DEUSDEDI MERCED

307 Good Hill Road · Weston, CT 06883 · (203) 557-6050 · dmerced@spedsolutions.com

Admitted to practice in New York, Massachusetts and D.C.
United States Supreme Court, May 2003
U.S. District Court, S.D.N.Y., February 2003
U.S. District Court, E.D.N.Y., February 2006
Fluent in conversational Spanish

CAREER PROFILE

Expert in special education law and accomplished litigator with over 20 years of experience advocating for children. Represented the nation's largest school district, as well as hundreds of parents of children with disabilities. Currently work as a neutral, consulting with various state educational agencies under multi-year contracts, including New York, Illinois, and Hawaii.

ACCOMPLISHMENTS

Presided over more than 200 impartial due process hearings regarding the provision of special education and services to students with disabilities pursuant to the Individuals with Disabilities Education Act (IDEA).

Litigated hundreds of special education cases at the administrative and federal court levels.

Recovered more than 10 million dollars of private, special education tuition costs for parents of children with disabilities, and also saved the New York City Department of Education millions of dollars in potential liability.

Featured speaker in nationally recognized conferences on legal issues of educating individuals with disabilities.

EXPERIENCE

SPECIAL EDUCATION SOLUTIONS, LLC, WESTON, CT
Managing Member, August 2015 – Present

Multi-service consultant on issues relating to children with special needs. Functions to provide state educational agencies with consulting services and/or legal advice on all matters related to special education, including, but not limited to, implementing, and complying with, IDEA and Section 504; provide systems consultation and evaluation, as well as compliance and policy reviews; offer professional development and/or training presentations; and serve as special counsel in impact or class action suits where the state educational agency is a party. (Prior to acquiring ownership interest in Special Education Solutions, LLC, consulting services provided between July 2008 and July 2015 listed below were through Deusdedi Merced, P.C.)

Current contracts include:

New York State Education Department
July 2011 – Present

Serve as Trainer and Program Director of contract. Establish standard and specialized training programs (onsite and webcast) for the 100+ Impartial Hearing Officers, Office of State Review personnel, and Education Department staff and provide and coordinate continuing education programs and services for the attendees. As appropriate, recommend to the Education Department any revisions to New York law, regulation, policy or procedures necessary or desirable to enhance the operation of the hearing process. Provide technical assistance to Impartial Hearing Officers and NYSED personnel on an as needed basis. Conduct new hire, Impartial Hearing Officer training on all aspects of the IDEA, including its implementation, once per contract term or upon request of the NYSED. Upon request, conduct external reviews of NYSED program offices or local educational agencies and provide written reports of findings.

Illinois State Board of Education
July 2012 – Present

Establish standard and specialized training programs for Impartial Hearing Officers and provide and coordinate continuing education programs and services for Impartial Hearing Officers, both individually and as a group. Provide technical assistance to Impartial Hearing Officers and ISBE personnel on an as needed basis. Conduct new hire, Impartial Hearing Officer training on all aspects of the IDEA, including its implementation, once per contract term or upon request of the ISBE.

Nevada Department of Education
June 2013 – Present

Serve as IDEA review officer of appeals from the first tier.

Hawaii Department of Education
June 2017 – Present

Assisting with the transition of the IDEA due process hearing system from one agency to another. Establish standard and specialized training programs (onsite and webcast) for the IDEA Impartial Hearing Officers and Education Department staff. As appropriate, recommend to the Education Department any revisions to Hawaii law, regulation, policy or procedures necessary or desirable to enhance the operation of the due process hearing system. Provide technical assistance to Impartial Hearing Officers and HIDOE personnel on an as needed basis.

<u>Former contracts include</u>:

Arkansas Department of Education
January 2016

Consulted with the Department on its special education regulations and provided feedback on how the state's regulations and practices may be improved to align with the IDEA and best practices.

New York State Education Department
November 2014

Served as lead trainer and conducted five-day training in New York City for 34 IDEA hearing officer candidates. Assessed candidates' performance vis-à-vis written assignment and made recommendations to State Education Department.

New York State Education Department
April 2014 – October 2014

Conducted external review of Education Department's Office of State Review resulting in a written report of findings, conclusions and recommendations addressing the Office of State Review's noncompliance (as determined by OSEP) since April 2012 with the 30-day decision timeline prescribed in federal and State regulations.

District of Columbia – Office of the State Superintendent of Education
August 2008 – December 2013

Served under contract as the Chief Hearing Officer for the District of Columbia's Special Education Due Process Impartial Hearing System. Monitored and supervised the timelines and quality of the special education hearing process and decisions through the provision of training, observation, review of decisions and administrative records, and feedback. Provided and coordinated continuing education programs and services for Impartial Hearing Officers, both individually and as a group, including research, technical assistance, compilation and dissemination of information, and advising of changes in the law relative to their duties. Evaluated the performance of individual Impartial Hearing Officers over the period of appointment consistent with established performance criteria and standards and, when appropriate, recommended discipline for an individual Impartial Hearing Officer who did not meet appropriate standards of conduct and competence in accordance with established directives.

Presided over impartial due process hearings involving disputes over the provision of special education to students in District of Columbia schools pursuant to the IDEA. Conducted prehearing conferences and issued prehearing orders that often disposed of all or part of each complaint, reviewed expert reports and other documentary evidence for admissibility, decided motions and evidentiary objections, received expert and lay testimony, and conducted examinations of witnesses. Interpreted federal education regulations, researched case law, determined remedies and sanctions, and issued decisions with lengthy findings of fact and conclusions of law within the applicable timeline. Administered more than 200 cases in a two-year period.

Served as Lead Mediator and IEP Team Facilitator in approximately 30 matters. Mediated both individual claims and systemic issues at the request of the OSSE, with the systemic matters resulting in Memoranda of Understanding between the OSSE and other agencies. Provided technical assistance to the OSSE in establishing a credible Mediation and IEP Team Facilitation program using its then existing cadre of IDEA Impartial Hearing Officers. Provided technical assistance to individual mediators and facilitators on an as needed basis.

LAW OFFICES OF DEUSDEDI MERCED, P.C., NEW YORK, NY
Principal, February 2004 – July 2008

Practice dedicated to all aspects of Education Law, with an emphasis in special education. Managed four associates and three administrative assistants. Lead Counsel in approximately 175 administrative due process (special education) impartial hearings per school year. Recovered approximately 10 million dollars of private special education school tuition costs, as well as the costs of related services, for children with disabilities that were denied appropriate services by their resident school districts. Represented aggrieved clients in appeals to the Office of State Review and Federal Court. Legal counsel to independent schools.

LAW OFFICES OF REGINA SKYER & ASSOCIATES, NEW YORK, NY
Associate, July 2000 – February 2004

Boutique law firm specializing in all aspects of Education Law. Managed and monitored 300+ administrative due process impartial hearings per year. Assisted in increasing client base from 200 to 1200+ within three years. Represented parents of children with disabilities in obtaining appropriate educational services. Handled student disciplinary matters. Legal counsel to independent schools. Assisted independent schools in obtaining New York State approval for the provision of services for children with disabilities.

OFFICE OF LEGAL SERVICES, NYC BOARD OF EDUCATION, BROOKLYN, NY
Attorney, General Practice and Special Education Unit, December 1997 – June 2000

Represented the Agency in federal and state courts and administrative proceedings. Devised litigation and discovery strategies. Prepared expert witness testimony for trial. Prepared deponents for depositions. Made oral arguments on motions. Wrote legal memoranda, motions, and appellate pleadings. Negotiated settlement agreements.

Served as lead counsel in over 30 cases involving private tuition reimbursement claims by parents who placed their children with disabilities in private schools. Successfully litigated administrative impartial hearings saving the Agency millions of dollars in potential liability. Managed and monitored over 200 special education due process impartial hearings per year. Negotiated settlement agreements in hundreds of cases.

Handled employment discrimination issues and claims. Trained attorneys and paralegal staff. Developed and conducted legal workshops for Agency personnel.

OFFICE OF STUDENT SUSPENSION HEARINGS, NYC BOARD OF EDUCATION, NEW YORK, NY
Hearing Officer, February 1996 – November 1997

Presided over formal, due process impartial hearings and issued written decisions for students who were suspended from school and represented by counsel. Made conclusions of law on issues of theft, sexual harassment, rape, assault, vandalism, possession of weapons and controlled substances, and fraud.

EDUCATION

ALBANY LAW SCHOOL OF UNION UNIVERSITY, ALBANY, NY
Juris Doctor, May 1995

Dean's list (three semesters)
Finalist, Senior Prize Trial Competition (civil and criminal), 1994-95

BRANDEIS UNIVERSITY, WALTHAM, MA
Bachelor of Arts, Politics, May 1992

PAST BOARD MEMBERSHIPS

Member, Executive Committee, Ramapo for Children, Inc., November 2014 – September 2015

Vice President, Board of Trustees, Ramapo for Children, Inc., November 2005 – October 2014

Chair, Development Committee, Board of Trustees, Ramapo for Children, Inc., November 2012 – September 2015

Member, Board of Trustees, Ramapo for Children, Inc., November 2003 – September 2015

Member, Advisory Board, The Kathryn A. McDonald Education Advocacy Project Juvenile Rights Division, The Legal Aid Society, April 2002 – June 2008

SAMPLE PRESENTATIONS

LRP'S NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES

Presenter, Have Gavel, Will Rule: A Hearing Officer's Expectations During Due Process
Pre-Institute Symposium, April 2013
Long Beach Convention Center, Long Beach, California

Presenter, Ethics for Special Education Attorneys
Advanced Session, April 2013
Long Beach Convention Center, Long Beach, California

Co-Presenter (with Art Cernosia), Ethically Speaking: A Compendium of Ethical Considerations for Hearing Officers
Pre-Institute Symposium: Hearing Officer Training, May 2011
Phoenix Convention Center, Phoenix, Arizona

Co-Presenter (with Art Cernosia), Common Practice Hurdles
Pre-Institute Symposium: Hearing Officer Training, May 2010
Disney's Coronado Springs Resort, Orlando, Florida

LRP'S SCHOOL ATTORNEYS CONFERENCE

Co-Presenter (with Jose Martin), Preparing for Your Due Process Hearing: Sound Strategies for Successful Results. (The presentation was viewpoint neutral and offered insights on how parties can best use the hearing process to attempt to resolve the due process complaint or advance efficient and effective practices to facilitate the fair and timely conduct of the hearing.)
Pre-Conference Symposium, January 2012
PGA National Resort & Spa, Palm Beach Gardens, Florida

ILLINOIS ANNUAL SPECIAL EDUCATION DIRECTORS' CONFERENCE

Presenter, Current Hot Legal Topics in Special Education: What's New, and Why It Should Matter to Me, August 2016. (This presentation was viewpoint neutral.)
Crowne Plaza, Springfield, Illinois

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES 18TH ANNUAL CONFERENCE

Co-Presenter, A View From Both Sides of the Bench: A Hearing Officer's Expectations and a Parent's Attorney's Perspective During Due Process, March 2016
Loews Hotel, Philadelphia, Pennsylvania

THE ACADEMY FOR IDEA ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS

Presenter, Developing the Hearing Record: When and How, July 2017
Washington College of Law, American University

Presenter, The Sanctioning Authority of IDEA Hearing Officers, July 2012
Seattle University School of Law, Seattle, Washington

Presenter, The Importance of Prehearing Procedures, March 2012
Duke Law School, Durham, North Carolina

