Special Education Legal Symposium

Mississippi Department of Education

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Federal Policy Review

The President signed an Executive Order (#13777) establishing a Federal policy "to alleviate unnecessary regulatory burdens". The United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) is currently reviewing regulations and guidance documents to determine which ones are "outdated, unnecessary or ineffective". As a result of the first phase of the review, 72 guidance documents were rescinded on October 20, 2017. 63 of the rescinded documents were issued by the U.S. Office of Special Education Programs (OSEP). A full listing of rescinded documents can be found at: https://www2.ed.gov/about/offices/list/osers/index.html

IDEA Final Regulations

IDEA Regulation Changes Resulting from the Every Student Succeeds Act (ESSA)

The United States Department of Education issued final regulations (effective June 30, 2017) under Parts B and C of the IDEA to implement ESSA requirements. The final regulations reflect the ESSA changes to personnel qualifications eliminating the highly qualified requirement for special education teachers and changes to the alternate assessment requirements for students with the most significant cognitive disabilities. The regulations also revise some IDEA definitions and citations included in the IDEA regulations. (see 82 Federal Register 29755)

Personnel Requirements (34 CFR 300.156(c) is amended, 34 CFR 300.18 is removed)

1. Eliminates the Highly Qualified Requirement for Special Education Teachers

2. Requires that Special Education Teachers
   a. has obtained full State certification as a special education teacher

(including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;

b. has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

c. holds at least a bachelor's degree.

3. A teacher will be considered to meet these standards if that teacher is participating in an alternate route to special education certification program under which the teacher:

a. Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;

b. Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

c. Assumes functions as a teacher only for a specified period of time not to exceed three years; and

d. Demonstrates satisfactory progress toward full certification as prescribed by the State; and

e. The State ensures, through its certification and licensure process, that these provisions are met.

<u>Alternate Assessments</u> (34 CFR 300.160(c) through (f) is amended)

1. If a State has adopted alternate academic achievement standards for children with disabilities who are students with the most significant cognitive disabilities (as permitted in section 1111(b)(1)(E) of the ESSA), the State must develop and implement alternate assessments and guidelines for the participation in alternate assessments of those children with disabilities who cannot participate in regular assessments, even with accommodations, as indicated in their respective IEPs.

2. A State must:

a. Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma; and

b. Not preclude a student with the most significant cognitive disabilities who takes an alternate assessment aligned with alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma.

3. A State must ensure that parents of students selected to be assessed using an alternate assessment are informed that their child's achievement will be measured based on alternate academic achievement standards, and of how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma.

4. An SEA must make available to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

a. The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations (that did not result in an invalid score) in order to participate in those assessments.

b. The number of children with disabilities, if any, participating in alternate assessments based on grade- level academic achievement standards in school years prior to 2017–2018.

c. The number of children with disabilities, if any, participating in alternate assessments aligned with modified academic achievement standards in school years prior to 2016– 2017.

d. The number of children with disabilities who are students with the most significant cognitive disabilities participating in alternate assessments aligned with alternate academic achievement standards.

e. Compared with the achievement of all children, including children with disabilities, the performance results of children with disabilities on regular

assessments, alternate assessments based on grade-level academic achievement standards (prior to 2017– 2018), alternate assessments based on modified academic achievement standards (prior to 2016–2017), and alternate assessments aligned with alternate academic achievement standards if: (i) The number of children participating in those assessments is sufficient to yield statistically reliable information; and (ii) Reporting that information will not reveal personally identifiable information about an individual student on those assessments.

Note: Under ESSA. the total number of students assessed for each subject (math, reading/language arts, science) using the alternate assessment cannot exceed 1 percent of the total number of students assessed in the State who are assessed in that subject.
The law prohibits a cap on any local education agency (LEA) of the percentage of students administered an alternate assessment. An LEA exceeding the 1% state cap shall submit information to the SEA justifying the need to exceed the cap. The SEA shall provide "appropriate oversight" of such LEA as determined by the SEA. (Section 1111(b)(2)(D))

Intellectual Disability

Final Regulations were issued on July 11, 2017 (see 82 Federal Register 31910) changing the term "mental retardation" to "intellectual disability" in both the IDEA and Section 504 regulations. The change was the result of a federal statutory change of the terms in 2010 in what is known as "Rosa's Law" (Public Law 111-256).

Significant Disproportionality

The United States Department of Education issued final IDEA regulations on December 19, 2016 (see 81 Federal Register 92376) regarding significant disproportionality issues. The regulations address a number of issues related to significant disproportionality in the identification, placement, and discipline of students with disabilities based on race or ethnicity.

The final regulations:

- Establish a standard approach that States must use in determining whether significant disproportionality based on race or ethnicity is occurring in the state and in its districts.
- Require that States address significant disproportionality in the incidence, duration, and type of disciplinary actions, including

suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities.

- Clarify requirements for the review and revision of policies, practices, and procedures when significant disproportionality is found. Districts will be required to identify and address the factors contributing to significant disproportionality as part of comprehensive, coordinated early intervening services (CEIS).
- Provide that support through additional flexibilities in the use of CEIS. Prior to these final regulations, districts identified as having significant disproportionality were not permitted to use their required 15 percent set aside for CEIS in order to serve students with disabilities, even if the district had identified racial disparities in the discipline and placement of children with disabilities. Likewise, CEIS funds could not be used to serve preschool children. Now, with these final regulations, districts identified as having significant disproportionality will have the flexibility to use their CEIS set aside to assist students with disabilities and preschool children with and without disabilities.

Source: Fact Sheet: Equity in IDEA (United States Department of Education, December 12, 2016)

The United States Department of Education has issued a draft rule on February 27, 2018 proposing to postpone the compliance date of the 2016 "significant disproportionality" rules by two years, from July 1, 2018, to July 1, 2020. The Department also proposes to postpone the date for including children ages three through five in the analysis of significant disproportionality with respect to the identification of children as children with disabilities and as children with a particular impairment from July 1, 2020, to July 1, 2022. The public comment period was open until May 14, 2018. (83 Federal Register 8396)

Case Law Update

I. Child Find/Evaluation Issues

A. The school district conducted a special education evaluation of a pre-schooler when screening indicated that the student might be developmentally delayed. The student was found not to be eligible for IEP services.

In kindergarten the school's general education intervention team, with parental involvement, developed an "RTI Plan" for the student with several interventions. The plan also called for an OT and PT to

observe the student. The OT and PT both were of the opinion that the student did not need services.

The student repeated kindergarten. The parents then provided medical reports obtained by them the previous year one of which prescribed OT, PT and speech therapy. A Section 504 Plan was developed including all the accommodations that the family requested.

In the spring of that year, the school district initiated another special education evaluation since the student was falling behind academically. The parents withdrew the student from school before all the evaluations were completed.

A due process hearing complaint was filed alleging denial of FAPE for violating the school's child find obligations. The ALJ found for the school which was affirmed by the District Court.

