

KEEPING CURRENT WITH AUTISM CASES

PRESENTED BY: PAULA MADDOX ROALSON, ATTORNEY AT LAW

WALSH, ANDERSON,
BROWN, GALLEGOS
and GREEN, P.C.

ATTORNEYS AT LAW

www.WalshAnderson.com

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505 E. Huntland Dr. Suite 600 Austin, Texas 78752 (512) 454-6864	100 N.E. Loop 410 Suite 900 San Antonio, Texas 78216 (210) 979-6633	909 Hidden Ridge Suite 410 Irving, Texas 75038 (214) 574-8800
6521 N. 10th Street Suite C McAllen, TX 78504 (956) 971-9317	500 Marquette, N.W. Suite 1360 Albuquerque, NM 87102 (505) 243-6864	10375 Richmond Ave. Suite 750 Houston, Texas 77042-4196 (713) 789-6864

ABA (METHODOLOGY)

J.D., by His Next Friends; Mark Davis, Tammy Davis v. Kanawha County Board of Education, 110 LRP 57258 (4th Cir. 2009), cert. denied 110 LRP 57264 (U.S. 2010). The Fourth Circuit Court of Appeals affirmed the decision of the District Court (reported at 110 LRP 57268) that the educational program for a child with autism was appropriate even though the parents maintained that the child required ABA and 1:1 assistance which was not provided. The Court noted that the child made educational progress without those services. The United States Supreme Court subsequently declined to review the decision.

Nicholas Sytsema, a Minor, by and through His Parents, Jack and Rebecca Sytsema v. Academy School District No. 20, 53 IDELR 226 (D.C.—Co. 2009). The parents of a young child with autism challenged the District's IEP. The dispute arose out of disagreement about the appropriate educational setting for the child (individualized ABA vs. an inclusive preschool setting) and whether the District's methods of instruction were adequate for him. Ultimately, the District Court held that the failure to provide any one-on-one services in the IEP and the offer of only a small number of instructional hours showed that the District did not give adequate

consideration to the student's individual needs in preparing the IEP. The student had made progress with one-on-one instruction, and the change to an integrated classroom setting was a "drastic move" which required some transitional services to assist him in adjusting to a new environment. Due to the absence of any 1:1 ABA services and the small number of instructional hours (approximately ten hours of instruction per week), the Court found the IEP insufficient. Further, while school representatives testified that the District was considering those services for the student, there was nothing written into the IEP to confirm those efforts. The Court entered a judgment in favor of the parents for \$38,503 worth of private ABA services.

Joshua A., a Minor, by and through Jorge A., His Guardian Ad Litem v. Rocklin Unified School District, 52 IDELR 64 (9th Cir. 2009)(unpublished). The school district did not deny the child a free and appropriate public education when it denied the provision of 1:1 ABA services but rather adopted an "eclectic approach" to providing instruction to the child. At the underlying administrative hearing, expert witnesses testified for both parties regarding the status of the research on appropriate methods for educating children with autism. Their opinions were "divided into two camps: 1) The witnesses called to testify by District believe it is appropriate to blend different methodologies when implementing an IEP in order to better address the specific symptoms and deficits of the child (the eclectic approach); and 2) The witnesses called to testify by Student believe that ABA is the only methodology that has been proven effective to meet the educational needs of children with autism." The Hearing Officer ruled that the "District did not act inappropriately by choosing to implement Student's IEP using the eclectic approach, despite the conclusions reached in the three studies relied on by Student's experts. The studies did not provide a definitive answer regarding the efficacy of the eclectic approach, as this matter is still being debated among the acknowledged professionals in the field of autism. The testimony of Student's experts merely expressed one point of view in this debate." The District Court agreed.

The 9th Circuit affirmed the decision of the Hearing Officer and the District Court, denying the parents' argument that the school district's eclectic approach was not supported by peer reviewed research. Although the Court noted that the program itself was not peer reviewed, the Court followed earlier precedent in holding that the eclectic program was "based on peer reviewed research to the extent practicable." In doing so, the Court stated "[w]e need not decide whether the District made the best decision or a correct decision, only whether its decision satisfied the requirements of the IDEA."

A.G. and L.G., on behalf of N.G. v. Thomas R. Frieden, New York City Department of Health and Mental Hygiene, 52 IDELR 65 (D.C. N.Y. 2009). In this challenge related to the provision of appropriate early intervention services to a toddler with autism, pursuant to Part III of the IDEA and its implementing regulations, the District Court upheld the decision of an Administrative Law Judge that the 20 hours of ABA services offered to the child by the Department were appropriate. While the parents rejected the IFSP, demanding 30 hours of ABA services, the Court found that the proposed IFSP was appropriate. The Court concluded, "[a]s the ALJ noted in her decision, the record in this case clearly and unmistakably shows that plaintiffs are loving and dedicated parents who are striving to provide the best therapy possible for their son. However, the IDEA simply does not require states to provide this level of therapy. Plaintiffs have not shown any material procedural error in the state administrative proceedings. Nor have they shown that the program of therapy set forth in the IFSP will provide no benefit or only trivial benefit. Thus, the Court concludes that the ALJ's decision must be affirmed.

J.A. and E.A., on behalf of M.A., v. East Ramapo Central School District, 52 IDELR 196 (S.D. N.Y. 2009). The Court upheld the education program for a student with autism, ruling that the District did not have to reimburse the student's parents for an additional ten hours of private ABA therapy per week. The student's education program for the 2005-2006 school year included only one hour of 1:1 behavior therapy, but the Court noted that the special education class in which the student was placed utilized a looser form of behavior therapy throughout the day. Although the neurologist who diagnosed the student with a pervasive developmental disorder recommended 14 hours per week of behavior therapy, the Court concluded that the precise allocation of behavior therapy hours between 1:1 and group and between home and school is the type of educational judgment that is entitled to deference. Accordingly, the District's program included enough behavior therapy to qualify as "reasonably calculated" to confer an educational benefit to the student under *Rowley*.

Crystol Seladoki v. Bellaire Local School District Board of Education, 53 IDELR 153 (S.D. Ohio 2009). The Court upheld the educational program for a six year old student with autism, including the provision of ABA services. While the school district did offer to consider the parents' demand for thirty hours of ABA services per week, the district noted that additional information would need to be considered by the IEP team before confirming that level of ABA services in order to avoid pulling the child unnecessarily from activities such as art, music, and physical education. Noting that the parents refused to sign or participate in the IEP process until the District committed to an amount and location of ABA services, the Court found that the parents did not participate in the IEP process in good faith.

With regard to the amount of ABA services to be provided to the child, the Court commented that "Plaintiffs rely on the case of *Renner v. Board of Education of the Pub. Schools of Ann Arbor*, 185 F.3d 635, 640 (6th Cir. 1999) for the proposition that a school district must administer between 30 and 40 hours per week of ABA therapy. The court in *Renner*, however, merely recognized the recommendation of the plaintiff's expert for the provision of 30 to 40 hours of ABA to that disabled child. Ultimately, the court of appeals disagreed with this expert's opinion, and determined that the school program at issue, which incorporated DTT into only part of the day, provided the autistic child a FAPE. *Id.* at 639, 645. Plaintiffs also cite to several other cases which purportedly support their position that the case law requires 40 hours of Lovaas-type ABA per week. Each of the cases cited by Plaintiffs, however, is very fact-specific and none compels the conclusion that 40 hours of ABA is mandated by law. A judicially crafted bright-line standard would vitiate the individualized assessment required under the IDEA."

ACCOMODATIONS

Cheryl Blanchard, et al. v. Morton School District, 54 IDELR 277 (9th Cir. 2010)(unpublished). The 9th Circuit Court of Appeals upheld the decision of the District Court that the school district did not violate the IDEA by not assigning the individual requested by the student's parent as the student's 1:1 aide. As stated by the District Court in the underlying opinion, "[t]his is a sad case of parental advocacy to assert rights on behalf of their son Daniel who suffers from autism and other severe limitations." The District Court's review of the record found "that plaintiff's conspiracy allegations notwithstanding, the person plaintiff...hoped to have selected to be her son's educational assistant... would not have taken the job if offered it, and knew that if she applied for the job it would be given to her. There is no independent or

objective evidence that [the aide assigned to the student by the school district] was an inadequate choice.”