Presenter, Basic Hearing Procedures and Management, July 2011
Seattle University School of Law, Seattle, Washington

LEHIGH SPECIAL EDUCATION LAW SYMPOSIUM

Presenter, Have Gavel, What Now?! An IHO Guide to Managing the Hearing Process
Presenter, The Pro Se Parent: An IHO Guide to Working with an Unrepresented Parent
ALJ/IHO Institute, June 2014
Lehigh University, Bethlehem, Pennsylvania

PRACTISING LAW INSTITUTE, NEW YORK, NEW YORK

Chair, School Law Institute
April 2012, 2013, May 2011, 2010, 2008, 2007, 2006

Co-Chair, School Law Institute
May 2005, 2004, 2003, June 2014, 2015, 2016, 2017, 2018 (confirmed event)

Panelist, Lawyer's Responsibility to Improve the Legal System
School Law Institute, April 2012

Moderator, Ethical Issues in Settlement Negotiations in Special Education Cases
School Law Institute, May 2010

Program Adviser, School Law Institute, May 2009
Faculty, Growing Dominance of Civil Procedure under the IDEA
Faculty, Ethical Issues Affecting Special Education Attorneys and Hearing Officers

Moderator, Special Education Update: Panel Discussion
School Law Institute, May 2006

Moderator, Student Discipline – Extent and Effectiveness of Applicable Law
Faculty, Legal Ethics – Frivolous or Protracted Litigation in Special Education Cases
School Law Institute, May 2005

Faculty, The Truncated Impartial Hearing
School Law Institute, May 2004

Faculty, Special Education Law Primer: Identification, Evaluation and Placement
School Law Institute, January 2002

NEW YORK STATE EDUCATION DEPARTMENT – ALBANY, NEW YORK AND NEW YORK, NEW YORK

Presenter, *Endrew F., Fry, and G.L.* Update, October 2017

Presenter, Practical Suggestions on Implementing *Endrew F., Fry, and G.L.*, October 2017

Presenter, Timeliness, October 2017

Presenter, IEP Building Blocks, October 2017

Moderator (webinar), Settlement of Due Process Proceedings, May 2017

Moderator (webinar), Selected Developments in Special Education Law, March 2017

Presenter, Developing the Hearing Record: When and How, October 2016

Presenter (webinar), Memos, Dear Colleague Letters and Policy Letters of Import (OSEP and FPCO), May 2016

Presenter (webinar), The Aftermath of R.E.: Prospective Challenges to a Child's Proposed Placement, January 2016

Presenter, Decision Writing Exercise, October 2015

Presenter (webinar), Evidence, Ethics, and the IDEA Hearing Officer, March 2015

Presenter, Five-Day New Hearing Officer Certification Orientation, November 2014

Presenter, Decision Writing Exercise, October 2014

Presenter (webinar), Legal Update: Recent Amendments to the Regulations of the Commissioner, May 2014

Presenter (webinar), IDEA Practice Tips: Hot Topics Affecting NYS IHO Practice, March 2014

Presenter (webinar), Compensatory Education: A Framework to Aid the IHO in Crafting an Award, March 2014

Presenter, Case Scenario: Tuition Reimbursement, October 2013 and November 2013

Presenter, Remedial Orders: A Summary of the Do's, the Don'ts, and the Maybe's, October 2013 and November 2013

Presenter (webinar), The Sanctioning Authority of IDEA Hearing Officers, March 2013

Presenter, The Decision, September 2012 and November 2012

Presenter (webinar), Managing the Hearing Process: The Hearing Officer's Authority Under the IDEA and Good Practice in Exercising It, April 2012 and May 2012

Presenter, The Prehearing Conference, November 2011 and December 2011

ILLINOIS STATE BOARD OF EDUCATION – CHICAGO, ILLINOIS

Presenter, Problematic Situations: You Be The Judge, April 2017

Presenter, Practice Note: *Endrew F. v. Douglas County Sch. Dist. RE-1*, April 2017

Presenter, The Pro Se Parent: An IHO Guide to Working with an Unrepresented Parent, January 2017

Presenter, Developing the Hearing Record: When and How, October 2016

Presenter, Remedial Orders: A Summary of the Do's, the Don'ts, and the Maybe's, October 2016

Presenter, Consolidating Multiple Due Process Complaints, November 2015

Presenter, Illinois Smorgasbord, April 2015

Presenter, Decision Writing Checklist, January 2015

Presenter, Decision Writing Exercise, September 2014

Presenter, Appropriate Standard Practices: Not Your Mother's Rules But A Common Sense Approach to IDEA Practice, January 2014

Presenter, Tackling the Issues – Why Do It and How?, May 2013 and September 2013

Presenter, Peculiarities of Illinois Law/Regulations, January 2013

Presenter, Tackling the Issues – Why Do It and How?, October 2012

Presenter, The Sanctioning Authority of IDEA Hearing Officers, May 2012

HAWAII DEPARTMENT OF EDUCATION – HONOLULU, HAWAII

Presenter, IEP Building Blocks, December 2017

Presenter, What's Happening and Where?, December 2017

Presenter, Memos, Dear Colleague Letters and Policy Letters of Import (OSEP and FPCO), December 2017

Presenter, Decision Writing Exercise, December 2017

Presenter, Timeliness, December 2017

NEW YORK CITY CHARTER SCHOOL CENTER – NEW YORK, NEW YORK

Presenter, Impartiality of Disciplinary Hearing Officers, May 2016

MARYLAND OFFICE OF ADMINISTRATIVE HEARINGS – HUNT VALLEY, MARYLAND

Presenter, Have Gavel, What Now?! An IHO Guide to Managing the Hearing Process, January 2016

Presenter, A Road Map to Defensible Decisions, January 2016

ARKANSAS DEPARTMENT OF EDUCATION – LITTLE ROCK, ARKANSAS

Presenter, Have Gavel, What Now?! An IHO Guide to Managing the Hearing Process, January 2016

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION – WASHINGTON, DC

Presenter, Remedial Orders: A Summary of the Dos, the Don'ts, and the Maybe's, March 2013

Presenter, Tackling the Issues – Why Do It and How?, November 2012

Presenter, The Sanctioning Authority of IDEA Hearing Officers, September 2012

Presenter, Evaluation and Eligibility, February 2012

Presenter, Hearing Officer Training for New Hearing Officers, September 2011 (three days)

Presenter, Hearing Officer Training for New Hearing Officers, March 2011 (one day)

Presenter, Compensatory Education, February 2011

Presenter, Educational Placements: Decoded, January 2011

Presenter, The Decision, January 2011

THE INTERNATIONAL DYSLEXIA ASSOCIATION – NEW YORK BRANCH, NEW YORK, NEW YORK

Speaker, IDEA 2004 – A Hearing Officer's Perspective, June 2009

THE LEGAL AID SOCIETY, VOLUNTEER DIVISION, NEW YORK, NEW YORK

Speaker, Special Education Law: A Primer on the IDEA and NYS Education Law September 2003

LORMAN EDUCATION SERVICES, NEW YORK, NEW YORK

Faculty, Individuals with Disabilities Education Act in New York: Defending Your IEP: A Trial Tactic Primer for Educators, June 2000

TEACHING EXPERIENCE

Adjunct Faculty Member, CUNY School of Law, Civil Procedure Lawyering Seminar, Fall 2001

Mentor, CUNY School of Law, Family Law Lawyering Seminar, Spring 2002

Mentor, CUNY School of Law, Civil Procedure Lawyering Seminar, Fall 2002

SPECIAL EDUCATION SOLUTIONS

AGENDA

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA ADMINISTRATIVE LAW JUDGE TRAINING
FRIDAY, AUGUST 3, 2018

8:00 a.m.	Introduction
8:15 a.m.	Open Session The trainer, Deusdedi Merced, Esq., will address prehearing issues that the Administrative Hearing Commission has brought to his attention. The Administrative Hearing Commissioners will also be given the opportunity to discuss other issues/problems they have encountered while presiding over IDEA hearings and ask questions of Mr. Merced.
9:00 a.m.	Applying *Endrew F.*: *Practical Considerations* Mr. Merced will lead an interactive discussion regarding how an IHO might approach assessing the substantive appropriateness of an IEP under the *Endrew F.* standard.
10:30 a.m.	What's Happening and Where? Participants will take a "ride" around the Country and review some of the latest decisions affecting IDEA and the hearing process.
1:00 p.m.	Adjourn

APPLYING *ENDREW F.*: *PRACTICAL CONSIDERATIONS*

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA ADMINISTRATIVE LAW JUDGE TRAINING
FRIDAY, AUGUST 3, 2018

DEUSDEDI MERCED, ESQ.[‡]

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I. INTRODUCTION

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982), the United States Supreme Court established a two-part test to determine whether FAPE had been offered/provided to the student. First, the court/hearing officer must determine whether the State, inclusive of the IEP team and school district, complies with the procedures outlined in the IDEA relating to the development of the IEP. Second, the court/hearing officer must determine whether the resulting IEP is reasonably calculated to enable the student to receive educational benefits. *Id.* at 206 – 207.

The *Rowley* standard had not been intended to be *the* test for determining the adequacy of educational benefits conferred upon all children. In fact, it was quite the opposite. The Court cautioned against it, saying:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

Id. at 202. Yet, despite this warning, courts since *Rowley* have broadly applied *Rowley's* standard to all children covered under the IDEA and expanded the standard and its application. Procedurally, as we know, courts sought to establish substantive harm resulting from the procedural violations.[1] (In 2004,

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[‡] The author acknowledges with appreciation source material provided by Lyn Beekman, Esq. and Mark C. Weber, Esq.

[1] *See* Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?*, 83 EXCEPTIONAL CHILD. 219 (2016) (providing analysis of court decisions specific to IEP-related procedural violations after the 2004 amendments).

Congress codified this practice in 34 C.F.R. § 300.513.) On the substantive side, the courts were split on how much benefit *Rowley* had intended, with a number of circuits – First, Fourth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia – deciding that *Rowley* only required "some" benefit and other circuits either applying a "meaningful" benefit standard (primarily the Third) or interchangeably using both.[2]

Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, 69 IDELR 174 (U.S. Mar. 22, 2017) is the Court's attempt to define what qualifies as an educational benefit with an emphasis on progress.

II. DECISION SUMMARY

In *Endrew F.*, a unanimous Supreme Court overturned a decision of the Tenth Circuit Court of Appeals that had applied a "merely more than *de minimis*" standard for the duty under the IDEA to provide a free, appropriate public education to children with disabilities served by public school districts. The opinion by Chief Justice Roberts interpreted *Rowley*'s reading of appropriate education as taking a middle position between no enforceable standard at all and affording the child an opportunity to achieve her full potential commensurate with the opportunity provided to children without disabilities.

The Court emphasized *Rowley*'s language requiring a substantively adequate education as well its statement that it was not establishing a single test for the adequacy of educational benefits children should receive. *Id.* at 996. The Court read *Rowley* as pointing to "a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. The approach focuses on the reasonable, not the ideal, but it emphasizes progress for the individual child given his or her unique needs. *Id.* The Court reaffirmed *Rowley*'s statement that if a child is fully integrated in the regular classroom, passing marks and advancement from grade to grade through the general curriculum will ordinarily satisfy the IDEA standard, though a footnote to the opinion warns that, "This guidance should not be interpreted as an inflexible rule," and is not a holding that every child advancing from one grade to the next "is automatically receiving an appropriate education." *Id.* at 1000, fn. 2. The Court said that a child not fully integrated in the regular classroom may not have the ability to achieve at grade level, but the IEP for that child should be "appropriately ambitious in light of his circumstances," a standard "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." *Id.* "The goals may differ, but every child should have the chance to meet challenging objectives." *Id.*

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[2] Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Ed. Law Rep. 1 (2009).

