What's Been Happening in Special Education Law? The Year in Review

Utah Institute on Special Education Law

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As is typically the case (pandemic or no pandemic), it's been another active year in the area of special education law since last year's Institute! Even though the IDEA and Section 504 have not changed in many years, there continues to be an enormous amount of litigation going on, as courts and agencies attempt to interpret and apply the provisions of these laws to individual cases. On top of that, there is a growing body of new case law addressing the mandate for FAPE during school closures and other disruptions due to COVID. In this session, I will update the audience on significant special education "legal happenings" during the past year, including an overview of relevant court decisions and federal agency interpretations.

DECISIONS AND GUIDANCE RELATED TO COVID-19 CHALLENGES AND ISSUES

- **Summary of Current Status of Decisional Law**

  - So far, there has been no real definitive or binding court case law reported nationally regarding FAPE obligations during COVID. This is primarily because IDEA student-specific FAPE cases must travel through due process proceedings first pursuant to the legal doctrine of "exhaustion of administrative remedies."

  - Guidance is slowly emerging regarding school obligations during the 2020-21 school year in the form of hearing officer decisions and SEA Complaint resolutions. More precedential guidance with respect to individual student situations will come from the courts as aggrieved parties in due process proceedings seek court review. While we will more than likely have a good bit of "COVID case law" in the future, it will be some time before a solid, reliable body of COVID special education case law has developed. Will it be too little, too late?

  - Most of the reported due process and State complaint decisions to date address an alleged failure to implement an IEP/denial of FAPE during the Spring/Summer of 2020. However, hearing decisions nationwide began to emerge in the late Fall addressing challenges to services provided during the 2020-21 school year and have continued. For the most part, the FAPE standard in Spring/Summer 2020 appeared as IEP/DLP implementation "to the

extent possible." As time is progressing, however, more has been expected as "possible" in light of the circumstances.

- Where a "material IEP implementation failure" is found, compensatory education services are being awarded in the form of either: 1) direct service delivery by the school; or 2) reimbursement for private in-person services obtained by the parents. Direct services awards typically are in the form of an order for the district to provide a certain amount of services or for the student's IEP team to meet and determine what, if any, compensatory services are appropriate.

- Districts or schools that maintained a flat "no in-person services to anyone" position during the 2020-21 school year and refused to consider individualized possibilities for in-person services appear to be the most vulnerable in FAPE cases.

- Some of the COVID decisions involve alleged procedural violations (inappropriate "change of placement" procedures or violation of stay-put; no "prior written notice," etc.), but most rulings have relied upon a 9th Circuit Court of Appeals decision, N.D. v. State of Hawaii Dept. of Educ., 600 F.3d 1104, 54 IDELR 11 (9th Cir. 2010) to find that: "Congress did not intend for the IDEA to apply to system-wide administrative decisions." As schools continue to open back up over time, however, procedural compliance has been and will continue to be more important.

- **Status Summary of Notable COVID-Related Court Cases that Remain Active**

For the past year, it has continued to be the case that there is no real definitive or binding court case law reported nationally regarding FAPE obligations to students with disabilities during COVID school closures and chaos. Although the early Hawaii (W.G. v. Kishimoto) and Pennsylvania (Doe v. Wolf) class action lawsuits filed in the Spring of 2020 challenging the move to distance/virtual learning were voluntarily dismissed, there are still a few of these kinds of cases that remain active and pending, mostly now on appeal to circuit courts by the parents whose FAPE claims were dismissed:

Hernandez v. Lujan Grisham, 78 IDELR 12 (D. N.M. 2020). For a number of reasons, including failure to exhaust administrative remedies, case against State of New Mexico alleging denial of FAPE to children in several school districts when schools were not reopened was dismissed. Parents' appeal on December 23, 2020 is pending before the Tenth Circuit Court of Appeals.

Martinez v. Newsom, 78 IDELR 19 (C.D. Cal. 2020). Case brought by parents of four students with disabilities on behalf of approximately 800,000 students with IEPs was dismissed for failure to exhaust IDEA administrative remedies. Parents' appeal filed on December 28, 2020, is pending before the Ninth Circuit Court of Appeals.

Brach v. Newsom, 77 IDELR 189 (C.D. Cal. 2020). Request of parents of seven unrelated students for a restraining order against state officials for adopting a school reopening framework that prohibits in-person instruction in counties on the state's COVID-19 monitoring

list is denied. On December 1, 2020, judgment was granted judgment for the state officials on the parents' FAPE claims on the basis that they must first exhaust administrative remedies. 77 IDELR 285. Parents' appeal is pending before the Ninth Circuit Court of Appeals and oral argument occurred on March 2, 2021.

J.T. v. de Blasio, 500 F.Supp.3d 137, 77 IDELR 252 (S.D. N.Y. 2020). Case brought against essentially all school districts and State Departments of Education across the country was dismissed on November 13, 2020 for a number of reasons, including lack of standing for all plaintiffs not residing within the court's jurisdiction and failure to exhaust administrative remedies. Parents' appeal filed on December 11, 2020 is pending before the Second Circuit Court of Appeals.

C.M. v. Jara, 77 IDELR 212 (D. Nev. 2020). Request for TRO by the parents of several unrelated students with disabilities ordering the district to provide in-person instruction was denied for failure to show irreparable harm and/or other required elements for such relief. On November 19, 2020, the parents' motion for preliminary injunction was denied but the case is still pending and in stages of discovery. 78 IDELR 2020.

Borishkevich v. Springfield Pub. Schs. Bd. of Educ., 78 IDELR 277 (W.D. Mo. 2021). Case brought by a group of parents under IDEA, ADA and 504 challenging school board's school reentry plan that contemplated students' attending in-person classes for two days per week and online classes for three days per week was dismissed for failure to exhaust IDEA's administrative remedies on May 27, 2021.

There is one brand new ruling from the District of Columbia providing injunctive relief to incarcerated youth who have alleged a denial of FAPE due to insufficient services provided during COVID times:

Charles H. v. District of Columbia, 121 LRP 22596 (D. D.C. 2021). Plaintiffs' motion for a Preliminary Injunction and provisional certification of a putative class of 18 to 22 year-old students is granted where the school district is not providing FAPE to students with disabilities who are incarcerated and enrolled in the district's Inspiring Youth Program for court-involved students ages 17 to 22. The district's contention that it has done and will continue to do the best it can, given the constraints imposed by COVID is rejected where from March 2020 to very recently, the district offered almost no direct instruction, whether virtual or in-person, to disabled IYP students. Thus, the district and State Superintendent are ordered to provide the plaintiffs, and all other members of the provisionally certified class (i.e., every student enrolled in the IYP program) with the full hours of all services in their IEPs through direct, teacher-or-counselor led group classes and/or 1:1 sessions delivered via live videoconference calls and/or in-person interactions. Further, the defendants are to report every 30 days on the implementation of special education and related services for every class member, beginning no later than 15 days after the date of the order and must file under seal copies of the IEPs of all class members, along with a 2 to 5-page consolidated summary of the special education and related service hours mandated by each student's IEP so that the court may ensure that defendants' representations in its periodic status reports match the hours listed in those IEPs. Interestingly, as part of its public interest and balance of the equities analysis, the court rejected

the district's arguments and noted that "[i]ndeed, the District has already received $386 million to safely reopen schools and meet student's needs during the pandemic. U.S. Dep't of Ed. Press Release, March 24, 2021, available at https://perma.cc/LFU6-WVF6; see also Statement of Interest at 13. If, as Defendants say, the IYP really is comprised of a comparatively 'small number of students,' the Court trusts that Defendants will find a way to financially accommodate the public's interest in ensuring that District residents receive 'special education and related services ... in accordance with applicable law.'"

- **U.S. DOE Guidance**

"ED COVID-19 Handbook Volumes 1 and 2"

On February 12, 2021 the U.S. DOE issued its "ED COVID-19 Handbook Volume 1: Strategies for Safely Reopening Elementary and Secondary Schools." In the Handbook, U.S. DOE indicated that it would soon issue a second Volume that would "provide specific strategies to address the extraordinary disruption created by COVID-19 for students, educators, and parents—especially for historically underserved students and communities that preliminary data suggest have been hit hardest by the pandemic."

On April 9, 2021, the "ED COVID-19 Handbook Volume 2" was indeed issued, and you can find that document and the associated press release at https://www.ed.gov/news/press-releases/us-department-education-releases-covid-19-handbook-volume-2-roadmap-reopening-safely-and-meeting-all-students-needs. Unfortunately, the document does not specifically address legal concerns, such as a standard for determining "compensatory services" or the like, but rather begins with the following statement that we have typically seen in these kinds of COVID guidance documents:

> Other than statutory and regulatory requirements referenced in the document, the contents of this volume do not have the force or effect of law and do not bind the public and school communities. This document is intended only to provide clarity regarding existing requirements under the law or agency policies. Further, this document does not substantively address federal disability law, which requires schools to provide certain educational and related services to students with disabilities and to take an individualized approach to providing specialized instruction and related services, consistent with the student's individualized education program (IEP) developed under IDEA or plan developed under Section 504 of the Rehabilitation Act of 1973 (504 plan), as appropriate. Additional guidance on these issues may be provided.

Handbook Vol. 2, p. 7. Though not specifically addressing the burning issue of "compensatory services," there is an interesting excerpt regarding it in the section of the Handbook that addresses "lost instructional time" and strategies for addressing it:

> It is important to note that strategies like in-school acceleration, tutoring programs, out-of-school time programs, and summer learning and enrichment are supplemental instruction and cannot replace a program of special education and

> related services based on a student's IEP and the decisions of the IEP Team. Similarly, these types of strategies cannot replace the special education and related services and other supports included in an IDEA-eligible student's IEP as determined by the student's IEP Team or the regular or special education and related aids and services documented in a 504 plan, or the decisions made by a group of people who are knowledgeable about the child, the meaning of evaluation data, and placement options as required by Section 504.
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> In addition, inclusion of students with disabilities in district or schoolwide interventions to address lost instructional time does not relieve a district of its responsibility to make individualized decisions required under the IDEA about needed special education and related services for a student with a disability. These could include providing extended school year services as defined in IDEA when determined necessary to ensure that the student maintains the skills necessary for the student to receive a free appropriate public education (FAPE) if educational services are not continued during periods when school is not in session, such as the summer. Similarly, Section 504 requires schools to make individualized decisions about services needed for a student with a disability. Consistent with IDEA and Section 504 and respective applicable standards, students with disabilities might be entitled to additional instruction and services, often referred to as compensatory services to make up for any skills that might have been lost if it is individually determined that the student was unable to receive FAPE, as a result of the closure of school buildings during the COVID-19 pandemic.

Handbook Vol. 2, p. 34.

"Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment"

On May 13, 2021, the Office for Civil Rights (OCR) issued another Q&A document regarding reopening of schools in light of the requirements of Title VI of the Civil Rights Act of 1964 (race, color, national origin discrimination), Title IX (sex discrimination) and Section 504/ADA. You can find this document at https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf.

