UNTANGLING IDEA'S DISCIPLINE PROCEDURES

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

THURSDAY, SEPTEMBER 28, 2023

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I. DISCIPLINE PROCEDURES

A. Under the Individuals with Disabilities Education Act (IDEA),[1] there are rules governing the discipline of children with disabilities, and the requirements differ depending on the number of days the student is being removed from the normal setting.[2]

B. A student with a disability can be removed for violating a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 consecutive school days (to the extent those alternatives are applied to students without disabilities) and for additional removals of not more than 10 consecutive school days in the same school year for separate incidents of misconduct that do not constitute a change of placement.[3] This is commonly referred to as a short-term removal.

C. For short-term removals, the local educational agency (LEA) is not required to provide services to the student, unless services are provided to students without disabilities who are similarly removed.[4]

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[1] 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300.1 *et seq*. In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

[2] *See*, *generally*, 34 C.F.R. § 300.530; Missouri State Plan for Special Education (rev. April 2023) (hereinafter, "State Plan"), pp. 89 - 94.

[3] 34 C.F.R. § 300.530(b); State Plan, p. 89.

[4] 34 C.F.R. § 300.530(d)(3); State Plan, p. 90. Note, for any student who has been removed from the current placement for 10 school days in the same year, services

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D. A removal for violating a code of student conduct can be for more than 10 consecutive school days. This is known as a long-term removal.

1. When an LEA has removed, or seeks to remove, the student for more than 10 consecutive school days, a change in placement occurs.[5]

2. A change in placement also occurs when the student is subjected to a series of removals (i.e., short-term removals) that constitute a pattern because the number of school days exceeds 10 days, the student's behavior is substantially similar to the behavior in previous incidents that resulted in the series of removals, and such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another.[6] The LEA (not necessarily the IEP team) determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, and such determination is subject to review by a hearing officer.[7]

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

F. A bus suspension counts as a day of suspension if bus transportation is listed on the student's IEP, unless the LEA provides alternative transportation. It counts because the bus service is necessary for the student to access the services on the IEP.[9]

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must be provided to the student for any additional short-term removal in the same school year that is not a change of placement under § 300.536. 34 C.F.R. § 300.530(d)(4); State Plan, p. 90.

[5] 34 C.F.R. § 300.536(a); State Plan, p. 89.

[6] *Id.* What constitutes "substantially similar" behavior is a "subjective" determination. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46729 (August 14, 2006).

[7] 34 C.F.R. § 330.536(b); State Plan, p. 90.

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

[9] *Id.*

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G. The IDEA imposes additional requirements on long-term removals.

1. Once a long-term removal is initiated (i.e., a decision is made to change the student's placement), the LEA, the parents, and relevant members of the IEP team must convene a meeting to review all relevant information in the student's file, including the IEP, and any relevant information provided by the parents to determine if the misconduct was caused by, or had a direct and substantial relationship to, the student's disability or if the misconduct was the direct result of the LEA's failure to implement the IEP.[10] This process is known as a manifestation determination review (MDR) meeting.[11]

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

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

4. If it is determined that the conduct is a manifestation of the student's disability, a long-term removal cannot take place. The student must be returned to the placement from which the student was removed, unless the parents and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.[16] An IEP team meeting must also be convened to either (1)

[10] 34 C.F.R. § 300.530(e)(1); State Plan, p. 90.
[11] *See id.*
[12] 34 C.F.R. § 300.530(e)(1); State Plan, p. 90.
[13] 34 C.F.R. § 300.530(c); State Plan, pp. 90 - 91.
[14] 34 C.F.R. § 300.530(d)(1). Participation in the general education curriculum does not require the LEA to replicate every aspect of the services that the student would have received in the IEP. The services must be comparable. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46716 (August 14, 2006).
[15] 34 C.F.R. § 300.530(d)(5).
[16] 34 C.F.R. § 300.530(f)(2); State Plan, p. 91.

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conduct an FBA, unless one had already been done, and implement a behavior intervention plan (BIP) for the student; or (2) review the existing BIP, if one had already been developed, and modify it, as necessary, to address the behavior.[17]

5. If it is determined that the misconduct is a direct result of the LEA's failure to implement the student's IEP, the LEA must take immediate steps to remedy those deficiencies.[18]

H. There are special circumstances that can result in a student being removed to what is known as an interim alternative educational setting (IAES).

1. A student may be removed to IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student (1) carries/possesses a weapon in school or at school functions; (2) knowingly possesses or uses illegal drugs or sells/solicits the sale of a controlled substance in school or at school functions; or (3) inflicts serious bodily injury upon another person in school or at school functions.[19]

2. The IEP team determines the IAES for services, and the setting must enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP, as well as appropriate behavior interventions.[20] The LEA cannot limit an IEP team to offering home instruction as the sole IAES option.[21]

I. Students who have not been determined eligible for special education and related services and are subject to disciplinary removal may assert IDEA protections if it is shown that the LEA had knowledge that the student was a student with a disability.[22]

1. An LEA is deemed to have knowledge that the student is a child with a disability if before the behavior that precipitated the

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[17] 34 C.F.R. § 300.530(f)(1); State Plan, p. 91.

[18] 34 C.F.R. § 330.530(e)(3).

[19] 34 C.F.R. § 300.530(g); State Plan, p. 91. Note that the IDEA continues to require a manifestation determination review meeting. *Id.* For these offenses, an LEA can remove the student to an IAES even though the MDR team determines that the behavior is linked to the student's disability. If the offense is not related to the student's disability, the LEA can discipline the student as it would a non-disabled student.

[20] 34 C.F.R. §§ 300.530(d)(1) and 300.531.

[21] *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).

[22] 34 C.F.R. § 300.534(a); State Plan, p. 93.

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disciplinary action occurred, (1) the parent expressed concern in writing to supervisory/administrative personnel of the LEA or a teacher that the student needed special education, (2) the parent requested an evaluation, or (3) the teacher or other district staff express specific concerns about a pattern of behavior directly to the director of special education or the supervisory staff.[23]

2. An LEA is not deemed to have knowledge if the parent did not allow the student to be evaluated, the student was evaluated and found not eligible, or the parent refused special education services.[24]

3. If a request for evaluation is made after the student is subjected to disciplinary measures, the evaluation is to be expedited. But, pending results of the evaluations, the student remains in the placement determined by the LEA.[25]

II. EXPEDITED HEARINGS

A. A parent of a student with a disability who disagrees with the placement decision resulting from a disciplinary removal or the manifestation determination may challenge said decision(s) by requesting a hearing.[26] A local educational agency (LEA) that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may seek to have the child placed in an interim alternative educational setting (IAES).[27]

B. In matters involving a challenge to the placement decision resulting from a disciplinary removal, the manifestation determination, or placement in an IAES, the parent or LEA must be given an opportunity for an expedited due process hearing,[28] which must occur within 20 school days of the date the complaint is filed.[29] A decision must be made and provided to the parties within 10 school days after the hearing.[30]

C. When the parent or LEA has requested an expedited hearing, the student must remain in the IAES pending the decision of the hearing officer in favor of the student or until the expiration of the time period of removal resulting from a long-term removal or a removal for special circumstances (for not more than 45 school days), whichever occurs first, unless the

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[23] 34 C.F.R. § 300.534(b); State Plan, p. 93.
[24] 34 C.F.R. § 300.534(c); State Plan, p. 93.
[25] 34 C.F.R. § 300.534(d)(2); State Plan, p. 93.
[26] 34 C.F.R. § 300.532(a); State Plan, pp. 91 - 92.
[27] 34 C.F.R. §§ 300.532(a) and (b)(2)(ii); State Plan, pp. 91 - 92.
[28] 34 C.F.R. § 300.532(c)(1); State Plan, p. 92.
[29] 34 C.F.R. § 300.532(c)(2); State Plan, p. 92.
[30] *Id.*

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parent and the State educational agency (SEA) or LEA agree otherwise.[31]

D. A resolution meeting must occur, unless waived in writing by both parties or the parties agree to use mediation in lieu of a resolution meeting, within seven calendar days of receiving notice of the due process complaint and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process complaint.[32] The resolution period runs concurrent with the hearing period.[33]

E. The sufficiency provision in § 300.508(d) does not apply to an expedited due process hearing.[34] Also, a response is not required from the non-filing party.[35]

F. A hearing officer has no authority to extend the timeline of an expedited hearing at the request of either party.[36]

G. The parties to an expedited hearing cannot mutually waive the expedited timelines.[37] Nor can the parties agree to treat the hearing as a regular hearing.[38]

H. Any party to a hearing has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.[39]

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[31] 34 C.F.R. § 300.533; State Plan, p. 92.

[32] 34 C.F.R. § 300.532(c)(3).

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

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

[35] *See* 34 C.F.R. § 300.532(c).

[36] 34 C.F.R. § 300.532(c). *See also Letter to Snyder*, 67 IDELR 96 (OSEP 2015).

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

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

[39] 34 C.F.R. § 300.512(a)(3). The IDEA also provides that, not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations on the offering party's evaluations, that the party intends to use at the hearing. However, unlike the right found in § 300.512(a)(3), i.e., any evidence, the hearing officer has discretion on whether to bar any party that fails to comply with § 300.512(b) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party. 34 C.F.R. § 300.512(b)(2).

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I. OSEP clarifies in its discussion of the 2006 IDEA regulations, citing *Schaffer v. Weast*,[40] that when a parent appeals the student's placement as a result of the student's disciplinary removal or the manifestation determination, the burden of persuasion is allocated to the parent, while when an LEA requests the removal of a child to an IAES, the burden of persuasion is on the LEA.[41]

J. In presiding over a due process hearing that includes both non-discipline and discipline issues, the hearing officer may, but is not required to, bifurcate the non-expedited issues from the expedited issues, thus allowing for an expedited hearing on the discipline and removal issues, and a separate hearing on any other non-disciplinary issues. The expedited issue(s) must be decided within the expedited timelines.[42]

III. CHALLENGES TO THE MDR MEETING

A. The Conference Committee report to IDEA 2004 is instructive on how hearing officers should examine challenges to the MDR meeting.

1. The Conference Committee to IDEA 2004 said that the MDR team must determine whether "the conduct in question was caused by, or has a direct and substantial relationship to, the [student's] disability, *and is not an attenuated association*, such as low self-esteem, to the [student's] disability."[43]

2. Further, the Conference Committee report on IDEA 2004 states that an MDR team must "analyze the [student's] behavior as demonstrated across settings and across time when determining whether the conduct in question is the direct result of the disability."[44] This language suggests that, for the conduct in question to be caused by, or have a direct and substantial relationship to, the student's behavior, evidence of patterns of behavior similar to the conduct in question would be seen across different settings and times.

B. The MDR team must review relevant information in the student's file, including the students' IEP, any teacher observations, and any relevant information provided by the parents.[45] It is not uncommon for a parent of

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[40] 546 U.S. 49, 44 IDELR 150 (U.S. 2005).

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

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

[43] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46720 (August 14, 2006).

[44] *Id.*

[45] 34 C.F.R. § 300.530(e)(1).

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a child with a disability to have obtained an independent educational evaluation that references mental health disorders found in the Diagnostic and Statistical Manual of Mental Health Disorders (DSM).[46]

1. Use of the DSM-5-TR to ascertain whether a student's misbehavior was caused by, or has a direct and substantial relationship to, the student's disability should be done with caution. The DSM-5-TR itself includes a variety of disclaimers relevant to this discussion.

2. The diagnostic criteria in the DSM-5-TR are intended to assist clinicians, not courts and attorneys:

> Although the DSM-5 diagnostic criteria and text are primarily designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning, DSM-5 is also used as a reference for the courts and attorneys in assessing the legal consequences of mental disorders. As a result, it is important to note that the definition of mental disorder in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than the technical needs of courts and legal professionals.[47]

3. Information beyond what is contained in the DSM-5-TR is usually required to make legal judgments:

> In most situations, the clinical diagnosis of a DSM-5 mental disorder… does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or "mental illness" as defined in law, or a specified legal standard (e.g., for competence, criminal responsibility, or disability). For the latter, additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the individual's functional impairments and how those impairments affect the particular abilities in question. It is precisely because impairments of a particular diagnosis vary widely within each diagnostic category that assignment of a particular diagnosis does not imply specific level of risk, impairment, or disability.[48]

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[46] The DSM is published by the American Psychiatric Association (APA) and the fifth edition was released in May 2013. A text revision to the DSM-5 was released in March 2022 and should be referenced as DSM-5-TR.

[47] DSM-5-TR, p. 29.

[48] *Id.*

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4. Relevant to the MDR team's work, the DSM-5-TR cautions:

> Use of DSM-5 to assess the presence of a mental disorder by nonclinical, nonmedical, or otherwise insufficiently trained individuals is not advised. Nonclinical decision-makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the etiology or causes of the individual's mental disorder or the individual's degree or control over behaviors that may be associated with the disorder. Even when diminished control over the individual's own behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her own behavior at a particular time.[49]

C. For misconduct related to an LEA's failure to implement the student's IEP to be a manifestation of the student's disability, the failure to implement must *directly* result in the misbehavior.[50] Further, there is no requirement in the IDEA for the manifestation determination team to also examine whether the IEP or the student's placement is inappropriate.[51] The inquire is limited to implementation. An implementation failure requires the LEA to take "immediate steps" to remedy the deficiencies.[52]

D. A parent challenging an MDR in an expedited hearing has the burden of persuasion.[53]

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[49] *Id.*

[50] 34 C.F.R. § 300.530(e)(1)(ii).

[51] *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46720 (August 14, 2006).

[52] 34 C.F.R. § 300.530(e)(3).

[53] *Schaffer v. Weast*, 546 U.S. 49, 44 IDELR 150 (2005); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46723 (August 14, 2006).

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IV. PRACTICE POINTERS

A. What is a "school day?" Given the timelines for expedited hearings are expressed in "school days"[54] and not calendar days, care must be taken to properly calculate the timelines. At the initial status or prehearing conference, the school calendar for the relevant LEA / school should be consulted and any instructional days over the summer closely examined to determine if they meet the definition of school day.

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

C. Any Way to "Buy" Time? The law is very clear that there can be no extensions in expedited hearings, nor can the parties waive or opt for a regular hearing. Yet, sometimes the parties understandably desire more time to try to settle the matter. If the parties are amenable, they could agree in writing (or the hearing officer could document in an order or a recorded conference call) that the party requesting the expedited hearing will withdraw and immediately refile its request without prejudicing the rights or position of either party, the resolution meeting will be waived, and the record in the prior matter will become a part of the record in the refiled matter.[55]

D. What Constitutes a "Disciplinary Removal?" Sometimes a "disciplinary removal" can result from disciplinary action taken against a student other than a traditional suspension (i.e., being sent home for a defined period of time). Other disciplinary action includes removal from a class(es), time out, in-school detention, suspension from transportation, being sent to the principal's office, and requiring the parent to attend a meeting with the administration before the student can return to the school.[56] These other

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[54] Under IDEA a "school day" means "any day, including a partial day that children are in attendance at school for instructional purposes." 34C.F.R. § 300.11(c)(1). Instructional days over the summer are school days only if the summer program is open to the student population at large. *Letter to Cox,* 59 IDELR 140 (OSEP 2012). A day on which the LEA only provides ESY services to children with disabilities and does not operate summer school programs for all children cannot be counted as a school day. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No.156, Page 46.552 (August 14, 2006).

[55] *See, e.g.*, State Plan, p. 92.

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

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

E. Whether There Has Been a Change in Placement Due to a Disciplinary Removal? A disciplinary removal can result in a change in placement. This happens when the removal is for more than 10 consecutive school days or the child has been subjected to a series of removals that constitute a "pattern" because: (a) the series of removals total more than 10 school days in a school year; (b) the child's behavior is substantially similar to the behavior in previous incidents that resulted in the removals; and, (c) because of such additional factors as the length of each removal, the total amount of time of all removals and the proximity of the removals to one another.[57]

1. A "change in placement" in the disciplinary context is defined differently than a change of placement in a non-disciplinary context. In the non-disciplinary context, a change in placement is a fundamental change in, or elimination of, a basic element of a program affecting the program in a significant way.[58]

2. A change in placement as defined in the disciplinary context should trigger a manifestation determination but may not if school personnel is unfamiliar with the specific requirements or, when there is a series of removals, are not keeping track of the number of school days for each removal or are unaware that a pattern exists between the incidents. When this happens, typically, the parent files a request for an expedited hearing alleging a change in placement and the hearing officer is tasked with determining whether the specific factors in § 300.536(a), *see* ¶ VI(E), *supra*, have been met.[59]

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

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[57] 34 C.F.R. 300.536(a).

[58] *See Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

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

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or implemented a new IEP and the student is suspended for more than 10 school days. This example reinforces why it is important for the hearing officer to read the complaint soon after appointment and follow up with the parties if there is a question as to whether the hearing should be on an expedited track. Hearing officers should not rely on the label assigned to a complaint by the SEA and/or LEA. Ultimately, it is the hearing officer's responsibility to determine the applicable timeline.