The Court rejected the parents' argument that children with disabilities must be offered an education that provides the opportunities to attain self-sufficiency and contribute to society substantially equal to the opportunities provided to children without disabilities. *Id.* at 1001. The Court noted that a similar standard was rejected in *Rowley*, and Congress, though it revised the IDEA several times since 1982, did not materially alter the statute's definition of free, appropriate public education. *Id.* The Court said it was not creating "a bright-line rule," but said the absence of the rule should not be taken as an invitation to courts to supplant the role of school authorities, to whose expertise and professional judgment deference should be paid. *Id.* A reviewing court, "may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 1002.

III. OBSERVATIONS

There is much that the Court does not define and will require further discussion.[3] Clarity will come first from hearing officers and, ultimately, from reviewing courts. We are just beginning to see courts delve into the nuances resulting from *Endrew F.*,[4] but appreciable discussion as to some of its pronouncements and how it all fits together is still in its infancy.

Nonetheless, we can definitively glean from *Endrew F.*, the following:

- There continues to be a two-step test to determining whether FAPE is offered/provided. *Endrew F.* did not eliminate the first prong of the

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[3] For example, it is unclear what "appropriately ambitious," "challenging objectives," and "markedly more demanding" than *de minimis* mean in operation, what responses must be made to children's unique needs, and in what situations will children who are fully integrated in the regular classroom and are achieving at grade level be considered not to be receiving an appropriate education in light of their individual circumstances.

[4] *See*, *e.g.*, *Z.B. v. District of Columbia*, 118 LRP 18827 (D.C. Cir. 2018) (*Endrew F.* "raised the bar on what counts as an adequate education"); *M.N. v. School Bd. of the City of Virginia Beach*, 71 IDELR 170 (E.D. Va. 2018) (appropriately ambitious does not equate to placing student in program that is beyond her abilities); *Rosaria M. v. Madison City Bd. of Educ.*, 72 IDELR 9 (N.D. Ala. 2018) (IEP appropriately ambitious as demonstrated by metrics demonstrating progress); *M.C. v. Antelope Valley Union Sch. Dist.,* 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017) (raising the possibility that *Endrew F.* has a more demanding standard than *Rowley*); *Bd. of Educ. of Albuquerque Public Schools v. Maez*, 70 IDELR 157 (D. N.M. 2017) (school district offered a "cogent and responsive explanation" as to why the IEP is appropriately ambitious); *Saucon Valley Sch. Dist.,* 71 IDELR 225 (SEA PA 2017) (*Endrew F.* does not require a school district to close the gap).

Rowley standard.

- The IEP must continue to be reasonably calculated, which is to say that school officials are tasked with prospectively judging through a fact-intensive, collaborative process what is reasonably appropriate for the student.[5]

- Like in *Rowley*, the Court reaffirms that the IDEA "cannot and does not promise 'any particular [educational] outcome.'"[6]

- *Endrew F.* better refocuses the inquiry on the individualized needs of the student – the IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[7] "[E]ducational benefit [that is] merely … more than *de minimus"* or enable the student "to make *some* progress," is inadequate.[8]

- The Court recognizes that there is a wide spectrum of disabled students and makes a distinction between students fully integrated in the regular classroom and those who are not fully integrated and cannot achieve on grade level. Despite this distinction, the Court clarifies that for all students, whether performing at or below grade level, a school district must offer an IEP that takes into consideration the student's circumstances.

    - With respect to the first group, the Court says, "progress appropriate in light of" the student's circumstances is "progress in the general education curriculum," as measured, generally, by performance in regular examinations, passing marks/grades, and advancement from grade to grade. The Court warns that advancing from grade to grade does not automatically mean the student is receiving FAPE.[9]

    - As to the second group (i.e., those not fully integrated), the Court offers even more subjective guidance. For this group, the "IEP need not aim for grade-level advancement," but "must be appropriately ambitious in light of [the student's] circumstances

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[5] *Endrew F.*, 137 S. Ct. at 999.
[6] *Id.* at 998.
[7] *Id.* at 999.
[8] *Id.* at 1000 – 1001.
[9] *Id.* As the Court noted, this guidance is not "an inflexible rule." *Id.*, fn 2. Not every child advancing from grade to grade is automatically receiving a FAPE. *Id.* For example, a student's goals and objectives may not be related to the general education curriculum and, therefore, the student's progress, or lack thereof, should not be measured by the general education "system" but rather by criteria set forth in the student's IEP. *Id.* at 1000.

> … just as advancement from grade to grade is appropriately ambitious for most [students] in the regular classroom." This would include "the chance to meet challenging objectives" just like any other student.[10]

That is what we do "know." What we do not know is what it all means. And, although the Court expressly stated that FAPE is not "[a]n education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities,"[11] the Court curiously says that the IEP is constructed only after careful consideration of the student's "potential for growth."[12]

IV. IMPORTANCE OF PLAAFP – A RENEWED EMPHASIS

As mentioned above, the new language – "progress appropriate in light of the child's circumstances" – better refocuses the inquiry on the individualized needs of the student and recognizes that there is a wide spectrum of disabled children whose circumstances are ever changing, e.g., new needs, needs that have been met, needs that require different interventions / supports, and life experiences that impact learning. And, without a well-defined understanding of the student's unique circumstances, an IEP team cannot determine what an ambitious program would be for the student that would provide for an appropriate measure of progress. Each student's IEP must, therefore, include, among other information, an accurate statement of the student's present levels of academic achievement and functional performance (PLAAFP).

The PLAAFP is the starting point for determining annual goals.[13] Without a baseline of current performance, it is difficult to draft measurable and relevant annual goals,[14] and to measure future progress. Age, behavior, other learning difficulties other than the primary disability, history, and current performance help to define the student's unique circumstances. How the IEP team evaluates and assess this information "contribute[s] to ensuring the [student] has access to challenging objectives."[15]

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[10] *Id.*

[11] *Id.* at 1001.

[12] *Id.* at 999.

[13] *Bend-Lapine Sch. Dist. v. K.H.*, 43 IDELR 191, 2005 WL 1587241 (D. Or. 2005), *aff'd*, *Bend-Lapine Sch. Dist. v. K.H.*, 234 F. App'x 508 (9th Cir. 2007) (unpublished). *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46662 (August 14, 2006).

[14] *Id.*

[15] *Questions and Answers on Endrew F. v. Douglas County School District RE-1*, 71 IDELR 68 (OSEP 2017).

V. PRACTICAL CONSIDERATIONS

A. Though more time (and, likely, litigation) is needed to fully appreciate the clarified, substantive standard articulated by the Court in *Endrew F.*, following are practical questions the hearing officer should consider when completing the record or discussing evidentiary matters with the parties and their representatives.

1. To determine whether a student's particular need / annual goal / objective is "challenging," seek to establish in the record –

- Whether the student's need(s) are identified in the present level of performance statement.
- Whether the statement includes a baseline of current performance for each need that is identified.
- Whether there is a corresponding annual goal for each identified need.
- The student's previous rate of academic / functional progress in learning / mastering needed skill(s).
- The student's potential for growth.[16]
- Whether the student is on track to achieve or exceed grade-level proficiency.
- Whether the goals are reasonably calculated to afford the student a reasonable opportunity to achieve them within one school year given the student's rate of progress.
- Whether the goals are measurable.

2. Whether there are any behaviors that are interfering with the student's progress.

3. Whether the IEP team considered additional information and input provided by the student's parents and independent evaluators.

4. Whether an increase in the intensity of instruction (e.g., amount, 1:1 versus small group, direct versus consultative) is necessary to allow the student a reasonable opportunity to achieve challenging goals / objectives.

[16] *Id.* (Question 9).

5. Whether specialized instruction / supplementary aides and services / related services in the regular / special education classroom is necessary to allow the student a reasonable opportunity to advance from grade to grade / achieve challenging goals / objectives.

6. Whether the appropriateness of the IEP hinges on the IEP goals as a whole or each goal independently.

    - If the appropriateness of the IEP hinges on the IEP goals as a whole, how is progress on the various goals collectively weighed to determine overall "benefit / progress?"

        - By the amount of time during the school day allocated to working on the goal?

        - By the relative importance of the goal to the student's overall needs?

        - By the student's progress in meeting the general education curriculum?

B. *Endrew F.* warns that a school district is expected to "offer a *cogent and responsive explanation*" for their decisions that shows the IEP is appropriately ambitious. Naturally, said explanation would be offered during the course of witness testimony but the documentary evidence, when viewed collectively, may shed light on the IEP team's deliberative process in composing an ambitious, yet appropriate, program for the student. Specifically, the hearing officer should examine –

1. whether the prior written notice documents the reasoning behind / basis for the IEP team's decisions.

2. whether the IEP includes baselines for the student's present levels and documents any circumstances that would limit progress.

3. whether there are appreciable changes in academic achievement and functional performance within the school year or between school years and why.

4. whether the IEP includes corresponding measurable and reasonable annual goals for each need identified in the PLAAFP statement.

5. whether the IEP team met during the course of the year to revise the student's IEP, as appropriate, to address any change circumstances, including lack of expected progress towards the annual goals and in the general education curriculum.[17]

NOTES: **REDISTRIBUTION OF THIS OUTLINE WITHOUT EXPRESS, PRIOR WRITTEN PERMISSION FROM ITS AUTHOR IS PROHIBITED.**

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. THE PRESENTER IS NOT, IN USING THIS OUTLINE, RENDERING LEGAL ADVICE TO THE PARTICIPANTS.

[17] 34 C.F.R. § 300.324(b)(1)(ii)(A).

WHAT'S HAPPENING AND WHERE?

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA ADMINISTRATIVE LAW JUDGE TRAINING
FRIDAY, AUGUST 3, 2018

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I. INTRODUCTION

The purpose of this presentation is to discuss the various legal cases in special education published in the last two years or so. The selected cases are not, for the most part, headline news. Rather, the selected cases provide lessons to be learned with practical significance to how you carry out your duties and responsibilities as a special education director.[1]

II. ELIGIBILITY / EVALUATION

A.A. v. Walled Lake Consol. Schs., 70 IDELR 73 (E.D. Mich. 2017). A parent's revocation of consent for the provision of special education programs and services – here resulting from a dispute over the student's placement in a classroom for cognitively impaired students rather than the parent's preferred placement in a general education classroom – does not alter the student's right to relief because the underlying dispute is likely to be an issue with each proposed IEP so long as the student continues to be eligible for FAPE.

L.J. v. Pittsburg Unif. Sch. Dist., 850 F.3d 996, 117 LRP 6572 (9th Cir. 2017). Simply classifying specialized services – like specially designed mental health services, one-on-one paraeducator, and extensive clinical interventions from behavior specialist – as general education interventions for a student with multiple diagnoses (i.e., bipolar disorder, oppositional defiant disorder, and AD/HD) placed in general education and making satisfactory progress with the services provided in the general education classroom does not make the student ineligible for IDEA

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[1] Although this presentation is before special education directors, the "lessons to be learned" would be equally helpful to attorneys who represent parents of children with disabilities, parents of students with disabilities, and adult, IDEA eligible students.

services. The student's educational progress resulted from the specialized services – services that were not available to his nondisabled peers.

Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 68 IDELR 61 (1st Cir. 2016). Overall academic performance is a factor to consider when determining whether a student has an educational disability such as, here, an SLD in reading fluency. However, simply because a student has excellent academic performance, it does not automatically compel a finding that the student is ineligible for special education. The overall performance may mask the presence of a disability and, as such, the IEP team should consider how the academic measures in question (e.g., report cards and statewide assessments) showing excellent academic performance relate to the student's alleged deficit and whether a more specific measure indicates a possible impairment. The IEP team cannot look at such academic measures in isolation and must consider the relationship between those academic measures and the alleged area of deficiency. However, even if the IEP team affirms the existence of a qualifying disorder, the IEP team must also determine whether the student "needs" special education and related services as result of the disorder. Here, too, "consideration of [the students] grades and standardized test results is not categorically barred under the need inquiry any more than it is categorically barred under the first prong inquiry."

Haddon Township Sch. Dist. v. New Jersey Dept. of Educ., 67 IDELR 44 (N.J. Super. Ct. App. Div. 2016) (unpublished). A parent has a right to an IEE at public expense even though the school district did not conduct any new assessments but rather reviewed existing data with which the parent disagrees. Under the IDEA, a review of existing data is considered an evaluation.

R.A. v. West Contra Costa Unif. Sch. Dist., 70 IDELR 88 (9th Cir. 2017). Here, the school district and parent reached an impasse during the course of the school district completing behavior and psychoeducational assessments because the parent wanted to impose conditions on the testing environment. Specifically, the parent sought to be allowed to see and hear their child during the testing, a request the school district denied. The Ninth Circuit held that the student was not denied FAPE simply because the school district did not acquiesce to the parent's demands, as there is no legal requirement to allow the parent to hear and see her child during testing. The Ninth Circuit further reaffirmed the notion that there is no legal obligation for the school district to halt updating a student's IEP simply because the parent filed a due process hearing.

Luo v. Owen J. Roberts Sch. Dist., 72 IDELR 86 (3rd Cir. 2018) (unpublished). Informed consent does not require a school district to advise the parent of the methodology an evaluator will use in a school district assessment. Here, the parent claimed that he was deprived of his "liberty right" to informed consent regarding the adaptive behavior assessment that the school psychologist performed on the student. Specifically, the parent claimed that, although he consented to the assessment, he did not consent to the methodology. The Third Circuit upheld the lower court's dismissal of the parent's claim.

D.L. v. Clear Creek Indep. Sch. Dist., 695 F. App'x 733, 70 IDELR 32 (5th Cir. 2017) (unpublished), *cert. denied*, 118 LRP 12676 (U.S. 2018). An eligible student must have a need for special education services based on current performance, not based on concerns that the student might require special education at some point in the future. Here, the student had received services in his freshman and sophomore years because of suicidal ideation, declining grades, and difficulties with interpersonal relationships. Shortly before his junior year, the student was exited from special education because of improved grades and social progress. The parent, however, disagreed and ultimately filed a due process complaint. The parent contended that the student would be unable to maintain his improved performance without services but the hearing officer, district court, and Fifth Circuit all agreed that there was no evidence at the time of the student's evaluation suggesting of a continued need for special education.

The Court did not address whether the school district violated its child find obligations by failing to consider the student's need for IDEA services in 12th grade when he was consistently absent from most classes.

Durbrow v. Cobb Cty. Sch. Dist., 72 IDELR 1 (11th Cir. 2018). Eligibility under the IDEA is premised on the student having a disability that adversely effects academic performance and, because of this, the student is in need of special education. Here, an ADHD student did great academically at a magnet school for his first three years in high school under a 504 plan. His senior year, however, he suddenly does poorly. His parents claimed that, because of his poor performance, he was in need of special education. The school district disagreed, explaining that the poor performance was due to the student's failure of effort and taking advantage of his 504 plan. The student was not found eligible under IDEA. The parents appealed this decision. An ALJ, the district court, and the Eleventh Circuit sided with the school district finding that the student's ADHD did not impede his performance.

MR. P and MRS. P v. West Hartford Bd. of Educ., 885 F.3d 735, 71 IDELR 207 (2d Cir. 2018). The Second Circuit held that a school district was right to wait to evaluate the student upon first learning of a recent

hospitalization and upon being informed that the student's medications were beginning to help. The Circuit agreed that, it was reasonable for the school district to "proceed deliberately," through monitoring and providing home tutoring as a temporary measure, when weighing whether the student, who had previously done well in school, should be found eligible for special education. The Circuit further agreed with the district court's finding that because the student was not experiencing problems "over a long period of time" it was reasonable of the school district to continue monitoring the student to determine whether the student's condition was long lasting as required for special education eligibility under the disability category of emotional disturbance. Ultimately, upon learning of a second hospitalization, the school district completed an evaluation within IDEA's 60-day time frame and determined the student eligible.

Lawrence County Sch. Dist. v. McDaniel, 72 IDELR 8 (E.D. Ark. 2018). Simply because a student with a disability performs well academically, it does not mean that the student does not require special education. Only an evaluation can determine whether the student is actually eligible for special education services. Here, the student had been diagnosed with ADHD and autism. He performed well academically but had a number of social and behavioral issues, including spinning in circles, avoiding human contact, having tantrums, and pulling his hair out. The parent requested an evaluation because he felt the student needed services to learn social skills. The school district declined to evaluate the student because of his good grades and honors recognitions. The parent filed a due process complaint and the hearing officer ordered an evaluation. The school district appealed the decision and the court affirmed the hearing officer's decision. The court explained that IDEA requires an evaluation of all students identified as possibly having a disability and that evaluation be "full and individual." The court further explained that evaluating a student is not the same as providing special education services.

Z.B. v. District of Columbia, 118 LRP 18827 (D.C. Cir. 2018). A school district has an affirmative obligation to "conduct a full and individual initial evaluation" of a student prior to providing services to the student. This evaluation, however, does not always require a school to conduct additional testing. "When 'existing … evaluations and information provided by the parents' and 'observations by teachers' and other professionals provide the IEP Team with a reasonable picture of the student's skills and needs, the school [district] may finalize an IEP without any further testing unless requested by the child's parents." Here, the school district, upon receiving the parent's private evaluation, did not complete its own assessments and solely relied on the private evaluation to develop the student's IEP. The D.C. Circuit questioned whether the IEP team "needed additional or different metrics" of the student's skills to develop the IEP, noting that "[t]he school may not simply rubber stamp

whatever evaluations parents manage to procure, or accept as valid whatever information is already at hand." Because the record did not establish whether the school district made a valid assessment of the student's needs before it offered services, and *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) "raised the bar on what counts as an adequate education," the Court remanded the matter to the district court to determine whether the school district complied with the IDEA when it offered services.

M.G. v. Williamson Cty. Schs., 71 IDELR 102 (6th Cir. 2018) (unpublished). The school district's provision of RTI, and later an individualized Section 504 plan, helped it fend off a child find claim. The Sixth Circuit observed that, in order to establish a child find violation, the parent must show that the school district overlooked clear signs of disability and that it was negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate. Here, an initial screening of the student suggested that she had developmental delays, prompting the school district to evaluate the student while in preschool. Testing revealed that the student was not IDEA eligible. In kindergarten, the student struggled and was behind her peers academically. Private testing suggested a neurological condition. The parents, however, did not initially share the testing with the school district but the school district nonetheless provided RTI services to the student in the form of one-on-one work between the student and classroom teacher three times per week. In first grade, the student continued to struggle, and the school district agreed to place her in kindergarten again and, upon receipt of the private testing, provided a Section 504 plan for the student. The student nonetheless continued to struggle, and the school district initiated a second IDEA evaluation, which was not completed because the parents withdrew the student from the school district. The parents sued, alleging a child-find violation. The ALJ, district court, and Sixth Circuit all sided with the school district. The Sixth Circuit further determined that the failure of the school district to provide prior written notice after each request for evaluation by the parents was simply a procedural violation and did not seriously infringed on their opportunity to participate in the special education process because the parents "continued to be closely involved in discussions" with the school district.

Panama-Buena Vista Union Sch. Dist. v. A.V., 71 IDELR 57 (E.D. Cal. 2017). Simply because a newly enrolled student had a Section 504 Plan in his previous school district it did not place the new school district on notice that the student needed special education services or trigger the school district's child-find obligation. The new school district "was entitled to draw its own conclusions about whether [the student] needed to be assessed based upon its own observations and those of its staff." It was, therefore, not unreasonable for the school district to initiate the evaluation process 30 days after the student had enrolled, the new school

district was in receipt of the student's education records, and upon having difficulty managing the student's behaviors with general education interventions.

A.A. v. Goleta Union Sch. Dist., 69 IDELR 156 (C.D. Ca. 2017). School districts may adopt a reasonable fee cap on an IEE, provided that it also affords parents an opportunity to show that there are unique circumstances warranting a higher reimbursement rate. Here, the parent sought $6000 reimbursement for a private neuropsychological assessment. The school district had $4500 fee cap but provided the parent with multiple opportunities to explain any unique circumstances, such as "complex medical, educational, and/or psychological needs such that there are not other qualified evaluators." The parent simply responded by saying the student had autism and used an augmentative communication device. The ALJ sided with the school district finding no unique circumstances and the court affirmed.

S.P. v. East Whittier City Sch. Dist., 72 IDELR 88 (9th Cir. 2018) (unpublished). The failure to properly classify a student may be a denial of FAPE. Here, the school district tied the student's eligibility for special education services to only her speech and language disorder and not also to her hearing impairment. Though, generally, the IDEA does not concern itself with labels (once determined eligible), the classification error for this student was not harmless because the school districts considered only goals and programs that would address the student's speech and language delay and not her hearing impairment. In addition, the school district denied the student FAPE because its evaluation of the student was heavily focused on her speech and language disability with "limited review" of the student's hearing loss.

III. IEP PROCESS

A.M. v. New York City Dep't of Educ., 845 F.3d 523, 69 IDELR 51 (2d Cir. 2017). An IEP team must consider the "clear consensus" of evaluative materials supporting the need for a particular service, methodology, or placement for the student to receive FAPE. Here, the student, a six-year old with autism, was deemed to have been denied FAPE when the IEP team disregarded, without conducting its own assessments, multiple evaluation reports submitted by private evaluators and current, private service providers showing that the student needed one-to-one instruction and intensive ABA therapy to receive FAPE. The IEP team erred when it relied solely on the school district's psychologist's recommendation for a 6:1+1 program that did not use ABA therapy.

S.B. v. New York City Dep't of Educ., 70 IDELR 221 (E.D.N.Y. 2017). Annual goals must align with the student's unique needs as opposed to grade-level expectations or other generic standards. A student would be

denied FAPE if the annual goals are not "appropriately ambitious." Annual goals are not appropriately ambitious if they are not attainable. Here, a second-grader with a speech and language impairment was expected – vis-à-vis the annual goals - to identify main ideas, analyze the motivations of characters, and use context clues to improve her vocabulary despite the fact that the student did not know the alphabet and was unable to write words because she was just learning to write the sounds that she heard within words.

Menthacton Sch. Dist. v. D.W., 70 IDELR 247 (E.D. Pa. 2017). Annual goals not based on appropriate baseline data will likely result in a denial of FAPE. The IEP team must have a clear understanding of the student's current strengths and weaknesses (i.e., PLAAFP) before drafting the student's annual goals. Here, the court determined that the student was denied FAPE because the IEP team did not assess the student's specific needs and/or develop challenging goals tailored to the student's specific circumstances and deferred in making the necessary determinations for after the student was enrolled in the public school.