The Court of Appeals found no violation of child find since the school never overlooked "clear signs of a disability" or lacked rational justification for its actions. The school effectively utilized general education interventions and a Section 504 plan to support the student. The school's actions in using these alternative intervention strategies before initiating a second evaluation were especially reasonable since the student had previously been found not eligible for special education.

In addition, the Court addressed the school's procedural violation when it did not send written notice of refusal to evaluate to the parent when the parent requested services under the IDEA the previous school year. The Court concluded that the parents did not show that the procedural violation resulted in a loss of educational opportunity since the student had never been deemed eligible. The parents also were closely involved with the school regarding the student's education. M.G. v. Williamson County School 71 IDELR 102 (United States Court of Appeals, 6th Circuit (2018)). Note: This is an unpublished decision.

B. The parents of a student who graduated initiated a due process hearing requesting two years of compensatory education in a private vocational facility. The parents alleged the school had violated its child find obligations, engaged in several procedural violations and provided an IEP that was substantively inappropriate.

The Court of Appeals, in affirming the hearing officer and District Court, concluded that the District Court properly granted Summary Judgment for the school.

Regarding child find, the Court stated that an IDEA child find violation occurs when the school overlooks clear signs of a disability

and is "negligent" in failing to evaluate the student without a rational justification.

Here, the student started having suicidal and homicidal ideations in 10th grade. The student was placed on a Section 504 plan which was revised several times to provide additional accommodations including counseling.

In March of the 10th grade year, the parent requested a special education evaluation which resulted in a decision that the student was not emotionally disturbed. The student eventually was found eligible after another evaluation was prompted by the student's hospitalization for aggressive thoughts and behaviors. The Court upheld the Team's initial decision since his behaviors and anxiety had not been experienced "over a long period of time" as the IDEA definition requires. The school acted reasonably in that it provided the student immediate support and accommodations when he first experienced problems. Mr. P. v. Hartford Board of Education 118 LRP 11253 (United States Court of Appeals, 2nd Circuit (2018))

C. The parent enrolled their student in a new school district on the first day of the school year. The parent provided the new school a Section 504 plan based on the student's ADHD diagnosis and behavior support plan developed by the previous district.

Early in the school year the student began engaging in several behavioral incidents some resulting in suspension. After the first behavioral incident, three days into the school year, the new school district requested student records from the previous district. Two weeks later the records arrived showing that the student had a history of behavior and disciplinary issues. The records also included a determination from the previous school year that a Team found the student ineligible for special education based on an evaluation conducted.

The parent requested a special evaluation and was given a consent form to sign. She returned the consent form three months later. The parent then requested a hearing alleging the district failed to timely assess the student for special education. The Administrative Law Judge ruled for the parents finding the new school should have initiated a special education evaluation on the first day of school.

On appeal, the Court reversed. The Court held that being on a Section 504 plan does not equate with a finding that the student is suspected of being IEP eligible. Most importantly the Court stated that the school was permitted to draw its own conclusions about whether the student needed to be assessed based on its own staff observations and its own interventions. The staff had no opportunity

to observe the student and had not even received his previous education records on the first day of the school year. Panama-Buena Vista Union School District v. A.V. 71 IDELR 57 (United States District Court, Eastern District, California (2017)).

D. A student with autism was in a school district funded home based program. Services were provided by a private teacher selected by the parents. When the three year reevaluation was due the school sent the parents a written notice and an evaluation plan. The plan noted the specific areas to be evaluated and also provided the title of the examiner proposed for each area. Along with the plan was a parental consent form to be returned allowing the assessments to be administered.

In response, the parent requested that the assessments be conducted in a room with a one-way mirror that would allow her to both see and hear the administration of the assessments. The school offered to conduct the assessments in a location where the parent could observe through a window but would not be able to hear the assessment. The parents refused to consent.

Due process was requested by the parents and the school district. The Court concluded that the school did not deny the student a FAPE by failing to complete the assessments. It was clear that the parent would not consent or produce the student for the assessments unless the school district gave in to the demand that the parent be allowed to fully observe (see and hear) the administration of the assessments.

The Court found that the parent's condition that she be allowed to see and hear the assessment was unreasonable and amounted to the imposition of improper conditions and restrictions on the assessments. The ALJ accurately concluded that the failure to complete the required assessments was caused by the parent's interference and denial of consent. The parent provided no legal authority granting her the right to observe the assessments. Moreover, the fact that the parent was permitted to observe assessments conducted by another assessor at a private diagnostic center was not relevant to the issue whether the school district was legally required to permit the parent to see and hear every assessment it conducted. Student R.A. v. West Contra Costa Unified School District 66 IDELR 36 (United States District Court, Northern District, California (2016)). Affirmed on appeal. 70 IDELR 88 (United States Court of Appeals, 9th Circuit (2017). Note: The Court issued a memorandum decision.

E. The school district conducted a psychoeducational assessment of the student. Based on the assessment the Team determined the student was eligible for special education as a student with autism and an intellectual disability. The parents requested an independent educational evaluation (IEE). The school provided the parents with the IEE guidelines and a non-exhaustive list of evaluators. The guidelines included "cost criteria" with a cost limit for the IEE unless the parents were able to show why it was necessary to exceed the cost based on unique circumstances.

The parents selected an evaluator whose fee was more than double the maximum amount in the guidelines. The parent indicated that the evaluator was uniquely qualified "due to her extensive training and experience assessing children and adolescents with complex and challenging needs". The school district concluded that the parent had not identified unique circumstances warranting exceeding the cost limit. Both the school district and parents requested a due process hearing.

The Court, in affirming the decision of the hearing officer, held that the cost cap in the guidelines was reasonable. The amount was based on fees from several evaluators in a three county area excluding those on both the high and low end of the spectrum. In addition, the Court concluded that the parent had not shown that the student had unique circumstances which would have supported that the cap be exceeded. A.A. v. Goleta Union School District 69 IDELR 156 (United States District Court, Central District, California (2017))

II. Eligibility Issues

A. A student diagnosed with PDD, anxiety, depression, OCD and ADHD was found eligible in 9th grade as a student with an emotional disturbance. At the end of 10th grade the student was found no longer eligible based on teacher recommendations, his academic performance, his behavior in class, lack of absences and ability to control his depression and anxiety. The Team concluded that he was not in need of special education.

The parent then requested an Independent Educational Evaluation which was not obtained for close to one year. The IEE concluded that the student was eligible. The Team considered the IEE but maintained their decision that he was no longer eligible. The parent filed a due process hearing.

The Court, in affirming the hearing officer and District Court, upheld the decision of the Team. The teachers, based on their

observation, disagreed with the IEE. The Court noted that "…teacher observations—like those of which the District relied stating that [the student's] disability was not affecting his academics or behavior—are especially instructive as they spend more time with students that do outside evaluators".

In addition, the parent argued that the school needed to look at not only his present needs but also to the "possible future consequences of his disability". The Court rejected that argument concluding "a fear that a student may experience problems in the future is not by itself a valid basis for IDEA eligibility". D.L. v. Clear Creek Independent School District 70 IDELR 32 (United States Court of Appeals, 5th Circuit (2017)). Note: This is an unpublished decision. Petition for appeal denied by the United Supreme Court. 118 LRP 12676 (2018).

