AGENDA

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

TUESDAY, OCTOBER 8, 2025

12:00 p.m. – 12:30 p.m.	*Open Session – Deusdedi Merced, Esq.* The Administrative Hearing Commissioners will be given the opportunity to ask questions and discuss issues/problems they have encountered while presiding over IDEA hearings since we last met.
12:30 p.m. – 3:30 p.m.	*Endrew F. – Judicial Interpretations and Trends* This session will focus on how the U.S. Supreme Court's decision in *Endrew F. v. Douglas County School District* has been interpreted by the lower courts since it was decided in 2017. The session will begin with a discussion of what the Court decided, as compared to what had been decided in *Board of Education of Hendrick Hudson Central School District v. Rowley* in 1982, followed by practical considerations the Commissioners should keep in mind when interpreting free, appropriate public education matters. The session will conclude with a review of interpretations by lower courts.
3:30 p.m. – 5:00 p.m.	*Legal Update* Mr. Merced will review select recent decisions addressing IDEA issues rendered by federal district courts and courts of appeals, while also providing insight on their significance to the hearing process.

APPLYING *ENDREW F.*: *PRACTICAL CONSIDERATIONS*

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

TUESDAY, OCTOBER 28, 2025

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I. INTRODUCTION

In *Board of Education of Hendrick Hudson Central School District v. Rowley*,[1] the United States Supreme Court established a two-part test to determine whether free, appropriate public education (FAPE) has been offered/provided to the student. First, the court/hearing officer must determine whether the State, inclusive of the individualized education program (IEP) team and school district, complied with the procedures outlined in the Individuals with Disabilities Education Act[2] (IDEA) relating to the development of the IEP. Second, the court/hearing officer must determine whether the resulting IEP is reasonably calculated to enable the student to receive educational benefits.[3]

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

[1] 458 U.S. 176, 553 IDELR 656 (1982)

[2] 20 U.S.C. § 1400, 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.'"). Implementing regulations followed the reauthorized IDEA in August 2006. *See* 34 C.F.R. Part 300 (August 14, 2006). In December 2008, the regulations were clarified and strengthened in the areas of parental consent for continued special education and related services and non-attorney representation in due process hearings. *See* 34 C.F.R. Part 300 (December 1, 2008). In June 2017, the regulations were further amended to conform to changes made to the IDEA by the Every Child Succeeds Act (ESSA).

[3] *Id*. at 206 – 207.

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

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.[4]

Yet, despite this warning, courts since *Rowley* have broadly applied *Rowley's* standard to all students covered under the IDEA and expanded the standard and its application. Procedurally, courts sought to establish substantive harm resulting from the procedural violations.[5] (In 2004, Congress codified this practice in 34 C.F.R. § 300.513.) On the substantive side, the courts were split on how much benefit *Rowley* had intended, with several circuits – First, Eighth, Tenth, Eleventh, and the District of Columbia – deciding that *Rowley* only required "some" benefit and, other circuits either applying a "meaningful" benefit standard – Second, Third, Fourth, Fifth, Sixth, and Ninth – or interchangeably using both – Seventh.[6]

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

II. DECISION SUMMARY

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

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[4] *Id*. at 202.

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

[6] Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Ed. Law Rep. 1 (2009). Scott Goldschmit, A New Idea for Special Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities, 60 Cath. U. L. Rev. 749 (2011).

The Court emphasized *Rowley*'s language requiring a substantively adequate education as well its statement that it was not establishing a single test for the adequacy of educational benefits students should receive.[7] The Court read *Rowley* as pointing to "a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[8] The approach focuses on the reasonable, not the ideal, but it emphasizes progress for the individual student given his or her unique needs.[9] The Court reaffirmed *Rowley*'s statement that if a student is fully integrated in the regular classroom, passing marks and advancement from grade to grade through the general curriculum will ordinarily satisfy the IDEA standard, though a footnote to the opinion warns that, "This guidance should not be interpreted as an inflexible rule," and is not a holding that every student advancing from one grade to the next "is automatically receiving an appropriate education."[10] The Court said that a student not fully integrated in the regular classroom may not have the ability to achieve at grade level, but the IEP for that student should be "appropriately ambitious in light of his circumstances," a standard "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit."[11] "The goals may differ, but every child should have the chance to meet challenging objectives."[12]

The Court rejected the parents' argument that students with disabilities must be offered an education that provides the opportunities to attain self-sufficiency and contribute to society substantially equal to the opportunities provided to children without disabilities.[13] The Court noted that a similar standard was rejected in *Rowley*, and Congress, though it revised the IDEA several times since 1982, did not materially alter the statute's definition of free, appropriate public education.[14] The Court said it was not creating "a bright-line rule," but said the absence of the rule should not be taken as an invitation to courts to supplant the role of school authorities, to whose expertise and professional judgment deference should be paid.[15] A reviewing court, "may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances."[16]

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[7] *Id*. at 996.
[8] *Id*. at 999.
[9] *Id*.
[10] *Id*. at 1000, fn. 2.
[11] *Id*.
[12] *Id*.
[13] *Id*. at 1001.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 1002.

III. OBSERVATIONS

There is much that the *Endrew F.* Court did not define and required further elaboration.[17] As expected, more clarity would come first from hearing officers and, ultimately, from reviewing courts. In the first year or so after *Endrew F.* was decided, courts delved into the nuances resulting from *Endrew F.* but without appreciable discussion.[18] Later cases have added dimension to *Endrew F.*

Nonetheless, there are some clear takeaways from *Endrew F.*, including:

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

- The IEP must continue to be reasonably calculated, which is to say that school officials are tasked with prospectively judging through a fact-intensive, collaborative process what is reasonably appropriate for the student.[19]

- Like in *Rowley*, the Court reaffirmed that the IDEA "cannot and does not promise 'any particular [educational] outcome.'"[20]

- *Endrew F.* better refocuses the inquiry on the individualized needs of the student – the IEP must be "reasonably calculated to enable a child

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

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

[19] *Endrew F.*, 137 S. Ct. at 999.

[20] *Id.* at 998.

to make progress appropriate in light of the child's circumstances."[21] "[E]ducational benefit [that is] merely … more than *de minimus"* or enables the student "to make *some* progress," is inadequate.[22]

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

    - With respect to the first group, the Court said, "progress appropriate in light of" the student's circumstances is "progress in the general education curriculum," as measured, generally, by performance in regular examinations, passing marks/grades, and advancement from grade to grade. The Court warned that advancing from grade to grade does not automatically mean the student is receiving FAPE.[23]

    - As to the second group (i.e., those not fully integrated), the Court offered even more subjective guidance. For this group, the "IEP need not aim for grade-level advancement," but "must be appropriately ambitious in light of [the student's] circumstances … just as advancement from grade to grade is appropriately ambitious for most [students] in the regular classroom." This would include "the chance to meet challenging objectives" just like any other student.[24]

That is what we do "know" from reading the decision. Putting it altogether, however, on a case-by-case basis, is a bit easier said than done. And, what is more, although the Court expressly stated that FAPE is not "[a]n education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities,"[25] the Court

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[21] *Id*. at 999.

[22] *Id*. at 1000 – 1001.

[23] *Id*. As the Court noted, this guidance is not "an inflexible rule." *Id*., fn 2. Not every student advancing from grade to grade is automatically receiving a FAPE. *Id*. For example, a student's goals and objectives may not be related to the general education curriculum and, therefore, the student's progress, or lack thereof, should not be measured by the general education "system" but rather by criteria set forth in the student's IEP. *Id*. at 1000.

[24] *Id*.

[25] *Id*. at 1001.

curiously also said that the IEP is constructed only after careful consideration of the student's "potential for growth."[26]

IV. IMPORTANCE OF PLAAFP – A RENEWED EMPHASIS

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

The PLAAFP is the starting point for determining annual goals.[27] Without a baseline of current performance, it is difficult to draft measurable and relevant annual goals,[28] and to measure future progress. Age, behavior, other learning difficulties other than the primary disability, history, and current performance help to define the student's unique circumstances. How the IEP team evaluates and assesses this information "contribute[s] to ensuring the [student] has access to challenging objectives."[29]

V. PRACTICAL CONSIDERATIONS

A. Though it has been eight years since *Endrew F.* was decided, not all decisions since then have provided useful guidance on aspects of the Court's opinion. Practitioners tasked with interpreting/applying *Endrew F.* should keep the following in mind:

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

- Whether the student's need(s) are identified in the present level of performance statement.

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[26] *Id.* at 999.

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

[28] *Id.*

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

- Whether the statement includes a baseline of current performance for each need that is identified.
- Whether there is a corresponding annual goal for each identified need.
- The student's previous rate of academic/functional progress in learning/mastering needed skill(s).
- The student's potential for growth.[30]
- Whether the student is on track to achieve or exceed grade-level proficiency.
- Whether the goals are reasonably calculated to afford the student a reasonable opportunity to achieve them within one school year given the student's rate of progress.
- Whether the goals are measurable.

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

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

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

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

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

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

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

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

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

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

B. *Endrew F.* warns that a school district is expected to "offer a *cogent and responsive explanation*" for their decisions that shows the IEP is appropriately ambitious. The Court's opinion does not specify when and where this explanation is offered/documented. However, practitioners should keep the following in mind to meet this expectation:

1. Whether the prior written notice (PWN) documents the reasoning behind/basis for the IEP team's decisions.

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

3. Whether there are appreciable changes in academic achievement and functional performance within the school year or between school years and why, and is it documented in the IEP/PWN.

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

5. Whether the IEP team met, and documented, during the year revisions to the student's IEP, as appropriate, to address any change circumstances, including lack of expected progress in meeting the annual goals and the general education curriculum.[31]

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

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

[31] 34 C.F.R. § 300.324(b)(1)(ii)(A).

ENDREW F.: JUDICIAL INTERPRETATIONS AND TRENDS

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
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Many judicial decisions cite *Endrew F. v. Douglas County School District RE-1*, 580 U.S. 386, 69 IDELR 174 (Mar. 22, 2017), which interpreted the Individuals with Disabilities Education Act's (IDEA) obligation to offer free, appropriate public education, but not all of the opinions provide useful guidance on the innovative aspects of the Court's decision, such as the declaration that IEPs should be "appropriately ambitious in light of [the child's] circumstances," that "every child should have the chance to meet challenging objectives," and that a "reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." This outline highlights judicial decisions that may shed light on *Endrew F.*'s interpretation of the obligation to provide free, appropriate public education. The emphasis is on recent cases from the federal courts of appeals and instructive district court decisions.

This outline covers a wide range of topics relevant to *Endrew F.* and free, appropriate public education. These topics include:

- IDEA and the Duty to Provide FAPE
- The *Endrew F.* Decision
- Appropriately Ambitious Programs and Challenging Objectives
- Individual Circumstances and FAPE
- Covid-19 and FAPE
- Related Services and FAPE
- Residential Placement and FAPE
- Disability Classification and FAPE
- More on Cogent and Responsive Explanations
- Appropriateness of Unilateral Private Placement
- Trends and Observations

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

IDEA and the Duty to Provide FAPE

The Individuals with Disabilities Education Act (IDEA) requires all states receiving federal special education funds to offer free, appropriate public education (FAPE) to all children with disabilities they and their school districts educate. IDEA provides:

> A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:
>
> > (1) Free appropriate public education
> > (A) In general
> > A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1412(a).

The statute gives a definition of the duty:

> The term "free appropriate public education" means special education and related services that--
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. § 1401(9).

As Justice Rehnquist pointed out in *Board of Education v. Rowley*, 458 U.S. 176, 188 (1982), this definition "tends toward the cryptic rather than the comprehensive," but drawing on the legislative history and other sources, the *Rowley* Court said that the FAPE duty did not require public schools to maximize the potential of each child with a disability. Nevertheless, "Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon" the child with a disability. Resolving the case in favor of the school district, the Court said that the duty did not entail an obligation to provide a sign language interpreter for a student who was deaf and performed better than the average child in her class, advancing easily from grade to grade with existing accommodations.

The *Endrew F.* Decision

In *Endrew F.*, the Supreme Court vacated and remanded a Tenth Circuit decision that had applied a "merely more than de minimis" standard for determining what constituted appropriate education. The child in the case had autism, and the condition manifested itself in disruptive behavior as well as other impediments to learning. In describing Endrew's situation, Chief Justice Roberts emphasized that the student's behaviors, including that he would "scream in class, climb over furniture and other students, and occasionally run away from school [and had] severe fears of commonplace things like flies, spills, and public restrooms," were a barrier to his educational advancement. The unilateral placement the parents found for him "developed a 'behavioral intervention plan' that identified Endrew's most problematic behaviors and set out particular strategies for addressing them. Firefly also added heft to Endrew's academic goals. . . . Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school." 580 U.S. at 395-96 (citation to record omitted).

The Court referred to *Board of Education v. Rowley* and said that *Rowley* embodied "a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 580 U.S. at 399. The child's IEP must be "appropriately ambitious in light of his circumstances . . . every student should have the chance to meet challenging objectives"; the standard is "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." *Id.* at 402. However, the Court also rejected a standard of requiring that child be provided opportunities to achieve academic success, attain self-sufficiency, and make societal contributions substantially equal to opportunities afforded children without disabilities. Thus, the Court preserved a core of the holding in *Rowley*. The Court further said there was a need to defer to the expertise and exercise of judgment by school authorities. But the Court stressed that "A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 404.

On remand, the district court ruled that the school district's program did not meet the Supreme Court's standard for appropriate education, specifically stating that the minimal progress Endrew made before the private placement was affected by district's lack of success in providing him a program that adequately addressed his behavior. *Endrew F. v. Douglas Cnty. Sch. Dist. RE 1*, 290 F. Supp. 3d 1175, 1183, 71 IDELR 144 (D. Colo. 2018), *appeal dismissed*, No. 18-1089, 2018 WL 4360885 (10th Cir. Apr. 5, 2018).

Appropriately Ambitious Programs and Challenging Objectives

Several recent cases apply *Endrew F.*'s requirement of ambitious programs and challenging objectives in ways that may be instructive for impartial hearing officers (IHOs).

In *Osseo Area Schools, Independent School District No. 279 v. A.J.T.,* 96 F.4th 1062, 124 LRP 9021 (8th Cir. Mar. 21, 2024), the student had a rare form of epilepsy that left her needing help with daily tasks including walking and toileting. Her seizures were so frequent in the morning that she was unable to attend school before noon, but she could remain alert and active from then until about 6 p.m. The Kentucky district she attended before moving to Minnesota in 2015 provided her evening instruction at home, but the Minnesota district refused the parents' requests for evening instruction, and from 2015 to 2018 provided one-on-one instruction in the afternoon, 4.25 hours each school day. When the student entered middle school, where the standard school day ended at 2:40, the district proposed to cut the instruction back to about 3 hours per day. The parents filed for due process and the pending proceeding kept the student at 4.25 hours under the stay-put rule. The ALJ ruled that the district had made maintaining the regular school faculty hours its paramount consideration, rather than meeting the student's needs, and ordered compensatory education and the addition to the student's IEP of home instruction from 4:30 to 6 p.m. each day. The district court affirmed, finding that although the student made some progress while in the district her overall progress was de minimis, and she regressed in areas such as using hand signs to communicate, returning greetings using a button switch, and toileting. The district court found the student could have made more progress if she had received evening instruction and that a 3-to-4-hour school day was too short to pursue many goals recommended by the experts.

The court of appeals affirmed. The court said that IDEA's reach is not restricted to the ordinary school day. It echoed the finding of the district court that the student's progress was de minimis, noting that the student met none of her annual goals for 2016 and 2017, met only a few short-term objectives in 2018, had no progress reports for 2019, and met only a single objective and no goals in 2020. The student regressed with regard to toileting, with a success rate of 45% at the end of her time in Kentucky and declining success once in the Minnesota school district, to the point of having only minimal success. For a while the toileting goal was removed due to the time constraint of the short day. Expert opinion showed that the student would have made more educational progress with evening instruction, and none of the district's explanations for refusing evening instruction were based in the student's needs. In a footnote, the court emphasized that it was rejecting the school district's argument that the IEP should be upheld because it ought to be evaluated as a snapshot at the time it was created, stating that, "[H]ere, the District had more and more information about A.J.T.'s instructional needs and insufficient progress each year. This is not a case where it only became apparent that the student's IEP was inappropriate after the fact." *Id*. at 1066 n.4.

A recent case that applied *Endrew F.* to reject a claim of denial of FAPE is *Alex W. v. Poudre School District R-1*, 94 F.4th 1176, 124 LRP 7692 (10th Cir. Mar. 7, 2024). This case concerned a student with Down Syndrome, autism spectrum disorder, and vision and hearing impairments, who experienced significant behavior difficulties, including grabbing at others, kicking, pulling hair, undressing himself, and trying to run away. He was largely nonverbal but used a touchscreen tablet with icons to communicate. The parents alleged a denial of FAPE for the school years from 2014 to 2018. The ALJ and the district court rejected claims regarding school years 2014 and 2015 as outside the statute of limitations and found no denial of FAPE for the other two years. The court of appeals affirmed these rulings. Regarding FAPE and the evaluations that led to the student's IEPs, the court said that the student's behavioral needs were adequately addressed, and that a functional behavioral analysis was not needed because the IEP team felt confident in helping the student regulate his behavior and knew what worked for him. The court said that the ALJ correctly found that the 2016 IEP included goals, supports, and accommodations to meet the behavioral needs, that it was possible for the student to progress on his goals even though his problem behaviors continued, and that the 2017 IEP had additional goals that responded to the findings of a 2017 reevaluation. The court also agreed that the student received FAPE despite a reduction in direct speech-language and occupational therapy hours, when indirect hours were added and instructional time increased, with the court saying that the therapy offered was adequate. The court further rejected an argument that extended school year (ESY) services should have been offered, noting that the student's regression in the past had been minor and declaring irrelevant the parents' contention that the reason the regression was minor was summer services that they funded. The court said the district could consider other resources available in determining the need for ESY. The court concluded that the district evaluated the student in all areas of disability, saying the district used autism-related assessments and tools; it further noted that the student worked with a speech-language therapist trained to use the touchscreen tablet device, and the student's functional communication improved.

Steckelberg v. Chamberlain School District, 77 F.4th 1167, 123 LRP 24587 (8th Cir. Aug. 15, 2023), is a case in which the parents prevailed that concerns ambitious programs and challenging goals and further exemplifies *Endrew F.*'s use of information about progress of the student at a parental placement to show a denial of FAPE. 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 school 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 students attended classes and counseling during the week, and 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.

A First Circuit case, *C.D. v. Natick Public School District,* 924 F.3d 621, 74 IDELR 121 (1st Cir. May 22, 2019), discussed *Endrew F.* and concluded, in line with cases such as *Alex W.*, that the public school's program was adequate if not ideal, and so met the *Endrew F.* standard. The case concerned a student with an intellectual disability and serious language deficits who had been educated in general education with the help of tutors prior to high school. The court affirmed a decision upholding a public high school placement for the student consisting of general education for electives and a self-contained program for academic courses, an arrangement that would be expected to lead to a certificate rather than a regular diploma. Accordingly, the court affirmed denial of tuition reimbursement for the private placement arranged for the student by the parents. The court said that the public school's proposed program and the modification of it for the final year met the *Endrew F.* standard for free, appropriate public education.

In another First Circuit case, *Johnson v. Boston Pub. Schs.*, 906 F.3d 182, 73 IDELR 31 (1st Cir. 2018), the Court noted that evidence of "slow" progress alone is not *per se* indicative that the student's program failed to meet the *Endrew F.* standard. The question is whether the student's rate of progress is appropriate given his/her circumstances.

Here, the parent of a student with profound hearing loss challenged the student's 2013-14 and 2014-15 IEPs and the school district's proposal to continue educating him in a school that offered both sign and spoken language instruction. The school district attempted to work with the parent and explored various alternative programs for the student but would not agree to provide the specific compensatory services and monetary damages that the parent sought. The hearing officer concluded that the IEPs provided the student with FAPE and that the student had made progress. The parent appealed and the district court agreed with the hearing officer and granted summary judgment against the parent. In her appeal to the First Circuit, the parent argued, in part, that *Endrew F.* had raised the bar for evaluating the adequacy of the IEPs offered to disabled students in the First Circuit. The First Circuit disagreed and held that its pre-*Endrew F.* standard comports with the *Endrew F.* standard. As to the parent's claim of slow progress, the First Circuit remarked that "…the relationship between speed of advancement and the educational benefit must be viewed in light of a child's individual circumstances." As for this student, the First Circuit agreed that the student "moved from a substantial inability to communicate or understand spoken or signed language to

gradually signing, vocalizing, and demonstrating comprehension of other linguistic concepts."

Similarly, in *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765, 73 IDELR 112 (5th Cir. 2018), the Fifth Circuit found that, though *Endrew F.* requires an "appropriately ambitious" IEP, the IEP must nonetheless reflect the student's disability-related needs and the failure to include grade-level standards in an IEP when the student cannot function at grade-level is not a denial of FAPE.

This case concerned a child with a seizure disorder, ADHD, a speech impairment, global developmental delay and other conditions. The Circuit Court affirmed a grant of summary judgment for the school district, ruling that the public school program offered FAPE. The Circuit Court found no conflict between *Endrew F.* and the indicators of FAPE identified in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), that "1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated."

