

# **AUTISM: A CASE LAW UPDATE FROM THE COURTS THAT COUNT**

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## **LEARNING OBJECTIVES**

- 1. Participants will gain knowledge and an understanding of the specific challenges being asserted legally on behalf of children with autism.**
- 2. Participants will gain practical strategies for addressing programmatic and placement concerns for children with autism in the public school context.**

## **GENERAL**

This session provides a comprehensive analysis of autism litigation from the “Courts that Count”—the United States Circuit Courts of Appeals. The materials provide a summary of how the Courts have interpreted the IDEA’s requirements for programs for students with autism, including issues such as methodology, LRE, requests for reimbursement for unilateral private

placements by parents, appropriate evaluations, IEP development and more. A summary of practice pointers taken from the Court decisions is included.

## **SPECIFIC CASES**

### **Eligibility**

#### ***Fort Osage R-1 School District v. Sims, 56 IDELR 282 (8<sup>th</sup> Cir. 2011).***

The Circuit Court held that the failure to identify the student as having autism was, at most, a procedural error that did not deny FAPE. The court noted that the 31-page IEP adequately and thoroughly addressed the student's needs, present levels and goals. Key quote:

Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, we believe that the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs.

#### ***K.S. v. Fremont Unified School District, 56 IDELR 190 (9<sup>th</sup> Cir. 2011)(unpublished).***

The court upheld a summary judgment in favor of the district. The parents argued that the IEP was flawed because there was no specific IQ test, and thus the district should not have identified the student as cognitively impaired. But the court upheld the ALJ's conclusion that was based on expert testimony, alternative testing, progress reports and IEPs. Nor did the IEP violate the law simply because it did not depend on ABA techniques. The eclectic approach used here had been previously approved by the court.

*Comment: The child made slow progress in this case, but the ALJ and the district court found that this was acceptable in light of the student's autism and cognitive impairment.*

#### ***Weissburg v. Lancaster School District, 53 IDELR 249 (9<sup>th</sup> Cir. 2010).***

The District evaluated the student and recommended eligibility based on Mental Retardation but determined that the student did not display behaviors consistent with Autism. The Hearing Officer found that the student should have been eligible under both Mental Retardation and Autism; however, the Hearing Officer found that the student was not denied a FAPE in that he received the educational benefits to which he was entitled under the IDEA regardless of his eligibility classification.

The Ninth Circuit disagreed. California state law requires special education teachers to be certified to instruct students with particular disabilities, including Autism. If the District had found the student eligible as a child with Autism, the child had a legal right to instruction by a teacher with autism certification. The Court acknowledged that the child did not lose educational opportunities as a result of his misclassification because his teacher had dual

certification in mental retardation and autism. The Court said that the misclassification could have resulted in the child being instructed by a teacher who did not have autism certification. “Although [the child] 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 a placement, until his eligibility category was changed.” The Court concluded that the change in classification altered the parties’ legal relationship such that the parents were prevailing parties for purposes of attorneys’ fees. The Court clarified that a denial of FAPE is not necessary for prevailing party status and attorneys’ fees.

## IEPs

***Lathrop R-II School District v. Gray*, 54 IDELR 276 (8th Cir. 2010), cert. denied at 111 LRP 3206 (U.S. 2011).**

The Circuit Court affirmed a decision in favor of the school district. The administrative panel, after an 18-day hearing, had ruled in favor of the parents, but the Circuit Court held that the panel made several legal errors. Key quotes:

The IDEA entitled students with disabilities to a FAPE. Because each child’s needs and abilities are unique, however, the law does not mandate the acquisition of specific knowledge or “strict equality of opportunities or services.” [Cite to Rowley case omitted]. “The IDEA does not require that schools attempt to maximize a child’s potential, or, as a matter of fact, guarantee that the student actually make any progress at all” *citing CJN v. Minneapolis Public Schools*, 323 F.3d 630, 642 (8th Cir. 2003).

The panel had held that the IEP must incorporate baseline data. The Circuit Court said:

[The parent] has not cited any case in which any court has read such an implied requirement into the law.

The panel had held that the IEP did not sufficiently address behavioral issues, but the Circuit Court said:

The IDEA does not however 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.” [Emphasis in the court’s decision].