In this document, OCR provides general school reopening guidance via a Q&A format related to serving students with disabilities that is generally similar to what it has provided previously, addressing FAPE, mask exemptions, physical distancing, accessibility and placement questions. In addressing some FAPE questions, OCR notes that "[t]he Department is aware of important questions regarding compensatory services for students with disabilities and plans to address those in a separate guidance document." Q&A document, page 7. As of the date of my submission of these Conference materials, I have not seen that this separate document has been issued.

- **Student Privacy Policy Office Guidance**

Letter to Anonymous, 121 LRP 19451 (SPPO 2021). While districts must generally obtain prior written parental consent before disclosing personally identifiable information from a student's education records to a third party, a teacher's disclosure of students' positive test results for COVID-19 to fellow staff and classmates without the parent's consent did not violate FERPA. Under FERPA's "health or safety emergency" exception to the parent consent rule, a district may disclose a student's education records to appropriate parties without parent consent if knowledge of that information is necessary to protect the health or safety of the student or other individuals. In making a determination of whether a health or safety emergency exists, a district may take into account the totality of the circumstances and where the district had a rational basis to conclude that disclosing the students' positive COVID-19 status was necessary to protect the health and safety of school staff and other students, this agency will not substitute its judgment for that of the district. Therefore, the investigation of this matter is closed and no violation of FERPA is found.

- **Some Sample Due Process Decisions**

A. Ankeny Community Sch. Dist., 121 LRP 10824 (SEA Iowa 2021). District provided FAPE to student with CP in the hybrid model of instruction chosen by the parent and is not required to provide an in-person 1:1 paraprofessional in the home during remote instruction. Where the teenager's IEP called for 435 minutes per day of 1:1 paraprofessional assistance, the parents selected a remote learning model among multiple options for the 2020-21 school year. The district is not obligated to offer FAPE in each and every learning model available and it does not have to provide the exact same methodology to students with disabilities, as long as it provided equally effective alternate access, which it did here with its hybrid model. The parent did not show that it was medically required that the student receive instruction in the home and the hybrid model proposed was responsive to the student's high-risk status, prioritized his safety, and provided him FAPE

B. Florence Co. Sch Dist. 1, 121 LRP 10625 (SEA SC 2021). Compensatory services are awarded to a 9-year-old student with OHI and SLD where the district failed to implement the student's IEP during school closures. The student's IEP included a BIP and the provision of a paraprofessional in the general education setting with specialized instruction in a resource room. However, when schools closed due to COVID, the district transitioned to virtual education, but did not provide the student with resource services or a para. As the 2019-20 school year ended, progress the student had been making in the school program began to "flat line" as the year ended, even with efforts on the part of the ESY special education teacher. While it could have been the shutdown, the reliance on virtual education, the lack of 1:1 teaching in the school setting, being at home, or a combination of all of these things that caused the slowdown in progress, it was the district's responsibility to respond to any change in circumstances that negatively impacted upon the student's education and "more of an effort could have been made" to provide services to the student during the shutdown and over the summer.

C. Special Sch. Dist. of St. Louis Co and Parkway C-2 Sch. Dist., 121 LRP 15324 (SEA MO 2021). Where student would have received appropriate services had the parent completed the private school's enrollment forms as instructed, the district did not deny FAPE where it made efforts to find an alternate private school placement when his special education school terminated his enrollment in March 2020. At the time that the former school was terminating services, the district administrator tasked with arranging private services for students with disabilities secured a spot in the new private special education school even though it was not accepting new students. The new school and the parent communicated by email as early as March 30, 2020—the same time the former school was ending services. The new school would have been able to implement the student's IEP during the period of distance learning, but the parent refused to complete the 31-page intake form required for enrollment. Because the district attempted to provide FAPE, the parent cannot hold it responsible for the lack of services in the Spring of 2020. In addition, the district did not violate IDEA by creating a distance learning plan for the student without holding an IEP meeting where the DLP did not replace the student's IEP. Rather, the DLP detailed how the IEP would be implemented during the extended school closures.

D. Orcutt Union Sch. Dist., 121 LRP 15399 (SEA CA 2021). District denied FAPE when creating a distance learning plan for a 14-year-old student with autism that was not tailored to meet the student's unique needs. In addition, the plan expected the student's mother to provide 1:1 behavioral supports for nearly the entire distance learning period. Where state law requires that "specialized instruction" be provided by a credentialed special education teacher, the district materially failed to implement the student's IEP. In addition, the DLP was not individualized for the student, but was identical to the plans of other similar students in the school district. This approach, along with the expectation that the parent would provide the needed 1:1 behavioral support during distance learning denied FAPE. Accordingly, the district must provide 428 hours of compensatory education to be used in any educationally related area of the mother's choice.

E. Rocklin Unif. Sch. Dist., 121 LRP 12194 (SEA CA 2021). Where district offered both in-person and virtual instructional models to a medically fragile student for the 2020-21 school year, the offer was ambiguous and interfered with the parent's opportunity to participate in the IEP process. Indeed, the parent chose the virtual option because the child was immunocompromised, but the student was placed on a waiting list. While the in-person proposed placement was described as the proposed placement in the appropriate section of the child's IEP, the notes section reflected the virtual instruction option that the parent chose. Describing two contradictory placement offers in separate sections of the IEP made the offer ambiguous and confusing to the parent and district staff did not have a clear understanding of the offer and how to implement it. The parent reasonably believed that the virtual learning model was an option and agreed to it, but the district failed to clarify what the final formal placement offer was. Since the parent was not able fully to evaluate the ambiguous offer and accept or reject it, that interfered with the parent's opportunity to meaningfully participate.

F. Clark County Sch. Dist., 78 IDELR 86 (SEA NV 2020). Where the district opted to provide all students with distance learning through live and recorded instructional sessions and did

not consider whether the student with an intellectual disability needed in-person services, FAPE was denied. The IEP only offered the student daily resource room instruction consisting of separate 15-minute sessions for math, reading and writing, and an additional 10-minute session for math and language arts. In addition, the September 2020 IEP specified services that were based upon across-the-board limits for distance learning rather than the individualized needs of the student. In fact, the IEP reduced the amount of time the student spent in the special education setting from 49% to 32% of the day. Further, the district failed to provide OT services to the student during the initial months of the 2020-21 school year. Thus, the district is to convene an IEP meeting, reimburse the parent for private tutoring services and fund private OT services for the student.

G. Hawaii Department of Educ., 121 LRP 3917 (SEA HI 2020). Parent's hearing request is dismissed and request for tuition reimbursement for a private program is denied because the Department did not fail to implement the student's IEP during the 2019-20 school year. When schools were closed due to COVID in March 2020, the Department offered students virtual enrichment learning opportunities through two different videoconferencing platforms. For this student, a special education teacher modified the enrichment materials to meet the student's needs in accordance with his IEP and repeatedly contacted the parent to inform her of upcoming virtual counseling and instructional services that would be provided. In addition, the teacher offered the student small-group or individual services, but the parent refused to cooperate with school staff. For example, the parent would not return the special education teacher's calls or emails and canceled the student's virtual sessions apparently because she believed that the services "would not be beneficial" for her child. The Department has shown that FAPE was made available to the child.

H. Newport-Mesa Unif. Sch. Dist., 120 LRP 26588 (SEA CA 2020). Because the district's decision to close its school buildings on March 13, 2020 due to the pandemic and to soon thereafter switch to distance learning applied to all students—not just to this student with autism—the parents were not entitled to PWN of the closure in March 2020. IDEA contemplates notice of placement decisions particular to a student, "not decisions that are system wide."

I. District of Columbia Pub. Schs., 120 LRP 25019 (SEA DC 2020). Though the due process complaint alleges that the district denied FAPE by not providing all speech language and OT services during the school closure period, FAPE was not denied. An IEP implementation failure denies FAPE if it is material—that is, if it substantially deviates from the services required by the IEP. According to the district's tracking information, the student resisted attending speech therapy, but the district offered the required 120 minutes of speech services per month up to the time schools closed. While the district offered no speech therapy during the month of April, the district did offer 155 hours of teletherapy the following month. According to US DOE, schools were not required to provide special education services during the pandemic if they were not providing any services to the general student population. The parent did not show that the general student population received services during April. Even if they had been, the loss of one month of services, under these circumstances was not material, especially where the district made up for some missed services in May. With respect to OT, the district provided enough make-up

teleservices in May so that the student actually received approximately the same amount as required by the IEP. Addressing the student's history of resisting related services, where the student is more receptive to teletherapy than in-person therapy based upon embarrassment, the student must be provided related services through videoconferencing, even after schools reopen and until the end of the 2020-21 school year.

J. Los Angeles Unif. Sch. Dist., 77 IDELR 116 (SEA CA 2020). District is ordered to provide the student 40 hours of compensatory postsecondary transition counseling to assist with locating employment for a student who aged out of IDEA eligibility on July 31, 2020. The parent's requested relief to allow student to continue in school with her existing placement and services after the end of 2020 extended school year through the fall/winter semester is not an appropriate remedy because there is no way to know when hands-on services will resume in the future. Clearly, though, a compensatory remedy is appropriate where the 12th-grader with autism received less than half of the specialized services required by her IEP during COVID-related school closures between March and May 2020—which constitutes a material implementation failure (a shortfall of 116 hours of hands-on vocational instruction). When the parent asked for the continued placement, the school district did not respond until the parent filed for due process on May 18th. The fact that the district may have implemented the student's IEP "to the best of its ability" was not enough to comply with IDEA where US DOE has noted that a district may need to provide compensatory education to a student if she was unable to receive FAPE during school closures. This is one of those circumstances, but to order continued virtual programming would not make sense or meet the student's needs. Thus, the 40 hours of compensatory postsecondary transition counseling is ordered.

DECISIONS AND GUIDANCE RELATED TO NON-COVID-19 CHALLENGES AND ISSUES

MONEY DAMAGES/LIABILITY/PERSONAL INJURY GENERALLY

A. Harrison v. Klein Indep. Sch. Dist., 78 IDELR 212 (5th Cir. 2021) (unpublished). District court's summary judgment ruling in favor of the district on the parent's 504 hostile environment claim is affirmed. Where the parent of an elementary school student with multiple disabilities alleges that the district is responsible for the mistreatment of her son by a special education teacher, an aide and a bus driver, the parent did not show the required elements for her claim. In this Circuit (and others), districts are not automatically liable for misconduct on the part of their employees. Rather, the parent must show that district persons of authority (i.e., Superintendents, principals, assistant principals, etc.) knew about the alleged abuse or misconduct and were deliberately indifferent to it by failing to take appropriate action in light of the known circumstances. Here, school administrators engaged in thorough investigation of each incident of misconduct as soon as it was reported and terminated the student's teacher and aide, as well as reassigning the bus driver who reportedly screamed at the student on the bus. In addition, the parent was promptly apprised of the resolution of each of the incidents and has identified nothing more that the district should have done in response. Finally, there was no evidence that the district knew that the teacher had hit, injured or otherwise mistreated students in the past. The district's

response to its employees' misconduct was reasonable in light of what was known and done.