Here, the parents sought more robust academic goals by reference to grade-level Texas Essential Knowledge and Skills (TEKS) strands. The Circuit Court, however, agreed with the lower court that the student could not meet grade-level standards given her disabilities:

> Given [student's] condition, providing her an IEP with every single TEKS strand and standard would not have been individualized. To the contrary, excessive goals could have put her in a position where success would have been exceedingly unlikely.

As such, appropriately ambitious in light of *Endrew F.* "does not require ambitions beyond what may be reasonably expected given the circumstances."

In *Z.B. v. District of Columbia*, 888 F.3d 515, 72 IDELR 27 (D.C. Cir. 2018), the court noted that the lower court had decided the case in favor of the school system before *Endrew F.* came down and expressed doubt that the school system should have prevailed. The court declared that the Supreme Court "in *Endrew F.* . . raised the bar on what counts as an adequate education under the IDEA," *id.* at 517, and quoted the opinion's language about challenging objectives and appropriately ambitious programs. On the merits of the case, which concerned a fourth grader whose parents sought reimbursement for a private placement, the court vacated and remanded the lower court decision upholding the student's 2014 IEP, stating, "The key inquiry regarding an IEP's substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP it offered was reasonably calculated to enable the specific student's progress." *Id.* at 524. The court said that the lower court erred in relying on premise that school system acted promptly after receiving an evaluation obtained by the parents, noting that the school system did not

conduct evaluations earlier when the student struggled, and it also erred in requiring parents to show that no placement within the public school system would be appropriate, stating that parents need only show the shortcomings of the IEP offered. The court upheld the student's 2015 IEP, reasoning that the absence of an executive functioning goal did not matter when that IEP addressed distinct weaknesses in functioning.

A recent District of Columbia Circuit case, in a brief opinion, seemed to echo *Z.B.*'s conclusion about the executive functioning goal when it noted that the repetition of goals in subsequent IEPs does not always show a denial of FAPE. *Edward M.R. v. District of Columbia*, 128 F.4th 290, 125 LRP 4880 (D.C. Cir. 2025).

Individual Circumstances and FAPE

Endrew F. placed great weight on the need to meet the individual needs of students with disabilities, stressing all the details of the Endrew's disabling conditions and the history of his educational progress and later plateauing, as well as the success in the parental placement. Subsequent cases apply individualization reasoning in a variety of contexts.

Los Angeles Unified School District v. A.O., 92 F.4th 1159, 124 LRP 5221 (9th Cir. Feb. 15, 2024), affirmed in part and reversed in part a district court decision and accordingly upheld an ALJ decision that agreed with the parents' position on most issues. The case developed *Endrew F.*'s need for an individualized approach and tied the issue of FAPE to the issue of least restrictive environment (LRE). The case involved a child turning three who had profound hearing loss and relied on cochlear implants. The parents rejected an IEP that called for placement in a public school setting in which 85% of the student's time would be with children who were deaf and hard of hearing. The student would be in an integrated setting for music, recess, library, art and occasional holiday parties for the remaining time. The proposed IEP also provided that the student would receive language and speech therapy one to ten times per week for a total of thirty minutes a week and audiology services one to five times per month for a total of twenty minutes per month, and did not specify if the language and speech therapy would be group or individual. The court affirmed that the school district violated IDEA by failing to specify the frequency and duration of audiology and speech and language services, citing 34 C.F.R. § 300.320(a)(7) and noting evidence from the ALJ hearing that multiple short sessions of speech and language would prevent the targeting of needed skills. Some flexibility could be permitted on the IEP, such as provision of one to three sessions, but not one to ten. The error was not harmless, for the ALJ found the parents did not understand how frequently the student would receive speech and language and audiology and were thus unable to decide if they agreed with the proposal; even staff did not know what the frequency would likely be.

The court also affirmed the ALJ's conclusion that the district's proposed program denied FAPE under IDEA and state law in that it did not provide enough interaction with typically hearing peers for the student to make meaningful progress in spoken language. The court relied on the expert testimony at hearing, saying recess and holiday

parties, plus the other opportunities for mainstreaming in the IEP, were not enough to support progress for the student. The court held there was no requirement for the ALJ to defer to the testimony of the district's staff, and the ALJ found the parents' experts' testimony more persuasive. The court further affirmed that the district's placement did not provide the least restrictive environment for the student, applying the test of *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). The student was not ready for full-time mainstream instruction, but only ninety minutes per week was not enough in light of the student's needs; the district's plan did not address support services to permit an increase in the amount. The fact that the public school was large and diverse, with many non-disabled students, did not matter. Instead, said the court, the focus should be on the individual student's educational experience. In upholding the parents' cross-appeal of the district court decision, the court ruled that the IEP was deficient in not specifying individual speech and language therapy, as opposed to group therapy. The court said the issue was substantive in this case, not a procedural failing of the IEP, in that the student needed individual therapy to receive FAPE. The court noted the ALJ's reliance on expert testimony that individual therapy was essential for the student to learn to pronounce final consonants of words. The school district did not contest the appropriateness of the private school where the parents placed the student, a placement the ALJ upheld. Judge Collins dissented on procedural and substantive issues.

Killoran v. Westhampton Beach School District, No. 21-2647, 2023 WL 4503151, 123 LRP 20863 (2d Cir. July 13, 2023) (unpublished), like *A.O.*, entailed claims of denial of FAPE and failure to educate in the LRE, but in analyzing the specific facts of the student's situation the court upheld the school district's program. The case involved a student with Down Syndrome, and the court of appeals in a summary order affirmed a district court decision in favor of the school district, which had also prevailed at the IHO and SRO levels. The court of appeals ruled that any procedural violations did not impede parents' participation or cause deprivation of educational benefits, and that the IEP was substantively adequate and satisfied the least restrictive environment requirement, although the court conceded that the IEP team should have considered the student's New York State Alternate Assessment results. The court of appeals held that the IEP met free, appropriate public education standards in that it was reasonably calculated to enable the student to make progress appropriate to his circumstances. Although the IEP did not the incorporate the general education curriculum, match the student's goals with the grade-level learning standards, or attempt to mainstream him in a district school, the court said, "It is uncontested that A.K. is an alternately assessed student who has significant learning disabilities, which makes adherence with general education standards impossible," 2023 WL 4503151, at *3. The court upheld the student's recommended placement in a special class in an out-of-district public school against an argument that it did not offer placement in the least restrictive environment. The court applied a test of whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily, and if not, whether the school mainstreamed the student to the maximum extent appropriate. The student placed below the first percentile in reading comprehension, spelling, listening comprehension, and math, and had similarly low results in other areas. Without discussing any particular supplemental aids or services, the court concluded, "In light of

A.K.'s unique needs, it is clear that it would not be possible to educate him in a regular classroom even with the use of supplemental aids and services." *Id*. Mainstreaming for non-academic activities was said to satisfy the obligation to mainstream to the maximum extent appropriate.

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

A case that has received some attention for its careful attention to the student's reading needs in its approach to a claim that the district's reading instruction did not provide FAPE is *Falmouth School Department v. Doe*, 44 F.4th 23, 81 IDELR 151 (1st Cir. August 9, 2022). The decision is also noteworthy in placing reliance on progress made in a private placement. 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 had 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 needed 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 was 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.

In a similar holding to the *Falmouth* case, a recent brief opinion from the Sixth Circuit found a school district's reading instruction inadequate for a student who graduated from high school with a 3.4 average but could not read, applying the individual-circumstances standards of *Endrew F. William A. v. Clarksville-Montgomery Cnty. Sch. Sys.*, 127 F.4th 656, 660 (6th Cir. Feb. 3, 2025) (affirming award of 888 hours of compensatory education, noting that the school district IEPs focused on fluency when the student lacked fundamental skills, stating "Apart from his dyslexia itself, William's most salient 'circumstance' for our purposes was that—with proper instruction—he can learn to read.").

Emphasizing the unique circumstances of the student, *G.D. v. Swampscott Public Schools*, 27 F.4th 1, 80 IDELR 149 (1st Cir. Feb. 7, 2022), upheld 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. In this case, the court 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.

H.W. v. Comal Independent School District, 32 F.4th 454, 81 IDELR 2 (5th Cir. Apr. 27, 2022), also rejected a claim of denial of FAPE, one in which the parent had also argued that the district failed to offer instruction in the least restrictive environment. The court relied on individualization ideas and approached the case on a granular level. The dispute involved an elementary school student found eligible for special education based on Down Syndrome, hypothyroidism, ADHD, asthma, and a speech impediment. Between kindergarten and the beginning of third grade, the district developed a series of IEPs based on full evaluations and functional behavioral assessments with corresponding behavioral intervention plans. Ultimately, the district proposed a placement it described as "blended," consisting of 235 minutes per day in special education (with additional time for speech) and 150 minutes per day in general education. Opportunity to participate with students without disabilities would be in nonacademic, extracurricular, and other activities. The hearing officer upheld this program as appropriate and constituting the least restrictive environment. The district court affirmed, as did the court of appeals. The court of appeals applied *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997) and *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1038 (5th Cir. 1989). It found the program sufficiently individualized and designed by key stakeholders. Although the student made some progress in general education, it was disputed how much. Turning to the *Daniel R.R.* factors, the court said the district took sufficient steps to accommodate the student in general education, implementing a modified curriculum and behavior plan, 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 stressed that the student was falling behind peers in test scores and percentile rankings. Moreover, said the court, 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.*

Among the earliest cases to consider the impact of *Endrew F.* is *M.L. v. Smith*, 867 F.3d 487, 70 IDELR 142 (4th Cir. Aug. 14, 2017), one in which the parents unsuccessfully contended that the unique circumstances of the student and the student's environment justified a private placement. In *M.L.*, the parents of an Orthodox Jewish child with Down Syndrome and an intellectual disability sought tuition reimbursement and continuing prospective placement of the child in a private institution dedicated to instruction in Orthodox Jewish religion and culture. The parents did not contest the IEP offered by the Montgomery County, Maryland public schools, except for its failure to provide for instruction of the child in the customs and practices of Orthodox Judaism. The parents' argument was that the IEP was not appropriate because it did not provide the education that would prepare the child for life in the Orthodox Jewish community. They said that he needed constant repetition and consistency of instruction that would

meet his cultural and religious needs, so that he could generalize from school to religious life. They contended that the student would never participate in the secular community, but only in the Orthodox Jewish community, and so would need an IEP that included teaching in the Torah and other religious texts, kosher rules, garments associated with Orthodox Judaism, ritual blessings, Hebrew language, and Jewish law. The parents said this education could be accomplished only at a religious school.

The Fourth Circuit affirmed administrative and district court decisions against the parents. The opinion began with a discussion of *Board of Education v. Rowley*, and pointed out the case's emphasis on procedures and on access to instruction that would provide benefit to the child. The court conceded that the Fourth Circuit standard for appropriate education mirrored that of Tenth Circuit rejected by *Endrew F.* But the court said that IDEA would not provide the relief the parents wanted no matter what FAPE standard were applied and further said that the parents never identified any way in which *Endrew F.* would affect the case. On the merits of the claim, the court declared that "religious and cultural instruction does not fall within the school's duty to provide a disabled student with access to the general curriculum. Under the IDEA, the school must only address the student's individual needs to the extent it takes to provide that access." 867 F.3d at 497. Quoting from *Rowley*, the court said the school system "is not required to "maximize the potential of handicapped children commensurate with the opportunity provided to other children." *Id*. Since the parties agreed that the public school IEP met the child's secular needs, that was enough. The court did not consider defenses proffered by the school system based on the Establishment Clause of the First Amendment, and it did not address Free Exercise Clause arguments raised only belatedly by the parents.

Another Fourth Circuit case that looked at the overall benefit to the student is *R.F. v. Cecil Cnty. Pub. Schs.*, 919 F.3d 237, 74 IDELR 31 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 156, 119 LRP 38775 (2019). The failure of an IEP to include specific goals or interventions to address a student's other interfering behaviors does not deny a student FAPE when the IEP as a whole addresses the student's needs.

Here, the Circuit Court considered the case of a then-seven-year-old student with autism, a rare genetic disorder, and significant neuromuscular deficits, who generally did not use words to communicate and exhibited hyperactivity and troubling conduct such as grabbing others, pulling their hair, biting, and mouthing. The school district placed the student in an intensive communication support classroom in which she was the only student, except for gym, art, music, recess, field trips, and occasional reading and math classes. Even then, the student was frequently removed from the general education classes she did attend. The parents requested that the student be placed in a full-day program for children with autism with no general education classes. The Circuit Court affirmed a lower court decision in favor of the school district. (The district court had affirmed the ALJ.) The Circuit Court identified *Endrew F.* as the controlling precedent on FAPE and clarified that the older Fourth Circuit standard, which was similar to that rejected in *Endrew F.*, was no longer good law.

On the issue that the school district violated the IDEA because it failed to provide

the student with an IEP that was sufficient to meet her needs, the Circuit Court held that the IEP was adequate. Specifically, the parents complained that the student's behavior intervention plan (BIP), which was incorporated into the student's IEP, was insufficient because it primarily focused on biting while ignoring the student's other behaviors like hair pulling, grabbing, hitting, kicking, and scratching. The Circuit Court disagreed that the BIP was insufficient and credited the ALJ's findings that, at the time the IEP was created, biting was the student's primary problem behavior and, even if the other behaviors were known to the school district when the IEP was created, the skill set forth in the BIP for the primary behavior can be generalized to the other behaviors.

As to the inadequacy of the IEP for its failure to include a social skills goal, the Circuit Court agreed with the ALJ that "an IEP is not required to contain every goal from which a student might benefit." The IEP as a whole must be considered and, here, the student's IEP did build in opportunities for the student to practice her social skills by including the use of social stories to remind the student of appropriate social interactions and regular walks around the school building to greet other students.

In *C.S. v. Yorktown Central Sch. Dist.*, 72 IDELR 7 (S.D.N.Y. 2018), the district court held that an IEP is not necessarily inadequate because a student with a disability is progressing slower than non-disabled peers. The student's progress must be measured against his/her own circumstances.

Here, the parent sought tuition reimbursement for a unilateral placement, in part, because the student, the parent argued, failed to make progress under her fifth grade IEP and, the parent further claimed, the school district offered a virtually identical IEP for sixth grade. The parent cited to the student's standardized test scores to support her claim of lack of progress. The parent was awarded reimbursement by the hearing officer and the school district appealed to the State review officer (SRO) who reversed the hearing officer and found in favor of the school district. In affirming the State review officer, the district court agreed with the SRO that, although the standardized test scores showed that the student performed below grade level, other evaluative data showed that the student made appropriate progress. And, although the parent took issue with the student's lack of independent mastery of all annual goals listed in the IEP, the district court noted that whether the student "achieved the goals set forth in the June 2014 IEP is not the controlling issue; rather, it is her progress toward achieving them." Even though the student did not achieve all her goals, the district court further noted that she nonetheless made progress in every category listed in the IEP, many with no additional support from the classroom teacher.

As to the parent's argument that the student performed "well below benchmark," the court noted that the student was expected to perform below grade level given her educational history and disability. "It would be irrational to expect [the student] to suddenly begin reading at a fifth-grade level after a year, even with intensive supports from her IEP, when she began that year at a first grade reading level."

Finally, in addressing the parent's claim that the sixth grade IEP was "virtually identical" to the fifth grade IEP, the court concluded that the school district did not fail

to offer a FAPE merely because it continued any recommendations from the earlier IEP. The sixth grade IEP services that were continued were reflective of the student's progress. Nevertheless, the court also found that the sixth grade IEP included numerous changes.

COVID-19 and FAPE

The Covid-19 pandemic is a special circumstance, one with implications for a broad group of students with disabilities. Many cases complaining about failure to offer FAPE to students during the pandemic went off on issues such as administrative exhaustion and standing, but a few cases apply *Endrew F.* principles to claims of denial of FAPE under the circumstances of the pandemic and may be instructive.

One such case is *Abigail P. v. Old Forge School District*, 105 F.4th 57, 124 LRP 21769 (3d Cir. June 26, 2024). In this case involving a student with severe disabilities including epilepsy, autism, global developmental delays, and other conditions, the court affirmed a district court's affirmance of a hearing officer decision that the school district did not deny the student FAPE when it changed her instruction to remote from November 25, 2020 until February 16, 2021 (plus four more days in spring, 2021 for specialized cleaning of facilities). The student had an IEP providing for specialized instruction and related services, which included three half-hour sessions per week for both speech-language therapy and occupational therapy, plus one half-hour session a week for both physical therapy and physical education. The IEP team modified the IEP in light of the pandemic. Quoting the court's description, the revised "IEP stated that Abigail would have Zoom sessions five days per week, with optional Google classroom assignments four days per week. Two days per week, Abigail's mother opted to have Abigail participate in circle (i.e., group) time instead of occupational therapy because of a scheduling conflict. One behavioral goal related to following schedules was 'placed on hold' because it could not 'be monitored appropriately in a virtual setting.' For similar reasons, the monitoring of Abigail's completion of instructional tasks throughout the day was slightly reduced. Abigail's mother agreed to each of these revisions." *Id*. at 62. The student received the full amount of PT and speech therapy, as well as some other services, but had less one-on-one instruction, only about 15 minutes of math and 15 minutes of reading a day, and the instruction was provided by an aide some days. The student struggled during remote instruction and regressed in some areas, but was offered compensatory education, which the mother declined because the student had been placed in another program for the summer. Deferring to hearing officer determinations, the court said that the modified program met the standard for FAPE and was implemented adequately. The student received behavior technician and behavior analyst services as well as the full amount of PT and speech, and missed OT sessions because her mother opted for circle time instead. The student's instructional time was only slightly diminished during remote instruction, and she received most of her related services and was given equipment for independent activities. Thus, there was no "failure by Old Forge to implement substantial or significant provisions of her IEP." *Id*. at 66. The court said that remote instruction is not a per se violation of IDEA but warned that "a school district is *never* relieved of its legal obligations under the IDEA," and must "continue to offer an educational program reasonably calculated to confer

meaningful educational benefits *in light of the child's individual circumstances*. As counsel acknowledged at oral argument, such circumstances can surely be affected by a global pandemic." *Id*. at 66-67 (emphasis in original).

In *E.E. v. Norris School District*, No. 1:20-CV-1291 AWI CDB, 2023 WL 3124618, 83 IDELR 68 (E.D. Cal. Apr. 27, 2023), a dispute over the services and educational setting for a student with autism spectrum disorder, the court took up issues of IEP content, least restrictive environment, applied behavioral analysis services (ABA), and modifications of services during the Covid-19 pandemic. The outcome of the case was mixed. The student had attended kindergarten with a 2018 IEP that called for general education 98 percent of the time and 2 percent of the time in speech and language services. When the IEP expired in 2019, the parties did not initially agree on a new IEP, and the 2018 IEP continued in force. Ultimately, in January 2020, the district offered a new IEP calling for moving the student to a new building in a special day class with a trained behavior aide and reducing the general education class time to 32 percent. The parents disagreed. The parties both filed for due process. The parents complained that the IEP lacked specificity as to frequency and setting for the occupational therapy services. The court found this issue adequately raised at due process, and overturned the ALJ decision, which had found the lack of specificity on frequency, duration, and location not to be a material violation of the IDEA's procedural requirements. The court commented that "the ambiguities as to the location and timing of the services would arguably not allow the Parents to monitor the situation to determine if the New IEP was being implemented correctly." 2023 WL 3124618, at *5. The court also found the IEP deficient in addressing social skills. The court found the amount of occupational therapy in the IEP to be inconsistent with that recommended by uncontested expert testimony and a denial of free, appropriate public education, though the court acknowledged possible concerns about the amount of out-of-classroom time required.

On the issue of placement in the least restrictive environment, the court recounted the conflicting testimony of the experts at hearing, and in the end endorsed the ALJ's decision upholding the district's position that placement in a special education day class with 32 percent of the time in general education was the proper LRE for the student. The court applied the standard of Sacramento *City Unified School District v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). Educational benefit, non-educational benefit, and impact on the general education classroom due to disruptive behavior all pointed toward the district's placement, in the court's analysis of the evidence. The court, however, reversed the ALJ on the topic of whether the IEP should have specified ABA services from staff trained in ABA. The court commented that "case law establishes the need to specify a specific methodology when the record shows a consensus on the issue." 2023 WL 3124618, at *5. (collecting cases, including *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 193-94 (2d Cir. 2012)).

Finally, the court affirmed the ALJ's decision that failure to implement the previous IEP during the pandemic denied the student FAPE. The court quoted the ALJ's opinion, which said that in light of the student's resistance to virtual instruction, the district should have held an IEP meeting, either virtually or in person, to consider alternative ways in which education could be provided. The ALJ wrote, "Norris' failure

to hold an IEP team meeting, in combination with its failure to send specific prior written notice to Parents, significantly impeded Parents' opportunity to participate in the decision-making process regarding Student's alternate educational program during the school closures." 2023 WL 3124618, at *12. The court collected cases holding that IEPs could be modified due to the pandemic, but that some form of instruction by a teacher, not just work packets, would be needed to provide FAPE.

Related Services and FAPE

There are several recent cases concerning the provision of related services in connection with the FAPE obligation. Since *Endrew F.* placed great emphasis on behavioral interventions as related services, these cases furnish a follow-up of sorts to the Supreme Court decision.