Mark and Rie H., Individually and as Guardians Ad Litem of Michelle H. and Natalie H., Minors v. Patricia Hamamoto, in Her Official Capacity as Superintendent of the Hawaii Department of Education; Department of Education, State of Hawaii, 55 IDELR 31 (9th Cir. 2010). The 9th Circuit Court of Appeals reversed the decision of the District Court granting summary judgment to the Department of Education and remanded the case. The Court held that that there were genuine issues of material fact regarding whether the Department of Education violated Section 504 of the Rehabilitation Act by denying young siblings with autism meaningful access to a public education. Specifically, the 9th Circuit held that the Department’s alleged failure to provide reasonable accommodations, coupled with evidence of its deliberate indifference, could support an award of damages under Section 504. Per the Court, the evidence raised a genuine issue of material fact as to whether the girls needed autism-specific services in order to access the benefits of public education. The evidence also supported the allegation that the IEPs that Hawaii DOE provided the girls were not designed to provide those autism-specific services. Accordingly, the Court concluded that the family raised genuine issues of material fact as to whether Hawaii DOE failed to design the children’s IEPs to include the autism-specific services necessary to meet the girls’ educational needs as adequately as the needs of non-disabled students were met.

A.C. and M.C., on behalf of M.C. v. Board of Education of the Chappaqua Central School District, 51 IDELR 147 (2d Cir. 2009). The 2nd Circuit Court of Appeals considered the decision by a lower court that a school district had prevented the student from learning how to function independently due to the constant presence of an instructional aide. The parents challenged that the 1:1 aide promoted the “learned helplessness” of the student. On appeal, the Court reversed the decision of the lower court, holding that the student’s proposed IEP addressed the student’s need to develop independence and called for the aide to decrease the level of support provided to the student. Accordingly, the Court upheld the school district’s program.

BEHAVIOR

Lathrop R-II School District v. William Gray, by and on behalf of His Son, D.G., 54 IDELR 276 (8th Cir. 2010). The 8th Circuit Court of Appeals affirmed the decision of the District Court, holding that the school district provided an appropriate program for a student with autism who displayed behavioral concerns. The student’s parent argued, in part, that the district’s IEPs were procedurally flawed because they lacked baseline data. The 8th Circuit noted, however, that the IDEA does not explicitly mandate such specific data. Noting that the IDEA does require a statement of the child’s present levels of educational performance and a statement of measurable annual goals, including benchmarks or short-term objectives, the Court concluded that a preponderance of the evidence established that the challenged IEPs contained both detailed statements of present levels (12 pages alone) and measurable goals (27 distinct and specific goals).

With regard to challenges related to the student’s behavior IEPs, the Court stated that “[t]he IDEA does not...require an IEP to create specific goals with regard to behavior. If a behavior

impedes a child's learning, the IEP team need only "*consider*, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior[.]" 20 U.S.C. §1414(d)(3)(B)(i) (emphasis supplied)". Such notwithstanding, the Court noted that the District's "good faith effort to enable D.G.'s progress by stemming disruptive behaviors" was evidenced by training for staff, the provision of speech and occupational therapy, the provision of a 1:1 aide, the conduct of an FBA by an autism specialist, and the use of a variety of tailored positive behavioral interventions in a sensory diet and a detailed behavior plan.

Joseph Doe, by and through His Parents, John Doe and Jane Doe v. Hampden-Wilbraham Regional School District, and Bureau of Special Education Appeals, 54 IDELR 214 (D. Mass. 2010). The parents of a child with autism appealed the decision of an administrative Hearing Officer that the IEP developed for their son was appropriate under the IDEA. The parents challenged, in part, that the IEP for the student was insufficient in that it did not contain specific behavioral recommendations and that the IEP was silent with regard to the student's expected generalization of behavioral skills from school to home. The District Court upheld the decision of the administrative Hearing Officer, finding that the IEP identified four specific behavioral goals for the student, including (1) use of appropriate protest words, (2) reducing self stimulatory behaviors, and (3) following adult requests. The goals were supported by numerous accommodations and instructional interventions. While the IEP itself did not identify the goal of generalization of skills, the Court noted that the IEP focused on school behavior and that the work done at school to address behavior could reasonably be expected to carry over into the home environment, as well. Finding that the student's IEP afforded the student with FAPE, the District Court upheld the Hearing Officer's decision and ruled in favor of the school district.

New Milford Board of Education v. C.R. o/b/o T.R., 54 IDELR 294 (D. N.J. 2010). The District Court upheld the decision of an Administrative Law Judge, holding that the Board of Education failed to afford a young student with autism with FAPE when it did not continue a program of extended day services in the student's home. The after school in home services had been provided to the student as the result of an earlier settlement agreement entered into by the parties. Following the expiration of that term, the parents requested that the district continue to provide the services. The school district declined, arguing that such was not required for the child to receive an appropriate special education program. Following the request for a special education due process hearing, an ALJ determined that the after school in-home services were required for FAPE, specifically to complement the school day program. In doing so, the ALJ relied upon the testimony of the parents' expert, who testified that the student's ability to learn at school required the in-home program to address certain behavioral and communication concerns. On appeal, the District Court upheld the decision of the ALJ, disagreeing with the school district's argument that districts are not required to ensure that a student can generalize skills outside of school as long as the student obtains some benefit. Stating, "[t]his Circuit has expressly mandated the provision of 'meaningful educational benefits in light of the student's intellectual potential,' not a lesser 'some progress' standard," the Court discounted the school district's argument. Further, the Court noted that the issue was not the student's ability to generalize skills outside of school, but his ability to obtain any benefit from the school program without the intervention he received at home.

COMPENSATORY SERVICES

Ferren C., Ronald C. and Leslie C. v. School District of Philadelphia, 54 IDELR 274 (3d Cir. 2010). The 3rd Circuit Court of Appeals upheld the decision of the District Court that compensatory education services were appropriate following the student aging out of eligibility for IDEA services. The Court of Appeals further held that a provision of monetary relief in lieu of IEP services would not satisfy an order requiring the school district to provide compensatory education services to the student. Noting that a “money-only” award would be an “empty victory” for the student, the Court affirmed the District Court’s decision awarding compensatory education services to the adult student. The Court opined, “[i]f an individual was deprived of his or her right to an adequate FAPE, and by extension an IEP, prior to the age of twenty-one, it follows that the student could only be fully compensated by an award of compensatory education that contains the elements of a FAPE that she was previously denied. There is nothing in the IDEA that evinces Congressional intent to limit courts' equitable power to awards of only financial support. In certain cases, such as the one here, monetary awards cannot fully compensate a student for a school district's past failures.”

Dracut School Committee v. Bureau of Special Education Appeals of the Massachusetts Department of Elementary and Secondary Education, Massachusetts Department of Elementary and Secondary Education, P.A. and C.A., 55 IDELR 66 (D. Mass. 2010). The District Court overturned the decision of an Independent Hearing Officer that ordered a school district to extend eligibility for IDEA services for a period of two years for an adult student with Asperger Syndrome. The order of extended eligibility followed the student’s graduation with a regular diploma, also ordered by the IHO. The Court did uphold the findings of the IHO that the student had been denied FAPE to the absence of a meaningful transition plan that addressed the student’s needs in pragmatic language and vocational skills, and the Court remanded the case to the IHO for further consideration regarding the extent and nature of compensatory services.

EVALUATION AND ELIGIBILITY

Shannon Pohorecki v. Anthony Wayne Local School District, 53 IDELR 22 (N.D. Ohio 2009). The parent of a student with ADD, ADHD, absence seizures, and Asperger Syndrome challenged the school district, arguing that the District’s classification of the student as emotionally disturbed, rather than as a student with autism, violated the student’s right to FAPE. At the special education due process hearing, the Independent Hearing Officer ruled in favor of the district, noting that the classification of the precise impairment under the IDEA is not critical, provided that the school district develops and implements appropriate IEP goals and objectives for the student that are individually tailored to the student’s need. On appeal, the District Court upheld the decision of the IHO, stating that “[u]nder 20 U.S.C. § 1412(a)(3)(B), states are not required to classify IDEA-qualifying students into a specific category; rather the focus of the mandate is on adequacy of services.” Noting that it was clear from the evidence that the student’s disability is not easily categorized, the Court held that the “classification of the student as a child with ‘emotional disturbance’ was a reasonable one and was appropriate for his educational needs.”

Joseph Weissburg and Adria Weissburg v. Lancaster School District et al., 53 IDELR 249 (9th Cir. 2010). The 9th Circuit Court of Appeals held that the classification of a student, while not required under the IDEA provided that the student receives FAPE, was an important consideration in determining whether the parents of a student were “prevailing parties” entitled to the reimbursement of attorney’s fees for their efforts in challenging the public school system.

The Court stated that “[a]lthough the IDEA does not confer a legal right to proper disability classification, legal ramifications do arise from a student's disability classification. For example, special education teachers must possess credentials specific to a child's primary disability...Here, it is undisputed that Edward's teacher was qualified to teach children whose primary disabilities included mental retardation and autism. Nevertheless, the question is whether the change in Edward's disability classification altered the legal relationship between the parties. Absent the change in disability classification, Edward did not have a legal right to instruction by a teacher qualified to teach a student with mental retardation and autism. Before his classification was changed, Edward could have been placed under the care and instruction of a teacher who was not qualified to teach a student with autism...”