The IDEA does not mandate the inclusion in an IEP of a behavior plan, *see Renollet*, 440 F.3d at 1011, let alone behavioral improvements.

The Court noted that the school district had conducted a functional behavioral assessment and developed a behavior management plan, as well as including a “host of strategies” in the IEP to address the student’s disruptive behaviors. The IEPs also contained a sensory diet with strategies for keeping the student on task, and the student was assigned a one-to-one aide. The IEP also provided for staff training, personnel experienced in working with students with autism, and arranged for a consult by an autism specialist. This resulted in a finding that the student made progress.

*Comment: As is often the case, the court simultaneously says that the IDEA does not require certain things to be included in an IEP, and also says that this IEP included those things. The court pointed out that the IEP did contain baseline data and behavioral interventions.*

***New Milford Board of Education v. C.R., 56 IDELR 283 (3<sup>rd</sup> Circuit 2011)(unpublished).***

The 3<sup>rd</sup> Circuit affirmed the decision of the District Court that the New Jersey school district failed to afford the student with autism a free and appropriate public education when it refused to continue funding a home-based afterschool program.

On appeal, the school district argued that the district court had applied an incorrect legal standard in reviewing the ALJ’s decision. Specifically, the district stated that the district court should have applied the legal standard set forth in *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143 (10<sup>th</sup> Cir. 2008), which stands for the proposition that a student’s failure to generalize certain skills learned in school to the home environment is an insufficient basis for concluding that a school district was not providing the student with FAPE. The 3<sup>rd</sup> Circuit stated that the district’s argument mischaracterized the ALJ’s underlying determination (which was not based on a legal standard requiring generalization of skills). Further, the Court stated that the district court had applied the correct legal standard—whether the IEP is “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.”

The Court affirmed the decision of the district court, holding that the IEP was not appropriate under that standard. Key quote:

T.R.'s IEP was inadequate because the "complementary nature of the home program was required for [him] to receive the meaningful educational benefit mandated by the IDEA."... If a mentally disabled child continuously presents an adverse behavior that genuinely interferes with his ability to garner any real benefit from the education provided and the IEP does not adequately remedy this behavior, it stands to reason that the school district has failed to provide even a "basic floor of opportunity," much less the meaningful benefit required by our Court...Here, the record included substantial evidence that T.R.'s behaviors were not only detrimental to his home life, but also interfered with his learning. For example, T.R.'s aggressive behavior resulted in his avoidance of

educational tasks during his IEP program. For this reason, we agree that T.R. did not receive the meaningful educational benefit required by the IDEA.

***Park Hill School District v. Dass*, 57 IDELR 121 (8<sup>th</sup> Cir. 2011).**

The Court concluded that the absence of a transition plan and behavior strategies from the IEPs of twin boys was, at most, a procedural error that did not deny FAPE. In so ruling, the Court emphasized the parents' failure to cooperate with the school. Key quotes:

If D.D. or K.D. had attended a District school, and if the transition services or behavior interventions the District actually provided were alleged to deny a FAPE, that would raise an issue of substantive error. But in a case where the Parents refused to give the District an opportunity to implement the IEPs and private school reimbursement was the issue, the Panels' [ALJ] failure to recognize this critical distinction was an error of law.

"The IDEA was not intended to fund a private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations." *C.H. v. Cape Henlopen Sch. Dist.* 606 F.3d 59, 72 (3d Cir. 2010).

*Comment: The twin boys attended the public school for only 15 days before their parents pulled them out and sought reimbursement for private school. The subsequent due process hearing lasted 17 days—longer than the time spent in public school.*

***T.M. v. Gwinnett County School District*, 57 IDELR 272 (11<sup>th</sup> Cir. 2011)(unpublished).**

The Court upheld the decision of the district court that the high school student with autism was offered a free appropriate public education by the school district. Although the Court provided little reasoning of its own to support the affirmation of the district court's decision, the Court found no error in the district court's decision that the student had received an IEP that was individually tailored to meet the student's needs and that offered him FAPE. Key quote from the district court decision [*T.M. v. Gwinnett County School District*, 111 LRP 73091 (N.D.—GA. 2010)]:

The IEP team formulated numerous individualized and measurable goals for T.M. to work toward in his IEP placement. The IEP insured that T.M. would receive 20 hours of weekly special education instruction in a small group environment, 5 hours of weekly speech and language therapy, and 5 hours of weekly speech and language therapy, and 5 hours of weekly instruction, assisted by special education teachers, in a regular education classroom... This special education setting, one of several placement options considered by the IEP team at the IEP meetings, provided a "basic floor of opportunity" from which T.M. could work

toward the goals and objectives described in the IEP for the remainder of the 2009-2010 school year.

This IEP satisfied all of the applicable Cypress-Fairbanks factors. First, the IEP Team clearly established the IEP based on an individualized determination of T.M.'s specific needs and performance. Cypress-Fairbanks, 118 F.3d at 253. The team considered T.M.'s current difficulties with vocabulary and language processing, as well as his frustration with his regular education class... They discussed his need for a personal FM system, teachers trained on the device, speech therapy, interaction with regular education peers, and practice with specific math and reading comprehension... Based on T.M.'s performance and needs, the IEP team crafted goals targeted at improving T.M.'s areas of deficiency and geared towards preparing T.M. for a world outside secondary school.

The proposed placement would also have been administered in the least restrictive environment. Cypress-Fairbanks, 118 F.3d at 253. Plaintiff argues that Lindamood Bell's one-on-one teaching methods are best for T.M. Despite this, several evaluations (including Dr. Campbell's recent comprehensive evaluation) suggested that T.M. would benefit from interaction with peers. Thus, Lindamood Bell constituted a more restrictive environment than that necessary or appropriate for T.M. Nothing in any of T.M.'s evaluations indicated that he could not learn in an environment other than a one-on-one teaching situation. Thus, the IEP placement which was flexible enough to accommodate one-on-one instruction (in speech therapy sessions or with a paraprofessional during a regular education class, for example) or group instruction would place T.M. in the least restrictive environment conducive to his learning needs.

Additionally, the services that GCSO proposed pursuant to the IEP would have been provided in a "coordinated and collaborative manner by the key 'stakeholders' in T.M.'s progress. Id. At the IEP meeting, GCSO team members made every possible effort to collaborate with T.M.'s caregivers and private specialists in formulating the goals and objectives that T.M. would pursue at school. The proposal stemmed from a collaborative effort on the part of GCSO and T.M.'s caregivers, private specialists, and teachers at Lindamood Bell. The resulting IEP included school-based special education services that would permit GCSO educational professionals to instruct and further evaluate T.M. Further, T.M.'s Secondary Transition goals relied heavily on GCSO professionals as well as S.M. and D.M. to motivate and assist T.M. in striving for long-term career goals... Thus, the Court concludes that the IEP coordinated T.M.'s key stakeholders S.M., D.M., and GCSO to provide T.M. with a FAPE.

Finally, the Court concludes that it cannot assess whether T.M. received "positive academic and non-academic benefits" from the IEP in accordance with Cypress-

Fairbanks because neither party offered evidence as to the efficacy of the placement. Therefore, the Court does not rely on the absence of this factor to either support or reject the contention that GCSD provided T.M. with a FAPE through its IEP. However, the Court concludes that, because the proposed placement met the three applicable Cypress-Fairbanks factors, that placement was reasonably calculated to enable T.M. to receive educational benefits and GCSD discharged its duty under the IDEA to provide T.M. with a FAPE.

### **IEP Implementation**

#### ***Sumter County School District 17 v. Heffernan*, 56 IDELR 186 (4<sup>th</sup> Cir. 2011).**

The Court affirmed fact findings of the district court that the district failed to provide FAPE, largely due to a failure to provide all of the ABA therapy called for by the IEP. Testimony showed that no more than 10 hours per week, even though the IEP called for 15 hours of ABA therapy. This was accompanied by significant behavioral problems in the classroom. Moreover, the court held that the home placement provided by the parents was appropriate, even though it was more restrictive than the school placement. Key quote:

As the district court noted, however, this circuit has “never held that parental placements must meet the least restrictive environment requirement.” *M.S. ex. rel. Simchick v. Fairfax County School Board*, 553 F.3d 315 (4<sup>th</sup> Cir. 2009).