B. A student was diagnosed with ADHD in the third grade. He excelled in advanced academic programs and state tests. He was admitted to a magnet high school program for students who are high achievers in math and science.

A Section 504 plan provided for accommodations such as extended time and small class sizes. He passed all of his classes and the end of the year tests through the end of his 11th grade school year.

The student's academic performance plummeted in 12th grade due to late and incomplete work. Two additional 504 Plan meetings were held and additional accommodations provided. However, the student failed 5 courses and was removed from the magnet program. The student did not graduate that year.

In May of his 12th grade year his parents requested a special education evaluation and a due process hearing. The student was eventually found eligible for special education the following September based on the Special Administrator's determination that his failure to submit timely work was the result of his ADHD. His teachers unanimously disagreed and felt that his poor work performance was due to lack of effort.

The due process complaint alleged that the school failed to find the student eligible for IEP services since the end of the 10th grade resulting in a denial of FAPE for two years. The Court, in affirming the ALJ and District Court, held that the student was not eligible during this period of time and therefore no denial of FAPE occurred. The student's poor work and grades were not due to his inability to concentrate but rather from the student neglecting his studies. Even if the student had a disability the evidence based on multiple sources of information did not support his need for special education.

Durbrow v. Cobb County School District 72 IDELR 1 (United States Court of Appeals, 11th Circuit (2018).

C. The U.S. Office of Special Education Programs (OSEP) issued a memo concerning a State's ability to establish standards for the IDEA disability category "visual impairment including blindness". OSEP clarified that States are permitted to establish standards for eligibility for special education and related services, and are not required to use the precise definition of a disability term in the IDEA. However, these State-established standards must not narrow the definitions in the IDEA.
The definition of "visual impairment including blindness," in the IDEA regulations does not contain a modifier. Therefore, any impairment in vision, regardless of significance or severity, must be included in a State's definition, provided that such impairment, even with correction, adversely affects a child's educational performance. OSEP Memo 17-05 70 IDELR 23 (United States Department of Education, Office of Special Education Programs (2017)).

III. IEP/FAPE

A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Procedural Issues

1. The parent of triplets with autism requested that her students' IEPs include 30 hours per week of Applied Behavior Analysis (ABA). The Team refused and the parent requested a due process hearing. The Administrative Law Judge found for the school.
The parent appealed to Court solely on procedural grounds alleging that the school had a "policy" of refusing to provide ABA services to any student. Therefore, she maintained her rights to be a meaningful participant in the IEP process were

violated since there was a predetermination of services. The Court held that each of the student's IEPs included a "picture/symbol communication system" (PECS) which the Court found to be an "ABA based intervention". Therefore, the inclusion of an ABA-based service in each of the student's IEPs refuted the parent's allegation that she was denied meaningful participation by a "policy" refusing to provide ABA.
The Court noted that since the parents did not challenge the IEPs on substantive grounds whether the "ABA-based intervention strategy was comprehensive enough or appropriate for the children's particular needs" was not relevant to the appeal. L.M.P. v. School Board of Broward County, Florida 118 LRP 2518 (United States Court of Appeals, 11th Circuit (2018))

2. A student with autism, learning disabilities and a speech impairment had an IEP developed which called for 24.5 hours of specialized instruction per week and monthly speech therapy and occupational therapy. Although the school staff told the parents that the student would also receive supports during lunch and recess, the IEP did not reflect these supports. The parents initiated a due process hearing challenging the IEP.
The Court concluded that the omission of lunch and recess supports in the IEP denied the student a FAPE. The IEP Team agreed that such supports were necessary. The Court found such omission was more than merely a procedural error. The issue in this case were the services/supports that the school actually offered the student in the IEP rather than the procedural method that the school used to offer them.
The Court went further and stated that even if the omission of the supports from the IEP was a procedural error, FAPE was denied. It observed "…the District's strategy of refusing to incorporate its oral representations into the IEP impedes parents' ability to make informed choices about the services that their children will actually receive. Parents may reasonably fear that the District's oral promises will prove to be illusory." One of the chief purposes of an IEP is to ensure that the services provided are formalized in a written document that can be assessed by the parents and challenged if necessary. N.W. v. District of Columbia 70 IDELR 10 (United States District Court, District of Columbia (2017))

3. The parents of a ninth grade student with a visual impairment initiated a due process hearing alleging that the school district did not provide Braille materials "for all classroom assignments and instruction" as his IEP required.
The Court, in affirming the administrative law judge and District Court, held that although the school did not provide the student with Braille materials 100% of the time, there was no violation of FAPE. The times that Braille was not provided involved short assignments within the student's capacity to read with alternative aids and large print.
The obligation under the IDEA is to provide instruction that is sufficient to enable the student to attain the specified level of proficiency in the IEP. The evidence supported the conclusion that the student "received significant educational benefit" from his classroom instruction and "met and often exceeded the ability to communicate with the proficiency of his peers". In citing the Endrew F. decision, the Court concluded that the school took reasonable steps in providing instructional materials in an accessible format enabling the student to make progress appropriate in light of his circumstances. The IDEA does not require perfection. I.Z.M. v. Rosemont-Apple Valley-Eagan Public Schools 117 LRP 27963 (United States Court of Appeals, 8th Circuit (2017)).

4. A preschooler with a speech and language impairment and deemed developmentally delayed received speech and language services under the student's IEP developed in November 2012. About one month later, the school informed the parent that she could no longer attend her student's speech therapy sessions. The parents then provided a 10 day written notice that they will be seeking reimbursement for private speech and language services.
A new IEP Team meeting was convened in February 2013 which called for preschool special education services and extended school year services. The parents disagreed with the IEP and proposed a home based program.
Another IEP Team meeting was called. The Team rejected the home based program and provided the parents with a prior written notice and again offered the services in the February 2013 IEP.
In May 2013, the school contacted the parents and informed them that it withdrew the student from enrollment based on

state law since the student had not attended school for more than 10 consecutive days. The school district also informed the parents that the student would need to re-enroll if they wanted preschool or kindergarten services for the next school year. They were told that at the time of enrollment of their student the IEP Team would be convened within 15 days of their request for such meeting.

The parents initiated a due process hearing. The ALJ found for the school district.

On appeal, the Court held that "it was not unreasonable for [the school district] to wait until the following school year [2013-2014] to hold an IEP meeting upon request from the parents". The Court also held that the student was properly withdrawn from enrollment pursuant to state law.

The Court also rejected the parents' allegation that the school district had an obligation to create a new IEP in February 2014 upon the expiration of the February 2013 IEP. The parent had no contact with the school from May 2013 through August 2014. The Court held that absent contact from the parents the school district did not have an obligation to create a new IEP.