“We hold that a change in eligibility category materially alters the legal relationship between the parties because it entitles Edward to placement in a classroom with a teacher qualified to teach students with the primary disabilities of mental retardation and autism. Although Edward did, in fact, receive placement in the proper classroom, the school district refused to recognize his additional primary disability of autism, and thus his legal right to such placement, until his eligibility category was changed. Accordingly, we hold that the Weissburgs qualify as prevailing parties under the IDEA and are thereby eligible for attorneys' fees at the discretion of the court.”

Stephen and Linda Maus, Parents of a Disabled Child, K.M. v. Wappingers Central School District et al., 54 IDELR 10 (S.D. N.Y. 2010). The District Court held that the public school district was correct in denying IDEA eligibility to the middle school student with ADHD, Asperger Syndrome, and a generalized anxiety disorder who excelled academically at school. While the student did qualify as a student with a disability under Section 504 and received accommodations, the Court found that the district correctly excluded the student from IDEA eligibility due to the student’s failure to demonstrate that her impairments resulted in an “adverse effect on educational performance.” The Court stated that “Plaintiffs admit that “[t]his case is not about a child whose disability inhibits academic progress...but contend that K.M.'s significant social and emotional problems -- including difficulty interacting with peers, anxiety, and hyperactivity --render her eligible for services under IDEA. The case law...however, indicates that because K.M.'s conditions have not adversely affected her academic performance, she does not qualify for services under IDEA.”

A.J., by His Parents and Natural Guardians, C.L.J. and C.J., and C.L.J. and C.J., Individually v. Board of Education, East Islip Union Free School District, 53 IDELR 327 (E.D. N.Y. 2010). The District Court held that the kindergarten student with Asperger Syndrome was ineligible for IDEA services, stating that the child’s academic progress was not evidence that the student’s impairment had an adverse impact on his educational performance. The Court cited earlier case law on point. Because the student’s parents were unable to

demonstrate an adverse impact on educational performance, the Court dismissed the parent's IDEA appeal.

D.A. b/n/f L.A. v. Houston Independent School District et al., 54 IDELR 168 (S.D. Tex. 2009). The school district's failure to timely evaluate a student suspected of having autism resulted in district liability. The District Court upheld the decision of the Independent Hearing Officer that the district failed to fulfill its child find obligations in timely evaluating the student. The child's pre-K teacher stated to the parent that the school district was unlikely to test the child at such a young age, but informed the parent that the child could be tested in kindergarten or first grade. The kindergarten teacher informed the parent that the district policy precluded the referral of a kindergarten student for special education, and this policy was confirmed for the parent by the campus principal. While the early intervention team met concerning the student's academic and behavioral concerns, the child was not referred for an evaluation. Ultimately, the parent withdrew the child from school and requested a hearing. The District Court agreed with the IHO's conclusion that the school district failed to timely evaluate the student. The parent, however, failed to submit sufficient evidence to support an award of compensatory education services.

Gwinnett County School District v. A.A., B.A., and D.A., 54 IDELR 316 (N.D. Ga. 2010). The parents of a sixteen year old student claimed that the public school district denied the student FAPE by not timely identifying the student as a student with autism for purposes of the IDEA. The student, who was evaluated in 1996 and determined to be a child with intellectual disabilities, was again evaluated at her parents' request in 2006. At that time, it was discovered that the student had autism. The district had not conducted a psychological evaluation between 1996 and 2006; thus, the parents challenged the district's provision of FAPE for ten years and requested academic remediation. An ALJ ruled in favor of the parents and awarded more than \$55,000 in tuition reimbursement and payment for the student's private school education. On appeal, the District Court overruled the school district's claim that the IDEA's two year statute of limitations would preclude such relief, noting that the school district had failed to properly identify the student ten years prior and that had the district appropriately identified the child at that time, the appropriate educational programming might have been provided. Nonetheless, the District Court found the district liable only from 2006 forward.

EXTRA-CURRICULAR ACTIVITIES

Independent School District No. 12, Centennial v. Minnesota Department of Education, 55 IDELR 140 (Minn. 2010). The parents of a child with autism and Tourette Syndrome requested that the student's IEP team consider supplementary aids and services that would permit the student to participate in extra-curricular and nonacademic activities, including volleyball. The school district refused, and the parents filed a complaint with the state department of education. The department of education ruled that the district violated the child's rights under IDEA. The school district appealed, and the Court of Appeals held that the district was required to consider whether supplementary aids and services were required for the student to participate in extracurricular activities, but only to the extent that the activity was required for the "education" of the student. On appeal, the Minnesota Supreme Court held that there is no such limit on the provision of supplementary aids and services to allow a child with a disability to participate in

nonacademic or extra-curricular activities, stating "[t]o limit extracurricular and other nonacademic activities to those required only to educate the [student with disabilities] would require adding or reading words into the above IDEA regulations." Finding that such a showing was not required, the Supreme Court reversed that part of the Court of Appeals decision.

IEPs

Anchorage School District v. D.S. and C.S., Parents of D.S., a Student with a Disability, 54 IDELR 29 (D. Alaska 2009). The public school district appealed the decision of an Independent Hearing Officer that the district had failed to afford the student with cerebral palsy and autism with required procedural safeguards under the IDEA. The IHO found that the school district had failed to properly assess the student related to autism, had not held properly constituted IEP team meetings, had not developed measureable goals and objectives in the student's IEPs, and ignored the recommendations of qualified experts. On appeal, the Court upheld the decision of the IHO, noting that the decision was supported by the administrative record. The Court further upheld the IHO's order requiring the District to reimburse the parents for the private in-home program.

K.S., a Minor, by and through Her Parents, P.S. and M.S. v. Fremont Unified School District, 53 IDELR 287 (N.D. Cal. 2009). The parents of a student with autism challenged the rate of the student's progress, arguing that the child was capable of progressing faster. In support of their argument, the parents alleged, in part, that the school district simply "rehashed" the student's IEPs from year to year. The Court disagreed, noting that the IEPs successively increased in challenge based upon the student's present levels of performance. Further, the Court accepted the school district's argument that nothing in the IDEA or related case law equates appropriate progress with achievement of each and every goal set forth in the IEP. In concluding that the district afforded the student with FAPE, the Court opined that "[s]low progress...is not necessarily indicative that plaintiff did not receive a FAPE, especially in light of the substantial evidence in the record concerning plaintiff's autism and cognitive impairments. Indeed, the fact that plaintiff achieved but did not surpass the majority of her goals tends to show that the IEPs were designed appropriately. Accordingly, a preponderance of the evidence supports the ALJ's conclusion that, during the years at issue, plaintiff 'made educational progress that was, for her, both meaningful and significant.'"

Dumont Board of Education v. J.T., o/b/o I.T., 54 IDELR 231 (D. N.J. 2010)(unpublished). The Court of Appeals denied the school district's motion for summary judgment, upholding the decision of the ALJ that the district's IEP for a three year old with autism was inappropriate. The evidence established that the child required a sensory diet in order to receive FAPE; however, the district did not clearly identify the components of a sensory diet in the child's IEP. The Court noted that "[w]ith respect to the sensory diet or sensory program, Dumont asserts that any deficiency in the IEP was obviated by testimony at trial that Tri-Valley would provide an adequate sensory program for I.T.'s needs. Under the IDEA, however, 'in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined.' (citations omitted). Whether or not Dumont would have offered I.T. additional sensory education services at a later date, the substance of the IEP with regard to her sensory education was limited to 'sensory activities,

tickles, hugging, deep pressure, physical touch,' without any indication the numerous sensory stimulation techniques used at Tri-Valley and discussed in Dumont's brief, or any detailed program or reference to I.T.'s home sensory diet. This Court finds that the ALJ's finding of fact with respect to the absence of an adequate sensory program for I.T. in the IEP was well-founded. This Court, therefore, denies summary judgment to Dumont on the basis that the Dumont IEP supplied I.T. with the necessary sensory program or behavioral program.”

E.S. and M.S. o/b/o B.S. v. Katonah-Lewisboro School District, 55 IDELR 130 (S.D. N.Y. 2010). The District Court held that the student’s IEPs failed to afford the student with FAPE. The District Court expressed concern regarding the recycled IEPs that carried over from the prior year, opining “[i]t is apparent that the CSE simply reprinted the unedited IEP. The Court finds that recycling an old IEP is not legally sufficient because it is not individualized or appropriate for B.S. for the specific school year to which it pertains.” Given that the student’s program failed to afford him with FAPE, the court ordered reimbursement for the student’s private placement for the prior school year.