B. I.M. v. Houston Indep. Sch. Dist., 78 IDELR 275 (S.D. Tex. 2021). Under Title IX, parents who are seeking relief under Title IX for student-on-student sexual assault must show that the district was deliberately indifferent to severe and pervasive sexual harassment about which it had actual knowledge. Under the 2020 Title IX regulations, a district has "actual knowledge" of sexual assault if the student notifies any employee who has authority to take corrective measures on the district's behalf, not just principals or other school administrators. Here, the alleged series of sexual assaults of a 16-year-old student with an intellectual impairment in a school restroom were reported to the student's special education teacher. Because the complaint alleges that the teacher controlled and supervised the student's trips to the restroom and had authority over both students, it sufficiently alleges that the teacher could have taken corrective action to prevent the repeated assaults. The fact that the teacher is not a school administrator does not preclude a finding that she is an appropriate employee with the authority to make the district liable. Therefore, the parent's Title IX claim against the district will not be dismissed.

C. L.J. v. Baltimore Curriculum Project, 78 IDELR 38 (D. Md. 2021). Parent's 4th Amendment, 504 and conspiracy claims against a tutor and the school's principal will not be dismissed at this juncture, where there is evidence that the tutor improperly slung a 7-year-old boy with ADHD and an intellectual disability over his shoulder, smashing the student's face into a wall during a disciplinary incident. The evidence reflects that when the student misbehaved during class, the teacher called the tutor to escort the student to the principal's office. On the way, the tutor grabbed the student, threw him over his shoulder and smashed his face into the wall as he went downstairs to the first floor. According to the record, two school employees witnessed the incident. Because these factual allegations suggest that the tutor's "seizure" of the student exceeded its reasonable scope and there is no apparent justification for the tutor's handling the student in this way, there is a plausible constitutional claim. In addition, there are sufficient factual allegations indicating that the principal conspired with the tutor to cover up the tutor's misconduct where the principal and tutor allegedly told police that the tutor lost his footing and the child hit himself on the wall.

D. Boykins v. Trinity, Inc., 78 IDELR 278 (E.D. Mich. 2021). District's motion to dismiss constitutional claims is denied. Where districts generally are not liable for constitutional violations committed by employees or third-party contractors, an exception exists when the alleged violation of law stems from an official policy maintained by the district. Here, the student's estate has sufficiently linked his seizure on the school bus and his death at the hospital several hours later to two district policies: 1) that all students with disabilities are transported on general education buses regardless of their individual needs and 2) students with disabilities are required to remain on the bus until the school is "ready to receive them." In this case, these policies could have contributed to the 20-year-old autistic student's death, as he was required to remain on a hot bus with poor ventilation on a morning in July and suffered a seizure while on the bus.

E. Doe v. Fulton Co. Sch. Dist., 78 IDELR 160 (N.D. Ga. 2021). District's motion to dismiss parent's 504, ADA and Title IX claims is denied where parent has alleged that the district removed a monitor from the school bus for financial reasons. Where the parent alleges that the monitor was placed on the bus for her 14-year-old intellectually impaired child because of her inability to verbally communicate but then removed and the student was sexually assaulted every day for two weeks, intentional discrimination may be established by showing deliberate indifference. Here, the parent has provided sufficient factual allegations to show that the district was deliberately indifferent. For example, the parent argues that the district was aware that the two students who allegedly assaulted her daughter had a history of dangerous behavior and that the district had previously installed a monitor to supervise the bus but removed it due to financial concerns. Since the parent has sufficiently pled claims under ADA/504 and Title IX, the claims may proceed.

F. Garza v. Lansing Sch. Dist., 972 F.3d 853, 77 IDELR 61 (6th Cir. 2020). District court's dismissals in favor of school administrators are reversed and remanded for further proceedings. Where the parent alleges that the administrators were well aware of a special education teacher's mistreatment of students with disabilities years before he purportedly threw a 12-year-old boy with autism across the room for sharpening a pencil without permission supports the parent's claim that they should be held liable for the teacher's constitutional violation. While supervisors are not automatically responsible for constitutional violations by employees, they may be responsible if it is shown that they knew an employee was violating a student's constitutional rights and failed to take appropriate action to prevent the behavior from reoccurring. Here, each of the five administrators involved -- two principals of the special education school where the teacher taught, the principal of the teacher's new school, the district's special education director and the district superintendent – received multiple reports over the years that the teacher at issue had grabbed, slapped, choked and thrown students in his class. According to the parent, however, the administrators investigated only a few of those incidents and did not take remedial measures to prevent further misconduct. As such, the administrators' alleged inaction could be viewed as the cause of the student's injuries. "[I]t is clearly foreseeable that if a teacher's ongoing physical abuse of students is not responded to, that teacher will continue to physically abuse students." Thus, the parent should have the opportunity to pursue her 14th Amendment claims against the administrators.

G. H.U. v. Colonial Northampton-IU 20, 77 IDELR 100 (E.D. Pa. 2020). District's motion for summary judgment as to the parent's claims is granted where the parents did not show that the bus monitor's decision to permit the 17 year-old student with learning disabilities to sit with another student who allegedly sexually assaulted her amounted to a "state-created danger." Here, the bus monitor did not know about the other student's history of physical altercations and could not have foreseen a sexual assault, which is required to show that there has been a state-created danger. According to the parents, the bus monitor permitted the student to switch seats and he sexually assaulted their child over the course of several days. Although the other student may have had a history of violence toward students, there was nothing to suggest that he would engage in sexual conduct. In addition, the bus monitor was not aware of the student's history, so she could not have foreseen any potential problems with allowing the students to sit together. In addition, the parents'

argument that the district should have known that the student may have been violent since many students at the school have impulse control problems and a history of violence is rejected.

H. K.M. v. Asbury Park Bd. of Educ., 76 IDELR 66 (D. N.J. 2020). Parent's failure to plead intentional discrimination requires dismissal of her Section 504 claims seeking compensatory damages for alleged injury to her son caused by the district's failure to train a school security guard on how to appropriately interact with students with disabilities. A parent bringing such claims must properly show "deliberate indifference" and that the district 1) had knowledge that harm to a federally protected right was substantially likely; and 2) failed to act on that knowledge. Here, the parent has set forth no facts to suggest that the district knew that harm to the child's constitutional rights was substantially likely (i.e., knowledge that the child was likely to be physically restrained in some unlawful way; nor did the parent allege any failure on the part of the district to act upon that likelihood. The parent's constitutional claims are also dismissed where the parent did not explain how alleged deficiencies in the district's training protocols caused the child's injury. The security guard has denied the parent's claim that he placed the child in a "choke hold" and caused him to lose consciousness.

I. Kouider v. Parma City Sch. Dist. Bd. of Educ., 77 IDELR 71 (N.D. Ohio 2020). Parent's attempt to hold the school district responsible for an SRO's alleged mistreatment of an 8-year-old child with disabilities is supported by evidence that a behavioral analyst asked the district to provide additional training to school resource officers who worked with children. The analyst's request raises questions about the adequacy of the district's training and, therefore, the district's motion for judgment on the parent's constitutional claims is denied. Here, the SRO's alleged conduct involving physical restraint of the child on the playground, detaining him in the principal's office, and squirting him in the face with a juice box could qualify as violations of the child's 4th and 14th Amendment rights. In addition, the parent may hold the district responsible for the SRO's alleged conduct by showing that existing training was inadequate, that the district disregarded an obvious need for more or different training, and that the inadequacy was closely related to or caused the child's injury. Here, the parent raises serious questions about the adequacy of the district's training, where the SRO made a statement that he was not supposed to be monitoring the child, and the behavioral analyst requested additional training for SROs before the playground incident occurred. The district's argument that the SRO did not need additional training to know his conduct was wrong is rejected. While the district is right that juice-squirting is obviously inappropriate, the court cannot conclude, at this juncture, that adequate training would not have made a difference. The SRO's motion for judgment on the parent's 4th and 14th amendment is also dismissed.

TITLE IX PROCEDURES & APPLICATION TO STUDENTS WITH DISABILITIES

A. L.K.M. v. Bethel Sch. Dist. 78 IDELR 217 (W.D. Wash. 2021). District's motion for judgment on the parents' 14th Amendment equal protection claim is denied where the district expelled their 9th grade student with an intellectual disability for "vulgar or lewd conduct" after an alleged assault by a special education classmate. Here, the district's

sexual harassment policy is in question where it focuses on "unwanted" sexual behavior and could be viewed as a violation of the student's equal protection rights where some students cannot vocally articulate their objection to unwanted behavior on the part of other students. Pointing to the vice principal's statement that he did not regard the classmate's inappropriate touching as sexual harassment because the student did not object to it, it is unclear whether the district's policy equally protects those that are unable to object due to a disability. The policy only covers some students and not others (specifically those who cannot vocally articulate their objection), necessarily discriminating against a protected class. Thus, the district's motion for judgment is denied at this juncture.

MONEY DAMAGES FOR FAILURE TO IMPLEMENT EDUCATIONAL PLANS

A. R.D. v. Lake Washington Sch. Dist., 78 IDELR 61 (9th Cir. 2021) (unpublished). The lower court's granting of summary judgment on the parents' ADA/504 disability discrimination claims is reversed where issues of material fact remain and recess is considered a part of FAPE for this student with a medical condition. A plaintiff bringing a lawsuit under ADA/504 must show 1) she is a qualified individual with a disability; 2) she was denied a reasonable accommodation that she needs in order to enjoy meaningful access to the benefits of public services; and 3) the program providing the benefit receives federal financial assistance. Here, plaintiff must show that the school denied her services that she needed to enjoy meaningful access to the benefits of public education and that were available as reasonable accommodations or by showing that the program denied her meaningful access to public education through another means, such as by violating a 504 regulation. Here, the student's 504 Plan provided, among other things, that she was to stay inside, due to her medical condition, when it is damp or raining and when the high temperature of the day is below 60 degrees. In addition, the Plan provides that she should have adult-supervised inside recess that includes a variety of activities, including gross motor. However, it is alleged that gross motor activities were not provided. The parents have offered evidence that recess is a part of FAPE and includes gross motor activity and supervision and there are disputes over whether the student was supervised to ensure she stayed inside when it was unsafe for her to be outside and whether she was provided gross motor activities when inside. As to the damages claims, the plaintiff has established the potential for deliberate indifference on the part of the district, based upon the school's knowledge that she needed the accommodations, especially where the 504 Plan explicitly provided for them.