In August 2014, the parent contacted the school about an IEP for the 2014-2015 school year. The school responded that it is "ready, able and willing" to convene an IEP Team meeting and develop an IEP should the parents decide to re-enroll their student. The Court found that the school district's position was contrary to the IDEA. Several courts have held that a school violates the IDEA when it withholds an offer of FAPE from a student residing in the district until the parents enroll the student in public school. As a result of this procedural error, the student experienced a loss of educational opportunity denying the student a FAPE. The case has been remanded back to the hearing officer. Hack v. Deer Valley Unified School District 117 LRP 28044 (United States District Court, Arizona (2017)).

5. A student with autism had attended a small private special education school. The IEP Team developed an IEP to transition the student to a public kindergarten program. The parents challenged the IEP in a due process hearing. The hearing officer and District Court found that the IEP was appropriate. The Court of Appeals, in a 2-1 decision, affirmed in part and reversed in part.

First, the Court held that the IEP was legally deficient since it did not address "transition services" regarding the move to the public school. In doing so the Court stated:

> Some Hawaii district courts have noted that the IDEA mentions transition services only with respect to students exiting the public school system, 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(bb), and thus inferred that transition services need not be provided at any other time. ….. However, these opinions have read the IDEA too narrowly and are to that extent overruled. The statute provides that IEPs must include "supplementary aids and services" that will allow children to "be educated and participate with other children with disabilities and nondisabled children[.]" 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Services that ease the transition between institutions or programs -- whether public or private -- serve this purpose. Cf. Cal. Educ. Code § 56345(b) (codifying this broader interpretation of IDEA requirements). Where transition services become necessary for disabled children to "be educated and participate" in new academic environments, transition services must be included in IEPs in order to satisfy the IDEA's "supplementary aids and services" requirement.

Second, the Court found that the IEP did not appropriately address the LRE requirement. The IEP stated that the student would "receive specialized instruction in the general education setting for Science and Social Studies activities as deemed appropriate" by his special and general education teachers. The Court concluded that such statement was not only too vague but "improperly delegated" the determination of placement to his teachers outside the IEP Team process. Third, the parents alleged that the IEP needed to address the qualifications of the student's one-on-one paraprofessional.

The Court disagreed finding that the IDEA does not require that the IEP specify the qualifications or training of service providers.
Lastly, the Court held that the IEP in this case should have included the methodology Applied Behavioral Analysis (ABA). Although not all IEPs must include the educational methodology that will be used, some student's IEPs must address it. The Court found that "When a particular methodology plays a critical role in the student's educational plan, it must be specified in the IEP rather than left up to the individual teachers' discretion." Here, the IEP Team recognized that ABA was integral to the student's education. The Court remanded the case for the determination of the appropriate remedy. R.E.B. v. State of Hawaii, Department of Education 70 IDELR 194 (United States Court of Appeals, 9th Circuit (2017)) The opinion has been withdrawn and the petition for rehearing granted by the 9th Circuit Court of Appeals 118 LRP 12999 (2018).

6. The parents of a 17 year old student with autism challenged their student's IEP since the school did not conduct assessments of the postsecondary transition needs of the student. The IDEA requires that beginning not later than the first IEP to be in effect when the child is 16 an IEP must include "appropriate measurable postsecondary goals based upon age appropriate transition assessments…." (34 CFR 300.320(b)(1))
The school justified not conducting its own transition assessments of the student because the parents submitted a privately obtained evaluation report. In addition, the school conducted a vocational interview with the parents and consulted with the student's private school teachers about his progress, goals, and preferred learning environment. It also invited the student to attend IEP meetings in which postsecondary goals and transitions services were discussed, but his parents declined to bring him because they felt that he could not sit through the meetings. The IEP Team then incorporated what it learned from these consultations into the student's IEP. The IEP stated that the student "require[d] support in clothing care, meal preparation, household management and consumer skills," and that his parents want him to seek employment after high school. The IEPs also identified "transition activities" to enable the student to meet

these goals.

The Court held:

> …the IEPs were reasonably calculated to provide [the student] with the postsecondary goals and transition services required by the IDEA. Even assuming arguendo that the failure to assess [the student] in person was a procedural violation, we conclude that the parents have not shown an impediment to his right to a FAPE, a significant impediment to their opportunity to participate in the decision making process, or a deprivation of educational benefits. The IEPs were reasonably calculated to provide [the student] with the postsecondary goals and transition services required by the IDEA.

R.B. v. New York City Department of Education 69 IDELR 263 (United States Court of Appeals, 2nd Circuit (2017)) Note: This is an unpublished decision.

C. Substantive Issues

1. In a unanimous decision the United States Supreme Court clarified the FAPE standard under the IDEA as established by the Court's previous decision in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, 553 IDELR 656 (1982)). In doing so, the Court rejected the lower Court's decision which held that a FAPE means that an IEP confer an educational benefit "merely…more than de minimis".

   The Supreme Court held that although their decision lays out a "general standard, not a formula" a school must offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances". The IEP provisions reflect "Rowley's expectations that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade". The Court noted that this decision does not attempt to elaborate on what "appropriate progress" will look like from case to case which

requires the IEP Team to have a prospective judgment of the child's circumstances based on a "fact intensive exercise". For those children not "fully integrated" in a regular classroom the IEP need not necessarily "aim for grade-level advancement" although the IEP must be "appropriately ambitious in light of his circumstances".

The Court observed that an IEP is a collaborative effort between families and school representatives to develop a plan for pursuing "academic and functional advancement". When a dispute does occur a Court "may fairly expect that those [school] authorities be able to offer a cogent and responsive explanation for their decision" (emphasis added) to show that the IEP offered the child a FAPE.

The Court vacated and remanded the decision. Endrew F. v. Douglas County School District RE-1 137 S.Ct. 988, 69 IDELR 174 (United States Supreme Court (2017)).

On remand, the District Court reversed its earlier decision and held that a FAPE was denied based on the Supreme Court's ruling. As the Court noted, the Supreme Court was very clear that every child should have the chance to meet challenging objectives. In this case, based on both the academic and functional goals, the student's progress was minimal. Changes to his IEP consisted of only updates and minor changes in the objectives with the same goals year after year and the abandonment of some IEP goals which could not be met.

In addition, the student had increasing maladaptive behaviors which were impacting his ability to meet his IEP goals. The IEP had no formal plan addressing the student's interfering behavior.

The Court concluded that the IEP "was not reasonably calculated to enable the student to make progress in light of his unique circumstances". The Court ordered the school to reimburse the parents the costs of his unilateral private school placement as well as attorney's fees. Endrew F. v. Douglas County School District RE-1 71 IDELR 144 (United States District Court, Colorado (2018)). The parties reached a settlement of the ongoing litigation. As a result, the Court issued a Stipulated Order of Dismissal With Prejudice. 118 LRP 23150 (United States District Court, Colorado (2018)).

Note: The United States Department of Education issued a technical assistance memorandum in light of the Endrew F.

decision. The memo is intended to provide stakeholders information addressing implementation questions and best practices. Questions and Answers on the U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District RE-1 71 IDELR 68 (United States Department of Education, Office of Special Education and Rehabilitative Services (2017)).

