NEW DEVELOPMENTS IN IDEA LITIGATION

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
IDEA ADMINISTRATIVE LAW JUDGE TRAINING
THURSDAY, SEPTEMBER 19, 2019

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I. INTRODUCTION

These materials list and describe significant cases and selected U.S. Department of Education guidance letters on topics of concern to Individuals with Disabilities Education Act due process hearing decision makers. The period covered is approximately July 2018 through July 2019. The primary focus is on full, precedential opinions of the federal courts of appeals and guidance letters that break new ground and have special bearing on matters likely to arise at due process hearings. However, a number of particularly noteworthy unpublished appellate opinions and decisions from district and other courts are also included.

II. CHILD-FIND

Krawietz v. Galveston Indep. Sch. Dist., 900 F.3d 673, 72 IDELR 205 (5th Cir. Aug. 17, 2018). This case involved a teenaged girl with multiple behavior problems and other difficulties. The district incorrectly believed her to have been dismissed from special education despite the fact that her family reported that the district had served her in special education five years earlier, before she withdrew from public school. The district enrolled her in general education as a ninth grader in August 2013, then in September she received a two-month disciplinary alternative placement after engaging in sexual activities at school, and in November she was failing most of her classes. The district provided her a Section 504 plan on the basis of post-traumatic stress disorder, ADHD, and obsessive compulsive disorder. The plan called for her to receive additional time for assignments, reminders to stay on task, provision of a quiet workspace and small group testing, but it lacked a behavioral plan. The student finished ninth grade but in the fall semester of tenth grade she completed fewer than half of her assigned credits, and was hospitalized after committing a theft from her parent. In February of tenth grade, the parent requested a special education hearing under the IDEA, and at the resolution session the district proposed to evaluate the student for special education. In April, the district found her eligible for services under the IDEA. The court of appeals affirmed a district court decision that the school district violated its IDEA child-find obligation. It reasoned that a combination of factors, including the student's declining academics and

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the hospitalization, should have led the district to suspect a need for special education by October of the tenth grade year at the latest. Even if the date the district requested consent for evaluation in February would be considered the relevant date for the district to have acted, the four-month delay that occurred was not reasonable. The court affirmed the relief ordered by the hearing officer and an award of attorneys' fees.

Doe v. Cape Elizabeth Sch. Dep't, No. 2:18-CV-00259-LEW, 2019 WL 1904670, at *14, 74 IDELR 95 (D. Me. Apr. 29, 2019). This case concerned a student enrolled in the defendant school district from kindergarten to eleventh grade, but who was not found eligible for special education until twelfth grade. She performed well in school except for increasing absences in eleventh grade, but was engaged in serious behavior conflicts at home and had difficulties due to a concussion from an auto accident. The court affirmed a due process hearing decision rejecting tuition reimbursement for the unilateral parental placement of the student at two out of state private educational and therapeutic institutions. The court acknowledged that the IDEA child-find process may be prompted by absenteeism alone, but said that in light of the student's high grades, a single unexcused absence, and no discipline problems in ninth and tenth grade, followed by absences, most of them excused, after the concussion, and a decline in grades in eleventh grade that led to a Section 504 referral, no child-find violation occurred. The court stated: "Without a causal link to a disability or suspected disability, the decline in Jane's educational performance was insufficient to obligate CEHS to identify and refer Jane in accordance with its child-find duty." The court said that it may be reasonable in some cases for a school to pursue general education interventions in form of a Section 504 plan before making a referral for special education. The court also said that the evaluation delays were attributable to unreasonable conduct by the parents.

Independent Sch. Dist. No. 283 v. E.M.D.H., No. CV 18–935, 2019 WL 201751, 74 IDELR 19 (D. Minn. Jan. 15, 2019), *appeal filed*, No. 19-1336 (8th Cir. Feb. 20, 2019). In this case, a student with diagnoses including generalized anxiety disorder, school phobia, unspecified obsessive-compulsive disorder or autism spectrum disorder, panic disorder with agoraphobia, ADHD-primarily inattentive type, and severe recurrent major depressive disorder, was frequently absent from school but generally performed well academically. In eighth grade, however, she stopped attending altogether and was admitted to a day treatment program. The public school entered incompletes for her grades, did not refer her for special education, and disenrolled her. In ninth grade the district reenrolled her, but disenrolled her again when she was readmitted to a day treatment program. Then, when the student was in tenth grade, the district provided her a Section 504 plan but eventually disenrolled her twice again for absences. After a second admission to an inpatient program, the student's parents requested a special education evaluation for her, and the student was reenrolled for eleventh grade. The district conducted the evaluation, and before completing the evaluation, the district offered an alternative learning environment and online program, but the student attended only two days of the program. Once the evaluation was complete, the district found the student not eligible under the autism, emotional disturbance or other health impairment categories. The parents obtained an independent neuropsychological exam and a partial functional behavioral assessment, and filed a due process hearing request. The court affirmed an ALJ decision in favor of the parents but modified the remedy. In

upholding the parents' claim the court reasoned that the district evaluations were deficient under state law due to the lack of any systematic classroom observation or functional behavioral assessment, and that the student met the emotional disturbance and other health impairment definitions. The court noted that the mental health problems caused absenteeism that inhibited progress in the general curriculum, even though the student performed well when attending school. The court also affirmed that the district failed its child-find duties when it was aware no later than spring of 2015 that student had stopped attending school because of anxiety, and that limitations did not apply because district failed to provide notice of procedural safeguards until June 2017. The court awarded reimbursement for the independent evaluations the parents obtained and for privately provided educational services, but reversed the ALJ's award of payment for private compensatory services, reasoning that the district itself might be able to provide the services.

Avaras v. Clarkstown Cent. Sch. Dist., No. 15 CV 9679, 2018 WL 4964230, at *10, 73 IDELR 50 (S.D.N.Y. Oct. 15, 2018, as amended), *appeal filed*, No. 18-3494 (2d Cir. Nov. 21, 2018), *reconsideration denied*, 2019 WL 2171140 (S.D.N.Y. May 20, 2019). In this case, a child who ultimately received a classification as learning disabled was provided early intervening and Response to Intervention services during kindergarten and first grade, but was not evaluated until the parent made a request late in child's first grade year, 2011-12. Overturning the impartial hearing officer and state review officer decisions, the court held that in 2011-12 the district violated its child-find responsibility by not beginning the evaluation process within a reasonable time after being on notice of child's likely disability. The court said, "[T]he District provided RTI services for N.A. for the majority of both his kindergarten and first grade years, apparently believing that his ability to 'advance from grade to grade' was sufficient an excuse not to refer him for evaluation," but the court ruled that it was not sufficient. The court pointed out that despite receiving RTI for most of kindergarten, the child was referred for RTI again in first grade. The court determined that the duty to refer was triggered no later than eight weeks after the child began Tier 3 services in first grade, and further ruled that the violation caused deprivation of educational benefits. The court denied tuition reimbursement for 2011-12, noting that the child remained in public school. The court found a denial of free, appropriate public education for 2012-13 on the ground that the district failed to have an IEP in place for the child at the beginning of the school year, and awarded tuition reimbursement, but affirmed that the district did offer appropriate education for 2013-14.

Z.J. v. Board of Educ. of the City of Chi., 344 F. Supp.3d 988, 996, 73 IDELR 95 (N.D. Ill. Sept. 26, 2018). This case concerned a student whose parent requested an evaluation on Jan. 12, 2016, but the school district did not test the student that school year, and near the end of the school year, on June 17, 2016, the parent requested a due process hearing. Four days later, the parent was told that the student needed to repeat sixth grade. The parent invoked stay-put rights to ensure the student's promotion to seventh grade, and the district conducted its initial evaluation on July 29, 2016, then gave the student a central auditory processing evaluation, then on Oct. 5, found the student eligible under the IDEA on the basis of learning disability. Meanwhile, the parent obtained independent evaluations that found the student had myopia and bilateral

vision disorder. The evaluation recommended vision therapy. The court ruled that the district violated its child find obligation under the standard that the "school district overlooked 'clear signs of disability' and was 'negligent in failing to order testing,' or 'that there was no rational justification for not deciding to evaluate.'" The court concluded that the district ignored clear signs of learning disability based on the student's test scores showing performance in math in the 12th to 15th percentile in fifth grade, far below 24th percentile required for promotion from sixth grade to seventh grade. The court also ruled that although the parent, who was a psychologist for the district, knew that the child was struggling as early as third grade but did not request an evaluation until mid-sixth grade, a remedy could be provided for the child find violation starting in March 2015, when the student received a second low math performance score, a date within the two-year statute of limitations period before the due process complaint was filed. The court remanded that case to the hearing officer to determine the amount of compensatory education, and ordered provision of 36 weeks of weekly vision therapy for oculomotor dysfunction as well as reimbursement for the developmental vision assessment.