IEP TEAM MEETINGS

(See also, PROCEDURAL ISSUES, below)

Marcia Huffman, Individually and on behalf of C.H., a Minor v. North Lyon County School District and Flint Hills Special Education Cooperative, 53 IDELR 147 (D. Kan. 2009). The parent of a child with autism challenged the appropriateness of the student’s IEP. In support, the parent argued, in part, that at least one person with expertise in autism should be involved in the development of an IEP for a child with autism. She contended that IEP team members lacked sufficient training in autism to formulate an appropriate education plan for a student with autism. In upholding the school district’s program, the Court stated that “none of the provisions of the Act or applicable state or federal regulations that plaintiff cites mandate that a person on the IEP team have expertise with a student's particular disability.” While the IDEA does require that a representative of the local agency who "is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities" serve on the IEP team, the Court noted that the provision facially does not require that this individual have a specialization with a particular disability. Moreover, the record in the case demonstrated that IEP team members did have varying levels of training in autism or in related areas. The Court concluded that “[c]ertainly, it would be preferable for an individual with extensive experience with a student's particular disability to take part in formulating that student's IEP, but the IDEA simply does not require this much.”

Shannon A. Hensley, ex rel. Steven J. Hensley v. Colville School District, 51 IDELR 279 (Wash. Ct. App. 2009). The Court of Appeals affirmed a decision that the district offered the student FAPE. Although the parent challenged the composition of the IEP team, the Court found the membership of the IEP team appropriate. Specifically, while the general education teacher at the IEP team meeting had never taught the student, she would be responsible for implementing the student's IEP. Thus, the court observed, she met the requirements of the general education teacher on the IEP team. While school staff did not include the mother in every conversation or “caucus” during the IEP development process, such did not result in a violation of the procedural safeguards. The Court stated that “[e]ven if the district erred in excluding [the mother] from the

[discussion], ... she [failed] to show that the error seriously infringed in her ability to participate in development of the IEP."

L.M., a Minor by and through His Guardian Ad Litem, Sam M. and Mariette M.; Sam M., on His Own Behalf; Mariette M., on Her Own Behalf v. Capistrano Unified School District, 109 LRP 17056 (9th Cir. 2009). In this case, the District Court was required to decide whether the school district significantly restricted the parents' right to participate in the development of their child's IEP by limiting the parents' classroom observational opportunities to twenty minutes, when the District observed the child in his private education program for up to three hours. Per the 9th Circuit, in reversing the administrative law judge, the District Court failed to properly consider whether the parents' right to participate was "significantly affected." In other words, the District Court failed to consider whether the school district's policy of limiting the parents' classroom observational opportunities to twenty minutes was harmless because the parents nevertheless had a full opportunity to participate in the process to fashion an appropriate educational plan for the child with help from an informed and knowledgeable expert. The 9th Circuit opined that there was no evidence to support a finding that the parents' right to participate was significantly affected. Accordingly, the Court reversed the District Court's order requiring the school district to reimburse the parents for the cost of in-home services and vacated the District Court's subsequent award of attorneys' fees to the parents as the prevailing party.

Jeffrey Winkelman, et al. v. Parma City School District Board of Education, 53 IDELR 215 (N.D. Ohio 2009). In a "well-known case with an extensive history created over many proceedings," the parents of a student with autism challenged two separate decisions of State Level Review Officers (SLROs) that Parma City School District provided an appropriate education to their son. Ultimately, the Court noted the parents' lack of cooperation in developing an IEP for their son and affirmed the decision of the magistrate judge that despite procedural errors, the school district had afforded the student with FAPE. The parents were unresponsive to district invitations to attend IEP team meetings prior to the beginning of the school year and then requested a due process hearing, complaining that the district did not have a current IEP in place prior to the beginning of the school year. The parents thereafter rejected opportunities to review a proposed IEP, instead choosing to home school their son. The following school year, the parents agreed to attend an IEP team meeting but walked out of the meeting when they learned that the student was ineligible for Ohio's autism scholarship program. Thereafter, the school district did not send the bus for the student on the first day of school, having presumed the parents would not send the student to school that year. The parents subsequently enrolled the student in a private school for students with autism and challenged the district's program, seeking reimbursement for the costs of the private school. In upholding the decision of the SLROs that the district offered the student FAPE, the District Court Judge opined, "[t]he court finds it important to emphasize the great pains [the district] went through to comply with the complex laws that govern [IDEA] issues, expending a great deal of time and effort while experiencing continued difficulties with the cooperation of [the parents]."

LENGTH OF INSTRUCTIONAL DAY

C.G. and L.G. o/b/o B.G. v. New York City Department of Education, 55 IDELR 157 (S.D. N.Y. 2010). The parents of a student with autism challenged the failure of the Independent Hearing Officer to award prospective payments for after school services. The student, who

received instruction at the school in a 6:1+2 arrangement with a 1:1 crisis management paraprofessional, demonstrated progress in the district's program. The district also provided significant parent training and communication. When the district decided to discontinue the provision of 15 hours of 1:1 ABA services in the student's home after school, the parents requested a due process hearing. The Hearing Officer determined that the school district had afforded the student with FAPE and declined to award funding for the continued services. On appeal, the District Court upheld the decision of the Hearing Officer, taking into consideration the Hearing Officer's reliance on testimony by the student's teachers over the testimony of the student's parent and private in home ABA trainer. Specifically, the court supported the Hearing Officer's reliance on the teacher's testimony that while continued in-home ABA services would be of benefit to the student, such services were not required for the student to make educational progress. The teacher further testified at the administrative hearing that the student would master the IEP without the continued services. The Court also found persuasive, as did the hearing officer, the testimony of the school's director in which the director noted the extensive parent training and other supports offered to the family. The Court ultimately agreed with the Hearing Officer that "[w]hile some areas, such as toilet training, may be difficult to address in school...such limitations are not sufficient to demonstrate that the IEP is calculated to yield regression rather than progress...especially in light of the parent training conducted by Hawthorne to help deal with such issues."

LEAST RESTRICTIVE ENVIRONMENT

M.H. and E.K., Individually and Collectively on behalf of P.H. v. New York City Department of Education, 54 IDELR 221 (D.C. N.Y. 2010). The parents of a kindergarten age child with autism challenged the school district's program and appealed the decision of the SRO that the proposed placement offered by the district was appropriate. Specifically, the parents challenged, in part, whether the school district's proposed placement of the student in a special classroom on a general education campus was appropriate to meet the student's needs. The classroom, which provided a 6:1+1 ratio, had been rejected by the student's parents, who unilaterally enrolled the student in a private school for children with autism and sought reimbursement for same from the public school district. The private school utilized a 1:1 instructional approach, using ABA methodology, the same method by which the student had demonstrated success in the preschool setting. In a 37 page opinion, the District Court reviewed the district's proposed program and placement and ultimately overturned the decision of the SRO. The Court determined that the school district's placement was not appropriate in that it failed to offer sufficient 1:1 ABA services for the student. Conversely, the Court found the private placement selected by the parents to be appropriate to meet the child's needs and rejected the district's argument that the private placement was not the least restrictive environment for the child. In so doing, the Court observed that while LRE is to be considered in determining the appropriateness of a private school setting, the argument posed by the district that the private school was overly restrictive was unpersuasive. The Court relied on the testimony of a psychologist who opined that the child was unable to interact with other students unless prompted by an aide, that he required intensive one-to-one instruction and ABA therapy to avoid regression, and that he was not ready to model typically developing peers. Thus, the Court ruled in favor of the parents and ordered the district to reimburse the parents for \$80,000 in private tuition.

G.B. and L.B., on behalf of Their Minor Child, N.B., and on Their Own Behalves v. Tuxedo Union Free School District, 110 LRP 69140 (S.D. N.Y. 2010). The parents of a four year old student with autism contested the educational placement of their child, maintaining that such was not the least restrictive environment. The child previously had been successful in an integrated preschool classroom with the assistance of a 1:1 aide. Subsequently, the public school district proposed the child's placement in a self contained class for students with disabilities. The parents alleged that such was not consistent with the IDEA's LRE mandate, and the District Court agreed, identifying that the IDEA permits a district to remove a child from the general education environment only when the nature or severity of the child's disability is such that education in such classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114(b). Here, the Court observed that the school district failed to consider appropriate supplemental aids and supports, citing relevant authority that such supports must be meaningful and not simply token gestures. Specifically, the Court identified the school's lack of consideration of a 1:1 aide for the student, a support with which the student previously had been successful in an integrated classroom. Finding the district's placement inappropriate for the student due to these considerations, the Court left open for further consideration the parent's demand for reimbursement for their unilateral private placement of the child in a school that offered an integrated classroom setting with supplemental supports.

