NEW DEVELOPMENTS IN IDEA LITIGATION

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA TRAINING FOR ADMINISTRATIVE HEARING COMMISSIONERS

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PRESENTED BY DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC [‡]
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

I. INTRODUCTION

These materials list and describe significant cases and selected U.S. Department of Education guidance materials on topics of concern to Individuals with Disabilities Education Act due process hearing decision makers. The period covered is approximately January 2021 through July 2022, with the newest cases and other information highlighted in yellow. The primary focus is on full, precedential opinions of the federal courts of appeals and federal guidance that break new ground and have special bearing on matters likely to arise at due process hearings. However, a number of particularly noteworthy unpublished federal appellate opinions and decisions from district courts and other sources are also included. Cases concerning issues not of primary importance to IDEA due process decision makers, for example, those that focus on administrative exhaustion, class action status, Section 504-Americans with Disabilities Act claims, and attorneys' fees awards, are omitted. Under each heading, the cases are arranged by level of authority, then date within each level.

II. CHILD FIND

J.M. v. Summit City Bd. of Educ., 39 F.4th 126, 81 IDELR 91 (3d Cir. July 1, 2022). This case involved a student denied special education services in February 2016, then diagnosed with autism in April 2017 and offered special education at that time. At the time of the initial denial, the student was six years old and attending first grade. The parents challenged the denial at due process but were not successful there or on appeal to the district court. The court of appeals affirmed the district court's ruling in favor of the district. The student had displayed behavior problems at day care towards the end of kindergarten, leading to his removal from day care. A clinical psychologist-school neuropsychologist retained by the parents evaluated the student before first grade, but the parents did not inform the school district of the problems the previous school year or the fact that the student was being privately evaluated when the student enrolled for

[‡] Prepared by Mark C. Weber, Esq., DePaul University College of Law, for Special Education Solutions, LLC.

first grade. The school staff observed behavior problems by mid-September of first grade and twice removed the student from the classroom for disruptive behavior. After one incident, the staff contacted the student's parents and learned of the behavior problems in kindergarten. A multidisciplinary school team met in late September to identify classroom interventions, including a behavior plan with rewards and other features, as well as academic interventions comprising extra reading lessons four days a week and an after-school skills program twice a week. The private evaluator completed a report in October, finding cognitive strengths but weakness in inhibition and problems with attention and impulsivity. The report said the student was a diagnostic challenge, particularly given his age, but found a language disorder, a social communication disorder, and a specific learning disorder. The report gave "rule-out" diagnoses for autism and ADHD, saying that they were not diagnosed but not ruled out. The report made various recommendations, which the district adopted by February of the first-grade year. In October of the first-grade year, the parents had requested the district to evaluate the student for special education, and the district conducted a multidisciplinary evaluation after a November meeting. While the evaluations were being completed, the intervention team met and concluded the interventions were working both as to behavior and academics. At the completion of the evaluation in February of the first-grade year, the district concluded that the student was not eligible for special education, noting the positive effects of the interventions. The parents and private evaluator disagreed, and the private evaluator conducted additional testing and concluded in the middle of the following school year that the student should be diagnosed with autism and ADHD. The district then referred the student to a psychiatrist who diagnosed him with autism and ADHD. Finally, in April 2017, the district determined that the student was eligible for special education on the basis of autism and began developing an IEP, which it completed in August 2017, shortly before third grade began. The parents enrolled the student in a private school in July 2019. The parents' due process complaint, filed on May 25, 2016, when the student was in first grade, alleged a child-find violation. In affirming the hearing officer and the district court, the court of appeals stated that an IDEA claim may be based on a child-find violation, but said no violation had been shown for failure to diagnose a specific learning disability. Although school districts may use a severe-discrepancy model for SLD, the defendant district determined that a 22-point difference between achievement and intellectual ability constitutes a severe discrepancy, and the student had discrepancies in three areas greater than 22 points, the court said the district did not have to rely on the severe discrepancy and could instead rely on response to intervention, which it said supported the conclusion there was not SLD in light of the student's progress. The court declared the district did not violate child-find by not evaluating the student further for autism and ADHD, saying the private evaluator's rule-out diagnosis was not sufficient to require the district to evaluate, and it rejected a bright-line rule that a rule-out diagnosis should trigger the duty. The evaluations and response-to-intervention progress were deemed sufficient. The court said that the district court was within its discretion to exclude evidence of facts that arose after the initial determination of ineligibility on February 8, 2016, including evaluations from July 2016 to February 2017, noting cases articulating a snapshot rule and stating, "evidence of a child's behaviors or test results outside of that snapshot – such as reports that did not exist when a school district decided not to evaluate a child or when a school district denied eligibility – are not relevant to whether

the school district breached its child-find obligations." *Id.* at 144. The court said some facts arising after an adverse eligibility determination are relevant, notably as to whether the child has a disability and how long or to what degree the district denied FAPE. The court said the district court did not err in deferring to the hearing officer's credibility determinations, and that other claims raised by the parents were outside the scope of the due process complaint. The court further rejected the parents' claim of a Section 504 violation. Greenaway, J., dissented, contending that application of snapshot rule to evidence in the case was not proper, and collecting cases saying post-hoc evidence must be considered on eligibility determinations as long as the use of the evidence does not amount to second-guessing district decisions on the basis of information to which it could not possibly have had access.

J.N. v. Jefferson Cnty. Bd. of Educ., 12 F.4th 1355, 79 IDELR 151 (11th Cir. Sept. 10, 2021). This is the case of an eighth grader who was diagnosed with ADHD at an early age. When she started sixth grade, her mother noted the diagnosis on her enrollment form. During sixth grade, the student had one disciplinary incident that led to what the court called a brief period of alternative schooling, and she received passing grades, though with Cs in math. Her difficulties worsened in seventh grade, when she began receiving Cs in English and science and struggled in math. Her teachers complained about her talking in class, seeking attention, and shouting across the room to her twin sister. In eighth grade, she received Ds in math and misbehaved, though the court noted that the math teacher testified that the material was difficult and many students underperformed. The student's mother asked the math teacher if the school had prepared an IEP for the student and was told it had not, but that the student was receiving extra help in class and reviews during a free school period. On October 3 of the eighth grade year, the school convened what it termed a problem solving team of teachers and administrators to coordinate additional support or accommodations. In December, the student was referred for special education evaluation. Five days after the referral, the parent filed a due process complaint, alleging failure to identify and evaluate in all areas of suspected disability and failure to develop and implement an IEP, and requesting compensatory education. The due process hearing officer dismissed the complaint as premature. The evaluation led to the student being found eligible for special education, and an IEP was provided in March. The parent appealed the dismissal of the complaint to district court. The court vacated the dismissal, remanding for a determination whether the defendant violated its child-find obligations. On remand, the hearing officer found that the defendant violated the child-find obligation by overlooking clear signs of disability, but the decision did not award compensatory education or any other remedy because the parent did not produce evidence on the student's need for it apart from the parent's opinion. Both sides appealed, but the court affirmed the hearing officer, and in addition denied the parent attorneys' fees. In affirming, the court of appeals said that the district court was well within its discretion in concluding that the parent had not shown that the child-find violation resulted in educational deficits that could be remediated with compensatory services. The court said a procedural violation is not necessarily a substantive harm, so the parent needed to show that the student's education would have been different but for the procedural violation. It said the parent did not show that the services the school provided were worse than what the student would have received had the school developed an IEP more

speedily. Low grades did not show that the education was deficient. The student did receive interventions in seventh and eighth grades and the school worked to resolve the behavior problems. The court declared, "without any evidence of how an earlier IEP would have helped Molly, what services she should have received, or what learning deficits she suffered as a result of not having an IEP, we cannot say that the district court abused its equitable authority by failing to craft its own compensatory plan." *Id.* at 1368. The court also affirmed denial of attorneys' fees.

Independent Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073, 76 IDELR 203 (8th Cir. June 3, 2020), *cert. denied*, 142 S. Ct. 67 (Oct. 4, 2021). This is the case of a 16-year-old high school student with diagnoses that included anxiety disorder, school phobia, autism with obsessive-compulsive traits, panic disorder with agoraphobia, ADHD, and severe recurrent major depressive disorder. The student frequently was absent from school but performed well academically when there. In eighth grade she stopped attending altogether and was admitted to a day treatment program. School personnel did not refer her for special education, but instead disenrolled her, then in ninth grade reenrolled her, then disenrolled her yet again when she was readmitted to a day treatment program, then in tenth grade disenrolled her twice for absences. After she had a second admission to an inpatient program, her parents requested a special education evaluation. The student reenrolled for eleventh grade, and the district conducted an evaluation. Before completion of the evaluation, the district offered an alternative learning environment and online program, but the student attended only two days of the alternative program. On the completion of evaluation, the district found the student not IDEA-eligible under the autism, emotional disturbance, and other health impairment categories. The parents obtained an independent neuropsychological exam and partial functional behavioral analysis and invoked due process. The court of appeals affirmed the ALJ decision in favor of the parents and reversed the district court's vacating of the compensatory education remedy imposed by the ALJ. The court of appeals supported its decision in favor of the parents by stating that the district evaluations were deficient under state law due to the absence of a systematic classroom observation and an FBA, and that the student's absenteeism did not excuse the failings when the student could have been evaluated away from school. The court held that the student met the emotional disturbance and other health impairment definitions. The court reasoned that the student's mental health problems caused the absenteeism. The court stated at 1082: "Despite this evidence, the District maintains that the Student is simply too intellectually gifted to qualify for special education. The District suggests the Student's high standardized test scores and her exceptional performance on the rare occasions she made it to class are strong indicators that there are no services it can provide that would improve her educational situation. The District confuses intellect for an education. . . . . The IDEA guarantees disabled students access to the latter, no matter their innate intelligence." The court went on to hold that the district failed its child-find obligations when it was aware no later than the spring of 2015 that the student stopped attending school due to mental health issues, and that limitations did not bar the claim because the failure to evaluate extended into the period two years before the filing of the due process complaint at the end of June 2017. The court affirmed the award of reimbursement for the independent evaluations and privately provided educational services, and reversed denial of payment for private compensatory services, stating at

1084-85: "Whether the District is able to provide the Student a FAPE prospectively is irrelevant to an award of compensatory education. Because of this backward-looking nature, the purpose of any compensatory-education award is restorative–and the damages are strictly limited to expenses necessarily incurred to put the Student in the education position she would have been had the District appropriately provided a FAPE. . . . The administrative record supports the ALJ's conclusion that the services of a private tutor are appropriate until the Student earns the credits expected of her same-age peers." On remand, the district court rejected the parents' plan for cash payment for ongoing compensatory services as excessive and also rejected the district's plan for services as deficient; the case was referred for mediation, No. 18-935, 2021 WL 1732256, 78 IDELR 254 (D. Minn. May 3, 2021), but the parties did not reach a settlement, and the court ultimately entered an award of private tutoring expenses as well as $360,945.05 in attorneys' fees, No. 18-935, 2022 WL 1607292, at *3, 81 IDELR 36 (D. Minn. May 20, 2022) ("(1) Parents are entitled to a judgment reinstating the ALJ's award of compensatory education services; (2) the District continues to be obligated to provide E.M.D.H. a FAPE that includes compensatory educational services that include private tutoring until E.M.D.H. earns the credits expected as her peers and only so long as E.M.D.H. suffers a credit deficiency; and (3) therefore, E.M.D.H. is entitled to these continued services, to be paid for by the District and, to the extent that E.M.D.H. can provide documentation, reimbursement for compensatory education services already paid for by Parents. To the extent that E.M.D.H. requests any additional monetary award, that request is respectfully denied.").

Spring Branch Indep. Sch. Dist. v. O.W., 961 F.3d 781, 76 IDELR 234 (5th Cir. June 12, 2020), *cert. denied*, 141 S. Ct. 1389 (Feb. 22, 2021). This case involved a student who transferred from a private therapeutic school to public school in fifth grade. In August, the parent told the school district that the student had ADHD and behavior challenges. In September, the student engaged in verbal and physical aggression, refused to follow directions, left without permission, slept in class, took others' property, and did not complete schoolwork. He started to fail in his academic classes. On October 8, the school adopted a Section 504 plan with behavior interventions, but the student's misconduct soon resumed and his grades declined. The mother said she requested a referral for special education evaluation in October, but the district did not make the referral. After incidents including misconduct toward staff, the district referred the student for a special education evaluation and the parents agreed to a temporary alternative school program placement. The district adopted an IEP on March 11. The IEP included specific behavior intervention techniques, including training the student in replacement behaviors, offering choices to avoid power struggles, and using calm interaction. It did not include time outs or restraint. The district placed the student in an adaptive behavior program that used "take 5" or "take 10" isolation at a desk in the classroom. The student was restrained 8 times over 40 days, and police were summoned. In May, school officials and the student's mother, without any consultation with the IEP team, placed the student on a shortened school day, which was then further reduced by the school. The parents enrolled the student at a private school, and eventually placed him in a residential setting. The parents filed for due process, seeking private placement and tuition reimbursement. The hearing officer found in favor of the parents on claims regarding child find and free, appropriate public education, as well as

the district's failure to comply with the IEP, and ordered tuition reimbursement and payment for the student's continuing enrollment. The district court affirmed. On appeal, the court of appeals stated that a failure to conduct an expedited evaluation pursuant to the student discipline provisions found in 34 C.F.R. § 300.534(d) did not constitute a violation of the child-find requirement, but went on to rule that the district committed a child-find violation by not initiating the special education evaluation process for the 99-day period from October 8, 2014, to January 15, 2015. The court stated at 793 that "the reasonableness of a delay is not defined by its length but by the steps taken by the district during the relevant period. A delay is reasonable when, throughout the period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps." The court rejected the district's position that it complied with child find by adopting behavioral interventions in a response-to-intervention program before making the special education referral. The court said that it was clear by October 8 that general education behavior interventions were not working. On the issue of denial of appropriate education, specifically the failure to implement the IEP and the use instead of time-outs, physical restraints, and police intervention as forms of discipline as well as the shortening of the school day, the court said that state law prohibits time-outs unless they are specified on the student's IEP or behavioral intervention plan and applied in conjunction with positive behavior strategies. It agreed with the district court that the take-5 and take-10 sessions constituted time outs and effected a substantial departure from the IEP. The deterioration in the student's grades and behavior demonstrated the denial of appropriate education. The court said that state law allows physical restraint in emergencies and ruled that the police intervention was not an actionable IDEA violation. The ultimate modification of the school day to three hours without a written agreement to amend the IEP denied FAPE. The court, however, said that a portion of award of tuition for a period when appropriate education was not denied was error, and remanded the case for a redetermination of the remedy. On remand, No. 4:16-CV-2643, 2021 WL 3493151, at *3, 79 IDELR 101 (S.D. Tex. Aug. 9, 2021), *appeal filed*, No. 21-20475 (5th Cir. Sept. 14, 2021), *stayed pending appeal*, No. 21-20475 (5th Cir. Apr. 27, 2022), the court determined that the school district denied the student FAPE during school year 2014-15, and remanded the case to the hearing officer to craft a compensatory education award, saying the hearing officer should first determine whether the student suffered specific educational deficits from the denial of FAPE and if so, what exact compensatory measures would be needed. The court said the 99-day delay found to be unreasonable by the Fifth Circuit constituted a delay in referral, so the fact that evaluation could have extended to 45 school days after referral did not support a conclusion that the delay was harmless. The court said, "In this case, there are numerous indications that O.W. was deprived of education benefits during the 99-day delay. For example, despite being identified as gifted and talented, O.W. failed his math and science benchmarks. . . . By January 2015, O.W. had failing grades, multiple in-school and out-of-school suspensions due to behavioral problems, and excessive absences due to his resistance to attending school. . . . As such, the Court finds that SBISD's Child-Find violation "caused a deprivation of education benefits" for O.W. and thus entitled O.W. to relief. The court further determined that the court of appeals

held that the failure to implement the student's IEP was substantial and caused the student to regress.

Jacksonville North Pulaski School District v. D.M., No. 4:20-CV-00256-BRW, 2021 WL 2043469, 78 IDELR 283 (E.D. Ark. May 21, 2021). In this case, the student's grandparents registered the student for kindergarten and made a request at that time for a special education evaluation. Three months later, they presented an evaluation they had obtained that diagnosed the student with ADHD, and they made another request for a special education evaluation to the school principal, advising the principal of the student's diagnoses of sensory processing disorder and ADHD. They also advised the principal that the student was being tested for autism spectrum disorder. At that point, the school completed a special education referral form, but decided not to evaluate the student because there was no data showing academic deficits. After the grandparents provided the promised autism evaluation, which found that the student had autism spectrum disorder, the school developed a Section 504 plan. In the first three months of school, the student was suspended for twelve days. Following a Section 504 disciplinary review and introduction of behavior interventions, the student was again suspended. The grandparents ultimately filed for due process under the IDEA, which resulted in a decision that the school denied the student free, appropriate public education by failing to properly evaluate the student and conduct child-find with respect to the student. The decision ordered the school to obtain the services of a behavioral analyst, to conduct a comprehensive evaluation in all areas of suspected disability, to use the services of the analyst to develop and implement a behavior support plan if needed and include training in the behavior plan and IEP if necessary, and to convene an IEP meeting to determine the student's eligibility and if the student should be found eligible, develop an IEP. The court affirmed the hearing officer decision, reasoning that the testimony the school presented of a lack of shortcomings in academics was not based on assessments comporting with IDEA requirements, and that the school relied on the single criterion of academic ability without considering the effect of the diagnosed conditions on the student's education as a whole. The court went on to dismiss counterclaims under Section 504 for lack of exhaustion through the IDEA administrative procedures and failure to show bad faith or gross misjudgment.

D.C. v. Klein Indep. Sch. Dist., No. 4:19–CV–00021, 2020 WL 2832968, 76 IDELR 208 (S.D. Tex. May 29, 2020), *aff'd*, 860 F. App'x 894, 79 IDELR 4 (5th Cir. June 17, 2021). Here the court adopted as modified a magistrate judge recommendation of affirmance of a hearing officer decision, which had concluded that the district violated its child find duty when it had notice that the student needed special education at least as of April 27, 2017. That conclusion was based on the provision of Section 504 services for reading since the student's third grade year without an improvement in course of the year, as well as a test score in the second percentile for the student's age and failure or low performance on other assessments, despite a slight improvement in reading fluency in the fourth grade. The decision found that the delay until October 19, 2017, was unreasonable in light of a request by the parent for special education evaluation in 2015 and the need to follow up with the district on the parent's September 2017 request for evaluation. The court further found the district's IEP inadequate under Fifth Circuit standards when the co-teach program was not designed to remediate the student's

reading comprehension disability, the dyslexia program was not appropriate for a student without dyslexia, and there was a lack of meaningful educational benefit despite passing grades and improvement in STAAR results at a time the student was receiving private tutoring and extensive test accommodations. The court awarded fees to the parent. The court of appeals decision found the determinations of the trigger date for the district to have reason to suspect a qualifying disability and of the unreasonableness of the period of delay to be correct. The court noted that the district's program for student did not specifically address the student's reading comprehension learning disability and declared that the student's passing all his classes was not especially significant. The court found the district's challenge to the compensatory education award moot.

Return to School Roadmap: Child Find Under Part B of the Individuals With Disabilities Education Act, 79 IDELR 140 (OSERS Aug. 24, 2021) Here the Office of Special Education and Rehabilitation Services stated, among other things, that "as they prepare to return to full-time, in-person learning for the 2021-2022 school year, SEAs and LEAs may need to evaluate whether their current child find procedures are sufficiently robust to ensure the appropriate referral and evaluation of children who may have a disability under IDEA. . . . The child find . . . requirement includes identification of children who are suspected of having a disability, including for example, children suspected of having long COVID or suspected of having post-COVID conditions that meet the definition of a disability under IDEA. . . . As a result of the educational disruptions due to the COVID-19 pandemic, a considerable number of students withdrew from public schools to attend private schools or were home schooled. . . . SEAs and LEAs are responsible for carrying out child find obligations to all children residing within the jurisdiction. . . . This includes children whose parents have chosen to home school them or place them in private schools, rather than enrolling them in the public schools. . . . Where virtual instruction limits or prevents the teacher's interaction and contact with a child, the SEA and LEA should examine whether existing child find policies and procedures are effective in meeting the State's responsibilities of identifying, locating, and evaluating children who may need special education and related services. . . . LEAs serving children virtually should not rely solely on referrals by parents as the primary vehicle for meeting IDEA's child find requirements. . . . SEAs and LEAs should reexamine the efficacy of their existing child find practices and initiate new activities in light of the educational disruptions caused by the COVID-19 pandemic. For example, LEAs may have to conduct additional screenings of children whose academic and behavioral needs may require an evaluation to determine eligibility for special education and related services. . . . If a child experiencing symptoms from long COVID is suspected of having a disability (e.g., other health impairment) and needs special education and related services under IDEA, they must be referred for an initial evaluation to determine the impact of the long COVID symptoms and the child's academic and functional needs." (footnotes omitted)

III. EVALUATION AND ELIGIBILITY

J.M. v. Summit City Bd. of Educ., supra.

Crofts v. Issaquah Sch. Dist. No. 411, 22 F.4th 1048, 80 IDELR 61 (9th Cir. Jan. 12, 2022). In this case, the court affirmed a district court decision that had affirmed an ALJ determination that the school district did not violate the IDEA by evaluating the student under the category of specific learning disability rather than for the specific disability of dyslexia. The parents requested the evaluation the summer before the student's second grade year and had her evaluated by a retired school psychologist, who concluded that she met the classic profile for dyslexia. The school district began its evaluation at the start of the second grade year. The evaluation cited the outside evaluator's assessments and the district's own assessments, and concluded that the student was eligible for IDEA services under the specific learning disability category, which includes dyslexia. The second-grade IEP created by the district offered her 40 minutes of reading and writing per day in a special education classroom, along with accommodations in general education. Both the general and special education teachers used a variety of reading programs, including ones with multisensory approaches. In February, the parents asked for another IEP meeting, citing the student's lack of progress in meeting her IEP goals and specifically requesting, inter alia, that her teachers be trained in and use the Orton-Gillingham method. The district denied the request to change the instructional method. At the start of the third grade year, the district prepared new goals, increased the special education instruction to 60 minutes per day, and revised the student's general education accommodations, but it denied a renewed request for Orton-Gillingham and a request that the disability category be changed to dyslexia. Although the student had not met her second grade IEP goals, she had progressed toward them. By December of third grade, the student had moved up several levels in the district's evaluations for reading. The parents requested an independent educational evaluation at the third-grade IEP meeting, but the district denied it and invoked due process. The parents filed for due process as well, alleging denial of FAPE for second and third grades. The ALJ held that the district evaluation was appropriate, as was the IEP, and that the district did not have to specifically assess the student for dyslexia to determine her educational needs. The district court affirmed. In affirming that decision, the Ninth Circuit found that the ALJ properly weighed the testimony of the parent's expert witness, who had not personally evaluated the student or spoken with her teachers. Moreover, the expert lacked special education teaching credentials and experience writing IEPs. The court said the district did not violate the obligation to evaluate the student in all areas of suspected disability, and that the allegation of failure to evaluate for dyslexia made a distinction without a difference since the evaluation included areas like reading and writing that dyslexia affects. On the use of Orton-Gillingham versus other methods, the court ruled that school districts are entitled to deference on methodology decisions. It said the parent did not demonstrate that Orton-Gillingham was necessary for the student to receive appropriate, individualized instruction. The IEP goals were appropriate and the student made progress.

Leigh Ann H. v. Riesel Indep. Sch. Dist., 18 F.4th 788, 80 IDELR 3 (5th Cir. Nov. 22, 2021). The court affirmed a determination that the school district did not violate its obligation to identify and evaluate a student who had a mixed academic record. The student displayed success in several subjects and on some standardized testing. The student also had an inconsistent disciplinary record. The parent did not request evaluation until the student's ninth grade year, his teachers never expressed specific concerns to supervisory personnel about him, and the parent did not share the report of an independent evaluator made in 2009 until 2016, during the student's initial assessment. The school district evaluated the student within about eight weeks of referral. The court said there had been an insufficient record to support an emotional disturbance categorization; it affirmed the ruling that the district's program was adequate even though it was administered in general education. The court said it was reasonably tailored to the student's needs and had measurable postsecondary goals. The court further ruled that exclusion of the student from the first of two manifestation determination meetings and the failure to consider all relevant information did not produce substantive harm when placement of the student in a disciplinary alternative educational center did not impede implementation of his IEP.