G. Making a Record. A preliminary issue can come up in an expedited hearing that requires findings of facts in order for the hearing officer to have a record from which to make an informed decision on the issue (e.g., whether the claim qualifies for an expedited hearing; whether an LEA has knowledge; whether certain days qualify as "school days"). The compressed hearing timeline in an expedited hearing complicates how the hearing officer proceeds. Nonetheless, a wide variety of procedural options are available to the hearing officer. Which is most appropriate will depend upon the circumstances of each case considering, among other factors, fairness, what time is remaining on the timeline, and the need to afford the parties adequate time to prepare (or not prepare) for the substantive hearing.

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

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

1. Stipulations of facts.

2. Affidavits from key witnesses.

3. A limited hearing, whether by telephone or in person, recorded or transcribed.[60]

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

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

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

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

3. Prior to the prehearing conference, the hearing officer should prepare a list of questions that will help in determining whether an issue necessitates an expedited hearing.

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

V. POSSIBLE OPTIONS TO EXPEDITE THE PROCESS

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

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

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C. To accommodate an earlier hearing, the parties can agree to shorten the five-business-day disclosure rule. The hearing officer, however, cannot impose a shorter disclosure timeline. Agreement of the parties is necessary.

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

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

F. Establish during the prehearing conference the number of hours/days each party will be afforded to present its case, keeping in mind that the hearing officer enjoys considerable discretion to impose reasonable time limitations when necessary.[61]

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

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

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

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

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

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THE *PEREZ* EFFECTS ON IDEA LITIGATION

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

THURSDAY, SEPTEMBER 28, 2023

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I. INTRODUCTION

A. In *Perez v. Sturgis Public Schools*,[1] the U.S. Supreme Court held that IDEA's exhaustion requirement does not preclude a student who has been determined to be eligible under the Individuals with Disabilities Education Act (IDEA)[2] from pursuing a lawsuit under the American with Disabilities Act (ADA)[3] without first exhausting IDEA's administrative procedures because the remedy the student sought (i.e., compensatory damages) is not something IDEA can provide.[4] Justice Neil Gorsuch delivered the opinion for a unanimous Court.[5]

B. The *Perez* holding answers the question that *Fry v. Napoleon Community Schools* did not.[6] In *Fry*, the Court expressly declined to consider whether a plaintiff who seeks damages not available under the IDEA would need to first exhaust claims related to a denial of a free, appropriate public education (FAPE) before pursuing the damages claim in court.[7]

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

[1] 143 S. Ct. 859, 82 IDELR 213 (2023).

[2] 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300.1 *et seq*. In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

[3] 42 U.S.C. §§ 12101 *et seq*.

[4] *See Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023).

[5] *Id.*

[6] 137 S. Ct. 743, 69 IDELR 116 (2017).

[7] *See Fry v. Napoleon Community Schs*, 137 S. Ct. 743, 69 IDELR 116 (2017).

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C. Petitioner was Miguel Luna Perez (Perez), a 23-year-old student who is deaf. Between the ages of 9 through 20, Perez attended schools in Michigan's Sturgis Public School District. Perez had been identified as a student with a disability under the IDEA. Sturgis provided Perez with aides to translate classroom instruction into sign language. When Sturgis informed Perez's parents that he would not graduate, the family filed a due process complaint with the Michigan Department of Education (MDE) alleging (among other things) that Sturgis failed to provide Perez with a FAPE under the IDEA by having provided unqualified sign language interpreters[8] and misrepresenting his educational progress.[9] The complaint also alleged that, in addition to the IDEA, MDE violated other laws.[10]

D. The parties reached an agreement prior to the commencement of the IDEA hearing. MDE agreed to provide the prospective relief Perez had requested, including additional schooling at the Michigan School for the Deaf. Perez then sued Sturgis in federal district court under the ADA seeking compensatory damages for emotional distress, lost income, and other financial harm.[11] Sturgis moved to dismiss claiming that the IDEA requires that Perez first exhaust IDEA's administrative procedures when "seeking relief that is also available under" IDEA.[12] The district court agreed with Sturgis and dismissed the suit.[13] The Sixth Circuit affirmed.[14]

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[8] The record included allegations that either the sign language interpreters were unqualified, with an assertion that one such interpreter attempted to teach herself sign language, or were absent from the classroom for hours on end, resulting in instruction not being interpreted. *See id.*

[9] The family asserted that Sturgis awarded Perez inflated grades to the point that he repeatedly made honor roll, and advanced him from grade to grade, despite not being able to read or write, leaving them to believe that he would graduate on time. However, months before graduation, Sturgis revealed that it would not award Perez a diploma. *See id.*

[10] *See id. See also* Brief of Petitioner, *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023) (No. 21-887).

[11] *See Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023).

[12] *See id.* Section 1415(l) says that the IDEA shall not be "construed to restrict … remedies" under federal laws other than the IDEA that protect the rights of children with disabilities. 20 U.S.C. § 1415(l). It further qualifies, that, prior to "filing of a civil action under such [other federal] laws seeking relief that is also available under [the IDEA] …," parents must first exhaust subsections (f), regarding the right to a due process hearing before a local or State administrative official, and (g), regarding an appeal to the State educational agency (SEA). *Id.*

[13] *Perez v. Sturgis Pub. Schs.*, No. 1:18-cv-1134, 2019 U.S. Dist. LEXIS 218443, 2019 WL 6907138 (W.D. Mich. Dec. 19, 2019).

[14] *Perez v. Sturgis Pub. Schs.*, 3 F.4th 236, 79 IDELR 1 (6th Cir. 2021).

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E. The case turned on the interpretation of § 1415(l). Perez argued that the language in § 1415(l) only required a plaintiff to exhaust the right to a due process hearing and subsequent appeal to an SEA, where applicable, when the plaintiff "pursues a suit under another federal law for *remedies* IDEA also provides."[15] In contrast, Sturgis argued that § 1415(l) required plaintiff to first pursue a claim in a due process hearing and subsequent appeal to an SEA, where applicable, "before he may pursue a suit under another federal law if that suit seeks relief for the same *underlying harm* IDEA exists to address."[16] The Court believed that Perez had the better argument.[17]

II. THE SIGNIFICANCE OF *PEREZ*

A. The Court's holding in *Perez* is not a blank check to bypass IDEA's exhaustion requirement where the parent seeks a remedy IDEA can supply. In fact, the Court cautioned –

> Under our view, for example, a plaintiff who files an ADA action seeking both damages and the sort of equitable relief IDEA provides may find his request for equitable relief barred or deferred if he has yet to exhaust § 1415(f) and (g).[18]

B. A plaintiff, therefore, must exhaust when seeking a specific remedy that the IDEA can provide, "not when they file a claim for which the IDEA could supply *some* remedy."[19]

C. However, contrary to the position of every circuit court to have considered the issue, the Court has now made clear that parents do not need to go through the IDEA's administrative process when seeking remedies that the IDEA does not allow.[20] And, there may be good reason for this.

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[15] *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023) (emphasis in original).

[16] *Id.*

[17] *Id.* The Court expended considerable time discussing whether there is any difference between the term "remedies" found in the first clause of § 1415(l) and the term "relief" in the second clause, with the Court determining that in the IDEA context, the two are synonymous – "relief" means the remedy or remedies a tribunal may award. *Id.*

[18] *Id.*

[19] U.S. Congressional Research Service. *Perez v. Sturgis Public Schools:* the Supreme Court Considers a Futility Exception to IDEA Administrative Exhaustion (LSB10907; March 24, 2023), by Abigail A. Graber. Text in: https://crsreports.congress.gov/product/pdf/LSB/LSB10907; Accessed: September 22, 2023.

[20] *See id.*

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1. The ADA, Section 504 of the Rehabilitation Act of 1973,[21] and § 1983,[22] which protect against State and local governments and recipients of federal funds from discriminating against people with disabilities or violating their constitutional rights, all provide different redress than what IDEA can provide.

2. For example, courts may order a school district to take action to remedy disability discrimination. Courts can also order services that are similar but not identical to the services that are available to a student with a disability under the IDEA.[23]

3. Also, as Perez argued, these laws, unlike the IDEA, may allow for compensatory damages, including emotional distress, medical bills, or lost income.[24]

III. OBSERVATIONS

A. Though parallel proceedings – an IDEA claim and ADA/504 claim – are possible under the *Perez* holding, in practice, it is unlikely.

1. Parents will not be able to circumvent IDEA's exhaustion requirement simply by slapping lipstick on a pig. Justice Ketanji Brown noted during oral arguments, "You can't just call an IDEA claim an ADA claim and get out of exhausting it to the same extent you would have to if it was labeled IDEA."[25] *Perez* makes clear that parents may find the request for equitable relief barred or deferred if he has yet to exhaust § 1415(f) and (g).[26]

2. Further, parents will not seek to "dodge the administrative process"[27] to the detriment of their child's education that can be timely addressed through a due process hearing subject to a 45-day

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[21] 29 U.S.C. § 794.

[22] 42 U.S.C. § 1983.

[23] *See* U.S. Congressional Research Service, *supra*.

[24] In 2022, the U.S. Supreme Court held that damages for emotional distress are not available under Section 504. *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562, 122 LRP 14381 (2022). Lower courts have increasingly held that emotional distress damages are also unavailable under the ADA, but the U.S. Supreme Court has not weighed on this issue. *See* U.S. Congressional Research Service, *supra*.

[25] Transcript of Oral Argument, *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023). Retrieved at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-887_h3ci.pdf. (Last visited on September 22, 2023.)

[26] *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023).

[27] U.S. Congressional Research Service, *supra*.

timeline.[28] As the Solicitor General noted in his amicus brief –

> As a practical matter, moreover, parents generally have every incentive to pursue relief through the IDEA process before turning to court if that process could reasonably be expected to provide appropriate educational relief for their children. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 209 (1982) (concluding that "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the [IDEA]"). The parents who are likely to choose to proceed directly to court without pursuing the IDEA's administrative process are those who (1) do not believe that the IDEA was violated at all, (2) are no longer eligible for relief available under the IDEA, or (3) have already reached a resolution with the school providing them with all the IDEA relief they seek. Those are precisely the parents who should not be forced to exhaust an unnecessary administrative process as a prerequisite to filing an inevitable civil action in court.[29]

3. And, even if the parents pursued parallel proceedings, the court could stay the non-IDEA case until the administrative process is resolved.[30] Parents also may not have the resources, both in time and money, to litigate two proceedings at once.

B. Though *Perez* may result in increased court litigation, an increase in administrative hearings is likely from stalled settlement negotiations. *Perez* will also make IDEA settlement agreements more expensive, particularly when the school district insists on a global agreement to address potential ADA/504 claims.

1. Given the holding in *Perez*, parties will need to consider and address potential ADA/504 claims in their settlement negotiations. Should parents have a viable ADA/504 claim that cannot be addressed through the IDEA, they may expect to have it addressed in the settlement agreement addressing the IDEA claim(s), likely through monetary compensation, as a condition to waiving their rights to pursue potential ADA/504 claim in court, which may result in increased costs to school districts.

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[28] *See* 34 C.F.R. § 300.515(a).

[29] Brief For the United States, *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023) (No. 21-887).

[30] Reply Brief of Petitioner, *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023) (No. 21-887).

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2. On the other hand, a school district who refuses during an IDEA settlement negotiation to entertain compensating a parent for a viable ADA/504 claim while also expecting a waiver of said claim, may find itself litigating both the IDEA and ADA/504 claims, albeit in different venues. Whereas prior to *Perez* both school district and parent attorneys were unsure whether filing in court at the outset for damages was even an option, *Perez* now makes clear, it is. This may result in increased attorneys' fees for the school district when parents walk away from a settlement proposal that does not address the educational claims, attorneys' fees, and money damages.

3. Finally, depending on whether the school district has insurance coverage(s) for claims under IDEA, ADA/504, or both, the insurance company's attorney (if different from that of the school district), may assume representing the school district in the litigation or at a minimum want to participate in any settlement negotiations. This tends to make the settlement negotiations more complicated because the school district in seeking a resolution is typically far more sensitive to attempting to not destroy/maintain/enhance its continuing relationship with the parents while the insurance company may give little, if any, importance to this factor in seeking a settlement.

C. The effect of *Perez* on *Fry* is an open question.

1. *Perez* did not overrule *Fry*.[31]

2. The rule in *Fry* is whether the gravamen of the lawsuit was a denial of FAPE for which IDEA's administrative process is available. In deciding whether exhaustion is required under the IDEA, the *Fry* Court identified two questions to consider: (1) whether the student could assert the same claim against a non-educational public facility; and (2) whether an individual other than the student could assert the same claim against the school district. If the answer to both questions is yes, then the parents do not need to exhaust the IDEA.[32]

3. While *Perez* may be read to provide an alternative framework for determining whether exhaustion would apply, the question remains whether it did. For the *Perez* Court, the answer is no.

> But the Court in *Fry* went out of its way to reserve rather than decide the question we now face.... This case presents an analogous but different question—whether a suit

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[31] *See Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023).
[32] *Fry v. Napoleon Community Schs.*, 580 U.S. 154, 69 IDELR 116 (2017).

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> admittedly premised on the past denial of a free and appropriate education may nonetheless proceed without exhausting IDEA's administrative processes if the remedy a plaintiff seeks is not one IDEA provides.[33]

4. The questions in *Fry*, therefore, should be asked where an ADA/504 plaintiff is seeking relief that may also be available under the IDEA, but not when an ADA/504 plaintiff is seeking only damages, which are not available under the IDEA and cannot be awarded in an IDEA administrative hearing.

D. *Perez* answers an academic question, not a practical one.

1. Section 1415(l) allows Perez to file an ADA lawsuit for compensatory damages resulting from IDEA violations. Whether damages for emotional distress are actually available under the ADA, is a question for another day.

> The parties pose a number of additional questions they would like us to answer—including ... whether the compensatory damages Mr. Perez seeks in his ADA suit are in fact available under that statute. But today, we have no occasion to address any of those things.[34]

Cummings, *supra*, relating to the availability of damages for emotional distress under Section 504, and *Barnes v. Gorman*,[35] relating to the availability of punitive damages under Section 504, suggest, absent a change in the law,[36] that Perez won the battle but may lose the war.

2. And, even if other damages are available, *Perez* does not change the standard of proof required to recover money damages for discriminatory FAPE denials.

a. Courts seem particularly reluctant in concluding that a violation of the IDEA appropriate education requirement supports a claim for monetary damages for violation of the Section 504 appropriate education requirement, with many demanding, for example, a showing of deliberate indifference to make out a damages claim for denial of meaningful access

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[33] *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023).
[34] *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 82 IDELR 213 (2023).
[35] 536 U.S. 181, 37 IDELR 31 (2002).
[36] In *Cummings*, in a concurring opinion, Justice Brett Kavanaugh suggested that a change in the laws may be necessary – "Congress, not this Court, creates new causes of action." *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562, 122 LRP 14381 (2022).

to education in violation of the Section 504 regulation.[37]

b. Many courts apply a more stringent standard – whether there is a showing of bad faith or gross professional misjudgment, not requiring a showing of discriminatory animus.[38]

c. The threshold for a FAPE claim is much lower.

E. How *Perez* impacts other recognized exceptions – like challenges to school district policies, systemic practices, claims of irreparable harm, or futility – to IDEA's exhaustion requirement, remains to be seen.

F. There is a distinction between reimbursement and damages. Parents must still exhaust IDEA to recover out of pocket educationally related expenses that have been paid or incurred in the education of their child with a disability. *Perez* only speaks to damages to compensate an individual for an injury to his person, property, or right.

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[37] *See e.g.*, *Mark H. v. Hamamoto*, 620 F.3d 1090, 55 IDELR 31 (9th Cir. 2010); *Bradyn S. v. Waxahachie Indep. Sch. Dist.*, No. 3:18-CV-2724-L, 2019 WL 3859301, 74 IDELR 281 (N.D. Tex. 2019) (dismissing Section 504-ADA claim based on failure to comply with IEP and provide appropriate behavioral and disciplinary interventions, on ground that allegations did not give rise to inference of anything greater than negligence, but granting leave to amend).

[38] *See, e.g., C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 63 IDELR 1 (2d Cir. 2014) ("Courts in this Circuit have recognized that a Section 504 claim may be predicated on the claim that a disabled student was denied access to a free appropriate education, as compared to the free appropriate education non-disabled students receive. Such a claim, however, requires proof of bad faith or gross misjudgment.") (citations and internal quotation marks omitted); *D.A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 55 IDELR 243 (5th Cir. 2010) (upholding IDEA claim while affirming dismissal of Section 504 claim, stating, "We concur that facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under § 504 or ADA against a school district predicated on a disagreement over compliance with IDEA.").

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IV. PRACTICAL CONSIDERATIONS

A. *Perez* reminds us that, while identifying the issues to be litigated is a key prehearing function for the hearing officer, understanding the remedy tied to such claims is equally important, particularly if the hearing officer must apply *Fry*.

