WHAT'S HAPPENING IN SPECIAL EDUCATION LAW?
THE YEAR IN REVIEW

UTAH INSTITUTE ON SPECIAL EDUCATION LAW AND PRACTICE

Ogden, Utah
August 8, 2013

Julie J. Weatherly
Resolutions in Special Education, Inc.
6420 Tokeneak Trail
Mobile, AL 36695
(251) 607-7377
JJWEsq@aol.com
Web site: www.specialresolutions.com

Wow! It's been another active year so far in the area of special education law! Although the IDEA has not changed since the 2004 Amendments, there is an enormous amount of litigation going on, as courts and agencies attempt to interpret and apply the law's provisions. In this session, Julie will update the audience on significant special education "legal happenings" during the past year or so, including court decisions and U.S. agency interpretations.

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Herrera v. Hillsborough Co. Sch. Bd., 113 LRP 25699 (M.D. Fla. 2013). Parents have pleaded viable claims under Section 1983, 504 and the ADA, and the district's motion to dismiss is denied. Parents' allegations that district employees knew that their child with a neuromuscular condition had difficulty holding her head upright supported their claim that the district was deliberately indifferent to the student's need for proper positioning on the bus. According to the parents, the district had a history of disregarding the safety of disabled students both before and after the student's death, including sending home a child with an intellectual disability with an unexplained fractured femur, leaving a young child alone on the bus for six hours, letting an LD student off the bus at the wrong location leaving the student to be struck and killed by a car, etc. In addition, the district had specific knowledge of this student's difficulty in holding her head upright and her most recent IEP recognized the need for proper positioning. Further, the parent and school employees made numerous reports about staff members' failure to position the student properly to prevent an airway obstruction. The parents also alleged facts that demonstrate that the numerous incidents and complaints about the transportation staff's failure to properly handle disabled students put the district on notice that its transportation staff needed additional or different training. This alleged failure to train could qualify as a municipal policy of deliberate indifference.

B. L.L. v. Tuscaloosa City Bd. of Educ., 60 IDELR 133 (N.D. Ala. 2013). Where school personnel tried to address the behaviors of a teenage boy who sexually assaulted an 8th grader with multiple disabilities, the district is entitled to judgment on the 504, Section 1983 and Title IX damages claims. Liability for disability discrimination and for sexual harassment both require a showing of deliberate indifference on the part of school personnel. The question is not whether the district knew the boy posed a risk of harm to students in the special education school, but whether the district made a deliberate choice not to take any action in response to a threat. Here, when the district learned of the boy's previous attempt to sexually assault a classmate, it suspended him from school and met with his mother to discuss behavioral interventions. Although the responses were ultimately ineffective, it cannot be said that the district was deliberately indifferent because it did not make a deliberate choice not to take any action. As for the 1983 claim, the district could not be responsible for harm caused by a third party unless it affirmatively placed the student in a dangerous situation, which it did not do here.

C. Skinner v. Clark Co. Sch. Dist., 61 IDELR 6 (D. Nev. 2013). Case for money damages under Section 504/ADA is dismissed based upon the complaint's failure to state a claim. Allegations that a bus driver permitted and encouraged an aide to hit and shake a 10-year-old child with bipolar disorder, fasten her to the seat with a belt and scream at her were not enough to support the request for money damages. A parent seeking money damages under 504/ADA must show that the district intentionally discriminated against the student on the basis of disability, that the district knew about the student's need for an accommodation and failed to consider the student's unique needs to ensure any accommodations offered were appropriate. This parent's claims did not mention that the district knew that the student needed accommodations or that the district intentionally discriminated or was deliberately indifferent.

D. D.E. v. Dauphin Sch. Dist., 60 IDELR 98 (M.D. Pa. 2013). Although former LD student went without appropriate special education services for the first 9 years of his public school career, he is not entitled to money damages under Section 504/ADA. Although the district delayed in evaluating the student, it ultimately did conduct evaluations and found the student eligible for speech-language services and the district developed IEPs for the student each year thereafter. While the district misclassified the student for two years as having an intellectual disability, neither the misclassification nor the student's improper placement in a life skills program demonstrated the necessary bad faith or gross misjudgment on the part of the district. In fact, as soon as the student's mother notified the district, the district apologized, was not uncooperative and suggested it would correct the error. While the extended failure to provide FAPE may have amounted to negligence, it did not constitute intentional discrimination.

E. Sagan v. Sumner Co. Bd. of Educ., 61 IDERL 10 (M.D. Tenn. 2013). Where the parents of four disabled preschoolers had no evidence that their children suffered serious or lasting harm as a result of a special education teacher's alleged abuse, their initiation of claims under Section 1983 against the school district amounted to a "truly egregious case of misconduct." Thus, the school district may recover a total of $72,118 in attorney's fees with respect to those four cases, but no fees with respect to the fifth one, where the parents presented a plausible claim that the teacher's sticking sharp objects under the child's fingernails "to try to teach her a lesson" amounted to a violation of the child's constitutional rights. In the remaining four cases, however, the parents and their attorneys had no reason to believe the teacher's actions rose to that level. By the time discovery was completed, it should have been apparent to the parents that the continuation of their lawsuits "based on these flimsy allegations had become unreasonable and their claims had tipped into the territory of frivolity."

F. Fulbright v. Dayton Sch. Dist. No. 2, 61 IDELR 47 (E.D. Wash. 2013). While the district may have been negligent when it canceled the services of the student's 1:1 paraprofessional, it was not responsible under Section 1983 for a series of sexual

assaults the student experienced while traveling to and from her sheltered work experience. The parents failed to allege deliberate indifference on the part of the school, which is "a very high standard of fault" required to sustain a cause of action for damages under Section 1983. Under Section 1983, the parents must show that the district recognized the existence of an unreasonable risk and actually intended to expose the student to that risk without regard for the consequences. While the parents here alleged that they notified the district about the student's sexual harassment by a male passenger and asked the district to ensure that she was not left alone again, the district only had knowledge of the sexual harassment. The parents did not show that the district was aware of the possibility of a sexual assault or that it intentionally exposed the student to the risk. While the district's actions might constitute "gross negligence," they do not rise to the "markedly higher standard of deliberate indifference." Thus, the parents' Section 1983 claims are dismissed.

G. I.A. v. Seguin Indep. Sch. Dist., 59 IDELR 133, 881 F.Supp.2d 770 (W.D. Tex. 2012). While some mistakes may have been made by district employees in their attempts to include a student with a mobility impairment, they did not rise to the level of bad faith or gross misjudgment required to obtain relief under Section 504/ADA. While the student declined to participate in a band concert after arriving at the concert location and finding that the stage was not wheelchair accessible, and the student missed a PE swimming class because the bus used to transport students to the pool did not have a wheelchair lift, this reflected a "negligent lack of prior planning," rather than an intentional effort to exclude him. As for the student's exclusion from a second swimming class based upon concerns about his ability to participate safely, the district had the right to seek information about any medical issues that might affect the student's participation. The fact that the district gave the guardian a form titled "Medical Excuse from Physical Education" rather than a general medical evaluation form, did not in itself constitute disability discrimination.

H. Atherton v. Norman Pub. Sch. Dist., 60 IDELR 37 (W.D. Okla. 2012). Parent's Section 1983 claim for violating her child's substantive due process rights may proceed where the parent alleged that a security guard's decision to pepper-spray her autistic child when he brandished a cake spatula stemmed from the district's failure to adequately train and or supervise its employees. According to the parent, the student was using the spatula as a pretend sword when the guard pepper-sprayed him. To establish municipal liability under Section 1983, a plaintiff must show that a municipal policy or custom caused the injury, and failure to adequately train or supervise employees may be sufficient to show a policy or custom, as long as the failure results from deliberate indifference. At this early stage in this case, the allegations were sufficient to show that school officials may have exhibited deliberate indifference in their failure to properly train or supervise the security guard. Even where there is no pattern of unconstitutional behavior, deliberate indifference can be shown if a violation of federal rights is a highly likely result of a district's action or inaction, "such as

when it fails to train an employee in specific skills needed to handle recurring situations." Here, the parent might be able to show that the failure to train the security guard to respond to the behavior of students with disabilities, or the failure to supervise his responses, constituted deliberate indifference. "Albeit barely," the plaintiff has set forth sufficient factual allegations to properly plead a Section 1983 cause of action, so the district's motion to dismiss is denied.

