (Eleventh Cir 7/2/15) Eleventh Circuit ruled that parents request for an IEE was **moot** as LEA evaluation was **no longer current** because of triennial reevaluation process.

2. Boose v Dist of Columbia 786 F.3d 1054, 65 IDELR 199 (DC Cir 5/26/15) DC Circuit reversed dismissal of parent claim as moot where SD developed an adequate IEP for the student but provided **no compensatory education** as requested by the complaint. Compensatory education is intended to make up for prior deficiencies, therefore, claim not moot.

3. District of Columbia Public Schs (JG) 111 LRP 75901 (SEA DC 8/21/11) Where the school district provided an authorization for an independent educational evaluation, the dpc was moot because the relief requested had been provided;

4. Bookout v Bellflower Unified Sch Dist 63 IDELR 4 (CD Calif 3/21/14) Ct affirmed HO who declined to rule on issue that was not yet ripe. HOs and courts do not rule on **hypothetical** issues; IEC by JR v Minneapolis Public Schs Special Sch Dist No. 1 34 F.Supp.3d 1005, 63 IDELR 215 (D Minn 7/22/14) Applying Eighth Circuit precedent in *Thompson*, court affirmed HO who dismissed dpc as moot where parent failed to file dpc before withdrawing the student from school.

5. Morris v Dist of Columbia 63 IDELR 99 (DDC 4/25/14) Court reversed HO who dismissed parent claim as moot where student was confined in a group home for three to nine months as a result of a probation violation. Although the student would not be able to obtain the relief of a private placement, he could receive compensatory education and his IEP could be corrected if inappropriate which could help him during confinement; Fullmore v Dist of Columbia 63 IDELR 94 (DDC 5/9/14) reversing Mgst @114 LRP 21506. HO erred in dismissing dpc as moot because SD had agreed to provide an IEE = the relief requested because the parent also requested compensatory ed. (????) Rather than remand to ho because of incomplete record Judge ordered parties to confer and determine whether moot. (??); Contrast Copeland v Dist of Columbia 64 IDELR 37 (DDC 9/15/14) Mgst recommended that HO be affirmed where he dismissed dpc as moot where SD had offered 125 hours of 1:1 tutoring as comp ed for a denial of FAPE.

***j. Res Judicata/Collateral Estoppel***

1. District of Columbia Public Schs (JG) 111 LRP 75901 (SEA DC 8/21/11) Res judicata and collateral estoppel preclude a dph on claims that have been previously litigated or resolved through a settlement agreement;

***7. Stay Put –Student’s Placement During Due Process or Litigation***

a. John M. by Christine M & Michael M v. Bd of Educ of the Evanston Township HS Dist No. 202 502 F.3d 708, 48 IDELR 177 (7th Cir. 9/17/7) The Seventh Circuit noted that determining “then current educational placement’ is an inexact science requiring a **fact driven** approach. Respect for the purpose of the stay put provision requires focus upon the child’s educational needs so the educational status quo for a

“growing, learning, young person” often makes rigid adherence to a particular educational methodology an impossibility. Stay put, therefore, requires **flexibility** in interpreting the educational placement per the last agreed upon IEP and flexibility concerning the child’s needs; CS by Julia V v Lansing Sch Dist #158 115 LRP 31079 (ND Ill 1/23/15) quoting *John M*, court held that a stay put educational placement falls **somewhere between the physical school attended by the child and the abstract goals of his IEP** and courts use a fact-driven approach to determine whether a change of placement has occurred. Here court found agreed upon placement was stay put.

b. DM & LM ex rel EM v New Jersey Dept of Educ 801 F.3d 205, 66 IDELR 93 (Third Cir 9/10/15) The question of what constitutes a change of educational placement for stay put purposes is necessarily **fact specific**. Here the court found that the record was not particularly developed (eg. No IEP in the record.) The court ruled that the safest course was to keep the student in her current school as stay put until court below rules on parent’s claim vs SEA re its approval process for private school programs. (SEA had downgraded approval of the private school in question for LRE concerns claiming this was merely a change of location not a change of placement; court disagreed finding that services were intertwined with location.)

c. Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) Parent argued that SD violated stay put by failing to provide the related services of speech therapy and OT. District court agreed but limited relief only to money that the parent had already paid out for the related services to avoid awarding money damages which are not available under IDEA. Second Circuit reversed holding that the parent was entitled to the **full value** of the related services provided for in the IEP

not as money damages, but rather as a form of compensatory education. (Full value of services not yet paid for by the parent.

d. MR & JR ex rel ER v. Ridley Sch Dist 744 F.3d 112, 62 IDELR 251 (3d Cir 2/20/14). Third Circuit held that stay put applies through the final resolution of the case. Joining the 9<sup>th</sup> and unlike the DC & 6<sup>th</sup> Circuits, the Third Circuit held that stay put does not end with a district court decision adverse to the parents, but continues through the appeals process. Thus where an IDEA ho approves a unilateral placement by a parent, stay put takes effect and remains until the appeals are over. **Reversal by a district court** of a ho decision that the parent's appropriate placement is necessary to meet the child's needs **does not release** the school district's **obligation to pay** until the appeal is concluded because stay put accrues when the dispute arises- not when the parent's request reimbursement. The premise of IDEA is that parents and schools working together is the ideal way to reach the statutory goal of FAPE for every child, but Congress recognized that the collaborative process may break down. Stay put maintains the educational status quo. To determine the then current educational placement, courts look at the **IEP actually functioning** when stay put is invoked. Parents do not have to request stay put or reimbursement for stay put to apply; ST by SJPT v Howard County Public Sch System 64 IDELR 63 (D Md 9/25/14) Court denied SD request for injunction to alter stay put. Even though HO decision that FAPE was provided made it likely SD would prevail on merits, and \$8.2K per month private school tuition was an irreparable injury, the equities required that student remain in private school.

e. NW by JW & JW v Boone County Board of Education 763 F.3d 611, 63 IDELR 275 (6<sup>th</sup> Cir 8/18/14) Private school placement pursuant to a settlement agreement

was not the stay put placement; rather, stay put involves a placement determined by an IEP team.

f. Bd of Educ of the County of Boone WV v KM 65 IDELR 138 (SD WV 3/31/15) Court denied SD motion to stay enforcement of HO decision pending appeal. HO ordered SD to pay for private ABA services and when **HO ordered** that relief it **became stay put**. The fact that SD failed to pay does not justify stay; AB v Baltimore Bd of Sch Commissioners 65 IDELR 10 (D Md 2/4/15) Court ruled that a private school was stay put because HO so ruled. HO decision in parents favor acts as an agreement by parties for stay put. SD had to pay private school tuition even though no ruling on merits yet; Wimbish v Dist of Columbia 66 IDELR 281 (DDC 12/22/15)(same);

g. AB v Baltimore City Bd of Sch Commissioners 65 IDELR 228 (D Md 6/9/15) Court declined to end stay put order requiring LEA to pay for a private school during the current school year because it would be disruptive to the student's education; Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Court reversed HO who cut off reimbursement after December 2013 when she found that SD had offered FAPE. Instead court agreed with parents that stay put required reimbursement until litigation was finished; AB v Baltimore City Bod of Sch Commissioners 66 IDELR 40 (D Md 8/13/15) Court criticized HO stay put order as unclear where HO ordered the private school named in a mediation agreement as stay put placement for the school year. Court interpreted HO to mean =stay put until litigation finished. Stay put order was also problematic because HO incorrectly questioned his authority to make SD pay for stay put placement.

h. Jackson County Sch Bd v PLB 66 IDELR 127 (ND Fla 9/29/15) Court denied SD motion for atty fees vs parents lawyer. While dph pending parents filed 2d dpc over cancellation of subsequent IEPT meeting. HO dismissed because of stay put. Court disagreed noting that although SD cannot compel a new IEP while dph pending, parties can agree so stay put did not bar the meeting. @d dpc was not frivolous or unreasonable.

i. Jalen Z v Sch Dist of Philadelphia 65 IDELR 198 (ED Penna 5/15/15) Court ruled that stay put during dispute over kindergartener's IEP was his preschool IEP (=then current placement.)

j. GB v Dist of Columbia 64 IDELR 310 (DDC 1/14/15) Court granted parent an injunction where SD made changes to student's current placement while dph was pending violating stay put.

k. JG by Jimenez v. Baldwin Park Unified Sch Dist 65 IDELR 177 (CD Calif 3/20/15) Stay put maintains the **status quo** unless the parties agree otherwise. It was wrong, therefor, for SD to refuse to consider mom's request for placement at state school for the deaf citing stay put because pending dph. They could have agreed otherwise.

l. Dervishi ex rel TD v Stamford Bd of Educ 66 IDELR 60 (D Conn 8/5/15) Because an IDEA **settlement** clearly provided for a student's home based program as a temporary measure, SD did not have to continue funding it for years under stay put.

m. SC by CC & SC v Palo Alto Unified Sch Dist 63 IDELR 124 (ND Calif 6/2/14) Court ruled that IDEA amendments concerning transfer students did not alter the stay put obligation. Stay put required that the new district approximate the home-based ABA program which was the **last agreed upon placement** from the student's previous district for the duration of the parties' dispute; DG by PG & FK v San Diego Unified Sch

Dist 66 IDELR 167 (SD Calif 9/21/15) For transfer students, stay put requires that the LEA implement the last agreed upon IEP or adopt one that approximates it, here private school from old IEP;

n. RR by Roslyn v Oakland Unified Sch Dist 62 IDELR 290 (ND Calif 2/25/14) Court held that stay put was 3 days per week at special day school that parties had agreed to in a subsequent agreement and not 2 days per week provided in last agreed upon IEP. Parent's request for daily body checks and monthly staff meetings were denied because not part of agreement and therefore not ordered as stay put.

o. Abington Heights Sch Dist v AC 63 IDELR 97 (MD Penna 5/2/14) Court refused to grant SD an injunction to undo a stay put order. SD had not shown likelihood of success on the merits or irreparable harm, but a temporary move could be harmful to the child.

p. Marcus I by Karen I v Dept of Educ, State of Hawaii 64 IDELR 13 (D Haw 8/22/14) Pursuant to 9<sup>th</sup> Circuit remand, district court remanded to HO to calculate housing expenses of parents for stay put purposes.

q. AA & LA ex rel AA,Jr v Claris Unified Sch Dist 63 IDELR 224 (ED Calif 7/11/14) Court dismissed parent lawsuit for a stay put violation. **Stay put is not** itself an **independent cause of action**, it is a protection during the administrative process and litigation.

r. Smith v Cheyenne Mountain Sch Dist 12 64 IDELR 134 (D Colo 10/17/14) (private school placement **ordered by HO** is stay put pending district appeal); Ricci & Karen C ex rel LC v Beech Grove City Schs 63 IDELR 187 (SD Ind 7/1/14) Court held that private placement ordered by HO was stay put; Contrast, AW & NW ex rel BW v Bd

of Educ Walkill Central Sch Dist 65 IDELR 211 (NDNY 4/21/15) adopted by Dist Ct @ 65 IDELR 237. Mgst recommended that a private placement was not the stay put placement where SRO found that private placement was appropriate for 2011-12 school year but not for 2012-13 & 2013-14. Mgst recognized that an administrative decision in parents favor is normally considered an agreement by parties for stay put, but here specific findings make the private placement inappropriate; JG by HG & DG v Dept of Educ, State of Hawaii 64 IDELR 7 (D Haw 8/27/14) Court ruled that HO order requiring reimbursement but not specifying that parent private placement was appropriate did not operate as an “agreement” for stay put purposes; Sheils v Pennsbury Sch Dist 64 IDELR 294 (ED Penna 1/26/15) Court ruled that stay put was the placement ordered by HO where mom was in agreement even though **divorced** father disagreed and requested previous placement and fba ordered by HO could also not be stayed by father.

s. Ocean Township Bd of Educ v. ER ex rel OR 63 IDELR 16 (D NJ 3/10/14) Noting that in disciplinary cases, **stay put is the IAES**, court granted TRO motion by SD and reversed ho’s stay put order that paced student back into neighborhood HS.

### ***8. 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. Fremont 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.

b. 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; 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; JF & LV ex rel NF v NYC Dept of Educ 65 IDELR 35 (SDNY 3/3/15) Courts defer to HOs because courts lack expertise in educational policy. Deference is particularly appropriate where as here decision is

grounded in **logical reasoning**, is thorough and where decision demonstrates HO's **command** of the record and where conclusions are supported with solid analysis; AA ex rel JA v NYC Dept of Educ 66 IDELR 73 (SDNY 8/24/15) **Well reasoned** HO decision entitled to deference.

c. 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**.

d. 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**.

e. Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} Court found that HO **properly explained and justified** his credibility findings where he found testimony of mom **less credible and persuasive** than the testimony of SD witnesses where there were serious inconsistencies in mom's testimony, where she overstated student's injuries and where she contradicted the parties' stipulations; Stepp ex rel MS v Midd West Sch Dist (JG) 65 IDELR 46 (MD Penna 2/23/15) {affirming HO decisions @112 LRP 45128 and 113 LRP 16891} Court affirmed HO determination that the testimony of parent's expert school psychologist was entitled to **no weight** where his testimony was not credible or persuasive and contained contradictions; ST ex rel SJPT and IT v Howard County Public

Sch System 64 IDELR 268 (D Mich 1/5/15) aff'd by 4<sup>th</sup> Cir in UNPUBLISHED decision @ 66 IDELR 270 (Fourth Cir 1/5/16). HO **properly weighed** expert testimony and determined credibility of witnesses appropriately. HO did not automatically credit SD witnesses as parent alleged. HO properly weighed the credibility and persuasiveness of all witnesses- parents' witnesses had little first-hand knowledge of student's needs; Oakland Unified Sch Dist v NS by Genning & Sandahl 66 IDELR 221 (ND Calif 11/10/15) Court defers to HO credibility findings because HO is in a better position to assess; TO & KO ex rel JO v Summit City Bd of Educ 66 IDELR 16 (DNJ 7/27/15) Court rejected SD argument that HO decision should be reversed because **every time** she considered **contradictory evidence** about a preschooler's needs, she **sided with the parent**. Where there are two permissible views of evidence, HO's choice between them is not clearly erroneous and unless there is non-testimonial evidence that would render the credibility determination unreasonable, court will defer.

f. (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.

g. BH by JH & JH v Johnston County Bd of Educ 65 IDELR 66 (EDNC 3/19/15) Court reversed Ho and SRO decision where they **failed** to make **findings** of fact or corresponding **conclusions** of law on **numerous issues** raised by the parents' claim. The HO decision which was summarily adopted by the SRO is **virtually a wholesale adoption of the SD's proposed final decision**. A line by line comparison reveals that the **HO adopted with no substantive modifications** all 480 findings of fact and 79 conclusions of law proposed by the SD.

h. LaGue v Dist of Columbia 66 IDELR 101 (DDC 9/16/15) The need for remand was particularly obvious where some of HO's **findings are unexplained** and others are stated in **hypothetical form**.

i. Troy Sch Dist v KM 65 IDELR 91 (ED Mich 3/31/15) Court rejected SD argument that HO decision violated the **spending clause** where compensatory services included a 1:1 psychologist for the student which it alleged was not required by IDEA. Court ruled that psychological services are among the related services available through IDEA and appropriate relief here. Also HO order that parent and SD work cooperatively was consistent with IDEA.

j. EF v Newport Mesa Unified Sch Dist 65 IDELR 265 (CD Calif 6/22/15) HO gave due **credit** to parent's expert testimony re IEP goals and fba; Kelsey v Dist of Columbia 115 LRP 14802 (DDC 1/13/15) Court ruled that HO properly discounted the testimony of parent's expert where he used the wrong legal standard; ML by Leiman v Starr 66 IDELR 7 (D Md 8/3/15) Court rejected parent argument that HO failed to consider evidence where he **discussed** it but clearly did not credit it or give it weight.

k. LS by Julia V Bd of Educ, Lansing Sch Dist 65 IDELR 225 (ND Ill 6/11/15) HO erred by considering in his decision an **affidavit** from the SD that contradicted witness who testified at dph without giving parent an opportunity to provide evidence rebutting the affidavit.

l. Sch Dist of Philadelphia v Williams ex rel LH 66 IDELR 214 (ED Penna 11/20/15) Compensatory education aims to place student in the position he would have occupied but for SD violation of IDEA, but comp ed is not the only remedy. Rather a court or HO **can order any equitable relief** that is appropriate given the purpose of

IDEA **including tuition reimbursement, a prospective injunction and declaratory relief**. Here HO did **not exceed her authority** by ordering remedy longer than one year denial of FAPE especially given prior litigation; Oconee County Sch Dist v AB by LB 65 IDELR 297 (MD Ga 7/1/15) Court affd HO remedy, including **reduction** of reimbursement for transportation by **50%** where both parties derailed the **collaborative** process. @n.5: Court encourages the parties to **work together** in the interest of the student; Larimer County Sch Dist, Poudre (CH) No. 2015:510 (SEA Colo 7/14/15) A state complaint investigator issued a decision requiring the school district, that had failed to comply with IDEA discipline requirements, to provide training to its staff - including **training on alternatives to traditional discipline**- including **restorative justice**. See my [blog post](#). Contrast, ZH ex rel ZH v NYC Dept of Educ 65 IDELR 235 (SDNY 5/28/15) Court ruled that HO erred by **ordering as relief** that the SD to place a student in a **private school that had not been approved by the state**. Unlike a unilateral placement by a parent- which can be in an unapproved school, an SD may only place a student in a school that meets state standards; Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Court reversed HO who cut off reimbursement after December 2013 when she found that SD had offered FAPE. Instead court agreed with parents that stay put required reimbursement until litigation was finished.

m. CC by Cripps v Hurst-Eules-Bedford Independent Sch Dist 65 IDELR 195 (ND Tex 5/21/15) Court did **not address** arguments that HO **exceeded** his authority by determining that the student's actions constituted a felony because the finding was not relevant to the issues he was deciding in a discipline case.

n. CC, Jr v Beaumont Independent Sch Dist 65 IDELR 109 (ED Tex 3/23/15)  
Court ruled that an IDEA HO has no obligation or authority to hear **motions to reconsider** after the final decision is issued;

o. JG by Jimenez v. Baldwin Park Unified Sch Dist 65 IDELR 177 (CD Calif 3/20/15) Court rejected HO's analysis where she **mischaracterized** the evidence, **ignored** mom's testimony, **failed to mention** the student's testimony, and where HO's analysis was not thorough and did not give a **fair representation** of the record; 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.

p. AB v Baltimore City Bod of Sch Commissioners 66 IDELR 40 (D Md 8/13/15) Court criticized HO stay put order as **unclear** where HO ordered the private school named in a mediation agreement as stay put placement for the school year. Court interpreted HO to mean =stay put until litigation finished. Stay put order was also

**problematic** because HO incorrectly questioned his authority to make SD pay for stay put placement.

q. 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.

r. 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.

s. Forrest 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 **standard** despite decades of court interpretations of IDEA; Grants Pass Sch Dist v Student 65 IDELR 207 (D Or 4/29/15) Court reversed HO who applied wrong **legal standard, ignored contradictory evidence**; made **inconsistent** determinations and **miscalculated** compensatory education;. Contrast, DeKalb County Bd of Educ v Manifold ex rel AM 65 IDELR 268 (ND Ga 6/16/15) Court rejected SD argument that HO improperly applied the ADA **legal standard** for effective communication to an IDEA claim where HO followed IDEA case law; Cobb County Sch Dist v DB by GSB & KB 66 IDELR 134 (ND Ga 9/28/15) HO affirmed where his judgment was sound, he applied correct legal standard, and his findings were supported by record evidence; Contrast JD ex rel AP v NYC Dept of Educ 66 IDELR 219 (SDNY 11/17/15) SRO given deference where his decision was well reasoned and he **explained why** he rejected contradictory evidence.

t. 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.

u. 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.

v. 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**. {aff'd 798 F.3d 1329, 66 IDELR 31 (10<sup>th</sup> Cir 8/25/15)}

w. 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 and (same case) , Dept of Educ, State of Hawaii v Rita L by Rita L 64 IDELR 293 (D Haw 1/27/15) Court remanded to a new HO when previous HO retired before complying with remand from court; Oakland Unified Sch Dist v NS by Genning & Sandahl 66 IDELR 221 (ND Calif 11/10/15) Court defers HO credibility findings because HO in a better position to assess.

x. 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;

y. Morgan M by Barbara M & Arthur WM III v Penn Manor Sch Dist 64 IDELR 309 (ED Penna 1/14/15) Court **reversed** HO ruling in favor of parent. Court ruled that SD **failure to label** its services as “autistic services” as required by state law did not violate IDEA where the IEP provided a full range of services to address the student’s identified needs.

z. YN by Gillamadrid v Clark County Schs 63 IDELR 7 (D Nev 3/20/14) HO dismissal order noting that the student received compensatory education as a part of a settlement was not sufficient judicial imprimatur to confer **prevailing party status** on parents for attorney’s fees purposes; RBIII by Batten v Orange East Supervisory Union 66 IDELR 277 (D Vt 12/30/15) Where HO dismissed dpc after settlement in mediation, and dismissal did not mention settlement or change parties’ legal relationship, insufficient **imprimatur**.

## ***9. Relief***

### ***a. In General***

1). Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 6/22/9) The Supreme Court noted that under its previous rulings in *Burlington* and *Carter*, courts and hos have broad authority to grant appropriate relief when there has been a violation of IDEA; 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**; Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12); In re Student with a Disability 111 LRP 40544 (SEA WV 5/31/11) (same re authority); MG & VM ex rel YT v City of NY Dept of Educ 62 IDELR 195 (SDNY 1/21/14) HO has

authority to award wide-ranging relief; Kelsey v Dist of Columbia 115 LRP 14802 (DDC 1/13/15) (broad discretion to fashion remedy to serve Act's remedial purposes.); Mr & Mrs A ex rel ZA v Greenwich Bd of Educ 66 IDELR 97 (D Conn 9/18/15) **All relief** under IDEA is **equitable**, including reimbursement.

2). GL by Mr GL & Mrs EL v Ligoneer Valley Sch Dist Authority 66 IDELR 91 (Third Cir 9/22/15) IDEA's **statute of limitations** for filing a dpc is 2 years and not 4 years as parent had argued. Dpc must be filed within 2 years of the date parent knew or reasonably should have known of the basis for the complaint. The IDEA statute of limitations does **not, however, limit the period of time for which compensatory education**. If the dpc is timely filed, then the court/ho has broad equitable powers to remedy for the entire period of the violation even if it extends beyond two years. In the Third Circuit, a child who is denied FAPE is entitled to compensatory education for the full period of deprivation excluding the time reasonably required by the district to remedy the situation.

3). Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) Parent argued that SD violated stay put by failing to provide the related services of speech therapy and OT. District court agreed but limited relief only to money that the parent had already paid out for the related services to avoid awarding money damages which are not available under IDEA. Second Circuit reversed holding that the parent was entitled to the full value of the related services provided for in the IEP **not as money damages**, but rather as a form of **compensatory education**. (Full value of services not yet paid for by the parent.) Contrast, Roges ex rel NH v Boston Public Schs 65 IDELR 175 (D Mass 4/17/15) (**money damages** which are not available under IDEA);

But See, Mr & Mrs A ex rel ZA v Greenwich Bd of Educ 66 IDELR 97 (D Conn 9/18/15) All relief under IDEA is **equitable**, including reimbursement. Since no money damages, no right to jury trial

4). EM ex rel NM v. New York City Dept of Educ 63 IDELR 181 (2d Cir 7/11/14) The Second Circuit held that the fact that the parent had not paid any money toward the \$85,000 tuition owed to a private school did not prevent reimbursement. **Direct payment** like reimbursement is within the scope of the equitable remedies available under IDEA.

5). RL & SL ex rel OL v Miami-Dade County Sch Bd 757 F.3d 1173, 63 IDELR 182 (11<sup>th</sup> Cir 7/2/14) Eleventh Circuit (joining at least circuits 4, 6, & 8) held that IDEA permits **reimbursement** for an **ABA** 1:1 home-based program where the Burlington/Carter/Forrest Grove factors are met.

6). Letter to Voigt 64 IDELR 220 (OSEP 6/2/14) OSEP opined that a **ho decision** must be **implemented** in a reasonable period of time and without undue delay. The nature of the **relief awarded** will determine what is a reasonable time. (Eg. Compensatory education services that are readily available should have little delay, but extensive renovations or the purchase of equipment not readily available will necessitate a longer time.)

7). Warrior Run Sch Dist 114 LRP 37530 (JG) (SEA Penna 3/17/14) Compensatory education is not a separate issue at a dph; rather it is a type of relief available to a student who prevails.

8). Sch Dist of Philadelphia v Williams ex rel LH 66 IDELR 214 (ED Penna 11/20/15) Compensatory education aims to place student in the position he would have

occupied but for SD violation of IDEA, but compensated is not the only remedy. Rather a **court or HO can order any equitable relief that is appropriate** given the purpose of IDEA **including tuition reimbursement, a prospective injunction and declaratory relief**. Here HO did **not exceed her authority** by ordering remedy longer than one year denial of FAPE especially given prior litigation; Oconee County Sch Dist v AB by **LB 65 IDELR 297** (MD Ga 7/1/15) Court affirmed HO remedy, including **reduction** of reimbursement for transportation by **50%** where both parties derailed the **collaborative** process. @n.5: Court encourages the parties to **work together** in the interest of the student; Larimer County Sch Dist, Poudre (CH) No. 2015:510 (SEA Colo 7/14/15) A state complaint investigator issued a decision requiring the school district, that had failed to comply with IDEA discipline requirements, to provide training to its staff - including **training on alternatives to traditional discipline-** including **restorative justice**. See my [blog post](#). Contrast, ZH ex rel ZH v NYC Dept of Educ 65 IDELR 235 (SDNY 5/28/15) Court ruled that HO erred by **ordering as relief** that the SD to place a student in a **private school that had not been approved by the state**. Unlike a unilateral placement by a parent- which can be in an unapproved school, an SD may only place a student in a school that meets state standards; Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Court reversed HO who cut off reimbursement after December 2013 when she found that SD had offered FAPE. Instead court agreed with parents that stay put required reimbursement until litigation was finished.

9). MS by Sartin v Lake Elsinore Unified Sch Dist 66 IDELR 17 (CD Calif 7/24/15) Court awarded parent the expense of an **IEE as equitable remedy** even though no previous SD evaluation as per fed regulations.

10). ZH ex rel ZH v NYC Dept of Educ 65 IDELR 235 (SDNY 5/28/15) Court ruled that HO erred by ordering as relief that the SD to place a student in a **private school** that had not been approved by the state. Unlike a unilateral placement by a parent- which can be in an **unapproved** school, an SD may only place a student in a school that meets state standards; Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Court reversed HO who cut off reimbursement after December 2013 when she found that SD had offered FAPE. Instead court agreed with parents that stay put required reimbursement until litigation was finished.

11). Troy Sch Dist v KM 65 IDELR 91 (ED Mich 3/31/15) Court rejected SD argument that HO decision violated the **spending clause** where compensatory services included a 1:1 psychologist for the student which it alleged was not required by IDEA. Court ruled that psychological services are among the related services available through IDEA and appropriate relief here. Also HO order that parent and SD work cooperatively was consistent with IDEA.

12). Forrest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14) Mgst rejected **extreme relief** awarded by ho and instead ordered an independent anxiety evaluation by a mutually agreeable evaluator (+relief more appropriate to the violation.)

13). Morris v Dist of Columbia 63 IDELR 99 (DDC 4/25/14) Court reversed HO who dismissed parent claim as moot where student was confined in a group home for three to nine months as a result of a probation violation. Although the student would not be able to obtain the relief of a private placement, he could receive compensatory education and his IEP could be corrected if inappropriate which could help him during confinement.

14). Chambers ex rel Chambers v Sch Dist of Philadelphia 64 IDELR 132 (ED Penna 10/20/14) Even though parents won IDEA dph and received > 4,000 hours of compensatory education, Court denied motion to dismiss §504 claim finding viable parent argument that **but for** IDEA violation, student **would have been functioning** at a much higher level and would need less physical and medical care.

15). IS by Sepiol v Sch Town of Munster 64 IDELR 40 (ND Ind 9/10/14) Court ruled that reimbursement was not available under Burlington because the parent had enrolled the student in a private school after the HO decision correcting the SD reading methodology that hadn't worked causing violation of FAPE, but Court found student entitled to compensatory education for the second school year and approved reimbursement for the private school as comp ed.

16). Warrior Run Sch Dist 112 LRP 41988 (JG) (SEA Penna 7/23/12) Although a HO may not grant individual relief for a procedural violation without more, a **HO may**, pursuant to IDEA § 615(f)(3)(E)(iii) order a school district to **fix** a procedural violation; Dawn G & Tony G ex rel DB v Mubank Indep Sch Dist 63 IDELR 63 (ND Tex 4/7/14) Court rejected SD argument that because HO found no FAPE violation, no relief could be awarded. HO found harmless procedural violations not a FAPE violation and HO awarded relief **correcting** the procedural violations; In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14) HO ruled that school district violated its child find duty. Because child was clearly not eligible, however, HO ordered **staff training** to comply with child find and correct the procedural violation in the future; Independent Sch Dist #413, Marshall v AJ by MN 66 IDELR 41 (D Minn 8/11/15) HO

properly denied compensatory education where no denial of FAPE but instead awarded a procedural remedy requiring an additional assessment.

***b. Compensatory education***

1) Reid ex rel Reid v. District of Columbia 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 3/25/05). The D.C Circuit developed a **qualitative** standard for awards of compensatory education in order to place disabled students in the same position they would have occupied but for the school district's violation of IDEA. The court rejected the hearing officer's calculation awarding one hour of compensatory education for each day of denial of FAPE. The court also rejected the parents' request of one hour of compensatory education for each hour of denial of FAPE. Instead, the court adopted a more **flexible approach** based upon the needs of the child who has been denied FAPE. For example some students might require only short intensive compensatory programs targeting specific deficiencies. Other students may require more extended programs, perhaps requiring even more hours than the number of hours of FAPE denied. Accordingly, the court remanded this matter for the submission of evidence as to the student's **deficiencies resulting from the denial of FAPE**. Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12) (same re flexible fact driven approach); Demarcus L by Dominique L v Bd of Educ of City of Chicago Dist #299 63 IDELR 13 (ND Ill 3/11/14) citing the Reid decision, court held that HO did not err in failing to award compensatory ed. HO ordered changes to student's IEP; added speech therapy and other related services; and ordered three IEEs. Parents could not show how comp ed would meet the student's needs resulting from educational harm; Gibson ex rel Gibson v Forrest Hills Sch Dist Bd of Educ 62 IDELR 261 (SD OH 2/11/14) Court noted that the Sixth Circuit has expressed

reservations about “rote hour-by-hour” compensatory education. Where court found transition violation, it rejected the comp ed proposed by both parties and fashioned its own remedy of 590 hours of transition services and 100 round trips for community job training; Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 200 (ND Calif 12/2/14) citing Reid, 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; Copeland v Dist of Columbia 65 IDELR 71 (DDC 3/11/15) HO erred in determining compensatory education where he made no determination of the harm to the student; Kelsey v Dist of Columbia 65 IDELR 92 (DDC 3/30/15) Compensatory education involves **discretionary injunctive relief** crafted by a HO or court to remedy the educational deficit created by a denial of FAPE by an LEA over time. Courts and hos award as comp ed educational services to be provided prospectively to compensate for a past deficient program. Comp ed may not be calculated by a cookie cutter approach (hour for hour, etc). Instead, there must be a qualitative and fact intensive inquiry. All IDEA relief depends upon **equitable considerations** and requires the HO or court to mold the relief to the necessities of the individual case. Here HO properly assessed the evidence and conducted a qualitative and fact intensive inquiry before he awarded 96 hours of speech as comp ed in order to **place the student where she would have been but for the denial of FAPE.**

2). GL by Mr GL & Mrs EL v Ligoneer Valley Sch Dist Authority 66 IDELR 91 (Third Cir 9/22/15) IDEA’s **statute of limitations** for filing a dpc is 2 years and not 4 years as parent had argued. Dpc must be filed within 2 years of the date parent knew or reasonably should have known of the basis for the complaint. The IDEA statute

of limitations **does not, however, limit the period of time for which compensatory education.** If the dpc is timely filed, then the court/ho has broad equitable powers to remedy for the entire period of the violation even if it extends beyond two years. A child's right to compensatory education does not turn on parental vigilance, but parental vigilance is vital to the preservation of that right. In the Third Circuit, a child who is denied FAPE is entitled to compensatory education for the full period of deprivation excluding the time reasonably required by the district to remedy the situation.

3). DK by Stephen K & Lisa K v. Abington Sch Dist 696 F.3d 233, 59 IDELR 271 (3d Cir 10/11/12) **Quantative:** Comp ed for a period equal to the deprivation and measured from the time that district knew or reasonably should have known minus a reasonable time to rectify; Jana K by Tim K v Annville Cleona Sch Dist 63 IDELR 278 (MD Penna 8/18/14) (same). But see, AW by HW & AW v Middletown Area Sch Dist 65 IDELR 16 (MD Penna 1/28/15) Court remanded to HO for an intensive fact specific inquiry to determine compensatory education- an equitable remedy that should aim to place the child in the same position they would have occupied but for the SD violation of IDEA.

4). Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} Compensatory education is **not a separate issue** at a dph; rather it is a **type of relief** available to a student who prevails; Morgan M by Barbara M & Arthur WM III v Penn Manor Sch Dist 64 IDELR 309 (ED Penna 1/14/15) HO erred by awarding compensatory education where parent had failed to prove any educational injury.

5). Stepp ex rel MS v Midd West Sch Dist (JG) 65 IDELR 46 (MD Penna 2/23/15) {affirming HO decisions @112 LRP 45128 and 113 LRP 16891} @n.8: where SD did not challenge HO determination that parent was entitled to four hours of **social work** for SD failure to permit a parent to communicate with IEPT thereby inhibiting right to participate, Court affirmed HO;

6). EF v Newport Mesa Unified Sch Dist 65 IDELR 265 (CD Calif 6/22/15) HO award of compensatory education (20 AT therapy sessions) was appropriate to remedy the IDEA violation.

7). JT by Renee & Floyd T v Dept of Educ, state of Hawaii 63 IDELR 3 (D Haw 3/24/14) Court noted that compensatory education may include reimbursement for **services** the student has **already received**, but denied reimbursement here because the student did not require the intensive mental health services offered by the school selected by the parents.

8). Mifflinburg Area Sch Dist (JG) 114 LRP 17516 (SEA Penna 3/18/14) HO declined to order additional tutoring as compensatory ed where the student already suffered from fatigue.

*c. Reimbursement/ Unilateral Placement*

1) Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 6/22/9) The Supreme Court held that it is not a prerequisite to reimbursement under IDEA that a child have been previously enrolled in and receive services from a public school. The Court noted that under its previous rulings in *Burlington* and *Carter*, courts have **broad authority** to grant appropriate relief when there has been a violation of IDEA. The Court held that the 1997 amendments do not limit that authority. The

ambiguous language of the provision at issue was not sufficient to effectuate a repeal by implication of *Burlington* and *Carter*.

2). Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 6/22/9) Reimbursement for a unilateral placement is appropriate where 1) the school district denied FAPE to the student or otherwise **violated IDEA**; 2) the parent **private school** placement is **appropriate**; and 3) **equitable** factors do not preclude the relief. See, CF by RF & GF v New York City Dept of Educ 746 F.3d 68, 62 IDELR 281 (2d Cir 3/4/14); LM & AM ex rel AM v East Meadows Sch Dist 63 IDELR 71 (EDNY 3/31/14); PC & MC ex rel MC v NY City Schs 64 IDELR 100 (EDNY 9/29/14); LM by MM & RM v Downingtown Area Sch Dist 65 IDELR 124 (ED Penna 4/15/15); Brock & Dalton ex rel SB v NYC Dept of Educ 65 IDELR 135 (SDNY 3/31/15); ML by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15); TM ex rel MM v NYC Dept of Educ 65 IDELR 146 (SDNY 3/25/15); MM ex rel JS v NYC Dept of Educ 65 IDELR 103 (SDNY 3/7/15); SW & BS ex rel PW v NYC Dept of Educ 92 F.Supp.3d 143, 65 IDELR 70 (SDNY 3/12/15); JL ex rel JR v NYC Dept of Educ 66 IDELR 239 (SDNY 12/16/15); LWL & EL ex rel CL v Pelham Union Free Schs 66 IDELR 241 (SDNY 12/9/15); AM ex rel EH v NYC Dept of Educ 66 IDELR 243 (SDNY 12/7/15); JM ex rel RM v Kingston City Sch Dist 66 IDELR 251 (NDNY 11/23/15); JD ex rel AP v NYC Dept of Educ 66 IDELR 219 (SDNY 11/17/15); DN & JN ex rel DN v Bd of Educ of Center Moriches Union Free Sch Dist 66 IDELR 163 (EDNY 9/28/15); John M ex rel Giovanni M v Brentland Union Free Sch Dist 66 IDELR 129 (EDNY 9/28/15); TF & AF ex rel MF v NYC Dept of Educ 66 IDELR 136 (SDNY 9/23/15); FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15); AA ex rel JA v NYC Dept of Educ

66 IDELR 73 (SDNY 8/24/15); SE ex rel GE v NYC Dept of Educ 66 IDELR 295 (SDNY 7/2/15);

3.) Blount County Bd of Educ v Bowens ex rel JB 63 IDELR 243 (11<sup>th</sup> Cir 8/5/14) Where LEA listed the private school the student had been attending in his IEP, it was **not** a unilateral placement by the parents.

4.) EM ex rel NM v. New York City Dept of Educ 63 IDELR 181 (2d Cir 7/11/14) The Second Circuit held that the fact that the parent had **not paid** any money toward the \$85,000 tuition owed to a private school did **not prevent** reimbursement. **Direct payment** like reimbursement is within the scope of the equitable remedies available under IDEA.

5.) SL by Loof v Upland United Sch Dist 747 F.3d 1155, 63 IDELR 32 (9<sup>th</sup> Cir 4/2/14) Ninth Circuit held that where reimbursement was ordered, it was also appropriate to reimburse for **transportation and expenses** incurred by two private aides.

6.) RL & SL ex rel OL v Miami-Dade County Sch Bd 757 F.3d 1173, 63 IDELR 182 (11<sup>th</sup> Cir 7/2/14) Eleventh Circuit (joining at least circuits 4, 6, & 8) held that IDEA permits reimbursement for an **ABA** 1:1 home-based program where the Burlington/Carter/Forrest Grove factors are met.

7.) Sneitzer v Iowa Dept of Educ, et al 796 F.3d 942, 66 IDELR 1 (8th Cir 8/7/15) Eighth Circuit denied reimbursement where FAPE provided. Parents could not demonstrate that participation in **show choir** was necessary for FAPE. Where goals were non-academic in nature, failure to make good grades did not show lack of progress.

8.) Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Court reversed HO who cut off reimbursement after December 2013

when she found that SD had offered FAPE. Instead court agreed with parents that stay put required reimbursement until litigation was finished.

9). AH by D'Avis v Independence Sch Dist 65 IDELR 149 (Missouri Ct App 4/7/15) Court upheld the HO panel's decision that parent waived right to reimbursement because she did not file dpc before withdrawing child from public school. Although 8<sup>th</sup> Cir decision in Thompson was not binding on state appeals court, it found its reasoning persuasive; Anmann v Wantzville R-IV Sch Dist 63 IDELR 101 (WD Missouri 4/23/14) Court dismissed parent claim as moot where parent had previously withdrawn daughter from public school and waived right to reimbursement.

10). **FIRST PRONG:** NW by JW & JW v Boone County Board of Education 763 F.3d 611, 63 IDELR 275 (6<sup>th</sup> Cir 8/18/14) IDEA does not permits courts or HOs to order reimbursement absent a finding of denial of FAPE or some other violation of IDEA; MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit remanded reimbursement claim after finding a denial of FAPE by failing to provide RtI documentation; MM & IF ex rel LF v New York City Dept of Educ 63 IDELR 156 (EDNY 6/17/14) Court granted reimbursement for private out-of-state residential school where district wrongfully failed to find child **eligible**; VS by DS v New York City Dept of Educ 63 IDELR 162 (EDNY 6/9/14) Court awarded reimbursement where district **violated** IDEA by failing to identify the school that the student would attend in **placement** notice and not notifying it until first day of dph; Parents had a right to timely and relevant information as a part of right to meaningful participation; MS by Sartin v Lake Elsinore Unified Sch Dist 66 IDELR 17 (CD Calif 7/24/15) Reimbursement awarded for evaluation violation; SB ex rel EG v NYC Dept of Educ 65

IDE LR 264 (SDNY 6/25/15); KR & SR ex rel Matthew R v NYC Dept of Educ 65  
IDE LR 173 (SDNY 4/20/15); HC ex rel SC v NTC Dept of Educ 65 IDE LR 176 (SDNY  
4/9/15); HW & HG ex rel MW v NY State Educ Dept 65 IDE LR 136 (EDNY 3/31/15);  
TM ex rel MM v NYC Dept of Educ 65 IDE LR 146 (SDNY 3/25/15); York Sch Dist v  
SZ ex rel PZ 65 IDE LR 39 (D Maine 2/27/15); Sch Dist of Philadelphia v Kirsch &  
Misher ex rel NK 66 IDE LR 247 (ED Penna 11/30/15); GB & DB ex rel AB v NYC Dept  
of Educ 66 IDE LR 223 (SDNY 11/5/15); FB & EB ex rel LB v NYC Dept of Educ 66  
IDE LR 94 (SDNY 9/21/15); **Contrast,** NS & OS ex rel SS v New York City Dept of  
Educ 63 IDE LR 157 (SD NY 6/16/14) Reimbursement denied where parent did not  
demonstrate that school district program was deficient; In Re: Student With a Disability  
58 IDE LR 270 (JG) (SEA WV 3/6/12); AG by MG v State of Hawaii Dept of Educ 65  
IDE LR 267 (D Haw 6/19/15); JL & JF ex rel CC c NYC Dept of Educ 65 IDE LR 137  
(SDNY 3/31/15); MM ex rel JS v NYC Dept of Educ 65 IDE LR 103 (SDNY 3/7/15);  
SW & BS ex rel PW v NYC Dept of Educ 92 F.Supp.3d 143, 65 IDE LR 70 (SDNY  
3/12/15); JF & LV ex rel NF v NYC Dept of Educ 65 IDE LR 35 (SDNY 3/3/15); PG &  
RG ex rel DG v City Sch Dist of NY 65 IDE LR 43 (SDNY 2/25/15); Tyler J by Cheryl  
Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDE LR 45 (D Haw 2/24/15); LWL &  
EL ex rel CL v Pelham Union Free Schs 66 IDE LR 241 (SDNY 12/9/15); AM ex rel EH  
v NYC Dept of Educ 66 IDE LR 243 (SDNY 12/7/15); JD ex rel AP v NYC Dept of Educ  
66 IDE LR 219 (SDNY 11/17/15); DN & JN ex rel DN v Bd of Educ of Center Moriches  
Union Free Sch Dist 66 IDE LR 163 (EDNY 9/28/15); TF & AF ex rel MF v NYC Dept  
of Educ 66 IDE LR 136 (SDNY 9/23/15); JN & JN ex rel JN v South West Sch Dist 66  
IDE LR 102 (MD Penna 9/15/15); AT & CT ex rel LT v Fife Sch Dist 66 IDE LR 104

(WD Wash 9/9/15); JK v Hudson City Sch Dist Bd of Educ 66 IDELR 142 (ND Ohio 9/9/15); KB by Brown v Dist of Columbia 66 IDELR 63 (DDC 9/8/15); Kornblut ex rel LK v Hudson City Sch Dist Bd of Educ 66 IDELR 66 (ND OH 9/2/15); AA ex rel JA v NYC Dept of Educ 66 IDELR 73 (SDNY 8/24/15); SE ex rel GE v NYC Dept of Educ 66 IDELR 295 (SDNY 7/2/15); (same); HO ruled FAPE not denied just because private school provided a better education; Rachel H v Dept of Educ, State of Hawaii 63 IDELR 155 (D Haw 6/18/14) (no reimbursement if no IDEA violation); BK & YK ex rel GK v NY City Dept of Educ 63 IDELR 68 (EDNY 3/31/14); WW ex rel MC v NY City Dept of Educ 63 IDELR 66 (SDNY 3/31/14); LU & NU ex rel GU v New York City Dept of Educ 63 IDELR 126 (SD NY 5/27/14); LM & AM ex rel AM v East Meadows Sch Dist 63 IDELR 71 (EDNY 3/31/14); ML & BL v NY City Dept of Educ 63 IDELR 67 (SDNY 3/31/14); MO & GO ex rel DO v NY City Dept of Educ 63 IDELR 37 (SDNY 3/27/14); RB & v NY City Dept of Educ 63 IDELR 74 (SDNY 3/26/14); Scott ex rel CS v NY City Dept of Educ 63 IDELR 43 (SDNY 3/25/14); EH ex rel MK v NY City Dept of Educ 63 IDELR 47 (SDNY 3/21/14); Smith v Dist of Columbia 63 IDELR 77 (DDC 3/14/14); Howard G ex rel Joshua G v State of Hawaii, Dept of Educ 62 IDELR 292 (D Haw 2/24/14); Matthew O by David O v Dept of Educ, State of Hawaii 62 IDELR 225 (D Haw 2/5/14); NM by WM & LM v Central Bucks Sch Dist 62 IDELR 237 (ED Penna 1/15/14) adopting MGST @62 IDELR 206; CL by Lucia Mar Unified Sch Dist 62 IDELR 202 (CD Calif 1/9/14); TE v Cumberland Valley Sch Dist 62 IDELR 204 (MD Penna 1/7/14); AW v Dist of Columbia 64 IDELR 149 (DDC 9/19/14) adopting Mgst @ 64 IDELR 114; EE ex rel GE v NY City Dept of Educ 64 IDELR 15 (SDNY 8/21/14); NB ex rel ZB v state of Hawaii, Dept of Educ 63 IDELR 216 (D Haw 7/21/14); (all

reimbursement denied where no IDEA violation); Reimbursement granted where FAPE denied; Dist of Columbia v Oliver 62 IDELR 293 (DDC 2/21/14) (same); KS v Strongville City Sch Dist 63 IDELR 125 (ND OH 5/30/14) (same); (all same)

11). **SECOND PRONG:** Leggett ex rel KE v Dist of Columbia 793 F.3d 59, 65 IDELR 251 (DC Cir 7/10/15) DC Circuit held that parent's private school is **appropriate** if it is reasonably calculated to confer educational benefit. Here appropriate; SL by Loof v Upland United Sch Dist 747 F.3d 1155, 63 IDELR 32 (9<sup>th</sup> Cir 4/2/14) Ninth Circuit approved reimbursement, specifically finding that the parents' private parochial school was **appropriate** in that it **provided specially designed instruction**. Although some of the student's progress was attributable to two private 1:1 aides, the school also played a major role by providing a supportive school environment and instructional materials; CL & GW ex rel CL v Scarsdale Union Free Sch Dist 744 F.3d 826, 63 IDELR 1 (2d Cir 3/11/14) **LRE is one factor** that should be considered in assessing the appropriateness of a private school selected by the parents, but in this setting the private school is not subject to the same LRE requirements as a public school placement. Some specialized private schools only educate children with disabilities. The standard for private schools is appropriate not perfect; 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) Second Circuit reversed district court that did not give sufficient deference to SRO decision concluding that parents' private school was not appropriate; In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) HO ruled private school not appropriate where it did **not provide related services** of OT and speech needed by the child; Downingtown Area Sch Dist (WC)112 LRP 27524 (SEA Penna 5/15/12) HO found parent's private school inappropriate, but

noted that in most cases parents are faced with a **massive** task of selecting an appropriate school after the public agency fails to appropriately educate the child generally requiring a **more relaxed standard**, but not here where parents had over one year to select; John M ex rel Giovanni M v Brentland Union Free Sch Dist 66 IDELR 129 (EDNY 9/28/15) reimbursement denied where parent could not explain how their private parochial school would provide services to address the student's disability. A unilateral placement need not provide every service that a student needs, but there must be a showing that there is some design in place for meeting the student's needs; Tyler J by Cheryl Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDELR 45 (D Haw 2/24/15) Court found private school inappropriate where no evidence that it could meet student's unique needs; Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Fact that private school did not maximize integration of disabled and non-disabled students as IDEA requires of public schools does not render private placement inappropriate for purposes of reimbursement; FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15) Private school was appropriate where it provided educational instruction and related services specifically designed to meet student's unique needs; KE v Dist of Columbia 62 IDELR 236 (DDC 1/23/14) Court affirmed HO denial of reimbursement where parent's private school was an expensive out-of-state school with no therapeutic component therefore not appropriate; West Linn Wilsonville Sch Dist v Student 63 IDELR 251 (D OR 7/30/14) Court reversed HO award of reimbursement where HO analysis of the appropriateness of the private school lacked substance; Suffield Bd of Educ v. LY 62 IDELR 203 (D Conn 1/7/14) Private school was not appropriate where no math supports and speech language services that student needed; Hannah L by George L

& Susan L v Downingtown Area Sch Dist 63 IDELR 254 (ED Penna 7/25/14) Although IDEA violation (LRE), court denied reimbursement where parent's private school was inappropriate; JH by LH & JH v Lake Central Sch Corp 64 IDELR 98 (ND Ind 9/30/14) (vacated at 65 IDELR 5 at request of SD) Court reversed HO decision where **no analysis** of whether parent's private school was appropriate but instead ordered reimbursement at a therapeutic day school of the parent's choosing; JG by HG & DG v Dept of Educ, State of Hawaii 64 IDELR 7 (D Haw 8/27/14) Court ruled that HO order requiring reimbursement but not specifying that parent private placement was appropriate did not operate as an "agreement" for stay put purposes; Pinto v Dist of Columbia 64 IDELR 103 (DDC 9/29/14) Mgst recommended dismissal of parent appeal where parent made no showing that private school was appropriate; Matthew D & Jennifer D ex rel MD v Avon Grove Sch Dist 65 IDELR 291 (ED Penna 7/13/15) Court aff'd HO decision denying reimbursement where parent's private school was not appropriate where little instruction provided and student regressed academically.

12). **THIRD PRONG:** Leggett ex rel KE v Dist of Columbia 793 F.3d 59, 65 IDELR 251 (DC Cir 7/10/15) DC Circuit held that it was not unreasonable for parent to enroll student in a private school in August where the SD had failed to return her calls or emails; RL & SL ex rel OL v Miami-Dade County Sch Bd 757 F.3d 1173, 63 IDELR 182 (11<sup>th</sup> Cir 7/2/14) Eleventh Circuit ruled that where **LEA** had **predetermined** the child's placement, it was **prevented** from raising the third prong **equities** of the Burlington etc analysis in order to defeat claim for reimbursement; Blount County Bd of Educ v Bowens ex rel JB 63 IDELR 243 (11<sup>th</sup> Cir 8/5/14) Even if it were a unilateral placement despite being mentioned in student's IEP, **failure to give notice** is not a bar to

reimbursement but rather **a factor** to be considered by the Court in its discretion; In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) HO ruled that equities did not favor reimbursement where the parent's **refused** to let the school district **evaluate** the child and where the parents failed to give the public school program a **chance** to succeed; HW & HG ex rel MW v NY State Educ Dept 65 IDELR 136 (EDNY 3/31/15) Equities favored reimbursement where parent did not place student in private school until after IEPT meeting; FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15) Equities favored parent where they cooperated throughout and where LEA **ignored several inquiries** by parents; Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Ct affd HO ruling that equities favored reimbursement where there was no evidence that parents had committed to sending student only to the private school; GB & DB ex rel AB v NYC Dept of Educ 66 IDELR 223 (SDNY 11/5/15) Where parents cooperated and were reasonable at all times, equities favored reimbursement; DN & JN ex rel DN v Bd of Educ of Center Moriches Union Free Sch Dist 66 IDELR 163 (EDNY 9/28/15) Bald assertion by SD that parents predetermined private school was not supported by the evidence; West Linn Wilsonville Sch Dist v Student 63 IDELR 251 (D OR 7/30/14) Court reversed HO award of reimbursement where the equities did not favor reimbursement- parents **refused to consider** or discuss a public school placement at IEPT meeting and failed to give the **10 day notice** of U/P; KS & MS ex rel AS v Summit Bd of Educ 63 IDELR 253 (DNJ 7/25/14) Court denied reimbursement because of equities- parents **failed to express** their concerns at most recent IEPT meeting and failed to give **ten day notice**; Scott ex rel CS v NY City Dept of Educ 63 IDELR 43 (SDNY 3/25/14) Equities favored reimbursement;

*d. Direct Payment*

1). EM ex rel NM v. New York City Dept of Educ 63 IDELR 181 (2d Cir 7/11/14) The Second Circuit held that the fact that the parent had **not paid** any money toward the \$85,000 tuition owed to a private school did **not prevent** reimbursement. **Direct payment** like reimbursement is within the scope of the equitable remedies available under IDEA.

*e. Prospective Relief*

1). District of Columbia Public Schs (JG) 111 LRP 60092 (SEA DC 4/17/11) Although HO has broad discretion to award appropriate relief, there is a clear preference under IDEA for public school over private school. A prospective private placement as relief is appropriate only in unusual circumstances after balancing several factors including LRE; District of Columbia Public Schs (JG) 111 LRP 75901 (SEA DC 8/21/11) (same) (prospective private placement very unusual outside of DC).