R.H., by His Parents and Next Friends, Emily H. and Matthew H. v. Plano Independent School District, 54 IDELR 211 (5th Cir. 2010). The Court upheld the denial of the parents' request for reimbursement for tuition at a private preschool. The parents argued that the private preschool was a "general education" setting, and therefore, less restrictive than the preschool special education program offered by the school district. The Court rejected that argument, stating, "R.H. asserts that 'PISD offers no mainstream public classes for preschool children.' In such a case, he argues, PISD was required to begin with the presumption that it would place him in '[t]he only mainstream placement available,' a 'private placement at a preschool for typically developing children,' and remove him from the private setting only if it could not provide a satisfactory education there...The IDEA, however, makes removal to a private school placement the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education. Courts should therefore be cautious before holding that a school district is required to place a child outside the available range of public options." The Court also upheld the denial of reimbursement for summer tuition at the private school, based on the parents' failure to give notice of this private placement to the school. The Court held that the notice requirements applied, even though there was never an IEP team meeting that specifically addressed summer services. In so doing, the Court upheld the District Court's view that "the lack of extended school year services was part and parcel of R.H.'s IEP" at the time, and thus he was required to give notice of his intent to reject the terms of the existing IEP.

B.S., a Minor by and through His Parents, R.S. and P.S. v. Placentia-Yorba Linda Unified School District, 51 IDELR 237 (9th Cir. 2010)(unpublished). The 9th Circuit Court of Appeals upheld the district's proposed placement of a student with autism in a blended language arts program, rather than a mainstream language arts class. The Court observed, "[w]e noted nearly 25 years ago that mainstreaming 'is a policy which must be balanced with the primary objective of providing [students with disabilities] with an appropriate education.'" Here, the Court found

that the school district's proposed placement constituted the LRE for the student, and further identified that the decision was supported by the very relief sought by the parents. "The incongruity of [the student]'s position is magnified by the very relief sought. [The student] seeks to substitute a four-hour (240-minute) program outside the "mainstream" of his general education for a 90-minute session while contending that the 90-minute session violates the LRE requirement of the IDEA. The argument that a separate 90-minute class session does not meet the LRE requirement, but a separate 240-minute session would, makes no sense."

E.H. and K.H. on Their Own Behalf, and as Parents and Next Friends of C.H., a Minor v. Board of Education of Shenendehowa Central School District et al., 53 IDELR 141 (2d Cir. 2009)(unpublished). The parents of a grade school student with autism failed to establish that the school district violated the student's rights by placing him a classroom with a 12:1 ratio. The parents contended that the student should be placed in a classroom with a 6:1 ratio, as authorized under state law for students with "highly intensive needs". In upholding the decision of the SRO that the student did not display such "highly intensive needs" thereby warranting a smaller class, the Court found persuasive the "testimony of an independent psychologist and...data regarding other students in the classroom to which [the district] proposed to assign [the student]."

C.P. and J.D., Individually and on behalf of Their Minor Child, M.D. v. State of Hawaii, Department of Education, 54 IDELR 218 (D. Haw. 2010). In this matter, the parents of an 8 year old boy with autism challenged the appropriateness of the school's proposed placement of the child in a 1:1 setting, claiming that the setting was not the least restrictive environment for their son. The school proposed the placement following the escalation in the fall of 2008 of the student's behaviors which included "hitting or slapping at peers in the regular education classroom on several occasions; throwing a stapler and hitting an individual on the head; scratching the eye of one of the classroom paraprofessionals and periodically attempting to hurt the same eye again; knocking over furniture; and kicking, pinching, scratching, and pulling hair." By the spring of 2009, the student's behaviors escalated further and the student began targeting other, more fragile children in the classroom, at one point tipping over and knocking down a child in a wheelchair. The student also engaged in inappropriate touching, disrobing, and public urination. He began to purposefully defecate in his pants and then smear the feces in order to gain attention. It became difficult for school personnel to service the student in a classroom with other general or special education students. Accordingly, the district amended the student's IEP to place him in a 1:1 ABA program in a self-contained classroom. While efforts were made to re-integrate the student into the special education classroom, those efforts were not successful. The student's parents unilaterally withdrew the student and placed him in a private school for children with autism. Prior to the student's removal, the IEP team determined that the student should again be provided with gradual reintegration into the special education classroom. The parents rejected that IEP and requested a hearing, seeking reimbursement for the costs of the private school placement. The Court upheld the school district's placement, noting the student's substantial progress after only three weeks in the more restrictive placement and the district's plan for reintegration. The Court stated, "[t]he fact that [the child] was isolated from his peers is not, in itself, indicative that he was not provided with the LRE."

Las Virgenes Unified School District v. S.K., by and through His Parents and Next Friends, J.K. and B.K., 54 IDELR 289 (C.D. Cal. 2010). This case addresses the appropriate educational placement for a middle school student with autism and significant impairments in cognition and communication. The Court noted that the parents and the school had “locked horns” regarding the appropriateness of the child’s special education program since the child was approximately three years of age. In the instant case, the school district proposed a blended placement for the student that would provide for instruction in core academics in a special education classroom with mainstreaming for other classes and activities. The parents rejected the placement, insisting that the student remain in all general education classes with the support of a 1:1 aide. Noting that the student would not receive educational benefit from such an arrangement, the Court upheld the school district’s placement. Key quote: “The Court is persuaded by the voluminous record in this case that S.K. was not receiving in the general education classroom the IDEA’s minimum level of educational benefit in light of S.K.’s unique needs. Throughout S.K.’s time in the general education classroom, teachers and observers have witnessed his separation and segregation from the general class. During general class discussion, S.K. could typically be found working with his one-to-one aide on work completely unrelated to the topics being covered in class. Neither S.K.’s parents nor the Hearing Officer offer any explanation as to how S.K. derives educational value from the general education classroom if he works independently with his aide on materials that have no connection to the general education grade level curriculum. In these circumstances, his work and education are not a modified version of the classroom work, but rather are completely unrelated. To suggest that such a situation provides S.K. with an educational benefit because it constitutes a ‘less restrictive environment’ mistakes proximity for participation.”

Richard Paul E., a Minor, and Annette S.B., Individually and as His Guardian and Next Friend v. Plainfield Community Consolidated School District, 52 IDELR 130 (N.D. Ill. 2009). The guardian of a twelve year old student with Central Auditory Processing Disorder, ADD, symptoms of ADHD, and Asperger Syndrome challenged the school district’s continued placement of the student in the public school setting following two instances. On one occasion, the student was struck by another student with sensory issues; on another occasion the student was reported to be chasing other students in the restroom, “making monster noises” with his pants down. Both situations were addressed by school staff members. The student’s guardian challenged that the student needed a more therapeutic placement in a private school setting. The Court disagreed, noting the student’s educational and behavioral progress at the public school and rejecting the argument that the student’s placement in special education classes was too restrictive. However, the Court noted that the IDEA only requires the student to be mainstreamed with students without disabilities to the maximum extent appropriate. Moreover, the therapeutic placement suggested by the guardian would allow for no opportunities for exposure to non-disabled peers. Accordingly, the Court upheld the school district’s placement.

R.F. and J.F., as Parents and Nearest Friends of N.F. v. Warwick School District, 51 IDELR 40 (E.D. Pa. 2009). Following the parent’s withdrawal of the student with autism from the public school due to suspicion of abuse and restraint of the student, the public school provided 10-20 hours of in-home services to the student each week by a certified special education teacher. While both parties recognized that it was questionable that the in-home services afforded FAPE, the Court found that the parents failed to present sufficient evidence

from which the Court could conclude that the district's proposed IEPs, including services at the public school, were not appropriate.

T.Y., K.Y., on behalf of T.Y. v. New York City Department of Education, Region 4, 53 IDELR 69 (2d Cir. 2009). The Court upheld the placement of a preschooler with autism, confirming that the term "educational placement," in the IDEA and its implementing regulations refers to the type of program a student will attend rather than a specific school location. Here, the parents of the child sued the school district for the costs of a unilateral private placement following their disagreement with the school district's proposed school site. While the IEP team agreed that the student would attend one of several schools in a district identified for the provision of services for students with disabilities, the parents were not informed of the specific school site at the meeting; rather, they received a letter from the school district over the summer identifying the school location. The parents visited the school and found it unsuitable. Following the visit to a second school proposed by the district and also finding it unsuitable, the parents brought this challenge. In ruling in favor of the district, the Court identified that "[e]ducational placement" refers to the general educational program -- such as the classes, individualized attention and additional services a child will receive -- rather than the "bricks and mortar" of the specific school. In support, the Court cited the analysis of the Department of Education in its promulgation of the 1997 federal regulations implementing IDEA. The Court concluded that that "an IEP's failure to identify a specific school location will not constitute a per se procedural violation of the IDEA."

N.S., Individually and on behalf of Her Minor Child, J.S. v. State of Hawaii, Department of Education, et al., 54 IDELR 250 (D. Haw. 2010). The District Court upheld the placement of a preschool student with autism, concluding that the IEP did not have to identify specifically the school that the student would attend. Key quote: "Plaintiffs argue that the IEP insufficiently defines Student's placement. Plaintiffs rejected the IEP because it failed to name the school at which Student would receive education. However, as the physical location where a placement will be implemented is an administrative decision made by the DOE, it is not necessarily included in the IEP. The IEP instead sets forth the IEP team's decisions."