2. The parents of a student with autism challenged the appropriateness of the student's IEP and sought reimbursement for her private school education.
The Court of Appeals, in affirming the hearing officer and District Court, held that the IEP provided the student with a FAPE. In doing so, the Court agreed that the FAPE standard established by the Fifth Circuit in Cypress-Fairbanks Independent School District v. Michael F. in 1997 was consistent with the Endrew F. standard. In Michael F. the Court held that FAPE is provided if:(1) the program is individualized on the basis of 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 lower Court found that this required that the educational benefit standard in an IEP "must be likely to produce progress, not regression or trivial educational advancement." Although the Court noted that the school could arguably have taken a better approach to the student's IEP "the role of the court is not to 'second guess' the decision or to substitute its plan once it is found that the IEP was reasonably calculated to enable the student to make progress in light of her circumstances. C.G. v. Waller Independent School District 70 IDELR 61 (United States Court of Appeals, 5th Circuit (2017)). Note: This decision is unpublished.

3. The District Court found that parents failed to meet their burden of showing that the IEP wasn't "reasonably calculated to confer [their student] with a meaningful benefit" under the Rowley standard.
The Court of Appeals remanded the decision for further consideration in light of the Endrew F. decision that was

rendered after the District Court's decision. The Court noted that the Supreme Court clarified Rowley and provided a more precise standard for evaluating whether a school district has complied substantively with the IDEA: "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." Citing Endrew F. .

The Court of Appeals stated:

> In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," …. taking into account the progress of his non-disabled peers, and the child's potential.

M.C. v. Antelope Valley Union High School District 852 F.3d 840, 69 IDELR 203 (United States Court of Appeals, 9th Circuit (2017)). Amended decision issued on May 30, 2017 at 858 F.3d 1189 (United States Court of Appeals, 9th Circuit (2017)). Appeal denied by the United States Supreme Court. (2017)

4. The parents of a student with Down Syndrome challenged their student's IEP. The student and his family are members of the Orthodox Jewish faith. The parents rejected the IEP because it did not "provide functional instruction to prepare [the student] for life in the Orthodox Jewish community." The parents wanted the IEP to incorporate "goals and objectives designed to teach [the student] about the laws and customs of Orthodox Judaism."

   The parents cited the Endrew F. decision which held "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." (emphasis added)

   The Court of Appeals, in affirming the decision that the IEP was appropriate, concluded that the "the relevant circumstance here is that [the student] is disabled, not that he is of the Orthodox Jewish faith". The IDEA does not require an education that furthers a student's practice of his religion

of choice. M.L. v. Smith 867 F.3d 487, 70 IDELR 142 (United States Court of Appeals, 4th Circuit (2017)) Appeal to the United States Supreme Court denied. 138 S.Ct. 752 (2018)

IV. Related Services/Assistive Technology

A. The United States Supreme Court Decision – Irving Independent School District v. Tatro, 104 S. Ct. 3371, IDELR 555:511 (1984).

1. The United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

a) A child must have a disability so as to require special education under the IDEA;

b) The service must be necessary to aid a child with a disability to benefit from special education; and

c) The service must be able to be performed by a non-physician.

B. The Supreme Court vacated the March 2017 decision in this matter by the Ninth Circuit and remanded the case for further consideration in light of the subsequent Endrew F. decision. On remand, the Ninth Circuit affirmed its earlier conclusions noting the Endrew F. did not change but "simply clarified" the FAPE standard as established by the previous Supreme Court's decision in Rowley.
In this case, the parents of a student with autism who was nonverbal shared with the IEP Team (February 2012) that the student had begun using an iPad at home. They requested that the school teach the student to read and write through the use of an iPad. The school did not conduct an assistive technology (AT) assessment or include iPad instruction in the IEP since the Team felt the student was still working on foundational skills of understanding symbolic communication.
At the next annual IEP Team meeting (January 2013) the Team agreed to have a trial period having the student use an iPod Touch and training for staff and parents on its use. Based on the trial period, the use of an iPod touch was continued in the IEP (May 2013).
The parent requested a due process hearing with several allegations

including that FAPE was denied for the previous 3 years due to the school's failure to conduct an AT assessment and provide the student with an AT device. The Court, in affirming the ALJ and District Court, held that with the exception of the school's failure to assess the student for AT between February 2012 and February 2013 (where the ALJ ordered 20 compensatory AT sessions which was not appealed), the student's IEPs provided a FAPE. The IEPs were "reasonably calculated to enable [the student] to receive educational benefits and make appropriate progress in light of the circumstances".

The Court of Appeals held that the evidence established that some foundational skills are necessary for children to use AT devices successfully. The school did not deny the student a FAPE by failing to conduct an AT assessment or provide an AT device before the February 2012 IEP Team meeting.

The Court also granted summary judgment for the school district on the parents' ADA and Section 504 claims. The denial of an AT assessment before 2013 did not amount to "intentional discrimination in the form of "deliberate indifference". E.F. v. Newport Mesa Unified School District 71 IDELR 161 (United States Court of Appeals, 9th Circuit (2018))

C. A student was on an IEP as being multiply disabled including having a seizure disorder. The IEP called for Extended School Year (ESY) services. Although nursing services were not listed as a related service in any of the student's IEPs the following statement was written at the top of his ESY IEP: "SPECIAL ALERT: IF R.G. FALLS TAKE HIM TO THE NURSE IMMEDIATELY AND NOTIFY PARENT".

The school where the ESY services were provided did not have a nurse although two schools 5-10 minutes away did have school nurses. The parent refused to send their student to the ESY program presuming that the school would have a nurse on site.

The school offered alternatives including providing ESY services at one of the other schools (which the IEP Team previously rejected due to the student's age) or homebound instruction. The parent rejected the alternatives and initiated a due process hearing.

The Court, in affirming the hearing officer, held that the school did not violate the IDEA since nursing services were never listed as a related service nor requested by the parent at any IEP meeting. The evidence demonstrated that the seizure plan on file never called for the services of a nurse but precautionary measures. The Court also observed that the student never needed the services from a nurse

during the previous two school years, after school or on weekends. R.G. v. Hill 70 IDELR 41 (United States District Court, New Jersey (2017)).

V. Placement/Least Restrictive Environment

A. A student with autism was in a school district funded home based program pursuant to a settlement agreement between the family and the school district. The IEP Team convened to determine the student's placement to be provided after the settlement agreement expired. After considering several placement options the Team, other than the parent, determined that an approved non-public school designed to serve students with autism was the LRE. The Team rejected the parent's proposed placement of a one-on-one program in a separate classroom in a public school with an ABA trained teacher as too restrictive. The parent initiated a due process hearing.
The Court concluded that the IEP placement in the non-public school provided the student FAPE and was the LRE for the student. The Court first addressed the procedural allegations submitted by the parent. The Court rejected the allegation that the Team predetermined the student's placement. The school members of the Team did not present the non-public school placement as a "take it or leave it" option. Several placement options were discussed at the IEP Team meetings with the parent involved. The Court did find that the school violated the IDEA since a representative of the non-public school did not participate at the IEP Team meeting (see 34 CFR 300.325(a)(2)). However, the parent did not provide evidence "how and why" the absence of such representative directly affected their rights.
The Court held that the placement was in keeping with the LRE requirement. No one involved believed that the student should be "mainstreamed" at this time. The Court observed:

> Here, it is difficult to see how placement at [the non-public school] constituted a more restrictive environment than the proposal of R.A.'s parents, which envisioned individualized, one-on-one instruction within the walls of a public school but without actual integration into public school classes. If anything, the evidence suggested that R.A.'s parents' proposed placement was significantly more restrictive than placement at [the non-public school]. The record therefore reflects that the District placed

R.A. in the least restrictive environment available.