B. S.C. v. Round Rock Indep. Sch. Dist., 78 IDELR 40 (W.D. Tex. 2021). School district's motion for judgment in its favor on the parents' 504/ADA discrimination claims on behalf of their daughter with Anorexia Nervosa is denied. Since the parents are seeking money damages, they must show that the district intentionally discriminated against the student on the basis of her disability, and they can meet that requirement by demonstrating that the district refused to provide the student with reasonable accommodations. The journalism teacher's sworn affidavit could support a finding of intentional discrimination, where it indicates that the teacher was a member of the student's 504 team and was well aware of its provision barring staff members from discussing dieting, body image or related topics in the student's presence. Despite the plan's provision, the teacher stated that when

yearbook editors asked if she knew anyone with an eating disorder, she approached the student about being interviewed and photographed for a yearbook story and did not ask her parents for permission to do so. This clearly creates an issue of fact as to whether the teacher intentionally discriminated against the student by knowingly denying the accommodations set out in her 504 plan. As noted in a previous order, the district is liable for any discriminatory actions of its employees.

C. Swogger v. Erie Sch. Dist., 78 IDELR 67 (W.D. Pa. 2021). While the Third Circuit Court of Appeals has not ruled on whether emotional distress damages are available under 504/ADA, this court adopts the view of the First, Second, Seventh and Eleventh Circuits that they are. Thus, the school district's motion to dismiss the parent's claim for money damages in the amount of $75,000 for her child's emotional distress is denied. Here, the student allegedly suffered emotional distress caused by school administrators who, after the student had a "meltdown," "gently but firmly" pushed him out of the school building and told him to go home, leaving him to find his way home 2.8 miles away. The parent alleges that this was a failure to implement the student's Behavior Support Plan and to ensure that he was provided the transportation to/from school as reflected in his IEP. While not addressing the merits of the case, these kinds of damages are available for this kind of alleged violation under 504/ADA.

BULLYING/DISABILITY HARASSMENT OR ABUSE/HOSTILE ENVIRONMENT

A. B.D. v. Cornwall Lebanon Sch. Dist., 78 IDELR 184 (M.D. Pa. 2021). District's motion to dismiss the parents' Section 504/ADA claims is denied. It is alleged that he was subjected to pervasive and outrageous bullying at school by his peers, based on his race and his disabilities, beginning during the student's fifth grade year. According to the parents, the student was called names based on his race and academic deficits and in September 2018, the student's teacher asked students to trade their completed tests and peer grade them. When another student finished grading this student's test, the other student openly mocked and ridiculed him for his failing grade on the assignment. In addition, it is alleged that this other student frequently called the student "dumb" or "retarded" when he struggled with an assignment in class. Plaintiffs further asserted that, after the peer grading incident in the fall of 2018, the parents informed the district about the incident and made the district aware of the continuing bullying. This prompted a November 2018 meeting between Parents and the district to address the situation and the parents were informed that their child would need to stay home from school for two days following the meeting while administration determined a better way to address the bullying. In addition, the middle school principal told them that they could not keep him safe. It is also alleged that the bullying continued and that in September of 2019, the other student passed him in the hallway and called him a "faggot," and the parents reported the incident to the district. The school then reviewed hallway security footage and confirmed that the incident occurred, but there was no further investigation. In response, the district adjusted the student's 504 Plan to provide that he stay away from the bully, placing the onus on the victim to avoid the bully. It is also alleged that the bully used the required separation of the two students as a device to further bully because on more than one occasion, the bully moved his seat at lunch to get closer to the student and his companions

so that the student would be forced to leave his chosen lunch table. It is alleged that the parents informed the district of these incidents, which continued and were witnessed by several teachers, who did not take any corrective action. If the district's failure to respond to all of this appropriately is true, it could support an award of compensatory damages based upon an inference of deliberate indifference on the part of the district.

B. Doe v. Huntsville City Schs. Bd. of Educ., 121 LRP 23636 (N.D. Ala. 2021). Motions to dismiss constitutional claims under Section 1983 against the district and several named educators are denied where the educators allegedly ignored clear indications that bullies were physically injuring an 8-year-old disabled student's genitals and required the victim to meet with one of the bullies. Claims that the district violated the student's due process rights by refusing to intervene appropriately to stop classmates from bullying and injuring the student with Asperger Syndrome are actionable where it is alleged that the defendants acted in an arbitrary and conscience-shocking manner. Here, the parent alleges that the parent and student notified teachers, an assistant principal and other school personnel numerous times that other students were repeatedly punching the student's genitals. In addition, the parent alleges that she provided the district with a doctor's letter noting that one of her child's testicles was not viable due to the assaults. Further, when the AP eventually intervened, instead of separating the student from the bullies, she required the student to meet with one of them "to encourage them to become friends." After that, the bully allegedly told the student that he should not report the bullying because friends do not tell on each other. Thus, the parent has sufficiently alleged a claim and it will not be dismissed at this juncture.

C. "DJ" v. School Bd. of Henrico Co., 77 IDELR 132 (E.D. Va. 2020). District cannot be sued for disability discrimination under 504 based upon allegations that a 12-year-old with ADHD was harassed by football teammates who allegedly filmed themselves performing simulated sex acts on him while taunting him with racial slurs. To state a claim for relief under 504, parents must show that 1) the student has a disability; 2) the student was harassed on the basis of the disability; 3) the harassment was so severe that it interfered with the student's education; and 4) the district was deliberately indifferent to the harassment. Here, the parents have not connected the teammates' purported behavior to the student's ADHD where they do not plead that the locker room incident or harassment suffered afterward related to the student's disability. Similarly, they do not allege that the district had notice of pervasive disability-related bullying at the school or in the locker room. Thus, the parents' 504 claims are dismissed. However, the district's motion to dismiss their Title VI and Title IX claims is denied.

RETALIATION/FREEDOM OF SPEECH

A. Hamilton v. Oswego Cmty. Unit Sch. Dist. 308, 78 IDELR 97 (N.D. Ill. 2021). In order to bring a claim against a district for retaliation under 504/ADA, parents must be able to show that 1) they engaged in protected advocacy; 2) the district took adverse action against them; and 3) the adverse action was based upon the protected advocacy. Here, the parents of a hearing impaired student claim, among other things, that a two-day contentious IEP meeting occurred where they pointed out to district team members that the district was

violating the law by, among other things, using pre-populated forms at the meeting (apparently claiming "predetermination"). According to the complaint, school team representatives and a social worker became "defensive" and "combative," and the day after the IEP meeting, the social worker searched the student's body inappropriately and found a bruise on her hip. Based upon the search, the social worker reported suspected abuse/neglect to the DCFS and things "spiraled" from there. If these allegations are true, they are enough to sustain a claim of unlawful retaliation, particularly where the body search and reporting came one day after the contentious IEP meeting. Where suspicious timing can support a retaliation claim, the district's motion to dismiss the claims at this time is denied.

B. Schaeffer v. Fulton Co. Sch. Dist., 78 IDELR 250 (N.D. Ga. 2021). Where a school social worker may have retaliated against a student with severe anxiety, depression and ADHD and his parents by filing a CHINS petition with juvenile court based upon excessive absences, the district's motion for summary judgment is dismissed and a jury will hear the case at trial. To establish a viable claim under 504/ADA, the parents must show that 1) they engaged in a protected activity of advocacy; 2) the district acted adversely toward them; and 3) there is a causal connection between the protected activity and adverse action. Where the social worker initiated the truancy proceedings soon after the parents requested emergency IEP meetings to address their concerns about services, the social worker's claim that the proceedings were initiated for a legitimate reason of chronic unexcused absences is questionable. This is so particularly due to the inconsistent letters being written to the parents and the inconsistency in following school policy regarding the same. Considering the facts in the light most favorable to the parents/student, a reasonable jury could find that but for the parents' advocacy for their child's accommodations at school, the CHINS referral would not have been filed. Thus, the parents have offered sufficient evidence of pretext to overcome the district's proffered legitimate reason for filing the CHINS petition. Thus, the district is not entitled to summary judgment on this issue.

C. Cottrell v. Newport-Mesa Unif. Sch. Dist., 78 IDELR 286 (C. D. Cal. 2021). Where the district acted with legitimate nonretaliatory reasons when reassigning the former director of special education to a teaching position, the former director's 504 claim of retaliation because of advocacy on behalf of students with disabilities is decided in favor of the district. Here, the district had sent an email to an elementary school teacher about her "unwillingness to follow standard [504] procedures" and accusing the teacher of various Section 504 violations as the school's Section 504 coordinator. The former director failed to speak with the teacher or the elementary school principal about her concerns prior to sending the email and the teachers' union confronted the district over the director's handling of the situation. The email also prompted the teacher to step down as Section 504 coordinator, which impacted the services of the 12 students at her school who had 504 Plans. Although the former director argued that her history of positive performance reviews showed that the district's reassignment was retaliatory, her most recent evaluation addressed a need to work on communication skills. The fact that the former director received criticism of her communication style—in particular, her "email correspondence"—prior to sending the email to the teacher strongly undercuts the former

director's argument of pretext. The district reassigned the director not based upon her advocacy but based upon the manner in which she raised her 504 concerns.

D. Kirilenko-Ison v. Board of Educ. of Danville Indep. Schs., 974 F.3d 652, 77 IDELR 91 (6th Cir. 2020). Where two former school nurses for the district disagreed with the parents of two unrelated students with diabetes with respect to the contents and implementation of their 504 plans, the fact that the parents agreed with the 504 plans that the district developed for their children does not prevent two former school nurses from suing the district over its response to their push for changes to the students' programs. Both nurses have stated viable claims for retaliation under ADA/504, and the district court's judgment in the district's favor is reversed and remanded for further proceedings. To establish unlawful retaliation, the nurses must show that 1) they engaged in a protected activity; 2) the district knew about that activity; 3) the district took adverse employment action against them; and 4) the protected activity was the reason for the adverse action. Here, the nurses engaged in a protected activity when they advocated on the students' behalf and in light of their concerns about their health and safety. The nurses have identified specific provisions in the students' 504 plans that they believed posed a health or safety risk to the students. Thus, they advocated against the district's policies regarding the 504 plans and in support of the children's interests. Clearly, the district was aware of the nurses' advocacy since they had expressed their concerns to supervisors and/or raised them during Section 504 meetings. In addition, the district suspended one of the nurses for five days without pay and failed to rehire the other nurse the following school year, which suggests that the district was punishing them for their advocacy. Because a reasonable jury could find in the nurses' favor, the district court's judgment in the district's favor is reversed.

E. Norris v. Opelika City Bd. of Educ., 77 IDELR 250 (M.D. Ala. 2020). School district's motion for judgment is denied where special education teacher's consistently favorable performance reviews did not mention any of the performance concerns cited by the district as the reason for nonrenewal of her contract. Under 504/ADA, to prove unlawful retaliation, a litigant must show that 1) she engaged in a protected activity; 2) the district took adverse action against her; and 3) the adverse action was in response to the protected activity. If a district alleged a legitimate, nonretaliatory reason for the adverse action, a litigant may still prevail if it is shown that the district's reasoning was a false excuse for the adverse action. Here, the teacher has sufficiently pleaded retaliation by alleging that the district did not renew her contract because she repeatedly objected to a student's segregation from the rest of his PE class. Although the district claims that it had already decided not to renew the contract for the next year due to her poor performance, the district's written evaluations of her do not support that claim. Rather, they reveal that the teacher conducted herself and her classroom in a satisfactory manner. In addition, the deposition testimony of several district officials acknowledges that the teacher provided FAPE to her students. Because a reasonable jury could find that the district retaliated against the teacher, the district's motion for judgment is denied.