Pierre-Noel v. Bridges Public Charter School, 113 F.4th 970, 124 LRP 32461 (D.C. Cir. Sept. 3, 2024), concerned transportation services. The case involved an eight-year-old with multiple disabilities who used a wheelchair for mobility. After attending school remotely in earlier years, he was set to begin first grade in person, and his mother requested the District of Columbia and his school to provide transportation from the door of his apartment in a walk-up building to the vehicle that would take him to school. The District denied the request, relying on its policies, which stated that transportation would be provided only from the outermost door of a student's dwelling, and that students should not be lifted or carried. The student's mother filed for due process. The hearing officer denied the relief the mother asked for, although the hearing officer ordered the District to provide transportation to and from the outermost door of the apartment building. In the mother's suit against the District and the student's charter school, the district court granted summary judgment for the defendants. The court of appeals reversed, however, ruling that IDEA required transportation from the apartment door to the school so that the student could attend class in person. The court said the District of Columbia has the obligation to provide transportation services to students with disabilities within its borders. Perhaps predictably, in light of *Endrew F.*, the court rejected an argument based on *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 295–96 (2006), that the obligation to provide door-to-door transportation was not clear enough that it could be imposed on the defendant. The court said that as long as the defendant can make a clear choice to accept federal funds (and incur the relevant obligation) or reject the money (and avoid the obligation), the *Murphy* standard is met. The court said that IDEA provided ample notice in this case. The court applied a plain-meaning interpretation to "transportation" in IDEA, emphasizing that it is modified by the language "as may be required to assist a child . . . to benefit from special education," 20 U.S.C. § 1401(26)(A), and is not limited to "vehicular" transportation, as in the Americans with Disabilities Act. The court also pointed out that the situation of a mobility-limited "child who lives in a walk-up apartment accessible by stairs [is] an everyday occurrence that hardly would have fallen outside Congress's expectations in enacting the IDEA." 113 F.4th at 981. The court noted as well the range of educational settings and locations contemplated by the statute and the statutory obligation to educate the student in the least restrictive environment, which it described as a central feature of IDEA. The court also read the relevant

provision of the IDEA regulations, 34 C.F.R. § 300.34(c)(16), to embrace the transportation the mother requested for the student.

Mr. P v. West Hartford Board of Education, 885 F.3d 735, 118 LRP 11253 (2d Cir. March 23, 2018), concerns another aspect of related services: whether the related services were sufficient to render the student's IEP appropriate. The court reviewed the student's program and found that the services sufficed, in light of *Endrew F.* The case involved a student diagnosed with high functioning autism spectrum disorder-Asperger's Syndrome, nonverbal learning disabilities, and psychotic disorder. During his sophomore year in high school, the student's parents discovered he was receiving Ds in all his classes. He expressed suicidal thoughts and was briefly hospitalized. A school meeting resulted in accommodations being offered, including not counting absences from class and allowing him to drop a course without penalty. In January, the student was offered additional accommodations under a Section 504 plan. He stopped attending school in February; his parents initiated a special education referral in March, and although the school did not begin an evaluation, he began to receive homebound tutoring. After denying the student's eligibility in a March meeting, the school district did evaluations in April and May and found the student eligible in June. His placement for the next two years, apart from a brief period at the beginning of senior year, was in a program called STRIVE, Success Through Responsibility Initiative Vision Education, an alternative high school program. For the year following senior year, the district proposed a post-secondary program called ACHIEVE, which entailed part-time work with a job coach and the opportunity to attend community college. The parents filed for due process regarding the past and proposed placements; at the administrative level their claims were denied except for a request for transportation for the post-secondary program. In court they alleged that the district delayed in evaluating the student and finding him eligible, committed additional procedural violations, and failed to offer substantively appropriate programs at STRIVE and ACHIEVE.

After disposing of procedural issues, the court analyzed the substantive adequacy of the programs provided the student under the framework established by *Endrew F.*, which came down after both the hearing officer and district court decisions. The Second Circuit stated that "Prior decisions of this Court are consistent with the Supreme Court's decision in *Endrew F.*" 885 F.3d at 757. The court said that its earlier decisions had rejected a more-than-merely-trivial-advancement standard. It affirmed the district court and hearing officer determinations that the district offered the student "a meaningful educational program that was reasonably calculated to enable" the student "to make progress appropriate in light of his circumstances." *Id.* The court looked to the accommodations and services provided before the student was found eligible, and it noted that the STRIVE program enabled the student to pass from junior to senior year and achieve mostly As and Bs, allowing him to meet graduation requirements and make progress in his behavior. The court said that "grades are an important indication of any student's progress," *id.* at 758, though it cited *Endrew F.* for the proposition that not every child who is advancing from grade to grade is receiving appropriate education. Although the parents argued that the post-secondary program that the school district offered the student was inferior to the private program they favored, the court said that

was not the relevant inquiry, and once the district program was modified to include transportation, it met the appropriate education standard.

Residential Placement and FAPE

Endrew F.'s interpretation of FAPE may affect cases claiming that FAPE demands residential placement for some students with disabilities. In *Edmonds School District v. A.T.*, 299 F. Supp. 3d 1135, 71 IDELR 31 (W.D. Wash. 2017), *aff'd*, 780 F. App'x 491, 74 IDELR 2018 (9th Cir. 2019), the district court affirmed an ALJ decision ordering reimbursement for a residential placement undertaken by the parents of a student diagnosed with ADHD and oppositional defiant disorder who manifested behavioral problems. His truancy increased fourfold from ninth to tenth grades, and his grades skidded. An expulsion came in response to his bringing a slingshot and ball bearings to school; a court-ordered psychological exam yielded a diagnosis of schizophrenia; and a report from the exam concluding that the schizophrenia combined with his ADHD and attachment issues to cause truancy. The psychologist strongly suggested enrollment in a residential facility to provide the academic, medical, and behavioral supports needed. The district offered to place the student in an alternative high school on a part-time basis. The student visited the alternative school and refused to return. After he ran away for 28 days and was picked up for shoplifting, the parents placed the student in a locked-campus residential school. His behavior gradually improved as did his grades.

The court readily concluded that the school district violated IDEA by creating an IEP not reasonably calculated to permit him to make progress considering his disabilities, which included impulsiveness, hallucinations, and cognitive disorganization. There was limited or nonexistent behavioral support. The court stated, "The fact that A.T.'s prodromal schizophrenia went undiagnosed until April 2015 does not excuse the inappropriate educational plan. Had the district taken its evaluative, diagnostic, and planning obligations seriously (i.e., had it followed the procedures mandated by the Act), A.T.'s constellation of disabilities and needs would have been addressed much earlier." 299 F.Supp.3d at 1144. The court declared, "In *Endrew F.*, the Supreme Court clarified that, while there is no single test for determining the adequacy of the educational benefits conferred on a child, the IDEA imposes a substantive standard based on a level of progress that is reasonable in light of each child's circumstances." *Id*. at 1137 n.1.

In affirming the district court, the court of appeals commented, "The District suggests that A.T.'s truancy rendered him unable to take advantage of the offered educational opportunities, thereby excusing its failure to offer a reasonably calculated IEP. We are skeptical that this could be a valid excuse in any case, but, even if it could be, it is not a valid excuse here. Before A.T. fully stopped attending school, the District had almost two years of A.T.'s performance at school on which to base a new educational plan, as well as a report with an entirely new mental health diagnosis for A.T." 780 F.

App'x at 494. The court of appeals noted that the student required a residential placement to get an educational benefit. It further commented: "The District focuses on the purpose of the placement, contending that A.T.'s mental health had deteriorated to such a significant degree that he could only benefit from serious medical intervention, so any placement must be understood as a medical one, and asserting that Provo is predominantly a medical placement. We disagree. Students who require residential placement to obtain an educational benefit are often experiencing some acute health crisis at the time they are placed—the severity of their condition is precisely why they need residential treatment. If we adopted the District's approach, it is difficult to imagine how any private residential placement would be reimbursable under the IDEA." *Id*. at 495.

Disability Classification and FAPE

Although *Endrew F.* does not concern a dispute over disability classifications, some courts deciding disputes over classifications have used reasoning that may relate to the case. In *Navarro Carrillo v. New York City Department of Education*, No. 21-2639, 2023 WL 3162127, 123 LRP 13987 (2d Cir. May 1, 2023) (unpublished), *cert. denied*, 144 S. Ct. 563 (Jan. 8, 2024), the Second Circuit Court of Appeals considered the case of a non-verbal, non-ambulatory student with what the court described as "significant disabilities." *Id*. at *1. At dispute in the case was the student's program for the 2018-19 school year. In March 2018, the defendant's Committee on Special Education developed an IEP calling for a 12:1:4 classroom, that is, one with at most 12 students, one licensed special education teacher, and at least four additional teachers or paraprofessionals. Thus, there would be at least one additional teacher or paraprofessional for every three students. The parents objected and provided notice of intent to place the student at the school called iBrain, and they filed for due process seeking tuition reimbursement and other relief. The hearing officer, state review officer, and district court all ruled in favor of the defendant and against the parents.

In affirming the district court decision, the court took up the parents' argument that the IEP incorrectly classified the student as having multiple disabilities, rather than traumatic brain injury, and this misclassification led to inappropriate recommendations for programs and services. The court disagreed with the parents' contention, reasoning that classification mattered only for eligibility for special education. Services and programs were to be evaluated under the standards for FAPE. On the issue of FAPE, the court rejected the parents' argument that the student needed a 6:1:1 classroom, relying on the determination of the CSE as well as the views of the IHO, SRO, and district judge. The court of appeals reasoned that under New York regulations, a 12:1:4 class was appropriate for students with severe multiple disabilities. The court noted that one of defendant's school psychologists testified that a 12:1:4 class is appropriate for students that have significant management needs and require support that includes attending to medical needs. The court stressed deference to local decision makers as well as the

unanimity of the CSE, IHO, and SRO. Neither the district court nor the court of appeals cited *Endrew F.* Another case of note on this topic is *Polanco v. Banks*, discussed below.

More on Cogent and Responsive Explanations

Several decisions apply the "cogent and responsive explanation" language in *Endrew F.* In *Gaston v. District of Columbia*, No. CV 18-1703, 2019 WL 3557246, 74 IDELR 248 (D.D.C. Aug. 5, 2019), a teenager with ADHD whose educational and behavioral performance showed severe and steady regression during the 2017-18 school year. The court overturned a hearing officer decision and ruled in favor of the parent, concluding that the December 6, 2017, IEP should have included more than an adjustment of specialized instruction to add ten hours per week outside general education. The court pointed out that the student finished the previous year with one failing grade and other near-failing grades, then by October of 2017 was failing all classes except music and had been in violent altercations and amassed disciplinary referrals while showing academic disengagement and self-destructive behavior. Nevertheless, the defendant did not provide the student full-time special education with behavior support until February 2018. The court stated that the defendant "failed to offer the "cogent and responsive explanation for [its December 2017] decision[ ]" that would entitle it to deference. *See Endrew F.*, 137 S. Ct. at 1001–02," 2019 WL 3557246, at *8, and remanded the case to the hearing officer for determination of compensatory education relief.

An additional case of interest is *Matthew B. v. Pleasant Valley School District*, No. 3:17-CV-2380, 2019 WL 5692538, 119 LRP 42439 (M.D. Pa. Nov. 1, 2019). This case concerned a student with autism and speech and language impairments. The court affirmed the hearing officer's decision that during school years 2012-13 through 2015-16 the district denied the student a free, appropriate public education with respect to transition services and functional skills instruction. It also affirmed the hearing officer's decision that in school year 2016-17 the district's homebound program completely denied him free, appropriate public education. The court remanded the case to the hearing officer to develop a more extensive compensatory education remedy than what had been ordered. Regarding transition and the years 2012-16, the court acknowledged that the school district provided transition and functional skills opportunities, including instruction about cooking, money, transportation, and recognizing sight words. The district also had the student participate at work sites. Nevertheless, the district did not explain how and why what it provided was appropriate under the student's circumstances. The court said that the hearing officer correctly concluded that the IEPs included many goals that the student had already nearly accomplished, and that the same transition goals came back year after year with little change. "Thus, it sensibly follows that the Hearing Officer reached the conclusion that the IEP was deficient in that it failed to provide Matthew with an 'appropriately ambitious' program with respect to transition services and functional skills, which are considered the fundamental aspects of Matthew's IEP. *Endrew*, 137 S. Ct. at 999.," 2019 WL 5692538, at *11. In affirming the finding of a complete denial of FAPE for 2016-17, the court pointed out that the student was on homebound instruction with only four hours of direct academic instruction per week, an hour of speech therapy, and some at-home assignments. The

court relied on the hearing officer's finding that the homebound program was calculated to provide no educational benefit to the student. The court further said that when a student's continuous behavior interferes with the ability to obtain any real benefit from the education offered, and the IEP fails to remedy the behavior, the school district has not provided even a basic floor of opportunity. On the issue of remedy, the court reasoned that the denial of appropriate education spanned five years, so the remedy should have considered the length of the denial, and residential services should have been considered.

Still another case in which the explanation was found wanting is *Preciado v. Board of Education of Clovis Municipal Schools*, 443 F. Supp. 3d 1289, 76 IDELR 67 (D.N.M. 2020), a case involving a sixth grader with a learning disability. The court affirmed a hearing officer decision that the district's IEPs did not offer the student appropriate progress, reasoning that although some progress occurred, student was still reading at a third-grade level at beginning of fifth grade and noting that the IEPs largely mirrored each other and over time showed some decrease in expected levels of mastery. Significantly, the school district could not explain test scores that it said indicated satisfactory progress under the program it used and could not provide a cogent and reasoned explanation for decisions about the levels of services.

Appropriateness of Unilateral Private Placements

To qualify for reimbursement, a unilateral parental placement must offer the student appropriate education. *M.M. v. New York City Department of Education*, No. 21-cv-3693 (BMC), 2024 WL 3904771, 124 LRP 31321 (E.D.N.Y. Aug. 22, 2024), suggests that *Endrew F.* left unaffected the standards for evaluating the appropriateness of such a private placement. There the court reversed a denial of tuition reimbursement that had been premised on a determination that the private school chosen by the parents was not appropriate. The student had autism spectrum disorder and ADHD, and her primary language was Spanish. In 2017, the CSE recommended a 6:1+1-day bilingual Spanish special class in a nonpublic school, with the related services, and a bilingual Spanish district-run 12:1+1 special class in District 75 until the district arranged the other class. The district failed to provide a permanent placement prior to the 2017-18, 2018-19, or 2019-20 school years. It recommended an interim placement at an English-language District 75 public school just before the 2017 school year, but the parties agreed that placement would not have provided FAPE. The parents placed the student at the Nord Anglia International School (NAIS) and sought tuition reimbursement for the 2018-19 and 2019-20 school years (the parties settled a claim for the 2017-18 school year). The IHO held that the district failed to offer the student FAPE but held that the parents did not demonstrate that NAIS was appropriate. The SRO agreed, recognizing that the student made educational progress as NAIS, but labeling the placement not appropriate. The administrative decisions focused on the failure to provide Spanish-language or bilingual classes or the IEP related services of speech-language and occupational therapy. The school did have small classes of 11 or 12 students, broken into groups of four, and there was a learning assistant fluent in Spanish in 2018-19, and a teacher who spoke Spanish as well as the assistant in 2018-19. The school provided a differentiated curriculum and behavior plans including

multisensory instruction.

Applying the relaxed standard of appropriateness for parental placements from *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356, 364-65 (2d Cir. 2006), the court overturned the denial of tuition, stating that administrative decisions do not merit deference if they are not well-reasoned or are unsupported by the record. The court commented, "To deny plaintiffs recovery would allow defendants to benefit from their failure to provide G.M. with an appropriate placement. Instead of requiring defendants to provide G.M.'s FAPE, they could simply fail to find a suitable program and shirk their responsibilities under the IDEA altogether." 2024 WL 3904771, at *6. The court said that "the IHO and SRO did not afford proper weight to defendants' failure to recommend any placement whatsoever that would have satisfied G.M.'s IEP," "a fundamental unfairness at the core of this case." *Id.* at *5. Moreover, although the district emphasized the lack of Spanish language classes, the court found the student had access to resources for her bilingual needs, plus NAIS offered an inclusion model with small class sizes and differentiated instruction in a general education setting. Some of the differentiation met needs that would have been addressed with related services under the district IEP. The parents acted in good faith and the student made academic progress. The court did not cite *Endrew F.* or act as though the case affected its decision.

L.H. v. Hamilton Cnty. Dep't of Educ., 900 F.3d 779, 72 IDELR 204 (6th Cir. Aug. 20, 2018), made explicit use of *Endrew F.* in applying previously established standards to the appropriateness of a parental placement. The case concerned a 15-year-old with Down Syndrome who was classified as intellectually disabled. The court affirmed a district court ruling that the school district's proposed placement for the student in a comprehensive development classroom was more restrictive than necessary. On the question of reimbursement for the Montessori program in which the parents placed the student, the court discussed the applicability of *Endrew F.* and other precedent:

> While pursuing a challenge to an IEP, the parents may unilaterally remove the student from the public school, "place the child in a private school[,] and seek reimbursement for the cost of the private school," *Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-70, (1985), though they "do so at their own financial risk," *id.* at 373-74. To award reimbursement, the State ALJ or district court must find both that: (1) the public school violated the IDEA and (2) the private school is appropriate under the IDEA. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, (1993). This means that, even though the IDEA's requirements do not apply to private schools, *id.* at 13-14, for reimbursement purposes, the private school must satisfy the substantive IEP requirement, i.e., it must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. But the private school need not meet the full public school standards. 34 C.F.R. § 300.148 ("A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by [state and local

> education agencies].") (codifying *Florence Cnty.*); *see also C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011) ("To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.") (quoting with approval *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006)).

L.H., 900 F.3d at 791.

The *L.H.* court ruled that the Montessori program in which the student was the only child with disabilities in the class and in which the student received a personalized curriculum, and the help of a one-on-one paraprofessional aide should be reimbursed despite the lower court's view that it was not appropriate because it lacked a systematic structure. The court relied on testimony in the record that a Montessori approach is well suited for children with Down Syndrome in many respects and further noted that the curriculum at the Montessori school was tied to regular state standards. The court held that the parents were justified in choosing the private placement rather than invoking stay-put rights to keep the student in a general education class at the public school, stressing that the public school teachers insisted they could not provide support services necessary to mainstream the student successfully.

Trends and Observations

Endrew F. has had an impact on decisions in special education cases, though it is open to debate how great and in what dimensions the greatest impact has been felt. The case is being applied in a range of cases concerning both mainstreamed (or largely mainstreamed) and separately educated students, and its language about ambitious programs and challenging objectives has influenced that whole range of decisions. Notably, the language about cogent and responsive explanations has also received development and appears likely to be further developed in the future.

NEW DEVELOPMENTS IN IDEA LITIGATION

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I. INTRODUCTION

This document lists and describes significant cases as well as selected U.S. Department of Education documents and academic research on topics of concern to Individuals with Disabilities Education Act due process hearing decision makers. The period covered is the beginning of January 2023 through early July 2025, with a few exceptions. The primary focus is on full, precedential opinions of the federal courts of appeals and federal guidance documents that break new ground and have special bearing on matters likely to arise at due process hearings. However, a few particularly noteworthy unpublished federal appellate opinions and decisions from federal district courts and state courts are also included. Cases concerning issues not of primary importance to IDEA due process decision makers, for example, many cases 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

**B.S.M. v. Upper Darby Sch. Dist.*, 103 F.4th 956, 124 LRP 17147 (3d Cir. June 4, 2024). The student in this case had academic weaknesses from the beginning of her education and over time developed emotional issues. The parent requested a psychoeducational evaluation when the student was in kindergarten. The school district found the evaluation unnecessary after reviewing academic records but did conduct a speech and language evaluation and found the student IDEA-eligible under the Speech or Language Impairment classification. The student received speech and language therapy for part of kindergarten through most of second grade. The student continued to struggle academically in first and second grade, achieving below average scores on assessments and developing emotional problems. The academic and emotional struggles continued

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into fourth grade, and the student scored below basic on math and reading assessments. A private psychologist found that the student had disruptive mood regulation disorder and recommended therapy. The parent requested a Section 504 plan, and the district, after evaluating her found her not eligible under IDEA but agreed to develop a Section 504 plan. The student's behavior problems continued, and a second private evaluator concluded she was not eligible for IDEA under Emotional Disturbance but should be found IDEA-eligible under Specific Learning Disability. At due process, the parent claimed the district denied the student FAPE under both IDEA and Section 504 by failing to satisfy child-find and not timely identifying and evaluating the student; by incorrectly determining that the student was not eligible for an IEP; and by not offering the student an appropriate Section 504 plan. The hearing officer concluded that the kindergarten evaluation was timely and thorough enough to satisfy child-find, that the issuance of a Section 504 plan was timely, that the student did not meet the burden of showing eligibility under IDEA's SLD and ED categories, but that the Section 504 plan was too general as to its accommodations to meet the student's social-emotional challenges. The hearing officer ordered the Section 504 plan revised, awarding one hour of compensatory education per week that school was in session from the start date of the Section 504 plan until an appropriate plan was developed. The parent filed an appeal in district court, which affirmed on the basis of the administrative record. The court of appeals vacated and remanded. It noted that IDEA and Section 504 both have child-find, evaluation, and FAPE requirements, but it stressed that Section 504 defines disability more broadly than IDEA does, so some students covered by Section 504 are not covered by IDEA. Section 504's definition includes "any mental or psychological disorder," 34 C.F.R. § 104.3(j)(2)(i)(B), as long as other standards are met, whereas IDEA requires a disability that falls into one or more of 13 categories. The court of appeals declared: "The same conduct can, of course, serve as the basis for IDEA and Section 504 claims. But that doesn't avoid the need to perform a Section 504 analysis. As noted above, Section 504 covers more students than does the IDEA, including students who are merely perceived as disabled. 28 C.F.R. § 35.108(a)(1)(iii). A student could be covered under one statute but not the other. . . . Indeed, [the student's] educational history is a case in point; from kindergarten through second grade, she received special education services under the IDEA, and from fourth grade on, she received them under Section 504. Her claims under both laws are plainly different—their timing alone reveals that. Moreover, the differences in the statutes' definitions of disability—particularly which emotional issues they encompass—are central to the family's argument. . . . Here—where the crux of [the student's] argument hinges on the School District repeatedly refusing to perform a comprehensive evaluation that might have detected a Section 504-eligible disability at a much earlier date—is an instance where they are [important]." *Id.* at 964-65. The court stressed the need to analyze whether the school district violated Section 504's child-find requirement by failing to conduct a comprehensive evaluation earlier than it did, in line with the family's repeated requests and the definition of disability under Section 504. The court further noted that modified de novo review, affording significant deference to hearing officer determinations, applies only to district court review of IDEA due process decisions.