BULLYING AND DISABILITY HARASSMENT

A. Long v. Murray Co. Sch. Dist., 113 LRP 25671 (11th Cir. 2013) (unpublished). School district was not deliberately indifferent to peer harassment of student who hanged himself, which is the standard that applies in Section 504 and ADA cases. While the school district should have done more to protect a student with Asperger's who committed suicide, there was insufficient evidence of deliberate indifference. The district responded to the complaints it received in a manner that was not clearly unreasonable, and it neither caused additional harassment nor made an official decision to ignore it. On that basis, the dismissal of the parents' Section 504 is upheld. While there was little question that the student was severely harassed based on his disability and the district should have done more to stop it and prevent future incidents, the Supreme Court requires a finding that the district deliberately ignored specific complaints. Here, however, the district disciplined the perpetrators and developed a safety plan that allowed the student to avoid crowds in the hallways and to sit near the bus driver. In addition, the district's decision on at least two occasions to meet with the perpetrators and victim together was not clearly unreasonable, and there were numerous cameras and teachers monitoring the hallways. Though the parents claimed that the student continued to be harassed despite these efforts, there was no evidence that any single harasser repeated his conduct once the district addressed it. The parents pointed out that the day after the student's suicide, students wore nooses to school and wrote messages in the bathroom stating "it was your own fault" and "we will not miss you" and that this was an indication of the culture of harassment and of the district's failure to address it. While the district never held any assemblies to discuss bullying and harassment, it took several steps to address the school climate—its code of conduct contained an anti-bullying policy that staff members were expected to read and it conducted a program in which teachers met with small groups of students to instruct them on peer relationships and review the code of conduct. Finally, the district conducted a school tolerance program and implemented a program aimed at improving overall student behavior. Without evidence of deliberate indifference, the parents' case could not proceed and the district court's decision is affirmed.

B. Moore v. Chilton Co. Bd. of Educ., 60 IDELR 274 (M.D. Ala. 2013). Parent's money damages action may proceed where they allege that the district took no action to address severe harassment that resulted in suicide by a student with growth and eating disorders. The parents stated that the student's growth disorder, Blount's disease, made her appear bow-legged, and that she was

overweight due to an eating disorder. The parents alleged that the student was harassed on a daily basis, including being called cruel names and pushed and locked into a closet on one occasion. In addition, she was subjected to "pig races," a school bus game in which a male grabs an "ugly," "fat" girl and kisses her in front of jeering students. To establish their discrimination case, the parents must show that: 1) the student had a disability; 2) she was harassed based upon that disability; 3) the harassment was sufficiently severe or pervasive that it altered the condition of her education and created an abusive educational environment; 4) the district knew about the harassment; and 5) the district was deliberately indifferent to it. Because the district appeared to assume the first three elements were met, the 4th and 5th are addressed. The parents adequately alleged that the district knew about the harassment based upon student complaints about it and that administrators, teachers and other staff members witnessed it first-hand and in plain view. In addition, it was sufficient that the parents contended that the district did nothing to stop the harassment, and that, when the student complained, teachers accused her of having a "bad attitude." Thus, the parents' discrimination claims will not be dismissed at this stage.

C. Sutherlin v. Independent Sch. Dist. No. 40, 61 IDELR 69 (N.D. Okla. 2013). Where the parents of a student with Asperger syndrome alleged that the school district disregarded dozens of reports of verbal and physical harassment, their claims under Section 504 and the ADA will not be summarily dismissed as sufficient claims are stated. The parents' allegations connect the alleged harassment to the student's disability since the complaint alleged that the student was "labeled" as having poor social skills and was mocked for his difficulties with socialization. In addition, the complaint alleged that other students called him names such as "retard," "crazy," "creepy," and "freak," which are names that can reasonably be inferred to make a reference to his social difficulties. In addition, the parents alleged that the district had reports of at least 32 incidents of disability-related harassment against their son between 2010 and 2012 but failed to investigate them or take action to prevent further bullying.

D. D.A. v. Meridian Jt. Sch. Dist. No. 2, 60 IDELR 192 (D. Idaho 2013). Case against district will not be dismissed where there is a genuine dispute as to whether school officials knew the student with Asperger syndrome was being harassed and failed to respond. According to the parents, the student was relentlessly bullied verbally and physically and was called names, such as "retard" during gym and had his clothes stolen. To establish discrimination for disability-based bullying, a parent must show: 1) the harassment was sufficiently severe or pervasive that it altered the condition of the student's education and created an abusive educational environment; 2) the district knew about the harassment; and 3) the district was deliberately indifferent. Where testimony that the student's out-of-school behavior (such as burning his parents' house down) was triggered at least in part by the bullying was sufficient to show that the harassment was severe and denied him equal access to education. In addition, there was evidence that the P.E. teacher witnessed the bullying and that the student's mother raised the issue

during school meetings. Further, after the vice principal learned of an incident, the school undertook little investigation and failed to follow its own anti-bullying procedures.

E. Morton v. Bossier Parish Sch. Bd., 60 IDELR 220 (W.D. La. 2013). Exhaustion of administrative remedies is not required in a 504/ADA case alleging that district inadequately responded to disability harassment of a teenager with diabetes, depression and bipolar disorder. Where the student victim committed suicide, a "common-sense analysis" would make exhaustion futile or inadequate since the district cannot now craft an administrative remedy to alleviate the alleged education deficiencies that the student may have experienced prior to her death.

F. Phillips v. Robertson Co. Bd. of Educ., 59 IDELR 227 (Tenn. Ct. App. 2012). Based upon the district's negligence and failure to supervise and disseminate information, trial judge's order that the district pay $300,000 to a student with Asperger syndrome who was left legally blind in one eye because of a class bully is affirmed. In this case, a private psychologist diagnosed the student with Asperger syndrome and sent a letter to the school stating that the student would need help with "social negotiation" and that he was likely to be bullied. In addition, the evidence was clear that the parent was constantly reporting bullying incidents and requesting help. While the district did not find the student eligible for special education, it developed modifications addressing his social skills weaknesses, including preferential seating, and a card system designed to signal the teacher when he was being bullied or felt stressed. After the teacher left the student's classroom unsupervised one day, however, the student was struck in the eye by a classmate, and he sustained permanent damage. Schools have a duty to safeguard students from reasonably foreseeable dangerous conditions including the dangerous acts of fellow students. Clearly, the incident was foreseeable based on the school's awareness of the student's vulnerability to bullying, the parent's and student's prior complaints of bullying and teasing, his social skills deficits and the nature of his disability. Even if it were true that the particular classmate had not bullied him in the past, the district had reason to expect that the student would be bullied by someone. The district breached its duty to protect the student not only by leaving him unsupervised, but also by failing to disseminate information regarding his disability. Importantly, the teacher testified that she never received formal information about the nature of the student's disability, how the condition affected him, and what might trigger symptoms. Instead, she learned through informal "water fountain" talk with other teachers that the student had Asperger syndrome and was allowed to have preferential seating. Nor was she provided the information from the private psychologist. Finally, she was not aware of the majority of the child's classroom accommodations. Thus, the injury would not have occurred had the teacher been properly informed.

G. Estate of Lance v. Kyer, 59 IDELR 226 (E.D. Tex. 2012). Although the district's response to peer harassment in its schools was inadequate overall, the parents of a 9-year-old disabled boy who hanged himself in a school restroom cannot prevail

on their Section 504 and Title II claims. Assuming the parents' allegations to be true, the district's alleged failure to investigate multiple incidents of bullying was unrelated to the student's status as a child with a disability. While the student's death was tragic, it did not result from the district's disregard of harassment against students with disabilities. Rather, the record reveals that district personnel had a consistent policy of ignoring bullying against *all* students and that is not within the court's jurisdiction. Even if the district wrongfully labeled the student as a "troublemaker" and chose to adopt the alleged offenders' version of events as the parents claimed, there was no evidence that the district did so because the student had disabilities. As a result, the district is entitled to judgment on the parents' disability discrimination claims. In addition, judgment is granted in favor of the district on the parents' Section 1983 claims, because the district does not have a constitutional duty to protect the student from third parties.