RESTRAINT/SECLUSION

A. Washington v. Paley, 121 LRP 22509 (5th Cir. 2021) (unpublished). District court's ruling that a 17-year-old student who was tased by an School Resource Officer could pursue a 4th Amendment claim against the SRO for the use of excessive force is reversed. Where this court has allowed some students to proceed with these kinds of 4th Amendment claims for excessive discipline but disallowed such a claim in at least one other case, the student's claimed 4th Amendment right to be free from excessive discipline was not "clearly established" at the time the SRO tased the student, even after the student had fallen to his knees and stopped resisting the SRO. Thus, the SRO is entitled to immunity where the law was not clearly established in the Circuit.

B. Langley v. Guiding Hands School, 78 IDELR 191 (E.D. Cal. 2021). Parents of nine students with disabilities may proceed with their 504/ADA claims against the state DOE and a private school that contracted with the state DOE to provide special education services. Where a school staff member placed a 13-year-old student with autism and other disabilities in a prone, face-down restraint for nearly two hours, it resulted in the student's death. The allegation that the DOE discriminated against students with disabilities by failing to supervise and investigate the private school's disproportionate use of restraint on students with disabilities supports a cause of action. The parents have plausibly asserted that the state DOE, despite receiving numerous emergency behavioral forms from the school, never initiated an investigation of the school's practices, which is enough to meet the elements required for a discrimination claim.

C. Ashley G. v. Copperas Cove Indep. Sch. Dist., 77 IDELR 275 (W.D. Tex. 2020). Where the 14-year-old student's aggressive and elopement behaviors posed an imminent danger of harm to the student and others, the principal and two assistant principals did not engage in excessive force or unreasonable seizure under the 4th Amendment when restraining the student. The physical restraint in this case was appropriate and necessary to address an emergency and to protect the student and others from harm. When one of the assistant principals brought the student to the office for stealing a classmate's snack, the student tried to leave and pushed the AP into a wall. A second AP temporarily placed the student in a standing restraint and attempted to release him when he calmed down, but the student refused to listen to instructions, headbutted and bit the AP and began kicking. In those circumstances, it was reasonable for the AP to restrain the student again until his parents arrived at the school. While the student may have suffered a shoulder injury during the restraint, the injury was caused by the student's struggling against the restraint rather than by the restraint itself. Finally, the restraint in this case is not deemed excessive where the student's father asked that the student continue to be restrained upon his arrival at the school as he talked to his son. Thus, the parents' constitutional claims are dismissed.

D. K.H. v. Antioch Unif. Sch. Dist., 76 IDELR 150 (N.D. Cal. 2020). The court approves a $450,000 settlement between the private special education school and the student's parent based upon an incident in which two aides at the school physically restrained a 14-year-old boy with a disability. The student's net recovery is fair and reasonable in light of balancing the severity of the allegations against the likelihood of recovery at trial. The

student allegedly sustained a concussion when the two aides "slammed" him to the floor, and he has post-traumatic stress disorder, depression and anxiety as a result of the incident. The student's expert estimates future therapy costs at $244,150, which would warrant considerable recovery. On the other hand, there is a substantial risk that the student would not receive any relief if the case proceeded to trial. Thus, the student's proposed net recovery of $218,839 is fair and reasonable in light of the facts of the case, the student's specific claim, and recovery in similar cases. In addressing the reasonableness of the student's attorney's fee award, the attorney's extensive work on the complicated case justifies her above-average contingency fee of 40% of the settlement amount. However, the attorney has calculated her proposed $180,000 award before deducting $51,160 in court costs from the settlement fund. The attorney is not entitled to double dip and can recover 40 percent of the $398,840 remaining after the payment of costs. Thus, the school must pay the attorney $159,535 in fees and $51,160 in costs and deposit the remainder into a custodial account for the student.

CHILD FIND DUTY TO TIMELY EVALUATE

A. D.C. v. Klein Indep. Sch. Dist., 121 LRP 20347 (5th Cir. 2021) (unpublished). School district's delay for several months in conducting an evaluation for SLD was not reasonable and denied FAPE. Districts are to evaluate students with suspected disabilities within a reasonable time after they have knowledge of facts that likely indicate that a disability exists. Here, there was extensive evidence that the district was or should have been aware of the student's disability during his fourth grade year by April 27, 2018. Among other things, the student had a 504 plan that indicated that he exhibited "characteristics of dyslexia evident in reading comprehension and written expression" and his performance substantially improved when assignments were administered orally. Despite receiving accommodations, however, the student's reading level did not improve from the beginning of his 4th-grade year through the middle of the year; therefore, the district should have known that its existing strategies were not working. The district's argument that the time period between April 27 and September 6, 2017 should not be considered because it included the summer break is rejected. Where school districts on summer break "need not move towards evaluation as expeditiously as they might during the school year," they "cannot get away with doing nothing, and here, the District did nothing." Further, the district delayed the evaluative process between early September, when the parents requested an evaluation, and late October, when the district obtained consent to evaluate.

B. Zamora v. Hays Consol. Indep. Sch. Dist., 121 LRP 21739 (W.D. Tex. 2021). Under the IDEA, an evaluation is required when a district suspects that a student 1) has one of the disabilities identified in the IDEA; and 2) needs special education and related services because of the disability. Here, the district had no reason to believe that the teenager diagnosed with ADHD, anxiety and depression had a disability-based need for specially designed instruction. Indeed, the student performed well with the provision of the accommodations set forth in his Section 504 Plan, which included checking for understanding; reminders to stay on task; and assistance with note-taking. In addition, the student earned A's and B's in all of his classes (including Advanced Placement classes) and scored at the "masters" level on state reading, social studies and science assessments.

While the parents specifically requested an evaluation shortly after the student entered high school in September 2018, they could not hold the district responsible for its delay in the evaluation process where the parents refused to provide their consent to the requested evaluation.

C. Mr. F. v. MSAD #35, 78 IDELR 282 (D. Me. 2021). District did not violate IDEA when it waited 20 months to evaluate a student for IDEA services where it had no reason to suspect a need for special education services until November 2018 during the student's 8th-grade year. Though the parent submitted medical documentation to the school indicating that the student was diagnosed with ADHD and an anxiety disorder in September 2017, the student's difficulties with organization and completing work were not atypical for middle schoolers. In addition, throughout most of the student's 7th-grade year, he was reported to be doing well. Thus, it was reasonable for the district to try to address his issues by implementing a 504 plan. When the student's executive functioning and social skills deficits became more apparent in November 2018, the district referred the student for an IDEA evaluation, but conducted a 504 evaluation instead based upon the mother's repeated statements that the student did not need special education services. Where the student was evaluated and found eligible for IDEA services in May 2019, the district complied with its child find obligations.

D. D.S. v. Bainbridge Island Sch. Dist., 78 IDELR 242 (W.D. Wash. 2021). District is ordered to provide 60 hours of additional instruction in writing where it failed earlier to evaluate the elementary school student's writing difficulties in addition to his reading difficulties. The district's argument that the reading instruction that it was providing to address the student's dyslexia would ultimately help to resolve his writing difficulties is rejected where the district disregarded documented teacher concerns about writing. Where the key question is whether the district was on notice of the student's writing difficulties when it evaluated him in the area of reading, the district was on notice when the school counselor notified that district psychologist via email that the student's teacher and reading specialist expressed concerns in reading, writing and math. However, the district focused its evaluation on the student's difficulties in ready and did not evaluate the student in the area of writing until he was in second grade and after his parents provided a private evaluation reflecting that he had dysgraphia. This failure to appropriately evaluate in all areas of suspected need not only resulted in a loss of educational benefit but also impeded the parents' participation in the IEP process by depriving them of necessary information.

E. Jacksonville North Pulaski Sch. Dist. v. D.M., 78 IDELR 283 (E.D. Ark. 2021). While the kindergartner's diagnoses of ADHD, autism and a sensory processing disorder do not in themselves require IDEA services, the district erred in focusing on the child's good academic performance when determining whether an evaluation was necessary. Here, the district suspended the child for a total of 12 days during the first 7 weeks of school for behaviors that could have been related to disability, and the guardians had notified the district of a history of behavioral problems when they registered him for kindergarten. Indeed, the testimony in the record indicates that the district narrowly focused on the child's academic ability without considering the overall effect that his diagnoses were having on his education. Further, IDEA prohibits districts from using a single measure or

assessment—such as academic performance—to determine whether a child needs special education services. Thus, the hearing officer's decision that that the district violated IDEA in refusing an evaluation based solely on academic proficiency is upheld.

F. P.P. v. Northwest Indep. Sch. Dist., 77 IDELR 7 (5th Cir. 2020) (unpublished). Where the purpose of a compensatory education award is to put a student in the position that she would have been if the district had complied with its IDEA obligations, parents must show that their child lost ground because of the district's child find violation. Here, the parents rejected several remedial services offered by the district as part of general education, including a dyslexia class, individualized tutoring and further evaluations. In addition, the parents stymied the efforts of the district to correct deficiencies in the student's initial IEPs by refusing to meet with the IEP Team while an independent educational evaluation was pending and refusing to adopt agreed-upon revisions in an IEP proposed in May 2017. In addition, the student made substantial progress under her February and May 2017 IEPs and, therefore, was not entitled to compensatory education services just because the district waited seven months to evaluate the student for dyslexia and other learning disabilities. Thus, the district court's decision that compensatory education was not warranted is affirmed.

G. D.C. v. Independent Sch. Dist., 76 IDELR 208 (S.D. Tex. 2020). District violated IDEA's affirmative obligation to earlier refer the student for an evaluation and, therefore, denied the student FAPE. The magistrate was correct when finding that the district had reason to suspect that the student had a disability when he entered the fourth grade. The evidence showed that the student received reading scores in the second percentile for his age group on state standardized tests and was found to be at a "reading level 0" under district standards. In addition, the student's reading skills did not sufficiently improve throughout the year, even with intensive supports and accommodations through a 504 Plan. Samples of the student's schoolwork reflected that he scored 72 to 100% when teachers read assignments and tests to him but scored only 30 to 50% when reading on his own. Despite all of this, the district failed to refer the student for an evaluation until his parents repeatedly requested an evaluation at the beginning of the fifth grade. Because the late evaluation denied FAPE, the magistrate's recommendations are adopted and judgment is entered for the parents.

