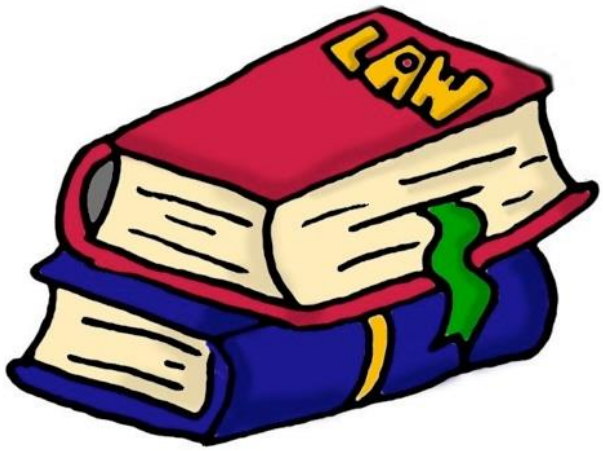
Special Education Law: What's Been Happening?



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As with all sessions that at I have presented at Best Practices over the years, this session will review recent developments in special education law through highlights of recent court and agency decisions relevant to the provision of free appropriate public education to students with disabilities. The information presented is designed to update all participants on hot topics in special education and how the courts and agencies have been ruling in 2019.

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Plainscapital Bank v. Keller Indep. Sch. Dist., 72 IDELR 207 (5th Cir. 2018) (unpublished). District court's decision to overturn a jury verdict of $1 million for the trustee of a nonverbal middle schooler is upheld. There was no evidence that the district was deliberately indifferent to the student's alleged abuse by his special education teacher, where the school principal investigated the allegations that the teacher had pulled on the student's gait belt and kicked his foot. After investigating and finding no abuse, the principal made a note in the teacher's file and monitored his classroom more closely, directing the teacher to be careful in handling students. Further, the trustee could not show that the teacher was responsible for any subsequent injuries to the student, including a bump on the head and a broken thumb. Thus, the trustee could not prove discrimination under Section 504/ADA on the part of the district and the reversal of the jury verdict was appropriate.

B. Estate of Esquivel v. Brownsville ISD, 72 IDELR 270 (S.D. Tex. 2018). Judgment for the district on the parents' 504/ADA claims is denied where testimony indicates that employees of the district chose not to provide certain safety accommodations for participation in the district's PE aquatics program to a 20-year-old student with multiple disabilities. The district could be liable for the student's fatal injuries suffered while participating in the aquatics program, where evidence could support a finding by a jury that the district was deliberately indifferent to the student's disability-related needs. To prove disability discrimination, the parents need to show that the district intentionally denied their daughter the benefits of the aquatics program, which could be done by showing that the district was aware of the student'' need for safety accommodations and intentionally failed to provide them. The parents' submission of a physician's form provided by the district to identify available accommodations in the aquatics program put the district on notice of the student's need for a nose clip, full body support, and one-to-one supervision. The district's admitted failure to provide those accommodations appeared to be a conscious choice by its employees, based upon testimony of employees that the nose clip was difficult to use because it frequently popped off and that the life jacket provided to the student was "cheap" and not intended for use by individuals with disabilities. The evidence suggests several excuses offered by the employees as to why they believed the physician's required accommodations were not necessary or important. This is sufficient to allow the parents to present their claims to a jury.

C. Leon v. Tillamook Co. Sch. Dist., 72 IDELR 61 (D. Ore. 2018). District's motion to dismiss parent's 4th Amendment claim is denied and the parent's Section 1983 claims for alleged 4th Amendment violations against the bus driver and the district's superintendent may proceed. Here, a 4 year-old was allegedly injured when left strapped in a car seat on the special education bus for 75 minutes. While a district is not automatically liable for employee violations of student constitutional rights, it could be where the alleged constitutional violation results from an official district policy, custom or practice. Not only did the district concede that transportation staff failed to check for bus passengers as required, but the superintendent's executive assistant apparently told the parent that such incidents occurred 4 to 5 times a year. In addition, it is alleged that the district failed to investigate those incidents, take remedial action or implement additional policies to prevent those incidents from reoccurring. If these allegations are true, it suggests that the district has a policy of inaction that amounts to deliberate indifference to the child's constitutional rights.

D. K.C. v. Marshall Co. Bd. of Educ., 73 IDELR 196 (6th Cir. 2019). (unpublished). Because the district did not learn about a special education teacher's alleged abuse of a nonverbal third-grader with disabilities until May 2016, the parents could not show that it violated Section 504/ADA by failing to investigate earlier. The district court's decision that the parents failed to prove disability discrimination is affirmed. To determine whether the district was "deliberately indifferent" to the teacher's alleged misconduct, the court was required to determine: 1) whether the district had actual knowledge that the teacher was mistreating students in her class; and 2) if so, whether the district took reasonable action in response. When the district first learned of the teacher's alleged misconduct when the parents filed a police report on May 1, 2016, the district could not be liable for any alleged abuse that occurred before that date. In response to the parents' claim that the district's subsequent investigation was inadequate, the parents can prevail only by showing that the allegedly flawed response resulted in further abuse. Here, the parents did not meet this standard, since they withdrew the student from school in late April 2016 after learning about the teacher's alleged misconduct from a classmate's parent. Thus, even if the parents could demonstrate that the investigation was inadequate, they could not show that the deficiencies caused further harm to the student.

E. Albuquerque Pub. Schs. v. Sledge, 74 IDELR 291 (D. N.M. 2019). Compliance with state law, not disability-based discrimination, was the basis of the district's denial of the parents' request for their daughter with Dravet syndrome to be administered cannabis on campus. Under Section 504, a district's failure to make reasonable modifications to existing practices in order to accommodate people with disabilities may violate the law if the failure is solely on the basis of disability. Here, the district's denial of the parents' request for on-campus cannabis was not on the basis of disability, and there was no evidence suggesting that the district administered cannabis to students without disabilities or stored cannabis at school for them. Likewise, nothing indicates that the district refused

to administer legal medications to the student or store legal medications for her. Thus, the parents' 504 claim for money damages is dismissed.

F. Whooley v. Tamalpais Union High Sch. Dist., 74 IDELR 258 (N.D. Cal. 2019). Parent is allowed to pursue her negligence claim against the district based upon its alleged failure to implement her high achieving teenager's 504 Plan and to claim that the implementation failure caused the student to commit suicide. The district could be liable for the student's death if its alleged negligence caused the student to suffer an "uncontrollable impulse" to take his life and if the district's prolonged failure to implement the student's 504 Plan caused the student to suffer from a mental condition that prevented him from controlling his suicidal impulses. The parent's complaint alleges that the repeated negligence of the district's employees in accommodating the student's learning disability, anxiety and medical condition caused him extreme anxiety and mental harm and it can be "reasonably inferred" that this anxiety and mental anguish created an uncontrollable impulse to commit suicide. The parent's claim that the student's academic-related stress increased significantly after the district failed to ensure that he received agreed-upon accommodations for Advanced Placement and college entrance exams may proceed.

G. B.D. v. Fairfax Co. Sch. Bd., 73 IDELR 261 (E.D. Va. 2019). The district's motion to dismiss the parents' 504/ADA claims for disability discrimination is denied at this early stage of the litigation. The student's sudden academic deterioration indicates that the district could have acted in bad faith when it allegedly denied FAPE to the 18-year-old high school student. Here, the parent must show that the district acted in bad faith or with gross misjudgment and, based upon the parent's allegations, a reasonable juror could conclude that the district discriminated against the student. This is based upon the allegation that the student's teachers denied him appropriate services when they disagreed with the goal in the student's IEP and instead chose to work on other goals and allowed him to watch videos on YouTube during instructional time. In addition, when the student's academic performance deteriorated, the district began to propose new IEPs that did not require as much rigor. Further, the district removed the student from general education classes without consent and prevented him from taking courses that were required for graduation, even though his IEP team determined that he was on track to graduate with a regular high school diploma. Because it appears that the district may have intentionally failed to implement the student's IEP appropriately, the motion to dismiss 504/ADA claims is denied.

H. Russell v. Wayne Co. Sch. Dist., 74 IDELR 282 (S.D. Miss. 2019). Because there does not appear to be any caselaw involving a school employee hitting a child with a wooden stick, the district employees could not have had clear notice that such conduct might be a violation of the student's constitutional right to bodily integrity. Thus, the employees are entitled to judgment on the constitutional claims brought by the parent of the nonverbal child with autism. The doctrine of qualified immunity does not apply if: 1) an employee's conduct

violated the child's constitutional rights; and 2) those rights were clearly established at the time of the alleged misconduct. This means that if a parent can show an employee knew her conduct was unlawful at the time it occurred, then the employee would not be entitled to immunity. However, at the time of the employees' conduct, it was not clearly established that repeatedly striking a non-verbal, autistic student with a wooden stick would violate constitutional rights. The Court does plan to proceed to trial on the ADA/504 claims.

I. Doe v. Board of Educ. of the Co. of Mercer, 74 IDELR 37 (S.D. W.Va. 2019). District did not violate the student's due process rights under the 14th Amendment where there is no evidence that the district acted to place the student in danger or to increase his risk of harm. Thus, the parent's Section 1983 suit is dismissed. In this case, the student and a classmate went into a bathroom stall and engaged in inappropriate sexual acts while they were supposed to be collecting attendance reports from various classrooms as instructed by their teacher. The parent alleged that because the district knew about the student's history of "touching others," the teacher's instructions affirmatively created a dangerous environment that led to the student's injury. However, the parent's complaint was about the district's failure to provide the student with appropriate supervision and that the student's injury would have never occurred if the district had assigned an adult to accompany the student at all times. Thus, this alleges inaction on the part of the district, rather than action that was affirmative for purposes of the state-created danger theory under Section 1983.

J. Washington v. Katy Indep. Sch. Dist., 74 IDELR 157 (S.D. Tex. 2019). Motion for judgment on 4th Amendment claim for excessive force used by a security guard employed by the school district is denied where the parent of a high school student with ED and an intellectual disability was tased after he attempted to leave the school building against staff member orders. The evidence does not clearly show that the officer's use of force was objectively reasonable and not excessive under the circumstances. While the student was agitated, refused to follow staff instructions and insisted on leaving the school building, the footage from the officer's body camera showed the student screaming and falling to his knees after his initial contact with the taser. It then shows the officer pressing the taser into the student's body until the student was lying on the floor, which raised some questions about staff testimony that the student had attempted to force his way past the security guard. Questions include whether the force used was necessary to keep the student in the school and whether continued use of the taser after the student fell to his knees is reasonable. However, the parent's claim under Section 504 for disability discrimination is dismissed because the evidence is that the school officials' decision to keep the student from exiting the school was motivated by a desire to keep the student safe from the vulnerabilities caused by his disabilities, not by a desire to discriminate on the basis of disability. Note: In a second decision, the court refused to reconsider judgment in favor of the district on the 504 disability discrimination claim. 119 LRP 33916 (S.D. Tex. 2019).

K. Suraci v. Hamden Bd. of Educ., 73 IDELR 173 (D. Conn. 2019). Parents' remaining state law claim for intentional infliction of emotional distress is resolved in favor of the school district's special education coordinator. Here, the special education coordinator had a valid reason for summoning emergency personnel to involuntarily transport the student with autism to the hospital for an emergency psychiatric evaluation when she learned that the student had created a list of teachers and students labeled "Subjects for Weapon X." Clearly, the coordinator did not intend to inflict emotional distress on the student, nor did she know that emotional distress would be the likely result of her conduct because the student had a fear of ambulances. The coordinator did not abuse her authority as a school official or use it as a cloak for misconduct where it is undisputed that Board policy required her to take action to ensure school safety under the circumstances as she understood them to be.