H. Galloway v. Chesapeake Union Exempted Village Schs. Bd. of Educ., 60 IDELR 13 (S.D. Ohio 2012). Claims of two school districts that the alleged bullying of a student with Asperger Syndrome, ADHD, SLD and a seizure disorder was not linked to the student's disabilities or gender are rejected. According to the complaint, other students teased and mocked him on a daily basis and sometimes physically assaulted him, but teachers overlooked the conduct and sometimes perpetrated it. When he and his parents complained to school officials, they took no action, although in one case an assistant principal allegedly told the student that he needed to learn to "work it out" after his classmates encouraged him to hang himself. To establish a 504 claim based on bullying, a plaintiff must show that he was harassed because of disability and, here, the student identified several incidents that were disability-based. For example, he alleged that his teacher often questioned whether he actually had a seizure disorder in front of the entire class, and when he later had a seizure, other children mimicked him and called him "seizure boy," all with the teacher's knowledge. The parents' numerous complaints and the student's own attempts to seek help, adequately demonstrated that the districts were aware of the harassment.

RETALIATION

A. A.C. v. Shelby Co. Bd. of Educ., 60 IDELR 271, 711 F.3d 687 (6th Cir. 2013). Retaliation claims under 504/ADA should not have been dismissed by the district court where a reasonable jury could conclude that the principal reported the parents to child welfare authorities in retaliation for their requests for accommodations for their diabetic child. The elementary school principal testified that she was genuinely concerned by the fluctuations in the second-grader's blood glucose levels, and that was why she reported that they failed to monitor the student's glucose levels and wanted "something horrible" to happen to the student at school so that they could file a lawsuit. However, the parents engaged in protected activities when they asked multiple times in one week that the student's blood testing occur in her classroom rather than the school clinic. The district was aware of that activity and took adverse action when it reported

the parents to child welfare authorities. The timing and the content of the initial and follow-up reports raise questions as to the principal's motives and should be heard by a jury. Moreover, while the district offered 10 reasons to show that the principal's reports were legitimate, the parents raised questions as to whether each of those reasons was a pretext for retaliation. Thus, the district court erred in determining that the district's mandatory reporting duty under Tennessee law shielded it from liability and the case is remanded for further proceedings.

RESTRAINT/SECLUSION IN SCHOOLS

A. Muskrat v. Deer Creek Pub. Schs., 61 IDELR 1 (10th Cir. 2013). Even if school district employees violated district policy when placing a child with developmental disabilities in a timeout room, their conduct did not rise to the level of violating the child's constitutional rights; thus, the parents did not establish liability under Section 1983. To establish a constitutional violation, the parents needed to show that the staff members' conduct was so severe, so disproportionate to the need presented, and so inspired by malic or sadism that it shocked the conscience. The parents failed to show that the student's placement in the timeout room following an incident in which he overturned chairs and knocked items form tables amounted to conscience-shocking behavior. Similarly, three alleged instances of abuse that included a "pop" on the cheek, a slap on the arm, and a few minutes of physical restraint did not amount to a brutal or inhumane abuse of power. While the court may rightly condemn this conduct, it does not rise to the level of a constitutional tort.

B. J.P.M. v. Palm Beach Co. Sch. Bd., 60 IDELR 158 (S.D. Fla. 2013). Although the district omitted some critical information when documenting its use of restraint with an autistic middle schooler, there is no evidence that the district intentionally aggravated the student's behavioral problems by using an inappropriate intervention. The parents' failure to demonstrate intentional discrimination or conscience-shocking behavior entitles the district to judgment on their Section 1983, Section 504 and Title II claims. According to the parents, the district discriminated against the student by restraining him 89 times in 14 months, when it was clear that the use of physical restraint was causing the student to regress behaviorally. While the district's records did not always identify the behavior that prompted staff members to use physical restraint, the parents bear the burden of proving that staff members were deliberately indifferent to the student's needs. "[The district] records show, for the most part, that [the student] was restrained due to his own aggressive or self-injurious behavior," and "[t]he records reveal nothing regarding the intent or knowledge of each person who restrained [the student]." In addition, neither the district's failure to fully document all incidents of restraint nor its failure to conduct an FBA after the first few incidents amounted to the type of "conscience-shocking" behavior that gives rise to liability under Section 1983. Thus, summary judgment is granted in favor of the district on all of the parents' federal claims.

C. Ebonie S. v. Pueblo Sch. Dist. 60, 59 IDELR 181, 695 F.3d 1051 (10th Cir. 2012), cert. denied, 113 LRP 10906 (2013). Teacher's use of a U-shaped desk designed with a wooden bar across the back to prevent the student from exiting the desk by pushing the chair out did not violate the student's right against an unreasonable seizure under the Fourth Amendment or her Fourteenth Amendment due process and equal protection rights. Because the kindergartner with Down syndrome and other disabilities was able to crawl over or slide under the writing surface of the "wraparound" desk, her placement in it did not violate her constitutional rights. A limitation on movement in the school setting amounts to a "seizure" under the Fourth Amendment only if it significantly exceeds that inherent in every-day compulsory school attendance. Although the U-shaped desk had a restraining bar across the back, the bar did not force the child to sit in any unusual manner. Instead, it merely required her to remain in her seat in the classroom setting. Coupled with the fact that district employees never attached restraint mechanisms to the child's body, the use of the desk did not amount to a seizure under the Fourth Amendment or a violation of her 14th Amendment right to be free from bodily restraint. Similarly, the district court's judgment in favor of the district on the parent's Equal Protection claim is affirmed, based upon the fact that the use of the desk was a rational response to the child's "unique pedagogical challenges."

CHILD-FIND/IDENTIFICATION

A. A.G. v. Lower Merion Sch. Dist., 59 IDELR 279 (E.D. Pa. 2012). Student's claims for damages under Section 504/ADA are dismissed for alleged misidentification of student as SLD when she was not actually disabled and for alleged discrimination on that basis. The student failed to demonstrate deliberate indifference, bad faith or gross misjudgment on the part of the district. The SLD evaluation conducted in 2003 complied with all IDEA procedures and the student's own expert was "equivocal" about whether the district's evaluation was incorrect. Although the expert did not agree that the student was SLD, she conceded that it could be argued that she met part of the criteria for SLD. While the district's psychologist may have erred in recommending in 2008 that the student be classified as OHI when she did not meet the definition, there is no evidence that the psychologist acted with deliberate indifference, bad faith or gross misjudgment that could lead to money damages under Section 504/ADA.

EVALUATIONS

A. Letter to Gallo, 113 LRP 19171 (OSEP 2013). Whether school districts are required to obtain consent from parents before collecting academic functional assessment data within an RTI model depends on the purpose of the data collection. Parental consent is required when an FBA is being conducted as part of an initial evaluation or reevaluation of a child to determine if the student qualifies as a child with a disability under IDEA. Thus, in a typical first-tier scenario, where any such data collection would not be focused upon the educational or behavioral needs of an individual child, consent would not be

required. "However, parental consent would be required if, during the secondary or tertiary level of an RTI framework for an individual student, a teacher were to collect academic functional assessment data to determine whether the child has, or continues to have, a disability and to determine the nature and extent of the special education and related services that a child needs." However, a district would not be required to obtain parental consent to review data collected during RTI as part of an initial evaluation or reevaluation because the data would be considered "existing evaluation data" under the IDEA regulations.

B. J.B. v. Lake Washington Sch. Dist., 60 IDELR 130 (W.D. Wash. 2013). School district has a legal right to evaluate an interstate transfer student's need for special education services. Both the IDEA and Washington law give the district the right to evaluate whether the student had an ongoing need for special education services and neither requires the district to prove the reasonableness of the proposed evaluation. Nonetheless, the evaluation data from the student's California district supported the new district's request, as the most recent evaluation in California resulted in a finding that the student was not eligible for services.