B. *Perez* sought compensatory damages under the ADA. *Perez* did not expand the authority of the IDEA hearing officer to hear ADA claims (or Section 504 for that matter).[39] An unintended consequence of *Perez*, however, may be that parent attorneys will file IDEA and ADA/504 claims in tandem as a means to negotiate a better settlement by putting school district attorneys on notice in the IDEA complaint of the potential ADA/504 claims. In the prehearing conference, however, the hearing officer must make clear what can and will be heard.

C. The standard of proof required to prove discriminatory denial of FAPE is a high one. IDEA hearings, however, should not be used to assess the viability of potential claims for money damages, or to obtain "cheap" discovery prior to filing in court. The hearing officers must ensure that the hearing process is used for its intended purpose – to resolve disputes between parents and school districts regarding the identification, evaluation, provision of FAPE, and placement of a student with a disability or student suspected of having a disability.

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[39] In a limited number of States, hearing officers may hear both IDEA and Section 504 claims.

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THURSDAY, SEPTEMBER 28, 2023

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AUGUST 28, 2023

I. INTRODUCTION

These materials list and describe significant cases and selected U.S. Department of Education guidance materials on topics of concern to Individuals with Disabilities Education Act due process hearing decision makers. The period covered is approximately July 2021 through August 2023, with the newest cases and other information since February 2023 highlighted in yellow. The primary focus is on full, precedential opinions of the federal courts of appeals and federal guidance that break new ground and have special bearing on matters likely to arise at due process hearings. However, a number of particularly noteworthy unpublished federal appellate opinions and decisions from district courts and other sources are also included. Cases concerning issues not of primary importance to IDEA due process decision makers, for example, those that focus on administrative exhaustion, class action status, Section 504-Americans with Disabilities Act claims, and attorneys' fees awards, are omitted. Under each heading, the cases are arranged by level of authority, then date within each level.

II. CHILD FIND

Ja. B. v. Wilson Cnty. Bd. of Educ., 61 F.4th 494, 82 IDELR 191 (6th Cir. Mar. 6, 2023)
This case involved a student with behavioral issues who moved to Tennessee in 2017 and whose parents told the eighth-grade counselor at his new school of the student's background and needs. After two weeks of attending the new school, the student received an in-school suspension, and the parents gave the school a letter with more information about the student's history. On September 8, they asked the school for intervention due to student's bad grades and refusal to do homework. The parents and the school conferred, but the student received another in-school suspension, and was then hospitalized. The parents requested a Section 504 plan or an IEP, but the school said that the Section 504 process would need to come first and the school would apply a

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tiered intervention program. The student received another in-school suspension, then was out-of-school suspended, then eight days later arrested by a school resource officer, although charges were dropped. Nevertheless, the student was again suspended pending a hearing to determine if he should be placed in an alternative school, and parents withdrew the student and began to homeschool him, even as they met with the school to draw up a Section 504 plan. The parents ultimately enrolled the student in a private school for the 2018-19 and 2019-20 school years. The court affirmed an ALJ determination and district court decision that the school district did not violate its child-find obligation by failing to evaluate the student while he was enrolled in the school, nor after he withdrew from school and was homeschooled. The court reasoned that the school took some steps to support the student and undertook a response-to-intervention process. The court stressed that the student was enrolled in the district for only a brief time and did not have a history of having been identified for special education. The court said: "It is true that WCS was neither as communicative, nor responsive, nor proactive as it could have been to meet Ja. B.'s needs and to respond to his parents' concerns. Still, on this record, we cannot say that WCS officials 'overlooked clear signs of disability and were negligent in failing to order testing, or [had] no rational justification for not deciding to evaluate.'" *Id.* at 504 (quoting *Board of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007)).

D.T. v. Cherry Creek Sch. Dist. No. 5, 55 F.4th 1268, 82 IDELR 78 (10th Cir. Dec. 20, 2022). Here the court affirmed a district court ruling that a student with depression was not denied a free, appropriate public education when he was not referred for an evaluation and found eligible for special education until after he made a school shooting threat during the first semester of his junior year in high school. In December of that year, he was found eligible under the serious emotional disability category and provided an IEP. The student began with the district in his freshman year and performed well academically. In January of that school year, his mother emailed his school counselor with concerns about his well-being, however, describing him as depressed and having trouble adjusting to the school. His grades declined in sophomore year, including a D in Honors English in fall and a failing grade in that course in spring, though he earned a B+ in a summer make-up non-honors English class. That spring, his mother informed the counselor of the student's suicidal ideation and a possible suicide attempt, as well as his suspected drug use. The school provided referrals to private therapists. The mother again contacted the counselor on September 14 of the student's junior year. After leaving home late at night, the student was discharged from a ten-day hospitalization with diagnoses of major depressive disorder and anxiety disorder. The school devised a re-entry plan; the mother informed the school that the student was using marijuana; and on October 11 the mother asked that the student receive a Section 504 plan. The school said that would take time, and the mother met with the school on October 13 to ask for immediate academic supports. The student did not respond to the school counselor's efforts to have him meet with a teacher specializing in strengthening students' organizational skills. Finally, on November 10, a student reported that the plaintiff student threatened to shoot up the school. A threat assessment meeting occurred, and soon the student was again hospitalized. He was suspended and then expelled from school. The school found the student eligible under IDEA on December 13. In spring, he transferred to a public school in another district. The mother filed a due process

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complaint alleging a child find violation. The hearing officer found no violation and the district court upheld the decision. In affirming, the court of appeals stated that "As applied to D.T., three unmet elements of an SED under Colorado's ECEA [Exceptional Children's Education Act] indicate the District's child find obligation was not breached. Until November 2017, D.T.'s emotional dysfunction had not manifested in the school environment; the District actively engaged him with alternative interventions; and his struggles were readily explainable by acute, non-academic stressors." *Id.* at 1275. The court said there was little in-school manifestation of the emotional disturbance until the shooting threat, despite the difficulties at home. The court did not consider the declining grades and social difficulties to be the kind of pervasive characteristics needed for the emotional disturbance identification. The court also stressed positive academic outcomes of school-based interventions. In addition, there were reasons, including the difficulty of the student's original schedule and drug use, for the academic problems. Hospitalization was said to be only one factor in determination of disability.

J.M. v. Summit City Bd. of Educ., 39 F.4th 126, 81 IDELR 91 (3d Cir. July 1, 2022). This case involved a student denied special education services in February 2016, then diagnosed with autism in April 2017 and offered special education at that time. At the time of the initial denial, the student was six years old and attending first grade. The parents challenged the denial at due process but were not successful there or on appeal to the district court. The court of appeals affirmed the district court's ruling in favor of the district. The student had displayed behavior problems at day care towards the end of kindergarten, leading to his removal from day care. A clinical psychologist-school neuropsychologist retained by the parents evaluated the student before first grade, but the parents did not inform the school district of the problems the previous school year or the fact that the student was being privately evaluated when the student enrolled for first grade. The school staff observed behavior problems by mid-September of first grade and twice removed the student from the classroom for disruptive behavior. After one incident, the staff contacted the student's parents and learned of the behavior problems in kindergarten. A multidisciplinary school team met in late September to identify classroom interventions, including a behavior plan with rewards and other features, as well as academic interventions comprising extra reading lessons four days a week and an after-school skills program twice a week. The private evaluator completed a report in October, finding cognitive strengths but weakness in inhibition and problems with attention and impulsivity. The report said the student was a diagnostic challenge, particularly given his age, but found a language disorder, a social communication disorder, and a specific learning disorder. The report gave "rule-out" diagnoses for autism and ADHD, saying that they were not diagnosed but not ruled out. The report made various recommendations, which the district adopted by February of the first-grade year. In October of the first-grade year, the parents had requested the district to evaluate the student for special education, and the district conducted a multidisciplinary evaluation after a November meeting. While the evaluations were being completed, the intervention team met and concluded the interventions were working both as to behavior and academics. At the completion of the evaluation in February of the first-grade year, the district concluded that the student was not eligible for special education, noting the positive effects of the interventions. The parents and private evaluator disagreed, and the private evaluator conducted additional testing and concluded in the

middle of the following school year that the student should be diagnosed with autism and ADHD. The district then referred the student to a psychiatrist who diagnosed him with autism and ADHD. Finally, in April 2017, the district determined that the student was eligible for special education on the basis of autism and began developing an IEP, which it completed in August 2017, shortly before third grade began. The parents enrolled the student in a private school in July 2019. The parents' due process complaint, filed on May 25, 2016, when the student was in first grade, alleged a child-find violation. In affirming the hearing officer and the district court, the court of appeals stated that an IDEA claim may be based on a child-find violation, but said no violation had been shown for failure to diagnose a specific learning disability. Although school districts may use a severe-discrepancy model for SLD, the defendant district determined that a 22-point difference between achievement and intellectual ability constitutes a severe discrepancy, and the student had discrepancies in three areas greater than 22 points, the court said the district did not have to rely on the severe discrepancy and could instead rely on response to intervention, which it said supported the conclusion there was not SLD in light of the student's progress. The court declared the district did not violate child-find by not evaluating the student further for autism and ADHD, saying the private evaluator's rule-out diagnosis was not sufficient to require the district to evaluate, and it rejected a bright-line rule that a rule-out diagnosis should trigger the duty. The evaluations and response-to-intervention progress were deemed sufficient. The court said that the district court was within its discretion to exclude evidence of facts that arose after the initial determination of ineligibility on February 8, 2016, including evaluations from July 2016 to February 2017, noting cases articulating a snapshot rule and stating, "evidence of a child's behaviors or test results outside of that snapshot – such as reports that did not exist when a school district decided not to evaluate a child or when a school district denied eligibility – are not relevant to whether the school district breached its child-find obligations." *Id.* at 144. The court said some facts arising after an adverse eligibility determination are relevant, notably as to whether the child has a disability and how long or to what degree the district denied FAPE. The court said the district court did not err in deferring to the hearing officer's credibility determinations, and that other claims raised by the parents were outside the scope of the due process complaint. The court further rejected the parents' claim of a Section 504 violation. Greenaway, J., dissented, contending that application of snapshot rule to evidence in the case was not proper, and collecting cases saying post-hoc evidence must be considered on eligibility determinations as long as the use of the evidence does not amount to second-guessing district decisions on the basis of information to which it could not possibly have had access.

J.N. v. Jefferson Cnty. Bd. of Educ., 12 F.4th 1355, 79 IDELR 151 (11th Cir. Sept. 10, 2021). This is the case of an eighth grader who was diagnosed with ADHD at an early age. When she started sixth grade, her mother noted the diagnosis on her enrollment form. During sixth grade, the student had one disciplinary incident that led to what the court called a brief period of alternative schooling, and she received passing grades, though with Cs in math. Her difficulties worsened in seventh grade, when she began receiving Cs in English and science and struggled in math. Her teachers complained about her talking in class, seeking attention, and shouting across the room to her twin sister. In eighth grade, she received Ds in math and misbehaved, though the court noted

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that the math teacher testified that the material was difficult and many students underperformed. The student's mother asked the math teacher if the school had prepared an IEP for the student and was told it had not, but that the student was receiving extra help in class and reviews during a free school period. On October 3 of the eighth-grade year, the school convened what it termed a problem solving team of teachers and administrators to coordinate additional support or accommodations. In December, the student was referred for special education evaluation. Five days after the referral, the parent filed a due process complaint, alleging failure to identify and evaluate in all areas of suspected disability and failure to develop and implement an IEP, and requesting compensatory education. The due process hearing officer dismissed the complaint as premature. The evaluation led to the student being found eligible for special education, and an IEP was provided in March. The parent appealed the dismissal of the complaint to district court. The court vacated the dismissal, remanding for a determination whether the defendant violated its child-find obligations. On remand, the hearing officer found that the defendant violated the child-find obligation by overlooking clear signs of disability, but the decision did not award compensatory education or any other remedy because the parent did not produce evidence on the student's need for it apart from the parent's opinion. Both sides appealed, but the court affirmed the hearing officer, and in addition denied the parent attorneys' fees. In affirming, the court of appeals said that the district court was well within its discretion in concluding that the parent had not shown that the child-find violation resulted in educational deficits that could be remediated with compensatory services. The court said a procedural violation is not necessarily a substantive harm, so the parent needed to show that the student's education would have been different but for the procedural violation. It said the parent did not show that the services the school provided were worse than what the student would have received had the school developed an IEP more speedily. Low grades did not show that the education was deficient. The student did receive interventions in seventh and eighth grades and the school worked to resolve the behavior problems. The court declared, "without any evidence of how an earlier IEP would have helped Molly, what services she should have received, or what learning deficits she suffered as a result of not having an IEP, we cannot say that the district court abused its equitable authority by failing to craft its own compensatory plan." *Id.* at 1368. The court also affirmed denial of attorneys' fees.

Independent Sch. Dist. No. 283 v. E.M.D.H., 960 F.3d 1073, 76 IDELR 203 (8th Cir. June 3, 2020), *cert. denied*, 142 S. Ct. 67 (Oct. 4, 2021). This is the case of a 16-year-old high school student with diagnoses that included anxiety disorder, school phobia, autism with obsessive-compulsive traits, panic disorder with agoraphobia, ADHD, and severe recurrent major depressive disorder. The student frequently was absent from school but performed well academically when there. In eighth grade she stopped attending altogether and was admitted to a day treatment program. School personnel did not refer her for special education, but instead disenrolled her, then in ninth grade reenrolled her, then disenrolled her yet again when she was readmitted to a day treatment program, then in tenth grade disenrolled her twice for absences. After she had a second admission to an inpatient program, her parents requested a special education evaluation. The student reenrolled for eleventh grade, and the district conducted an evaluation. Before completion of the evaluation, the district offered an alternative

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learning environment and online program, but the student attended only two days of the alternative program. On the completion of evaluation, the district found the student not IDEA-eligible under the autism, emotional disturbance and other health impairment categories. The parents obtained an independent neuropsychological exam and partial functional behavioral analysis and invoked due process. The court of appeals affirmed the ALJ decision in favor of the parents and reversed the district court's vacating of the compensatory education remedy imposed by the ALJ. The court of appeals supported its decision in favor of the parents by stating that the district evaluations were deficient under state law due to the absence of a systematic classroom observation and an FBA, and that the student's absenteeism did not excuse the failings when the student could have been evaluated away from school. The court held that the student met the emotional disturbance and other health impairment definitions. The court reasoned that the student's mental health problems caused the absenteeism. The court stated at 1082: "Despite this evidence, the District maintains that the Student is simply too intellectually gifted to qualify for special education. The District suggests the Student's high standardized test scores and her exceptional performance on the rare occasions she made it to class are strong indicators that there are no services it can provide that would improve her educational situation. The District confuses intellect for an education. . . . . The IDEA guarantees disabled students access to the latter, no matter their innate intelligence." The court went on to hold that the district failed its child-find obligations when it was aware no later than the spring of 2015 that the student stopped attending school due to mental health issues, and that limitations did not bar the claim because the failure to evaluate extended into the period two years before the filing of the due process complaint at the end of June 2017. The court affirmed the award of reimbursement for the independent evaluations and privately provided educational services, and reversed denial of payment for private compensatory services, stating at 1084-85: "Whether the District is able to provide the Student a FAPE prospectively is irrelevant to an award of compensatory education. Because of this backward-looking nature, the purpose of any compensatory-education award is restorative–and the damages are strictly limited to expenses necessarily incurred to put the Student in the education position she would have been had the District appropriately provided a FAPE. . . . The administrative record supports the ALJ's conclusion that the services of a private tutor are appropriate until the Student earns the credits expected of her same-age peers." On remand, the district court rejected the parents' plan for cash payment for ongoing compensatory services as excessive and also rejected the district's plan for services as deficient; the case was referred for mediation, No. 18-935, 2021 WL 1732256, 78 IDELR 254 (D. Minn. May 3, 2021), but the parties did not reach a settlement, and the court ultimately entered an award of private tutoring expenses as well as $360,945.05 in attorneys' fees, No. 18-935, 2022 WL 1607292, at *3, 81 IDELR 36 (D. Minn. May 20, 2022) ("(1) Parents are entitled to a judgment reinstating the ALJ's award of compensatory education services; (2) the District continues to be obligated to provide E.M.D.H. a FAPE that includes compensatory educational services that include private tutoring until E.M.D.H. earns the credits expected as her peers and only so long as E.M.D.H. suffers a credit deficiency; and (3) therefore, E.M.D.H. is entitled to these continued services, to be paid for by the District and, to the extent that E.M.D.H. can provide documentation, reimbursement for compensatory education services already

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paid for by Parents. To the extent that E.M.D.H. requests any additional monetary award, that request is respectfully denied.").