III. EVALUATION AND ELIGIBILITY

Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 74 IDELR 124 (5th Cir. May 15, 2019). In this case, the district had provided the child with accommodations under Section 504 when the child was in second grade. Shortly before the student started fourth grade, the parents requested a special education evaluation, but the district refused. The parents then obtained a private evaluation, and the district conducted its own evaluation and held an IEP meeting at which it found the student eligible under the IDEA on the basis of specific learning disability and other health impairment-ADHD. Twelve days later, after a private staff meeting, the district changed course and found the student not IDEA-eligible, and the parents challenged that decision at a due process hearing. The court affirmed the hearing officer and district court decisions that the child was eligible for special education. It analyzed the case as one in which the student had an impairment that qualified as a disability under the IDEA, so that the question on eligibility was whether due to the condition the student needed special education as of the time the determination was made. On that question, the court pointed to the hearing officer's credibility determinations and emphasized the student's record of failure in benchmark tests, his attention difficulties and difficulties with written work, lack of concentration, and stomach pains due to distress over academics. The court commented on the student's areas of strength, stating that "students with some baseline writing ability may still need special education." *Id.* at 219. The court also said that "Nothing in our opinion today should be read to foreclose the possibility that a student who demonstrates some academic success might still need special education. Indeed, federal regulations specifically provide that IDEA eligibility must be granted to a disabled student 'who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.' 34 C.F.R. § 300.101(c)(1)." *Id.* at 218 n.12.

T.B. v. Prince George's Cnty. Bd. of Educ., 897 F.3d 566, 72 IDELR 171 (4th Cir. July 26, 2018), *cert. denied*, 139 S. Ct. 1307 (Mar. 4, 2019). This is the case of a student whose

grades declined in middle school, then who did poorly in high school and failed all but one class in tenth grade. The student was truant much of the time and was often disruptive when present at school. The student's father requested an evaluation for him early in ninth grade, but at an IEP meeting the district found the student not eligible under the IDEA. The parents persisted in asking for testing, and at the end of the student's tenth grade year, they obtained an independent educational evaluation which diagnosed the student with ADHD, specific learning disorder and depressive disorder. After the student continued to fail to attend school and after the parents requested a due process hearing, the IEP team determined that additional testing should occur. In March of the student's second year in tenth grade, the IEP team concluded student was eligible on basis of emotional disturbance due to severe anxiety, which kept him from attending school, and offered limited compensatory services and a program that the student never attended. At hearing, the ALJ ruled that the district's failure to conduct testing in response to the parental request was a procedural violation of the IDEA, but did not interfere with free, appropriate public education because no matter what had been offered, the student would not have attended school. The district court affirmed the denial of a compensatory education remedy, although it reversed the denial of reimbursement for the independent evaluation. The court of appeals agreed that the failure to timely respond to the parents' evaluation requests violated the IDEA, but it deferred to the ALJ's finding that special education would not have provided any benefit to the student because the student would not have attended in any event. The court also deferred to the ALJ as to credibility findings. Chief Judge Gregory concurred in the result only, writing "Although I join the Court's judgment, I do so solely on the grounds that the plaintiffs failed to present sufficient evidence at the due process hearing to establish that T.B. was denied FAPE. I write separately to express my view that I cannot agree with the majority's characterization in its opinion of either T.B. and his parents or PGCPS and its employees. While I am constrained to conclude that the plaintiffs have failed to demonstrate that the school division's egregious child find violations actually interfered with the provision of FAPE, I cannot agree that the blame lies with T.B. and his parents, and that PGCPS should bear little or no responsibility for a student in its care or for the unfortunate outcome of this case." *Id.* at 578 (concurring opinion).

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) This case concerned a student with a reading disability, ADHD, anxiety disorder, and a central auditory processing disorder. The court affirmed a state review officer decision in favor of the school district, which had overturned an impartial hearing officer decision largely in favor of parents. The court ruled that a district error in in the student's birthdate indicating she was one year older than she was, which caused incorrect evaluation results, was harmless when it led to support for more intense services than otherwise would have been justified. The court also held that the error, which was later corrected, was not shown to have caused the parents to place child privately. The court further declared that the district did not have to follow the views of the parents' evaluator when other evaluative materials supported the program the school district offered. The court said that the failure to conduct a classroom observation before the IEP meeting or obtain participation of private school teachers in that meeting did not deny the child appropriate education in light of other information available to the IEP team. The cumulative effect of procedural failings did

not deny the child free, appropriate public education. On the merits of the public school program of services and accommodations in the general education environment, the court said that appropriate education was offered.

IV. DISPROPORTIONALITY IN SPECIAL EDUCATION IDENTIFICATION

Council of Parent Attorneys and Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28, 74 IDELR 13 (D.D.C. Mar. 7, 2019), *appeal filed*, No. 19-5137 (D.C. Cir. May 10, 2019). The court in this case denied a motion to dismiss for lack of standing and granted the plaintiff organization's motion for summary judgment in an action seeking to vacate a regulation at 83 Fed. Reg. 31306 (July 3, 2018). The regulation would have delayed until July 2020 the date for compliance with the 2016 IDEA regulations setting common parameters by which state educational agencies are required to determine whether significant disproportionality of minority students' placement in special education occurs in states and in local school districts, through the use of reasonable risk ratios set by the states. The court reasoned that organizational standing existed on the basis of a denial of access to information that must be publicly disclosed. The court also found associational standing on the basis of an informational injury to members of the organization. The organization's litigation goals were found to be germane to its mission. On the merits, the court held that the challenged regulation was arbitrary and capricious, for it lacked a reasoned explanation for the delay. The court ruled that the 2016 regulation had significant safeguards against the adoption of racial quotas, safeguards that the delay regulation did not adequately address. The court also stated that the delay regulation did not explain the Education Department's change in position from its prior regulation, apart from citing information about a decrease in identification of eligible children in Texas, which the court said did not involve race or ethnicity. The court further pointed out that the delay regulation did not consider cost, including damage to transparency and participation costs to parents and children.

V. IEE AT PUBLIC EXPENSE

B.G. v. City of Chicago Sch. Dist. 299, 901 F.3d 903, 72 IDELR 231 (7th Cir. Aug. 27, 2018). The court in this case 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 teen with medical conditions who was diagnosed with emotional and learning disabilities. The court reasoned that substantial evidence supported the hearing officer's decision that the school district's evaluations were appropriate. As to the district's psychological evaluation, the court held that the district's evaluators were qualified, and further stated that a drop in the student's IQ score after the student's father's death was due to conditions other than intellectual disability, 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 given 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. The court also affirmed the district court's denial of a motion to supplement the record, applying an abuse-of-discretion standard and reasoning that additional evidence of post-hearing independent evaluations would change the proceeding into a trial de novo.

Letter to Zirkel, 74 IDELR 142 (OSEP May 2, 2019). In response to a set of questions on the interpretation of the IDEA from Professor Zirkel, the Office of Special Education Programs stated: "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. Question 2: If a parent whose child has been found not to be a child with a disability provides an IEE at his or her expense, is the district required to consider it? Answer: Yes. . . . [citing 34 C.F.R. § 300.502(c)]."

Letter to Anonymous, 72 IDELR 251 (OSEP Aug. 23, 2018). The Office of Special Education Programs affirmed that school districts must afford independent educational evaluators the access to the child that is needed to conduct the evaluation, stating: "[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."

VI. IEP IMPLEMENTATION AND RELATED

L.J. v. School Bd. of Broward Cnty., 927 F.3d 1203, 1211, 74 IDELR 185, 119 LRP 24771 (11th Cir. June 26, 2019). This case concerned a student who was identified for special education on account of autism and a speech-language impairment. The student's third-grade IEP remained in place for several years of elementary school, but when the student entered middle school, the board proposed a new IEP. The student exhibited

problem behavior at middle school, persistently refusing to attend, and the mother home-schooled the student for most of sixth grade, then challenged the proposed IEP and invoked stay-put rights to continue operation of the elementary school IEP. The case involved an alleged failure by the board to implement that elementary school stay-put IEP during the student's seventh grade year, in which the student due to illness and refusal to attend missed over 100 school days, as well as the first part of eighth grade before the mother withdrew him from public school in February 2008. The ALJ found that there was a failure to implement the stay-put IEP. The school board appealed to district court, and the mother sued for enforcement of the hearing decision and additional relief, and district court reversed. The court of appeals affirmed the district court's decision in favor of the school board. The court said that the proper standard for evaluating cases alleging failure to implement an IEP is that "the plaintiff must prove more than a minor or technical gap between the plan and reality; *de minimis* shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's IEP." In support of this approach, the court reasoned that schools should not be "inappropriately penalized for *de minimis* failures that do not themselves deprive a student of the educational promise of the IDEA." The court further relied on the "in conformity with" language in 20 U.S.C. § 1401(9)(D). The court said that the materiality of the failure depends on the proportion of services provided in light of the importance of the services, the student's actual progress or lack of it (though that is not dispositive), the context of implementation such as implementation of an elementary school IEP in middle school, and the IEP's overall goals. As to this student, the court ruled that shortfalls as to hours of speech and occupational therapy were relatively minor, and other alleged failures were actually disputes about how to provide services, The court also said that the student's school aversion was not caused by any IEP implementation failure, though it noted that a child's absence from school does not relieve the school of its duties under the IDEA. Judge Jordan filed a partial dissent, concluding that the board materially failed to implement the IEP.