C. T.J. v. Winton Woods City Sch. Dist., 60 IDELR 244 (S.D. Ohio 2013). Independent psychologist's use of "facilitated communication" approach when evaluating a teenager with severe disabilities renders the evaluation unreliable. According to the results of the independent evaluation, the student was capable of doing academic work at the 9th grade level, which contrasted sharply with the district's evaluation results showing that the student has a full-scale IQ of 33 and performs at the kindergarten level in math and a 1st grade level in reading. Clearly, the parents' psychologist physically supported the nonverbal student's hand/wrist during testing, which raises questions as to whether the student independently gave correct answers. In addition, the psychologist's expertise is in cognitive abilities and not behavior or communication; thus, the private evaluation could not be used either to rebut the district's measure of the student's cognitive ability or to question the behavioral goals contained in the district's proposed IEP.

INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs)

A. Phillip C. v. Jefferson Co. Bd. of Educ., 60 IDELR 30, 701 F.3d 691 (11th Cir. 2012). The U.S. Department of Education did not exceed its authority when it promulgated the IDEA regulation requiring publicly funded IEEs. While the statute does not explicitly provide for IEEs "at public expense," it would make little sense for the statute to include the right to an IEE without the attendant right to funding from a school district. "We cannot conclude that Congress extended to parents the 'opportunity…to obtain an independent educational evaluation' at their own expense merely to secure for parents what they already could obtain without the statute." Thus, the district court did not err in requiring the school board to reimburse the parents for the IEE they obtained for their child.

B. M.Z. v. Bethlehem Area Sch. Dist., 60 IDELR 273 (3d Cir. 2013) (unpublished). Where the hearing officer determined that the district failed to conduct an appropriate reevaluation, the IDEA provides only one option: to order an IEE at public expense. Thus, the hearing officer erred in ordering as a remedy only that the district conduct formal classroom observations and seek parent and teacher input. The district's argument that the hearing officer did not find its reevaluation to be inappropriate is rejected, because the record clearly stated that the assessment tools and strategies were not "sufficiently comprehensive" and it failed to consider the student's ability to apply pragmatic language skills in peer settings on a daily basis. In addition, the reevaluation failed to consider the student's upcoming transition to high school. Thus, the district court correctly ordered an IEE at public expense.

C. M.V. v. Shenendehowa Cent. Sch. Dist., 60 IDELR 213 (N.D. N.Y. 2013). As an initial matter, the parent does not have the right to an IEE at public expense because she did not disagree with the district's evaluation. Rather, she requested an IEE because she was dissatisfied with the IEP proposed for her son. Even if she had the right to an IEE, however, she failed to show that the district's $1,800 cap on IEEs was unreasonable. Between July 14, 2010 and August 18, 2010, at least 6 public and private clinics in the parent's geographic area were willing to conduct an IEE for $1,800. Although the district was willing to exceed the $1,800 cap if the parent demonstrated the need for an exception, the parent's wish to use a particular neuropsychologist did not amount to "unique circumstances" that would warrant the excess cost. Parent's failure to contact any of the psychologists or neuropsychologists on the list of qualified evaluators supplied by the school district defeated her challenge to the $1,800 cap.

D. C.W. v .Capistrano Unif. Sch. Dist., 59 IDELR 163 (C.D. Cal. 2012). Parent's vague objections to the district's reevaluation justified the district's 41-day delay in requesting a due process hearing. Where the parent did not challenge any specific component of the district's evaluation and merely told the IEP team that it was "stupid," the district had to review the entire report to determine whether it should request a hearing to defend it. "Such detailed review obviously takes time and money" and the parent "could have reduced this time and money by identifying her specific objections to the disputed report."

ELIGIBILITY

A. Torda v. Fairfax Co. Sch. Bd., 61 IDELR 4 (4th Cir. 2013) (unpublished). The district did not deny FAPE to a teenager with Down syndrome based on its failure to list auditory processing disorder as his secondary disability in his IEP. This is so, because the IEP addressed all of the student's needs, regardless of his classifications. Teachers gave detailed testimony on how they simplified lessons, paired visual material with oral instruction and checked for comprehension.

Thus, there is no reason to disturb the district court's decision that the student received FAPE.

B. Shafer v. Whitehall Dist. Schs., 61 IDELR 20 (W.D. Mich. 2013). District staff committed a procedural error by deciding, prior to the IEP team meeting, that the student's IEP would classify him primarily as SLD and secondarily as OHI and speech-language impaired and that he would not be classified as autistic. However, a procedural error constitutes a denial of FAPE only if it impedes the child's right to FAPE, significantly impedes the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or causes a deprivation of educational benefits. The ALJ was correct in distinguishing between predetermination of a student's classification and predetermination of an IEP and correctly concluded that the procedural misstep was not fatal because the IEP nevertheless put the student in other eligibility categories and provided him with appropriate services. In addition, the evidence reflected that the parent fully participated in the development of the IEP and the team considered the relevant data, creating an IEP that addressed the student's unique needs. Thus, the failure to classify the student as autistic did not amount to a denial of FAPE.

C. G.H. v. Great Valley Sch. Dist., 61 IDELR 63 (E.D. Pa. 2013). Although student had violent tantrums at home, she had few conflicts at school, according to her teachers. Based upon her solid academic performance and generally good behavior at school, her behavioral problems do not adversely affect educational performance sufficient to make her eligible as a student with an emotional disturbance. Neither her grades nor her state assessment results reflect any negative impact of her behaviors at school, even though her behavior at home included flying into violent tantrums, including one where she grabbed a butcher knife and stabbed a chair. In addition, her teachers testified that she was self-controlled at school. Further, her private therapy exclusively focused on issues at home, including issues related to her being adopted and difficulty getting along with her mother and sister. Finally, while her hospitalizations required a month-long absence from school, that in itself did not demonstrate an adverse educational impact. In fact, her teacher indicated that following absences, she needed no time to catch up.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Doug C. v. Hawaii Dept. of Educ., 113 LRP 25045 (9th Cir. 2013). Education Department's failure to reschedule an IEP meeting when requested by the parent amounts to a denial of FAPE to the student. Thus, the case is remanded to the district court to determine the parent's right to private school tuition reimbursement. Where the ED argued that it had to hold the IEP meeting as scheduled to meet the student's annual review deadline, the argument is rejected because the father was willing to meet later in the week if he recovered from his illness and the ED should have tried to accommodate the parent rather than

deciding it could not disrupt the schedules of other team members without a firm commitment from the parent. In addition, the ED erred in focusing on the annual review deadline rather than the parent's right to participate in IEP development. With it is acknowledged that the ED's inability to comply with two distinct procedural requirements was a "difficult situation," the ED should have considered both courses of action and determined which was less likely to result in a denial of FAPE. Here, the ED could have continued the student's services after the annual review date had passed and the parent did not refuse to participate in the IEP process. Given the importance of parent participation in the IEP process, the ED's decision to proceed without the parent "was not clearly reasonable" under the circumstances.

B. P.K. v. New York City Dept. of Educ., 113 LRP 21695 (2d Cir. 2013) (unpublished). Parents are entitled to reimbursement for the child's private placement because the proposed IEP did not contain that one-to-one speech-language services that the child required to progress. It is not sufficient that school witnesses testified that such services would have been provided if the student had come to the school's program. Courts hearing reimbursement cases must focus on the terms of the IEP and cannot consider "retrospective testimony" about additional services the district would have offered if the child had actually attended the program.

C. DiRocco v. Board of Educ. of Beacon City Sch. Dist., 60 IDELR 99 (S.D. N.Y. 2013). While the district failed to comply with state and federal regulations when it invited a math teacher who taught 10th, 11th and 12th graders to the IEP meeting to serve as the regular education teacher for a student who was entering high school as a freshman, this did not impede the parents' participation in the IEP process or the student's right to FAPE. The parents' active participation in a discussion about the student's proposed placement in integrated co-teaching classrooms made the violation harmless. In addition, the Team's failure to discuss the student's annual goals at the IEP meeting did not amount to a denial of FAPE, where the parents were provided with a draft IEP prior to the meeting and were allowed to comment on it during the meeting. Further, the private school's dean participated in the meeting by phone and provided the team with updated information about the student's present levels of academic achievement and functional performance, which was accurately reflected in the goals in the draft IEP. Finally, while the district was required to consider private evaluation reports, it was not required to adopt the evaluators' recommendations. Thus, the parents are not entitled to recover the costs of the private school placement.