*Comment: The court also quoted from its own decision in the Carter v. Florence case that was later affirmed by the U.S. Supreme Court, noting that “mainstreaming is a policy to be pursued so long as it is consistent with the Act’s primary goal of providing disabled students with an appropriate education. Where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program.”*

### **Supplementary Aids and Services**

#### ***Blanchard v. Morton School District et al.*, 54 IDELR 277 (9<sup>th</sup> Cir. 2010)(unpublished).**

The court affirmed a summary judgment issued by the district court in favor of the school district. The lower court’s decision is at 52 IDELR 3. At issue was the parent’s request for a specific person to serve as the child’s aide. The court noted that there was no evidence of the inadequacy of the aide assigned to the child and the person recommended by the parent did not want the job. The circuit court noted the lack of evidence of deliberate indifference by the school district, which would be necessary to make a claim under the ADA or Section 504.

***J.D. v. Kanawha County Board of Education, 110 LRP 57258 (4<sup>th</sup> Cir. 2009), cert denied at 110 LRP 57264 (U.S. 2010).***

The 4<sup>th</sup> Circuit Court of Appeals affirmed the decision of the district court that the school district had developed an appropriate IEP for a child with autism. The parents had challenged the school district's program, arguing that the child required ABA and one-to-one assistance. However, the district court found that the child had made progress in his special day class without those services.

### **Least Restrictive Environment**

***R.H. v. Plano Independent School District, 54 IDELR 211 (5<sup>th</sup> 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 directly addressed a common point of contention in placement disputes involving preschoolers: if a public school does not or cannot offer a fully mainstreamed placement, then is the public school required to first try the private preschool program? Here is how the court dealt with this issue:

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. 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.

## Reimbursement for Private School Placement

***C.B. v. Garden Grove Unified School District*, 56 IDELR 121 (9<sup>th</sup> Cir. 2011), cert. denied at 111 LRP 68912 (U.S. 2011).**

This case addresses the second prong of the *Carter* test for reimbursement after unilateral placement. The facts established that the private placement satisfied some, but not all, of the student's educational needs. Based on this, the district argued that only partial reimbursement was called for, and that the district court had abused its discretion by ordering full reimbursement. The Circuit Court rejected that argument, noting that the issue, according to *Carter*, was if the private placement was "proper under the Act." The court held that it was, and that "proper" did not mean that all of the student's educational needs were met, but only that the services provided were "proper" and beneficial.

Key quote from the district court decision published at 53 IDELR 39 (C.D.—CA 2009):

RLC however, is not a properly certified nonpublic school. Rather, RLC is a nonpublic agency which is designed to provide supplemental services in addition to enrollment in a full-time school. RLC is not equipped to meet all of Student's needs. On the basis of this distinction between a nonpublic school and nonpublic agency, the ALJ determined that placement at RLC was not proper.

It is unclear whether this distinction between a nonpublic school and a nonpublic agency is material for a determination of reimbursement under the IDEA. This Court disagrees with the importance of this distinction made by the ALJ. While it is true that *Florence County Sch. Dist. Four v. Carter* and the other cases which consider this issue consider placement within nonpublic schools, the cases have found that educational benefit is the proper standard for placement, not State requirements or the strict guidelines of the IDEA. The Court in *Carter*, for example, noted that "[n]or do we believe that reimbursement is necessarily barred by a private school's failure to meet state education standards." Although reference is made to a private "school," the idea that proper placement is determined by educational benefit to the student rather than by adherence to strict standards is clear. Likewise, in *Carter v. Florence County School District*, 950 F.2d 156 (4th Cir. 1991), the court noted that several courts "have allowed reimbursement despite the absence of state approval of the private school chosen by the parents." *Id.* at 163. Rather, "when a public school system has defaulted on its obligations under the Act, a private school placement is proper under the Act if the education provided by the private school is reasonably calculated to enable the child to receive educational benefits." *Id.* Therefore, the yardstick by which to determine whether reimbursement is proper is whether the placement affords the student educational benefits.