*f. Creative Relief*

1). Many HO decision and court awards of relief have been **creative**: Draper v. Atlanta Indep Sch System 518 F.3d 1275, 49 IDELR 211 (11th Cir. 3/6/08) The Eleventh Circuit specifically approved of a **private school** placement as a **form of compensatory education** where the school district continued to use an ineffective reading program for three years despite the student's failure to make progress. Park v. Anaheim Union High Sch. Dist. 106 LRP 23543 (9th Cir. 4/17/06). The Ninth Circuit affirmed an award of compensatory education by a hearing officer in the form of requiring **training** of two of the teachers who implemented the student's IEP. The hearing officer phrased the award as compensatory education for the student in the form of training for his teachers in order

to meet the student's needs. P by Mr & Mrs P v. Newington Bd of Educ 546 F.3d 111, 51 IDELR 2 (2d Cir 10/9/8) The Second Circuit affirmed an award of compensatory ed by a HO that required the school district to **hire an inclusion expert** for a year and to permit him to participate in the development of an FBA for the student; Stepp ex rel MS v Midd West Sch Dist (JG) 65 IDELR 46 (MD Penna 2/23/15) {affirming HO decisions @112 LRP 45128 and 113 LRP 16891} @n.8: where SD did not challenge HO determination that parent was entitled to four hours of social work for SD failure to permit a parent to communicate with IEPT thereby inhibiting right to participate, Court affirmed HO; In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14) HO ruled that school district violated its child find duty by encouraging its staff to guide them away from SpEd evaluations and where the §504 administrator told a parent that the student was not likely eligible for SpEd or 504 because he had good grades when parent specifically requested a child find evaluation. Because child was clearly not eligible, however, HO ordered **staff training** to comply with child find in the future; Mifflinburg Area Sch Dist (JG) 114 LRP 17516 (SEA Penna 3/18/14) HO declined to order additional tutoring as compensatory ed where the student suffered from fatigue; Instead HO **rewrote IEP** to reflect evaluative data and awarded the use of a laptop computer and appropriate software as well as an AT evaluation; Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12) HO awarded compensatory service of **counseling** where special ed director ridiculed mom and severely impaired her right to meaningfully participate in IEPT process resulting in student not receiving counseling sessions with social worker; District of Columbia Public Schs (JG) 111 LRP 71480 (SEA DC 5/22/11) Where violation was failure to update IEP and resulting behavioral issues HO awarded as comp ed school district

**funding of summer camp** suited to address emotional issues; District of Columbia Public Schs (JG) 111 LRP 75901 (SEA DC 8/21/11) Where psychologist testified that student needed behavior therapy, HO awarded **behavioral support** services as comp ed; District of Columbia Public Schs (JG) 111 LRP 25934 (SEA DC 3/18/11) HO awarded **computer software** and a speech/language **evaluation** in addition to tutoring as comp ed; Albuquerque Public Schs 111 LRP 38713 (SEA NM 4/11/11) HO ordered a **facilitated IEPT** meeting as a part of the relief; District of Columbia Public Schs (JG) 111 LRP 25934 (SEA DC 3/18/11) HO awarded **computer software** and a speech/language **evaluation** in addition to tutoring as comp ed; Willington Bd of Educ v GW ex rel MW 65 IDELR 300 (D Conn 6/15/15) HO awarded private school placement as compensatory education which court found to be supportable and appropriate; Troy Sch Dist v KM 65 IDELR 91 (ED Mich 3/31/15) Court approved HO decision awarding as a 1:1 psychologist for the student and HO ordered that parent and SD work cooperatively was consistent with IDEA; Sch Dist of Philadelphia v Williams ex rel LH 66 IDELR 214 (ED Penna 11/20/15) Here HO did not exceed her authority by ordering remedy longer than one year denial of FAPE especially given prior litigation; Oconee County Sch Dist v AB by LB 65 IDELR 297 (MD Ga 7/1/15) Court affd HO remedy, including **reduction** of reimbursement for transportation by **50%** where both parties derailed the **collaborative** process. @n.5: Court encourages the parties to **work together** in the interest of the student; Horizon Instructional System Charter Schs 58 IDELR 145 (SEA Calif 1/3/12) After finding a transition violation, HO ordered a **vocational assessment** to be followed by an IEP using the results, a **mobility guide** and a **job coach**; Montgomery County Intermediate Unit (LV) 112 LRP 39052 (SEA Penna 7/3/12) HO awarded compensatory

education plus a **personal care assistant** and an **augmentative communication device**; Pasadena Independent Sch Dist (AL) 58 IDELR 210 (SEA TX 2/6/12) HO required as comp ed and as equitable relief that the district provide staff **training** to all SpEd teaching staff on **teaching human sexuality** appropriately to students with disabilities; IT by Renee & Floyd T v Dept of Educ, State of Hawaii 113 LRP 51351 (D Haw 12/17/13) Court held that **compensatory education** or relief can take the form of reimbursement for private tuition. The purpose of compensatory education is to put the student back in the position that he would have occupied had the district not violated IDEA; Larimer County Sch Dist, Poudre (CH) No. 2015:510 (SEA Colo 7/14/15) A state complaint investigator issued a decision requiring the school district, that had failed to comply with IDEA discipline requirements, to provide training to its staff - including **training on alternatives to traditional discipline**- including **restorative justice**. See my [blog post](#).

2). But see, Dracut Sch Committee v. Bureau of Sp Educ Appeals 55 IDELR 66 (D Mass 9/3/10) reversing Dracut Public Schs 52 IDELR 85 (SEA Mass 3/13/9) in prior outlines (granting extended eligibility and ordering LEA to hire specific person as comp ed); and Forrest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14) Mgst rejected **extreme relief** awarded by ho and instead ordered an independent anxiety evaluation by a mutually agreeable evaluator (+relief more appropriate to the violation.); ZH ex rel ZH v NYC Dept of Educ 65 IDELR 235 (SDNY 5/28/15) Court ruled that **HO erred** by ordering as relief that the SD to place a student in a **private school** that had **not** been **approved** by the state. Unlike a unilateral placement by a parent- which can be in an

unapproved school, an SD may only place a student in a school that **meets state standards**.

***g. Other Relief***

1). Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (U.S. 6/22/09) The Supreme Court noted that under its previous rulings in *Burlington* and *Carter*, courts and hos have **broad authority to grant appropriate** relief when there has been a violation of IDEA. In Re Student With A Disability 52 IDELR 239 (SEA WV 4/8/9) (HO has **broad powers** to grant appropriate relief); Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12); 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 - here awarding comp ed and thorough behavioral **evaluation**; In re Student with a Disability 111 LRP 40544 (SEA WV 5/31/11) (same re authority); MG & VM ex rel YT v City of NY Dept of Educ 62 IDELR 195 (SDNY 1/21/14) HO authority wide-ranging relief; Kelsey v Dist of Columbia 115 LRP 14802 (DDC 1/13/15) (broad discretion fashion remedy serve Act's remedial purposes)

2) Larimer County Sch Dist, Poudre (CH) No. 2015:510 (SEA Colo 7/14/15) A state complaint investigator issued a decision requiring the school district, that had failed to comply with IDEA discipline requirements, to provide training to its staff - including **training on alternatives to traditional discipline**- including **restorative justice**. See my [blog post](#).

3) Mr & Mrs A ex rel ZA v Greenwich Bd of Educ 66 IDELR 97 (D Conn 9/18/15) All relief under IDEA is **equitable**, including reimbursement. Since no money damages, no right to jury trial

### ***10. Enforcement of HO Decision***

a. Letter to Voigt 64 IDELR 220 (OSEP 6/2/14) OSEP opined that a HO decision must be **implemented** in a reasonable period of time and without undue delay. The nature of the **relief awarded will determine** what a reasonable time is. (Eg. compensatory education services that are readily available should have little delay, but extensive renovations or the purchase of equipment not readily available will necessitate a longer time.)

b. TB by Brenneise v San Diego Sch Dist 795 F.3d 1067, 66 IDELR 2 (Ninth Cir 7/31/15){see corrected opinion at 115 LRP 54544 (9<sup>th</sup> Cir 11/19/15)} Ninth Circuit reversed district court award of summary judgment for SD finding that SD's **failure to comply with HO order** requiring IEP to specify which qualified individual would provide G-tube feedings may constitute deliberate indifference.

c. DE by English & Shefy v Central Dauphin Sch Dist 765 F.3d 260, 64 IDELR 1 (3d Cir 8/27/14) Where a school district fails to comply with a HO's decision, the student is an **aggrieved party** and may sue under IDEA to enforce the decision. In a two tier dph system, a party who prevails at the first level need not exhaust the second level before seeking to enforce the ho's order in court; Oconee County Sch Dist v AB by LB 65 IDELR 17 (MD Ga 1/28/15) Parent does not have to exhaust administrative remedies before suing to enforce previous HO decision in court. Contrast, BD by Davis v Dist of Columbia 64 IDELR 201 (DDC 12/2/14) Court ruled that parent was not an aggrieved party where parent sought to enforce a favorable HO decision and therefore dismissed complaint; KP v Dist of Columbia 66 IDELR 96 (DDC 9/18/15) (same)

d. Bd of Educ of the County of Boone WV v KM 65 IDELR 138 (SD WV 3/31/15) Court denied SD motion to stay enforcement of HO decision pending appeal. HO **ordered SD to pay for private ABA** services and when HO ordered that relief it became **stay put**. The fact that SD failed to pay does not justify stay.

e. Fortes-Cortes v Garcia-Padilla 66 IDELR 18 (DPR 7/23/15) Because of SEA's **history of non-compliance with HO decisions** in parents' favor, court allowed parent to forego exhaustion with dph to enforce a settlement agreement reached at IEPT meeting by going directly to court. Exhaustion was futile given SEA willingness to disobey judicial and administrative orders.

f. Dist of Columbia v Masucci 62 IDELR 228 (DDC 1/30/14) Court held that although a ho decision placing a five year old in a private placement was likely wrong, SD erred by simply ignoring it rather than seeking a stay pending appeal.

g. Fresno Unified Sch Dist V KU 63 IDELR 250 (ED Calif 7/30/14) Court dismissed action by SD seeking to enforce a HO decision by requiring parent to consent and cooperate with a publicly funded IEE. Court noted that the courts are split on whether parents can file a suit to enforce a HO decision, but **no court** has allowed a **SD** to file a **lawsuit to enforce** a HO decision. SD is **not** an **aggrieved party**. Court found that the policies underlying IDEA protect students and parents but not LEAs. Therefore it would not serve public **policy**.

## *11. Appeal Issues*

### **a. Exhaustion of Administrative Remedies** (illustrative cases)

1) **Exhaustion required** - dismissed for failure to first have dp hearing:  
Fry ex rel EF v. Napoleon County Schs 788 F.3d 622, 65 IDELR 221 (Sixth Cir 6/12/15)

2 judge majority of Sixth Circuit held that parents §504 action to require a service dog for a quadriplegic student with cerebral palsy must be dismissed because of failure to exhaust IDEA remedies. “**Exhaustion ensures that complex factual disputes** over the education of disabled children are **resolved, or at least analyzed**, through **specialized local administrative** procedures.” Here exhaustion required because parent claims related to IDEA services; parents argued that dogs presence would allow child to forego aide and be more independent: Carroll ex rel AKC v Lawton Independent Sch Dist No 8 66 IDELR 210 (Tenth Cir 11/10/15) Tenth Circuit affirmed district court dismissal of parent §504, ADA & 1983 claims alleging a combination of educational, physical and emotional injuries because of a failure to exhaust administrative remedies. Parents alleged that teacher pulled student’s underwear and placed her in a dark closet as punishment. Mention of academic progress triggered the exhaustion requirement. n.4: Court **declined** to determine whether exhaustion is a **jurisdictional issue or an affirmative defense** because here SD had not waived issued by failing to raise it; AF by Christine B v Espanola Public Schs 66 IDELR 92 (Tenth Cir 9/15/15) A 2-1 majority of the Tenth Circuit ruled that successful **mediation** of an IDEA claim is not exhaustion of administrative remedies for later 504/ADA/1983 claims. Dissent disagrees; Batchelor ex rel RB v. Rose Tree Media Sch Dist 759 F.3d 266, 63 IDELR 212 (3d Cir 7/17/14) Third Circuit affirmed dismissal of parents’ claims under §504/ADA for failure to exhaust. Parents argued that harassment and retaliation of a high school student with SLD caused harm to his educational achievement and personal well-being. Parents did not allege an IDEA violation, but Third Circuit held that IDEA exhaustion was required because the **facts alleged involve FAPE** and failure to implement an IEP; EL by Lorsson v Chapel

Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit dismissed parent complaint where they had not exhausted by seeking review by second tier SRO; Rivera-Quinones ex rel AVR v Dept of Education of Puerto Rico 65 IDELR 202 (DPR 5/4/15) Parent failed to exhaust where she withdrew her accessibility complaint while pending before HO; Frank ex rel Frank v Sachem Sch Dist 84 F.Supp.3d 172, 65 IDELR 9 (EDNY 2/5/15) Court dismissed parent's claim for violation of ADA integration mandate for failure to exhaust IDEA remedies. Court found that the parent was alleging the equivalent of an LRE violation which was therefore a placement issue and IDEA exhaustion was needed; Singletary ex rel NM v Cumberland County Schs 65 IDELR 104 (EDNC 3/12/15) reversing Mgst @65 IDELR 78 Court granted summary judgment for SD where parent participated in dph but filed IDEA appeal before HO decision. Merely questioning witnesses at a dph is not sufficient; exhaustion is only satisfied if there is an administrative decision; TS by Sharbowski v Utica Community Schs 64 IDELR 270 (ED Mich 1/5/15) Where parent had a dph scheduled for the next week, court dismissed because case was not ripe and no exhaustion; LW v Egg Harbor Township Bd of Educ 65 IDELR 80 (NJ Superior Ct 3/10/15) State appellate court dismissed parent state anti-discrimination law claim for failure to exhaust IDEA remedies. Exhaustion ensures that IDEA's numerous procedural safeguards are not superfluous and lack of exhaustion would run counter to Congress' view that parents and school districts need to work together collaboratively; JA by TL & LA v Moorehead Public Schs, ISD #152 65 IDELR 47 (D Minn 2/23/15) Where bip for a 5 year old with Down Syndrome specified a quiet room when overstimulated, Parent claim concerning her being placed in a storage closet fell squarely within IDEA, therefore exhaustion

required for §504/ADA claims; Kuhiner ex rel JK v Highland Community Unit Sch Dist # 5 66 IDELR 131 (SD Ill 9/28/15) 504/ADA dismissed where no exhaustion and educational injuries were alleged; WR v State of Ohio, Dept of Health 66 IDELR 69 (ND OH 8/27/15) Part C lawsuit dismissed where no prior Part C dph; no futility where no systemic issues; Motyku ex rel KM v Howell Public Sch Dist 63 IDELR 154 (ED Mich 6/20/14) Court dismissed complaint alleging wrongful seclusion of kindergarten student with a disability in a bathroom after he ran away where parent did not exhaust administrative remedies by first having dph- NOTE a favorable state complaint decision was not sufficient; Holden v Miller-Smith 63 IDELR 154 (WD Mich 6/20/14) Court has previously dismissed parent IDEA lawsuit re misuse of mechanical restraints for failure to exhaust where no dph first; Parent action for events 5 years ago was also barred by statute of limitations; BC ex rel JC v Mt Vernon City Sch Dist 64 IDELR 49 (SDNY 8/28/14); TH v Cincinnati Public Sch Bd of Educ 63 IDELR 189 (SD OH 6/27/14) Court refused to excuse exhaustion at dph merely because affidavit of speech pathologist said student was at risk of serious regression without ESY; RR by Roslyn v Oakland Unified Sch Dist 63 IDELR 192 (ND Calif 6/23/14) Court dismissed parents IDEA claims which were included with §504/ADA claims for failure to exhaust; Rachel H v Dept of Educ, State of Hawaii 63 IDELR 155 (D Haw 6/18/14) Court rejected parent predetermination claim and denied reimbursement where school district contacted parents to determine the school closest to their residence after they moved to the other side of the big island; Laura A ex rel JO v Limestone County Bd of Educ 63 IDELR 166 (ND Ala 5/30/14) Parents §504 claim was dismissed for failure to exhaust with an IDEA dph; Chambers v Cincinnati Sch Bd 63 IDELR 93 (SD OH 5/13/14) Court dismissed lawsuit for

negligence for injuries suffered by a SpEd student with diabetes during a sexual assault for a lack of a federal question. Court also dismissed for failure to exhaust. Despite the lack of connection between IDEA and the injuries suffered, and the parents not seeking relief for educational injuries, failure to exhaust was not excused; Retamar-Lopez v Bd of Educ of the Dublin City Sch Dist 62 IDELR 196 (SD Ohio 1/21/14) Court dismissed for failure to exhaust administrative remedies. HO had dismissed after parent failed to show up for dph. Court ruled by failing to show, parent had not exhausted; RD v Souderton Area Sch Dist 65 IDELR 196 (ED Penna 5/19/15) Court dismissed parent §1983 suit claiming that SD had their daughter committed to a juvenile detention facility because of inappropriate behaviors in an out of district placement - parent claim was beyond statute of limitations (borrowed state 2 year S/L for tort claims); HB & TB ex rel BB v Byram Hills Central Sch Dist 66 IDELR 47 (SDNY 7/20/15) Although SRO failed to issue a decision for nearly two years after dpc, court dismissed for exhaustion where new HO promised a decision by a date certain; JR v Cox-Cruey 65 IDELR 294 (ED Ky 7/6/15) Court ruled that parent's request for second tier review of unfavorable HO decision was untimely because she sent request by regular mail and not certified mail as required by state rule. Because no timely appeal to second tier, parent had not exhausted administrative remedies.

2). **Exhaustion excused:** DE by English & Shefy v Central Dauphin Sch Dist 765 F.3d 260, 64 IDELR 1 (3d Cir 8/27/14) Where a school district fails to comply with a ho's decision, the student is an aggrieved party and may sue under IDEA to enforce the decision. In a two tier dph system, a party who prevails at the first level need not exhaust the second level before seeking to enforce the ho's order in court; JSR by

Childs v Dale County Bd of Educ 66 IDELR 164 (MD Ala 9/28/15) Parents exhausted by alleging 504/ADA/1983 claims **in IDEA dpc**; where **HO ruled** he had **no authority** over these claims, court permitted additional evidence on appeal; Oconee County Sch Dist v AB by LB 65 IDELR 17 (MD Ga 1/28/15) Parent does not have to exhaust administrative remedies before suing to enforce previous HO decision in court. Contrast, BD by Davis v Dist of Columbia 64 IDELR 201 (DDC 12/2/14) Court ruled that parent was not an aggrieved party where parent sought to enforce a favorable HO decision and therefore dismissed complaint; Alboniga ex rel AM v Sch Bd of Broward County Fla 65 IDELR 7 (SD Fla 2/10/15) Court ruled that exhaustion excused where parent was not seeking relief for any educational injury; GM & MCM ex rel CM v Brigantine Public Schs 65 IDELR 229 (DNJ 6/8/15) HO approval of settlement constituted sufficient exhaustion of administrative remedies to permit parent's §504/ADA/1983 action; Zdrowski ex rel CR v Rieck 66 IDELR 42 (ED Mich 8/11/15) Settlement of dph is not enough for exhaustion, but here SD waived argument; MB & RB by RPB v Islip Sch Dist 65 IDELR 269 (EDNY 6/16/15) Court denied SD motion to dismiss 504/ADA claims for bullying where parents alleged that SD had failed to provide them with the required Notice of Procedural Safeguards therefore exhaustion was futile because no information regarding the dph system was given to them; AP ex rel LH v Johnson 65 IDELR 102 (ND Iowa 3/23/15) Court excused parent's failure to exhaust where she would be unable to obtain relief under IDEA for the physical injuries caused by a teacher who restrained a student on two occasions; LL by KL v Hastings on Hudson Union Free Sch Dist 65 IDELR 168 (SDNY 4/21/15) Court excused exhaustion where parent alleged systemic violations; AM by Muschette v American Sch for the Deaf 65 IDELR 131 (D Conn 4/9/15) exhaustion was

not required for parent's §504/ADA claim where an IDEA HO would have no jurisdiction because the school was a private school; MH by KH v Mount Vernon City Sch Dist 63 IDELR 17 (SDNY 3/3/14) (excused where systemic issues alleged); MG & VM ex rel YT v City of NY Dept of Educ 62 IDELR 195 (SDNY 1/21/14)(same) Everett H by Harvey v Dry Creek Joint Sch Elementary Sch Dist 63 IDELR 39 (ED Calif 3/26/14) Court excused exhaustion where parents filed a state complaint (no dph) that challenged SEA policies; MG & VM ex rel YT v City of NY Dept of Educ 62 IDELR 195 (SDNY 1/21/14) Court excused exhaustion where SRO decision was more than 8 months late; Walsh ex rel VW v King 64 IDELR 39 (NDNY 9/12/14) Where SRO decision more than seven months late, court ordered SRO to decide within 14 days or exhaustion would be determined futile; Fortes-Cortes v Garcia-Padilla 66 IDELR 18 (DPR 7/23/15) Because of SEA's **history of non-compliance with HO decisions** in parents' favor, court allowed parent to forego exhaustion with dph to enforce a settlement agreement reached at IEPT meeting by going directly to court. Exhaustion was futile given SEA willingness to disobey judicial and administrative orders.

3). LH v Hamilton County Dept of Educ 65 IDELR 208 (ED Tenn 4/27/15) Parent **exhausted** by filing **IDEA dpc**. Fact that complaint did **not mention** 504 or ADA was not relevant.

4). West Baton Rouge Parish Sch Bd v Deshotel ex rel TD 63 IDELR 35 (MD Louisiana 3/31/14) Court reversed ho dismissal of SD dpc; court ruled that a SD could appeal an unfavorable state complaint decision with a dph. **State complaint** investigator had ruled against SD and ordered reimbursement for privately obtained services. Because the state complaint procedure could not satisfy the exhaustion

requirements, the only way that the SD could bring a civil action was to first have a dph; Southern ex rel NS v Fayette County Public Schs 63 IDELR 257 (ED KY 7/24/14) Court ruled that parent filing a state complaint was not sufficient for exhaustion; Pollard ex rel JH v Georgetown Sch Dist 66 IDELR 98 (D Mass 9/17/15) (same- state complaint not = exhaustion); Southfield Public Schs v Dept of Educ 64 IDELR 50 (Mich Ct App 9/16/14) State appellate court ruled that an LEA could only challenge a state complaint investigation in court if it first exhausted its administrative remedies by filing a **dph**.

#### **b. Deference to Hearing Officer's Decision**

1). EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit notes that a court must give deference to a HO decision unless it departs from **normal fact finding**.

2). 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; 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; BK &YK ex rel GK v NY City Dept of Educ 63 IDELR 68 (EDNY 3/31/14) Court held that IEP goals were appropriate deferring to SRO and noting that this is precisely the type of issue that requires deference to the expertise of administrative hos; WW ex rel MC v NY City Dept of Educ 63 IDELR 66 (SDNY 3/31/14) (same).

3). 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 hos **superior educational expertise**. Level of review is “involved oversight” ie, somewhere in between the highly deferential “clear error” standard and the non-deferential “de novo” standard.

4). Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} Court found that HO properly explained and justified his credibility findings where he found testimony of mom less **credible** and persuasive than the testimony of SD witnesses where there were serious **inconsistencies** in mom’s testimony, where she overstated student’s injuries and where she contradicted the parties’ stipulations; Stepp ex rel MS v Midd West Sch Dist (JG) 65 IDELR 46 (MD Penna 2/23/15) {affirming HO decisions @112 LRP 45128 and 113 LRP 16891} Court affirmed HO determination that the testimony of parent’s expert school psychologist was entitled to **no weight** where his testimony was not credible or persuasive and contained contradictions; McAllister v Dist of Columbia 63 IDELR 130 (DDC 5/21/14) adopting Mgst @ 62 IDELR 294. Fact based or credibility HO findings are entitled to greater deference; Oakland Unified Sch Dist v NS by Genning & Sandahl 66 IDELR 221 (ND

Calif 11/10/15) Court defers to HO credibility findings because HO is in a better position to assess; JN & JN ex rel JN v South West Sch Dist 66 IDELR 102 (MD Penna 9/15/15) HO credibility determinations are entitled to special weight; TO & KO ex rel JO v Summit City Bd of Educ 66 IDELR 16 (DNJ 7/27/15) Court rejected SD argument that HO decision should be reversed because **every time** she considered **contradictory evidence** about a preschooler's needs, she **sided with the parent**. Where there are two permissible views of evidence, HO's choice between them is not clearly erroneous and unless there is non-testimonial evidence that would render the credibility determination unreasonable, court will defer.

5.) JF & LV ex rel NF v NYC Dept of Educ 65 IDELR 35 (SDNY 3/3/15) Courts defer to HOs because courts lack expertise in educational policy. Deference is particularly appropriate where as here decision is grounded in logical reasoning, is thorough and where decision demonstrates HO's **command** of the record and where conclusions are supported with solid analysis; AA ex rel JA v NYC Dept of Educ 66 IDELR 73 (SDNY 8/24/15) Well reasoned HO decision entitled to deference.

6.) Laura A ex rel JO v Limestone County Bd of Educ 63 IDELR 166 (ND Ala 5/30/14) Under Eleventh Circuit caselaw, a reviewing court reviews ho's factual findings for clear error, but gives de novo review to mixed questions or application of facts to law.

7).Court gives **deference**: 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; RB & v NY City Dept of Educ 63 IDELR 74 (SDNY 3/26/14) thorough & well-reasoned; Scott ex rel CS v NY City Dept of Educ 63 IDELR 43 (SDNY 3/25/14) conclusions supported by record. But see, 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 {aff'd 798 F.3d 1329, 66 IDELR 31 (10<sup>th</sup> Cir 8/25/15)}; TM ex rel MM v NYC Dept of Educ 65 IDELR 146 (SDNY 3/25/15) Court held that IEP goals were appropriate deferring to SRO and noting that this is precisely the type of issue that requires deference to the expertise of administrative hos; JN & JN ex rel JN v South West Sch Dist 66 IDELR 102 (MD Penna 9/15/15) (credibility determinations approved); JD ex rel AP v NYC Dept of Educ 66 IDELR 219 (SDNY 11/17/15) SRO given deference where his decision was well reasoned and he explained why he rejected contradictory evidence.

8). **No deference:** Grants Pass Sch Dist v Student 65 IDELR 207 (D Or 4/29/15) Court gave no deference to and reversed HO who applied wrong **legal standard, ignored contradictory evidence**; made **inconsistent** determinations and **miscalculated** compensatory education;. 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; 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; Forrest 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; Suffield Bd of Educ v. LY 62 IDELR 203 (D Conn 1/7/14)n.4; Pointe Educ Services v AT 63 IDELR 279 (D Ariz 8/14/14) not careful and thorough.

9). AW v Dist of Columbia 64 IDELR 149 (DDC 9/19/14) adopting Mgst @ 64 IDELR 114. Under IDEA, a court may reverse a HO only if the court, giving the HO decision due weight, is nevertheless satisfied that the plaintiff has shown by a preponderance of the evidence that the ho decision is wrong. (??)

10). Credibility:

a. Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} Court found that HO **properly explained and justified his credibility findings** where he found testimony of mom less credible than the testimony of SD witnesses where there were serious inconsistencies in mom's testimony, where she overstated student's injuries and where she contradicted the parties' stipulations; Stepp ex rel MS v Midd West Sch Dist (JG) 65 IDELR 46 (MD Penna 2/23/15) {affirming HO decisions @112 LRP 45128 and 113 LRP 16891} Court affirmed HO determination that the testimony of parent's expert school psychologist was entitled to **no weight** where his testimony was not credible or persuasive and contained contradictions; ST ex rel SJPT and IT v Howard County Public Sch System 64 IDELR 268 (D Mich 1/5/15) aff'd by 4<sup>th</sup> Cir in UNPUBLISHED decision @ 66 IDELR 270

(Fourth Cir 1/5/16). HO properly weighed expert testimony and determined credibility of witnesses appropriately. HO did not automatically credit SD witnesses as parent alleged. Ho properly weighed the credibility and persuasiveness of all witnesses- parents' witnesses had little first-hand knowledge of student's needs; JN & JN ex rel JN v South West Sch Dist 66 IDELR 102 (MD Penna 9/15/15) HO credibility determinations are entitled to special weight; TO & KO ex rel JO v Summit City Bd of Educ 66 IDELR 16 (DNJ 7/27/15) Court rejected SD argument that HO decision should be reversed because **every time** she considered **contradictory evidence** about a preschooler's needs, she **sided with the parent**. Where there are two permissible views of evidence, HO's choice between them is not clearly erroneous and unless there is non-testimonial evidence that would render the credibility determination unreasonable, court will defer.

b. (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.

c. EF v Newport Mesa Unified Sch Dist 65 IDELR 265 (CD Calif 6/22/15) HO gave due **credit** to parent's expert testimony re IEP goals and fba.

d. 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.

e. 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.

### **c. Hearing Officer Immunity**

1) Singletary v Dept of Health & Human Services/NC Infant-Toddler Program 848 F.Supp.2d 588, 58 IDELR 228 (EDNC 3/2/12) Court held that an IDEA HO had **absolute quasi-judicial immunity** from suit.

### **d. Representation by Lawyer**

1. In Winkelman by Winkelman v. Parma City Sch. Dist 550 U.S. 516, 127 S.Ct. 1994, 47 IDELR 281 (5/21/2007) the Supreme Court ruled by a 7 to 2 margin

that the IDEA grants independent enforceable rights to parents as well as students. Accordingly, the court concluded that parents may pursue IDEA appeals in federal **court** without being represented by an attorney. NOTE: parents may proceed pro se in a due process hearing. See, discussion of federal regulation effective 12/31/2008 regarding representation by a lay advocate in a due process hearing.

2. The federal regulations were amended effective December 31, 2008 to make an important change to the policy interpretation by OSEP regarding the representation of parties (primarily parents) by **non-lawyers** in due process hearings. OSEP changed 34 C.F.R. Section 300.512 (a) (1) to specify that whether a party has the right to be represented by a non-lawyer at a due process hearing shall be determined by state law. In Re Student With a Disability 115 LRP 33576 (SEA Louisiana 5/28/15) (AC) HO dismissed a dpc filed by a non-attorney advocate. Louisiana law does not permit a non-attorney advocate to represent parties in an IDEA hearing.

3. Deer Valley Unified Sch Dist (KA) 114 LRP 20306 (SEA AZ 4/17/14) HO found that SD violated IDEA by refusing to have an IEPT meeting including the parent's **advocate**. HO pointed out that a parent may include as IEPT members persons with knowledge or special expertise regarding the child and here the parent selected the advocate; Blackman v Dist of Columbia 64 IDELR 169 (DDC 11/4/14) Court deplored the egregious conduct by SD lawyer who had directed school staff to call police who removed parent's lawyer from an IEPT meeting. SD also contacted parent and offered alternative compensatory education if parent attended IEPT meeting without her attorney. Parent had a right to have her lawyer at an IEPT as a **discretionary team member**; Miller ex rel TM v Monroe Sch Dist 66 IDELR 99 (WD

Mich 9/16/15)@n.3: LEA did not violate IDEA when parent showed up at IEPT meeting with an attorney & LEA gave parent a choice of rescheduling meeting with LEA attorney or proceeding without lawyers;

4. Reyes v, Bd of Educ of the Bellmore & Merrick Sch Dist 63 IDELR 132 (EDNY 5/19/14) Court ruled that parents could not represent student without counsel, but adult student could represent himself. See also 63 IDELR 46; Smith by Smith v Cheyenne Mountain Sch Dist #2 64 IDELR 76 (D Colo 9/18/14) Court dismissed parent suit where she failed to cure defects in pleading within 30 days. Among defects were to amend IDEA claim to be filed in her own name if she did not hire an attorney to represent student. (See 63 IDELR 283 for previous order).

5. Card ex rel JD v Citrus County Sch Bd 65 IDELR 3 (MD Fla 2/12/15) Although **pro se parties** are held to less stringent standards and their pleadings must be liberally construed, they must still comply with the rules. Here failure to specify facts and failure to include or describe administrative record caused court to dismiss, with leave to amend; Aaron v Gwinnett County Sch Dist 64 IDELR 16 (ND GA 8/19/14) Court noted that although pleadings by **pro se** parties are entitled to **liberal** construction, such generosity does **not excuse** them from complying with the court's **procedural rules**; informed the court that it had put money aside for this purpose; Horen v Bd of Educ of the City of Toledo Public Schs 63 IDELR 290 (ND OH 8/1/14) Court imposed Rule 11 sanctions vs **pro se** parent for > \$32K in attorney fees. Parent had filed three previous complaints which the court had dismissed, warning on two occasions of future sanctions. Court concluded that **sanction** is only way to **deter** this **misbehavior**. (@n.3: Parent response to SD motion to dismiss was **5,500 pages** long.) Finley v Shelby County Schs

114 LRP 3705(WD Tenn 1/22/14) adopts Mgst @ 114 LRP 3712. Court dismissed complaint of pro se parents where they failed to amend complaint within time allowed; Hinton ex rel MWH v Lenoire County Public Sch Bd 66 IDELR 76 (EDNC 8/6/15) adopted in part @66 IDELR 109. Mgst recommended dismissal of **pro se** parents complaint where parent had disregarded court order requiring her to state how she had exhausted administrative remedies.

*e. Jury Trial*

1. Mr & Mrs A ex rel ZA v Greenwich Bd of Educ 66 IDELR 97 (D Conn 9/18/15) Parents had **no right** to a jury trial in IDEA reimbursement claim. Despite 7<sup>th</sup> Amendment guarantee of jury trial where amount in controversy exceeds \$20K, no money damages are allowed under IDEA – only equitable relief. No jury.

*f. Insurance* (No significant cases.)

*g Evidence on Appeal* (illustrative cases)

1. Oskowis ex rel EO v Sedona-Oak Creek Unified Sch Dist No 9 65 IDELR 169 (D Ariz 4/21/15) Noting that an **erroneous record** is a valid basis for admitting additional evidence on appeal, Court ordered SD to search its records where parent claimed to have received a PWN by email that differed substantially in content from the PWN in evidence; JSR by Childs v Dale County Bd of Educ 66 IDELR 164 (MD Ala 9/28/15) Parents exhausted by alleging 504/ADA/1983 claims **in IDEA dpc**; where **HO ruled** he had **no authority** over claims, court permitted additional evidence on appeal;

2. AW & NW ex rel BW v Bd of Educ of the Wallkill Central Sch Dist 65 IDELR 132 (NDNY 4/9/15) Mgst denied request to supplement record with affidavits when parents had **ample opportunity** to call the affiants as witnesses and where SD

would be denied cross; Kelsey v Dist of Columbia 63 IDELR 95 (DDC 5/6/14) Mgst denied student's request to supplement the record on appeal because he had the opportunity to present the evidence at dph. Counsel for parent mischaracterizes the ho ruling at dph, ho did not prevent parent expert from testifying about compensatory services. Instead ho merely required both parties to comply with the three issues specified in PHC order; Mr & Mrs Doe ex rel Doe v Cape Elizabeth Sch Dist 63 IDELR 188 (D Me. 6/30/14) Court refused to allow additional evidence on appeal where effort by evaluator to clarify her opinion did not constitute new evidence; SD ex rel HV v Portland Public Schs 62 IDELR 226 (D Maine 2/4/14) Court allowed additional evidence on appeal but precluded witness from addressing matters that she could have covered at dph; Dist of Columbia v Masucci 62 IDELR 229 (DDC 1/30/14) Court allowed additional evidence on appeal: and @n.2 court allowed evidence excluded by HO as irrelevant because it came into existence after dpc because it was relevant to issue of whether IEP was appropriate{???snapshot rule?}; Buckley v State Correctional Institution – Pine Grove 62 IDELR 206 (MD Penna 1/6/14) Where student is appealing a ho decision that required the prison (his LEA) to obtain an IEE, but found that he was not entitled to FAPE because he posed a bona fide security risk, Court allowed additional evidence on appeal of his IEP report and evidence of his interactions with prison staff; Luo v Baldwin Union Free Sch Dist 63 IDELR 281 (EDNY 8/12/14) Court refused to allow parent to take deposition of court reporter who allegedly was influenced by SD to deny her a fair hearing where the accuracy of the transcript was not an issue on appeal.

***h. Appeal Issues In General*** (no significant cases)

## ***B. Selected Hot Button Special Education Issues***

### ***1. Seclusion and Restraints***

#### **a. The Controversy**

1). Early in 2009, a study was released, “School is Not Supposed to Hurt: An Investigative Report on The Use of Seclusion and Restraint in Schools,” Disability Rights Network (January 2009) available at <http://www.napas.org/sr/SR-Report.pdf> (chronicling abusive misuse of restraint and seclusion for children with disabilities resulting in deaths or injuries.)

2) A subsequent GAO study made similar findings: <http://www.gao.gov/new.items/d09719t.pdf> This led to congressional hearings.

3) In response to an inquiry by the Secretary, the Department of Education compiled a state-by-state comparison of state laws and policies on the use of seclusion and restraints. That report is available at: <http://www2.ed.gov/policy/seclusion/summary-by-state.pdf>

4) In early February 2010, the Committee on Education and Labor of the House of Representatives approved a bill limiting the use of seclusion and restraints on students, HR 4247. Among other things, the bill limits the use of these techniques to cases of imminent danger; requires that staff using these techniques be properly trained; outlaws mechanical restraints; requires parental notification and establishes oversight mechanisms. Note that this is a new law not an amendment to IDEA. This link provides further information: <http://edlabor.house.gov/blog/2009/12/preventing-harmful-restraint-a.shtml>

5) The ABC news magazine Nightline had an investigative piece on the abuse of seclusion and restraints in the schools on November 29, 2012: <http://democrats.edworkforce.house.gov/blog/abc-news-investigation-students-hurt-dying-after-being-restrained>

b. Recent Cases

1). CB v City of Sonora 114 LRP 45248 (9<sup>th</sup> Cir EN BANC 10/15/14) Ninth Circuit en banc ruled that police who **handcuffed** and removed from school property an **eleven** year old with ADHD for sitting quietly and resolutely (while being non-responsive) were **not** entitled to **qualified immunity** because no reasonable police officer would believe that this did not violate his 4<sup>th</sup> Amendment rights. {Reversing CB v City of Sonora 730 F.3d 816, 113 LRP 37201 (9<sup>th</sup> Cir. 9/12/13) cited in previous outlines.}

2). Carroll ex rel AKC v Lawton Independent Sch Dist No 8 66 IDELR 210 (Tenth Cir 11/10/15) Tenth Circuit affirmed district court dismissal of parent §504, ADA & 1983 claims alleging a combination of educational, physical and emotional injuries because of a failure to **exhaust** administrative remedies. Parents alleged that teacher pulled student's underwear and placed her in a **dark closet** as punishment. {Affirms cases in previous outlines: AKC by Carroll v Lawton Indep Sch Dist #8 63 IDELR 41 (WD Okla 3/26/14). See, AKC by Carroll v Lawton Indep Sch Dist #8 63 IDELR 42 (WD Okla 3/26/14)}; JA by TL & LA v Moorehead Public Schs, ISD #152 65 IDELR 47 (D Minn 2/23/15) Where bip for a 5 year old with Down Syndrome specified a quiet room when overstimulated, Parent claim concerning her being placed in a **storage closet** fell squarely within IDEA, therefore exhaustion required for §504/ADA claims;

Contrast, AP ex rel LH v Johnson 65 IDELR 102 (ND Iowa 3/23/15) Court excused parent's failure to exhaust where she would be unable to obtain relief under IDEA for the physical injuries caused by a teacher who restrained a student on two occasions; Motyku ex rel KM v Howell Public Sch Dist 63 IDELR 154 (ED Mich 6/20/14) Court dismissed complaint alleging wrongful seclusion of kindergarten student with a disability in a bathroom after he ran away where parent did not exhaust administrative remedies by first having dph- NOTE a favorable state complaint decision was not sufficient; Holden v Miller-Smith 63 IDELR 154 (WD Mich 6/20/14) Court has previously dismissed parent IDEA lawsuit re misuse of mechanical restraints for failure to exhaust where no dph first; Parent action for events 5 years ago was also barred by statute of limitations.

3). SR v Kenton County Sheriff's Office 115 LRP 58577 (ED Ky 12/28/15) Court denied **sheriff's** motion to dismiss parent ADA/Fourth Amendment claim. **Two students**- one with PTSD & ADHD one with ADHD and mental health issues were **handcuffed** by school resource officer. Court found that students were handcuffed at a time when no danger was present because they wouldn't obey resource officer. Video is available in my [blog post](#).

4). Roges ex rel NH v Boston Public Schs 65 IDELR 175 (D Mass 4/17/15) Court dismissed parent §1983 (dp/EP) for improper forcible restraint where claim was filed outside of statute of limitations.

5). Shiffbauer v Schmidt 65 IDELR 100 (D Md 3/24/15) Court dismissed §504/ADA action where parent failed to show **deliberate indifference**. Complaint alleged a single incident where a classroom aide restrained the student with ADHD and ODD after he attempted to attack another student on the playground; Zdrowski ex rel CR

v Rieck 66 IDELR 42 (ED Mich 8/11/15) Court dismissed 504/ADA claims for restraint of second grader with Asperger Syndrome by a method not recommended while student is struggling because no bad faith or gross misjudgment in removing violent student from classroom. Contrast, SD by Brown v Moreland Sch Dist 63 IDELR 252 (ND Calif 7/29/14) Court refused to dismiss §504/ADA suit finding deliberate indifference because SD improperly used a physical restraint that traumatized her and because it ignored the head banging of a student with autism that was interfering with her ability to receive an education.

6). EbonieS & Mary S v Pueblo Sch Dist #60 65 IDELR 44 (D Colo 2/25/15) Court granted SD motion in limine to prevent jury from hearing evidence of **state law** regarding restraints where no allegation of state law violation and where probative value is **outweighed** by **prejudice**. Parent §504/ADA claim involves the use of a restraint desk.

7). KS v Strongville City Sch Dist 63 IDELR 125 (ND OH 5/30/14) Court held that school district use of a **glass vestibule** or glass house for a quiet area or for rest breaks was **not a violation of LRE** or a change of placement where the student continued to receive meaningful benefit and was educated in the general ed classroom.

8). Domingo v Kowalski 64 IDELR 47 (ND OH 8/29/14) Court dismissed §1983 suit vs SpEd teacher whose techniques might be child abuse (he gagged one child and belted a child to a chair) they were not **conscience-shocking**.

9). Nekoosa Sch Dist 114 LRP 36095 (SEA Wisc 6/3/14) State complaint investigator found that a school district violated state law by improperly

restraining a student with a disability, by failing to notify parents and by failing to adequately train staff on the use of restraints.

c. Forecast

1). Look for more cases alleging violations of IDEA (See cases on Bullying/Harassment/Safety

2). Also look for possible changes in IDEA in reauthorization- especially the sections regarding behaviors/FBA/BIP, especially positive behavior interventions, etc

***2. Educational vs Medical or Other Needs***

a. District of Columbia Public Schs (JG) 111 LRP 60125 (SEA DC 4/22/11) HO ruled that a school district is responsible for meeting the educational needs of a student with a disability but not required to meet the **medical, psychiatric, medication** or other needs of the student;

b. Student v Ridgefield Bd of Educ (JJ)(SEA CT 6/24/14) LEA was paying academic portion of a residential placement, parent wanted it to also pay for residential portion. HO ruled that the emotional issues requiring the residential placement were for **family/personal issues** and did **not relate to academics** and held that LEA did not have to pay for residential portion. You can read the decision [here](#).

c. EK by AG v Warwick Sch Dist 62 IDELR 289 (ED Penna 2/26/14) Court found that SD is not responsible for treatment of a long-standing **drug addiction**, family problems or delinquent behavior and rejected parent request to require SD to fund a residential placement for a teen with ADHD and a substance abuse problem. SD's IEP provided FAPE. Contrast, Oakland Unified Sch Dist v NS by Genning & Sandahl 66 IDELR 221 (ND Calif 11/10/15) Although SD is not under any obligation to treat drug

abuse, here any drug abuse was a result of the student's disability, therefore child find duty to evaluate was triggered.

d. See other cases under residential placements

### ***3. Recession/Bad Economy***

a. In general **cost** of services is **not** a permissible consideration; FAPE required. See the Supreme Court decision Cedar Rapids Community Sch. Dist. v. Garret F. 526 U.S. 66, 119 S.Ct. 992, 29 IDELR 966 (1999). In some recent cases, however, the issue of cost of services has resurfaced:

1). San Diego County Office of Educ v Pollock ex rel MP 63 IDELR 193 (SD Calif 6/20/14) Court denied LEA motion to continue litigation where claim was **moot** after HO ordered a student formerly in **juvenile hall** to be placed in a residential facility. However, because of **financial issues** including the unfairness of other agencies not contributing; court remand to HO re residential placement instructed HO to dismiss.

2). Shanea S v Sch Dist of Philadelphia 63 IDELR 161 (ED Penna 6/10/14) Mgst recommended that **financial hardship** resulting to school district was **not sufficient reason** to reduce parent attorney's fee award by more than \$42K. That school district would have to lay off hundreds of teachers, increase class sizes, sell several buildings and borrow millions to meet current obligations was not a defense; Charles O v Sch Dist of Philadelphia 64 IDELR 106 (ED Penna 9/26/14) Court rejected SD argument that parent attorney fees should be reduced by 15% because the SD was in a severely distressed financial condition; EC & CO ex rel CCO v Sch Dist of Philadelphia 91 F.Supp.3d 598, 65 IDELR 33 (ED Penna 3/4/15) (similar).

3). In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12)

HO rejected parent's argument that the student was excluded from eligibility because there was **no room** for the student in the school district's special education program. HO concluded that parent witnesses misheard the alleged statement where the other evidence in the record showed that the student was not excluded for this reason.

***4. Incarcerated Students***

a. Dear Colleague Letter 64 IDELR 249 (OSERS 12/5/14) OSERS issued guidance on the IDEA rights of children with disabilities who are **incarcerated**. The guidance spells out the responsibilities of state departments of education, school districts and other LEAs, correctional facilities and non-educational agencies in providing child find, identification, evaluation, FAPE, least restrictive environment, discipline protections and the other provisions of IDEA. Here is a quote from the letter: "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 from 9 percent to 78 percent across jurisdictions. 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**. Evidence suggests that **proper identification** of students with disabilities **and** the **quality** of education **services** offered to students in these settings is often inadequate. Challenges such as overcrowding, frequent transfers in and out of facilities, lack of qualified teachers, inability to address gaps in students' education, and lack of

collaboration with the LEA contribute to the problem. 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." You can read the twenty-one page [Dear Colleague letter](#) here. The guidance was a part of a larger package, consisting of four guidance documents, of materials on the topic of educating incarcerated youth jointly issued by the federal departments of Education and Justice. You can review the [entire package](#) here; See, [Letter to Chief State School Officers](#) 114 LRP 26961 (US DOE 6/9/14) The Department noted that incarcerated students, **many of whom have disabilities** should be provided supports to ensure that they meet educational goals and avoid recidivism. Steps to address school to prison pipeline; and [Dear Colleague Letter](#) 64 IDELR 284 (OCR 12/8/14) OCR noted that more than **60,000** young people are in **juvenile justice residential facilities** and reminded that these students are entitled to equal educational opportunity including: access to coursework; services for **ELLs**; §504 FAPE; fair administration of **discipline**; freedom from harassment; **effective communication** for students with hearing, speech or vision disabilities; and **LRE** concerns.

b. [Meridian Joint Sch Dist No. 2 v. DA ex rel MA](#) 792 F.3d 1054, 65 IDELR 253 (Ninth Cir. 7/6/15) Ninth Circuit affirmed ho and lower court finding that parents were entitled to an **IEE at public expense** due to SD failure to evaluate the student after his release from a **juvenile** facility.

c. [Los Angeles Unified Sch Dist v Garcia](#) 741 F.3d 922, 62 IDELR 221 (9<sup>th</sup> Cir 1/28/14) Pursuant to a ruling by the California SCt, the school district where

the **parents reside** is responsible for providing FAPE to 18-22 year old students who are incarcerated in adult facilities. IDEA leaves it to each state to determine which entity within the state is responsible for providing SpEd and related services to students who are incarcerated. {See history of case as follows: Los Angeles Unified Sch Dist v Garcia 699 F.3d 956, 58 IDELR 62 (9th Cir 1/20/12) The Ninth Circuit certified a question to the California Supreme Court regarding whether under state law the school district in which the parents reside is responsible for providing IDEA services to an incarcerated student; Los Angeles Unified Sch Dist v Garcia 62 IDELR 148 (Cal S Ct 12/12/13) Upon certified question from 9<sup>th</sup> Circuit, California Supreme Court ruled that under state law, the school district of the parent's residence is responsible for the cost of providing FAPE to adult students in county jail. }

d. **Can a child be too bad for FAPE?** Before **HO**: State Correctional Institution Pine Grove (BF) 113 LRP 32792 (SEA Penna 5/1/13) HO ruled that an incarcerated student was such a **serious security/safety risk** that he was **not entitled to FAPE** under IDEA, citing §614(d)(7)(A)& (B), and 34 CFR §300.324(D)}. On **Appeal: Discovery**: Buckley v State Correctional Institution – Pine Grove 62 IDELR 206 (MD Penna 1/6/14) Where student is appealing a HO decision that required the prison (his LEA) to obtain an IEE, but found that he was not entitled to FAPE because he posed a bona fide security risk, Court allowed additional evidence on appeal of his IEP report and evidence of his interactions with prison staff; On **Appeal- Merits**: Buckley v State Correctional Institution – Pine Grove 65 IDELR 127 (MD Penna 4/13/15) Court reversed HO and found that a correctional institution denied FAPE to a student by discontinuing all SpEd services. IDEA allows a public agency to modify the IEP of a student if warranted where

the student is incarcerated in an adult facility and if it demonstrates a **bona fide security interest**. {§614(d)(7)(A)& (B), and 34 CFR §300.324(D)} Here the student had 25 incidents of serious misconduct and assault so the prison had a bona fide security interest but it failed to convene the IEPT or to modify the IEP. While "... special education services must yield to legitimate **security considerations** ... program should be revised **not annulled** in light of this interest." The court emphasized that it was not holding that the student must be educated outside of his cell. Quoting Brown v Bd of Educ, it is doubtful that a child may reasonably succeed in life without an education. Youth with disabilities are incarcerated at **disproportionate rates** and are **often denied** an appropriate education while incarcerated. Court hopes that a meaningful benefit might disrupt the viscous cycle of incarceration for this student

e. Handberry v Thompson 66 IDELR 286 (SDNY 12/2/15) In a previous ruling in this class action, Handberry III 446 F.3d 335 (2d Cir 2006) Second Circuit ruled that defendants had to comply with **IDEA procedures re child find and developing IEPs** for inmates at Rikers Island. Here reacting to a report that inmates with disabilities in restricted housing were not not receiving IDEA services, Mgst recommended at least 3 hours of educational services for each student although recognizing that IEPs might be modified to meet **penal objectives**.

f. GF v Contra Costa County 66 IDELR 14 (ND Calif 7/30/15) Court granted preliminary approval of a settlement of a class action requiring a county education department to evaluate **all students in juvenile hall** suspected of having a disability and to coordinate with probation and mental health agencies to ensure FAPE.

g. TR v Humbolt County Office of Educ 65 IDELR 293 (ND Calif 7/8/15) Court refused to dismiss parent §504 action finding deliberate indifference where county office of education had notice of teen's need for intensive psychiatric interventions but failed to provide them for nine months while student was in **juvenile hall**.

h. Tillman v Dist of Columbia 66 IDELR 77 (DDC 7/29/15) adopted @ 66 IDELR 110. Mgst recommended that parent attorney's be awarded attorney fees for time spent keeping abreast of developments in student's juvenile court proceedings so that they could decide how to proceed in IDEA action (but no fees for time preparing and attending juvenile proceedings.)

i. CC by Cripps v Hurst-Eules-Bedford Independent Sch Dist 65 IDELR 195 (ND Tex 5/21/15) Court affirmed HO who ruled that SD's IAES was not inappropriate just because the **juvenile** authorities had decided **not to prosecute** the student for photographing another student on the toilet; Wicks v Freedom Area Sch Dist 66 IDELR 130 (WD Penna 9/28/15) Court noted that the fact that the student was dissatisfied with his **post-plea bargain placement** did not amount to constitutional dp/1983 violation.

j. Easter v Dist of Columbia 66 IDELR 62 (DDC 9/8/15) Court ruled that 22 year old student stated a claim under §504 and denied motion to dismiss. An IDEA HO had previously ruled that SD had denied FAPE during a five year stay in a **juvenile** detention facility and ordered compensatory ed. SD then offered a choice of HS program with younger students or an adult ed program that would not address his SLD. **Failure to identify an LEA for students in juvenile detention was a systemic violation.**

k. RD v Souderton Area Sch Dist 65 IDELR 196 (ED Penna 5/19/15) Court dismissed parent §1983 suit claiming that SD had their daughter committed to a juvenile

detention facility because of inappropriate behaviors in an out of district placement - parent claim was beyond statute of limitations (borrowed state 2 year S/L for tort claims).

l. Morris v Dist of Columbia 63 IDELR 99 (DDC 4/25/14) Court reversed HO who dismissed parent claim as moot where student was confined in a group home for three to nine months as a result of a **probation violation**. Although the student would not be able to obtain the relief of a private placement, he could receive compensatory education and his IEP could be corrected if inappropriate which could help him during confinement.

m. San Diego Office of Educ v Pollock ex rel MP 64 IDELR 42 (SD Calif 9/6/14) Court dismissed LEA suit for breach of contract and reimbursement for a residential placement for a twelve year old in the juvenile justice system because there was no federal question. The IDEA provision requiring interagency cooperation did not create a private right of action. {See San Diego Office of Educ v Pollock ex rel MP 114 LRP 35529 (SD Calif 8/11/14) Court ordered further briefs in this case.}

n. San Diego County Office of Educ v Pollock ex rel MP 63 IDELR 193 (SD Calif 6/20/14) Court denied LEA motion to continue litigation where claim was moot after HO ordered a student formerly in juvenile hall to be placed in a residential facility. However, because of financial issues including the unfairness of other agencies not contributing; court remanded to HO re residential placement and instructed to dismiss.

o. McAllister v Dist of Columbia 63 IDELR 130 (DDC 5/21/14) adopting Mgst @ 62 IDELR 294. Parent was not permitted to raise issue of alleged denial of FAPE during 46 day period of incarceration where parent's dpc did not raise this issue.