D. Horen v. Board of Educ. of the City of Toledo Pub. Sch. Dist., 113 LRP 23332 (N.D. Ohio 2013). District's motion for judgment is granted where it made numerous efforts to schedule an IEP meeting with the student's parents who canceled several IEP meetings. One meeting was canceled by them because the district's attorney would be present; three were canceled because the district would not allow them to record the meetings; one other was canceled because the

district could not provide licensing information about the student's stay-put special center school. After the cancellations, the district sought updated information about the student's educational performance and developed a draft IEP, but the parents did not respond to the request for updated data or the draft IEIP. "Their doing so kept the cornerstone of an IEP from the builder's hands." While the student had gone without services for some time, it was because the parents would not send her to her stay-put placement. However, the student's failure to receive FAPE stemmed from the parents' failure to cooperate with the IEP process, and the district was, therefore, not liable for the student's loss of educational services.

E. Z.F. v. Ripon Unif. Sch. Dist., 60 IDELR 137 (E.D. Cal. 2013). District did not commit a procedural violation when it terminated its contract with a third-party behavioral aide for a student with autism. The contract termination did not mean that the district was unwilling to consider parental input about the child's transition needs or that the district was unable to meet those needs. Furthermore, the evidence reflected that the parent participated in discussions about the change in aides. Based upon the fact that the child had been provided with 10 different aides since kindergarten (with 4 different ones in the previous year alone), the district members of the IEP team determined that the child did not need an elaborate transition plan to adjust to a new provider. While the parent may have disagreed with the decision, the district did not exclude her from the IEP process when failing to use the previous provider's services beyond the contract's termination date.

F. P.C. v. Milford Exempted Village Schs., 60 IDELR 129 (S.D. Oh. 2013). District predetermined placement prior to the IEP meeting and, therefore, denied FAPE to the student. The district's preplanning notes showed that its staff members were "firmly wedded" to a decision to withdraw the student from a private Lindamood-Bell program and return him to his home school to receive reading services. Most troubling was the student's teacher's testimony that the district was prepared to "go the whole distance this year" and force the parents into due process. Clearly, school officials went beyond merely forming opinions and, instead, became impermissibly and "deeply wedded" to a single course of action that the student not continue at the private school. In addition, they made their decision before determining what reading methodology would be used in the public school program and failed to discuss that issue with the parents. In this case, the type of methodology used could mean the difference in whether the student obtained educational benefit and, therefore, it was essential for the parents to participate in a conversation about it.

G. Letter to Ackerhalt, 112 LRP 51286 (OSEP 2012). It is inconsistent with the IDEA for a district to maintain a policy that would provide for all students' related services to start at a specific time after the beginning of the school year. Rather, when a service will begin is decided on a case-by-case basis by each student's IEP team.

H. Letter to Chandler, 112 LRP 27623 (OSEP 2012). Prior written notice (PWN) of a proposal or refusal to take action regarding identification, evaluation, placement or the provision of FAPE to a student must be given after an IEP team meeting, but before implementing the action. The regulations obligate a district to give PWN, however, regardless of whether or not the proposal or refusal is made during an IEP meeting, and it must be provided "a reasonable time" before the district implements the action in order to allow parents time to thoroughly deliberate on the change and respond before the district implements it. However, sending PWN before the IEP team meeting could suggest that the district's proposal or refusal was predetermined. Most districts send it to the parents after the meeting with a copy of the IEP. PWN is not required where a child is simply moving from elementary school to middle school as part of the normal progression that all students follow and where the child's program will be substantially and materially similar to their elementary school program. However, there might be occasions when PWN would be required if, for example, the child would not be attending the middle school he/she would normally attend if not disabled.

I. Anchorage Sch. Dist. v. M.P., 59 IDELR 91, 689 F.3d 1047 (9th Cir. 2012). Administrative award for tutoring reimbursement is reinstated where school district could not justify its failure to develop an updated IEP for an autistic student based on that fact that his parents had several IDEA administrative complaints pending. The district had an affirmative duty to review the student's IEP at least once a year and revise his program if necessary. Neither the IDEA nor its regulations make that obligation contingent upon the parents' acceptance of the district's offer of services, and the district court's determination that the parents' pursuit of their student's interests excused the district's refusal to update the IEPs is rejected. A stay-put order obtained by the parents did not prevent the district from updating the student's IEP. Rather, it merely prevented the district from changing the student's placement.

J. K.A. v. Fulton Co. Sch. Dist., 59 IDELR 248 (N.D. Ga. 2012). Where the district proposed a change of placement to a more restrictive setting at another school at an IEP meeting, the consent of the parents is not required to implement the IEP change. Rather, the IDEA regulations simply require the entire team to be present, at which time the team reaches a consensus that does not have to be unanimous, and parents play a significant role at the meeting and their input must be considered. If the parents disagree with a proposed change of placement, the proper course for them is to file a due process complaint. Here, the district provided the parents with proper prior written notice of the change, including the reasons for it, and sent the parents notice of their procedural safeguards, including their right to challenge the decision via a due process hearing.

K. Nickerson-Reti v. Lexington Pub. Schs., 59 IDELR 282, 893 F.Supp.2d 276 (D. Mass. 2012). Based upon an audio recording of an IEP meeting and written documentation related to it, the former high school student with Asperger's and

ADHD and his parent could not support their allegations that the meeting was procedurally flawed. The IEP Team was properly constituted, a wealth and variety of information was reviewed at the meeting, and the parent was permitted to participate. For example, in support of her contention that her input was ignored, the parent asserted that the district's legal counsel, who was also the meeting chair, told her "we will make the determination about how much of your concerns make it into the IEP." The audio recording, however, revealed that counsel actually said that the district team members would determine "what should be incorporated into the IEP based on your information that's been incorporated in the past," responding to the parent's refusal to voice her concerns about the proposed IEP. In addition, the evidence indicated that the student refused to attend the meeting and that the parent refused to provide the Team with any medical records or information concerning her son's current placement. Thus, the Team's use of any outdated information was largely due to the student's and mother's failure to cooperate and not a procedural violation.

THE FAPE STANDARD

A. K.K. v. Alta Loma Sch. Dist., 60 IDELR 159 (C.D. Cal. 2013). While the parents of an SLD grade schooler may have been dissatisfied with the progress their daughter had made, they are not entitled to reimbursement for the cost of a private Lindamood-Bell program. An IEP offers meaningful educational benefit if it is tailored to the student's unique needs and is reasonably calculated to produce more than *de minimis* benefits when gauged against the student's abilities. Testimony for district employees showed that the IEP team considered detailed evaluations of the student's skills and limitations and used the information from those evaluations to determine her goals and services. With respect to progress, the student made advancements in the third grade in writing paragraphs on her own and made progress in fluency and reading comprehension, while meeting many third grade standards. Although not progressing as quickly as her nondisabled peers, the student's slow-but-steady progress showed that her IEPs offered meaningful benefit to her.

B. D.C. v. New York City Dept. of Educ., 61 IDELR 25 (S.D. N.Y. 2013). District failed to offer an appropriate placement to an autistic student with a life-threatening seafood allergy when the information presented to the parent during her tour of the proposed school showed that the district was not able to provide a seafood-free environment. Testimony that the special education school could have been made into a seafood-free environment if the parent had accepted the district's placement offer is not sufficient. Courts and hearing officers deciding IDEA private school reimbursement claims cannot consider the services a district "would have" provided in addition to the services identified in the student's IEP. "Prior to making a placement decision, a parent must have sufficient information about the proposed placement school's ability to implement the IEP to make an informed decision as to the school's adequacy." At the time the parent toured the proposed school, the cafeteria included fish on the menu, and school personnel

informed the parent that students were free to bring lunches from home which might include fish. In addition, because culinary arts students came from the high school and prepared seafood dishes to be served in the teachers' cafeteria, the child may have been exposed to seafood smells that would trigger an anaphylactic reaction. When failing to promptly inform the parent of its plan to create a seafood-free environment for the student, the district failed to offer an appropriate placement.