Here, it seems clear that student received educational benefits from the services he obtained at RLC. While the District argues that this distinction between a nonpublic school and nonpublic agency should prevent reimbursement, the Court is not referred to authority for this proposition, nor are reasons given for such a distinction. Therefore, the Court is not persuaded that the distinction between a nonpublic school and a nonpublic agency is material to reimbursement in light of the facts of this case and the purposes of the IDEA. Accordingly this Court finds that the Guardian should be reimbursed for the full amount claimed for services provided by RLC to Student. Plaintiff counsel is to submit a proposed judgment for this Court's use.

***J.E. v. Boyertown Area School District, 57 IDELR 273 (3<sup>rd</sup> Cir. 2011)(unpublished).***

The 3<sup>rd</sup> Circuit upheld the decision of the district court that the proposed placement for a student with Asperger syndrome at the large public high school was appropriate despite the fears of the parents about bullying. The lower court found that the school was capable of dealing with bullying if it should occur. Key quote from that decision:

J.E. may face bullying, but a fair appropriate public education does not require that the District be able to prove that a student will not face bullying at a placement, as this is impossible.

On appeal, the 3<sup>rd</sup> Circuit noted that the fact that the student was doing well at the private school where he had been placed by his parents would not preclude the school district from transitioning the student to the public school placement. Key quote:

Contrary to J.E.'s and his parents' suggestion, [the IDEA] does not provide that a student's placement may not be changed if the student is meeting or exceeding his annual goals; instead, it says only that an IEP must be revised "as appropriate to address ... any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate ...." ...Moreover, J.E.'s and his parents' argument ignores a fundamental and well settled principle of the IDEA: a school district is required to provide a free appropriate public education, not to maximize each individual child's educational potential)... Thus, there is no legal support for the position J.E. and his parents urge. The relevant consideration is whether the School District has provided a free appropriate public education -- in other words, whether the IEP provides for an "education that would confer meaningful benefit," ...which is the standard that the District Court articulated and applied

## **Behavior**

***C.N. v. Willmar Public Schools, Independent School District No. 347, et. al., 53 IDELR 251 (8<sup>th</sup> Cir. 2010).***

The student's BIP allowed the teacher to use seclusion and restraint. The Court explained that the BIP set the standard for the teacher's use of seclusion and restraint. "Because [the IEP] authorized such methods, [the teacher's]- use of those and similar methods ..., even if overzealous at times and not recommended by [the independent evaluator], was not a substantial departure from accepted judgment, practice or standards, and was not unreasonable in the constitutional sense." Thus, the teacher's use of seclusion and restraint did not amount to a Fourth Amendment violation. The court also dismissed the IDEA claim against the district because the parents and child did not reside in the district at the time of the request for a due process hearing. This followed 8th Circuit precedent.

***E.H. and K.H. v. Board of Education of the Shenendehowa Central School District, 53 IDELR 141 (2<sup>nd</sup> Cir. 2009), cert denied at 110 LRP 18650 (U.S. 2010).***

Because the IEP identified techniques that his teachers could use to address his behavior issues, the lack of a formal BIP did not make the student's program deficient. The court also rejected the argument that the parents were denied the right to meaningful participation. Key quote:

The record reflects a robust, if acrimonious, dialogue between school personnel and plaintiffs, as well as plaintiffs' participation in many meetings aimed at developing educational programming for C.H. Thus, we identify no error, much less one capable of denying C.H. a FAPE.

The court also ruled in favor of the district on placement. A witness testified that a six-student classroom would be the "best" placement for a student. The court found that the six-student classroom would not have been the least restrictive environment as required by the IDEA and that the IDEA does not require district to provide the "best" possible placement so long as the district offers to provide an appropriate education which allows the child to receive meaningful educational benefit.