A.R. v. Connecticut State Bd. Of Educ., 5 F.4th 155, 79 IDELR 34 (2d Cir. July 8, 2021). In this class action, the Second Circuit affirmed a ruling that the state violated the IDEA by denying free, appropriate public education to students with disabilities between ages 21 and 22 while providing free education to nondisabled students in the same age range. The court affirmed an injunction that the state's agents not terminate, on the basis of age, FAPE for class members who do not receive a regular high school diploma before they reach 22. The court also affirmed a grant of compensatory education to class members who were completely excluded from educational placements between the ages of 21 and 22. The court stated that the original named plaintiff had standing when his special education continued for three years after he was offered a diploma and ended on the stated basis of his age when he reached 21, that the student refused a diploma, and that the student had very limited reading and math skills. On the merits of the age eligibility claim, the court reasoned that the state's local educational agencies are required to provide some form of adult public education, including the GED, the National External Diploma Program, and the Adult High School Credit Diploma Program, and to offer these programs leading to high school diplomas for nondisabled students in 21-22 age range, and these programs meet the IDEA concept of public education. The court further reasoned that an award of compensatory education was a proper remedy for failure to provide education, noting an earlier Second Circuit case, *Lillbask v. Connecticut Dept. of Educ.*, 397 F.3d 77 (2d Cir. 2005), which interpreted the IDEA age range in Connecticut as extending to age 22.

Amanda P. v. Copperas Cove Indep. Sch. Dist., 838 F. App'x 104, 78 IDELR 92 (5th Cir. Mar. 1, 2021), *cert. denied*, 142 S. Ct. 234 (Oct. 4, 2021). This case concerned a child with disabilities that including autism, ADHD, and dyslexia. The district court held that the student did not suffer substantive harm when the district used a dyslexia screener before conducting a dyslexia assessment. The court also said that the district did not unduly delay in writing a new IEP eight months after the student transferred into the district, noting that the dyslexia screening and testing occurred and the summer break

intervened. The court found the evaluation sufficient. As to the substance of the IEP, the court found it sufficiently individualized based on the assessment, that there was active participation by the parents, and that the student received benefits, as shown by objective progress in academic and nonacademic areas. The affirmance from the court of appeals stressed that a denial of free, appropriate public education had not been demonstrated.

Independent Sch. Dist. No. 283 v. E.M.D.H., *supra*.

Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., No. 3:20-CV-00493-MOC-DCK, 2021 WL 3561226, 79 IDELR 98 (W.D.N.C. Aug. 11, 2021), *appeal filed*, No. 21-2003 (4th Cir. Sept. 13, 2021). In this case, the court affirmed an administrative decision against the parent. At the time of the due process complaint, the student was a twelve-year-old seventh grader who had been deemed eligible under Section 504. The parent had over time submitted eight requests for evaluation of the student for special education. On four occasions, the IEP team conducted an evaluation and found the student not eligible. On the last one, the parent presented the team the student's diagnosis of autism spectrum disorder with language and cognitive impairment. After additional evaluations by the school, the team concluded that the student remained ineligible. The school granted a request for independent evaluations in several areas but did not change the IDEA eligibility outcome based on the results. The ALJ and SRO ruled in favor of the school. In affirming, the court rejected a child-find claim on the ground that the school did in fact initiate the IDEA eligibility process, further noting that the student was receiving assistance under the Section 504 plan. On a claim for delay in evaluation, the court said the delay did not cause harm so as to deny the student FAPE. The court also rejected a claim based on use of the single evaluation measure of the student's grades, noting the variety of assessments done and considered by the team. An informal evaluation showing extensive delay in expressive-receptive language came after the IEP team determination and did not create an issue of fact, according to the court. A claim of failure to assess for learning disability was held barred by limitations on the basis that a notice more than a year before the due process filing indicated the assessment would be only for autism. The court rejected claims alleging failure to follow the private evaluation and failure to develop an IEP. On a claim for improper rejection of requests for independent evaluation at public expense, the court said one contested IEE had been provided, and that evaluations for functional behavior and assistive technology would not be required when there was no evaluation by defendant in these areas and they were not needed to determine eligibility. Other claims were rejected as duplicative or not exhausted. Finally, the court dismissed the parent's contention that the case should not have been decided administratively on summary judgment without a hearing and the opportunity for cross-examination, reasoning that the parent had the burden of proof and the procedure was fair.

Hood River County Sch. Dist. v. Student, No. 3:20-CV-1690-SI, 2021 WL 2711986, 79 IDELR 40 (D. Or. July 1, 2021), *appeal dismissed*, Nos. 21-35616, 22-35197, 2022 WL 3073835 (9th Cir. June 6, 2022). Here the court affirmed in part and reversed in part an ALJ decision that that the district denied the student FAPE, determining that the ALJ did not err in awarding compensatory education for the full 2018-19 school year on

the basis of a due process complaint filed on March 20, 2019, when the ALJ concluded that the conduct of the school district before the filing of the complaint deprived the student of FAPE for the full school year. The court deferred to credibility findings of the ALJ as to the district's purported reasons for delay in an autism evaluation for the student during the 2016-17 school year and nine months of 2017-18 school year. The court commented on the ALJ's careful discussion of the evidence. The court agreed with the ALJ that progress reports concerning the student did not provide sufficient information to the parents when the goals and objectives in the IEP were stated in quantitative terms but the reports lacked sufficient data to determine progress on the goals and objectives. The court further held that a parent need not object to an IEP or IFSP at the time of adoption to challenge it later. The court affirmed the decision that the school should have conducted an FBA in light of the danger the student's aggressive behavior posed when dysregulated. The court also agreed with the ALJ that the district failed to implement the May 2018 IEP in the first days of kindergarten by failing to provide support for transitions and not having an assistant and a sensory menu. Instead the district ejected the student from the general education classroom. The district also lacked a basis for shifting the student to a more restrictive placement in 2018-19 by shortening the student's school day to two hours. The court affirmed an award of the entire school year of kindergarten instruction and related services as compensatory education, 900 hours to be spread out over time. The court, however, overturned an award of a new FBA, noting that one took place five months before the filing of the due process complaint.

Maggie J. v. Donegal Sch. Dist., *infra*.

Montgomery Cnty. Intermediate Unit No. 23 v. K.S., No. CV 20-233, 546 F. Supp. 3d 385, 79 IDELR 5 (E.D. Pa. June 29, 2021). This case concerned a young student with autism spectrum disorder and other conditions, who was eligible under the IDEA disability standard. The court held that although Pennsylvania does not offer free, universal preschool, the intermediate unit has to reimburse the parents for tuition and transportation for placing the student at a typical preschool if the student requires placement in a typical preschool to receive FAPE. This conclusion held despite the Pennsylvania custom against transporting students to typical preschools and despite an offer of placement at a preschool designed for children with specialized needs. The court said that the intermediate unit's own evaluation supported placement of the student in a typical preschool, and that the state did not clearly opt out of IDEA Part B for 3-5 year-olds. Moreover, state policy documents made clear that 3-5 year-olds are entitled to FAPE, IDEA LRE requirements apply to 3-5 year-olds, and transportation is a related service under the IDEA.

E.C. v. Fullerton Sch. Dist., No. SA CV 18-1496-JFW(JDEX), 2021 WL 2337630, 79 IDELR 17 (C.D. Cal. Apr. 30, 2021). This case involved a second grader with autism and speech and language impairments who had average to high average intelligence but behavior and other difficulties. The district proposed continuing to place the student in a multi-age general education classroom. The court affirmed the ALJ's conclusion that the procedural violation of failing to allow the parents' evaluator to observe the student at school before resumption of an IEP meeting denied the student free, appropriate

public education. The court stressed the importance of procedural rights to enable parental participation, as well as the presence of a state law right to have a parental expert observe the district's proposed placement before a due process hearing. Regarding remedies, the court reversed the ALJ's denial of reimbursement for the student's private placement and related services. The court emphasized the denial of FAPE and the appropriateness of the private placement at the UC Irvine Child Developmental School. The court further held that the district behaviorist's functional behavior assessment was not appropriate due to lack of testing of the validity of hypotheses concerning the student's eloping and aggression, but held that this failing did not deny FAPE. Therefore the ALJ's remedy for the violation of an order for an independent functional behavior assessment at district expense was proper.

IV. CHILD-FIND AND EVALUATION REGARDING COVID-19 ISSUES

Return to School Roadmap: Child Find Under Part B of the Individuals With Disabilities Education Act, 79 IDELR 140 (OSERS Aug. 24, 2021). In Question B-3, the agency asked: "Can an LEA require that all students participate in general education multi-tiered systems of support (MTSS) or other general education interventions prior to referring a child for special education?" The answer was: "No. MTSS is a comprehensive continuum of evidence-based, systemic practices to support a rapid response to students' needs with regular observation to facilitate data-based instructional decision-making. Many LEAs have implemented successful MTSS frameworks, thus ensuring that children who simply need short-term and targeted, or intensive interventions are provided those interventions, IDEA, however, does not require, or encourage, an LEA to use an MTSS approach prior to a referral for evaluation or as part of determining whether a child is eligible for special education or related services."

Fact Sheet: Long Covid under Section 504 and the IDEA: A Resource to Support Children, Students, Educators, Schools, Service Providers, and Families, 79 IDELR 76 (OCR & OSERS July 26, 2021). This document states, among other things, that "long COVID can be a disability under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. . . . A child or student experiencing long COVID or other conditions that have arisen as a result of COVID-19 may be eligible for special education and related services under IDEA and/or may be entitled to protections and services under Section 504. . . . Child Find for IDEA Part B requires public agencies to implement policies and procedures ensuring that all children with disabilities who need special education and related services are identified, located, and evaluated, regardless of the severity of the disability. This includes, for example, children who may have been identified as a child with a disability under the IDEA category of other health impairment as a result of contracting COVID-19 (e.g., long COVID or multisystem inflammatory syndrome in children, known as MIS-C). . . . Under Section 504, schools must conduct an evaluation in a timely manner of any student who needs or is believed to need special education or related services because of a disability. . . . For example, a student who has had COVID-19 and who continues to have difficulty concentrating may require an evaluation to determine if the student has a disability and needs special

education or related services such as additional time to finish classwork and tests." (Footnotes omitted.)

V. INDEPENDENT EDUCATIONAL EVALUATION AT PUBLIC EXPENSE

L.C. v. Alta Loma Sch. Dist., 849 F. App'x 678, 680, 78 IDELR 271 (9th Cir. June 8, 2021). Here the court of appeals ruled that the district court erred in finding that the school district unnecessarily delayed in providing an IEE or filing a due process complaint to oppose the request, stating: "In this case, the District exchanged numerous emails and letters with Student's parents from August 10, 2017, until it filed for a due process hearing on December 5, 2017. These communications reflect the parties' attempts to reach agreement on Dr. Stephey's IEE and other issues. Indeed, the parties reached agreement on a contested issue as late as December 1. Further, the longest delay in communications, November 17–30, was largely due to the District's Thanksgiving break. The parties reached final impasse on the IEE issue on Thursday, November 30, and the District filed for a due process hearing the following Tuesday, December 5. Thus, we conclude there was no unnecessary delay."

VI. IEPs, IEP IMPLEMENTATION, AND RELATED

J.T. v. District of Columbia, No. 20-7105, 2022 WL 126707, 80 IDELR 62 (D.C. Cir. Jan. 11, 2022) (unpublished). This case involved a student with autism, whose 2018-19 IEP called for minimal noise in his classroom and a maximum class of six students. The public school system's social worker suggested possible schools to the parent, who rejected the first one, saying it was too far from the student's home, too noisy, and had a class size of more than six. The parent filed a due process complaint, but the hearing officer rejected the parent's contentions and dismissed the case. The school system then offered another school, but the parent again declined, for the same reasons. The parent filed for due process again and the hearing officer ruled for the school system. The parent then filed in district court, and the district court granted summary judgment to the school system. On appeal, the D.C. Circuit affirmed. It reasoned that previous caselaw established that the educational placement offered by the public school system need not necessarily include a specific institution, and even if that view were rejected, in this case the school system worked actively to involve the parent in the selection of the school. Accordingly, the school system did not significantly impede the parent's participation rights. On the merits of the claim that the schools offered were not appropriate, the court rejected the allegation that the schools were too far away, reasoning that transportation is to be provided in conformity with the IEP, and the student's IEP did not mention intolerance of long rides. The hearing officer credited testimony from the school system's social worker that the proposed classroom placements were not overly noisy. According to the social worker, one had only one nonverbal student in the class and the other had procedures in place to minimize noise. The hearing officer also credited testimony that the class sizes would not exceed six. The court said it would not second-guess the hearing officer's conclusions.

Capistrano Unified Sch. Dist. v. S.W., 21 F.4th 1125, 80 IDELR 31 (9th Cir. Dec. 30, 2021), *petition for cert. filed*, No. 21-1479 (May 24, 2022). This case involved a first grader whose parents believed she was not receiving adequate support throughout the school day. They filed for due process and enrolled her in private school. They told the district the student would stay in private school for first and second grade and sought tuition reimbursement for both school years. That due process complaint was subsequently withdrawn, and the contested first-grade IEP expired. When the student was in second grade, the parents filed a new due process complaint requesting reimbursement. Ruling on the second due process complaint, the ALJ found in favor of the district on issues related to the student's kindergarten year, a decision that was not contested before the court. The ALJ ruled for the parents on other issues, namely that the district denied the student appropriate education by failing: to develop appropriate first grade IEP goals, making a suitable offer of placement and services, filing for due process to defend the first grade IEP, and having a current IEP in place at the start of the second grade year. On review, the district court ruled that the district failed to offer appropriate placement and services for first grade, a decision that the district did not further challenge. The district court found for the district on the other issues. Although it said the district did not have an obligation to prepare an IEP for second grade, it affirmed the ALJ's order of reimbursement for that year. The district appealed the reimbursement for that year and the parents cross-appealed on the other issues. The court of appeals ruled that the first grade IEP had appropriate goals and that district adequately considered the parents' concerns and recommendations. The IEP's goals were sufficiently measurable. The district's use of existing data was sufficient. Interpreting California law, the court said that the district had no obligation to file for due process unless they determined that a proposed special education component to which the parent did not consent is necessary to provide the student with FAPE. There was no such determination in this case. Finally, the court ruled that once the parents placed the student in private school, the district did not have an obligation to develop an IEP. Although the obligation to provide an IEP applies to all students with disabilities within the jurisdiction, IEPs do not have to be provided if the student is placed in private school by the parents. Instead, students in the private schools need only be offered a services plan, and the parents do not have an individual right to challenge it. This applies even if a claim for reimbursement has been filed. The court relied on 20 U.S.C. § 1412(a)(10), and said it distinguishes students placed in private schools by districts from those placed by parents, and provides for reimbursement for a subset of those placed by parents. The students placed by parents, then, do not have a continuing entitlement to an IEP unless the parents ask for one. The court affirmed and remanded the case to the district court for consideration of attorneys' fees. *See also id.*, Nos. 20-55961, 20-55987, 2021 WL 6196698, 80 IDELR 63 (9th Cir. Dec. 30, 2021) (reversing award of reimbursement for tuition and services for second grade, but not reversing award for occupational therapy services).

Board of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 78 IDELR 91 (2d Cir. Mar. 3, 2021). In this case, a panel of the Second Circuit ruled that, contrary to some language in *R.E. v. New York City Department of Education*, 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012), a school district is not permitted to unilaterally amend an IEP during the thirty-day resolution-session period following a parent's filing of a due process

complaint. The case involved a student diagnosed with Tourette's syndrome, ADHD, developmental coordination disorder, and central auditory processing disorder, who was classified as learning disabled. The relevant school year was for the student's seventh grade, 2016-17. The student had enrolled in a specialized private school for her sixth grade year, and the parents failed in a due process hearing and state-level review to obtain tuition for that year. In June of the sixth-grade year, the district held a meeting to develop the IEP for seventh grade; there was a dispute later over whether the class the district proposed at that meeting was one with a 15:1+1 ratio or a 12:1+1 ratio. The parent visited the public school and reported that teachers said the ratio was 15:1+1. The school had no 12:1+1 classes. The district did not provide a written IEP at the June meeting nor after the school visit. On August 17, the parents gave written notice that they intended to enroll the student at the private school for her seventh- grade year. The notice spoke of the need for a small class size and the absence of services and supports the parents felt the student needed on the basis of the evaluation. On August 30 or 31, the parents received a written IEP from the district stating that the student would be placed in a 12:1+1 class. The student began seventh grade at the private school on September 6. The parents filed for due process on September 26, 2016. The complaint cited the uncertainty over the ratio, among other issues. On October 7, the parents attended a resolution session with district personnel, and were told the IEP mistakenly said 12:1+1 when it should have said 15:1+1. The parents and district did not agree on a settlement at the resolution session. The district did not send the parents a revised IEP with the 15:1+1 ratio on it until October 27, which was 31 days after the date of the due process complaint. The parents said it was not delivered until November 1, the day they signed a contract with the private school for the school year. The IHO concluded that procedural errors, including the listing of a ratio in the August IEP that the district did not intend to implement, did not deny the student FAPE. The IHO ruled on the substantive issues that the October IEP's 15:1+1 ratio and other features offered the student FAPE. The SRO reversed, noting that the October IEP was outside the 30-day resolution period and finding that the August IEP denied FAPE because the district was not able to implement it, as written, at the start of the school year. The private school was an appropriate placement and equitable considerations did not weigh against the parents, so reimbursement was ordered. The district court affirmed the SRO, and the court of appeals affirmed the district court. In affirming, the court of appeals made clear that it disagreed with the premise of the school district, the IHO, the SRO, and the district court that the IDEA allows districts to unilaterally amend a student's IEP during the 30-day resolution period, in accordance with a dictum in *R.E.* that the resolution period gives districts 30 days to remedy IEP deficiencies without penalty. *R.E.*, 694 F.3d at 188. The *Yorktown* court declared: "We now hold that, although the IDEA permits a school district to propose changes to an IEP during the resolution period, it does not permit a district to unilaterally amend an IEP during this period. Consistent with our prior interpretations of the statute, this holding ensures that parents who decide to reject a proffered public placement, place their child in a suitable private school, and seek reimbursement as part of their due process complaint can rely on the contents of their child's written IEP when making the decision to do so. . . . To the extent that dicta in *R.E.* suggested otherwise, we now clarify the scope of the Court's ruling in that case." *Yorktown*, 990 F.3d at 167. The court noted that the school district did not contest that the unamended IEP denied the student free, appropriate public education for 2016-17

because the school district did not have the specified class, and so affirmed the judgment of the district court in favor of the parents.

Spring Branch Indep. Sch. Dist. v. O.W., *supra*.

V.A. v. City of New York, No. 20-CV-0989(EK)(RML), 2022 WL 1469394, 81 IDELR 46 (E.D.N.Y. May 10, 2022). The parent sought tuition reimbursement for her daughter for the 2018-19 school year, when the student was in eighth grade. The public school system had designated the student as having a specific learning disability in reading back in 2012. In seventh grade (2017-18), the student attended a private school, and the parent took on the obligation of paying tuition. The public school system's IEP for the following school year, 2018-19, provided for a 12:1+1 class for academics in a nonspecialized public school as well as various related services and supports. The projected implementation date was September 3, 2018, but the 2018-19 IEP did not identify any specific school for the student. The defendant maintained that it mailed a "school location letter" to the parent on July 12, 2018. The parent maintained that she never received the letter or any other notice of the location of the placement. The copy of the letter produced by the defendant at hearing had the date of September 9, 2018, a Sunday four days after the start of the school year. The defendant said that the date on the copy was due to a computer programming error: the student information database was said to generate dates based on the start of the school year, which the staff could not modify. But, as the court pointed out, September 9 was not the start of the school year, so "The City thus has offered no logical explanation for why September 9 was printed on the letter." *Id*. at *2. The defendant relied on testimony from a placement officer that the letter was mailed, and a document from the computerized student database. The parent said that since she had no information about the school designation, she arranged for placement of the student at the private school the student had attended the previous year. In August (either August 17 or 19), she sent a letter to the committee on special education stating her intention to place the student at the private school starting September 4 and seek reimbursement. She enrolled the student there, acquiring an obligation to pay $41,659, plus or minus any adjustment that the New York State Education Department would make in the state-approved rate. The parent filed for due process on September 28, 2018. The IHO decision rejected the parent's contention that the site offer letter had never been received and concluded that the IEP was substantively adequate. The SRO affirmed, acknowledging that "in light of the immense ... size of the district in this case, it is reasonable to hold that ... the district was required to notify the parent where the IEP services would be implemented before the IEP went into effect as part of its obligations to implement the student's services," *id*. at *4 (quoting SRO decision), but concluding that a presumption of mailing and receipt applied and the IHO was entitled to rely on the placement officer's testimony about mailing the letter. The district court vacated the SRO decision. It noted that the school system had the burden of establishing the validity of its plan for the student, and:

> Given the uncertainty surrounding the mailing of the school location letter, the City failed (at the first step) to demonstrate that its plan provided K.A.D. with a FAPE — at least on a timely basis. Simply put, a school district that fails to tell a parent where it proposes to send her child

> to school cannot carry its burden of demonstrating that it proposed a valid plan for that student.

Id. at *5. The case was remanded for a decision whether the parent's unilateral placement was appropriate to the student's needs and whether the equities favored relief. As the court noted, the federal regulations require that an IEP include the location of the services to be provided, 34 C.F.R. § 300.323(a), and even if it is not a per se violation for the IEP to omit the name of the school if the information soon follows, the information cannot come so late that it impedes the parent's ability to participate meaningfully in the school selection process. The court collected cases in support of that proposition. Although a presumption of receipt of a letter applies under New York law when the record establishes office procedures followed in the regular course of business under which correspondence is addressed and mailed, the presumption did not apply here. The court cited the lack of testimony of an independent recollection on the part of the placement officer of mailing the letter when she mailed many such letters in the course of the year. The court also noted the September 9 date of the letter – inconsistent with the claim that letters were dated for the start of the school year – as well as the absence of relevant information in the database log. Under New York law, various additional evidence in support of the claim of actual mailing was also insufficient, notably because of the lack of specific recollection of mailing the letter on the part of the placement officer. The absence of notice meant that the parent could not arrange a visit to the proposed placement or otherwise meaningfully participate in the school selection process. Policy concerns did not compel deference to the SRO in this case, where the notice question turned on New York law about presumptions of mailing and receipt. The court found remand on the appropriateness of the private placement and the equities to be proper. The SRO did not reach those issues, and the court found that the record did not support the IHO's findings that the private placement failed to offer sufficient remediation and was not slowly enough paced. The evidence the IHO relied on as to the student's reading level was from 2017 and was contradicted by standardized testing from December 2018. Moreover, eventually the defendant itself placed the student at the private placement and funded the tuition, at least as of 2021. The private placement provided all or most of the services in the IEP. The court said the SRO should make the decision about the appropriateness of the private placement in the first instance.

Albuquerque Pub. Schs. Bd. of Educ. v. Armstrong, No. 1:21-CV-00396, 2021 WL 5881996, 80 IDELR 42 (D. N.M. Dec. 13, 2021), *appeal filed*, No. 22-2012 (10th Cir. Feb. 7, 2022). The court affirmed the hearing officer's decision in favor of the parents in this case involving a student's fourth through sixth grade years. The student was found to have characteristics of dyslexia back in second grade. The court said that the parents established that the district failed to implement with fidelity the SPIRE program for reading, writing, and spelling. The student made progress academically, but the progress was inconsistent and test scores showed a lack of meaningful improvement, with the student not advancing beyond level four in SPIRE from the start of fifth grade to the start of sixth grade. The class sizes varied, with ten to fourteen in fifth grade when six to eight are preferred under the SPIRE program. The court said that the school failed to offer a cogent and responsive explanation for its decisions. Further, the student's teachers lacked professional training in the program, contrary to state law requirements

for dyslexia instruction. Although the student appeared to have had frequent absences, the evidence was unclear, in part from difficulties in recording online attendance during the Covid-19 pandemic, and the absences appeared related to the disability, whether because of problems logging on due to reading difficulties or avoidance of language arts class or attendance at therapy. The court also affirmed the hearing officer's finding that the district failed to provide all the assistive technology listed on the IEP. The court agreed that other IDEA violations occurred but that the hearing officer correctly found that prospective relief was sufficient to remedy them.