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

III. EVALUATION AND ELIGIBILITY

Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., 64 F.4th 569, 83 IDELR 1 (4th Cir. Apr. 6, 2023). In this case, the parent of a student who had been diagnosed with autism spectrum disorder by a psychologist in July 2018 requested from the school district to evaluate the student for an IEP. The district evaluated the student on adaptive behavior, vision and hearing, education, speech-language, occupational therapy, and autism rating scales. The district found the student not eligible, saying that he did not manifest at least three of the four impairments required under state policies to qualify as a student with autism needing special education. The parent requested repeats of some assessments and additional assessments pertaining to psychological, assistive technology, and behavior/functional issues. The parent also initiated a state review process, alleging seven violations of IDEA and raising at oral argument before the ALJ a

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claim of disenfranchisement of the parents. The ALJ granted summary judgment against the parent on all claims. The state review officer and the district court affirmed. The court of appeals affirmed the district court. The court said it had jurisdiction for the appeal, even though the district courts do not, according to Fourth Circuit caselaw, have jurisdiction under IDEA to review IDEA state administrative complaints to permit them to reverse or vacate those decisions. The court said that the district court did have power to order compensatory education services. Nevertheless, the plaintiff's case failed on the merits. The parent did not explain how any procedural defects of the administrative process invalidated the findings, and the court ruled that the claim of a child-find violation failed. The court said that convening the IEP team and comprehensively evaluating the student's eligibility was sufficient for child-find. A parent's disagreement with the evaluation was not the same as a district not conducting the evaluation. The parent, moreover, did not establish that the eligibility determination was wrong based on allegations of deficits, lack of meaningful progress, and continuing problems of inattentiveness. The court said that the district was not required to defer to the opinion of private evaluators. Although the evaluation took 110 days rather than the state maximum of 90, there was no showing that the delay denied FAPE. Failure to conduct a learning disabilities evaluation did not matter when the evaluation that was conducted enabled the team to conclude that the student did not meet the district's criteria for a specific learning disability. The parent did not show denial of FAPE from failure to conduct functional behavior and assistive technology evaluations, according to the court.

D.O. v. Escondido Union Sch. Dist., 59 F.4th 394, 82 IDELR 125 (9th Cir. Jan. 31, 2023). This decision reversed a district court ruling that the school district denied FAPE to the student by its conduct in learning of a private evaluator's diagnosis of the student's autism on December 5, 2016, but not proposing to assess the student for autism until April 2017. In April 2017, the mother filed a complaint alleging that the delay in assessing the student for autism denied the student FAPE. Although the school district proposed the evaluation for autism in April 2017, the mother did not consent to the assessment until August 2017. The student's mother did not provide the report to the district until July 5, 2017. The ALJ ruled that the delay in assessing the student for autism did not constitute a procedural violation of IDEA nor deny FAPE. The district court reversed in relevant part, but the court of appeals reversed the district court. The student had received special education since September 2012, including substantial mental health and behavioral intervention services, but continued to manifest aggressive behavior and other problems. He was hospitalized for psychiatric issues, including hallucinations. After the hospitalization, the student's mother asked his therapist to assess him for autism and the therapist did so. The district conducted an additional assessment in October 2016 but was found to be unaware of the suspicion of autism, and staff reported behavior inconsistent with autism. The therapist stated in an IEP meeting on December 5, 2016, that the student appeared to meet the criteria for autism based on the testing the therapist did. The ALJ held that the therapist's statement put the district on notice of the suspected disability of autism. But the ALJ also found that assessment instruments for autism spectrum disorder restrict how often any particular assessment can be readministered to a patient and still be valid and reliable, and the district did not want to use the same instruments used by the therapist,

so it needed the therapist's report listing the instruments used, which in turn necessitated consent from the mother. In finding for the district, the court of appeals reasoned that the delay did not violate California's statutory deadline, as there was no written request for assessment until April 2017, nor the federal deadline, as there was no actual request for reevaluation of the student until April 2017. Moreover, some delay is permissible, and the court noted reasons that the district was dubious about the autism diagnosis. It also noted that the district waited for the report before assessing, so as not to improperly repeat using testing instruments. The court found the school district's efforts to get the report were more than what the district court called minimal. The district promptly acted after getting the report. The court further ruled that a delay in assessment is not a per se denial of FAPE, and any delay by the district in this case did not deprive the student of any educational benefit, nor educational opportunity. Once the district did its autism assessment, the placement remained the same. Nor did the delay seriously infringe the mother's opportunity to participate in the IEP process. On this point, the court stressed the mother's delay in providing consent. The court also rejected a mootness argument. Judge Sanchez dissented in part.

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

Crofts v. Issaquah Sch. Dist. No. 411, 22 F.4th 1048, 80 IDELR 61 (9th Cir. Jan. 12, 2022). In this case, the court affirmed a district court decision that had affirmed an ALJ determination that the school district did not violate the IDEA by evaluating the student under the category of specific learning disability rather than for the specific disability of dyslexia. The parents requested the evaluation the summer before the student's second grade year and had her evaluated by a retired school psychologist, who concluded that she met the classic profile for dyslexia. The school district began its evaluation at the start of the second-grade year. The evaluation cited the outside evaluator's assessments and the district's own assessments, and concluded that the student was eligible for IDEA services under the specific learning disability category, which includes dyslexia. The second-grade IEP created by the district offered her 40 minutes of reading and writing per day in a special education classroom, along with accommodations in general education. Both the general and special education teachers used a variety of reading programs, including ones with multisensory approaches. In February, the parents asked for another IEP meeting, citing the student's lack of progress in meeting her IEP goals and specifically requesting, inter alia, that her teachers be trained in and use the Orton-Gillingham method. The district denied the request to change the instructional method. At the start of the third-grade year, the district prepared new goals, increased the special education instruction to 60 minutes per day, and revised the student's general education accommodations, but it denied a renewed request for Orton-Gillingham and a request that the disability category be changed to dyslexia. Although the student had not met her second grade IEP goals, she had progressed toward them. By December of third grade, the student had moved up several levels in the district's evaluations for reading. The parents requested an independent educational evaluation at the third-grade IEP meeting, but the district denied it and invoked due process. The parents filed for due process as well, alleging denial of FAPE for second and third grades. The ALJ held that the district evaluation was appropriate, as was the IEP, and that the district did not have to specifically assess the student for dyslexia to determine her educational needs. The

district court affirmed. In affirming that decision, the Ninth Circuit found that the ALJ properly weighed the testimony of the parent's expert witness, who had not personally evaluated the student or spoken with her teachers. Moreover, the expert lacked special education teaching credentials and experience writing IEPs. The court said the district did not violate the obligation to evaluate the student in all areas of suspected disability, and that the allegation of failure to evaluate for dyslexia made a distinction without a difference since the evaluation included areas like reading and writing that dyslexia affects. On the use of Orton-Gillingham versus other methods, the court ruled that school districts are entitled to deference on methodology decisions. It said the parent did not demonstrate that Orton-Gillingham was necessary for the student to receive appropriate, individualized instruction. The IEP goals were appropriate, and the student made progress.

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

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

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students in 21-22 age range, and these programs meet the IDEA concept of public education. The court further reasoned that an award of compensatory education was a proper remedy for failure to provide education, noting an earlier Second Circuit case, *Lillbask v. Connecticut Dept. of Educ.*, 397 F.3d 77 (2d Cir. 2005), which interpreted the IDEA age range in Connecticut as extending to age 22.

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

Hood River County Sch. Dist. v. Student, No. 3:20-CV-1690-SI, 2021 WL 2711986, 79 IDELR 40 (D. Or. July 1, 2021), *appeal dismissed*, Nos. 21-35616, 22-35197, 2022 WL 3073835 (9th Cir. June 6, 2022). Here the court affirmed in part and reversed in part an ALJ decision that that the district denied the student FAPE, determining that the ALJ did not err in awarding compensatory education for the full 2018-19 school year on the basis of a due process complaint filed on March 20, 2019, when the ALJ concluded that the conduct of the school district before the filing of the complaint deprived the student of FAPE for the full school year. The court deferred to credibility findings of the ALJ as to the district's purported reasons for delay in an autism evaluation for the student during the 2016-17 school year and nine months of 2017-18 school year. The court commented on the ALJ's careful discussion of the evidence. The court agreed with the ALJ that progress reports concerning the student did not provide sufficient information to the parents when the goals and objectives in the IEP were stated in quantitative terms, but the reports lacked sufficient data to determine progress on the goals and objectives. The court further held that a parent need not object to an IEP or IFSP at the time of adoption to challenge it later. The court affirmed the decision that the school should have conducted an FBA in light of the danger the student's aggressive behavior posed when dysregulated. The court also agreed with the ALJ that the district failed to implement the May 2018 IEP in the first days of kindergarten by failing to provide support for transitions and not having an assistant and a sensory menu. Instead, the district ejected the student from the general education classroom. The district also lacked a basis for shifting the student to a more restrictive placement in 2018-19 by shortening the student's school day to two hours. The court affirmed an award of the entire school year of kindergarten instruction and related services as compensatory education, 900 hours to be spread out over time. The court, however, overturned an award of a new FBA, noting that one took place five months before the filing of the due process complaint.

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

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

Return to School Roadmap: Child Find Under Part B of the Individuals With Disabilities Education Act, 79 IDELR 140 (OSERS Aug. 24, 2021). In Question B-3, the agency asked: "Can an LEA require that all students participate in general education multi-tiered systems of support (MTSS) or other general education interventions prior to referring a child for special education?" The answer was: "No. MTSS is a comprehensive continuum of evidence-based, systemic practices to support a rapid response to students' needs with regular observation to facilitate data-based

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instructional decision-making. Many LEAs have implemented successful MTSS frameworks, thus ensuring that children who simply need short-term and targeted, or intensive interventions are provided those interventions, IDEA, however, does not require, or encourage, an LEA to use an MTSS approach prior to a referral for evaluation or as part of determining whether a child is eligible for special education or related services."

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

V. INDEPENDENT EDUCATIONAL EVALUATION (IEE) AT PUBLIC EXPENSE

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

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VI. IEPs, IEP IMPLEMENTATION, AND RELATED

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

Capistrano Unified Sch. Dist. v. S.W., 21 F.4th 1125, 80 IDELR 31 (9th Cir. Dec. 30, 2021), *cert. denied*, 143 S. Ct. 98 (Oct. 3, 2022). This case involved a first grader whose parents believed she was not receiving adequate support throughout the school day. They filed for due process and enrolled her in private school. They told the district the student would stay in private school for first and second grade and sought tuition reimbursement for both school years. That due process complaint was subsequently withdrawn, and the contested first-grade IEP expired. When the student was in second grade, the parents filed a new due process complaint requesting reimbursement. Ruling on the second due process complaint, the ALJ found in favor of the district on issues related to the student's kindergarten year, a decision that was not contested before the court. The ALJ ruled for the parents on other issues, namely that the district denied the student appropriate education by failing: to develop appropriate first grade IEP goals, making a suitable offer of placement and services, filing for due process to defend the first grade IEP, and having a current IEP in place at the start of the second-grade year. On review, the district court ruled that the district failed to offer appropriate placement and services for first grade, a decision that the district did not further challenge. The district court found for the district on the other issues. Although it said the district did not have an obligation to prepare an IEP for second grade, it affirmed the ALJ's order of reimbursement for that year. The district appealed the reimbursement for that year and the parents cross-appealed on the other issues. The court of appeals ruled that the first

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grade IEP had appropriate goals and that district adequately considered the parents' concerns and recommendations. The IEP's goals were sufficiently measurable. The district's use of existing data was sufficient. Interpreting California law, the court said that the district had no obligation to file for due process unless they determined that a proposed special education component to which the parent did not consent is necessary to provide the student with FAPE. There was no such determination in this case. Finally, the court ruled that once the parents placed the student in private school, the district did not have an obligation to develop an IEP. Although the obligation to provide an IEP applies to all students with disabilities within the jurisdiction, IEPs do not have to be provided if the student is placed in private school by the parents. Instead, students in the private schools need only be offered a services plan, and the parents do not have an individual right to challenge it. This applies even if a claim for reimbursement has been filed. The court relied on 20 U.S.C. § 1412(a)(10), and said it distinguishes students placed in private schools by districts from those placed by parents, and provides for reimbursement for a subset of those placed by parents. The students placed by parents, then, do not have a continuing entitlement to an IEP unless the parents ask for one. The court affirmed and remanded the case to the district court for consideration of attorneys' fees. *See also id.*, Nos. 20-55961, 20-55987, 2021 WL 6196698, 80 IDELR 63 (9th Cir. Dec. 30, 2021) (reversing award of reimbursement for tuition and services for second grade, but not reversing award for occupational therapy services).

*Board of Educ. of Yorktown Cent. Sch. Dist. v. C.S.***,** 990 F.3d 152, 78 IDELR 91 (2d Cir. Mar. 3, 2021). In this case, a panel of the Second Circuit ruled that, contrary to some language in *R.E. v. New York City Department of Education*, 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012), a school district is not permitted to unilaterally amend an IEP during the thirty-day resolution-session period following a parent's filing of a due process complaint. The case involved a student diagnosed with Tourette's syndrome, ADHD, developmental coordination disorder, and central auditory processing disorder, who was classified as learning disabled. The relevant school year was for the student's seventh grade, 2016-17. The student had enrolled in a specialized private school for her sixth-grade year, and the parents failed in a due process hearing and state-level review to obtain tuition for that year. In June of the sixth-grade year, the district held a meeting to develop the IEP for seventh grade; there was a dispute later over whether the class the district proposed at that meeting was one with a 15:1+1 ratio or a 12:1+1 ratio. The parent visited the public school and reported that teachers said the ratio was 15:1+1. The school had no 12:1+1 classes. The district did not provide a written IEP at the June meeting nor after the school visit. On August 17, the parents gave written notice that they intended to enroll the student at the private school for her seventh- grade year. The notice spoke of the need for a small class size and the absence of services and supports the parents felt the student needed on the basis of the evaluation. On August 30 or 31, the parents received a written IEP from the district stating that the student would be placed in a 12:1+1 class. The student began seventh grade at the private school on September 6. The parents filed for due process on September 26, 2016. The complaint cited the uncertainty over the ratio, among other issues. On October 7, the parents attended a resolution session with district personnel, and were told the IEP mistakenly said 12:1+1 when it should have said 15:1+1. The parents and district did not agree on a settlement at the resolution session. The district did not send the parents a revised IEP

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with the 15:1+1 ratio on it until October 27, which was 31 days after the date of the due process complaint. The parents said it was not delivered until November 1, the day they signed a contract with the private school for the school year. The IHO concluded that procedural errors, including the listing of a ratio in the August IEP that the district did not intend to implement, did not deny the student FAPE. The IHO ruled on the substantive issues that the October IEP's 15:1+1 ratio and other features offered the student FAPE. The SRO reversed, noting that the October IEP was outside the 30-day resolution period and finding that the August IEP denied FAPE because the district was not able to implement it, as written, at the start of the school year. The private school was an appropriate placement and equitable considerations did not weigh against the parents, so reimbursement was ordered. The district court affirmed the SRO, and the court of appeals affirmed the district court. In affirming, the court of appeals made clear that it disagreed with the premise of the school district, the IHO, the SRO, and the district court that the IDEA allows districts to unilaterally amend a student's IEP during the 30-day resolution period, in accordance with a dictum in *R.E.* that the resolution period gives districts 30 days to remedy IEP deficiencies without penalty. *R.E.*, 694 F.3d at 188. The *Yorktown* court declared: "We now hold that, although the IDEA permits a school district to propose changes to an IEP during the resolution period, it does not permit a district to unilaterally amend an IEP during this period. Consistent with our prior interpretations of the statute, this holding ensures that parents who decide to reject a proffered public placement, place their child in a suitable private school, and seek reimbursement as part of their due process complaint can rely on the contents of their child's written IEP when making the decision to do so. . . . To the extent that dicta in *R.E.* suggested otherwise, we now clarify the scope of the Court's ruling in that case." *Yorktown*, 990 F.3d at 167. The court noted that the school district did not contest that the unamended IEP denied the student free, appropriate public education for 2016-17 because the school district did not have the specified class, and so affirmed the judgment of the district court in favor of the parents.

V.A. v. City of New York, No. 20-CV-0989(EK)(RML), 2022 WL 1469394, 81 IDELR 46 (E.D.N.Y. May 10, 2022). The parent sought tuition reimbursement for her daughter for the 2018-9 school year, when the student was in eighth grade. The public school system had designated the student as having a specific learning disability in reading back in 2012. In seventh grade (2017-18), the student attended a private school, and the parent took on the obligation of paying tuition. The public school system's IEP for the following school year, 2018-19, provided for a 12:1+1 class for academics in a nonspecialized public school as well as various related services and supports. The projected implementation date was September 3, 2018, but the 2018-19 IEP did not identify any specific school for the student. The defendant maintained that it mailed a "school location letter" to the parent on July 12, 2018. The parent maintained that she never received the letter or any other notice of the location of the placement. The copy of the letter produced by the defendant at hearing had the date of September 9, 2018, a Sunday four days after the start of the school year. The defendant said that the date on the copy was due to a computer programming error: the student information database was said to generate dates based on the start of the school year, which the staff could not modify. But, as the court pointed out, September 9 was not the start of the school year, so "The City thus has offered no logical explanation for why September 9 was printed on

the letter." *Id.* at *2. The defendant relied on testimony from a placement officer that the letter was mailed, and a document from the computerized student database. The parent said that since she had no information about the school designation, she arranged for placement of the student at the private school the student had attended the previous year. In August (either August 17 or 19), she sent a letter to the committee on special education stating her intention to place the student at the private school starting September 4 and seek reimbursement. She enrolled the student there, acquiring an obligation to pay $41,659, plus or minus any adjustment that the New York State Education Department would make in the state-approved rate. The parent filed for due process on September 28, 2018. The IHO decision rejected the parent's contention that the site offer letter had never been received and concluded that the IEP was substantively adequate. The SRO affirmed, acknowledging that "in light of the immense ... size of the district in this case, it is reasonable to hold that ... the district was required to notify the parent where the IEP services would be implemented before the IEP went into effect as part of its obligations to implement the student's services," *id.* at *4 (quoting SRO decision), but concluding that a presumption of mailing and receipt applied and the IHO was entitled to rely on the placement officer's testimony about mailing the letter. The district court vacated the SRO decision. It noted that the school system had the burden of establishing the validity of its plan for the student, and:

> Given the uncertainty surrounding the mailing of the school location letter, the City failed (at the first step) to demonstrate that its plan provided K.A.D. with a FAPE — at least on a timely basis. Simply put, a school district that fails to tell a parent where it proposes to send her child to school cannot carry its burden of demonstrating that it proposed a valid plan for that student.