R.E.B. v. Department of Educ., 770 F. App'x 796, 74 IDELR 125 (9th Cir. May 9, 2019), *superseding* 870 F.3d 1025 (9th Cir. Sept. 13, 2017). The court in this case affirmed a district court decision in favor of the school district, holding that the defendant sufficiently addressed parental concerns about the location of summer services for the child's transition from a private school for children with autism to the public school system. The court further held that the specific school for the child need not be listed on the IEP. It went on to hold that the IEP sufficiently specified the least restrictive environment for the student when it provided for a self-contained program for most academic subjects with participation in the mainstream at the discretion of the special education teacher. Moreover, said the court, the IEP did not need to spell out the qualifications of the one-on-one aide to be assigned the student. The court ruled that for this student, the IEP did not have to specify the particular ABA methodology to be used, reasoning that the child's teachers thought it best to use multiple methodologies to meet needs as they arose. The court also held that the case was not moot, because although the IEP was no longer operative, the plaintiff-appellant continued to seek reimbursement for transportation and compensatory education that were originally sought in the due process proceeding.

R.F. v. Cecil Cnty. Pub. Schs., 919 F.3d 237, 74 IDELR 31 (4th Cir. Mar. 25, 2019), *petition for cert. filed*, No. 18-1591 (U.S. June 27, 2019). Here the court considered the case of a then-seven-year-old student with autism, a rare genetic disorder, and significant neuromuscular deficits, who generally did not use words to communicate and exhibited hyperactivity and troubling conduct such as grabbing others, pulling their hair, biting, and mouthing. The district placed the child in an intensive communication support classroom in which she was the only student, except for gym, art, music, recess, field trips, and occasional reading and math classes. Even then, the student was frequently removed from the general education classes she did attend. The parents requested that the child be placed in a full-day program for children with autism with no general education classes. The court affirmed a lower court decision in favor of the school system. The court identified *Endrew F.* as the controlling precedent on free, appropriate public education and clarified that the older Fourth Circuit standard, which was similar to that rejected in *Endrew F.*, was no longer good law. On the issue of least restrictive environment, the court ruled that placing the child in a classroom where she was the only student did not violate the requirement. The court reasoned that the LRE duty is defined in terms of education of children with disabilities with children who are not disabled; it further said that the classroom of one was due to an unforeseen lack of enrollment of students who could be served in the program. The court said that failure to follow the IEP in removing the child from her general education classes was a procedural violation but not a substantive IDEA violation in light of the child's struggles in general education. It additionally declared that the increase in special education hours without notice to the parents did not significantly impede parental participation when it was consistent the with the parents' expressed wishes about the child's program, and the school system did ultimately hold a new IEP meeting. The destruction of raw data about the child's behavior was not a knowing violation of policy and not a procedural violation of IDEA. The court also ruled that the child's behavior plan was sufficient when it focused on biting, when no evidence showed that the school system was aware of other behaviors of the child interfering with her learning; moreover, other behaviors were addressed outside the behavior plan. The IEP was deemed sufficient even though it lacked a social skills goal, and was said to have adequate instructional hours despite the child's failure to achieve grade-level advancement. Applying *Endrew F.*, the court said the IEP had reasonably ambitious goals focused on the child's particular circumstances.

Wade v. District of Columbia, 322 F. Supp. 3d 123, 136, 72 IDELR 247 (D.D.C. Aug. 22, 2018). The IEP of the student in this case called for 27.5 hours of specialized instruction outside general education each week and 4 hours per month of behavioral support services, but the school system provided only 20 hours per week of specialized services outside general education, and eventually amended the IEP to reduce the specialized services amount to 20 hours per week because the high school the student attended could not provide more than that. The court held that the failure to provide the full 27.5 hours denied the student appropriate education, that the violation was not *de minimis*, and that the hearing officer's remedy of 50 hours of compensatory education was insufficient. The court ruled that in light of good faith efforts to by the school system to provide behavior support services in accordance with the IEP and the student's refusal

of the services, the defendant did not deny appropriate education by failure to fully implement the behavior services. Finally, the court ruled that the decrease in the hours of specialized services in the amended IEP denied the student appropriate education. The court stressed the student's need for individualized instruction and pointed out the attendance difficulties that arose when the student was provided only 20 hours per week. The court declared: "The Court appreciates that DCPS may not be able to provide more than 20 hours of specialized education per week in its regular schools. That limitation on the system's capacity does not excuse its failure to provide a free appropriate public education beyond 20 hours/week when a student has such needs, as does J.W. DCPS must place such students in a non-public school to fulfill its obligations under the law."

Letter to Wayne, 73 IDELR 263 (OSEP Jan. 29, 2019). This letter stated that when the parent places a child with a disability at a private school and does not request special education from the school district, but instead tells the district that the child will continue attending private school, the district need not offer the child IEPs in the following school year and each year thereafter, if the parent does not contact the school district and request free, appropriate public education. The letter noted that the child-find obligation requires the school district where the child's parents live to identify, locate, and evaluate children who may have disabilities, including children in private schools, but "If a determination is made through IDEA's child find process that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private school, the LEA where the child's parent resides, is not required to make FAPE available to the child."

VII. *ENDREW F.* AND FAPE

Albright v. Mountain Home Sch. Dist., 926 F.3d 942, 74 IDELR 187 (8th Cir. June 12, 2019). This case involved a young student with autism and intellectual deficits whose parent challenged the educational program proposed by the district. The court of appeals affirmed determinations below that the IEP conformed to the requirement of providing free, appropriate public education as articulated in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017). The court stressed the evidence that the child's behavior plan was working and that the district extensively used peer-reviewed practices. The sensory integration techniques employed by the district were recommended by an occupational therapist. The court also noted that the student's test scores, when considered in context, demonstrated academic improvement. The court also affirmed that the parent was not denied the opportunity to participate in the IEP process. It pointed out that the parent attended all the IEP conferences she chose to attend. There was no evidence that IEP conferences were held without her. Moreover, various emails and IEP meeting transcripts demonstrated that the parent participated. The court declared that any technical violation of the IDEA notice requirements did not affect the student's IEPs or deprive her of an educational benefit. An issue existed about other school years, but the court held that the settlement of IDEA due process proceedings as to those school years meant that claims under other statutes for the same periods were not exhausted; futility might be a basis to excuse exhaustion, but a futility

argument not raised in district court. The court also affirmed summary judgment against the parent on a retaliation claim, saying that it lacked factual support.

R.F. v. Cecil Cnty. Pub. Schs., *supra*.

E.R. v. Spring Branch Indep. Sch. Dist., 909 F.3d 754, 765, 73 IDELR 112 (5th Cir. Nov. 28, 2018) (per curiam). This case concerned a child with a seizure disorder, ADHD, a speech impairment, global developmental delay and other conditions. The court affirmed a grant of summary judgment for the school district, ruling that the public school program offered free, appropriate public education. The court found no conflict between *Endrew F.* and the indicators of free, appropriate public education identified by *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), that "1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." The court further ruled that the IEP process employed was adequate in scope, included parental participation, and was not pre-determined. The court said that the appropriate education standard did not require that goals be set for each grade-level Texas Essential Knowledge and Skills strand when the child could not meet them. It held that the IEP's goals were appropriately ambitious and noted that the child made educational progress. The court also ruled that the district could transfer the student to a different school without holding an IEP meeting, and that there was no showing of a loss of educational opportunity by the student's removal from a mainstream science class. The court stated that the failure to formulate a new IEP while the child was in a unilateral private placement did not impede her right to an appropriate education or significantly impede the parents' opportunity to participate in the process, in light of the parents' near total rejection of any public placement.