C. Klein Indep. Sch. Dist. v. Hovem, 59 IDELR 121, 690 F.3d 390 (5th Cir. 2012), cert. denied, 113 LRP 10911 (2013). Though it was "regrettable" that the school district failed to address the source of a former student's writing difficulties earlier in his educational career, the accommodations set forth in the student's IEPs allowed him to receive FAPE. While the district's failure to provide more intensive services amounted to an IDEA violation, the Supreme Court only requires districts to ensure that students with disabilities receive some educational benefit. Thus, the district court erred in focusing on the student's ongoing deficits rather than his overall academic record. "Nowhere in *Rowley* is the educational benefit defined exclusively or even primarily in terms of correcting the child's disability." As long as the student's program met the four requirements set forth in *Cypress-Fairbanks Independent School District v. Michael F.*, a district would satisfy its FAPE obligation. Here, the student's IEPs satisfied the *Michael F.* factors because, not only were the IEPs customized on the basis of the student's assessments and performance, they were implemented in the student's LRE—the general education classroom. The district also ensured that staff provided the student's services in a collaborative and coordinated manner. Most notably, the student earned above-average grades in the general education curriculum by using a spell checker and a computer for written assignments. "Viewed from the holistic *Rowley* perspective, rather than the District Court's narrow perspective of disability remediation, [the student] obtained a high school level education that would have been sufficient for graduation."

D. Sebastian M. v. King Philip Reg. Sch. Dist., 59 IDELR 61, 685 F.3d 79 (1st Cir. 2012). District court properly deferred to the hearing officer's valuation of the experts' testimony in finding that the school district's placement was appropriate. Although a neuropsychologist testified that the student's proposed IEPs should have emphasized the development of independent living skills, she did not speak with the student's teachers or review his schoolwork. Her opinion was based upon two evaluations, one of which had been conducted five years earlier, her review of the student's academic records, and a single observation of the student's performance in his public school placement. Further, the educational consultant who claimed the proposed IEPs were inadequate had never evaluated the student or observed him in the district's program. In contrast, educators who testified about the appropriateness of the IEPs worked directly with the student on a daily basis and witnessed his progress firsthand, and all of them testified that the proposed IEPs offered an appropriate combination of services designed to permit him to achieve meaningful educational progress, including counseling services,

OT, social skills training, and vocational training. Thus, the district court did not err in deferring to the hearing officer's decision that the educators' views were entitled to more weight than those of the parents' experts.

CHANGE OF PLACEMENT/STAY-PUT

A. P.V. v. School Dist. of Philadelphia, 60 IDELR 185 (E.D. Pa. 2013). While school districts generally have the right to determine the specific schools that students with disabilities will attend, this district's practice of unilaterally transferring autistic students with autism between centralized grade-level programs located in different schools violates the IDEA. Because children with autism typically have difficulty with transitions and changes in routine, a change in the physical location of services would likely be far more traumatic for them than it would be for students with other disabilities. "Accordingly, we must conclude that under the particular facts of our case, [transferring] students with autism to a separate school building in the school district constitutes a change in their 'educational placement' under the IDEA." As such, the district must follow the IDEA's placement procedures, including parent participation and appropriate notice, before transferring students with autism to new schools.

DISCIPLINE

A. Anaheim Union High Sch. Dist. v. J.E., 113 LRP 22112 (C.D. Cal. 2013). District had notice of student's likely status as a child with a disability when the Section 504 Team met to discuss the student's panic attacks, inability to complete work, failing grades, inability to remain in class and hospitalization for attempted suicide. Thus, the district had an obligation to conduct a manifestation determination before placing him in an alternative school for disciplinary purposes. A school district is deemed to have knowledge of a student's disability before the misconduct occurred where a teacher or other staff member "expresses concern about a pattern of behavior" to the special education director or other district supervisor. This does not require teachers to suggest a special education evaluation. Rather, the high school AP's attendance at the 504 meeting triggered the knowledge that the student was likely covered by IDEA. Thus, the hearing officer's decision requiring a manifestation determination is upheld.

B. Letter to Sarzynski, 59 IDELR 141 (OSEP 2012). A bus suspension must be treated as a disciplinary removal and all of the IDEA's discipline procedures applicable to children with disabilities apply if transportation is listed on the IEP. If a student is suspended from transportation included in the IEP for more than 10 consecutive school days, that suspension constitutes a change of placement. Such a change of placement triggers the requirement for a manifestation determination. The fact that a family member voluntarily transports the student to and from school does not change the analysis. "Generally, a school district is not relieved of its obligation to provide special education and related services at no cost to the parent and consistent with the discipline procedures just because the child's parent

voluntarily chooses to provide transportation to his or her child during a period of suspension from that related service."

C. Letter to Ramirez, 60 IDELR 230 (OSEP 2012). Due process hearing officers have the authority to rule on whether a disabled student's conduct violates a code of student conduct when deciding appropriate placement or reviewing a manifestation determination in a disciplinary context.

D. M.N. v. Rolla Pub. Sch. Dist. 31, 59 IDELR 44 (W.D. Mo. 2012). When the district proposed to move a student from a general education class to an on-campus alternative program housed in a trailer, this did not trigger the obligation to conduct a manifestation determination, because it was not a "change of placement." The district suspended the student several times for assaultive behavior and, on April 11, 2011, the parent withdrew consent for special education but five minutes later, requested an initial evaluation. Consequently, the student was placed in a general education class and, on April 19, with the new IEP still pending, the student was suspended again. The district told the parent it would be placing him in an alternative program that included a disciplinary point system, and the parent claimed the district had to conduct a manifestation determination first. Whether a transfer to another school constitutes a change in placement turns on whether a child's educational goals and needs are being similarly met in the new placement. Here, the alternative program had a low student-staff ratio, certified teachers, and met the same goals and needs as the general education class. While the parent argues that the program is isolated, educational placement is primarily concerned with goals and needs, not physical location within a district. "Therefore, the fact that the program is in a trailer on the District's campus is not relevant." In addition, there was no evidence that the added structure would not benefit the student and, while there, he would continue to be exposed to general education students. Addressing the parent's assertion that the student's various suspensions constituted a pattern of removal, the April 19 suspension could not be considered when determining a pattern because the parent had withdrawn her consent to services, and the student was placed in a class that could not address his behavior. Without that suspension, the removals totaled only 9.2 days. Second, even if April 19 were considered, the removals were too infrequent, brief, and diffuse to create a pattern. Because there was no change of placement, the case is dismissed.

METHODOLOGY

A. Poway Unif. Sch. Dist. v. K.C., 60 IDELR 249 (S.D. Cal. 2013). The school district was not required to provide Communication Access Real-time Translation (CART) to a 15-year-old student with a hearing impairment who had recently received a second cochlear implant and as she transitioned from middle to high school. Because the district offered to provide meaning-for-meaning transcription services to the student instead, CART is not essential to the student's FAPE. Here, the student's academic performance had been satisfactory and she advanced

from grade to grade without CART services. Indeed, the district did not dispute that the student needed transcription services and had crafted an IEP that included such services, along with preferential seating, copies of teacher's notes, an extra set of textbooks, closed captioning for media, a peer note-taker, an FM system, a laptop for streaming closed-captioned videos, a closed-caption decoder, visual presentation of new materials and vocabulary and a directive that teachers face the student when speaking. Where the disagreement is over proper methodology, districts have the choice to determine the methodology they will use to implement a student's IEP.