M.L. v. Smith, 867 F.3d 487, 70 IDELR 142 (4th Cir. 2017). IDEA does not require the IEP to include religious and cultural instruction. The decision in *Endrew F.*, which came after the parties submitted their arguments to the Fourth Circuit but the Court nonetheless mentions, did not affect the case because the IDEA does not provide the remedy the parents were seeking, to wit, that the IEP address the religious and cultural needs of the student to allow this 9-year old with Down syndrome to learn skills such as reading Hebrew and preparing kosher foods to be part of the Orthodox Jewish community.

Unknown Party v. Gilbert Unif. Sch. Dist., 70 IDELR 131 (D. Ariz. 2017) (unpublished). Here, an increase of special education services time by 20 minutes per day and reassignment from the neighborhood school to a school with a more intensive special education program resulted in a change in location as opposed to a change in placement. The reassignment of the student did not impact the amount of time the student would spend in the general education classroom and was intended to meet the student's need for more intensive academic instruction.

R.E.B. v. Hawaii Dep't of Educ., 870 F.3d 1025, 70 IDELR 194 (9th Cir. 2017). In a short, but sweeping, decision, the Ninth Circuit made several rulings of import: an IEP may need to include transition services to meet the IDEA's supplementary aids and services requirement when the student is transitioning from one school or program to another and the transition services are needed to allow the student to be educated and participate in the new environment; an IEP team cannot delegate to others when the student would participate with nondisabled peers in the regular class or the anticipated frequency, location, and duration of the proposed

specialized instruction; the IDEA does not require that the IEP team specify the qualifications or training of service providers; and, where a specific methodology (like ABA) is integral to, and plays a critical role in, the student's education, the IEP must include the methodology and the IEP team cannot leave it up to the individual teachers to determine when to use the methodology. Also, noteworthy, the Ninth Circuit notes, "ABA is widely recognized as a superior method for teaching children with autism."

NOTE: The Ninth Circuit subsequently withdrew its earlier ruling, denied en banc review as moot but granted the school district's request for a rehearing by a three-judge panel. 118 LRP 12999 (9th Cir. 2017).

Rachel H. v. Dep't of Educ., State of Hawaii, 868 F.3d 1085, 70 IDELR 169 (9th Cir. 2017). The failure to specify the anticipated school where special education services will be delivered within a student's IEP is not a per se violation of the IDEA. There may be the need to identify a specific school in some instances, including when a parent might require the information to assess whether a proposed IEP is capable of meeting the student's unique needs.

M.C. v. Antelope Valley Union Sch. Dist., 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017). A parent's right to meaningful participation in the IEP development process does not end with the IEP meeting. The parent has the right to monitor and enforce the services that the student is to receive, and any amendments to the IEP subsequent to the meeting (even, as here, when quadrupling the amount of services to the student) must be with the parent's knowledge.

In addressing the parent's claim that the school district failed to develop measurable annual goals in all areas of need, the Ninth Circuit leaves open the possibility that *Endrew F.* has a more demanding standard than *Rowley*. It points out that *Endrew F.* provides "a more precise standard for evaluating whether a school district has complied substantively with the IDEA," and quotes to the "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" language as the now "more precise standard." It then interprets this language and says, "the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can 'make progress in the general education curriculum,' … , commensurate with his non-disabled peers, *taking into account the child's potential*." [Emphasis added.]

T.K. v. New York City Dep't of Educ., 810 F.3d 869, 67 IDELR 1 (2d Cir. 2016). The refusal to discuss bullying at an IEP meeting upon the parent's reasonable belief that it is interfering with the student's ability to receive meaningful educational benefit may significantly impede the

parent's right to participate in the development of the IEP, and potentially impair the substance of the IEP and the parent's ability to assess the adequacy of the student's IEP.

N.B. v. New York City Dep't of Educ., 70 IDELR 245 (2d Cir. 2017) (unpublished). The mere fact that the annual goals "implicitly recommended" a specific methodology (i.e., DIR/Floortime) did not require the school district to use the methodology to achieve the goals when the goals could be achieved through the use of other instructional techniques. Here, the school district adopted the annual goals and short-term objectives almost word-for-word from the student's private school. The parent argued, unsuccessfully, that, because the goals and objectives were developed for a DIR/Floortime environment, the school district was obligated to use the DIR/Floortime methodology in the recommended public school placement.

Bd. of Educ. of Albuquerque Pub. Schs. v. Maez, 70 IDELR 157 (D. N.M. 2017). In reversing the decision of the hearing officer, the district court determined that the school district offered a "cogent and responsive explanation," as to why the student's most recent IEP was appropriately ambitious. The parents argued that the school district had low expectations for the student – a nonverbal sixth grader with autism and global developmental delays – because the IEP goals included sorting objects by color and size and using pictures to answer questions. The district court disagreed noting that the student required a significant amount of time to acquire new skills – "The record is brimming with evidence that [the student] takes a tremendous amount of time to make progress toward even the smallest goals." The district court further noted that the student made progress under the contested IEP, including being able to work in the classroom for up to 45 minutes at a time (an increase from earlier in the school year), paying attention in the classroom, and sorting objects into their correct boxes with minimal prompting.

Endrew F. v. Douglas County Sch. Dist. RE 1, 71 IDELR 144 (D. Co. 2018). On remand from the Tenth Circuit, after the U.S. Supreme Court unanimously rejected the Tenth Circuit's holding that an IEP only needs to provide progress that is "merely more than *de minimus*," the district court determined that the IEP did not satisfy the "undeniably higher standard" of FAPE. What had been a "close case," now tipped in the parent's favor because the IEP in question had the same goals as the student's second-, third-, and fourth-grade IEP, with only minor changes. The district court further rejected the argument that the student's severe behavioral problems prevented him from making greater progress, noting that the school district had not completed a functional behavioral assessment or developed a behavioral intervention plan for the student. The parents were awarded tuition reimbursement.

M.N. v. School Bd. of the City of Virginia Beach, 71 IDELR 170 (E.D. Va. 2018). Though *Endrew F.* says that a school district must develop an IEP that is appropriately ambitious in light of the student's circumstances, an IEP that is too ambitious given the student's performance can deny the student FAPE. Here, the district court affirmed the hearing officer's award of reimbursement for two years in a private school because the school district materially failed to implement the first year's IEP due to an ineffective teacher and, as to the second, the IEP "failed to offer [the student] a FAPE … because it sought to place her in an academic program beyond her abilities …."

Saucon Valley Sch. Dist., 71 IDELR 225 (SEA PA 2017). Where parents contend the school district's IEP denies FAPE because it fails to "close the gap," an IHO determined, citing *Endrew F.*, that there was no denial because the school district is not expected to eliminate the student's disability or guarantee that the student attain any level of proficiency.

Rosaria M. v. Madison City Bd. of Educ., 72 IDELR 9 (N.D. Ala. 2018). Similarly, where parents contend that the school district's IEP was not "appropriately ambitious" under *Endrew F.*, the district court, citing to several "metrics," found that the IEP provided FAPE as demonstrated, for example, by the student's progress from an 8% to 63% score on a words assessment and "huge gain" in the student's math standing.

C.S. v. Yorktown Central Sch. Dist., 72 IDELR 7 (S.D.N.Y. 2018). Where parent used standard scores in an effort to show lack of progress (relative to other peers), the district court agreed with the review officer (who had overturned the decision of the hearing officer awarding reimbursement) that the student had made progress given her severe disability and despite the challenged IEP having similar annual goals as the prior year's IEP.

L.M.P. v. School Bd. of Broward Cty., 71 IDELR 101 (11th Cir. 2018). The Eleventh Circuit determined that the parents of triplets diagnosed with autism did not have standing to challenge a school district's policy not to include ABA-based services in students' IEPs because the IEPs included references to Picture Exchange Communication System instruction – an ABA-based intervention.

McKnight v. Lyon Cty. Sch. Dist., 70 IDELR 181 (D. Nev. 2017). The district court determined that there was no merit to the parent's argument that the school district retaliated after she filed a due process complaint by refusing to allow participation in the student's IEP team meeting by email. The district court found that the school district had a legitimate reason for denying the parent's email-only participation request, to wit: it would limit collaboration by members of the IEP team. (The school district had also

offered participation by teleconference.)

Colonial Sch. Dist. v. G.K., 72 IDELR 69 (E.D. Penn. 2018). The failure to make progress under an IEP does not necessarily indicate a denial of FAPE. As such, the hearing officer erred in explicitly basing his award of compensatory education solely on a lack of progress with no other showing of a denial of FAPE. The hearing officer also erred by expansively interpreting the extent of parental participation in the decision-making process beyond what the IDEA anticipates. There is no requirement in the IDEA that the parent have a "deep intellectual understanding of the pedagogy underlying an IEP."

I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Sch., 863 F.3d 966, 70 IDELR 86 (8th Cir. 2017). The parents of a student with a visual impairment could not convince the Eighth Circuit that the IDEA's regulation at 34 C.F.R. § 300.172 governing access to instructional materials created a "strict compliance" standard that would make the school district liable for even a single implementation failure. The Circuit observed that school district's must "take all reasonable" steps in light of the student's circumstances to provide accessible instructional materials (e.g., Braille) but that the IDEA did not guarantee "perfect results."

R.B. v. New York City Dep't of Educ., 69 IDELR 263 (2d Cir. 2017) (unpublished). The parents of a student with autism were not able to convince the Second Circuit that they were entitled to tuition reimbursement because of the school district's failure to conduct a formal vocational assessment of the student. The school district explained that the standard vocational assessment required reading skills that the student did not possess. The school district, however, took other steps to ensure that the student's postsecondary transition plan reflected the student's unique needs, interests, and preferences by interviewing the parents and private school teachers. The student was also invited to attend meetings, but the parents declined to bring him because they felt the student could not sit through the meetings. As such, the IEP was reasonably calculated to provide the student with the postsecondary goals and transition services required by the IDEA.

B.E.L. v. State of Hawaii Dep't of Educ., 71 IDELR 162 (9th Cir. 2018) (unpublished). The Ninth Circuit affirmed the lower court's finding that the student was provided with FAPE when he was placed in a special education room for language arts and math and in general education for the remainder of the school day. The parent sought placement in all-day general education arguing that the placement in special education classes for language arts and math was overly restrictive. The Court disagreed, finding that the student was far behind his peers in reading and math, and that he had already received accommodations in the general education classroom that did not help.

M.C. v. Knox Cty. Bd. of Educ., 72 IDELR 91 (E.D. Tenn. 2018). There is no requirement in the IDEA that a school district list the time spent modifying regular education materials. Material preparation time is neither a related service or a supplementary aid or service that must be specifically identified in the IEP.

Downington Area Sch. Dist. v. K.D., 1485 C.D. 2016, 69 IDELR 162 (Pa. Commw. 2017) (unpublished). Placing a gifted student with AD/HD in an online program when he tended to get off task, missed his peers, and asked to be part of the regular education classroom, was deemed not appropriate, as the student's unique needs required him to receive instruction with peers in the regular classroom.

Greene v. East Poinsett Cty. Sch. Dist., 72 IDELR 34 (E.D. Ark. 2018). The parents of a student with aggressive behaviors that had been previously placed in a combination program school- and home-based services, did not prevail in convincing the court that the clinical setting the school district was proposing was overly restrictive. The court reasoned that the clinical program was far less restrictive than the home-based program because at home she was without any other peers. And, even though there were no typically developing peers enrolled in the program, the court did not find it unreasonable for the school district to first offer ABA services to the student prior to being returned to the mainstream educational environment.