Johnson v. Boston Pub. Schs., 906 F.3d 182, 194, 73 IDELR 31 (1st Cir. Oct. 12, 2018). This case involved a student with a substantial hearing loss despite a cochlear implant. The parent advocated for an out-of-district private school for the deaf with a program focusing on spoken English. The court, however, affirmed the district court decision, which upheld a hearing officer decision that IEPs providing for, among other things, instruction in the use of ASL and placement at a public school for children who are deaf, offered free, appropriate public education. The court reaffirmed prior circuit precedent as consistent with *Endrew F.*, stating "[W]e disagree with Johnson's premise that *Endrew F.* altered the standard to be applied here. . . . In our view, the standard applied in this circuit comports with that dictated by *Endrew F.* This court has announced that, 'to comply with the IDEA, an IEP must be reasonably calculated to confer a meaningful educational benefit,' and emphasized that this requires consideration of the individual child's circumstances." The court applied the clear-error standard to the lower court decision and upheld the conclusion that a sign-supported spoken English program at the public school was adequate in light of objective indicia of student's advancement, considering the reality of a low starting point and the parent's resistance to the program. The court also said that the parent failed to exhaust arguments based on least restrictive

environment, and it held that the hearing officer's taking into consideration the parent's preference for parochial schooling did not infringe the parent's First Amendment rights.

K.D. v. Downingtown Area Sch. Dist., 904 F.3d 248, 251, 72 IDELR 261 (3d Cir. Sept. 18, 2018). The subject of this case was a child found eligible for services and offered an IEP, who two years later was given an independent evaluation which found she had dyslexia, ADHD, a mathematics disorder, organizational deficits, a memory impairment, and executive functioning impairments. She was reading at below a first grade level in the summer before third grade, when the school district offered a revised IEP with increased services. Her parents withdrew her from public school halfway through third grade, placed her in a private school, and demanded a due process hearing. The court affirmed a district court decision in favor of the school district, even though the hearing officer decision that the district court upheld had applied precedents from before *Endrew F.* The court said, "Our precedents already accord with the Supreme Court's guidance in *Endrew F.*, so we continue to apply them. Under both *Endrew F.* and our precedents, Downingtown Area School District followed the law in educating K.D." The court declared that the child's IEPs were reasonably calculated to enable her to make appropriate progress, even though she did not advance at same pace as her grade-level peers. The court also rejected an interpretation of a Department of Education guidance that would require a child's program to provide support for the successful learning of grade-level content.

Smith v. District of Columbia, No. CV 16-1386, 2018 WL 4680208, 73 IDELR 6 (D.D.C. Sept. 28, 2018). This case concerned a student with an emotional disturbance and a record of physical altercations who performed at or above grade level academically. The defendant placed him in two self-contained settings, first one for students with learning disabilities, and then one for students needing behavior support but with peers one year ahead of him. The student was not provided AP classes outside the general education setting. The court determined that the hearing officer erred in concluding that the learning disability classroom provided appropriate education. The placement was not tailored to the student's needs and did not offer challenging objectives, and it was not reasonably calculated to enable him to make progress appropriate in light of his circumstances. On the issue of whether the behavior support classroom offered free, appropriate public education, the court remanded the case to the hearing officer to determine whether the student could receive 26.5 hours per week of specialized instruction as required by his IEP when he was the only one of the seven students in the class doing ninth grade work and the rest were doing tenth grade work. The court granted the defendant summary judgment on an ADA claim based on the failure to offer AP courses outside the general education setting. It reasoned that the student was not qualified because he lacked curricular prerequisites.

M.L. v. Smith, No. CV PX 16-3236, 2018 WL 3756722, 72 IDELR 218 (D. Md. Aug. 7, 2018). The student in this case had learning disabilities. The school district proposed a placement in which she would be integrated into the larger student population. She would receive 20 hours per week of special education, 17.5 outside the general education setting and 2.5 in the general education setting, plus twice-weekly 45 minute speech-language sessions. The parents were not satisfied with the program and placed her in a

private setting, the Lab School. The court affirmed an ALJ decision in favor of the school district, denying reimbursement for the private placement. The judge reasoned that the ALJ properly considered the student's educational history, that the ALJ's credibility determinations deserved deference, that "The ALJ's determination to weigh M.L.'s Lab School performance as useful but not dispositive" was proper, *id.* at *8, and that an increase in service hours offered by the district above what was specified in the previous IEP was supported by new testing and other factors. The court noted that the student made progress under the district's previous program. With regard to the *Endrew F.* standard for free, appropriate public education, the court declared: "Further, this case can be distinguished from *Endrew F.* because MCPS continually adapted M.L.'s IEPs to account for new testing and performance measures, as well as the Parents' concerns about M.L.'s academic and emotional needs." *Id.* at *9. The court also made note of the desirability of integration into the general education setting.

E.S. v. Smith, No. PWG-17-3031, 2018 WL 3533548, at *15, 72 IDELR 184 (D. Md. July 23, 2018). This case involved a student with autism spectrum disorder, ADHD, and anxiety disorder, whose parents challenged his IEP and sought a full-time therapeutic placement. The parents contended that the middle school program offered by the district was not appropriate when the IEP called for 29 hours and 20 minutes of specialized instruction per week outside the general education setting, with an option for lunch in general education setting. Moreover, they argued, the placement was predetermined. The court, however, affirmed an ALJ decision against the parents, reasoning that the ALJ's credibility determinations as to testimony that the public school program could deal with explosive students merited deference, as did the ALJ's credibility determinations about testimony that the program could implement all aspects of the IEP. The court went on to state that the student had not needed further support during time in the hallways when he was in a previous program, and noted that he would not be left alone while other students were in the general education class. The court stated: "Simply put, a FAPE, to which a child with a disability is entitled, is the education that any student without disabilities would receive"; it said that *Endrew F.* does not require that the student's education be the best possible. The court acknowledged the evidence that the public school predetermined the student's placement, but said that any predetermination was harmless because the school system provided appropriate education. The court of appeals affirmed in an unpublished opinion. 767 F. App'x 538 (4th Cir. May 24, 2019) (stating that procedural errors do not support any relief greater than ordering compliance with IDEA procedural requirements unless the ALJ determines that the procedural violation denied the child free, appropriate public education, even when the procedural violation is that of predetermination).

Jack J. v. Coatesville Area School Dist., No. 17-CV-3793, 2018 WL 3397552, at *9, 72 IDELR 154 (E.D. Pa. July 12, 2018). The student in this case had ADHD and was in sixth and seventh grade during the relevant time period. The court affirmed a hearing officer decision against the student's parent, citing *Endrew F.* for the proposition that the student's "IEP must provide services reasonably calculated to enable a child to receive meaningful educational benefits in light of the student's intellectual potential," but need not offer the optimal level of services desired by the parent. The court concluded that

contrary to assertions that the IEP failed to address all of the student's educational needs, it provided goals and instruction tailored to his ADHD-related weaknesses while maintaining opportunities for high-level academic achievement. The court mentioned a behavioral goal addressing the student's ability to focus on assigned tasks, an organizational goal, and strategies to meet the IEP goals. The court also stated that the student did not need a functional behavioral analysis when the IEP included goals, interventions and supports to address his behavior. Finally, the court held that the deviations in implementing the IEP were *de minimis*, and noted that the student made meaningful if mixed progress.

VIII. AUTISM-SPECIFIC SERVICES

R.E.B. v. Department of Educ., supra

Renee J. v. Houston Indep. Sch. Dist., 913 F.3d 523, 73 IDELR 168 (5th Cir. Jan. 16, 2019). This decision upheld a grant of summary judgment to the school district in the case of a student diagnosed with autism, intellectual disability, and ADHD, whose parents alleged the denial of free, appropriate public education during the student's eighth and ninth grade years. The court rejected the argument that the student's program was predetermined, reasoning that although the district did not expressly provide Applied Behavioral Analysis, it incorporated ABA techniques into its approach. The court also said that the record failed to show that the parents specifically requested ABA, and further declared that courts should not dictate pedagogical methods. The court also rejected the claim that the district denied the student appropriate education by not adequately addressing bullying, which was said to have caused the student to refuse to attend school. The court reasoned that the district communicated with the parents about bullying and it proposed accommodations including having the student's teacher meet him at drop-off and having the student spend the first hour of the day in the office of student support, and the parents did not respond to repeated requests for more information. Finally, the court rejected a claim based on an allegedly unrealistic transition plan focusing on law enforcement careers, reasoning that the district made efforts to collaborate with the parents on transition plans, and that subsequent plans were more realistic.