## 5. *IEP Implementation*

a. Van Duyn ex rel Van Duyn v. Baker Sch Dist 5J 481 F.3d 770, 47 IDELR 182 (9th Cir. 4/3/07) The Ninth Circuit held that a school district's failure to implement an IEP must be **material** to constitute a violation of IDEA. Minor discrepancies between the services actually provided and those specified in the IEP do not constitute a violation. A material failure occurs when the services provided by a school fall significantly short of the IEP services.

b. MO & GO ex rel DO v NYC Dept of Educ 393 F.3d 236, 65 IDELR 283 (Second Cir 7/15/15) Second Circuit clarified its previous ruling in RE decision. That decision did not require a student to physically attend a proposed school before parent could challenge the school's ability to implement an IEP; rather it **prohibited speculative challenges** to a school's ability to **implement an IEP**. While it is speculative to conclude that a school with the capacity to implement an IEP will simply fail to do so, it is not speculative to find that an IEP cannot be implemented at a school that lacks the services required by the IEP. This case speculative; HC ex rel SC v NTC Dept of Educ 65 IDELR 176 (SDNY 4/9/15) (speculative) JW & LW ex rel Jake W v NYC Dept of Educ 95 F.Supp.3d 952, 65 IDELR 94 (SDNY 3/27/15) (speculative objections to teaching methodology; JF & LV ex rel NF v NYC Dept of Educ 65 IDELR 35 (SDNY 3/3/15) (speculative); NS & OS ex rel SS v New York City Dept of Educ 63 IDELR 157 (SD NY 6/16/14) (speculative); YF ex rel KH v NYC Dept of Educ 66 IDELR 11 (SDNY 7/31/15)(speculative); TF & AF ex rel MF v NYC Dept of Educ 66 IDELR 136 (SDNY 9/23/15) (speculative); MC & CK ex rel CC v NYC Dept of Educ 65 IDELR 290 (SDNY 7/15/15) (speculative); SE ex rel GE v NYC Dept of Educ 66 IDELR 295 (SDNY 7/2/15) (speculative); Contrast; SB ex rel EG v NYC Dept of Educ 65 IDELR 264

(SDNY 6/25/15) (Judge=Judge Judy's daughter) Parent's implementation claim was not speculative where parent observed LEA proposed classroom and was informed that IEP could not be implemented there; JS & LS v NYC Dept of Educ 65 IDELR 201 (SDNY 5/6/15) HO erred in rejecting parent objections to classroom's ability to implement IEP as speculative where parent gave two other discrete reasons; KR & SR ex rel Matthew R v NYC Dept of Educ 65 IDELR 173 (SDNY 4/20/15) Not speculative where IEP mentioned his need for quiet and teacher testified no sensory equipment;

c. CTL by Trebatoski v Ashland Sch Dist 743 F.3d 524, 62 IDELR 252 (7<sup>th</sup> Cir 2/19/14) Seventh Circuit held that a district's **failure to** train three staff members on a first grader's diabetes equipment as required by his **§504 plan** did **not** amount to a **violation of IDEA** for failing to accommodate his disability. The court noted that few cases exist concerning an alleged **failure to implement a §504 plan**. (5<sup>th</sup>, 8<sup>th</sup> & 9<sup>th</sup> use the materiality standard from IDEA) Seventh Circuit ruled that a district's failure to implement a §504 plan does not amount to disability discrimination under §504 unless the deviation is so significant that it effectively denies the child the benefit of his education. Here the staff was adequately trained regarding the diabetes equipment.

d. Midd-West Sch Dist (JG) 113 LRP 48545 (SEA Penna 10/2/13) HO ruled that school district violated IDEA by failing to reimburse parents for payment for a warranty for a TOBII augmentative communication device which was a **material** part of the IEP of a student with cerebral palsy; District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) HO ruled that a failure to implement must be material to constitute a denial of FAPE; CL by Lucia Mar Unified Sch Dist 62 IDELR 202 (CD Calif 1/9/14) IEP and bip implemented in all material respects; TM v Dist of Columbia 64

IDELR 197 (DDC 12/3/14) Where student missed some OT sessions, not material; AW v Dist of Columbia 64 IDELR 149 (DDC 9/19/14) adopting Mgst @ 64 IDELR 114 Failure to implement not material where providers did not give massage brush, pencil grip or fidget object but caused no educational harm; Tyler J by Cheryl Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDELR 45 (D Haw 2/24/15) Court denied parent claim that charter school failed to implement IEP for first few days of the school year; not material especially where first days are used for orientation; Sch Dist of Philadelphia v Williams ex rel LH 66 IDELR 214 (ED Penna 11/20/15) material where SD failed to provide a tablet or other AT device to allow the student to communicate with teachers and other students for over seven months and where SD failed to provide 1:1 aide required by IEP; Mearns v Rim of the World Sch Dist 66 IDELR 39 (CD Calif 8/13/15) Failure of 1:1 aide to keep up with student on extracurricular mountain biking was not a failure to implement. Mountain biking was not necessary for a 17 year old with autism to receive FAPE and 1:1 aide in IEP was only for classroom and not extracurricular activities. Even if implementation failure, it was **not material**. Also failure to provide 3 hours of speech therapy by SD not material where student had academic success; Joaquin v Friendship Public Charter Sch 66 IDELR 64 (DDC 9/3/15) LEA's failure to provide transition services to a teenager was a substantive not a procedural violation of IDEA. It was also a **material failure** to implement his IEP, but immaterial departures from bip were not a violation of IDEA; Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 200 (ND Calif 12/2/14) SD failed to materially implement IEP; MS by JS v Utah Sch for the Deaf & Blind 64 IDELR 11 (D Utah 8/25/14) Court held that inconsistencies in

communication method and a teacher's unilateral decision to discontinue an FM system were material failures to implement IEP of student with hearing loss/intellectual.

e. Dist of Columbia v Kirksey-Harrington 65 IDELR 11 (DDC 2/4/15) adopting Mgst, SD violated IDEA by placing student at his **neighborhood** school that **could not** implement the IEP developed by the team.

f. Troy Sch Dist v KM by Janice M & Warren M 64 IDELR 303 (ED Mich 1/16/15) Court denied Honig v Doe injunction where SD did not demonstrate that maintaining student's placement was likely to result in injury to student or others. Incident occurred when SD **did not implement** IEP by providing a safe person.

g. Contrast standard, DD by VD v. New York City Bd of Educ 465 F.3d 503, 46 IDELR 181 (2d Cir. 10/12/6) The Second Circuit **rejected** district's argument that partial implementation of IEPs constituted the necessary "substantial compliance." The Court held that substantial compliance in IDEA refers only to a district's right to receive funding. The FAPE obligation, on the other hand, requires "compliance."

h. U. S. ex rel Bachmann v Minnesota Transitions Charter Sch 64 IDELR 101 (D Minn 9/29/14) Court dismissed with leave to amend SpEd teacher's claim that her former employer, a charter, required her to include **two hours** of direct instruction on **each student's IEP regardless** of whether they actually received the instruction. Leave to amend was granted to explain how the funding mechanisms operated.

### ***6. Predetermination***

a. Deal v. Hamilton County 392 F.3d 840, 42 IDELR 109 (6th Cir. 1/16/04). Where the school district had already **predetermined** the student's program and services

**before** the IEP Team meeting, the parents were denied the opportunity to meaningfully participate in the IEP process. Accordingly, the district denied FAPE for the student.

b. RL & SL ex rel OL v Miami-Dade County Sch Bd 757 F.3d 1173, 63 IDELR 182 (11<sup>th</sup> Cir 7/2/14) Eleventh Circuit ruled that where IEPT meeting transcript showed that the district representative at the meeting **cut short** conversation regarding a smaller setting in the public high school, LEA had predetermined the child's placement. The school district's predetermination prevented them from raising the third prong (equities) of the Burlington etc analysis in order to defeat claim for reimbursement.

c. In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14) HO found **no** predetermination where eligibility team members had an **open mind** and where parents and their advocate attended and were allowed to participate at the meeting.

d. JD by Davis v. Kanawha County Bd of Educ 48 IDELR 159 (S.D.WV 8/3/7) The fact that the district had prepared a **draft** IEP for discussion was not predetermination where the parents offered suggestions and changes, many of which were adopted in the IEP; In re Student With a Disability (JG) 111 LRP 40554 (SEA WV 5/31/11) HO found no predetermination where some of parents **concerns** were adopted in IEP despite draft IEP, therefore open minds; e. (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Court affd HO conclusion that student and parent fully **participated** in IEPT process- no predetermination.; In Re Student With A Disability 52 IDELR 239 (JG)(SEA WV 4/8/9) HO ruled that school district predetermined the result of a **manifestation** determination review, thereby depriving the parents of their right to participate.

e. Where courts and hearing officers find **no predetermination** in the sense of Deal v. Hamilton County, supra, they are likely to uphold the IEP; AG by MG v State of Hawaii Dept of Educ 65 IDELR 267 (D Haw 6/19/15) No predetermination where IEPT made changes to **draft IEP** after parents had input; SW & BS ex rel PW v NYC Dept of Educ 92 F.Supp.3d 143, 65 IDELR 70 (SDNY 3/12/15) No predetermination where draft IEP incorporated input from parents and their expert and where parents participated; AP & SP ex rel AP v NYC Dept of Educ 66 IDELR 13 (SDNY 7/30/15) No where OEPT gave meaningful consideration to parents concerns and where there were substantial differences between **draft IEP** and final IEP. Predetermination is **not synonymous with preparation**; LM by MM & RM v Downingtown Area Sch Dist 65 IDELR 124 (ED Penna 4/15/15) Mgst ruled no predetermination where SD conferred, thought and developed ideas and options **prior to IEPT meeting** but SD also solicited and considered parents' input; GB & DB ex rel AB v NYC Dept of Educ 66 IDELR 223 (SDNY 11/5/15) (same); DN ex rel GN v NYC Dept of Educ 65 IDELR 34 (SDNY 3/3/15) No where IEPT minutes and testimony showed parents participated; PG & RG ex rel DG v City Sch Dist of NY 65 IDELR 43 (SDNY 2/25/15) No where parents actively participated, IEPT mad changes at parent request, and where outside evaluations were considered; Student RA v West Contra-Costa Unified Sch Dist 66 IDELR 36 (ND Calif 8/17/15) No where parents had opportunity to participate and their input was considered by IEPT; KK ex rel KSK v State of Hawaii, Dept of Educ 66 IDELR 12 (D Haw 7/30/15) No where mom had every opportunity to participate; Rachel H v Dept of Educ, State of Hawaii 63 IDELR 155 (D Haw 6/18/14) Court rejected parent predetermination claim and denied reimbursement where school district contacted parents to determine the

school closest to their residence after they moved to the other side of the big island; Laura A ex rel JO v Limestone County Bd of Educ 63 IDELR 166 (ND Ala 5/30/14) No predetermination where parents' concerns were considered at eligibility meeting and parent's input regarding the type of evaluator was accepted; BK &YK ex rel GK v NY City Dept of Educ 63 IDELR 68 (EDNY 3/31/14) parents actively participated; the fact that district staff disagreed with parent suggestions did not evidence predetermination; Alloway Township Bd of Educ v CQ & RQ ex rel CQ 63 IDELR 12 (DNJ 3/14/14) Court reversed ho and found no predetermination where parents actively participated in the development of the student's IEP but steadfastly refused to consider any out of state placement; Anthony C by Linda L & Lionel C v Dept of Educ, State of Hawaii 62 IDELR 257 (D Haw 2/14/14) Court ruled no predetermination where IEPT considered various placement options; Matthew O by David O v Dept of Educ, State of Hawaii 62 IDELR 225 (D Haw 2/5/14)(same); Porter v Illinois State Board of Educ 62 IDELR 267 (Ill App CT 2/10/14) State appellate court found no predetermination where IEPT considered various placements and where parents had active participation; Cooper v Dist of Columbia 64 IDELR 271 (DDC 12/30/14) No predetermination where parent was actively engaged in every IEPT meeting; Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 200 (ND Calif 12/2/14) Failure to reconvene IEPT after parents refused to attend does not mean that IEP was predetermined; Lofisa S ex rel SS v State of Hawaii, Dept of Educ 64 IDELR 163 (D Haw 11/14/14) No predetermination where only evidence was a letter from SD to parents with kids in private school asking them to contact SD if they wish to have child receive FAPE in a public sch; BEL ex rel BEL v State of Hawaii, Dept of Educ 64 IDELR 130 (D Haw 10/24/14) No evidence of predetermination; West Linn

Wilsonville Sch Dist v Student 63 IDELR 251 (D OR 7/30/14) No predetermination where parent participated.

f. Where courts or hearing officers conclude that the IEP was **predetermined**, however, they are likely to find a denial of FAPE. See, LMP ex rel EP, DP & KP v Sch Bd of Broward County Fla 64 IDELR 66 (SD Fla 9/23/14) Court refused dismissal of §504 action by parent of triplets with autism noting that a statement by an SD employee that it **predetermined** student's IEPs because it did not offer ABA therapy as an intervention was sufficient evidence of deliberate indifference; Independent Sch Dist #413, Marshall v AJ by MN 66 IDELR 41 (D Minn 8/11/15) SD predetermined that student not eligible before meeting with parents.

## ***7. Bullying/ Harassment/Safety***

### ***a. Early Cases***

1). Shore Regional High Sch. Bd. of Educ. v. P.S. 381 F.3d 194, 41 IDELR 234 (3d Cir. 8/30/04) A school district's failure to stop **bullying** may constitute a denial of IDEA FAPE. Despite repeated complaints by parents, bullying continued; student became depressed and school district developed an IEP. The harassment continued and the student attempted suicide. The Third Circuit agreed with the hearing officer that the unabated harassment and bullying made it impossible for the student to receive FAPE.

2). Gagliardo v. Arlington Central Sch Dist 489 F.3d 105, 48 IDELR 1 (2d Cir. 5/30/7) The Second Circuit held that the school district had denied FAPE by permitting bullying and **harassment** of the student, but denied reimbursement where the parent placement lacked the trained professionals the student needed as a result of the bullying .

3). Lillbask ex rel Mauclaire v. State of Connecticut Dept. of Educ. 397 F.3d 77, 42 IDELR 230 (2d Cir. 2/2/05). The Second Circuit Court of Appeals ruled that an IDEA hearing officer has the authority to review IEP **safety** concerns. The court provided an expansive interpretation of the jurisdiction of the hearing officer, ruling that Congress intended the hearing officer to have authority over any subject matter that could involve a denial of or interference with a student's right to receive FAPE, including safety concerns that might affect receipt of FAPE.

*b. Current Cases*

1) TK & SK ex rel LK v. New York City Dept of Educ 779 F.Supp.2d 289, 56 IDELR 228 (EDNY 4/25/11) The court denied a school district motion to dismiss. Parents alleged that bullying of a twelve year old with an SLD was a denial of FAPE and sought reimbursement for unilateral placement. Peers ostracized her, pushed her refused to touch items that she had touched and ridiculed her daily. The court noted that when responding to bullying of a student with a disability, a school district must take **prompt** and **appropriate action** including investigating and taking steps to prevent. Here evidence showed that school district knew about the bullying but failed to do anything, even rebuffing the parent requests to discuss. Court ruled that the parents do not need to show that the student was deprived of all educational benefit or that she regressed; parent only needs to show that her educational **benefit was adversely affected** by the bullying. Where the bullying reaches a level where the student is **substantially restricted** in learning opportunities, FAPE has been denied. Court includes a long discussion on Bullying in America and kids with disabilities;

1A) TK & SK ex rel LK v. New York City Dept of Educ 63 IDELR 256 (EDNY 7/24/14) On remand, the SRO found that the parents had not shown that the bullying substantially affected the student's educational performance and denied reimbursement for a unilateral placement, but the district court reversed. The court held that the FAPE bullying standard is as follows: A disabled student is deprived of a FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts a child with learning disabilities in her educational opportunities. The conduct does not need to be outrageous in order to be considered a deprivation of rights of a disabled student. It must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment. When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination. The rule does not require that the bullying would have prevented all opportunity for an appropriate education, only that it was likely to affect the opportunity of the student for an appropriate education. Applying this standard, the court ruled that the student's educational opportunities were substantially restricted by bullying and that the IEP team substantively denied FAPE by failing to address bullying.

2). Estate of Lance by Lance v Lewisville Independent Sch Dist 743 F.3d 982, 62 IDELR 282 (5<sup>th</sup> Cir 2/28/14) Where school district **properly investigated** bullying complaints and dealt with bullying appropriately, Fifth Circuit ruled that there was no deliberate indifference and therefore ruled that the district was **not liable under §504** for the bullying and subsequent suicide of a fourth grader with ADHD. A **valid IEP** is **sufficient but not necessary** to satisfy the requirements of §504, but a denial of IDEA FAPE is not enough to make out a §504 violation. Court also dismissed §1983 claim where the school district did not create a dangerous environment for the student.

3). Dear Colleague Letter 64 IDELR 115 (OCR 10/21/14) Any bullying may interfere with FAPE even if the bullying is **not disability-based**. You can review the new guidance [here](#). Here is [more discussion](#) by the Department of Education.

4). Dear Colleague Letter (OSERS 8/20/13) OSERS issued **guidance on Bullying**. The letter notes that bullying of a student with a disability that results in not receiving meaningful educational benefit is a denial of FAPE and may be disability harassment under 504 and Title II of ADA. OSERS states that bullying of any student cannot be tolerated. Bullying is characterized by **aggression** within a relationship where the aggressor has **more real or perceived power** than the target and the aggression is **repeated over time**, Targets suffer negative effects. Students with disabilities are disproportionately affected by bullying. Schools have an obligation to address bullying that results in a denial of FAPE. Part of an appropriate response is to convene the IEP team to determine whether the student's needs have changed as a result of the bullying. Schools should never unilaterally change the frequency, duration, intensity, placement, or location of services as these are IEPT decisions. SEAs and LEAs are encouraged to

remind administrators, school boards, teachers and staff that bullying can be a denial of FAPE. You can read the letter here: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf> An attachment to the letter provides specific, evidence-based suggestions/strategies that schools can implement to effectively prevent and response to bullying. You can read the attachment here: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf>

5). Batchelor ex rel RB v. Rose Tree Media Sch Dist 759 F.3d 266, 63 IDELR 212 (3d Cir 7/17/14) Third Circuit affirmed dismissal of parents' claims under §504/ADA for failure to exhaust. Parents argued that harassment and retaliation of a high school student with SLD caused harm to his educational achievement and personal well-being. Parents did not allege an IDEA violation, but Third Circuit held that **IDEA exhaustion was required** because the facts alleged involve FAPE and failure to implement an IEP; Kuhiner ex rel JK v Highland Community Unit Sch Dist # 5 66 IDELR 131 (SD Ill 9/28/15) 504/ADA for peer bullying dismissed where no exhaustion and educational injuries were alleged;

6). Tyler J by Cheryl Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDELR 45 (D Haw 2/24/15) Court **rejected** parent argument that **bullying violated IDEA** where there was **no evidence** that bullying had any **impact** upon student's educational benefit.

7). MB & RB by RPB v Islip Sch Dist 65 IDELR 269 (EDNY 6/16/15) Court denied SD motion to dismiss 504/ADA claims for bullying where parents alleged that SD had failed to provide them with the **required Notice** of Procedural Safeguards therefore exhaustion was **futile** because no information regarding the dph system was given to

them; JR v NYC Dept of Educ 66 IDELR 32 (EDNY 8/20/15) Principal's failure to change student's bus route coupled with his statement that the student was likely to encounter disability based bullying on every bus route amounted to deliberate indifference so SD motion to dismiss 504/ADA action was denied.

8). Dorsey ex rel JD v Pueblo Sch Dist 60 IDELR 183 (D Colo 10/26/15) Although court found bullying disturbing, it dismissed 504/ADA suit because parent failed to allege that the bullying was **disability based**; Eskenazi-McGibney v Connecticut Central Sch Dist 65 IDELR 8, (EDNY 2/6/15) Although troubled by the SD response to bullying of a student by his peers, court dismissed §504/ADA/§1983(EP) claim because parents' complaint did not allege that harassment was based upon his **disability**; Spring v Allegany-Limestone Central Sch Dist 66 IDELR 157 (WDNY 9/30/15) Court dismissed 504/ADA/1983(dp) claims for bullying of student with Tourettes syndrome where peers called him names leading to suicide where no allegation of effect on **major life** activities and no state created danger; Gohl ex rel JG v Livonia Public Schs 66 IDELR 122 (ED Mich 9/30/15) Court dismissed 504/ADA claims by parents of 3 year old with hydrocephalus whose SpEd teacher allegedly jerked his head back and yelled in his face where **no deprivation** of benefits where student showed emotional **progress** after the incident.

9). JL by O'Flaherty v Eastern Suffolk BOCES 65 IDELR 262 (EDNY 6/29/15) Court dismissed §1983 claims vs SD for mistreatment of a 14 year old with autism where the mistreatment was allegedly by employees of an intermediate unit who were **not trained or supervised** by the SD.

10). VS by Sisneros v Oakland Unified Sch Dist 65 IDELR 234 (ND Cal 5/28/15) Court denied SD motion to dismiss parent §504 action for bullying student with a severe intellectual disability on **school bus**. SD claimed no knowledge because bus was run by a contractor, but complaint alleged that bus driver told parent she had contacted SD officials but got no response; Contrast, Sisneros v Oakland Unified Sch Dist 65 IDELR 97 (ND Cal 3/27/15) Court dismissed parent EP/§1983 action for bullying student with a severe intellectual disability on school **bus**. Because people with disabilities are **not a protected class**, parent's complaint was deficient where she failed to allege a lack of a rational basis and a legitimate state interest.

11). KRS by McClaron v Bedford Community Sch Dist 65 IDELR 272 (SD Iowa 4/20/15) Court denied SD motion to dismiss finding that allegations that a 9<sup>th</sup> grader with **SLD** was called "**dumb**" and "**stupid**" by football teammates was sufficient to show disability based harassment for §504;

12). Lockhart v Willingboro HS 65 IDELR 141 (DNJ 3/31/15) Court dismissed parent §1983 action where **no deliberate intention**- SD returned 17 year old girl who had been sexually assaulted to an empty classroom did not violate EP; Moore ex rel Estate of AM v Chilton County Bd of Educ 62 IDELR 286 (MD Ala 3/3/14) Court dismissed parent lawsuit under §504/ADA for daughter's suicide after bullying. Parents could **not show** deliberate indifference where teachers and bus driver took actions to stop the bullying.

13). KS v Strongville City Sch Dist 63 IDELR 125 (ND OH 5/30/14) Court ruled that allegations by parents that bullying interfered with the student's education were **not**

**supported** by the record evidence – especially where the parent had rejected the designation of a safe place that the student could run to.

14). Morton v Bossier Parish Sch Bd 63 IDELR 96 (WD Louisiana 5/6/14) In an IDEA/§504/Fourteenth Amendment action, court upheld the validity of an **interrogatory** by parents of a teen who allegedly committed suicide after disability-based harassment. Interrogatory sought the names, addresses and phone numbers of **all students who attended class with the student for two years before his death**. Mgst noted that before complying with the interrogatory, SD must notify classmates and parents of the court order to permit them to seek protective order under FERPA. Other interrogatories approved include discipline of bullies, etc.; Letter to Soukup 115 LRP 18668 (FPCO 2/9/15) Consistent with the long-standing view of the Department of Education, FPCO ruled that **FERPA permits** a school to disclose to the parent of a **harassed** student information about the disciplinary sanctions imposed upon the perpetrators of the harassment (including stay away from the student; stay out of the school; or transfer to another class) FPCO noted that where any **civil rights laws** conflict with FERPA, the civil rights law **override** any conflicting provisions of FERPA.

15). JH by Thomas v Bd of Educ of Pikeland Community Sch Dist # 10 63 IDELR 98 (CD Ill 5/1/14) Where HO had ordered that SD provide counselling and social schools, ho had indirectly addressed the issue of bullying of teen with depression, the only one of three issues in which parent prevailed, no deduction in attorney fees despite losing on other issues.

16). SS by Street v Dist of Columbia 64 IDELR 72 (DDC 9/19/14) Court rejected parent claim of bullying in violation of IDEA & §504 where student's injuries were caused by his own tantrums, clumsiness or horseplay and not by bullying.

17). NM by WM & LM v Central Bucks Sch Dist 62 IDELR 237 (ED Penna 1/15/14) adopting MGST @62 IDELR 206. Court affirmed ho decision that SD provided FAPE by **properly responding** to reports that the student had been bullied and where student made progress therefore reimbursement denied.

18). Galloway v Chesapeake Union Exempted VIII Sch Bd of Educ 64 IDELR 129 (SD OH 10/27/14) In an action alleging that SD failed to respond to repeated incidents of bullying in violation of §504/ADA/§1983, Court allowed parents to present evidence of a settlement agreement in prior dph because the fact that SD only arranged for **staff training on autism after parents filed a dpc** was relevant to deliberate intention concerning the bullying.

16). Also see, the hot button issue on seclusion and restraints

c. Other Resources:

1). ***GAO Report***

In May 2012, the Government Accountability Office issued a landmark report on **school bullying**. You can read the entire 64 page report here: <http://www.gao.gov/assets/600/591202.pdf> Although the report deals with bullying of all students, and not just students with disabilities, it contains a wealth of information. Among the facts it reveals are the following:

a) Bullying at school is **pervasive**. After reviewing the research on school bullying, including four national studies between 2005 and 2009, the report notes that

between **20 and 28** percent of students report that they have been bullied. That number is way high!

b) Bullying is **costly**. Among the results of peer bullying are the following: suicide; violent actions against others; depression; loneliness; low self-esteem; anxiety and higher risk for physical health consequences; and increased behavioral issues.

c) Important for purposes of special education law, the report notes that the literature finds that **victims** of bullying often have *academic* difficulties.

d) 49 states currently have bullying statutes, but the protections, and even the definition of bullying, vary widely from state to state.

e) The responses of selected states and school districts are discussed.

## **2). OCR Activity Report**

On November 28, 2012, The Office for Civil Rights of the U. S. Department of Education issued a report yesterday summarizing its activities and actions over the last four years. OCR deals primarily with §504 and various other statutes, but the report featured numerous examples of school bullying which OCR described as an important cross-cutting issue. OCR has signaled in this report that it intends to continue to emphasize bullying cases. You can read the report here:

<http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf>

## **3). Twenty-Year Study**

On February 20, 2013, Duke University medical School released the results of its twenty year study on the effects of bullying. The study followed children who were bullied or who were bullies or both for a period of twenty years. The study

by William E. Copeland, PhD; Dieter Wolke, PhD; Adrian Angold, MRCPsych; E. Jane Costello, PhD was published in the JAMA Psychiatry Journal.

The study found that bullied children grow into adults who are at increased risk of developing anxiety disorders, depression and suicidal thoughts. Those who were both bullies and victims had higher levels of all anxiety and depressive disorders, plus the highest levels of suicidal thoughts, depressive disorders, generalized anxiety and panic disorder. Bullies were also at increased risk for antisocial personality disorder. You can read a summary of the study and find a link to the full study here: [http://www.dukehealth.org/health\\_library/news/bullied-children-can-suffer-lasting-psychological-harm-as-adults](http://www.dukehealth.org/health_library/news/bullied-children-can-suffer-lasting-psychological-harm-as-adults)

### ***8. Methodology***

a. EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit ruled that so long as an IEP provides the basic floor of opportunity, a court should not attempt to resolve disputes over **methodology**.

b. Parents cannot compel a specific **methodology**, IDEA accords educators **discretion** to select from various methods for meeting the individualized needs of a student;; Grants Pass Sch Dist v Student 65 IDELR 207 (D Or 4/29/15) Court ruled that data collection concerning ESY is a methodology within the discretion of the SD; MA v Jersey City Bd of Educ 63 IDELR 9 (DNJ 3/18/14); Methodology decisions are within the discretion of the school district; REB ex rel JB v State of Hawaii, Dept of Educ 63 IDELR 105 (D Haw 4/16/14) (IEP need not specify a methodology; educators have discretion to select methodology so long as reasonably calculated to confer benefit); ML

by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15) Parents objected to SD choice of methodology: TEACCH for a nine year old with autism; court rejected the argument noting that an SD is not required to use any particular teaching methodology. @n.12 court noted that an SD is not required to specify a methodology in the IEP; JW & LW ex rel Jake W v NYC Dept of Educ 95 F.Supp.3d 952, 65 IDELR 94 (SDNY 3/27/15) Court rejected parents' speculative challenge to proposed placement; parents objected to ABA methodology. @n.7 court noted that parents do **not have a right** under IDEA to a specific teaching **methodology**, and in any event their claim was speculative where no evidence that school would not use other methodologies; AM ex rel EH v NYC Dept of Educ 66 IDELR 243 (SDNY 12/7/15) Court rejected parent argument that 7 year old with autism needed 1:1 instruction based upon **ABA** methodology to receive FAPE. Parent preference for ABA was not determinative and IEP properly left choice of methodology to professionals in the classroom; Wood v Katy Independent Sch Dist 66 IDELR 158 (SD Tex 9/30/15) SD was not required to use the Orton-Gillingham methodology recommended by its evaluator. @n.4:Parent cannot compel a specific methodology; JN & JN ex rel JN v South West Sch Dist 66 IDELR 102 (MD Penna 9/15/15) SD is not required to select the teaching program requested by the parents (here Wilson) SD's Read-180 program was appropriate; GK & CB ex rel TK v Montgomery County Intermediate Unit 66 IDELR 288 (ED Penna 7/17/15) Although parents preferred Lovaas methodology, LEA provided FAPE by using a slightly different ABA method.

c. PS v NY City Dept of Educ 63 IDELR 255 (SDNY 7/24/14) Court rejected parent argument that a teen with autism needed **ABA-based** program to receive educational benefit. Court affirmed SRO decision that a 6:1 TEACCH program provided

FAPE. Even if ABA is the superior methodology as parent's expert testified, SD has no obligation to maximize educational benefit or to use the parent's preferred methodology.

d. IS by Sepiol v Sch Town of Munster 64 IDELR 40 (ND Ind 9/10/14) Court ruled that SD violated IDEA by **continuing to use a methodology** (Read 180) that had proven **highly ineffective** for a student with severe dyslexia the previous year.

### ***9. Parent's Right to Participate in the IEP Process***

a. Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) Second Circuit ruled that SD did not violate IDEA by **finishing IEP** and issuing it **after** the IEPT **meeting**. The parent's right to meaningful participation was met where the parents fully participated at IEPT meeting and her input was considered. The parent does **not** have a right to be **physically present** during LEA decisional process.

b. Wenk v. O'Reilly 783 F.3d 585, 65 IDELR 121 (Sixth Cir 4/15/15) Sixth Circuit affirmed district court ruling that school administrator was **not** entitled to **qualified immunity** for parent First Amendment §1983 action claiming **retaliation** for exercising IDEA participation rights. After parent had advocated for an IEP for his daughter with cognitive disability, SD director pupil services filed a **child abuse complaint** with child welfare agency. Critical emails showed animus re parent. Allegations were either embellished or entirely fabricated. Administrator waited until three weeks after deadline for mandatory reporters to report abuse.

c. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) 2-1 majority of Ninth Circuit held that a school district denied FAPE by failing to share more than a year's worth of **RtI data** with a student's parents. Although the

district used the severe discrepancy model to conclude that the student was eligible, without the RtI data, the parents were denied meaningful opportunity to participate. The procedural violation was actionable because without the data, the parents, unlike other IEPT members were unable to decipher the student's unique needs.

d. Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12) HO found that a parent has a right to meaningful participation in the IEP process as well as the education of their child. Where the special ed director severely limited the parent's right to **communicate** with other IEP team members and the special ed director sent emails to other IEPT members **ridiculing** the parent, he severely impaired her right to participate. HO ordered the compensatory service of counseling for the student.

e. John & Maureen M ex rel JM v Cumberland Public Schs 65 IDELR 231 (DRI 6/30/15) Court held that parents do not have a right to **observe** their child in the current or prospective classrooms and LEA did not violate parent right to participate by refusing to allow them to observe;

f. JS & LS v NYC Dept of Educ 65 IDELR 201 (SDNY 5/6/15) IEP Team's failure to consider parent's independent psycho-educational evaluation was a **procedural error-but harmless** where current psycho-ed evaluation was considered and parent had a full opportunity to participate in IEP team meeting; Pollack & Quirion ex rel BP v Regional Sch Unit #75 65 IDELR 206 (D Maine 4/29/15) SD failure to give parents notice of a change in lunch outing procedures was a procedural violation, but harmless where parents learned of the change and voiced their objection, therefore no impairment of participation rights.

g. JM ex rel RM v Kingston City Sch Dist 66 IDELR 251 (NDNY 11/23/15) Even where IEPT did not engage in a detailed discussion of needs, goals and appropriateness of placement, parents had right to participate at IEPT meeting but specifically declined to ask questions- no violation.

h. FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15) SD violated IDEA parent right to meaningful participation by ignoring 2 letters by parents during a four month delay from IEPT to placement decision by SD.

i. Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 200 (ND Calif 12/2/14) Where parents attended IEPT meeting that was suspended to be reconvened after members reviewed evaluative data, but while suspended parents filed dph and informed SD that it would not attend further IEPT meetings until HO ruled, SD did not violate IDEA by developing an IEP without additional meetings.

j. Simmons v Pittsburg Unified Sch Dist 63 IDELR 158 (ND Calif 6/11/14) Court ruled that school district had violated IDEA by concluding that the fact that it had developed a §504 plan for the student relieved the district of conducting an IDEA evaluation. Parents' right to participate was violated because they were not included in the eligibility process. Remanded to provide compensatory education.

k. VS by DS v New York City Dept of Educ 63 IDELR 162 (EDNY 6/9/14) Court found that district violated IDEA by **failing to identify the school** that the student would attend in placement notice and not notifying it until first day of dph; Parents had a right to timely and relevant information as a part of right to meaningful participation. The **procedural violation** substantially **impaired** the parents' right to meaningful **participation**. Parents had a right to know what school. LU & NU ex rel GU v New

York City 63 IDELR 126 (SD NY 5/27/14) District denied FAPE by failing to answer parent questions concerning whether the proposed district school had the resources to implement the IEP, including an onsite nurse to administer meds to a student with a seizure disorder, and a quiet place to recover. LEAs may select the specific school if it complies with IEP requirements. Here the procedural violation in excluding the parents from the selection process was a denial of FAPE because it **denied** them **meaningful participation**; **Contrast**, JL & JF ex rel CC c NYC Dept of Educ 65 IDELR 137 (SDNY 3/31/15) SD did not violate IDEA by failing to give notice that the summer site of the student's ESY had changed because unlike placement parents have **no right to participate in location** decisions; LGB by Bubby v Sch Bd of City of Norfolk 63 IDELR 197 (ED VA 5/30/14) adopted by Dist Ct at 63 IDELR 225, Mgst recommended that summary judgment be granted against parent's claim, rejecting argument that IEP requiring a 13 year old with autism attend one of several schools offered by an IEU but not identifying a specific school. AK decision by Forth Circuit was limited to cases where the placement offered in an IEP was uncertain; here parent had the opportunity to discuss the specific classrooms and programs offered by the IEU. The touchstone of educational placement is **not the location** to which the student will be assigned but the **environment** where services will be provided. Here the parents were provided meaningful participation; MA v Jersey City Bd of Educ 63 IDELR 9 (DNJ 3/18/14) SD did not violate IDEA by failing to include parent in discussions about the student's school and classroom; **specific location** is not the same as **educational placement**; Williams by Williams v Milwaukee Public Schs 64 IDELR 237 (ED Wisc 12/12/14) Court found no IDEA violation where SD notified parents of change of school, but even if no notice,

parents learned of change before school started, so harmless; Copeland v Dist of Columbia 64 IDELR 37 (DDC 9/15/14) Educational placement is **something between** the physical **school and** the **abstract IEP goals** in the IEP; A change of location is not a change of placement and parent need not be included in the decision to change schools; Gore v Dist of Columbia 64 IDELR 41 (DDC 9/10/14) Court held that LEA did not violate IDEA by transferring student from one private school to another without consulting guardian. This is a change in location not a change in educational placement and therefore **no right to participate**; CS by Julia V v Lansing Sch Dist #158 115 LRP 31079 (ND Ill 1/23/15) quoting *John M*, court held that a stay put educational placement falls **somewhere between the physical school attended by the child and the abstract goals of his IEP** and courts use a fact-driven approach to determine whether a change of placement has occurred. KB by Brown v Dist of Columbia 66 IDELR 63 (DDC 9/8/15) Transfer without fundamental change in services is a change of **location** and not a change of educational placement.

1. DA & JA ex rel MA v Meridian Joint Sch Dist No 2 62 IDELR 205 (D Idaho 1/6/14) That SD did **not acquiesce** to parents' position does **not mean** that parents (who actively participated) were **denied** meaningful participation; BP & SH v NY City Dept Of Educ 64 IDELR 199 (SDNY 12/3/14) Ct held that parents were allowed meaningful participation where goals in question were discussed by IEPT; MS by JS v Utah Sch for the Deaf & Blind 64 IDELR 11 (D Utah 8/25/14) Court held that parents were not denied meaningful participation where they participated in IEPT meetings.

### ***10. Least Restrictive Environment***

a. The Supreme Court has not yet ruled on the issue of LRE, but a number of Circuit Courts of appeal have provided some guidance. For example, P by Mr & Mrs P v. Newington Bd of Educ 546 F.3d 111, 51 IDELR 2 (2d Cir 10/9/08) Second Circuit adopted the two pronged **Oberti test** (can the regular ed classroom with supplemental aids and services be satisfactorily achieved for the student; if not, has the student been mainstreamed to the maximum extent appropriate.). The Ninth Circuit has developed four factors which must be balanced to determine the LRE placement: (1) the educational benefits available to the student in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of the student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the student in a regular ed classroom. Sacramento City Sch Dist v. Rachel H by Holland 14 F.3d 1398, 20 IDELR 812 (9th Cir. 01/24/1994).

b. TM by AM & RM v Cornwall Central Sch Dist 752 F.3d 145, 63 IDELR 31 (2d Cir 4/2/14) an LRE violation is a **substantive** (not procedural) **violation** of IDEA. The LRE requirement applies to Extended School Year programs in the same manner that it applies during the regular school year. Because ESY is necessary to prevent substantial regression, LRE fully applies even if the district does not offer a mainstream ESY program (can consider private programs).

c. CL & GW ex rel CL v Scarsdale Union Free Sch Dist 744 F.3d 826, 63 IDELR 1 (2d Cir 3/11/14) LRE is **one factor** that should be considered in assessing the appropriateness of a unilateral placement **private school** selected by the

parents, but the private school is not subject to the same LRE requirements as a public school placement. Some specialized private schools only educate children with disabilities. The standard for private schools is appropriate not perfect; Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Fact that private school did **not maximize** integration of disabled and non-disabled students as IDEA requires of public schools does **not render** private placement inappropriate for purposes of reimbursement;

d. (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) LRE concerns make a private special school inappropriate for a student who did not need such a restrictive placement.

e. Midd-West Sch Dist (JG) 113 LRP 48545 (SEA Penna 10/2/13) HO ruled that school district denied FAPE by placing a student with severe disabilities in a general education classroom because **parent requested** it even though she received no educational benefit; SW & BS ex rel PW v NYC Dept of Educ 92 F.Supp.3d 143, 65 IDELR 70 (SDNY 3/12/15) Court rejected the **more restrictive** placement **requested** by parents because it was not consistent with LRE principles.

f. Guidance on Inclusion in Early Childhood Programs (Depts of Education & Health & Human Services 9/14/15) The federal departments of Education and Health & Human Services issued guidance urging **early learning programs** to adopt inclusion of children with disabilities. The guidance urges school districts, states, lead agencies and other providers to ensure that children with disabilities receive high quality early learning programs in an **inclusive setting**. The policy statement asserts that "...all young children with disabilities should have access to inclusive high-quality early

childhood programs, where they are provided with individualized and appropriate support in meeting high expectations. Children with disabilities and their families continue to face significant barriers to accessing inclusive high-quality early childhood programs, and too many preschool children with disabilities are only offered the option of receiving special education services in settings separate from their peers without disabilities." You can find a link to the guidance at my [blog post](#); AS v Harrison Township Bd of Educ 66 IDELR 126 (DNJ 9/29/15) Court denied motion to dismiss parent IDEA & 504 claim ruling that **preschool** students with disabilities must be educated in **LRE** and SD **cannot segregate** preschool students with disabilities into one classroom.

g. Letter to Deal & Olens 115 LRP 31132 (DOJ 7/15/15) and Letter to Deal & Olens 115 LRP 31259 (DOJ 7/15/15) Department of Justice found that Georgia SEA violated **ADA's integration mandate** by placing over 5000 students with behavior related disabilities in the Georgia Network for Educational and Therapeutic Support. DOJ likened the segregated facility to a prison and ordered the students transitioned back into local schools; Frank ex rel Frank v Sachem Sch Dist 84 F.Supp.3d 172, 65 IDELR 9 (EDNY 2/5/15) Court dismissed parent's claim for violation of **ADA integration mandate** for failure to exhaust IDEA remedies. Court found that the parent was alleging the equivalent of an LRE violation which was therefore a placement issue and IDEA exhaustion was needed.

h. HG by Davis v Upper Dublin Sch Dist 65 IDELR 123 (ED Penna 4/17/15) largely adopting Mgst @ 113 LRP 10277. Applying Oberti test, Court found that student was disruptive and not successful in general ed class even with

supplementary aids and services and that SD had maximized mainstreaming opportunities, therefore no LRE violation.

i. DM & LM ex rel EM v New Jersey Dept of Educ 66 IDELR 226 (DNJ 11/17/15) Court denied SEA motion to dismiss ruling that parents have a right to challenge SEA **regulatory activities** under IDEA. Here parent challenged a regulation **prohibiting** private schools from **mainstreaming** thus making it impossible for private school to implement student's IEP.

j. Troy Sch Dist v KM 65 IDELR 91 (ED Mich 3/31/15) Court upheld HO decision that SD violated LRE by placing a thirteen year old with Aspergers Syndrome, ADHD and ODD in a center based program for children with emotional disabilities. Despite multiple behavioral incidents, general ed classroom was LREW.

k. AG by MG v State of Hawaii Dept of Educ 65 IDELR 267 (D Haw 6/19/15) Court found that student's placement **was LRE**. Court rejected parent argument that the student should have received PE in general education; Student RA v West Contra-Costa Unified Sch Dist 66 IDELR 36 (ND Calif 8/17/15) Placement = LRE; KK ex rel KSK v State of Hawaii, Dept of Educ 66 IDELR 12 (D Haw 7/30/15) (same); Porter v Illinois State Board of Educ 62 IDELR 267 (Ill App CT 2/10/14) State appellate court affirmed HO decision that public school was the LRE placement for a student with dyslexia; REB ex rel JB v State of Hawaii, Dept of Educ 63 IDELR 105 (D Haw 4/16/14) Court affirmed ho ruling that SD provided the LRE placement for a kindergarten student with autism where his IEP provided that he would receive specialized instruction in the general education setting in science and social studies "as deemed appropriate" by his SpEd and gen ed teachers; Anthony C by Linda L & Lionel C v Dept of Educ, State of

Hawaii 62 IDELR 257 (D Haw 2/14/14) Court affirmed HO decision that public school placement was LRE; SP by JAP & JLP v Fairview Sch Dist 64 IDELR 99 (WD Penna 9/30/14) Court held that SD placement of a full time charter school was LRE for a student with migraines who required a dark room for 12-16 hours after SD had made extraordinary efforts to keep him in general ed classes; BEL ex rel BEL v State of Hawaii, Dept of Educ 64 IDELR 130 (D Haw 10/24/14) Where SD had attempted modifications and interventions in general ed classroom without success, SD offer of pullout services in SpEd classroom was LRE; CL by Lucia Mar Unified Sch Dist 62 IDELR 202 (CD Calif 1/9/14) General ed classes for half day were LRE for a large student with autism and a history of aggression.

l. Hannah L by George L & Susan L v Downingtown Area Sch Dist 63 IDELR 254 (ED Penna 7/25/14) Court affirmed HO decision that SD **violated** LRE by removing a student with SLDs from the general education environment for a portion of each day. SD merely paid **lip service** to the LRE requirement and **could not identify** the supplementary aids and services considered or the reasons for removal; Bookout v Bellflower Unified Sch Dist 63 IDELR 4 (CD Calif 3/21/14) Court ruled that SD denied LRE to a first grade student with autism by moving him to a special day class from the general education classroom. SD had **not** provided **sufficient training in autism** for his gen ed teachers and student received significant academic and nonacademic benefit in gen ed classroom. Student had exhibited behaviors but SD did not provide the supports the teachers needed to address the behaviors.

m. Rachel H v Dept of Educ, State of Hawaii 63 IDELR 155 (D Haw 6/18/14) Court ruled that the federal regulations re LRE require placement as **close** to the

**home** as possible; here school was LRE; JT ex rel AT v Dumont Public Schs 64 IDELR 248 (NJ App Ct 11/24/14) IDEA does not require that student attend **neighborhood** school; Dist of Columbia v Kirksey-Harrington 65 IDELR 11 (DDC 2/4/15) adopting Mgst, SD violated IDEA by placing student at his **neighborhood school** that could not implement the IEP developed by the team; But see, Dist of Columbia v Kirksey-Harrington 65 IDELR 11 (DDC 2/4/15) adopting Mgst, SD violated IDEA by placing student at **neighborhood** school that could not implement the IEP developed by team.

n. KS v Strongville City Sch Dist 63 IDELR 125 (ND OH 5/30/14) Court held that school district use of a glass vestibule or glass house for a quiet area or for rest breaks was not a violation of LRE or a change of placement where the student continued to receive meaningful benefit and was educated in the general ed classroom.

o. ADDITIONAL RESOURCE: Mark C Weber, “A Nuanced Approach to the Disability Integration Presumption,” 156 U. Pa. L. Rev. PENNumbra 174 (2007)

### ***10. Discipline/ Manifestation Determination***

a. Letter to Gerl 51 IDELR 166 (OSEP 5/1/8) In the scenario of an expedited hearing, the fifteen calendar day **resolution** period runs **concurrently** with the twenty school day limit for the convening of the hearing. Although the five business day rule for disclosure of evidence must also be factored in, DOE feels that there is nonetheless sufficient time to schedule the expedited hearing.

b. Dear Colleague Letter 114 LRP 1091 (US DOE & DOJ 1/8/14) The United States Departments of Education and Justice issued policy guidance for school districts and states to **reduce unlawful discrimination** in student discipline policies. This seems to be a conscious decision by the Administration to attack

the **school-to-prison pipeline** problem. Although the thrust of the guidance is obviously to reduce **racial** discrimination in school discipline, the Dear Colleague letter notes specifically that the contents of the guidance **also** fully apply to discipline that discriminates against children with **disabilities** and other protected groups. (See footnote 4 on pages 2-3 of the Dear Colleague Letter). You can read the DOE blog article [here](#). You can review the video by Secretary Duncan and the complete guidance package [here](#). The Dear Colleague Letter is available [here](#).

c. ZH by RH & JH v Lewisville Independent Sch Dist 65 IDELR 147 (ED Tex 3/24/15) adopting Mgst @ 65 IDELR 106 Court ruled that SD did not violate IDEA when it found that a sixth grader's creation of a **list** of students that he wanted **to shoot** was **not a manifestation** of his PDD-NOS (diagnosed 5 days after incident) and ADHD. The **shooting list** was developed over several days and not a result of ADHD impulsivity.(Note analysis is in Mgst decision)

d. Warrior Run Sch Dist 114 LRP 37530 (JG) (SEA Penna 3/17/14) HO ruled that IDEA **disciplinary protections** were available **only to** students who are eligible or who should have been identified; In Re Student With A Disability 52 IDELR 239 (SEA WV 4/8/09) Under IDEA'04 changes, conduct is a **manifestation** of a disability only if 1) the disability caused or is substantially related to the conduct, or 2) the conduct is the direct result of the failure to implement the IEP; District of Columbia Public Schs (JG) 111 LRP 60123 (SEA DC 4/10/11) HO found a denial of FAPE where the school district failed to conduct a manifestation determination where a **series/pattern** of suspensions constituted a change of placement because the pattern of removal for over

20 days total for incidents involving similar types of misconduct over a short period of time. HO ordered **MDR** and a review of student's bjp for possible modifications;

e. Larimer County Sch Dist, Poudre (CH) No. 2015:510 (SEA Colo 7/14/15) A state complaint investigator issued a decision requiring the SD, that had failed to comply with IDEA discipline requirements, to provide training to its staff - including **training on alternatives to traditional discipline**- including **restorative justice**. See my [blog post](#).

f. Morton v Bossier Parish Sch Bd 63 IDELR96 (WD Louisiana 5/6/14) Court **upheld** the validity of an **interrogatory** by parents of a teen who allegedly committed suicide after disability-based harassment. Interrogatory sought the names, addresses and phone numbers of **all students who attended class with the student for two years before his death**. Mgst noted that before complying with the interrogatory, SD must notify classmates and parents of the court order to permit them to seek protective order under FERPA; Letter to Soukup 115 LRP 18668 (FPCO 2/9/15) Consistent with the long-standing view of the Department of Education, FPCO ruled that **FERPA permits** a school to disclose to the parent of a **harassed** student information about the **disciplinary** sanctions imposed upon the perpetrators of the harassment (including stay away from the student; stay out of the school; or transfer to another class) FPCO noted that where any **civil rights laws** conflict with FERPA, the civil rights law **override** any conflicting provisions of FERPA.

g. Memo to Chief Sch Officers Re Dispute Resolution Procedures Under Part B of IDEA 61 IDELR. 232 (OSEP 7/23/13) The 64 page Q & A attachment includes a section on **expedited hearings**; Questions and Answers on Discipline Procedures 52 IDELR 231 (OSERS 6/1/9) (NB OSERS offers guidance in the situation where consent is

revoked); Questions and Answers on Procedural Safeguards and Due Process Procedures 52 IDELR 266 (OSERS 6/1/9).(NB OSERS clarifies that a school district may still go directly to court for a temporary injunction to remove a student for safety reasons. In OSERS' opinion a district need not exhaust administrative remedies in that situation.); Questions and Answers on Serving Children with Disabilities Eligible for Transportation 53 IDELR 268 (OSERS 11/1/9) (NB OSERS clarifies that because a school bus suspension may be a change of placement, it may trigger all of the IDEA disciplinary protections, including educational services to enable student to access the general curriculum).

h. District of Columbia v. Doe ex rel Doe 611 F.3d 888, 54 IDELR 275 (DC Cir 7/6/10) DC Circuit ruled that HO did not exceed his authority where he **reduced** a disciplinary **suspension**. HO reduced a 45 day suspension to an 11 day suspension noting the trivial nature of the infraction and finding that the more lengthy suspension denied FAPE to the student. Court notes that in legislative history Congress intended to strip schools of the unilateral authority they traditionally had to exclude children with disabilities.

i. Dist of Columbia Pub Schs (PV) 114 LRP 25503 (SEA DC 5/9/14) HO held that numerous incidents of sending student home for being disruptive or aggressive were not disciplinary in nature and therefore did **not trigger** the **MDR** requirement. (?); Avila v Spokane Sch Dist #81 64 IDELR 171 (ED Wash 11/3/14) Court rejected parent argument that SD was required to conduct an MDR to determine whether there was a connection between student's autism and the conduct he was suspended for. Where suspension was for six days and there was no pattern of removals, there was no change of

placement and no MDR was required; Wicks v Freedom Area Sch Dist 66 IDELR 130 (WD Penna 9/28/15) Court ruled that SD properly followed IDEA discipline procedures and concluded at MDR that student's drug use on campus was not a manifestation of his disability. SD properly expelled student and transferred him to an alternative school.

j. Mars Area Sch Dist v CL by KB 66 IDELR 153 (WD Penna 10/16/15) SD appeal of HO decision in parent's favor in expedited discipline case was **moot** where parent enrolled student in a private school.

k. KA ex rel JA v Abington Heights Sch Dist 65 IDELR 174 (MD Penna 4/20/15) Court denied SD motion to dismiss §504 and §1983 (14<sup>th</sup> due process) claims where parent alleged that SD expelled a student receiving 504 services without an MDR. Failure to conduct MDR was evidence of disability discrimination.

l. Wayne-Westland Community Schs v VS & YS 64 IDELR 139 (ED Mich 10/9/14) Court **granted** SD a **Honig v Doe injunction**. Court granted TRO prohibiting teen from entering upon school grounds where he was **extremely dangerous** and temporarily permitted SD to educate the student through an online charter program. The 6 foot 250 pound student has kicked, punched and spat on students and staff, threatened to rape a teacher and made racist comments; Seashore Charter Sch v EB by GB 64 IDELR 44 (SD Tex 9/3/14) Court **issued Honig v Doe injunction**. Court found that a 15 year old with autism had a tendency to bite, scratch and pull hair and that this constituted a dangerous situation at a charter school, ordering his stay put placement to his neighborhood HS until HO rules; But See, Troy Sch Dist v KM by Janice M & Warren M 64 IDELR 303 (ED Mich 1/16/15) Court **denied Honig v Doe injunction** where SD did not demonstrate that maintaining student's placement was likely to result in injury to

student or others. The incident occurred when SD did not provide a safe person as required by IEP and resulted in no serious injuries and where SD waited until after HO ruled SD had violated IDEA and ordered student returned to HS. {Honig v. Doe (1988) 484 U.S. 305,108 S.Ct. 592, 59 LRP 8952}(These used to be **rare**)

m. CC by Cripps v Hurst-Euleless-Bedford Independent Sch Dist 65 IDELR 195 (ND Tex 5/21/15) Court affirmed HO who ruled that SD's IAES was not inappropriate just because the juvenile authorities had decided not to prosecute the student for photographing another student on the toilet.

n. Ocean Township Bd of Educ v. ER ex rel OR 63 IDELR 16 (D NJ 3/10/14) Noting that in disciplinary cases, **stay put is the IAES**, court granted TRO motion by SD and reversed ho's stay put order that paced student back into neighborhood HS.

o. JF by Abel-Irby v New Haven Unified Sch Dist 64 IDELR 212 (ND Calif 11/19/14) Court dismissed parent suit challenging SD MDR determination was **moot** where all available relief had already been provided, including an fba/bip.

p. **safety exception** (no significant cases)

q. **serious bodily injury**. (no significant cases)

r. "dangerous **weapon**" provision (no significant cases)

s. student knowingly possessed illegal **drugs** at school (no significant cases)

t. Other Resources:

1. Report by **Council of State Governments:**

The Council of State Governments released a report on school discipline that tells school districts to spare the rod. The report notes that an over reliance by schools on suspensions

is fueling the school to prison pipeline. The report is highly critical of **zero tolerance** discipline policies. The School Discipline Consensus Report mentions frequently that kids with disabilities are targeted for school discipline. Indeed the report emphasizes that children with disabilities are **twice as likely** as their non-disabled peers to be singled out for school discipline. The Report includes sixty recommendations to keep kids in the classroom and out of the courtroom. You can read the entire 436 page report [here](#). Video and press coverage of the report are available [here](#).