Elliott Cone and Nancy Cone, Individually and on behalf of Elliott Hamilton Cone III v. Randolph County Schools Board of Education, 53 IDELR 113 (D. N.C. 2009). The District Court rejected the school district's motion for summary judgment in this matter, where the parents of a teenage student with autism and Fragile X sought recovery of tuition for the private placement of their son. The Court found that it was unclear whether the student could be served in the neighborhood school, finding that the student's IEP was deficient in that it failed to provide appropriate support services and ensure consistency across the school day while minimizing transitions, in accordance with evaluative recommendations. Accordingly, the Court denied the school district's motion for summary judgment and confirmed the award of private tuition reimbursement to the student's parents.

MISCELLANEOUS (BUT INTERESTING)

M.S., A Minor, by His Next Friend, Mother, and Natural Guardian, Helena Soltys v. Seminole County School Board et al, 52 IDELR 286 (M.D. Fla. 2009). The teacher of a student with autism was denied summary judgment on the basis of qualified immunity in response to allegations the teacher abused a student with special needs. In so ruling, the Court noted that a jury would have to determine whether the teacher had violated the student's Constitutional rights. Underlying alleged facts included the teacher's alleged response to the student pinching the teacher (noted to be common when the student was redirected). According to instructional aides in the classroom, the teacher at one point allegedly "jerked [the student] out of his desk so fast and flipped [his] body down on his desk, had one arm behind him, took the other arm and put it behind him, started to lean down and with her left hand she held his head down." The teacher then reportedly "pushed M.S.'s head down across the desk while holding his hands behind his back until 'his eyes were bulging' and 'his lips started turning ... a purply light blue.'" When [the aide] told [the teacher] that M.S. had had enough, [the teacher] released him and pushed [the aide] against the closet door and stated "This is my fucking class and I'll run it the way I see fit." The aides subsequently reported the incident to a campus administrator, and the teacher thereafter was convicted of third-degree felony child abuse under Florida law.

Other alleged incidents included the teacher striking and yelling at the student ("[y]ou will not piss in my class ... piss your pants in my class") when the student wet his pants at school. Upon finding that the plaintiff had presented evidence that could support a jury finding that the teacher's actions directed at the student were conscious shocking, constituting excessive force in violation of the student's clearly established substantive due process rights, the Court denied the teacher's motion for summary judgment requesting qualified immunity.

Atlanta Independent School System v. S.F., a Minor, by and through His Parents and Next Friends, M.F., and C.F., and M.F. and C.F. v. Gwendolyn Stokes and Sherri Jones, Third-Party Defendants, 110 LRP 69129 (N.D. Ga. 2010). On a Motion for Reconsideration, the Court refused to set aside its earlier ruling that that while an adult or child in a classroom may have no expectation that conversations that occur therein will not be heard by others in the classroom, they are entitled reasonably to remain free from the surveillance and recording of those conversations. Citing a Georgia statute regarding surveillance, the Court upheld its decision that the parents, students, and staff of the school had a reasonable expectation of privacy and that their conversations would not be recorded. The decision followed a finding that the parent of a child with autism sewed a recording device into the student's clothes and recorded his activities and surrounding conversations throughout the day, without discrimination as to the nature of any particular place or person (e.g. use of the restroom, etc.) to be recorded. The Court earlier determined that such was a violation of the privacy rights of other individuals.

JGS, a Minor and James Harold Sterner v. Titusville Area School District, 55 IDELR 39 (W.D. Pa. 2010). The first grade student with autism had a history of verbal and physical outbursts that included loud and profane screaming and verbal threats of force and violence toward others. On one occasion, when the student stood up and began screaming during an in-class counseling session, the aide was alleged by the student's parent to have placed hand sanitizer in her hand and placed her hand over the student's mouth, forcing the student to ingest

it. The aide denied that she used hand sanitizer but did admit to placing her hand over the student's mouth. The student eventually settled down and took a nap before leaving school. There were no reports of the student's injury. On review, the Court held that the aide's use of corporal punishment did not violate the student's 14th Amendment substantive due process rights.

Kimberly Johnson v. Frank Cantie, Deborah Cantie and Iroquois Central School District, 54 IDELR 257 (N.Y. 2010). An occupational therapist sued the school district of residence of a child with autism, along with the child's parents, when the therapist sustained injuries in attempting to block herself from being hit and kicked by the child in the autism classroom. Specifically, she claimed that the school district had a duty to warn her of the child's behavior and that the parents were negligent in the supervision of their child. The Court upheld the earlier rulings on the motions for summary judgment, which were granted in favor of both the school and the parents. The Court noted that the parents did not have the opportunity or ability to control their daughter's behavior in the classroom and that there was no duty under state law of the school to warn of a condition of which the therapist was actually aware or that she could have readily observed by a reasonable use of her senses.

PRIVATE SCHOOL CASES

Richardson Independent School District v. Michael Z.; Carolyn Z., as Next Friends of Leah Z., a Minor Child, 52 IDELR 277 (5th Cir. 2009). Although a teenage student with autism displayed behavioral concerns that interfered with her academic achievement, such was not enough to justify the student's placement in a private residential setting. Here, the Court vacated a lower court ruling that would have required the school to pay for the residential placement of the student. The Court held that the lower court did not apply the correct standard to the case. The Court agreed with the lower court that the proposed IEP from the school was inappropriate, but that was not enough to justify residential placement. In so concluding, the Court disagreed with the 3rd Circuit's ruling on the same issue in the Kruelle case (the "inextricably intertwined" standard) and instead adopted this test: "In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education."

C.S., a Minor by and through His Natural Parents, Wendy and Kenneth Sundberg v. Governing Board of Riverside Unified School District et al., 52 IDELR 122 (9th Cir. 2009). Here, the Court affirmed a decision denying the parents' reimbursement for a private placement. The Hearing Officer had denied the claim based on the finding that the parents had not given the school district the opportunity to make a formal offer of placement. The Court held that this was not an abuse of discretion. The Court also denied the request for IEE reimbursement because 1) the request for reimbursement came prior to receipt of the school's evaluation; and 2) the Hearing Officer had concluded that the school's evaluation was appropriate.

Johnnie Smith v. James C. Hormel School of The Virginia Institute of Autism and Greene County School Board, 53 IDELR 261 (W.D. Va. 2009); magistrate report accepted at 54 IDELR 75. The student was residentially placed by the school district at a private program for students with autism. That program discharged the student in December, 2007 due to behavioral issues. The student's parents later sued the school district for allegedly failing to provide FAPE after the discharge. But the court ruled for the school district, noting its prompt efforts to provide appropriate services. Key Quote: "Indeed, it is clear from the record that Greene County made great efforts to provide Johnnie with a suitable education. It placed him at VIA at public expense pursuant to an appropriate IEP; Johnnie's discharge from VIA was not something Greene County took lightly. Greene County was, at all times, ready and willing to provide educational services to Johnnie and/or find him an alternative placement."

Blake C., by and through His Mother, Tina F. v. Department of Education, State of Hawaii, 51 IDELR 239 (D. Haw. 2009). The court reversed a Hearing Officer's decision, holding that the IHO used the wrong standard to determine if FAPE was provided. The Hearing Officer specifically rejected a "meaningful educational benefit" standard in favor of "some benefit." The court ruled that this was erroneous in light of N.B. v. Hellgate Elementary School District, 541 F.3d 1202 (9th Cir. 2008).

G.B. and D.B. o/b/o J.B. v. Bridgewater-Raritan Regional Board of Education, 52 IDELR 30 (D. N.J. 2009). The Court upheld the decision of the ALJ that a preschooler with autism had been offered an appropriate special education program by the public school district. In doing so, the Court stated that it recognized "that the District's proposed IEP could have better provided for some of J.B.'s educational needs. For example, it may have been better for the proposed IEP to have attached a specific behavioral program and other learning specifics, instead of calling for further detailed plans to be developed and implemented after J.B.'s needs were examined during the initial period of J.B.'s enrollment. Indeed, the Court could identify a few modifications to the proposed IEP that may have better served J.B. However, that is not the standard by which the District's proposed IEP is judged. The Court cannot by law decide the case on whether the District's proposed IEP would maximize J.B.'s potential or provide him with the best education possible...Instead, the Court is concerned with whether the proposed IEP would confer significant learning and a meaningful educational benefit on J.B., and just as the Court does not doubt that improvements to the proposed IEP are possible, the Court is equally convinced that the instant IEP would provide J.B. with significant learning and a meaningful educational benefit."