BULLYING, DISABILITY HARASSMENT/HOSTILE ENVIRONMENT

A. Estate of Barnwell v. Watson, 71 IDELR 122, 880 F.3d 998 (8th Cir. 2018). The mother's general statements at IEP meetings regarding her concerns about bullying of her child with Asperger syndrome (who allegedly committed suicide based on his inability to cope with bullying by his classmates) were not sufficient to put the district on notice of disability harassment. Unless the parents could show that the district knew about it and failed to intervene, an action for money damages under Section 504 may not proceed. Though the student's mother told the IEP team on more than one occasion that she worried that he was being bullied, she could not say whether the student was being targeted by his classmates. In addition, she did not have any specific observations or reports to substantiate her concerns. Thus, the mother's statements, without more, did not put the district on notice of disability harassment. A failure to address a parent's "worries" fall well short of establishing the level of bad faith or gross misjudgment needed to support a 504 claim. In addition, the parents' claim that the district actively "covered up" the conduct of other students by failing to investigate whether their child had been bullied by peers before his suicide is rejected. There is no authority that a district can discriminate against a student with a disability after his death by failing to investigate harassment that may have occurred before he died.

B. J.M. v. Matayoshi, 72 IDELR 145 (9th Cir. 2018) (unpublished), reh'g denied, 118 LRP 33122 (9th Cir. 2018). The IEP's inclusion of a crisis plan and a dedicated aide to the student with autism afforded the student FAPE and were adequate to address peer bullying. While prior IEPs did not adequately address this issue, the Department remedied those deficiencies in 2014 by adding a 1:1 aide and developing a crisis plan that called for adult monitoring of all peer interactions and set out a protocol to stop bullying when it occurred. In fact, it contains many, if not all, of the suggestions to combat bullying set forth in OCR's 2014 *Dear Colleague Letter*.

C. Renee J. v. Houston Indep. Sch. Dist., 73 IDELR 168 (5th Cir. 2019). The school district made FAPE available where it was able to show that it made multiple attempts to accommodate the teenager with autism, InD and ADHD. While the student had gotten into altercations with other students and had anxiety about attending school based upon some of those incidents, the student's teacher communicated with the parents nearly 30 times over a 4-month period of time in an attempt to convince them to return the student to school. In addition, the district arranged for the teacher to escort him from his parents' car into the school building every morning and allowed him to attend the first hour of each school day in the office to ease his transition into the school setting. Based upon these efforts, the parents' claim that teachers and school administrators were "callous and unresponsive" to the student's fears about bullying is rejected. As to the parents' claim that the district should have offered home instruction even though there was no medical need, Texas law prohibits that. The parents' inability to provide the necessary information despite several requests by the district prevented an IEP team from placing the student on a home instruction program.

D. M.J.G. v. School Dist. of Philadelphia, 74 IDELR 151 (3d Cir. 2019) (unpublished). District court's judgment in favor of the district is affirmed. School district did not discriminate under the ADA where the special education teacher took steps to separate a teenager with autism and a severe intellectual disability from a classmate who allegedly touched her inappropriately the previous school year. Where parent argued that the district acted with deliberate indifference when it continued both students' placement in a classroom for students with intellectual disabilities that allegedly resulted in a second incident of inappropriate touching during lunch time, her argument is rejected. This is so because the special education teacher separated the students inside the classroom by rearranging their seats and instructed the aides to monitor the student and the alleged harasser more closely. The parent's argument that the district discriminated against the student by having only one classroom for students with intellectual disabilities is also rejected. While this may have been a better accommodation for the student, the suggestion of a better accommodation is not equal to or sufficient for showing deliberate indifference.

E. E.M. v. San Benito Consolidated Indep. Sch. Dist., 374 F.Supp.3d 616, 74 IDELR 106 (S.D. Tex. 2019). District's motion to dismiss the parent's hostile environment claims under Section 504/ADA is denied. A parent claiming hostile environment must show 1) the student has a disability; 2) the student was harassed because of the disability; 3) the harassment was so severe or pervasive that it caused an abusive environment; 4) the district knew about the harassment; and 5) the district was deliberately indifferent to the harassment. The parent's complaint here included all elements, where it claimed that the multiply disabled middle school student was repeatedly mocked for his intellectual and speech impairment and that there existed a "constant stream" of physical and verbal harassment for 2 and ½ years. It is alleged that peers repeatedly insulted the student, damaged his property and, one time, knocked his front teeth out to the

point that roots were exposed. As a result, the student's academic performance declined. This type of alleged harassment goes far beyond the sort of teasing and bullying that normally takes place in schools. The parents also allege that they sent letters to district leaders on seven different occasions to notify them of the harassment and the district only responded to one incident but closed the matter without allowing the parent to review video surveillance. Thus, the parent has properly plead deliberate indifference.

F. Sauzo Vargas v. Madison Metro. Sch. Dist., 74 IDELR 165 (W.D. Wis. 2019). Where parent has failed to show that the sexual assault of her child with an intellectual disability by a peer was related to the child's disability, the 504/ADA claims against the district are dismissed. While the student may have been vulnerable to such abuse, this overall vulnerability is not enough to establish a link between her disability and the assault. Instead, the parent needs to show that the perpetrator knew about the student's vulnerability and targeted the student for that specific reason. Although someone could speculate that the perpetrator saw the student as "easy prey" due to her cognitive immaturity, speculation will not avoid summary judgment to the district.

G. Barry v. Cedar Rapids Comm. Sch. Dist., 74 IDELR 46 (N.D. Iowa 2019). Where the bus driver slapped an 11-year-old with CP, it did not create a valid claim under 504/ADA against the district. Even if the slap were intentional, the single incident is not enough for a parent to argue that the district subjected the student to a hostile environment based upon his disability. Here, the student had undergone brain surgery several months prior to the bus incident and his negative behaviors increased due to apparent lack of impulse control resulting from the surgery. On the day of the incident, when it was time for the student and his wheelchair to get off the bus, he began yelling and spitting at those around him. As the driver, bus attendant and paraprofessional struggled with the student, the parent got on the bus to help. Eventually, the student was placed on the wheelchair lift, but witnesses generally agreed that the student was attempting to spit at the driver while on the lift and the driver's hand hit the student's face. The one incident, however, does not support disability discrimination or a hostile environment toward the student.

H. Wagon v. Rocklin Unif. Sch. Dist., 74 IDELR 196 (E.D. Cal. 2019). District's claim that the alleged derogatory comments made by a bus driver were unrelated to the nonverbal adult student's disability is rejected. Here, the parent has sufficiently pleaded disability discrimination and the district's motion to dismiss 504/ADA claims is dismissed. According to the parent's allegations, the bus driver made statements that were connected to the student's disability, such as "you're just being a brat" and "you almost look like you know what you're doing" when the student urinated on the bus, engaged in repetitive movements or when he touched or moved items. If the parent's allegations are true, they could support a finding of disability harassment where "abuse in response to various symptoms of plaintiff's disability meets the causation standard for a discrimination

claim…." In addition, the parent has effectively stated a claim against the district for deliberate indifference to support the request for money damages, where it is alleged that school administrators had access to bus videos showing this behavior and did not appropriately monitor or address the bus driver's inappropriate behaviors.

I. T.C. v. Central Westmoreland Career & Technology Ctr., 74 IDELR 138 (W.D. Pa. 2019). The physical and sexual assault of the student by his peers in this case does not rise to the level of a violation of the 14th Amendment on the part of the district. This is because the district did not take any affirmative steps to place the student in danger, which is required to substantiate a constitutional violation under the "state-created danger" theory. The parents did not show that the district took such affirmative steps to create the danger that resulted in the student's injury, and there was no evidence that the district sanctioned the assault or made the student more vulnerable to it. Where the student was prone to being bullied and harassed based upon his impairments, the IEP team determined that he needed a personal aide to accompany him at all times at school. Although the parent alleged that the district failed to assign the student the 1:1 aide as required, the implementation failure did not constitute an affirmative action to place the student in danger. While this may have been a denial of FAPE, the district did not create the danger and, therefore, did not violate the 14th Amendment. Thus, the 14th Amendment claim is dismissed.

J. Wong v. Seattle Sch. Dist., 74 IDELR 155 (W.D. Wash. 2019). School district is not responsible for the decision of the parents of a classmate to obtain a court order barring this third-grader with autism from school grounds after he threatened to harm the classmate. Thus, judgment for the district on the parents' 504/ADA claims is granted. To hold the district responsible for the restraining order, these parents would need to show that 1) the alleged harassment was based on their child's disability; 2) the classmate's parents were under the district's control; and 3) the district had actual knowledge of the harassment but failed to respond appropriately. While the court questions the decision to request a TRO as "shockingly insensitive" to the student's disability, his parents could not establish that there was harassment on the basis of the student's autism. Even if the parents here could establish disability harassment, they could not hold the district responsible for the actions of other parents, as their decision to file for a TRO was not within the district's control. There is little evidence that the district encouraged the "unfortunate and misguided" attempt to obtain a TRO against the student. To the contrary, teachers and school administrators participated in a subsequent hearing and testified that the restraining order was inappropriate and attempted to address the social and behavioral issues that prompted the classmate's parents to seeks the TRO in the first place. Where the parents cannot show that the district played any role in the issuance of the TRO, they cannot hold the district responsible for any emotional harm caused by the removal from school.

RETALIATION

A. Richard v. Regional Sch. Unit 57, 72 IDELR 203, 901 F.3d 52 (1st Cir. 2018). Teacher failed to show that the district transferred her and placed her on a performance improvement plan based upon her advocacy on behalf of two kindergarten students who she referred for IDEA evaluations. To prevail on her retaliation claims, the teacher was required to show that: 1) she engaged in a protected activity; 2) the district took adverse action against her; and 3) the adverse action was based on the protected activity. Here, the teacher was subjected to adverse action following her referral of the students for an evaluation, but the teacher did not connect the referrals to her reassignment and poor performance review. The district regularly referred students for IDEA evaluations and, therefore, would have no reason to retaliate against the teacher for these two referrals. In addition, it appeared that the dissatisfaction with the teacher's performance originated with the Superintendent, who did not appear to be aware of the referrals that she made.

B. H.C. v. Fleming Co. Kentucky Bd. of Educ., 72 IDELR 144 (6th Cir. 2018). Where the district kept a detailed record of the parent's contentious and unpleasant interactions with school staff, the parent's claim that the district banned her from school grounds based upon her advocacy on behalf of her son is rejected. Thus, the district court's dismissal of the parent's 504 retaliation claim is affirmed. Assuming that the mother's request for a 504 hearing and complaints about disciplinary measures qualify as "protected activity," the district offered a legitimate, nondiscriminatory reason for banning the parent from school grounds. Not only did the district have documentation showing that the parent harassed, intimidated and threatened its employees, but it explained that it filed a criminal trespass against the parent because she disregarded a letter banning her from entering school property without prior approval. The burden then shifted back to the parent to show pretext, but she failed to present any evidence showing that the proffered reasons for her exclusion were pretextual.

C. L.F. v. Lake Washington Sch. Dist., 72 IDELR 152 (W.D. Wash. 2018). Judgment is granted for the district on the father's 504 unlawful retaliation claim where there is evidence that he has a history of angry, aggressive and hostile encounters with district employees. Based upon such encounters, a communications protocol was put in place that limited the father's communications with school staff by holding biweekly meetings to address his concerns about his children's education. The parent failed to show that the district implemented this plan because of his advocacy. In fact, the record demonstrates that the district imposed the plan in response to the parent's history of burdensome, intimidating and unproductive communication with district staff and was completely unrelated to any attempts by the father to pursue a Section 504 action.