R.H. v. Bd. of Educ. Saugerties Cent. Sch. Dist., 72 IDELR 58 (N.D. N.Y. 2018). The benefits obtained in a private school by a student with autism and an anxiety disorder were determined incidental and, therefore, reimbursement denied. The court reasoned that the private school did not attempt to address the student's anxiety but rather avoided his anxiety by, for example, when reading, skipping over the student if he wished not to read, and giving him a pass in making up missed assignments.

Howard G. v. State of Hawaii, Dept. of Educ., 72 IDELR 59 (D. Haw. 2018). A school district's directive to its contracted private service provider forbidding the provider to directly communicate with the parents about the student's performance denied the student FAPE because the parents' ability to meaningfully participate in the IEP process was significantly impeded.

IV. SERVICES

S.G.W. v. Eugene Sch. Dist., 69 IDELR 181 (D. Or. 2017). Simply offering classes and resources made available to all students without conducting age-appropriate postsecondary transition assessments to determine which additional services, if any, a student needs to prepare for life after high school denies FAPE. Here, the school district offered postsecondary transition services in the form of finance and career classes and the opportunity to participate in career day and to visit a local community college. The school district, however, was not able to demonstrate that these services, available to all students, met the student's specific disability-related needs.

R.G. v. Hill, 70 IDELR 41 (D.N.J. 2017). A "special alert" included in the student's IEP requiring that, if the student were to fall, that he be taken to the "nurse immediately and notify the parent" did not obligate the school district to have a nurse onsite at all times. The finding was based on the facts that the IEP did not list school nurse services as a related service and the notification to the nurse and parent was intended simply for information gathering and to prepare a report for each incident.

Bethel Local Sch. Dist., 116 LRP 26503 (SEA 2016). The school district was determined to have violated the requirements of the IDEA because neither school personnel nor the student, whose IEP listed the use of an iPad, were trained how to use an iPad or the programs on the device.

M.B. v. City Sch. Dist. of New Rochelle, 72 IDELR 12 (S.D.N.Y. 2018). The use of a shared aide was determined to meet the student's academic, medical, and safety needs, as student, despite her considerable diagnosed medical conditions, was "always within arms' length" of an adult at all times and received considerable individualized attention for redirection and refocusing.

Smith v. Cheyenne Mountain Sch. Dist. 12, 71 IDELR 185 (D. Col. 2018). While staff without training made the child prompt dependent, the district court determined that there was no educational harm found because the IDEA does not guarantee "potential maximizing education" and progress was appropriate in light of the student's circumstances.

Spring Branch Indep. Sch. Dist., 72 IDELR 11 (S.D. Tex. 2018). In affirming a hearing officer's decision granting reimbursement, the district court held that the school district violated IDEA by waiting four months to evaluate an academically gifted fifth-grader with oppositional defiant disorder. Staff failed to follow the student's BIP, instead using physical restraints eight times and time outs, and calling the police four times. The district court noted the frequency of behavioral emergencies indicated

either that the IEP and/or BIP was/were inappropriate or staff failing to follow it, caused the student's behavior to escalate.

V. HEARING OFFICER, INDIVIDUALLY

T.O. v. Cumberland Cty. Bd. of Educ., 69 IDELR 182 (E.D.N.C. 2017), *aff'd*, 70 IDELR 170 (4th Cir. 2017). IDEA hearing officers are afforded immunity for decisions arising from their judicial acts such as, as here, dismissing the parent's due process complaint because of the parent's failure to disclose any documentary or testamentary evidence by the required deadline.

Lou v. Owen J. Roberts Sch. Dist., 68 IDELR 245 (E.D. Pa. 2016). IDEA hearing officers are entitled to absolute judicial immunity because their role is functionally comparable to that of judges.

Henry v. Lane, 69 IDELR 277 (W.D. Pa. 2017). Hearing officer is entitled to absolute judicial immunity because her actions as a hearing officer and the decision she rendered in her capacity were within the course and scope of her duties.

J.E. v. Chappaqua Cent. Sch. Dist., 68 IDELR 48 (S.D.N.Y. 2016), *aff'd*, 70 IDELR 31 (2d Cir. 2017) (unpublished). The hearing officer's actions did not show bias or lack of impartiality simply because of his previous employment as a superintendent of New York schools. The hearing officer was also found not to be incompetent simply because he was a non-lawyer and was observed to be nodding off during the hearing.

VI. PREHEARING

Avila v. Spokane Sch. Dist., 852 F.3d 936, 69 IDELR 202 (9th Cir. 2017). Adopts the rationale in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015), and concludes that the IDEA's two-year statute of limitations period does not prohibit parents from seeking relief for alleged denials of FAPE that occurred more than two years earlier, provided the parents file the complaint within two years of discovering the school district's alleged wrongdoing. Importantly, just because the parent is aware of the underlying facts, it does not necessarily mean that that the parent knew or should have known of the basis of his/her claim because some issues require specialized expertise a parent cannot be expected to have.

Note: On remand, the lower court determined that the parents' claims were untimely because they either knew, or should have known, of the alleged actions that form the basis of their complaint more than two years earlier from the date they filed the due process complaint. The lower court further determined that a school district does not have an

obligation to affirmatively explain the procedural safeguard rights and, as such, the school district had not withheld information from the parents. See 71 IDELR 172 (E.D. Wash. 2018).

E.G. v. Great Valley Sch. Dist., 70 IDELR 3 (E.D. Pa. 2017). In deciding whether alleged claims are untimely, a hearing officer must determine the KOSHK date for each violation. Just because the parent had contemporaneous knowledge of the school district's action does not mean that the parent knew or should have known that the school district' actions denied FAPE to the student. Adopting the rationale of *Damarcus*, *infra*, the court held that what is required is for the hearing officer to conduct a "fine-grained analysis" for each asserted claim for relief independently for the particular deficiency asserted to determine the parent's ability to recognize the violation.

Damarcus S. v. Dist. of Columbia, 67 IDELR 239 (D.D.C. 2016). Adopts the rationale in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015), and concludes that as long as the complaint is filed within two years of the KOSHK date, the complainant is entitled to full relief for that injury. In determining the KOSHK date, the hearing officer must determine when each alleged violation should have been immediately apparent even to a layperson, like the parent. A lack of progress alone is insufficient to put parents on notice of an IDEA claim because the lack of progress may be attributable, for example, to the student's low aptitude rather than inadequate educational support.

Jessica E.* v. *Compton Unified Sch. Dist., 70 IDELR 103 (C.D. Cal. 2017). The hearing officer must consider when the parent discovered key facts underlying the claims to determine the KOSHK date and cannot cursorily determine that the statute of limitations started to run two years before the filing of the due process complaint (i.e., backward-looking analysis).

K.P. v. Salinas Union High Sch. Dist., 67 IDELR 172 (N.D. Cal. 2016). When the claims are premised on deficiencies in the IEP as written (e.g., IEP not including relevant information about deficits known to the parent, failure to give due weight to available information from prior assessments, inappropriate transition plan), and not on the implementation of the IEP, the KOSHK date would be the date of the IEP because the parent should have known of the deficiencies.

Hack v. Deer Valley Unified Sch. Dist., 70 IDELR 130 (D. Ariz. 2017). Receipt of FAPE may require enrollment, but an offer of FAPE is not predicated on enrollment where the school district is aware of the student and the parent has requested an IEP. However, where the parent rejects the services offered and provides the school district with a 10-business day notice of unilateral placement, the school district does not

have an IDEA obligation to create a new IEP.

West Chester Area Sch. Dist. v. A.M., 164 A.3d 620, 70 IDELR 77 (Pa. Cmwlth 2017). Hearing officers may decide whether parents are being subjected to duress. Here, the parents claimed that the school district harassed and coerced them into signing a waiver agreement because it threatened to change the student's honor level classes to lower level courses where he would be bullied based on his disability unless the parents agreed to sign the waiver. The court agreed with the hearing officer's finding that the parents were free to "come and go" and consult with an attorney and, because of this, there was no duress.

Consistent with *J.K. v. Council Rock Sch. Dist.*, 833 F. Supp. 2d 436, 58 IDELR 43 (E.D. Pa. 2011), hearing officers lack jurisdiction to enforce settlement agreements between school districts and parents.

M.C. v. Antelope Valley Union Sch. Dist., 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017). Generally, hearing officers have the authority to restate the issues presented in words different from the words in the due process complaint and to reorganize the issues by consolidating similar issues into a single issue. However, hearing officers should refrain from restating and/or reorganizing the issues when the issues are "intelligibly" outlined in the complaint. In such cases, a party will not be deemed to waive any claim fairly encompassed in the due process complaint if the complainant properly framed the issues in the complaint.

Andover Pub. Sch., 68 IDELR 208 (Mass. SEA 2016). A hearing officer may require a school district to turn over to the parent IEPs and Section 504 plans – cleansed of all identifying information – of students enrolled in the student's proposed placement if the records are necessary for the parent to challenge the appropriateness of the student's IEP. Here, the central panel's hearing rules allow discovery in IDEA proceedings.

M.A. v. Jersey City Bd. of Educ., 69 IDELR 57 (D.N.J. 2016). The hearing officer did not err in denying the parent's expert access to other students' records because under state law – here New Jersey – access to student records is limited to authorized organizations or individuals either through consent from the parents of the other students or court order. Further, even if the parent here had requested of the hearing officer that she compel the production of the records – a request that was not specifically made of the hearing officer – the hearing officer would not have erred in denying it because the records of the other students would have very little, if any, bearing on whether the school district provided the student with FAPE.

E.D. v. Colonial Sch. Dist., 69 IDELR 245 (E.D. Pa. 2017). Although emails might be education records, they are not necessarily so. For an

email to be an education record, it must both contain information related to the student and be maintained by the school district.

M.B. v. New York City Dep't of Educ., 69 IDELR 132 (S.D.N.Y. 2017). Consistent with *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 (2d Cir. 2013), a hearing officer is without authority to consider claims that are not raised with sufficient particularity in the due process complaint. The due process complaint cannot incorporate arguments by reference to letters and other documentation.

A.P. v. Lower Merion Sch. Dist., 71 IDELR 188 (E.D. Pa. 2018). An IDEA hearing officer has jurisdiction to resolve residency disputes involving IDEA-eligible students or students suspected of having a disability. Though residency is a state law issue, it is implicated in IDEA proceedings because states are obligated to identify, evaluate, and provide FAPE to disabled students residing in the state. As such, the student's residency is a prerequisite to entitlement to FAPE and, therefore, must be addressed in a due process hearing.

Smithtown (NY) Cent. Sch. Dist., 117 LRP 46371 (OCR 2017). A school district's duty to provide reasonable accommodations for individuals with disabilities at IEP team meetings extends to parent advocates with disabilities. The school district does not have to provide the specific accommodations sought (here, a notetaker) but must confer with the advocate and discuss mutually acceptable alternatives. This duty may extend to the hearing proceedings.