IX. BEHAVIOR SERVICES AND STUDENT DISCIPLINE

Olu–Cole v. E.L. Haynes Pub. Charter Sch., No. 18-7028, 2019 WL 3242552, ___ F.3d ___, 119 LRP 26900 (D.C. Cir. July 19, 2019). This case concerned a teen with emotional disturbance who allegedly attacked another student, causing that student a concussion. Because the victim suffered serious bodily harm, this misconduct resulted in a suspension of 45 days during which the student was removed to an isolated interim alternative educational setting. At the conclusion of the 45 days, the charter school the student had attended refused to allow him to return, and instead initiated a due process hearing to change his placement on the ground of dangerousness. The parent sued in district court for preliminary relief against the student's continued exclusion from school, but the district court, despite finding a likelihood of success on the merits, denied the injunction on the ground that the student was not shown he would suffer

irreparable injury from the continued exclusion. The court of appeals reversed the denial of the relief, reasoning that the IDEA provides for an automatic injunction when the stay-put principle applies, and it was error to place a burden of showing of irreparable harm on the student. The district court had made a finding that there was an unacceptably significant potential of injury to other interested parties if the student returned to school, but the court of appeals ruled that this was not a sufficient basis to override the right to stay put. The court further held that the case was not moot even though the school had relented and readmitted the student, for the decision affected the measurement of compensatory education relief, which would hinge on the difference between the value of the stay-put services wrongfully denied and the services actually provided. Finally, the court held that 34 C.F.R. § 300.533, which limits an interim alternative educational placement to a 45-day period, does not conflict with the IDEA provision that a child remains in the interim alternative educational setting until the hearing officer issues a decision, 20 U.S.C. § 1415(k)(4).

Albright v. Mountain Home Sch. Dist., *supra*

Parrish v. Bentonville Sch. Dist., 896 F.3d 889, 894, 72 IDELR 141 (8th Cir. July 24, 2018). In several consolidated cases concerning children with severe behavioral difficulties, challenging, among other things, the school district's use of restraint, the court of appeals affirmed determinations of the district court and the due process hearing officer that "(1) the District took reasonable steps to train its teachers; (2) the District did not use physical force and seclusion in a way that denied Child L or Child A a FAPE; (3) the District held programming conferences and informal meetings to propose, implement, modify, and communicate interventions regarding misbehavior and academic progress as well as goals and objectives; (4) the District's implementation and collection of data arising from behavior intervention plans complied with the IDEA; (5) the strategies used by the District, even if not perfect, complied with the IDEA; (6) the parents did not raise a genuine issue for trial on whether the District failed to educate their children in the least restrictive environment; and (7) after fully developing the record on whether the parents of Child L were given a meaningful opportunity to participate in the modification of Child L's IEP and behavior plans, there was no actionable IDEA violation raised by either Child L or Child A."

Department of Educ. v. L.S., No. 18-CV-00223, 2019 WL 1421752, at *12, 74 IDELR 71 (D. Haw. Mar. 29, 2019). This case concerned a teenaged student with autism spectrum disorder and other conditions. The court upheld some portions of the student's program, but determined that the public school denied the student free, appropriate public education by failing to sufficiently describe the student's behavioral supports in the IEP. The court stressed that the school system did not incorporate into the IEP measures to address student's behavioral needs, never made the behavior plan part of the IEP, and never sent the behavior support plan to the parent while the IEP was being developed. The court said: "Failing to incorporate the BSP into the IEP in this case was a procedural violation that seriously infringed on Parent's ability to meaningfully participate in the formation of Student's IEP. Because the BSP was not made part of the IEP, the district was free to amend or curtail the BSP without Parent's knowledge or input, which seriously infringes upon her right to participate in the IEP process. . . .

Indeed, DOE failed to send the BSP to Parent, thus precluding her from providing any input into it. The facts in this case demonstrate the need for parent participation, because had Parent seen the BSP, she may have objected to the fact that significant portions of the BSP were not completed." The court ultimately found the behavior plan substantively insufficient. However, it reversed an award of full private school tuition and remanded the case to the hearing officer for determination of the reasonableness of the costs of the private program. The court also imposed a 25% reduction based on parental conduct.

Letter to *Zirkel*, 74 IDELR 171 (OSEP May 13, 2019) In a response to several inquiries, the Office of Special Education Programs stated: "Question 2: Does the specific express authorization for hearing officers to address issues arising from disciplinary changes in placement (34 C.F.R. § 300.532(a)-(b)) exclude these issues from the jurisdiction of the State complaint process? Response: No. The express authorization for hearing officers to hear appeals from parents of decisions regarding disciplinary changes of placement under 34 C.F.R. §§ 300.530 and 300.531 and the manifestation determination under 34 C.F.R. § 300.530(e) would not limit an SEA's authority to resolve the same issues under the State complaint procedures. . . . Question 3: Do the two specifically authorized hearing officer remedies for disciplinary changes in placement at 34 C.F.R. § 300.532(b)(2) preclude the hearing officer from alternatively, or additionally, ordering other remedies, such as compensatory education services, for these particular issues? Response: No. IDEA does not preclude hearing officers conducting due process hearings under 34 C.F.R. § 300.511(a) on expedited due process complaints filed under 34 C.F.R. § 300.532(a) from ordering relief that is appropriate to remedy the alleged violations based on the facts and circumstances of each individual complaint. This is so even though 34 C.F.R. § 300.532(b)(2) identifies the specific actions that a hearing officer may take in resolving an expedited due process complaint. . . ."

Letter to Nathan, 73 IDELR 240 (OSEP Jan. 29, 2019). In response to a query, the Office of Special Education Programs stated that for any child that a school district is deemed to know is a child with disability under the IDEA, the district must conduct a manifestation determination within ten days of a decision to change the child's placement due to violation of school rules. The school is not permitted to postpone the manifestation determination until completion of the child's evaluation, if that would entail delay of the determination beyond the time limit. The letter went on to say that the manifestation determination might be made without the completion of an IEP. The school might act on the basis of "the information that served as the LEA's basis of knowledge that the child may be a child with a disability under IDEA, such as concerns expressed by a parent, a teacher or other LEA personnel about a pattern of behavior demonstrated by the child." The letter also declared that the district must offer the parent a printed copy of the notice of parental rights to invoke due process, and is not permitted to simply provide a link in the suspension notice to the notice of procedural rights on the district's web site.

Letter to Fletcher, 72 IDELR 275 (OSEP Aug. 23, 2018). This letter stated that when "the due process complaint requesting an expedited due process hearing is filed with less than 20 school days remaining in the school year or if the request is filed during the

summer or other times when school is not in session . . . , the SEA or LEA must ensure that the hearing is completed no later than the 20th school day from when the expedited due process complaint is filed and that the hearing officer's determination is made no later than the 10th school day after the hearing concludes – even if the complaint was filed during the previous school year or during the summer, and the due date falls during the following school year."

Letter to Mason, 72 IDELR 192 (OSEP July 27, 2018). The Office of Special Education programs stated in this guidance, "In your letter, you provide a description of one of your client's cases in which a child experienced an administratively shortened school day to address problem behavior at the child's school. You stated that the shortened school days did not occur as a result of the individualized education program (IEP) Team process. . . . You stated that you are concerned that students with disabilities in this school are not being provided with the disciplinary protections required under the Individuals with Disabilities Education Act (IDEA). . . . The use of short-term disciplinary measures under the circumstances you described, *if implemented repeatedly* . . . could constitute a disciplinary removal from the current placement, and thus the discipline procedures set out in 34 CFR §§ 300.530-300.536 would apply."

X. LEAST RESTRICTIVE ENVIRONMENT

C.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 74 IDELR 121 (1st Cir. May 22, 2019). This case concerned a student with an intellectual disability and serious language deficits who had been educated in general education with the help of tutors before high school. The court affirmed a decision upholding a public high school placement for the student consisting of general education for electives and a self-contained program for academic courses, an arrangement that would be expected to lead to a certificate rather than a regular diploma. Accordingly, the court affirmed denial of tuition reimbursement for the private placement arranged for the student by the parents. The court said that the public school's proposed program and the modification of it for the final year met the *Endrew F.* standard for free, appropriate public education. The court went on to state that the least restrictive environment standard should be same irrespective of whether a less restrictive placement is proposed by the district or by the parents. The court adhered to the analysis of *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993 (1st Cir. 1990), that "the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement." The court declined to adopt the approach of *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989), which asks first "whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily," and, if child cannot be educated in the regular classroom, asks second "whether the school has mainstreamed the child to the maximum extent appropriate." The court, however, stressed that the district considered the use of supplementary aids and services for the student.