D. L.G. v. Fayette Co. Kentucky Bd. of Educ., 72 IDELR 126 (E.D. Ky. 2018), aff'd, 119 LRP 22928 (6th Cir. 2019). The parents did not engage in any protected activity that would support their claim for retaliation against the district. Their submission of a doctor's note stating that their son would need to be out of school for several months due to an e-coli infection was not "advocacy" sufficient to constitute protected activity for purposes of a retaliation claim. The complaint never alleges that they requested a 504 plan or any other accommodation dealing with educational needs. Instead, they only provided the district with a doctor's note and a school counselor contacted them a short time later to discuss how the student could access coursework online. Because the parents did not allege that they advocated on behalf of their child before the district filed its truancy petition, they could not show retaliation based upon their advocacy.

E. M.L. v. Williamson Co. Bd. of Educ., 74 IDELR 152 (6th Cir. 2019)(unpublished). The fact that two teachers commented on the second-grader's sleeping arrangements and other aspects of home life when they reported his inappropriate touching of a classmate to child welfare authorities as a part of a suspected abuse report did not prove that the district intended to punish the parents for their advocacy in seeking more effective behavioral supports. The parents sufficiently pled the elements for retaliation by showing that they did engage in protected activity when they challenged the district's use of a seclusion room with their son and showed adverse action toward them by the teachers who reported them to child welfare authorities shortly thereafter. However, the teachers were mandatory reporters of suspected child abuse and neglect under state law and, therefore, the parents could not prevail on their claim unless they showed that the teachers' compliance with the mandatory reporting requirements was a "coverup" for unlawful retaliation. Although the teachers' reports included some questionable information about the family's home life, that information could have some connection to the sexualized behaviors the student was exhibiting in the classroom. The court cannot say that a child's sleeping arrangements, the parents' sleeping arrangements, the parents' relationship with each other and the potential substance abuse issues of relatives are irrelevant to whether a child is being sexually abused. Finally, the child welfare department's decision to close the cases following an investigation does not prove the district's intent to retaliate, because the teachers had a duty to report suspicions of abuse.

RESTRAINT/SECLUSION

A. Crochran v. Columbus City Schs., 73 IDELR 33 (6th Cir. 2018) (unpublished). Dismissal of parents' claims for damages under Section 1983 is affirmed where the claim speaks to a potential claim for negligence rather than a constitutional violation. There is no evidence that the student's teacher used a "body sock" for the purpose of harming the student with autism and ADHD. Rather, the teacher's use of the "breathable cocoon" of stretchable fabric was for pedagogical purposes when the student was acting out in class and did not respond to typical behavioral interventions. Finding that the use of a body sock helps children who are

"sensory seeking" and is used as a sensory tool to put pressure on a child and because this student's IEP indicated that he needed "heavy work sensory warm up" in order to be successful with fine or visual motor tasks, the teacher's actions did not "shock the conscience." In addition, the teacher did not force the student to get into the body sock; rather, the student willingly stepped into it when the teacher asked if he would like to use it. While the student did fall and sustain injury to his teeth while in the body sock, the teacher did not violate his constitutional rights.

B. A.T. v. Dry Creek Joint Elem. Sch. Dist., 72 IDELR 122 (E.D. Cal. 2018). Even though the parents of a student with bipolar disorder authorized educators to restrain their son if he posed an immediate danger to self or others, they can sue them for violating their son's constitutional rights, nonetheless. Thus, the educators' motion to dismiss the parents' 4th Amendment claim is denied. This is because the parents' authorization for "therapeutic containment" only authorized the use of physical restraint when necessary to prevent the student from hurting self or others or from damaging property. The parents alleged, however, that district employees restrained their son 112 times over a three-year period. This number itself raises questions as to whether the use of physical restraint was reasonable under the circumstances. Further, the parents allege that the educators failed to notify them after each incident of restraint as required. Thus, the parents have stated a viable claim for relief under the 4th Amendment.

C. Cameron D. v. Arab City Bd. of Educ., 73 IDELR 11 (N.D. Ala. 2018). District's motion for summary judgement on parents' 504/ADA claims is granted where the parents failed to prove deliberate indifference on the part of the district. The parents were required to show that the district was aware of the special education teacher's use of an adaptive chair as "timeout" for a kindergartner with a disability but failed to intervene. Here, the school principal responded to the parents' complaint by investigating the allegations and sending a report of her findings. In addition, the principal instructed teachers at the school to stop using adaptive equipment like the chair at issue here when addressing student behavioral issues. This response was reasonable in light of the known circumstances.

D. Ricks v. State of Hawaii Dept. of Educ., 73 IDELR 225 (9th Cir. 2019) (unpublished). District court's denial of the parent's motion for judgment on her Section 504 claim regarding the use of a Rifton chair that was not included in the autistic preschooler's IEP is upheld. Where the parties disagreed on the facts at issue, the district court was correct in allowing the case to proceed to a jury trial, where the jury found in favor of the district after a four-day trial. While the teacher's use of a Rifton chair was not set forth in the child's IEP, the teacher explained that the child's lethargy and poor muscle tone prevented him from sitting upright and interfered with the provision of special education services, so she placed him in the chair once or twice per week over a two-month period to provide physical support and to keep him from falling. Based upon this, it "does

not follow that the use of a Rifton chair, above and beyond the aids and services listed in the IEP, necessarily violates Section 504's regulations…."

E. E.C. v. U.S.D. 385 Andover, 74 IDELR 94 (D. Kan. 2019). District did not violate 504/ADA when it used seclusion and restraint to handle the aggressive, disruptive, defiant and sometimes violent behaviors of an 11-year-old. To successfully bring an action under 504/ADA, the parents are required to show that the district discriminated against the student "by reason of" his disability. According to Tenth Circuit authority, a district's use of restraint in response to behavior that is disability-related is not discriminatory, as long as the district's response is based upon the student's conduct rather than disability. According to the parents' complaint, the district used seclusion and restraint as behavior management techniques when the student was disruptive or violent. However, the Tenth Circuit has specifically held that a student's conduct may be regulated, even if it is a manifestation of the student's disability. Because the parents could not connect the district's use of seclusion or restraint to the student's disability as opposed to his misconduct, they could not show disability discrimination.

CHILD FIND DUTY TO REFER

A. Krawietz v. Galveston Indep. Sch. Dist., 900 F.3d 673, 72 IDELR 205 (5th Cir. 2018). District court's ruling in favor of the parents is affirmed. School districts are required to identify, locate and evaluate all children who need special education as a result of a suspected disability. In this case, when the student re-enrolled in the district for the 2013-14 school year, she immediately had behavioral issues, so a 504 Plan was developed to provide for accommodations needed for PTSD, ADHD and OCD. In addition, her application indicated that she had received special education in the past and that she had never been dismissed from special education services but since the district could not locate her previous records, it was determined that she had been dismissed. Although the accommodations in the Plan, such as extended time to complete assignments and small group testing, enabled the student to pass ninth grade and resulted in improved behaviors during that school year, her behaviors and academic performance deteriorated the following year. The evidence showed that the student scored below the 20th percentile on standardized tests, failed several classes and engaged in criminal behaviors, such as stealing. In addition, records indicated that the student was hospitalized in September 2014 for disability-related health issues. However, the district failed to refer the student for an evaluation until April 2015, approximately 6 months after it became aware of the student's difficulties. The district's argument that the student's academic success in the 9th grade precluded the need for an evaluation is rejected, as the district's child find duty arose anew in the Fall of 2014 based upon the student's decline, hospitalization and incidents of theft during the semester, taken together. Thus, the hearing officer's award of compensatory education is upheld, and the parents are entitled to more than $70,000 in fees.

B. Lawrence Co. Sch. Dist. v. McDaniel, 72 IDELR 8 (E.D. Ark. 2018). While the student with autism and ADHD made good grades, was recognized as an honor student and received commendation to the gifted and honors program, this did not relieve the district of its obligation to evaluate for special education. Thus, the district's request for summary judgment challenging the hearing officer's order to evaluate is denied. Here, the student had a number of social and behavioral issues, including spinning in circles, avoiding human contact, having temper tantrums and pulling his hair out. In addition, his teachers reported that he blurted out answers and argued in class, and his parent had requested an evaluation based upon her feeling that the student needed services in the area of social skills. The district had refused to evaluate, contending that the student's 504 plan was sufficient and challenged the hearing officer's order because the student did not need special education. However, the duty to evaluate is triggered when a district identifies a student as possibly having a disability, which requires a "full and individual" evaluation. The hearing officer's order to evaluate does not necessarily contradict the opinions of experts who believe that the student does not need special education. Rather, the hearing officer concluded only that adequate evaluation had not taken place based upon the assumption that children with disabilities who perform well academically do not need special education. Although this position "comports with common sense," it contravenes the IDEA's regulations and guidance from the U.S. DOE.

C. Stephen C. v. Bureau of Indian Educ., 72 IDELR 44 (D. Az. 2018). BIE's motion to dismiss the Section 504 action brought against it is denied where specific descriptions are provided as to how the exposure of three Havasupai students to childhood trauma affected their ability to read, think and concentrate. The complaint describes how exposure to trauma can result in physiological harm to children and how those physiological impairments can manifest in the school setting. Importantly, the students here described how their own experiences relate to their education, as the complaint is replete with allegations relating to each student's unique exposure to complex trauma and adverse childhood experiences. In addition, the BIE's position that it was unaware of any possible trauma-related disabilities is rejected, based upon BIE's own documentation of the difficulties faced by the Havasupai community. Clearly, the agency had knowledge of the impact of trauma and adversity on Havasupai students. Thus, there is a possible cause of action for failure to evaluate and noncompliance with Section 504 regulations governing child find and procedural safeguards.

D. T.W. v. Leander Indep. Sch. Dist., 74 IDELR 12 (W.D. Tex. 2019). The hearing officer's decision that the district did not violate its child find duty when it refused the parent's request to evaluate a former star high school football player with dyslexia is upheld. Here, the student did not establish that he had any need for special education and related services that would have made him eligible for special education under the IDEA. The student passed all of his classes, graduated from high school, was admitted to college and performed well on most state assessments. Further, the student made behavioral progress and had appropriate

social skills. Contrary to the student's assertions, the accommodations provided to the student both at home and school were not "highly individualized," but were available to other students as needed, including things such as extra time and opportunity to make up homework and tests. The provision of those accommodations did not show that the student needed specialized instruction. While the hearing officer considered the help and encouragement the student received from his parent and coaches, the student's overall performance, graduation and admission to college showed that he did not need special education. Thus, the district's motion for judgment on the child find claim is granted.

E. Doe v. Cape Elizabeth Sch. Dept., 74 IDELR 95 (D. Me. 2019). Hearing officer's decision is upheld that district did not violate IDEA's child find requirements and had no reason to refer the student for an evaluation in 9th or 10th grades. A district has a duty to evaluate when 1) it has reason to suspect the student has one of the disabilities identified in IDEA; 2) the suspected disability adversely affects the student's educational performance; and 3) the student may need specialized instruction to address those adverse effects. Here, however, the fact that there were allegations that the student had behavioral issues in the home is not sufficient. The student maintained "excellent grades" in school and did not have any disciplinary problems. In addition, the student had only one unexcused absence during those two years at issue, which did not trigger the duty to evaluate based upon absenteeism. While the student was diagnosed with anxiety disorder in the 11th grade and the district did find the student eligible for IDEA services at that time, the district had no reason to suspect a disability earlier. Finally, the district's decision to develop a 504 Plan for the student during her 11th grade year before finding her eligible for an IEP is upheld given the student's history of academic success. It was not unreasonable for the district to attempt accommodations and modifications prior to finding the need for special education.