R.A. v. West Contra Costa Unified School District 117 LRP 26025 (United States Court of Appeals, 9th Circuit (2017).

B. The parents alleged the IEP was legally deficient since neither the IEP nor the Prior Written Notice specified a particular school where the IEP would be implemented.

The parents based their argument on the IDEA provision that the IEP must contain "the anticipated frequency, ***location,*** and duration of those services and modifications." (emphasis added) (see the IDEA statute at Section 1414(d)(1)(A)(i)(VII)) The Court, in granting Summary Judgment for the Hawaii Department of Education, held "location does not necessarily include the specific school where special education services will be implemented." The Court cited the interpretation of the United States Department of Education in the Comments to the 1999 IDEA regulations that "location" means the general setting in which the special education services will be provided and not a particular school or facility.

However, the Court did state that "although we agree that having a local educational agency identify the school where special education services will be delivered makes sense and may even be required in some circumstances, we do not agree the IDEA requires such identification in all instances…" Knowledge of a particular school, classroom, or teacher may well be relevant to allowing parents to participate meaningfully in the IEP process. Not identifying a particular school in the IEP may at times result in denial of FAPE "especially when a child's disability demands delivery of special education services at a particular facility." The Court clarified that "We hold only that the IDEA does not procedurally require every IEP to identify the anticipated school where special education services will be delivered." Rachel H. v. Hawaii Department of Education 70 IDELR 169 (United States Court of Appeals, 9th Circuit (2017)).

C. The parent of a second grader with a specific learning disability rejected the IEP that called for language arts and math to be provided in a special education classroom. The parents felt the placement was overly restrictive and pulled their student out of school placing him in a private school. They initiated a due process hearing requesting reimbursement for the private school.

The Court of Appeals, in affirming the hearing officer and District Court, held that the placement was the least restrictive environment

appropriate for the student. The evidence showed that the student was unlikely to receive any educational benefit from full time placement in a general education class. The student was far behind his peers in reading and math and had already received accommodations in the general education classroom that did help him.
In addition, the parents presented no evidence to challenge the school's position that the student could obtain non-academic benefits from interacting with peers who are nondisabled during the portion of the day when he was placed in a general education classroom.
Note that the Court also affirmed the ruling by the District Court when it refused to hear alleged procedural violations since those issues were not included in the due process hearing complaint.
B.E.L. v. State of Hawaii Department of Education 71 IDELR 162 (United States Court of Appeals, 9th Circuit (2018)) Note: This is an unpublished decision.

VI. Behavior and Discipline

A. The IDEA requires the IEP Team to consider the use of positive behavioral interventions, supports and strategies if the student's behavior impeded their learning or the learning of others. (see 34 CFR 300.324(a)(2)(i)). In a recent guidance document, the United States Department of Education clarified:

> IEP Teams must consider and, if necessary to provide FAPE, include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers.

Questions and Answers on Endrew F. v. Douglas County School District Re-1, Question 16 71 IDELR 68 (United States Department of Education (2017)).

B. A 17 year old student who was classified as having an emotional disturbance attacked another student in school resulting in a concussion. The student was placed in a 45 day interim alternative educational setting (IAES) which consisted of home tutoring. When the 45 day period ended the student attempted to return to the Charter School which refused to admit him. The parent initiated an expedited due process hearing seeking to change the student's

assignment to another school in the district. Since then the student has remained at home.

The parent filed a Motion for a Preliminary Injunction in Court seeking an order to return the student to the charter school during the pendency of the expedited hearing process.

The Court first addressed the "stay put" provision in the IDEA which states that the student shall remain in the IAES until the expiration of the 45 day period or the decision of the hearing officer whichever occurs first. (see 34 CFR 300.533). Although a school can ask the hearing officer to extend the IAES if it proves that returning the student is "substantially likely to result in injury" the school did not do so in this case. It was under the mistaken belief that the school could extend the IAES on its own.

However, the Court concluded that the "stay put" presumption can be overcome if a school can demonstrate a different result is warranted. The Court refused to order the charter school to reenroll the student since the Court found the student would not suffer irreparable harm since the hearing decision was expected within 10 days. In addition, the Court found that the public interest and potential injury to others favored the school's position since there had been a history of multiple violent incidents with other students and staff. Olu-Cole v. E.L. Haynes Public Charter School 118 LRP 7246 (United States District Court, District of Columbia (2018))

C. A student enrolled in a new school district. The parent provided the new school with a Section 504 plan and behavior support plan developed by the student's previous school.

The new school scheduled a 504 meeting to review the plan. The parent requested a special education evaluation three days before the meeting based on several behavioral incidents the student had engaged in. The school agreed to conduct the special education evaluation at the 504 meeting.

The parent was provided with written notice of the proposed evaluations and a request to consent both in English and Spanish since she primarily spoke Spanish. After several attempts to acquire consent, the parent consented to the evaluations 4 months later which happened to be the first day of the expedited due process hearing.

The parent had filed an expedited due process hearing request alleging that the school failed to conduct a manifestation determination before suspending the student for more than 10 school days. The parent contended that the student was protected by the IDEA even though the student had not yet been deemed eligible for

special education since the school had a "basis of knowledge" suspecting a disability.

The District Court, in affirming the Administrative Law Judge, held that a basis of knowledge existed as of the date of the parent's written request for a special evaluation. However, the Court held that the IDEA provision regarding a basis of knowledge does not apply if the parent has not allowed the evaluation to take place due to lack of written consent. Here, the school had made several documented efforts to obtain consent. A parent's failure to provide consent results in their student being disciplined in the same manner as students who are not disabled. A.V. v. Panama-Buena Vista Union School District 71 IDELR 107 (United States District Court, Eastern District, California (2018)).

VII. Procedural Safeguard/Due Process Issues

A. Jurisdiction/Party Status

1. The parent of a high school student who was on a Section 504 plan was determined ineligible for special education. The parents obtained an Independent Educational Evaluation disputing eligibility. The school called a meeting to consider the IEE. In the meantime, the student turned 18 years of age. At the meeting the student indicated he did not want special education although his mother disagreed. He was found not eligible.