EVALUATION OF PARENTALLY PLACED PRIVATE SCHOOL/HOME SCHOOL STUDENTS

A. A.B. v. Abington Sch. Dist., 440 F.Supp.3d 428, 76 IDELR 41 (E.D. Pa. 2020), aff'd, 78 IDELR 1 (3d Cir. 2021) (unpublished). While a district must make FAPE available to a parentally placed private school student with autism upon parent request--even if the student has not enrolled in a district school--the parent's general inquiries about the types of services the district has to offer did not qualify as a request for FAPE. To prove an IDEA violation, parents must prove that they specifically asked the district for an evaluation and development of an IEP and the district refused. Here, the student services coordinator at the high school testified that the parent called him and, in a very brief conversation, asked about special education services available in the district. The parent

ended the call by thanking him for the information and the coordinator noted that the person on the phone did not ask about an evaluation for her child. In addition, the parent did not request an evaluation or an IEP in her prior emails to the district. Thus, the hearing officer's decision that the district had no obligation to reevaluate the student is upheld.

B. M.C. v. School Dist. of Philadelphia, 77 IDELR 69 (E.D. Pa. 2020). Where parent of a homeschooler did not expressly request a reevaluation until August 2017 and did not consent to it until October 2017, the district complied with IDEA when it reevaluated the student in December 2017. Parentally placed private school students with disabilities—which some states define to include homeschooled students with disabilities—do not have a right to FAPE. However, the district must make an offer of FAPE when a parent makes a specific request for it. General expressions of concern will not trigger a district's duty to reevaluate. Here, the parent argues that a May 2017 certified letter from her attorney requesting a meeting to discuss the student's progress and "future programming" as contemplated by a September 2016 FAPE settlement agreement, placed the district on notice that she was requesting a reevaluation. This reference to "future programming," however, did not include a request to reevaluate or to revise the student's IEP.

ELIGIBILITY/CLASSIFICATION

A. G.M. v. Martirano, 78 IDELR 68 (D. Md. 2021). School district correctly found that the student with ADHD and dyslexia is not eligible for services under IDEA. A student is only eligible for services under IDEA if he has a disability and a need for special education services as a result. While the student has a diagnosis of dyslexia, he does not have an IDEA disability because the student is meeting grade-level standards and does not exhibit a discernible pattern of strengths and weaknesses. In addition, while the student's ADHD may qualify as an "other health impairment" based on its adverse effect on his educational performance, the student has no need for specially designed instruction. Students who are progressing appropriately in general education classrooms do not need special education. Here, witnesses agree that notwithstanding the student's behavior problems, he is making progress comparable to same age peers and meeting state-approved grade-level standards. Further, the district's expert witnesses testified that the interventions and accommodations made available to the student in the general education setting do not qualify as special education or specialized instruction. Therefore, since the student does not need special education services, he is not eligible for special education under IDEA, and the ALJ's denial of reimbursement for private school placement to the student's parents is affirmed.

B. Minnetonka Pub. Schs. v. M.L.K., 78 IDELR 94 (D. Minn. 2021). Where the misclassification of a student's disability only amounts to a denial of FAPE if it results in a failure to identify and address all of the student's special education needs, FAPE was denied in this case. Here, the district's April 2018 reevaluation did not identify the student's most significant disabilities: dyslexia and ADHD. Though the district argued that it was aware of the student's reading, attentional and focusing difficulties, the student's IEPs for grades 2-4 did not appropriately address the student's needs in those areas. In addition, the IEP reading goals were substantially the same for three school years, indicating a lack of progress in reading. The district's failure to accurately identify the

student's dyslexia and ADHD was not harmless. Rather, it hindered the proper design of an IEP that would have met the student's needs. Thus, the hearing officer's award of reimbursement to the parents for private reading services and the cost of an IEE is upheld.

C. Gwendolynne S. v. West Chester Area Sch. Dist., 78 IDELR 125 (E.D. Pa. 2021). Hearing officer's decision that the district correctly found that the fourth-grader is not eligible for special education services is upheld. While the district's school psychologist found strengths and weaknesses in the student's academic skill levels, she was performing overall at an average grade level standard for fourth grade. In conducting an evaluation, the district's psychologist reviewed QRI test results, the Teacher's College Reading and Writing Assessment and a variety of other results. She also administered a number of assessments, including the WISC-V, Kaufman Test of Educational Achievement, the W-J Test of Achievement and the Fifer Assessment of Reading. Based upon these assessments, the student's IQ was found to be in the average range and her achievement results reflected average performance in phonological processing. In addition to test results, progress monitoring data, as well as grades (A's and B's), information provided from teachers and other school records were considered. While the parents' retained expert—a developmental neuropsychologist licensed and certified as a school psychologist—conducted a number of similar tests, they focused on age-normed standards rather than grade-level normed standards. The private expert concluded that the student had SLD and generalized anxiety disorder and made a number of recommendations for special education services and accommodations. The hearing officer's legal conclusion giving more weight to the evaluation conducted by the district because of its educational focus—rather than its medical focus—is accepted. Clearly, an educational focus is more appropriate for purposes of determining eligibility for special education and should be given more weight, particularly where the parents' expert failed to consider the student's school performance, grades, and the results of progress monitoring in the general education intervention process. In fact, there was very little in the private evaluation report concerning the student's overall school performance.

D. J.D. v. East Side Union High Sch., 78 IDELR 35 (N.D. Cal. 2021). District did not err when finding the student no longer eligible for special education services as a student with SLI on reevaluation. Thus, the district properly dismissed the student from special education and the decision of the ALJ is affirmed. Here, all of the student's teachers testified that the student has no speech/language difficulties, and the ALJ found that throughout the due process proceedings, no professional testified that the student was eligible for special education under any disability category. The father's argument that the student succeeded in general education classes and sustained a high grade-point average only because he was receiving special education services is rejected. The eligibility team and the ALJ properly considered the student's accommodations when assessing his continued eligibility and finding that he no longer qualified for special education services. In addition, the ALJ's finding that the district afforded the parent meaningful opportunity to participate in the eligibility decision is upheld, where the father admitted that he zealously advocated on his son's behalf and frequently communicated with the district regarding his needs. Indeed, the parent was heavily involved at IEP meetings and spoke

"scores if not hundreds of times" at a meeting in December 2018. The father took full advantage of the opportunity to participate in the decision-making process.

E. J.R. v. Board of Educ. for the Iroquois Cent. Sch. Dist., 78 IDELR 280 (W.D. N.Y. 2021). The district's determination that the student with dyslexia no longer needs special education and that she should be transitioned to a 504 plan to help with reading fluency is upheld. Magistrate's recommendation to deny tuition reimbursement to the parents who placed the teen in a private college preparatory school for SLD students is therefore adopted. A student continues to be eligible for special education only as long as the student needs special education because of a disability. Here, although the district violated the IDEA procedurally by not reevaluating the student before dismissing her from special education services, the district had sufficient information to identify her needs and make its decision. The student was earning superior grades in general education classes without any modifications and did not request any reading support in class. The special education teacher testified that the student did not need any support and the student earned a final grade of 97 in her general education English class.

F. William V. v. Copperas Cove Indep. Sch. Dist., 77 IDELR 92 (5th Cir. 2020) (unpublished). District court's decision granting judgment in favor of the district is affirmed where the court found that the student was, in fact, eligible under IDEA as an SLD student, but that it was a procedural violation that caused no substantive harm. While the student's scores on standardized tests showed he was performing below grade level, IDEA requires focus upon individual progress—not how a student's progress compares to that of his or her same-age peers. Here, the student's grades and reading level assessments demonstrated that he was making progress. Thus, the parents did not show that the district court clearly erred in finding that the student was making continuous progress in the general education setting in reading, writing and math. In addition, the parents' assertion that the district failed to use a "research-based" reading program is rejected where the district used the Wilson reading program, which is a structured research-based program that meets state standards for dyslexia instruction. Since the student did not lose any educational opportunities as a result of the flawed SLD eligibility determination, there was no denial of FAPE.

G. J.M. v. Summit City Bd. of Educ., 77 IDELR 224 (D. N.J. 2020). District did not violate its child find duty when finding that the student with autism was not eligible under IDEA during the 2016-17 school year. Though the parent submitted an independent educational evaluation stating that the student presented behaviors that suggested ADHD and autism, the district properly considered the evaluation in conjunction with the results of its own assessments and other data collected during the RTI process. While the student was subsequently diagnosed officially with autism the following school year by a private practitioner, the district developed an IEP for him and its later classification does not render its earlier determination inadequate. This is so, where the district had a reasonable basis for determining that the student did not need special education services earlier because the student had improved in reading, writing and communication skills with academic and behavioral interventions available in the general education setting through RTI. Thus, the hearing officer's dismissal of the parent's IDEA claims is upheld.

INDEPENDENT EDUCATIONAL EVALUATIONS

A. L.C. v. Alta Loma Sch. Dist., 78 IDELR 271 (9th Cir. 2021) (unpublished). District court erred when concluding that the school district unnecessarily delayed providing an IEE or filing a due process complaint. Unnecessary delay is a "fact-specific inquiry" which is to focus on the circumstances surrounding the delay. In this case, the district exchanged numerous emails and letters with the student's parents from August 10, 2017, until it filed for a due process hearing on December 5, 2017. These communications reflect the parties' attempts to reach agreement on the evaluator's IEE and other issues. Indeed, the parties reached agreement on a contested issue as late as December 1, 2017. Further, the longest delay in communications, November 17–30, was largely due to the district's Thanksgiving break. The parties reached final impasse on the IEE issue on Thursday, November 30, and the district filed for a due process hearing the following Tuesday, December 5th. Thus, the court concludes that there was no unnecessary delay and reverses the district court's decision on its merits and vacates the fee award to the parents.

B. D.D. v. Garvey Sch. Dist., 121 LRP 20353 (C.D. Cal. 2021). Where the school district failed to respond at all to the parent's request for IEEs, it cannot challenge the appropriateness of the requests as part of the parent's request for due process hearing challenging the evaluation of her son. Under IDEA, parents are entitled to a district-funded IEE where the parent disagrees with an evaluation conducted by the district, unless the district files for a due process hearing to show that its evaluation was appropriate. Here, when the parent disagreed with the district's speech-language, OT, AT and behavioral evaluations and requested IEEs, the district did not fund them, file for due process or otherwise respond to her requests at all. While the ALJ correctly determined that the district denied FAPE when it failed to respond, the ALJ erred by only ordering the district to fund a speech-language IEE on the basis that the parent failed to show that the district's other assessments were not appropriate. The district's silence in responding to the parent's request stands alone to warrant all of the requested IEEs and its unexplained delay in failing to respond to the IEE requests waived any right to contest them. Thus, all of the requested IEEs must be funded by the district.