EVALUATIONS

A. Z.B. v. District of Columbia, 72 IDELR 27, 888 F.3d 515 (D.C. Cir. 2018). Where it appeared that the district relied only upon the private evaluation report to develop the 2014 IEP for a student diagnosed with ADHD and learning disabilities rather than conducting its own assessments, it is unclear whether additional data were required to develop an appropriate IEP. After the parents provided a private evaluation report diagnosing the child with ADHD and determining that she had "weaknesses" in math and written expression, the district found the student eligible under the IDEA and developed an IEP based on the evaluation. The parents subsequently enrolled the student in private school and filed a due process hearing for reimbursement of private school costs, arguing that the IEPs for 2014 and 2015 were inadequate because they lacked certain goals and adequate specialized instruction. For the 2014 IEP, the district erred by failing to question whether the IEP team needed additional or different metrics of

the child's skills before developing her IEP. It was not enough to reason that the IEP accorded with recommendations in the private evaluator's report. "The school may not simply rubber stamp whatever evaluations parents manage to procure or accept as valid whatever information is already at hand." As to the 2015 IEP, the district took an affirmative role in collecting information before developing it, so that IEP offered FAPE. The case is remanded to determine the appropriateness of the 2014 IEP.

B. Letter to Mills, 74 IDELR 205 (OSEP 2019). In response to a parental request for an evaluation and regardless of whether the district chooses to screen a child to determine whether an evaluation is needed, the district must notify the parent that it is, or is not, going to evaluate the student and why pursuant to IDEA's prior written notice (PWN) requirements. Here, the question stems from the parent's request for a functional vision assessment by an optometrist for a child diagnosed with a visual disability. The district proposed in response to conduct a "screening" in the same area of suspected disability but with different personnel. When a district responds to a parent's evaluation request, however, it must provide the parent PWN regardless of whether it decides to proceed with the evaluation. If the district believes the evaluation is not necessary, it must explain why in the PWN. While IDEA does not prohibit districts from screening a child to determine whether there is a suspicion of a disability, districts may not use screening procedures to delay or deny an IDEA evaluation. Thus, referring a child for a screening after a request for an evaluation has been made does not replace the evaluation or alleviate the district's responsibility to issue a PWN.

ELIGIBILITY/CLASSIFICATION

A. Durbrow v. Cobb Co. Sch. Dist., 72 IDELR 1, 887 F.3d 1182 (11th Cir. 2018). Student with ADHD was not a student with a disability because he did not demonstrate a need for special education services. A student is unlikely to need special education if, inter alia: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to understand course material. Here, the student met or exceeded academic expectations during the first three years of high school. Not only was he selected for his school's rigorous magnet program based on his achievement in math and science, but he earned straight A's in his honors and Advanced Placement courses and achieved high scores on college entrance exams. In addition, the student's teachers did not believe he needed special education and several testified that his ADHD did not impede his learning and that he was able to make progress when he put forth sufficient effort. The work the student completed during his senior year showed that he was able to absorb material and maintain focus. The low grades that he received stemmed from his failure to complete homework or take advantage of the accommodations in his Section 504 plan. Thus, the district court did not err when finding that the

student's poor grades did not result from his inability to concentrate. Rather, it stemmed from neglect of his studies.

B. William V. v. Copperas Cove Indep. Sch. Dist., 74 IDELR 277 (5th Cir. 2019) (unpublished). The district court's decision is vacated and remanded where the court failed to consider whether the second-grader with dyslexia had an educational need for specialized instruction and related services when finding that the district erred in determining the child was not eligible under IDEA. On remand, the lower court must apply the two-part test for IDEA eligibility and find that the student: 1) has one of the 13 disabilities specifically identified in the statute; and 2) needs special education and related services because of that disability. Thus, the district court erred in finding the student eligible based solely on his dyslexia diagnosis and simply because dyslexia qualifies as a specific learning disability under IDEA. Where the district court never considered whether the accommodations the student received in the regular classroom qualified as special education -- a circumstance that might demonstrate a need for IDEA services nor did it discuss whether the student made appropriate progress with those accommodations, this court cannot review the appropriateness of the district's eligibility determination.

C. Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 74 IDELR 124 (5th Cir. 2019). District violated IDEA when it found that the 4th-grader with ADHD and dysgraphia had no need for special education services just weeks after it found that he was eligible. The fact that the student made A's and B's in all subjects after the district changed its mind about his need for special services has no bearing on the appropriateness of the district's eligibility determinations. The district's revised position about eligibility was not based upon any new evaluative data. Where the IEP team (which included 9 district members) found the student eligible for services in January 2016 following a three-hour review of hundreds of pages of evaluative data and then convened a staff meeting and determined the student was not eligible in February 2016 after the parents rejected the proposed IEP, the district court's decision that a violation of IDEA occurred is affirmed. The hearing record reflected various reliable indicators of the student's struggles in the general education setting in January 2016, including failed benchmarks in reading, writing and math and teachers noting attentional difficulties and trouble producing written work.

D. Independent Sch. Dist. No. 283 v. E.M.D.H., 357 F.Supp.3d 876, 74 IDELR 19 (D. Minn. 2019). Because a high schooler with depression and anxiety was unable to access the general education curriculum due to her frequent absences, the district erred in focusing on her above-average academic performance when considering her need for IDEA services and, therefore, denied the student FAPE. IDEA eligibility has two components. First, the student must have one of the disabilities identified in the IDEA. Second, the student must need special education because of that disability. The purpose of special education is to help students with disabilities progress in the general education curriculum. Here, the student's frequent absences and subsequent school refusal prevented her from

making educational progress. "No one disputes that the student excelled on standardized tests" but "neither can anyone dispute that her absenteeism also inhibited her progress in the general education curriculum." The district violated its child find obligation by waiting two years to conduct an IDEA evaluation, where the district had knowledge of the student's frequent absences and mental health conditions in 2015 but waited until her parents requested an evaluation in April 2017. Thus, the parents should be reimbursed for several independent evaluations and the district must hold quarterly IEP meetings for the student.

E. R.F. v. Southern Lehigh Sch. Dist., 74 IDELR 292 (E.D. Pa. 2019). Though the parents of the 4th grader disagreed with the district's decision to exit their child from special education, the hearing officer was correct in finding that the district's evaluative data supported the decision. The evaluation data included progress reports showing that the student mastered the speech and language goals in the third-grade IEP, data showing that his language skills were in the "average" range; and the results of newly conducted assessments in the areas of academics, behavior, PT, OT and visual motor ability. In addition, the student earned scores ranging from "basic" to "advanced" on the PA System of School Assessment and he performed will in class, obtaining passing grades at the end of 4th grade and earned a C+ in ELA 4, an A in Math 4, an A in Science 4 and a B+ in Social Studies 4. While the parents produced an independent evaluation that the student had an ongoing need for special education, it was not consistent with the district's reevaluation or the student's performance.

F. S. v. West Chester Area Sch. Dist., 74 IDELR 20 (E.D. Pa. 2019). The district's initial evaluation and finding that the student with a health impairment was not eligible for special education services was appropriate. The fact that the district reevaluated the student less than a year after finding the student ineligible and found him eligible at that time does not invalidate its earlier decision that there was no need for specially designed instruction and that a Section 504 plan would be provided instead. The district had the right to monitor the student's progress with the 504 plan before considering the need for additional services. The district conducted a second IDEA evaluation after the student's 5th grade teachers reported that he was having academic, social and emotional difficulties and found him eligible in light of the new information. Thus, the hearing officer's finding that the district's initial evaluation and eligibility determination were appropriate is upheld.

G. Independent Sch. Dist. v. E.M.D.H., 74 IDELR 19 (D. Minn. 2019). Where the high school student with depression and anxiety was not able to access the general curriculum based upon her frequent absences from school, the school district erred in focusing on her above-average grades when considering her eligibility for special education services. IDEA eligibility has two components: 1) the student has one of the disabilities set out under IDEA and 2) the student needs special education because of the disability. Where the purpose of special education is to help students with disabilities progress in the general education curriculum, this

student's frequent absences and subsequent school refusal prevented her from making educational progress. While no one disputes that the student excelled on standardized tests, her absenteeism also inhibited her progress in the general curriculum. In addition, the district violated its child find duty when it waited two years to conduct an IDEA evaluation. The district had knowledge of the student's frequent absences and mental health conditions in 2015 and should have evaluated her long before her parents requested an evaluation in April 2017. Thus, the parents are entitled to reimbursement for several independent evaluations, and the district must hold quarterly IEP meetings for the student.

H. E.P v. North Arlington Bd. of Educ., 74 IDELR 80 (D. N.J. 2019) (unpublished). District's decision that preschooler was no longer eligible under IDEA is upheld. Just because the child did not master every one of her IEP goals and was still a bit more shy than her peers, did not mean that she continued to need special education. Three educators who worked with the child testified at the due process hearing that she had made tremendous progress and had mastered most of her speech goals and many of her social goals. In addition, they testified that her failure to master certain social goals would not prevent her for interacting and being successful in the regular education classroom. Finally, the teachers' reports and end-of-year testing supported the fact that the child was no longer eligible and that she had made significant progress, such that she can succeed without special education. While there was some evidence to the contrary, it came from witnesses whose testimony relied primarily on the parent's views, rather than upon objective data.

I. Bentonville Sch. Dist. v. Smith, 73 IDELR 203 (W.D. Ark. 2019). Where the special education services in the student's IEP are tailored to address his academic and behavioral needs, FAPE was not denied when the district changed the student's classification from autism to emotional disturbance. The parent's claim that the change in classification was incorrect and, as a result, the district could not appropriately address the student's autism-related behaviors, is rejected. The change in classification had no effect on the special education services set out in the IEP, since the most recent IEP and BIP continued to offer the student positive behavioral interventions, such as frequent breaks, positive reinforcement and encouragement, a highly-structured environment, a separate desk and alternative work options. These interventions were the same ones provided when the student was classified with autism. In addition, the evidence is that the interventions have continued to reduce the student's behavioral issues in class and helped him to improve his overall social skills and academic performance. Thus, the particular disability classification will, "in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs." Thus, the hearing officer's decision in favor of the parent is reversed.

INDEPENDENT EDUCATIONAL EVALUATIONS

A. A.H. v. Colonial Sch. Dist., 74 IDELR 219 (3d Cir. 2019) (unpublished). Parent is not entitled to an IEE funded by the district simply because her own expert would have conducted different or additional tests and that she thought the district should have conducted neurological, psychiatric, OT and functional behavioral assessments. Here, the district requested a hearing to show that its evaluation was appropriate and showed that it used a variety of assessment tools and strategies, used technically sound instruments and properly considered all data when determining the student's eligibility as an ED student. While the private psychologist testified that the district's evaluation was "incomplete" because it did not include the requested assessments, the focus is not on whether the district's evaluation explored all facets of the student's disabilities. Rather, the district was able to show that its evaluation identified all of the student's special education needs.

B. D.S. v. Trumbull Bd. of Educ., 357 F.Supp.3d 166, 73 IDELR 228, (D. Conn. 2019). Where the school district had conducted an FBA, the parents were not able to show how their requested IEE was within the scope of the district's evaluation. The right to an IEE must be premised upon an actual disagreement with an evaluation that the school district has conducted. Thus, there must be a "connection between the evaluation with which the parents disagree and the independent evaluation they demand." Here, the additional assessments that the parents sought went beyond what the district's FBA measured. If parents were to have such "free-ranging" rights to impose financial obligations on schools every time that a school district conducts a limited assessment...then schools would understandably be reluctant to conduct any interim testing or assessment beyond the bare statutory minimum for fear of significant financial liability from parental demands for publicly funded IEEs." Thus, the hearing officer's ruling that the parents' disagreement with the FBA did not entitle them to an IEE for the additional requested assessments of OT, AT and PT is upheld.