Rogich v. Clark Cnty. Sch. Dist., No. 2:17-CV-01541-RFB-NJK, 2021 WL 4781515, 79 IDELR 252 (D. Nev. Oct. 12, 2021). This case concerned IEPs for June 2014 and the school years 2014-15, 2015-16, and 2016-17, regarding a student with a history of hydrocephalus and with multiple developmental delays as well as learning disabilities and other disorders. The IEPs for 2014 and 2016 provided accommodations such as multisensory instruction but did not identify a specific methodology or program or a structured curriculum format that teachers would be obliged to use to meet the student's needs. The court overturned an SRO decision in favor of the district and ruled that the IHO decision properly concluded that the IEP teams failed to adequately review evaluations provided by the parents and consider the parents' concerns, as required by 20 U.S.C. § 1414(c)(1)(A)(i) and (d)(3)(A)(ii). The court noted that the parents were not provided information regarding any programs provided by district that would adequately address the student's needs, which evaluation materials showed called not only for multisensory instruction but also for a delivery mechanism that would include multimodality teaching applied with consistency and fidelity, without switching or mixing of methodologies. The court further declared that the district substantively violated the IDEA by not offering a specific methodology equivalent to Orton-Gillingham that was research based, systemic, cumulative, and rigorously implemented. On the contrary, no district personnel had sufficient knowledge of Orton-Gillingham, and that infringed the parents' participation rights and resulted a in loss of educational opportunity. The court also found that refusal to include Orton-Gillingham or a similar structured literacy program in the IEPs, despite being on notice of the need, constituted a denial of reasonable accommodation in violation of Section 504 and the ADA. The court awarded a total reimbursement under IDEA and ADA-Section 504 of $456,990.60.

S.S. v. Bellflower Unified Sch. Dist., No. CV 20-9829-MWF, 2021 WL 4260392, 79 IDELR 201 (C.D. Cal. Sept. 3, 2021). The court here ruled that a district failed materially in implementing the IEP of a teenaged blind student with no usable vision when it failed to hire a teacher with the credentials to provide direct academic instruction to students who have visual impairments. Under the student's IEP, the specialized academic instruction in English, math, and social studies was to be taught by a teacher of the visually impaired. The teacher who had previously served the student had credentials in both academics and teaching visually impaired students, but retired after the student's ninth grade year, and after offering no specialized instruction for four days at the beginning of the student's tenth grade year, the district contracted to provide an itinerant service provider who held a credential in supporting students with vision impairments, but who could do no more than support the academic teacher conducting

the instruction. The district learned of the problem and sought a new teacher of the visually impaired, and apparently asked for a meeting to conform the IEP to the services actually being provided, but the parent resisted and the IEP stayed the same. Substitute teachers without visual impairment credentials provided instruction with support of the itinerant. Finally, on February 10 of the school year, a credentialed teacher of the visually impaired began providing instruction. The court found that the failure to implement the IEP was material, denying FAPE. The court relied on Ninth Circuit precedent (*Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007)), in holding that the materiality standard does not require demonstrable educational harm for the student's claim to prevail. The court further ruled that the itinerant did not implement the instruction called for on the IEP based on the great weight of the evidence and contrary to the ALJ's ruling. The court said:

> During [a] visit, Parent observed Pawluk [the itinerant] brailling some materials, but not providing the academic instruction. (AR 1685). The substitute teacher asked Pawluk what to do with Student, to which Pawluk responded, "I don't know.... [Y]ou're the teacher; you have to, like, come up with some academics." (AR 1685). The substitute responded, "[L]et me see what I can find." (AR 1685). In the meantime, Pawluk told Student to practice her braille by writing her name, address, and phone number in braille; however, Student completed this assignment very quickly. (AR 1685). The substitute teacher eventually found a worksheet for Student to complete, but because the worksheet was not Brailled, the substitute had to read it out loud to Student. (AR 1685-1686). Parent left the visit in tears, pleading with Harvin, the District's program administrator who was supervising the visit, to help find an appropriate solution. (AR 1686). *Id*. at *8.

The court imposed an award of 239 hours of compensatory education. The court affirmed the ALJ's decision that the student's psychoeducational assessment was adequate.

Hood River County Sch. Dist. v. Student, supra.

Elmira City Sch. Dist. v. New York St. Educ. Dep't, 166 N.Y.S.3d 710, 717, 80 IDELR 294 (App. Div. Apr. 7, 2022). This case involved a nonverbal, non-ambulatory student with a condition causing mucous to accumulate in her throat and threaten asphyxiation in absence of suctioning, hence requiring the care of a one-to-one registered nurse at school. The nurse was not provided for a significant period of time, and the district eventually proposed placing the student residentially. In deciding the parent's appeal of an adverse IHO decision, the SRO determined that the district failed to offer the student a free, appropriate public education between the periods of September 2018 to December 2018, when it should have taken measures to obtain a corrected care plan for the student rather than relying on the parent and her care coordinator, and February 2019 to June 2019, when the nurse assigned by the BOCES resigned and the district said it was unable to find a replacement. The SRO further rejected the district's plan to place the student residentially over the parent's objection. The lower court dismissed the

district's appeal. The Appellate Division reversed in part, ruling that any failure by the district to do more to obtain a corrected care plan in the 2018 period did not significantly impede the delivery of services. But it affirmed the holding that the district denied FAPE during the 2019 period, ruling that the IEP was not implemented and that "an impossibility of performance defense is generally at odds with the purpose of the IDEA." The court went on to affirm the finding that the residential placement recommendation, which was largely based on the inability to hire the needed nurse rather than the student's educational needs, was not appropriate, and that compensatory education must be provided.

VII. *ENDREW F.* AND FREE, APPROPRIATE PUBLIC EDUCATION

Falmouth Sch. Dep't v. Doe, Nos. 21-1882, 21-1887, 2022 WL 3270438, 81 IDELR 151 (1st Cir. August 9, 2022). In this case, the court affirmed a hearing officer decision in favor of the parents of a student who struggled with reading and writing while enrolled in public school, a decision that the district court also affirmed. The due process hearing officer held that the district failed to offer the student a FAPE from January 2018 to March 2019 and from September 2019 to February 2020, concluding that by January 2018 it became clear that the SPIRE program employed by the district was not reasonably calculated to furnish the student a FAPE, and that the September 2019 IEP was not sufficiently ambitious to enable the student to make appropriate progress. The hearing officer ordered compensatory education, including independent evaluation expenses and reimbursement of private school tuition and transportation. The court of appeals rejected the school district's argument that the hearing officer and district court mistakenly found that SPIRE did not address orthographic processing. Instead, the decisions said that the evidence showed the student was in need of a program like Seeing Stars (a Lindamood Bell program) that is specifically designed to address orthographic processing. Educational agencies may choose among competing methodologies, but here the instruction did not meet the student's individual and unique needs for a focus on orthographic processing. The court noted the greater progress the student made when in a private school using an approach focused on orthographic processing. The court also said that the parents' experts did not have to explicitly testify that IEPs were inadequate, when they testified to facts supporting the conclusion that the IEPs were inadequate. The court rejected an argument based on the least restrictive environment principle, pointing out the lower court's conclusion that the parents' proposal for half-time in mainstream instruction at public school and half at the specialized private school they chose was not much more restrictive than the public school's approach, and was justified by instructional needs. The remedy of reimbursement for full-time placement at the private school after the parents rejected the district's IEP should not depend on an LRE comparison, but rather on a determination that the private school offered appropriate education. The lower court did not base the conclusion that the January 2018 IEP was deficient on information unavailable at the time it was devised; the post-IEP information simply reinforced the conclusion that it was deficient. The conclusion that the district's offer of services in January 2019 was too little, too late was supported by the fact that the Lindamood Bell instruction offered was to be conducted by a teacher not certified in the program who lacked recent experience with the program. By fall of 2019, the district offered

additional specialized reading instruction, but did not agree to use Lindamood Bell, and instead changed to multisensory synthetic phonics instruction. Due weight had to be afforded the hearing officer's determination that the September 2019 IEP not targeted to the student's needs. The tuition reimbursement order was not improper due to lack of mainstreaming at the private school when it provided special education the student needed and it enabled him to make progress. The court went on to affirm the district court's dismissal of the parents' claims against the district for retaliation in violation of Section 504 and the Americans with Disabilities Act as well as their claim against the director of special education for retaliation in violation of the First Amendment.

Minnetonka Pub. Schs., Indep. Sch. Dist. No. 276 v. M.L.K., 42 F.4th 847, 81 IDELR 123 (8th Cir. July 29, 2022), involved a student identified under the IDEA as eligible under autism spectrum disorder, who demonstrated difficulties in math, reading, writing, and attention, plus social and behavioral issues. Over several years, he received gradually increasing services directed significantly to reading and writing, and made some progress on IEP goals. The parents filed a due process complaint just before the student started fourth grade. An independent educational evaluation revealed that the student had ADHD and severe dyslexia in addition to autism. The ALJ found a failure to assess in all areas of suspected disability, failure to develop appropriate IEP goals, failure to revise the IEP to address lack of progress and failure to offer extended year services. Compensatory education was ordered, but restricted due to limitations. The district court affirmed, but applied a shorter, two-year limitations period. In reversing, the court of appeals said the failure to identify the student as having ADHD and dyslexia did not cause the student's slow progress in reading, and that the services in the IEP were reasonably calculated to allow him to make appropriate progress. Updates to goals and benchmarks increased the student's small group and one-on-one instruction, and the goals were achievable and measurable, and the student was said not to be a good candidate for Wilson instruction before it was offered, due to lack of attentional stamina.

G.D. v. Swampscott Public Schools, 27 F.4th 1, 80 IDELR 149 (1st Cir. Feb. 7, 2022). Here, the court affirmed a district court's affirmance of a due process decision rejecting the parents' claim for tuition for a unilateral placement of the student, who had significant learning disabilities, at Landmark School after her second grade year at the school system. The court said that the student in fact made notable progress in reading and other areas after enrolling in the school district for second grade after kindergarten and first grade in local private school. The court discounted a lack of progress in standardized test performance, reasoning that standardized tests do not account for the student's individual circumstances. The court also rejected the argument that the district court should have admitted evidence of the student's progress at Landmark, evidence not available at the time of the hearing, reasoning that the IEP is to be evaluated based on data available at the time it is written.

Crofts v. Issaquah Sch. Dist. No. 411, *supra*.

Amanda P. v. Copperas Cove Indep. Sch. Dist., *supra*.

D.C. v. Klein Indep. Sch. Dist., *supra*.

VIII. FAPE AND COVID-19

Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1179 (9th Cir. Dec. 4, 2021). The court in this decision stated that an injunction against requiring compliance with a student vaccination mandate had now terminated, after a per se deferral option for pregnant students had been removed. The court found insufficient likelihood of success on a free exercise of religion claim, noting the neutrality and general applicability of the requirement when only medical exemptions would be permitted, and that newly enrolling students would receive only a 30-day grace period for documentation. Furthermore, "in-person attendance by unvaccinated students with an IEP is not comparable to in-person attendance by students with religious objections to vaccination because federal law—the IDEA—requires that a school 'follow certain procedures before it can bar students [with IEPs] from in-person attendance.'" (quoting from dissent). The court went on to state that under the IDEA IEPs must remain in effect until completion of the process for changing them, and the vaccination mandate accounts for that legal requirement by permitting conditional enrollment, providing only temporary procedural protection. The Supreme Court denied certiorari before judgment and denied injunctive relief without prejudice to a later application. 142 S. Ct. 1099 (Feb. 18, 2022).

E.T. v. Paxton, 19 F.4th 760, 80 IDELR 1 (5th Cir. Dec. 1, 2021). The court here granted a stay pending appeal of an injunction preventing enforcement of the Texas governor's order prohibiting local government entities from imposing mask mandates, reasoning that a strong likelihood of success existed to defeat a claim by parents of seven children with disabling conditions that the executive order violated rights under the ADA, Section 504, the IDEA, and the American Rescue Plan Act, and that the defendant showed irreparable injury and met other requirements for a stay. The court declared that plaintiffs who had disabilities leaving them particularly vulnerable during pandemic conditions likely lacked standing, in that they failed to show any concrete, or actual or imminent injury from enforcement of the order. The court reasoned that they could use distancing, voluntary masking, class spacing, plexiglass, and vaccinations to ensure a safer learning environment regardless of the prohibition on mask mandates. The court also stated that increased risk often fails to satisfy the requirement of actual or imminent injury and that the injury was likely not redressable because no authority exists to require schools to adopt mandates. The court said as to the merits of the claim that the IDEA exhaustion provision would apply because the claims were not centered on physical access to schools, and no reasonable accommodation request was made for purposes of ADA and Section 504. Further, the court declared that because other means exist to control the spread of Covid-19, there is no basis to claim preemption by ADA and Section 504, and that the order did not conflict with the Rescue Plan Act. The court also expressed doubt that Rescue Plan Act provided a private cause of action. The court said that the district court's injunction was overbroad. The court also opined that whenever a statute is enjoined a state necessarily suffers irreparable harm and that a similar point applied to an order such as this one. The court subsequently vacated the trial court's permanent injunction, ruling that the plaintiff students lacked standing on

the basis of an asserted injury of increased risk of contracting Covid-19 or suffering complications from Covid-19 infections. 41 F.4th 709, 81 IDELR 126 (5th Cir. July 25, 2022).

Brach v. Newsom, 6 F.4th 904, 79 IDELR 61 (9th Cir. July 23, 2021), *vacated and reh'g en banc granted*, 18 F.4th 1031, 121 LRP 40338 (9th Cir. Dec. 8, 2021), *appeal dismissed*, 38 F.4th 6, 81 IDELR 62 (9th Cir. Jun 15, 2022). In the July 23, 2021, decision, the Ninth Circuit affirmed the part of a district court decision that granted summary judgment against parents whose children attended public school who challenged state Covid-19-related restrictions on instruction on the ground that they violated a federal constitutional right to public education guaranteed by the Fourteenth Amendment and denied substantive due process rights. However, the court reversed summary judgment against private school parents who argued that the restrictions violated substantive due process and equal protection and remanded the private school parents' case for further proceedings. The court further held that the case was not moot under the doctrines of voluntary cessation and capable of repetition yet evading review. Judge Hurwitz dissented on the issue of mootness and the validity of the private school parents' claims. Background to the appeal is found in two district court decisions. The first, at No. 2:20-cv-06472-SVW-AFM, 2020 WL 6036764, 77 IDELR 189 (C.D. Cal. Aug. 21, 2020), was an action by parents, including parents of children with disabilities, and a student with disabilities, who alleged that California's school reopening framework violated the U.S. Constitution, the Civil Rights Act, the IDEA, and Section 504 by restricting in-person education through county-wide determinations based on the local prevalence of COVID-19 cases and local strain on health care capacity. The court denied a proposed TRO. The court reasoned with regard to the IDEA that the claim was subject to the exhaustion requirement and no exception applied, even though the relief sought was systemic. The court also found an inadequate showing of irreparable harm. In the second decision, 2020 WL 7222103, 77 IDELR 285 (C.D. Cal. Dec. 1, 2020), the court granted summary judgment against the plaintiffs, pointing to the replacement of the statewide monitoring list with a tier-based system with different criteria and the permission for necessary in-person child supervision and limited instruction, targeted support services, and facilitation of distance learning in small groups for specified subsets of students. The court again relied on the administrative exhaustion requirement regarding the IDEA claim. This latter ruling is what was affirmed in part and reversed in part by the court of appeals in the July 23, 2021, decision. Ultimately, however, the *en banc* Ninth Circuit ruled that the appeal was moot, and remanded with instructions that the district court vacate its judgment and dismiss the complaint. 38 F.4th 6, 81 IDELR 62 (9th Cir. Jun 15, 2022).

Charles H. v. District of Columbia, No. 1:21-CV-00997, 2021 WL 2946127, 79 IDELR 14 (D.D.C. June 16, 2021). The court granted a preliminary injunction for a group of about 40 students ages 18 to 22 with IEPs incarcerated at two D.C. Department of Corrections facilities, who were being educated on-site in high school programs, but whose in-person instruction was terminated in March 2020 in response to Covid-19 without the provision of the virtual classes available to other students. The education offered the group consisted of sporadic delivery of instructional work packets, either printed or distributed through tablets, at least until April 21, 2021. These materials were of little

value to students. The printed materials rarely resulted in responses from instructors, and the tablets did not access needed software and so were even less usable than the paper packets. Moreover, the students did not receive counseling or other related services or received only very limited services. The court found a likelihood of success on the claim of denial of appropriate education in the form of beneficial, specialized instruction for even half of the amounts on the students' IEPs as of May 2021, as well as lack of support services. The court also concluded that the plaintiffs were likely to demonstrate the defendants did not implement students' IEPs to the greatest extent possible in light of the pandemic, noting that a secure WiFi network was not even begun until after the filing of suit. The court further found irreparable injury, balance of equities, and public interest, and provisionally certified the class. In February 2022, the court held the district in contempt of court for failure to provide IEP-mandated services to 44 incarcerated students eight months after being ordered to do so. *Charles H. v. District of Columbia*, No. 1:21-CV-00997, 2022 WL 1416645, 80 IDELR 163 (D.D.C. Feb. 16, 2022).

Round Rock Indep. Sch. Dist. v. Amy M, 540 F. Supp. 3d 679, 78 IDELR 285 (W.D. Tex. May 19, 2021). This case principally concerned ADA and Section 504 claims. It involved a high school student with traumatic brain injury who experienced hospitalizations and many absences during freshman year, was denied flexible scheduling and homebound services as accommodations, and instead was the subject of truancy proceedings, then was disenrolled when she did not appear for first day of the next school year and eventually was unilaterally enrolled by her parent in private school after hospital treatment. Relevant to the IDEA and Covid-19, the court held that the private placement ordered by hearing officer remained the student's stay-put placement even though the student opted to attend the private placement remotely during the Covid-19 pandemic. The court required the school district to reimburse the parent for the continued placement, including summer. The court reasoned that the change of location to remote learning was not a significant change in the program and noted that the student was slated to return to in-person instruction in October 2020.

L.A. v. New York City Dep't of Educ., No. 1:20-CV-05616-PAC, 2021 WL 1254342, 78 IDELR 185 (S.D.N.Y. Apr. 5, 2021). In this decision, the court granted a defense motion to dismiss the complaint for want of exhaustion. The parent contended that the defendant had not produced an IEP for the student for the 2020-21 school year, but the parent did not oppose a pendency placement at a private school through remote instruction. Although a delay in appointment of a hearing officer occurred due to the Covid-19 pandemic, a resolution agreement provided some relief and no systemic claims were made. The case was a sequel to *L.A. v. New York City Dep't of Educ.*, No. 1:20-cv-05616-PAC, 2020 WL 5202108, 77 IDELR 104 (S.D.N.Y. Sept. 1, 2020). There the court denied a preliminary injunction but issued an order enforcing the automatic injunction under 20 U.S.C. § 1415(j) to maintain the payment of private school tuition for a four-year-old nonverbal child with autism. The child had been served under an IEP developed by the Committee on Preschool Special Education at Howard Haber School from April 2019 until the school closed in March 2020 due to Covid-19 pandemic, then was the subject of a Committee on Special Education meeting in which the defendant's representative allegedly changed the IEP into a service plan for a student placed at a

private or parochial school at the parent's expense. The parent filed for due process. The court ruled that concrete harm is present when prospective funding for a placement is needed, and excused administrative exhaustion as not required under the circumstances.

LV v. New York City Dep't of Educ., No. 03-CV-9917, 2021 WL 663718, 78 IDELR 105 (S.D.N.Y. Feb. 18, 2021). This case is an installment in a long-running action concerning children with disabilities who have final or pendency administrative orders requiring the defendant to pay for all or part of their private school tuitions. The plaintiffs now challenged the defendant's refusal to pay tuition to private schools whose remote-learning plans did not receive defendant's approval. This caused several children to have educational services interrupted. The court granted the appointment of a special master and the entry of declaratory relief that defendant's policy of refusing to pay for tuition at certain schools violated the IDEA and New York law. The court declared at *8: "In sum, the economic bind in which DOE finds itself does not afford it a roving commission to re-evaluate the propriety of Orders that the IDEA and New York law make plain are final and binding. DOE's only lawful course of action is to implement those Orders, full stop. By its own admission, DOE has not done that. Accordingly, Plaintiffs are entitled to a declaration that DOE's refusal to implement final Orders until DOE approves a school's remote-learning plan violates Section 1415 of the IDEA and section 4404 of the New York State Education Law." In a subsequent opinion, the court specified the scope of authority of the special master. No. 03-CV-9917, 2021 WL 1941834 (S.D.N.Y. May 14, 2021).

J.T. v. DeBlasio, 500 F. Supp. 3d 137, 77 IDELR 252 (S.D.N.Y. Nov. 13, 2020), *appeal filed*, No. 20-4128 (2d Cir. Dec. 14, 2020). The plaintiffs' class action complaint claimed that "when schools were shut down due to the public health emergency created by the COVID-19 pandemic, every school district in the United States that went from in-person to remote learning (1) automatically altered the pendency placement of every special education student in the United States; and (2) ceased providing every one of those students with a FAPE, in violation of IDEA's substantive and procedural safeguards." *Id.* at *1. The court dismissed the complaint as to all defendants outside State of New York and dismissed the complaint as against all defendants except New York City defendants and New York State Department of Education. The court further dismissed as plaintiffs all parents who did not have children enrolled in New York City public schools. Ultimately, the court denied the New York City plaintiffs' motion for a preliminary injunction and dismissed their complaint against the New York City defendants without prejudice; it also sua sponte dismissed the complaint against the New York State Department of Education. The court noted that there were no specific allegations that any particular parent filed a due process complaint triggering stay-put, but even if so, part-time in-person services were being offered in school buildings in New York City, teletherapy was being offered to students needing clinical and therapeutic services, and broader in-person services were being permitted for students whose parents opted in, and district-placed students in private schools had yet another range of options. The court cited *Hernandez* (discussed *infra*) and USDOE guidance.

Return to School Roadmap: Development and Implementation of Individualized Education Programs, (OSERS Sept. 30, 2021), https://sites.ed.gov/idea/idea-files/return-to-school-roadmap-development-and-implementation-of-ieps/. Categorized under COVID-19, IEPs, and LRE, this document is described by OSERS as a summary of IEP requirements in light of Covid-19: "This Q&A document highlights certain Individuals with Disabilities Education Act (IDEA) requirements related to the development and implementation of individualized education programs (IEPs) and other information that state educational agencies (SEAs) and local educational agencies (LEAs), regular and special education teachers, related services providers, and parents should consider."

IX. AUTISM-SPECIFIC SERVICES

Wake Cnty. Bd. of Educ. v. S.K., 541 F. Supp. 3d 652, 78 IDELR 279 (E.D.N.C. May 26, 2021). The court affirmed the reversal of a due process hearing decision in favor of the school board and entered judgment for the parent, ruling that the state review officer afforded deference but properly declined to give due weight to hearing officer findings based on witness statements not found in the transcript or not supported by the transcript, and noting that the testimony of the parent's expert was not internally inconsistent and that the parent's expert and the school board's expert equally lacked personal experience with the public school autism program. The court said the review officer also properly ruled that the ALJ's determination that the parent's additional witness refused to answer questions about a class-size cap was not supported by the transcript, and that the ALJ's written findings about the mother's conduct conflicted with the ALJ's statements at the hearing. The court said the parent did not claim that a specific class size cap was required, but rather that both sides agreed that a small class setting was needed, and the parent contended that goal could be achieved in different ways, as by adding personnel with proper training in a mixed setting. The court further ruled that the review officer correctly found the private school chosen by the parent to be an appropriate setting for the student, and no reimbursement reduction was warranted. The court affirmed dismissal of claims based on evaluation and procedure. It awarded attorneys' fees without reduction for incomplete success and awarded four years' tuition and transportation reimbursement but not costs of before- and after-school care.