Id. at *5. The case was remanded for a decision whether the parent's unilateral placement was appropriate to the student's needs and whether the equities favored relief. As the court noted, the federal regulations require that an IEP include the location of the services to be provided, 34 C.F.R. § 300.323(a), and even if it is not a per se violation for the IEP to omit the name of the school if the information soon follows, the information cannot come so late that it impedes the parent's ability to participate meaningfully in the school selection process. The court collected cases in support of that proposition. Although a presumption of receipt of a letter applies under New York law when the record establishes office procedures followed in the regular course of business under which correspondence is addressed and mailed, the presumption did not apply here. The court cited the lack of testimony of an independent recollection on the part of the placement officer of mailing the letter when she mailed many such letters in the course of the year. The court also noted the September 9 date of the letter – inconsistent with the claim that letters were dated for the start of the school year – as well as the absence of relevant information in the database log. Under New York law, various additional evidence in support of the claim of actual mailing was also insufficient, notably because of the lack of specific recollection of mailing the letter on the part of the placement officer. The absence of notice meant that the parent could not arrange a visit to the proposed placement or otherwise meaningfully participate in the school selection process. Policy concerns did not compel deference to the SRO in this case, where the

notice question turned on New York law about presumptions of mailing and receipt. The court found remand on the appropriateness of the private placement and the equities to be proper. The SRO did not reach those issues, and the court found that the record did not support the IHO's findings that the private placement failed to offer sufficient remediation and was not slowly enough paced. The evidence the IHO relied on as to the student's reading level was from 2017 and was contradicted by standardized testing from December 2018. Moreover, eventually the defendant itself placed the student at the private placement and funded the tuition, at least as of 2021. The private placement provided all or most of the services in the IEP. The court said the SRO should make the decision about the appropriateness of the private placement in the first instance.

Albuquerque Pub. Schs. Bd. of Educ. v. Armstrong, No. 1:21-CV-00396, 2021 WL 5881996, 80 IDELR 42 (D. N.M. Dec. 13, 2021), *aff'd*, No. 22-2012, 2022 WL 17576355 (10th Cir. Dec. 12, 2022) (finding defendant's arguments as to remedy waived). The district court affirmed the hearing officer's decision in favor of the parents in this case involving a student's fourth through sixth grade years. The student was found to have characteristics of dyslexia back in second grade. The court said that the parents established that the district failed to implement with fidelity the SPIRE program for reading, writing, and spelling. The student made progress academically, but the progress was inconsistent and test scores showed a lack of meaningful improvement, with the student not advancing beyond level four in SPIRE from the start of fifth grade to the start of sixth grade. The class sizes varied, with ten to fourteen in fifth grade when six to eight are preferred under the SPIRE program. The court said that the school failed to offer a cogent and responsive explanation for its decisions. Further, the student's teachers lacked professional training in the program, contrary to state law requirements for dyslexia instruction. Although the student appeared to have had frequent absences, the evidence was unclear, in part from difficulties in recording online attendance during the Covid-19 pandemic, and the absences appeared related to the disability, whether because of problems logging on due to reading difficulties or avoidance of language arts class or attendance at therapy. The court also affirmed the hearing officer's finding that the district failed to provide all the assistive technology listed on the IEP. The court agreed that other IDEA violations occurred but that the hearing officer correctly found that prospective relief was sufficient to remedy them.

Rogich v. Clark Cnty. Sch. Dist., No. 2:17-CV-01541-RFB-NJK, 2021 WL 4781515, 79 IDELR 252 (D. Nev. Oct. 12, 2021). This case concerned IEPs for June 2014 and the school years 2014-15, 2015-16, and 2016-17, regarding a student with a history of hydrocephalus and with multiple developmental delays as well as learning disabilities and other disorders. The IEPs for 2014 and 2016 provided accommodations such as multisensory instruction but did not identify a specific methodology or program or a structured curriculum format that teachers would be obliged to use to meet the student's needs. The court overturned an SRO decision in favor of the district and ruled that the IHO decision properly concluded that the IEP teams failed to adequately review evaluations provided by the parents and consider the parents' concerns, as required by 20 U.S.C. § 1414(c)(1)(A)(i) and (d)(3)(A)(ii). The court noted that the parents were not provided information regarding any programs provided by district that would adequately address the student's needs, which evaluation materials showed called not

only for multisensory instruction but also for a delivery mechanism that would include multimodality teaching applied with consistency and fidelity, without switching or mixing of methodologies. The court further declared that the district substantively violated the IDEA by not offering a specific methodology equivalent to Orton-Gillingham that was research based, systemic, cumulative, and rigorously implemented. On the contrary, no district personnel had sufficient knowledge of Orton-Gillingham, and that infringed the parents' participation rights and resulted a in loss of educational opportunity. The court also found that refusal to include Orton-Gillingham or a similar structured literacy program in the IEPs, despite being on notice of the need, constituted a denial of reasonable accommodation in violation of Section 504 and the ADA. The court awarded a total reimbursement under IDEA and ADA-Section 504 of $456,990.60.

S.S. v. Bellflower Unified Sch. Dist., No. CV 20-9829-MWF, 2021 WL 4260392, 79 IDELR 201 (C.D. Cal. Sept. 3, 2021). The court here ruled that a district failed materially in implementing the IEP of a teenaged blind student with no usable vision when it failed to hire a teacher with the credentials to provide direct academic instruction to students who have visual impairments. Under the student's IEP, the specialized academic instruction in English, math, and social studies was to be taught by a teacher of the visually impaired. The teacher who had previously served the student had credentials in both academics and teaching visually impaired students, but retired after the student's ninth grade year, and after offering no specialized instruction for four days at the beginning of the student's tenth grade year, the district contracted to provide an itinerant service provider who held a credential in supporting students with vision impairments, but who could do no more than support the academic teacher conducting the instruction. The district learned of the problem and sought a new teacher of the visually impaired, and apparently asked for a meeting to conform the IEP to the services actually being provided, but the parent resisted and the IEP stayed the same. Substitute teachers without visual impairment credentials provided instruction with support of the itinerant. Finally, on February 10 of the school year, a credentialed teacher of the visually impaired began providing instruction. The court found that the failure to implement the IEP was material, denying FAPE. The court relied on Ninth Circuit precedent (*Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007)), in holding that the materiality standard does not require demonstrable educational harm for the student's claim to prevail. The court further ruled that the itinerant did not implement the instruction called for on the IEP based on the great weight of the evidence and contrary to the ALJ's ruling. The court said:

> During [a] visit, Parent observed Pawluk [the itinerant] brailling some materials, but not providing the academic instruction. (AR 1685). The substitute teacher asked Pawluk what to do with Student, to which Pawluk responded, "I don't know.... [Y]ou're the teacher; you have to, like, come up with some academics." (AR 1685). The substitute responded, "[L]et me see what I can find." (AR 1685). In the meantime, Pawluk told Student to practice her braille by writing her name, address, and phone number in braille; however, Student completed this assignment very quickly. (AR 1685). The substitute teacher eventually found a worksheet for Student to

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> complete, but because the worksheet was not Brailled, the substitute had to read it out loud to Student. (AR 1685-1686). Parent left the visit in tears, pleading with Harvin, the District's program administrator who was supervising the visit, to help find an appropriate solution. (AR 1686). *Id.* at *8.

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

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

Elmira City Sch. Dist. v. New York St. Educ. Dep't, 166 N.Y.S.3d 710, 717, 80 IDELR 294 (App. Div. Apr. 7, 2022). This case involved a nonverbal, non-ambulatory student with a condition causing mucous to accumulate in her throat and threaten asphyxiation in absence of suctioning, hence requiring the care of a one-to-one registered nurse at school. The nurse was not provided for a significant period of time, and the district eventually proposed placing the student residentially. In deciding the parent's appeal of an adverse IHO decision, the SRO determined that the district failed to offer the student a free, appropriate public education between the periods of September 2018 to December 2018, when it should have taken measures to obtain a corrected care plan for the student rather than relying on the parent and her care coordinator, and February 2019 to June 2019, when the nurse assigned by the BOCES resigned and the district said it was unable to find a replacement. The SRO further rejected the district's plan to place the student residentially over the parent's objection. The lower court dismissed the district's appeal. The Appellate Division reversed in part, ruling that any failure by the district to do more to obtain a corrected care plan in the 2018 period did not significantly impede the delivery of services. But it affirmed the holding that the district denied FAPE during the 2019 period, ruling that the IEP was not implemented and that "an impossibility of performance defense is generally at odds with the purpose of the IDEA." The court went on to affirm the finding that the residential placement recommendation, which was largely based on the inability to hire the needed nurse rather than the student's educational needs, was not appropriate, and that compensatory education must be provided.

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

Steckelberg v. Chamberlain Sch. Dist., No. 22-3658, 2023 WL 5211641, --- F.4th ----, 123 LRP 24587 (8th Cir. Aug. 15, 2023). This case involved a special education student with severe neuropsychiatric conditions. Before junior year in high school, a behavior analyst created support documents for the student, but the behavior support plan was not included in the IEP, and the behavior goals in the IEP were said to leave little room for error. Behavior difficulties ensued, and a plan to have the student attend classes at home was unsuccessful. Often, the student could not access learning materials. There was limited contact with teachers. The parents suggested an out-of-state placement, which the district did not endorse, but the district did not suggest any alternatives. The parents placed the student at the out-of-state academy, filed for due process, and were

awarded tuition by the hearing examiner. The district filed an action to overturn the decision in state court, the parents removed to federal court, and the federal district court affirmed the hearing decision, as did the court of appeals. After ruling that the parents properly removed the case to federal court, the court of appeals turned to the merits of the claim of denial of free, appropriate public education and found that FAPE was denied. It noted that the school district did not consider the behavior support plan when writing the IEP, that the goals for behavior in the IEP were for near-perfect compliance, and that the amended IEP for home placement lacked sufficient information about how the student would make progress in the changed environment, and failed to provide academic support at home. The court further found that the academy placement was appropriate, stressing that it was designed to address problem behavior and the student attended classes and counseling during the week, and also had online support outside of class. The student did well enough to graduate and enroll in college. The court affirmed an award of travel costs in addition to tuition.

Doe v. Newton Pub. Schs., 48 F.4th 42, 81 IDELR 211 (1st Cir. Sept. 2, 2022). This case involved a student with autism, depression, and anxiety disorder who was placed by his parents in a residential therapeutic school after his sophomore year in public high school because he had been treated and hospitalized for suicidal thinking, and then refused to return to public high school on account of alleged bullying. The district court reversed a hearing officer decision that the public school offered appropriate education, and it awarded tuition reimbursement, but excluded payment for boarding and out-of-state travel. The court of appeals affirmed, reasoning that the district court gave due weight to the hearing officer's findings, but permissibly concluded that although the public school's program would have provided some therapeutic benefit, placement of the student in a full-inclusion model at the public school would not provide appropriate education. The outside evaluations stressed the need for a therapeutic school to ensure educational gains, as well as to provide safety in light of the suicidal ideation. The outside evaluators provided ongoing care for the student, while the public school's evaluator had only one session with him. The district court did not improperly rely on the later IEPs recommending therapeutic school in invalidating the August 2017 IEP, but instead found sufficient evidence available at the time of the 2017 IEP to conclude it did not offer FAPE. On the reimbursement issue, the court of appeals pointed out that the district court rejected 2018 and 2019 IEPs on the ground that removing the student from the then-current environment at Franklin would cause emotional and social disruption, further noting that the public school had enough information to reach the same conclusion under a snapshot-in-time approach. The unique needs of the student extended the need for keeping the student at the placement into twelfth grade. The court of appeals said the district court correctly held that the least restrictive environment principle does not require the parents to place the student in the LRE if the IEP does not offer FAPE. Rejecting the parents' cross-appeal, the court of appeals affirmed the denial of reimbursement for residential services, noting that at the time the parents made the residential placement the parents' evaluators had not yet recommended residential placement. The court deferred to the district court in rejecting the later evaluation's call for residential placement, noting that it was speculative. The requirement that reimbursement be limited to what is reasonable meant that the district court did not let

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an inapplicable LRE requirement in by the back door when it rejected residential reimbursement.

Falmouth Sch. Dep't v. Doe, 44 F.4th 23, 81 IDELR 151 (1st Cir. August 9, 2022). In this case, the court affirmed a hearing officer decision in favor of the parents of a student who struggled with reading and writing while enrolled in public school, a decision that the district court also affirmed. The due process hearing officer held that the district failed to offer the student a FAPE from January 2018 to March 2019 and from September 2019 to February 2020, concluding that by January 2018 it became clear that the SPIRE program employed by the district was not reasonably calculated to furnish the student a FAPE, and that the September 2019 IEP was not sufficiently ambitious to enable the student to make appropriate progress. The hearing officer ordered compensatory education, including independent evaluation expenses and reimbursement of private school tuition and transportation. The court of appeals rejected the school district's argument that the hearing officer and district court mistakenly found that SPIRE did not address orthographic processing. Instead, the decisions said that the evidence showed the student was in need of a program like Seeing Stars that is specifically designed to address orthographic processing. Educational agencies may choose among competing methodologies, but here the instruction did not meet the student's individual and unique needs for a focus on orthographic processing. The court noted the greater progress the student made when in a private school using an approach focused on orthographic processing. The court also said that the parents' experts did not have to explicitly testify that IEPs were inadequate, when they testified to facts supporting the conclusion that the IEPs were inadequate. The court rejected an argument based on the least restrictive environment principle, pointing out the lower court's conclusion that the parents' proposal for half-time in mainstream instruction at public school and half at the specialized private school they chose was not much more restrictive than the public school's approach, and was justified by instructional needs. The remedy of reimbursement for full-time placement at the private school after the parents rejected the district's IEP should not depend on an LRE comparison, but rather on a determination that the private school offered appropriate education. The lower court did not base the conclusion that the January 2018 IEP was deficient on information unavailable at the time it was devised; the post-IEP information simply reinforced the conclusion that it was deficient. The conclusion that the district's offer of services in January 2019 was too little, too late was supported by the fact that the Lindamood Bell instruction offered was to be conducted by a teacher not certified in the program who lacked recent experience with the program. By fall of 2019, the district offered additional specialized reading instruction, but did not agree to use Lindamood Bell, and instead changed to multisensory synthetic phonics instruction. Due weight had to be afforded the hearing officer's determination that the September 2019 IEP not targeted to the student's needs. The tuition reimbursement order was not improper due to lack of mainstreaming at the private school when it provided special education the student needed, and it enabled him to make progress. The court went on to affirm the district court's dismissal of the parents' claims against the district for retaliation in violation of Section 504 and the Americans with Disabilities Act as well as their claim against the director of special education for retaliation in violation of the First Amendment.

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

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

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

VIII. FAPE AND COVID-19

Roe v. Healey, No. 22-1740, 2023 WL 5199870, --- F.4th ---, 123 LRP 24589 (1st Cir. Aug. 15, 2023). This putative class action suit alleged that Massachusetts officials and the Department of Elementary and Secondary Education, along with several school districts and superintendents, deprived children with disabilities of free, appropriate public education and parents of participation rights due to the closure of in-person education during the Covid-19 pandemic. The district court granted the defendants' motions to dismiss and denied the plaintiffs' motion for a preliminary injunction. The court of appeals affirmed. It ruled that the plaintiffs lacked standing to seek declaratory and injunctive relief on the ground that they pled no facts suggesting that re-closure of

the schools is imminent or that a substantial risk of it exists. The court further ruled that the request for forward-looking relief was moot since all schools in the commonwealth returned to in-person instruction by May 2021. The court further ruled that claims for retrospective relief under IDEA, Section 504, the Americans with Disabilities Act, and Section 1983 for Fourteenth Amendment violations were properly dismissed for failure to exhaust IDEA administrative remedies, reasoning that the claims were for denial of free, appropriate public education as understood from *Fry v. Napoleon Public Schools*, 580 U.S. 154 (2017). The court rejected an argument based on futility and the systemic nature of the violation, reasoning that the plaintiffs could use the administrative process to air their grievances over the closure. The court also rejected a Racketeer-Influenced Corrupt Organizations Act claim. The court did not discuss exhaustion as to claims for damages not available under IDEA but available under laws other than IDEA, and it is unclear from the opinion whether the plaintiffs presented damages claims of this type, although there apparently was a claim for nominal damages. *See* 2023 WL 5199870, at *9 & n.13; *cf. Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859 (2023) (finding ADA damages claim not subject to exhaustion).