   His mother initiated a due process hearing challenging the eligibility determination. While the due process proceeding was pending, the student turned 18 years of age. The Administrative Law Judge (ALJ) dismissed the case based on testimony from the meeting where the 18 year old declined services. The ALJ held that the adult student's position was controlling. The ALJ also noted that the student had by that time earned enough credits to graduate from high school and therefore demonstrated his ability to succeed. Harris v. Cleveland City Board of Education 118 LRP 8181 (United States District Court, Eastern District, Tennessee (2018))

B. Exhaustion of Administrative Remedies

1. A student with cerebral palsy was on an IEP which called for one-on-one paraprofessional support. Her parents also provided her with a trained service dog which assisted her by

increasing her mobility and assisting with some physical tasks. The school administrators prohibited the service dog from coming to school reasoning that the dog would not be able to provide any support that the paraprofessional could not provide.

The family filed a complaint with OCR. OCR found that the school violated the ADA by not allowing the student to bring her service dog to school. After the family moved to a neighboring school district which welcomed the service dog, the family initiated a lawsuit against the school, the principal and the school district alleging violations of the ADA, Section 504 and state disability law seeking monetary damages.

The United States Supreme Court, in a unanimous decision, vacated the Appeals Court's decision dismissing the lawsuit for failing to first exhaust the IDEA's due process hearing system. The Supreme Court held that the exhaustion of the IDEA due process hearing process is limited to issues where the "gravamen" of the complaint is an alleged denial of FAPE.

The Supreme Court remanded the case back to the Court of Appeals decision for further consideration. The Court of Appeals was instructed by the Supreme Court to determine if the "gravamen" of the lawsuit was based on a FAPE claim or a discrimination claim which would not require exhaustion of the IDEA due process hearing system. Fry v. Napoleon Community Schools 137 S.Ct. 743, 69 IDELR 116 (United States Supreme Court (2017)).

2. A student with autism had a "meltdown" and was placed by his teacher in a "Chill Zone" which was a 4 foot by 4 foot enclosure pressed against the classroom wall. The parent happened to be in school at the time meeting with the counselor. The parent went to classroom and heard her student repeatedly yell "let me out" and saw the teacher holding the door to the Chill Zone closed with her foot.

   A lawsuit was brought against the school district and the teacher in her individual capacity. The lawsuit claimed violations of Section 504, the Americans With Disabilities Act, false imprisonment, unreasonable seizure, excessive force and state law.

   The Court held that the Section 504 and ADA claims overlap with the IDEA and therefore must be dismissed for failure to

exhaust administrative remedies as required by Fry. The claims are based on the allegation that the student was denied appropriate behavioral instruction.
Note: The Court refused to dismiss the claim against the teacher in her individual capacity that her actions constituted a violation of the 4th Amendment prohibition against unreasonable seizures. The Court found she could be held liable for punitive damages. Rhodes v. Lamar County School District 72 IDELR 17 (United States District Court, Southern District, Mississippi (2018)).

C. Attorney's Fees

1. The parent of a student with a disability initiated a due process hearing challenging the placement of her student. The parent sought reimbursement for a unilateral placement in a private special education school.
The school district sent the parent an offer to settle the dispute more than 10 days prior to the hearing. The school agreed to pay for the private school tuition and transportation in the settlement offer. The parent rejected the offer since it did not address attorney's fees.
The Administrative Law Judge issued a consent order stipulated to by the parties ordering tuition, one on one instructional support and transportation. The parent then filed an action in Court for attorney's fees.
Under the IDEA a parent who prevails in a due process hearing may be awarded attorney's fees by a Court. However, the IDEA limits the award to only those fees accrued before the 10 day settlement offer if, among other reasons, the parent was "substantially justified" in rejecting the offer.
The Court held that the parents were justified in rejecting the settlement offer since it did not address the payment of attorney's fees. The Court noted:

> We do not read the IDEA to force parents to decide between the resolution of a placement dispute and paying for the attorney who assisted in achieving an appropriate placement for the student. A school district seeking to settle a dispute in which a lawyer has been involved should acknowledge that the parent has accrued attorney's fees and should clearly state if its

offer includes the payment of any fees.

The Court remanded the case to the District Court for the calculation of attorney's fees. Rena C. v. Colonial School District 72 IDELR 26 (United States Court of Appeals, 3rd Circuit (2018)).

VIII. Liability Issues

A. The parents appealed a hearing officer's decision under the IDEA naming not only the school district but the superintendent and special education administrator in their individual capacities. The individuals filed a Motion to Dismiss contending that the IDEA prohibits individuals from being sued in their personal capacities. The Court denied the Motion.

In doing so, the Court stated that it found no judicial decision which held that school employees cannot be held personally liable under the IDEA. The Court cited Stanek v. St. Charles Community School District 783 F.3d 634 (United States Court of Appeals, 7th Circuit (2015)) to support its conclusion that individuals may be personally sued under the IDEA. Crofts v. Issaquah School District et. al. 71 IDELR 61 (United States District Court, Western District, Washington (2017))

In a subsequent decision where the parents wanted to add another three individuals to the lawsuit, the Court reversed its earlier opinion. The Court held that individual staff members cannot be sued in their individual capacities under the IDEA.

The Court looked at the language of the IDEA where dispute resolution processes reference parents and local education agencies (LEA) but not individuals employed by the LEA. Given the language and intent of the IDEA and the lack of remedies against individual employees, alleged violations of the IDEA may be pursued against the school district and not employees in their individual capacities. The Court dismissed the lawsuit against the individuals. Crofts v. Issaquah School District 118 LRP 12367 (United States District Court, Western District, Washington (2018)).

B. The parents of a student with Asperger Syndrome sued the school district and the middle and high school principals under Section 504 and the Americans With Disabilities Act (ADA) for being deliberately indifferent to the harassment and bullying the student suffered.

There is no dispute about the numerous incidents of bullying

throughout the student's middle and high school years. The Court provided examples of bullying which included both verbal and physical behaviors. Other students called the student "gay", "queer", "fag", told him to "go f…n die" and threatened to kill his family. In addition, gum was put in the student's hair and a bag of feces was left at his house.

The parents complained of more than 30 incidents of bullying. The school investigated each incident by interviewing students and staff and in some cases made referrals to the police. When the investigation supported the bullying, a corrective action plan was implemented which included steps such as counseling, suspension and referral for criminal charges. The student also acknowledged that sometimes he called other students names and threatened to beat up another student in response to being bullied.

Although the Court observed that the school "cannot be particularly proud of its response to the problem" it concluded that the school was not liable since it was not deliberately indifferent. The school did not ignore the parents' complaints and its response was not "clearly unreasonable". Bowe v. Eau Claire Area School District 71 IDELR 168 (United States District Court, Western District, Wisconsin (2018))

C. The parent claimed that her student with ADHD was "harassed, teased, bullied and assaulted" based on his disability. She brought a lawsuit against the school district based on Section 504, the ADA and state law. The parent alleged the school engaged in discrimination when it made the student take a test in the principal's office after it learned about the bullying incident in the bathroom. The parent argued that this punished the student victim rather than the bullies.