**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 the 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 tiered intervention program. The student received another in-school suspension, then was out-of-school suspended, then eight days later was 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 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, 47 IDELR 122 (6th Cir. 2007)).

Jennifer N. Rosen Valverde, *A Panoramic IDEA: Cabining the Snapshot Rule in Special Education Cases*, *infra* (Conducting Due Process Hearings)

III. EVALUATION AND ELIGIBILITY

**G.M. v. Barnes*, 114 F.4th 323, 124 LRP 32983 (4th Cir. Sept. 5, 2024). This case concerned a second-grade student who had been diagnosed with dyslexia, ADHD, and other conditions, and whose performance on standardized tests had sharply declined compared to the previous year, but who was, according to district assessments, performing at average or low average levels in reading and writing. The district maintained that the student was not eligible under IDEA. The parents disagreed, placing the student in a private school at the end of second grade and later filing for due process. In second grade working with a tutor and in the private school for third grade, the student made progress using Orton-Gillingham methodology. After hearing, the ALJ upheld the denial of IDEA eligibility, and the district court agreed. The ALJ found the standards for specific learning disability were not met, though the decision said the ADHD qualified as an other health impairment. But the ALJ ruled that the student did

not need special education by reason of the impairment because he was performing at grade-level standards. The ALJ said Orton-Gillingham methodology was not special education because it could be used with children without dyslexia in general education. The court of appeals held that the ALJ's findings of fact and credibility determinations were regularly made. On the merits, the court said the student did not satisfy a Maryland standard requiring that for a determination of specific learning disability the student must exhibit a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, grade-level standards, or intellectual development. The court agreed with the parties that the student's ADHD was an other health-impairment that adversely affected his educational performance, though it disagreed with the ALJ's conclusion that Orton-Gillingham was not special education, citing the description of the method as specially designed instruction highly recommended for students with dyslexia and noting that the district did not use the methodology. Nonetheless, assuming without deciding that Orton-Gillingham as requested by the parents was special education, the court said that the student was not in need of special education, reasoning that he was achieving passing marks and advancing from grade to grade in general education and so was already getting a FAPE without special education.

**J.B. v. Kyrene Elementary Sch. Dist. No. 28*, 112 F.4th 1156, 124 LRP 30919 (9th Cir. Aug. 20, 2024). The facts of this case go back a decade. In 2013-14, the child was enrolled in the district as a special education student on account of his disabilities including reactive attachment disorder, fetal alcohol syndrome, intellectual disability, Klinefelter's syndrome, ADHD, dyslexia, and dysgraphia. On January 31, 2013, the IEP team updated the IEP. In August 2013, school staff physically restrained the student many times, and the parent stopped sending the student to school in early September because of concerns over the use of restraint. The district held an IEP meeting on September 19 to address the concerns, and the parent that day told the district of her intention to place the student in a private school. At a meeting in October, the district offered to pay for a placement at the parent's chosen private school for the next nine weeks, and discussions ensued about returning the student to a district school in January 2014. On December 18, the district offered to pay for an additional month, with a February 3 date for placement in-district. The proposed agreement required the parent to consent to additional testing for the student and provided for another IEP meeting no later than January 29, 2014. The email attachment said to sign if the parent agreed. On December 19, 2013, the next day, the parent and district met again, and the district explained the desired assessments and observations. The parent proposed using videos and audio recordings rather than in-person assessments and observations. The district agreed to try that option. The parent at the end of the meeting presented a proposed agreement saying the parent would not consent to testing because none had been proposed but would consider any evaluations that were proposed and would notify the district if she would consent within five business days. Early the next day the parent emailed the district to request an independent evaluation. After an initial response saying the district would provide a copy of the procedures for the independent evaluation, the district issued a prior written notice to the parent saying that because the student was not currently enrolled in the school district, no further IEP meetings would take place. The parent filed for due process and the district court ultimately affirmed ALJ determinations in favor of the district on all issues. The court of appeals affirmed,

holding that there was no clear error in the conclusion that the parent refused consent to evaluate the student despite the district's efforts to accommodate the parent. The court also found no clear error in the conclusion that the parent expressed a clear intention not to re-enroll the student in the district. The court said there was no denial of FAPE by the district's refusal to offer an IEP after December 19, 2013. The court said the parent's refusal to consent to evaluations while the student was enrolled in the private school relieved the district of further IDEA obligations, and that a district is not required to continue offering FAPE if the parent of a privately placed student makes clear the intent not to re-enroll the student in the district. The court conceded that "The District's written reason for discontinuing IEP meetings—because J.B. was not enrolled in the District—was not a valid reason under the IDEA." *Id*. at 1164-65 (citing 34 C.F.R. § 300.131). But the court ruled the error harmless on the ground that the district had valid reasons to refuse evaluations and IEP meetings. Judge Collins dissented, contending that by failing to include the valid grounds for the district's decision on the prior written notice and instead terminating the IEP process on an invalid ground, the district significantly impeded the parent's opportunity to participate in the decision-making process.

B.S.M. v. Upper Darby Sch. Dist., *supra* (Child Find)

Alex W. v. Poudre Sch. Dist. R-1, *infra* (Endrew F. and Free, Appropriate Public Education)

**Bradley v. Jefferson Cnty. Pub. Schs.*, 88 F.4th 1190, 123 LRP 37395 (6th Cir. Dec. 21, 2023). This case involved an intellectually gifted student with Tourette's Syndrome, microcephaly, autism, and other conditions, who was enrolled at the Craft Academy for Excellence in Science and Mathematics, a state residential school on the campus of Morehead State University. The student took courses that were dually eligible for secondary school and college credit, enrolling in the same classes as the college undergraduates. The family sought payment for the costs of the student's support accommodations in the dual-credit courses, but the lower court dismissed the claim and the court of appeals affirmed. The court reasoned that IDEA does not apply to post-secondary education, and that it defers to state law as to which courses are post-secondary, notwithstanding dual credit. In distinguishing the situation of A.P. coursework, the court relied on the fact that A.P courses are taught on high school campuses rather than through enrollment in a college. The court also rejected ADA and Section 504 claims. There was a dissent by Judge White, who argued that the state requires high schools to offer dual enrollment or dual credit courses to qualifying students and that A.P. courses are not meaningfully different from the courses the student took.

**Holland v. Kenton Cnty. Pub. Schs.*, 88 F.4th 1183, 123 LRP 37397 (6th Cir. Dec. 21, 2023). This case concerned a student with ADHD, anxiety, encephalopathy, and other conditions. His IEP provided that he would take four classes, including English and math, at a public high school aided by the services of a special education teacher, and four automotive-technician elective classes at community college under the auspices of the high school's dual enrollment program. The parents, however, enrolled him in a full

course load at community college, and claimed that the defendant violated IDEA by not implementing the IEP at the community college with the same supports as would be provided at the public high school. The court affirmed a grant of summary judgment in favor of the defendant. The court reasoned that the education at the community college was post-secondary and so was not covered by IDEA. The court also relied on the fact that the community college would not allow the school district's special education teachers to provide support services there, and the parents never showed that the district failed to comply with the IEP. Justice White concurred, contending that the dual enrollment courses were secondary education, but concluding that there was no showing that the community college courses taken were needed to provide FAPE.

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 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 tests 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 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 so as 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's 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 evaluations that were 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.

**Board of Educ. of Twp. of Sparta v. M.N.*, 318 A.3d 670, 124 LRP 29999 (N.J. Aug. 7, 2024). In this case, the New Jersey Supreme Court unanimously held that a state-issued high school diploma based on passing the General Education Development (GED) test does not disqualify a student with a disability from re-enrolling in public high school to receive a free, appropriate public education. The case involved a student with an IEP who withdrew from public high school, took and passed the GED test, and received a

state-issued high school diploma. He subsequently re-enrolled in the public high school, but the school eventually informed the parents that the student's services would be discontinued because he had a high school diploma. The parents objected, and the student continued to receive services, but difficulties with attendance and completion of work ensued, and after another withdrawal from public school and an attempt to re-enroll, which was denied, the parent filed for due process, and ultimately an ALJ determined that the state-issued diploma was not merely a GED but a regular high school diploma fully aligned with state standards. On appeal, the State Commissioner of Education concurred, and the Appellate Division affirmed. The Supreme Court reversed, relying on 34 C.F.R. § 300.102(a)(3) and noting that the state recognizes both state-endorsed diplomas and state-issued diplomas. State-issued diplomas are based on demonstrations of academic competency, including but not limited to the GED. The school board argued that the diploma was not simply a GED, which 34 C.F.R. § 300.102(a)(3)(iv) says is not a regular high school diploma, but instead a regular high school diploma within the meaning of the regulation due to its alignment with state standards. The Supreme Court reasoned, however, the state-issued diploma is not sufficient to be a regular high school diploma under the language of § 300.102(a)(3)(iv) providing that "the term regular high school diploma means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma." Citing official data, the court noted that of all state students who entered high school four years before 2022, 91.1% graduated and earned a state-endorsed high school diploma by completing local graduation requirements, the vast preponderance of graduating students. The court rejected a further argument that a 2017 amendment to the language of § 300.102 (a)(3)(iv) gave the language a different meaning than what its plain reading demanded. The court relied as well on state law clarifying that a student does not receive a state-endorsed diploma based on passing the GED but instead may receive only a state-issued diploma.

IV. AGE ELIGIBILITY

**N.D. v. Reykdal*, 102 F.4th 982, 124 LRP 16052 (9th Cir. May 22, 2024). This class action case challenged the policy of Washington State to discontinue special education services at the end of the school year in which the student turns 21. The court vacated a district court order that had denied a preliminary injunction. The court said that under IDEA, eligibility generally ends on the student's twenty-second birthday, except if the state opts to not offer services for students aged 18 through 21 and it also fails to provide public education to nondisabled students in the same age range. The court noted that Washington provides two educational programs to 21-year-olds, High School+ and GED preparation. There is a $25 per quarter tuition for each of those programs, but about 40 percent of students receive a waiver due to inability to pay. The court said the case was not moot in that one of the named plaintiffs would not turn 22 until July 2024; it appeared that he did not graduate and receive a regular high school diploma due to requesting due process and invoking stay-put. Defendants' projected difficulties in complying with an injunction did not render the case moot. The court said the district court abused its discretion in denying the injunction, reasoning that the plaintiffs were likely to succeed on the merits. *E.R.K. v. Hawaii Department of Education*, 728 F.3d 982, 61 IDELR 241 (9th Cir. 2013), read the IDEA provision to require a comparison to

free education for nondisabled students, but the court noted that Washington waived the fees for the two programs for tens of thousands of students. The court further said there was irreparable harm from interrupting the named plaintiff's special education and that compensatory education is not an adequate substitute. Finally, balance of hardships and public interest worked in the students' favor. The court said the duties under IDEA are unequivocal, and the burdens were comparable to those imposed by stay-put or a new special education student moving into a school in the state. Class certification was left to the district court on remand. On remand, the district court found that the case was not moot, that the class action requirements were met, and that declaratory and preliminary injunctive relief without bond was appropriate for a provisional class of "All students with disabilities in Washington who aged out of their special education programs at the end of the 2022-2023 school year who have not yet turned 22 and all students with disabilities in Washington at risk of aging out of their special education programs before they turn 22 years old as a result of Section 28A.155.020 of the Revised Code of Washington and Section 392.172A.02000(2)(c) of the Washington Administrative Code." *N.D. v. Reykdal*, No. 2:22-cv-01621-LK, 2024 WL 3358743, 124 LRP 25498 (W.D. Wash. July 10, 2024). Approval of a class action settlement is reported at 2025 WL 1736639, 125 LRP 18892 (W.D. Wash. June 23, 2025).

L.T. v. New York City Dep't of Educ., 23-CV-09826 (MMG), 2025 WL 896842, 125 LRP 8602 (S.D.N.Y. Mar. 24, 2025), *appeal filed*, No. 25-1046 (2d Cir. Apr 25, 2025). In this class action case, students with disabilities and their parents sued, asserting that the right to a free appropriate public education extended until the students' 22nd birthday, basing their claim on IDEA, Section 504, and rights enforceable under 42 U.S.C. § 1983. The court dismissed the case for lack of subject matter jurisdiction on the ground that the plaintiffs failed to exhaust their administrative remedies, rejecting the argument that exhaustion would be futile, noting that due process proceedings were pending for two students, and that administrative proceedings were initially successful, though they ultimately failed on appeal, which decision was said to be currently pending on further appeal. See the *Mahopac* and *Katonah-Lewisboro* cases *infra*.

**Mahopac Cent. Sch. Dist. v. New York State Educ. Dep't*, No. CV-25-0492, 2025 WL 1954096, 125 LRP 21209 (N.Y. App. Div. July 17, 2025). The court in this New York CPLR Article 78 proceeding ruled that a student's parents could make a special education complaint to the State Education Department even though the student was already 21 years old, and that the Department did not violate separation of powers by issuing a formal opinion that public schools in the state must provide special education and related services until the student reaches 22. The court found that opinion not to be arbitrary and capricious, reasoning that the IDEA exception allowing states not to serve students from age 18 up to age 22 when nondisabled students in the same age range are not offered free public education, 20 U.S.C. § 1412(a)(1)(B)(i), did not apply to New York. The court drew a comparison to *A.R. v. Connecticut State Board of Education*, 5 F.4th 155, 79 IDELR 34 (2d Cir. 2021). The court stated, "The record reveals that the adult education programs offered in New York, i.e., the General Educational Development (hereinafter GED) and National External Diploma Program (hereinafter

NEDP) programs, possess sufficient attributes of public education to qualify under the IDEA." 2025 WL 1954096, at *4.

**Katonah-Lewisboro Union Free Sch. Dist. v. New York State Educ. Dep't*, No. CV-24-0696, 2025 WL 1954074, 125 LRP 21207 (N.Y. App. Div. July 17, 2025) The court in this Article 78 proceeding upheld a determination by the State Education Department on a state complaint under 8 NYCRR 200.5[l][1] that the school district was obligated to provide free, appropriate public education until the student turned 22. The court ruled that 20 U.S.C. § 1412(a)(1)(B)(i), which allows an exception to the requirement that FAPE be provided until the student turns 22 when the state does not provide public education to students without disabilities who are in the age ranges 18 through 21, did not apply to New York. The court found that information from official government websites relied upon in the State Education Department brief was properly before the court. Relying on *Mahopac Central School District v. New York State Education Department*, No. CV-25-0492, 2025 WL 1954096, 125 LRP 21209 (N.Y. App. Div. July 17, 2025), *supra*, the court stated that New York law extends the right to a free public education to the student's 22nd birthday.

**Pennsylvania Sch. Bds. Ass'n v. Mumin*, 317 A.3d 1077, 124 LRP 15580 (Pa. Commw. Ct. May 16, 2024). In this case the court declared void a Pennsylvania State Education Department policy requiring school districts to offer special education services up to students' 22nd birthday, when the Pennsylvania School Code requires that services be provided only through the end of the term in which the student turns 21. A student in 2023 had filed a class action against the department in federal court, and the department entered into a settlement agreement undertaking, as of the beginning of the 2013-24 school year, to change the expiration of the entitlement to special education to special education students' 22nd birthday. The department altered its policy accordingly but had not notified school districts and intermediate units before entering into the settlement. School districts filed a petition for review in the commonwealth court's original jurisdiction, seeking declaratory and injunctive relief against the new policy. After determining that an actual controversy existed, that the petitioners had standing to make a pre-enforcement challenge, and that no exhaustion was needed, the court found the policy invalid on the grounds that it amounted to a regulation in the sense of a binding norm, and so the department had to promulgate it through the formal notice and comment rulemaking requirements of the Commonwealth Documents Law and Regulatory Review Act, which the department failed to do.

V. INDEPENDENT EDUCATIONAL EVALUATION (IEE) AT PUBLIC EXPENSE

Alex W. v. Poudre Sch. Dist. R-1, *infra* (Endrew F. and Free, Appropriate Public Education)

VI. IEPs, IEP IMPLEMENTATION, AND RELATED

**Los Angeles Unified Sch. Dist. v. A.O.*, 92 F.4th 1159, 124 LRP 5221 (9th Cir. Feb. 15, 2024). The court in this case affirmed in part and reversed in part a district court decision and accordingly upheld an ALJ decision that agreed with the parents' position on most issues. The case involved a child turning three who had profound hearing loss and relied on cochlear implants. The parents rejected an IEP that called for placement in a public school setting in which 85% of the student's time would be with children who were deaf and hard of hearing. The student would be in an integrated setting for music, recess, library, art and occasional holiday parties for the remaining time. The proposed IEP also provided that the student would receive language and speech therapy one to ten times per week for a total of thirty minutes a week and audiology services one to five times per month for a total of twenty minutes per month and did not specify if the language and speech therapy would be group or individual. The court affirmed that the school district violated IDEA by failing to specify the frequency and duration of audiology and speech and language services, citing 34 C.F.R. § 300.320(a)(7) and noting evidence from the ALJ hearing that multiple short sessions of speech and language would prevent the targeting of needed skills. Some flexibility could be permitted on the IEP, such as provision of one to three sessions, but not one to ten. The error was not harmless, for the ALJ found the parents did not understand how frequently the student would receive speech and language and audiology and were thus unable to decide if they agreed with the proposal; even staff did not know what the frequency would likely be. The court also affirmed the ALJ's conclusion that the district's proposed program denied FAPE under IDEA and state law in that it did not provide enough interaction with typically hearing peers for the student to make meaningful progress in spoken language. The court relied on the expert testimony at hearing, saying recess and holiday parties, plus the other opportunities for mainstreaming in the IEP, were not enough to support progress for the student. The court held there was no requirement for the ALJ to defer to the testimony of the district's staff, and the ALJ found the parents' experts' testimony more persuasive. The court further affirmed that the district's placement did not provide the least restrictive environment for the student, applying the test of *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). The student was not ready for full-time mainstream instruction, but only ninety minutes per week was not enough considering the student's needs; the district's plan did not address support services to permit an increase in the amount. The fact that the public school was large and diverse, with many non-disabled students, did not matter. Instead, said the court, the focus should be on the individual student's educational experience. In upholding the parents' cross-appeal of the district court decision, the court ruled that the IEP was deficient in not specifying individual speech and language therapy, as opposed to group therapy. The court said the issue was substantive in this case, not a procedural failing of the IEP, in that the student needed individual therapy to receive FAPE. The court noted the ALJ's reliance on expert testimony that individual therapy was essential for the student to learn to pronounce final consonants of words. The school district did not contest the appropriateness of the private school where the parents placed the student, a placement the ALJ upheld. Judge Collins dissented on procedural and substantive issues.

**Pitta v. Medeiros*, 90 F.4th 11, 124 LRP 521 (1st Cir. Jan. 4, 2024), *cert. denied*, 144 S. Ct. 2631 (June 10, 2024). In this unusual case, the court of appeals affirmed the dismissal of a claim by the father of a public school special education student that the defendants violated his rights under the First Amendment by forbidding him from making a video recording of an IEP meeting that was held over the internet. The father said he wanted to make the recording because there were omissions and inaccuracies in the school district's minutes of a prior meeting. In rejecting the claim, the court said that cases upholding the First Amendment right to record police interactions were not applicable. The court said that unlike police interactions that bystanders filmed, "[a] student's IEP Team Meeting, whether virtual or in person, is ordinarily not conducted in a 'public space.' The meeting could not be public because only members of a student's IEP Team may attend an IEP Team Meeting, and because IEP Team Meetings involve the discussion of sensitive information about the student." *Id*. at 20. The court also argued that the recording would not further the interest in the free discussion of public affairs and that the barring of video recording was a permissible time, place and manner regulation, both content neutral and narrowly tailored.