X. INFANT AND TODDLER PROGRAMS

Dear Special Education and Early Intervention Partners, 79 IDELR 139 (OSERS Aug. 24, 2021) In this document, the Office of Special Education and Rehabilitation Services stated: "[T]he Department expects that all LEAs will provide every student with the opportunity for full-time, in-person learning for the 2021–2022 school year. The Department recognizes that some parents may have specific health and safety concerns about sending their children back to in-person instruction because of the perceived health risk to the student's immediate family and to other household members — even as parents are also concerned about their child missing the instructional and social and emotional opportunities that come with in-person learning. Therefore, reopening schools safely is of utmost importance. . . . We recognize that SEAs, LEAs, LAs, and EIS

providers have worked hard to meet children's needs and provide required services, given the unprecedented educational disruptions and other challenges resulting from the pandemic. OSERS wants to reiterate and emphasize that, notwithstanding these challenges, infants and toddlers with disabilities and their families and children with disabilities retain their rights to receive appropriate services under IDEA. This includes ensuring that IEPs are in effect for children with disabilities at the start of the upcoming school year, and all other rights of children with disabilities and their parents under IDEA Part B are protected. Similarly, IDEA Part C requires IFSPs to be implemented and that all other rights of parents and their infants and toddlers with disabilities must be protected." (Footnotes omitted.)

XI. BEHAVIOR SERVICES AND STUDENT DISCIPLINE

Leigh Ann H. v. Riesel Indep. Sch. Dist., *supra*.

Spring Branch Indep. Sch. Dist. v. O.W., *supra*.

Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, 81 IDELR 138 (OSERS July 19, 2022). In this lengthy document, the Office of Special Education and Rehabilitative Services of the U.S. Department of Education provided a comprehensive description of the discipline provisions in the IDEA and its regulations. The document addressed, among other things, informal removals from school that shorten the school day (Q. C-6: "Are informal removals, such as administratively shortened school days, considered a school day when calculating a disciplinary change in placement? IDEA's implementing regulations define school day as any day, including a partial day, that children attend school for instructional purposes. . . . In general, the use of informal removals to address a child's behavior, if implemented repeatedly throughout the school year, could constitute a disciplinary removal from the current placement. Therefore, the discipline procedures in 34 C.F.R. §§ 300.530 through 300.536 would generally apply unless all three of the following factors are met: (1) the child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child's IEP; and (3) the child continues to participate with nondisabled children to the extent they would have in their current placement."). OSERS also discussed risk or threat assessments ("Q. E-5: When school personnel are conducting risk or threat assessments of a child with a disability, how must the LEA ensure FAPE is provided to the child? Under IDEA, the procedural safeguards and right to FAPE for a child with a disability must be protected throughout any threat or risk assessment process, including the provision of services during any removals beyond 10 cumulative school days in a school year. 34 C.F.R. §§ 300.101 and 300.530(d). States and LEAs should ensure that school personnel involved in screening for, and conducting, threat or risk assessments of children with disabilities are aware that the child has a disability and are sufficiently knowledgeable about the LEA's obligation to ensure FAPE to the child, including IDEA's discipline provisions." Seclusion and restraint were also covered (Q. B-3: "Does the Office of Special Education Programs (OSEP) consider restraint or seclusion to be appropriate strategies for disciplining a child for behavior related to their disability? No. OSEP is not aware of any evidence-based support for the view that the

use of restraint or seclusion is an effective strategy in modifying a child's behaviors that are related to their disability. The Department's longstanding position is that every effort should be made to prevent the need for the use of restraint or seclusion and that behavioral interventions must be consistent with the child's rights to be treated with dignity and to be free from abuse. Further, the Department's position is that restraint or seclusion should not be used except in situations where a child's behavior poses imminent danger of serious physical harm to themselves or others."). In Appendix I, the document features a glossary of terms, including "informal removal," "in-school suspension," "physical restraint," and "seclusion."

XII. CHOICE PROGRAMS AND RESIDENCY

XIII. LEAST RESTRICTIVE ENVIRONMENT

J.P. v. Belton Sch. Dist. 124, 40 F.4th 887, 81 IDELR 124 (8th Cir. July 26, 2022). The court in this case affirmed a district court decision upholding the district's proposed placement of the student in Trails West, designated as a Missouri School for the Severely Disabled, removing him from his placement at Kentucky Trail Elementary School in the Belton School District. The court noted that in the Kentucky Trail placement, the student received all of his instruction in the special education classroom and was exposed to peers without disabilities only in the hallways and during recess. The court said the burden was on the parent to show that the proposed placement did not meet the district's IDEA obligations, and agreed with the district court that the student derived minimal benefit from the less restrictive Kentucky Trail placement and was making little or no progress towards his IEP goals from his education there, and had only minimal social benefit in light of his difficulty interacting with others, whereas Trails West offered limited stimuli and a smaller, less chaotic environment.

H.W. v. Comal Indep. Sch. Dist., 32 F.4th 454, 81 IDELR 2 (5th Cir. Apr. 27, 2022), involved an elementary school student found eligible for special education on the basis of Down Syndrome, Hypothyroidism, ADHD, Asthma, and a speech impediment. Between kindergarten and the beginning of third grade, the district developed a series of IEPs based on full evaluations and functional behavioral assessments with corresponding behavioral intervention plans. Ultimately, the district proposed a placement it described as "blended," consisting of 235 minutes per day in special education (with additional time for speech) and 150 minutes per day in general education. Opportunity to participate with students without disabilities would be in nonacademic, extracurricular, and other activities. The hearing officer upheld this program as appropriate and constituting the least restrictive environment. The district court affirmed, as did the court of appeals. The court of appeals applied *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997) and *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1038 (5th Cir. 1989). It found the program sufficiently individualized and designed by key stakeholders. Although the student made some progress in general education, it was disputed how much. Turning to the *Daniel R.R.* factors, the court said the district took sufficient steps to accommodate the student in general education, implementing a modified curriculum and BIP, plus inclusion support and extended school year services. The court said the

student did not receive meaningful educational benefit in the sense of grasping the essential elements of the general education curriculum when in the general education classroom for academic instruction. The court said it should look to progress not just on IEP goals but rather the student's overall academic record, disagreeing with the approach of *L.H. v. Hamilton County Department of Education*, 900 F.3d 779, 793 (6th Cir. 2018). The court stressed that the student was falling behind peers in test scores and percentile rankings. Moreover, the court said the student had a disruptive effect on the general education classroom. "The hearing officer and district court found that although there was no direct evidence of H.W. impairing the education of other students, the totality of the evidence established that she had a 'negative, detrimental' effect on others," *H.W.*, 32 F.4th at 470, in that "she hit, bit, and kicked staff and peers; yelled, screamed, moaned, and grunted in the classroom; and swiped materials off desks. . . ." *id*. The court deemed the proposed program the least restrictive environment for the student.

Killoran v. Westhampton Beach Sch. Dist., No. 19-CV-3298(JS)(SIL), 2021 WL 4776720, 79 IDELR 254 (E.D.N.Y. Oct. 11, 2021), *appeal filed*, No. 21-2647 (2d Cir. Oct 20, 2021). In this case, involving a sixteen-year-old student with Down Syndrome classified as having intellectual disability, the court affirmed a ruling that the proposed 12:1:1 program in another school district met IDEA standards despite an argument that the Regents Diploma track could be modified to meet the student's needs. The court reasoned that the failure to consider the results of alternate assessment testing did not rise to the level of a FAPE violation when other evaluations had been considered and parental input was received. On the merits of the claim, the court held that providing FAPE did not compel modification of the Regents track program to meet the needs of the student, noting that the student was reading at a first grade level, that the other students in the program had IQs of 102-110, and that the student scored low in listening comprehension, mathematics, and other areas, and needed daily living skills instruction. The court rejected the argument that the student's educational goals were insufficiently aligned with grade level standards, reasoning that grade level advancement should not be expected for the program to be appropriately ambitious for the student. The court rejected a least restrictive environment argument, stressing evidence that the student could not be educated appropriately in general education, and the district had a choice regarding the particular school to be assigned.

Montgomery Cnty. Intermediate Unit No. 23 v. K.S., *supra*.

Knox Cnty., Tenn. v. M.Q., 535 F. Supp. 3d 750, 78 IDELR 255 (E.D. Tenn. Apr. 27, 2021), *appeal filed*, No. 21-5556 (6th Cir. June 7, 2021). This case involved a student with autism who was five at time of the relevant IEP meeting. The student was largely nonverbal and communicated his wants with an augmented assistive communication device, usually with assistance, and visual communication. The student did not appear to be cognitively impaired and did not have significant behavior issues. The student was placed in a fully inclusive blended classroom three days per week and made progress there, then was offered a comprehensive development classroom with only children with disabilities 4.75 hours per day and general education with a paraprofessional 2.25 hours per day (a phonics program, arrival, departure, music, art, physical education, library,

lunch, and recess) for his kindergarten year. The court ruled that the student was denied FAPE. It reasoned that the absence of a general education kindergarten teacher at IEP meeting was a procedural violation but did not entitle the student to relief. On the merits of the program, however, the court reasoned that the student would benefit from general education and the consistency of remaining in the general education class rather than moving between that and another program, and would also benefit from the opportunity to model his behavior on non-disabled peers, and would not be disruptive but would respond to supports that could be provided in a general education class.

XIV. RELATED SERVICES

J.T. v. District of Columbia, supra.

R.F. v. Board of Educ. of the City of Chi., No. 22-cv-2608, 2022 WL 1805099, 81 IDELR 33 (N.D. Ill. June 2, 2022). In this case, the court granted a temporary restraining order for a medically complex 10-year-old girl in the custody of the State Department of Children and Family Services. The child had conditions including spastic quadriplegic cerebral palsy, ulcerative colitis, and profound intellectual disability. The child was nonverbal, with an estimated developmental age of 2.8 months. She was living in an assistive living facility on far north side of Chicago but was assigned a day school placement on Chicago's near west side, and her April 2020 IEP called for transportation to and from home on an air-conditioned bus with a wheelchair lift, shared nurse, and an aide. The girl's attendance at school was disrupted by the COVID-19 pandemic beginning in the spring of 2020, then in March 2022 she was assigned a bus route requiring travel two hours each way, despite the stated concerns of the defendant's nursing staff of a threat to her health and safety from the lengthy commute. The district suggested homebound services, citing nurse, bus driver, and accessible bus shortages as the reason that it could not make the commute shorter. The court excused exhaustion on the ground that the IDEA did not provide a remedy to enforce the terms of the April 2020 IEP, just as it does not provide a remedy for a school district's failure to comply with a hearing officer decision favorable to student. The court, collecting cases, also rejected an abstention argument made by the defendant. On the probability of success of the student's claim for relief, the court reasoned that the defendant did not dispute its nursing staff's position that the two-hour commute would be life-threatening to the student, nor did it dispute the position of plaintiff that a maximum commute of one hour would be a reasonable interpretation of the IEP. The court found irreparable injury in the deprivation of educational services. It further reasoned that 34 C.F.R. § 300.103(c) does not permit delaying implementation of an IEP due to financial considerations. The court waived the requirement of a bond for the injunctive relief.

XV. RESIDENTIAL PLACEMENT

Trost v. Dixon Unit Sch. Dist. 170, No. 21 C 50255, 2021 WL 3666940, 79 IDELR 132 (N.D. Ill. Aug. 18, 2021) In this case, the district court granted a preliminary injunction requiring the defendant to pay for the residential placement of a student at Brehm Preparatory Academy under the terms of a mediation agreement. The court pointed out that the agreement for a private placement was made and student accepted at Brehm,

but that one week later the school district was advised that Brehm was not approved by state board of education even though the district previously had been advised it was. In granting the injunction, the court reasoned that the state regulation stating that an unapproved placement shall not be used means that the placement is ineligible for reimbursement, not that it is forbidden. The court further held that failure to return information release forms after acceptance of the student at Brehm did not prevent performance of the agreement by the district. The court also ruled that any mistake as to approval status did not render the agreement unconscionable under applicable state law. Thus, the plaintiff had a high likelihood of success on the claim. The court additionally found irreparable harm, that traditional remedies were inadequate and that the balance of harms favored the plaintiff. The court issued the injunction without requiring a bond in light of high likelihood of success and the plaintiff's in forma pauperis status.

Doe v. Newton Pub. Schs., 537 F. Supp. 3d 56, 78 IDELR 253 (D. Mass. May 3, 2021), *appeal filed*, No. 21-1505 (1st Cir. July 12, 2021), Nos. 21-1535, 21-1539 (1st Cir. July 23, 2021). This case involved a student with autism, depression, and anxiety disorder who was placed by his parents in a residential therapeutic school after his sophomore year in public high school because he had been treated and hospitalized for suicidal thinking, and then refused to return to public high school on account of alleged bullying. The court reversed a hearing officer decision that the public school offered appropriate education and awarded tuition reimbursement, but excluded payment for boarding and out-of-state travel. The court reasoned that the defendant's proposed junior year IEP, which offered enhanced counseling and other support in public school, did not meet the student's documented need for a therapeutic program and was supported largely with testimony of the school psychologist, who saw the student for only one evaluation, an evaluation that took place before the student's mental health crisis, and conflicted with the views of clinicians who provided psychiatric care during the relevant period. The court said that the hearing officer discredited the clinicians' testimony without explanation. The court held that an offer of private day placement in two subsequent IEPs was not adequate due to the threat of emotional and social disruption from removal from the student's current placement, but the court nevertheless agreed with the hearing officer that support for residential placement was lacking, and accordingly limited the reimbursement.

Perkiomen Valley Sch. Dist. v. R.B., 533 F. Supp. 3d 233, 2021 WL 1390764, 78 IDELR 222 (E.D. Pa. Apr. 13, 2021). This case concerned a student with an intellectual disability and speech-language impairment. The court held that programs offered by the school district for 2015-16 school year did not offer appropriate education. The first of these programs offered exposure only to the single vocation of childcare when student's interest had shifted to other areas, she needed independent living skills and instruction in the use of public transportation, and information was lacking about the nature of the instruction at the high school. The second program was preparation for college, which was an objective beyond the student's interests and capabilities. The third program duplicated living-skills and other instruction already received. As to the 2016-17 school year, the court again found the programs offered not to be appropriate, including the "Discover" program, which did not afford the student the opportunity to learn

independent living skills and duplicated prior instruction. The court ruled that the parentally chosen private residential program was appropriate because it was likely to confer a meaningful benefit even though it lacked services such as speech and language therapy, individual direct instruction, and counseling. The court noted that the program was educational and was a transition program rather than post-secondary, had students funded by school districts, and addressed the student's needs and interests. The court overturned the hearing officer decision in part and ruled that equity favored full reimbursement for the 2016-17 school year, and residential and travel expenses for both relevant school years.

XVI. POST-SECONDARY TRANSITION

Perkiomen Valley Sch. Dist. v. R.B., *supra*.

E.G. v. Anchorage Indep. Bd. of Educ., No. 3:19-CV-220-CHB, 2021 WL 374483, 78 IDELR 70 (W.D. Ky. Feb. 3, 2021), *appeal dismissed,* No. 21-5215, 2021 WL 4059688 (6th Cir. May 13, 2021). This case involved a high-school-age student with autism and severe communication difficulties, as well as reading, sensory, and motor coordination issues. The court ruled in favor of the student, concluding that a lack of vocational training and the inability of the school to implement the IEP constituted substantive violations and would cause substantive harm. The court affirmed the review decision regarding transition, stating that the district denied the student FAPE when the IEP did not include specifics about when or how the student would participate in vocational training, the goals and objectives lacked specific training requirements, and under the IEP vocational skills instruction would not be available until grade 12. The court further affirmed the review decision's conclusion that the district could not implement the IEP when the student would be placed in small, crowded classroom, with noise including a student who repeatedly screamed, and other chaotic conditions. This setting was unlike the small, quiet setting with much one-on-one instruction and only limited mainstreaming that the student had in grade school, where the student had been successful. The court awarded tuition reimbursement despite an absence of notice by the parent, pointing out that the school district was informed of the parents' concerns and objections and their desire to have the student attend the private placement. The court found that the claim for tuition for the following school year was not exhausted.

XVII. MAINTENANCE OF PLACEMENT

Doe v. Portland Pub. Schs., 30 F.4th 85, 80 IDELR 207 (1st Cir. Mar. 29, 2022). In this case, the court of appeals reversed a district court order requiring the school system to pay throughout the continuation of the litigation for the student's tuition at a private school where he had been placed by his parents in February 2020. The district court had ruled that the hearing officer's reimbursement order constituted an agreement between the parents and the state education agency that a change of placement to the private school was appropriate. In reversing the district court decision, the court emphasized that the hearing officer had actually determined that the IEP issued by the public school in January 2020, would provide FAPE, and the order to pay tuition was simply an equitable remedy the hearing officer ordered for the public school's denial of a FAPE to the student from December 2017 to November 2019. The parents had referred the student for special education evaluation as early as September of 2017, but the school concluded in December 2017 that he was not eligible. The parents made a referral again in May 2019, and he was found eligible in November 2019, then offered an IEP on January 24, 2020. The parents had already placed the student in a private school in fall, 2019. The parents invoked due process on November 6, 2019, and the hearing officer concluded that the student had been denied a FAPE between December 2017 and November 2019. The hearing officer required the public school system to reimburse the parents $74,613.35, for the costs of tutoring and summer programming in summer 2019, a private tutor engaged in fall 2019, private school classes in spring and summer of 2020, a private evaluation, and the fall 2020 semester at private school. However, the hearing officer found that the January 2020 IEP offered the student FAPE and did not order continuing placement for the student at private school. The district court granted the parents' motion to require the school system to pay for continued placement at the private school for pendency of judicial proceedings. After ruling that the court of appeals had jurisdiction despite the final order rule due to the collateral order exception, the court reversed the order. Though noting that "An administrative decision in favor of a unilateral change of placement to private school by parents can constitute 'agreement' by the state to that placement for purposes of the stay-put provision," under *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 372 (1985) and 34 C.F.R. § 300.518(d), the court said that this decision by the hearing officer was not a decision that the private school was appropriate so as to constitute agreement. Reimbursement in this case was a remedy for a fixed period in the past. Judge Thompson dissented.

S.C. v. Lincoln Cnty. Sch. Dist., 16 F.4th 587, 79 IDELR 241 (9th Cir. Oct. 18, 2021). This case concerned a teenage girl with Prader-Willi Syndrome, a genetic condition that disrupts appetite control and leads to anxiety, depression, and developmental delay. The therapy includes total food security, in which food is provided at mealtimes but otherwise kept securely out of sight. The student's mother filed a due process case in May 2020, then in September, the IEP team issued a new IEP not approved by the mother or the student. The hearing covered the two years prior to the filing of the complaint and so the decision did not cover the September 2020 IEP. The ALJ found a denial of FAPE for May 21, 2018, to May 21, 2020, holding that the student needed total food security in a school-wide environment to receive meaningful educational benefit,

and ordered as a remedy that the student be placed at a residential facility that treats students with Prader-Willi and provides total food security in the overall educational environment, starting the first day of winter 2021 semester until the district provided total food security in a school-wide setting, along with an IEP addressing all the deficiencies identified in the decision, or until the next annual IEP in September 2021. The district neither appealed nor complied with the order, and the parent filed the court action seeking a stay put order or preliminary injunction. The court of appeals reversed the district court's denial of the requested order. The court reasoned that the parent was a party aggrieved under the IDEA by the district's failure to comply or appeal. It further reasoned that the ALJ's order adopted a two-phase remedy, first the immediate transfer to the private center, and second that the student could be moved back if the ALJ determines that a new IEP addresses the deficiencies in the prior setting of the student. The court went on to say that a district should not be able to nullify an ALJ decision by issuing a new IEP superseding the one that is the subject of the decision, and the parent should not be forced to file a new due process complaint to challenge the new IEP. The court further reasoned that the ALJ's order constituted an agreement between the state and the parent for funding of the student at the private center, making the center the student's legal placement no later than the first day of the winter semester 2021. The court also held that irreparable harm and other traditional preliminary injunction factors need not be shown.

Hatikvah Int'l Acad. Charter Sch. v. East Brunswick Twp. Bd. of Educ., 10 F.4th 215, 79 IDELR 121 (3d Cir. Aug. 19, 2021). In an action brought by a student's former charter school against the student's school district, the court reversed a preliminary injunction decision that had assigned the school district the costs of transportation for the student's stay-put placement, but assigned the charter school the tuition costs. The court of appeals ruled that the resident school district had to pay all the pendent placement costs. The student, a fifth grader with ADHD, oppositional tendencies, and developmental delays, had been at the public charter school, which is its own local educational agency, and in 2018 the charter school proposed an IEP that would place him at the Bridge Academy private school. The parents unilaterally placed the student at a different private school and filed for due process against the charter school and the resident school district seeking tuition reimbursement. The charter school and the parents settled on the record in front of the ALJ, with the private school agreeing to implement a new IEP that would place the student at the private school chosen by the parents. The ALJ approved the agreement. The resident district did not object, did not participate in the proceedings, and was present when the agreement was placed on the record, but was not a party to the agreement. The resident district then filed its own due process petition, challenging the private placement and contending that the resident district could provide the student FAPE in a less restrictive environment. The ALJ ruled in 2021 that the resident district did not show that it could provide the student the education required by his IEP. The parents filed an emergency motion in response to the district's due process petition to force the district to pay the costs of the private school, and the charter school supported the motion. All parties agreed that the private school was the current educational placement, but a dispute emerged between the charter and the district over payment for the costs of the pendency placement. The ALJ assigned transportation costs to the district, and the district did not object. But the ALJ ruled that

the charter had to pay the tuition, and the charter filed an appeal to district court. The district court upheld the ruling and the court of appeal reversed. The court of appeals noted that in earlier cases, the resident school district had been found responsible for all costs of pendency placements, though those cases did not involve charter schools. Turning to state law, the court said that, "New Jersey law explicitly extends the resident school district's financial obligations to costs associated with an IEP that a charter school implements. N.J. Stat. Ann. § 18A:36A-11 broadly requires charter schools that provide services to students with disabilities to comply with state laws. But it also explicitly provides that, "the fiscal responsibility for any student currently enrolled in or determined to require a private day or residential school shall remain with the district of residence," not with the charter school. *Id*. § 18A:36A-11(b)." *Id*. at 219. Resident school districts can challenge the placement decision, but the court said that a challenge would not change the responsibility to pay. Nor does the reimbursement character of the relief, for financing is part of a placement. The requirement to pay for the pendent placement does not undermine the right to challenge the placement on its merits. The court found this arrangement to be a deliberate state policy choice despite an argument it could induce charters to try to shift costs to resident districts.

Y.B. v. Howell Twp. Bd. of Educ., 4 F.4th 196, 79 IDELR 31 (3d Cir. July 19, 2021). In this case involving a twelve year old student with Down Syndrome with cognitive, social, and motor delays, who had been served in a private placement by the Lakewood school district, but then moved to the Howell school district, which offered placement in a special education class in a public school, the court ruled in favor of Howell. The parent had rejected the Howell school district's proposal, continued to send the student to the private placement, and eventually filed for due process. The court affirmed the ALJ and district court decisions and held that under 20 U.S.C. § 1414(d)(2)(C)(i)(I), an intrastate transfer student need only be afforded comparable services to those received from the previous district, and the stay-put provision, 20 U.S.C. § 1415(j), does not apply so as to require the new school district to continue to implement the student's original IEP. The court reasoned that the parent's view would render the comparable-services provision a nullity and would make the school district subject to the unilateral power of parent to invoke stay put. The court opined that the status quo no longer exists once a student voluntarily transfers. It further concluded that the evidence demonstrated the Howell program provided services comparable to those in previous IEP.