C. D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 77 IDELR 122 (2d Cir. 2020). District court's opinion is vacated, reversed and remanded because a functional behavioral assessment is not an "evaluation" for which a parent may seek a publicly funded IEE. Although IDEA does not specifically define "evaluation," it sets forth specific requirements for evaluations and reevaluations. Those requirements taken together make it clear that an "evaluation" refers to a comprehensive assessment of a child in all areas of suspected disability to determine whether the student has a disability and the nature and extent of special education and related services that are needed. An FBA, by title and definition, is not a comprehensive assessment of a child's disability and is "a purposefully targeted examination of a child's behavior." While the U.S. DOE has a longstanding view otherwise, its view does not reflect the plain text of the IDEA and its implementing regulations and, therefore, the court owes it no deference. In addition, the IDEA's 2-year statute of limitations period does not apply to requests for IEEs, because IDEA provides for parental requests for due process complaints about identification, evaluation, placement

or services, but parents are not required to file a due process complaint to request an IEE. Here, the parents challenged the student's October 2014 reevaluation five months before the next reevaluation was due. Thus, the request for an IEE was timely. Thus, the case is remanded for further proceedings on the appropriateness of the October 2014 reevaluation.

D. Cynthia K. v. Portsmouth Sch. Dept., 76 IDELR 248 (D. N.H. 2020). Administrative hearing decision in favor of the district is reversed and the parents' request for an IEE is granted. Where the district evaluated the student for SLD, the district was required to ensure the evaluation included a classroom observation that documented the student's academic and behavioral performance. Here, the parties agreed to rely on observations conducted after the student's referral for evaluation. While a behavioral expert had observed the student in class during his kindergarten year while conducting an FBA, the district did not arrange a classroom observation after the parent consented to the evaluation. The teacher's observations of the student during instruction are not the type of classroom observations contemplated for SLD evaluations.

E. Hopewell v. Township Bd. of Educ., 77 IDELR 20 (D. N.J. 2020) (unpublished). The district's failure to file a due process complaint in response to a parent's request for an IEE is a basis for ordering the district to fund the IEE. The district's argument that the parent's request for an IEE was untimely is rejected. While it is true that the parent waited until May 2018 to express disagreement with a reevaluation the district conducted from April to June 2016, neither the federal nor state regulations governing IEEs set a time limit for disagreement. Rather, the regulations state that the right to a publicly funded IEE is triggered by a parent's disagreement with an evaluation. Because the parent stated her disagreement with the 2016 evaluations in a May 2018 email, she would be entitled to an IEE at public expense unless the district filed a due process complaint within 20 days, as required by New Jersey law. The district never filed a due process request to challenge the IEE, so the parent is entitled to it.

F. Smith v. Tacoma Sch. Dist., 77 IDELR 48 (W.D. Wash. 2020). Parent is not entitled to an IEE where the district's reevaluation of the student complied with IDEA and state law. To defend against a request for an IEE, a district is required to show that it used a variety of assessment tools and strategies, reviewed existing evaluative data, and considered all areas of potential need upon reevaluation. Here, the district's reevaluation met all of these requirements. The district's evaluators administered behavioral and occupational therapy assessments, sought input from the grandmother and school personnel, and observed the student in class. In addition, the district reviewed existing evaluative data and considered whether the student continued to need services to address anxiety, sensory issues, fine motor deficits, or speech and language difficulties. Thus, the ALJ did not err when denying an IEE.

G. C.P. v. Clifton Bd. of Educ., 77 IDELR 46 (D. N.J. 2020). Where the district's formal policy regarding IEEs provides that it will pay a "reasonable and customary rate" for the type of evaluations (one psychological, one auditory) requested by the parent, the hearing officer's determination that $5,200 for the two IEEs sought by the parent is not reasonable is upheld. The evidence reflects that the district typically pays $900 for independent

psychological evaluations of this type and unless the parent can show "extraordinary circumstances" that justify a higher rate, she is not entitled to reimbursement for more than the district's rate cap. Where the district's documentation shows that it paid between $650 and $1350 for IEEs in the previous two years, with an average cost of $900, the maximum reasonable amount for reimbursement to the parent is $1800. The parent has not identified any circumstances that would warrant reimbursement in excess of the district's cap and, therefore is not entitled to recover the full amount sought. Note: The court began its decision by noting that "[t]his is a federal-court litigation, with both parties represented by counsel, over the sum of five thousand dollars--or at least the portion of that amount that may be deemed excessive--or at least the procedures by which the parties argued about it. Though it makes no difference to the result, I observe that the secret headwaters of this flowing stream of issues seem to be underlying disputes about attorney's fees."

THE FAPE STANDARD

A. D.H. v. Fairfax Co. Sch. Bd., 78 IDELR 39 (E.D. Va. 2021). Hearing decision denying reimbursement for private placement of a student with OHI (based upon ADHD and anxiety) is upheld where the IEP provided by the district was reasonably calculated to enable the student to continue to make progress in light of his circumstances in the LRE. An IEP is not required to offer the best possible educational program to a student with a disability. The student's good grades reflect his average to above-average abilities and he was advancing from grade to grade, mastered the reading and writing goals in his 4th grade IEP, and was close to mastering his two behavioral goals before his parents placed him in a private school. While the student's inability to pass the statewide reading assessment was of concern, the IEP team discussed the student's ongoing difficulties and increased his special education services from 10 to 22.5 hours per week. Based upon the student's academic and behavioral progress combined with continued struggles, the August 2018 IEP offered for the 5th grade was appropriate.

B. Whitaker v. Board of Educ. of Prince George Co. Pub. Schs., 77 IDELR 64 (D. Md. 2020). District did not deny FAPE where the student's 2018-19 IEP appropriately addressed his educational needs. Under IDEA, a district must ensure that an IEP is reasonably calculated to enable the student to make educational progress that is appropriate in light of his circumstances. Here, progress reports show that special education and related services outlined in the IEP helped the student improve in the areas of social skills, math and science throughout the year. In addition, the positive behavioral interventions required by the student's BIP assisted him with problem-solving and other behavioral matters. Although the parent contends that the student failed to achieve his annual goals and his grades were declining, when the student's progress in math began to decline, the parent refused to utilize math tutoring services offered by the district. In addition, the district convened an IEP meeting and revised the student's annual goals to address the parent's concerns regarding the student's struggles in math and appropriately requested consent to conduct an FBA for the purpose of revising the student's annual behavior goals. Because the IEP was reasonably tailored to the student's unique needs and enabled him to improve his academic performance and behaviors, it offered him FAPE.

C. Downingtown Area Sch. Dist. v. G.W., 77 IDELR 155 (E.D. Pa. 2020). Where the student's progress was stagnant during the second part of the 2016-17 school year, so was the district's approach to addressing his needs and providing FAPE. Thus, the hearing officer's decision that the district denied FAPE to the student with autism is upheld, particularly where many of his IEP goals were repeated, the district failed to substantially change his programming and failed to reevaluate him before developing a new IEP in February 2017. Here, a significant portion of the IEP goals were repeated from the student's March 2016 IEP because the student had not mastered them. Five of the 11 goals were repeated, with only slight changes in phraseology. In addition, the student's special education services remained largely the same from February 2017 to the end of the school year, despite the student's stagnation in progress. Finally, the hearing officer appropriately relied upon the district's failure to reevaluate the student prior to developing the February IEP as a basis for finding a denial of FAPE, particularly given the student's lack of progress. Thus, it was reasonable for the hearing officer to find that the district did not ascertain the student's educational needs, respond to his deficiencies, or place him accordingly from February 2017 to the end of that school year. Thus, the compensatory education award is appropriate.

PROCEDURAL SAFEGUARDS/VIOLATIONS

A. Davis v. Carranza, 78 IDELR 167 (S.D. N.Y. 2021). State review officer's decision that guardian of a 10-year-old multiply disabled student is not entitled to private school reimbursement is upheld. The district made sufficient efforts to include the guardian in the IEP decision-making process. Thus, any procedural violation resulting from the guardian's absence at the student's annual IEP review is harmless. Parents are entitled to relief under IDEA where a procedural violation results in a denial of FAPE for the student or impedes the parent's participation in the decision-making process. Here, the district's documentation reflects that it repeatedly rescheduled the annual review meeting to accommodate the guardian's schedule, but the guardian could not remember why she was unable to attend the meeting. In addition, there is no indication that the guardian would have participated in a reconvened IEP meeting after "frustrating the attempts to schedule the IEP Meeting for months." Further, there is no evidence that the district's failure to reconvene the IEP team resulted in a denial of FAPE to the student. Finally, the SRO was also correct in deciding that the district's failure to include the names of the student's physician and an additional parent member in the final IEP notice was harmless.

B. E.C. v. Fullerton Sch. Dist., 121 LRP 21383 (C.D. Cal. 2021). The ALJ's decision that the district denied FAPE based upon a procedural violation is affirmed. Here, the district violated IDEA and the California Code when it refused to allow the parents' independent neurologist/evaluator to observe their child in his current or proposed educational placement, particularly when it allows its own evaluators to conduct classroom observations of IDEA-eligible students. The district's refusal to allow the classroom observation impeded the parents' participation in the IEP process and, therefore, amounted to a denial of FAPE. However, the ALJ's order requiring the district to fund an observation by the parents' expert in the future did not remedy the harm done, and the district is ordered

instead to reimburse the parents for the cost of their child's unilateral private school placement.

C. Montgomery Co. Intermed. Unit No. 23 v. A.F., 506 F.Supp.3d 293, 78 IDELR 31 (E.D. Pa. 2020). School district is ordered to reimburse the parents of a preschool child with autism for private schooling at a school for students with disabilities. This is so because the district failed to explain to the parents why it did not continue behavioral supports for the child that had been included in his initial IEP. This failure denied the child FAPE where it impeded the parents' participation in the IEP process and left them without the information they needed in order to make a formal decision about the district's proposed educational program for their child. Removal of the behavioral supports from the IEP without informing them that those supports would be part of the classroom-based autism program the parents had requested deprived them of the ability to determine whether the education offered to their child was appropriate. While the hearing officer's decision on this point is upheld, the hearing officer's finding that the proposed IEP would have met the child's needs is rejected, because it was inadequate as written.

D. J.T. v. District of Columbia, 983 F.3d 516, 77 IDELR 160 (D. D.C. 2020). Where school district did not ensure that private school representatives were present when developing IEPs for private school programs, this procedural violation did not significantly impede the parents' participation in the IEP process. This is so where procedural violations are actionable only if they result in educational harm or significantly impede parent participation in the educational decision-making process. While the parent did not have the opportunity to question private school representatives during the IEP meeting, the district did arrange for her to visit the schools afterward and observe how the student performed in both private school programs. Although the district failed to comply with IDEA requirements, it otherwise afforded her ample opportunity to participate.