A.D. and M.D., Individually and on behalf of E.D. v. Board of Education of the City School District of the City of New York et al., 54 IDELR 9 (S.D. N.Y. 2010). The central issue for review in this case was whether the private school program in which the parents unilaterally enrolled their student with autism was an appropriate placement. In the administrative case, the SRO had ruled against the parents, questioning the accuracy of assessments conducted by the private school upon which the district ultimately had relied in developing a proposed IEP for the student. While the school district did not contest the findings of the SRO that the district's program had failed to afford the student with FAPE, the district argued on appeal that the SRO correctly had denied reimbursement to the parents for the private school placement. In support, the district argued that the private school selected by the parents was not an appropriate

placement for the student. The Court disagreed, holding that the private school placement provided education and instruction specific to meet the student's individual needs. With regard to the questionable assessments, the Court explained that the responsibility to ensure appropriate assessment for purposes of developing an IEP lay with the school district, not the private school. The Court ultimately awarded the parents \$62,590 in tuition reimbursement.

E.G. and M.G., on behalf of A.G. v. City School District of New Rochelle, 52 IDELR 228 (S.D. N.Y. 2009). The parents of a young child with autism rejected the school's proposed placement for the student and instead sought reimbursement from the school for a private school placement. The parents feared, in part, that the school district would not provide continued ABA services in the home. The District ultimately offered a program containing: five mornings of mainstream class with a 1:1 aide, five afternoons of a special education class, ten hours of at-home behavior therapy, and various related services. The parents rejected this offer and instead enrolled A.G. in a program of two full days and three half days of mainstream class with a 1:1 aide, along with at-home behavior therapy from 11-20 hours per week. They thereafter sought reimbursement for the program from the school district, challenging that the district's proposed placement would not afford the child the opportunity to be educated in the LRE. In ruling on the LRE claim, the Court held that in light of the testimony of the school providers, it "cannot be said that the [school's] education program is overly restrictive. Rather, it adequately balances the maximizing mandate of the IDEA with its individually-tailored mandate. Statutory terms like 'appropriate' do not admit of mathematical precision."

Jordan S., a Minor, by and through His Parents and Next Friends, Suzanne and Jeffrey S. v. Hewlett Woodmere Union Free School District, 110 LRP 70676 (E.D. N.Y. 2010). The parents of a student with autism disagreed with the appropriateness of the proposed school district program and unilaterally enrolled the student in a private school placement that was not approved by the Board of Education. They thereafter sought reimbursement for the cost of the placement from the public school district. Both the IHO and the SRO ruled against the parents on the reimbursement claim, and they appealed those rulings to the District Court. The Court granted the school district's Motion for Summary Judgment, holding that there existed "ample evidence" to support that the student would benefit from the school district's proposed program. While the parents maintained that the student's placement on a self contained campus was too restrictive, the Court observed that the classroom recommended for the student served the highest functioning students in the school and would allow the student to interact with peers who shared similar verbal and social skills. The class also allowed for the student to participate in community activities and instruction. Thus, the Court ruled in favor of the school district and denied the reimbursement claim.

Atlanta Independent School System v. S.F., a Minor, by and through His Parents and Next Friends, M.F., and C.F., and M.F. and C.F. v. Gwendolyn Stokes and Sherri Jones, Third-Party Defendants, 55 IDELR 97 (N.D. Ga. 2010). The Court held that the school district could not recover the costs expended in funding a private school placement, per the prior order of an ALJ, should the decision of the ALJ be reversed upon appeal. Key Quote: "This Court agrees with the decisions reached by those courts discussed above that held that parents of a child awarded private educational services because the IEP offered by the school was deemed to be inappropriate are not required to reimburse the school district for that expenditure, even if the

administrative decision is later reversed. As noted by the First Circuit in *Burlington*, this conclusion is warranted by a consideration of the IDEA as a whole and the interests it seeks to protect and further.”

Regional School District No. 9 Board of Education v. Mr. and Mrs. P., as Parents and Next Friends of M.P., a Minor Child et al., 51 IDELR 241 (D. Conn. 2009). In reviewing the case concerning a teenage student with PDD-NOS, the Court upheld the decision of the IHO that the school district’s proposed programs for the student “fell short” in several respects. In one respect, the IHO noted that the school district failed to adequately plan and/or adequately document the student’s transition from a private facility to the school district’s high school. The IHO had reasoned that even if the transition plan satisfied the IDEA, the plans were not developed fully in a way that the parents could determine their adequacy. The social worker from the private facility testified at the due process hearing that the parties did not discuss the issue of the transition plan in meetings conducted to review possible transfer to the school district’s placement. Accordingly, the Court held that the lack of planning contributed to the school district’s denial of FAPE to the student and upheld the private school placement.

PROCEDURAL ISSUES

T.P. and S.P., on behalf of S.P. v. Mamaroneck Union Free School District, 51 IDELR 176 (2d Cir. 2009). The Circuit Court ruled for the school district, thus reversing the District Court in a case alleging “predetermination.” Prior to the IEP team meeting, the school’s expert on autism reviewed the independent evaluation obtained by the parents and prepared a chart comparing the IEE recommendations with her own. There was at least some discussion about the matter between the expert and the chair of the IEP team. The parents alleged, and the District Court found, that this was “predetermination.” The Circuit Court disagreed. Key Quotes: “Even if there was such discussion, [referring to the meeting between the expert and the team chair before the meeting] this does not mean the parents were denied meaningful participation at the meeting. IDEA regulations allow school districts to engage in ‘preparatory activities....to develop a proposal or response to a parent proposal that will be discussed at a later meeting’ without affording the parents an opportunity to participate. See 34 CFR 300.501(b)(1) and (b)(3). Mamaroneck’s conduct was consistent with these regulations.”

Kalliope R. et al. v. New York State Department of Education, 54 IDELR 253 (E.D. N.Y. 2010). The plaintiffs in this case were the parents of four minor children, along with the special school for language/communication development that the children attend, who sued the Department of Education for the State of New York, alleging that the Department unlawfully promulgated a policy prohibiting the use of a particular student-teacher ratio. They sought to enjoin the Department’s application of the policy. In response, the Department filed a Motion to Dismiss, which the Court denied in its entirety. According to the complaint, the Department instructed IEP teams to discontinue the placement of students in 12:2:2 classes. In refusing to dismiss the complaint, the Court noted that the allegations were sufficient to raise claims that the parents were denied the opportunity to meaningfully participate in the IEP process. The Court further noted that based on the claims presented, it was plausible that the plaintiffs could establish that the Department violated the IDEA by predetermining the placement of children with disabilities. Moreover, the claims that the Department prohibited a particular instructional

model despite the needs of the students with disabilities created a plausible claim that the Department acted with gross misjudgment and violated Section 504 of the Rehabilitation Act.

Amy French, a Person with a Disability, by Her Parent Gary French v. New York State Department of Education et al., 55 IDELR 128 (N.D. N.Y. 2010). This action was brought on behalf of a child with autism, challenging the appropriateness of her special education program over the course of an eight year period. The Court upheld the school's program, noting that for the parent to prevail on his claim that the district failed to afford FAPE to the student due to procedural errors (e.g., failing to provide prior written notice), the error would have to have compromised the student's right to an appropriate education, seriously impeded the parent's opportunity to participate, or caused a deprivation of educational benefits. 20 USC 1415(f)(3)(E)(ii). None of those things occurred here. Key Quote: "Plaintiff's father repeatedly makes reference to the fact that Plaintiff received no education during the years in question because of Defendant FM's failures to abide by the IDEA's requirements. A review of the record, however, shows that Plaintiff's lack of a formal education during this period was not due to the District's unwillingness to provide her with a FAPE, but because Plaintiff's father repeatedly demonstrated an unwillingness to permit Plaintiff to attend school pursuant to any IEP in place, regardless of its reasonableness and regardless of whether the District provided him with every item of relief he requested."

Ka.D., a Minor, by Her Mother, Ky.D., as Her Next Friend; Ky.D. and B.D. v. Solana Beach School District et al.; 54 IDELR 310 (S.D. Cal. 2010). The District Court upheld the decision of an ALJ that the school district did not predetermine the placement for a student with autism who was receiving services in a private school. On appeal, the parent alleged that the evidence established that the Special Education Director had predetermined that the parties would not agree at the IEP level to the continued private preschool placement of the student. The parent further alleged that such resulted in the school district being dismissive to the idea of keeping the child in the private arrangement rather than a district school. The District Court, citing Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857 (6th Cir. 2004), observed that predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. In this instance, however, the Court found that the evidence established that the parent was a "welcomed and active participant" at the IEP team meetings. Thus, while the Director may have expressed concerns to the parent prior to the meeting about the parties' ability to reach consensus, such was not evidence of predetermination. "In sum, Student's mother may have been frustrated by the IEP -- which she was ultimately able to alter -- but the ALJ did not err by concluding that Plaintiffs failed to prove that the District procedurally violated her rights under the IDEA with regard to predetermining Student's classroom placement."