B. R.P. v. Alamo Heights Indep. Sch. Dist., 60 IDELR 60, 703 F.3d 801 (5th Cir. 2012). Although the district's year-long delay in reviewing an assistive technology evaluation and providing a voice output device to the student as not optimal, it did not deny her FAPE. Initially, the nonverbal autistic 10-year-old used PECS to enable her to communicate but when she began to communicate less at home, the district ordered an AT evaluation by October 1, 2008. While the team convened in October 2008 and again in December, it did not review the assessment until May 2009 and, as a result, began then to provide the student with a voice output device the following school year. While the team failed to sufficiently individualize the student's program based upon assessment results, the evidence showed that the student nevertheless obtained positive academic and nonacademic benefits through the use of PECS. The fact that she made greater strides with a voice output device is an indicator that PECS was perhaps not allowing her to reach her maximum potential but IDEA requires only the opportunity for meaningful educational benefit.

C. Reyes v. New York City Dept. of Educ., 112 LRP 58832 (S.D. N.Y. 2012). School district's proposed placement is appropriate, even though it does not have swings or other suspended equipment available for teenager with autism and sensory integration dysfunction. The student's vestibular input needs could be met by the public school's supply of other sensory equipment, including mats, a bean bag chair, a weighted vest, therapy balls, ramp-shaped mats and tables. In addition, the special day class teacher testified that the district could order any equipment that the student needed. Although the OT supervisor at the student's private school testified that the use of suspended equipment was the most effective therapy for addressing the student's balance and movement needs and that she did not see any equipment at the public school that was capable of addressing those needs, the IDEA does not require the district to provide the optimal level of services. The district could have met the student's needs in the proposed SDC class and the parent's reimbursement claim for private schooling is denied.

PRIVATE/RESIDENTIAL PLACEMENT

A. Jefferson Co. Sch. Dist. R-1 v. Elizabeth E., 60 IDELR 31, 702 F.3d 1227 (10th Cir. 2012). Parents of an emotionally disturbed teenager can recover the cost of

her out-of-state residential placement from the school district. While the 1st, 2nd, 3rd, 4th, 6th, 8th, 9th, 11th and D.C. circuit courts use the "educationally necessary" test for determining whether residential placement should be provided by a school district (which focuses upon the segregability of the student's academic, medical and emotional needs), the 5th and 7th circuits have used a standard that requires consideration of whether the services provided in the residential program are "primarily oriented" toward allowing the student to be educated. This court will settle upon a third option using a straightforward application of the statute's text providing that parents may recover the cost of a student's residential placement if 1) the district denied FAPE to the student; 2) the residential facility is a state-accredited elementary or secondary school; 3) the facility provides specially designed instruction to meet the student's unique needs; and 4) any nonacademic services the student receives meet the IDEA's definition of "related services." Importantly, the district never challenged the administrative or judicial findings that it denied FAPE to the student. In addition, because the residential placement is an accredited educational institution under Idaho law, it falls within the IDEA's definition of a secondary school. Further, the facility provided the student both specially designed instruction and related services. Thus, in this case, the application of the IDEA's plain language entitles the parents to reimbursement.

B. M.N. v. Dept. of Educ., 60 IDELR 181 (9th Cir. 2013) (unpublished). A parent's unilateral private placement is "proper" for reimbursement purposes only if it offers instruction that is specially designed to meet the child's unique needs and provides the support services a child needs to benefit from instruction. By limiting the autistic child's program to language acquisition, the private school failed to address the child's needs in the areas of academics, social interaction, group instruction, generalization of skills and personal care and grooming. After more than a year in the private program, the record showed "a host of essential areas in which the child made no progress at all" and the child received only "meager" benefits from the private school. Thus, the parent is not entitled to reimbursement for private school tuition. In addition, the district court properly denied reimbursement on equitable grounds where the parent and the private school hindered the ED's development of the child's IEP.

C. M.B. v. Minisink Valley Cent. Sch. Dist., 61 IDELR 5 (2d Cir. 2013) (unpublished). Even though progress reports showed that the student made academic and behavioral gains during his time at a therapeutic boarding school, the school did not provide services to address his unique needs. Academic and behavioral progress alone does not demonstrate the appropriateness of a private program for reimbursement purposes. Rather, the parent must show that the school offered instruction and support services specially designed to meet the student's unique needs. Here, the boarding school did not offer specific services to address the student's difficulties with organization, executive functioning, and fine motor skills. In addition, the school's use of time-outs and other sanctions to address the student's behavioral problems was inappropriate. Because the parent

could not show that their chosen placement was appropriate, she could not recover the cost of it from the district.

D. M.L. v. East Ramapo Cent. Sch. Dist., 61 IDELR 12 (S.D. N.Y. 2013). Where the student's father was the acting Director of a nonprofit special education school that he had helped to establish, the parents were not merely seeking reimbursement for the student's placement. Rather, letters written to the district from the father discussed the parents' intent to expand the school, move it within the district's borders, and seek district funding for the school's program and services. The father never spoke with the district about the possibility of a public school placement and the parents signed a contract for their child's placement at the nonprofit school nearly two months before they attended a meeting with the district to develop the student's 2010-11 IEP. Thus, the equities of the case weigh against reimbursement to the parents for the cost of the private placement.

COMPENSATORY EDUCATION

A. B.M. v. New York City Dept. of Educ., 61 IDELR 68 (S.D. N.Y. 2013). Even though the student's support teacher was unqualified, the parent did not establish a denial of FAPE to support her claim that the autistic student needed 960 hours of compensatory services to make up for inadequate instruction. The student's report cards reflected that he received passing grades in all of his core academic subjects, which he took in the general education setting. The support teacher testified that she was able to address problem behaviors that included picking gum off the floor, and his social studies teacher indicated that he had made social progress and had a "wide circle of friends."

B. D.F. v. Collingsworth Borough Bd. of Educ., 59 IDELR 211, 694 F.3d 488 (3d Cir. 2012). In a case of first impression for this Court, a student's move to another district even in another state does not moot claims for compensatory education. If the duty to provide compensatory education ended when a student moved away, a district could simply stop providing FAPE in the hopes that the student would relocate to another LEA. While recognizing that a district might not be able to provide compensatory education directly, especially if the student has moved out of state, a district found liable for an IDEA violation could establish a fund for the student's education, pay the new LEA to provide compensatory services, or contract with a third-party to provide them in the new LEA. Thus, district court erred in holding that parent's move to Georgia prevented her from seeking compensatory education for her 6-year-old son.

LEAST RESTRICTIVE ENVIRONMENT

A. D.W. v. Milwaukee Pub. Schs., 61 IDELR 32 (7th Cir. 2013) (unpublished). District's proposed placement in an SDC class for students with intellectual disabilities is the appropriate LRE where the student will receive FAPE. The student earned poor grades in her less restrictive multi-categorical class and often

refused to participate. As a result, the student's IEP team developed a BIP that included several hours of daily 1:1 instruction, modification of assignments and daily progress reports. However, the interventions were not successful, and the team modified the student's IEP again to include class work at the student's instructional level, seating near the teacher and positive feedback. Only after those interventions failed did the district propose the more restrictive SDC placement. "The relevant inquiry is whether the student's education in the mainstream environment was 'satisfactory' (or could be made satisfactory through reasonable measures)."

B. J.T. v. Newark Bd. of Educ., 61 IDELR 27 (D. N.J. 2013) (unpublished). School district has no obligation to offer a resource in-class support program to the SLD student at his neighborhood school. In this case, the student's neighborhood school did not offer the special education services set forth in the student's IEP and a district may offer certain types of programming in a centralized location. In addition, the proposed school was only .8 miles from the student's home.

ONE-TO-ONE AIDES

A. Lainey C. v. State of Hawaii, 61 IDELR 77 (D. Haw. 2013). Where the social skills training set out in the autistic student's IEP would have met her needs, a one-to-one aide was not necessary for FAPE. Even though a teacher testified that an aide would be "helpful," that is not the same as being necessary for FAPE. While some witnesses supported the idea of a one-to-one aide, others believed it was unnecessary and the ED's behavioral health specialist testified that an aide might make the student overly dependent on the aide and more isolated socially.