L.C. v. Laurel Sch. Dist., 71 IDELR 208 (D. Del. 2018). A surrogate parent thought that the IEEs ordered by a hearing panel were unnecessary and that the school district was providing FAPE to the student. The student's IDEA attorneys felt that the surrogate was not acting in the student's interest and moved to have a guardian-ad-litem appointed upon the surrogate moving to dismiss the claims. The district court denied the surrogate parent's motion to dismiss the case on the basis the surrogate was not acting in the student's best interest, noting that "allowing a parent to compromise a minor's claim in violation of the policies advanced by IDEA would directly compromise Congress's intent in drafting IDEA and emphasis on procedural safeguards." However, when the surrogate relented, the district court said it was premature to appoint a guardian-ad-litem, as requested by the student's IDEA attorneys.

Brady P. v. Central York Sch. Dist., 71 IDELR 215 (M.D. Pa. 2018). A private psychologist's statement that the student "had a five percent chance of becoming a competent reader and writer" during an IEP meeting, and the school principal's purported subsequent comment that he and the psychologist "couldn't believe that they had missed this," put the parents on notice of a potential FAPE claim affecting the statute of

limitations. The parent knew or should have known of the alleged FAPE denial around the time of the statement and comment.

J.K. v. Missoula Cty. Pub. Sch., 71 IDELR 181 (9th Cir. 2018). The Ninth Circuit found that the parents knew or should have known that they had a child find complaint when they enrolled the student in middle school in 2009. But, because they did not file until 2014, claims prior to 2012 were barred.

Z.B. v. Dist. of Columbia, 71 IDELR 164 (D.D.C. 2018). The stay put provision of the IDEA prohibits a school districts from unilaterally changing a student's placement during a dispute over an IEP – it does not prohibit a change in location of services. The key question is whether services at the new location are "basically the same." Here, the district court found that there was not a change in placement simply because the new non-public school followed a different bell schedule. The new non-public school also had a longer academic year making up for the shorter instructional week.

Harris v. Cleveland City Bd. of Educ., 71 IDELR 189 (E.D. Tenn. 2018). Unless state law affords the parent additional rights, or the student has been declared incompetent, the parent's IDEA rights terminate when the student turns 18 years old. Here, the student had a Section 504 plan and had previously been found ineligible for IDEA services. The parent, however, felt that he was eligible under the IDEA and obtained an IEE. At the IEP team meeting to review the IEE, the student indicated that he did not need special education services. His mother disagreed. The student had turned 18 years old the month prior to the IEP team meeting. The student was not offered an IEP and the parent sued the school district for alleged IDEA violations. The court, just as the ALJ had done, dismissed the due process complaint finding that the student's refusal of services was "controlling."

I.K. v. Montclair Bd. of Educ., 72 IDELR 101 (D. N.J. 2018). A dismissal based on insufficiency of the due process complaint is limited to the enumerated criteria in 20 U.S.C. § 1415(b)(7)(A)(ii) (34 C.F.R. § 300.508(a)(2)). Here, the parent disagreed with the school district's recommendation to place the student in a half-day inclusion class in a general education setting because it did not reflect the least restrictive environment for the student. The parent requested mediation and the school district agreed. The parties reached an agreement. The mediation agreement states that the student would be placed in a full-day inclusion class. The parent subsequently filed a due process complaint alleging that the placement was not the least restrictive environment for the student. The school district filed a notice of insufficiency and the ALJ dismissed the due process complaint as insufficient, concluding that the mediation agreement binds the parties and prevents the parent from relitigating the

placement issue. The court dismissed the school district's argument that the court lacked jurisdiction to hear appeals of decisions concerning sufficiency. The court explained that the ALJ did not render a "sufficiency decision" but rather effectively enforced the mediation agreement without a full hearing or record, effectively finding that the student received FAPE. The court remanded the case back to the ALJ to determine whether the placement denied the student FAPE thereby entitling the student to compensatory education.

Anchorage Sch. Dist. v. M.G., 71 IDELR 192 (D. Alaska 2018). The IDEA's stay-put provision when invoked holds the school district responsible for the costs of a student's placement beyond the end date specified in a hearing officer's order and regardless of which party ultimately prevails in an appeal. Here, the school district and the parent agreed that the student required a residential placement but disagreed on the appropriate residential placement. A due process hearing ensued, resulting in the hearing officer finding that the parent's preferred residential school was appropriate and funding it through February 2018. The decision, however, did not provide for a placement after the hearing officer's end date. The school district appealed the hearing officer's decision and "administratively rejected paying tuition" at the parent's preferred residential school despite the hearing officer's decision, and while the decision was under review, because it felt that the residential school was not providing FAPE to the student based on subsequent evaluations, observations, and school reports. The court held that the IDEA's stay-put provision applied despite the hearing officer's end date. The court noted that the hearing officer's decision did not establish a definitive end date but rather a hope that the parties would work together to transition the student back to his home district. (Ultimately, the parent's preferred residential school was deemed appropriate. *See* 118 LRP 26009 (D. Alaska 2018).)

Burnett v. San Mateo-Foster City Sch. Dist., 118 LRP 27117 (9th Cir. 2018). The Ninth Circuit affirms the lower court, finding that, under the IDEA, which uses the same definition of education records as FERPA, a school district is not required to turn over emails that are not "maintained" in a filing cabinet or permanent secure database.

VII. HEARING

S.W. v. Florham Park Bd. of Educ., 70 IDELR 46 (D.N.J. 2017). Dismissal vis-à-vis summary judgment of a parent's due process complaint before the parent has had an opportunity to present any evidence or witnesses is improper even if the ALJ finds that the school district, who carried the burden of proof (pursuant to state law) offered the student FAPE because IDEA "guarantees parents the right to present both evidence and witnesses at a due process hearing." The parent's evidence may contradict the evidence offered by the school district.

B.G. v. City of Chicago Sch. Dist. 299, 69 IDELR 177 (N.D. Ill. 2017). A hearing officer may set reasonable time limits on witness testimony.

Pangerl v. Peoria Unif. Sch. Dist., 67 IDELR 36 (D. Ariz. 2016). It is within the discretion of the hearing officer to allow in the record relevant evidence from outside the statute of limitations period.

Jason O. v. Manhattan Sch. Dist. No. 114, 67 IDELR 142 (N.D. Ill. 2016). A procedural violation committed by the hearing officer during the course of a due process hearing is harmless unless the violation results in the loss of educational opportunity for the student. Here, the parents' objected to the hearing officer denying the introduction of a photograph that had not been disclosed within the five-business day requirement, the exclusion of the parents' advocate because the advocate was listed as a witness and was not designated as the individual to assist in the presentation of their case, and the hearing officer's refusal to allow rebuttal witnesses. The court was not persuaded that the hearing officer exceeded his discretionary authority.

Carr v. Dep't of Public Instruction, 71 IDELR 197 (W.D. Wisc. 2018). A state educational agency (SEA) may be a proper party to an action involving claims of "systematic violations of the IDEA," i.e., the action implicates the integrity of the IDEA's dispute resolution procedures themselves. A claim that the hearing officer was not impartial does not alone support an inference that the SEA was somehow at fault. (The parents alleged that the hearing officer only took notes only during the school district's presentation and testimony and ignored their own testimony.) Had the SEA known that the hearing officer was, in fact, biased against the parents, the parents may have had a viable claim against the SEA.

E.P. v. Howard Cty. Pub. Sch. System, 70 IDELR 176 (D. Md. 2017), *aff'd*, 118 LRP 26428 (4th Cir. 2018). The IDEA does not address whether evidence used for impeachment or rebuttal purposes is subject to the IDEA 5-business day rule. The hearing officer, therefore, may exercise discretion in its admission despite the offering party not timely disclosing

the evidence. Here, the school district filed a due process complaint seeking to demonstrate that its evaluation of the student was appropriate and that the parent's request for an IEE should be denied. The parent called an expert witness to testify about what constitutes an appropriate report and the standards that should be used. The school district sought to impeach the expert with a report that the expert had prepared years earlier on another student that did not meet the specifications that the expert was holding the school district to during his testimony. The parent objected and the ALJ permitted the school district to use the report despite it not being timely disclosed. Ultimately, the ALJ determined that the school district's evaluation was appropriate. The parent appealed, challenging, in part, the ALJ's ruling permitting the school district to use the report despite it not being timely disclosed. The court found that the ALJ had discretion to allow the school district to use the report, in part, because its use was limited to impeachment purposes and because the parties had reserved the right in their disclosure letters to offer additional witnesses and/or documents for impeachment or rebuttal purposes.

VIII. REMEDIES

Avila v. Spokane Sch. Dist., 852 F.3d 936, 69 IDELR 202 (9th Cir. 2017). Confirming IDEA's wide-ranging remedial purpose intended to protect the rights of students with disabilities and their parents.

Damarcus S. v. Dist. of Columbia, 67 IDELR 239 (D.D.C. 2016). IDEA affords hearing officers the discretion to fashion equitable remedies tied to the student's needs rather than to the specific deprivations the student suffered or when they were suffered.

Sch. Dist. of Philadelphia v. Kirsch, 71 IDELR 123 (3d Cir. 2018) (unpublished). Parents are entitled to reimbursement for out-of-pocket expenses that the school district should have paid all along and would have borne in the first instance had it developed a proper IEP. The fact that the parents incurred extra costs beyond the tuition amount "to make the private school appropriate" is immaterial if the service is educationally necessary as authorized by the student's IEP to obtain educational benefit.

Dallas Indep. Sch. Dist. v. Woody, 71 IDELR 146 (N.D. TX 2018). Here, the district court discusses the availability of prejudgment and post-judgement interest in a reimbursement case in which the school district initially lost at hearing but was partially successful in reducing the awarded amount at the Fifth Circuit, with the district court awarding post-judgment interest but not prejudgment interest to the parent. Whether hearing officers may award post-judgment interest (e.g., where school district fails to timely reimburse the parent per hearing officer order) is an open question.

Doe v. East Lyme Bd. of Educ., 70 IDELR 99 (D. Conn. 2017). Due to practical considerations, the district court orders the school district to establish an escrow account in the amount of $203,478 to hold funds for compensatory education services. The student, at the time of the litigation, was in college. The school district sought to provide the student with the compensatory education services due in the form of direct services. Though the school district provided speech and language services using electronic means, the district court noted that the school district could not produce any evidence showing that it could provide physical therapy, occupational therapy, or Orton-Gillingham reading instruction in the same manner.

Stapleton v. Penns Valley Area Sch. Dist., 71 IDELR 87 (M.D. Pa. 2017). Compensatory education awards cannot be used to pay for college tuition payments but may be applied toward college services or courses that are intended to remedy deficits resulting from an earlier denial of FAPE. Here, a former student with Asperger syndrome sought to use 990-hour award (approximating $75,000) to pay for postsecondary courses in Forestry Ecosystem Management. The district court denied the request because the course did not provide developmental, remedial, or enriching instruction needed to address the student's educational deficits.

A.T. v. Harder, 118 LRP 13303 (N.D.N.Y. 2018). Because correctional facilities have a joint obligation with school districts to ensure that eligible detainees receive FAPE, the district court enjoined a county jail from placing juvenile detainees in solitary confinement for up to 23 hours a day.

J.T. v. Dep't of Educ., State of Hawaii, 72 IDELR 95 (D. Haw. 2018). A court must consider all relevant factors, not just those listed in 20 U.S.C. § 1412(a)(10)(C)(iii), in determining whether reimbursement for some or all of the cost of a unilateral placement is warranted. Hence, in addition to the notice provided by the parents prior to removing the student from the public school, the school district's opportunities for evaluating the student, and the unreasonableness of the parent's actions, the court may also consider, for example, the existence of other, more suitable placements; the effort expended by the parents in securing alternative placements; the general cooperative or uncooperative position of the school district; whether the student's parents chose the private placement for reasons unrelated to the student's disabilities; and, the student's lack of progress.