R.E.B. v. Department of Educ., *supra*

R.F. v. Cecil Cnty. Pub. Schs., *supra*

L.H. v. Hamilton Cnty. Dep't of Educ., 900 F.3d 779, 72 IDELR 204 (6th Cir. Aug. 20, 2018). This was the case of a 15-year-old with Down Syndrome who was classified as intellectually disabled. The court affirmed a district court ruling that the school district's proposed placement for the student in a comprehensive development classroom was more restrictive than necessary. The court went on to reverse the lower court's denial of reimbursement for the parental placement of the child in a Montessori school. The court declared that "The LRE is a non-academic restriction or control on the IEP—separate and different from the measure of substantive educational benefits—that facilitates the IDEA's strong 'preference for mainstreaming handicapped children,' *Rowley*, 458 U.S. at 181 n.4." 900 F.3d at 789. The court relied on factors identified in *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), regarding mainstreaming. It stated with regard to deference to school authorities that the decision about mainstreaming does not require educational expertise in the same way that a methodology determination does. The court said that a student need not master the general education curriculum in order to be mainstreamed. Rather, the question is whether the student can make progress toward the student's IEP goals in the regular education setting. The court further accepted the finding of the lower court that the goals of the student's IEP should not have been pegged to grade-level standards. The court said that the difficulties the student had with the general education curriculum, and the proposal by the district to move him to a largely self-contained setting "do not demonstrate a failure of mainstreaming as a concept, but a failure of L.H.'s teachers and the other HCDE staff to properly engage in the process of mainstreaming L.H. rather than isolating and removing him when the situation became challenging." 900 F.3d at 798. The court of appeals ruled that the Montessori program in which the student was the only child with disabilities in the class and in which the student received a personalized curriculum and the help of a one-on-one paraprofessional aide should be reimbursed despite the lower court's view that it lacked a systematic structure. The court relied on testimony in the record that a Montessori approach is well suited for children with Down Syndrome in many respects, and further noted that the curriculum at the Montessori school was tied to regular state standards. The court held that the parents were justified in choosing the private placement rather than invoking stay-put rights to keep the student in a general education class at the public school, stressing that the public school teachers insisted they could not provide support services necessary to mainstream the student successfully. On remand, the district court ordered $103,274.00 in reimbursement to the parents for the costs of private education at Montessori School of Chattanooga for the student's third to eighth grade years, covering tuition and full-time aide services while the child attended school. No.1:14-CV-00126, 2018 WL 6069161, 73 IDELR 121 (E.D. Tenn. Nov. 20, 2018)

XI. RELATED SERVICES

E.I.H. v. Fair Lawn Bd. of Educ., 747 F. App'x 68, 73, 72 IDELR 263 (3d Cir. Sept. 5, 2018). In this case concerning a child with autism and epilepsy, the court of appeals reversed a district court decision and ruled that nurse accompaniment on the bus route to school was a related service that needed to be included in the student's IEP. The court recited that after the student had a seizure, the parent requested that a health professional trained in administering the Diastat epilepsy mediation be provided during

the bus ride to and from school, and after one month the district agreed, but would not place the nurse service on the IEP. Ultimately, the district did add the service to the student's individualized health plan. In response to the parent's request for a due process hearing and emergency relief, an ALJ ordered that a medically trained individual accompany the student on the bus pending the final due process decision. Another ALJ then ruled on the merits that the district was required to amend the IEP to add the nursing service as part of the related service of transportation on the student's IEP and had to reimburse the parent for transporting the student during the period from the request for the service until it was provided. The court of appeals overturned the district court's reversal of ALJ decision. The court of appeals reasoned that transportation services may include additional accommodations, and emphasized that the child could not safely take the bus unless a nurse was provided to administer the drug when needed, even if eventually the service might no longer be needed. The court stated that the nurse was required for the child to have access to free, appropriate public education: "Here, accepting that L.H.'s bus transportation is already included in her IEP as a related service, and understanding—as the School District already does—that L.H. needs the nurse on the bus in order to safely get to school in the event of a seizure, it stands to reason that she would not be able to access her FAPE without the nurse. And if that is the case, then the ALJ was correct to include the nurse within L.H.'s IEP as opposed to IHP." The court remanded for an award of attorneys' fees.

Letter to McDowell, 72 IDELR 252 (OSEP Aug. 2, 2018). In this guidance letter the Office of Special Education Programs stated: "[Y]ou request that the U.S. Department of Education (Department), Office of Special Education Programs (OSEP), provide clarification that individualized education program (IEP) Teams "may consider interveners as an appropriate related service for children who are deaf-blind, even though interveners are not specifically identified in the list of examples of related services in the IDEA. . . . If the IEP Team determines that a particular service, including the services of an intervener, is an appropriate related service for a child and is required to enable the child to receive FAPE, the Team's determination must be reflected in the child's IEP, and the service must be provided at public expense and at no cost to the parents. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) and §1401(9)."

XII. RESIDENTIAL PLACEMENT

M.S. v. Los Angeles Unified Sch. Dist., 913 F.3d 1119, 73 IDELR 195 (9th Cir. Jan. 24, 2019). This case involved a ward of the superior court and Department of Child and Family Services with mental health needs and history of violent actions. The court of appeals affirmed a district court decision overturning the decision of an IDEA ALJ. The court held that the student was denied free, appropriate public education when the district did not consider offering her a residential placement for educational purposes as part of her IEP on the ground that another county agency had residentially placed her for mental health treatment pursuant to a juvenile court order. The court said that the school district had an independent obligation to ensure that a continuum of placements was available to meet the student's educational needs and therefore had to consider whether the residential placement was necessary for educational purposes. The court remanded the case to the ALJ for the determination of relief.

Center for Discovery, Inc. v. New York City Dep't of Educ., No. 160157/2016, 2019 WL 399554, 73 IDELR 239 (N.Y. Sup. Ct. Jan. 29, 2019). The court here held that the defendant's refusal to increase the tuition rate for a child's placement at a private school was arbitrary and capricious when it continued to pay at the same rate after the child demonstrated seriously dangerous and self-injurious behavior while in residential placement, and the defendant held a meeting at which the child's IEP was amended to include an around-the-clock, one-on-one crisis management paraprofessional, as well as psychological and behavioral services by a board-certified analyst to monitor and oversee implementation of the child's behavior intervention plan. The court emphasized that the initial rate was set on the assumption that the student would have a one-on-one aide only for the 30 hours per week that he received educational services.

XIII. POST-SECONDARY TRANSITION

Renee J. v. Houston Indep. Sch. Dist., supra

XIV. MAINTENANCE OF PLACEMENT

Olu–Cole v. E.L. Haynes Pub. Charter Sch., supra

L.J. v. School Bd. of Broward Cnty., supra

Renee J. v. Houston Indep. Sch. Dist., supra

Anchorage Sch. Dist., v. M.G., 735 F. App'x 441, 72 IDELR 233 (9th Cir. Aug. 22, 2018). Here the court affirmed a district court stay-put order keeping the student in Perkins School for the Blind. The IEP had called for residential placement, but the parties could not agree on which school. The case went to due process and the hearing officer decision was that Perkins was appropriate and that the district had to pay for the placement from the student's enrollment date through Feb. 17, 2018. At the conclusion of that time, the district issued notice of its intention to place the student in an in-district class, but the district court enjoined the move as a violation of stay-put rights. The court of appeals noted that the hearing officer decision confirmed that the Perkins placement was appropriate. The court distinguished the case from one in which agreed-upon multi-stage IEP places child in private school but expressly requires transition to public school at start of next school year.

Avaras v. Clarkstown Cent. Sch. Dist., No. 15 CV 9679, 2018 WL 4103494, 72 IDELR 236 (S.D.N.Y. Aug. 28, 2018). In this case involving a child with dyslexia, the court ruled that the parent's unilateral placement of the child in a private Montessori school constituted the child's current placement when the hearing officer had previously entered an order that the pendency placement was the private Montessori school and directed the district to provide transportation, neither party appealed that order, and the district continued to provide transportation. The court ordered reimbursement for current tuition, but did not require immediate reimbursement of tuition from the date of the due process hearing request up to the current bill. The court remanded the issue

of propriety of payment for that period to the hearing officer for determination in the first instance.