## **Compensatory Education**

***Ferren C. v. School District of Philadelphia, 110 LRP 40562 (3<sup>rd</sup> Cir. 2010).***

The 3<sup>rd</sup> Circuit affirmed a decision of the lower district court that a Pennsylvania school district was required to develop IEPs as compensatory services for a 24 year old student, and not simply pay for three years of services at a private school. The Court identified that "Ferren requires highly structured, systematic instruction that is specifically keyed to her particular educational needs. Ferren's parents lack the training and experience to develop a compensatory education program for her." Stating that the district court appropriately

determined that the statutory age bar did not limit the available form of relief to a monetary award of compensatory education, the 3<sup>rd</sup> Circuit upheld the decision that the court had the equitable power under the IDEA to order the school district to provide Ferren, who was past her twenty-first birthday, with annual IEPs and to serve as her LEA for the duration of her compensatory education. The 3<sup>rd</sup> Circuit concluded by stating that “any additional litigation over the adequacy of the compensatory education can be minimized if the school district simply complies with the requirements of the IDEA.”

### **Procedural Safeguards**

#### ***H. Berry v. Las Virgenes Unified School District, 54 IDELR 73 (9<sup>th</sup> Cir. 2010)(unpublished).***

In this case, the 9<sup>th</sup> Circuit Court of Appeals upheld a finding of the District Court that the school district had pre-determined the placement of a student with autism.

Earlier in the case, the 9<sup>th</sup> Circuit approved the standard for pre-determination and remanded the case back to the district court because that court failed to “make specific factual findings regarding the School District’s intent or state of mind prior to and during the IEP meeting.” Key quotes:

[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. In such case, regardless of the discussions that may occur at the meeting, the School District’s actions would violate the IDEA’s procedural requirement that parents have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child.” ...Thus, “[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.”

[T]he School District determined, prior to the IEP meeting, that the student plaintiff would be moved from his private school to a public school classroom for children with autism [and there was] evidence that the School District had a longstanding plan to return him to a public school placement.... [T]he School District assumed that the student would be placed in a public school program, stated that the meeting participants would discuss a transition plan, and did not discuss alternatives to the district’s proposed placements. This establishes that the School District desired that the student return to a public school and believed that its proposed placement was appropriate. It does not, however, necessarily establish that the School District was unwilling to consider other placements.

FN3 Although an educational agency is not required to accede to parents' desired placement, it must maintain an open mind about placement decisions and be willing to consider a placement proposed by the parents, as well as its own proposed placement.

On remand, the District Court found that the District had indeed predetermined the outcome of the IEP Team Meeting.

One of the requirements of a procedurally valid IEP meeting is meaningful participation by the parents. Here, although the student's mother attended the IEP and did participate in some parts of the discussion, the Court finds credible her explanation that her minimal participation was based on her sense of futility. She reasonably believed that the transition of her son from Elliott to Lupin Elementary was a foregone conclusion.

The Court concludes that, before the IEP meeting began, the District was not willing to consider alternative placements for the student. The Court does not believe the testimony of the district representatives to the contrary. The Court finds by a preponderance of the evidence that H.B.'s placement was predetermined and, accordingly, the procedural requirements of the IDEA were violated. The decision of the Hearing officer is reversed. 52 IDELR 163 (D.C.— Central Dist. CA 2008).

The 9th Circuit subsequently affirmed the District Court's decision that the school district predetermined the student's placement in a special day class.

### **Parental Rights and Responsibilities**

***French v. New York State Department of Education, et. al., 57 IDELR 241 (2<sup>nd</sup> Cir. 2011)(unpublished).***

The 2<sup>nd</sup> Circuit upheld the decision of the district court in favor of the school district and state, despite the fact that the student had not been served appropriately for several years. The court squarely attributed this to the parent: Key quote:

In our view, the District Court did not err in finding that the primary fault for the gap in Amy's education lies with her father and not with the District. As discussed above, French repeatedly rescheduled meetings and refused to allow special education teachers sent by the District to meet with Amy, thereby delaying the development and implementation of the District's IEPs. He refused to participate in CSE meetings or to recognize IEPs drafted throughout 1998 and 1999 because he insisted that the District conduct a comprehensive evaluation of Amy -- an evaluation French repeatedly obstructed when the District later sought to conduct it. Further, although the June 23, 1999 IEP was declared

invalid by the DoE, it was only one of several IEPs developed by the CSE that were in effect during the period between 1996 and 2003. If French had availed himself of those IEPs, Amy would not have been deprived of the opportunity for a FAPE.