We the Patriots USA, Inc. v. Connecticut Office of Early Childhood Development, 2023 WL 4982325, --- F.4th ---, 123 LRP 23566 (2d Cir. Aug. 4, 2023). In this broad-based challenge to Connecticut's decision to repeal religious exemptions to vaccination requirements for students and participants in childcare programs, the court affirmed dismissal of all claims except the claim of one of the plaintiffs of that the repeal violated IDEA. On that claim, the court overturned the district court's dismissal. The district court had relied on the fact that the complaint alleged that the child of the plaintiff received special services without saying that the child received special education, but the court of appeals said a reasonable inference was that the child received special education when other allegations pertained to the child's speech and learning disorder and asserted the child was disabled within the meaning of IDEA. The court remanded for consideration of the merits of the parent's claim.

L.E. v. Superintendent of Cobb Cnty. Sch. Dist., 55 F.4th 1296, 82 IDELR 79 (11th Cir. Dec. 16, 2022). This case was brought by students with respiratory disabilities and their parents alleging that the defendants violated the Americans with Disabilities Act and Section 504 when they ended COVID-19 safeguards, which led the parents to withdraw the students from in-person schooling. The district court denied the motion for preliminary relief, but the court of appeals reversed and remanded. The court of appeals held that the case was not moot, that denial of access to in-person education sufficed for the claim of failure to provide reasonable accommodations, and the district court was obliged to take up the further claim that the students were subjected to unjustified isolation. On mootness, the elimination of a general mandate on masking in the CDC guidelines did not moot a request for compliance with CDC guidelines that required, among other things, accommodations for students with disabilities. On the probability of success on the merits, the district court needed to analyze "whether virtual schooling is a reasonable accommodation for *in-person* schooling, not education in general." *Id.* at 1303 (emphasis in original). The district court also needed to treat the students' isolation claim under a theory derived from *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999).

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R.K. v. Lee, 53 F.4th 995, 82 IDELR 51 (6th Cir. Nov. 18, 2022). In this case, eight students with disabilities and their parents filed suit alleging that a Tennessee statute providing, among other things, that a school shall not require a person to wear a face mask on school property unless specific conditions were met, violated the Americans with Disabilities Act; Section 504; the Equal Protection Clause of the Fourteenth Amendment; and the Constitution's Supremacy Clause. The court found that the plaintiffs lacked standing to sue, saying the showing of concrete injury was insufficient when accommodations such as keeping unmasked persons more than six feet away from the students, were available. The alleged injury was also said to be not traceable to the named defendants, who were the governor and the commissioner of education, nor redressable by the relief sought from the two defendants.

Martinez v. Newsom, 46 F.4th 965, 81 IDELR 181 (9th Cir. Aug. 24, 2022), *cert. denied*, 143 S. Ct. 1782 (Apr. 24, 2023). This case involved allegations that the plaintiff students with disabilities were denied free, appropriate public education in violation of IDEA and the Fourteenth Amendment when they received remote instruction during the COVID-19 pandemic. The court of appeals held that the students and their parents lacked standing to bring a class action case against school districts and special state schools where they were not enrolled, for they were not personally injured by those defendants, even if class members were injured. The court further held that the case did not fall within any exceptions to the exhaustion requirement. Although the request for compensatory education made by the plaintiffs kept the case against their own school districts from being moot, the court dismissed as moot claims against the state education department and superintendent. The court upheld the exhaustion arguments of the districts the students attended. The court acknowledged the systemic conduct exception to exhaustion, but said it would apply only if an agency decision, regulation, or other binding policy caused the injury. The court said the plaintiffs had not met that requirement. The court also rejected the applicability of the inadequacy and futility exceptions.

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

E.T. v. Paxton, 19 F.4th 760, 80 IDELR 1 (5th Cir. Dec. 1, 2021). The court here granted a stay pending appeal of an injunction preventing enforcement of the Texas governor's order prohibiting local government entities from imposing mask mandates, reasoning that a strong likelihood of success existed to defeat a claim by parents of seven children with disabling conditions that the executive order violated rights under the ADA, Section 504, the IDEA, and the American Rescue Plan Act, and that the defendant showed irreparable injury and met other requirements for a stay. The court declared that plaintiffs who had disabilities leaving them particularly vulnerable during pandemic conditions likely lacked standing, in that they failed to show any concrete, or actual or imminent injury from enforcement of the order. The court reasoned that they could use distancing, voluntary masking, class spacing, plexiglass, and vaccinations to ensure a safer learning environment regardless of the prohibition on mask mandates. The court also stated that increased risk often fails to satisfy the requirement of actual or imminent injury and that the injury was likely not redressable because no authority exists to require schools to adopt mandates. The court said as to the merits of the claim that the IDEA exhaustion provision would apply because the claims were not centered on physical access to schools, and no reasonable accommodation request was made for purposes of ADA and Section 504. Further, the court declared that because other means exist to control the spread of Covid-19, there is no basis to claim preemption by ADA and Section 504, and that the order did not conflict with the Rescue Plan Act. The court also expressed doubt that Rescue Plan Act provided a private cause of action. The court said that the district court's injunction was overbroad. The court also opined that whenever a statute is enjoined a state necessarily suffers irreparable harm and that a similar point applied to an order such as this one. The court subsequently vacated the trial court's permanent injunction, ruling that the plaintiff students lacked standing on the basis of an asserted injury of increased risk of contracting Covid-19 or suffering complications from Covid-19 infections. 41 F.4th 709, 81 IDELR 126 (5th Cir. July 25, 2022).

Brach v. Newsom, 6 F.4th 904, 79 IDELR 61 (9th Cir. July 23, 2021), *vacated and reh'g en banc granted*, 18 F.4th 1031, 121 LRP 40338 (9th Cir. Dec. 8, 2021), *appeal dismissed*, 38 F.4th 6, 81 IDELR 62 (9th Cir. Jun 15, 2022), *cert. denied*, 143 S. Ct. 854 (Feb. 21, 2023). In the July 23, 2021, decision, the Ninth Circuit affirmed the part of a district court decision that granted summary judgment against parents whose children attended public school who challenged state Covid-19-related restrictions on instruction on the ground that they violated a federal constitutional right to public education guaranteed by the Fourteenth Amendment and denied substantive due process rights. However, the court reversed summary judgment against private school parents who argued that the restrictions violated substantive due process and equal protection and remanded the private school parents' case for further proceedings. The court further held that the case was not moot under the doctrines of voluntary cessation and capable of repetition yet evading review. Judge Hurwitz dissented on the issue of mootness and the validity of the private school parents' claims. Background to the appeal is found in two district court decisions. The first, at No. 2:20-cv-06472-SVW-AFM, 2020 WL 6036764, 77 IDELR 189 (C.D. Cal. Aug. 21, 2020), was an action by parents, including parents of children with disabilities, and a student with disabilities, who alleged that

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California's school reopening framework violated the U.S. Constitution, the Civil Rights Act, the IDEA, and Section 504 by restricting in-person education through county-wide determinations based on the local prevalence of COVID-19 cases and local strain on health care capacity. The court denied a proposed TRO. The court reasoned with regard to the IDEA that the claim was subject to the exhaustion requirement and no exception applied, even though the relief sought was systemic. The court also found an inadequate showing of irreparable harm. In the second decision, 2020 WL 7222103, 77 IDELR 285 (C.D. Cal. Dec. 1, 2020), the court granted summary judgment against the plaintiffs, pointing to the replacement of the statewide monitoring list with a tier-based system with different criteria and the permission for necessary in-person child supervision and limited instruction, targeted support services, and facilitation of distance learning in small groups for specified subsets of students. The court again relied on the administrative exhaustion requirement regarding the IDEA claim. This latter ruling is what was affirmed in part and reversed in part by the court of appeals in the July 23, 2021, decision. Ultimately, however, the *en banc* Ninth Circuit ruled that the appeal was moot and remanded with instructions that the district court vacate its judgment and dismiss the complaint. 38 F.4th 6, 81 IDELR 62 (9th Cir. June 15, 2022).

Charles H. v. District of Columbia, No. 1:21-CV-00997, 2021 WL 2946127, 79 IDELR 14 (D.D.C. June 16, 2021). The court granted a preliminary injunction for a group of about 40 students ages 18 to 22 with IEPs incarcerated at two D.C. Department of Corrections facilities, who were being educated on-site in high school programs, but whose in-person instruction was terminated in March 2020 in response to Covid-19 without the provision of the virtual classes available to other students. The education offered the group consisted of sporadic delivery of instructional work packets, either printed or distributed through tablets, at least until April 21, 2021. These materials were of little value to students. The printed materials rarely resulted in responses from instructors, and the tablets did not access needed software and so were even less usable than the paper packets. Moreover, the students did not receive counseling or other related services or received only very limited services. The court found a likelihood of success on the claim of denial of appropriate education in the form of beneficial, specialized instruction for even half of the amounts on the students' IEPs as of May 2021, as well as lack of support services. The court also concluded that the plaintiffs were likely to demonstrate the defendants did not implement students' IEPs to the greatest extent possible in light of the pandemic, noting that a secure WiFi network was not even begun until after the filing of suit. The court further found irreparable injury, balance of equities, and public interest, and provisionally certified the class. In February 2022, the court held the district in contempt of court for failure to provide IEP-mandated services to 44 incarcerated students eight months after being ordered to do so. *Charles H. v. District of Columbia*, No. 1:21-CV-00997, 2022 WL 1416645, 80 IDELR 163 (D.D.C. Feb. 16, 2022).

Round Rock Indep. Sch. Dist. v. Amy M, 540 F. Supp. 3d 679, 78 IDELR 285 (W.D. Tex. May 19, 2021). This opinion principally concerned ADA and Section 504 claims. It involved a high school student with traumatic brain injury who experienced hospitalizations and many absences during freshman year, was denied flexible scheduling and homebound services as accommodations, and instead was the subject of

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truancy proceedings, then was disenrolled when she did not appear for first day of the next school year and eventually was unilaterally enrolled by her parent in private school after hospital treatment. Relevant to the IDEA and Covid-19, the court held that the private placement ordered by hearing officer remained the student's stay-put placement even though the student opted to attend the private placement remotely during the Covid-19 pandemic. The court required the school district to reimburse the parent for the continued placement, including summer. The court reasoned that the change of location to remote learning was not a significant change in the program and noted that the student was slated to return to in-person instruction in October 2020. The court ultimately granted the parent's motion for judgment on the administrative record, affirming the hearing officer decision and awarding tuition reimbursement for the 2019-20 school year, reimbursement for counseling during the 2018-19 school year, and mileage reimbursement for transportation to the student's private placement. No. 1:20-CV-496-DAE, 2022 WL 4589102 (W.D. Tex. Aug. 22, 2022).

J.T. v. DeBlasio, 500 F. Supp. 3d 137, 77 IDELR 252 (S.D.N.Y. Nov. 13, 2020), *aff'd in part, appeal dismissed in part sub nom. K.M. v. Adams*, No. 20-4128, 2022 WL 4352040 (2d Cir. Aug. 31, 2022) (rejecting arguments that exhaustion of administrative remedies would have been futile and that district court improperly denied motion to amend complaint, and finding appeal of denial of preliminary motion moot), *cert. denied*, 143 S. Ct. 2658 (June 26, 2023). The plaintiffs' class action complaint claimed that "when schools were shut down due to the public health emergency created by the COVID-19 pandemic, every school district in the United States that went from in-person to remote learning (1) automatically altered the pendency placement of every special education student in the United States; and (2) ceased providing every one of those students with a FAPE, in violation of IDEA's substantive and procedural safeguards." *Id.* at *1. The court dismissed the complaint as to all defendants outside State of New York and dismissed the complaint as against all defendants except New York City defendants and New York State Department of Education. The court further dismissed as plaintiffs all parents who did not have children enrolled in New York City public schools. Ultimately, the court denied the New York City plaintiffs' motion for a preliminary injunction and dismissed their complaint against the New York City defendants without prejudice; it also sua sponte dismissed the complaint against the New York State Department of Education. The court noted that there were no specific allegations that any particular parent filed a due process complaint triggering stay-put, but even if so, part-time in-person services were being offered in school buildings in New York City, teletherapy was being offered to students needing clinical and therapeutic services, and broader in-person services were being permitted for students whose parents opted in, and district-placed students in private schools had yet another range of options. The court cited *Hernandez* (discussed *infra*) and USDOE guidance.

Return to School Roadmap: Development and Implementation of Individualized Education Programs, (OSERS Sept. 30, 2021), https://sites.ed.gov/idea/idea-files/return-to-school-roadmap-development-and-implementation-of-ieps/. Categorized under COVID-19, IEPs, and LRE, this document is described by OSERS as a summary of IEP requirements in light of Covid-19: "This Q&A document highlights certain Individuals with Disabilities Education Act (IDEA) requirements related to the

development and implementation of individualized education programs (IEPs) and other information that state educational agencies (SEAs) and local educational agencies (LEAs), regular and special education teachers, related services providers, and parents should consider."

IX. AUTISM-SPECIFIC SERVICES

X. INFANT AND TODDLER PROGRAMS

Dear Special Education and Early Intervention Partners, 79 IDELR 139 (OSERS Aug. 24, 2021) In this document, the Office of Special Education and Rehabilitation Services stated: "[T]he Department expects that all LEAs will provide every student with the opportunity for full-time, in-person learning for the 2021–2022 school year. The Department recognizes that some parents may have specific health and safety concerns about sending their children back to in-person instruction because of the perceived health risk to the student's immediate family and to other household members — even as parents are also concerned about their child missing the instructional and social and emotional opportunities that come with in-person learning. Therefore, reopening schools safely is of utmost importance. . . . We recognize that SEAs, LEAs, LAs, and EIS providers have worked hard to meet children's needs and provide required services, given the unprecedented educational disruptions and other challenges resulting from the pandemic. OSERS wants to reiterate and emphasize that, notwithstanding these challenges, infants and toddlers with disabilities and their families and children with disabilities retain their rights to receive appropriate services under IDEA. This includes ensuring that IEPs are in effect for children with disabilities at the start of the upcoming school year, and all other rights of children with disabilities and their parents under IDEA Part B are protected. Similarly, IDEA Part C requires IFSPs to be implemented and that all other rights of parents and their infants and toddlers with disabilities must be protected." (Footnotes omitted.)

XI. BEHAVIOR SERVICES AND STUDENT DISCIPLINE

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

Dear Colleague (OSERS-OSEP July 19, 2022). This letter addresses disparities in the use of discipline for children with disabilities and the implementation of IDEA's discipline provisions, and is accompanied by guidance documents: Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's discipline Provisions, and Positive, Proactive Approaches to Supporting the Needs of Children with Disabilities. The letter calls special attention to disparities between racial groups in the imposition of exclusionary discipline measures. The documents are available at https://sites.ed.gov/idea/idea-files/dcl-implementation-of-idea-discipline-provisions/

Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, 81 IDELR 138 (OSERS July 19, 2022). In this lengthy document, the Office of Special Education and Rehabilitative Services of the U.S. Department of Education provided an comprehensive description of the discipline provisions in the

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IDEA and its regulations. The document addressed, among other things, informal removals from school that shorten the school day (Q. C-6: "Are informal removals, such as administratively shortened school days, considered a school day when calculating a disciplinary change in placement? IDEA's implementing regulations define school day as any day, including a partial day, that children attend school for instructional purposes. . . . In general, the use of informal removals to address a child's behavior, if implemented repeatedly throughout the school year, could constitute a disciplinary removal from the current placement. Therefore, the discipline procedures in 34 C.F.R. §§ 300.530 through 300.536 would generally apply unless all three of the following factors are met: (1) the child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child's IEP; and (3) the child continues to participate with nondisabled children to the extent they would have in their current placement."). OSERS also discussed risk or threat assessments ("Q. E-5: When school personnel are conducting risk or threat assessments of a child with a disability, how must the LEA ensure FAPE is provided to the child? Under IDEA, the procedural safeguards and right to FAPE for a child with a disability must be protected throughout any threat or risk assessment process, including the provision of services during any removals beyond 10 cumulative school days in a school year. 34 C.F.R. §§ 300.101 and 300.530(d). States and LEAs should ensure that school personnel involved in screening for, and conducting, threat or risk assessments of children with disabilities are aware that the child has a disability and are sufficiently knowledgeable about the LEA's obligation to ensure FAPE to the child, including IDEA's discipline provisions." Seclusion and restraint were also covered (Q. B-3: "Does the Office of Special Education Programs (OSEP) consider restraint or seclusion to be appropriate strategies for disciplining a child for behavior related to their disability? No. OSEP is not aware of any evidence-based support for the view that the use of restraint or seclusion is an effective strategy in modifying a child's behaviors that are related to their disability. The Department's longstanding position is that every effort should be made to prevent the need for the use of restraint or seclusion and that behavioral interventions must be consistent with the child's rights to be treated with dignity and to be free from abuse. Further, the Department's position is that restraint or seclusion should not be used except in situations where a child's behavior poses imminent danger of serious physical harm to themselves or others."). In Appendix I, the document features a glossary of terms, including "informal removal," "in-school suspension," "physical restraint," and "seclusion."