2. My Interview of Assistant Secretary of OSERS **Michael Yudin** included his warning against **ten free days of suspension**. He said that there is nothing free when a child with a disability is suspended. See [my interview](#).

### *12. Extended School Year*

a. TM by AM & RM v Cornwall Central Sch Dist 752 F.3d 145, 63 IDELR 31 (2d Cir 4/2/14) The **LRE** requirement applies to **Extended School Year** programs in the same manner that it applies during the regular school year. Because ESY is necessary to prevent substantial regression, LRE fully applies even if the district does not offer a mainstream ESY program (can consider private programs).

b. In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) HO ruled that where the school district provided ESY services, the fact that certain skills were not identified as critical was irrelevant; question was whether serious regression after school breaks that would **significantly jeopardize** gains made by the student; Midd West Sch Dist 112 LRP 42002 (JG) (SEA Penna 7/22/12) HO ruled that ESY was not needed where parent presented no evidence of substantial **regression or recoupment** problems; ESY is not about progress, it is about regression and recoupment; Grants Pass

Sch Dist v Student 65 IDELR 207 (D Or 4/29/15) Court found that where SD data showed little or no regression or recoupment problems, ESY was not required. Court ruled that data collection concerning ESY is a methodology within the discretion of the SD; AG by MG v State of Hawaii Dept of Educ 65 IDELR 267 (D Haw 6/19/15) Court rejected parent argument that ESY was necessary where evidence revealed no regression or recoupment problems; Morgan M by Barbara M & Arthur WM III v Penn Manor Sch Dist 64 IDELR 309 (ED Penna 1/14/15) ESY is required where child has regression and recoupment problems; here ESY program was appropriate.

c. JK v Hudson City Sch Dist Bd of Educ 66 IDELR 142 (ND Ohio 9/9/15) Court rejected parent argument that SD should have offered ESY where parents had told SD that they wanted the student to attend a summer camp rather than ESY; Kornblut ex rel LK v Hudson City Sch Dist Bd of Educ 66 IDELR 66 (ND OH 9/2/15) (similar summer camp).

d. TH v Cincinnati Public Sch Bd of Educ 63 IDELR 189 (SD OH 6/27/14) Court refused to excuse exhaustion at dph merely because affidavit of speech pathologist said student was at risk of serious regression without ESY.

### ***13. Mediation and Settlement***

a. CEATS, Inc v. Continental Airlines, Inc, et al, \_\_\_ F. 3d \_\_\_\_ (Fed. Cir. 6/24/2014). The United States Supreme Court has [denied certiorari](#) for this case, Docket # 14-681, on March 23, 2015. NOTE: This is **not** a special education case. The Federal Circuit ruled that mediators have the same **ethical obligations of disclosure and recusal** as judges and hearing officers. "Although we recognize that mediators perform different functions than judges and arbitrators, mediators still serve a vital role in our litigation

process. Courts depend heavily on the availability of the mediation process to help resolve disputes. Courts must feel confident that they are referring parties to a **fair and effective process** when they refer parties to mediation. And parties must be **confident** in the mediation process if they are to be willing to participate openly in it. Because parties arguably have a **more intimate relationship** with mediators than with judges, it is critical that potential mediators not project any reasonable hint of bias or partiality. Indeed, all mediation standards require the mediator to disclose any facts or circumstances that even reasonably create a presumption of bias. ... This duty to disclose is similar to the recusal requirements imposed on judges. ... While mediators do not have the power to issue judgments or awards, because parties are encouraged to share confidential information with mediators, those parties must have **absolute trust** that their confidential disclosures will be preserved. ... Indeed, mediation is not effective unless parties are **completely honest** with the mediator. ... Just as a judge is required to recuse himself ... whenever “his impartiality might reasonably be questioned,” **mediators are required to disclose** a potential conflict whenever there are facts and circumstances that “could reasonably be seen as raising a question about the mediator’s impartiality.” You can read the entire [decision](#) here.

b. Letter to Gerl 59 IDELR 200 (OSEP 6/6/12) OSEP opined that a school district may **not use mediation** as a means to inform a parent of his options after a parent revokes **consent** for special education. Despite the requirement under IDEA that parental decisions under IDEA be made with “informed consent,” and despite the policy favoring mediation under the reauthorization amendments, a school district may not use mediation

or the other dispute resolution mechanisms under subpart E of the federal regulation, even if a parent voluntarily agrees to do so, after revocation of consent.

c. AF by Christine B v Espanola Public Schs 66 IDELR 92 (Tenth Cir 9/15/15) A 2-1 majority of the Tenth Circuit ruled that successful **mediation** of an IDEA claim is not exhaustion of administrative remedies for later 504/ADA/1983 claims. Dissent disagrees. Contrast, GM & MCM ex rel CM v Brigantine Public Schs 65 IDELR 229 (DNJ 6/8/15) HO approval of settlement constituted sufficient exhaustion of administrative remedies to permit parent's §504/ADA/1983 action; Zdrowski ex rel CR v Rieck 66 IDELR 42 (ED Mich 8/11/15) Settlement of dph is not enough for exhaustion, but here SD waived argument.

d. Sam K by Diane C & George K v State of Hawaii, Dept of Educ 788 F.3d 1033, 65 IDELR 222 (Ninth Cir 6/5/15) Ninth Circuit ruled that parent claim for reimbursement for a private placement was not barred by state 180 day statute of limitations for reimbursement where LEA tacitly agreed to a private placement where it did not propose a public placement for the 2010-11 school year after a settlement agreement required LEA to pay for the private placement for 2009-10 school year.

e. SL by Loof v Upland United Sch Dist 747 F.3d 1155, 63 IDELR 32 (9<sup>th</sup> Cir 4/2/14) @n.2 Ninth Circuit reversed District Court holding that an IDEA hearing officer has the **authority to review or enforce a settlement agreement**. Note that in South Kingston Sch Committee v Joanna S ex rel PJS 64 IDELR 191 (1<sup>st</sup> Cir 12/9/14) @n3 First Circuit did not address whether an IDEA HO has the authority to enforce or interpret a settlement agreement but noted that courts are **split** on the issue.

f. TB by Brenneise v San Diego Sch Dist 795 F.3d 1067, 66 IDELR 2 (Ninth Cir 7/31/15){see corrected opinion at 115 LRP 54544 (9<sup>th</sup> Cir 11/19/15)} Ninth Circuit **reversed** district court decision to **cut off attorney's fees** after settlement offer finding that SD settlement offer was not more favorable than the relief obtained by the parents; JO v Tacoma Sch Dist 64 IDELR 269 (WD Wash 1/5/15) (same); MM & EM ex rel SM v Sch Dist of Philadelphia 66 IDELR 181 (ED Penna 11/3/15) Court did not cut of attorney's fees where SD offer was made one day less than 10 days before dph as required by IDEA

g. KC by Erica C v Torlakson 63 IDELR 276 (9<sup>th</sup> Cir 8/11/14) Where parents were seeking to assert right to attorney's fees under IDEA and not to enforce a provision of a settlement agreement, parents right to seek attorney's fees was not affected by a 30 month time limit contained in the settlement agreement for the District Court to hear claims related to compliance with the settlement agreement. Court asserted its ancillary jurisdiction and such jurisdiction is discretionary.

h. South Kingston Sch Committee v Joanna S ex rel PJS 64 IDELR 191 (1<sup>st</sup> Cir 12/9/14) First Circuit held that a settlement agreement provision whereby the parent agreed to **waive any and all** causes of action of which the parent knew or should have known at the time that she signed the agreement did **not waive any unforeseeable** grounds for a complaint. But here the new request for a psychoeducational evaluation was among the many issues resolved by the previous settlement and was therefore foreseeable and waived by the settlement agreement.

i. FH by Hall v Memphis City Schs 764 F.3d 638, 64 IDELR 2 (6<sup>th</sup> Cir 9/4/14) A 97 day **gap** between the resolution meeting and the parties signing a settlement

agreement did not prevent a 20 year old former student from **suing to enforce** the settlement. There is no time limit on resolution sessions, and a resolution agreement is enforceable in court.

j. NW by JW & JW v Boone County Board of Education 763 F.3d 611, 63 IDELR 275 (6<sup>th</sup> Cir 8/18/14) Private school placement pursuant to a settlement agreement was not the **stay put** placement; rather, stay put involves a placement determined by an IEP team; .

k. Dear Colleague Letter 65 IDELR 151 (OSEP 4/15/15) OSEP has learned that some SDs are filing dpcs based upon the same issues after parents file state complaints to prevent SEA investigation. Although this is permissible under IDEA, OSEP strongly encourages LEAs to respect the parent's choice to use state complaint procedures rather than dph. Likewise **before pursuing dph, LEA should attempt** to engage parent in **mediation** or other informal dispute resolution mechanisms.

l. Memo to Chief Sch Officers Re Dispute Resolution Procedures Under Part B of IDEA 61 IDELR. 232 (OSEP 7/23/13) The 64 page Q & A attachment includes a section on **mediation**.

m. JD by Davis v. Kanawha County Bd of Educ 571 F.3d 381, 52 IDELR 182 (4th Cir. 7/9/9) Fourth Circuit held that mediation discussions under IDEA are **confidential**. Accordingly where the school district offered a settlement stating that the terms would be the same terms as a failed mediation, district could not use the settlement offer to prove that it had made a more favorable settlement offer than the relief obtained by the parent at the due process hearing; Guillermo G v Bd of Educ City of Chicago, Dist 299 64 IDELR 133 (ND Ill 10/20/14) Court held that SD offer of settlement did not bar

later attorney's fees for parent where offer included no attorney's fees and parent already owed \$20K, therefore parent refusal of offer was justified.; Champa v Weston Public Schs 66 IDELR 187, 473 Mass 86 (Mass Supreme Judicial Court 10/23/15) Court required SD to provide parent with copies of all settlements in which SD paid for out of district private placements with all personal information redacted. They are educational records under FRPA, IDEA and state law. Fact that settlements had **confidentiality clauses** did not prevent access of documents to other parents if personal info is redacted.

n. MP v. Penn-Deko Sch Dist 66 IDELR 252 (ED Penna 11/20/15) Where parent entered into a settlement agreement with SD that included \$20K in attorney's fees for parent's lawyer, the **clear and unambiguous language** of the settlement agreement **waiving** all other claims vs SD barred a later suit for attorney's fees. @n.30: The **principle** that a **release drafted by a lawyer** for a party should be construed against that party does not apply where the terms of the release are **unambiguous**.

o. Tyler J by Cheryl Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDELR 45 (D Haw 2/24/15) @n.6 Court **rebuked** parents for presenting the court with a **draft** settlement agreement where the parties never agreed to a settlement. Court did not consider the draft.

p. NW v Dist of Columbia 65 IDELR 230 (DDC 6/4/15) Court reversed HO who found that settlement and **waiver language** barring all claims that accrued before June 20, 2013 to bar a claim concerning an IEP drafted in April 2013 because the IEP applied to the next school year. Court did not reach the issue of whether a waiver of a federal statutory right under IDEA must be **knowingly and voluntarily made** because not briefed by parties; KA ex rel JA v Abington Heights Sch Dist 65 IDELR 174 (MD Penna

4/20/15) Court refused to dismiss because of settlement and release where it was not clear from the release whether the parent had intended to release §504 claims; Copeland v Dist of Columbia 65 IDELR 71 (DDC 3/11/15) Court reversed HO ruling that settlement was an accord and satisfaction where **language** in the letter from SD stated that the offer was to cover all potential harm to date but mom thought that it was only for past dph; Michelle K ex rel Alice K v Pentucket Regional Sch Dist 64 IDELR 304 (D Mass 1/16/15) Court found language in settlement agreement to be **ambiguous** where parent had agreed "... to dismiss her administrative complaint involving her daughter..." and court allowed parent to pursue dph.

q. Crawford v San Marcos Consolidated Independent Sch Dist 64 IDELR 306 (WD Tex 1/15/15) Mgst recommended dismissal of parent 504/ADA claims where parent settled previous IDEA suit and signed waiver agreeing to dismiss all claims that were or could have been brought against SD to date. Second suit was dismissed because of **waiver**. Third suit was dismissed because of res judicata.

r. Zilberman v Gateway Sch Dist 65 IDELR 261 (WD Penna 6/29/15) Court dismissed parent IDEA claim vs SEA to avoid duplicate recovery where parent had already accepted a settlement from LEA.

s. JH by Sarah H v Nevada City Sch Dist 65 IDELR 77 (ED Calif 3/6/15) Settlement agreement lacked any judicial **imprimatur** therefore, no attorney's fees; RBIII by Batten v Orange East Supervisory Union 66 IDELR 277 (D Vt 12/30/15) Where HO dismissed dpc after settlement in mediation, and dismissal did not mention settlement or change parties' legal relationship, insufficient imprimatur.

t. Dervishi ex rel TD v Stamford Bd of Educ 66 IDELR 60 (D Conn 8/5/15)  
Because an IDEA **settlement** clearly provided for a student's home based program as a temporary measure, SD did not have to continue funding it for years under stay put.

u. Hudson City Schs 63 IDELR 26 (SEA OH 2/7/14) State complaint investigator ruled that a **mediator** did **not violate impartiality** by sending an email to school officials repeating their statement that the parent is "odd." Investigator also ruled that the SEA did not violate FERPA, IDEA privacy or confidentiality requirements by sharing information about the student with the mediator after the parent agreed to mediation.

v. JY by EY & GY v. Dothan City Bd of Educ 63 IDELR 33 (MD Ala 3/31/14) SD violated IDEA by not having a person with **decision making authority** present at a resolution session. Court ruled that this was a procedural violation that was harmless where no settlement was reached at the resolution session.

w. Olivia B ex rel Bijon B v Sankofa Academy Charter Sch 64 IDELR 276 (ED Penna 12/19/14) Court ruled that a parent stated a cause of action for breach of contract and wrongful estoppel where a charter school failed to pay student's private school tuition as provided in an **IDEA settlement** agreement; Olivia B ex rel Bijon B v Sankofa Academy Charter Sch 63 IDELR 247 (ED Penna 8/1/14) Court dismissed parent's claim against SEA, noting that although SEA is ultimately responsible for ensuring FAPE, here the student received FAPE. Charter school and parents **settled IDEA claim** with charter agreeing to pay private school tuition for the student. Charter went bankrupt, but private school continued to educate child despite unpaid tuition.

x. AS & RS ex rel SS v Office for Dispute Resolution, Quakertown Community Sch Dist 62 IDELR 239 (Penna Commonwealth Ct 1/24/14) Majority of state court held that a settlement was binding even though parents and their lawyer **changed the terms of the agreement** (including reimbursement for private services) without telling SD. District ratified the changes by signing the agreement{**reversing** this HO decision: Quakertown Community Sch Dist (LV) 113 LRP 23564 (SEA Penna 5/3/13) HO concluded that there was **no settlement**. The parties agreed, counsel for the district prepared an agreement, parents then changed language in the agreement and signed and returned the altered document};

y. Galloway v Chesapeake Union Exempted VIII Sch Bd of Educ 64 IDELR 129 (SD OH 10/27/14) In an action alleging that SD failed to respond to repeated incidents of bullying in violation of §504/ADA/§1983, Court allowed parents to present evidence of a **settlement agreement** in prior dph because the fact that SD only arranged for staff training on autism after parents filed a dpc was relevant to deliberate intention concerning the bullying.

z. Bd of Educ of Plainfield Community Council Sch Dist 202 v Ill State Bd of Educ 63 IDELR 40 (D Ill 3/26/14) Court granted **SD motion to enforce** an IDEA **mediation agreement**, rejecting parent claims that she signed agreement under **duress**, was strong-armed and received nothing of benefit. Court noted that settlement was a compromise between the positions of the two parties concerning the transition of twins from a private school to a public school. No evidence of duress.

aa. District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) HO held that an IDEA HO has the authority to **enforce** a settlement agreement pertaining to the issues of identification, evaluation, placement or FAPE;

bb. SD by Brown v Moreland Sch Dist 64 IDELR 205 (ND Calif 11/25/14) Court approved of settlement as **fair** and in the student's **best interest**;

cc. Bd of Educ Evanston Skokie Community Dist 65 v. Risen 63 IDELR 191 (ND Ill 6/24/14) Court ruled that the IDEA'04 restriction against attorney fees for resolution sessions did not apply to mediations. Court awarded fees.

dd. ADDITIONAL RESOURCE: Mark C Weber, "Settling IDEA Cases: Making Up is Hard to Do," (09/05/09), Loyola of Los Angeles Law Review Forthcoming, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1446008](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446008)

### *C. Other IDEA Issues*

#### *1. Child Find*

a. Ridley Sch Dist v. MR & JR ex rel ER 680 F.3d 260, 58 IDELR 271 (3d Cir 5/17/12) Although a school district has a **duty to identify** students suspected of having a disability within a reasonable time, a reevaluation is not required every time that a child posts a **poor grade** or **misbehaves**.

b. Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} SD did **not violate** its child find obligations where it conducted a robust evaluation of student; In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) HO found that School district **complied** with its child find obligation.

c. In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14)

HO ruled that school district **violated** its child find duty by **encouraging** its staff to **guide** them **away from SpEd evaluations** and where the §504 administrator told a parent that the student was not likely eligible for SpEd or 504 because he had good grades when parent specifically requested an evaluation. Because child was clearly not eligible, however, HO ordered only staff training to comply with child find in the future.

d. District of Columbia Public Schs (JG) 111 LRP 25934 (SEA DC

3/18/11) The standard for child find is **suspicion** of a disability rather than actual knowledge. LEA violated child find duty where it failed to evaluate and forgot about a child despite academic struggles, discipline issues and an arrest in middle school; District of Columbia Public Schs (JG) 111 LRP 25929 (SEA DC 3/25/11) same re standard; LEA violated child find duty by not evaluating student exhibiting distractibility, impulsive behaviors and discipline problems

e. Letter to Kotler 65 IDELR 21 (OSEP 11/12/14) OSEP noted that in

conducting child find and eligibility determinations SDs must be careful not to miss children with **near vision** problems even though they may pass a standard eye exam.

f. PP v Compton Unified Sch Dist 66 IDELR 121 (CD Calif 9/29/15) Court

rejected plaintiffs argument in class action that trauma from **growing up in poverty** was in itself a **§504 disability triggering child find**, but ruled that the physical or mental effects of such trauma might be a substantial limitation on a major life activity. Court denied SD motion to dismiss; PP v Compton Unified Sch Dist 66 IDELR 161 (CD Calif 9/29/15) Court denied plaintiffs' request for a preliminary injunction to require SD to train its staff on the effects of trauma on the ability to learn; PP v Compton Unified Sch

Dist 66 IDELR 162 (CD Calif 9/29/15) Court denied 504/ADA class certification of students in high poverty area who suffered trauma where plaintiffs' experts did not address the effects of trauma on their education. Court gave plaintiffs leave to renew their motion with additional evidence; See my [blog post](#).

g. Oakland Unified Sch Dist v NS by Genning & Sandahl 66 IDELR 221 (ND Calif 11/10/15) **Threshold** for assessment under child find duty is relatively **low**. Here SD violated child find by failing to evaluate a teen with significant difficulties with anxiety and social skills dating back to 7<sup>th</sup> grade.

h. DC v Dist of Columbia 66 IDELR 185 (DDC 10/23/15) Court ruled that a subclass of all children age 3 to 5 whom the SD had failed to locate under its child find duty was not too broad.

i. Demarcus L by Dominique L v Bd of Educ of City of Chicago Dist #299 63 IDELR 13 (ND Ill 3/11/14) Court affirmed HO who found **no** child find **violation**. Eight year old with behavior issues was properly managed in classroom and school district did not overlook signs that he had a disability. SD evaluated student after two disciplinary incidents and court found this = reasonable; Simmons v Pittsburg Unified Sch Dist 63 IDELR 158 (ND Calif 6/11/14) Court ruled that ho properly found no IDEA child find violation where the school district had developed a §504 plan; Morgan M by Barbara M & Arthur WM III v Penn Manor Sch Dist 64 IDELR 309 (ED Penna 1/14/15) No child find violation;

j. Jana K by Tim K v Annville Cleona Sch Dist 63 IDELR 278 (MD Penna 8/18/14) Court ruled that SD **violated its child find duty** where it failed to evaluate a teen with declining grades, frequent visits to the school nurse, and acts of self-harm. SD

should have suspected that student had a disability; CC, Jr v Beaumont Independent Sch Dist 65 IDELR 109 (ED Tex 3/23/15) Court ruled that SD violated its child find duty by not evaluating a student when it had reason to suspect a disability when mom had played an audio of student's speech for SD speech pathologist. **SD policy** of not evaluating students **until parent** makes a formal request violates IDEA child find duty; AW by HW & AW v Middletown Area Sch Dist 65 IDELR 16 (MD Penna 1/28/15) SD violated child find by waiting 13 months to evaluate after it should reasonably have suspected a disability.

k. JY by EY & GY v. Dothan City Bd of Educ 63 IDELR 33 (MD Ala 3/31/14) Court rejected SD argument that a parent cannot raise child find at a dph.

l. Questions and Answers on Title IX and Sexual Violence 114 LRP 19550 (OCR 4/29/14) The U. S. Department of Education issued new guidance on how schools should address sexual violence and other sex discrimination. The guidance focuses primarily upon Title IX, but it impacts upon several other statutes. You can read the DOE [guidance here](#). Concerning Q #B-3 re students with disabilities, the guidance states: "A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services. At the elementary and secondary education level, this **may trigger** a school's **child find obligations** under IDEA and the evaluation and placement requirements under Section 504, which together require a school to evaluate a student suspected of having a disability to determine if he or she has a disability that requires special education or related aids and services."

## ***2. Eligibility***

a. Warrior Run Sch Dist 112 LRP 41988 (JG) (SEA Penna 7/23/12) HO ruled that to be eligible under IDEA, parent must show that the child has an enumerated **disability**; that the child **by reason thereof needs** special education and that the disability **adversely affects** her educational performance; Warrior Run Sch Dist 114 LRP 37530 (JG) (SEA Penna 3/17/14) (same; student with concussions did not meet second and third prongs for eligibility where they did not adversely affect his educational performance and where he did not need special education by reason of the concussions; EL Haynes Public Charter Sch v Frost 66 IDELR 287 (DDC 9/11/15) Court reversed HO and ruled that student was not eligible despite ADHD & ODD where the disabilities did not adversely impact his educational performance where the student made academic and behavioral progress.

b. In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14) A student's outbursts and behavioral meltdowns **at home** did not adversely affect his education and he did not need special education, so therefore, he was not eligible. He also did not meet the state definition of **OHI** where he was not shown to have limited vitality, energy or alertness; QW by MW & KTW v Bd of Educ of Fayette County, KY 64 IDELR 308, aff'd in an UNPUBLISHED decision by 6<sup>th</sup> Cir @ 66 IDELR 212 (Sixth Cir 11/17/15) Student with autism was no longer eligible for SpEd where he performed off the charts academically and his behavior was similar to other students. His autism no longer affected his educational performance. While ed performance extends beyond academics to behavioral and social issues at school, it doesn't apply to problems only exhibited **at home**.

c. EM by EM & EM v Pajaro Valley Unified Sch Dist 63 IDELR 211 (9<sup>th</sup> Cir 7/15/14) Ninth Circuit held that a child with a disability may be eligible under more than one of IDEA’s categories. The fact that the student was not eligible under SLD because of a lack of a severe discrepancy did not prevent the child from possibly being eligible under OHI with an auditory processing disorder. Here, however, the student was not eligible under OHI because he did not have limited alertness.

d. Blunt v Lower Merion Sch Dist 767 F.3d 247, 64 IDELR 32 (3d Cir 9/12/14) Third Circuit ruled that the school district properly followed IDEA by **individually** evaluating students for special education. The fact that **black students** were classified as **eligible** for SpEd at a rate 5.7% to 6.6% higher than white students was not race discrimination.

e. Dear Colleague Letter 66 IDELR 188 (OSERS 10/23/15) OSERS stated that nothing in IDEA prohibits the use of the terms “dyslexia,” “dyscalculia” or “dysgraphia” in an IEP. The non-exhaustive list of examples of **SLDs** in §601(30) and 34 CFR §300.8(c)(10) includes dyslexia, but not the other two terms, but the other two may be SLDs if they meet the criteria for SLD.

f. Dear Colleague Letter 66 IDELR 21 (OSEP 7/6/15) OSEP reminded education agencies that ABA therapy is just one methodology that may be appropriate for a child on the autism spectrum, and that **eligibility** and services should be determined by the **team** after the child’s unique needs have been determined by evaluation. Some districts have been leaning entirely on ABA therapists for eligibility and services and excluding speech language therapists and others.

g. Memorandum to State Directors of Special Educ 65 IDELR 181 (OSEP 4/17/15) OSEP asked SEAs to remind LEAs that they **may not refuse** to evaluate students for IDEA eligibility because they have **high cognition** (or – 2E). No single measure or assessment may be the sole criterion for eligibility.

h. Letter to Blodgett 115 LRP 5869 (OSEP 11/12/14) OSEP stated that the fact that a child's **hearing loss** has been surgically **corrected** does not necessarily mean that he is no longer eligible under IDEA. He could be eligible based upon a speech language impairment or other disability if SD evaluates and finds an enumerated disability plus a need for SpEd by reason thereof; JB & AB ex rel GB v Wells-Oqunquit Sch Dist 63 IDELR 294 (D Maine 5/31/14) Mgst recommended that court deny parents' challenge to school district decision to **terminate** the IDEA **eligibility**. Parents argued that the student's strong performance on standardized tests was the result of specialized instruction, but Mgst pointed out that under parents' argument, no student could ever **exit** from eligibility. OK to consider progress which is the result of SpEd so long as **not the sole yardstick**, adopted by Dist Court at 64 IDELR 17; Doe ex rel Doe v Cape Elizabeth Sch Dept 64 IDELR 272 (D Maine 12/29/14) Court upheld SD finding that student was no longer eligible for SpEd at his reevaluation. Above average grades, good performance on state tests and non-academic factors supported the decision;

i. Letter to Kotler 65 IDELR 21 (OSEP 11/12/14) OSEP noted that in conducting child find and eligibility determinations SDs must be careful not to miss children with **near vision problems** even though they may pass a standard eye exam.

j. HM by JM v Weakley County Bd Of Educ 65 IDELR 68 (WD Tenn 3/13/15) Court reversed HO and found that a student with a history of sexual abuse was eligible for IDEA under the category of **emotional disability**.

k. VW ex rel BM v Sparta Township Bd of Educ 63 IDELR 184 (DNJ 7/3/14) Court ruled that SD violated IDEA when the **eligibility team** looked only at severe discrepancy data in denying eligibility. The district had done a thorough evaluation with a **variety of assessment tools and strategies**, but explicitly denied eligibility using only **one measure**. Remanded to consider other data; Moore ex rel Bell v Hamilton Southeastern Sch Dist 61 IDELR 283 (SD Ind 8/29/13) Court denied dismissal of parent suit under IDEA, §1983 and negligence, where district failure to find student eligible for SpEd was based solely upon his average grades and **no observations** were conducted. Court found evidence that his ED disrupted and impacted his education.

l. DA & JA ex rel MA v Meridian Joint Sch Dist No 2 62 IDELR 205 (D Idaho 1/6/14) Court ruled that SD **properly** found student **not eligible** under IDEA. Student had **autism** but he did not meet the second and third factors. His disability did not have an adverse effect upon his educational performance where he performed well in general ed classes. He also did not need special education as a result of his disability; LJ v Pittsburg Unified Sch Dist 63 IDELR 133 (ND Calif 5/14/14) Court ruled that HO erred in concluding that the student did not have a disability, but HO ruling was bottom line correct because the student was not eligible for SpEd where he did not need SpEd as evidenced by his academic and behavioral progress after receiving general ed interventions; Laura A ex rel JO v Limestone County Bd of Educ 63 IDELR 166 (ND Ala 5/30/14) Court upheld school district determination that student was not eligible with

an **SLD**. The district correctly applied its serve discrepancy analysis- even though another test could have resulted in a determination of eligibility, the district correctly used the WISC-IV recommended by the parent's expert witness; Timothy F by Fernando F and Demaris F v Antietam Sch Dist 63 IDELR 70 (ED Penna 3/31/14) Court upheld SD finding that student was not eligible with an SLD, noting that school psychologist who used WISC-IV and WJ-III to determine no severe discrepancy properly supplemented this information with DIBELS and GMADE testing information;

m. Simmons v Pittsburg Unified Sch Dist 63 IDELR 158 (ND Calif 6/11/14) Court ruled that school district had **violated IDEA** by concluding that the fact that it had developed a §504 plan for the student relieved the district of conducting an IDEA evaluation. Parents' right to participate was violated because they were not included in the eligibility process. Remanded to ho re compensatory education; MM & IF ex rel LF v New York City Dept of Educ 63 IDELR 156 (EDNY 6/17/14) Court held that school district erred in finding student with anxiety and depression not eligible; even though she earned good grades, her condition kept her from attending school and thus adversely affected her education.

n. **NOTE:** Some legal scholars have questioned whether the *Rowley* test is too restrictive for eligibility purposes, Weber, Mark "The IDEA Eligibility Mess," [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1206202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1206202)

### ***3. Evaluation***

a. TP by JP & BP v Bryan County Sch Dist 792 F.3d 1284, 65 IDELR 254 (Eleventh Cir 7/2/15) @n.13: Eleventh Circuit notes that the parties misuse of “**evaluation**” and “**assessment**” has “plagued this litigation from the onset.” IDEA

specifies that an evaluation is a process during which assessments occur. §614(b)(2). SD conducts an initial evaluation (singular) and a reevaluation every three years (singular) and a parent is entitled to an IEE (singular) not IEEs...

b. 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 an **OT evaluation was appropriate** after rejecting several findings of fact by HO.

c. Letter to Blodgett 115 LRP 5869 (OSEP 11/12/14) OSEP stated that the fact that a child's **hearing loss** has been **surgically corrected** does not necessarily mean that he is no longer eligible under IDEA. He could be eligible based upon a speech language impairment or other disability if SD evaluates and finds an enumerated disability plus a need for SpEd by reason thereof; JB & AB ex rel GB v Wells-Oqunquit Sch Dist 63 IDELR 294 (D Maine 5/31/14) Mgst recommended that court deny parents' challenge to school district decision to **terminate** the IDEA eligibility. Parents argued that the student's strong performance on standardized tests was the result of specialized instruction, but Mgst pointed out that under parents' argument, no student could ever **exit** from eligibility. OK to consider progress which is the result of SpEd so long as **not the sole yardstick**, adopted by Dist Court at 64 IDELR 17; Doe ex rel Doe v Cape Elizabeth Sch Dept 64 IDELR 272 (D Maine 12/29/14) Court upheld SD finding that student was no longer eligible for SpEd at his reevaluation. Above average grades, good performance on state tests and non-academic factors supported the decision;

d. Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} District court ruled that HO correctly

found that the LEA evaluation of student was **appropriate and legally sufficient**. Parent did not show that the SD's methodology was flawed;

e. In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14) HO ruled that a school district evaluation was **comprehensive** and complied with all legal requirements.

f. In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) HO ruled that school district evaluated the student in all **areas of suspected** disability and properly considered the report of the parent's evaluator although they disagreed with it. Warrior Run Sch Dist 112 LRP 41988 (JG) (SEA Penna 7/23/12) (same);

g. Questions & Answers on IEPs, Evaluations & Reevaluations 111 LRP 63322 (OSERS 9/1/11) OSERS revised the Q & A document. See especially regarding **transition**: an IEPT can combine training and education goals but separate goals for employment still need to be developed.

h. Kornblut ex rel LK v Hudson City Sch Dist Bd of Educ 66 IDELR 66 (ND OH 9/2/15) SD properly evaluated student; ; Kimi R by Malia V v Dept of Educ, State of Hawaii 65 IDELR 12 (D Haw 2/4/15) SD evaluation was appropriate; Grasmick ex rel AG v Matanuska Sustina Borough Sch Dist 64 IDELR 68 (D Alaska 4/23/14) SD **properly followed** evaluation procedures;

i. Independent Sch Dist #413, Marshall v AJ by MN 66 IDELR 41 (D Minn 8/11/15) Court aff'd HO ruling that SD did **not properly evaluate** the student by failing to include a medical assessment where state law required a medical assessment if student had at least 3 of 8 ADHD criteria; MS by Sartin v Lake Elsinore Unified Sch Dist 66 IDELR 17 (CD Calif 7/24/15) Court ruled that SD failed to properly evaluate all areas of

a student's suspected disabilities- including maladaptive behaviors and awarded reimbursement for a private school. Data collected by a 1:1 aide was not sufficient and SD failed to use a variety of assessment tools. Increasingly aggressive behaviors resulted in lost instructional time.

j. KK ex rel KSK v State of Hawaii, Dept of Educ 66 IDELR 12 (D Haw 7/30/15)

Where parent refused to **consent** to evaluations after student was beaten by another student, court denied reimbursement for private tutoring. School district had done everything it could to obtain evaluative data that IEPT needed, but no consent.

k. Student v Sch Dist of Philadelphia 115 LRP 2848 (ED Penna 4/3/15) Court denied IEE at public expense, rejecting parent argument that IDEA evaluation requires **observation** of student by a person other than the teacher.

l. Jackson-Johnson v Dist of Columbia 65 IDELR 166 (DDC 4/23/15) adopting 115 LRP 17728. Court (affd Mgst and reversed HO). Court ruled that a **13 month delay** in providing an adaptive evaluation resulted in a denial of FAPE where HS principal testified that the lack of evaluative data left the student's IEPT in the dark.

m. Simmons v Pittsburg Unified Sch Dist 63 IDELR 158 (ND Calif 6/11/14) Court ruled that school district had violated IDEA by concluding that the fact that it had developed a §504 plan for the student relieved the district of conducting an IDEA evaluation. **Parents' right to participate** was violated because they were **not included** in the eligibility process. Remanded to provide compensatory education.

n. Conway ex rel KCG v Bd of Educ of Northpoint- East Northpoint Sch Dist 63 IDELR 289 (EDNY 8/1/14) After student lost consciousness with a panic attack,

the SD proposed placing the student on homebound instruction for the entire year without making any effort to evaluate him. Court found **violation**

o. Student v Ridgefield Bd of Educ (JJ)(SEA CT 6/24/14) HO denied request to **override** lack of **consent** for a psychiatric evaluation where student was excelling in coursework. You can read the decision [here](#).

p. The LEA must conduct the **reevaluation** process every three years, but not every evaluation needs to be repeated; instead a review must be conducted and a decision made as to what additional evaluation data is required if any; HG by Davis v Upper Dublin Sch Dist 65 IDELR 123 (ED Penna 4/17/15) largely adopting Mgst @ 113 LRP 10277. Court ruled that SD reevaluation of student was appropriate; Brock & Dalton ex rel SB v NYC Dept of Educ 65 IDELR 135 (SDNY 3/31/15) SD failure to conduct the triennial reevaluation was a procedural violation which here = a denial of FAPE because IEPT had insufficient evaluative data to develop an IEP; MM ex rel JS v NYC Dept of Educ 65 IDELR 103 (SDNY 3/7/15) SD failure to conduct triennial reevaluation was harmless procedural violation where the IEPT had sufficient evaluative data re student's needs; TF & AF ex rel MF v NYC Dept of Educ 66 IDELR 136 (SDNY 9/23/15) Failure to conduct a reevaluation was not a violation of IDEA where IEPT had sufficient evaluative data; but even if a procedural violation, here harmless; AA ex rel JA v NYC Dept of Educ 66 IDELR 73 (SDNY 8/24/15) SD failure to conduct 3 year reevaluation was a procedural violation, but **harmless** where IEPT had good information re student's needs; Phyllene W ex rel NW v Huntsville City Bd of Educ 64 IDELR 242 (D Alabama 12/10/14) Court affirmed HO decision that SD properly reevaluated student by reviewing existing data and determining that no additional assessments were necessary; EE ex rel

GE v NY City Dept of Educ 64 IDELR 15 (SDNY 8/21/14) SD properly relied on evaluation data less than three years old. No duty to reevaluate where parent had not requested it; Student RA v West Contra-Costa Unified Sch Dist 66 IDELR 36 (ND Calif 8/17/15) IDEA and federal regs do not give the parent a right to **observe** a child's assessments. Parent demanded that 3 year reevaluation be conducted in a room with a mirror so that she could observe. Court agreed with HO that mom's conditions were unreasonable and SD did not violate IDEA by failing to agree.

#### **4. Other IEP Issues**

##### **a. Rowley Standard**

1). Andrew F by Joseph F & Jennifer F v Douglas County Sch Dist RE-1 798 F.3d 1329, 66 IDELR 31 (10<sup>th</sup> Cir 8/25/15) The Tenth Circuit reasserted that the standard for FAPE remains the Rowley standard: **some educational benefit**. The Tenth Circuit **declined** to adopt the “**meaningful benefit**” standard articulated by some other circuits. The district court and HO applied the standard correctly in concluding FAPE provided. NB @n.8, the court noted that although the meaningful benefit standard is purportedly higher than the some benefit standard, but **the difference** between them **is not clear**. See my [8/30/15 blog post](#).

2). OS by Michael S & Amy S v Fairfax County Sch Bd 66 IDELR 151 (Fourth Cir 10/19/15) Parents asked Fourth Circuit to find that the 1997 and 2004 **amendments** to IDEA **raised the standard** for FAPE from Rowley's some benefit to a meaningful benefit standard. The Fourth Circuit **rejected** this argument finding that

Congress shift in emphasis from access to results did not change the definition of FAPE. In the Fourth Circuit, the standard for FAPE remains that the SD must provide **some educational benefit**, which means **more than minimal or trivial** benefit. See my [10/20/15 blog post](#).

3). JL & ML ex rel KL v. Mercer Island Sch Dist 575 F.3d 1025, 52 IDELR 241(9th Cir. 8/6/09) The Ninth Circuit held that the **Rowley standard** of a basic floor of opportunity is still the standard for FAPE. Congress has not referenced *Rowley* in subsequent amendments to IDEA and has not otherwise altered the definition of FAPE. If Congress had intended to change the FAPE standard, it would have expressed a clear intent to do so. Reverses district Court opinion to the contrary. See amended opinion same conclusion: 592 F.3d 938, 53 IDELR 280 (9th Cir 1/13/10)

4). EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit noted that the standard is **some benefit**; the student's education need **not maximize** his potential.

5). West Linn Wilsonville Sch Dist v Student 63 IDELR 251 (D OR 7/30/14) HO correctly applied Rowley standard; Contrast, Forrest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14) Mgst gives little deference to ho conclusions of law where ho imposed an **arbitrarily high legal standard** despite decades of court interpretations of IDEA.

6). ADDITIONAL RESOURCE: Mark C Weber, "Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley," 41 Journal of Law & Education 95 (January 2012); also available at the SSRN at: <http://ssrn.com/author=83733>

*b. IEPs In General*

- 1). Dear Colleague Letter 66 IDELR 227 (OSERS & OSEP 11/16/2015)

OSERS and OSEP provided guidance stating that **IEPs must be aligned to a state's content standards for the grade** in which the student is enrolled. The guidance document states, "Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided. Conversely, **low expectations** can lead to children with disabilities receiving less challenging instruction that reflects below grade-level content standards, and thereby not learning what they need to succeed at the grade in which they are enrolled..." "Based on the interpretation of "general education curriculum" set forth in this letter, we expect **annual IEP goals** to be **aligned** with State academic content standards for the grade in which a child is enrolled. This alignment, however, must guide but **not replace** the individualized decision-making required in the IEP process. See my 11/17/15 [blog post](#). Also see [my interview](#) with Assistant Secretary Michael Yudin where he specifically mentioned this letter and high expectations.

- 2). Questions & Answers on IEPs, Evaluations & Reevaluations 111 LRP

63322 (OSERS 9/1/11) OSERS revised Q&A document.

- 3). Leggett ex rel KE v Dist of Columbia 793 F.3d 59, 65 IDELR 251

(DC Cir 7/10/15) DC Circuit held that a **residential** placement was educationally necessary where SD **failed to provide an IEP** for HS student with SLD, anxiety and depression for first several weeks of the school year.

4). Letter to Breton 63 IDELR 111 (OSEP 3/821/14) OSEP noted that states may permit LEAs to **distribute IEPs** to parents **by email** where the LEA and the parent agree.

5). District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) HO ruled that an IEP is reviewed by “**snapshot rule**” taking into account what was objectively reasonable at the time IEP drafted, not in hindsight; IEP = snapshot not a retrospective; TO & KO ex rel JO v Summit City Bd of Educ 66 IDELR 16 (DNJ 7/27/15) @n.13: HO should not consider after acquired evidence that was not available to IEPT at the time. Here ok; AL by PLB v Jackson County 64 IDELR 173 (ND Fla 10/30/14))(same); Dist of Columbia v Walker 65 IDELR 271 (DDC 6/12/15) Court found that HO erred by considering **irrelevant evidence**- a psychiatrist’s report that was made four weeks after IEPT meeting. HOs and courts must evaluate whether an IEP was reasonably calculated to confer educational benefit at the time of its formation. No Monday morning quarterbacking. (snapshot rule)

6). Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Court awarded reimbursement where SD procedural violation in taking **six months** to develop an IEP seriously impeded the parents participation rights.

7). KM & SN ex rel LN v NYC Dept of Educ 65 IDELR 143 (SDNY 3/30/15) adopting Mgst @ 113 LRP 43587 Court ruled that SD forgetting to give parents a copy of student’s proposed IEP was a **harmless procedural** violation where the parents had received a draft IEP and they participated at the IEPT meeting.

8). ML by Leiman v Starr 66 IDELR 7 (D Md 8/3/15) Court rejected parent argument that SD failure to include goals and instruction on the rules and customs

of **Orthodox Judaism** in a nine year old's IEP violated IDEA – where IEP met all of the student's social and emotional needs. An IEP must be individualized only in the sense of the student's cognitive and developmental abilities. IDEA does **not require** that a student be able to access the curriculum based upon his **cultural or religious** circumstances.

9). Milan Area Schs 115 LRP 31123 (SEA Mich 6/30/15) State investigator concluded that SD did not violate IDEA by failing to make student's assistive technology plan a part of his IEP.

10). SD ex rel HV v Portland Public Schs 64 IDELR 74 (D Maine 9/19/14) Court ruled that SD violated IDEA by stating in IEP **PLEPS** that student was reading at the seventh grade level when he was really reading at second grade level. 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.

11). Forrest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14) Mgst found that school district violated IDEA by discontinuing the student's self-management curriculum. Even though he had good grades (3.25 GPA), the district's own evaluation showed that the student's anxiety was a contributing problem to behaviors.

***c. IEPs and FAPE***

1). EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit ruled that a student **received FAPE** where she received the speech provided on her IEP. Where IEP provided that student would

receive speech in “total school environment,” parents’ contention that she should receive pullout speech was rejected.

2). Reyes ex rel RP v New York City Dept of Educ 760 F.3d 211, 63 IDELR 244 (2d Cir 7/25/14) Second Circuit ruled that a 6:1:1 class with a full-time 1:1 aide only for the first three months was a denial of FAPE because it did **not meet the needs** of a 19 year old autistic student.

3). (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Court affd HO who ruled that **FAPE** was **received** where student made significant progress despite district failure to provide related services on his IEP.

4). Mifflinburg Area Sch Dist (JG) 114 LRP 17516 (SEA Penna 3/18/14) HO found that school district **denied FAPE** where it ignored the findings and recommendation of its evaluation report and by failing to follow the recommendation of its school psychologist to remediate the student’s math skills. IEP had a single very broad goal “complete all work necessary to obtain passing grades.”

5). York Sch Dist v SZ ex rel PZ 65 IDELR 39 (D Maine 2/27/15) Where SD offered an IEP for the next school year that was essentially the **same as the inadequate** IEP from the **previous year**, it denied FAPE.

6). LM & AM ex rel AM v East Meadows Sch Dist 63 IDELR 71 (EDNY 3/31/14) Where student made progress and his IEP adequately addressed his needs, parent argument that student with PDD did not consume the amount of food reported by SD was irrelevant as **FAPE** was provided.

7). McKay ex rel SD v Sch Bd of Avoyellas Parish 66 IDELR 283 (WD Louisiana 12/16/15) Court aff’d HO finding that FAPE provided despite SD failure to

document toileting progress; IDEA does **not require potential maximizing** or improvement in every area.

8). See also cases on unilateral placements, etc

*d. Retrospective vs. Prospective Analysis of IEPs*

1. Reyes ex rel RP v New York City Dept of Educ 760 F.3d 211, 63 IDELR 244 (2d Cir 7/25/14) Second Circuit refused to consider **retrospective testimony** to the effect that the parties had an agreement that the IEP would later be modified to include a full-time 1:1 aide; VS by DS v New York City Dept of Educ 63 IDELR 162 (EDNY 6/9/14) Court ruled that SRO and HO erred by failing to exclude retrospective testimony; MT ex rel NM v NY City Dept of Educ 64 IDELR 70 (SD NY 9/22/14) Remand to consider same; Contrast, Jalen Z v Sch Dist of Philadelphia 65 IDELR 198 (ED Penna 5/15/15) Court ruled although an IEP should be judged at the time it was written, and **retrospective** testimony that services not listed on IEP would actually have been provided, here HO properly admitted and considered testimony that explains or justifies the services listed on the IEP; ; KC ex rel CR v NYC Dept of Educ 65 IDELR 142 (SDNY 5/30/15) Court held that SD failure to list OT and speech on IEP as related services was a harmless procedural error where the IEP included speech and OT goals and where the related services were discussed at IEPT meeting. Discussions at IEPT meeting are **not** improper **retrospective** testimony; DN & JN ex rel DN v Bd of Educ of Center Moriches Union Free Sch Dist 66 IDELR 163 (EDNY 9/28/15) HO & SRO impermissibly relied upon retrospective testimony re intent of 8:1:1 placement.

2. District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) HO ruled that an IEP is reviewed by “**snapshot rule**” taking into account what

was objectively reasonable at the time IEP drafted, not in hindsight; IEP = snapshot not a retrospective; TO & KO ex rel JO v Summit City Bd of Educ 66 IDELR 16 (DNJ 7/27/15) @n.13: HO should not consider after acquired evidence that was not available to IEPT at the time. Here ok); AL by PLB v Jackson County 64 IDELR 173 (ND Fla 10/30/14) (same); Dist of Columbia v Walker 65 IDELR 271 (DDC 6/12/15) Court found that HO erred by considering **irrelevant evidence**- a psychiatrist's report that was made four weeks after IEPT meeting. HOs and courts must evaluate whether an IEP was reasonably calculated to confer educational benefit at the time of its formation. No Monday morning quarterbacking. (snapshot rule)

*e. IEP Team*

1). Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) Second Circuit ruled that SD did not violate IDEA by **finishing IEP** and issuing it **after the IEPT meeting**. The parent's right to meaningful participation was met where the parents fully participated at IEPT meeting and her input was considered. The parent does not have a right to be physically present during LEA decisional process.

2). Dear Colleague Letter 66 IDELR 21 (OSEP 7/6/15) OSEP reminded education agencies that **ABA therapy** is **just one** methodology that may be appropriate for a child on the autism spectrum, and that **eligibility and services** should be determined by the **team** after the child's unique needs have been determined by evaluation. Some districts have been leaning entirely on ABA therapists for eligibility and services and excluding speech language therapists and others.

3). JS & LS v NYC Dept of Educ 65 IDELR 201 (SDNY 5/6/15) IEP Team's **failure to consider** parent's independent psycho-educational evaluation was a procedural error-but **harmless** where current psycho-ed evaluation was considered and parent had a full opportunity to participate in IEP team meeting.

4). LWL & EL ex rel CL v Pelham Union Free Schs 66 IDELR 241 (SDNY 12/9/15) IEPT gave report by parent's private psychologist due consideration and designed a placement that incorporated his concerns. FAPE provided; JM ex rel RM v Kingston City Sch Dist 66 IDELR 251 (NDNY 11/23/15) Even where IEPT did not engage in a detailed discussion of needs, goals and appropriateness of placement, parents had right to participate at IEPT but **specifically declined** to ask questions- no violation.

5). Dervishi ex rel TD v Stamford Bd of Educ 66 IDELR 60 (D Conn 8/5/15) **No violation** of IDEA where SD held two **IEPT meetings without parents** where parents were offered numerous dates and failed to avail themselves of the opportunity. Not a violation where parents are intransigent; Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 200 (ND Calif 12/2/14) Where parents attended IEPT meeting that was suspended to be reconvened after members reviewed evaluative data, but while suspended parents filed dph and informed SD that it **would not attend** further IEPT meetings until HO ruled, SD did not violate IDEA by developing an IEP without additional meetings; AL by PLB v Jackson County 64 IDELR 173 (ND Fla 10/30/14) **No IDEA violation** where SD held IEPT meeting without parent, where exclusion was the result of the parent's own actions: meeting had been rescheduled multiple times, and parent refused to participate by telephone; Contrast, MS by Sartin v Lake Elsinore

Unified Sch Dist 66 IDELR 17 (CD Calif 7/24/15) IEPT meeting without parent denied FAPE because procedural violation impaired participation.

6). Letter to Savitt 64 IDELR 250 (OSEP 2/10/14) The same principles concerning the **tape recording** of IEPT meetings applies to resolution sessions: an SEA or LEA may require, prohibit, limit or otherwise regulate the use of recording devices at IEPT meetings, except as may be necessary for a parent to understand the IEP or the process.

7). Letter to Lentz 64 IDELR 283 (OSEP 2/7/14) IDEA requires an IEP to include a statement of measurable goals and how the child's progress toward those goals will be measured and reported, but progress **reporting applies only to annual goals**. The IEPT must decide whether progress toward any benchmarks or short term objectives will be reported.

8). Dear Colleague Letter 61 IDELR 263 (OSERS 8/20/13) OSERS issued guidance on **Bullying**. Part of an appropriate response is to **convene the IEP team** to determine whether the **student's needs** have changed **as a result** of the bullying. Schools should never unilaterally change the frequency, duration, intensity, placement, or location of services as these are IEPT decisions.

9). District of Columbia Public Schs (JG) 111 LRP 75901 (SEA DC 8/21/11) HO ruled that school district violated IDEA by making changes to student's educational program **without** utilizing the IEPT process required by IDEA.

10). AP & SP ex rel AP v NYC Dept of Educ 66 IDELR 13 (SDNY 7/30/15) Failure to have **general education teacher** at IEPT meeting was not a violation where student was not considered for a general ed placement. Even if procedural violation,

harmless where no educational harm or impairment on participation; Deer Valley Unified Sch Dist (KA) 114 LRP 20306 (SEA AZ 4/17/14) HO found that SD violated IDEA by refusing to have an IEPT meeting including the parent's **advocate**. HO pointed out that a parent may include as IEPT members persons with knowledge or special expertise regarding the child and here the parent selected the advocate; Blackman v Dist of Columbia 64 IDELR 169 (DDC 11/4/14) Court deplored the egregious conduct by SD **lawyer** who had directed school staff to call police who removed parent's lawyer from an IEPT meeting. SD also contacted parent and offered alternative compensatory education if parent attended IEPT meeting without her attorney. Parent had a right to have her lawyer at an IEPT as a **discretionary team member**; Miller ex rel TM v Monroe Sch Dist 66 IDELR 99 (WD Mich 9/16/15)@n.3: LEA did not violate IDEA when parent showed up at IEPT meeting with an **attorney** & LEA gave parent a choice of rescheduling meeting with LEA attorney or proceeding without lawyers; TM ex rel MM v NYC Dept of Educ 65 IDELR 146 (SDNY 3/25/15) Failure to have a **special education teacher** at IEPT meeting was a procedural error, but harmless where LEA representative had 21 years experience as a SpEd teacher and parent participated; JG by Jimenez v. Baldwin Park Unified Sch Dist 65 IDELR 177 (CD Calif 3/20/15) SD committed procedural violation by not inviting to IEPT **representatives of current school** or state school for the deaf which was actionable because it infringed upon mom's participation rights; RB & v NY City Dept of Educ 63 IDELR 74 (SDNY 3/26/14) IEPT did not include a **SpEd teacher** who was a teacher of the child (state law), but cured by fact that a special ed teacher from a private school attended meeting.