C. Collette v. District of Columbia, 74 IDELR 251 (D. D.C. 2019). Parents are entitled to $4,400 for the full cost of a neuropsychological evaluation conducted of their child with autism and Pediatric Autoimmune Neuropsychiatric Disorders Associated with Streptococcal Infections. In denying full funding to the parents, the hearing officer improperly placed the burden on the parents to establish that the IEE met agency criteria. When faced with an IEE request, a district must either 1) file a due process complaint to show its evaluation is appropriate or 2) pay for the IEE, unless it does not meet agency criteria. Thus, the district has the burden to show that an IEE is inadequate. First, the hearing officer required the parents to show that the evaluator charged the prevailing market rate in order to recover the difference between what the district paid the parents ($2,406) and the actual cost of the IEE. At the same time, the district did not provide any evidence of the market rate. Secondly, the hearing officer erroneously required the parents to show that a classroom observation was not a required IEE component.

Although there were some indications that an observation may have been part of district criteria, the district did not provide clear evidence of this. In fact, the school psychologist's testimony suggested that he thought a classroom observation was required to effectively evaluate the student—not that it was mandatory for all neuropsychological evaluations.

D. S.S. v. Hillsborough Township Pub. Sch. Dist., 73 IDLER 210 (D. N.J. 2019) (unpublished). District is not required to pay $4,400 for a neuropsychological assessment obtained by the parents of a 16-year-old student with autism before the district had the chance to reevaluate the student. The parents' withdrawal of consent for the district's reevaluation invalidated their request for a publicly funded IEE. IDEA allows parents to seek an IEE at public expense when they disagree with a district evaluation and New Jersey's Code notes that this is "upon [the] completion of an initial evaluation or reevaluation" with which they disagree. Thus, these parents are only entitled to an IEE at the district's expense if they disagreed with an evaluation that had already been completed by the district. Here, the parents requested an IEE the day after they signed the district's assessment plan, and then verbally revoked consent for the district's reevaluation three weeks later. It is undisputed that at the time the parents requested an IEE, the district had not yet finished its reevaluation. Because the parents had not disagreed with an evaluation conducted by the district, they were are not entitled to an IEE at public expense and the ALJ's decision is reversed.

E. L.C. v. Issaquah Sch. Dist., 74 IDELR 132 (W.D. Wash. 2019). District is not required to fund an IEE where it appropriately evaluated the student for SLD. While the parents took issue with the district's evaluation because it did not assess the student for dyslexia, the district explained that dyslexia fell under the SLD category for IDEA eligibility. Under IDEA, districts are required to conduct "full and individual" evaluations and are to use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the student. Assessments are to be administered by trained and knowledgeable personnel and must encompass all areas related to suspected disability and special education and related service needs. The district met these requirements when it 1) obtained parent input; 2) considered a private evaluation; 3) conducted a classroom evaluation; 4) administered a battery of standardized assessments; and 5) evaluated the student in writing, math, communication and social emotional functioning. In addition, the district produced a "detailed and comprehensive evaluation report" that was sufficient in scope for developing an IEP.

F. Rose Tree Media Sch. Dist. v. M.J., 74 IDELR 15 (E.D. Pa. 2019). Because the district could not show that its evaluation of a gifted high school student with PTSD, depression and anxiety was appropriate, it must fund an IEE. After increased absences and declining grades, the district evaluated the student for ED but determined that the student was not eligible for IDEA services. In conducting its evaluation, however, the district seemingly made no effort to explore any

relationship between the student's emotional functioning and her attendance issues, which the district pointed out were clearly adversely affecting her educational performance. The district also erred in finding that her exceptionally strong academic performance when at school reflected that her mental health needs did not adversely affect her educational performance. Because the district did not adequately assess whether the student met ED criteria, the hearing officer's order for the school district to fund a comprehensive IEE is upheld.

G. L.C. v. Alta Loma Sch. Dist., 74 IDELR 261 (C.D. Cal. 2019). The IEE process was unnecessarily delayed when the district would not provide information to the parent sufficient to seek an exception to the district's cost cap for IEEs. In addition, the district waited 84 days to request a hearing on the parent's IEE request. Thus, the case is remanded to the hearing officer to determine the effect of the procedural violation.

REEVALUATION

A. Wimbish v. District of Columbia, 381 F.Supp. 3d 22, 74 IDELR 65 (D. D.C. 2019). District is required to conduct a comprehensive reevaluation of student with ADHD. Where the district explained to the parent at an IEP meeting that it would be replacing the student's IEP with accommodations in a 504 plan, an evaluation should have taken place before the student was dismissed from special education under the IDEA. A reevaluation requires a new round of tests and analysis, not just observations, interviews and other data collection. The district, therefore, must conduct a full evaluation of the student in all areas of suspected disability. In addition, it must fund an IEE should the parent disagree with its evaluation.

B. Bellflower Unif. Sch. Dist., 74 IDELR 231 (C.D. Cal. 2019). Parents' contact with the district four times over a two-year period to request an updated IEP for their daughter with a disability triggered the district's duty to reevaluate the student and convene a meeting to develop a new IEP. Here, the district knew that the parents of the parochial school student wanted their daughter to return to public school, but conditioned their request for a reevaluation and an updated IEP upon the student's re-enrollment in the district, noting that since the parents placed her in a private school located in another district, there was no duty to evaluate. Clearly, the district had a continuing obligation to make FAPE available to all of its resident students with disabilities and to convene an IEP meeting when the parents expressed interest in a public school placement. The refusal to do so is a denial of FAPE, and the parents are entitled to recover the cost of the private school placement as they were able to show that the private school met the child's needs and that she made significant progress while there.

THE FAPE STANDARD

A. C.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 74 IDELR 121 (1st Cir. 2019). District court's ruling that the district's proposed IEPs offered FAPE in the LRE to a teenager with an intellectual disability is affirmed. The parents' argument that, based upon the *Endrew F.* case, courts must also separately consider whether an IEP's objectives are "ambitious" and "challenging"—in addition to determining whether it is reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances—is rejected. *Endrew F.* did not create a 2-part test for the provision of FAPE, but instead rejected the notion that an IEP is appropriate if it allows for "merely more than *de minimis* progress." In doing so, the Court used terms such as "demanding, "challenging" and "ambitious" to define "progress appropriate in light of the child's circumstances," not to announce a separate dimension of the FAPE requirement. While a court evaluating the substantive appropriateness of a particular IEP may need to consider whether the IEP is challenging enough, such a determination would be part of the court's overall review rather than a separate part of the FAPE analysis. Because the district court determined that the proposed IEPs would allow the student to make appropriate progress, the parents are not entitled to reimbursement for private schooling. In addition, the district did not violate IDEA when it proposed placement of the student in a self-contained special education class for academic instruction. After weighing the restrictiveness of the placement and the extent of the student's needs, the proposed placement was appropriate.

B. D.F. v. Smith, 74 IDELR 75 (D. Md. 2019). IEPs developed by the school district offered FAPE to the student with autism when he attended public school. Thus, the parent is not entitled to reimbursement for private school. There is no evidence that the IEPs were deficient, even though the student only mastered his math goal during the two years he attended public school. The student's inability to master all of his IEP goals, however, does not necessarily indicate a denial of FAPE. Indeed, when the student received services in the 3:1 program outlined in his IEP, he was able to achieve the smaller objectives set forth under his IEP goals for written language, social and emotional development, OT, reading, speech-language, self-help and classroom behavior. Students with autism may not progress "linearly or consistently," and the nature of the disability suggests that any academic and social progress may occur intermittently. Because the evidence indicates that the student made progress toward his annual goals that was appropriate in light of his circumstances, the IEPs offered FAPE.

C. R.S. v. Highland Park Indep. Sch. Dist., 74 IDELR 10 (N.D. Tex. 2019). Hearing officer's decision that FAPE was afforded to the student is upheld where school district made efforts to prevent multiply disabled 5th-grader from falling from a seated position and took adequate measures to protect his safety. While the student suffered minor injuries when falling on two occasions—once from an OT bench and once when seated in an office chair that had a safety belt—a specialist

from the Texas School for the Blind and Visually Impaired visited on four occasions and did not observe any unsafe conditions. In addition, testimony revealed that the student was always accompanied by at least one adult, bolstering the district's evidence that it required a teacher or aide to be present when the student received related services. Further, the student did not suffer any serious or permanent harm as a result of either fall, and there was no record of any long-term effect of the injuries on the student's health or ability to learn. Thus, the student's injuries did not constitute a denial of FAPE.

D. Dennis v. Lubbock-Cooper Indep. Sch. Dist., 74 IDELR 18 (N. D. Tex. 2019). District offered FAPE to student with TBI, ADHD and speech impairment where student was able to make progress in the second-grade curriculum with services outlined in his 2016-17 IEP. According to the *Endrew* case, a student must receive an IEP that enables him to make appropriate progress in light of his circumstances. Here, the student made appropriate educational progress in both academic and nonacademic areas during the 2016-17 school year, and the district properly developed the IEP based on the student's previous IEP, education records, evaluation reports, teacher observations, parent feedback and input from the child's private OT. The child passed all of his general education courses with A's and B's, made measurable progress toward his annual IEP goals, and achieved grade-level reading and math scores on statewide assessments. In addition, the student developed and maintained appropriate relationships with his nondisabled peers and earned first place in a music memory competition. Although the parent claimed that her child "should have done better" because he was repeating second grade and was "a third grader by age," the district was not obligated to maximize the student's potential or guarantee a specific result. Thus, the hearing officer's ruling in the parent's favor is vacated and the parent's claims are dismissed. Note: In a second opinion by the court, the court denied the parent's request that the student's IEP be amended to add SLD as a disability classification, because the student was performing well. Lubbock-Cooper Indep. Sch. Dist., 74 IDELR 17 (N.D. Tex. 2019). Thus, the hearing officer's decision awarding reimbursement and compensatory services is vacated.

E. A.W. v. Tehachapi Unif. Sch. Dist., 74 IDELR 11 (E.D. Cal. 2019). The district did not deny FAPE simply because the proposed education plan provided less educational benefit than what the student's parent might prefer. Here, the district appropriately addressed the behavioral needs of a 9-year-old boy with autism and ADHD when it assigned a one-to-one aide to him to address his disruptive classroom behaviors. The aide provided the student with positive behavioral interventions during the school day which allowed him to reduce the severity and frequency of spitting, biting, kicking, hitting, screaming and eloping behaviors. Although the parent alleged that there was a need for the aide to be supervised by a BCBA for 2 hours per week to completely eliminate the behaviors, this position is rejected in light of the *Endrew* decision. Thus, the administrative decision in favor of the school district is upheld.

F. Mr. and Mrs. G. v. Canton Bd. of Educ., 74 IDELR 8 (D. Conn. 2019). The hearing officer properly denied the parent's request for private school tuition reimbursement where the district was able to demonstrate the student's significant progress on her IEP objectives. Here, the student improved during her last two years in middle school in numerous areas, including reading comprehension, writing, expressive and receptive language skills, motor skills and visual perception. Thus, the hearing officer's finding of progress was supported by the recorded progress noted by the IEP team in the student's IEPs. For example, in both seventh and eighth grades, she either mastered or made satisfactory progress on the majority of her IEP objectives. She also made honor roll and achieved mostly A and B grades. Thus, her IEPs were reasonably calculated to assist her in making appropriate progress and afforded FAPE.