XII. CHOICE PROGRAMS AND RESIDENCY

XIII. LEAST RESTRICTIVE ENVIRONMENT

Knox Cnty., Tenn. v. M.Q., 62 F.4th 978, 82 IDELR 214 (6th Cir. Mar. 17, 2023). This case involved a kindergarten student with autism who manifested delays in communication skills, social-emotional behavior, and prevocational skills. The school district proposed placement in a self-contained classroom for nearly the entire school day. The parents rejected the proposal and requested due process. They prevailed before the ALJ and the district court affirmed. The court of appeals affirmed that ruling. It pointed out that the student was well behaved and made progress on the IEP goals while

in the inclusive preschool classroom and receiving supports. The student did not display a cognitive impairment, at least within the limits of what could be discerned in light of difficulties with communication. The court ruled that an error by the district court concerning the membership of the IEP team was harmless. The court stressed that the student made progress in the inclusive setting, and that evidence showed that supports could be implemented in the mainstream placement. The court also relied on evidence of benefits the student would obtain from being in a regular education setting, in particular improving interpersonal and self-regulation skills.

Bouabid v. Charlotte-Mecklenburg Schs. Bd. of Educ., 62 F.4th 851, 82 IDELR 216 (4th Cir. Mar. 15, 2023). This case involved a student found eligible for special education in kindergarten who faced significant deficits in linguistics, behavior, and academics. The student started in general education but was placed by the IEP team in gradually more specialized environments. By seventh grade, she was receiving services under the autism category. In ninth grade, she was thought to require adult supervision at all times and displayed aggressive behavior and failure to complete assigned tasks. Ultimately, when she was in tenth grade, the parent filed for due process, contending among other things that the defendant failed to place the student in the least restrictive environment for tenth grade and failed to provide appropriate behavior interventions, that the defendant failed to offer appropriate services in ninth grade, and that it failed to facilitate a requested independent evaluation. The ALJ ruled against the parent on most issues, but for the parent on the claim that the defendant failed to establish requirements or benchmarks or measurable criteria for considering a change to a less restrictive environment. The court of appeals affirmed the judgment of district court, which upheld the ALJ ruling over the objection of the parent. The court reasoned that the findings of ALJ were regularly made on the basis of credibility judgments and the evidence submitted. The court determined that the relief ordered by the ALJ on the LRE issue, specifically that defendant revise student's IEP to include benchmarks and criteria for the least restrictive environment, was proper.

D.R. v. Redondo Beach Unified Sch. Dist., 56 F.4th 636, 82 IDELR 77 (9th Cir. Dec. 20, 2022). The student in this case had autism, and his parents and the district agreed to an IEP before the start of third grade that called for him to spend 75% of the day in the general education classroom with aids and services to support his progress, including a one-on-one aide, a modified curriculum, and four hours per week of special education instruction in the school's learning center. The school proposed to move the student to a blended program of half-general education classroom, half special education classroom midway through third grade, but the parents demurred, and the student stayed in his placement. The school again proposed change before fourth grade, calling for placing the student in the special day class for 56% of the time. Again, the parents objected, and the student stayed in general education. Before the start of fifth grade the school renewed its proposal, and parents responded by withdrawing the student from the school. They could not find a private school that would accept the student and ultimately hired a private tutor. They requested due process but lost before the ALJ and again in district court. The court of appeals reversed in part and affirmed in part. It applied the factors in *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). All the factors but that of academic progress concededly supported the

general education placement with the supplemental aids and services. On the issue of academic progress, the court noted the fact that the student met four of six IEP goals and made progress on the other two. In interpreting the requirement that education in the regular classroom with the use of supplementary aids and services "cannot be achieved satisfactorily," 20 U.S.C. § 1412(a)(5)(A), the court said that what mattered was not that the student was several grade levels below his peers, but rather that he was progressing towards meeting his IEP's academic goals, and undisputed evidence established that he was making substantial progress on the goals. The court said the record did not support a prediction that the student would make more progress on the IEP goals in the special day class, citing the parents' submission of expert testimony based on studies of student progress in inclusive and non-inclusive environments. The fact that the progress the student made in the regular classroom was due to supplementary aids and services, specifically the services of a one-on-one aide and supplemental instruction in the school's learning center did not undermine the desirability of general education placement, nor did the significant modifications in the general education curriculum. The court, however, affirmed the denial of the parents' request for reimbursement because they withdrew the student rather than rejecting the school's proposal. Had they not done that, he would have stayed in his general education placement and the school could have sought a due process hearing if it wished to move him.

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

H.W. v. Comal Indep. Sch. Dist., 32 F.4th 454, 81 IDELR 2 (5th Cir. Apr. 27, 2022), involved an elementary school student found eligible for special education on the basis of Down Syndrome, Hypothyroidism, ADHD, Asthma, and a speech impediment. Between kindergarten and the beginning of third grade, the district developed a series of IEPs based on full evaluations and functional behavioral assessments with corresponding behavioral intervention plans. Ultimately, the district proposed a placement it described as "blended," consisting of 235 minutes per day in special education (with additional time for speech) and 150 minutes per day in general education. Opportunity to participate with students without disabilities would be in nonacademic, extracurricular, and other activities. The hearing officer upheld this program as appropriate and constituting the least restrictive environment. The district court affirmed, as did the court of appeals. The court of appeals applied *Cypress-*

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Fairbanks Independent School District v. Michael F., 118 F.3d 245, 252 (5th Cir. 1997) and *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1038 (5th Cir. 1989). It found the program sufficiently individualized and designed by key stakeholders. Although the student made some progress in general education, it was disputed how much. Turning to the *Daniel R.R.* factors, the court said the district took sufficient steps to accommodate the student in general education, implementing a modified curriculum and BIP, plus inclusion support and extended school year services. The court said the student did not receive meaningful educational benefit in the sense of grasping the essential elements of the general education curriculum when in the general education classroom for academic instruction. The court said it should look to progress not just on IEP goals but rather the student's overall academic record, disagreeing with the approach of *L.H. v. Hamilton County Department of Education*, 900 F.3d 779, 793 (6th Cir. 2018). The court stressed that the student was falling behind peers in test scores and percentile rankings. Moreover, the court said the student had a disruptive effect on the general education classroom. "The hearing officer and district court found that although there was no direct evidence of H.W. impairing the education of other students, the totality of the evidence established that she had a 'negative, detrimental' effect on others," *H.W.*, 32 F.4th at 470, in that "she hit, bit, and kicked staff and peers; yelled, screamed, moaned, and grunted in the classroom; and swiped materials off desks. . . ." *id*. The court deemed the proposed program the least restrictive environment for the student.

Killoran v. Westhampton Beach Sch. Dist., No. 19-CV-3298(JS)(SIL), 2021 WL 4776720, 79 IDELR 254 (E.D.N.Y. Oct. 11, 2021), *aff'd*, No. 21-2647 2023 WL 4503151, 123 LRP 20863 (2d Cir. July 13, 2023) (finding that any procedural violations did not impede parents' participation or cause deprivation of educational benefits, and that IEP was substantively adequate and satisfied least restrictive environment requirement). In this case, involving a sixteen-year-old student with Down Syndrome classified as having intellectual disability, the court affirmed a ruling that the proposed 12:1:1 program in another school district met IDEA standards despite an argument that the Regents Diploma track could be modified to meet the student's needs. The court reasoned that the failure to consider the results of alternate assessment testing did not rise to the level of a FAPE violation when other evaluations had been considered and parental input was received. On the merits of the claim, the court held that providing FAPE did not compel modification of the Regents track program to meet the needs of the student, noting that the student was reading at a first-grade level, that the other students in the program had IQs of 102-110, and that the student scored low in listening comprehension, mathematics, and other areas, and needed daily living skills instruction. The court rejected the argument that the student's educational goals were insufficiently aligned with grade level standards, reasoning that grade level advancement should not be expected for the program to be appropriately ambitious for the student. The court rejected a least restrictive environment argument, stressing evidence that the student could not be educated appropriately in general education, and the district had a choice regarding the particular school to be assigned.

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XIV. RELATED SERVICES

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

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

XV. RESIDENTIAL PLACEMENT

Steckelberg v. Chamberlain Sch. Dist., supra

Doe v. Newton Pub. Schs., supra

Trost v. Dixon Unit Sch. Dist. 170, No. 21 C 50255, 2021 WL 3666940, 79 IDELR 132 (N.D. Ill. Aug. 18, 2021) In this case, the district court granted a preliminary injunction requiring the defendant to pay for the residential placement of a student at Brehm Preparatory Academy under the terms of a mediation agreement. The court pointed out that the agreement for a private placement was made and student accepted at Brehm, but that one week later the school district was advised that Brehm was not approved by state board of education even though the district previously had been advised it was. In granting the injunction, the court reasoned that the state regulation stating that an unapproved placement shall not be used means that the placement is ineligible for reimbursement, not that it is forbidden. The court further held that failure to return

information release forms after acceptance of the student at Brehm did not prevent performance of the agreement by the district. The court also ruled that any mistake as to approval status did not render the agreement unconscionable under applicable state law. Thus, the plaintiff had a high likelihood of success on the claim. The court additionally found irreparable harm, that traditional remedies were inadequate and that the balance of harms favored the plaintiff. The court issued the injunction without requiring a bond in light of high likelihood of success and the plaintiff's *in forma pauperis* status.

XVI. POST-SECONDARY TRANSITION

XVII. MAINTENANCE OF PLACEMENT (STAY-PUT)

Davis v. District of Columbia, No. 21-7134, 2023 WL 5209559, --- F.4th ---, 123 LRP 24587 (D.C. Cir. Aug. 15, 2023). This case involved a student with autism spectrum disorder and other disabilities, who had a history of aggression, self-injury, and property destruction, behavior easily triggered by a range of environmental stimuli. The residential facility in which he received special education services unilaterally discharged him at the end of October 2021. The defendant said it was unable to locate a new residential placement, and offered him in-home services or virtual services with a virtual support aide in a high school classroom, until it found a new residential setting for him. Nineteen residential facilities rejected him. The parent filed for due process shortly before the discharge from the residential facility and requested a stay-put injunction from the district court, but the district court denied a motion for a temporary restraining order or injunction to maintain the placement at a residential facility or provide comparable interim services. The court of appeals affirmed. The court declared, "The stay-put mandate does not apply because the District did not effectuate a fundamental change in [the student's] educational placement by attempting to alter or undo the services to which he is entitled under his IEP." 2023 WL 5209559, at *4 (internal quotation marks deleted). The court repeated the district court's finding that the defendant engaged in a thorough and ongoing search for a placement. It continued, "[T]he stay-put provision is inapplicable because the residential component of [the student's] IEP became unavailable for reasons outside of the District's control." *Id*. The court, however, noted that "the District may ultimately be responsible for failing to provide [the student] a FAPE." *Id*. at *5. The court went on to state that even if the stay-put provision applied, denial of relief was proper, saying that the language of 20 U.S.C. § 1415(j) speaks of remaining in the then-current placement, but "a student cannot remain in an unavailable placement." *Id* at *6. The court said the provision did not require the defendant to create an alternative placement under the circumstances of the case. The court left open the possibility of injunctive relief under traditional standards, as opposed to an automatic stay-put injunction, as well as retrospective relief if the defendant shirked its duty to provide FAPE.

Mendez v. Banks, 65 F.4th 56, 83 IDELR 28 (2d Cir. Apr. 12, 2023). Here the parents and guardians of five students with disabilities who filed due process proceedings alleging that the New York City Department of Education denied the students FAPE obtained pendency orders requiring the department to fund the students' placement at a

specialized private school for the duration of the proceedings. The parents sued the department and its chancellor for failing to make payments. The district court denied a preliminary injunction, and the court of appeals affirmed. The court declared, "The IDEA's stay-put provision entitles families to automatic relief with respect to educational placement but not with respect to payments. Parents seeking educational payments may still be entitled to automatic injunctive relief if they can show that a delay or failure to pay has threatened their child's placement. But absent such a showing, the IDEA does not compel the state to accelerate its disbursement of funds." *Id.* at 59. In applying that rule, the court noted that the department said that it was applying its usual payment process and needed to receive and review financial documentation, and that it had already issued payment through at least March 2023. The parents were not yet entitled to relief in the form of tuition payment for the remainder of the school year, and there was no guarantee that the proceedings would be pending that long, even if that may be probable. Accordingly, the claim for payment of tuition was not yet ripe. Prophylactic relief was not warranted when the department had paid the obligations when due. A claim for unpaid transportation costs incurred in February and still unpaid, was ripe, however. The court said that entitlement to an automatic injunction without a showing of irreparable injury did not create an obligation that the department fast-track the payment in the absence of jeopardy to a student's placement. Traditional preliminary relief standards did not compel relief when by the plaintiffs' own concession, the placements were not in danger.

Doe v. Portland Pub. Schs., 30 F.4th 85, 80 IDELR 207 (1st Cir. Mar. 29, 2022). In this case, the court of appeals reversed a district court order requiring the school system to pay throughout the continuation of the litigation for the student's tuition at a private school where he had been placed by his parents in February 2020. The district court had ruled that the hearing officer's reimbursement order constituted an agreement between the parents and the state education agency that a change of placement to the private school was appropriate. In reversing the district court decision, the court emphasized that the hearing officer had actually determined that the IEP issued by the public school in January 2020, would provide FAPE, and the order to pay tuition was simply an equitable remedy the hearing officer ordered for the public school's denial of a FAPE to the student from December 2017 to November 2019. The parents had referred the student for special education evaluation as early as September of 2017, but the school concluded in December 2017 that he was not eligible. The parents made a referral again in May 2019, and he was found eligible in November 2019, then offered an IEP on January 24, 2020. The parents had already placed the student in a private school in fall, 2019. The parents invoked due process on November 6, 2019, and the hearing officer concluded that the student had been denied a FAPE between December 2017 and November 2019. The hearing officer required the public school system to reimburse the parents $74,613.35, for the costs of tutoring and summer programming in summer 2019, a private tutor engaged in fall 2019, private school classes in spring and summer of 2020, a private evaluation, and the fall 2020 semester at private school. However, the hearing officer found that the January 2020 IEP offered the student FAPE, and did not order continuing placement for the student at private school. The district court granted the parents' motion to require the school system to pay for continued placement at the private school for pendency of judicial proceedings. After ruling that the court of appeals

had jurisdiction despite the final order rule due to the collateral order exception, the court reversed the order. Though noting that "An administrative decision in favor of a unilateral change of placement to private school by parents can constitute 'agreement' by the state to that placement for purposes of the stay-put provision," under *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 372 (1985) and 34 C.F.R. § 300.518(d), the court said that this decision by the hearing officer was not a decision that the private school was appropriate so as to constitute agreement. Reimbursement in this case was a remedy for a fixed period in the past. Judge Thompson dissented.

S.C. v. Lincoln Cnty. Sch. Dist., 16 F.4th 587, 79 IDELR 241 (9th Cir. Oct. 18, 2021). This case concerned a teenage girl with Prader-Willi Syndrome, a genetic condition that disrupts appetite control and leads to anxiety, depression, and developmental delay. The therapy includes total food security, in which food is provided at mealtimes but otherwise kept securely out of sight. The student's mother filed a due process case in May 2020, then in September, the IEP team issued a new IEP not approved by the mother or the student. The hearing covered the two years prior to the filing of the complaint and so the decision did not cover the September 2020 IEP. The ALJ found a denial of FAPE for May 21, 2018, to May 21, 2020, holding that the student needed total food security in a school-wide environment to receive meaningful educational benefit, and ordered as a remedy that the student be placed at a residential facility that treats students with Prader-Willi and provides total food security in the overall educational environment, starting the first day of winter 2021 semester until the district provided total food security in a school-wide setting, along with an IEP addressing all the deficiencies identified in the decision, or until the next annual IEP in September 2021. The district neither appealed nor complied with the order, and the parent filed the court action seeking a stay put order or preliminary injunction. The court of appeals reversed the district court's denial of the requested order. The court reasoned that the parent was a party aggrieved under the IDEA by the district's failure to comply or appeal. It further reasoned that the ALJ's order adopted a two-phase remedy, first the immediate transfer to the private center, and second that the student could be moved back if the ALJ determines that a new IEP addresses the deficiencies in the prior setting of the student. The court went on to say that a district should not be able to nullify an ALJ decision by issuing a new IEP superseding the one that is the subject of the decision, and the parent should not be forced to file a new due process complaint to challenge the new IEP. The court further reasoned that the ALJ's order constituted an agreement between the state and the parent for funding of the student at the private center, making the center the student's legal placement no later than the first day of the winter semester 2021. The court also held that irreparable harm and other traditional preliminary injunction factors need not be shown.