S.A., a Minor, by and through L.A., Guardian Ad Litem v. Exeter Union School District, 110 IDELR 69145 (E.D. Cal. 2010). On appeal, the District Court was asked to decide whether the IEP denied a student with autism FAPE because the school district allegedly predetermined an offer of behavioral services without allowing the student and the student's mother meaningful participation in its development. Although the district previously had agreed with the parent to contract with an outside provider for behavioral services for the student, the Superintendent of Schools subsequently allowed the contract with the outside provider to lapse. The

Superintendent expressed concern about contracting out services for which the school district remained legally responsible. While the contract was not renewed, the school district continued to pay the outside provider to serve the student for several months. The parent subsequently requested a special education due process hearing, arguing in part that the school district predetermined the behavioral services. The Court of Appeals disagreed, holding that the evidence demonstrated the district did not predetermine the student's behavioral services. "Although District chose not to renew its contract with [the outside provider] prior to the October 7, 2008 IEP, and that decision was made outside of an IEP, there is no evidence that the offer made to Student was predetermined. On the contrary, District continued to pay for [the outside provider] to provide Student behavior supervision services from July 1, 2008 through the October 7, 2008 IEP meeting. Thus, although District's contract with [the outside provider] was not renewed, there is no indication that District intended to terminate Student's services provided by [the outside provider] unilaterally. Additionally, the parties stipulated that at the end of the October 7, 2008 IEP, District's attorney told Mother and her attorney that District's offer would not go into effect without parental consent. This further supports the ALJ's conclusion that the IEP offer was not predetermined and that the October 7, 2008 offer allowed parental participation."

D.B. and L.B., on behalf of H.B. v. Gloucester Township School District, 110 LRP 68182 (D. N.J. 2010). "Plaintiffs have shown that for each of the IEPs before the Court, the School District had come to definitive conclusions on H.B's placement without parental input, failed to incorporate any suggestions of the parents or discuss with the parents the prospective placements, and in some instances even failed to listen to the concerns of the parents. It is clear from the evidence before the Court that the IEPs were predetermined, and therefore the School District denied the parents any meaningful participation in the development of the IEPs in violation of IDEA."

Fort Osage R-I School District v. Nichole and Brandon Sims, by and on behalf of Their Daughter, B.S., a Minor, 55 IDELR 127 (W.D. Mo. 2010). The evidence established that the school district did not predetermine the outcome of the IEP process for a child with Down Syndrome and autism. Following the review of pages of the transcript from the due process hearing, the court found that while the teachers were not always forthcoming with the parent (e.g., concerning their opinion about the parents' discipline of the child), the evidence established that the school staff members did not withhold important information such that it deprived the parents of the opportunity to meaningfully participate in the IEP process. In fact, "[t]he district spent an inordinate amount of time and manpower to accommodate the Parents and their representatives' positions." Accordingly, the Court ruled in favor of the school district.

Joshua A., a Minor, by and through Jorge A., His Guardian Ad Litem v. Rocklin Unified School District, 52 IDELR 1 (9th Cir. 2009). Less than one month after filing an appeal with the 9th Circuit, the student's parents filed a motion for stay put under § 1415(j) of the IDEA, requesting that the school district continue to co-fund his in-home intervention program through the appeals process. The Circuit Court of Appeals observed that "[t]he statute requires the state to maintain the child's 'current educational placement' during the course of 'any proceedings conducted pursuant to this section,'" citing 20 U.S.C. § 1415(j); *L.M. ex rel. Sam M. v. Capistrano Unified Sch. Dist.*, 538 F.3d 1261, 1270 (9th Cir. 2008). As the phrase "current

educational placement" includes the placement described in the most recently implemented IEP, the stay put arrangement for the student required the school district to co-fund forty hours a week of in-home educational services administered by an outside agency. The school district argued that the stay put provision was no longer applicable during the appeals process, but the Circuit Court of Appeals held that the "automatic" nature of a stay put order did not support the district's position. Key Quote: "The fact that the stay put provision requires no specific showing on the part of the moving party, and no balancing of equities by the court, evidences Congress's sense that there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting. In light of this risk, the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process. It is unlikely that Congress intended this protective measure to end suddenly and arbitrarily before the dispute is fully resolved. Ultimately, refusing to enforce the stay put provision during the appeals process would force parents to choose between leaving their children in an education setting which potentially fails to meet minimum legal standards, and placing the child in private school at their own cost. Congress sought to eliminate this dilemma through its enactment of §1415(j)."

Joseph Heffernan and May Baird, on behalf of Their Son, T.H. v. Sumter County School District 17, 55 IDELR 134 (D. S.C. 2010). "...Defendant argues that the stay-put claim for which it seeks a certification of judgment is 'wholly separate' from the remaining reimbursement claim asserted by Plaintiffs. As such, it believes 'there is little or no chance that the need for review of the stay-put ruling might be mooted by future proceedings' and that 'there is little if any possibility that the Fourth Circuit might be obliged to consider the stay-put issue a second time.'...While Defendant's assertion certainly is correct in relation to Plaintiffs' reimbursement claim, it excludes from its consideration the fact that Defendant currently contests this court's judgment that a home-based stay-put placement was appropriate in the first instance. Depending on how the Fourth Circuit resolves Defendant's appeal, the court might be inclined to revise its decision in this matter, which it is entitled to do under Rule 54(b). Fed. R. Civ. P. 54(b) (reference omitted). Of course...a reversal of this court's prior judgment by the Fourth Circuit might moot this issue altogether or some other guidance by the Fourth Circuit in its opinion might cause this court or the Fourth Circuit to consider the issue a second time. The court is mindful of the parties' interest to lay this matter to rest, but like the parties, the court wants to proceed in proper fashion. In the interest of judicial economy, as well as the factors stated above, the court believes that there is just reason to delay the rendering of a final judgment with respect to the stay-put issue and that it is best to stay this matter, in its entirety, until Defendant resolves its appeal. Moreover, this court's August 24, 2010 order only enjoins Defendant from altering the stay-put placement insofar as it cannot prove that it has an appropriate ABA therapy program. Being the case, nothing precludes Defendant from initiating the appropriate proceedings to make such a showing and ending the home-based stay-put placement."

SERVICE ANIMALS

K.D., by and through His Parents, Nichelle D. and Bradley D. v. Villa Grove Community Unit School District 302 Board of Education et al., 55 IDELR 78 (Ill. App. Ct.—4th Dist. 2010). As the student's service animal met the definition of "service animal" under Illinois State Law, the Court held that the student was entitled to be accompanied by the animal at school and

at school functions. Key quotes: “The District...argues Chewey's behavior (1) fails to ‘reflect the appropriate behaviors expected’ and (2) does not benefit K.D. but instead ‘has actually caused K.D. to regress in his educational and functional development.’ These arguments exceed the plain meaning of the statute. Regardless of whether Chewey's behavior varies from his training, section 14-6.02 does not specify service animals must behave perfectly at all times. Moreover, the statute does not require evaluating the disabled child's educational and behavioral performances before labeling the animal assisting the child a ‘service animal’...the District also contends Chewey is not a service animal because he cannot ‘accompany’ K.D. pursuant to section 14-6.02 because ‘any act [Chewey] does do is at the command of an adult handler -- not on [his] own or at the command of K.D.’ Again, no statutory language suggests affording ‘accompany’ a definition other than its plain, ordinary meaning... The District's assertion K.D. -- not an adult handler --must control Chewey for the dog to ‘accompany’ K.D. is unpersuasive because the plain meaning of ‘accompany’ does not encompass ‘control.’” Finding that the applicable state law provision is unambiguous, the Court upheld the decision of the lower court.

TRAINING

Regional School District No. 9 Board of Education v. Mr. and Mrs. P., as Parents and Next Friends of M.P., a Minor Child et al., 51 IDELR 241 (D. Conn. 2009). The Court upheld a private placement for a teenage student with PDD-NOS due to numerous deficiencies in the school district’s program. In support, the Court upheld the finding of the IHO that “voluntary and nonspecific” training for school staff regarding the student’s program was likely to “produce regression” rather than progression.

Bev Nelson, as Mother and Next Friend of M.C., a Minor Child, et al. v. Board Of Education of Albuquerque Public Schools et al., 53 IDELR 329 (D. N.M. 2009). The parents of children with autism enrolled in the Albuquerque Public Schools alleged, in part, that the school district deliberately failed to provide training to teachers regarding the education of students with autism and as a result, students were asked to stay home or were sent home early. The parents alleged that the school district’s actions violated the Americans with Disabilities Act and Section 504 and constituted discrimination against children with autism compared to their non-disabled counterparts. The school district, however, was able to demonstrate that non-disabled children had more absences than the students with autism. Further, the parents were unable to produce any evidence showing the lack of training caused the student absences. Accordingly, the Court granted the school district’s motion for summary judgment.