E.E. v. Norris Sch. Dist., 4 F.4th 866, 79 IDELR 32 (9th Cir. July 14, 2021). In this case, involving a young boy with autism spectrum disorder, the Ninth Circuit affirmed a district court ruling that the student's current educational placement in a general education class under his 2018 IEP was his stay-put placement. The ALJ had made a stay-put determination placing the student elsewhere in accordance with the school district's proposed 2020 IEP, but the court reasoned that the last uncontested IEP establishes the current educational placement for purposes of stay-put, and that the ALJ lacked legal authority to reinterpret current placement to mean a future placement. The court further held that the parents did not have to show the traditionally required factors such as irreparable harm in order to obtain preliminary relief. The court said the school district did not meet the standards for preliminary relief. The court affirmatively rejected the district's proposed creation of a judicial exception to the statute, reasoning

that it would be contrary to the statutory language and the purpose of the statutory provision, even if it applied only in situations in which parents challenge the underlying placement. The court noted that the parents might consider the district's proposed placement to be worse than the existing one they challenge.

Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 76 IDELR 173 (2d Cir. May 18, 2020), *cert. denied*, 141 S. Ct. 1075 (Jan. 11, 2021). Parents of children placed in a private school called iHope pursuant to earlier due process hearing decisions moved their children to a new school called iBrain in the wake of a dispute among the management of iHope. The parents invoked due process and sought judicial enforcement of stay-put rights to require payment by the defendant of tuition at iBrain, arguing that the iBrain program was substantially similar to that offered at iHope. In one case, the court affirmed the denial of preliminary relief and the dismissal of the case, and in the other, it reversed the grant of a preliminary injunction. The court rejected an exhaustion defense but ruled against parents in both cases on the stay-put claims. The court reasoned that school districts have general authority over educational decision making and that exceptions are limited. The court further noted that districts cannot recoup pendency costs from parents, and that private placement costs vary dramatically. Moreover, said the court, the court, the parents' interpretation of stay-put would entail races to the courthouse to obtain determinations of the similarity of the programs.

International Inst. for the Brain, Ltd. v. Kapoor, No. 20-CV-8002, 2021 WL 3172984, 79 IDELR 65 (S.D.N.Y. July 26, 2021). In a short opinion, the court held that a private special education school lacked standing to bring a cause of action under IDEA to obtain pendency payments for the children enrolled there.

XVIII. MAINTENANCE OF PLACEMENT AND COVID-19

Round Rock Indep. Sch. Dist. v. Amy M, *supra*.

Abrams v. Carranza, No. 20-CV-5085, 2020 WL 6048785, 77 IDELR 152 (S.D.N.Y. Oct. 13, 2020), *aff'd sub nom. Abrams v. Porter*, No. 20-3899-cv, 2021 WL 582976280 IDELR 35 (2nd Cir. Dec. 9, 2021). In this case the court denied a motion for a temporary restraining order and preliminary injunction despite allegations that the defendant failed to fund services, including special transportation and nursing since start of Covid-19 pandemic in March, in contravention of pendency rights, for students at a private school called iBrain. The defendant responded that not all students in the suit were entitled to the same services, and that it had not been provided adequate information from iBrain nor invoicing for nursing services during the pandemic so as to permit reimbursement. The parents sought reimbursement for expenses from March to July 2020, alleging financial hardship. The court, however, found no irreparable harm, reasoning that the placement at iBrain was not at risk and noting that prospective relief had been granted for 2020-21 school year. *See also* 2020 WL 4504685, 77 IDELR 47 (S.D.N.Y. Aug. 5, 2020) (denying motion for temporary restraining order and preliminary injunction requiring immediate payment for transportation and other services, reasoning that placement at iBrain itself was not at risk). The October 13,

2020, decision was summarily affirmed by *Abrams v. Porter*, No. 20-3899-cv, 2021 WL 5829762, at *2, 80 IDELR 35 (2nd Cir. Dec. 9, 2021) ("[G]iven that both sides agreed that there was no risk of the students losing their pendency placement while the dispute regarding past payments continued to be litigated, and that the plaintiffs were granted prospective relief for the 2020-2021 school year, the district court did not abuse its discretion in denying an injunction under the IDEA's stay-put provision. For the same reason, there is no basis to disturb the district court's decision under the traditional preliminary injunction standard. . . . [G]iven the evidence that the students' placements for the then-ongoing 2020-2021 school year were not at risk, the district court did not abuse its discretion in finding that plaintiffs' monetary dispute with the DOE did not satisfy the 'irreparable harm' requirement."). Ultimately, the district court granted the plaintiffs' motion for summary judgment requiring the department to fund transportation services on the basis of school-year long contracts by plaintiffs with a private transportation company, after the department had refused to pay for transportation and tuition when schools were closed due to Covid-19. No. 20-CV-5085, 2022 WL 523455, 80 IDELR 157 (S.D.N.Y. Feb. 22, 2022).

L.A. v. New York City Dep't of Educ., No. 1:20-cv-05616-PAC, 2020 WL 5202108, 77 IDELR 104 (S.D.N.Y. Sept. 1, 2020). Here the court denied a preliminary injunction but issued an order enforcing the automatic injunction under 20 U.S.C. § 1415(j) to maintain the payment of private school tuition for a four-year-old nonverbal child with autism. The child had been served under an IEP developed by Committee on Preschool Special Education at Howard Haber School from April 2019 until the school closed in March 2020 due to the Covid-19 pandemic, then was the subject of a Committee on Special Education meeting in which the defendant's representative allegedly changed the IEP into a service plan for a student placed at a private or parochial school at the parent's expense. The parent filed for due process. The court ruled that concrete harm is present when prospective funding for a placement is needed, and excused administrative exhaustion as not required under the circumstances. In a later decision, 2021 WL 1254342, 78 IDELR 185 (S.D.N.Y. Apr. 5, 2021), the court granted the defense's motion to dismiss the complaint for want of exhaustion. The parent contended that the defendant had not produced an IEP for the child for the 2020-21 school year, but the parent did not oppose the pendency placement of private schooling through remote instruction. The court reasoned that although a delay in appointment of a hearing officer occurred due to the Covid-19 pandemic, a resolution agreement provided some relief; moreover, no systemic claims were made, so there was no valid ground to excuse exhaustion.

XIX. MOOTNESS

Patrick G. v. Harrison Sch. Dist. No. 2, 40 F.4th 1186, 81 IDELR 125 (10th Cir. July 26, 2022), involved a student with autism and speech delays, placed by district at private school named Alpine starting in 2013, whose proposed 2016 IEP called for placement at Mountain Vista Community School. The parents disagreed with the 2016 IEP and filed for due process; the district continued paying the Alpine tuition at first, but ultimately stopped. The court affirmed in part and reversed in part the district court's dismissal of the case as moot. It held that the claims of the parents based on the terms of the 2016

IEP and the procedures used to adopt it were moot because the IEP expired, and that the exception to mootness for controversies capable of repetition yet evading review did not apply to those claims because there was no reasonable expectation that the student would be subjected to the same action again, specifically inadequate evaluation, failure to include Alpine staff at the IEP meeting, pre-determining placement for a Mountain Vista classroom, not making an IEP that was appropriately ambitious, failing to consider the student's behaviors and develop a behavior intervention plan for the IEP, and unilaterally limiting services in the IEP, all of which related to the 2016 IEP and its development. However, the court ruled that the parents' claim for attorneys' fees for alleged partial success in the due process hearing was not moot, stating, "an attorney's fee claim is not moot when predicated on the (allegedly) favorable merits relief a claimant obtained from an administrative decision." *Id*. at 1210. The court further held that there was a live dispute between the district and the parents over whether the district can reimburse the parents' insurer for all but the parents' premiums for the costs for occupational therapy and speech and language services that the insurer funded, or must reimburse the parents directly. Finally, the court held that the parents' claim for ongoing stay-put relief was moot, reasoning that the parents never argued that the claim was not moot when the underlying substantive claim was moot, despite the existence of authority supporting such an argument.

Johnson v. Charlotte-Mecklenburg Schs. Bd. of Educ., 20 F.4th 835, 80 IDELR 33 (4th Cir. Dec. 20, 2021). This case involved two children of the plaintiff parent. The parent alleged that for one child there had been an unjustified proposed reduction of services, an inadequacy as to services provided in the past, a failure to respond to a request for independent educational evaluations, and other violations. The ALJ dismissed the claims in the due process hearing decision on the ground that the parent's evidence was insufficient and a new IEP eliminated the ongoing legal controversy. The state review officer affirmed. As to the other child, the parent filed a due process hearing request alleging that the public school system had failed to offer the child appropriate education, improperly neglecting to evaluate her and provide appropriate services. The ALJ granted a motion for summary judgment in favor of the school system, saying that the parent had not provided sufficient evidence to support the claims and that the parties had by then agreed to evaluate the child, so the case was moot. The state review officer affirmed the decision in part but reversed and remanded the case to the ALJ to consider whether the school district had erroneously failed to identify the student as a child with a disability and had failed to create an appropriate IEP. The parent appealed both cases to federal court, and the district court consolidated the complaints. In the administrative proceedings, the parent sought remedies that included prospective services and compensatory education, but the parent withdrew her children from the defendant's system and placed them in another district after filing the complaints in district court. The federal complaints did not include a request for compensatory education. Accordingly, the district court ruled that the claims of the parent as to both children were moot, and the court of appeals affirmed. The court of appeals reasoned that the parent could not rely on a request for relief made only in the state administrative proceedings to save the case from mootness. The court further rejected the idea that the parent preserved the claim for compensatory education by requesting a

remand to the state administrative agency, saying that federal courts do not supervise or supplant state administrative action.

Brach v. Newsom, supra.

XX. PRECLUSION AND RELATED

Loof v. Upland Unified Sch. Dist., No. EDCV 21-556 JGB (SPX), 2021 WL 4974797, at *4, 79 IDELR 282 (C.D. Cal. Sept. 10, 2021). The court in this case granted a motion to dismiss a complaint seeking reversal of an administrative hearing office order dismissing a due process complaint brought by a parent of an adult with specific learning disabilities. The due process complaint related to 2018-19, when the student was age-eligible for special education, was dated September 11, 2020. The ALJ dismissed that complaint on the ground that a hearing decision involving other complaints brought by the parent had been dismissed on November 24, 2020, and barred the current complaint by virtue of collateral estoppel. The court applied a test that, "The doctrine of collateral estoppel applies to a question, issue, or fact when four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." (Internal quotation marks deleted). The court said that collateral estoppel principles applied to the administrative hearing decision in the earlier complaints, even though a district court appeal of that decision was pending. Moreover, although the earlier cases related to a different school year, the parent failed to allege any facts supporting the claim that the issues differed, specifically regarding the student's eligibility for services after the parent allegedly refused to consent to services. The court gave leave to amend so that the parent could try to allege facts to support the position that the issues in the 2018-19 school year differed from those in the previous time span and/or there was a subsequent assessment referral not considered in the previous due process decision.

Q.C. v. Winston-Salem/Forsyth Cnty. Schs. Bd. of Educ., No. 1:19CV1152, 2021 WL 1430697, 78 IDELR 220 (M.D.N.C. Apr. 15, 2021) This case, brought under Section 504 and the ADA as well as the Fourteenth Amendment, involved a seven-year-old with Down syndrome who had an average nonverbal IQ, who was proposed to be placed by the district in a class for students with below-average cognitive abilities. Her parents placed her in a private school and prevailed in a due process hearing, which decision called for her to make a transition back to public school. The parents alleged that the transition was not implemented as directed. The court denied dismissal of claims for prospective relief, pointing out that the parents continued to desire placement of the student at public school with her siblings. The court also denied dismissal of the case on basis of res judicata, reasoning that state law expressly discusses the administrative hearing of claims pursuant to the IDEA but does not discuss administrative actions under Section 504, the ADA, or the Constitution. Moreover, Section 1415(*l*) affirms the viability of the ADA and Section 504 as separate vehicles. The court stated at *5: "In the instant matter, while the relevant claims that Plaintiffs bring before the Court seek relief for the denial of a FAPE under Section 504, Title II, and § 1983, this is the first opportunity for Plaintiffs to press these claims in a federal court, i.e. a court of

competent jurisdiction. Thus, even though this lawsuit suit follows Plaintiff having brought an IDEA claim arising out of the same operative facts as those before OAH in which an ALJ issued a final decision in favor of Plaintiffs, unlike the cases offered by Defendant, Defendant did not appeal that final decision to federal court. Thus, res judicata does not preclude Plaintiffs claims here." The court denied dismissal of the Section 504 and ADA claims as insufficiently stated, and denied dismissal of an equal protection claim. The court ultimately denied summary judgment against plaintiffs on the Section 504 and ADA claims but granted it as to the equal protection claim. No. 1:19CV1152, 2022 WL 1686905, 81 IDELR 40 (M.D.N.C. May 26, 2022).

XXI. DUE PROCESS HEARING COMPLAINTS

XXII. DUE PROCESS HEARING REQUEST LIMITATIONS

Independent Sch. Dist. No. 283 v. E.M.D.H., *supra*.

Maggie J. v. Donegal Sch. Dist., No. CV 20-2782, 2021 WL 2711531, 79 IDELR 42 (E.D. Pa. June 30, 2021). The student in this case had behavioral difficulties as well as other conditions. The court limited relief to damages arising within two years before the filing of the due process hearing request, adopting the hearing officer's reasoning that the parent had near-contemporaneous knowledge of district's actions and inactions as they occurred. As to other issues, the court held that an evaluation in first grade was timely in light of general education interventions and the student's improved behavior, and that the second grade program for the student was appropriate and led to success. The court also held that the district's implementation of behavior supports in third grade was largely consistent with the independent evaluation of the student, that the academic program, which enabled the student to master IEP goals, constituted appropriate education, and that the record supported the hearing officer's ruling that compensatory education would be justified only for the period between January and March 2017, when the district failed to identify the student's emotional disturbance, but the tiered intervention services offered were sufficient so that there was no denial of appropriate education. The court also found no violation of the FAPE duty from the failure to provide extended year services.

XXIII. CONDUCTING DUE PROCESS HEARINGS

G.W. v. Ringwood Board of Education, 28 F.4th 465, 80 IDELR 209 (3d Cir. Mar. 16, 2022), involved a due process hearing initiated by the parents of a student eligible for special education under the Individuals with Disabilities Education Act. After a first hearing session was adjourned, the administrative law judge held a meeting with counsel for both parties, then a meeting with one of the parents and a school board representative. The parties appeared to reach an agreement, and the terms of the agreement were read into the record. The ALJ found that the parties voluntarily agreed to the signed settlement document, the settlement disposed of all issues in controversy between the parties, and the settlement was consistent with the law. The parties were ordered to comply with the settlement terms. The agreement said the parties would bear their own fees and costs. Three days later, the parents wrote to the school

superintendent and all members of the school board, stating that they repudiated the agreement. They filed a motion with the ALJ to set the agreement aside. A little more than a month later, the parents filed suit in federal court alleging that they did not enter into the agreement knowingly and voluntarily. They sought relief under the IDEA, under the New Jersey Declaratory Judgment Act seeking to declare the settlement void, and under the New Jersey Declaratory Judgment and Civil Rights Acts to have the attorney fee waiver declared void. The district court dismissed the case without prejudice for lack of subject matter jurisdiction. On appeal, the circuit court reversed and remanded. The court reasoned that the parents were challenging the order of the ALJ terminating their due process complaint, contending that they did not enter into any valid agreement resolving the case. Accordingly, the parents were alleging that the ALJ's order was erroneous. That the basis for the alleged error was that the supposed agreement was invalid under contract law did not deprive the federal court of jurisdiction, for 20 U.S.C. § 1415(i)(2)(A) permits a civil action in state or federal court challenging the findings and decision of the ALJ or hearing officer. The decision was one made on substantive grounds, as 20 U.S.C. § 1415(f)(3)(E)(1) requires, and addressed the student's rights under the IDEA, further reciting the right to appeal to court. There is no requirement that the decision address free, appropriate public education for it to be appealable: a dismissal could be on the basis of limitations or any of various procedural grounds and still be appealable to federal court. The court found the assertion of jurisdiction consistent with earlier caselaw that allowed a judicial action when a school district ignored a due process decision and the parent filing the case was considered aggrieved despite winning the case below. Judge Phipps dissented.

K.M. v. Katonah-Lewisoboro Union Free School District, No. 19 CIV. 9671, 2020 WL 4038354, 77 IDELR 12 (S.D.N.Y. July 17, 2020). In this case the court denied the parents' motion to supplement the record in the appeal of a State Review Officer decision with a group of photos the Impartial Hearing Officer took during the course of the due process hearing. The student's program at the school district for the relevant period was in a single, isolated classroom in a hallway on the basement level of the school building. The hallway was crowded with boxes of storage and other materials, and the parents believed the location was unsafe if the students needed to exit in an emergency. In addition, the location segregated the students with disabilities, and the class included students older than the parents' daughter. The parents unilaterally placed the student at a private school and filed for due process. The hearing took place at the public school building and the record included photos of the location at the time the parents withdrew the student. With the agreement of the parties, the IHO visited the hallway and the classroom. Without any request from either party, when he was there he took photos for his own use. He went to the classroom and hallway and took photos on other occasions as well. The IHO ruled that the district denied FAPE to the student for the school years at issue and ordered tuition reimbursement for that period and up to the student's graduation or reaching age 21. The court said that "The IHO found, in relevant part, that the isolation of the Classroom had an adverse impact on I.M.'s education because the students with disabilities were segregated from students who did not have disabilities. . . . He also noted that the Hallway was 'cluttered with building material and equipment,' as shown in the photos submitted by Plaintiffs. . . . The IHO further found that I.M. should not have been placed in the Life Skills class with students

who were 18 to 21 years old" *Id*. at *3. The State Review Officer reversed the decision with respect to the conditions at the location, however, and remanded to the same IHO to determine whether the student's IEPs were appropriate. The IHO found that the IEPs were not appropriate and that the private placement was appropriate. The SRO reversed a second time and denied tuition reimbursement. The court did not rule on the merits of the appeal, but in denying the motion to supplement the record, it said: "The Court finds that Plaintiffs have failed to satisfy their burden of demonstrating that supplementing the record with the IHO's photographs is warranted. The IHO photographs of the condition of the Hallway after I.M. left John Jay are of limited relevance to the adequacy of her IEP." *Id*. at *6. The court also said the parents could have offered more of their own photos at hearing. "This would have provided Defendant an opportunity to object to such evidence or conduct cross-examinations in its defense. Moreover, the admission of these photographs now could cause unnecessary delay in proceeding with the case," *id*., and would create "an evidentiary issue relating to the authentication of the photographs since the photographs were taken by the factfinder at the due process hearing that is the subject of the instant matter," *id*. n.4. Without filing a written opinion, the district court affirmed the ultimate decision of the state review officer in favor of the school district, 2021 WL 4131604 (S.D.N.Y. Aug. 11, 2021), *appeal withdrawn*, No. 21-2156, 2021 WL 7367233 (2d Cir. Dec. 21, 2021).

Letter to Zirkel, 81 IDELR 22, https://sites.ed.gov/idea/files/osep-policy-letter-22-04-to-zyrkel-04-15-2022.pdf (OSEP Apr. 15, 2022). Here the Office of Special Education Programs of the U.S. Department of Education offered guidance on, among other topics, the sufficiency of due process complaints and dismissals of due process complaints without hearings. Question One asked "Does a parent's failure to provide a proposed resolution of the problem in their due process complaint as required by 34 C.F.R. § 300.508(b)(6), restrict the authority of a hearing officer to order prospective relief (such as ordering an individualized education program (IEP) Team meeting to correct identified deficiencies in the child's IEP) and/or retrospective relief (such as requiring the agency to provide compensatory services or reimburse the parent for expenses they incurred)?" OSEP's response was that "A due process complaint must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing within 15 days of receiving it, that the receiving party believes the due process complaint does not meet the requirements in 34 C.F.R. § 300.508(b). . . . If a party does not raise a sufficiency claim within 15 days of receiving the due process complaint, the due process complaint is deemed sufficient, and a due process hearing may occur." The response continues, "Since 34 C.F.R. § 300.508(b)(6) requires the filing party to propose a resolution to the complaint only to the extent known and available to the party at the time the complaint is filed, the failure to include a proposed resolution to the problem would not automatically render a due process complaint insufficient. In addition, consistent with IDEA Section 615(c)(2)(D), the final decision regarding the sufficiency of a due process complaint is left to the discretion of the hearing officer." Question Two asked, "What is the outer limit for the number of calendar days for an expedited hearing from the date of filing to the date of the hearing officer's decision?" The response stated that the applicable timelines are measured in school days, as that term is defined in 34 C.F.R. § 300.11(c). That term does not easily translate into calendar days. "School district calendars vary a great deal and are affected

by factors such as whether a school: (1) operates summer school programs for all children; (2) recognizes certain days as holidays that require closure of the school for students; (3) conducts staff in-services and professional development conferences that result in closure of the school for students; (4) closes due to inclement weather; or (5) allows use of school building facilities for elections and other community functions that require closure of the school for students. School district calendars vary widely, and there are many variables that may affect whether a day is a 'school day.'" (footnote omitted). Question Three asked about dismissals of due process cases, other than on the basis of sufficiency determinations, made without a hearing. The letter stated: "You state in your correspondence to OSEP that some States, especially those that opt to use State administrative law judges to adjudicate IDEA due process complaints, engage in practices that dismiss a due process complaint and/or issue summary judgment on the matter without holding a hearing. You ask whether such practices (other than when a hearing officer rules that a due process complaint is insufficient) violate the parties' right to a hearing under IDEA and/or arguably Fourteenth Amendment procedural due process rights." After cautioning that the response "is limited to the hearing rights afforded to parties under IDEA. 20 U.S.C. §§ 1415(f)(1)(A), 1415(f)(2), 1415(f)(3)(A)-(D), and 1415(h)," OSEP stated, "Among the rights IDEA affords parties to any hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534, or an appeal conducted pursuant to § 300.514, is the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. 34 C.F.R. § 300.512(a)(2)." The letter continued,

> [T]he only provision in IDEA or its implementing regulations that contemplates summary dismissal is when the due process complaint is insufficient. To the extent any summary proceedings in a hearing on a due process complaint - other than a sufficiency determination - limit, or conflict with, either party's rights, including the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, we believe such proceedings can be used only when both parties consent to use the summary process (e.g., cross-motions for summary judgment).

XXIV. DUE PROCESS AND COVID-19

XXV. TUITION REIMBURSEMENT

VW v. New York City Dep't of Educ., No. 21 CIV. 6317, 2022 WL 3448096, 122 LRP 27407 (S.D.N.Y. Aug. 17, 2022). This case involved a 16-year-old student who was diagnosed with autism, and experienced severe expressive and receptive delays and sensory processing deficits. She was considered nonverbal and exhibited self-injurious behavior. By the time the case reached the district court, the defendant did not dispute that it failed to offer the student free, appropriate public education for the 2019-20 school year by failing to provide an IEP for the year. The parent placed the student in a private school, and the IHO awarded tuition reimbursement, as well as compensatory education in the form of home-based ABA services. The SRO overturned the compensatory services award, but the district court reversed that decision. The court held that compensatory education and tuition reimbursement are not mutually

exclusive remedies. The compensatory services, though they are to be delivered prospectively, do not undercut or circumvent the process for annual review of a student's IEP by the IEP team because they are compensation for deprivation in the 2019-20 school year. And although the private school had to have offered appropriate education to the student for the tuition to be reimbursed, the services to which a student is entitled may include both an educational placement and related services, such as home-based ABA. As for other claims, the court affirmed the SRO's denial of transportation-based ABA services, noting that the defendant was already working to secure those services prospectively. The court also rejected the parent's claim under the IDEA and Section 504 for compensation for the loss of her time effectively acting as a transportation paraprofessional for the student. The court reasoned that out-of-pocket costs of transportation would have been reimbursed had they been proven, and the parent was not a trained professional whose professional services qualified for reimbursement. The court also rejected a claim for reimbursement for food for which proof of payment was lacking.