It is clear from the record that French, by engaging in the obstructionist tactics discussed above, substantially prevented the District from implementing properly-developed IEPs that it was ready and willing to implement, and from developing revised IEPs that could have assuaged his concerns...We hold that it was the actions of Amy's father, rather than any procedural violation that may have been committed by the District, that prevented Amy from receiving a FAPE, and that she is therefore not entitled to the prospective equitable remedy of compensatory education.

***G.J. v. Muscogee County School District, 58 IDELR 61 (11<sup>th</sup> Cir. 2012).***

The 11<sup>th</sup> Circuit upheld an order by the district court that the parents of a grade schooler with autism and a brain injury effectively denied consent for the school district's proposed evaluation by placing so many conditions upon their consent. The 11<sup>th</sup> Circuit further upheld the district court's order requiring the parents to provide consent for the evaluation.

In the earlier case, the district court had ordered the parents to consent to an evaluation under terms set out by the court. Key quotes from the lower court's decision:

Though Plaintiffs argue that, for the most part, their addendum [containing the conditions to consent] merely tracks what is required by IDEA and the Family Educational Rights and Privacy Act of 1974, [cite omitted] some of their requirements are much more restrictive. For example, the addendum specifies who shall conduct the evaluation; it requires that the parents approve each of the specific instruments to be used for the evaluation; it requires that the evaluator meet with the parents before and after the evaluation; it requires that the evaluator discuss the evaluation results with the parents before the results are submitted to the IEP team; and it requires that the evaluation be used only for the purpose of developing G.J.'s IEP. In addition, Plaintiff added the condition that the testing must be done in L.J.'s presence.

The court then set out the conditions that would apply to the ordered evaluation:

1. The reevaluation may be used to update G.J.'s IEP or for any other purpose permitted by IDEA.
2. MCSD shall select the evaluator(s) to conduct the reevaluation. If the parties still agree on Dr. Lankenau, then Dr. Lankenau should be selected to conduct the reevaluation.

3. MCSD shall consult with Plaintiffs to determine a mutually agreeable date and time for the reevaluation.
4. MCSD shall disclose to Plaintiffs in writing all information relevant to the reevaluation, including but not limited to (a) the date and time, (b) the location, (c) the duration, and (d) the procedures, assessment tools, and strategies to be used.
5. The issue of whether G.J.'s parents are permitted to observe all or part of the reevaluation shall be left to the evaluator, and Plaintiffs shall be informed of the evaluator's decision prior to the reevaluation.
6. If the evaluator determines that additional tests are necessary, then MCSD shall seek consent for those tests in accordance with these requirements.
7. The reevaluation results and reports shall not be shared with any third parties without prior written consent from G.J.'s parents except to the extent allowed by FERPA and IDEA.
8. The parties shall receive the reevaluation results at the same time.
9. If G.J.'s parents disagree with the reevaluation results, they may request an IEE.

Finally, the 11<sup>th</sup> Circuit held that the issue raised by the parents, regarding whether the student required residential placement was "intertwined with the re-evaluation issue" and found no procedural defect with the fact that the school district would not consider residential placement until the reevaluation was completed. Key quote:

The school district could not make an informed decision about residential placement until it conducted a reevaluation, a process that could not take place until the parents consented.

### **Procedural Issues**

#### ***Payne v. Peninsula School District, et. al., 57 IDELR 31 (9<sup>th</sup> Cir. 2011).***

In an en banc decision, the 9th Circuit held that IDEA's exhaustion requirement is not jurisdictional, and does not apply to non-IDEA claims. Overruling its previous holding, the court held here that the exhaustion requirement is a "claims processing provision" that must be asserted as an affirmative defense. It is not a jurisdictional requirement. The court noted that the circuits were split on this issue, with the 4th and 8th viewing exhaustion as a jurisdictional requirement, while the 7th and 11th did not. With regard to non-IDEA claims, the court adopted a "relief based" approach, meaning that the focus should be on the relief sought, regardless of the statutory basis for the relief. Thus if the suit seeks relief for a denial of FAPE, the exhaustion requirement applies. But if the suit seeks relief that is not available under IDEA (such as general or punitive damages) and cites a separate statutory basis for that relief, then exhaustion is not required. Key quote:

We hold that IDEA's exhaustion provision applies only in cases where the relief sought by a plaintiff in the pleadings is available under the IDEA. Non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA.