Rivas v. Banks, No. 22-CV-10007 (LJL), 2023 WL 8188069, 123 LRP 34269 (S.D.N.Y. Nov. 27, 2023), *reconsideration denied*, 2024 WL 292276 (S.D.N.Y. Jan. 25, 2024), *aff'd sub nom. Rivas v. Ramos*, No. 24-268, 2024 WL 5244849 (2d Cir. Dec. 30, 2024) (unpublished). Here the district court affirmed administrative decisions rejecting a parental challenge to the district's placement. The IHO, SRO, and court all relied on the failure of the parent to properly offer evidentiary support for the claim that the school chosen was not appropriate for the student, who was an eleven-year-old with cystic encephalomalacia, global central nervous system injury, seizure disorder, hypoxic-ischemic encephalopathy, cerebral palsy, optic atrophy, and cortical visual impairment. He was non-ambulatory and nonverbal and used a feeding tube. He attended a private school called iBrain, and personnel there developed an education plan for him for 2021-22 on January 22, 2021. On February 1, the district IEP team wrote an IEP that was similar in calling for 12-month education, 6:1:1 classes and a 1:1 paraprofessional but lacked music therapy called for in the private school plan. Later that month, the district issued a letter saying the services would be provided at P.S. 168, a public school in District 75, but then in June sent the parent a letter saying the student was reassigned to the same school but a different location. The parent rejected the IEP and placement saying she would unilaterally place the student at iBrain but still remained open to the student's enrollment in an appropriate public school. She filed for due process seeking tuition payment. The hearing officer concluded that the district offered FAPE for the 2021-22 school year. Though music therapy would be beneficial, the goals it served could be met with other services. The student was said to not require an extended school day, and the concern the student would be inappropriately placed with children with autism was called speculative. An issue about wheelchair accessibility of the public school placement was rejected because the parent did not address it until the closing argument. The hearing officer also determined that iBrain was an appropriate placement and the equities favored the parent. The review officer affirmed the decision in favor of the district. On appeal, the district court found that the evidence supported the administrative decisions, and held specifically that the objection to the placement with students with autism was speculative. The issue about wheelchair accessibility was

waived, in that it was not in the due process complaint, nor reached by the IHO or SRO, nor was at the heart of the dispute. In a summary order, the court of appeals affirmed, agreeing that the accessibility issue was waived and that the claim that the student would be inappropriately placed with students with autism was based on speculation. It also agreed with the district court that push-in services could be provided in the public school placement, eliminating the need for an extended school day and that the functions of music therapy could be fulfilled with other interventions.

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

Boone v. Rankin Cnty. Pub. Sch. Dist., 140 F.4th 697, 125 LRP 18544 (5th Cir. June 18, 2025). This case involved a teenage student with autism who made limited academic progress over several years and manifested disruptive behavior including fecal smearing and elopement. The district proposed immediately moving the student from a private therapeutic school to Brandon Middle School, over the objections of the parent who contended the student needed a smaller environment better tailored to his needs, and that the district's transition plan did not address his elopement problem. The parent suggested a transition to Florence High School, a smaller setting with other students with autism, which featured vocational programs. Florence was the school where the student would eventually be placed, therefore avoiding a second transition. The hearing officer and district court ruled that the school district's proposed placement denied FAPE, though they denied the parent's request for compensatory education. The court of appeals affirmed, reasoning that the district's proposal was not individualized in that the district's transition plan did not address elopement, and the proposal was predetermined, in that it was firmly decided upon before the parent's input. The court said the proposed placement was not shown to violate least restrictive environment standards. The court held that the district court did not clearly err in finding the school district's plan did not provide educational benefits when the student's experience with the district's special education services over seven years appeared to show regression from a first-grade academic level to a kindergarten level or only slight non-academic progress. The court ruled that the district court was within its discretion in denying compensatory education when the focus of the parent's case was on the deficiencies of the district's proposed placement at Brandon Middle School. The court affirmed the district court's award of attorneys' fees for the parent.

Cruz v. Banks, 134 F.4th 687, 125 LRP 12165 (2d Cir. Apr. 15, 2025), *certified question accepted*, No. 64, 2025 WL 1439661 (N.Y. May 20, 2025). In a case involving a student with cerebral palsy, a visual impairment, a seizure disorder, and scoliosis who attended the iBrain school starting in 2018, the parent challenged the public school system's IEPs of May 2020 and June 2021. The 2020 IEP recommended a 6:1:1 classroom with extensive services; however, it called for a placement at Horan Public School and no music therapy. The 2021 IEP recommended a 12:1:4 classroom but was otherwise similar to the 2020 IEP. The hearing officer found that both IEPs offered free, appropriate public education, but that Horan could not implement the IEPs because its school days were too short for all the required instruction and services. The iBrain placement was found appropriate, but the IHO ordered a reduced tuition reimbursement amount on grounds of excessive cost. The state review officer reversed

the holding that the public school could not implement the IEPs, saying services could be provided concurrently. The district court agreed with the SRO. Like the SRO, the district court rejected a contention of the parent that under state regulation, the student had to be placed in a classroom with no more than six students. The district court said the school system could choose to apply another regulation setting a twelve-student maximum for students with severe multiple disabilities. The court of appeals said that the question whether FAPE was offered turned on an issue regarding the state regulations for which there was no controlling decision of the state courts, so it certified that question to the New York Court of Appeals. In doing so, the reviewing court first determined that several of the parent's objection to the IEPs failed: Horan was said to have been able to implement the IEPs through simultaneous provision of services; music therapy's goals could be accomplished by other services in the IEP; a new evaluation was not needed before the switch to the larger class; and there was no evidence that the student needed oxygen and a ventilator during transportation. Second, the court noted that N.Y. Comp. Codes R. & Regs. tit. 8 § 200.6(h)(4)(ii)(a) sets a maximum of six students for classes of "students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention," while § 200.6(h)(4)(iii) sets a class size maximum of 12 for "students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment." The court said that in light of the textual dissonance between the two provisions, whether courts should apply deference to the agency's interpretation is itself a question suited to the state court's resolution. The Second Circuit said the interpretation question implicated state policy concerns and that the state law issue was dispositive in the case. It rejected worries about delay since the case requested reimbursement rather than immediate services, and said the dissent conflated certification with abstention. The question the court certified was: "When a student is covered by more than one class size regulation under § 200.6(h)(4), do the varying restrictions serve as distinct requirements that must be independently fulfilled or as a list of class size options from which the DOE may pick?" 134 F.4th at 698-99. Park, J., dissented, arguing that certification was not proper and the court should have deferred to the hearing officer and review officer's interpretation of the law.

**William A. v. Clarksville-Montgomery Cnty. Sch. Sys.,* 127 F.4th 656, 125 LRP 3627 (6th Cir. Feb. 3, 2025). This case concerned a dyslexic student served by the school district from fifth grade forward who graduated from high school with a 3.4 grade-point average but still could not read or even spell his own name. The student's IEPs remained similar despite his failure to meet reading fluency goals and an expression of concern by a high school special education teacher that the student could not read. Eventually, in the student's eleventh grade year, the parent requested an evaluation for dyslexia and the district's evaluation confirmed that diagnosis. A private tutor hired by the parents began dyslexia instruction, but the district rejected the proposal to incorporate the program into the student's IEP. The hearing officer found a denial of FAPE and ordered 888 hours of tutoring as compensatory education. The district court affirmed, though denying a request to order the district to have the student's current tutor be the one to provide the tutoring. The court of appeals affirmed. After determining that the district's appeal remained justiciable because of collateral effects such as attorneys' fees even though the district did not challenge bases for relief under the ADA and Section 504, the

court affirmed the district court's judgment on the IDEA claim. The court noted that the accommodations the district provided hid the student's disability without addressing it:

> [P]er the terms of his IEPs, he relied on a host of accommodations that masked his inability to read. To write a paper, for example—as the ALJ described—William would first dictate his topic into a document using speech-to-text software. He then would paste the written words into an AI software like ChatGPT. Next, the AI software would generate a paper on that topic, which William would paste back into his own document. Finally, William would run that paper through another software program like Grammarly, so that it reflected an appropriate writing style. Not all these workarounds were specifically listed in his IEP, but all were enabled by an accommodation that was: 24 extra hours to complete all assignments, which allowed William to complete his assignments at home, using whatever technology tools he could find.

Id. at 660. The court held that the fact that the student passed from grade to grade did not mean he received appropriate education. "When a child is capable of learning to read, and his IEP does not aim to help him overcome his particular obstacles to doing so, that IEP does not provide him the 'free appropriate public education' to which he is entitled." *Id*.

**Osseo Area Schs., Indep. Sch. Dist. No. 279 v. A.J.T.,* 96 F.4th 1062, 124 LRP 9021 (8th Cir. Mar. 21, 2024). The student in this case had a rare form of epilepsy that left her needing help with daily tasks including walking and toileting. Her seizures were so frequent in the morning that she was unable to attend school before noon, but she could remain alert from then until about 6 p.m. The Kentucky district she attended before moving to Minnesota in 2015 provided her evening instruction at home, but the Minnesota district refused the parents' requests for evening instruction, and from 2015 to 2018 provided one-on-one instruction in the afternoon, 4.24 hours each school day. When the student entered middle school, where the standard school day ended at 2:40, the district proposed to cut back to about 3 hours per day. The parents filed for due process and the pending proceeding kept the student at 4.25 hours under stay-put. After hearing, the ALJ ruled that the district made maintaining the regular school faculty hours its paramount consideration, rather than the student's needs, and ordered compensatory education and the addition to the of student's IEP of home instruction from 4:30 to 6 p.m. each day. The district court affirmed, finding that although the student made some progress while in the district her overall progress was de minimis, and she regressed in areas such as using hand signs to communicate, returning greetings using a button switch, and toileting. The district court found the student could have made more progress if she had received evening instruction and that a 3-to-4-hour school day was too short to pursue many goals recommended by the experts. The court of appeals affirmed. The court said that IDEA's reach is not restricted to the ordinary school day. It echoed the finding of the district court that the student's progress was de minimis, noting that the student met none of her annual goals for 2016 and 2017, met only a few short-term objectives in 2018, had no progress reports for 2019, and met only a single objective and no goals in 2020. The student regressed in toileting, with a

success rate of 45% at the end of her time in Kentucky and declining success once in the Minnesota school district, to the point of having only minimal success. For a while the toileting goal was removed due to the time constraint of the short day. Expert opinion showed that the student would have made more educational progress with evening instruction, and none of the district's explanations for refusing evening instruction were based in the student's needs. In a footnote, the court emphasized that it was rejecting the school district's argument that the IEP should be upheld because it ought to be evaluated as a snapshot at the time it was created, stating that "[H]ere, the District had more and more information about A.J.T.'s instructional needs and insufficient progress each year. This is not a case where it only became apparent that the student's IEP was inappropriate after the fact." *Id*. at 1066 n.4.

**Alex W. v. Poudre Sch. Dist. R-1*, 94 F.4th 1176, 124 LRP 7692 (10th Cir. Mar. 7, 2024). This case concerned a student with Down Syndrome, autism spectrum disorder, and vision and hearing impairments, who experienced significant behavior difficulties, including grabbing at others, kicking, pulling hair, undressing himself, and trying to run away, and who was largely nonverbal but used a touchscreen tablet with icons to communicate. The parents alleged a denial of FAPE for the school years from 2014 to 2018. The ALJ and the district court rejected claims regarding school years 2014 and 2015 as outside the statute of limitations and found no denial of FAPE for the other two years. The court of appeals affirmed these rulings. The ALJ and district court also found that the district had to reimburse the parents for an independent educational evaluation. The court of appeals reversed on that issue. Regarding limitations, the court found that the parents did not properly reserve their contention that statute of limitations does not restrict the time frame for recovery of damages. Regarding FAPE and the evaluations that led to the student's IEPs, the court said that the student's behavioral needs were adequately addressed, and that a functional behavioral analysis was not needed because the IEP team felt confident in helping the student regulate his behavior and knew what worked for him. The court said that the ALJ correctly found that the 2016 IEP included goals, supports, and accommodations to meet the behavioral needs, that it was possible for the student to progress on his goals even though his problem behaviors continued, and that the 2017 IEP had additional goals that responded to the findings of a 2017 reevaluation. The court also agreed that the student received FAPE despite a reduction in direct speech-language and occupational therapy hours when indirect hours were added and instructional time increased, with the court saying that the therapy offered was adequate. The court further rejected an argument that extended school year services should have been offered, noting that the student's regression in the past had been minor and declaring irrelevant the parents' contention that the reason the regression was minor was the summer services they funded. The court said the district could consider other resources available in determining the need for ESY. The court concluded that the district evaluated the student in all areas of disability, saying the district used autism-related assessments and tools; it further noted that the student worked with a speech-language therapist trained to use the touchscreen tablet device, and the student's functional communication improved. On the IEE issue, the court said that the school district did afford the parents an IEE at public expense after an August 2017 triennial reevaluation in accordance with their request in February 2018 for an IEE in the areas of speech and language and occupational therapy. The

district, the court said, did not need to afford another IEE in response to a June 2018 request for a neuropsychological evaluation. The court relied on 34 C.F.R. § 300.502(b)(5), which provides that the parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation. The court relied on the regulation's text and said the issue was one of first impression in the circuit.

Los Angeles Unified Sch. Dist. v. A.O., *supra* (IEPs, IEP Implementation, and Related)

**Steckelberg v. Chamberlain Sch. Dist.*, 77 F.4th 1167, 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 students 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.

VIII. COVID-19

**Chollet v. Brabrand*, 137 F.4th 241, 125 LRP 15058 (4th Cir.. May 19, 2025). In this case, parents of children with disabilities attending public school in Fairfax County, Virginia, alleged that the transition to remote learning during the COVID-19 pandemic was an unconstitutional taking of the parents' children's property interest in education, in violation of the takings clause. The court affirmed dismissal of the action, reasoning that a property interest for purposes of the due process clause encompasses more than a property interest calling for compensation under the takings clause. The takings clause applies only to private property, not public benefits, and public education is not the private property of the plaintiffs for which the plaintiffs must be compensated if it is taken for public use. The court noted, among other points, that students' use of public education is subject to many restrictions, and there is no option to buy, sell, or assign the right to attend school, just as there is no right to exclude others.

**Abigail P. v. Old Forge Sch. Dist.*, 105 F.4th 57, 124 LRP 21769 (3d Cir. June 26, 2024). In this case involving a student with severe disabilities including epilepsy, autism, global developmental delays, and other conditions, the court affirmed a district court's affirmance of a hearing officer decision that the school district did not deny the student free, appropriate education when it changed her instruction to remote from November 25, 2020 until February 16, 2021 (plus four more days in spring, 2021 for specialized cleaning of facilities). The student had an IEP providing for specialized instruction and related services, which included three half-hour sessions per week for both speech-language therapy and occupational therapy, plus one half-hour session a week for both physical therapy and physical education. The IEP team modified the IEP in December. Quoting the court's description, the revised "IEP stated that Abigail would have Zoom sessions five days per week, with optional Google classroom assignments four days per week. Two days per week, Abigail's mother opted to have Abigail participate in circle (i.e., group) time instead of occupational therapy because of a scheduling conflict. One behavioral goal related to following schedules was 'placed on hold' because it could not 'be monitored appropriately in a virtual setting.' For similar reasons, the monitoring of Abigail's completion of instructional tasks throughout the day was slightly reduced. Abigail's mother agreed to each of these revisions." *Id*. at 62. The student received the full amount of PT and speech therapy, as well as some other services, but had less one-on-one instruction, only about 15 minutes of math and 15 minutes of reading a day, and the instruction was provided by an aide some days. The student struggled during remote instruction and regressed in some areas, but was offered compensatory education, which the mother declined because the student had been placed in another program for the summer. Deferring to hearing officer determinations, the court said that the modified program met the standard for FAPE and was implemented adequately. The student received behavior tech and behavior analyst services as well as the full amount of PT and speech, and missed OT sessions because her mother opted for circle time instead. The student's instructional time was only slightly diminished during remote instruction, and she received most of her related services and was given equipment for independent activities. Thus, there was no "failure by Old Forge to implement substantial or significant provisions of her IEP." *Id*. at 66. The court said that remote instruction is not a per se violation of IDEA, but "a school district is *never* relieved of its legal obligations under the IDEA," and must "continue to offer an educational program reasonably calculated to confer meaningful educational benefits *in light of the child's individual circumstances*. As counsel acknowledged at oral argument, such circumstances can surely be affected by a global pandemic." *Id*. at 66-67 (emphasis in original).

Doe v. Franklin Square Union Free Sch. Dist., infra (Administrative Exhaustion and Damages Claims)

Arc of Iowa v. Reynolds, 94 F.4th 707, 124 LRP 6281 (8th Cir. Feb. 27, 2024). This case challenged the enforcement of a state statute prohibiting mask requirements in schools unless otherwise required by law. The lower court granted the plaintiffs' motion for summary judgment and, according to the court of appeals, "issued two declarations: (1) 'the phrase 'other provision[s] of law' as is used in Iowa Code section 280.31 includes

Title II of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act;' and (2) 'Iowa Code section 280.31 cannot be cited as the only basis to deny a student's request for reasonable modification or accommodation made under Title II of the ADA or section 504 of the Rehabilitation Act that includes requiring others to wear masks.'" *Id*. at 710. On appeal, the court vacated the district court's order and remanded the case with instructions to dismiss the case for lack of standing. Agreeing with a variety of other circuits' decisions, the court said that "the general risks associated with COVID-19, even though COVID-19 remains an ever-present concern in society, are not enough to show 'imminent and substantial' harm for standing." *Id*. at 711. The court said the risk of harm was too speculative to support injury in fact, and that the plaintiffs could not show traceability. On traceability, the court said that "Plaintiffs here have not shown that either the Governor or the Director of the Department of Education have a duty to enforce Iowa Code § 280.31 or that they have attempted to enforce the law in a manner that has directly affected them. Further, Iowa Code § 280.31 does not prohibit a school from complying with disability laws, nor have Plaintiffs alleged that a school denied their request for masking as a reasonable accommodation tailored to their child's situation." *Id*.

Simmons v. Pritzker, No. 22-3057, 2023 WL 8649881, 123 LRP 36972 (7th Cir. Dec.14, 2023) (unpublished). This case involved a student who was 16 at the time of the events that gave rise to the suit, but who had meanwhile attained majority. The student had a learning disability and was provided accommodations and services under an IEP. The school closed in response to COVID-19 pursuant to an executive order by the governor. At first the student was offered remote learning, then in-person, half-day educational services. The student eventually went on to graduate high school. The parent abandoned a due process proceeding she had filed, which claimed that the student's placement was changed in violation of IDEA, and filed a class action alleging violations of IDEA, Section 504, the ADA, the Constitution, state law and the RICO Act, asking for equitable relief that included a declaratory judgment and the appointment of a special monitor, in addition to nominal and punitive damages. The district court dismissed the class action complaint and the court of appeals affirmed. The court of appeals stated that the student had reached majority, but had not delegated rights to the parent, so parent could assert only her own rights. The court held that the parent lacked standing because she suffered no injury of her own.

Roe v. Healey, 78 F.4th 11, 123 LRP 24589 (1st Cir. Aug. 14, 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 was imminent or that a substantial risk of it existed. 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 determined 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* 78 F.4th at 24-25 & n.13; *cf. Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 82 IDELR 213 (2023) (finding ADA damages claim not subject to exhaustion).

We the Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev., 76 F.4th 130, 123 LRP 23566 (2d Cir. Aug. 4, 2023), *cert. denied*, 144 S. Ct. 2682 (June 24, 2024). 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.

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.

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 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 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).

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) (unpublished) (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." 500 F. Supp. 3d at 148. 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 precedent and USDOE guidance.

IX. AUTISM-SPECIFIC SERVICES

X. INFANT AND TODDLER PROGRAMS

XI. BEHAVIOR SERVICES AND STUDENT DISCIPLINE

Alex W. v. Poudre Sch. Dist. R-1, *supra* (Endrew F. and Free, Appropriate Public Education)

Steckelberg v. Chamberlain Sch. Dist., supra (Endrew F. and Free, Appropriate Public Education)

Secretary's Letter on Restraint and Seclusion (U.S. Sec'y of Educ., Jan. 8, 2025), https://www.ed.gov/laws-and-policy/key-policy-letters/secretarys-letter-restraint-and-seclusion states that restraint and seclusion practices can have a lasting negative impact on children and provides links to Department of Education guidance on the topic.

XII. PRIVATE SCHOOLS, VOUCHERS, AND RELATED

Loffman v. California Dep't of Educ., *infra* (Private and Residential Placement)

**Questions and Answers on Serving Children With Disabilities Placed by Their Parents in Private Schools*, https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf, 80 IDELR 197 (OSERS Feb. 28, 2022). This document concerns special education services for children with disabilities whose parents have placed them in nonpublic schools when FAPE is not at issue. It reiterates that those children do not have an individual entitlement to the special education and related services they would be able to receive if enrolled in a public school, and that private schools may not be required to meet state personnel or curriculum standards in some states. Not all procedural protections of IDEA are required. Proportionate spending on equitable services for such children as a group is required, but some children may not receive any

services. The document covers identification requirements (Q.A-2), says that districts may not require private schools to implement response-to-intervention processes before the evaluation of a child (A-3), in general rejects continuing obligations to offer IEPs to such children (A-6), discusses consultation requirements (B-1 to B-9), defines equitable services and says who may provide them (C-1 to C-2), elaborates on the services themselves (D-1 to D-7), distinguishes service plans from IEPs (E-1), discusses location of services and transportation (F-1 to F-4), covers service providers (G-1 to G-5), and addresses other topics, including homeschooled children (I-1 to I-3) and children participating in state voucher and scholarship programs (K-1 to K-5). The document also covers equitable services to children in private schools during periods of extended public school closures (M-1 to M-2). Dispute resolution is also covered (Q-1 to Q-4).