Hatikvah Int'l Acad. Charter Sch. v. East Brunswick Twp. Bd. of Educ., 10 F.4th 215, 79 IDELR 121 (3d Cir. Aug. 19, 2021). In an action brought by a student's former charter school against the student's school district, the court reversed a preliminary injunction decision that had assigned the school district the costs of transportation for the student's stay-put placement, but assigned the charter school the tuition costs. The court of appeals ruled that the resident school district had to pay all the pendent

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placement costs. The student, a fifth grader with ADHD, oppositional tendencies, and developmental delays, had been at the public charter school, which is its own local educational agency, and in 2018 the charter school proposed an IEP that would place him at the Bridge Academy private school. The parents unilaterally placed the student at a different private school and filed for due process against the charter school and the resident school district seeking tuition reimbursement. The charter school and the parents settled on the record in front of the ALJ, with the private school agreeing to implement a new IEP that would place the student at the private school chosen by the parents. The ALJ approved the agreement. The resident district did not object, did not participate in the proceedings, and was present when the agreement was placed on the record, but was not a party to the agreement. The resident district then filed its own due process petition, challenging the private placement and contending that the resident district could provide the student FAPE in a less restrictive environment. The ALJ ruled in 2021 that the resident district did not show that it could provide the student the education required by his IEP. The parents filed an emergency motion in response to the district's due process petition to force the district to pay the costs of the private school, and the charter school supported the motion. All parties agreed that the private school was the current educational placement, but a dispute emerged between the charter and the district over payment for the costs of the pendency placement. The ALJ assigned transportation costs to the district, and the district did not object. But the ALJ ruled that the charter had to pay the tuition, and the charter filed an appeal to district court. The district court upheld the ruling and the court of appeal reversed. The court of appeals noted that in earlier cases, the resident school district had been found responsible for all costs of pendency placements, though those cases did not involve charter schools. Turning to state law, the court said that, "New Jersey law explicitly extends the resident school district's financial obligations to costs associated with an IEP that a charter school implements. N.J. Stat. Ann. § 18A:36A-11 broadly requires charter schools that provide services to students with disabilities to comply with state laws. But it also explicitly provides that, "the fiscal responsibility for any student currently enrolled in or determined to require a private day or residential school shall remain with the district of residence," not with the charter school. *Id.* § 18A:36A-11(b)." *Id.* at 219. Resident school districts can challenge the placement decision, but the court said that a challenge would not change the responsibility to pay. Nor does the reimbursement character of the relief, for financing is part of a placement. The requirement to pay for the pendent placement does not undermine the right to challenge the placement on its merits. The court found this arrangement to be a deliberate state policy choice despite an argument it could induce charters to try to shift costs to resident districts.

Y.B. v. Howell Twp. Bd. of Educ., 4 F.4th 196, 79 IDELR 31 (3d Cir. July 19, 2021). In this case involving a twelve-year-old student with Down Syndrome with cognitive, social, and motor delays, who had been served in a private placement by the Lakewood school district, but then moved to the Howell school district, which offered placement in a special education class in a public school, the court ruled in favor of Howell. The parent had rejected the Howell school district's proposal, continued to send the student to the private placement, and eventually filed for due process. The court affirmed the ALJ and district court decisions and held that under 20 U.S.C. § 1414(d)(2)(C)(i)(I), an intrastate transfer student need only be afforded comparable services to those received

from the previous district, and the stay-put provision, 20 U.S.C. § 1415(j), does not apply so as to require the new school district to continue to implement the student's original IEP. The court reasoned that the parent's view would render the comparable-services provision a nullity and would make the school district subject to the unilateral power of parent to invoke stay put. The court opined that the status quo no longer exists once a student voluntarily transfers. It further concluded that the evidence demonstrated the Howell program provided services comparable to those in previous IEP.

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

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

XVIII. MAINTENANCE OF PLACEMENT AND COVID-19

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

Abrams v. Carranza, No. 20-CV-5085, 2020 WL 6048785, 77 IDELR 152 (S.D.N.Y. Oct. 13, 2020), *aff'd sub nom. Abrams v. Porter*, No. 20-3899-cv, 2021 WL 5829762, at *2, 80 IDELR 35 (2nd Cir. Dec. 9, 2021) ("[In the instant case, plaintiffs' counsel conceded in the district court that the students' placements at iBRAIN were not at risk in the absence of an automatic injunction. More specifically, the dispute related to efforts by the plaintiffs to obtain payment for tuition and supporting services for a portion of the prior school year (namely, the 2019–2020 school year)."). In this case the court denied a motion for a temporary restraining order and preliminary injunction despite allegations that the defendant failed to fund services, including special transportation and nursing since start of Covid-19 pandemic in March, in contravention of pendency rights, for students at a private school called iBrain. The defendant responded that not all students in the suit were entitled to the same services, and that it had not been provided adequate information from iBrain nor invoicing for nursing services during the pandemic so as to

permit reimbursement. The parents sought reimbursement for expenses from March to July 2020, alleging financial hardship. The court, however, found no irreparable harm, reasoning that the placement at iBrain was not at risk and noting that prospective relief had been granted for 2020-21 school year. *See also* 2020 WL 4504685, 77 IDELR 47 (S.D.N.Y. Aug. 5, 2020) (denying motion for temporary restraining order and preliminary injunction requiring immediate payment for transportation and other services, reasoning that placement at iBrain itself was not at risk). The October 13, 2020, decision was summarily affirmed by *Abrams v. Porter*, No. 20-3899-cv, 2021 WL 5829762, at *2, 80 IDELR 35 (2nd Cir. Dec. 9, 2021) ("[G]iven that both sides agreed that there was no risk of the students losing their pendency placement while the dispute regarding past payments continued to be litigated, and that the plaintiffs were granted prospective relief for the 2020-2021 school year, the district court did not abuse its discretion in denying an injunction under the IDEA's stay-put provision. For the same reason, there is no basis to disturb the district court's decision under the traditional preliminary injunction standard. . . . [G]iven the evidence that the students' placements for the then-ongoing 2020-2021 school year were not at risk, the district court did not abuse its discretion in finding that plaintiffs' monetary dispute with the DOE did not satisfy the 'irreparable harm' requirement."). Ultimately, the district court granted the plaintiffs' motion for summary judgment requiring the department to fund transportation services on the basis of school-year long contracts by plaintiffs with a private transportation company, after the department had refused to pay for transportation and tuition when schools were closed due to Covid-19. No. 20-CV-5085, 2022 WL 523455, 80 IDELR 157 (S.D.N.Y. Feb. 22, 2022).

XIX. MOOTNESS

Patrick G. v. Harrison Sch. Dist. No. 2, 40 F.4th 1186, 81 IDELR 125 (10th Cir. July 26, 2022), involved a student with autism and speech delays, placed by district at private school named Alpine starting in 2013, whose proposed 2016 IEP called for placement at Mountain Vista Community School. The parents disagreed with the 2016 IEP and filed for due process; the district continued paying the Alpine tuition at first, but ultimately stopped. The court affirmed in part and reversed in part the district court's dismissal of the case as moot. It held that the claims of the parents based on the terms of the 2016 IEP and the procedures used to adopt it were moot because the IEP expired, and that the exception to mootness for controversies capable of repetition yet evading review did not apply to those claims because there was no reasonable expectation that the student would be subjected to the same action again, specifically inadequate evaluation, failure to include Alpine staff at the IEP meeting, pre-determining placement for a Mountain Vista classroom, not making an IEP that was appropriately ambitious, failing to consider the student's behaviors and develop a behavior intervention plan for the IEP, and unilaterally limiting services in the IEP, all of which related to the 2016 IEP and its development. However, the court ruled that the parents' claim for attorneys' fees for alleged partial success in the due process hearing was not moot, stating, "an attorney's fee claim is not moot when predicated on the (allegedly) favorable merits relief a claimant obtained from an administrative decision." *Id.* at 1210. The court further held that there was a live dispute between the district and the parents over whether the district can reimburse the parents' insurer for all but the parents' premiums for the costs

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for occupational therapy and speech and language services that the insurer funded, or must reimburse the parents directly. Finally, the court held that the parents' claim for ongoing stay-put relief was moot, reasoning that the parents never argued that the claim was not moot when the underlying substantive claim was moot, despite the existence of authority supporting such an argument.

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

Brach v. Newsom, supra.

XX. PRECLUSION AND RELATED

Heston v. Austin Indep. Sch. Dist., 71 F.4th 355, 123 LRP 18885 (5th Cir. June 22, 2023). The court in this case held that preclusion does not bar the refiling of Section 504, ADA, and Section 1983 damages claims against a school district based on allegations of verbal harassment and physical abuse of a student with a disability by a school staff member, when the identical case had been finally dismissed for failure to exhaust prior to the Supreme Court decision in *Perez v. Sturgis Public Schools*.

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

XXI. DUE PROCESS HEARING COMPLAINTS – PARENTAL STATUS

Q.T. v. Pottsgrove Sch. Dist., 70 F.4th 663, 123 LRP 18151 (3d Cir. June 14, 2023). Here, the court of appeals reversed the district court and hearing officer and ruled that the hearing officer should not have dismissed a due process hearing request brought by the adult cousin of the student in a dispute with the school district over the IDEA eligibility of the student. The student lived with the adult cousin, and supported the student, not just during the school year. The cousin had the student on the household SNAP grant and HUD paperwork. The court relied on 20 U.S.C. § 1401(23)(C), which defining "parent" to include "an individual acting in the place of a natural or adoptive parent ... or other relative ... with whom the child lives." The court said that although the student's grandmother had primary legal and physical custody and the custody order did not prejudice the rights of the student's biological parents, there was no need to resort to 34 C.F.R. § 300.30(b)(2), regarding judicial decrees and orders, which the district court had relied on, when neither the grandmother nor the biological parent contested the cousin's authority to act as parent for IDEA purposes.

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XXII. DUE PROCESS HEARING REQUEST LIMITATIONS

Charlotte-Mecklenburg Cnty. Bd. of Educ. v. Brady, 66 F.4th 205, 83 IDELR 27 (4th Cir. Apr. 19, 2023). This case involved a student enrolled in the public school from 2005 to 2015. Due to impairments that gave rise to problem behavior, the school provided the student with accommodations under Section 504. The public school did not evaluate the student for eligibility for an IEP under IDEA. Before a meeting set for February 26, 2013, the parent forwarded the 504 team an email from the student's psychologist saying that the student would be eligible for an IEP on the basis of other health impairment and asking if an IEP could provide tutoring or other services; the parent explained that he wanted to discuss the topics in the email. The 504 team reconvened on September 13, 2013, and the parent signed a form acknowledging receipt of a copy of parental-student rights and procedural safeguards. When the student's condition worsened in 2015, the assistant principal told the parents that she needed to attend school elsewhere. The parents enrolled her in a short-term residential treatment center and then in a therapeutic boarding school. She returned home in 2017 and continued her schooling through online classes. On January 22, 2018, the parent filed a request for due process. The ALJ ruled that the claim was barred by limitations because the parent knew or should have known of the claim before January 2017. The state review officer reversed, holding that the withholding exception applied. *See* N.C. Gen. Stat. § 115C-109.6(c) ("The one-year restriction in subsection (b) of this section shall not apply to a parent if the parent was prevented from requesting the hearing due to ... the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent."); *see also* 20 U.S.C. § 1415(f)(3)(D) (similar federal statutory provision). The review officer reasoned that the public school failed to provide notice to the parents of the IDEA procedural safeguards or issue a prior written notice of refusal to evaluate the student under IDEA. The case was remanded to the ALJ, but before any action on the remand, the school filed suit in district court to challenge the decision. The parent filed a counterclaim asking the court to declare that the public school violated IDEA and to order compensatory education. The district court held that the parent made a request for evaluation when he sent the psychologist's email to the 504 team and said he wanted to discuss it with the team. The public school did not send the parent the copy of the procedural safeguards then and did not send written notice of refusal to evaluate. So the due process case was not time barred. The parent's counterclaim was dismissed for lack of exhaustion, however. The court of appeals affirmed in part and reversed in part. It said that the district court was correct that the parent effectively requested an IEP evaluation by sending the school the psychologist's report and communicating the desire to discuss the issues raised by it. Receipt of procedural safeguards under Section 504 in September 2013 is not the same as receipt of the IDEA safeguards explaining the right of review under IDEA and notice of the applicable limitations. An annual mailed notice of the availability of the Parent-Student Handbook on the school's website was not enough even when the Handbook contained the procedural rights. The court further held that the parent did not need to exhaust administrative remedies for the counterclaim, reasoning that 20 U.S.C. § 1415(i)(2)(A)'s pre-suit requirements apply only to the party bringing the action. A compulsory counterclaim is not subject to that restriction. Since under Fed. R. Civ. P. 13, a party's counterclaim is compulsory if it arises out of the same transaction or

occurrence that is the subject matter of the opposing party's claim and does not require adding a party over whom there would be no jurisdiction, the parent's claim was compulsory and exhaustion was not required. The court commented that both the complaint by the school and the parent's counterclaim involved the school's actions or inactions during the same time period and regarding the same student, and there was a logical relation between claim and counterclaim. The case was remanded to district court.

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

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

XXIII. CONDUCTING DUE PROCESS HEARINGS

G.W. v. Ringwood Board of Education, 28 F.4th 465, 80 IDELR 209 (3d Cir. Mar. 16, 2022), involved a due process hearing initiated by the parents of a student eligible for special education under the Individuals with Disabilities Education Act. After a first hearing session was adjourned, the administrative law judge held a meeting with counsel for both parties, then a meeting with one of the parents and a school board representative. The parties appeared to reach an agreement, and the terms of the agreement were read into the record. The ALJ found that the parties voluntarily agreed to the signed settlement document, the settlement disposed of all issues in controversy between the parties, and the settlement was consistent with the law. The parties were ordered to comply with the settlement terms. The agreement said the parties would bear their own fees and costs. Three days later, the parents wrote to the school superintendent and all members of the school board, stating that they repudiated the agreement. They filed a motion with the ALJ to set the agreement aside. A little more than a month later, the parents filed suit in federal court alleging that they did not enter into the agreement knowingly and voluntarily. They sought relief under the IDEA, under the New Jersey Declaratory Judgment Act seeking to declare the settlement void, and under the New Jersey Declaratory Judgment and Civil Rights Acts to have the attorney

fee waiver declared void. The district court dismissed the case without prejudice for lack of subject matter jurisdiction. On appeal, the circuit court reversed and remanded. The court reasoned that the parents were challenging the order of the ALJ terminating their due process complaint, contending that they did not enter into any valid agreement resolving the case. Accordingly, the parents were alleging that the ALJ's order was erroneous. That the basis for the alleged error was that the supposed agreement was invalid under contract law did not deprive the federal court of jurisdiction, for 20 U.S.C. § 1415(i)(2)(A) permits a civil action in state or federal court challenging the findings and decision of the ALJ or hearing officer. The decision was one made on substantive grounds, as 20 U.S.C. § 1415(f)(3)(E)(1) requires, and addressed the student's rights under the IDEA, further reciting the right to appeal to court. There is no requirement that the decision address free, appropriate public education for it to be appealable: a dismissal could be on the basis of limitations or any of various procedural grounds and still be appealable to federal court. The court found the assertion of jurisdiction consistent with earlier caselaw that allowed a judicial action when a school district ignored a due process decision and the parent filing the case was considered aggrieved despite winning the case below. Judge Phipps dissented. In subsequent proceedings, the district court denied the school board's motion for summary judgment and the plaintiffs' motion for judgment on the pleadings. No. 19-13734, 2022 WL 17850251 (D.N.J. Dec. 21, 2022).

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

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

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

XXIV. DUE PROCESS AND COVID-19

XXV. TUITION REIMBURSEMENT

D.R. v. Redondo Beach Unified Sch. Dist., supra.

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

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

Doe v. Newton Pub. Schs., supra.

XXVI. COMPENSATORY EDUCATION AND RELATED

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

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

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

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

XXVII. ADMINISTRATIVE EXHAUSTION AND DAMAGES CLAIMS

Perez v. Sturgis Pub. Schs., 143 S. Ct. 859, 82 IDELR 213 (Mar. 21, 2023) (Gorsuch). The Supreme Court applied a plain-meaning interpretation to the language of 20 U.S.C. § 1415(*l*), holding that "before the filing of a civil action under [other] laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." Accordingly, a student who used sign language and was allegedly denied appropriate services for years, who settled an IDEA claim against the school district, did not need to exhaust IDEA due process procedures and was free to pursue an action seeking compensatory damages under Americans with Disabilities Act Title II.

Cummings v. Premier Rehab Keller, 142 S. Ct. 1562, 122 LRP 14381 (Apr. 28, 2022) (Roberts). In this case, the Supreme Court ruled that Section 504 and the provision of the Affordable Care Act that adopts the remedies of Section 504 do not permit an award

of damages for emotional distress. The Court reasoned that the federal government-federal grantee relationship resembles that of the parties to a contract, and that the grantee would not expect that emotional distress damages would be the remedy for conduct that violates the contract.

Heston v. Austin Indep. Sch. Dist., supra.

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