The Court dismissed the lawsuit. Under Section 504, intentional discrimination must be shown to support a Section 504 liability claim. In this case, the parent disagreed with the educational accommodation provided which did not support a claim of discrimination under Section 504. Blackledge v. Vicksburg-Warren School District 71 IDELR 6 (United States District Court, Southern District, Mississippi (2017)).

D. The parents of a student with multiple disabilities including Asperger's Syndrome who committed suicide sued the Superintendent under Section 504 for monetary damages. They alleged that the school failed to address allegations that their son was being bullied and harassed and that the school failed to investigate

those allegations after their son's death.
The Court of Appeals granted summary judgment for the Superintendent. In doing so the Court concluded that the allegations failed to show that the school acted in bad faith or with deliberate indifference.
Although the student had a history of being teased it did not amount to harassment under Section 504. The alleged facts did not show that the student was the target of anything more than "hurtful but immature" behavior. As the Supreme Court held in a Title IX case of alleged sexual harassment (Davis v. Monroe County Board of Education) "damages are not available for simple acts of teasing and name calling among school children". The behavior must be "so severe, pervasive and objectively offensive that it denies its victims the equal access to education".
In addition, the Court held that there was no evidence that the school knew or should have known about the student being harassed. Although the parents raised their concern at an IEP meeting it was not discussed extensively. The parents could not say whether the harassing behavior occurred at school or in the neighborhood and the student never reported being harassed. Estate of Chandler J. Barnwell v. Watson 880 F.3d 998, 71 IDELR 122 (United States Court of Appeals, 8th Circuit (2018)

IX. Section 504/ADA Discrimination Issues

A. The parents enrolled their student with a noticeable speech impairment in kindergarten. Within the first week of school the teacher observed another student acting aggressively toward his classmates especially this student.
The Student Study Team met with the parents to discuss her student. The parent expressed behavioral changes the student started exhibiting. Around the same time, the other student's behavior escalated into kicking and spitting on other students but especially this student. The teacher reported her concern to the principal.
The parent then reported to the teacher that her student shared with her that he was followed into the bathroom by the student perpetrator and touched inappropriately. The student perpetrator was suspended. Ultimately, the student perpetrator was transferred.
The student victim was taken to the hospital the same day and diagnosed with post-traumatic stress disorder. The parent removed the student from school and provided homeschooling for the rest of the school year.
The parents sued the school and several staff members for not

preventing the bullying and not properly responding to the incidents. The lawsuit raised claims under the ADA, Section 504, the Constitution and state negligence law. The school defendants moved to dismiss.

Regarding the discrimination claims, the Court held that the allegations did not establish any link between the bullying and the student's disability. The Court observed "To hold otherwise would convert the ADA and Rehabilitation Act into generalized anti-bullying statutes".

However, the Court did find merit to the claim that the school did not reasonably accommodate the student before and after the bullying occurred. In order to succeed the parents must show; 1. the student is disabled under the ADA/504; 2. the school knew that the bullying was substantially likely to impact the student's right to a FAPE; and 3. The school did not provide reasonable accommodations to address the impact. Here, there were sufficient alleged facts to survive the motion to dismiss the claim. Wormuth v. Lammersville Union School District 71 IDELR 86 (United States District Court, Eastern District, California (2017))

Note: The parents subsequently reached a Court approved settlement agreement with both the parents of the student perpetrator for $40,000 and the school district for $600,000.

B. The parents of a nonverbal 19 year old student who is autistic and has an intellectual disability requested that the student be allowed to carry an audio recording device at school to record everything said in his presence. The school refused to allow the student to carry the device.

An IDEA due process hearing was conducted. The hearing officer held that the device was not necessary for the student to receive educational benefit. The student had been making good progress in school and safety was not an issue. The hearing officer observed that the use of the device may in fact be disruptive and detrimental. The parents did not appeal the decision.

A lawsuit was initiated under the Americans With Disabilities Act (ADA) and Section 504. In particular, it was alleged that the school's refusal amounted to an unreasonable accommodation and the ADA's effective communications regulations required such an accommodation. The District Court found that the hearing officer's unappealed findings prevented the parents from showing the device was a required accommodation. In addition, the Court held the effective communications regulations did not apply to

communications between the student and his parents.
The Court of Appeals affirmed. The parents must prove under the ADA/504 that the rejection of the request to carry the recording device would deny the student "the benefits of [the school's] services, programs or activities" provided other students. It found that the hearing officer's finding in the IDEA hearing that the device would provide "no demonstrable benefit" precluded the student from establishing this essential element of his ADA/504 claim. Pollack v. Regional School District Unit 75 118 LRP 11675 (United States Court of Appeals, 1st Circuit (2018)).

C. The parent of a student with autism alleged that the school district retaliated against her as a result of her filing a due process hearing complaint against the school district. Specifically, she alleged that the district refused to provide her with a copy of a standardized test taken by her student and refused to hold an IEP Team meeting via email as she requested. She filed a lawsuit alleging such retaliation violated the Americans With Disabilities Act.
The Court found that the school had legitimate non-retaliatory reasons for its actions and granted judgment for the school district. The school refused to provide a copy of the particular test since it had copyright protections under federal copyright law. The testing company stated in their agreement that the company does not "permit the making and giving of copies of test materials to students or their parents or guardians."
Regarding the IEP Team meeting, the school refused to have the meeting held via email since it would limit collaboration by IEP Team members. The school offered other dates and times for the meeting, the opportunity to participate via teleconference as well as to tape record the meeting. The special education administrator sent the parent a letter refusing to hold the IEP meeting via email since "communication through email does not provide an opportunity for the IEP Team, including the parent, to engage in the discussions that Congress contemplated when requiring IEP Teams to meet and requiring the parents be afforded the opportunity to participate in the meeting". McNight v. Lyon County School District 70 IDELR 181 (United States District Court, Nevada (2017)).

D. The parent of a high school student with a disability engaged in a pattern of intimidating conduct with school staff. His conduct included yelling at staff, disrupting meetings and walking out and acting aggressively. The staff went to the principal expressing concern about their safety.

After the parent was called by the school about his student's conduct, he became angry and hung up the phone and said he was coming to school. The school's resource officer met the parent at the front door and engaged in a "heated exchange". The SRO instructed the parent to leave school property. The parent eventually complied. Afterward, the principal sent a letter to the parent stating that, due to his "aggressive and disruptive" conduct with staff, he had to contact the principal and obtain permission before coming to school. The parent was granted permission to come to school several times. There was no evidence presented that the parent was ever denied permission by the principal.

The parent initiated a lawsuit under the Americans With Disabilities Act alleging discrimination based on disability and retaliation. The Court granted the school's Motion for Summary Judgment dismissing the matter.

The Court concluded that there was no evidence that the procedure put in place for obtaining permission to come to school excluded him from participating in the school's programs or activities. The restrictions placed on the parent were due to his "intimidating, aggressive, disruptive and angry behavior". Lagervall v. Missoula County Public Schools 71 IDELR 40 (United States District Court, Montana (2017)).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.