...when determining whether the IDEA requires a plaintiff to exhaust, courts should start by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA. If it is not, then it is likely that Section 1315(2) does not require exhaustion in that case.

*Comment: This issue is now ripe for Supreme Court review.*

### **Miscellaneous**

#### ***Cedillo v. Secretary of Health and Human Services, 110 LRP 48873 (Fed. Cir. 2010).***

This case was one of approximately five thousand cases that were filed under the National Childhood Vaccine Injury Act of 1986 in the Court of Federal Claims, claiming a link between childhood vaccines and autism. The parents in this case alleged that the measles-mumps-rubella ("MMR") vaccine together with thimerosal-containing vaccines ("TCVs") caused their daughter to suffer from various medical conditions, including autism, an intellectual disability, developmental delay, seizures, and gastrointestinal issues. The Federal Circuit Court of Appeals affirmed the finding of the lower court that the parents failed to present persuasive evidence that the child's disabilities were caused by the vaccines.

#### ***Chavez v. New Mexico Public Education Department, 55 IDELR 121 (10<sup>th</sup> Cir. 2010).***

The court held that the state agency was not responsible for providing services directly to the student, despite a lengthy standoff between the parents and the school that resulted in a long period in which the student was not served.

*Comment: The case is noteworthy for its detailed analysis of the respective responsibilities of LEAs and the SEA. The court noted that there are situations in which the SEA can be ordered to provide services directly, but this case was not one of them.*

#### ***T.W. v. School Board of Seminole County, Florida, 54 IDELR 243 (11<sup>th</sup> Cir. 2010).***

The Circuit Court, in a 2-1 decision, affirmed a summary judgment in favor of a teacher and the school district after concluding that the student had not suffered a constitutional injury. The student alleged physical and verbal abuse by the teacher, much of which was confirmed by teacher aides who worked in the classroom. However, the court concluded that the instances of physical restraint, along with the profanity and verbal abuse, did not "shock the conscience" of the court, and therefore, did not violate the constitution. With regard to Section 504, the

court noted that it was not clear whether plaintiffs are required to prove intentional discrimination or deliberate indifference, but under either standard, this case failed. Key quote:

The record established that school administrators or the Professional Standards Division of the School Board investigated all complaints of abuse that parents lodged against Garrett and that they were unable to substantiate the complaints. Because it investigated the complaints, and was unable to substantiate them, the School Board did not know that it was substantially likely that a violation of federally protected rights would occur.

*Comment: The facts alleged in this case are very disturbing. The district court decision includes footnotes indicating that the teacher was charged with criminal child abuse in state court, and that there are 14 companion cases arising out of the same fact situation. This decision only addresses possible liability under the U.S. Constitution and Section 504. Other avenues of redress exist.*

#### **Summary and Practice Pointers:**

- **Courts look to how a child with a disability is served and not necessarily to the eligibility “label” that is provided**
- **However, in at least one case, the failure to properly identify a student as a student with autism resulted in a parent being identified as a prevailing party**
- **Evaluation is crucial in determining programming and placement; the failure by a parent to provide consent for an evaluation or reevaluation reduces the parent’s likelihood of success if they challenge the school district’s program**
- **IEPs must be crafted based on the individual needs of each student. An eligibility of autism should not result in a one size fits all program**
- **In home services and training are frequently considered necessary components of FAPE for students with autism**
- **More cases regarding students with autism have been taken up by the 9<sup>th</sup> Circuit Court of Appeals than in other jurisdictions**
- **Failure to implement IEP services can result in a denial of FAPE and resulting school district liability**
- **Compensatory services are based upon the individual needs of each student and may result in services following a student’s eligibility for same based upon age**
- **Cases are being brought successfully under the Constitution, Section 1983, Section 504 and the ADA for issues related to special education programs; parents may not have to exhaust administrative remedies before seeking redress in federal court for some of these claims**