XIII. LEAST RESTRICTIVE ENVIRONMENT

Los Angeles Unified Sch. Dist. v. A.O. supra (IEPs, IEP Implementation, and Related)

**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 the student 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 further 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.

**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) (unpublished) (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.

XIV. RELATED SERVICES

**Pierre-Noel v. Bridges Public Charter School*, 113 F.4th 970, 124 LRP 32461 (D.C. Cir. Sept. 3, 2024). This case involved an eight-year-old with multiple disabilities who used a wheelchair for mobility. After attending school remotely in earlier years he was set to begin first grade in person, and his mother requested the District of Columbia and his school to provide transportation from the door of his apartment in a walk-up building to the vehicle that would take him to school. The District denied the request, relying on its policies that transportation is provided only from the outermost door of a student's dwelling, and that students should not be lifted or carried. The student's mother filed for due process. The hearing officer denied the relief the mother asked for, although the hearing officer ordered the District to provide transportation to and from the outermost door of the apartment building. In the mother's suit against the District and the student's charter school, the district court granted summary judgment for the defendants. The court of appeals reversed, ruling that IDEA required transportation from the apartment door to the school so that the student could attend class in person. The court said the District of Columbia has the obligation to provide transportation services to students with disabilities within its borders. Discussing mootness, the court

noted that the student was no longer enrolled at the charter school where he initially enrolled. He attended a private school for a while, but as of the time of the circuit court decision, he was re-enrolled in the D.C. schools. The school system again had refused transportation to and from the door of the apartment, however. The court found the appeal moot as to the charter school but held that it was live as to the District of Columbia on the ground that the case was capable of repetition yet evading review. On the merits, the court rejected an argument based on *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 295–96, 45 IDELR 267 (2006), that the obligation to provide door-to-door transportation was not clear enough that it could be imposed on the defendant. The court said that as long as the defendant can make a clear choice to accept federal funds (and incur the relevant obligation) or reject the money (and avoid the obligation), the *Murphy* standard is met. The court said that IDEA provided ample notice in this case. The court applied a plain-meaning interpretation to "transportation" in IDEA, emphasizing that it is modified by the language "as may be required to assist a child . . . to benefit from special education," 20 U.S.C. § 1401(26)(A), and is not limited to "vehicular" transportation, as in the Americans with Disabilities Act. The court also pointed out that the situation of a mobility-limited "child who lives in a walk-up apartment accessible by stairs [is] an everyday occurrence that hardly would have fallen outside Congress's expectations in enacting the IDEA." 113 F.4th at 981. The court noted as well the range of educational settings and locations contemplated by the statute and the statutory obligation to educate the student in the least restrictive environment, which it described as a central feature of IDEA. The court also read the relevant provision of the IDEA regulations, 34 C.F.R. § 300.34(c)(16), to embrace the transportation the mother requested for the student.

LePape v. Lower Merion Sch. Dist., *infra* (Administrative Exhaustion and Damages Claims)

Alex W. v. Poudre Sch. Dist. R-1, *supra* (Endrew F. and Free, Appropriate Public Education)

Los Angeles Unified Sch. Dist. v. A.O., *supra* (IEPs, IEP Implementation, and Related)

Assistive Technology Devices and Services for Children With Disabilities Under the IDEA, 124 LRP 1839, 124 LRP 1843, https://sites.ed.gov/idea/idea-files/at-guidance/ (OSEP Jan. 22, 2024). This Dear Colleague letter – Myths and Facts document updates the Department of Education's guidance on assistive technology. The materials place emphasis on the need to consider AT whenever an IEP team meets to develop an IEP, as well as the range of devices and services to consider. Text-to-speech software, word prediction devices, augmentative and alternative communication devices, and visual schedules and timers are singled out as examples of the devices and services IEP should employ as needed to provide FAPE for a student with disabilities. The AT should be included in the IEP, considered for a student's transition plan, and may need to be provided for use at home and in other non-school locations. The materials also address AT for children served under IDEA Part C.

XV. PRIVATE AND RESIDENTIAL PLACEMENT

Loffman v. California Dep't of Educ., 119 F.4th 1147, 124 LRP 37590 (9th Cir. Oct. 28, 2024). In this case, the court held that parents of a high school student had standing and plausibly pled that the California statutory requirement that the private schools it contracts with to provide education to students with disabilities under IDEA had to be non-sectarian violated plaintiffs' rights under the Free Exercise Clause of the First Amendment. The court reversed the dismissal of the free exercise claims and the denial of a motion for preliminary injunction, vacated dismissal of a claim under the Equal Protection clauses and remanded for further proceedings. The court, however, ruled that some plaintiffs, including two Orthodox Jewish schools and parents of a pre-school child, lacked standing. As to the standing of the Orthodox schools, the court ruled that the schools had not plausibly alleged they were able and ready to satisfy the requirements of a contracting school apart from the non-sectarian obstacle, and instead suggested they sought public funding for religious instruction. In addition, the pre-school student's parents had not plausibly alleged that their child could be placed in a private school even apart from the non-sectarian requirement. The parents of a high school student, however, had plausibly alleged that the student could be placed in a private school to meet his need for FAPE. As to the free exercise claim of the family who were found to have standing, the court relied on *Trinity Lutheran Church v. Comer*, 582 U.S. 449 (2017), regarding Missouri's Department of Natural Resources policy categorically disqualifying religious organizations from receiving playground resurfacing grants, as well as *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), regarding tuition assistance to parents who send their children to private schools but limited to nonsectarian schools under the state constitution, and *Carson v. Makin*, 596 U.S. 767 (2022), regarding a tuition assistance program for parents of students living in districts that do not operate their own high schools only as long as the private school chosen was non-sectarian. The court in *Loffman* said that under these precedents there was a cognizable burden on the families' free exercise in their efforts to obtain a public benefit. The court applied strict scrutiny and said there was no compelling state interest in avoiding the establishment of religion that could not be met by more narrowly tailored means, declaring, "The State Appellee does not present any historical analysis to support its position that California's nonsectarian requirement is narrowly tailored," as required by *Kennedy v. Bremerton School District*, 597 U.S. 507, 525 (2022). *Loffman*, 119 F.4th at 1171.

Steckelberg v. Chamberlain Sch. Dist., *supra* (Endrew F. and Free, Appropriate Public Education)

**S.M. v. Chichester School District,* No. 2:21-cv-04266, 2024 WL 4438472, 124 LRP 35901 (E.D. Pa. Oct. 7, 2024), *aff'd*, No. 24-2727, 2025 WL 649894, 125 LRP 6255 (3d Cir. Feb. 28, 2025) (unpublished). This case involved a 17-year-old boy whose autism and intellectual disabilities entailed a need for assistance to do tasks such as dressing himself, showering, and using the bathroom. When living at home, he was hospitalized multiple times due to concerns for his safety and the safety of his family. The district court found that the student had made progress only when educated in a residential facility. Upon moving to the defendant Chichester school district, the parents requested

a residential placement for the student, but the district offered only a day placement. The parents placed the student at a medical residential treatment facility called Elwyn RTF and had him attend school at the Delaware County Intermediate Unit. But his medical programming and educational programming were not coordinated, and he struggled to develop basic life skills. In February 2022, the court granted a preliminary injunction requiring Chichester School District:

> [T]o make all necessary referrals for residential educational placement for purposes of S.M.'s [free appropriate public education], in full consultation with parents; make all necessary arrangements to secure such placement and authorize the necessary funding; and plan for and execute a reasonable and appropriate plan for transitioning S.M. from the [residential treatment facility] where he currently resides, to the residential educational placement the parties mutually select, as soon as practicably possible.

2024 WL 4438472, at *2 (describing prior proceedings). That order was affirmed on appeal, but the parties could not agree on a placement among the few schools that would accept the student, and they returned to the district court with the parents proposing a residential educational placement at Melmark, and the district arguing that residential placement was not needed but, as a fallback, that Elwyn Children's Residential Treatment and Learning Center could serve the student. The court heard testimony from an independent evaluator the court appointed and others, and "ordered Chichester to (1) take all necessary steps to secure S.M.'s residential educational placement at the Melmark School for his immediate admission—including signing an enrollment contract and completing all related requirements—on or before September 5, 2024; and (2) make all necessary arrangements to fund S.M.'s placement at the Melmark School." *Id*. at *7. In support of the decision, the court reasoned that the student continued to need residential placement, noting his problem behaviors, which spiked whenever he was home for more than one night, and his ongoing struggles with basic self-help, social, and life skills. The court deemed education for a student with those needs to cover development of such basic self-help and social skills. The court further ruled that the Elwyn placement was not appropriate. The court pointed out that the proposed Elwyn educational placement would include vocational math involving decimals and money values when the student was functioning at the level of a toddler between the ages of two and three. Melmark's program was oriented around life skills, and it employed Applied Behavior Analysis. The school district agreed ABA was needed, but the court said that Elwyn did not appear to apply it as consistently as Melmark did. Therefore, the court issued the preliminary injunction. The district appealed, and the Third Circuit affirmed. It noted that the offer of admission at Melmark was open for only three weeks and was about to expire, so the lower court had to act quickly. The court of appeals said the parents had long ago exhausted their administrative remedies, and it was up to the district court to determine what satisfied that court's orders. The order did not need to include a termination date. The court found no clear error in the district court's determination that the student needed residential education and Elwyn was not adequate. It further cited the stay-put provision of IDEA, 20 U.S.C. § 1415(j). The court

remanded for proceedings on the merits of the case, though it suggested that a negotiated settlement could avoid that necessity.

XVI. POST-SECONDARY TRANSITION

XVII. MAINTENANCE OF PLACEMENT (STAY-PUT)

**B.D. v. District of Columbia*, No. 23-7132, 2025 WL 1540560, 125 LRP 16125 (D.C. Cir. May 30, 2025) (unpublished). This case involved a student with autism. The District paid for a home tutor as well as occupational therapy and speech and language services for two years when the student could not attend school; the District tried to place him in a school in 2011, but he was dismissed. The District proposed a different school, but the parents considered it inappropriate and filed for due process. They continued educating the student at home, paying for tutoring and occupational therapy themselves. In a March, 2012 decision, the hearing officer agreed that the District had denied the student FAPE and ordered the District to reimburse the parents for the tutoring and OT they had provided, to furnish the student a certain amount of occupational therapy as compensatory education, and to reconvene the IEP team to conduct assessments and determine appropriate interim services pending the assessments. The interim services had to include one-on-one home instruction for two hours a day, five days a week. The IEP team developed a new IEP later that year but the parents disagreed and filed for due process to challenge that program. They made a motion to the hearing officer to establish the student's current educational placement for purposes of stay-put, and the parties agreed that the current educational placement was the placement when the hearing officer in March 2012 ruled in favor of the parents. The hearing officer in the second proceeding ruled that the current placement "was his home program — consisting of only the one-on-one tutoring and occupational therapy that the [parents] had provided [the student] out-of-pocket while challenging the 2011 individualized education program." 2025 WL 1540560, at *2. The parents challenged that determination in district court, but the district court upheld it. The court of appeals affirmed, reasoning that "one-on-one tutoring and occupational therapy were the only services the hearing officer approved in the March 2012 decision," so the student's "'then-current educational placement' included only those services." The services to be determined by the IEP team were services in the future and not part of stay-put. The court overturned a denial of attorneys' fees for the parents' achievement of a consent order providing reimbursement for an independent evaluation.

Scheff v. Banks, *infra* (Mootness)

**Davis v. District of Columbia*, 80 F.4th 321, 123 LRP 24587 (D.C. Cir. Aug. 15, 2023), *cert. denied*, 144 S. Ct. 2684 (June 24, 2024). This case involved a student with autism spectrum disorder and other disabilities, who had a history of aggression, self-injury, and property destruction, all 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 student's 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." *Id*. at 326 (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*. at 327. The court, however, noted that "the District may ultimately be responsible for failing to provide [the student] a FAPE." *Id*. at 328. 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*. 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), *cert. denied*, 144 S. Ct. 559 (Jan. 8, 2024). 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 had 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.

**C.S. v. New York City Dep't of Educ.*, No. 24-CV-02111 (ER), 2025 WL 964008, 125 LRP 9549 (S.D.N.Y. March 31, 2025). This action concerned seven student plaintiffs who had attended a private school for children with autism, Reach for the Stars Learning Center (RFTS-LC). Before the 2021-22 school year, the private school had a tuition-based program. Starting that year, it switched to fees for services, providing services through a different corporate entity, RFTS-LD (LD stands for learning and development). This change increased the costs dramatically, doubling them or more in some instances. Various of the plaintiffs sought funding for tuition and related services for the school years from fall 2021 through spring 2024, claiming that pendency agreements or unappealed pendency orders covered RFTS-LD, though some of the orders' texts provided pendency at RFTS-LC. The court denied the plaintiffs' motions for summary judgment. For students whose agreement called for RFTS-LC, the court ruled, in line with the SRO, that the parental agreement to placement at RFTS-LD changed the students' placement from what had been the pendency placement, and there was no pendency at RFTS-LD. The court also found that RFTS was not shown to be an appropriate placement in one case. In three other students' cases, the defendant did not dispute that the pendency placement was at RFTS-LD, but issues of fact existed about whether payments were made, so summary judgment was not appropriate. The court denied plaintiffs' requests for declaratory relief, attorneys' fees, and sanctions.

**A.M-G. v. Salem Keizer Pub. Schs.*, Nos. 6:24-cv-01517-MC, 6:24-cv-01575-MK, 2024 WL 4867060, 124 LRP 40061 (D. Or. Nov. 22, 2024). This case concerned two deaf students in the Salem Keizer Public School District (SKPS), designated as A.M-G. and K.B. The students attended the regional Deaf/Hard of Hearing (D/HH) Center Site Program run by the Willamette Educational Service District (WESD) and housed at Crossler Middle School, until WESD decided to close the D/HH program. The students' families demanded due process hearings and invoked the right to maintenance of placement during the pendency of the dispute. They moved for preliminary relief from the court to order SKPS and WESD to reopen the D/HH program, reinstate the students, and maintain the program during the litigation. The court denied the relief. The students used American Sign Language and relied on teachers of the deaf to supplement their instruction at Crossler Middle School. SKPS and WESD maintained an inter-district agreement for WESD to provide services for deaf and hard of hearing students, and the program was housed at Salem Heights Elementary School, Crossler Middle School, and Sprague High School. Deaf students had the option "to receive their education at these schools, giving them access to centralized support services and a cohort of Deaf peers." 2024 WL 4867060, at *1 (citing complaint). On March 21, 2024, WESD informed the parents that the Crossler and Sprague programs would close at the end of the school year, and the students would be returned to their neighborhood settings, with IEP services remaining effective. Students at Crossler could continue there through eighth grade, unless they chose to be served by their neighborhood schools. Students wishing to attend Sprague High School could request a transfer if it was not their neighborhood school. In due process proceedings, the ALJ denied motions for stay-put relief and dismissed the due process complaints on the ground they were not ripe since they asserted only future harm in the following school year. In rejecting the motions for a temporary restraining order or preliminary injunction, the court said

there was no change in educational placement. The court said the then-current placement is the placement set out in the student's last-implemented IEP. The students' special education placement determination were "Access to special education in, or outside of the general education setting for up to 20% of the school day." In a June 2022 IEP, A.M-G. had as placement "Crossler Center Site for D/HH Students – 1 Class in Special Education Classroom: Study Skills." The May 2024 IEP's special education placement determination" was also "Access to special education in, or outside of the general education setting for up to 20% of the school day," and the placement was "Foundations class at the high school. Offering academic supports and study skills." The court said, "A.M-G.'s education remains primarily in the general education classroom, or the same option on the continuum of placement options." K.B. had a November 2023 special education placement determination of "Access to special education in, or outside of the general education setting for up to 20% of the school day" in an "Advisory class 20 minutes a day, 4 days a week." In the June 2024 IEP, K.B.'s special education placement determination" was also "Access to special education in, or outside of the general education setting for up to 20% of the school day." The placement determination stated that since Sprague High School ran a block schedule, K.B. would "be removed for one class period … for a Study Skills tutorial class." The court declared that "K.B.'s education likewise remains primarily in the general education classroom, or the same option on the continuum of placement options." *Id*. at *3. To support its conclusion that there was no change in the current educational placement for either student, the court said that the students' prior and proposed IEPs were substantially similar, and the students would be educated with nondisabled students to the same extent under both sets of IEPs. There was no evidence of a barrier to participation in extracurriculars. The parents argued that the cohort of deaf peers at the Center Site program was an integral part of the prior placement. They noted that "students previously had daily access to a teacher of the deaf, received direct instruction in ASL, and had onsite technology support for their assistive devices." *Id*. at *4. The court countered that these objections went to whether FAPE was offered, rather than whether the placements in the IEPs had been maintained. The court also stated that "even if the D/HH program were the students' current educational placement, stay put would not require that the program reopen. SKPS contracts with WESD to provide services for D/HH students. . . . The responsibility to provide identified students with a FAPE remains with SKPS, not with WESD. . . . WESD ran the D/HH program and made the decision to close the program. Neither SKPS nor this Court can compel WESD to reinstate the program." *Id*. at *6.

XVIII. MAINTENANCE OF PLACEMENT AND COVID-19

XIX. MOOTNESS

Pierre-Noel v. Bridges Pub. Charter Sch., supra (Related Services)

**Scheff v. Banks*, No. 23-1006-cv, 2024 WL 3982986, 124 LRP 32027 (2d Cir. Aug. 29, 2024) (unpublished). This case involved a demand for payment for a private placement during the 2022-23 extended school year while IDEA administrative proceedings were pending. The district court denied the request and issued summary judgment against the plaintiffs, and they appealed. The court dismissed the appeal as moot, stating that

the defendants and the plaintiffs agreed that the defendants had to pay the tuition and transportation for 2022-23. The plaintiffs, however, alleged that the defendants had not paid for nursing services that were inadvertently omitted from the original order for which pendency was requested. The nursing services were included in a "Corrected Final Order" from the impartial hearing officer (which the defendants contended was not a valid order because it did more than fix minor, typographical errors), but the court said that all that was before it was the appeal of the district court's denial of a request for a pendency order concerning the original due process decision and order. That order was now superseded by the corrected final order, whatever its validity might be. Because the defendants and the plaintiffs agreed that the defendants had to pay the tuition and transportation for 2022-23, the dispute that was actually before the court was moot. The court further rejected an argument based on the contention the case was capable of repetition yet evading review.

Kass v. Western Dubuque Cmty. Sch. Dist., infra (Compensatory Education and Related)

**A.B. v. Brownsburg Cmty. Sch. Corp.*, 80 F.4th 805, 123 LRP 27631 (7th Cir. Sept. 5, 2023). This case had to do with a student who was eligible for accommodations under Section 504 and was provided accommodation plan, but who was involved in a disciplinary infraction and recommended for expulsion in September 2019, before the holding of a manifestation determination conference. The parents filed a petition for due process, claiming that the student should have been evaluated because he was eligible under IDEA. After the manifestation determination was decided against the student, the student was expelled for the remainder of the school year. During discussions over the due process proceeding, the defendant agreed to have a doctor evaluate the student and to convene a meeting to review the evaluation and determine eligibility. The parents then filed an additional due process request that incorporated the earlier request and included later actions by the defendant. The evaluation and eligibility meeting eventually took place. The defendant decided that the student was not eligible under IDEA, but it amended the Section 504 plan, adding a diagnosis of ADHD, and planning for the return of student to school for the spring semester. Still more negotiations ensued, the parents initially rejected a proposed settlement, the defendant sent the parents a draft due process settlement offering to accede to all the parents' demands except for attorneys' fees, and the defendant filed a motion requesting the hearing officer to cancel the due process hearing and dismiss the case. The motion included a unilateral stipulation by the defendant that the student was IDEA-eligible and a promise that the defendant would provide all education-related relief requests by made the parents. The parents replied that they did not object to the hearing officer's entry of an order acknowledging that the defendant conceded the student's eligibility, but they continued to ask the hearing officer for factual findings regarding prevailing party status for attorneys' fees. The hearing officer ultimately denied all pending motions, and entered a finding that student was IDEA-eligible under the Emotional Disability and Other Health Impairment categories and further ordered the defendant to convene a case conference committee. The hearing officer denied later-filed motions and dismissed the due process proceedings. The parents filed suit for attorneys' fees, but the district court granted summary judgment for the defendant. The court of appeals

reversed, however, pointing out that the unilateral stipulation was not binding since it was conditioned on the parents' acceptance of the defendant's offer, and the parents had refused. The court reasoned that therefore the legal relationship between the parents and the defendant materially altered only when hearing officer issued the finding of eligibility. The court remanded the case to the district court for the exercise of its discretion whether to award fees. It may be noted that the court could have relied on *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016), which held that an unaccepted Fed. R. Civ. P. 68 offer of settlement that would have provided full relief for the plaintiff's statutory claim did not moot the plaintiff's case, because an unaccepted offer of settlement is a mere legal nullity.

Brach v. Newsom, supra (COVID-19)

XX. PRECLUSION AND RELATED

LePape v. Lower Merion Sch. Dist., *infra* (Administrative Exhaustion and Damages Claims)

Lartigue v. Northside Indep. Sch. Dist., *infra* (Administrative Exhaustion and Damages Claims)

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 dismissed for failure to exhaust prior to the Supreme Court decision in *Luna Perez v. Sturgis Public Schools*, 598 U.S. 142, 82 IDELR 213 (2023).