Scordato v. Kinnikinnick Sch. Dist., No. 18 CV 50264, 2018 WL 4005210, at *2, 72 IDELR 248 (N.D. Ill. Aug. 22, 2018). This case concerned a 14-year-old with intellectual disabilities. The court granted a stay-put order for the student's placement as set out in the IEP of Feb. 5, 2018 at Hononegah High School, in Hononegah Community High School District 2017, rather than having the student remain at Roscoe Middle School in the student's elementary school district, as requested by the parents. The court said that the IEP calling for placement at Hononegah High School included notice to the parents that services would be provided under it within ten days of its issuance, but the parents did not seek due process within ten days, and instead requested another IEP meeting. The meeting was held Mar. 22, 2018, but did not change the IEP's placement recommendation. The parents filed for due process on same day, but the court said that "even though by filing this suit he has stayed implementation of the March 22, 2018, IEP, the February 5, 2018, IEP remains in place and under it, P.S. is to receive his programs and services for the 2018-19 school year at Hononegah High School. Thus, even setting aside the March 2018 IEP, under the February 2018 IEP, P.S. is already set to transition to high school, not stay in middle school." The court also commented on the benefits to the student of being educated in the high school.

XV. MOOTNESS

Olu–Cole v. E.L. Haynes Pub. Charter Sch., supra

Steven R.F. v. Harrison Sch. Dist. No. 2, 924 F.3d 1309, 74 IDELR 122 (10th Cir. May 28, 2019, as amended June 12, 2019). The court held that this case was moot. It involved a 14-year-old with severe autism, whose school district proposed a change of placement to a public school program. The district court ordered the school district to reimburse the parent for school year 2016-17 tuition at the student's private placement, and awarded attorneys' fees. The school district had paid the tuition pursuant to the IDEA stay-put provision. In finding the appeal moot, the court rejected the view that the dispute was capable of repetition yet evading review, even while recognizing that a one-year IEP is too short in duration to be fully litigated before it expires. The court reasoned that the procedural challenges the parent raised were fact-specific to the 2016-17 IEP process, in particular, the alleged failure to follow requirements for an IEP meeting required by the outcome of a state complaint review – having a staff member from the proposed placement observe the student at the private placement and having a neutral facilitator for the IEP meeting – which would not necessarily recur at subsequent IEP meetings. Thus, the court vacated the district court judgment, including the award of fees.

R.E.B. v. Department of Educ., supra

Burke v. Hillsborough Cnty. Sch. Bd., 752 F. App'x 713 (11th Cir. Sept. 24, 2018). This decision held that a claim that a third grader with autism who engaged in violent and destructive behaviors should be returned to general education with support services,

and a claim regarding predetermination by the district of the child's placement were both moot once the parent relocated away from the school district and the state due to a military reassignment. The court said that although a claim for damages would not be deemed moot, dismissal of the claim in this case was harmless error when no evidence had been put forward to support a request for compensation.

Lauren C. v. Lewisville Indep. Sch. Dist., 904 F.3d 363, 72 IDELR 262 (5th Cir. Sept. 14, 2018). Here the Fifth Circuit ruled that claims regarding child-find and free, appropriate public education became moot when the student aged out of special education eligibility prior to the district court ruling. The court said that the determination that the case was moot neither precluded nor is precluded by any entitlement to attorneys' fees; it rejected the argument that the mootness of the underlying claim on the merits automatically defeated an entitlement to fees. Nevertheless, it affirmed the denial of attorneys' fees in the case before it on the ground that the student was not the prevailing party. All aspects of the IEP were appropriate, and a change in the student's diagnostic label in this case did not confer prevailing party status.

XVI. DUE PROCESS HEARING REQUEST LIMITATIONS

Ms. S. v. Regional Sch. Unit 72, 916 F.3d 41, 73 IDELR 223 (1st Cir. Feb. 15, 2019). The First Circuit held that Maine has a two-year statute of limitations for due process complaints, aligned with IDEA limitations. Therefore, claims as to school years 2009-10 and 2010-11 were untimely when the due process complaint was filed in May 2013. Procedurally, the court held that the law of the case doctrine did not bar consideration of the theory that Maine has one statute of limitations mirroring IDEA's, and that the argument not waived when the school district failed to raise it in an earlier appeal of the decision in district's favor. On the merits of the limitations issue, the court reasoned that Maine intended to adopt a two-year limitations period mirroring IDEA's timing provisions. The court followed the analysis employed by *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 604-05 (3d Cir. 2015), and *Avila v. Spokane Sch. Dist. No. 81*, 852 F.3d 936, 937 (9th Cir. 2017), as to IDEA limitations. In this case, according to the court, there were no misrepresentations by the school district that would support an exception to the limitations.

Board of Educ. of the N. Rockland Cent. Sch. District v. C.M., 744 F. App'x 7, 72 IDELR 172 (2nd Cir. Aug. 1, 2018). This case applied the two-year IDEA statute of limitations in affirming a judgment in favor of the school district. The court held that the action accrued in May of 2011, when an IEP meeting rejected the parental request for residential placement, or June of 2011, when the parent was sent the IEP, but due process complaint was not filed until January of 2015. The court held that the specific misrepresentation exception to the IDEA limitation did not apply when the district never misrepresented that it denied the request for residential placement. The withholding of information exception did not apply when the parent knew of her rights when she engaged a parent advocate in May of 2011, then consulted a special education attorney in June 2012, then signed an acknowledgement of receipt of procedural safeguards in August 2012.

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). This is the case of a student found eligible for special education and served by a charter school who was last reevaluated in December 2015, then suffered a concussion in June 2017 and received an evaluation from a pediatric neuropsychologist hired by her parents. After obtaining the 2017 evaluation from the neuropsychologist, the parents expressed disagreement with charter school's 2015 evaluation and requested an independent evaluation at public expense. The parents refused to consent to a reevaluation by the school district and instead filed for due process over the district's refusal to pay for the independent evaluation. The hearing officer decided that the parents' objection to the 2015 evaluation was not barred by limitations, but also ruled that the IDEA did not provide the parents the right to an independent evaluation at public expense under the circumstances. The court remanded the case to the hearing officer. The court stated that "The decision of N.D.S.'s parents to not request a new reevaluation—but instead to express disagreement with the December 2015 reevaluation—was strategic. As soon became clear, the main goal of N.D.S.'s parents (who were being advised by legal counsel) was to force AFSA to pay for an IEE of N.D.S.." *Id*. at *2. Nevertheless, if limitations did not bar the case, the relevant question for the hearing officer should be whether the district's evaluation was adequate at the time it was conducted, and if the parents' due process complaint was timely, the hearing officer should order the district either to file a due process complaint to show that its 2015 evaluation was appropriate or provide an independent evaluation at public expense. On the limitations issue, the court adopted the analysis of *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015), and said the hearing officer should determine the date on which the parents knew or should have known of the reasons the district evaluation was inadequate at the time it was conducted. The court concluded: "If a hearing or IEE is ordered, however, that hearing or IEE must focus on whether the December 2015 reevaluation was "appropriate" at the time it was completed. If N.D.S.'s parents want a publicly funded IEE with respect to N.D.S.'s current condition, then they must follow the reevaluation procedures of IDEA and its implementing regulations. Specifically, they must allow AFSA to reevaluate N.D.S. and then, if they disagree with that reevaluation, they can request a publicly funded IEE." *Id*. at *7 (footnote omitted).

Wehrspann v. Dubuque Cmty. Sch. Dist., No. 15-CV-1029-LRR, 118 LRP 33775 (N.D. Iowa July 27, 2018) (magistrate judge report and recommendation), *adopted*, 2018 WL 3865379, 72 IDELR 212 (Aug. 14, 2018). The magistrate judge report, adopted by the district court, recommended reversing and remanding an ALJ decision dismissing a due process complaint in a case in which a now-20-year-old student was diagnosed with social anxiety disorder in 2006. The mother alleged she informed the school district at the time, and also informed the district of the student's post-traumatic stress disorder in spring, 2012. The student alleged that he had been the target of extreme bullying at school, and although the district began to develop a Section 504 plan in 2012, it never identified the student for special education. The student graduated in May 2013, but the due process complaint was not filed until May 19, 2015. The magistrate judge concluded that the contention that the student was not eligible under IDEA because he needed only related services and not special education did not support dismissal; the record did not provide adequate information to support that argument. The judge further concluded that if the district failed its child-find obligation by not identifying the student under the

IDEA despite knowledge that he was struggling or awareness of a diagnosis such as generalized anxiety disorder, limitations would be tolled under 20 U.S.C. § 1415(f)(3)(D) for failure to provide notice. Explicit refusal to evaluate was not required. The magistrate judge said that the amended due process complaint, which added the adult student as a party, would relate back to date of original complaint.