11). Sheils ex rel MDS v Pennsburg Sch Dist 64 IDELR 143 (ED Penna 10/8/14) Although the Fourteenth Amendment protects a parent’s fundamental right to make decisions about their children’s’ care, custody and control, court **dismissed** father’s suit claiming that SD had violated this right by **always siding with his ex-wife at IEPT meetings**. Father had fully participated.

12). MKN v Dist of Columbia 62 IDELR 295 (DDC 2/10/14) Court adopted Mgst and awarded four months of compensatory ed where LEA **refused to reschedule** IEPT meeting.

13). Colon Vazquez v Dept of Educ of Puerto Rico 64 IDELR 244 (DPR 12/4/14) n.2. **In Spanish**, IEPT = “Comite de Programacion Y Ubicacion Educacion Especial,” and is often called “COMPU.”

*f. Related Services*

1). Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) Parent argued that SD violated stay put by failing to provide the **related services** of speech therapy and OT. District court agreed but limited relief only to money that the parent had already paid out for the related services to avoid awarding money damages which are not available under IDEA. Second Circuit reversed holding that the parent was entitled to the **full value** of the related services provided for in the IEP **not as money damages**, but rather as a form of **compensatory education**. (Full value of services not yet paid for by the parent.)

2). EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit ruled that a student received FAPE where she received the **speech** provided on her IEP. Where IEP provided that student would

receive speech in “total school environment,” parents’ contention that she should receive pullout speech was rejected.

3). 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 an **OT** evaluation was appropriate after rejecting several findings of fact by HO.

4). District of Columbia Public Schs 111 LRP 76506 (JG) (SEA DC 9/23/11) HO, citing *Tatro*, noted that a student’s **entitlement to related services** depended upon whether he **needed** the related services **in order to benefit** from special education;

5). Troy Sch Dist v KM 65 IDELR 91 (ED Mich 3/31/15) Court rejected SD argument that HO decision violated the spending clause where compensatory services included a 1:1 psychologist for the student which it alleged was not required by IDEA. Court ruled that **psychological services** are among the related services available through IDEA and appropriate relief here.

6). **OT:** KC ex rel CR v NYC Dept of Educ 65 IDELR 142 (SDNY 5/30/15) Court held that SD failure to list OT and speech on IEP as related services was a harmless procedural error where the IEP included speech and OT goals and where the related services were discussed at IEPT meeting; Douglas v Calif Office of Admin Hearings 64 IDELR 300 (ND Calif 1/21/15) Court found that HO exceeded his authority by ordering an increase from a district in OT hours for a student as a medical necessity where state law and an interagency agreement gave state Department of Health responsibility for providing OT that is **medically necessary** and gave Health department sole authority to determine medical necessity. (LEA provides OT that is educationally needed but not

medically necessary) HO lacked authority to review health department's determination concerning medical necessity. (?? Supremacy clause)

7). **transportation** Midd-West Sch Dist (JG) 113 LRP 48545 (SEA Penna 10/2/13) HO ruled that where bus transportation offered by school district was sufficient to permit the student to benefit from SpEd, no violation of IDEA; Williams v. Weatherstone 63 IDELR 109 (NY CT App 5/13/14) 4 to 3 majority of state appellate court ruled that SD was not responsible for injuries suffered by a student with ADHD and mild intellectual disability whose IEP required **transportation** where bus driver drove past the stop and student walked into a busy highway. Because student was not yet in the SD's custody, they were not negligent and not responsible for his injuries according to majority; VS by Sisneros v Oakland Unified Sch Dist 65 IDELR 234 (ND Cal 5/28/15) Court denied SD motion to dismiss parent §504 action for bullying student with a severe intellectual disability on **school bus**. SD claimed no knowledge because bus was run by a contractor, but complaint alleged that bus driver told parent she had contacted SD officials but got no response; Derek H by Rita H v Dept of Educ, State of Hawaii 66 IDELR 285 (D Haw 12/29/15) adopted by Ct @ Mgst @ 116 LRP 19. Mgst recommended no reimbursement for transportation where parent did not show that travel by taxi was educationally necessary; Ruby J ex rel LL v Jefferson County Bd of Educ 66 IDELR 38 (ND Ala 8/17/15)@n.21: Where parent offered to provide transportation, SD did not violate IDEA by allowing her to transport student to both school and extracurricular activities; Oconee County Sch Dist v AB by LB 65 IDELR 297 (MD Ga 7/1/15) Court affd HO decision requiring SD to provide student with a **trained school bus aide**. The teenager with profound physical and intellectual disabilities had a life-

threatening seizure disorder for which he needed access to a particular drug within 5 minutes of a seizure. The related services of **transportation and medical services** were necessary for the student to receive FAPE.

8). **parent counselling:** TM by AM & RM v Cornwall Central Sch Dist 752 F.3d 145, 63 IDELR 31 (2d Cir 4/2/14) Procedural violations of not providing an fba and parent counselling (required by state law) were harmless and not actionable; ML & BL v NY City Dept of Educ 63 IDELR 67 (SDNY 3/31/14)(same); JL & JF ex rel CC c NYC Dept of Educ 65 IDELR 137 (SDNY 3/31/15) Failure to include parent counselling violated state law but no denial of FAPE; DN ex rel GN v NYC Dept of Educ 65 IDELR 34 (SDNY 3/3/15) (same)

9). **Speech:** District of Columbia Public Schs 111 LRP 76506 (JG) (SEA DC 9/23/11) HO ruled that speech language therapy is required where it is required to assist the student in benefitting from special education; SA by MAK & KS v NY City Dept of Educ 63 IDELR 73 (EDNY 3/30/14) Court ruled that the speech therapy specified by child's IEP was appropriate; DeKalb County Bd of Educ v Manifold ex rel AM 65 IDELR 268 (ND Ga 6/16/15) Court ruled that SD did not violate IDEA by removing speech language therapy from her IEP where her speech was now comparable to her peers; Kimi R by Malia V v Dept of Educ, State of Hawaii 65 IDELR 12 (D Haw 2/4/15) IEP goals for a student with Rett Syndrome were appropriate. Parent wanted speech articulation goals, but speech pathologist testified that student's performance was commensurate with her cognitive abilities; Derek H by Rita H v Dept of Educ, State of Hawaii 66 IDELR 285 (D Haw 12/29/15) adopted by Ct @ Mgst @ 116 LRP 19. Mgst recommended reimbursement for private speech therapy where speech was a related

service on IEP Sch Dist of Philadelphia v Williams ex rel LH 66 IDELR 214 (ED Penna 11/20/15) SD failure to provide adequate speech was a denial of FAPE; Meares v Rim of the World Sch Dist 66 IDELR 39 (CD Calif 8/13/15) Failure to provide 3 hours of speech therapy by SD not material where student had academic success.

10). **1:1 aide:** Reyes ex rel RP v New York City Dept of Educ 760 F.3d 211, 63 IDELR 244 (2d Cir 7/25/14) Second Circuit ruled that a 6:1:1 class with a full-time 1:1 aide only for the first three months was a denial of FAPE because it did not meet the needs of a 19 year old autistic student; HW & HG ex rel MW v NY State Educ Dept 65 IDELR 136 (EDNY 3/31/15) Court reversed SRO and awarded reimbursement where SD placed student in a larger class without a 1:1 aide after he had struggled in a smaller class = denial FAPE; ML by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15) Parent demand for a 1:1 aide was rejected where court found that student had received FAPE; Sch Dist of Philadelphia v Williams ex rel LH 66 IDELR 214 (ED Penna 11/20/15) SD committed material failures to implement IEP where it failed to provide 1:1 aide required by IEP; Meares v Rim of the World Sch Dist 66 IDELR 39 (CD Calif 8/13/15) Failure of 1:1 aide to keep up with student on extracurricular mountain biking was not a failure to implement. Mountain biking was not necessary for a 17 year old with autism to receive FAPE and 1:1 aide in IEP was only for classroom and not extracurricular activities. Even if implementation failure, it was not material.

#### ***g. Other Placement Issues***

1). Rachel H v Dept of Educ, State of Hawaii 63 IDELR 155 (D Haw 6/18/14) Court ruled that the particular **location** where services will be implemented is a school district decision; Williams by Williams v Milwaukee Public Schs 64 IDELR 237

(ED Wisc 12/12/14) Court found no IDEA violation where SD notified parents of change of school, but even if no notice, parents learned of change before school started, so harmless; MA v Jersey City Bd of Educ 63 IDELR 9 (DNJ 3/18/14) **specific location** is not the same as **educational placement**; Copeland v Dist of Columbia 64 IDELR 37 (DDC 9/15/14) Educational placement is **something between** the physical **school and** the **abstract IEP goals** in the IEP; A change of location is not a change of placement and parent need not be included in the decision to change schools; CS by Julia V v Lansing Sch Dist #158 115 LRP 31079 (ND Ill 1/23/15) quoting *John M*, court held that a stay put educational placement falls **somewhere between the physical school attended by the child and the abstract goals of his IEP** and courts use a fact-driven approach to determine whether a change of placement has occurred; JL & JF ex rel CC c NYC Dept of Educ 65 IDELR 137 (SDNY 3/31/15) SD did not violate IDEA by failing to give notice that the summer site of the student's ESY had changed because unlike placement parents have no right to participate in **location** decisions; KB by Brown v Dist of Columbia 66 IDELR 63 (DDC 9/8/15) Transfer without fundamental change in services is a change of **location** and not a change of educational placement; Gore v Dist of Columbia 64 IDELR 41 (DDC 9/10/14) Court held that LEA did not violate IDEA by transferring student from one private school to another without consulting guardian. This is a change in location not a change in educational placement and therefore no right to participate; Bobby v. Sch Bd of City of Norfolk 63 IDELR 225 (ED Va 7/7/14) adopting *Mgst* @63 IDELR 197. Court ruled that failure to identify a specific school in the IEP did not violate FAPE.

2). But see, DM & LM ex rel EM v New Jersey Dept of Educ 801 F.3d 205, 66 IDELR 93 (Third Cir 9/10/15) The question of what constitutes a change of **educational placement** for stay put purposes is necessarily **fact specific**. Here the court found that the record was not particularly developed (eg. No IEP in the record.) The court ruled that the safest course was to keep the student in her current school as stay put until court below rules on parent's claim vs SEA re its approval process for private school programs. (SEA had downgraded approval of the private school in question for LRE concerns claiming this was merely a change of location not a change of placement; court disagreed finding that services were **intertwined with location.**); VS by DS v New York City Dept of Educ 63 IDELR 162 (EDNY 6/9/14) Court found that district violated IDEA by failing to identify the school that the student would attend in placement notice and not notifying it until first day of dph; Parents had a right to timely and relevant information as a part of right to meaningful participation. The procedural violation substantially impaired the parents' right to meaningful participation. Parents had a right to know what school; LU & NU ex rel GU v New York City 63 IDELR 126 (SD NY 5/27/14) District denied FAPE by failing to answer parent questions concerning whether the proposed district school had the resources to implement the IEP, including an onsite nurse to administer meds to a student with a seizure disorder, and a quiet place to recover. LEAs may select the specific school if it complies with IEP requirements. Here the procedural violation in excluding the parents from the selection process was a denial of FAPE because it denied them meaningful participation; Eley v Dist of Columbia 63 IDELR 165 (DDC 6/4/14) Adopting the Seventh Circuit approach, court found that **stay put** is a flexible concept that **includes elements of both location and educational program.**

Here the stay put placement for the student was the internet-based private school that he had been attending rather than the private school recommended by the LEA; Contrast, LGB by Bubby v Sch Bd of City of Norfolk 63 IDELR 197 (ED VA 5/30/14) adopted by Dist Ct at 63 IDELR 225, Mgst recommended that summary judgment be granted against parent's claim, rejecting argument that IEP requiring a 13 year old with autism attend one of several schools offered by an IEU but not identifying a specific school. AK decision by Forth Circuit was limited to cases where the placement offered in an IEP was uncertain; here parent had the opportunity to discuss the specific classrooms and programs offered by the IEU. The touchstone of educational placement is **not the location** to which the student will be assigned but the **environment** where services will be provided. Here the parents were provided meaningful participation.

3). West Linn Wilsonville Sch Dist v Student 63 IDELR 251 (D OR 7/30/14) LEA **violated IDEA** by changing student's **placement** (removing him from all mainstream) because he violent without convening an IEPT meeting or evaluating him.

#### ***h. Transition***

1. Questions & Answers on IEPs, Evaluations & Reevaluations 111 LRP 63322 (OSERS 9/1/11) OSERS revised the Q & A document. See especially regarding transition: an **IEPT can combine training and education goals** but separate goals for employment still need to be developed; Questions and Answers on Secondary Transition 57 IDELR 231 (OSERS 9/1/11) OSERS revised the Q & A document concerning transition.

2. Joaquin v Friendship Public Charter Sch 66 IDELR 64 (DDC 9/3/15) LEA's failure to provide **transition services** to a teenager was a **substantive not a procedural** violation of IDEA. It was also a material failure to implement his IEP.

3. ML by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15) IDEA **only** requires transition services **for post-secondary** activities not transferring from private school; AM ex rel EH v NYC Dept of Educ 66 IDELR 243 (SDNY 12/7/15) Failure to develop transition plan from private school not a violation; Kornblut ex rel LK v Hudson City Sch Dist Bd of Educ 66 IDELR 66 (ND OH 9/2/15) (same); FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15) No transition plan required for a change of schools by an autistic student.

4. Gibson ex rel Gibson v Forrest Hills Sch Dist Bd of Educ 62 IDELR 261 (SD OH 2/11/14) Where court found transition violation, it rejected the comp ed proposed by both parties and fashioned its own remedy of 590 hours of transition services and 100 round trips for community job training.; Jefferson County Bd of Educ v Lolita S ex rel MS 62 IDELR 2 (ND Ala 9/30/13) Failure to conduct transition **assessments** and to provide transition **services** was a denial of FAPE; Contrast, MM ex rel JS v NYC Dept of Educ 65 IDELR 103 (SDNY 3/7/15) SD failure to conduct an **assessment** of student's post-secondary transition needs was harmless procedural violation where IEP sufficiently addressed the student's transition needs.

5. RR by Roslyn R v Oakland Unified Sch Dist 62 IDELR 287 (ND Calif 2/28/14) Court dismissed parent transition claim where student had **not** yet turned **16 years old**.

*i. IEP & Behavior/BIP/FBA*

1. Andrew F by Joseph F & Jennifer F v Douglas County Sch Dist RE-1 798 F.3d 1329, 66 IDELR 31 (10<sup>th</sup> Cir 8/25/15) Tenth Circuit ruled that the SD **appropriately considered** appropriate behavior interventions **to address** the student's behavioral issues as required by IDEA; Sneitzer v Iowa Dept of Educ, et al 796 F.3d 942, 66 IDELR 1 (8th Cir 8/7/15) Eighth Circuit ruled that SD **appropriately** addressed the student's behavioral and emotional needs after she had been raped.

2. Letter to Mc Williams 66 IDELR 111 (OSEP 7/16/15) An SEA **may not** refuse to investigate a **state complaint** alleging a failure to implement a **bip** which is part of an IEP just because it was not created following an MDR. Failure to implement a bip is an alleged violation of Part B of IDEA and is a proper issue for a state complaint. Also not relevant if the bip is in supplemental aids and services rather than in goals- failure to implement a bip is grounds for a state complaint.

3. District of Columbia Public Schs (JG) 111 LRP 70473 (SEA DC 4/30/11) HO ruled that IDEA does **not guarantee** the results of a bip or IEP regarding behaviors. Instead it requires that an IEP be reasonably designed to **address** behaviors that interfere with learning and here bip was appropriate; SA by MAK & KS v NY City Dept of Educ 63 IDELR 73 (EDNY 3/30/14) IDEA **only requires** a school district to consider positive behavior interventions, supports and other strategies when a child's **behavior impedes learning. FBA/BIP is not necessarily required.** Here failure to conduct an FBA before implementing BIP was not a violation of IDEA. (State regs requiring fba before bip caused a harmless procedural violation.); DN ex rel GN v NYC

Dept of Educ 65 IDELR 34 (SDNY 3/3/15) No fba not a violation of IDEA where bip adequately addresses student behaviors.

4. Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12) where a student's behaviors **interfere with her learning** or that of other students, the IEPT must address the behaviors; Anthony C by Linda L & Lionel C v Dept of Educ, State of Hawaii 62 IDELR 257 (D Haw 2/14/14) Court rejected parent argument that SD had not properly addressed student's problem behaviors; CL by Lucia Mar Unified Sch Dist 62 IDELR 202 (CD Calif 1/9/14) fba/bip adequately addressed student's behaviors; TM v Dist of Columbia 64 IDELR 197 (DDC 12/3/14) SD appropriately implemented and revised student's bip; EH ex rel MK v NY City Dept of Educ 63 IDELR47 (SDNY 3/21/14) Court ruled that SD properly addressed student's problem behaviors. Although fba was informal, it included observations and properly assessed the student's behaviors; Pointe Educ Services v AT 63 IDELR 279 (D Ariz 8/14/14) Court reversed ho and found that SD adequately addressed student's behaviors; LP by LN v Krum Independent Sch Dist 64 IDELR 113 (ED Tex 8/6/14) Court found that the SD bip adequately and appropriately addressed the student's behaviors; AM ex rel EH v NYC Dept of Educ 66 IDELR 243 (SDNY 12/7/15) Where fba/bip managed behaviors they were appropriate; JL & JF ex rel CC c NYC Dept of Educ 65 IDELR 137 (SDNY 3/31/15) Where IEP adequately addressed the student's behaviors, no fba required to receive FAPE.

5. Kornblut ex rel LK v Hudson City Sch Dist Bd of Educ 66 IDELR 66 (ND OH 9/2/15) **bip is only required** in discipline scenario when misconduct is a manifestation. Here bip not required.

6. ML by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15)

**Failure** of IEPT to **quantify** the frequency and duration of the student's problem behaviors was a procedural violation but **harmless** where fba/bip and IEP adequately addressed the student's behaviors = harmless. Contrast, Cobb County Sch Dist v DB by GSB & KB 66 IDELR 134 (ND Ga 9/28/15) Parent was entitled to an IEE at public expense where fba by SD **failed to collect data** re consequences of behavior and failed to base hypotheses upon data.

7. Joaquin v Friendship Public Charter Sch 66 IDELR 64 (DDC 9/3/15)

Where departures from student's bip were **not material**, no violation of IDEA.

8. TM by AM & RM v Cornwall Central Sch Dist 752 F.3d 145, 63

IDELR 31 (2d Cir 4/2/14) **Procedural violations** of not providing an fba and parent counselling (required by state law) were **harmless** and not actionable; ML & BL v NY City Dept of Educ 63 IDELR 67 (SDNY 3/31/14)(same); LWL & EL ex rel CL v Pelham Union Free Schs 66 IDELR 241 (SDNY 12/9/15)(same) Contrast, CF by RF & GF v New York City Dept of Educ 746 F.3d 68, 62 IDELR 281 (2d Cir 3/4/14) Second Circuit ruled that procedural violation of failure to provide an fba was an actionable procedural violation where the school district had **not** otherwise taken appropriate steps to **address** the student's **behaviors**. Here the bip was vague and did not specifically address the student's problem behaviors.

9. Bookout v Bellflower Unified Sch Dist 63 IDELR 4 (CD Calif 3/21/14)

Court ruled that SD denied LRE to a first grade student with autism by moving him to a special day class from the general education classroom. Student had exhibited behaviors but SD did **not** provide the **supports** the teachers needed to address the behaviors.

10. Forrest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14) Mgst found that school district violated IDEA by discontinuing the student's **self-management** curriculum. Even though he had good grades (3.25 GPA), the district's own evaluation showed that the student's anxiety was a contributing problem to behaviors.

11. West Linn Wilsonville Sch Dist v Student 63 IDELR 251 (D OR 7/30/14) LEA **violated** IDEA by changing student's **placement** (removing him from all mainstream classes) because he had become violent **without** convening an IEPT meeting or evaluating him.

12. Canders v Jefferson County Public Schs 64 IDELR 36 (WD KY 9/15/14). Court dismissed parent defamation action where parent **requested resources** for the student's behaviors and SD personnel suggested **spanking** them, **psychiatric** care and **child protective services** but parent could not show damage to reputation. (Bad Eg)

13. Also see the section above on Seclusion and Restraints

***j. Services Not Based Upon Category***

1. Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12) One of the **fundamental concepts** of the IDEA is that each child with a disability should receive an IEP that is **individualized** to his individual needs. The IDEA does not concern itself with labels but whether a student with a disability is receiving a free and appropriate public education. A disabled child's IEP must be tailored to the unique needs of that particular child. The child's identified needs, not the child's disability category, determine the services that must be provided to the child.

2. CC & PC ex rel AC v Sch Bd of Broward Fla 64 IDELR 67 (SD Fla 9/23/14) Court refused to certify class action of all students with autism as overbroad.

Court noted that children with the same **disability classification** can have very different needs. Parents given leave to refile.

3. Tyler J by Cheryl Ann & Kevin J v Dept of Educ, State of Hawaii 65 IDELR 45 (D Haw 2/24/15) Where student was already eligible under the category of OHI, parent argument that he should also be categorized as autistic was irrelevant; Contrast, Sch Bd of City Of Suffolk v Rose ex rel CAR 66 IDELR 137 (ED Va 9/22/15) Although as a general rule services are far more important than disability category, here misidentification violated IDEA because it affected the student's inappropriate **placement** and was done because of acrimonious relationship with parent advocate.

4. WW ex rel MC v NY City Dept of Educ 63 IDELR 66 (SDNY 3/31/14) SD had no obligation to classify students in any particular disability **category**. Here the student's goals and IEP met the student's needs.

#### *k. Assistive Technology*

1. Dear Colleague Letter and Frequently Asked Questions 64 IDELR 180 (OCR/OSERS + DOJ 11/12/14) The agencies issued joint guidance about the rights of public elementary and secondary students with hearing, vision, or speech disabilities to **effective communication**. The guidance is intended to help schools understand and comply with federal legal requirements on meeting the communication needs of students with disabilities. The document covers the **requirements** of **IDEA** as well as the ADA effective communication requirement. The guidance discusses when auxiliary aids and services must be provided and concludes with dispute resolution mechanisms available if parents disagree with school decisions. The guidance consists of the following documents which

are linked here: a [Dear Colleague Letter](#) and an attachment with [frequently asked questions and answers](#). The agencies also provided a quick reference [fact sheet](#).

2. [Letter to Negron](#) 65 IDELR 304 (Dept of Justice, OCR & OSERS 6/15/15) In response to a challenge to its previous guidance and FAQs by NSBA legal counsel, claiming that the three agencies had inappropriately applied the Ninth Circuit rule nationwide. The agencies responded that they agree with the Ninth Circuit that simply because a school district has provided **FAPE under IDEA** does **not** necessarily mean that it has provided **effective communication** services **required under ADA** (for students with hearing, vision and speech disabilities)

3. [Mid-West Sch Dist](#) (JG) 113 LRP 48545 (SEA Penna 10/2/13) HO ruled that school district violated IDEA by failing to reimburse parents for payment for a warranty for a TOBII **augmentative communication device** which was a material part of the IEP of a student with cerebral palsy.

4. [EF v Newport Mesa Unified Sch Dist](#) 65 IDELR 265 (CD Calif 6/22/15) Court upheld HO decision that SD **violated** IDEA by failing to do an **AT evaluation** for more than a year after parents reported that the student was using a tablet at home with success; [North Hills Sch Dist v MB](#) 65 IDELR 150 (Penna Commonwealth Ct 4/7/15) Court upheld HO determination that SD violated IDEA by failing to conduct an AT evaluation where student had difficulty communicating throughout the day. Contrast, [LM by MM & RM v Downington Area Sch Dist](#) 65 IDELR 124 (ED Penna 4/15/15) Mgst rejected parent argument that SD should have conducted an AT evaluation where IEP provided meaningful educational benefit; [HG by Davis v Upper Dublin Sch Dist](#) 65 IDELR 123 (ED Penna 4/17/15) largely adopting Mgst @ 113 LRP 10277. Court

found that Mgst erred by classifying SD duty to conduct an AT evaluation as procedural- it is a substantive requirement, but harmless nonetheless where SD conducted an AT evaluation that resulted in several interventions adopted in student's IEP.

5. DeKalb County Bd of Educ v Manifold ex rel AM 65 IDELR 268 (ND Ga 6/16/15) Court upheld HO decision that a deaf HS student was **denied FAPE** where SD failed to provide CART services or other **speech to text** technology and failed to provide an AT device.

6. Sch Dist of Philadelphia v Williams ex rel LH 66 IDELR 214 (ED Penna 11/20/15) SD committed **material failures** to implement IEP where it failed to provide a **tablet** or other AT device to allow the student to communicate with teachers and other students for over seven months.

7. Milan Area Schs 115 LRP 31123 (SEA Mich 6/30/15) State investigator concluded that SD did **not violate** IDEA by failing to make student's assistive technology plan a part of his IEP.

8. DF by LMP v Leon County Sch Bd 62 IDELR 167 (ND Fla 1/2/14) Court ruled that parent's **revocation** of consent under IDEA did not prevent her from challenging SD's subsequent refusal to provide **assistive technology** to address student's hearing impairment under §504/ADA.

### ***1. Transfer Students***

1. Letter to State Directors of Special Ed 61 IDELR 202 (OSERS 7/19/13) OSERS opined that comparable services for a transfer student who transfers during the summer may include **ESY**. A school district should not use RtI to attempt to

expand the time limit for completion of an initial evaluation for a student who transfers into the district in mid-year.

2. DG by PG & FK v San Diego Unified Sch Dist 66 IDELR 167 (SD Calif 9/21/15) For transfer students, **stay put** requires that the LEA implement the last agreed upon IEP or adopt one that approximates it, here private school from old IEP; SC by CC & SC v Palo Alto Unified Sch Dist 63 IDELR 124 (ND Calif 6/2/14) Court ruled that IDEA amendments concerning **transfer students** did not alter the stay put obligation. Stay put required that the new district approximate the home-based ABA program which was the last agreed upon placement from the student's previous district for the duration of the parties' dispute.

3. Ruby J ex rel LL v Jefferson County Bd of Educ 66 IDELR 38 (ND Ala 8/17/15) For a student who transfers from another state, IDEA requires that the new SD provide **services comparable** to the old IEP until the new district adopts that IEP or develops and implements a new IEP. Here services were comparable, no violation.

4. AT & CT ex rel LT v Fife Sch Dist 66 IDELR 104 (WD Wash 9/9/15) Court denied reimbursement noting that a student **returning** from a **residential** placement is **akin to a transfer student** and the LEA must provide services comparable to his old IEP until it adopts that IEP or develops its own. Here, LEA appropriately observed the student for three weeks and then developed its own IEP.

5. NB ex rel ZB v state of Hawaii, Dept of Educ 63 IDELR 216 (D Haw 7/21/14) Court ruled that duty to provide FAPE begins when child is **enrolled in public school**; accordingly the duty to provide comparable IEP services to a transfer

student begins when he enrolls. Parent could not claim reimbursement based upon a telephone conversation with LEA coordinator before she moved into the new state.

*m. Personnel Decisions* (no significant cases)

*n. No Attorney Fees for IEPT Meetings* (No significant cases)

*o. Four Corners of IEP*

1 Reyes ex rel RP v New York City Dept of Educ 760 F.3d 211, 63 IDELR 244 (2d Cir 7/25/14) Second Circuit refused to consider **retrospective testimony** to the effect that the parties had an agreement that the IEP would later be modified to include a full-time 1:1 aide; JF & LV ex rel NF v NY City Dept of Educ 61 IDELR 78 (SDNY 4/24/13) (applies 2d Cir rule) DC ex rel EB v NY City Dept of Educ 950 F.Supp.2d 494, 61 IDELR 25 (SDNY 3/25/13) (applies 2d Cir rule); Contrast, Jalen Z v Sch Dist of Philadelphia 65 IDELR 198 (ED Penna 5/15/15) Court ruled although an IEP should be judged at the time it was written, and retrospective testimony that services not listed on IEP would actually have been provided, here HO properly admitted and considered testimony that explains or justifies the services listed on the IEP; ; KC ex rel CR v NYC Dept of Educ 65 IDELR 142 (SDNY 5/30/15) Court held that SD failure to list OT and speech on IEP as related services was a harmless procedural error where the IEP included speech and OT goals and where the related services were discussed at IEPT meeting. Discussions at IEPT meeting are not improper retrospective testimony; DN & JN ex rel DN v Bd of Educ of Center Moriches Union Free Sch Dist 66 IDELR 163 (EDNY 9/28/15) HO & SRO impermissibly relied upon retrospective testimony re intent of 8:1:1 placement.

2. Contrast, Systema by Systema v. Academy Sch Dist No. 20 538 F.3d 1306, 50 IDELR 213 (10th Cir. 8/26/08) Tenth Circuit held that FAPE analysis is limited to the **written IEP document itself** and should not include any proposals made at IEP team meeting. Court limited review to the **four corners** of the IEP;

*p. Notice of IEPT Meeting* (no significant cases)

*q. Extra-Curricular Activities*

1. Sneitzer v Iowa Dept of Educ, et al 796 F.3d 942, 66 IDELR 1 (8th Cir 8/7/15) Eighth Circuit denied reimbursement where FAPE provided. Parents could not demonstrate that participation in **show choir** was necessary for FAPE.

2. KRS by McClaron v Bedford Community Sch Dist 65 IDELR 272 (SD Iowa 4/20/15) Court denied SD motion to dismiss finding that allegations that a 9<sup>th</sup> grader with SLD was called “dumb” and “stupid” by **football** teammates was sufficient to show disability based harassment for §504.

3. Meares v Rim of the World Sch Dist 66 IDELR 39 (CD Calif 8/13/15) Failure of 1:1 **aide to keep up** with student on extracurricular **mountain biking** was **not** a failure to implement. Mountain biking was not necessary for a 17 year old with autism to receive FAPE and 1:1 aide in IEP was only for classroom and **not extracurricular** activities. Even if implementation failure, it was not material.

4. Ruby J ex rel LL v Jefferson County Bd of Educ 66 IDELR 38 (ND Ala 8/17/15)@n.21: Where parent offered to provide transportation, SD did not violate IDEA by allowing her to transport student to both school and **extracurricular** activities.

*r. Specific School*

1. Copeland v Dist of Columbia 64 IDELR 37 (DDC 9/15/14) Educational placement is **something between** the physical school and the **abstract IEP goals** in the IEP; A change of location is not a change of placement and parent need not be included in the decision to change schools; CS by Julia V v Lansing Sch Dist #158 115 LRP 31079 (ND Ill 1/23/15) quoting *John M*, court held that a stay put educational placement falls **somewhere between the physical school attended by the child and the abstract goals of his IEP** and courts use a fact-driven approach to determine whether a change of placement has occurred; Bobby v. Sch Bd of City of Norfolk 63 IDELR 225 (ED Va 7/7/14) adopting *Mgst* @63 IDELR 197. Court ruled that failure to identify a specific school in the IEP did not violate FAPE; JL & JF ex rel CC c NYC Dept of Educ 65 IDELR 137 (SDNY 3/31/15) SD did not violate IDEA by failing to give notice that the summer site of the student's ESY had changed because unlike placement parents have no right to participate in **location** decisions; KB by Brown v Dist of Columbia 66 IDELR 63 (DDC 9/8/15) Transfer without fundamental change in services is a change of **location** and not a change of educational placement.

2. But see, DM & LM ex rel EM v New Jersey Dept of Educ 801 F.3d 205, 66 IDELR 93 (Third Cir 9/10/15) The question of what constitutes a change of educational placement for stay put purposes is necessarily **fact specific**. Here the court found that the record was not particularly developed (eg. No IEP in the record.) The court ruled that the safest course was to keep the student in her current school as stay put until court below rules on parent's claim vs SEA re its approval process for private school programs. (SEA had downgraded approval of the private school in question for LRE

concerns claiming this was merely a change of location not a change of placement; court disagreed finding that services were intertwined with location.); VS by DS v New York City Dept of Educ 63 IDELR 162 (EDNY 6/9/14) Court found that district violated IDEA by failing to identify the school that the student would attend in placement notice and not notifying it until first day of dph; Parents had a right to timely and relevant information as a part of right to meaningful participation. The procedural violation substantially impaired the parents' right to meaningful participation. Parents had a right to know what school; LU & NU ex rel GU v New York City 63 IDELR 126 (SD NY 5/27/14) District denied FAPE by failing to answer parent questions concerning whether the proposed district school had the resources to implement the IEP, including an onsite nurse to administer meds to a student with a seizure disorder, and a quiet place to recover. LEAs may select the specific school if it complies with IEP requirements. Here the procedural violation in excluding the parents from the selection process was a denial of FAPE because it denied them meaningful participation. Contrast, LGB by Bubby v Sch Bd of City of Norfolk 63 IDELR 197 (ED VA 5/30/14) adopted by Dist Ct at 63 IDELR 225, Mgst recommended that summary judgment be granted against parent's claim, rejecting argument that IEP requiring a 13 year old with autism attend one of several schools offered by an IEU but not identifying a specific school. AK decision by Forth Circuit was limited to cases where the placement offered in an IEP was uncertain; here parent had the opportunity to discuss the specific classrooms and programs offered by the IEU. The touchstone of educational placement is **not the location** to which the student will be assigned but the **environment** where services will be provided. Here the parents were provided meaningful participation.

3. See also, cases under o. Four Corners of IEP, above

*s. Educational Needs Only*

(See cases in the section for the hot button issue – Educational vs. Medical Needs)

*t. IEP Content Reflects Evaluation Data*

1. Mifflinburg Area Sch Dist (JG) 114 LRP 17516 (SEA Penna 3/18/14) HO found that school district **denied FAPE** where it **ignored** the findings and recommendation of its **evaluation** report and by failing to follow the recommendation of its school psychologist to remediate the student’s math skills. IEP had a single very broad goal “complete all work necessary to obtain passing grades.”

2. Forrest Grove Sch Dist v Student 63 IDELR 163 (D Ore 6/9/14) Mgst found that school district violated IDEA by discontinuing the student’s self-management curriculum. Even though he had good grades (3.25 GPA), the district’s own **evaluation** showed that the student’s anxiety was a contributing problem to behaviors.

3. SD ex rel HV v Portland Public Schs 64 IDELR 74 (D Maine 9/19/14) Court ruled that SD violated IDEA by **stating incorrectly** in IEP **PLEPS** that student was reading at the seventh **grade level** when he was really reading at **second** grade level. 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**.

*u. Graduation/ Age Out*

1. Letter to White 63 IDELR 230 (OSERS and OSEP 7/2/14) OSERS and OSEP recommended that Louisiana take steps to ensure that a recent **state law** that

**empowers IEPTs to set their own graduation standards** for students with disabilities be implemented in a manner consistent with IDEA, ESEA, §504 and ADA. They note that students with disabilities are entitled to FAPE after graduation until age 22 unless they graduate with a regular diploma (IDEA) and that subjecting students with disabilities to lower standards could violate §504/ADA.

2. KS v Rhode Island Bd of Educ 115 LRP 55545 (D RI 6/30/15) Court dismissed as moot claim by 21 year old challenging a statewide policy cutting off eligibility at age 21 and not 22 as in IDEA because SD agreed to provide services for an additional year thereby **mooting** claim; JM ex rel RM v Kingston City Sch Dist 66 IDELR 251 (NDNY 11/23/15) Where student had already graduated and received diploma, all remaining issues were moot. Contrast, MW ex rel AW v NYC Dept of Educ 66 IDELR 71 (SDNY 8/25/15) Court reversed HO conclusion that student had no right to IDEA services after 21<sup>st</sup> birthday and granted an injunction **extending her eligibility** for IDEA services.

3. Thurman v Mount Carmel HS 65 IDELR 192 (ND Ill 5/23/15) Court denied parent request for an injunction requiring SD to permit student to participate in graduation ceremonies where they were unlikely to prevail on their IDEA lawsuit. Student with ADHD received home tutoring as a result of a serious disciplinary infraction. Even if a procedural violation, **no** showing of a **right to graduate**.

4. RP-K by CK v Dept of Educ, State of Hawaii 64 IDELR 14 (D Haw 8/22/14) Court ruled that all **class members** (students where eligibility was terminated at **age 20**) were **entitled to compensatory education** and ordered LEA/SEA to work with Mgst to calculate comp ed;

*v. Generalization of Skills* (no significant cases)

**w. Residential Placements**

1. Leggett ex rel KE v Dist of Columbia 793 F.3d 59, 65 IDELR 251 (DC Cir 7/10/15) DC Circuit held that a **residential** placement was **educationally necessary** where SD failed to provide an IEP for HS student with SLD, anxiety and depression for first **several weeks** of the school year.

2. AT & CT ex rel LT v Fife Sch Dist 66 IDELR 104 (WD Wash 9/9/15) Court denied reimbursement noting that a student **returning from a residential** placement is akin to a transfer student and the LEA must provide services comparable to his old IEP until it adopts that IEP or develops its own. Here, **LEA appropriately** observed the student for three weeks and then developed its own IEP.

3. District of Columbia Public Schs (JG) 111 LRP 60125 (SEA DC 4/22/11) HO ruled that a parent request for a residential placement as relief will not be ordered unless school district denies FAPE or otherwise violates IDEA. The LEA is **not** required to provide a residential placement to meet the **psychiatric, medical, or medication** needs of the student; EK by AG v Warwick Sch Dist 62 IDELR 289 (ED Penna 2/26/14) Court found that SD is not responsible for treatment of a long-standing **drug addiction, family problems or delinquent** behavior and rejected parent request to require SD to fund a residential placement for a teen with ADHD and a substance abuse problem. SD's IEP provided FAPE; Student v Ridgefield Bd of Educ (JJ) (SEA CT 6/24/14) LEA was paying academic portion of a residential placement, parent wanted it to also pay for residential portion. HO ruled that the emotional issues requiring the

residential placement were for **family/personal issues** and did **not relate to academics** and held LEA did not have to pay for residential portion. You can read the decision [here](#).

4. MC v Starr 64 IDELR 273 (D Md 12/29/14) Court rejected parent argument that SD should pay for residential placement. SD offer of a therapeutic day school provided FAPE.

5. San Diego County Office of Educ v Pollock ex rel MP 63 IDELR 193 (SD Calif 6/20/14) Court denied LEA motion to continue litigation where claim was **moot** after HO ordered a student formerly in juvenile hall to be placed in a residential facility. However, because of financial issues including the unfairness of other agencies not contributing; court remanded to HO re residential placement and instructed HO to dismiss.

6. See other cases under Educational vs. Medical or Other Needs.

#### **x. Residency of Student/ Parent**

1. NG v ABC Unified Sch Dist 64 IDELR 73 (ND Calif 9/19/14) Court rejected complaint of guardian for student. State law provides that the LEA where a psychiatric hospital is located must provide FAPE only until the student is released; thereafter the **LEA** of the parent's **residence** is responsible for FAPE.

#### **y. Gap Analysis**

1. District of Columbia Public Schs (JG) 111 LRP 77405 (SEA DC 7/20/11) HO ruled that a school district is not required to “**close the gap**” between children with disabilities and their non-disabled peers; District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11)(same); District of Columbia Public Schs (JG) 111 LRP 60092

(SEA DC 4/17/11)(same); District of Columbia Public Schs (JG) 111 LRP 60125 (SEA DC 4/22/11)(same).

2. Kelsey v Dist of Columbia 115 LRP 14802 (DDC 1/13/15) Court ruled that HO properly discounted the testimony of parent's expert where he used the wrong legal standard. He gave the amount of compensatory education needed to raise the student to grade level. IDEA does **not guarantee** any particular result; JN & JN ex rel JN v South West Sch Dist 66 IDELR 102 (MD Penna 9/15/15) Court ruled that FAPE provided despite fact that **scores** of seventh grader were **lower** than other children his age. This discrepancy reflected the severity of his disability; FAPE requires only a **basic floor** of opportunity, not potential maximization.

*z. Standard Not Potential Maximizing*

1. Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) Second Circuit ruled that the IEP **need not furnish every service** necessary to **maximize** the potential of a student with a disability; EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit noted that the standard is some benefit; the student's education need **not maximize** his potential.

2. (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13) Court noted that IDEA requires only the **basic floor** of opportunity not that a student's potential be maximized. HO correctly discounted testimony of witnesses who testified to the student's "needs" using a potential maximizing standard; EF v Newport Mesa Unified Sch Dist 65 IDELR 265 (CD Calif 6/22/15) FAPE does not require

potential maximizing or the absolute best education. IEP goals are not in violation of IDEA just because student does not meet all of them.

3. Midd-West Sch Dist (JG) 113 LRP 48545 (SEA Penna 10/2/13) HO ruled that FAPE is not a potential maximizing standard. Rather IEP must provide the **basic floor** of opportunity by being reasonably calculated to provide meaningful educational benefit; District of Columbia Public Schs (JG) 111 LRP 24663 (SEA DC 1/15/11) IDEA guarantees only the basic floor of opportunity not the **maximizing of potential**; (FAPE does not require the best possible education.); Warrior Run Sch Dist 112 LRP 41988 (JG) (SEA Penna 7/23/12); Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12); District of Columbia Public Schs (JG) 111 LRP 77405 (SEA DC 7/20/11).

4. IDEA standard is the basic floor of opportunity, not potential maximizing; HG by Davis v Upper Dublin Sch Dist 65 IDELR 123 (ED Penna 4/17/15) largely adopting Mgst @ 113 LRP 10277; REB ex rel JB v State of Hawaii, Dept of Educ 63 IDELR 105 (D Haw 4/16/14); Howard G ex rel Joshua G v State of Hawaii, Dept of Educ 62 IDELR 292 (D Haw 2/24/14); TE v Cumberland Valley Sch Dist 62 IDELR 204 (MD Penna 1/7/14); Mr S ex rel BS v Regional Sch Unit 72 64 IDELR 202 (D Maine 11/29/14); AL by PLB v Jackson County 64 IDELR 173 (ND Fla 10/30/14); PS v NY City Dept of Educ 63 IDELR 255 (SDNY 7/24/14); LM by MM & RM v Downingtown Area Sch Dist 65 IDELR 124 (ED Penna 4/15/15); ML by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15); LO ex rel KT v NYC Dept of Educ 94 F.Supp.3d 530, 65 IDELR 101 (SDNY 3/23/15); McKay ex rel SD v Sch Bd of Avoyellas Parish 66 IDELR 283 (WD Louisiana 12/16/15); JN & JN ex rel JN v South West Sch Dist 66 IDELR 102 (MD Penna 9/15/15); (basic floor – not potential maximizing); ( all same)

5. Kornblut ex rel LK v Hudson City Sch Dist Bd of Educ 66 IDELR 66 (ND OH 9/2/15) @n.25: FAPE is the equivalent of a **serviceable Chevy not a Cadillac**.

*aa. Absenteeism/ Truancy*

1. District of Columbia Public Schs (JG) 111 LRP 24663 (SEA DC 1/15/11) HO held that where a student does not avail himself of the benefits of his education because he is **frequently absent** from class for reasons unrelated to his disability, there is no denial of FAPE. District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11)(same); District of Columbia Public Schs (JG) 111 LRP 60125 (SEA DC 4/22/11)(same); In re Student with a Disability 113 LRP 34705 (SEA Okla 4/30/13) HO found that student's frequent absences and tardiness rather than actions of school district resulted in the inability of a school district to mainstream a ten year old with behavioral issues;

2. Dear Colleague Letter 115 LRP 48468 (Depts of Labor, Justice, Education & HUD 10/7/15) The four federal agencies joint program to **combat** chronic **absenteeism**.

2. SS by Street v Dist of Columbia 64 IDELR 72 (DDC 9/19/14) Where student was absent 103 days of school, court concluded that his lack of progress was **attributable to his absences** not to bullying or school phobia.

3. Joaquin v Friendship Public Charter Sch 66 IDELR 64 (DDC 9/3/15) Student's **excessive truancy** did **not relieve** SD of its duty to provide teenager with transition services.

*bb. Evaluator May Not Prescribe SpEd*

1. Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO

decisions at 113 LRP 39220 and 64 IDELR 260} A physician's input is **important information** for the IEPT to consider, but a physician **may not** simply **prescribe** SpEd.

2. District of Columbia Public Schs (JG) 111 LRP 76506 (SEA DC 9/23/11) HO ruled that an evaluator cannot **prescribe** the components of a student's educational plan or eligibility; these are team decisions; In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12) (same); Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12)(same); Warrior Run Sch Dist 112 LRP 41988 (JG) (SEA Penna 7/23/12)(same); Warrior Run Sch Dist 114 LRP 37530 (JG) (SEA Penna 3/17/14) (same re eligibility).

3. JD ex rel AP v NYC Dept of Educ 66 IDELR 219 (SDNY 11/17/15) IEPT need not adopt the recommendations of a private evaluator, but it must consider them. Here IEPT appropriately adopted many but not all of the recommendations of the private evaluator.

***cc. Home-Schooled Child***

1. In re Student with a Disability 111 LRP 40544 (SEA WV 5/31/11) Under WV state law, a **home schooled** student is not a private school student and, therefore, an LEA does not have a duty of FAPE to a home schooled student.

2. Questions and Answers on Serving Students with Disabilities Placed by their Parents in Private Schools 111 LRP 32532 (OSERS 4/1/11) Whether **home schooled** child is in a private school is a matter of state law.

***dd. Homebound Instruction***

1. Rodriguez & Lopez ex rel CL v Independent Sch Dist of Boise City # 1 63 IDELR 36 (D Idaho 3/28/14) Court reversed HO and found a denial of FAPE

where SD **summarily rejected** parent request for homebound services. Instead SD should have evaluated the student's anxiety to ride the bus and attend a specific school rather than shift the burden to the parents. Student received no educational benefit during the months before he returned to a different school.

2. Grasmick ex rel AG v Matanuska Sustina Borough Sch Dist 64 IDELR 68 (D Alaska 4/23/14) Where parents had never revoked consent, Court rejected parent argument that dpc by SD was a disguised attempt to force consent to services. Instead court found that while **teachers** and providers were at the parent's home to provide homebound instruction they were **verbally abused, threatened and denied access** to the student. Court affirmed HO order for IEPT to obtain an opinion from the student's physician re whether a location outside the home might be appropriate, but court ordered SD to provide homebound services and ordered parents to cooperate with providers.

3. Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 275 (ND Calif 12/22/14) Court ruled that SD did not violate IDEA by refusing to permit ten year old with a seizure disorder to receive home instruction. Doctor's note failed to provide the information required by state regs including a projected **return to school date**.

4. Conway ex rel KCG v Bd of Educ of Northpoint- East Northpoint Sch Dist 63 IDELR 289 (EDNY 8/1/14) After student lost consciousness with a panic attack, the SD inappropriately proposed placing the student on homebound instruction for the entire year **without** making any **effort to evaluate** him.

*ee. IEP Goals*

1. Dear Colleague Letter 66 IDELR 227 (OSERS & OSEP 11/16/2015) OSERS and OSEP provided guidance stating that based on the interpretation of "general

education curriculum” set forth in this letter, we expect **annual IEP goals** to be **aligned** with State academic **content standards** for the **grade** in which a child is enrolled.

2. Letter to Lentz 64 IDELR 283 (OSEP 2/7/14) IDEA requires an IEP to include a statement of **measurable goals** and how the child’s progress toward those goals will be measured and reported, but **progress reporting** applies only to annual goals. The IEPT must decide whether progress toward any benchmarks or short term objectives will be reported.

3. Mifflinburg Area Sch Dist (JG) 114 LRP 17516 (SEA Penna 3/18/14) HO found that school district denied FAPE where IEP had a **single very broad goal** “**complete all work** necessary to obtain **passing grades.**”

4. JK v Hudson City Sch Dist Bd of Educ 66 IDELR 142 (ND Ohio 9/9/15) Mgst recommended deny reimbursement where IEP goals were **appropriate**-rejecting parent argument that IEP must identify **all 75 sight words** for the student. IDEA does **not require** that degree of **specificity**; LO ex rel KT v NYC Dept of Educ 94 F.Supp.3d 530, 65 IDELR 101 (SDNY 3/23/15) IEP goals were **appropriate**. The omission of IEP goals regarding PT and OT was harmless procedural violation where IEP provided for PT and OT; Kimi R by Malia V v Dept of Educ, State of Hawaii 65 IDELR 12 (D Haw 2/4/15) IEP goals for a student with Rhett Syndrome were appropriate. Parent wanted speech articulation goals, but speech pathologist testified that student’s performance was commensurate with her cognitive abilities; LWL & EL ex rel CL v Pelham Union Free Schs 66 IDELR 241 (SDNY 12/9/15) (goals sufficiently addressed areas of need and were appropriate); JK v Hudson Sch Dist Bd of Educ 66 IDELR 165 (ND OH 9/28/15) adopts Mgst @ 66 IDELR 142. IEP goals were measurable and

appropriate; AT & CT ex rel LT v Fife Sch Dist 66 IDELR 104 (WD Wash 9/9/15) IEP goals appropriate where parent did not prove that goals were recycled from previous IEPs; WW ex rel MC v NY City Dept of Educ 63 IDELR 66 (SDNY 3/31/14) goals were appropriate even though they made no reference to student's dyslexia;

5. NS & OS ex rel SS v New York City Dept of Educ 63 IDELR 157 (SD NY 6/16/14) Court found that IEP goals were objectively **measurable**; BK &YK ex rel GK v NY City Dept of Educ 63 IDELR 68 (EDNY 3/31/14) Court held that IEP goals were appropriate deferring to SRO and noting that this is precisely the type of issue that requires deference to the expertise of administrative hos; TM ex rel MM v NYC Dept of Educ 65 IDELR 146 (SDNY 3/25/15) (same); RB &v NY City Dept of Educ 63 IDELR 74 (SDNY 3/26/14) Although goals were short and broadly worded, they were measurable and tailored to the student's needs therefore appropriate; Anthony C by Linda L & Lionel C v Dept of Educ, State of Hawaii 62 IDELR 257 (D Haw 2/14/14) Court ruled that IEP goals were measurable; BP & SH v NY City Dept Of Educ 64 IDELR 199 (SDNY 12/3/14) Although IEP goals were not measurable in isolation, the defect was cured by short-term objectives and were appropriate;

6. EF v Newport Mesa Unified Sch Dist 65 IDELR 265 (CD Calif 6/22/15) FAPE does not require potential maximizing or the absolute best education. IEP goals are not in violation of IDEA just because **student does not meet** all of them.

7. LM by MM & RM v Downington Area Sch Dist 65 IDELR 124 (ED Penna 4/15/15) Mgst ruled that a **lack of goals** or progress monitoring in a particular area may be a procedural violation, but here **harmless** where no educational harm.

8. ML by Leiman v Starr 66 IDELR 7 (D Md 8/3/15) Court rejected parent argument that SD failure to include goals and instruction on the rules and customs of **Orthodox Judaism** in a nine year old's IEP violated IDEA – where IEP met all of the student's social and emotional needs. An IEP must be individualized only in the sense of the student's cognitive and developmental abilities. IDEA does **not require** that a student be able to access the curriculum based upon his **cultural or religious** circumstances.

*ff. Physical Education*

1. AG by MG v State of Hawaii Dept of Educ 65 IDELR 267 (D Haw 6/19/15) Court found that student's placement was LRE. Court **rejected** parent argument that the student should have received **PE in general education**.

*gg. Accommodations*

1. KP by JP v City of Chicago Sch Dist #299 65 IDELR 42 (ND Ill 2/25/15) adopting Mgst@64 IDELR 137. Court denied parent claim that student should be allowed to use a handheld **calculator** on district wide math test that would affect his right to be admitted to a competitive HS as an **ADA accommodation**. Court found that the calculator would give the student an unfair advantage over his non-disabled peers.

2. Gates-Chili Central Sch Dist 65 IDELR 152 (Dept Justice 4/3/15) DOJ ruled that SD violated **ADA** by refusing to allow a student with autism to have a **1:1 aide** to be the handler of his service dog.

*hh. Service Dogs*

1. Fry ex rel EF v. Napoleon County Schs 788 F.3d 622, 65 IDELR 221 (Sixth Cir 6/12/15) 2 judge majority of Sixth Circuit held that parents §504 action to require a service dog for a quadriplegic student with cerebral palsy must be dismissed

because of **failure to exhaust IDEA** remedies. “Exhaustion ensures that complex factual disputes over the education of disabled children are resolved, or at least analyzed, through specialized local administrative procedures.” Here exhaustion required because parent claims related to IDEA services; parents argued that dogs presence would allow child to forego aide and be more independent:

2. Alboniga ex rel AM v Sch Bd of Broward County Fla 65 IDELR 7 (SD Fla 2/10/15) Court ruled that SD failure to provide an **employee to assist** the student with the **routine care** of a service dog was a **failure to accommodate under ADA**. ADA regs stating that the public entity is not responsible for the care and supervision of service dogs did not apply; here the accommodation was to the child and not the dog; Gates-Chili Central Sch Dist 65 IDELR 152 (Dept Justice 4/3/15) DOJ ruled that SD **violated ADA** by refusing to allow a student with autism to have a 1:1 aide to be the handler of his service dog.