Doe v. Newton Pub. Schs., *supra*.

E.C. v. Fullerton Sch. Dist., *supra*.

Caleb M. v. Department of Education, No. 20-cv-00212, 2021 WL 829700, 78 IDELR 133 (D. Haw. Mar. 4, 2021), concerned a failure of proof on the issue whether the private placement selected by the parent was appropriate so as to justify an award of tuition reimbursement. The hearing officer found that the education department denied the student free, appropriate public education, but denied the parent tuition reimbursement, ruling that the student's placement at a school called Corvid Academy was not proper under the Individuals with Disabilities Education Act. The court affirmed the hearing officer decision. Citing, among other cases, *Frank G. v. Board of Education*, 459 F.3d 356, 365, 46 IDELR 33 (2d Cir. 2006), the court stated that if the public placement violates the IDEA, reimbursement is authorized if the private placement is proper under the IDEA, that is, if it provides educational instruction specially designed to meet the unique needs of the student, supported by the services that are necessary to permit the student to benefit from instruction. There was no contest that the public placement violated the IDEA by denying FAPE. "Plaintiffs, however, have made no showing that Student's placement at Corvid was specially designed to meet his unique needs. Notably, the record is entirely silent on whether Corvid even offers special education services designed for the needs of handicapped children, much less those of Student." 2021 WL 829700, at *2. Noting the absence of evidence on that issue, the court said that the record suggested that the private school did not offer such services, for if it did, it would not have conditioned enrollment on the parent obtaining a registered behavior technician to be with the student at all times. In addition, although the parent testified that applied behavior analysis was the core of the educational program, she also testified the school itself did not supply the ABA. Instead the same third party providing the behavior technician furnished it. And the record was silent on the qualifications of the student's teacher and other personnel at the school, suggesting that the instruction was not specially designed. The only evidence was that, according to the parent, the student was doing "pretty good" at the school. The court

said the evidentiary shortcomings could easily have been met by calling the teacher or other staff member to testify about their qualifications and how the instruction was specially designed. The court declined to address other reasons the hearing officer gave for denying reimbursement.

XXVI. COMPENSATORY EDUCATION AND RELATED

Johnson v. Charlotte-Mecklenburg Schs. Bd. of Educ., supra.

J.N. v. Jefferson Cnty. Bd. of Educ., supra.

Independent Sch. Dist. No. 283 v. E.M.D.H., supra.

Hood River County Sch. Dist. v. Student, supra.

LEGAL UPDATE:
MISSOURI AND THE EIGHTH CIRCUIT COURT OF APPEALS

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA TRAINING FOR ADMINISTRATIVE HEARING COMMISSIONERS

TUESDAY, OCTOBER 11, 2022

PRESENTED BY DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC [‡]
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

Eighth Circuit Case in *New Developments* Outline

Minnetonka Pub. Schs., Indep. Sch. Dist. No. 276 v. M.L.K., 42 F.4th 847, 81 IDELR 123 (8th Cir. July 29, 2022).

J.P. v. Belton Sch. Dist. 124, 40 F.4th 887, 81 IDELR 124 (8th Cir. July 26, 2022).

Independent Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073, 76 IDELR 203 (8th Cir. June 3, 2020), *cert. denied*, 142 S. Ct. 67 (Oct. 4, 2021).

Additional District Court Cases of Interest

Murray v. Joplin R-VIII Sch. Dist. Bd. of Educ., No. 3:22-CV-05020-MDH, 2022 WL 2705255, 81 IDELR 96 (W.D. Mo. July 12, 2022) CONDUCTING DUE PROCESS HEARINGS. This case concerns federal removal jurisdiction, but because it affects the scope of what falls outside the IDEA it might be relevant to the scope of issues in a due process hearing. The plaintiff filed a petition in state circuit court alleging the defendants discriminated against, harassed, and retaliated against the plaintiff in violation of the Missouri Human Rights Act. The plaintiff, a high schooler, contended that the defendants discriminated against him by refusing to allow him to use to the boys' restroom and locker facilities. The defendant school district removed the case alleging that the petition asserted claims under Section 504 and the IDEA, thus presenting a federal question. The court granted the plaintiff's motion to remand to state court. It said that clearly the petition only cited to claims under the state act, not the federal laws. The court retained jurisdiction to award plaintiff attorneys' fees.

[‡] Prepared by Mark C. Weber, Esq., DePaul University College of Law, for Special Education Solutions, LLC.

B.M. v. Liberty Sch. Dist. # 53, No. 4:21-CV-00495-DGK, 2021 WL 5299666, 80 IDELR 14 (W.D. Mo. Nov. 15, 2021). CONDUCTING DUE PROCESS HEARINGS. This case also concerns federal removal jurisdiction, and again could possibly be relevant to the scope of issues in a due process proceeding. The plaintiff filed an action in state circuit court alleging the school district discriminated against, harassed, and retaliated against the plaintiff in violation of the Missouri Human Rights Act by placing him in uncomfortable situations, making frequent changes to his school schedule, and failing to accommodate his disabilities. The school district removed the case to federal court and the plaintiff moved for remand. The court granted the remand motion. The district argued that the case fell within federal jurisdiction on the ground that the gravamen of the complaint was that the district denied the plaintiff FAPE as required by the IDEA. However, the court noted that the case was in fact brought under Missouri law rather than asserting a federal cause of action, and that the case did not qualify as one of the rare instances in which federal question jurisdiction is present because the case rests on a nearly pure issue of federal law that once settled would govern numerous cases. The court found *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017), concerning administrative exhaustion of claims on other statutes when IDEA can provide relief, to be wholly inapplicable, and awarded the plaintiff attorneys' fees.

Borishkevich v. Springfield Pub. Schs. Bd. of Educ., 541 F. Supp. 3d 969, 78 IDELR 277 (W.D. Mo. May 27, 2021) COVID-19 ISSUES. The plaintiffs here, parents and children, some of which children had IEPs, challenged the defendants' plan for virtual and in-person instruction during the Covid-19 pandemic. The court granted summary judgment in favor of the defendants. The July 23, 2020, plan offered parents the option of having their children attend class in person two days a week and virtually three days a week, or, alternatively, having the children attend virtual classes every day. The plan required case managers to contact parents of students who had IEPs near the beginning of the 2020-21 school year to develop approaches to meet the students' needs. Around the start of November, the defendants allowed all students in the eighth grade and below who had chosen to attend in person to attend classes in person four days a week. On February 1, 2021, the defendants allowed students at all grade levels who had chosen to attend in person to attend classes in person four days per week. Then, on March 22, 2021, defendants allowed students who had chosen to attend in person to attend classes in-person classes five days per week, essentially the same as before the pandemic. The court held, among other things, that the plan did not violate any constitutional rights to procedural or substantive due process, and that it did not violate equal protection. The court also found no actionable violation of the Americans with Disabilities Act, relying on an absence of a showing of bad faith or gross misjudgment, and it rejected state statutory and constitutional claims. Relevant to the Individuals with Disabilities Education Act and Section 504, the court held that the exhaustion requirement had not been satisfied, so the claims had to be dismissed. The court previously denied the plaintiffs a temporary restraining order to stop the school district's plan. 2020 WL 9815965 (W.D. Mo. Aug. 21, 2020).

J.P. v. Belton Sch. Dist. 124, No. 4:20-CV-00189-NKL, 2021 WL 5544399 (W.D. Mo. Feb. 24, 2021). CONDUCTING DUE PROCESS HEARINGS. Although this case deals with exclusion of evidence in the context of an appeal to federal district court, it may be of interest regarding relevance of expert testimony in due process hearings. The court denied a motion to exclude the expert report of Tim Lewis, Ph.D., which the school district sought to admit to rebut expert testimony from the parent's expert, Dr. Peter Blanck. Lewis's report evaluated Blanck's report and explained his belief that Blanck's views were unsupported by empirical literature and embraced flawed methodologies. The issues in dispute were whether it was proper to move the student from a mainline school to the Missouri State School for the Severely Disabled, and whether the district likely retaliated against the student and parent for trying to assert their educational rights. The court noted that the parties had agreed to a bench trial in the case and that the parent did not dispute the reliability of Lewis's opinions. Applying Federal Rule of Evidence 702, the court ruled that the Lewis report would help it to understand the evidence by providing an adversarial perspective on the Blanck report, even though the Lewis report did not address the specific facts of the student's educational placement. The court said the Lewis report was admissible as rebuttal testimony because it directly addressed the Blanck report's essential opinions item-by-item. Finally, the Lewis testimony related to the retaliation claim as well, for it said that no empirical research supported the conclusion in the Blanck report that parents of children with severe disabilities are often retaliated against when they seek appropriate education, reasonable modifications, and accommodations for their children. Note: The Lewis report is found on Westlaw at 2021 WL 2042154 (W.D. Mo. Feb. 17, 2021) and the Blanck report at 2020 WL 9692977 (W.D. Mo. Oct. 15, 2020).

INDEPENDENT EDUCATIONAL EVALUATION ISSUES UNDER THE IDEA

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA TRAINING FOR ADMINISTRATIVE HEARING COMMISSIONERS

TUESDAY, OCTOBER 11, 2022

PRESENTED BY DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC [‡]
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

Parents of children with disabilities frequently obtain independent educational evaluations (IEEs). They also frequently ask for public funding for IEEs. Disputes over IEEs are a challenging component of many due process hearings, so the law on the topic is of importance to impartial hearing officers (IHOs). This outline discusses:

- Relevant Provisions of the Individuals with Disabilities Education Act, the Federal Regulations, and Missouri Statutes and Regulations
- The essentials of the right to an IEE
- Bases for obtaining publicly funded IEEs
- Procedures for obtaining publicly funded IEEs
- Uses of IEEs
- Remedies in IEE cases

The IDEA and the Federal Regulations

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, a state educational agency, state agency, or local educational agency (typically a school district) that receives federal special education funding must provide, "An opportunity for the parents of a child with a disability . . . to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). The procedural safeguards notice furnished to parents must explain the statutory and regulatory provisions relating to independent educational evaluations. *Id*. § 1415(d)(2)(A); *see also* 34 C.F.R. § 300.504(c)(1).

Under the federal regulation, an IEE is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i). School districts and other public agencies have to afford parents of children with disabilities the right to obtain an IEE. *Id*. § 300.502(a)(1). The agency has to provide the parents who make a request for

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[‡] Prepared by Mark C. Weber, Esq., DePaul University College of Law, for Special Education Solutions, LLC.

independent evaluation the information they need about where to obtain the evaluation and the agency's criteria that apply to IEEs. *Id*. § 300.502(a)(2).

Parents may have the right to an educational evaluation at public expense. "Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with [34 C.F.R.] § 300.103," one of the regulations interpreting the requirement to provide free, appropriate public education (FAPE). *Id*. § 300.502(a)(3)(ii). The federal regulation on educational evaluation at public expense provides:

> Parent right to evaluation at public expense.
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
>
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
>
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
>
> (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
>
> (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
>
> (5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

Id. § 300.502(b).

The section of the federal regulation covering "agency criteria" that apply to IEEs at public expense states:

> Agency criteria.
>
> (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.
>
> (2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

Id. § 300.502(e).

Independent educational evaluations requested by hearing officers as part of a hearing on a due process complaint must also be at public expense. *Id.* § 300.502(d).

Publicly funded or not, the IEE has to be considered by the school district and may be used in a due process hearing and state level appeal:

> Parent-initiated evaluations.
>
> If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—
>
> (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and
>
> (2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

Id. § 300.502(c).

The Missouri State Plan for Special Education (State Plan) has a number of provisions that bear on independent educational evaluations, *see*, *e.g.*, State Plan, § V(B) (Procedural Safeguards / Discipline) (March 2022), p. 62, and said regulations harmonize with the federal requirements regarding independent evaluations at public expense. The State Plan also includes additional requirements that are consistent with interpretations from the U.S. Department of Education Office of Special Education Programs (OSEP) and federal district court decisions. These include:

> (4) If the responsible public agency has a policy regarding reimbursement for independent evaluations, that policy will specify the factors to be considered in

the determination of public funding for the evaluation. That determination should be based on:

a. The qualifications and locations of the evaluators, and
b. The cost of the evaluation.

The public agency may only impose limitations on the cost of an IEE if the agency uses those same limitations when conducting an evaluation. If a public agency uses such cost limitations, it must ensure that its procedures require payment for an IEE at a higher rate if an appropriate IEE cannot, in light of the student's unique needs and other unique circumstances, be obtained within those cost limitations. If the cost of an IEE at public expense exceeds the agency's cost limitations, the public agency must either:

a. Initiate a due process hearing or
b. Pay the full cost of the IEE.

(5) If the responsible public agency has a policy regarding reimbursement for independent evaluations and that policy establishes allowable maximum charges for specific tests or types of evaluations, the maximum set will still enable parents to choose from among qualified professionals in the area and will result only in the elimination of excessive fees. The policy shall specify that the responsible public agency will pay the fee for the independent evaluation up to the maximum established. Additionally, the policy will anticipate that a student's "unique circumstances" may justify an evaluation that exceeds the allowable cost criteria.

(6) If the responsible public agency has no policy which sets maximum allowable charges for specific tests or types of evaluation, then the parents will be reimbursed for services rendered by a qualified evaluator.

Id.

The Essentials of the Right to an IEE

The right to an IEE exists against a background of duties on the part of public school authorities to evaluate all children suspected of having disabilities. A public agency has to conduct a comprehensive evaluation, using a variety of assessment tools and strategies to obtain relevant functional, developmental, and academic information about the child. Information obtained through the evaluation is to assist in determining whether the child is a child with a disability as well as determining the content of an eligible child's IEP to enable the child to be involved in, and make progress in, the general education curriculum. 34 CFR § 300.304(b)(1). The public agency must ensure that each child is assessed in all areas related to the suspected disability, including as appropriate, academic performance. 34 CFR § 300.304(c)(4). Nevertheless, "There is no provision in the IDEA that gives a parent the right to dictate the specific areas that the public agency must assess as part of the comprehensive evaluation; the public agency is only required to assess the child in particular areas related to the child's suspected

disability, as it determines appropriate." *Letter to Unnerstall*, 68 IDELR 22 (OSEP Apr. 25, 2016). "However, if a determination is made through the evaluation process that a particular assessment for dyslexia is needed to ascertain whether the child has a disability and the child's educational needs, including those related to the child's reading difficulties, then the public agency must conduct the necessary assessments." *Id*.

A court has emphasized that access to school district evaluations are critical to the ability of parents to exercise their IDEA right to an independent evaluation, and that the information has to be made available to the parents early enough for them to obtain an IEE:

> The right to examine a district's evaluations undergirds the parents' right to request an independent evaluation if they disagree. In order for these rights to be effectuated, they need to be available far enough in advance of the school year for the independent evaluation to be conducted and reviewed by the [IEP] team. By failing to provide a copy of R.Y.'s evaluation until the May 2012 [IEP] meeting was already underway, the DOE violated the Parents' right to be involved in the IEP decisionmaking.

S.Y. v. New York City Dep't of Educ., 210 F. Supp. 3d 556, 569, 68 IDELR 230 (S.D.N.Y. 2016) (citation omitted) (finding violation not sufficient to invalidate IEP in light of other steps taken to inform parents).

The IDEA regulations contain extensive provisions on evaluations and reevaluations at 34 C.F.R. § 300.301-.311. Beyond the authorities requiring or withholding public funding for independent evaluations considered below, there is an abundance of case law concerning what constitutes an adequate evaluation. For a discussion of the topic, see Mark C. Weber, *"All Areas of Suspected Disability,"* 59 Loy. L. Rev. 289 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235090.

Parents are, of course, free to have evaluations done on their children independently of the public school's IDEA evaluation process. When parents undertake such an evaluation, the school authorities must consider the evaluation in making special education eligibility, program, and placement decisions, even if the district has done its own evaluation, as long as the independent evaluation meets the criteria set by the district. *See* 34 C.F.R. § 300.502(c)(1). *See generally T.S. v. Bd. of Educ. of the Town of Ridgefield*, 10 F.3d 87, 20 IDELR 889 (2d Cir. 1993); *M.Z. v. New York City Dep't of Educ.*, No. 12 CIV. 4111, 2013 WL 1314992, at *5 (S.D.N.Y. 2013), *appeal dismissed*, No. 13-1508 (2d Cir. June 17, 2013). As indicated above, the evaluation may also be used as evidence in a due process or review proceeding. *Id*. § 300.502(c)(2). The criteria for the IEE have to be the same as the criteria that the school district uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. *Id*. § 300.502(e)(1). An evaluation is deemed independent if conducted by an examiner who is qualified and not employed by the public agency responsible for the education of the child. *Id*. § 300.502(a)(3)(i).

As noted above, parents may demand an IEE at public expense if they disagree with the public school's evaluation of their child. *Id*. § 300.502(b)(1). The school district

may avoid paying for the IEE only if it requests a due process hearing and establishes at the hearing that its evaluation was appropriate. *Id.* § 300.502(b)(3). A federal court of appeals has upheld the regulation requiring school districts and other public agencies to fund IEEs when the parents disagree with the public school's evaluation and the public agency fails to request a due process hearing and show that its evaluation is appropriate. In *Philip C. v. Jefferson County Board of Education*, 701 F.3d 691, 60 IDELR 30 (11th Cir. 2012), the court held that the regulation requiring that an IEE be at public expense if the specified conditions are met was a valid exercise of the Department of Education's rulemaking power, even though the right to funding was not specifically listed in the IDEA's text.

The regulation on IEEs at public expense does not clarify which parent prevails when one demands the IEE and the other objects. The Second Circuit ruled that a parent's whose parental rights to participate in her daughter's education had been revoked by a Vermont family court lacked standing to invoke due process on a demand she made for an IEE when the parent with the right to educational decision making disagreed. *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768 (2d Cir. 2002) (Sotomayor, J.).

The regulation does not require notice to the district before the parent who disagrees with the district evaluation obtains the IEE and seeks reimbursement, and courts have required reimbursement when the parents did not give notice before hiring the evaluator and incurring the cost. *E.g., Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 31 IDELR 27 (3d Cir. 1999) (not requiring parents to express disagreement with district's evaluation before getting IEE for child); *Hiller v. Board of Educ.*, 687 F. Supp. 735, 441 IDELR 194 (N.D.N.Y. 1988). The school district or other public agency may ask the parent about the reason for disagreement with the school's evaluation, but the parent does not have to answer, and the district must not delay in providing the IEE or filing the due process hearing request. 34 CFR § 300.502(b)(4). A written statement of the nature of the disagreement cannot be required, nor is the request for the publicly funded IEE subject to consideration by the IEP team. *Letter to Anonymous*, 55 IDELR 106 (OSEP Jan. 4, 2010) ("While it is reasonable for a public agency to require that it be notified prior to the parent obtaining an IEE at public expense, it is inconsistent with 34 CFR § 300.502 to deny reimbursement prior to discussion of the district's evaluation at an IEP meeting, or to require the parent to provide a written statement of its disagreement with the district's evaluation, or to provide notice of their request for an IEE in an IEP team meeting for consideration by the IEP team.").

As stated above, school district or the other relevant public agency criteria for evaluations must be followed with regard to publicly funded IEEs. *Letter to Savit*, 67 IDELR 216 (OSEP Jan. 19, 2016) ("[U]nder 34 CFR § 300.502(e), if an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE."). But a school district must not restrict the providers of IEEs to a set list, and must give parents the chance to show that unique circumstances require choosing an evaluator who does not meet school district criteria.

Letter to Parker, 41 IDELR 155(OSEP 2004) ("[W]hen enforcing IEE criteria, the district must allow parents the opportunity to select an evaluator who is not on the list but who meets the criteria set by the public agency. In addition, when enforcing IEE criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify the selection of an evaluator that does not meet agency criteria.").

School districts or other public agencies may set cost caps for IEEs at public expense. *See M.V. v. Shenendehowa Cent. Sch. Dist.*, No. 1:11-CV-0070, 2013 WL 936438, 60 IDELR 213 (N.D.N.Y. Mar. 8, 2013) (noting that parents failed to contact several experts in area who would perform requested evaluation for less than cap set by district); *Shafi A. v. Lewisville Indep. Sch. Dist.*, 69 IDELR 66 (E.D. Tex. 2016) (rejecting the parents' argument that their child was denied FAPE when the school district declined to pay for an IEE because the fee charged by the independent evaluator significantly exceeded the district's fee schedule). The Office of Special Education Programs has cautioned, however:

> The denial of an IEE based solely on financial cost would be inconsistent with 34 CFR § 300.502. To avoid unreasonable charges for IEEs, the school district may establish maximum allowable charges for specific tests. When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly-funded. If the total cost of the IEE exceeds the maximum allowable costs and the school district believes that there is no justification for the excess cost, the school district cannot in its sole judgment determine that it will pay only the maximum allowable cost and no further. The public agency must, without unnecessary delay, initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet the agency's cost criteria and that unique circumstances of the child do not justify an IEE at a rate that is higher than normally allowed.

Letter to Anonymous, 103 LRP 22731 (OSEP 2002).

A parent is entitled to only one IEE at public expense each time the school district or other public agency conducts an evaluation with which the parent disagrees. 34 C.F.R. § 300.502(b)(5). The limit of one school district reevaluation per year, 34 C.F.R. § 300.303(b)(1), does not apply to independent evaluations at public expense. *Meridian Joint Sch. Dist. No. 2 v. D.A.*, No. 1:11-cv-00320-CWD, 60 IDELR 282 (D. Idaho Mar. 20, 2013), *aff'd*, 792 F. 3d 1054, 65 IDELR 253 (9th Cir. 2015).

School districts may not limit the amount of time that independent evaluators spend with the child in completing the evaluation. *See Letter to Anonymous*, 72 IDELR 251 (OSEP Aug. 23, 2018) ("[I]t would be inconsistent with the right of a parent to have an IEE considered by the public agency for a public agency to limit an independent evaluator's access in a way that would deny the independent evaluator the ability to conduct an evaluation in a way that meets agency criteria. Such criteria would include

the amount of time that the independent evaluator spends with the child."). Other restrictions on independent evaluators may also run afoul of the federal law. *See School Bd. of Manatee Cnty. v. L.H.*, No. 8:08–cv–1435–T–33MAP, 2009 WL 3231914, 53 IDELR 149 (M.D. Fla. Sept. 30, 2009) (ruling that not permitting private psychologist conducting IEE to make observations in classroom violated IDEA; affirming order that observation at least two hours long be allowed).

Requesting an IEE at public expense does not by itself trigger the right to maintenance of placement (i.e., stay-put) under 20 U.S.C. § 1415(j). *See Letter to Anonymous*, 72 IDELR 163 (OSERS June 28, 2018) ("It is important to note that the parent's request for an IEE alone would not require the school district to continue the child's current educational placement unless a due process complaint was filed in the matter. If the public agency agrees to a parent's request for an IEE it may either delay the issuance of the prior written notice until the IEE has been completed and reviewed by the IEP Team or it may issue the prior written notice within a reasonable time and discontinue special education services, pending the completion and review of the IEE.").

Bases for Obtaining Publicly Funded IEEs

The ordinary basis for obtaining a publicly funded IEE is that the school district's evaluation is not appropriate. For example, in *Rose Tree Media Sch. Dist. v. M.J.*, No. 18-CV-1063, 2019 WL 1062487, 74 IDELR 15 (E.D. Pa. Mar. 6, 2019), the court considered the case of a high school student with various disorders but with top grades, whose grades deteriorated as she became frequently absent from school. She received an evaluation by a school psychologist that covered a cognitive assessment, academic achievement testing, social, emotional and behavior scales, teacher input, observations, and a records review, which resulted in a finding that she was not eligible for IDEA services on the ground that she did not need specialized instruction despite her mental health needs. The court affirmed a hearing officer ruling that the district failed to evaluate her in all areas of suspected disabilities in a manner that properly considered all of her special education needs, and thus an independent evaluation at public expense should be provided. The court noted that the district did not evaluate the student or consider her eligibility under the other health impairment (OHI) category when there appeared to be no dispute that OHI was an area of suspected disability, and the district did not sufficiently explain why the student did not meet the emotional disturbance classification despite many indicators. *See also Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015) ("When an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.").