XVII. TUITION REIMBURSEMENT

W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 147, 74 IDELR 186 (2d Cir. June 14, 2019). In this case a teen had a migraine condition causing him to miss many school days. The court of appeals upheld the state review officer's determination that the district met its child-find obligation when it did not have sufficient reason to believe that student's disability required special education during eighth grade. The court noted that the student made progress in the general curriculum and received good test scores, which undermined the conclusion that he needed special education. As to ninth grade, the court affirmed the state review officer and district court determination that the private boarding school chosen by the parent was not an appropriate placement for the student. The court said that the SRO considered evidence of the student's progress at the private school but relied on the lack of evidence that the private school addressed the student's tendencies to develop physical symptoms and exhibit school avoidance when under stress, and his need to develop coping and organizational skills. The court stated: "[T]he question of whether a private school placement provided special education services is precisely a question on which we defer to educational experts." The court additionally overturned a ruling of the district court and affirmed the SRO, who denied tuition reimbursement for the student's tenth grade year. The court stressed that the student's absences in ninth and tenth grades were similar, and the SRO took into account improvements produced by the use of an iPad and small classes, as well as the lack of evidence that the private school provided specially designed instruction to meet the student's specific needs.

L.H. v. Hamilton Cnty. Dep't of Educ., *supra*

A.S. v. Board of Educ. of Shenendohowa Cent. Sch. Dist., No. 1:17-CV-0501, 2019 WL 719833, at *9, 73 IDELR 260 (N.D.N.Y. Feb. 20, 2019). The court in this case rejected reimbursement for a home-based program for a child with autism, stating, "Here, the only deficiency with the IEP the SRO identified was the district's failure to consider the extent to which its program constituted a removal from the general education setting in a manner inconsistent with A.S.'s LRE. . . . As the Court upholds the SRO conclusion that the only deficiency in the IEP was the LRE issue, the unilateral placement can only be regarded as proper, or appropriate, if the unilateral placement addressed that LRE deficiency. . . The parents' unilateral placement did not address this deficiency. The parents did not place A.S. in a more general education setting or in a plausibly less restrictive environment. Rather, the parents provided A.S. home-based instruction that removed him even further from a general education setting."

I.W. v. Lake Forest High Sch. Dist. No. 115, No. 17 C 7426, 2019 WL 479999, 73 IDELR 236 (N.D. Ill. Feb. 7, 2019). In this case, the parents of a teenaged student with multiple

disabilities removed her from public high school and placed her in Eagle Hill, an out of state private residential school. They filed a due process complaint requesting reimbursement for two years' tuition, which led to a decision, not appealed by the school district, that the school district failed to offer appropriate education. The hearing officer also ruled, however, that the parents were not entitled to tuition reimbursement because they failed to show that the private school was an appropriate placement for student. The court vacated the hearing officer decision as to reimbursement and remanded. The court said that teacher narratives on the student's progress may be considered in determining whether a private placement provided appropriate education, but it was uncertain whether the hearing officer afforded them no weight or merely overlooked them. The court said: "The court remands the case to the Hearing Officer for reconsideration of his propriety finding, in light of the teacher narratives included in I.W.'s Eagle Hill report card." *Id*. at *11. The court also pointed out that the hearing officer gave little weight to the grades at the private placement but the court said that teacher narratives may illuminate how the student earned the grades. The hearing officer did not explain the conclusion that the student did not make progress in many areas of need. The court commented: "This court's own review of the administrative record suggests that I.W. did make social, psychiatric, and academic progress at Eagle Hill." *Id*. at *12.

XVIII. COMPENSATORY EDUCATION AND RELATED

Somberg v. Utica Cmty. Schs., 908 F.3d 162, 175, 73 IDELR 88 (6th Cir. Nov. 5, 2018). This case involved a now-24 year old student with autism spectrum disorder, ADHD, Tourette's Disorder, and symptoms of obsessive-compulsive disorder, whose 2012-13 IEP lacked measurable goals and called for an even split between general education and special education classes but who was enrolled in a community-based inclusion program for two periods of day in addition to three special education classes and only one general education class. After the parent objected that the IEP was not being followed, the school provided the student instruction in the principal's office and kept him from enrolling in the general education classes he selected. The court of appeals affirmed the district court's award of 1,200 hours of tutoring and one year of transition planning as compensatory education, plus attorneys' fees. It held that the case was not moot due to the claim for compensatory education. Applying an abuse of discretion standard, it upheld the award of compensatory education, reasoning that the district court's giving little deference to the underlying ALJ determination on the issue was harmless error in light of the district judge's own evaluation of the evidence and holding of a bench trial. The court found no error in the lower court's admitting evidence outside the hearing record regarding the years between 2008 and 2015 in order to determine the amount of educational loss that the student suffered due to the inadequacy of the IEP during the 2012–2013 school year, stating "The district court would have been unable to discern the extent of Dylan's educational loss in a vacuum. Evidence of his abilities and progress in the years before and after the IDEA violation is therefore relevant in determining whether he suffered a loss during the 2012–2013 school year. Without such testimony, for example, the court would have had no baseline against which to measure Dylan's progress (or lack thereof) during the year in which the violation occurred. And without such a baseline, the court would have been unable to assess whether and how much

Dylan progressed, stalled, or regressed because of UCS's IDEA violation." The court said that the school district failed to raise mitigation of damages before the in lower court, and failed to offer evidence contrary to that of the student on the amount of compensatory education. The court affirmed the ruling that the services should be paid for by the district rather than directly provided by the district, noting the contentious relationship between parent and district and the district's failed suits against the parent and the parent's attorney. On cross-appeal, the court held that the district judge did not err in considering that the student made some educational advances when the judge determined the amount of compensatory education. The court noted that *Endrew F.* requires more than some advancement to fulfill the appropriate education obligation, but pointed out that the issue in *Endrew F.* was whether the IEP complied with the IDEA, not the measure of compensatory education.

T.B. v. Prince George's Cnty. Bd. of Educ., *supra*

R.S. v. Board of Dirs. of Woods Charter Sch. Co., No. 1:16-CV-119, 2019 WL 1025930, 73 IDELR 252 (M.D.N.C. Mar. 4, 2019), *appeal filed*, No. 19-1349 (4th Cir. Apr. 4, 2019). This case involved a student with a nonverbal learning disability who transferred into the charter school from out of state and began to attend on Aug. 20, 2013 but experienced academic difficulties and was withdrawn by the school on March 6, 2014 after ceasing to attend during the period after December 2, 2013. The court granted the parent's motion for summary judgment against the charter school, overturning the state review officer's rejection of the ALJ's fact finding and credibility determinations. The court held that the school provided comparable services upon transfer as to speech and language, even though the school used pull-out services rather than a mix of pull-out and push-in, but ruled that it failed to provide comparable services when it offered modified rather than adapted physical education. The court also determined that there was a failure to timely develop an IEP under the state's 90-day timeline from referral for evaluation starting August 20, 2013, which elapsed November 17, 2013. The court also found a violation of the prior written notice requirement when the school disenrolled the student. The physical education violation denied appropriate education, and the parents' conduct did not relieve the school of liability for failure to develop the IEP when the parents wanted an attorney to attend the IEP meeting and the attorney had a scheduling conflict. The disenrollment also deprived the student of appropriate education. The court awarded compensatory private education funding for adaptive physical education hours for the period from August 20, 2013 to November 17, 2013, and full direct funding for at least three hours per day of compensatory education from November 17, 2013 to the end of school year, with parents choosing credentialed providers at the prevailing market rate.

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

M.P. v. Campus Cmty. Sch., No. CV 16-63, 2018 WL 4926448, 73 IDELR 38 (D. Del. Oct. 10, 2018). This case had to do with a child with a seizure disorder, dyslexia, learning disabilities in reading, math, and writing, and processing and memory issues, who was served in the defendant's school from first grade but not evaluated until late in third grade. An IEP was not provided until near the end of third grade, despite the fact

that the parent provided information about the child's conditions to the school, a request by the first grade teacher and by the parent for educational evaluations, struggles by the student in class, and excessive absences due to health issues. The court affirmed the hearing panel decision not to award compensatory education for an extended school year, but it modified the compensatory education award that was granted so as to cover the period from February 1 of first grade, in light of the teacher's request for evaluation and other information available to the school no later than November 3 of that school year, as well as the child's second and third grade years. The court also increased the hourly rate for the compensatory education from $17.50 per hour to $70.00 as the approximate weighted average of specialized and nonspecialized services costs, for full seven-hour days. It permitted use of the funds up to the end of the child's 21st year.

Letter to Zirkel, 74 IDELR 142 (OSEP May 2, 2019). In response to a set of questions on interpretation of the IDEA from Professor Zirkel, the Office of Special Education Programs stated: "Question 3: 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? 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. We believe that the hearing officer, as the designated trier of fact under IDEA, is in the best position to determine whether a delayed evaluation or a failure to complete an evaluation would be subject to the remedies described in your question."