Edmonds Sch. Dist. v. A.T., 71 IDELR 31 (W.D. Wash. 2017). Just because a student is intelligent and capable of learning in a general education classroom without support if his medical conditions are under control does not mean that any support given is medical. Here, the student, who had been recently diagnosed with schizophrenia, had a history of behavioral, decision-making, and interpersonal problems. His truancy increased four-fold between 9th and 10th grades, his grades

plummeted, and he engaged in odd behavior (like locking himself up in the girls' bathroom, having locked all of the stalls except for the one next to him and having stuffed toilet paper in the cracks of the door of the stall in which he was hiding). The school district's behavioral specialist was concerned that the student was having mental health problems and suspected he was on the autism spectrum but did not share these concerns with the parents or initiate a reevaluation because she was unaware of the school district's obligation to assess students in all areas of suspected disability. Ultimately, the parent had the student independently evaluated and were advised to place the student in a residential school after the school district recommended a part-time educational setting and the student stopped attending school, had been placed in juvenile detention, had run away, or was in a psychiatric hospital. The parents sought reimbursement. The ALJ and court awarded reimbursement rejecting the school district's argument that the supportive services offered (e.g., psychological services, therapeutic recreation, social work services, medication management, counseling, etc.) were medical in nature. The court reasoned that these supportive services were specifically defined in the IDEA as related services or were the type offered in a school nurse's office. The court further determined that, in order for the services to "reach" the student, they had to be offered in a structured residential setting to overcome the student's tendency toward elopement and truancy resulting from his disabilities.

Olu-Cole v. E.L. Haynes Pub. Charter Sch., 71 IDELR 194 (D.D.C. 2018). A student's history of violent altercations and unreasonably dangerous behaviors justified his continued placement on homebound instruction (i.e., the IAES) pending a hearing officer's determination whether he needed a change in placement. The court found that, while the student had a presumptive right to remain in the then-current educational placement during the pendency of the hearing process, a school district could overcome that presumption if that placement was inappropriate and the school district was able to support a preliminary injunction under *Honig v. Doe*, 484 U.S. 305, 559 IDELR 231 (1988).

Burke v. Hillsborough Cty. Sch. Bd., 71 IDELR 187 (M.D. Fla. 2018). *Pro se* parent is deemed to have abandoned his request for reimbursement of approximately $32k of ABA services by not having raised the issue during the course of the hearing despite seeking "compensatory consideration" in the complaint.

IX. DECISION

M.C. v. Antelope Valley Union Sch. Dist., 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017). Consistent with Rule 15(b)(2) of the Federal Rules of Civil Procedures, the Ninth Circuit holds that issues not raised in the due process complaint but tried by the parties' express or implied consent, must be treated in all respects as if raised in the pleadings.

The mere fact that the hearing officer questions witnesses during a long hearing and writes a lengthy opinion that reviews the qualifications of the witnesses and culls relevant details from the record does not demonstrate that the hearing officer is "thorough and careful," where the hearing officer fails to address all issues and disregards some of the evidence presented at the hearing.

Somberg v. Utica Cmty. Schs., 67 IDELR 139 (E.D. Mich. 2016). The mere cessation of FAPE violations coupled with IEP modifications to correct deficiencies will generally not be enough to reverse the harm already done to the student. Courts would expect that hearing officers remedy the past violations with some compensatory education.

T.S. v. Utica Cmty. Schs., 69 IDELR 95 (E.D. Mich. 2017). The lack of sufficiently detailed fact findings and reasoning is likely to invite rebuke from the court and result in a remand instructing the hearing officer to identify the specific evidence on which s/he relied in resolving the claims.

P.C. v. Rye City Sch. Dist., 69 IDELR 122 (S.D.N.Y. 2017). Finding that the hearing officer's "rambling, incomplete … [d]ecision," was an "embarrassment" and directing counsel to send a copy to the individual at the SEA responsible for certification of hearing officers.

McLean v. Dist. of Columbia, 70 IDELR 202 (D.D.C. 2017). A hearing officer's decision will be found to be inadequate where, as here, the hearing officer pulls a statement from the parent's expert out of context to support his conclusion when the full statement would suggest contrary to the hearing officer's conclusion, or when the hearing officer does not give any consideration whatever to the professional opinions of the parent's experts, let alone discredit them. *Cf. J.C. v. Katonah-Lewisboro Sch. Dist.*, 690 F. App'x 53 (2d Cir. 2017) (noting that, though a review officer is not required to automatically accept an evaluator's recommendations, s/he is required to consider the recommendations and, if s/he rejects them, to convincingly explain why).

Pollack v. Regional Sch. Unit 75, 71 IDELR 206 (1st Cir. 2018). The parents' failure to appeal an IDEA hearing officer's finding of fact, i.e., that the presence of a recording device would be "disruptive and detrimental" to the student's education and would not have any "demonstrable benefit,"

precluded the parents from pursuing a subsequent ADA claim of discrimination against the school district, who had denied the parents' request to allow the student to carry an audio recording device throughout the school day. The finding effectively prevented the parents from arguing that the accommodation was effective and reasonable – a critical component of their failure to accommodate claim.

Bd. of Educ. of the N.Y.C. Dep't of Educ., 117 LRP 13957 (SEA N.Y. 2017). Noting that a hearing officer decision once rendered is final, the review officer held that there is no authority to reopen a hearing, reconsider a decision or retain jurisdiction to resolve future disputes. As for clarifying a decision, the review officer further noted that there is no procedure to do so, and even if there was, the hearing officer would be required to render the final decision within the 45-day limit. The review officer further held that a hearing officer has no authority to enforce a hearing officer decision; the parent must either file a state complaint or seek enforcement in court. *See also Bd. of Educ. of the N.Y.C. Dep't of Educ.*, 117 LRP 25324 (SEA N.Y. 2017) (holding that there is no authority for a hearing officer to clarify a decision after the 45-day timeline has elapsed, even if the parties do not object).

Rena C. v. Colonial Sch. Dist., 72 IDELR 26 (3rd Cir. 2018). A school district's failure to implicitly include attorneys' fees in its 10-day settlement offer did not prevent the parent from recovering legal fees incurred after rejecting the settlement offer. Here, the attorneys' fee language included in the settlement offer was determined to be too vague – "This offer is also being made in order to further limit the School District's possible prevailing party attorney fee liability" – as the school district did not acknowledge that it would pay attorneys' fees incurred to date.

X. SECTION 504

B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 68 IDELR 151 (2d Cir. 2016). Although there is a strong possibility that a student who is IDEA eligible may also qualify as an individual with a disability under the IDEA, IDEA eligibility does not automatically create eligibility under the ADA and Section 504. A parent, therefore, cannot seek relief for disability discrimination based on IDEA eligibility alone. The ADA defines disability as a physical or mental impairment that *substantially limits* one or more major life activities. Section 504 adopts the ADA's definition. In contrast, under the IDEA, a student is eligible if s/he has one or more of an enumerated list of impairments requiring special education and related services. The legal standards are distinct. Thus, a student might need special education and related services by reason of an impairment even if that impairment does not *substantially limit* a major life activity.

Lagervall v. Missoula Cty. Pub. Schs., 117 LRP 45538 (D. Mont. 2017). A school district may limit a parent's ability to visit their child's school because of past inappropriate behavior. Here, the school district did not discriminate against the parent with an unknown disability when it required him to notify the principal and obtain permission before coming to his son's school.

Puerto Rico (PR) Dep't of Educ., 71 IDELR 69 (OCR 2017). The failure to have a back-up plan (i.e., cross-trained staff or access to outside providers) to address high staff shortages resulted in the school district discriminating against a student with disabilities. The school district agreed to a resolution agreement providing for the services listed in the IEP.

XI. MISCELLANEOUS

Washoe Cty. Sch. Dist., 69 IDELR 201 (SEA 2016). A school district must provide the assistive technology devices listed in the student's IEP. The failure to do so is a violation of the IDEA, and the school district's allowance of the student's use of his own personal device without reimbursement violates the IDEA's no cost requirement.

Lawrence County Sch. Dist. v. McDaniel, 71 IDELR 3 (E.D. Ark. 2017). A school district must implement a hearing officer's decision pursuant to the IDEA's stay-put provision even though it is appealing the hearing officer's decision and immediate implementation will result in the school district later being precluded from relief because of the nature of the hearing award (e.g., evaluation).

Hopewell Valley Reg'l Bd. of Educ. v. J.R., 67 IDELR 202 (D.N.J. 2016). Appeals of interim decisions of the hearing officer are not permissible under the IDEA because only a party aggrieved by a final administrative decision has the right under the IDEA to appeal that decision in court.

Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 69 IDELR 116 (Feb. 22, 2017). The Court overturned the dismissal of a claim under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act for not allowing a student to bring a service dog to school and remanded for further proceedings. 20 U.S.C. § 1415(*l*) requires exhaustion on non-IDEA claims "seeking relief that is also available under" the IDEA. The Court reasoned that the IDEA makes relief available for denials of FAPE. In deciding whether the lawsuit seeks relief for a FAPE denial, courts ought to look to the gravamen of the complaint actually filed in court, rather than asking whether the parents could have filed an action seeking relief under the IDEA. The Court identified clues for telling if the substance of the claim is for denial of FAPE. It is not FAPE if essentially the same claim

could have been brought in a context in which no FAPE obligation is present, for example, if the same suit could be brought for access to a public library, or if a similar suit could have brought by an adult visitor to a school or a school employee. On the other hand, if the parents began administrative proceedings under the IDEA, that would be a clue that the denial of a FAPE is the substance of the complaint.

Doe v. Dallas Indep. Sch. Dist., 118 LRP 16375 (N.D. TX. 2018). Where a parent sought to sue a district for lost educational opportunities based on its alleged inadequate response to sexual harassment, the district court, relying on *Fry v. Napoleon Community Schs.*, 137 S. Ct. 743, 69 IDELR 116 (2017), dismissed the complaint due to the parent's failure to exhaust administrative remedies under IDEA. The district court reasoned that the student could not assert the same claim in another public facility or an adult in the school have filed the same claim.

R.S. v. Bd. of Educ. Shenendehowa Cent. Sch. Dist., 71 IDELR 85 (N.D.N.Y. 2017). Here, the parents sued both the school district and the SEA contending, in part, that its rules governing the content of IEPs denied their child FAPE. The rules, according to the parents, fail to require that an IEP list specific methodologies in the Management Needs section of the student's IEP. Specifically, the parents sought to have ABA listed in the Management Needs section because ABA is necessary for their child to make progress. The SEA moved to dismiss the claim on the grounds that the SEA is not a proper party in cases where parents seek review of an administrative decision regarding the IEP process. The district court disagreed, finding that the parents made a plausible claim that the SEA rules interfered with the IEP process.

Crofts v. Issaquah Sch. Dist., 72 IDELR 15 (W.D. Wash. 2018). Individual employees of the school district cannot be sued in their individual capacities under the IDEA. Here, the parents sought to add the school principal, the director of special education, and the school psychologist to their lawsuit against the school district to recover tuition reimbursement. The district court denied the request after reviewing the language in the IDEA that speaks to the obligation of the local educational agency (LEA), not an individual, to provide FAPE. The district court further pointed out that the language governing the appeal process specifically references parents and the LEA, but not third parties or employees of the LEA.

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