A court has ruled that specific deficiencies as to individual assessments by the district result in an entitlement to a publicly funded IEE in all relevant areas, even those in which the assessments were sufficient. In *Jones-Herrion v. District of Columbia*, No. CV 18-2828, 2019 WL 5086693, 75 IDELR 92 (D.D.C. Oct. 10, 2019), the school system performed only four of the five assessments it agreed to do when evaluating a seventh grader for eligibility for special education. Of the four, the district could defend only

three before the special education hearing officer. The five areas were assistive technology; occupational therapy; speech/language; functional behavior; and comprehensive psychological. The parents asked for funding for an IEE that would cover all five assessments, and in litigation the school system agreed to fund an IEE for the one assessment that it did not perform (the assistive technology assessment) and the one it could not defend (the occupational therapy assessment, which was conducted by a therapist who could not attend the hearing). The court granted the parents' motion for summary judgment, awarding payment for all five assessments. The court ruled that when an IEE is requested the district must defend the appropriateness of the evaluation as a whole, and that the hearing officer erred in finding that the partial evaluation by the school system was appropriate. The court stated: "Congress recognized that assessments cannot be separated from the evaluation which they inform. Here, DCPS determined which assessments were needed to evaluate K.H. but failed to perform them all or even to defend successfully all of those it did perform. Without necessary assessments, its evaluation was clearly deficient. IDEA entitles K.H. to a publicly funded independent educational evaluation, and therefore entitles her to all of the independent assessments necessary to formulate that evaluation." *Id*. at *4.

Similarly, in *D.S. v. Trumbull Board of Education*, 975 F.3d 152, 77 IDELR 122 (2d Cir. 2020), the Second Circuit held that a functional behavioral assessment (FBA) that the parent disagrees with does not trigger a parent's right to an IEE at public expense. The case involved a student with ADHD and signs of developmental and behavioral disorders, such as autism. He entered fifth grade in 2013 and as of 2014 was served in a therapeutic day school. He received a comprehensive triennial reevaluation in October 2014, which reported a decline in his abilities and performance. He was scheduled for another reevaluation in October 2017. In addition, his parents and the school agreed to conduct a functional behavioral assessment (FBA) for him in the spring of each year. The school conducted the annual FBA in March 2017, but the parents contested the adequacy of both the 2017 FBA and the 2014 comprehensive evaluation. They sought an IEE at public expense as to behavior and all other areas of the student's disability. They also sought to withdraw their consent for the comprehensive reevaluation scheduled for October 2017. The school refused the requests and filed for due process to challenge the request for an IEE at public expense. The hearing officer denied the parents' request for a publicly funded IEE that addressed non-behavioral concerns. The hearing officer granted the parents an independent assessment of the student's behavior at public expense, though apparently the hearing officer also ruled that the request was mooted by the district's agreement to pay for the independent FBA. *Id*. n.6. The parents filed suit in district court. That court found that the school waived any argument that the FBA is not an evaluation triggering the publicly funded IEE right, but it affirmed the hearing officer's decision that denied the request for an IEE that would exceed the scope of the behavioral assessment. The district court also ruled that any disagreement with the 2014 evaluation could no longer be pursued due to the two-year statute of limitations. The court of appeals vacated the judgment, reversed the decision, and remanded. Despite a concession by the defendant, the Second Circuit panel ruled that an FBA, by itself, is not an evaluation for purposes of the parent's right to an IEE at public expense. The opinion reasoned that the relevant section of the IDEA established just two types of evaluations: initial evaluations and reevaluations. The court

declared that an FBA, standing alone, is neither an initial evaluation nor a reevaluation because it lacks the comprehensiveness the statutory definition requires. The court disagreed with district court caselaw and U.S. Department of Education policy letters (*see*, *e.g*., *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007); *Letter to Scheinz*, 34 IDELR 34 (OSEP 2000)) that state that insufficient FBAs support the right to a publicly funded IEE. The court did identify a different option for parents: "Rather than demand a comprehensive IEE at public expense in response to this targeted assessment of D.S.'s behavior, the parents could have requested that the school conduct another reevaluation of D.S. . . . [I]f the new evaluation and its suggestions came up short, then D.S.'s parents could have voiced their disagreement and obtained the publicly funded comprehensive evaluation they seek in this case." *Id*. at 167.

In any instance, when the parents' IEE request challenges the entirety of a school district's evaluation or reevaluation, it is error for the hearing officer to focus only on the specific assessments that were performed and not consider whether further assessments were needed. *L.D. v. Anne Arundel Pub. Schs.*, No. CV CCB-18-1637, 2019 WL 6173818, 119 LRP 44337 (D. Md. Nov. 20, 2019) (stating that evidence should have been allowed regarding the failure to assess student for learning disability when parents' IEE request stated disagreement with triennial evaluation as a whole, but ALJ decided that hearing would focus only on reading, writing, math, pragmatic language, and social emotional development assessments; remanding case to hearing officer).

Parents' rights to a publicly funded IEE do not hinge on the school district's failure to cure defects in the school's evaluation. In other words, there is no safe harbor in which a district may try to fix inadequacies of the evaluation; the district must demand the hearing or pay for the IEE. *See Letter to Carroll*, 68 IDELR 279 (OSEP Oct. 22, 2016) ("The IDEA affords a parent the right to an IEE at public expense and does not condition that right on a public agency's ability to cure the defects of the evaluation it conducted prior to granting the parent's request for an IEE. Therefore, it would be inconsistent with the provisions of 34 CFR § 300.502 to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents' request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate.").

Similarly, the right to the publicly funded evaluation does not depend on the district's evaluation having resulted in a finding of IDEA eligibility for the child. *See Letter to Zirkel*, 74 IDELR 142 (OSEP May 2, 2019) ("Question 1: Does the parent have the right to obtain an IEE at public expense if the child is evaluated under IDEA and found not to be a child with a disability in need of special education and related services? Answer: Yes. Under 34 C.F.R. § 300.502(a), the parents of a child with a disability have the right under Part B of IDEA to obtain an IEE, subject to 34 C.F.R. § 300.502(b) through (e). Under 34 C.F.R. § 300.15, the term 'evaluation' means the procedures used in accordance with 34 C.F.R. §§ 300.304 through 300.311 to determine whether a child has a disability (emphasis added), and the nature and extent of the special education and related services that the child needs. Because the definition of evaluation includes eligibility determinations under IDEA, we believe an IEE can be obtained after an initial evaluation regardless of whether the child was found eligible as

a child with a disability, if the parent disagrees with the initial evaluation obtained by the public agency, subject to certain conditions. 34 C.F.R. § 300.502(b)(1). The right to an IEE at public expense, therefore, would extend to parents who suspect their child might be a child with a disability and who disagree with the initial evaluation obtained by the public agency.").

When the district demonstrates at hearing that its evaluation is appropriate, payment for a parent's IEE is denied; a parent is not entitled to an IEE when the district has properly assessed a child in all areas related to the child's suspected disability. *R.Z.C. v. North Shore Sch. Dist.*, 755 F. App'x 658, 118 LRP 50704 (9th Cir. 2018) (finding evaluation appropriate when it did not omit needed information, but instead included results of student's cognitive, attention, social, emotional, medical, and physical assessments, as well as general education teacher reports, parent input, past and current grades, progress measurements, teacher observations, psychologist's report, specific assessment results, and transition assessment, minor omission was harmless, and classroom observation was adequate); *Avila v. Spokane Sch. Dist. 81*, 686 F. App'x 384, 69 IDELR 204 (9th Cir. 2017) (affirming district court decision that denied independent evaluation at public expense, stating that district assessed child in all areas related to his suspected disability when it gave him battery of tests for reading and writing deficiencies, including many of same tests parent's private evaluator used).

Minor deficiencies in the district's evaluation do not justify public funding for the parent's IEE. In *B.G. v. City of Chicago Sch. Dist. 299*, 901 F.3d 903, 72 IDELR 231 (7th Cir. 2018), the court affirmed the district court's denial of a motion to overturn a hearing officer decision rejecting a request for independent educational evaluations at public expense for a teenager with medical conditions and emotional and learning disabilities. The court reasoned that substantial evidence supported the hearing officer's decision that the school district's evaluations were appropriate. Regarding the district's psychological evaluation, the court held that the district's evaluators were qualified, that errors in test administration were harmless, that testing in English was appropriate for the student, that support for the recommended emotional disability classification was adequate, and that the evaluators considered the possibility of ADHD. The court further said that the belief of the evaluator that the student did not have a learning disability did not cause harm when the student was classified as having a learning disability and provided access to audiobooks and a multisensory approach to decoding. The court also found the occupational therapy evaluation sufficient. It ruled that the social work evaluation was adequate though it did not include a home visit, and that the functional behavioral assessment was sufficient. With regard to the physical therapy evaluation, the court found that the hearing officer's error about the evaluator's finding of pain was harmless. As to the speech and language evaluation, the court affirmed that the evaluator's loss of test protocols was harmless when the evaluator had them at the meeting on eligibility and the findings had additional corroboration.

Courts have ruled that for the parent to have a right to a publicly funded IEE, there has to be a district evaluation for the parent to disagree with. *G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1266, 58 IDELR 61 (11th Cir. 2012) ("The district court correctly determined that the statutory provisions for a publicly funded independent

educational evaluation never kicked in because no reevaluation ever occurred. The right to a publicly funded independent educational evaluation does not obtain until there is a reevaluation with which the parents disagree."). This principle applies when the parent withholds consent to the public school evaluation, which prevents the district's evaluation from taking place. *Id.*; *see also M.S. v. Hillsborough Twp. Pub. Sch. Dist.*, No. 19-1510, 2019 WL 6817169, 75 IDELR 212 (3d Cir. Dec. 13, 2019) (unpublished).

In one case, however, a court held that parents might be able to obtain district funding for an IEE by contesting an earlier evaluation that was still within the limitations period, while refusing consent to a later evaluation; but in that instance, said the court, the hearing on the district's earlier evaluation and the IEE, if ordered, would have to relate to the time period of the earlier evaluation. *N.D.S. v. Academy for Sci. & Agric. Charter Sch.*, No. 18-CV-0711, 2018 WL 6201725, 73 IDELR 114 (D. Minn. Nov. 28, 2018). Nevertheless, a court has ruled that when the evaluation with which the parent disagrees is obsolete because it took place too long ago, requiring a district to provide an IEE at public expense is futile because it will not aid in the parents' assertion of the child's right to FAPE. *See T.P. v. Bryan Cnty. Sch. Dist.*, 792 F.3d 1284, 1293, 65 IDELR 254 (11th Cir. 2015) ("The parental right to an IEE is not an end in itself; rather, it serves the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation. The evaluation in connection with which Parents sought an IEE at public expense—the 2010 initial evaluation of T.P.—is no longer current because more than three years have passed since September 2010. Regardless of the merits of Parents' case, ordering an IEE at public expense in these circumstances would be futile because the District cannot be forced to rely solely on an independent evaluation conducted at the parents' behest.") (citations and internal quotation marks omitted).

A court has also ruled that there is no entitlement to a publicly funded IEE if the parent has no actual disagreement with the district's evaluation. *M.C. v. Katonah/Lewisboro Union Free Sch. Dist.*, No. 10 CV 6268(VB), 2012 WL 834350, at *11 (S.D.N.Y. Mar. 5, 2012) ("[P]arent's claim depends on whether the Flaum evaluation was obtained because she disagreed with a district evaluation within the meaning of that statute."); *see also R.L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222, 43 IDELR 57 (D. Conn. 2005) (stating that parents seeking IEE did not disagree with the district's evaluation, but merely desired additional evaluation).

Nevertheless, in various cases, courts have required IEE reimbursement for parents when school districts have improperly failed to evaluate children for suspected disabilities, and so no district evaluation exists. *See, e.g., A.S. v. Norwalk Bd. of Educ.*, 183 F. Supp. 2d 534, 36 IDELR 92 (D. Conn. 2002) (requiring reimbursement for evaluation when district did not conduct educational assessment before proposing movement of child to non-mainstreamed setting); *J.P. v. Anchorage Sch. Dist.*, 260 P.3d 285, 57 IDELR 169 (Alaska 2011) (affirming order that parents be reimbursed for independent evaluation when parents requested evaluation of child and district did not act within 45 school days, and even though ultimately child was not found eligible for special education,; noting that right to publicly funded IEE does not depend on eligibility, and that district made use of private evaluation); *see also J.G. v. Douglas*

Cnty. Sch. Dist., 552 F.3d 786, 51 IDELR 119 (9th Cir. 2008) (reversing decision to refuse full reimbursement of private evaluations of twins with autism when district did not promptly evaluate twins after special education referral, even though parents refused to share private evaluations with school district).

Of course, there may be disputes over just what constitutes an evaluation with which the parents can disagree, for purposes of the parents' entitlement to a publicly funded IEE. In *Haddon Township School District v. New Jersey Department of Education*, No. A-1626-14T4, 2016 WL 416531 (N.J. App. Div. Feb. 4, 2016), the New Jersey Appellate Division ruled that under the federal regulations, a review of existing data constitutes an evaluation with which parents may disagree so as to entitle them to an IEE at public expense. *See id.* at *3 ("[T]he School District also seeks to define an evaluation as 'something more than a review of data.' The federal regulation does not support this interpretation. Evaluations are defined as procedures used 'to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.' 34 C.F.R. § 300.15 (2016)."). *F.C. v. Montgomery County Public Schools*, No. TDC-14-2562, 2016 WL 3570604, 68 IDELR 6 (D. Md. June 27, 2016), took a contrary view. It stated, "[I]t is evident that the May 2012 meeting was not an evaluation under 34 C.F.R. § 300.502(b). The meeting consisted of reviewing 2009 assessment data, report card data, and teacher observations." *Id.* at *3. The Office of Special Education programs has issued a letter stating that a request for an IEE at public expense made "early during" the Response to Intervention process is not subject to reimbursement "because the district has not completed an evaluation." *Letter to Zirkel*, 52 IDELR 77 (OSEP Dec. 11, 2008).

The federal regulation provides that when the IHO orders an independent evaluation, it must be at public expense. 34 C.F.R. § 300.502(d). Circumstances in which an IHO may order the evaluation will vary, but one court has ruled that a hearing officer may need to order an independent educational evaluation to determine specific deficits due to the denial of appropriate education and what compensatory services will remedy them. *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 5, 70 IDELR 149 (D.D.C. 2017) ("A hearing officer who finds that he needs more information to make such an individualized assessment [of needs for compensatory education due to denial of FAPE] has at least two options. He can allow the parties to submit additional evidence to enable him to craft an appropriate compensatory education award . . . , or he can order the assessments needed to make the compensatory education determination, . . . In the end, he must solicit the evidence necessary to determine the student's 'specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.' What he cannot do is what the hearing officer did here, that is, outright reject an award for compensatory services and terminate the proceedings.") (citations omitted).

Procedures for Obtaining Publicly Funded IEEs

If a parent requests an IEE at public expense, the school district must, without any unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation was appropriate, or make sure that an IEE is provided at public expense "unless the agency demonstrates in a hearing pursuant to . . . that the

evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. § 300.502(b)(2). The burden is on the school district to show that its evaluation is appropriate. *Collette v. District of Columbia*, No. CV 18-1104, 2019 WL 3502927, 74 IDELR 251 (D.D.C. Aug. 1, 2019) (ruling that hearing officer incorrectly shifted burden of showing appropriateness of independent evaluation onto parents).

Courts will look at the reason for a school district's delay in requesting the hearing to determine whether reimbursement for the parent is appropriate. In *L.C. v. Alta Loma Sch. Dist.*, 849 F. App'x 678, 680, 78 IDELR 271 (9th Cir. June 8, 2021), the parents requested an independent evaluation regarding the student's visual processing. The district delayed filing for due process from the August 21, 2017, request to December 5, 2017, while asking for justification of a fee in excess of the district's area plan limits. The district court held that the delay was unreasonable, pointing out that the district failed to provide the parents full information on cost maximums and on how much the parents' chosen evaluator exceeded the maximum. The court said that "a district's unreasonable actions during attempts to resolve a dispute with parents regarding an IEE, including the withholding of pertinent information necessary for the parents to defend their position, could fairly amount to 'unnecessary delay' under the particular circumstances of a given case." *Id.* at 866. The Ninth Circuit disagreed. The court of appeals ruled that the district court erred in finding that the school district unnecessarily delayed in providing an IEE or filing a due process complaint to oppose the request, stating: "In this case, the District exchanged numerous emails and letters with Student's parents from August 10, 2017, until it filed for a due process hearing on December 5, 2017. These communications reflect the parties' attempts to reach agreement on Dr. Stephey's IEE and other issues. Indeed, the parties reached agreement on a contested issue as late as December 1. Further, the longest delay in communications, November 17–30, was largely due to the District's Thanksgiving break. The parties reached final impasse on the IEE issue on Thursday, November 30, and the District filed for a due process hearing the following Tuesday, December 5. Thus, we conclude there was no unnecessary delay." *See also Pajaro Valley Unified Sch. Dist. v. J.S.*, No. C 06-0380, 2006 WL 3734289, 47 IDELR 12 (N.D. Cal. 2006) (entering judgment in favor of parent for publicly funded IEE when district lacked justification for waiting 11 weeks before filing due process request challenging demand for IEE and when evidence indicated public school assessment was not adequate).

Parents are entitled to prior written notice when a school district proposes or refuses to initiate or change the evaluation of a child, 20 U.S.C. § 1415(b)(3), but a court found that that provision did not support the parents' claim that they did not receive notice that the district was not going to follow their independent evaluator's conclusions when the district had not made that decision at the time of the notice, but was instead planning a reevaluation in order to review the private psychologist's assessment. *R.Z.C. v. North Shore Sch. Dist.*, 755 F. App'x 658, 660 (9th Cir. 2018). A school district may conduct its own evaluation in addition to one that is privately obtained and is not bound to rely on the privately obtained evaluation. *A.B. v. Lawson*, 354 F.3d 315, 326 & n.4, 40 IDELR 121 (4th Cir. 2004); *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 24 IDELR 693 (7th Cir. 1996); *V.M. v. North Colonie Cent. Sch. Dist.*, 954 F. Supp. 2d 102, 118 (N.D.N.Y. 2013) ("A parent seeking special education services for their child under the

IDEA must allow the school to evaluate the student and cannot force the school to rely solely on an independent evaluation.").

At least one circuit has held that delays in challenging a school district's evaluation is not subject to IDEA's statute of limitations. In *D.S. v. Trumbull Board of Education*, 975 F.3d 152, 77 IDELR 122 (2d Cir. Sept. 17, 2020), the Second Circuit held that the IDEA's two-year statute of limitations for due process complaints does not apply to requests for IEEs at public expense. The court reasoned that the parent does not need to file a due process complaint to obtain a publicly funded IEE. Only if the school fails to accede to the IEE request and does not file a due process complaint would the parents need to file a hearing request, and then the limitations would run from the date of the district's statutory violation in failing to agree or to file for due process. Hence, the parents' request for a publicly funded IEE on the ground that the 2014 reevaluation was inadequate was timely because it occurred before October 2017, the date for the next reevaluation. The appropriateness of the 2014 evaluation would be judged on the basis of the child's condition at that time. The case was thus remanded to the district court to address the 2014 evaluation.

Uses of IEEs

The failure to consider an IEE may result in the denial of FAPE, and that conclusion applies even after a student graduates. In *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 70 IDELR 113 (5th Cir. 2017), the court considered a case in which a student with schizophrenia and learning disabilities enrolled in private school in Texas pursuant to a settlement agreement with a school district in California regarding the 2012-13 school year. The parent then changed residency at the start of the 2013-14 school year to a Texas school district, keeping the student in the private school in Texas. Although the court held that the Texas district was not obligated to adopt the California IEP nor offer an immediate interim IEP, and could proceed with reasonable promptness to determine the student's eligibility and needs, the court also held that the Texas district was obligated to reconsider its proposed IEP in light of an independent evaluation even after the student graduated in the spring of 2014. Thus the district denied the student appropriate education from April 24 to the end of the semester, and the court required tuition reimbursement for that period. *But see J.S. v. New York City Dep't. of Educ.*, 104 F. Supp. 3d 392 (S.D.N.Y. May 6, 2015) (holding that failure to consider 2011 IEE provided by parents was violation of 34 C.F.R. § 300.502(c)(1), but it did not invalidate IEP when later evaluation with similar findings was considered and mother was active participant in IEP meeting who had ability to bring information from 2011 evaluation to committee's attention), *aff'd*, 648 F. App'x 96 (2d Cir. 2016).

That the district must consider the IEE does not mean that the district has to follow the IEE. In *Mr. P v. West Hartford Board of Education*, 885 F.3d 735, 753, 71 IDELR 207 (2d Cir.), *cert. denied*, 139 S. Ct. 322 (2018), the parents complained that, among other things, the district failed to consider a report from a private neuropsychologist engaged by the parents. The court commented, "While the IDEA required the District to consider this neuropsychological report, the District was not required to implement Dr. Isenberg's suggestions." *Id.* at 753. Testimony showed that the evaluation was reviewed and commented upon at the relevant IEP meeting. *See also*

T.S. v. Board of Educ. of Town of Ridgefield, 10 F.3d 87 (2d Cir. 1993) (finding IEE to have been adequately considered); *Y.N. v. Board of Educ. of Harrison Cent. Sch. Dist.*, No. 17-CV-4356, 2018 WL 4609117, 73 IDELR 73 (S.D.N.Y. Sept. 25, 2018) ("It is Defendant's burden to demonstrate which evaluative materials were reviewed during the [IEP] meeting in reaching the terms of the IEP . . . . Ultimately, Plaintiffs are arguing that the [IEP team] did not adopt, or at least give enough credence to, Dr. Tagliareni's recommendation. However, the [IEP team] was not required to do so, and therefore, this cannot establish a procedural violation of the IDEA.") (internal quotation marks and brackets omitted).

If the school district files a due process complaint to request a hearing and the final decision is that the district's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense. 34 C.F.R. § 300.502(b)(3). Hence, the privately funded IEE must be considered by the district and may be used in an IEP meeting or as evidence in a hearing. *See Letter to Zirkel*, 74 IDELR 142, at Question 2 (OSEP May 2, 2019).

Remedies in IEE Cases

Reimbursement is a proper remedy for an improper denial of an IEE at public expense. The reimbursement should be for the full bill, even if the parents made use of third-party payments. *Jason O. v. Manhattan Sch. Dist. No. 114*, 173 F. Supp. 3d 744, 67 IDELR 142 (N.D. Ill. 2016) (requiring reimbursement for full cost of evaluations, not net cost after insurance payments, noting school district's use of evaluations in lieu of its own), *vacated as moot sub nom. Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677, 69 IDELR 175 (7th Cir. 2017)

Substantial compliance with agency criteria for the evaluation is all that is required for full reimbursement but, as noted above, caps on reimbursement may be imposed as long as there is an opportunity to demonstrate unique circumstances supporting an exemption. These caps may diminish otherwise applicable remedies. *Seth B. v. Orleans Parish Sch. Bd.*, 810 F.3d 961, 67 IDELR 2 (5th Cir. 2016) (in case of child with autism whose parents secured assent from school district for independent evaluation at public expense but whose request for reimbursement was rejected on ground evaluation did not meet state criteria, vacating and remanding decision in favor of school district; holding that substantial compliance with educational agency criteria suffices for reimbursement; applying $3,000 cap in light of failure to respond to opportunity to demonstrate unique circumstances supporting exemption); *see also Collette v. District of Columbia*, No. CV 18-1104, 2019 WL 3502927, 74 IDELR 251 (D.D.C. Aug. 1, 2019) (ruling that parents were entitled to reimbursement of full cost of independent evaluation even though it did not include classroom observation and was more expensive than defendant allowed).