### *ii. English Language Learners*

1. Letter to Colleague 115 LRP 524 (OCR & Dept of Justice 1/7/15) The U.S. Departments of Education and Justice released joint guidance reminding states, school districts and schools of their obligations under federal law to ensure that **English learner** students have equal access to a high-quality education and the opportunity to achieve their full academic potential. The guidance also included a toolkit and two factsheets. See my [blog post](#).

## 5. *Other Procedural Safeguards Issues*

### a. *Procedural Safeguards In General*

1. MB & RB by RPB v Islip Sch Dist 65 IDELR 269 (EDNY 6/16/15) Court denied SD motion to dismiss 504/ADA bullying claims -parents alleged that SD failed to provide them the required **Notice of Procedural Safeguards** therefore exhaustion was **futile** because no information regarding the dph system was given to them.

2. LP by LN v Krum Independent Sch Dist 64 IDELR 113 (ED Tex 8/6/14) Mgst recommended dismissal of parent claim finding that even if parent was not given a **copy** of the **procedural safeguards** (which she had been given at least ten times), the procedural violation was **harmless** where there was **no effect** upon FAPE or participation.

### b. *Independent Educational Evaluation*

1. TP by JP & BP v Bryan County Sch Dist 792 F.3d 1284, 65 IDELR 254 (Eleventh Cir 7/2/15) Eleventh Circuit ruled that parents request for an IEE was **moot** as LEA evaluation was **no longer current** because of triennial reevaluation process. Court rejected analysis of HO and lower court that the 2 year statute of limitations barred the request. SD evaluated second grader with autism in September 2010. In November 2012, parents requested an IEE. In January 2013, parents filed suit for an IEE. Eleventh Circuit declined to address the statute of limitations, instead ruling the request was moot. The **purpose of an IEE** is to furnish parents with independent expertise and information they need to confirm or disagree with the extant SD conducted evaluation. Here SD eval not current. @n.13: Court notes that the parties misuse of “**evaluation**” and “**assessment**” has “plagued this litigation from the onset.” IDEA specifies that an evaluation is a

process during which assessments occur. §614(b)(2). SD conducts an initial evaluation (singular) and a reevaluation every three years (singular) and a parent is entitled to an IEE (singular) not IEEs...

2. Meridian Joint Sch Dist No. 2 v. DA ex rel MA 792 F.3d 1054, 65 IDELR 253 (Ninth Cir. 7/6/15) Ninth Circuit affirmed ho and lower court finding that parents were **entitled** to an IEE at **public expense** due to SD failure to evaluate the student after his **release from a juvenile** facility.

3. Letter to Baus 65 IDELR 81 (OSEP 2/23/15) A parent may request an IEE for an area that was not assessed by the SD evaluation. A child must be assessed in all areas of suspected disability. If a parent requests an IEE, the district must without undue delay either initiate a dph to prove that its evaluation was appropriate or else provide the IEE at public expense.

4. Letter to Savitt 64 IDELR 250 (OSEP 2/10/14) Where an IEE is publicly funded, SEAs and LEAs cannot have policies restricting the **amount of time** that third party evaluators may conduct classroom observations unless the SD similarly limits the duration of classroom observations by SD evaluators.

5. Stepp ex rel MS v Midd West Sch Dist (JG) 65 IDELR 46 (MD Penna 2/23/15) {affirming HO decisions @112 LRP 45128 and 113 LRP 16891} Court agreed with HO that parent was not entitled to IEE at public expense because SD evaluation was appropriate.

6. Warrior Run Sch Dist (JG) 113 LRP 39220 (SEA Penna 9/10/13) HO ruled that school district showed that its initial evaluation of the student was **appropriate**. Therefore, parent was **not entitled** to an IEE at public expense.

7. District of Columbia Public Schs (JG) 111 LRP 60092 (SEA DC 4/17/11)  
HO ruled that a **delay** of nearly **seven months** in calling an IEPT meeting to **review** the results of an **IEE** was unreasonable and coupled with the severity of the student's disability constituted a denial of FAPE.

8. Cobb County Sch Dist v DB by GSB & KB 66 IDELR 134 (ND Ga 9/28/15) Parent was **entitled** to an IEE at **public expense** where fba by SD failed to **collect data** re consequences of behavior and failed to base hypotheses upon data; EL Haynes Public Charter Sch v Frost 66 IDELR 287 (DDC 9/11/15) Parent entitled to IEE at public expense where SD psychiatric evaluation was inappropriate because **no interview** with student; MS by Sartin v Lake Elsinore Unified Sch Dist 66 IDELR 17 (CD Calif 7/24/15) Court awarded parent the expense of an **IEE as equitable remedy** even though no previous SD evaluation as per fed regulations.

9. EF v Newport Mesa Unified Sch Dist 65 IDELR 265 (CD Calif 6/22/15) Parent was **not entitled** to an IEE at public expense for an AT evaluation conducted before SD's evaluation and without the **knowledge** of the SD; LM by MM & RM v Downingtown Area Sch Dist 65 IDELR 124 (ED Penna 4/15/15) Mgst affirmed HO finding that parent was not entitled to IEE at public expense where the evaluation was not obtained in conjunction with the SD or with the intention that it be considered by the IEPT but rather for the purpose of **supporting** the parents' **reimbursement** claim; Student v Sch Dist of Philadelphia 115 LRP 2848 (ED Penna 4/3/15) Court denied IEE at public expense, rejecting parent argument that IDEA evaluation requires observation of student by a person other than the teacher; AL by PLB v Jackson County 64 IDELR 173

(ND Fla 10/30/14) Court denied IEE at public expense where parent insisted upon an evaluator outside the **financial and geographic limits** of the SD.

10. MM v Lafayette Sch Dist 66 IEDLR 217 (ND Calif 11/18/15) Court denied motion for judgment on pleadings for parent claim of **retaliation** against student with SLD because parent had requested IEE

11. Jeffries by Foster v City of Chicago Sch Dist #299 63 IDELR 280 (8/13/14) Court affirmed HO who ruled that under federal regs, a parent who **never requested** an IEE at public expense and who **never disagreed** with a SD evaluation could not claim reimbursement under IDEA for a private evaluation to establish eligibility. Because parent was not an aggrieved party, ho properly dismissed claim;

*c. Prior Written Notice*

1. JL & JF ex rel CC c NYC Dept of Educ 65 IDELR 137 (SDNY 3/31/15) SD properly complied with IDEA PWN requirement by notifying parents that student would attend a 6:1:1 SpEd school even though PWN did not specify change of location for summer ESY.

2. Oskowis ex rel EO v Sedona-Oak Creek Unified Sch Dist No 9 65 IDELR 169 (D Ariz 4/21/15) Noting that an **erroneous record** is a valid basis for admitting additional evidence on appeal, Court ordered SD to search its records where parent claimed to have received a PWN by email that differed substantially in content from the PWN in evidence.

*d. Parental Consent and Revocation*

1. 34 C.F.R. Sections 300.300 and 300.9 were amended effective December 31, 2008 to provide that parents are permitted to **revoke** in writing their

consent for the continued provision of special education and related services after having received services. School districts are not permitted to use mediation or a due process hearing to seek to override or challenge the parents' lack of consent. School districts will not be deemed to be in violation of IDEA for denial of FAPE where the parent has revoked consent to the continued provision of special education and related services.

2. Letter to Gerl 59 IDELR 200 (OSEP 6/6/12) OSEP opined that a school district may not use **mediation** as a means to inform a parent of his options after a parent revokes consent for special education. Despite the requirement under IDEA that parental decisions under IDEA be made with "informed consent," and despite the policy favoring mediation under the 2004 amendments, a school district may not use mediation or the other dispute resolution mechanisms under subpart E of the federal regulations, even if a parent voluntarily agrees to do so, after revocation of consent.

3. LR by EN v Los Angeles Unified Sch Dist 66 IDELR 208 (Ninth Cir 11/17/15) Ninth Circuit held that SD denied FAPE where it violated state law requiring it to file dpc within a reasonable time where student receives SpEd services but parent later fails to consent to a portion of an IEP that the district feels is necessary for FAPE. Here SD waited over 18 months.

4. Jason E by Linda E v Dept of Educ, State of Hawaii 64 IDELR 211 (D Haw 11/20/14) Court dismissed §504 claim of parent who had **revoked consent** for IDEA services on the eve of an IEPT meeting and then sued for failure to provide accommodation that student did not need; Contrast, DF by LMP v Leon County Sch Bd 62 IDELR 167 (ND Fla 1/2/14) Court ruled that parent's revocation of consent under IDEA did not prevent her from challenging SD's subsequent refusal to provide assistive

technology to address student's hearing impairment under §504/ADA. Court noted that federal **courts are divided** on this issue; Grasmick ex rel AG v Matanuska Sustina Borough Sch Dist 64 IDELR 68 (D Alaska 4/23/14) Where parents had never revoked consent, Court rejected parent argument that dpc by SD was a disguised attempt to force consent to services; DF by LMP v Leon County Sch Bd 65 IDELR 134 (ND Fla 3/31/15) Court dismissed §504 action by parent alleging that in **retaliation** for parent **revoking** consent for IDEA services, SD denied §504 services to the student.

5. KK ex rel KSK v State of Hawaii, Dept of Educ 66 IDELR 12 (D Haw 7/30/15) Where parent refused to consent to evaluations after student was beaten by another student on school grounds, court denied reimbursement for private tutoring. School district had done everything it could to obtain evaluative data that IEPT needed, but no consent.

*e. Access to Records/ Confidentiality/Observation*

1. You Tube Guidance on Student Privacy (Dept of Educ 2/26/15)

The Department of Education published a You Tube video providing guidance to school officials on protecting student privacy. You can find a link to the video at my [blog post](#).

2. Pollack & Quirion ex rel BP v Regional Sch Unit #75 65 IDELR 206 (D Maine 4/29/15) Court found that **HO erred** by concluding that the **FERPA** complaint procedure was the only mechanism for resolving parent complaints that they have been denied **records** regarding their child. IDEA's legislative history shows that **IDEA** requires SD to provide parent with all records about a child upon parent request and failure can be **remedied under IDEA**. Court ordered SD to inform court what records were withheld.

3. Morton v Bossier Parish Sch Bd 63 IDELR96 (WD Louisiana 5/6/14) In an IDEA/§504/Fourteenth Amendment action, court **upheld** the validity of an **interrogatory** by parents of a teen who allegedly committed suicide after disability-based harassment. Interrogatory sought the names, addresses and phone numbers of **all students who attended class with the student for two years before his death**. Mgst noted that before complying with the interrogatory, SD must notify classmates and parents of the court order to permit them to seek protective order under FERPA. Other interrogatories approved include discipline of bullies, etc; Letter to Soukup 115 LRP 18668 (FPCO 2/9/15) Consistent with the long-standing view of the Department of Education, FPCO ruled that **FERPA permits** a school to disclose to the **parent of a harassed** student information about the **disciplinary** sanctions imposed upon the **perpetrators** of the harassment (including stay away from the student; stay out of the school; or transfer to another class) FPCO noted that where any **civil rights laws** conflict with FERPA, the civil rights law **override** any conflicting provisions of FERPA.

4. Southern ex rel NS v Fayette County Public Schs 63 IDELR 257 (ED KY 7/24/14) Court dismissed parent's **FERPA** complaint noting that FERPA does **not** create a **private right of action**; Fresno Unified Sch Dist v KU by AOU 980 F.Supp.2d 1160, 62 IDELR 83 (ND Cal 10/28/13) FERPA does not provide for a private cause of action; the remedy for violations is a loss of federal funds.

5. Champa v Weston Public Schs 66 IDELR 187, 473 Mass 86 (Mass Supreme Judicial Court 10/23/15) State court required SD to provide parent with copies of all **settlements** in which SD paid for out of district private placements with all personal information redacted. They are **educational records** under FRPA, IDEA and

state law. Fact that settlements had confidentiality clauses did not prevent access of documents to other parents if personal info is redacted.

6. On July 25, 2014, the federal Department of Education issued new guidance for schools on keeping students and parents informed as to **what data** is collected on students and how it is used. The guidance notes that transparency is the key. The guidance seeks balance between the need to measure student progress and the assurance that the information is being used responsibly. The [guidance document](#) is available here. The Department of Education [press release](#) is available here. The Department's Family Policy Compliance Office which administers FERPA has also unveiled a new website that contains a wealth of information about student privacy and use of student records. The [new website](#) may be found here.

7. On February 25, 2014, the Department of Education's Privacy Technical Assistance Center issued new guidance on Protecting Student Privacy While Using **Online Educational Services**. The guidance lays out what is required as well as what is best practice when using computer software, mobile "apps" and other online services. You can review a summary in the Department's press release [here](#). You can read the 14 page guidance document [here](#). For more general information on student privacy, you should review the [PTAC website](#).

8. [Letter to Chief State School Officers](#) 114 LRP 24552 (USDOE & USDHHS 5/30/14) DOE & DHHS noted that the Uninterrupted Scholars Act (re children in **foster care**) amendments to **FERPA** affect the confidentiality provisions of IDEA

9. [Letter to Tobias](#) 115 LRP 33135 (FPCO 5/8/15) FPCO noted that school districts who maintain education records that are kept in **electronic systems** must protect

them from unauthorized access and disclosure. In investigating FERPA complaints in the future, FPCO will consider the steps an agency has taken concerning protecting against unauthorized access.

10. Letter to Anonymous 115 LRP 33141 (FPCO 5/8/15) One **exception** to the consent requirement is **safety and health**. SD did not violate FERPA where it provided records to the police after determining that a student was a high level of risk on a threat assessment; Letter to Anonymous 115 LRP 33156 (FPCO 5/1/15) Because **school officials exception** (SD staff can share information to fulfill their professional responsibilities), FPCO declined to investigate a parent complaint.

11. Letter to Flores 115 LRP 39433 (FPCO 4/20/15) FPCO rejected parent complaint where it found that SD did not violate FERPA by destroying test protocols after making electronic copies. FERPA does not address **destruction or maintenance of records** (except after there has been a request for a record) and FERPA does not require **originals** over exact copies; Letter to Anonymous 115 LRP 40693 (FPCO 3/13/15) FPCO dismissed parent complaint that teacher had stopped giving weekly updates re student's performance in class. An SD is not required to provide parents with periodic access to records. Rather FERPA only applies to specific individual requests for records. A school need not comply with a **standing request** for records; Letter to Anonymous 115 LRP 18603 (FPCO 2/27/15) FPCO required parent to submit additional evidence as to why she felt that a counsellor took notes. FERPA does not require schools to **maintain particular records** or to create records in response to a parent complaint.

12. Letter to Anonymous 115 LRP 33154 (FPCO 5/1/15) FPCO dismissed parent complaint that did not specify that SD had refused their request to amend a

student's educational record. A parent may request a change to an educational record (other than a grade, opinion or subjective decision) but must **first request** that SD itself correct the record before filing with FERPA; Letter to Anonymous 115 LRP 18661 (FPCO 2/19/15) FPCO rejected parent complaint that SD failed to amend a medical report in educational record because parent doctor disagreed. The FERPA provision allowing a parent to request that a record be **amended** does **not apply** to **grades, opinions or subjective decisions**. An SD need not provide an impartial hearing after refusing to amend a record that involves grades, opinions or subjective decisions.

13. Letter to Anonymous 115 LRP 33158 (FPCO 5/1/15) There is nothing in FERPA that requires a SD to notify the parent with **joint custody** of its intent to comply with a subpoena from the other parent with joint custody. SD is permitted to, but not required to, notify the second **divorced parent**.

14. Letter to Anonymous 115 LRP 14174 (FPCO 1/16/15) FPCO rejected as **untimely** complaint by parent more than 180 days after alleged FERPA violation.

15. Letter to Anonymous 114 LRP 37975 (FPCO 5/1/14) FPCO ruled that SD properly complied with parent request for records. Parent filed **blanket request** (all records past three years). SD complied. Parent claimed some records still missing. SD gave two computer disks full of the student's records. Parent continued to object. FPCO ruled that where a parent makes a blanket request and claims noncompliance, parents must specify what records are missing; Letter to Anonymous 114 LRP 28828 (FPCO 2/25/14) (same re blanket request); Letter to Anonymous 115 LRP 40689 (FPCO 3/13/15) (same re blanket request);

16. Letter to Erquiaga 114 LRP 50728 (FPCO 7/28/14) FPCO ruled that **SEA storage of electronic data** about students is not exempt from FERPA's parental access/inspection requirements even if the data is not available in readable form. The SEA was not required to create a new computer program, but it could allow the parent to view the data about his son; or provide him with a copy of the data dictionary or if requested provide a reasonable explanation of the data

17. Hudson City Schs 63 IDELR 26 (SEA OH 2/7/14) State complaint investigator ruled that a mediator did not violate impartiality by sending an email to school officials repeating their statement that the parent is "odd." Investigator also ruled that the SEA did **not violate FERPA, IDEA privacy or confidentiality** requirements by sharing information about the student with the mediator after the parent agreed to mediation; Letter to Anonymous 114 LRP 37980 (FPCO 5/19/14) FPCO rejected parent's FERPA claim. Parent argued that a SD guidance counsellor had violated FERPA by discussing confidential information with the student's physician, but they only reviewed the student's medical report and projected length of absence due to health reasons. There was no disclosure of confidential information in educational records; Letter to Anonymous 114 LRP 50890 (FPCO 7/29/14) FPCO found no FERPA violation by SD speech language pathologist where a thorough investigation by the SD found no disclosure of confidential information;

18. Jessica K by Brianna K v Eureka City Sch Dist 114 LRP 8981 (ND Calif 2/21/14) Court denied student request to use **fictitious names** in a civil action to avoid retaliation. Court held that to investigate the alleged harassment, SD would need to make the names known; Fresno Unified Sch Dist v KU 62 IDELR 230 (ED Calif 1/30/14)

Court denied SD motion to seal all pleadings and supporting documents. SD claimed it was necessary for it to be in compliance with FERPA and IDEA privacy. Court held that it would be sufficient to refer to student solely by **her initials**.

19. Letter to Savitt 64 IDELR 250 (OSEP 2/10/14) IDEA does not provide a general entitlement to third parties, eg attorneys or advocates, to **observe** children in their classrooms; Where an IEE is publicly funded, SEAs and LEAs cannot have policies restricting the amount of time that third party evaluators may conduct classroom observations unless the SD similarly limits the duration of classroom observations by SD evaluators; John & Maureen M ex rel JM v Cumberland Public Schs 65 IDELR 231 (DRI 6/30/15) Court held that parents do not have a right to **observe** their child in the current or prospective classrooms and LEA did not violate parent right to participate by refusing to allow them to observe; Pollack & Quirion ex rel BP v Regional Sch Unit #75 65 IDELR 206 (D Maine 4/29/15) Court ruled that IDEA procedures do not permit a student to carry an audio **recording device** to school at parents' request, and therefore, SD refusal to allow was not a procedural violation; JL & JF ex rel CC c NYC Dept of Educ 65 IDELR 137 (SDNY 3/31/15) @n.14 Court rejects parent argument that IDEA gives them a right to visit the proposed classroom and observe it; TM v Dist of Columbia 64 IDELR 197 (DDC 12/3/14) Court ruled that IDEA does not guarantee parents the right to **observe** their children in classroom; TG ex rel RP v NY City Dept of Educ 62 IDELR 20 (SDNY 9/16/13)at n.14, Court rejected parent argument that it was a procedural violation for school district to refuse to allow parents to **visit** the proposed classroom; IDEA does not give parents a right to visit the student's classroom; Student RA v West Contra-Costa Unified Sch Dist 66 IDELR 36 (ND Calif 8/17/15) IDEA and federal regs do not give the

parent a right to **observe** a child's assessments. Parent demanded that 3 year reevaluation be conducted in a room with a mirror so that she could observe. Court agreed with HO that mom's conditions were unreasonable and SD did not violate IDEA by failing to agree.

*f. Transfer of Rights*

1. Stanek by Stanek v. Saint Charles Unit Sch Dist # 303 783 F.3d 634, 65 IDELR 122 (Seventh Cir 4/9/15) Seventh Circuit reversed district court and held that the fact that the student had reached **majority age** did not deprive his parents of the right to bring an IDEA/504/ADA claim vs SD because he had signed a delegation of rights authorizing his parents to act on his behalf. {Reversing Stanek by Stanek v. Saint Charles Unit Sch Dist # 303 63 IDELR 38 (ND Ill 3/27/14) cited in previous outlines }

2. Michelle K ex rel Alice K v Pentucket Regional Sch Dist 64 IDELR 304 (D Mass 1/16/15) Where student did not sign settlement agreement near his 18<sup>th</sup> birthday and language ambiguous, settlement did not bar subsequent dph.

*g. State Complaint Procedures*

1. Memo to Chief Sch Officers Re Dispute Resolution Procedures Under Part B of IDEA 61 IDELR. 232 (OSEP 7/23/13) The 64 page Q & A attachment includes a section on **state complaints**.

2. Fairfield-Suisun Unified Sch Dist v State of Calif, Dept of Educ 780 F.3d 968, 65 IDLER 61 (Ninth Cir 3/16/15) Ninth Circuit ruled that an LEA does **not** have an **implied private right** of action to sue SEA for alleged mishandling of a state complaint investigation.

3. MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit held that SEA properly **stayed** state complaint pending resolution of dph.

4. Letter to Deaton 65 IDELR 241 (OSEP 5/19/15) Where an SEA orders corrective action following a state complaint investigation and the parent then files a dph on the same issue, the SEA must ensure that the corrective action is completed within the timeframe ordered. The SEA **may not wait** for the result of the dph in these circumstances. SEAs have broad flexibility to determine appropriate remedy or corrective action necessary to resolve a state complaint, including reimbursement and compensatory services. Answering the question asked- relief may include child specific services- including modifications or amendments to an IEP.

5. Letter to McWilliams 66 IDELR 111 (OSEP 7/16/15) An SEA **may not refuse** to investigate a state complaint alleging a failure to implement a bip which is part of an IEP **just because** it was not created following an MDR. Failure to implement a bip is an alleged violation of Part B of IDEA and is a proper issue for a state complaint. Also not relevant if the bip is in supplemental aids and services rather than in goals- failure to implement a bip is grounds for a state complaint.

6. Dear Colleague Letter 65 IDELR 151 (OSEP 4/15/15) OSEP has learned that some SDs are filing dpcs based upon the same issues after parents file state complaints to prevent SEA investigation. Although this is permissible under IDEA, OSEP strongly encourages LEAs to respect the parent's choice to use state complaint procedures rather than dph. Likewise before pursuing dph, LEA should attempt to engage parent in mediation or other informal dispute resolution mechanisms.

7. Letter to Reilly 64 IDELR 219 (OSEP 11/3/14) In a state complaint, the parent does **not** have the **burden of proof**. Once a complaint is filed, the SEA has the obligation to investigate, collect evidence and reach a conclusion. OSEP noted that a **preponderance** of the evidence standard for determining whether there has been a violation is consistent with IDEA.

8. JH by Sarah H v Nevada City Sch Dist 65 IDELR 77 (ED Calif 3/6/15) Court dismissed parent **appeal** of a decision on parent's state complaint in favor of SD as **untimely**. Borrowing IDEA's 90 day statute of limitations for appeals, this case untimely where 127 days after decision.

9. West Baton Rouge Parish Sch Bd v Deshotel ex rel TD 63 IDELR 35 (MD Louisiana 3/31/14) Court reversed ho dismissal of SD dpc; court ruled that a **SD could appeal an unfavorable state complaint decision with a dph**. State complaint investigator had ruled against SD and ordered reimbursement for privately obtained services. Because the state complaint procedure could not satisfy the exhaustion requirements, they only way that the SD could bring a civil action was to first have a dph; Pollard ex rel JH v Georgetown Sch Dist 66 IDELR 98 (D Mass 9/17/15) (same- state complaint not = exhaustion); Southfield Public Schs v Dept of Educ 64 IDELR 50 (Mich Ct App 9/16/14) State appellate court ruled that an LEA could only challenge a state complaint investigation in court if it first exhausted its administrative remedies by filing a dph.

10. KP v Dist of Columbia 66 IDELR 96 (DDC 9/18/15) Parent **not an aggrieved party** where mostly favorable HO decision. State complaint procedures existed for this type of complaint.

11. Motyku ex rel KM v Howell Public Sch Dist 63 IDELR 154 (ED Mich 6/20/14) Court dismissed complaint alleging wrongful seclusion of kindergarten student with a disability in a bathroom after he ran away where parent did not **exhaust** administrative remedies by first having dph- NOTE a favorable **state complaint** decision was **not sufficient**; Southern ex rel NS v Fayette County Public Schs 63 IDELR 257 (ED KY 7/24/14) Court ruled that parent filing a state complaint was not sufficient for exhaustion. Contrast, Everett H by Harvey v Dry Creek Joint Sch Elementary Sch Dist 63 IDELR 39 (ED Calif 3/26/14) State complaint sufficient to excuse exhaustion where parents filed a state complaint (no dph) that challenged SEA policies; {same case Everett H by Harvey v Dry Creek Joint Sch Elementary Sch Dist 66 IDELR 68 (ED Calif 9/1/15) Court refused to reconsider previous ruling. }

12. Examples of some recent state complaint findings: Nekoosa Sch Dist 114 LRP 36095 (SEA Wisc 6/3/14); Northwest Colorado Bd of Coop Educ Services 114 LRP 32935 (SEA Colo 5/15/14) (investigator awarded compensatory education for SD failure to provide HQT); Florida Dept of Educ 114 LRP 47196 (SEA FL 5/13/14); Hudson City Schs 63 IDELR 26 (SEA OH 2/7/14); Milan Area Schs 115 LRP 31123 (SEA Mich 6/30/15); Larimer County Sch Dist, Poudre (CH) No. 2015:510 (SEA Colo 7/14/15) A state complaint investigator issued a decision requiring the school district, that had failed to comply with IDEA discipline requirements, to provide training to its staff - including **training on alternatives to traditional discipline**- including **restorative justice**. See my [blog post](#).

### *h. SEA Monitoring/Compliance*

1. East Ramapo Central Sch Dist v King 65 IDELR 239 (NY Supreme Ct, App Div 6/4/15) State appellate court ruled LEA could not sue SEA under IDEA for SEA's **monitoring**/compliance actions. No private right of action for LEAs.

2. Emma C v Eastin 66 IDELR 245 (ND Calif 12/5/15) Court denied SEA motion to stay a corrective action plan recommended by court appointed monitor who had found **state level monitoring system** inadequate for ensuring FAPE; {same case: Emma C v Eastin 66 IDELR 72 (ND Calif 8/20/15) Court denied SD motion to set aside court monitor's report finding that court had authority under consent decree to review SEA compliance with monitoring of LEAS.}

### *i. Other Procedural Safeguards*

#### *(1). Surrogate Parents*

(a) In the Matter of CS 63 IDELR 21 320 P.2d 981, 63 IDELR 21 (Montana S Ct 3/18/14) Noting that a **foster** parent can be a "parent" under IDEA, state supreme court criticized trial court for appointing a surrogate parent below when the foster parent had been attending IEPT meetings, etc. Although **IDEA requires** a SD to appoint a **surrogate** parent where it cannot identify or locate a parent or where the student is a ward of the state, IDEA and state law permit a foster parent to act for the child.

#### *(2). Homeless Children*

(a) Martha's Vineyard Public Schs (WL) 112 LRP 38658 (SEA Mass) Applying state regs, HO ruled that the school district that was responsible for the student before he became **homeless** is programmatically and financially responsible for the student until his parent enrolls him in a district where a shelter or temporary residence is located.

### ***(3) Foster Children***

(a) Letter to Chief State School Officers 114 LRP 24552 (USDOE & USDHHS 5/30/14) DOE & DHHS expressed concern that some **LEAs** may be unaware of their **responsibility** for developing a **stability plan** in conjunction with child welfare agencies for each child in foster care. The two agencies released guidance on this topic on the Students in Foster Care website. Also the Uninterrupted Scholars Act amendments to FERPA affect the confidentiality provisions of IDEA.

(b) In the Matter of CS 63 IDELR 21 320 P.2d 981, 63 IDELR 21 (Montana S Ct 3/18/14) Noting that a **foster parent** can be a “parent” under IDEA, state supreme court criticized trial court for appointing a surrogate parent below when the foster parent had been attending IEPT meetings, etc. Although IDEA requires a SD to appoint a surrogate parent where it cannot identify or locate a parent or where the student is a ward of the state, IDEA and state law permit a foster parent to act for the child.

(c) Letter to Chief State School Officers 114 LRP 24552 (USDOE & USDHHS 5/30/14) DOE & DHHS noted that the Uninterrupted Scholars Act (re children in **foster care**) **amendments to FERPA** affect the **confidentiality** provisions of IDEA

### ***6. Procedural Violations***

a. A procedural violation is only actionable under IDEA if it results in a loss of **educational** opportunity for the student or it seriously impairs the parent’s **participation** in the IEP process; District of Columbia Public Schs (JG) 111 LRP 23798 (SEA DC 1/28/11) (same); In Re: Student With a Disability 58 IDELR 270 (JG) (SEA WV 3/6/12)(same); Midd West Sch Dist 112 LRP 42002 (JG) (SEA Penna 7/22/12)(same);

b. CF by RF & GF v New York City Dept of Educ 746 F.3d 68, 62 IDELR 281 (2d Cir 3/4/14) Second Circuit ruled that procedural violation of failure to provide an fba was an **actionable** procedural violation where the school district had not otherwise taken appropriate steps to address the student's behaviors. Here the bip was vague and did not specifically address the student's problem behaviors; MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) 2-1 majority of Ninth Circuit held that the procedural violation of not providing **RtI data** to parents was **actionable** because without the data, the parents, unlike other IEPT members were unable to decipher the student's unique needs. See, SA by MAK & KS v NY City Dept of Educ 63 IDELR 73 (EDNY 3/30/14) Failure to provide parent training (state law) at a time when parents could access it was **actionable** procedural violation where the lack of training adversely affected toileting and communication; Sch Dist of Philadelphia v Kirsch & Misher ex rel NK 66 IDELR 247 (ED Penna 11/30/15) Court awarded reimbursement where SD procedural violation in taking six months to develop an IEP seriously impeded the parents participation rights; MS by Sartin v Lake Elsinore Unified Sch Dist 66 IDELR 17 (CD Calif 7/24/15) IEPT meeting without parent denied FAPE because procedural violation impaired participation; JG by Jimenez v. Baldwin Park Unified Sch Dist 65 IDELR 177 (CD Calif 3/20/15) SD committed procedural violation by not inviting to IEPT representatives of current school or state school for the deaf which was **actionable** because it infringed upon mom's participation rights; Leggett ex rel KE v Dist of Columbia 793 F.3d 59, 65 IDELR 251 (DC Cir 7/10/15) DC Circuit held that procedural violation (late IEP) was a denial of FAPE because the delay affected the student's education;

c. JS & LS v NYC Dept of Educ 65 IDELR 201 (SDNY 5/6/15) IEP Team's failure to consider parent's independent psycho-educational evaluation was a procedural error-but **harmless** where current psycho-ed evaluation was considered and parent had a full opportunity to participate in IEP team meeting; Pollack & Quirion ex rel BP v Regional Sch Unit #75 65 IDELR 206 (D Maine 4/29/15) SD failure to give parents notice of a change in lunch outing procedures was a procedural violation, but harmless where parents learned of the change and voiced their objection, therefore no impairment of participation rights; LM by MM & RM v Downingtown Area Sch Dist 65 IDELR 124 (ED Penna 4/15/15) Mgst ruled that a lack of goals or progress monitoring in a particular area may be a procedural violation, but here harmless where no educational harm; KC ex rel CR v NYC Dept of Educ 65 IDELR 142 (SDNY 5/30/15) Court held that SD failure to list OT and speech on IEP as related services was a harmless procedural error where the IEP included speech and OT goals and where the related services were discussed at IEPT meeting; ML by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15) Failure of IEPT to quantify the frequency and duration of the student's problem behaviors was a procedural violation but harmless where fba/bip and IEP adequately addressed the student's behaviors = harmless; LWL & EL ex rel CL v Pelham Union Free Schs 66 IDELR 241 (SDNY 12/9/15)(same); TM ex rel MM v NYC Dept of Educ 65 IDELR 146 (SDNY 3/25/15) Failure to have a special education teacher at IEPT meeting was a procedural error, but harmless where LEA representative had 21 years' experience as a SpEd teacher and parent participated; LO ex rel KT v NYC Dept of Educ 94 F.Supp.3d 530, 65 IDELR 101 (SDNY 3/23/15) SD failure to provide 30/60 minutes of speech per day was harmless procedural violation where student made progress in

speech. Also harmless procedural violations were the failure to conduct fba and give parent counselling (state law) and omission of OT goals; KM & SN ex rel LN v NYC Dept of Educ 65 IDELR 143 (SDNY 3/30/15) adopting Mgst @ 113 LRP 43587 Court ruled that SD forgetting to give parents a copy of student's proposed IEP was a harmless procedural violation where the parents had received a draft IEP and they participated at the IEPT meeting; Dixon v Dist of Columbia 65 IDELR 67 (DDC 3/18/15) SD reduction of specialized instruction from 27.5 hours to 15 hours was a harmless procedural violation where no harm to student; MM ex rel JS v NYC Dept of Educ 65 IDELR 103 (SDNY 3/7/15) SD failure to conduct an assessment of student's post-secondary transition needs was harmless procedural violation where IEP sufficiently addressed the student's transition needs. SD failure to conduct triennial reevaluation was harmless procedural violation where the IEPT had sufficient evaluative data re student's needs; DN ex rel GN v NYC Dept of Educ 65 IDELR 34 (SDNY 3/3/15) No parent training harmless; ST ex rel SJPT and IT v Howard County Public Sch System 64 IDELR 268 (D Mich 1/5/15) aff'd by 4<sup>th</sup> Cir in UNPUBLISHED decision @ 66 IDELR 270 (Fourth Cir 1/5/16)(harmless); TF & AF ex rel MF v NYC Dept of Educ 66 IDELR 136 (SDNY 9/23/15) Failure to conduct a reevaluation was not a violation of IDEA where IEPT had sufficient evaluative data ; but even if a procedural violation, here harmless; AA ex rel JA v NYC Dept of Educ 66 IDELR 73 (SDNY 8/24/15) SD failure to conduct 3 year reevaluation was a procedural violation, but **harmless** where IEPT had good information re student's needs; AP & SP ex rel AP v NYC Dept of Educ 66 IDELR 13 (SDNY 7/30/15) Failure to have general education teacher at IEPT meeting was not a violation where student was not considered for a general ed placement. Even if procedural

violation, **harmless** where no educational harm or impairment on participation; Ruby J ex rel LL v Jefferson County Bd of Educ 66 IDELR 38 (ND Ala 8/17/15) (harmless procedural violations).

d. TM by AM & RM v Cornwall Central Sch Dist 752 F.3d 145, 63 IDELR 31 (2d Cir 4/2/14) an LRE violation is a **substantive** (not procedural) violation of IDEA. Procedural violations of not providing an fba and parent counselling (required by state law) were harmless and not actionable; ML & BL v NY City Dept of Educ 63 IDELR 67 (SDNY 3/31/14)(same); HG by Davis v Upper Dublin Sch Dist 65 IDELR 123 (ED Penna 4/17/15) largely adopting Mgst @ 113 LRP 10277. Court found that Mgst erred by classifying SD duty to conduct an **AT evaluation** as procedural- it is a **substantive** requirement, but harmless nonetheless where SD conducted an AT evaluation that resulted in several interventions adopted in student's IEP; Joaquin v Friendship Public Charter Sch 66 IDELR 64 (DDC 9/3/15) LEA's failure to provide **transition services** to a teenager was a **substantive not a procedural** violation of IDEA;

e. Warrior Run Sch Dist 112 LRP 41988 (JG) (SEA Penna 7/23/12) Although a HO may not grant individual relief for a procedural violation without more, a **HO may**, pursuant to IDEA § 615(f)(3)(E)(iii) order a school district to **fix a procedural violation**. Where two members of an eligibility committee testified that they could not offer an opinion regarding eligibility because they were not a school psychologist, HO ordered school district to train staff as to their role, including their right to express opinions at eligibility committee meetings; Dawn G & Tony G ex rel DB v Mubank Indep Sch Dist 63 IDELR 63 (ND Tex 4/7/14) Court rejected SD argument that because HO found no FAPE violation, no relief could be awarded. HO found harmless

procedural violations not a FAPE violation and HO awarded relief **correcting** the procedural violations; In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14) HO ruled that school district violated its child find duty. Because child was clearly not eligible, however, HO ordered **staff training** to comply with child find and correct the procedural violation in the future;

f. Brock & Dalton ex rel SB v NYC Dept of Educ 65 IDELR 135 (SDNY 3/31/15) SD failure to conduct the **triennial reevaluation** was a procedural violation which here = a denial of FAPE because IEPT had insufficient evaluative data to develop an IEP;

g. VS by DS v New York City Dept of Educ 63 IDELR 162 (EDNY 6/9/14) Court found that district violated IDEA by failing to identify the school that the student would attend in placement notice and not notifying it until first day of dph; Parents had a right to timely and relevant information as a part of right to meaningful participation. The procedural violation substantially impaired the parents' right to **meaningful participation**. Parents had a right to know what school; LU & NU ex rel GU v New York City 63 IDELR 126 (SD NY 5/27/14) District denied FAPE by failing to answer parent questions concerning whether the proposed district school had the resources to implement the IEP, including an onsite nurse to administer meds to a student with a seizure disorder, and a quiet place to recover. LEAs may select the specific school if it complies with IEP requirements. Here the procedural violation in excluding the parents from the selection process was a denial of FAPE because it denied them meaningful participation.

h. JY by EY & GY v. Dothan City Bd of Educ 63 IDELR 33 (MD Ala 3/31/14) SD violated IDEA by not having a person with decision making authority present at a **resolution session**. Court ruled that this was a procedural violation that was **harmless** where no settlement was reached at the resolution session.

i. (no procedural violation); MA v Jersey City Bd of Educ 63 IDELR 9 (DNJ 3/18/14); Cooper v Dist of Columbia 64 IDELR 271 (DDC 12/30/14); LP by LN v Krum Independent Sch Dist 64 IDELR 113 (ED Tex 8/6/14); Court reversed HO finding no procedural violation; NW v Poe 62 IDELR 77 (ED Ky 11/4/13) no procedural violation.

**7. Section 504, ADA, Section 1983, etc** (selected cases)

a. Frequently Asked Questions About §504 and the Education of Children With Disabilities 111 LRP 76408 (OCR 3/17/11) OCR incorporates the changes made by the amendments to ADA effective 1/1/2009 in this Q & A document.

b. Ridley Sch Dist v. MR & JR ex rel ER 680 F.3d 260, 58 IDELR 271 (3d Cir 5/17/12) To **establish a violation** of §504, a **parent must prove**:1) that the student is disabled; 2) that's he was "otherwise qualified" to participate in school activities; 3) that the school district received federal funds; and 4) that the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school. To offer an appropriate education under 504, the district must reasonably accommodate the needs of the handicapped child to ensure meaningful participation in educational activities and meaningful access to educational benefits. To comply with 504, a school district must provide education and related aids or services that are designed to meet the individual educational needs of handicapped students as adequately as the needs of non-

handicapped students are met; Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} (same re 4 elements; and disability must substantially impair a major life activity.); Spring v Allegany-Limestone Central Sch Dist 66 IDELR 157 (WDNY 9/30/15) Court dismissed 504/ADA/1983(dp) claims for bullying of student with Tourettes syndrome where peers called him names leading to suicide where **no allegation** of effect on **major life activities** and no state created danger; Gohl ex rel JG v Livonia Public Schs 66 IDELR 122 (ED Mich 9/30/15) Court dismissed 504/ADA claims by parents of 3 year old with hydrocephalus whose SpEd teacher jerked his head back and yelled in his face where **no deprivation** of benefits where student showed emotional progress after the incident.

c. Perrin ex rel JP v Warrior Run Sch Dist (JG) 66 IDELR 225 (MD Penna 9/16/15) adopted by district court at 66 IDELR 254 (MD Penna 11/4/15) {affirming HO decisions at 113 LRP 39220 and 64 IDELR 260} HO properly found student **not eligible** under §504 and no discrimination – includes standards for what parent must prove under §504; Stepp ex rel MS v Midd West Sch Dist (JG) 65 IDELR 46 (MD Penna 2/23/15) {affirming HO decisions @112 LRP 45128 and 113 LRP 16891} Court affirmed HO determination that the parent did **not prove** a §504 violation- quoting Ridley four factors.

d. TB by Brenneise v San Diego Sch Dist 795 F.3d 1067, 66 IDELR 2 (Ninth Cir 7/31/15){see corrected opinion at 115 LRP 54544 (9<sup>th</sup> Cir 11/19/15)} Ninth Circuit reversed district court award of summary judgment for SD finding that **SD's failure to comply with HO order** requiring IEP to specify which qualified individual would provide G-tube feedings may constitute **deliberate indifference**.

e. Estate of Lance by Lance v Lewisville Independent Sch Dist 743 F.3d 982, 62 IDELR 282 (5<sup>th</sup> Cir 2/28/14) A **valid IEP is sufficient but not necessary** to **satisfy** the requirements of **§504**, but a denial of IDEA FAPE is not enough to make out a §504 violation. Where school district properly investigated bullying complaints and dealt with bullying appropriately, Fifth Circuit ruled that there was **no deliberate indifference** and therefore ruled that the district was not liable under §504 for the bullying and subsequent suicide of a fourth grader with ADHD. Court also dismissed §1983 claim where the school district did not create a dangerous environment for the student.

f. CTL by Trebatoski v Ashland Sch Dist 743 F.3d 524, 62 IDELR 252 (7<sup>th</sup> Cir 2/19/14) Seventh Circuit held that a district's **failure to train** three staff members on a first grader's diabetes equipment as required by his §504 plan did **not amount** to a **violation** of IDEA or §504 for failing to accommodate his disability. The court noted that few cases exist concerning an alleged **failure to implement a §504 plan**. (5<sup>th</sup>, 8<sup>th</sup> & 9<sup>th</sup> use the **materiality** standard from IDEA) Seventh Circuit ruled that a district's **failure to implement a §504 plan** does not amount to disability discrimination under §504 unless the deviation is so significant that it effectively denies the child the benefit of his education. Here the staff was adequately trained regarding the diabetes equipment.

g. Lebron & Portales ex rel KFPL v. Commonwealth of Puerto Rico 64 IDELR 95 (1<sup>st</sup> Cir 10/20/14) Where parents rejected IEP from school district and enrolled the student in a private school, parents filed suit against the district for \$6M claiming that the district violated §504/ADA by not permitting them to file an LRE complaint against the private school. First Circuit dismissed the parents' claim because the district had **no duty to supervise a private school**, therefore no intentional discrimination;

h. Dear Colleague Letter and Frequently Asked Questions 64 IDELR 180  
(OCR/OSERS/DOJ 11/12/14)

The agencies issued joint guidance about the rights of public elementary and secondary students with **hearing, vision, or speech** disabilities to **effective communication**. The guidance is intended to help schools understand and comply with federal legal requirements on meeting the communication needs of students with disabilities. The document covers the requirements of IDEA as well as the ADA effective communication requirement. The guidance covers when auxiliary aids and services must be provided and concludes with dispute resolution mechanisms available if parents disagree with school decisions. The guidance consists of the following documents which are linked here: a [Dear Colleague Letter](#) and an attachment with [frequently asked questions and answers](#).

The agencies also provide a quick reference [fact sheet](#); Letter to Negron 65 IDELR 304 (Dept of Justice & OCR & OSERS 6/15/15) In response to a challenge to its previous guidance and FAQs by counsel for NSBA legal counsel, claiming that the three agencies had inappropriately applied the Ninth Circuit rule nationwide. The agencies responded that they agree with the Ninth Circuit that simply because a school district has provided FAPE under IDEA does not necessarily mean that it has provided effective communication services required under ADA (for students with hearing, vision and speech disabilities)

i. Letter to Deal & Olens 115 LRP 31132 (DOJ 7/15/15) and Letter to Deal & Olens 115 LRP 31259 (DOJ 7/15/15) Department of Justice found that Georgia SEA violated **ADA's integration mandate** {similar to LRE} by placing over 5000 students with behavior related disabilities in the Georgia Network for Educational and Therapeutic

Support. DOJ likened the segregated facility to a prison and ordered the students transitioned back into local schools.

j. SR v Kenton County Sheriff's Office 115 LRP 58577 (ED Ky 12/28/15) Court denied sheriff's motion to dismiss parent ADA/Fourth Amendment claim. **Two students**- one with PTSD & ADHD one with ADHD and mental health issues were **handcuffed by school resource officer**. Court found that students were handcuffed at a time when **no danger** was present **because they wouldn't obey** resource officer. Video is available in my [blog post](#).

k. PP v Compton Unified Sch Dist 66 IDELR 121 (CD Calif 9/29/15) Court rejected plaintiffs argument in class action that **trauma** from **growing up in poverty** was in itself a **504 disability** triggering child find, but ruled that the physical or mental **effects** of such trauma might be a substantial limitation on a major life activity. Court denied SD motion to dismiss; PP v Compton Unified Sch Dist 66 IDELR 161 (CD Calif 9/29/15) Court denied plaintiffs' request for a preliminary injunction to require SD to train its staff on the effects of trauma on the ability to learn; PP v Compton Unified Sch Dist 66 IDELR 162 (CD Calif 9/29/15) Court denied 504/ADA class certification of students in high poverty area who suffered trauma where plaintiffs' experts did not address the effects of trauma on their education. Court gave plaintiffs leave to renew their motion with additional evidence; See my [blog post](#).

l. **Exhaustion required** - dismissed for failure to first have dp hearing: Fry ex rel EF v. Napoleon County Schs 788 F.3d 622, 65 IDELR 221 (Sixth Cir 6/12/15) 2 judge majority of Sixth Circuit held that parents §504 action to require a service dog for a quadriplegic student with cerebral palsy must be dismissed because of failure to exhaust

IDEA remedies. Here exhaustion required because parent claims related to IDEA services; parents argued that dogs presence would allow child to forego aide and be more independent; Carroll ex rel AKC v Lawton Independent Sch Dist No 8 66 IDELR 210 (Tenth Cir 11/10/15) Tenth Circuit affirmed district court dismissal of parent §504, ADA & 1983 claims alleging a combination of educational, physical and emotional injuries because of a failure to exhaust administrative remedies. Mention of academic progress triggered the exhaustion requirement. Batchelor ex rel RB v. Rose Tree Media Sch Dist 759 F.3d 266, 63 IDELR 212 (3d Cir 7/17/14) Third Circuit affirmed dismissal of parents' claims under §504/ADA for failure to exhaust. Parents argued that harassment and **retaliation** of a high school student with SLD caused harm to his educational achievement and personal well-being. Parents did not allege an IDEA violation, but Third Circuit held that IDEA **exhaustion** was required because the facts alleged involve FAPE and failure to implement an IEP; Frank ex rel Frank v Sachem Sch Dist 84 F.Supp.3d 172, 65 IDELR 9 (EDNY 2/5/15) Court dismissed parent's claim for violation of ADA integration mandate for failure to exhaust IDEA remedies. Court found that the parent was alleging the equivalent of an LRE violation which was therefore a placement issue and IDEA exhaustion was needed; Laura A ex rel JO v Limestone County Bd of Educ 63 IDELR 166 (ND Ala 5/30/14) Parents §504 claim was dismissed for failure to exhaust with an IDEA dph. Contrast, MM & EM ex rel LM v. Lafayette Sch Dist 64 IDELR 31 (9<sup>th</sup> Cir 9/12/14) Ninth Circuit held that District Court improperly dismissed §504 retaliation claim and remanded to consider same; JA by TL & LA v Moorehead Public Schs, ISD #152 65 IDELR 47 (D Minn 2/23/15) Where bip for a 5 year old with Down Syndrome specified a quiet room when overstimulated, Parent claim concerning her

being placed in a storage closet fell squarely within IDEA, therefore exhaustion required for §504/ADA claims; Kuhiner ex rel JK v Highland Community Unit Sch Dist # 5 66 IDELR 131 (SD Ill 9/28/15) 504/ADA dismissed where no exhaustion and educational injuries were alleged; AKC by Carroll v Lawton Indep Sch Dist #8 63 IDELR 41 ((WD Okla 3/26/14) §504/ADA claims dismissed for failure to exhaust by dph;

m. **exhaustion excused:** JSR by Childs v Dale County Bd of Educ 66 IDELR 164 (MD Ala 9/28/15) Parents exhausted by alleging 504/ADA/1983 claims **in IDEA dpc**; where **HO ruled** he had **no authority** over these claims, court permitted additional evidence on appeal; MB & RB by RPB v Islip Sch Dist 65 IDELR 269 (EDNY 6/16/15) Court denied SD motion to dismiss 504/ADA claims for bullying where parents alleged that SD had failed to provide them with the required Notice of Procedural Safeguards therefore exhaustion was futile because no information regarding the dph system was given to them; AP ex rel LH v Johnson 65 IDELR 102 (ND Iowa 3/23/15) Court excused parent's failure to exhaust where she would be unable to obtain relief under IDEA for the physical injuries caused by a teacher who restrained a student on two occasions; LH v Hamilton County Dept of Educ 65 IDELR 208 (ED Tenn 4/27/15) Parent exhausted by filing IDEA dpc. Fact that complaint did not mention 504 or ADA was not relevant.

n. Easter v Dist of Columbia 66 IDELR 62 (DDC 9/8/15) Court ruled that 22 year old student stated a claim under §504 and denied motion to dismiss. **Failure to identify an LEA for students in juvenile detention** was a systemic violation.

o. GM & MCM ex rel CM v Brigantine Public Schs 65 IDELR 229 (DNJ 6/8/15) Court allowed parents to pursue §504 claim against school authorities where they alleged that school staff submitted a false report of abuse & neglect to child welfare

authorities in **retaliation** for parent asserting their IDEA rights; Jenkins ex rel Jenkins v Butts County Sch Dist 65 IDELR 172 (MD Ga 4/20/15) (same); Contrast, BD by Davis v Dist of Columbia 64 IDELR 46 (DDC 8/30/14) Court dismissed §504/ADA retaliation claims by parent where state law requires SD to report children absent more than 10 unexcused absences in a school year for possible child neglect; Smith v Harrington 65 IDELR 95 (ND Calif 3/27/15) Court dismissed parent 504/ADA claim that SD retaliated against her for requesting IDEA evaluations and for reporting alleged bullying by filing an abuse and neglect complaint against her with child welfare authorities where parent had a history of aggressive behaviors and angry outbursts at the school causing the student to suffer from anxiety; DF by LMP v Leon County Sch Bd 65 IDELR 134 (ND Fla 3/31/15) Court dismissed §504 action by parent alleging that in **retaliation** for parent revoking consent for IDEA services, SD denied §504 services to the student; Contrast, MM v Lafayette Sch Dist 66 IEDLR 217 (ND Calif 11/18/15) Court denied motion for judgment on pleadings for parent claim of retaliation against student with SLD because parent had requested IEE; O’Shea v Interboro Sch Dist 114 LRP 19334 (ED Penna 4/28/14) Court dismissed suit by SpEd director who claimed retaliatory discharge for asserting the statutory rights of students with disabilities in violation of §504/ADA. Court found long delays between the protected activity and the discharge;

p. Ebonie S & Mary S v Pueblo Sch Dist #60 65 IDELR 44 (D Colo 2/25/15) Court granted SD motion in limine to prevent jury from hearing evidence of **state law regarding restraints** where no allegation of state law violation and where probative value is outweighed by prejudice. Parent §504/ADA claim involves use of restraint desk.

q. LH v Hamilton County Dept of Educ 65 IDELR 208 (ED Tenn 4/27/15)  
Court rejects SD argument that all §504 and ADA claims were **subsumed by IDEA**. Congress amended IDEA to reverse Smith v Robinson (SCT) to this effect; Simmons v Pittsburg Unified Sch Dist 63 IDELR 158 (ND Calif 6/11/14) Court ruled that school district had violated IDEA by concluding that the fact that it had developed a **§504 plan** for the student relieved the district of conducting an **IDEA evaluation**. Parents' right to participate was violated because they were not included in the eligibility process. Remanded to ho re compensatory education.

r. Zdrowski ex rel CR v Rieck 66 IDELR 42 (ED Mich 8/11/15) Court dismissed 504/ADA claims for restraint of second grader with Asperger Syndrome by a method not recommended while student is struggling because **no bad faith or gross misjudgment** in removing violent student from classroom

s. Alboniga ex rel AM v Sch Bd of Broward County Fla 65 IDELR 7 (SD Fla 2/10/15) Court ruled that **ADA regs** by DOJ were valid and enforceable and that they were entitled to Chevron deference; KP by JP v City of Chicago Sch Dist #299 65 IDELR 42 (ND Ill 2/25/15) adopting Mgst@64 IDELR 137. Court denied parent claim that student should be allowed to use a handheld calculator on district wide math test that would affect his right to be admitted to a competitive HS as an **ADA accommodation**. Court found that the calculator would give the student an unfair advantage over his non-disabled peers.

t. JL by O'Flaherty v Eastern Suffolk BOCES 65 IDELR 262 (EDNY 6/29/15)  
Court dismissed **§1983 claims** vs SD for mistreatment of a 14 year old with autism where the mistreatment was allegedly by employees of an intermediate unit who were not

trained or supervised by the SD; KM v Chichester Sch Dist 65 IDELR 5 (ED Penna 2/10/15) Court denied SD motion to dismiss noting that children with autism are particularly vulnerable to injury therefore imposing a lower standard for **conscience shocking** behavior for viable §1983 claim (here state created danger/XIV dp claim-student left on bus asleep causing great anxiety); Contrast, AKC by Carroll v Lawton Indep Sch Dist #8 63 IDELR 41 ((WD Okla 3/26/14) Court ruled no §1983 constitutional violation where teacher allegedly battered a student with autism, tearing her clothing, and placing her in a closet. Even if teacher's behavior shocked the conscience, there was no district custom or policy supporting the actions; Domingo v Kowalski 64 IDELR 47 (ND OH 8/29/14) Court dismissed §1983 suit vs SpEd teacher whose techniques might be child abuse (he gagged one child and belted a child to a chair) they were not conscience-shocking; Wicks v Freedom Area Sch Dist 66 IDELR 130 (WD Penna 9/28/15) Court noted that the fact that the student was dissatisfied with his post-plea bargain placement did not amount to constitutional dp/1983 violation.

u. DL v Dist of Columbia 65 IDELR 226 (DDC 6/10/15) Court dismissed class action based on §504 where LEA recent efforts to improve IDEA compliance show no bad faith or deliberate indifference; Shiffbauer v Schmidt 65 IDELR 100 (D Md 3/24/15) Court dismissed §504/ADA action where parent **failed** to show **deliberate indifference**. Complaint alleged a single incident where a classroom aide restrained the student with ADHD and ODD after he attempted to attack another student on the playground. Contrast, TR v Humbolt County Office of Educ 65 IDELR 293 (ND Calif 7/8/15) Court refused to dismiss parent §504 action finding deliberate indifference where county office of education had notice of teen's need for intensive psychiatric interventions but failed to

provide them for nine months while student was in **juvenile hall**; Wicks v Freedom Area Sch Dist 66 IDELR 130 (WD Penna 9/28/15) Court noted that the fact that the student was dissatisfied with his **post-plea bargain placement** did not amount to constitutional dp/1983 violation.

v. Court **found deliberate indifference** Galloway v Chesapeake Union Exempted VIII Sch Bd of Educ 64 IDELR 129 (SD OH 10/27/14) In an action alleging that SD failed to respond to repeated incidents of bullying in violation of §504/ADA/§1983, Court allowed parents to present evidence of a settlement agreement in prior dph because the fact that SD only arranged for staff training on autism after parents filed a dpc was relevant to deliberate intention concerning the bullying; In Re Student With A Disability 63 IDELR 205 (JG) (SEA UT 6/9/14) HO found no evidence of discrimination presented by pro se parent, therefore no §504 violation; RR by Roslyn v Oakland Unified Sch Dist 63 IDELR 192 (ND Calif 6/23/14) Court dismissed §504/ADA claims where parents of child with autism failed to plead deliberate indifference or intentional discrimination; LMP ex rel EP, DP & KP v Sch Bd of Broward County Fla 64 IDELR 66 (SD Fla 9/23/14) Court refused dismissal- a statement by an SD employee that it predetermined student's IEPs because it did not offer ABA therapy was sufficient evidence of deliberate indifference; SD by Brown v Moreland Sch Dist 63 IDELR 252 (ND Calif 7/29/14); VS by Sisneros v Oakland Unified Sch Dist 65 IDELR 234 (ND Cal 5/28/15) Court denied SD motion to dismiss parent §504 action for bullying student with a severe intellectual disability on school bus. SD claimed no knowledge because bus was run by a contractor, but complaint alleged that bus driver told parent she had contacted SD officials but got no response; KA ex rel JA v Abington Heights Sch Dist 65 IDELR

174 (MD Penna 4/20/15) Court denied SD motion to dismiss §504 and §1983 (14<sup>th</sup> due process) claims where parent alleged that SD expelled a student receiving 504 services without an MDR. Failure to conduct MDR was evidence of disability discrimination; Lee v Natomas Unified Sch Dist 65 IDELR 41 (ED Calif 2/25/15) Court permitted parent §504/ADA claim to continue where SD required that all communications from parent go through SD lawyer. Court had also denied SD request for a TRO keeping parent away; JR v NYC Dept of Educ 66 IDELR 32 (EDNY 8/20/15) Principal's failure to change student's bus route coupled with his statement that the student was likely to encounter disability based bullying on every bus route amounted to deliberate indifference so SD motion to dismiss 504/ADA action was denied.

w. finding **no intentional discrimination** Moore ex rel Estate of AM v Chilton County Bd of Educ 62 IDELR 286 (MD Ala 3/3/14) Court dismissed parent lawsuit under §504/ADA for daughter's suicide after bullying. Parents could not show deliberate indifference where teachers and bus driver took actions to stop the bullying; AM by Muschette v American Sch for the Deaf 65 IDELR 131 (D Conn 4/9/15) No discrimination where only similarly disabled students attended school; Lockhart v Willingboro HS 65 IDELR 141 (DNJ 3/31/15) Court dismissed parent §1983 action where no deliberate intention- SD returned 17 year old girl who had been sexually assaulted to an empty classroom did not violate EP; Stanek by Stanek v. Saint Charles Unit Sch Dist # 303 63 IDELR 38 (ND Ill 3/27/14) (D Idaho 3/28/14) (dismissed no discrimination); Dorsey ex rel JD v Pueblo Sch Dist 60 66 IDELR 183 (D Colo 10/26/15) Although court found bullying disturbing, it dismissed 504/ADA suit because parent failed to allege the bullying was disability based.

x. KRS by McClaron v Bedford Community Sch Dist 65 IDELR 272 (SD Iowa 4/20/15) Court denied SD motion to dismiss finding that allegations that a 9<sup>th</sup> grader with SLD was called “dumb” and “stupid” by football teammates was sufficient to show **disability based** harassment for §504; Eskenazi-McGibney v Connecticut Central Sch Dist 65 IDELR 8, (EDNY 2/6/15) Although troubled by the SD response to bullying of a student by his peers, court dismissed §504/ADA/§1983(EP) claim because parents’ complaint did not allege that harassment was based upon his disability.

y. RD v Souderton Area Sch Dist 65 IDELR 196 (ED Penna 5/19/15) Court dismissed parent §1983 suit claiming that SD had their daughter committed to a juvenile detention facility because of inappropriate behaviors in an out of district placement - parent claim was beyond **statute of limitations** (borrowed state 2 year S/L for tort claims); Roges ex rel NH v Boston Public Schs 65 IDELR 175 (D Mass 4/17/15) Court dismissed parent §1983 (dp/EP) for improper forcible restraint where claim was filed outside of statute of limitations.

z. Chambers ex rel Chambers v Sch Dist of Philadelphia 64 IDELR 132 (ED Penna 10/20/14) Even though parents won IDEA dph and received > 3,000 hours of compensatory education, Court denied motion to dismiss §504 claim finding viable parent argument that but for IDEA violation, student would have been functioning at a much higher level and would need less physical and medical care.

aa. MH by KH v Mount Vernon City Sch Dist 63 IDELR 17 (SDNY 3/3/14) Court refused to dismiss **SEA** as party to §504/ADA suit where complaint alleged that LEA had not corrected **systemic** noncompliance issues revealed in an independent audit years earlier;

bb. Sisneros v Oakland Unified Sch Dist 65 IDELR 97 (ND Cal 3/27/15)  
Court dismissed parent EP/§1983 action for bullying student with a severe intellectual disability on school bus. Because people with disabilities are **not a protected class**, parent's complaint was deficient where she failed to allege a lack of a rational basis and a legitimate state interest.