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 student's IDEA eligibility. The student lived with the adult cousin, and the adult cousin supported the student year-round, 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 defines "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.

XXII. DUE PROCESS HEARING REQUEST LIMITATIONS

**Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (May 9, 2024). In this Copyright Act case, the Supreme Court held that assuming the three-year statute of limitations employs a discovery rule in which accrual of the action occurs when the claimant discovers or with due diligence should have discovered the infringing conduct, the claimant may obtain damages for the entire period of infringement rather than damages for only the three years prior to filing of the action.

**Edward M.R. v. District of Columbia*, 128 F.4th 290, 125 LRP 4880 (D.C. Cir. Feb. 14, 2025). The due process complaint of the student in this case, filed in June 2020, alleged that his IEPs from 2015 through 2019 were insufficient to meet his needs and reflected a decrease in speech and language services despite lack of progress in pragmatic language skills, increases in time spent outside general education without an increase in needed support, a cut in occupational therapy, and failure to address needs in a variety of areas with research-based instruction. The hearing officer found the challenges to the 2015 through 2017 IEPs untimely and ruled that the 2018 and 2019 IEPs offered FAPE; the district court affirmed. On appeal, the student continued to challenge the 2017 through 2019 IEPs, but the court affirmed that the claims concerning the 2017 IEP were barred by limitations, noting that the student did not contest the hearing officer's finding that he had notice of the claims regarding that IEP on the date it issued, November 27, 2017. Therefore, the student needed to file the due process complaint as to that IEP by November 27, 2019. The court affirmed the district court on the claims regarding the content of the 2018 and 2019 IEPs, holding that the repetition of some goals was not enough to show a denial of FAPE when the student had severe memory issues requiring repetition and consistency in instruction. The law was said not to ensure outcomes, and the claim that the IEPs did not include research-based instruction failed when the omission was not shown to affect substantive rights to instruction. A claim concerning lack of applied behavior analysis was deemed an implementation claim, which was found to be not exhausted when the due process complaint raised only claims regarding IEP content. Henderson, J., concurred, questioning the propriety of summary judgment as a vehicle to resolve appeals of IDEA hearings in district court.

**Peter G. v. Derry Twp. Sch. Dist.*, No. 1:23-CV-00043, 2025 WL 270057, 125 LRP 2346 (M.D. Pa. Jan. 22, 2025). This case involved a 16-year-old student with ADHD, learning disabilities, epilepsy, incomplete hippocampal inversion, and accommodative vision spasms. The parents asked for a special education evaluation in January 2017, when the student was in third grade. Rather than conduct an IDEA evaluation, the district created a Section 504 service agreement, which was modified several times. The district proposed a Section 504 service agreement again in August 2020, but agreement was not reached. In fourth grade, 2017-18, the student told the parents he was being moved to a different reading class. The parents asked the district about the move and were told there might be changes to the student's accommodations. No special education evaluation was recommended, however. At the end of fourth grade, a district reading specialist recommended summer reading tutoring, which the parents obtained at their own expense. At the end of fifth grade, the parents were told the student was not permitted to pursue foreign language instruction because of his "Tier II" reading needs.

Finally, in October 2019, the parents formally requested evaluation of the student for learning disabilities. On January 10, 2020, the district issued an evaluation report, finding the student not eligible under IDEA. The report showed very low test scores in many areas, including reading comprehension scores in the first and fifth percentiles. The parents disagreed with the district's educational placement recommendation and requested mediation, which never occurred. During remote instruction occasioned by the COVID-19 pandemic, the parents continued to seek additional support for the student, then in March 2021 they requested reevaluation for special education. The district found the student to meet the eligibility criteria due to ADHD. An IEP was issued on May 27, 2021, but the parents enrolled the student in a private school. The parents filed for due process on January 10, 2022, seeking compensatory education, tuition reimbursement, and payment for an independent educational evaluation. Upon the district's raising a statute of limitations defense, the hearing officer issued an order limiting the scope of the parents' claims to events that occurred on or after January 10, 2020. After hearing evidence under this restriction, the hearing officer ruled against the parents, and the parents filed in court for review citing IDEA, Section 504, the ADA, and state law. In its decision of January 22, 2025, the court resolved only the limitations issue. The court noted that the hearing officer made no findings of fact as to the date the parents knew or should have known of the special needs of the student and the failure of the district to respond to the needs appropriately, instead treating the limitations as a remedy cap. The court ruled that this was directly contrary to *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 66 IDELR 91 (3d Cir. 2015). The parents contended that they did not know nor should have known of the failure to provide FAPE until the January 10, 2020, evaluation report, due to the district's continual assurances that the Section 504 accommodations met the student's educational needs. The court stressed that knowledge of the school's programming does not trigger the statute of limitations. The court said:

> The relevant inquiry is not whether Peter's parents were *concerned* about his academic performance and educational supports before the Evaluation Report was issued, but whether they *knew or should have known* that the District would not provide Peter with the educational supports necessary to provide him with a FAPE. The administrative hearing officer in this case made no factual findings on this issue. Considering the record before us de novo, we find that, as Peter's parents have contended, the issuance of the January 10, 2020, Evaluation Report constitutes the sort of clear action or inaction by the District sufficient to alert a reasonable parent that Peter's educational support needs would not be appropriately accommodated.

2025 WL 270057, at *9 (emphasis in original). The court considered the issue de novo on the basis of the record and found that the January 10, 2020, report provided the relevant date for limitations, that the complaint was timely filed, and "the hearing officer erred in limiting the scope of the claims she considered to those occurring on or after January 10, 2020." *Id.* at *9. The case was remanded to the hearing officer to consider actions or events preceding the January 10, 2020, report, and the court case was stayed until the conclusion of the administrative proceedings.

XXIII. CONDUCTING DUE PROCESS HEARINGS

**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).

Jennifer N. Rosen Valverde, *A Panoramic IDEA: Cabining the Snapshot Rule in Special Education Cases*, 55 ARIZ. ST. L.J. 1445 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4718851 (free registration required). This paper discusses the "snapshot" rule, by which some evidence not available to a school district at the time it acts is excluded from consideration by decision makers in special education cases. The author contends that application of the rule to child-find and eligibility contexts is contrary to IDEA's language and intent; Supreme Court precedent interpreting the statute; and procedural due process principles. It proposes an alternate approach allowing wide consideration of post-hoc evidence in child find and eligibility cases, subject to limits generally applicable under the rules of evidence.

XXIV. DUE PROCESS AND COVID-19

XXV. TUITION REIMBURSEMENT

**Ferreira v. Aviles-Ramos*, 120 F.4th 323, 124 LRP 37950 (2d Cir. Oct. 30, 2024). In this case, involving a student with a brain injury, cerebral palsy, and epilepsy, the district court required the public school system to make a retrospective tuition payment for the 2020-21 school year directly to a private school, as opposed to waiting for the parent to pay the school and reimbursing the parent on proof of payment. The district court further held that the parent did not need to show a lack of resources to obtain direct payment to the school. The district court, however, affirmed a state review officer order denying tuition reimbursement to the parent for the 2019-20 school year on the equitable grounds that the parent was not cooperative in completing updated evaluations of the student and failed to attend a CSE meeting. It was this denial of reimbursement for 2019-20 that the parent took up on appeal. The Second Circuit affirmed the district court but clarified that the district court needs to make an independent decision on the balancing of the equities concerning reimbursement. As relevant to the 2019-20 school year, the Committee on Special Education met on May 20, 2019, to develop the student's IEP, but the parent did not attend, instead re-enrolling the student at iBrain, a private placement. The CSE recommended the

student's placement at a public school, and the parent filed for due process stating that the school system's placement denied free, appropriate public education, and requesting tuition reimbursement for the school year. The hearing officer upheld the school system placement and further ruled that the equities did not support reimbursement because the parent's failure to attend the IEP meeting impeded efforts to include the parent in the meeting and prevented obtaining a current evaluation. The review officer ruled that the school system placement was not appropriate and the private placement at iBrain was appropriate but agreed that the parent impeded the IEP process by not producing the student for scheduled evaluations and by not assisting in getting updated progress reports from the private school. The review officer concluded that the balance of equities disfavored reimbursement. The district court upheld the reimbursement denial for 2019-20, and the court of appeals affirmed. The court of appeals commented that district courts must give due weight to administrative decisions regarding the substantive and procedural adequacy of the IEP. Decisions on adequacy of IEPs involve hard questions of educational policy on which the administrative decision makers are thought to have specialized knowledge, justifying the district courts' deference. But balancing of equities "is an exercise of judgment that falls squarely within federal courts' expertise." *Id*. at *5. The court declared:

> We therefore conclude that the "substantial deference" that the IDEA requires for matters of educational policy is inapplicable to the equitable balancing called for at the third step of the *Burlington/Carter* test. While courts are of course free to consider an IHO and/or SRO's views of the equities for their power to persuade, we now hold that a district court reviewing a claim pursuant to section 1415(i)(2) errs as a matter of law when it fails to (1) engage in an independent review of the administrative record, and (2) make a determination [of the balance of the equities] based on a preponderance of the evidence.

Id. at 332-33 (citations and internal quotation marks omitted). The court then reviewed the district court's ruling denying reimbursement on equitable grounds and determined that "the district court neither improperly deferred to the IHO and SRO's view of the equities nor abused its discretion in concluding that the equities disfavored reimbursement." *Id*. at 333. The court of appeals said the record of parental noncooperation supported the view of the district court that the equities favored denying reimbursement.

**A.P. v. New York City Dep't of Educ.*, No. 22-2636, 2024 WL 763386, 124 LRP 6283 (2d Cir. Feb. 26, 2024) (unpublished). In this decision, the court of appeals vacated and remanded a district court decision concerning a 13-year-old student with autism who had been approved by the defendant to attend a non-public school for students with special education needs. For the 2020-21 school year, however, the defendant did not offer a FAPE to the student. The parents enrolled the student in Keswell, a private special-needs school, and they opted for remote instruction for that year due to concerns over COVID-19. The parents then initiated due process to obtain reimbursement for the placement. The IHO found Keswell generally appropriate as a placement but awarded only partial tuition reimbursement for the 2020-21 school year due to the remote

instruction. The SRO denied that the Keswell placement was appropriate and denied any tuition award for 2020-21. The district court on the parent's suit reinstated the IHO award of partial tuition. In vacating and remanding, the court of appeals held that the district court failed to meaningfully weigh the equities as to the tuition award. The district court accepted the finding that the remote live sessions of three hours per day were appropriate but did not weigh equities in reducing the tuition award. The court also said that the district court and IHO erred in applying the test for tuition reimbursement:

> In its analysis of the second prong of the test—the appropriateness prong—the IHO found that three hours of remote sessions out of an eight-hour day were appropriate, thus entitling Appellants to 3/8th of the tuition reimbursement. The IHO incorrectly applied the *Burlington-Carter* test by conducting reimbursement calculations in its appropriateness analysis. It should have determined only whether the placement was appropriate or not.

Id. at *2. Moreover, said the court of appeals:

> [O]nce parents pass the first two prongs of the *Burlington-Carter* test, the Supreme Court's language in *Forest Grove Sch. Dist.*[*v. T.A.*, 557 U.S. 230 (2009)], stating that the court retains discretion to "reduce the amount of a reimbursement award if the equities so warrant," suggests a presumption of a full reimbursement award. *Id*. at 247; *see also* 20 U.S.C. § 1412(a)(10)(C)(ii) (suggesting that reimbursements "for the cost of … enrollment" is the ordinary remedy when a student is denied a FAPE and must be placed in private school, subject to certain limitations in (a)(10)(C)(iii)). . . . Here, after finding that Appellants were eligible for relief, the IHO also found that the equities favored Appellants. But it nonetheless awarded only partial reimbursement without explaining any equitable factors that justified this reduction.

Id. Therefore the district court decision was overturned and the case remanded. The district court further remanded the case "to the IHO to develop the factual record on the third prong of the *Burlington/Carter* test – 'a consideration of the equities' – and thereby determine the proper amount of reimbursement." No. 21 Civ. 7439 (LGS), 2025 WL 1466844, at *4, 125 LRP 15663 (S.D.N.Y. May 22, 2025).

**Neske v. New York City Dep't of Educ.*, No. 22-2962-CV, 2023 WL 8888586, 123 LRP 37531 (2d Cir Dec. 26, 2023) (unpublished). Here the court of appeals affirmed the district court's decision denying tuition reimbursement in a case in which the hearing officer and review officer found that the student had been denied free, appropriate public education, and that the parental placement at the iBrain school was appropriate, but equitable considerations did not support reimbursement. The court of appeals said that the district court appropriately exercised its discretion to deny reimbursement: "The record provides sufficient support for the district court's determination, based on the agency's findings, that the Neskes not only did not cooperate with the DOE but also

were likely part of a broader campaign to disrupt the IEP creation process to support the migration of students from iHope to iBrain, which was orchestrated by the founder of iBrain and his related law firm. Specifically, the district court highlighted that the record showed that dozens of iHope parents, including the Neskes, insisted on requesting that a physician be present at the in-person IEP meetings but then failed to attend themselves. The IHO and SRO found that DOE physicians could not physically attend all IEP meetings because they received such a large volume of requests from parents. However, when the physicians did attend the in-person IEP meetings at the parents' behest, the parents were often absent, or the meetings were cancelled on short notice. The district court determined that these group cancellations were evidently a delaying tactic 'designed to stymie the DOE's effort to create IEPs for the students.'" *Id*. at *2. The court also relied on a finding that testimony by the student's parent was not credible.

**M.M. v. New York City Department of Education*, No. 21-cv-3693 (BMC), 2024 WL 3904771, 124 LRP 31321 (E.D.N.Y. Aug. 22, 2024). Here the court reversed a denial of tuition reimbursement by the hearing officer and state review officer, who had ruled that the private school chosen by the parents was not appropriate. The student had autism spectrum disorder and ADHD, and her primary language was Spanish. In 2017, the IEP team recommended a day bilingual Spanish special class in a nonpublic school, with related services, and a bilingual Spanish district-run special class to be implemented until the district arranged the other class. But the district failed to provide a permanent placement for the 2017-18, 2018-2019, or 2019-2020 school years. It recommended an interim English-language public school placement just before the 2017 school year; however, the parties agreed that placement would not have provided free, appropriate public education. The parents reacted by placing the student at the Nord Anglia International School (NAIS) and sought tuition reimbursement for the 2018-19 and 2019-20 school years, settling a claim for tuition for the 2017-18 school year. The IHO ruled that the district failed to offer the student FAPE, but that the parents did not demonstrate NAIS was appropriate. The SRO agreed, admitting that the student made educational progress as NAIS, but nonetheless labeling the placement not appropriate. The administrative decisions focused on the private school's failure to provide Spanish-language or bilingual classes and speech-language and occupational therapy, which were related services listed on the IEP. The school did feature small classes of 11 or 12 students, broken into groups of four, and there was a learning assistant fluent in Spanish in 2018-19, and a teacher who spoke Spanish as well in 2018-19. The school provided a differentiated curriculum, and behavior plans that included multisensory instruction. The court reversed the denial of tuition reimbursement, reasoning that administrative decisions do not merit deference if they are not well-reasoned or are unsupported by the record. The court said that it was proper to apply the relaxed standard of appropriateness for parental placements found in *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356, 364-65, 46 IDELR 33 (2d Cir. 2006). The court went on to say, "To deny plaintiffs recovery would allow defendants to benefit from their failure to provide G.M. with an appropriate placement. Instead of requiring defendants to provide G.M.'s FAPE, they could simply fail to find a suitable program and shirk their responsibilities under the IDEA altogether." 2024 WL 3904771, at *6. The court declared that "the IHO and SRO did not afford proper weight to defendants' failure to recommend any placement whatsoever that would have satisfied G.M.'s IEP," "a

fundamental unfairness at the core of this case." *Id*. at *5. Moreover, although the defendant stressed the lack of Spanish language classes, the court found the student did have access to resources for her bilingual needs at the private school. In addition, NAIS offered an inclusion model with small class sizes and differentiated instruction in a general education setting. Some of the differentiation met needs that might have been addressed with related services under the public school IEP. The court emphasized that the parents acted in good faith and the student made academic progress.

XXVI. COMPENSATORY EDUCATION AND RELATED

Boone v. Rankin Cnty. Pub. Sch. Dist., *supra* (Endrew F. and Free, Appropriate Public Education)

**Kass v. Western Dubuque Cmty. Sch. Dist.*, 101 F.4th 562, 124 LRP 15032 (8th Cir. May 10, 2024). In this case, a student with epilepsy, autism, ADHD, severe vision impairment, and intellectual disabilities had accumulated enough credits for high school graduation by the end of the 2019-20 school year, but his IEP team recommended he stay in school to receive services for unmet transition needs, and proposed an IEP in May 2020 offering two hours of instruction at school or in the community, followed by outside work with a job coach and necessary transportation. The parents demanded due process and invoked stay-put rights, so that the student stayed in the high school placement until losing age eligibility at the end of the 2022-23 school year. The May 2020 IEP was never implemented. Meanwhile, in April 2021, the ALJ ruled against the parents on their claims concerning the 2018-19 and 2019-20 school years. The parents appealed to district court, and the district judge affirmed, also rejecting claims under Section 504 and the ADA. On appeal to the circuit court, the parents abandoned the claims for 2018-19 and 2019-20 but maintained that the May 2020 IEP and its adoption violated IDEA and Section 504. The court rejected the school district's argument that the case was moot, reasoning that the claim for compensatory education for fall 2020 through spring 2023 remained viable even though the student was now 22 years old. The court reasoned that compensatory education is a restorative remedy and that the inability of parents to front the costs of a placement should not eliminate the entitlement to free education. Moreover, "As the First Circuit noted in *Pihl* [*v. Massachusetts Dep't of Educ*., 9 F.3d 184, 20 IDELR 668 (1st Cir. 1993)], if compensatory education is not an available remedy beyond a student's twenty first birthday, 'school districts simply could stop providing required services to older teenagers, relying on the Act's time-consuming review process to protect them from further obligations.' [*Id*.] at 189." On the merits of the procedural and substantive claims, however, the court ruled that the district engaged in numerous meetings with the parents, involving them in the IEP process and determining that community engagement activities were more appropriate than the core academics the parents preferred. The program did not need to be optimal, and though the school day was shortened to just include mornings, the services included individualized instruction in functional math, reading, and writing, and the services of the job coach were provided. The IEP goals were said to be adequately measurable. Judge Colloton dissented, arguing the case was moot.

XXVII. ADMINISTRATIVE EXHAUSTION AND NON-IDEA CLAIMS

A.J.T. v. Osseo Area Schs., Indep. Sch. Dist. No. 279, 145 S. Ct. 1647, 125 LRP 17919 (June 12, 2025) (Roberts, C.J.). In this case, the parents sued for a permanent injunction, reimbursement of costs, and compensatory damages under Section 504 and the ADA for the repeated denial of their requests for evening instruction for their daughter so as to provide her a school day closer in length to that of students without disabilities. The student's epileptic condition was so severe in the morning hours that the student could not attend school until noon, but the student was alert enough to receive instruction in the afternoon and evening. Nonetheless, the school district rejected the parental requests for evening services and gave the student only 4.25 hours of instruction daily, compared to the 6.5-hour day for other students. It eventually proposed cutting the instructional time still further, to about three hours. The parents filed for due process claiming a violation of IDEA's obligation to provide FAPE. They prevailed on the IDEA claim before an administrative law judge, as well as in the courts on review. *See Osseo Area Schools, Independent School District No. 279 v. A.J.T.*, 96 F.4th 1062, 124 LRP 9021 (8th Cir. Mar. 21, 2024). But in the parent's separate suit for injunctive, damages, and other relief premised on violation of Section 504 and the ADA, the district court granted summary judgment to the school district, holding that the district did not act with bad faith or gross misjudgment. The Eighth Circuit Court of Appeals affirmed, saying that when the ADA or Section 504 violation is based on educational services for children with disabilities, the district will not be liable based on denial of reasonable accommodation. "Rather, a plaintiff must prove that school officials acted with 'either bad faith or gross misjudgment,' *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982), which requires 'something more than mere non-compliance with the applicable federal statutes,' *B.M. [v. South Callaway R–II Sch. Dist.*, 732 F.3d [882] at 887 [(8th Cir. 2013)] (citation omitted). The district's 'statutory non-compliance must deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate that [it] acted with wrongful intent.' *Id.*" *A.J.T. v. Osseo Area Schs., Indep. Sch. Dist. No. 279*, 96 F.4th 1058, 1061, 124 LRP 9023 (8th Cir. Mar. 21, 2024). The court said that the district did not ignore the student's needs or delay efforts to address them, even if the efforts were inadequate and failed to provide meaningful access to educational benefits, so there was no showing of wrongful intent. In a footnote, the court of appeals questioned why there should be "such a high bar for claims based on educational services when we require much less in other disability-discrimination contexts," but it said that even though the *Monahan* case was rejected by Congress in passing 20 U.S.C. § 1415(*l*), it remained the law of the circuit. *Id.* n.2.