G. C.F. v. Radnor Township Sch. Dist., 74 IDELR 48 (E.D. Pa. 2019). Parents are not entitled to reimbursement for a unilateral private placement where the school district's proposed IEP was appropriate. In developing the IEP, the district engaged in a thorough evaluation of the student's needs while incorporating input from the parents and their private experts. Here, the student had attended private school without any special education services until the conclusion of eighth grade. The parents then sought an evaluation prior to high school, and an IEP team convened which included his parents, three regular education teachers, the district psychologist, the parents' psychologist, the parents' speech pathologist, the district representative, the district's supervisor of instruction and an educational advocate. A second IEP meeting was also held that the parents attended with a special education advocate and an attorney. The district proposed a 42-page IEP that the parents rejected and filed for due process while unilaterally placing the student in a private school. The district's IEP met IDEA requirements by linking the student's IEP goals to the student's strengths and needs as identified by appropriate evaluations. For example, the IEP contained a goal for social skills and oral communication, connecting to the district's assessment results that revealed that the student did not accurately recognize nonverbal cues in his environment. In addition, a goal for verbal comprehension was included based upon the speech-language assessment that demonstrated the student had receptive and expressive deficits. In fact, the IEP included 31 specially designed interventions and additional modifications to assist the student in accomplishing his goals.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Forest Grove Sch. Dist. v. Student, 73 IDELR 115 (D. Ore. 2018). District did not impede the parents' participation in the IEP process by establishing a communication protocol with her limiting her ability to email school staff. This did not violate the IDEA, as parents do not have an unlimited right to communication with school staff. Reasonable restrictions on communication may be appropriate when a parent sends an excessive number of emails or uses an inappropriate tone with staff. The district must still, however, ensure that the

parent has the opportunity to participate in the IEP process and can speak with teachers and other service providers when necessary. Here, the district adopted the protocol in response to the large number of emails the parent sent to school staff, which limited her to one weekly email sent to the student's case manager regarding all of her concerns about the student's services. When the parent failed to comply with that protocol, the district began to block her email address for a few weeks in October 2012; however, the parent fully participated in every IEP meeting held and regularly spoke to the student's teachers by phone. Since the parent had no difficulty advocating for the student, the ALJ's finding that the district violated the IDEA by putting the protocol in place should be reversed.

B. R.F. v. Cecil Co. Pub. Schs., 919 F.3d 237, 74 IDELR 31 (4th Cir. 2019). It was not a denial of FAPE when the special education teacher unilaterally decreased the amount of time the student with autism and a rare genetic disorder spent in the general education setting based on the child's struggles there. Here, the parents had repeatedly requested a full-time special education placement for their child, so the procedural error did not significantly impede the parents' participation in the IEP process. Although the special education teacher made a procedural error, the parents had repeatedly objected to the child spending any time in the general education setting. Thus, the parents' participation rights were not impeded when the district failed to inform them that it was gradually changing the child's placement in line with their expressed wishes. In addition, the child's mother participated in a subsequent IEP meeting where the team agreed that the child would spend most of her time in a special education classroom. Because the only relief the parents are seeking—a private special education placement—would not remedy the district's procedural violation, the parents are not entitled to relief for a denial of FAPE. The parents' additional claim that the teacher's destruction of the raw data used for progress reports significantly impeded their participation is also rejected, because the parents received adequate information about the child's progress from data summaries contained in quarterly progress reports.

C. E.S. v. Montgomery Co. Bd. of Educ., 74 IDELR 153 (4th Cir. 2019) (unpublished). District court's decision upholding a ruling by an ALJ in favor of the school district is affirmed. While the parents contend that the district denied them the chance to meaningfully participate in the IEP process by not considering their input and objections to the district's placement and how the student responded to the unilateral private placement, their position is rejected. Procedural violations amount to an IDEA violation only if they significantly impeded the parents' opportunity to participate in the decision-making process or deprived the student of FAPE. Here, while the district may have disregarded the parents' information about how the student was performing in the private school, this noncompliance was "procedural and harmless." Because the student received FAPE from the school district, the parents are entitled to no remedy.

D. Pangerl v. Peoria Unif. Sch. Dist., 74 IDELR 246 (9th Cir. 2019) (unpublished). The parent's active participation during the first two hours of an IEP meeting for

her high schooler with speech and language impairment and SLDs nullified any procedural violation resulting from the district's continuation of that meeting for an additional 20 minutes after the parent left. A procedural violation is actionable only when it results in a denial of FAPE or seriously infringes on the parent's participation rights. While the parent's educational consultant notified the other team members that she would have to leave the meeting after two hours, the parent did not offer any explanation as to why she needed to leave at the same time. Further, the district members of team informed the parent that they intended to complete the IEP that day in order to meet the annual review deadline. The parent's voluntary departure and the district's decision to proceed with the IEP meeting could not amount to an IDEA violation, especially in light of the fact that the district reconvened the team two months later to amend the completed IEP. Since the parent participated in the vast majority of the meeting and then chose to leave, with the knowledge that the district would continue to finish the IEP and without expressing any reason why she could not stay, the continuation of the meeting for 20 more minutes did not constitute a serious infringement on her right to participate.

E. J.G. v. Hawaii Dept. of Educ., 74 IDELR 190 (9th Cir. 2019) (unpublished). The parent was not denied meaningful participation in decision-making for the student with autism; nor did the Department predetermine placement where the intermediate school's principal took steps to include the parents in the placement discussion. Each time the parents asked the team why it would consider moving the student from the private program he had attended for seven years, the principal explained that the team had a duty to discuss less restrictive placements first and used an LRE worksheet to document the potential benefits and drawbacks of each type of setting. Although the parents objected to the team's methods, the sequence of events described by the parents is consistent with working through and eliminating other possible placement options for the student. While there are concerns that the Department did not give the parents the opportunity to visit its proposed newly-developed special education center before proposing placement there, the Department did offer the parents a tour of the center and agreed to develop a plan to help the student transition from his private program. This evidence, along with the team's half-hour discussion about the special education center and the student's private program supports the finding that the Department did not predetermine placement for the student.

F. Colonial Sch. Dist. v. G.K., 73 IDELR 224 (3d Cir. 2019) (unpublished). Although the parents of a student with autism may not have understood exactly how the school district would measure their son's progress toward his annual goals, they could not show that they were excluded from the IEP decision-making process. The purpose of the IDEA's procedural provisions is to ensure that parents can exchange information with other members of the IEP team and understand what is happening during an IEP meeting. These are procedural safeguards rather than a substantive guarantee that parents will fully comprehend and appreciate to their satisfaction "all of the pedagogical purposes in the IEP."

Here, the district members of the IEP team attempted to address all parental concerns by authorizing assessments that would give the parents a clearer understanding of their child's progress and also convened an emergency IEP meeting to address the student's allegedly deficient annual goals. Where the parents appear to be objecting to the goals themselves rather than their understanding of them, there is no evidence of a procedural violation.

G. Jones v. District of Columbia, 73 IDELR 233 (D. D.C. 2019). Where the student actually received 32.5 hours per week of special education services (in accordance with a ruling of a hearing officer), rather than the incorrect number of hours of 21.5 hours per week set forth in the IEP, the parent was denied sufficient participation in the IEP decision-making process. However, the student did not actually lose any services sufficient for an award of compensatory education services. The district did not harm the student's education, it harmed the parent's role in developing that education. An award of compensatory education to the student would have no impact on the parent's participation in the IEP process and, therefore, the parent's request for compensatory services is denied.

H. Letter to Haller, 74 IDELR 172 (OSEP 2019). While districts may invite school administrators to IEP meetings as non-contributing observers, given the confidentiality issues involved and the sensitive nature of discussions at IEP meetings, an administrator generally should attend only if she will contribute to the team's decision concerning the child's special education services.

TRANSFER STUDENTS

A. R.S. v. Board of Directors of Woods Charter Sch. Co., 73 IDELR 252 (M.D. N.C. 2019). Charter school must fund close to three months of private educational instruction for neglecting to provide the teenager with a non-verbal learning disability adapted PE services. The school's provision of modified PE was not "comparable" to the adapted PE in the transfer student's out-of-state IEP. While the IEP called for adapted PE, the school did not begin implementing it until November of the school year. Not providing an IEP-required service to a transfer student may result in a denial of FAPE when it causes a deprivation of educational benefits, unless the school provided comparable services. In comparing modified PE to adapted PE, modified PE is appropriate when a child can participate in the general PE program with accommodations or modifications. Adapted PE, on the other hand, is instruction in PE that is designed on an individual basis specifically to meet the needs of a child with a disability. Here, the school's modified program was not comparable to the adapted program the student's IEP required. Specifically, a specialist was supposed to "come in and consult and perhaps ... do lessons" with the student, but this did not occur for several months. While some minor delay in providing comparable services might be reasonable when implementing an out-of-state IEP, the school's delay resulted in the failure of the school to provide the middle schooler with IEP-required services. Thus, the school is to fund private educational instruction and

related services for the number of hours the student should have received adapted PE services.

IEP CONTENT/IMPLEMENTATION ISSUES

A. Johnson v. St. Louis Pub. Sch. Dist., 72 IDELR 266 (E.D. Mo. 2018). When the district developed an IEP for the 9th grade student with schizophrenia in March 2017, the team did not have access to 744 pages of medical records that the parent sought to introduce during a due process hearing a month later. The March IEP addressed the issues that the district identified during the student's reevaluation, including auditory and visual hallucinations and the team developed a safety plan to reduce unsupervised contact with the general student population at school. When the parent produced the medical records during the due process hearing, the district convened an IEP team meeting to review the information and revise the IEP as needed. The fact that the district issued a new IEP when presented with the student's medical records did not render the March 2017 IEP defective. Because the district team members were not aware of the medical information, the hearing commission's decision that the IEP was appropriate at the time it was created is upheld.

B. L.J. v. School Bd. of Broward Co., 927 F.3d 1203, 74 IDELR 185 (11th Cir. 2019). Joining the 4th, 5th, 8th and 9th Circuits, only material IEP implementation failures are actionable under IDEA, not every single deviation. While there is no clear test for determining the materiality of an IEP implementation failure, it is recommended that district courts compare the quantity and quality of the services actually provided to those required by the IEP. In other words, courts should consider the amount of services that were not provided and the importance of those services to the student's education. Here, the district failed to provide certain services to a middle schooler with autism under the IDEA's "stay-put" provision while proceedings were pending in federal court. However, because the stay-put IEP had been developed when the student was in elementary school, the district was entitled to some leeway in providing certain services during stay-put in subsequent settings while the litigation was pending. In addition, many of the services that were allegedly not provided were not required by the stay-put IEP and the other shortfalls were the direct result of the student's absences. Where the implementation failures were not material, the district court's decision in favor of the school district is affirmed.

MEDICAL MARIJUANA

A. Albuquerque Pub. Schs. v. Sledge, 74 IDELR 290 (D. N.M. 2019). The district's decision to require the student with Dravet syndrome who needed a dose of CBD Oil three times a day for seizures to attend school without the cannabis could result in her inability to receive educational benefit. Thus, the hearing officer's decision requiring a "hybrid" home instruction program is upheld because home instruction with opportunities for socialization would meet the LRE requirement

of IDEA. Under New Mexico law, the student is allowed to take the CBD Oil for her seizures, but due to federal anti-drug law and New Mexico provisions, the district informed the parents that the student's cannabis could not be stored or administered on school campus. While the student was in preschool, her mother accompanied her to school and removed her from campus when she required cannabis treatment for seizures. However, the parents asked the district to provide home instruction to eliminate the need for the mother to come to school with the student when she began kindergarten. The district denied the parents' multiple requests for home instruction and when the district proposed an IEP without it, the parents filed for due process contending that home instruction would provide FAPE. The hearing officer's decision in favor of the parents' request for home instruction is affirmed where IDEA requires districts to provide an IEP reasonably calculated to provide educational benefit to a student. Here, sending the student to school without access to "rescue" cannabis would "basically put her life on the line." In addition, compelling the parent to accompany the student to school over her objection would "impose a substantial financial burden" on the parent and violate IDEA's mandate that FAPE be "free."