### **8. NCLB/ ESEA Issues**

a. Dear Colleague Letter (Dept of Educ 12/18/15) The Department of Education issued guidance to states and districts concerning the transition to the new ESEA. The letter covers expectations regarding: Title I assessment peer review; annual measurable objectives (AMOs) and annual measurable achievement objectives (AMAOs) for school years 2014–2015 and 2015–2016; conditions and other related requirements under ESEA flexibility; priority and focus school lists; and educator evaluation and support systems under ESEA flexibility. You can find a link to the guidance on my [blog post](#).

b. Northwest Colorado Bd of Coop Educ Services 114 LRP 32935 (SEA Colo 5/15/14) State complaint investigator found that SD denied FAPE to a student by failing to provide a **HQT**. (NOTE: Among the changes to ESEA is the elimination of the HQT requirement.) **See section on ESEA amendments above.**

### **9. Disproportionality**

a. Blunt v Lower Merion Sch Dist 767 F.3d 247, 64 IDELR 32 (3d Cir 9/12/14) Third Circuit ruled that the school district properly followed IDEA by **individually evaluating** students for special education. The fact that black students were

classified as eligible for SpEd at a rate 5.7% to 6.6% higher than white students was not evidence of race discrimination.

b. Request for Information (USDOE 6/14/14) The U S Department of Education published a request for information in the Federal Register seeking public comment on the steps it should take to address disproportionality based upon race and ethnicity in special education. You can review the [Federal Register](#) posting here.

c. Dear Colleague Letter 114 LRP 42907 (OCR 10/1/14) OCR noted the widespread racial disparity in access to educational opportunity across the country and reminded SDs of their obligations under Title VI of the Civil Rights Act of 1964 which prohibits both intentional discrimination and disparate impact.

**10. Part C/ Early Intervention** (illustrative cases)

a. Guidance on Inclusion in Early Childhood Programs (Depts of Education & Health & Human Services 9/14/15) The federal departments of Education and Health & Human Services issued guidance urging early learning programs to adopt inclusion of children with disabilities. The guidance urges school districts, states, lead agencies and other providers to ensure that children with disabilities receive high quality early learning programs in an inclusive setting. The policy statement asserts that "...all young children with disabilities should have access to inclusive high-quality early childhood programs, where they are provided with individualized and appropriate support in meeting high expectations. Children with disabilities and their families continue to face significant barriers to accessing inclusive high-quality early childhood programs, and too many preschool children with disabilities are only offered the option of receiving

special education services in settings separate from their peers without disabilities." You can find a link to the guidance at my [blog post](#).

b. Letter to Wedel 64 IDELR 313 (OSEP 7/10/14) OSEP noted that Part C regulations permit state lead agencies to use public benefits and insurance as potential funding for Part C services if the parent has consented or if the state has adopted cost protections.

c. WR v State of Ohio, Dept of Health 66 IDELR 69 (ND OH 8/27/15) Part C lawsuit dismissed where no prior **Part C dph**; no futility where no systemic issues.

### ***11. Private Schools***

a. RH by Emily H & Matther H v. Plano Independent Sch Dist 54 IDELR 211 (5th Cir 5/27/10) Court noted that under IDEA, placement in a **private school** is the **exception!** District of Columbia Public Schools (JG) 111 LRP 60092 (SEA DC 4/17/11) There is a clear preference under IDEA for public school over private school; District of Columbia Public Schools (JG) 111 LRP 75901 (SEA DC 8/21/11) (same; prospective private placements as relief are very unusual outside DC)

b. DM & LM ex rel EM v New Jersey Dept of Educ 801 F.3d 205, 66 IDELR 93 (Third Cir 9/10/15) The question of what constitutes a change of educational placement for stay put purposes is necessarily **fact specific**. Here the court found that the record was not particularly developed (eg. No IEP in the record.) The court ruled that the safest course was to keep the student in her current school as stay put until court below rules on parent's claim vs SEA re its **approval process** for **private school programs**. (SEA had downgraded approval of the private school in question for LRE

concerns claiming this was merely a change of location not a change of placement; court disagreed finding that services were intertwined with location.)

c. Doe ex rel Doe v East Lyme Bd of Educ 790 F.3d 440, 65 IDELR 255 (Second Cir 6/26/15) @n.9: Second Circuit ruled that an LEA is **not required to offer an IEP if** the parents expressed intention is to enroll the child in a private school outside the district and have no intention of having child attend public school (not here); AH by D'Avis v Independence Sch Dist 65 IDELR 149 (Missouri Ct App 4/7/15) Court rejected parent argument that their placement of the student in a private school in the SD entitled him to FAPE from the SD. SD has a **child find** duty and the requirement of **equitable services** but **no duty** to provide **FAPE** to private school students; NB ex rel ZB v State of Hawaii, Dept of Educ 63 IDELR 216 (D Haw 7/21/14) Court ruled that duty to provide FAPE begins when child is enrolled in public school; Contrast, LaGue v Dist of Columbia 66 IDELR 101 (DDC 9/16/15) Although LEA does not have to provide FAPE to students in private schools, it must make FAPE available by creating an IEP. Here Mgst rejected HO finding that LEA made FAPE available by offering an IEPT meeting to which parents did not respond for over two weeks; Dist of Columbia v Oliver 62 IDELR 293 (DDC 2/21/14) Court held FAPE denied where SD failed to prepare an IEP for a student in a private school even though parent never intended to enroll student in a public school (??); Dist of Columbia v Wolfire 62 IDELR 198 (DDC 1/16/14); Noce v Dist of Columbia 64 IDELR 112 (DDC 9/18/14) (same)(??).

d. Lebron & Portales ex rel KFPL v. Commonwealth of Puerto Rico 64 IDELR 95 (1<sup>st</sup> Cir 10/20/14) Where parents rejected IEP from school district and enrolled the student in a private school, parents filed suit against the district for \$6M claiming that

the district violated §504/ADA by not permitting them to file an LRE complaint against the private school. First Circuit dismissed the parents' claim because SD had **no duty to supervise a private school**, therefore no intentional discrimination.

e. Letter to Sarzynski 66 IDELR 51 (OSEP 7/6/15) Even where the parents of a child with a disability **live outside the United States**, the same rules regarding **child find** and **equitable services** apply to the LEA where the private school is located. OSEP encourages conference calls and video conferences to communicate with such parents.

f. Questions and Answers on Serving Students with Disabilities Placed by their Parents in Private Schools 111 LRP 32532 (OSERS 4/1/11) Whether home schooled child is in a private school is a matter of state law. **LEA** where the **private school is located** is **responsible for** child find, evaluation and propionate share.

g. Kornblut ex rel LK v Hudson City Sch Dist Bd of Educ 66 IDELR 66 (ND OH 9/2/15) Fact that student witnessed her father kill her mother in their home did **not mean** that she could only receive FAPE in a **private** school.

h. DM & LM ex rel EM v New Jersey Dept of Educ 66 IDELR 226 (DNJ 11/17/15) A **private school** where SD placed student has no private right of action **against SEA** under IDEA.

i. ZH ex rel ZH v NYC Dept of Educ 65 IDELR 235 (SDNY 5/28/15) Court ruled that **HO erred** by ordering as relief that the SD to place a student in a **private school** that had **not been approved** by the state. Unlike a unilateral placement by a parent- which can be in an unapproved school, an SD may only place a student in a school that **meets state standards**.

j. AM by Muschette v American Sch for the Deaf 65 IDELR 131 (D Conn 4/9/15) Court reversed previous ruling and held that exhaustion was not required for parent's §504/ADA claim where an IDEA **HO** would have no jurisdiction because the school was a **private school**.

k. **district of residence** is responsible for evaluation even after parent enrolls student in a private school: Bd of Educ of Township of Mine Hill v Bd of Educ of the Town of Dover 66 IDELR 19 (NJ Superior Ct, App Div 8/6/15) State appellate court ruled that SD = LEA of residence had the fiscal responsibility for student's private school placement. The court found no inconsistencies with this ruling and State Public School Choice Program Act.

m. Community County Day Sch v Sch Dist of the City of Erie 63 IDELR 228 (WD Penna 5/20/14) adopted by Dist Ct @ 63 IDELR 259. Mgst recommended dismissal of parent claim under **Medicaid freedom of choice** for lack of standing. Parents had the **freedom to choose** a private **therapeutic setting** for student's medical treatment, but parent **could not transfer** to the school district the **duty to pay** private school tuition where the SD had offered FAPE in a different setting.

## ***12. Charter Schools***

a. Dear Colleague Letter 115 LRP 46747 (U S Dept of Educ 9/28/15) The Department urged **SEAs** to increase their accountability and fiscal **monitoring of charter schools** and offers suggestions for ensuring that funds given to charter schools are used for intended purposes.

b. Dear Colleague Letter 63 IDELR 138 (OCR 5/14/14) Although the specific policy guidance does not pertain to IDEA, it does include a discussion of **charter**

**schools compliance with §504.** A portion of the report states as follows: under Section 504, every student with a disability enrolled in a public school, including a public charter school, must be provided a free appropriate public education—that is, regular or special education and related aids and services that are designed to meet his or her individual educational needs as adequately as the needs of students without disabilities are met. Evaluation and placement procedures are among the requirements that must be followed if a student needs, or is believed to need, special education or related services due to a disability. Charter schools may not ask or require students or parents to waive their right to a free appropriate public education in order to attend the charter school. Additionally, charter schools must provide nonacademic and extracurricular services and activities in such a manner that students with disabilities are given an equal opportunity to participate in these services and activities.

You can read the [guidance document](#) here.

c. Charlene R v Solomon Charter Sch 64 IDELR 208 (ED Penna 11/21/14) Where parent had reached an agreement with a charter school that later went insolvent, court required **SEA** to step in and defend breach of contract suit to ensure FAPE provided.

f. See, ADDITIONAL RESOURCES: Weber, Mark C., Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System (October 12, 2009). Loyola Journal of Public Interest Law, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1487667>; See, “Charters, Students With Disabilities Need Not Apply,” by Prof. Thomas Herir, (op-ed piece) Education Week online January 25, 2010,

[http://www.edweek.org/ew/articles/2010/01/27/19hehir\\_ep.h29.html?tkn=QQNC6AY97%2B01O7%2Bu4nwLnioyJY%2BAvdDbAtIU](http://www.edweek.org/ew/articles/2010/01/27/19hehir_ep.h29.html?tkn=QQNC6AY97%2B01O7%2Bu4nwLnioyJY%2BAvdDbAtIU)

**13. Attorney's Fees** (selected cases)

a. In Arlington Cent. Sch. Dist Bd. of Educ v. Murphy 548 U.S. 291, 126 S.Ct. 2455, 45 IDELR 267 (6/16/06) the Supreme Court ruled that a parent who prevails in an IDEA case is not entitled to recover **expert** witness fees under the Act's provision allowing recovery of reasonable attorney's fees and costs; McAllister v. Dist of Columbia 65 IDELR 284 (DC Circuit 7/14/15) DC Circuit ruled that a SpEd expert employed by law firm representing parents was an **expert** witness and **not a paralegal**, and therefore was not entitled to fees under Arlington decision. Expert's resume listed services like SpEd curriculum development and testifying at dphs. But see, MM & EM ex rel SM v Sch Dist of Philadelphia 66 IDELR 181 (ED Penna 11/3/15) Mgst recommended that parent be awarded **IDEA expert witness fees under §504**. Finding that a denial of IDEA FAPE is sufficient- no intentional discrimination necessary where parent had waived compensatory damages- and expert witness fees are available under 504.

b. DG by Catisha T v New Caney Independent Sch Dist 66 IDELR 209 (5th Cir 11/10/15) Fifth Circuit ruled that a parent's claim for attorney's fees need not be filed within IDEA's **time limit** for appeals; Meridian Joint Sch Dist No. 2 v. DA ex rel MA 792 F.3d 1054, 65 IDELR 253 (Ninth Cir. 7/6/15)(same); Doe v Boston Public Schs 64 IDELR 296 (D Mass 1/23/15) Court reversed its previous decision and ruled that S/L = 3 yrs); Pagan-Melendez v Commonwealth of Puerto Rico 64 IDELR 111 (DPR 9/16/14) Court applied a three-year statute of limitations to IDEA attorney's fee claims using a

similar territory statute of limitations; Suarez Martinez ex rel FSM v Commonwealth of Puerto Rico 63 IDELR 221 (DPR 7/16/14) (same). Contrast, Brittany O ex rel L v Bentonville Sch Dist 64 IDELR299 (ED Ark 1/22/15) 90 day time limit applies to attorney's fees petitions.

c. Eley v Dist of Columbia 793 F.3d 97, 65 IDELR 252 (DC Cir 7/10/15) DC Circuit reversed and remanded to lower court an award of \$625.00/hour because parent attorney failed to prove that his rate was in line with the **prevailing attorney fee rates** in the community for lawyers with comparable skill, experience and reputation. Here lawyer merely produced the Laffey Matrix (tool for lawyers in complex litigation.); Price ex rel JP v Dist of Columbia 792 F.3d 112, 65 IDELR 256 (DC Cir 6/26/15) DC Circuit ruled that prevailing parent is entitled to attorney's fees at the **prevailing rate** and reversed district court award limiting parent's attorney to \$90/hour under the Criminal Justice Act. Remanded for correct rate.

d. TB by Brenneise v San Diego Sch Dist 795 F.3d 1067, 66 IDELR 2 (Ninth Cir 7/31/15){see corrected opinion at 115 LRP 54544 (9<sup>th</sup> Cir 11/19/15)} Ninth Circuit reversed district court decision to cut off attorney's fees after settlement offer finding that SD settlement offer was **not more favorable** than the **relief obtained** by the parents; JO v Tacoma Sch Dist 64 IDELR 269 (WD Wash 1/5/15) (same); MM & EM ex rel SM v Sch Dist of Philadelphia 66 IDELR 181 (ED Penna 11/3/15) Court did not cut of attorney's fees where SD offer was made one day less than **10 days** before dph as required by IDEA; Guillermo G v Bd of Educ City of Chicago, Dist 299 64 IDELR 133 (ND Ill 10/20/14) Court held that SD offer of settlement did not bar later attorney's fees

for parent where offer included no attorney's fees and parent already owed \$20K, therefore parent refusal of offer was justified.

e. Sam K by Diane C & George K v State of Hawaii, Dept of Educ 788 F.3d 1033, 65 IDELR 222 (Ninth Cir 6/5/15) Ninth Circuit affirmed district court fee award.

f. Meridian Joint Sch Dist No. 2 v. DA ex rel MA 792 F.3d 1054, 65 IDELR 253 (Ninth Cir. 7/6/15) Ninth Circuit ruled that because parents had not proven that student was eligible for IDEA services, they were, **not a prevailing party** "who is a **parent** of a child with a **disability**" and therefore are not entitled to attorney's fees.

g. KC by Erica C v Torlakson 63 IDELR 276 (9<sup>th</sup> Cir 8/11/14) Where parents were seeking to assert right to attorney's fees under IDEA and not to enforce a provision of a settlement agreement, parents right to seek attorney's fees was not affected by a 30 month **time limit** contained in the settlement agreement for the District Court to hear claims related to compliance with the settlement agreement. Court asserted its ancillary jurisdiction and such jurisdiction is discretionary.

h. North Kingston Sch Committee v Justine R ex rel MR 65 IDELR 105 (DRI 3/12/15) mostly adopting MGST @ 65 IDELR 79. Court **reduced** parent's attorney's fees because of **unreasonable protraction** of litigation.

i. Shanea S v Sch Dist of Philadelphia 63 IDELR 161 (ED Penna 6/10/14) Mgst recommended that **financial hardship** resulting to school district was not sufficient reason to reduce parent attorney's fee award by more than \$42K. That school district would have to lay off hundreds of teachers, increase class sizes, sell several buildings and borrow millions to meet current obligations was not a defense; Charles O v Sch Dist of Philadelphia 64 IDELR 106 (ED Penna 9/26/14) Court rejected SD argument that parent

attorney fees should be reduced by 15% because the SD was in a severely **distressed** financial condition; EC & CO ex rel CCO v Sch Dist of Philadelphia 91 F.Supp.3d 598, 65 IDELR 33 (ED Penna 3/4/15) (similar).

j. Tillman v Dist of Columbia 66 IDELR 77 (DDC 7/29/15) adopted @ 66 IDELR 110. Mgst recommended that parent attorney's be awarded attorney fees for time spent **keeping abreast** of developments in student's **juvenile court proceedings** so that they could decide how to proceed in IDEA action (but no fees for time preparing and attending juvenile proceedings.)

k. MP v. Penn-Deko Sch Dist 66 IDELR 252 (ED Penna 11/20/15) Where parent entered into a settlement agreement with SD that included \$20K in attorney's fees for parent's lawyer, the clear and unambiguous language of the settlement agreement **waiving** all other claims vs SD barred a later suit for attorney's fees.

l. AR ex rel NB v NY City Dept of Educ 64 IDELR 174 (SDNY 10/28/14) Court ruled that the fact that a residential facility had **advanced** the parents' attorney's fees did not affect the parents right to be awarded attorney's fees as the prevailing party.

m. JH by Thomas v Bd of Educ of Pikeland Community Sch Dist # 10 63 IDELR 98 (CD Ill 5/1/14) Where ho had ordered that SD provide counselling and social schools, ho had indirectly addressed the issue of bullying of teen with depression, the only one of three issues in which parent prevailed, no deduction in attorney fees despite losing on other issues.

n. Dawn G & Tony G ex rel DB v Mubank Indep Sch Dist 63 IDELR 63 (ND Tex 4/7/14) Court awarded no attorney fees where the **only relief** was correction of harmless **procedural violations** that did not amount to denial of FAPE.

o. Bd of Educ Evanston Skokie Community Dist 65 v. Risen 63 IDELR 191 (ND Ill 6/24/14) Court ruled that the IDEA'04 restriction against attorney fees for resolution sessions did not apply to **mediations**. Court awarded fees.

p. JH by Sarah H v Nevada City Sch Dist 65 IDELR 77 (ED Calif 3/6/15) Settlement agreement lacked any judicial **imprimatur** therefore, no attorney's fees; YN by Gillamadrid v Clark County Schs 63 IDELR 7 (D Nev 3/20/14) HO **dismissal order** noting that the student **received compensatory education** as a part of a settlement was **not sufficient** judicial **imprimatur** to confer prevailing party status on parents for attorney's fees purposes; RBIII by Batten v Orange East Supervisory Union 66 IDELR 277 (D Vt 12/30/15) Where HO dismissed dpc after settlement in mediation, and dismissal did not mention settlement or change parties' legal relationship, insufficient imprimatur.

#### ***14. Parent Rights – in Student's Education***

a. Sheils ex rel MDS v Pennsburg Sch Dist 64 IDELR 143 (ED Penna 10/8/14) Although the Fourteenth Amendment protects a parent's **fundamental right** to make **decisions** about their children's' care, custody and control, court dismissed father's suit claiming that SD had violated this right by **always siding with his ex-wife** at IEPT meetings. Father had fully participated.

b. Letter to Anonymous 115 LRP 33158 (FPCO 5/1/15) There is nothing in FERPA that requires a SD to notify the parent with **joint custody** of its intent to comply with a subpoena from the other parent with joint custody. SD is permitted to, but not required to, notify the second **divorced parent**.

c. See cases under Representation by Lawyer and Parties

### *15. Maintenance of Effort*

- a. Memorandum to State Sch Officers 66 IDELR 20 (OSEP 7/27/15)

OSEP **clarified its rules** for maintenance of effort for SDs. A district is allowed to change its method of calculating local funding of SpEd for purposes of MOE. OSEP provides a series of Q & A re MOE- including one regarding its **subsequent year rule** which requires that an LEA meet the level of effort in the year after a failure that it would have been required to meet absent the failure.

- b. Letter to Chief State Sch Officers 63 IDELR 80 (OSEP 3/13/14)

OSEP noted that if an LEA fails to maintain effort by not spending enough funds, the **standard for the next year** is the amount spent in the previous year when the LEA did maintain effort and not the reduced amount that the LEA spent last year.

### *16. Technology*

- a. Questions & Answers on the National Instructional Materials

Accessibility Standards (NIMAS) 55 IDELR 80 (OSERS 8/1/10) OSEP clarified which students with **blindness and print disabilities** are eligible to use **NIMAS** materials.

- b. Dear Colleague Letter 114 LRP 7187 (US DOE 2/5/14) The Office

of Educational Technology informed public agencies that they could use a portion of federal **funds**, including IDEA \$, to support the **use of technology** to improve instruction and student outcomes. Egs are provided.

- c. Dear Colleague Letter 114 LRP 52614 (US DOE 1/19/14) The

Office of Educational Technology encouraged public agencies to **leverage IDEA and ESEA funding** for **digital technology** and learning.

- d. See the section on Assistive Technology

**17. Collaborative Process**

a. Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5). The Supreme Court noted that the IEP process is designed to be **collaborative** in nature.

b. MR & JR ex rel ER v. Ridley Sch Dist 744 F.3d 112, 62 IDELR 251 (3d Cir 2/20/14) The premise of IDEA is that parents and schools **working together** is the ideal way to reach the statutory goal of FAPE for every child, but Congress recognized that the collaborative process may break down.

c. Troy Sch Dist v KM 65 IDELR 91 (ED Mich 3/31/15) Court approved HO order that parent and SD work **cooperatively** was consistent with IDEA; LW v Egg Harbor Township Bd of Educ 65 IDELR 80 (NJ Superior Ct 3/10/15) State appellate court dismissed parent state anti-discrimination law claim for failure to exhaust IDEA remedies. Lack of exhaustion would run counter to Congress' view that parents and school districts need to work together collaboratively.

d. Oconee County Sch Dist v AB by LB 65 IDELR 297 (MD Ga 7/1/15) Court affd HO remedy, including **reduction** of reimbursement for transportation by **50%** where both parties derailed the **collaborative** process. @n.5: Court encourages the parties to **work together** in the interest of the student.

e. Midd West Sch Dist 112 LRP 45128 (JG) (SEA Penna 8/25/12) HO noted that the IEP process is to be collaborative in nature.

## *18. Court Issues: Immunity, Standing, Mootness, etc.*

### a. **Immunity**

1. CB v City of Sonora 114 LRP 45248 (9<sup>th</sup> Cir EN BANC 10/1514)

Ninth Circuit en banc ruled that police who **handcuffed** and removed from school property an eleven year old with ADHD for sitting quietly and resolutely (while being non-responsive) were **not entitled** to qualified immunity because no reasonable police officer would believe that this did not violate his 4<sup>th</sup> Amendment rights. Reversing CB v City of Sonora 730 F.3d 816, 113 LRP 37201 (9<sup>th</sup> Cir. 9/12/13) cited in previous outlines.

2. Wenk v. O'Reilly 783 F.3d 585, 65 IDELR 121 (Sixth Cir 4/15/15)

Sixth Circuit affirmed district court ruling that a school administrator was **not entitled** to qualified immunity from parent First Amendment §1983 action claiming retaliation for exercising their IDEA participation rights. After parent had advocated for an IEP for his daughter who has a cognitive disability, the SD director of pupil services filed a child **abuse complaint** with the child welfare agency. Previous critical emails showed animus toward parent. Allegations to the welfare authorities were either embellished or entirely fabricated. Administrator waited until three weeks after deadline for mandatory reporters to report abuse. Contrast, Tripp v Imbusch 62 IDELR 162 (D Mass 2/11/14) Court dismissed actions for defamation and First Amendment where principal had qualified immunity.

3. Brittany O ex rel L v Bentonville Sch Dist 64 IDELR299 (ED Ark

1/22/15) Court dismissed parent suit vs SEA because of **sovereign immunity**. Contrast, Jefferson County Bd of Educ v Bryan M & Doug M ex rel RM 66 IDELR 95 (ND Ala

9/21/15) Court denied SD motion to dismiss ruling that **SDs are not immune** from suit under Eleventh Amendment (only states have Eleventh Amendment immunity).

**b. Mootness/Ripeness**

1. TP by JP & BP v Bryan County Sch Dist 792 F.3d 1284, 65 IDELR 254 (Eleventh Cir 7/2/15) Eleventh Circuit ruled that parents request for an IEE was **moot** as LEA evaluation was **no longer current** because of triennial reevaluation process.

2. Boose v Dist of Columbia 786 F.3d 1054, 65 IDELR 199 (DC Cir 5/26/15) DC Circuit **reversed dismissal** of parent claim as **moot** where SD developed an adequate IEP for the student but provided no compensatory education as requested by the complaint. Compensatory education is intended to make up for prior deficiencies, therefore, claim not moot. {Reversing Latonya Boose v Dist of Columbia 63 IDELR 129 (DDC 5/22/14) in previous outlines }

3. KS v Rhode Island Bd of Educ 115 LRP 55545 (D RI 6/30/15) Court dismissed as **moot** claim by 21 year old challenging a statewide policy cutting off eligibility at age 21 and not 22 as in IDEA because SD agreed to provide services for an additional year thereby mooting claim; JM ex rel RM v Kingston City Sch Dist 66 IDELR 251 (NDNY 11/23/15) Where student had already graduated and received diploma, all remaining issues were moot.

4. JA & CA ex rel CA v Wentzville R-IV Sch Dist 65 IDELR 133 (ED Missou 4/16/15) Court dismissed IDEA appeal by parents because same facts as were previously dismissed by court, therefore no actual **case or controversy**.

5. Mars Area Sch Dist v CL by KB 66 IDELR 153 (WD Penna 10/16/15)  
SD appeal of HO decision in parent's favor in expedited discipline case was **moot** where parent enrolled student in a private school; Anmann v Wantzville R-IV Sch Dist 63 IDELR 101 (WD Missouri 4/23/14) Court dismissed parent claim as **moot** where parent had withdrawn daughter from public school and waived right to reimbursement.

6. KP v Dist of Columbia 66 IDELR 96 (DDC 9/18/15) Court found parent challenge to HO decision **not ripe** where LEA had not yet conducted HO ordered IEPT meeting; TS by Sharbowski v Utica Community Schs 64 IDELR 270 (ED Mich 1/5/15) Where parent had a dph scheduled for the next week, court dismissed because case was not ripe

7. Derek H by Rita H v Dept of Educ, State of Hawaii 116 LRP 19 (D Haw 12/29/15) adopting Mgst @ 66 IDELR 285. Court dismissed as **moot** where reimbursement already granted; JF by Abel-Irby v New Haven Unified Sch Dist 64 IDELR 212 (ND Calif 11/19/14) Court dismissed parent suit challenging SD MDR determination was moot where all available relief had already been provided, including an fba/bip.

8. San Diego County Office of Educ v Pollock ex rel MP 63 IDELR 193 (SD Calif 6/20/14) Court denied LEA motion to continue litigation where claim was **moot** after HO ordered a student formerly in juvenile hall to be placed in a residential facility. However, because of financial issues including the unfairness of other agencies not contributing; court remanded to HO re residential placement and instructed HO to dismiss.

### c. Standing

1.) Blunt v Lower Merion Sch Dist 767 F.3d 247, 64 IDELR 32 (3d Cir 9/12/14) Third Circuit held that an **organization** called Concerned Black Parents **lacked standing** to sue on behalf of **individual students** and their parents.

2.) Vanselous v Bucks County Intermediate Unit #22 63 IDELR 194 (ED Penna 6/18/14) Court dismissed IDEA claim for retaliation by SpEd teacher. Court adopted Mgst recommendation at 63 IDELR 169; no support for teacher having **standing** to sue under **IDEA**.

3.) Community County Day Sch v Sch Dist of the City of Erie 63 IDELR 228 (WD Penna 5/20/14) adopted by Dist Ct @ 63 IDELR 259. Mgst recommended dismissal of parent claim under **Medicaid freedom of choice** for lack of standing. Parents had the freedom to choose a private therapeutic setting for student's medical treatment, but parent could not transfer to the school district the duty to pay private school tuition where the SD had offered FAPE in a different setting.

### d. Private Right of Action

1.) Fairfield-Suisun Unified Sch Dist v State of Calif, Dept of Educ 780 F.3d 968, 65 IDLER 61 (Ninth Cir 3/16/15) Ninth Circuit ruled that an **LEA does not have an implied private right** of action to **sue SEA** for alleged mishandling of a state complaint investigation; East Ramapo Central Sch Dist v King 65 IDELR 239 (NY Supreme Ct, App Div 6/4/15) State appellate court ruled that LEA could not sue SEA under IDEA for SEA's monitoring and compliance actions. IDEA does not provide a private right of action for LEAs; San Diego Office of Educ v Pollock ex rel MP 64 IDELR 42 (SD Calif 9/6/14) The **IDEA provision** requiring **interagency cooperation**

did **not create** a private **right of action** for LEA to seek reimbursement from other agencies in fed court.

2). DM & LM ex rel EM v New Jersey Dept of Educ 66 IDELR 226 (DNJ 11/17/15) A **private school** where SD placed student has **no private right** of action against SEA under IDEA.

3). Southern ex rel NS v Fayette County Public Schs 63 IDELR 257 (ED KY 7/24/14) Court dismissed parent's FERPA complaint noting that **FERPA** does **not create** a **private right of action**; Fresno Unified Sch Dist v KU by AOU 980 F.Supp.2d 1160, 62 IDELR 83 (ND Cal 10/28/13) FERPA does not provide for a private cause of action; the remedy for violations is a loss of federal funds. Contrast, Pollack & Quirion ex rel BP v Regional Sch Unit #75 65 IDELR 206 (D Maine 4/29/15) Court found that **HO erred** by concluding that the **FERPA** complaint procedure was the only mechanism for resolving parent complaints that they have been denied **records** regarding their child. IDEA's legislative history shows that **IDEA** requires SD to provide parent with all records about a child upon parent request and failure can be **remedied under IDEA**. Court ordered SD to inform court what records were withheld.

4). AA & LA ex rel AA, Jr v Claris Unified Sch Dist 63 IDELR 224 (ED Calif 7/11/14) Court dismissed parent lawsuit for a stay put violation. **Stay put** is not itself an **independent** cause of action, it is a protection during the administrative process and litigation.

5). Vaneslous v Bucks County Intermediate Unit #22 62 IDELR 169 (ED Penna 1/24/14) adopted @63 IDELR 194. Mgst recommended dismissal of retaliation claim by **SpEd teacher** who claimed she was forced to resign because she was zealous in

securing rights of disabled students, ruling that there is **no private right** of action under IDEA for teachers- only students and parents.

**e. Other Issues**

JH ex rel DW v Williamsville Central Sch Dist 65 IDELR 203 (WDNY 5/4/15)  
Court overruled SD objection and **consolidated** parents' 504 and IDEA complaints into one action for judicial economy.

**1). Removal**

a. Delgado v Edison Township Bd of Educ 64 IDELR 215 (DNJ 11/5/14) adopts Mgst @ 64 IDELR 177. Court remanded parent claim for personal injury and discrimination to state court; mere **mention of an IEP** did **not** raise a **federal question**; Massimilla v Highley Unified Sch Dist # 60 65 IDELR 99 (D Ariz 3/27/15) Negligence complaint remanded to state court; SD had removed but mere mention of IDEA without an IDEA cause of action is not a federal question.

b. JA & CA ex rel CA v Wentzville R-IV Sch Dist 65 IDELR 133 (ED Missou 4/16/15) Court **remanded** state Human Rights Act claim to state court after dismissing IDEA claim. (SD had removed to federal court).

**2). Pleading/Service.**

a. Brittany O ex rel L v Bentonville Sch Dist 64 IDELR 166 (ED Ark 11/7/14) Court set aside **default judgment** vs SD where failure to answer where lawyer who failed to file answer acted in good faith; Olivia B ex rel Bijon B v Sankorfa Charter Sch 64 IDELR 170 (ED Penna 11/4/14) Court set aside default judgment vs charter school. {See Olivia B ex rel Bijon B v Sankorfa Charter Sch 63 IDELR 286 (ED Penna 8/6/14) preliminary order same case}; Luo v Baldwin Union Free Sch Dist 63 IDELR

281 (EDNY 8/12/14) Court excused answer 8 weeks late where parent had multiple dphs and where failure to answer was excusable neglect.

b. SM ex rel LC v Hendry County Sch Bd 64 IDELR 109 (MD Fla 9/23/14) Court dismissed with leave to amend the **quintessential shotgun complaint**. Parent IDEA/§504/ADA complaint was disjointed, disorganized, repetitive, and barely comprehensible- with such a lack of clarity that opposing party is unable to frame a response; Lamberth v Clark County Sch Dist 66 IDELR 244 (D Nev 12/7/15) Court dismissed parent complaint where they missed deadline in scheduling order.

c. Swanson by Swanson v Yuba City Unified Sch Dist 65 IDELR 197 (ED Calif 5/15/15) court denied motion to dismiss parent IDEA/504 appeal ruling that **thirty-three page complaint** was not excessive

d. Mr S ex rel BS v Regional Sch Unit 72 64 IDELR 136 (D Maine 10/16/14) Court ruled that SD could **not file a counterclaim** against parent attorney for fees because the **lawyer was not a party**.

e. Aaron v Gwinnett County Sch Dist 64 IDELR 16 (ND GA 8/19/14) Court dismissed parent lawsuit under IDEA/§504/ADA where parent failed to perfect **service of process**. She served complaint but not summons within 120 days.

f. Reyes v, Bd of Educ of the Bellmore & Merrick Sch Dist 63 IDELR 132 (EDNY 5/19/14) Court gave adult student two weeks to file **in forma pauperis** paperwork or have IDEA claim dismissed.

### 3). Collateral Estoppel/Res Judicata

a. Crawford v San Marcos Consolidated Independent Sch Dist 64 IDELR 306 (WD Tex 1/15/15) Mgst recommended dismissal of parent 504/ADA claims

where parent settled previous IDEA suit and signed waiver agreeing to dismiss all claims that were or could have been brought against SD to date. Second suit was dismissed because of waiver. Third suit was dismissed because of **res judicata**.

b. District of Columbia Public Schs (JG) 111 LRP 60125 (SEA DC 4/22/11) HO ruled that res judicata and collateral estoppel preclude a dph on claims that have been previously litigated or resolved through a **settlement agreement**;

4). **Pendant State Causes of Action**. (no significant cases)

5). **Interlocutory Appeals** (no significant cases)

6). **Class Certification & Class Actions**

a. PP v Compton Unified Sch Dist 66 IDELR 121 (CD Calif 9/29/15)

Court rejected plaintiffs argument in class action that **trauma from growing up in poverty** was in itself a **504 disability triggering child find**, but ruled that the physical or mental effects of such trauma might be a substantial limitation on a major life activity. Court denied SD motion to dismiss; PP v Compton Unified Sch Dist 66 IDELR 161 (CD Calif 9/29/15) Court denied plaintiffs' request for a preliminary injunction to require SD to train its staff on the effects of trauma on the ability to learn; PP v Compton Unified Sch Dist 66 IDELR 162 (CD Calif 9/29/15) Court denied 504/ADA class certification of students in high poverty area who suffered trauma where plaintiffs' experts did not address the effects of trauma on their education. Court gave plaintiffs leave to renew their motion with additional evidence; See my [blog post](#).

b. Smith by Thompson v Los Angeles Unified Sch Dist 62 IDELR 197 (CD Calif 1/16/14) Court denied parents' motion to intervene in a 20 year old class action

requiring compliance with LRE. Parent concerns re individual children were better addressed by individual dphs.

c. Emma C v Eastin 63 IDELR 226 (ND Calif 7/2/14) Court ruled that Walmart v Dukes does not impact the court's ability to manage the application of a consent decree in a class action; Emma C v Eastin 64 IDELR 12 (ND Calif 8/25/14) Court denied stay pending appeal in 18 year old class action order requiring SEA to comply with court monitored corrective action plan to correct flawed SEA oversight & monitoring; Emma C v Eastin 65 IDELR 130 (ND Calif 4/10/15) Court denied SEA motion for evidentiary hearing because monitor's report was too vague. SEA had not challenged similar reports for the last decade of this IDEA class action.; Emma C v Eastin 66 IDELR 245 (ND Calif 12/5/15) Court denied SEA motion to stay **a corrective action plan** recommended by court appointed monitor who had **found state level monitoring system inadequate** for ensuring FAPE; {same case: Emma C v Eastin 66 IDELR 72 (ND Calif 8/20/15) Court denied SD motion to set aside court monitor's report finding that court had authority under consent decree to review SEA compliance with monitoring of LEAS.}

e. Handberry v Thompson 66 IDELR 286 (SDNY 12/2/15) In a previous ruling in this class action, Handberry III 446 F.3d 335 (2d Cir 2006) Second Circuit ruled that defendants had to comply with **IDEA procedures re child find and developing IEPs** for inmates at Rikers Island. Here reacting to a report that inmates with disabilities in restricted housing were not receiving IDEA services, Mgst recommended at least 3 hours of educational services for each student although recognizing that IEPs might be modified to meet **penal objectives**.

f. GF v Contra Costa County 66 IDELR 14 (ND Calif 7/30/15) Court granted preliminary **approval of a settlement** of a class action requiring a county education department to **evaluate all students in juvenile hall** suspected of having a disability and to coordinate with probation and mental health agencies to ensure FAPE.

g. CC & PC ex rel AC v Sch Bd of Broward Fla 64 IDELR 67 (SD Fla 9/23/14) Court refused to certify class action of all students with autism as **overbroad**. Court noted that children with the same disability classification can have very different needs. Parents given leave to refile; Contrast, DC v Dist of Columbia 66 IDELR 185 (DDC 10/23/15) Court ruled that a subclass of all children age 3 to 5 whom the SD had failed to locate under its child find duty was **not too broad**.

h. RP-K by CK v Dept of Educ, State of Hawaii 64 IDELR 14 (D Haw 8/22/14) Court ruled that all class members (students where eligibility was terminated at age 20) were entitled to compensatory education and ordered LEA (SEA) to work with Mgst to calculate comp ed;

i. DL v Dist of Columbia 65 IDELR 226 (DDC 6/10/15) Court dismissed class action based on §504 where LEA recent efforts to improve IDEA compliance show no bad faith or deliberate indifference.

j. ADDITIONAL RESOURCE: Mark C Weber, “IDEA Class Actions After Wal Mart v Dukes,” publication forthcoming, University of Toledo Law Review, available here: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2363145](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363145)

## 7). Supremacy Clause

a. West Virginia Schools for the Deaf & Blind v AV by Darren V & Stacy V 58 IDELR 275 (ND WV 5/14/12) Court affirmed HO decision

requiring school for the deaf to continue student's program there rather than transfer her to home school district. A state law limiting enrollment that would have resulted in denial of FAPE under IDEA yielded under Supremacy Clause.

8). **Stay Pending Appeal**

a. Bd of Educ of the County of Boone WV v KM 65 IDELR 138 (SD WV 3/31/15) Court **denied** SD motion to **stay** enforcement of HO decision pending appeal. HO ordered SD to pay for private ABA services and when HO ordered that relief it became stay put. The fact that SD failed to pay does not justify stay; Dist of Columbia v Masucci 62 IDELR 228 (DDC 1/30/14) Court held that although HO decision placing a five year old in a private placement was likely wrong, SD erred by **simply ignoring it** rather than seeking a stay pending appeal. Court **denied belated** request for a **stay**.

b. Willington Bd of Educ v GW ex rel MW 65 IDELR 300 (D Conn 6/15/15) Court **refused to stay** compensatory education award pending appeal. Board was unlikely to win on appeal, HO award of private school placement as compensatory education was supportable and appropriate and student would likely be harmed by delay.

c. Emma C v Eastin 64 IDELR 12 (ND Calif 8/25/14) Court **denied stay** pending appeal in 18 year old class action order requiring SEA to comply with court monitored corrective action plan to correct flawed SEA oversight & monitoring; Brianna v Pittsburg Unified Sch Dist 63 IDELR 287 (ND Calif 8/4/14) SD sought a stay pending appeal of court's order that it evaluate the needs of student with MS, calling it a waste of time and money. Court refused stay.

## 9). Injunction

- a. Thurman v Mount Carmel HS 65 IDELR 192 (ND Ill 5/23/15)

Court **denied** parent request for an injunction requiring SD to permit student to participate in **graduation** ceremonies where they were unlikely to succeed on merits of their IDEA lawsuit; Miller ex rel TM v Monroe Sch Dist 66 IDELR 99 (WD Mich 9/16/15) Court **denied** parent request for temporary injunction to pay private school tuition. Parent had lost before HO and were **not likely to succeed** on merits.

- b. MW ex rel AW v NYC Dept of Educ 66 IDELR 71 (SDNY 8/25/15)

Court reversed HO conclusion that student had not right to IDEA services after 21<sup>st</sup> birthday and **granted** an injunction **extending her eligibility** for IDEA services finding substantial likelihood of success on appeal of SRO unfavorable decision.

- c. TH v Cincinnati Public Sch Bd of Educ 63 IDELR 189 (SD OH

6/27/14) Court refused to excuse exhaustion at dph merely because affidavit of speech pathologist said student was at risk of serious regression without ESY. Court **denied TRO** to place student in autism program for the rest of the summer.

- d. Abington Heights Sch Dist v AC 63 IDELR 97 (MD Penna 5/2/14)

Court **refused** to grant SD an injunction to undo a stay put order. SD had not shown likelihood of **success** on the merits or irreparable harm, but a temporary move could be harmful to the child.

10). **Court Costs** (no significant cases)

## 11). Federal Jurisdiction

- a. JH by Sarah H v Nevada City Sch Dist 65 IDELR 77 (ED Calif

3/6/15) Court dismissed parent breach of contract claim regarding settlement- where no

pendant or supplemental jurisdiction, **no federal question**; Chambers v Cincinnati Sch Bd 63 IDELR 93 (SD OH 5/13/14) Court dismissed lawsuit for negligence for injuries suffered by a SpEd student with diabetes during a sexual assault for a lack of a **federal question**. Court also dismissed for failure to exhaust. Despite the lack of connection between IDEA and the injuries suffered, and the parents not seeking relief for educational injuries, failure to exhaust was not excused.

b. San Diego Office of Educ v Pollock ex rel MP 64 IDELR 42 (SD Calif 9/6/14) Court dismissed LEA suit for breach of contract and reimbursement for a residential placement for a twelve year old in the juvenile justice system because there was **no federal question**. The IDEA provision requiring interagency cooperation did not create a private right of action. {See San Diego Office of Educ v Pollock ex rel MP 114 LRP 35529 (SD Calif 8/11/14) Court had ordered further briefs in this case. }

c. Brunswick Central Sch Dist v Gill Montague Regional Sch Dist 63 IDELR 282 (NDNY 8/12/14) Court dismissed for lack of a **federal question** a tuition reimbursement claim by a NY SD vs a Mass SD. If a Mass regulation requires its SDs to pay for a student in NY foster home, it is a matter of state law.

## 12). **Discovery**

a. Morton v Bossier Parish Sch Bd 63 IDELR96 (WD Louisiana 5/6/14) In an IDEA/§504/Fourteenth Amendment action, court upheld the validity of an **interrogatory** by parents of a teen who allegedly committed suicide after disability-based harassment. Interrogatory sought the **names, addresses and phone numbers** of all **students who attended class with the student for two years before his death**. Mgst noted that before complying with the interrogatory, SD must notify classmates and

parents of the court order to permit them to seek protective order under FERPA. Other interrogatories approved include discipline of bullies, etc; Letter to Soukup 115 LRP 18668 (FPCO 2/9/15) Consistent with the long-standing view of the Department of Education, FPCO ruled that **FERPA permits** a school to disclose to the parent of a **harassed** student information about the disciplinary sanctions imposed upon the perpetrators of the harassment (including stay away from the student; stay out of the school; or transfer to another class) FPCO noted that where any **civil rights laws** conflict with FERPA, the civil rights law **override** any conflicting provisions of FERPA.

### ***19. Retaliation vs IDEA Staff***

a. Vansalous v Bucks County Intermediate Unit #22 63 IDELR 194 (ED Penna 6/18/14) Court dismissed IDEA claim for retaliation by **SpEd teacher**. Court adopted Mgst recommendation at 63 IDELR 169; no support for teacher having standing to sue under IDEA.

b. O'Shea v Interboro Sch Dist 114 LRP 19334 (ED Penna 4/28/14) Court dismissed suit by **SpEd director** who claimed retaliatory discharge for asserting the statutory rights of students with disabilities in violation of §504/ADA. Court found long delays between the protected activity and the discharge.

c. U. S. ex rel Bachmann v Minnesota Transitions Charter Sch 64 IDELR 101 (D Minn 9/29/14) Court dismissed with leave to amend **SpEd teacher's** claim that her former employer, a charter, required her to include two hours of direct instruction on each student's IEP regardless of whether they actually received the instruction. Leave to amend was granted to explain how the funding mechanisms operated.