The Supreme Court unanimously vacated and remanded. It said that apart from cases involving elementary and secondary education, the Eighth Circuit and the courts of appeals generally allow plaintiffs "to establish a statutory violation and obtain injunctive relief under the ADA and Rehabilitation Act without proving intent to discriminate." 145 S. Ct. at 1655. For compensatory damages, the courts generally hold that the plaintiff must show intentional discrimination, which is satisfied by proof of deliberate indifference. That standard requires only that the plaintiff show the defendant disregarded a strong likelihood that the conduct would result in a violation of statutory rights. That standard does not require ill will or animosity toward the plaintiff with a

disability. The Court said, "We hold today that ADA and Rehabilitation Act claims based on educational services should be subject to the same standards that apply in other disability discrimination contexts. Nothing in the text of Title II of the ADA or Section 504 of the Rehabilitation Act suggests that such claims should be subject to a distinct, more demanding analysis." *Id*. The Court said various provisions applicable to remedies also fail to make that distinction. The *Monahan* decision was based on a desire to harmonize the law that became known as IDEA with broadly applicable anti-discrimination laws. But Congress rejected that effort, as it did the similar effort of the Supreme Court itself in *Smith v. Robinson*, 468 U.S. 992, 555 IDELR 493 (1984), by enacting what is now 20 U.S.C. § 1415(*l*). Section 1415(*l*) provides that nothing in IDEA is to be construed "to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act [including § 504], or other Federal laws protecting the rights of children with disabilities," with the caveat that some such claims may need to be exhausted under IDEA's administrative procedures. *Monahan*'s higher bar for claims based on educational services, as opposed to other discrimination claims, placed a limit on the ability to vindicate ADA and Section 504 rights that "is irreconcilable with the unambiguous directive of § 1415(*l*)." 145 S. Ct. at 1657. The Court further rejected a last-minute argument by the school district that *Monahan* was wrong in creating an asymmetric rule for educational and other cases because the bad-faith-or-gross-misjudgment should be applied to all disability discrimination cases, not just those having to do with elementary and secondary education. The Court said that contention was not presented below and would not be entertained now. The Court concluded by saying: "That our decision is narrow does not diminish its import for A.J.T. and 'a great many children with disabilities and their parents.' *Luna Perez v. Sturgis Public Schools*, 598 U. S. 142, 146 (2023). Together they face daunting challenges on a daily basis. We hold today that those challenges do not include having to satisfy a more stringent standard of proof than other plaintiffs to establish discrimination under Title II of the ADA and Section 504 of the Rehabilitation Act." 145 S. Ct. at 1659. The Court stated in a footnote that "Because we address only the application of the heightened bad faith or gross misjudgment standard of intent to education related ADA and Rehabilitation Act claims, our opinion should not be read to speak to any other showing that a plaintiff must make in order to prove a violation of the respective requirements of those statutes or the IDEA." *Id*. at 1657 n.6..

Justice Thomas, joined by Justice Kavanaugh, concurred, questioning the view of many courts that the language in the ADA and Section 504 requires different things with respect to showings of intent depending on whether the plaintiff seeks compensatory damages or injunctive relief. Justice Thomas found Spending Clause concerns about a Section 504 claim based on anything less than an intent standard, and other constitutional concerns about allowing ADA liability on less than intent. Justice Sotomayor, joined by Justice Jackson, also concurred. Justice Sotomayor stressed that the text of the ADA and Section 504 excluded a reading that would require a showing of improper purpose or animus. Justice Sotomayor pointed out that people with disabilities can lose access to services and benefits by reason of disability without an invidious animus or purpose on the part of the defendant, as, for example, with architectural barriers or failure to provide communication accommodations. The concurrence continued, "There can be no question, too, that the statutes impose an

affirmative obligation on covered entities to provide reasonable accommodations, undercutting any improper-purpose requirement," *Id*. at 1652 (Sotomayor, J., concurring), something reinforced by the statutes' use of the passive voice as well as by the history and purpose of the statutes, as articulated in cases such as *Alexander v. Choate*, 469 U. S. 287, 556 IDELR 293 (1985).

Luna Perez v. Sturgis Pub. Schs., 598 U.S. 142, 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.

Y.A. v. Hamtramck Pub. Schs., 137 F.4th 862, 125 LRP 15657 (6th Cir. May 22, 2025). Here three parents brought a class action case alleging violations of ADA Title II by the school district and the state. Specifically, they alleged that the district failed to provide essential special education services and the state failed to adequately supervise the district and provide needed funding. The court of appeals reversed the district court's denial of a motion to dismiss the Title II claim against the state defendant. The court noted that the named-plaintiff parents alleged that services in their children's IEPs were not delivered, that the students were sent home early or improperly placed in seclusion, and they were denied evaluations and enrollment in needed programs. In two cases, the state education department, in response to complaints, ordered compensatory services and corrective action plans, but the parents alleged failure to implement the corrective action plans, and said that abbreviated school days, limited services, and inadequate processes remained pervasive. As the first step in the determination whether Eleventh Amendment-style sovereignty immunity protects the state defendant, a defense providing the basis for the interlocutory appeal, the court asked whether the state in fact was sufficiently alleged to have violated ADA Title II. It concluded that it was not. The court said that Michigan's schools are not a service, program, or activity of the state to be covered by ADA Title II. Instead, under state law, school districts have responsibility for public education and are separate public entities under control of local boards of education and subject to suit under Title II and other laws. The court said that state funding was not enough to make the state liable. The court distinguished IDEA's imposition of duties on states, as well as instances in which local agencies act as agents of the state.

Hawai'i Disability Rights Ctr. v. Kishimoto, 122 F. 4th 353, 124 LRP 40099 (9th Cir. Nov. 26, 2024). Here, a federally funded protection and advocacy agency brought a case for declaratory and injunctive relief against the state education and human services departments, claiming that a practice of denying access to ABA services to students with autism during the school day violated IDEA, the Americans with Disabilities Act, Section 504, and the Medicaid Act. The agency contended that "unless DOE

independently determines a student requires ABA for educational purposes and provides DOE-approved personnel for that purpose, a student with autism who has been medically prescribed ABA services will not receive services during the school day." *Id*. at 358. Reviewing the district court's grant of summary judgment against all the agency's claims, the court affirmed the district court's ruling that the agency needed to exhaust the IDEA claim through the due process procedure, although it reversed that ruling in part, saying that the agency did not have to ensure that individual parents exhausted. The court of appeals refused to excuse the agency from the exhaustion requirement, rejecting arguments based on futility, reasoning that the agency had not tried to obtain administrative relief and some parents had succeeded administratively; systemic violation, reasoning that the alleged violation was not concerned with the integrity of the IDEA dispute resolution procedures or a demand for restructuring of the educational system; and inadequacy of remedy, reasoning that hearing officers are bound by IDEA in the face of contrary local or state policies. The court reversed the district court as to exhaustion of the agency's claims of violations of the Medicaid Act, Section 504, and the ADA, applying 20 U.S.C. § 1415(*l*) and the factors identified in *Fry v. Napoleon Community Schools*, 580 U.S. 1 (2017). The court said that the claims under Section 504 and the ADA did not concern the provision of educational services and could be brought if a different public facility refused to allow ABA therapists to provide on-site services or if access to an accompanying ABA therapist were denied to a nonstudent visitor. There was no history of IDEA administrative proceedings on the claim brought by the agency. Similar reasoning applied to the Medicaid Act claim, and the court further noted that the agency's claim was that the Department of Human Services "violates the Medicaid Act's early and periodic screening, diagnostic, and treatment mandate *by* delegating ABA services to DOE during school hours. The State of Hawaii is statutorily required under the Medicaid Act to provide early and periodic screening, diagnostic, and treatment services that have been found to be medically necessary, regardless of their educational relevance." *Id*. at 371 (emphasis in original).

LePape v. Lower Merion Sch. Dist., 103 F.4th 966, 124 LRP 17149 (3d Cir. June 4, 2024). The student in this case, a non-speaker, was classified for IDEA under Autism, Intellectual Disability, and Speech and Language Impairment. In 2017 when he was 16, the family began requesting the school district to consider using a communication technique called "Spelling to Communicate" ("S2C"), which involves a student pointing at letters on an alphabet board held by a trained communication support person. Over 17 months, covering 2 school years, the family made at least 33 requests to the district to allow the student to use the S2C letter board in school and train school staff to assist him in using it. The school rejected the requests, doubting the basis in scientific evidence for the communication method, although the student's psychiatrist, speech therapist, and behavior analyst all deemed the method an effective means of communication for him. Eventually, the parents withdrew the student from public school. The family filed for due process, alleging denial of rights to free, appropriate public education under IDEA, Section 504, the ADA, and state law. The hearing officer ruled that the district did not discriminate against the student in violation of Section 504 and did not deny the student FAPE under IDEA and the statutes other than the ADA. The decision further stated that although there was no jurisdiction over the ADA claim, the claim should be denied if jurisdiction existed. The family filed an action in

district court alleging a denial of FAPE under IDEA, Section 504, and state law. The action also asserted claims of intentional discrimination against the student in violation of Section 504 and the ADA, seeking compensatory damages and a jury trial. The court denied summary judgment to the district on the Section 504 claim but granted the district's summary judgment motion on the ADA claim, reasoning that the ADA claim was subsumed by the IDEA FAPE claim. Then, based on modified de novo review, the court affirmed the hearing officer's decision that there was no FAPE denial under IDEA. Further relying on the due process hearing record, the district court denied relief under Section 504 and the ADA, reasoning that the intentional discrimination claims were denial-of-FAPE claims. The family appealed the grant of summary judgment on the ADA claim and the entry of judgment on the administrative record on the ADA and Section 504 claims. The court of appeal reversed the district court. It reasoned that *Fry v. Napoleon Community Schools*, 580 U.S. 154, 170-71 (2017), imposed an exhaustion requirement on some ADA and Section 504 claims, but otherwise placed no restrictions on the claims. The court said a plaintiff could succeed on an intentional discrimination claim under the ADA even if the plaintiff received FAPE under IDEA. Specifically, regarding the facts before the court, under the ADA the public entity must give primary consideration to the requests of the individual with disabilities to auxiliary aids and services such as methods of communication and has to honor those requests unless it can show that another effective means of communication exists. 28 C.F.R. § 35.160(b)(2); 28 C.F.R. Part 35, App. A. "[T]he only effect of finding that the gravamen of an ADA claim is denial of a FAPE should be that the claim must be exhausted through an IDEA hearing, which the District Court correctly found the Le Papes had done." *LePape*, 103 F. 4th at 980. The court endorsed the conclusion of *Lartigue v. Northside Independent School District*, 100 F.4th 510, 523, 124 LRP 9486 (5th Cir. 2024), that a standalone ADA claim is permitted. The court noted that the effective communication requirement in the ADA puts a greater obligation of equal access on the public agency than the FAPE requirement does. Quoting *K.M. v. Tustin Unified School District*, 725 F.3d 1088, 1092, 1101, 61 IDELR 182 (9th Cir. 2013), the court said that "there is no basis to conclude that 'the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of her [ADA] claim.'" *LePape*, 103 F.4th at 981. The court of appeals said there clearly was a disputed issue of fact whether the communication methods used by the school district were an effective alternative to the student's preferred method of communication, S2C. The court declared:

> We need not resolve this dispute now, nor was it proper for the District Court to do so. Under the Constitution's Seventh Amendment, the Le Papes were entitled to have a jury evaluate the effectiveness of the communication supports for Alex, and this precluded summary judgment where there existed a disputed issue of material fact. . . . Critically, the Court's role on summary judgment was not to decide that issue. Still less was its role to defer the question and then decide it by a judgment on the administrative record under the modified de novo standard of review.

Id. at 982. Nor was the disputed issue of fact resolved by the result in the due process hearing:

> "[w]hen exhausting an administrative process is a prerequisite to suit in court," we do not give "preclusive effect to the agency's determination … [.]" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 152 (2015). Additionally, "the legal standards under the IDEA and the ADA in this context are significantly different, barring application of issue preclusion to [the Le Papes'] federal ADA claim." *Lartigue*, 100 F.4th at 522.

Id. at 983. Applying modified de novo review to the non-IDEA claims restricted the rights and remedies of the family under the laws other than IDEA and violated the Seventh Amendment right to jury trial. Moreover, the lower court effectively disregarded significant evidence developed during pretrial discovery.

Doe v. Franklin Square Union Free Sch. Dist., 100 F.4th 86, 124 LRP 13128 (2d Cir. April 25, 2024), *cert. denied*, 145 S. Ct. 570 (Nov. 18, 2024). This case alleged that the school district failed to grant a student with asthma an exemption to the requirement that students wear masks pursuant of the New York State Department of Health's regulation responding to the COVID-19 pandemic. The student and parent alleged that asthma prevented her from being able to medically tolerate wearing a face mask, and that the district's conduct violated the Due Process Clause of the U.S. Constitution, the ADA, Section 504 and state law. The lower court dismissed the constitutional claim and state law claim on the merits, and the ADA and Section 504 claims for failure to exhaust IDEA administrative remedies. On appeal, the plaintiffs pursued these claims and sought damages. The court of appeals affirmed the dismissal of the due process claim, applying rational basis review. Regarding the ADA and Section 504 claims, the court reversed the dismissal. It rejected an argument that an agreement at one point to permit the student to wear a mesh mask was a reasonable accommodation because the parent agreed to it, when the plaintiffs alleged that the arrangement was not satisfactory in preventing asthma attacks. The court said reasonable accommodation is a fact-specific issue. Regarding exhaustion, the court said the claims were not for denial of FAPE, reasoning that the claim could have been brought in a non-school environment and could have been brought by an adult visitor to the school. In addition, the case in its posture on appeal involved only damages claims, relief not available in an IDEA claim. The state law claim was deemed abandoned.

Lartigue v. Northside Indep. Sch. Dist., 100 F.4th 510, 124 LRP 9486 (5th Cir. Mar. 26, 2024), *superseding* 86 F.4th 689, 123 LRP 33956 (5th Cir. Nov. 16, 2023). This case alleged that the school district failed to accommodate student's hearing impairment adequately during high school. The complaint said that among other things, the district failed to accommodate her as the ADA required in that it did not:

> (1) provide her with Communication Access Realtime Translation ("CART") services for her use during class, and during her training and participation in debate tournaments; (2) furnish copies of notes for all of her academic classes; (3) supply two interpreters for all classes and extracurricular activities in line with professional standards of care; (4) arrange Consultative AI Teacher Services; (5) provide closed-captioning services for in-class films and videos; (6) furnish AI Counseling Services in

> a consistent and private fashion; (7) supply group counseling, a service all other students at a regional school for the deaf were given; (8) designate a private "quiet space" to cut out multiple voices and stimuli; (9) provide an interpreter on the bus to assist her during normal school days; and (10) implement a "flashing lights" system during the school's emergency drills, leaving her unaware of a called emergency.

100 F4th at 516. The student claimed that:

> [A]s a result of these failures, she experienced panic attacks, could not participate in certain debate competitions, that she suffered alone, and that her physical and emotional state deteriorated as a result. Taken together, Lartigue claims that "[Northside's] refusals to accommodate [her] hearing impairment left her isolated from her peers and unable to meaningfully participate in various educational programs and activities," forcing Lartigue to leave the [public school] in March 2019 to be homeschooled.

Id. The parents initially sought relief as part of a putative class action alleging violations of IDEA, the ADA, and Section 504. A month after that filing, the parents filed for due process, but the hearing officer accepted the school district's argument that there was no jurisdiction over any claims but those under IDEA, and on the IDEA claims ruled that the district's services and accommodations were sufficient to meet its duty to offer free, appropriate education. The student and parents returned to the suit originally filed as a class action, and after amendments became the sole plaintiffs. They claimed violations of ADA Title II, Section 504, and the United States Constitution, but not a violation of IDEA. They asked for compensatory damages as relief. The district court ruled in favor of the school district on the ADA claim and dismissed the remaining claims. Although the district court rejected the argument that the ADA claim was barred by issue preclusion due to the due process decision, it found that the gravamen of the complaint was a denial of FAPE. On the student's appeal of the district court's ruling on the ADA claim, the court of appeals vacated the district court decision and remanded the case. The court of appeals reasoned that the district court correctly ruled that gravamen of complaint was denial of FAPE but said the plaintiffs did not need to exhaust the IDEA procedures because they sought damages relief. The court further ruled that the ADA claim was not precluded by the hearing officer decision adverse to the student because legal standards applicable to IDEA claims differ significantly from those of ADA failure-to-accommodate claims, quoting the district court's statement,

> The legal standards applied by the hearing officer in Lartigue's due process hearing and the Court in this case are significantly different. The purpose of the due process hearing was to determine whether NISD provided an educational program reasonably calculated to enable Lartigue's progress. Lartigue's ADA claim turns on whether NISD discriminated against her on account of her disability. That issue was not considered in the due process hearing.

Id. at 520. The court further stated that the ADA and IDEA require different accommodations for students with hearing impairments. "First, the ADA and its accompanying regulations require entities to 'give primary consideration to the requests of individuals with disabilities,' an element absent in the IDEA. Second, the ADA requires public entities to provide equal opportunities to disabled and non-disabled individuals; the IDEA does not." *Id*. (footnotes omitted). The court elaborated, "For example, accommodations under the ADA must present 'an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity,' while an IDEA IEP must only help students 'advance appropriately,' 'make progress' in their education, and "participate" in extracurricular activities." *Id*. at 520-21 (footnotes omitted). Under the ADA, communications with people with disabilities must be as effective as those with others, while IDEA does not have that mandate. "When reviewing these standards, it becomes evident that a school district could establish a FAPE in compliance with the IDEA, while nevertheless engaging in discriminatory conduct under the ADA." *Id*. at 521. The court also noted that the IDEA hearing officer did not consider and make findings regarding important fact issues alleged in the ADA complaint. The court further rejected the district court's view that the standalone ADA complaint was an evasion of the gravamen reasoning in *Fry v. Napoleon Community Schools*, 580 U.S. 154, 157, 69 IDELR 116 (2017). The court said that the gravamen test applies only to the exhaustion requirement. In addition, the court said that *Cummings v. Premier Rehab Keller*, 596 U.S. 212 (2022), did not forbid the filing of a damages claim, and pointed out that the question whether *Cummings* applies to ADA Title II remained open in Fifth Circuit, and the district court never ruled on the issue. Judge Jerry E. Smith dissented, arguing that collateral estoppel effects of the hearing officer decision's barred the case.

Powell v. School Bd. of Volusia Cnty., Fla., 86 F.4th 881, 123 LRP 33407 (11th Cir. Nov. 13, 2023). The court of appeals reversed the district court's dismissal for failure to exhaust administrative remedies in this case, which was filed as a class action and put forward claims under the ADA and Section 504 for compensatory and punitive damages. The plaintiffs alleged that "the School Board routinely excluded students with disabilities from classroom instruction through the use of informal tactics, such as sending children home early, instructing parents to keep their children home even if they were not suspended, and otherwise removing them from the classroom and, thus, depriving them of an education" and, "Appellants also alleged instances when the School Board would improperly suspend students or institute other formal disciplinary actions,." *Id*. at 883. The court of appeals concluded that under *Luna Perez* v. *Sturgis Pub. Schs.*, 598 U.S. 142, 82 IDELR 213 (2023), a case seeking damages relief is not subject to the exhaustion requirement.

Heston v. Austin Indep. Sch. Dist., supra (Preclusion and Related)

Chavez v. Brownsville Indep. Sch. Dist., No. 22-40085, 2023 WL 3918987, 123 LRP 18043 (5th Cir. June 9, 2023) (unpublished). The court of appeals in this case vacated the dismissal of a damages claim based on injuries the student was alleged to have incurred at the district's high school while under the care of a paraprofessional aide. In June 2017, settlement of a due process proceeding released the school district from all

claims up to that date arising out of any alleged failure to provide the student a FAPE, and the student eventually graduated and aged out of services. Subsequently, the student's mother filed an action alleging violations of the ADA and the Fourteenth Amendment due process clause, seeking damages and injunctive relief. The district court dismissed the case for failure to exhaust administrative remedies. In vacating the dismissal of the damages claim and remanding for further proceedings regarding that claim, the court relied on *Luna Perez v. Sturgis Public Schools*, 598 U.S. 142, 82 IDELR 213 (2023). The court, however, ruled that the claim for equitable relief for an injunction against the defendants was properly dismissed because the claim was not exhausted through the administrative process.

Z.W. v. Horry Cnty. Sch. Dist., 68 F.4th 915, 83 IDELR 75 (4th Cir. May 26, 2023). Here the psychologist treating an elementary school student with autism spectrum disorder recommended ABA therapy administered by a certified behavior therapist in settings that including school. The family had insurance to pay for an outside therapist to be present with the student at school during the school day, but the district forbade the therapist to be present with the student at school. The court of appeals reversed the district court's decision, which had dismissed the claim under Section 504 and ADA for injunctive relief on basis of exhaustion. The court of appeals reasoned that the student did not have to exhaust administrative remedies when what was essentially the same claim could have been brought had the conduct occurred at a public facility other than the school, and an adult at the school could have made essentially the same claim. The court further noted that due process proceedings apparently never were filed.

Richard Marsico, *A New Hope:* Perez v. Sturgis Public Schools *Opens the Courthouse Doors to Children with Disabilities*, 11 BELMONT L. REV. 210 (2024). This article discusses the *Luna Perez* case and its interpretation of the exhaustion requirement for cases brought under laws protecting the rights of children with disabilities other than IDEA. It collects post-*Luna Perez* cases relating to schooling of children with disabilities that claim violations of Section 504 and the ADA, and discusses the impact of *Luna Perez*. It contends that the case has opened the courthouse doors to Section 504 and ADA cases for monetary damages, as well as opening the doors for cases alleging race discrimination in special education and law reform litigation over systemic IDEA violations.