LEAST RESTRICTIVE ENVIRONMENT

A. Solorio v. Clovis Unif. Sch. Dist., 74 IDELR 2 (9th Cir. 2019) (unpublished). Placement of teenager with Down's Syndrome part-time in a special education setting is appropriate where there is evidence that she made F's in her general education history and science classes and withdrew from social interaction based upon her embarrassment. According to the 4-factor balancing test set forth in the *Holland* case in 1994, the district's program was FAPE in the LRE. The four factors for considering the LRE are 1) the academic benefits of a general education placement; 2) the nonacademic benefits of that placement; 3) the student's impact on the teacher and nondisabled peers; and 4) the cost of mainstreaming. Although the student here did not disrupt the general education classroom, she was not receiving any academic or nonacademic benefit from being there. Thus, there was no fault with the IEP team's decision to place her in special education classes for academic subjects and general education classes for the remainder of the school day.

B. A.H. v. Smith, 73 IDELR 234 (D. Md. 2019). The ALJ's decision that the school district offered FAPE in the LRE is upheld, and private school funding is not warranted. While the parents were concerned about the proposed program's inability to keep their child with autism safe, the district sufficiently addressed the concerns about elopement when its proposal included paraprofessional support during lunch and recess. The student's emerging social skills and desire to interact with adults and peers suggest that he would benefit from general education lunch and recess. In addition, the district planned to collect data upon the student's enrollment in public school and revisit the proposed placement if necessary. Under the circumstances, the plan was reasonable, and the evidence supports that the student's initial inclusion in the general education setting for

lunch and recess was appropriate. While the cafeteria had doors that lead outside and recess was held outside on the playground, the IEP called for frequent eye contact/proximity control, along with paraprofessional support.

C. L.L. v. Tennessee Dept. of Educ., 73 IDELR 227 (M.D. Tenn. 2019). Student with autism may proceed with claims against the State that it failed to monitor and enforce IDEA's LRE requirements when a school district placed him in a preschool program exclusively for students with disabilities. Like many states, Tennessee permits, but does not mandate, that school districts operate preschool programs for "at-risk" 4-year-olds. This means that a preschooler with a disability may be in a school district or zone where there is no public general education preschool for mainstreaming with non-disabled same-aged peers. The simple assumption that every child of a certain age "shall be wholly segregated from non-disabled children is a failure to make an individualized LRE determination" and is a "challengeable procedural violation of the IDEA" Thus, the student has stated a claim under the IDEA and the State's motion to discuss is denied.

D. A.S. v. Board of Educ. of Shenendehowa Cent. Sch. Dist., 73 IDELR 260 (N.D. N.Y. 2019). The district's failure to consider a full-day inclusive program for the child with autism does not warrant funding for the home-based program provided by private service providers. While parents generally do not have to meet the same LRE requirements as school districts when choosing a private program, the unilateral placement must, at a minimum, address the alleged deficiencies in the child's IEP. Where the one alleged flaw in the district's proposal was its failure to make a full continuum of educational placements available, the unilateral placement could only be found appropriate if it addressed the LRE deficiency. Instead, the child's home-based program consisting of ABA services removed the child even further from the general education setting.

ONE-TO-ONE AIDES

A. R.S. v. Morgan Co. Bd. of Educ., 74 IDELR 200 (N.D. W.Va. 2019). Child with a potentially life-threatening genetic condition does not need a one-to-one aide for FAPE. The evidence supports the hearing officer's decision that the child's kindergarten teacher and classroom aide could appropriately monitor the child's blood sugar. While the child could benefit from having a one-to-one aide, IDEA does not require a district to provide the best possible education to students with disabilities. Rather, districts must design programs that allow students with disabilities to make progress that is appropriate in light of their circumstances. Here, the kindergarten teacher testified that the child was meeting educational standards. In addition, the child attended a school with a full-time nurse on staff and the child's teacher and aide could identify when he was having problems with his blood sugar—a condition that required immediate medical attention. As long as the educational staff is appropriately trained, a one-to-one aide should not be

necessary for monitoring and identifying signs of low blood sugar. Thus, the hearing officer's decision is upheld.

RELATED SERVICES

A. M.G. v. Williamson Co. Schs., 71 IDELR 102 (6th Cir. 2018) (unpublished). District's decision that the student did not need OT and PT was supported. Although the parents challenged the school's conclusions by pointing to the child's doctor's prescription for OT and PT, "a physician cannot simply prescribe special education." IDEA does not require schools to provide PT or OT to all students who might benefit from or need those services outside the educational context; rather, IDEA only requires schools to provide those services to students who require them in order to receive the benefit of special education instruction. Thus, the educators' numerous assessments are a better indicator of her need for special education services than the child's doctor's prescription.

METHODOLOGY

A. R.E.B. v. Hawaii Dept. of Educ., 74 IDELR 125 (9th Cir. 2019) (unpublished). The Department was not required to specify ABA as a methodology in the autistic student's IEP. While the teachers used ABA in the student's program, the father specifically wanted "pure VB-MAPP," a particular kind of ABA methodology set forth in the IEP. However, at the IEP meeting, the teachers stated that they thought it best to use multiple appropriate methodologies with the student, including "natural environment training," "things" they use in OT and speech therapy, and various "reinforcers and motivators." The principal and teachers explained that they did not want to specify ABA methodology in the IEP because they wanted to use more than one methodology for the student. Where the student's teachers wanted the flexibility to select the methodology that best fit the student's needs as they arose, it was appropriate that ABA was not required to be specified in the IEP.

BEHAVIOR/FUNCTIONAL BEHAVIORAL ASSESSMENTS & BIPS

A. Department of Educ. v. L.S., 74 IDELR 71 (D. Haw. 2019). Department violated IDEA when it developed a behavioral support plan for the high schooler with autism and other disabilities without including the parent in the process. Thus, the parent is entitled to reimbursement for the reasonable costs of a private therapeutic placement. Any services needed by a student must be incorporated into the student's IEP because services provided outside of the IEP can be changed without the parent's knowledge or input. Although a plan was developed to address the student's noncompliance, verbal threats and refusal to attend class, the plan was not incorporated into the IEP and was not shared with the parent. This seriously infringed on the parent's right to participate in the IEP process. In addition, the few behavioral services that appeared in the IEP—ABA, positive reinforcement and weekly counseling—were not adequate to meet the student's

behavioral needs. While the parent was entitled to relief, the hearing officer's ordered amount was for many services that were not necessary for the student and the parent failed to collaborate with the Department during IEP development, warranting a 25% reduction in the amount of reimbursement awarded to the parent.

DISCIPLINE/MANIFESTATION

A. McNeil v. Sherwood Sch. Dist. 88, 119 LRP 9741 (9th Cir. 2019). Student may be disciplined for off-campus speech where he created a list of students that "must die" in his personal journal while he was at home. Thus, the district court's dismissal of the parents' Section 1983 claims is affirmed. When the police learned about the list from the student's therapist and informed the district, the district was correct in expelling the student for one year without violating the student's free speech rights. A school district may constitutionally regulate off-campus speech if, based on the totality of the circumstances, the speech bears a sufficient nexus, or close connection, to the school. Under this standard, "there is always a sufficient nexus between the speech and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence." Because the "hit list" identified 22 classmates and one former school employee by name, the student has access to guns and 525 rounds of ammunition at home and lived close to the school, the situation constituted a credible, identifiable threat to the school. The parents' argument that the district's decision to expel the student was no longer reasonable once the student was released by police is rejected. Schools have a right and an obligation to address a credible threat of violence involving the school community, even where police or mental health professionals have elected not to take action. Thus, the expulsion was constitutional under the Supreme Court's decision in *Tinker*. It is also noted that allowing the student to return to school after the discovery of the journal entry would have caused a substantial disruption to school activities and interfered with other students' right to be secure.

B. Jay F. v. William S. Hart Union High Sch. Dist., 74 IDELR 188 (9th Cir. 2019) (unpublished). Where there was extensive documentation that the student engaged in disability-related threats for many years, the district court's decision that the behavior at issue was a manifestation of the ED student's disability is affirmed. The district relied too heavily upon the school psychologist's opinion that the student's threat to retaliate against two classmates was not a manifestation of his disability. In January of 2015, the ED student threatened retaliation against two classmates who had reported a substance abuse violation on his part. At the MDR, the school psychologist opined that the threats were not consistent with the manner in which the student's ED typically manifested itself, which was through depression or inappropriate feelings. On that basis, the team found that the conduct was not a manifestation and placed the student on disciplinary probation after he signed an agreement suspending his expulsion. Several months later, the student violated the agreement when he decapitated a lizard in front of other

students and the district sought to reimpose the expulsion. The district court did not clearly err when it found the January incident was a manifestation of the student's ED, given the student's history of threatening behavior stemming from the ED. Indeed, the ALJ found that the district failed to thoroughly and carefully analyze whether the psychologist's determination could be reconciled with the student's extensive history, which was documented in school records. Thus, the district court's order that the student's expulsion and suspended expulsion agreement be expunged from the record is affirmed, as well as its award of dialectical behavioral therapy and attorneys' fees.

C. Boutelle v. Board of Educ. of Las Cruces Pub. Schs., 74 IDELR 130 (D. N.M. 2019). Hearing officer's decision that the school district did not violate IDEA when it placed the middle schooler with ED and ADHD on long-term suspension is upheld. Based upon an investigation into the incident, which included interviews with witnesses, collecting statements and completing a police report, the principal correctly concluded that the student had intentionally thrown rocks at two other students and injured them. Parent's assertion that the student's behavior was a manifestation of his Tourette syndrome is rejected, where the student struck a student with four rocks and then hit a second student with a rock. Before hitting the second student, the student asked a peer something like, "Do you think I can hit him with a rock?" This certainly suggests intentional conduct rather than involuntary based upon a complex motor tic as suggested by the parent. Thus, the school team did not err when it found that the student's rock throwing behaviors were not a manifestation of disability.

D. G.R. v. Colonial Sch. Dist., 74 IDELR 7 (E.D. Pa. 2019). District did not err when it expelled the general education high school student for a year for bringing a knife to school without first conducting a manifestation determination. While a general education student may be entitled to disciplinary protections under IDEA if the district had knowledge that the student had a potential disability, such was not the case here. Here, the district had no reason to believe that the student needed special education services due to a potential disability. None of the student's teachers expressed concerns about his grades or academic performance. Indeed, during the student's high school career, he received good grades, excelled in a vocational program focused on auto repair and achieved "proficient" and "advanced" scores on state standardized assessments. Although the parents alleged that they frequently communicated with the district about the student's academic troubles, those communications occurred while the student attended middle school and addressed the provision of general education interventions there. In addition, records indicate that the parents never requested a special education evaluation or reported to the district that the student might need special education, even though their other two children receive IDEA services. Because there was no reason to suspect that the student had a possible disability, the district was not required to conduct a manifestation determination prior to the expulsion. The hearing officer's decision upholding the expulsion is upheld.