## ***20. IDEA – In General***

- a. Blunt v Lower Merion Sch Dist 767 F.3d 247, 64 IDELR 32 (3d Cir 9/12/14)

Third Circuit ruled that the school district properly followed IDEA by **individually evaluating** students for special education. The fact that black students were classified as eligible for SpEd at a rate 5.7% to 6.6% higher than white students was not race discrimination.

b. EL by Lorsson v Chapel Hill-Carrboro Bd of Educ 773 F.3d 509, 64 IDELR 192 (4<sup>th</sup> Cir 12/3/14) Fourth Circuit **upheld** the NC **two-tier dph** system even though the first tier was not held by the LEAs (1<sup>st</sup> tier = OAH; 2d tier = SROs for SEA). The court noted that the state has the primary role in setting educational policy and in resolving disputes under IDEA. **However** court noted that the result might be different if the state system in question had **numerous steps or onerous levels** of review as such would violate IDEA, but NC system was ok'ed.

c. Letter to Kane 65 IDELR 303 (OSEP 4/13/15) OSEP opined that once a factual determination has been made that an **LEA is unable** to establish or maintain programs that provide FAPE, an **SEA has the responsibility** to use payments that would have been available to the LEA or a state agency **to provide SpEd** and related services directly to the children residing in the LEA.

d. Letter to Chief State School Officers 63 IDELR 200 (OSEP 6/11/14) If SEAs use **school lunch program** data to **calculate** IDEA grants relative to the **number of children** living in **poverty**, SEAs must not include children receiving free meals who do not meet poverty guidelines. (New regs for school lunch program allow school districts to

eliminate eligibility requirements and to provide school lunch to all students regardless of poverty.)

e. Letter to Chief State School Officers 114 LRP 24552 (USDOE & USDHHS 5/30/14) DOE & DHHS expressed concern that some LEAs may be unaware of their responsibility for developing a **stability plan** in conjunction with child welfare agencies for **each child in foster care**. The two agencies released guidance on this topic on the Students in Foster Care website. Also the Uninterrupted Scholars Act amendments to FERPA affect the confidentiality provisions of IDEA.

f. Fresno Unified Sch Dist V KU 63 IDELR 250 (ED Calif 7/30/14) Court found that the **policies underlying IDEA** protect **students** and parents but not LEAs.

g. BC ex rel JC v Mt Vernon City Sch Dist 64 IDELR 49 (SDNY 8/28/14) Court ruled that parents in a §504/ADA suit could not use **statistics** that showed only that an SD policy adversely affected students with IEPs (ie, IDEA eligible) to prove discrimination against students with disabilities under §504/ADA.

h. Rivera-Quinones ex rel AVR v Dept of Education of Puerto Rico 65 IDELR 202 (DPR 5/4/15) In view of SEA's (also = LEA) **history of not acting with urgency** when it comes to the rights of SpEd students, court ordered SEA to provide the covered ramps needed by this student and to inform the court of its execution of the ramp project despite parent's failure to exhaust; Fortes-Cortes v Garcia-Padilla 66 IDELR 18 (DPR 7/23/15) Because of SEA's **history of non-compliance with HO decisions** in parents' favor, court allowed parent to forego exhaustion with dph to enforce a settlement agreement reached at IEPT meeting by going directly to court. Exhaustion was futile given SEA willingness to disobey judicial and administrative orders; Colon Vazquez v

Dept of Educ of Puerto Rico 64 IDELR 244 (DPR 12/4/14) Because of repeated failure of LEA (=SEA) to develop and implement an IEP for the student, the court issued an injunction with strict deadlines. The court concluded that court oversight is necessary because only the threat of contempt would persuade the LEA to fulfill its legal obligations. {See 64 IDELR 108 (same case) and Colon Vazquez v Dept of Educ of Puerto Rico 64 IDELR 244};

i. BR ex rel KO v New York City, Dept of Educ 113 LRP 118 (SDNY 12/26/12) at n1 Court notes that the opinion is replete with **acronyms**. “One suspects that regulators and **bureaucrats love such jargon** because it makes even simple matters cognizable only to the cognoscenti and this enhances their power at the expense of people who only know English...”

j. Other Resources:

1. NCES Statistical Report: The National Center for Education Statistics released a report - "The Condition of Education 2015." The report contains a wealth of information and statistics on education in America. You may review the entire [320 page report here](#). An "at a glance" [summary](#) is available here. Some of the [highlights](#) of the report are available here. Also please read my [blog post](#).

Here is a quote concerning some special education data:

"From school years 1990–91 through 2004–05, the number of children and youth ages 3–21 who received special education services increased, as did the percentage of total public school enrollment they constituted: 4.7 million children and youth ages 3–21, or about 11 percent of public school enrollment, received special education services in 1990–91, compared with 6.7 million, or about 14 percent, in 2004–05. Both the number and percentage of children and youth served under IDEA declined from 2004–05 through 2011–12, with some evidence of leveling off in 2012–13. By 2012–13, the number of children and youth receiving services under IDEA had declined to 6.4 million, corresponding to 13 percent of total public school enrollment." (emphasis added)

"... In 2012–13, some 35 percent of all children and youth receiving special education services had specific learning disabilities, 21 percent had speech or language impairments, and 12 percent had other health impairments (including having limited strength, vitality, or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia,

hemophilia, epilepsy, lead poisoning, leukemia, or diabetes). Children and youth with autism, intellectual disabilities, developmental delays, or emotional disturbances each accounted for between 6 and 8 percent of students served under IDEA. Children and youth with multiple disabilities, hearing impairments, orthopedic impairments, visual impairments, traumatic brain injuries, or deaf-blindness each accounted for 2 percent or less of those served under IDEA."

"About 95 percent of school-age children and youth ages 6–21 who were served under IDEA in 2012–13 were enrolled in regular schools. Some 3 percent of children and youth ages 6–21 who were served under IDEA were enrolled in separate schools (public or private) for students with disabilities; 1 percent were placed by their parents in regular private schools; and less than 1 percent each were in separate residential facilities (public or private), homebound or in hospitals, or in correctional facilities. Among all children and youth ages 6–21 who were served under IDEA, the percentage who spent most of the school day (i.e., 80 percent or more of time) in general classes in regular schools increased from 33 percent in 1990–91 to 61 percent in 2012–13. In contrast, during the same period, the percentage of those who spent 40 to 79 percent of the school day in general classes declined from 36 to 20 percent, and the percentage of those who spent less than 40 percent of time inside general classes also declined from 25 to 14 percent. In 2012–13, the percentage of students served under IDEA who spent most of the school day in general classes was highest for students with speech or language impairments (87 percent). Approximately two-thirds of students with specific learning disabilities (67 percent), students with visual impairments (64 percent), students with other health impairments (64 percent), and students with developmental delays (62 percent) spent most of the school day in general classes. In contrast, 16 percent of students with intellectual disabilities and 13 percent of students with multiple disabilities spent most of the school day in general classes."

2.. NCES Statistical Report:

The National Center for Education Statistics has released a report - "The Condition of Education 2014." You can find general information [here](#). You can download the entire report [here](#). The report provides data about level of education and employment; the status of rural education; how post-secondary education is financed and tons of other topics of interest to those who work in or are concerned about education.

**21. Other Causes of Action**

a. CB v City of Sonora 114 LRP 45248 (9<sup>th</sup> Cir EN BANC 10/15/14)

Ninth Circuit ruled that police who handcuffed and removed from school property an eleven year old with ADHD for sitting quietly and resolutely (while being non-responsive) were not entitled to qualified immunity because no reasonable officer would believe that this did not violate his 4<sup>th</sup> Amendment rights.{Reversing CB v City of

Sonora 730 F.3d 816, 113 LRP 37201 (9<sup>th</sup> Cir. 9/12/13) cited previous outlines}; Gohl ex rel JG v Livonia Public Schs 66 IDELR 122 (ED Mich 9/30/15) (4<sup>th</sup> Amendment & EP).

b. Williams v. Weatherstone 63 IDELR 109 (NY CT App 5/13/14) 4 to 3 majority of state appellate court ruled that **SD** was **not responsible** for injuries suffered by a student with ADHD and mild intellectual disability whose **IEP required transportation** where bus driver drove past the stop and student walked into a busy highway. Because student was not yet in the SD's custody, they were not **negligent** and not responsible for his injuries according to majority.

c. Cherry v Clark County Sch Dist 63 IDELR 103 (D Nev 4/22/14) Court dismissed parent **defamation** action alleging that SD employees emails describing student with autism and his various altercations were defamatory. Court noted that even if emails were slightly exaggerated, they were substantially true and therefore not defamatory. Court also dismissed claims for racial discrimination, privacy, emotional distress and negligent supervision; Tripp v Imbusch 62 IDELR 162 (D Mass 2/11/14) Court dismissed actions for defamation and First Amendment where principal had qualified immunity; Canders v Jefferson County Public Schs 64 IDELR 36 (WD KY 9/15/14) Court dismissed Parent's IDEA claim for failure to exhaust. SD had parent cited for criminal trespass but that did not excuse failure to file dpc. Court dismissed parent defamation action where parent requested resources for the student's behaviors and SD personnel suggested spanking them, psychiatric care and child protective services but parent could not shoe damage to reputation.

d. Lockhart v Willingboro HS 65 IDELR 141 (DNJ 3/31/15) Court dismissed parent §1983 action for EP, but declined to dismiss **Title IX** and **negligence** claims.

e. AKC by Carroll v Lawton Indep Sch Dist #8 63 IDELR 42 (WD Okla 3/26/14) Court dismissed remaining claims (**negligence, battery, emotional distress, civil conspiracy**) because not sufficiently plead; KRS by McClaron v Bedford Community Sch Dist 65 IDELR 272 (SD Iowa 4/20/15) Court dismissed negligence and emotional distress claims for bullying; Pollard ex rel JH v Georgetown Sch Dist 66 IDELR 98 (D Mass 9/17/15) (**negligence, emotional distress**, EP substantive and procedural DP; **First Amendment; Freedom of Association**)

f. JT ex rel AT v Dumont Public Schs 64 IDELR 248 (NJ App Ct 11/24/14) State appellate court dismissed parent claim under **state anti-discrimination** law; JA & CA ex rel CA v Wentzville R-IV Sch Dist 65 IDELR 133 (ED Missou 4/16/15) state anti-discrimination law; LW v Egg Harbor Township Bd of Educ 65 IDELR 80 (NJ Superior Ct 3/10/15). (same)

g. Spring v Allegany-Limestone Central Sch Dist 66 IDELR 157 (WDNY 9/30/15) (EP, DP, **First Amendment**); JR v NYC Dept of Educ 66 IDELR 32 (EDNY 8/20/15) (**Fourth Amendment**, First Amendment, EP all dismissed).

## 22. *AUTISM – selected cases*

a. Ermini v Vittori 114 LRP 31602, 2014 WL 3056360 (2d Cir 7/8/14) NOT a SpEd case! The Italian parents of a nine year old boy with autism moved to the United to obtain **ABA therapy** for their son. After some domestic violence, the marriage ended in divorce. The father sued under the **Hague Convention** as implemented in the

United States by the International Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq. to have his daughter returned to Italy. The Hague Convention is a treaty that provides for the return of children wrongfully removed from their country of habitual residence. The U. S. District Court in New York found that the student had benefited immensely from her ABA-based program, especially in the areas of communication, vocabulary, self-care and general cognition. The court found further that any hope that the child might lead an independent and productive life required a continued ABA program like the one offered by his school in the United States. The Court found it very likely that the child would not be able to have a similar educational program in Italy. The court ruled that the child could remain in the US because return to Italy posed a grave risk of harm to the child, one of the exceptions spelled out by the treaty. The Second Circuit affirmed noting that both the domestic violence history and the harm caused by the loss of the child's educational ABA-based program would pose a grave risk of harm to the child. The big question from our perspective is how this case will affect the IDEA analysis of ABA-based therapy. You can read the entire Second Circuit [decision here](#).

b. RL & SL ex rel OL v Miami-Dade County Sch Bd 757 F.3d 1173, 63 IDELR 182 (11<sup>th</sup> Cir 7/2/14) Eleventh Circuit (joining at least circuits 4, 6, & 8) held that IDEA permits reimbursement for an **ABA** 1:1 home-based program where the Burlington/Carter/Forrest Grove factors are met; SC by CC & SC v Palo Alto Unified Sch Dist 63 IDELR 124 (ND Calif 6/2/14) Court ruled that IDEA amendments concerning transfer students did not alter the stay put obligation. Stay put required that the new district approximate the **home-based ABA program** which was the last agreed upon placement from the student's previous district for the duration of the parties'

dispute; PS v NY City Dept of Educ 63 IDELR 255 (SDNY 7/24/14) Court rejected parent argument that a teen with autism needed **ABA-based program** to receive educational benefit. Court affirmed SRO decision that a 6:1 **TEACCH** program provided FAPE. Even if ABA is the superior methodology as parent's expert testified, SD has no obligation to maximize educational benefit or to use the parent's preferred methodology; AM ex rel EH v NYC Dept of Educ 66 IDELR 243 (SDNY 12/7/15) Court rejected parent argument that 7 year old with autism needed 1:1 instruction based upon **ABA** methodology to receive FAPE. Parent preference for ABA was not determinative and IEP properly left choice of methodology to professionals in the classroom.

c. Dear Colleague Letter 66 IDELR 21 (OSEP 7/6/15) OSEP reminded education agencies that **ABA therapy is just one methodology** that may be appropriate for a child on the autism spectrum, and that eligibility and services should be determined by the team after the child's unique needs have been determined by evaluation. Some districts have been leaning entirely on ABA therapists for **eligibility and services** and excluding speech language therapists and others.

d. Bd of Educ of the County of Boone WV v KM 65 IDELR 138 (SD WV 3/31/15) Court **denied** SD motion to **stay** enforcement of HO decision pending appeal. **HO ordered** SD to pay for **private ABA services** and when HO ordered that relief it became stay put. The fact that SD failed to pay does not justify stay.

e. ML by YL & CL v NYC Dept of Educ 65 IDELR 96 (EDNY 3/27/15) Parents objected to SD choice of methodology: **TEACCH** for a nine year old with autism; court rejected the argument noting that an SD is not required to use any particular teaching **methodology**. @n.12 court noted that an SD is not required to specify a methodology in

the IEP; JW & LW ex rel Jake W v NYC Dept of Educ 95 F.Supp.3d 952, 65 IDELR 94 (SDNY 3/27/15) Court rejected parents' speculative challenge to proposed placement; parents objected to ABA methodology. @n.7 court noted that parents do not have a right under IDEA to a specific teaching methodology, and in any event their claim was speculative where no evidence that school would not use other methodologies; GK & CB ex rel TK v Montgomery County Intermediate Unit 66 IDELR 288 (ED Penna 7/17/15) Although parents preferred Lovaas methodology, LEA provided FAPE by using a slightly different ABA method.

f. Morgan M by Barbara M & Arthur WM III v Penn Manor Sch Dist 64 IDELR 309 (ED Penna 1/14/15) Court reversed HO ruling. Court ruled that SD failure to label its services as “**autistic services**” as required by state law did not violate IDEA where the IEP provided a full range of services to address the student's identified needs.

g. FB & EB ex rel LB v NYC Dept of Educ 66 IDELR 94 (SDNY 9/21/15) **No transition plan required** for a change of schools by an autistic student.

h. QW by MW & KTW v Bd of Educ of Fayette County, KY 64 IDELR 308, aff'd in an UNPUBLISHED decision by 6<sup>th</sup> Cir @ 66 IDELR 212 (Sixth Cir 11/17/15) Student with autism was no longer eligible for SpEd where he performed off the charts academically and behavior was similar to other students. His autism no longer affected his educational performance. While ed performance extends beyond academics to behavioral/social issues at school, it doesn't apply to problems **only exhibited at home**.

i. Gates-Chili Central Sch Dist 65 IDELR 152 (Dept Justice 4/3/15) DOJ ruled that SD violated ADA by refusing to allow a student with autism to have a 1:1 **aide** to be the **handler** of his **service dog**.

j. KM v Chichester Sch Dist 65 IDELR 5 (ED Penna 2/10/15) Court denied SD motion to dismiss noting that **children with autism are particularly vulnerable** to injury therefore imposing a **lower standard** for **conscience shocking** behavior for viable §1983 claim (here state created danger/XIV dp claim- student left on bus asleep causing great anxiety); . SD by Brown v Moreland Sch Dist 63 IDELR 252 (ND Calif 7/29/14) Court refused to dismiss §504/ADA suit finding **deliberate indifference** because SD improperly used a **physical restraint** that traumatized her and because it ignored the head banging of a student with autism that was interfering with her ability to receive an education; Galloway v Chesapeake Union Exempted VIII Sch Bd of Educ 64 IDELR 129 (SD OH 10/27/14) In an action alleging that SD failed to respond to repeated incidents of bullying in violation of §504/ADA/§1983, Court allowed parents to present evidence of a settlement agreement in prior dph because the fact that SD only arranged for staff **training on autism** after parents filed a dpc was relevant to **deliberate intention** concerning the bullying.

k. PC & MC ex rel MC v NY City Schs 64 IDELR 100 (EDNY 9/29/14) Court found denial of FAPE where SD assigned a 13 year old with autism to a 6:1+1 class because district regarded the **6:1+1 placement as the standard** for students with **autism** instead of considering student's **unique needs**; Contrast, . BK &YK ex rel GK v NY City Dept of Educ 63 IDELR 68 (EDNY 3/31/14) A 6:1+1 setting with FT paraprofessional provided FAPE for a six year old with autism; Scott ex rel CS v NY City Dept of Educ 63 IDELR 43 (SDNY 3/25/14) 12:1+1 setting provided FAPE; EE ex rel GE v NY City Dept of Educ 64 IDELR 15 (SDNY 8/21/14) 6:1+1 setting provided FAPE.

1. LMP ex rel EP, DP & KP v Sch Bd of Broward County Fla 64 IDELR 66 (SD Fla 9/23/14) Court refused dismissal of §504 action by parent of triplets with autism noting that a statement by an SD employee that it **predetermined** student's IEPs because it **did not offer ABA therapy** as an intervention was sufficient evidence of deliberate indifference. HO erred by ruling that **ABA** therapy was **treatment** and not education that could be ordered under IDEA.

m. CC & PC ex rel AC v Sch Bd of Broward Fla 64 IDELR 67 (SD Fla 9/23/14) Court **refused to certify class action** of **all students with autism** as overbroad. Court noted that children with the same disability classification can have very different needs. Parents given leave to refile. Parents had claimed that SD had a practice of refusing ABA therapy as a matter of policy. Court noted that some students diagnosed with ASD would have no interest in ABA.

n. REB ex rel JB v State of Hawaii, Dept of Educ 63 IDELR 105 (D Haw 4/16/14) Court affirmed ho ruling that SD provided the **LRE** placement for a kindergarten student with autism where his IEP provided that he would receive specialized instruction in the **general education** setting in science and social studies "as deemed appropriate" by his SpEd and gen ed teachers; Bookout v Bellflower Unified Sch Dist 63 IDELR 4 (CD Calif 3/21/14) Court ruled that SD **denied LRE** to a first grade student with autism by moving him to a special day class from the general education classroom. SD had not provided sufficient training in autism for his gen ed teachers and student received significant academic and nonacademic benefit in gen ed classroom. Student had exhibited behaviors but SD did not provide the supports the teachers needed to address the behaviors.

o. SD by Brown v Moreland Sch Dist 63 IDELR 252 (ND Calif 7/29/14) Court refused to dismiss §504/ADA suit finding deliberate indifference because SD improperly used a physical restraint that traumatized her and because it ignored the head banging of a student with autism that was interfering with her ability to receive an education.

p. TH v Cincinnati Public Sch Bd of Educ 63 IDELR 189 (SD OH 6/27/14) Court refused to excuse exhaustion at dph merely because affidavit of speech pathologist said student was at risk of serious regression without ESY. Court **denied TRO** to place student in autism program for the rest of the summer.

### 23. *Systemic Issues*

a. MH by KH v Mount Vernon City Sch Dist 63 IDELR 17 (SDNY 3/3/14) Court refused to dismiss SEA as party to §504/ADA suit where complaint alleged that LEA had not corrected **systemic noncompliance** issues revealed in an independent audit years earlier;

b. Emma C v Eastin 66 IDELR 245 (ND Calif 12/5/15) Court denied SEA motion to stay a corrective action plan recommended by court appointed monitor who had found **state level monitoring system inadequate for ensuring FAPE**; {same case: Emma C v Eastin 66 IDELR 72 (ND Calif 8/20/15) Court denied SD motion to set aside court monitor's report finding that court had authority under consent decree to review SEA compliance with monitoring of LEAS; Emma C v Eastin 63 IDELR 226 (ND Calif 7/2/14) Court ruled that Walmart v Dukes does not impact the court's ability to manage the application of a consent decree in a class action; Emma C v Eastin 64 IDELR 12 (ND Calif 8/25/14) Court denied stay pending appeal in 18 year old class action order requiring SEA to comply with court monitored corrective action plan to correct flawed

SEA oversight & monitoring; Emma C v Eastin 65 IDELR 130 (ND Calif 4/10/15) Court denied SEA motion for evidentiary hearing because monitor's report was too vague. SEA had not challenged similar reports for the last decade of this IDEA class action. }

c. Easter v Dist of Columbia 66 IDELR 62 (DDC 9/8/15) Court ruled that 22 year old student stated a claim under §504 and denied motion to dismiss. An IDEA HO had previously ruled that SD had denied FAPE during a five year stay in a juvenile detention facility and ordered compensatory ed. SD then offered a choice of HS program with younger students or an adult ed program that would not address his SLD. **Failure to identify an LEA for students in juvenile detention was a systemic violation.**

d. LL by KL v Hastings on Hudson Union Free Sch Dist 65 IDELR 168 (SDNY 4/21/15) Court **excused exhaustion** where parent alleged **systemic** violations; Everett H by Harvey v Dry Creek Joint Sch Elementary Sch Dist 63 IDELR 39 (ED Calif 3/26/14) State complaint sufficient to excuse exhaustion where parents filed a state complaint (no dph) that challenged systemic SEA policies; {same case Everett H by Harvey v Dry Creek Joint Sch Elementary Sch Dist 66 IDELR 68 (ED Calif 9/1/15) Court refused to reconsider previous ruling.}; MH by KH v Mount Vernon City Sch Dist 63 IDELR 17 (SDNY 3/3/14) (exhaustion excused where systemic issues alleged); MG & VM ex rel YT v City of NY Dept of Educ 62 IDELR 195 (SDNY 1/21/14)(same); Contrast, WR v State of Ohio, Dept of Health 66 IDELR 69 (ND OH 8/27/15) Part C lawsuit dismissed where no prior Part C dph; no futility where no systemic issues;

e. Rivera-Quinones ex rel AVR v Dept of Education of Puerto Rico 65 IDELR 202 (DPR 5/4/15) In view of SEA's (also = LEA) **history of not acting with urgency** when it comes to the rights of SpEd students, court ordered SEA to provide the

covered ramps needed by this student and to inform the court of its execution of the ramp project despite parent's failure to exhaust; Colon Vazquez v Dept of Educ of Puerto Rico 64 IDELR 244 (DPR 12/4/14) Because of **repeated failure** of LEA (=SEA) to develop and implement an IEP for the student, the court issued an injunction with strict deadlines. The court concluded that court oversight is necessary because only the threat of contempt would persuade the LEA to fulfill its legal obligations. {See 64 IDELR 108 (same case) and Colon Vazquez v Dept of Educ of Puerto Rico 64 IDELR 244; Fortes-Cortes v Garcia-Padilla 66 IDELR 18 (DPR 7/23/15) Because of SEA's **history of non-compliance with HO decisions** in parents' favor, court allowed parent to forego exhaustion with dph to enforce a settlement agreement reached at IEPT meeting by going directly to court. Exhaustion was futile given SEA willingness to disobey judicial and administrative orders.

c. ADDITIONAL RESOURCE: Mark C Weber, "IDEA Class Actions After Wal Mart v Dukes," publication forthcoming, University of Toledo Law Review, available here: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2363145](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363145)

#### **24. Funding**

a. Letter to Kane 65 IDELR 303 (OSEP 4/13/15) OSEP opined that once a factual determination has been made that an LEA is unable to establish or maintain programs that provide FAPE, an **SEA** has the responsibility to **use payments** that would have been available to the LEA or a state agency to provide SpEd and related services directly to the children residing in the LEA.

b. Dear Colleague Letter 115 LRP 46747 (U S Dept of Educ 9/28/15) The Department urged SEAs to increase their accountability and **fiscal monitoring of**

**charter schools** and offers suggestions for ensuring that funds given to charter schools are used for intended purposes.

c. Letter to Chief State School Officers 63 IDELR 200 (OSEP 6/11/14) If SEAs use **school lunch** program data to **calculate** IDEA grants relative to the number of children living in **poverty**, SEAs must not include children receiving free meals who do not meet poverty guidelines. (New regs for school lunch program allow school districts to eliminate eligibility requirements and to provide school lunch to all students regardless of poverty.)

d. Dear Colleague Letter 114 LRP 7187 (US DOE 2/5/14) The Office of Educational Technology informed public agencies that they could use a portion of federal **funds**, including IDEA \$, to support the **use of technology** to improve instruction and student outcomes. Egs are provided.

### **25. Abuse/Neglect/ Mandatory Reporters**

a. Wenk v. O'Reilly 783 F.3d 585, 65 IDELR 121 (Sixth Cir 4/15/15) Sixth Circuit affirmed district court ruling that a school administrator was **not entitled to qualified immunity** from parent First Amendment/§1983 action claiming **retaliation** for exercising their **IDEA participation rights**. After parent had advocated for an IEP for his daughter who has a cognitive disability, the SD director of pupil services filed a **child abuse complaint** with the child welfare agency. Previous critical emails showed animus toward parent. Allegations to the welfare authorities were either embellished or entirely fabricated. Administrator waited until three weeks after deadline for mandatory reporters to report abuse.

b. GM & MCM ex rel CM v Brigantine Public Schs 65 IDELR 229 (DNJ 6/8/15)  
Court allowed parents to pursue §504 claim against school authorities where they alleged that school staff submitted a **false report of abuse & neglect** to child welfare authorities in **retaliation** for parent asserting their **IDEA rights**; Jenkins ex rel Jenkins v Butts County Sch Dist 65 IDELR 172 (MD Ga 4/20/15) (same); Contrast, BD by Davis v Dist of Columbia 64 IDELR 46 (DDC 8/30/14) Court dismissed §504/ADA retaliation claims by parent where state law requires SD to report children absent more than 10 unexcused absences in a school year for possible child neglect; Smith v Harrington 65 IDELR 95 (ND Calif 3/27/15) Court dismissed parent 504/ADA claim that SD retaliated against her for requesting IDEA evaluations and for reporting alleged bullying by filing an abuse and neglect complaint against her with child welfare authorities where parent had a history of aggressive behaviors and angry outbursts at the school causing the student to suffer from anxiety.

c. Graven & Briggs ex rel DGB v Greene Central Sch Dist 65 IDELR 144 (NDNY 3/31/15) Court dismissed parent complaint but allowed amendment where it was **unclear** whether student was in **custody** of a state agency **due to abuse and neglect**.

d. Ball v St Mary's Residential Training Sch 65 IDELR 233 (WD Louisiana 5/28/15) Court dismissed parent 504/ADA claim where she failed to allege discrimination on the basis of disability. **Parent allegations** of **abuse and neglect** by the **residential school** may constitute a breach of contract or negligence but not 504 or ADA.

## 26. *Medicaid/ Insurance*

a. United States ex rel Doe v Taconic Hills Central Sch Dist 63 IDELR 44 (SDNY 3/25/14) Court dismissed suit by feds against SD under False

Claims Act for billing Medicaid for IEP reviews. Court held that **SD was following procedures in state law** and that it is questionable whether federal law prohibits SD from billing Medicaid for IDEA services.

**27. SEA/LEA Regulations**

a. DM & LM ex rel EM v New Jersey Dept of Educ 66 IDELR 226 (DNJ 11/17/15) Court denied SEA motion to dismiss ruling that **parents have a right to challenge SEA regulatory activities under IDEA**. Here parent challenged a regulation prohibiting private schools from mainstreaming- thus making it impossible for private school to implement student's IEP.

b. KS v Rhode Island Bd of Educ 115 LRP 55545 (D RI 6/30/15) Court dismissed as moot claim by 21 year old challenging a **statewide policy** cutting off **eligibility at age 21** and not 22 as in IDEA because SD agreed to provide services for an additional year thereby mooting claim.

c. Ms S ex rel BB v Regional Sch Unit #72 65 IDELR 140 (D Maine 3/31/15) adopting 64 IDELR 202. Court adopted Mgst recommendation and ruled that **two contradictory state regulations** re dph S/L (4 and 2 years) should be read consistent with the legislature's intent as being a 2 year statute;

d. JG by Jimenez v. Baldwin Park Unified Sch Dist 65 IDELR 177 (CD Calif 3/20/15) **State regulation** requiring that possible referral to state school for the deaf must be discussed at IEPT meeting for deaf student are **enforceable in federal court under IDEA** (if state regs impose a greater duty and are not inconsistent with federal standards).

e. Bd of Educ of Township of Mine Hill v Bd of Educ of the Town of Dover 66 IDELR 19 (NJ Superior Ct, App Div 8/6/15) State appellate court ruled that SD = LEA of residence had the fiscal responsibility for student's private school placement. The court found no inconsistencies with this ruling and State Public **School Choice** Program Act.

f. SA by MAK & KS v NY City Dept of Educ 63 IDELR 73 (EDNY 3/30/14) (State regs **requiring fba** before bip caused a harmless procedural violation.) See cases on procedural violations.

g. Cupertino Union Sch Dist v KA by SA & JS 64 IDELR 275 (ND Calif 12/22/14) Court ruled that SD did not violate IDEA by refusing to permit ten year old with a seizure disorder to have receive home instruction. Doctor's note failed to provide the information required by state regs including a projected **return to school date**.

## ***28. SEA General Supervisory Responsibility***

a. Letter to Kane 65 IDELR 303 (OSEP 4/13/15) OSEP opined that once a factual determination has been made that an LEA is unable to establish or maintain programs that provide FAPE, an **SEA has the responsibility to use payments** that would have been available to the LEA or a state agency to provide SpEd and related services directly to the children residing in the LEA.

b. Dear Colleague Letter 115 LRP 46747 (U S Dept of Educ 9/28/15) The Department urged SEAs to increase their accountability and fiscal **monitoring of charter schools** and offers suggestions for ensuring that funds given to charter schools are used for intended purposes.

- c. Letter to Chief State School Officers 114 LRP 32168 (OSERS 5/21/14)  
OSERS solicited support for its **results driven accountability** (RDA) programs.
- d. Emma C v Eastin 63 IDELR 226 (ND Calif 7/2/14) Court rejected SEA's attacks upon the corrective actions recommended by the court monitor. SEA argued that because OSEP continued its funding, OSEP approved of its statewide monitoring. Court noted that OSEP funding did not mean this, but even if it did, the court declined to defer to OSEP. The court also upheld monitor's decision to review SEA's monitoring and oversight on a statewide basis rather than just the original SD;
- e. See cases and notes under sections on Hearing Officer Training and Qualifications.

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# *Hearing Officer Ethics, Bias, and Impartiality*

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## *I. BIAS – the Standard for Courts*

It is a fundamental component of due process of law that any trial or hearing must be held before an impartial tribunal. Goldberg v. Kelly 397 U.S. 254, 271 (1970). See also, Wong Yang Sun v. McGrath 339 U.S. 33, 45 (1950). To ensure justice, a tribunal must also give the appearance of impartiality. In re Murchison 349 U.S. 133, 136 (1955). Due process requires an impartial and disinterested tribunal. Marshall v. Jerrico, Inc. 446 U.S. 238, 242 (1980).

Thus, the decision maker must be free from bias against any party to the proceeding. Republican Party of Minnesota v. White 536 U.S. 765, 777 (2002). For example, a judge may not have a financial interest in ruling against one of the parties. Tumey v. Ohio 273 U.S. 510, 531-534 (1927); Aetna Life Ins. Co. v. Lavoie 475 U.S. 813, 822-825 (1986). It also violates the due process clause if a judge is inclined to rule against parties who do not bribe him. Bracy v. Gramley 520 U.S. 899, 905 (1997). A strong personal bias against a person or a group of people would also likely be a disqualification. See, NLRB v. Pittsburgh S. & S. Co. 337 U.S. 656 (1949); Berger v. U. S. 255 U.S. 22 (1921).

In a relatively recent and significant development, disqualification is now also required in cases where the appearance of unfairness is overwhelming. Caperton et al v. Massey Coal Co, Inc, et al \_\_\_\_ U.S.\_\_\_\_, 129 S.Ct. 2252 (USSCt 6/8/2009); <http://www.supremecourtus.gov/opinions/08pdf/08-22.pdf> In this case, the petitioners had won a \$50M jury verdict against Massey in a 2002 fraud case. In 2004, while Massey was appealing the decision, Brent Benjamin challenged sitting Justice Warren McGraw for a seat on West Virginia's only appellate court. Don Blankenship, President of Massey Coal, formed a 527 organization and spent over \$3M campaigning against McGraw. When Massey's appeal of the verdict reached the West Virginia

Supreme Court of Appeals, Benjamin refused to recuse himself and the state court ruled 3-2 to reverse the jury award.

The U. S. Supreme Court reversed the West Virginia court in a 5 to 4 decision. The majority opinion by Justice Kennedy explained that Blankenship's contributions "had a significant and disproportionate influence" upon Justice Benjamin's election and that there was a serious risk of actual bias. The opinion concludes that this risk is compelled recusal under the Due Process Clause. Although the majority gave no clear guidance for decision makers to follow in the future, it is clear that the appearance of bias may now be so extreme on a particular set of facts as to require disqualification even in the absence of actual bias.

It is not required, however, that the decision maker lack any opinions or predisposition regarding relevant legal issues that may arise in a case before her. Republican Party of Minnesota v. White 536 U.S. 765, 777-778 (2002); F.T.C.v. Cement Institute 333 U.S. 683 (1948). The Court has noted that a lack of preconceived views as to legal issues may really be undesirable, or even a lack of qualification, in a judge. Laird v. Tatum 409 U.S. 824, 825 (1972); Republican Party of Minnesota v. White 536 U.S. 765, 777-778 (2002).

## ***II. BIAS – the Standard for Hearing Officers***

There must be a showing of bias before an administrative decision maker will be required to recuse himself (i.e., step down). Without a showing to the contrary, a decision maker is assumed to be a person of "... conscience and intellectual discipline, capable of judging a particular controversy on its own circumstances." United States v. Morgan 313 U.S. 409, 421 (1941); Withrow v. Larkin 421 U.S. 35 (1975).

Specifically as to IDEA hearing officers, the Tenth Circuit has held that the hearing officer enjoys a **presumption** of honesty and integrity; the court ruled that the parents did not overcome that presumption by offering a substantial countervailing reason to conclude that the hearing officer was actually biased with respect to the factual issues being adjudicated. L.C. & K.C. on behalf of N.C. v. Utah State Board of Educ., et al 43 IDELR 29 (10<sup>th</sup> Cir. 3/21/05).

Other courts have similarly concluded that an IDEA due process hearing officer is afforded a presumption of honesty and lack of bias. (JG) AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13); Warrior Run Sch Dist (JG) 113 LRP 39220 (SEA Penna 9/10/13) An IDEA HO enjoys a **presumption** of honesty, integrity and freedom from bias that may be overcome only by a showing that HO has a conflict of interest or actual bias; Dell ex rel Dell v. Township High Sch Dist 113 32 F.3d 1053, 21 IDELR 563 (7<sup>th</sup> Cir. 8/9/94); Roland M v. Concord Sch Comm 910 F.2d 983, 16 IDELR 1129 (1<sup>st</sup> Cir. 8/3/90); Thomas ex rel A.J. v. District of Columbia 44 IDELR 246 (D.D.C. 7/29/05). (An IDEA hearing officer enjoys a presumption of honesty, integrity and freedom from bias. The presumption can only be rebutted by a showing of conflict of interest or some other specific reason indicating bias- the appearance of impropriety is insufficient. An incorrect ruling on a point of law and an ex parte communication concerning a typographical error were not sufficient to overcome the presumption); MN v Rolla Public Sch Dist # 31 59 IDELR 44 (WD Missouri 6/6/12) IDEA HOs are entitled to a presumption that they are unbiased. Accordingly, court rejected allegation of HO bias, noting that expressions of impatience, annoyance and even anger do not establish bias. Court held that HO did not argue on behalf of the district as parent had alleged; GM by Marchese v Drycreek Joint Elementary Sch Dist 59 IDELR 223 (ED Calif 9/7/12) HOs are entitled to a presumption that they are not biased that may be overcome only by a showing of actual bias or a clear inability to render a fair judgment; Nickerson-Reti v Lexington Public Schs 59 IDELR 282 (D Mass 9/27/12) See also, Mr & Mrs V ex rel HV v. York Sch. Dist. 106 LRP 32255 (D. Maine

5/17/6)(presumption of honesty and integrity); and Wissahickon Sch Dist 46 IDELR 149 (SEA PA 8/10/6) (The standard for impartiality of due process hearing officers approaches that for judges.); PB & JB ex rel MB v. State of New Hampshire, et al 17 IDELR 898 (D.NH 1991){“without a showing to the contrary...(HOs) are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.}; Walled Lake Consolidated Schs 40 IDELR 89 (SEA Mich 10/8/3); York County District Three 49 IDELR 178 (SEA SC 1/24/8) (presumption of impartiality.)

In some reported decisions, however, courts and reviewing officers have been critical of the actions of the hearing officer accused of bias. Derry Township Sch Dist 107 LRP 10891 (SEA PA 11/24/6) (SRO panel noted that they were troubled by the relationships between the HO, the parents’ lawyer and an SEA advisory board, but rejected bias allegations by the district where the appeal involved only an issue of law decided de novo by the SRO panel.); Paolella ex rel Paolella v. District of Columbia 46 IDELR 271 (D.C. Cir. 12/6/6) (HO’s reference to one participant in the hearing by his first name was lamentable, but does not show legal bias. Parents’ contention that HO was biased was rejected.); Wissahickon Sch Dist 46 IDELR 149 (SEA PA 8/10/6)(SRO panel noted that HO’s incomplete disclosures and failure to grant joint motion for recusal was imprudent, but not evidence of legal bias); Walled Lake Consolidated Schs 40 IDELR 89 (SEA Mich 10/8/3){(Long discussion of bias)HO exercised his discretion inappropriately, but no evidence of bias}; Knight ex rel JKN v. Washington Sch Dist 51 IDELR 209 (E.D. Mo. 12/22/8) Where ho panel chair dismissed 4 of 5 issues, and was asked by parent attorney to recuse self, chair then had **heated** exchange with the attorney on the record and dismissed the fifth issue in **retaliation** for the motion to recuse. Court reversed noting that especially dismissal of the fifth claim was improper because it denied parents an opportunity to present evidence, etc; Henry A. v. Wilden 678 F.3d 991, 112 LRP 22783 (9th Cir 5/4/12) Ninth Circuit refused to assign the case to a new district judge on

remand even though the Judge had expressed frustration with plaintiff's counsel and made a few troubling comments.

In most other decisions, the challenges alleging bias on the part of the hearing officer were ruled to be unfounded. JN & JN ex rel JN v South Western Sch Dist 64 IDELR 65 (MD Penna 9/24/14) Court rejected parent request to supplement record on appeal with evidence of HO bias. Parent did not sufficiently allege bias where she claimed that lawyer for SD also represented ODR (the agency that supervises hos) in a lawsuit by a former ho. A past working relationship with a party or counsel does not render HO biased; Williams by Williams v Milwaukee Public Schs 64 IDELR 237 (ED Wisc 12/12/14) Court rejected allegations of HO bias as baseless and the result of the parents' longstanding dissatisfaction with SD and the administrative process; Lofisa S ex rel SS v State of Hawaii, Dept of Educ 64 IDELR 163 (D Haw 11/14/14) Court rejected allegations of HO bias as unfounded; Avila v Spokane Sch Dist #81 64 IDELR 171 (ED Wash 11/3/14) Court rejected allegations of ho bias where no evidence suggested that HO was biased or dph unfair; In re Student with a Disability 58 IDELR 178 (SEA NY 1/5/12) SRO rejected allegations of HO bias, ruling that HO did not manifest bias toward parent by saying that the school **district's job here** "...is to show that we offered an appropriate program..."

Bd of Educ of the Williamsville Cent. Sch Dist 46 IDELR 294 (SEA NY 8/28/6) (HO's calling parent at 8:30pm after several unsuccessful calls during business hours was not evidence of bias. HO met standard requiring HOs to be fair and impartial and to avoid even the appearance of prejudice.); Sand v. Milwaukee Public Schs 46 IDELR 161 (E.D. Wisc 9/15/6) (Court rejected the parents allegations of bias. The fact that HO was a state employee (OAH) did not constitute bias. HO's ruling permitting the district to substitute attorneys was also not indicative of bias. Where parent forgot to make an opening statement, HO acted without bias in permitting the parent to make an opening statement in the middle of his presentation.); Renolett by Renolett v. Indep. Sch. Dist. No. 11, Anoka-Hennepin 42 IDELR 201

(D.Minn. 1/8/05). (The actions of the hearing officer in defining and narrowing the issues, and by making evidentiary rulings were not arbitrary or capricious. The Court ruled that the hearing officer did not act improperly.) Evergreen Sch. Dist. 106 LRP 18815 (SEA Wash. 2/7/6) (HO may ask questions of witnesses although HO must remain neutral and appear to be fair.); New York City Dept. of Educ. 106 LRP 22605 (SEA NY 3/21/6) (HO may ask questions of witnesses); Pittston Area Sch Dist 45 IDELR 110 (SEA Pa. 3/1/6)(Participation by SRO panel member in prior decision with same parties does not render him biased.); A.D. by Duell v. Clay Community Sch. Special Services 43 IDELR 192 (S.D.Ind. 3/17/05). (Where the parents did not raise the issue of whether the hearing officer should have recused himself during the administrative proceeding, the parents did not preserve the issue for appeal. The parents also sued the SEA. The court noted that naming the SEA as a defendant is no more appropriate than naming the clerk of court as a defendant when appealing the decision of a judge.) See also, Mr & Mrs V ex rel HV v. York Sch. Dist. 106 LRP 32255 (D. Maine 5/17/6)(HO must have opportunity to rule and make a record on the allegation of bias.); DM ex rel Michael M v. Pemi-Baker Regional Sch Dist 46 IDELR 267 (D. NH 8/31/4)(HO decision was justifiably critical of the parent; HO exercised great patience under trying circumstances.); Kattan v. District of Columbia 691 F.Supp. 1539, 441 IDELR 207 (D.DC 1988)(HO abrupt but not biased); Delaware Valley Sch Dist 38 IDELR 224 (SEA PA 2/14/3); Fallmouth Sch Comm v. Mr & Mrs B ex rel PB 106 F.Supp.2d 69, 32 IDELR 256 (D. ME 7/11/00) (that HO had a child with a disability not a disqualification, and insufficient evidence of ex parte communication).

Other decisions finding no bias include: PC & MC ex rel KC v. Oceanside Union Free Sch Dist 56 IDELR 252 (EDNY 5/24/11) Court rejected implication that SRO's credibility determinations were biased where the decision was a lucid and well reasoned opinion. HO's credibility determinations were thoroughly discussed. In n.5 to decision court notes that parent counsel complained of the HO's "fabricated **lunacy**." Court reprimanded parent counsel for ad hominem attacks; EJ by Tom

& Ruth J v. San Carlos Elementary Sch Dist 803 F.Supp.2d 1024, 56 IDELR 159 (ND Calif 3/24/11) Court rejected parent argument that HO conducted a prejudicial and inaccurate hearing. Court found instead a thoughtful and detailed analysis in the decision entitled to significant weight; Clark County Sch Dist (LB) 111 LRP 65198 (SEA NV 8/26/11) SRO ruled that HO did not err in failing to recuse himself where there was no evidence of bias; Allyson B By Susan B & Mark B v. Montgomery county Intermediate Unit # 23 54 IDELR 164 (ED Penna 3/31/10) Court ruled that HO was not required to recuse himself or to disclose his past relationship with defense counsel or his current working relationship with defense counsel's wife (also a HO); Sundbury Public Schs v. Mass Dept of Elementary & Secondary Schs 55 IDELR 284 (D. Mass 12/23/10) Court ruled that HO's clarifying of issues and questioning of Ws did not reveal bias; SA by CA v. Exeter Unified Sch Dist 110 LRP 69145 (ED Calif 11/24/10) Court upheld the right of the HO to ask questions and found no credit in the parent's allegations that the Qs were adversarial or lacked impartiality; LF by Ruffin v. Houston Indep Sch Dist 53 IDELR 116 (S.D. Tex 9/21/9) Court rejected parent allegations of HO bias where parent produced no evidence that HO and district lawyer were close friends, partners, lovers and that decisions were based upon "**bedroom affairs**;" . McComish v. Underwood Public Schs 49 IDELR 215 (D. ND 3/6/8) Parent claim of HO bias was not supported by the evidence; York County District Three 49 IDELR 178 (SEA SC 1/24/8) Where HO showed no evidence of bias and displayed careful reasoning, no bias found by SRO; AG & LG ex rel NG v. Frieden 52 IDELR 65 (S.D,NY 3/25/9) Court found no evidence of HO bias where HO was patient and afforded both parties an opportunity to present evidence; WH by BH & KK v. Clovis Unified Sch Dist 52 IDELR 258 (E.D. Calif 6/8/9) Ct ruled no evidence of HO bias where HO ruled consistently on objections; HH by Hough v. Indiana Bd of Special Educ Appeals 50 IDELR 34 (N.D. Ind. 4/11/8) Being paid by the SEA to teach a workshop for school administrators does not constitute evidence of bias, eventual dismissal by court.

Also in WT & KT ex rel JT v. Bd of Educ Sch Dist of NY City 716 F.Supp.2d 270, 54 IDELR 192 (SD NY 4/15/10) Court rejected allegation that SRO Paul Kelly was biased. Parent cited *Massey Coal* decision by SCt, and alleged bias because SRO lives with an SEA lawyer and because a Wall St Journal article stated that he ruled for LEA in an overwhelming number of cases before him. Ct found no evidence of actual bias (Is this the standard after *Massey Coal*?); See similar unsuccessful allegations in: CG & LG ex rel BG v. NY City Dept of Educ 55 IDELR 157 (SD NY 10/25/10); ES & MS ex rel BS v. Katonah-Lewisboro Sch Dist 55 IDELR 130 (SD NY 9/30/10); and BJS ex rel NS v. State Educ Dept, University of State of New York 57 IDELR 166 (WDNY 8/31/11) (adopted by court at 57 IDELR 195); HC & JC ex rel MC v. Katonah-Lewisboro Union Free Sch Dist 59 IDELR 108 (SDNY 5/24/12) Court declined parent request to give SRO no deference because of alleged bias; WSJ article and allegation re romantic relationship with SEA lawyer were all based upon inadmissible evidence; RB ex rel AB v Dept of Educ, City of NY 61 IDELR 80 (SD NY 4/11/13) Court rejected parent argument that SRO was biased based upon WSJ articles and allegation re romantic relationship with SEA lawyer where parent claim was untimely as SRO had correctly ruled.

### ***III. Bias Bottom Line: Two Rules for All Hearing Officers***

#### ***A. 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. In conducting the hearing and in rendering the decision, fairness must be the primary consideration. Moreover, the strong policy underlying the due process clause involves fairness. The reasoning of the United States Supreme Court in the seminal cases of Goldberg v. Kelly, supra, and Matthews v. Eldridge, supra, focused upon the concept of fairness. Thus, fairness in our hearings is also a constitutional mandate.

Accordingly, fairness must be the guiding principle for those who conduct due process hearings and who write decisions. In general, hearing officers are accorded wide discretion in conducting a hearing and in writing decisions, and they must exercise that discretion in a fair and impartial manner.

A hearing officer should make disclosures of any matters which might be construed to constitute actual bias to all parties and counsel at the earliest opportunity. In such cases, the hearing officer should only continue to serve if all parties have agreed that he should after full and complete disclosures have been made.

Motions to recuse (or remove) the hearing officer should be ruled upon promptly and in conformity with any state rules or procedures. Where such a motion is denied, the hearing officer should ensure that an adequate record has been created in the event of review by a court or review officer.

A good discussion of the considerations involving impartiality is set forth in Section III. of the Model Code of Ethics promulgated by the National Association of Hearing Officials. See the website, <http://naho.org/Model-Code-of-Ethics> In addition, in

some states the Judicial Code of Conduct applies to administrative hearing officers. In such states compliance with these rules is mandatory. Even in states that do not require compliance with the ethical rules for judges, however, it is wise for administrative hearing officers to utilize these rules as guidance. For example, see the Oklahoma Code of Judicial Conduct which is available at <http://www.oscn.net/applications/OCISWeb/index.asp?level=1&ftd b=STOKST05>

### ***B. 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 legal system requires the belief that the system is fair. Respect for the rule of law cannot exist in the absence of such public confidence. Accordingly, the appearance of fairness in all legal proceedings, as well as actual fairness in such proceedings, plays an important role in a system that relies upon the rule of law.

For due process hearing officers, whether or not they are lawyers, giving the appearance of being fair is almost as critical as being fair. Having had the fairest hearing in the world means nothing to the party who believes that he has just been to a kangaroo court. By the time that parties get to a due process hearing, they are often angry, if not outraged. Parents often feel that district personnel are messing with their child. District officials often feel that the parents are being unreasonable. Now they are being forced into a “legal” proceeding

Imagine how a party to a hearing would feel if, in addition to all the elevated emotions they have entering a hearing, they now believe that the hearing and decision will be unfair. Hearing officers should remember treatment that they have received from

a judge, or other person in a position of authority, whom they feel was unfair. Parties to a hearing should never leave the hearing with that feeling of unfair treatment. It is incumbent upon the hearing officer to ensure that the parties believe that the hearing process has been conducted in an absolutely fair manner.

In order to avoid even the appearance of unfairness, the hearing officer should take extraordinary steps to make it abundantly clear that the hearing officer does not favor one party or attorney over the other. In this regard, the hearing officer should never call one lawyer or party by their first name and the other by their last name. There should be no discussion of experiences shared by the hearing officer with one party or lawyer. The hearing officer should never go to lunch with any party or lawyer. (If there is a court reporter at the hearing, that is the only person with whom you can eat.) The hearing officer's demeanor during the hearing and his tone in the decision should reflect a proper judicial temperament. A professional decorum should be maintained at all times. The dignity of the process should never be in doubt.

The hearing officer also should avoid all types of ex parte communications, i.e., communications with one attorney or party without the other side being present. Obviously, the substance of a case should never be discussed unless all parties and their lawyers are present. Even communications as to non-substantive matters, however, should be avoided unless both sides are present. The danger of ex parte communications is that the party who is not present may well fear that the merits of the case were discussed in a private meeting or conversation by the opposing party with the hearing officer. Such a fear in itself could vitiate the appearance of impartiality, thereby making it impossible for the party to believe that the hearing will be fairly conducted and the decision will achieve a fair result.

Avoiding the appearance of partiality or unfairness also require the hearing officer to make appropriate disclosures of prior relationships with the parties and their counsel at the

prehearing conference or some other early interaction with the parties. I disclose all past interactions with the lawyers and parties. Although this at times may seem extreme or even absurd, I find that disclosure of even brief interactions or encounters tends to make the parties, especially pro se parties, feel more confident that the hearing process will be fair. When a hearing officer is in doubt as to whether a disclosure should be made, a good rule of thumb is to make the disclosure.

The appearance of impartiality and fairness also requires that the hearing officer maintain strict confidentiality. No matter how juicy the facts of a hearing may have been, they are not a proper topic of conversation at a cocktail party. The hearing officer's decision should avoid reference to personally identifiable information to the extent possible. Office staff, especially typists, should be made aware of, and periodically reminded of, the requirement that they also keep all matters related to a due process proceeding strictly confidential.

When using social media, a hearing officer should exercise extreme caution to make sure that the considerations outlined above are not implicated.

My favorite anecdote about the appearance of unfairness involves the hearing officer who was asked by a party at a break in the hearing whether he had change for a five dollar bill. The hearing officer hands five ones to the party who pockets them and hands the hearing officer the \$5 bill. Just then the other pro se party comes around the corner and says to the hearing officer, "I don't really mind you selling my case, but I think that you should have held out for more than five bucks."

The appearance of fairness is obviously not a shortcut to avoid the cardinal requirement that the hearing truly be conducted fairly. The appearance of fairness is not meant to be a disguise for an unfair proceeding. Rather, the requirement of the appearance of fairness is an additional requirement. The hearing must itself have been 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 follows the mandate of the due process clause.

If a hearing officer religiously follows these two rules, any hearing she conducts should comport with the requirements of the due process clause. Scholars and courts will likely continue to argue concerning the contours of legal doctrine in the vast field of procedural due process, but hearing officers must implement the constitutional mandate. If the hearing has been conducted fairly and with the appearance of fairness, the likely result is that due process of law has been accorded to the parties.

A good discussion of the considerations involving ex parte communications, decorum and confidentiality is set forth in Sections V., VI. and IX. of the Model Code of Ethics promulgated by the National Association of Hearing Officials. See the website, <http://naho.org/Model-Code-of-Ethics> In addition, in some states the Judicial Code of Conduct applies to administrative hearing officers. In such states compliance with these rules is mandatory. Even in states that do not require compliance with the ethical rules for judges, however, it is wise for administrative hearing officers to utilize these rules as guidance. For example, see the Oklahoma Code of Judicial Conduct which is available at <http://www.oscn.net/applications/OCISWeb/index.asp?level=1&ftdb=STOKST05>

#### ***IV. Twenty-first Century Ethics Issues for Hearing Officers: Electronic Social Media (Facebook, LinkedIn, Twitter, etc.)***

A. Some opinions {NOTE: the following ethics opinions apply to Article III judges. The inquiry for us then is whether the same or similar rulings do or should apply to administrative hearing officers such as those who hear IDEA cases. This collection was compiled by ALJ Carol Greta of Iowa and are used here with her permission}:

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?”**

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 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)

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 (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.)

- (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. 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."
- (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. 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. Rule 2.10 sets forth several restrictions on judicial speech.
- (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
- (10) A Judicial Official may not give legal advice to others on a social networking site. Rule 3.10
- (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
- (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, 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.

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.

**B. 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.

## V. Other Resources:

A. Pennsylvania Standards of Conduct for Office for Dispute Resolution (ODR) Special Education Hearing Officers  
<http://odr-pa.org/wp-content/uploads/pdf/PA-Standards-of-Conduct-for-Hearing-Officers.pdf>

B. Model Code of Ethics promulgated by the National Association of Hearing Officials  
<http://naho.org/Model-Code-of-Ethics>

C. Model Code of Judicial Conduct  
[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html)

D. Model Code of Conduct for State Administrative Law Judges  
[http://www.naalj.org/assets/documents/publications/naalj\\_%20model\\_code\\_of\\_judicial\\_conduct\\_for\\_state\\_aljs.pdf](http://www.naalj.org/assets/documents/publications/naalj_%20model_code_of_judicial_conduct_for_state_aljs.pdf)

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