B. Hupp v. Switzerland of Ohio Local Sch. Dist., 60 IDELR 63 (S.D. Ohio 2012). District did not deny FAPE to student with Asperger Syndrome when it offered to provide a 1:1 aide only for unstructured times during the school day, such as lunch, music and P.E., because the student did not need an aide throughout the entire school day. While the child's medical providers recommended the presence of a 1:1 aide at all times, none of those providers had observed the child at school. Educators and autism experts who observed the child in class concluded that the presence of a 1:1 aide during instructional time was unnecessary and would prevent the child from becoming more independent. Recognizing that the child needed help socializing with peers, the district did offer to provide a dedicated aide for the times the student was outside the classroom. Thus, the parents' claim that the lack of a 1:1 aide was a "crucial failure" of his program is rejected, and the hearing officer's decision that the district offered FAPE is upheld.

PARENTALLY PLACED PRIVATE SCHOOL STUDENTS

A. Letter to Corwell, 113 LRP 10885 (OSEP 2013). Parentally placed private school students whose parents live outside of the U.S. are entitled to participate in

equitable services. Under IDEA, the district where the private school is located is responsible for providing for the equitable participation of parentally placed private school students with disabilities by providing them with special education and related services consistent with their numbers and their need. The IDEA does not distinguish between parentally placed private school children whose parents reside in other countries and those whose parents reside in the U.S. with respect to the district's obligation to provide equitable services under the IDEA.

RESOLUTION MEETINGS

A. Letter to Casey, 113 LRP 19186 (OSEP 2013). It is contrary to IDEA for a school district to convene a resolution meeting but refuse to discuss the issues raised in the parent's request for due process at that meeting. The stated purpose of a resolution meeting is for the parent and the district to discuss the facts and issues that form the basis of the parents' complaint so that the district has the opportunity to resolve it. Where the district instead told the parent at the meeting that she would have to broach her issues with the district in an IEP team meeting, that would not serve the purpose of a resolution meeting.

ATTORNEYS' FEES

A. Alief Indep. Sch. Dist. v. C.C., 61 IDELR 3, 713 F.3d 268 (5th Cir. 2013). District court's denial of parents' fee request is upheld, because these parents were not prevailing parties as contemplated under the IDEA. Prevailing party status under the IDEA has two requirements: 1) the remedy must alter the legal relationship between the district and the student; and 2) the remedy must foster the purposes of the IDEA. While the district court did deny fees sought by the district against the parents, the parents achieved only a technical victory that had no bearing on their child's services. Here, the parents filed an unsuccessful IDEA case and "were merely fortunate enough to have the lower court deny a common request for attorney's fees" against them. "In no way have they succeeded on the merits of their claim or achieved a desired remedy" sufficient to transform them into prevailing parties under the IDEA.

B. A.L. v. Jackson Co. Sch. Bd., 60 IDELR 187 (N.D. Fla. 2013). District's motion for sanctions is granted because the parent's attorney should have known that the claims that the school district should have revised the student's IEP were groundless. This is so, because the parent attorney was involved in a 2007 Eleventh Circuit case that held that the IDEA's stay-put provision prohibits a district from changing a student's placement after the parent files a due process complaint, unless the parent and the district agree to such a change or a hearing officer orders a new placement. Here, the parties were not able to agree to change the student's program, so the stay-put provision prevented the district from updating the IEP. Because the parent's attorney also represented the student in the Eleventh Circuit case in 2007 which specifically ruled this way, she was

"well-aware" of the current law on the stay-put provision. Thus, the district is entitled to recover attorney's fees.

C. Bethlehem Area Sch. Dist. v. Zhou, 61 IDELR 9 (E.D. Pa. 2013). The parent's alleged statement that her lawsuit would "go away" if the district would just pay for her sons to go to a private school may entitle the district to a fee award because she filed her hearing request for an improper purpose. The parent requested several due process hearings regarding the IEPs for her sons over the years, despite the fact that they were making significant progress. Under the IDEA, a prevailing district may recover fees from a parent who has litigated for any improper purpose, such as to cause unnecessary delay or to needlessly increase litigation costs. There are several pieces of evidence that indicate the parent's intent in seeking the hearing was to drive up district costs to the point where it would rather pay for her sons to attend private school than oppose her extensive requests. For example, the parent reportedly told a special education director that "if the district would pay for a private school…this would all go away." While the parent is highly ambitious that her sons achieve all they can, the law does not require a district to maximize a child's potential or "cause him or her to become a second Einstein." Because the district prevailed at the due process hearing and the parent pursued her complaint for an improper purpose, the district is potentially entitled to attorney's fees and a conference will be held to address the issue.

SECTION 504/ADA

A. D.L. v. Baltimore City Bd. of Sch. Comm'rs, 60 IDELR 121, 706 F.3d 256 (4th Cir. 2013). The duty to provide FAPE to students under Section 504 only extends to students attending public schools, not private ones. A district has no obligation to provide Section 504 services to a parentally placed private school student if it has offered the student appropriate services.

B. Moody v. New York City Dept. of Educ., 60 IDELR 211 (2d Cir. 2013) (unpublished). While an 11-year-old diabetic student may have preferred eating hot food for lunch, his preference does not require the school district to heat up lunches prepared by his mother. The availability of diabetic-friendly lunch options in the school cafeteria satisfied the district's duty to accommodate the student's disability, and the district only is required to ensure that the student has meaningful access to school lunch and other district programs. Here, the school's cafeteria offered a selection of hot and cold foods that the student could eat. Thus, even if the student sometimes skipped lunch and did not like the food on the school menu, that did not warrant a further accommodation beyond what the district had already provided. In addition, the district monitored the student's blood glucose throughout the day to ensure it stayed within acceptable levels.

C. Kimble v. Douglas Co. Sch. Dist. RE-1, 60 IDELR 221 (D. Colo. 2013). District's position that parents' revocation of consent to an IEP under IDEA

amounted to a rejection of a 504 Plan is rejected. However, the district convened a Section 504 meeting to discuss the student's need for accommodations and modifications after the parents revoked consent to the IEP and the district's attempt to implement the IEP that it has offered as 504 FAPE is appropriate. Thus, the parents cannot hold the district liable for failing to provide accommodations after rejecting the 504 Plan, and the district's obligation to protect the student from discrimination was satisfied when it offered the same services set out in the IEP.

D. G.B.L. v. Bellevue Sch. Dist. #405, 60 IDELR 186 (W.D. Wash. 2013). It was not a "reasonable accommodation" to make in the fast-paced gifted program for the student with ADHD and a hearing impairment to be able to complete a lesser amount of homework each night than other students. This is so because the gifted program required all students to learn a significant amount of material on their own through homework assignments. The district is not required to make a fundamental alteration or substantial modification to its programs so that students with disabilities can participate. The parents' request to limit the student to two hours of homework per night was not reasonable, as the assigned homework is an essential component of the coursework in the gifted program. In addition, the student would be unable to keep up with class discussions if he completed only 2 hours of homework each night. Further, evidence shows that the student was already completing only part of the assigned homework and was falling behind as a result. Thus, the student could not meet the program's academic standards even with the required accommodation and judgment is granted in favor of the district.

PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES

A. Dear Colleague Letter, 60 IDELR 167 (OCR 2013). Because extracurricular athletics offer benefits such as socialization, fitness, and teamwork and leadership skills, districts must make more of an effort to ensure that students with disabilities have an equal opportunity to participate in athletic programs. Districts should not act on the basis of generalizations and stereotypes about a particular disability. While students with disabilities do not have a right to join a particular team or play in every game, decisions about participation must be based on the same nondiscriminatory criteria applied to all prospective players. In addition, districts have the obligation to offer reasonable modifications so that students with disabilities may participate. If a particular modification is necessary, the district must offer it unless doing so would fundamentally alter the nature of the activity or give the student with a disability an unfair advantage. For example, using a visual cue to signal the start of the 200-meter dash would not fundamentally alter a track meet or give a student with a hearing impairment an unfair advantage over other runners. If a district does determine that a requested modification is unreasonable, it must consider whether the student could participate with a different modification or accommodation. While some students might be unable to participate in traditional athletic activities, even with modifications and supports, districts should offer athletic opportunities that are

separate or different from those offered to nondisabled students in these instances. Such opportunities might include disability-specific team sports, such as wheelchair basketball, or teams that allow students with disabilities to play alongside nondisabled peers. Districts should be flexible and creative when developing alternative programs for students with disabilities.