E. Letter to Nathan, 73 IDELR 240 (OSEP 2019). School districts must conduct a manifestation determination within 10 school days of the decision to suspend a student on a long-term basis (over 10 school days), even if there is no IEP or eligibility paperwork for it to consider when a student is in the evaluation process. The district cannot wait to conduct the MDR until after an initial evaluation has been completed and eligibility determined. While the MDR team may not have an IEP to review in making the determination, it would still be possible to conduct the determination by reviewing and considering all available information. The team would likely consider the information that served as the district's basis of knowledge that the child may be a child with a disability in the first place, such as concerns expressed by a parent, teacher or other school personnel about a pattern of behavior demonstrated by the student.

DANGEROUS STUDENTS

A. N.L. v. Springboro Comm. City Sch. Dist., 74 IDELR 161 (S.D. Ohio 2019). Parent's request for emergency injunction under IDEA's stay-put provision for the district to maintain second-grader with autism in his current placement is denied where the school district was able to show that it was substantially likely to result in injury to himself or others. While IDEA's stay-put provision creates a presumption in favor of a child's current educational placement while proceedings to challenge it are pending, school officials can overcome that presumption by showing that maintaining the student is his current placement is substantially likely to result in injury to self or others. Here, the student had, among other things, a behavioral incident where he threw chairs at school staff, ran out of the school building and struck himself in the jaw. The district filed a due process complaint seeking to remove the student to a more restrictive placement and a hearing officer agreed that the student should be moved to a center for students with autism. The parent sued in court to challenge the hearing officer's ruling, but it is found that the district met its burden to show that maintaining the student at his then-current placement was substantially likely to result in injury. The evidence demonstrates that the student's behaviors raised serious concerns regarding the safety of the student, district staff and, potentially, other students who had to be evacuated from the classroom at times.

STUDENTS IN JUVENILE JUSTICE/CORRECTIONAL FACILITIES

A. Letter to Duncan, 73 IDELR 264 (OSEP 2019). Where an incarcerated student presents a "bona fide security or compelling penological interest" that prevents the student from receiving a regular high school diploma, the IEP team may determine that the student needs to earn a GED credential. The IEP team for a student who has been convicted as an adult and is incarcerated in an adult prison must make this determination on an individual basis. In doing so, the team may consider whether the student actually presents a bona fide security or penological interest that cannot otherwise be accommodated to allow the student to receive the special education and related services necessary to enable the student to earn a

regular high school diploma. However, neither a state's unwillingness to spend money nor administrative convenience rise to this level. If a team decides that the GED credential will be awarded, that student will continue to have the right to FAPE after completing the GED program, subject to the state's age restrictions and IDEA's FAPE limitations applicable to incarcerated students.

B. Brown v. District of Columbia, 74 IDELR 140 (D. D.C. 2019). School district's motion for reconsideration is denied where the district is required to provide FAPE to all students who reside within its boundaries, regardless of whether they are incarcerated in a federal prison. The plain language of IDEA requires that all states (including the D.C. district) receiving federal grants must ensure that FAPE "is available to all children with disabilities residing in the state." This obligation continues while children with disabilities convicted under state law are incarcerated in adult prisons. Here, the student with an undisclosed disability is a resident of the district who is eligible for special education and related services, was tried and convicted as an adult for a felony and transferred to federal prison. While incarcerated, the student alleges that he was not provided with special education services. Thus, it is unnecessary to resolve the question of whether all states are responsible for ensuring that their residents who are incarcerated in federal prisons receive FAPE. Instead, the question is limited to whether children who are convicted as adults for violations of D.C. law and who are incarcerated pursuant to the Revitalization Act are entitled to FAPE. While the Revitalization Act charges the prison with the responsibility for "the custody, care, subsistence, education, treatment, and training" of D.C. offenders, nothing in this act prevents the district from having a simultaneous responsibility under IDEA to provide FAPE. The district is obligated to work with the prison to provide qualifying individuals a FAPE and, if that is not possible, to provide compensatory education post-incarceration or other appropriate benefits. Because FAPE is triggered by a child's residency under IDEA and that obligation is not terminated when a child is in federal custody, the district, not the prison, is required to provide the student with FAPE.

RESIDENTIAL PLACEMENT

A. M.S. v. Los Angeles Unif. Sch. Dist., 73 IDELR 195 (9th Cir. 2019). District court's decision that the school district denied FAPE to a teenager with ED is affirmed. Where a school district has the duty to make a continuum of alternative educational placements available for students with disabilities, the school district erred when it did not consider whether this student needed residential placement for educational reasons just because the Department of Children and Family Services placed her in the locked residential treatment facility for mental health reasons under state law and pursuant to a Juvenile Court order. Because DCFS could change that placement at any time, the school district has an independent duty under the IDEA to consider whether residential placement was needed for educational reasons as part of her IEP and not merely "necessary quite apart from the learning process." The district court's finding that the school district erred in

offering a placement in a nonpublic school with the expectation that DCFS would keep the student in a residential placement is upheld.

B. Edmonds Sch. Dist. v. A.T., 74 IDELR 218 (9th Cir. 2019) (unpublished). Where high schooler with ADHD, ODD and schizophrenia requires intensive mental health supports to benefit from his education, the district's argument that his placement in a therapeutic residential school (Provo Canyon School) was based purely on his medical needs is rejected. The district denied FAPE when it failed to reevaluate the student and revise his IEP to address declining academic performance and increasing disciplinary problems. In addition, the parents were able to show that the residential placement is appropriate for reimbursement purposes because it is necessary for the student to receive educational benefit and was made for educational reasons and not in response to medical, social or emotional problems unrelated to learning. Though the district argues that the deterioration in mental health shows the placement was medical in nature, this argument is rejected. Many students who require residential placement for medical reasons experience an acute health crisis at the time of the placement. If the district's approach were adopted, it is difficult to imagine how any private residential placement would be reimbursable under IDEA. The residential program here is an accredited educational institution that offers a full school day with regular classroom settings, testing and certified special education teachers. In addition, the student only spent 40 minutes each day in group therapy sessions. Because it is educational in nature, the district court's award of reimbursement to the parents is upheld.

PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES

A. Pritchard v. Florida High Sch. Athletic Assn, Inc., 74 IDELR 135 (M.D. Fla. 2019). Because the fifth-year senior with a learning disability has participated in high school athletics for four consecutive school years, he is no longer eligible to play sports for his school. The Association's motion to dismiss the student's 504/ADA claim for disability discrimination is granted. To prevail on his claims, the student must show that: 1) he had a disability; 2) he was otherwise qualified to participate in high school athletics; and 3) the athletic association excluded him on the basis of his disability. Here, the student could not prove the second or third elements where the Association's bylaws limit participation in high school athletics to four consecutive school years. Because the student has already played football, basketball and lacrosse for four consecutive years, he is not "otherwise qualified" to participate in high school athletics. In addition, the student could not show that the Association excluded him on the basis of his disability where he has completed four consecutive years and, therefore, is ineligible under [the Association's] bylaws." The student's argument that the Association should have permitted a fifth year of eligibility as a disability accommodation is rejected where it would fundamentally alter the nature of the Association's eligibility requirements and, therefore, is not reasonable.

B. Clemons v. Shelby Co. Bd. of Educ., 74 IDELR 232 (W.D. Ky. 2019). Parent's motion for reconsideration of ruling in favor of the district is denied where tennis coach did not discriminate on the basis of disability against the high schooler with Asperger syndrome. In order to prove disability discrimination, the parent is required to show that the district subjected the student to differential treatment solely on the basis of disability and that similarly-situated nondisabled students were treated more favorably. While the tennis coach routinely criticized this student's skills, ignored her during practices and matches and denied her application to play on the varsity tennis team, the coach was unaware that the student has Asperger syndrome and did not receive notice of the diagnosis until later in the season. In addition, even the parent conceded that the coach harshly criticized most members of the tennis team, not just her daughter. While the coach's behaviors stemmed from "poor coaching skills," they did not stem from discriminatory animus.

D. K.N. v. Gloucester City Bd. of Educ., 74 IDELR 73 (D. N.J. 2019). Under Section 504/ADA, the school district is required to provide the reasonable accommodation of a one-to-one aide who is supervised by a special education teacher to an elementary student with autism so that the student can meaningfully participate in its afterschool program. This is necessary when compared to the district's offer to provide an unsupervised one-to-one aide, where the student has shown increased behavioral problems with an unsupervised aide, causing several of the aides to resign on the basis of the behavioral problems. The parents' requested accommodation is the only way for the student to meaningfully access the afterschool program. Now that the court has determined that the school district has violated Section 504 and the ADA, the parties are ordered to convene and determine a briefing schedule to address what remedies are appropriate under the law and whether damages are available (in whatever form).

SERVICE ANIMALS

A. Naegle v. Canyons Sch. Dist., 72 IDELR 99 (D. Utah 2018). Though Utah law allows for nondisabled individuals to be accompanied by service animals in training, it is only allowed in public buildings and facilities such as stores, hotels and amusement parks. The Utah service animal law's list of public buildings and facilities does not include public school classrooms and its plain language cannot be read to require accommodations to nondisabled individuals with service animals in training to the same extent required for disabled individuals with service animals under the ADA. In addition, this case is moot because the plaintiff here—a dog breeder who intended to donate the animal in question to a child with a disability after the dog had been trained in school with the breeder's nondisabled daughter—has moved to a new district and the student no longer attends the high school that had excluded the dog. In addition, the dog at issue is now a retired service dog.

B. Doe v. U.S. Secretary of Transportation, 73 IDELR 152 (S.D. N.Y. 2018). While the parents of a middle schooler with asthma and severe allergies cannot sue the school district for its refusal to exclude service animals from school premises, they may file disability discrimination claims for the school district's alleged failure to protect their daughter from exposure to service dogs and implementing her 504 Plan. Allegations that the student encountered a service animal at school raised questions as to whether the district reasonably accommodated her disabilities as set forth in her 504 Plan. According to the parents' complaint, the district violated 504 when it allowed another person's service dog to come within 30 feet of the student during two school events in violation of the student's 504 Plan. There were also four other incidents where the student allegedly had a reaction to service animal dander on school grounds. Thus, the parents' allegations are sufficient to support a claim against the district sufficient to deny the district's motion to dismiss the complaint at this juncture.

C. Pettus v. Conway Sch. Dist., 73 IDELR 176 (E.D. Ark. 2019). Parent's request for preliminary injunction requesting district be ordered to allow high-achieving 12th-grader with anxiety and depression to bring her service animal to school is denied. The ADA's regulations do not mean that a service animal's presence is always reasonable. The key question is whether the service animal would be a reasonable accommodation. Here, it would be unreasonable to require the district to allow the service animal on school grounds because the dog's presence would be a distraction to other students and for students, faculty and staff with allergies, the dog could be "truly disruptive. This would be compounded if multiple students were permitted to bring dogs to school." In addition, the district offered other ways to address the student's relatively infrequent panic attacks. For instance, the district agreed, via a 504 plan, that the student could leave the classroom and go to the school nurse or counselor at the onset of anxiety; could have an alternative seating arrangement; and could leave class early to avoid crowds. In addition, the school agreed to keep the student's prescription medication in the school nurse's office; to alert the student in advance of drills so she could avoid crowds; allow the student to be in an alternative location during assemblies; have extra time on assignments; and wear a weighted vest during panic attacks. The 504 team "voted" that the student should not be allowed to bring the dog to school, and the district decided the dog would not be allowed. The student's ability to earn straight A's, participate in band and attend football games shows that her anxiety does not impede her ability to participate in the school district's program. In addition, district staff discussed the issue and decided that the student did not need to be accompanied by her service dog—which is a decision that is entitled to the court's deference. Thus, the unlikelihood of the student's success on the merits prevents the court from granting the request for an injunction. [NOTE: This decision is contrary to all other decisions and guidance from the Department of Justice].