As these cases suggest, remedies in IEE cases in which parents prevail will most likely be either an order to fund a prospective evaluation or an order to reimburse parents for an evaluation that has already taken place. There may, however, be some situations in which other remedies, such as compensatory education or tuition reimbursement could be a proper remedy for an inappropriate school district

evaluation. In *Letter to Zirkel*, 74 IDELR 142 (OSEP May 2, 2019), OSEP responded to the question,

> In a case where the parent files for a due process hearing to claim a child find violation but either: (a) the district's belated evaluation determines that the child is not eligible under IDEA; or (b) the district never evaluated the child, is the parent deprived of the right to a FAPE-denial remedy (e.g., compensatory education or tuition reimbursement) and to attorneys' fees under the IDEA?

The answer: "The determination of a specific remedy resulting from a due process hearing is made on a case-by-case basis in light of the specific facts of each case at the discretion of the hearing officer. . . ." *Id*. Question 3.

In one recent case, an ALJ ordered an IEE at public expense when a school district failed to comply with a scheduling order in a hearing over the parents' right to the publicly funded IEE; a court subsequently denied the district's motion for preliminary relief on the ground that the district did not have a strong likelihood of success on the merits. *Independent Sch. Dist. No. 720 v. C.L.*, No. 18–CV–00936, 2018 WL 2108205, at *6, 72 IDELR 64 (D. Minn. May 7, 2018) ("[H]ere, the ALJ explicitly found that the District was 'attempting to cause unnecessary delay in either proceeding to hearing or in providing the IEE at public expense.' That, in light of the time–sensitive nature of proceedings under the IDEA, can justify the harsh result of a dismissal with prejudice.") (citation to record omitted) (also finding that ongoing needs of child weighed against stay).

When a parent has requested an IEE at public expense and the hearing officer finds that the district evaluation is not appropriate, relief restricted to a redo or enlargement of the district evaluation is not sufficient. *M.Z. v. Bethlehem Area Sch. Dist.*, No. 11–2313, 2011 WL 2669248, 57 IDELR 5 (E.D. Pa. 2011) (requiring publicly funded IEE, finding that hearing officer committed error of law when, after correctly finding school district's report of evaluation on which it based discontinuance of child's special education to be inappropriate, hearing officer did not order IEE requested by parents but instead ordered expansion and updating of district's evaluation), *aff'd*, 521 F. App'x 74, 60 IDELR 273 (3d Cir. 2013).

An IEE may be needed to determine a proper remedy in a case in which parents establish denial of FAPE. As noted above, an IHO may need to order an IEE where evidence about the scope of compensatory education required to remedy a denial of FAPE is deficient. See *Butler v. District of Columbia*, 275 F. Supp. 3d 1, 5, 70 IDELR 149 (D.D.C. 2017).

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Additional Reference: Mark C. Weber, "Independent Evaluation," *Special Education Law and Litigation Treatise* § 4.5 (LRP Pubs. 4th ed. 2017).

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EXPEDITED HEARINGS – MANAGING THE PROCESS

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA TRAINING FOR ADMINISTRATIVE HEARING COMMISSIONERS

TUESDAY, OCTOBER 11, 2022

DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

I. DISCIPLINE PROCEDURES

A. Under the IDEA, there are different rules governing the discipline of children with disabilities, and the requirements differ depending on the number of days the student is being removed from his normal setting.[1]

B. A child with a disability can be removed for violating a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 consecutive school days (to the extent those alternatives are applied to students without disabilities) and for additional removals of not more than 10 consecutive school days in the same school year for separate incidents of misconduct that do not constitute a change of placement.[2] This is commonly referred to as a short-term removal.

C. For short-term removals, the local educational agency (LEA) is not required to provide services to the student, unless services are provided to students without disabilities who are similarly removed.[3]

In Missouri, once a student has been removed from his or her placement for a total of 10 school days in the same school year, the LEA must, during any subsequent days of removal in that school year, provide services to the extent required by regulation.[4] This provision requires the LEA to consult with at least one of the student's teachers to determine the extent to which services are needed to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress

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[1] *See, generally*, 34 C.F.R. § 300.530.
[2] 34 C.F.R. § 300.530(b).
[3] 34 C.F.R. § 300.530(d)(3).
[4] State Plan, § V(K) (Procedural Safeguards / Discipline) (March 2022), pp. 88-89.

toward meeting the goals set out in the student's IEP.[5]

D. In the disciplinary context, a change in placement occurs if –

1. the removal is for more than 10 consecutive school days; or

2. the student is subjected to a series of removals that constitute a pattern because the number of school days exceeds 10 days, the student's behavior is substantially similar to the behavior in previous incidents that resulted in the series of removals, and such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another.[6]

The LEA (not necessarily the IEP team) determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, and such determination is subject to review by a hearing officer.[7]

E. An in-school suspension would not be considered part of the days of suspension provided the student is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified in his or her IEP, and continue to participate with nondisabled students to the extent they would have in their current placement. However, portions of a school day that a student has been suspended may be considered when determining whether there is a pattern of removals.[8]

F. A bus suspension would count as a day of suspension if bus transportation were listed on the student's IEP, unless the LEA provides the bus service in some other way, because that transportation is necessary for the student to obtain access to the location where services will be delivered.[9]

G. A long-term removal is one of over 10 consecutive school days. Establishing whether the removal is short or long-term is important because of the additional requirements imposed on long-term removals.

H. Once a long-term removal is initiated (i.e., a decision is made to change the student's placement), the LEA, the parents, and relevant members of the IEP team must convene a meeting to review all relevant information in the student's file, including the IEP, and any relevant information

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[5] *Id.*

[6] 34 C.F.R. § 300.536(a).

[7] 34 C.F.R. § 330.536(b).

[8] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46715 (August 14, 2006).

[9] *Id.*

provided by the parents to determine if the misconduct was caused by, or had a direct and substantial relationship to, the student's disability or if the misconduct was the direct result of the LEA's failure to implement the IEP.[10] This process is known as a manifestation determination review.[11]

I. The manifestation determination must occur within 10 school days of the decision to change the student's placement.[12]

J. If it is determined that the conduct is not a manifestation of the student's disability, the LEA may apply the relevant disciplinary procedures to the student in the same manner and for the same duration as the procedures would be applied to students without disabilities.[13] The LEA, however, must continue to provide the student with educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress towards meeting the goals set out in his or her IEP. In addition, the student must receive, as appropriate, a functional behavioral assessment (FBA), and behavioral intervention services and modifications to address the behavior violation so that it does not recur.[14] The IEP team determines what services are to be provided to the student.[15]

K. Participation in the general education curriculum does not require the LEA to replicate every aspect of the services that the student would have received in his or her classroom.[16]

L. If it is determined that the misconduct is a direct result of the LEA's failure to implement the student's IEP, the LEA must take immediate steps to remedy those deficiencies.[17]

M. If it is determined that the conduct is a manifestation of the student's disability, a long-term removal cannot take place. The student must be returned to the placement from which s/he was removed, unless the parents and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.[18] An IEP team meeting must also be convened to either (1) conduct an FBA, unless one had already been done, and implement a behavior intervention plan (BIP) for

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[10] 34 C.F.R. § 300.530(e)(1).
[11] *See id.*
[12] 34 C.F.R. § 300.530(e)(1).
[13] 34 C.F.R. § 300.530(c).
[14] 34 C.F.R. § 300.530(d)(1).
[15] 34 C.F.R. § 300.530(d)(5).
[16] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46716 (August 14, 2006).
[17] 34 C.F.R. § 330.530(e)(3).
[18] 34 C.F.R. § 300.530(f)(2).

the student; or (2) review the existing BIP, if one had already been developed, and modify it, as necessary, to address the behavior.[19]

N. A student may be removed to an interim alternative educational setting (IAES) for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of his or her disability, if the student (1) carries/possesses a weapon in school or at school functions; (2) knowingly possesses or uses illegal drugs or sells/solicits the sale of a controlled substance in school or at school functions; or (3) inflicts serious bodily injury upon another person in school or at school functions.[20] Note that the IDEA continues to require a manifestation determination even though the outcome of the meeting does not much matter to whether the LEA removes the student to the IAES.[21]

O. The IEP team determines the IAES for services, and the setting must enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP, as well as appropriate behavior interventions.[22] The LEA cannot limit an IEP team to offering home instruction as the sole IAES option.[23]

P. Students who have not been determined eligible for special education and related services and are subject to disciplinary removal may assert IDEA protections if it is shown that the LEA had knowledge that the student was a child with a disability.[24] An LEA is deemed to have knowledge that the student is a child with a disability if before the behavior that precipitated the disciplinary action occurred, (1) the parent expressed concern in writing to supervisory/administrative personnel of the LEA or a teacher that the student needed special education, (2) the parent requested an evaluation, or (3) the teacher or other district staff express specific concerns about a pattern of behavior directly to the director of special education or the supervisory staff.[25] An LEA is not deemed to have knowledge if the parent did not allow the student to be evaluated, the student was evaluated and found not eligible, or the parent refused special education services.[26] If a request for evaluation is made after the student is subjected to disciplinary measures, the evaluation is to be expedited. But, pending results of the evaluations, the student remains in the

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[19] 34 C.F.R. § 300.530(f)(1).
[20] 34 C.F.R. § 300.530(g).
[21] 34 C.F.R. § 300.530(g).
[22] 34 C.F.R. §§ 300.530(d)(1) and 300.531.
[23] *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).
[24] 34 C.F.R. § 300.534(a).
[25] 34 C.F.R. § 300.534(b).
[26] 34 C.F.R. § 300.534(c).

placement determined by the LEA.[27]

Q. The parents of a child with a disability who disagree with the placement decision or the manifestation determination resulting from a disciplinary removal may challenge said decision by requesting a hearing.[28] An LEA that believes maintaining the current placement of the student is substantially likely to result in injury to the student or others, may seek to have the hearing officer order a change in placement to an IAES.[29] The disciplinary hearing must be expedited.[30] The hearing must occur within 20 school days of the date the complaint requesting the hearing was filed and the hearing officer must issue a decision within 10 school days after the hearing.[31]

II. EXPEDITED HEARINGS

A. Subject Matter. A parent of a child with a disability may challenge the placement decision resulting from a disciplinary removal or the manifestation determination.[32] A local educational agency (LEA) that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may seek to have the child placed in an interim alternative educational setting (IAES).[33]

B. Expedited Hearing. In matters involving a challenge to the placement decision resulting from a disciplinary removal, the manifestation determination, or placement in an IAES, the parent or LEA must be given an opportunity for an expedited due process hearing, which must occur within 20 school days of the date the complaint is filed.[34] A decision must be made and provided to the parties within 10 school days after the hearing.[35]

C. Child Not Determined Eligible. An LEA must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred: (1) the parent expressed concern in writing to supervisory/administrative personnel or the teacher of the child that the child is in need of special education; (2) the parent of the child requested an evaluation; or, (3) the teacher of the child or other

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[27] 34 C.F.R. § 300.534(d)(2).
[28] 34 C.F.R. § 300.532(a).
[29] 34 C.F.R. §§ 300.532(a) and (b)(2)(ii).
[30] 34 C.F.R. § 300.532(c)(1).
[31] 34 C.F.R. § 300.532(c)(2).
[32] 34 C.F.R. § 300.532(a).
[33] 34 C.F.R. §§ 300.532(a), (b)(2)(ii).
[34] 34 C.F.R. §§ 300.532(c)(1), (2).
[35] 34 C.F.R. § 300.532(c)(2).

personnel, expressed specific concerns about the pattern of behavior demonstrated by the child directly to the director of special education/other supervisory personnel.[36]

An LEA will not be deemed to have knowledge if: (1) the parent has not allowed an evaluation or refused services; or, (2) the child has been evaluated and determined not to be eligible.[37]

D. Resolution Period. A resolution meeting must occur, unless waived in writing by both parties, within seven calendar days of receiving notice of the due process complaint and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process complaint.[38] The resolution period runs concurrent with the hearing period.[39]

E. Sufficiency Challenges and Response. The sufficiency provision in § 300.508(d) does not apply to the expedited due process hearing.[40] Also, a response is not required from the non-filing party.[41]

F. Extensions. A HO has no authority to extend the timeline of an expedited hearing at the request of either party.[42]

G. Waiver. The parties to an expedited hearing cannot mutually waive the expedited timelines.[43] Nor can the parties agree to treat the hearing as a regular hearing.[44]

H. Disclosures. Any party to a hearing has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.[45] With respect to

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[36] 34 C.F.R. § 300.534(b).

[37] 34 C.F.R. § 300.534(c).

[38] 34 C.F.R. § 300.532(c)(3).

[39] *Letter to Gerl*, 51 IDELR 166 (OSEP 2008).

[40] *See* 34 C.F.R. § 300.532(c) (the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§ 300.508(a) through (c)); *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46725 (August 14, 2006).

[41] *See* 34 C.F.R. § 300.532(c).

[42] 34 C.F.R. § 300.532(c). *See also Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

[43] *Letter to Zirkel*, 68 IDELR 142 (OSEP 2016).

[44] *See Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

[45] 34 C.F.R. § 300.512(a)(3). The IDEA also provides that, not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations on the offering party's evaluations, that the party intends to use at the hearing.[45] However, unlike the right found in § 300.512(a)(3), i.e., any evidence, the HO has discretion on whether to bar any

the disclosure rule, the IDEA does not make a distinction between non-discipline and discipline hearings. The same timeline applies to both.[46]

I. Burden of Persuasion. OSEP clarifies in its discussion of the 2006 IDEA regulations, citing *Schaffer v. Weast*, 546 U.S. 49, 44 IDELR 150 (U.S. 2005), that when a parent appeals a manifestation determination, the burden of persuasion is allocated to the parent, while when an LEA requests the removal of a child to an IAES, the burden of persuasion is on the LEA.[47]

J. Bifurcation. A hearing officer has discretion to hear only those issues identified by IDEA as proper for expedited hearings under the expedited timelines, leaving all other issues to be heard under the timelines governing non-expedited hearings.[48]

III. PRACTICE POINTERS

A. What is a "school day?" Given the timelines for expedited hearings are expressed in "school days"[49] and not calendar days, care must be taken to properly calculate the timelines. At the initial status or prehearing conference, the school calendar for the relevant LEA should be consulted and any instructional days over the summer closely examined to determine if they meet the definition of school day.

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party that fails to comply with § 300.512(b) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party. 34 C.F.R. § 300.512(b)(2).

[46] *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Pages 46706, 46724, 46726 (August 14, 2006); *Letter to Gerl*, 51 IDELR 166 (OSEP 2008). *See also Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232, Question E-8 (OSEP 2013) (explaining that the 15-day resolution period concludes well before the 20-school day period, allowing for enough time to meet the five-business-day requirement).

[47] *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Pages 46723-46724 (August 14, 2006).

[48] *Letter to Snyder*, 67 IDELR 96 (OSEP 2015) (noting that hearing officers have discretion under IDEA to bifurcate the hearing, thus allowing for an expedited hearing on the discipline and removal issues, and a separate hearing on any other issues).

[49] Under IDEA a "school day" means "any day, including a partial day that children are in attendance at school for instructional purposes." 34C.F.R. § 300.11(c)(1). Instructional days over the summer are school days only if the summer program is open to the student population at large. *Letter to Cox,* 59 IDELR 140 (OSEP 2012). A day on which the LEA only provides ESY services to children with disabilities and does not operate summer school programs for all children cannot be counted as a school day. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No.156, Page 46552 (August 14, 2006).

B. Lack of Sufficiency Process. Since there is no sufficiency process available in an expedited hearing, and IDEA limits the time for both the hearing and decision with no extensions possible, both the parties and HO would benefit from a discussion during the prehearing conference focused on the specific issue(s) to be decided. Said discussion will afford the parties an opportunity to adequately prepare for the hearing and allow for a focused hearing.

C. Any Way to "Buy" Time? The law is very clear that there can be no extensions in expedited hearings, nor can the parties waive or opt for a regular hearing. Yet, sometimes the parties understandably desire more time to try to settle the matter. If the parties are amenable, they could agree in writing (or the HO could document in an order or a recorded conference call) that the party requesting the expedited hearing will withdraw and immediately refile its request without prejudicing the rights or position of either party, the resolution meeting will be waived, and the record in the prior matter will become a part of the record in the refiled matter.

D. What Constitutes a "Disciplinary Removal?" Sometimes a "disciplinary removal" can result from disciplinary action taken against a student other than a traditional suspension (i.e., being sent home for a defined period of time). Other disciplinary action includes removal from a class(es), time out, in school detention, suspension from transportation, being sent to the principal's office, and requiring the parent to attend a meeting with the administration before the student can return to the school.[50]

These other disciplinary actions can, each on their own or in combination thereof, result in a disciplinary removal. Whether, in fact, there has been a disciplinary removal resulting from other disciplinary action is a factual determination for hearing.

E. Whether There Has Been a Change in Placement Due to a Disciplinary Removal? A disciplinary removal can result in a change in placement. This happens when the removal is for more than 10 consecutive school days or the child has been subjected to a series of removals that constitute a "pattern" because: (a) the series of removals total more than 10 school days in a school year; (b) the child's behavior is substantially similar to the behavior in previous incidents that resulted in the removals; and, (c) because of such additional factors as the length of each removal, the total

[50] *See Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46715 (August 14, 2006). *See also Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSERS July 19, 2022).

amount of time of all removals and the proximity of the removals to one another.[51]

A change in placement as defined in the disciplinary context should trigger a manifestation determination but may not if school personnel is unfamiliar with the specific requirements or, when there is a series of removals, are not keeping track of the number of school days for each removal or are unaware that a pattern exists between the incidents. When this happens, typically, the parent files an expedited hearing alleging a change in placement and the HO is tasked with first determining whether a change placement has occurred and, if so, s/he must the make a factual determination on whether the cumulative behaviors are a manifestation of the student's disability or resulted from failure to implement the student's IEP.[52]

F. Other Situations. There may be other situations that trigger an expedited hearing, though at first blush it may not be apparent. For example, an eligible student who transfers from another LEA to a new LEA may be entitled to an expedited hearing if, upon moving to the new LEA, the LEA does not provide FAPE to the student because neither adopted the student's IEP from the previous LEA nor developed, adopted, or implemented a new IEP and the student was suspended for more than 10 school days.

This example reinforces why it is important for the HO to read the complaint soon after appointment and follow up with the parties if there is a question as to whether the hearing should be on an expedited track.

G. Making a Record. A preliminary issue can come up in an expedited hearing that requires findings of facts in order for the HO to have a record from which to make an informed decision on the issue (e.g., whether the claim qualifies for an expedited hearing; whether an LEA has knowledge; whether certain days qualify as "school days"). The compressed hearing timeline in an expedited hearing complicates how the HO proceeds. Nonetheless, a wide variety of procedural options are available to the HO. Which is most appropriate will depend upon the circumstances of each

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[51] 34 C.F.R. 300.536(a). A "change in placement" in the disciplinary context is defined differently than a change of placement in a non-disciplinary context. In the non-disciplinary context, a change in placement is a fundamental change in, or elimination of, a basic element of a program affecting the program in a significant way. *See Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

[52] There may be instances when the parent does not file for an expedited hearing but rather alleges a failure to implement the IEP because the LEA has removed the child for a host of reasons from his/her regular program. Care should be taken to review the alleged facts to confirm whether a change in placement has occurred resulting from the removals.

case considering, among other factors, fairness, what time is remaining on the timeline, and the need to afford the parties adequate time to prepare (or not prepare) for the substantive hearing.

The HO should not hesitate to suggest what s/he believes would be the most appropriate way to proceed, seeking the reaction of either party and/or their representatives, and if there is agreement, moving forward in the manner suggested. Alternatively, the HO might ask the moving party for its suggestion and seek the non-moving party's reaction and agreement. In the absence of agreement, the HO should decide how to proceed and direct the parties/representatives accordingly.

The menu of options available to resolve a fact dispute underlying an issue includes at least the following (or a combination thereof):

1. Stipulations of facts;

2. Affidavits from key witnesses;

3. A limited hearing, whether by telephone or in person, recorded or transcribed.[53]

H. The disciplinary rules are complex, confusing, and unforgiving. The following approach, however, will help the HO to best understand the claim(s) and mitigate against blowing the timelines.

1 Every due process complaint should be reviewed upon assignment to determine whether any issue/fact alleged give rise to an expedited hearing. Complainants, especially *pro se* litigants, do not always expressly request (or know to request) an expedited hearing.

2 Should an issue/fact implicate (or appear to implicate) the disciplinary procedures, the HO should convene a prehearing conference (within two to three calendar days from appointment) to confirm the need for an expedited hearing and schedule same, if required.

3 Prior to the prehearing conference, the HO should prepare a list of questions that will help in determining whether an issue

[53] Consideration must be given to asking the parties what exhibits and witnesses are necessary to allow the HO to determine the issue(s), when the documents will be provided, how long the testimony will take, scheduling of the limited hearing and witnesses, arranging for the court reporter, and when the parties should expect a decision on the issue. (It may be advisable, depending on the timeline, for the HO to provide the parties with his/her ruling and including a more formal explanation in the final hearing decision.)

necessitates an expedited hearing.

4 At the prehearing conference, the HO should review the complaint in detail with the parties and/or their representatives, making pointed inquiries about the allegations/facts included in the complaint, as well as the various issues discussed in this outline, as applicable. Should the HO determine after consulting the parties and/or their representatives that the complaint does not implicate the disciplinary procedures and, therefore, not require an expedited hearing, the HO should explain his/her findings in the prehearing order. However, if the need for an expedited hearing is confirmed, the HO must schedule the hearing within the required timeline, keeping in mind that any complaint that includes mixed non-disciplinary and disciplinary claims, the non-disciplinary issues can be bifurcated.

IV. POSSIBLE OPTIONS TO EXPEDITE THE PROCESS

A. Hold the prehearing conference soon after, and within two to three calendar days from, appointment. Seek to clarify the issue(s) and encourage settlement opportunities, including offering suggestions with permission of the parties.

B. Lack of availability of the parties and/or their representatives does not excuse the 20-school-day hearing timeline. Nor is extending the timeline an option. Evening and weekend sessions should be considered to accommodate the hearing when the parties and/or their representatives are not otherwise available during normal business hours.

C. To accommodate an earlier hearing, the parties can agree to shorten the five-business-day disclosure rule.[54]

D. Alternative methods to taking witness testimony should be considered when scheduling witnesses is proving to be difficult. Examples include taking witness testimony by telephone and/or via video conferencing.

E. Require a proffer regarding each witness the parties intend to call and exclude any witness who is determined to offer irrelevant, immaterial, unreliable, or unduly repetitious testimony.

F. Establish during the prehearing conference the number of hours/days each party will be afforded to present its case, keeping in mind that the HO

[54] *See* notes 14 and 15, *supra*, and accompanying text.

enjoys considerable discretion to impose reasonable time limitations when necessary.[55]

G. Consider the use of affidavits in lieu of in-hearing testimony, provided that each witness who offers an affidavit is made available for cross-examination. Said practice will cut down on the time needed for the hearing.

H. Consider allowing multiple experts, if scheduled to testify, to discuss an issue with each other on the record and under oath, when appropriate. Though the consent of both parties is advisable, it is within the discretion of the HO whether to sequester competing expert witnesses. When done right, it allows for a better record and a shorter hearing.

I. Direct the parties to limit their exhibits to what is absolutely necessary to address the disciplinary claim(s).

J. Consider a hearing format more akin to a glorified IEP meeting, to wit: all witnesses are sworn in and participate in the hearing simultaneously with the HO taking a lead role in directing the testimony. This may be particularly helpful when the parent is unrepresented.

[55] *B.S. v. Anoka Hennepin Pub. Sch.*, 799 F.3d 1217, 66 IDELR 61 (8th Cir. 2015) (upholding an ALJ's time limitation of nine hours to present IDEA claims); *B.G. v. City of Chicago Sch. Dist 299*, 69 IDELR 177 (N.D. Ill. 2017) (upholding the hearing officer's use of time limitations on witness testimony and denial of a sixth day of hearing); *L.S. v. Bd. of Educ. of Lansing Sch. Dist.*, 65 IDELR 225 (N.D. Ill. 2015) (noting that hearing officers, "like judges, have the inherent authority to manage hearings to avoid needless waste and delay…, including imposing reasonable time limits where appropriate").