LEAST RESTRICTIVE ENVIRONMENT

A. Knox Co. v. M.Q., 78 IDELR 255 (E.D. Tenn. 2021). The hearing officer's decision that the district's proposed placement of a five-year-old student with autism in a special education setting for two-thirds of the school day is not the LRE is upheld. The Sixth Circuit has developed a three-part categorical test to determine whether placement outside of the general education setting qualifies as a student's LRE. "[A] school may separate a disabled student from the regular class...when: (1) the student would not benefit from regular education; (2) any regular-class benefits would be far outweighed by the benefits of special education; or (3) the student would be a disruptive force in the regular class." (citing Roncker, 700 F.2d at 1063). Here, the student does not fall within the first or third category, because the evidence is clear that the student did and would continue to benefit from regular education, particularly where he is delayed in three areas--communication, prevocational and social skills. Based on expert testimony, young children with autism need as much social exposure to non-disabled peers as possible to develop communication and socialization skills. In addition, this student benefits from a routine, as changes to routine cause him discomfort and overstimulate him. Remaining in the general ed. environment, rather than transitioning back and forth between the general education

classroom and the proposed special education program, will allow him to follow a regular routine in addition to modeling non-disabled peers. As to the third category, witnesses who have interacted with the student testified that he would not be a disruptive force in the regular class, as he does not have any behavioral issues. Rather, he is compliant, cooperative and responds well to redirection. As to the second category, the court must identify the supposedly superior services provided by the proposed non-mainstream setting and then determine whether those services can be provided in a mainstream setting. If the benefits of the non-mainstream setting are not portable to the non-segregated setting, the court must then determine whether those non-portable benefits far outweigh the benefits of mainstreaming. If the parents prevail on either of these two steps, they have established that the child does not fall within Roncker's second category of students for whom mainstreaming is not appropriate. Where two school witnesses testified that the supports offered in the proposed blended classroom can be provided in the general education kindergarten classroom, and the district's autism support team is available to assist and train paraprofessionals or other support staff to provide the student with needed supports and services, the general education classroom is the student's LRE.

B. E.B. v. Baldwin Park Unif. Sch. Dist., 77 IDELR 164 (C.D. Cal. 2020). District's proposal to move a 7-year-old student with an intellectual disability from a special day class for students with mild to moderate disabilities to a more restrictive setting is appropriate. The evidence indicates that the student has gained minimal academic and social benefits in the special day class. To determine whether a student has been placed in the LRE, courts in the 9th Circuit consider: 1) the educational benefits of the less restrictive setting; 2) the nonacademic benefits of that setting; 3) the effect the student had on the teacher and other students in the less restrictive setting; and 4) the costs of educating the student in the less restrictive setting. Here, the student's teacher testified that the student was not able or refused to participate in most classroom activities in the mild/moderate SDC, even with modifications and a one-to-one aide. In addition, the teacher testified that the student preferred to play alone and "blew raspberries" at or said "no" to students who tried to interact with him. Finally, the teacher asserted that the student negatively impacted his classmates by taking up an inordinate amount of her time. Because the student received little benefit and negatively impacted the learning of his peers, the LRE is a more structured setting for the student as proposed by the district.

C. Wishard v. Waynesboro Area Sch. Dist., 77 IDELR 65 (M.D. Pa. 2020). Where fifth grader with autism made little progress in the general education setting despite receiving extensive accommodations, modifications and supports, the district's offer of a part-time placement in a special education classroom is appropriate and the hearing officer's decision is upheld. The Third Circuit applies a two-part test when determining whether a district has taken sufficient steps to educate a student with a disability with his nondisabled peers. First, the court considers whether the student can be educated satisfactorily in the general education setting with the use of supplementary aids and services. If the answer to that question is "no," the court then considers whether the district mainstreamed the student to the maximum extent appropriate. Here, the student could not receive a satisfactory education in the general education classroom and continued to fall farther behind, even though the district provided numerous accommodations, curriculum modifications and

supplementary aids and services to the student over the years. In addition, evidence in the record suggests that the student's presence in the regular education classroom resulted in greater distraction for both him and other students. With respect to the district's efforts to mainstream the student to the maximum extent appropriate, the student would receive 60 minutes of instruction each day in the general education classroom and would participate in specials, lunch and recess with his classmates in the district's proposed program. Thus, the district's proposal would mainstream the student to the maximum extent appropriate.

BEHAVIOR/FUNCTIONAL BEHAVIORAL ASSESSMENTS & BIPS

A. Lauren and Eric B. v. Frisco Indep. Sch. Dist., 78 IDELR 137 (E.D. Tex. 2021). Magistrate Judge's Report and Recommendation is adopted that the impartial hearing officer was correct in finding that the district offered FAPE to a student with Asperger Syndrome. Where the parents' argument is that the district should have conducted an FBA earlier than it did in October 2018, there is no general requirement under IDEA to conduct an FBA or to do so within a certain time period. Here, the district conducted an FBA two months after the student began third grade, when the student's behavior became much more of a concern. In addition, the student's initial IEP contained behavioral supports and the district took "extensive action" to address the student's behavioral issues, including the collection of data and providing intervention, support, goals, strategies and frequent meetings with the parents and district staff. While there were behavioral incidents that occurred, the student often met behavioral expectations and demonstrated progress on his IEP goals.

B. Elizabeth B. v. El Paso Co. Sch. Dist. 11, 78 IDELR 5 (10th Cir. 2020) (unpublished). The district court's decision in favor of the district is affirmed where the 6-year-old autistic student's IEP offered FAPE. The fact that a BIP was not developed for the student as part of the IEP did not amount to a denial of FAPE where IDEA requires only that districts consider the use of positive behavioral interventions and supports when a student's behavior is found to impede her learning or that of others. Here, the district did consider them but found them unnecessary where district witnesses testified that the student's noncompliant self-injurious and self-stimulating behaviors occurred only during unstructured activities, such as recess and other unstructured time and quickly subsided once learning commenced. These witnesses consistently stated that the child's behaviors did not interfere with her ability to learn or interact with others. In addition, while the district did not create a formal BIP, it did begin to draft a "tip sheet" for the child's teachers to help them identify and respond to any negative behaviors. In addition, the district was not required to include ABA therapy in the child's IEP where the parent's preferred label of ABA is not required and the IEP included strategies consistent with ABA.

C. J.N. v. Oregon Dept. of Educ., 77 IDELR 105 (D. Ore. 2020). The parents of four students with disabilities and the Council of Parent Attorneys and Advocates have standing to sue the Oregon SEA under IDEA, ADA and Section 504 where it is alleged that the SEA has allowed districts to repeatedly shorten students' school days rather than providing appropriate behavioral supports. Plaintiffs seek declaratory and injunctive relief on behalf of themselves and similarly situated Oregon students currently or at substantial risk of being subjected to a shortened day due to disability-related behaviors and allege that the SEA has failed to properly monitor districts it knows are unlawfully shortening students'

school days. To demonstrate standing, a plaintiff must show an injury in fact that is 1) concrete and particularized and actual or imminent; 2) fairly traceable to the challenged conduct; and 3) likely to be redressed by a favorable decision. Here, one of the students has sufficiently alleged that he suffered an actual injury, while the other three claim that they have yet to receive supports they need to succeed at school on a full-day schedule and are, therefore, at risk of imminent future harm from again suffering unnecessarily shortened school days. In addition, the students have sufficiently alleged that the harm is fairly traceable to the SEA's neglect of its duty to monitor districts and ensure they provide FAPE. The alleged harm is redressable, since the SEA is ultimately responsible for ensuring children with disabilities receive FAPE. Finally, since plaintiffs' parents are among the organization's members, COPAA has associational standing to sue.

DISCIPLINE/MANIFESTATION DETERMINATIONS

A. Mahanoy Area Sch. Dist. v. B.L., 121 LRP 21955 (2021). Judgment of the Third Circuit in favor of a high school student who was suspended from the junior varsity cheerleading squad for a year based upon vulgar Snapchat posts made off campus is affirmed. When the teenager did not make the school's varsity cheerleading squad, she posted two images on Snapchat while visiting a local convenience store over the weekend expressing frustration with the school and its cheerleading squad. The posts, one of which contained vulgar language and gestures (some F-bombs and the finger), though admittedly "crude," are protected by the First Amendment regardless of the use of profanity. However, while schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," the Third Circuit's distinction between on-campus speech v. off-campus speech when defining the parameters of a school's interest in regulating speech is rejected because schools continue to have an interest in regulating student speech while off campus in circumstances that involve "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." Having said that and from a student's perspective, regulation of off-campus speech, when coupled with regulation of on-campus speech, means that everything a student says during a full 24-hour day may be regulated by a school. "That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." Putting this student's vulgar language aside, the Snapchat posts were mere criticism of the cheerleading team, the coaches and the school, which would in other circumstances have amounted to protected speech on matters of public concern. These posts were not fighting words; nor did they incite violence. In response to the district's argument that it was entitled to suspend the student based on its "interest in teaching good manners" and punishing the use of vulgar language aimed at part of the school community, while that may have been enough to justify punishment for behavior on school campus, the fact that she was off campus and spoke outside the school on her own time negates that justification. Thus, the school's punishment of the student violated the First Amendment where the posts did not cause a substantial disruption to school.

B. Gloria V. v. Wimberley Indep. Sch. Dist., 78 IDELR 96 (W.D. Tex. 2021). Court adopts Magistrate Judge's report and recommendation supporting district's decision to move the student from the High School to an alternative placement where the district believed that his continued presence at the High School would be disruptive. The Magistrate found that the district made an appropriate determination that the SLD/OHI 17-year-old's felony theft of an all-terrain vehicle (belonging to another student at the High School) off campus and during summer break was not a manifestation of his ADHD. Based upon all relevant information available to the team, the crux of the team's decision was that the student's stealing of the ATV would "at least require some sort of planning for execution." In addition, the team's determination that the theft was not caused by the student's disability was made after discussing, for well over two hours, the student's past behaviors and diagnoses, including his impulsivity attributed to ADHD. The Magistrate also noted that the team considered the type of item stolen as important and that the team's decision might have differed had the student stolen a cookie rather than an ATV. Judgment in favor of the district is granted.

C. N.F. v. Antioch Unif. Sch. Dist., 78 IDELR 257 (N.D. Cal. 2021). District complied with IDEA when it conducted an MDR, even though the student's parents did not attend the MDR meeting. Here, the parents argue that the district violated IDEA when it improperly excluded them from the MDR meeting by scheduling it on short notice. The district's argument that it was scheduled on short notice because IDEA requires the MDR to occur within 10 days of the student's removal from his educational placement is accepted. The student was suspended for 5 days following a behavioral incident that occurred right before a school holiday. Because of the holiday, the district was required to conduct the MDR on the day after he returned from the removal and it did so. In addition, the district reached out to both parents and attempted to ensure that they could participate, though neither could do so on short notice. Even if the district committed a procedural violation, any such violation would have been harmless, since the district's detailed records showed that the team concluded that the behavior was a manifestation of disability and immediately returned him to his regular placement. Finally, the district attempted to conduct an FBA and to modify the student's BIP, but the parent's refusal to consent and subsequent removal of the student from school interfered with the district's effort to do so.

POST-SECONDARY TRANSITION SERVICES

A. Perkiomen Valley Sch. Dist. v. R.B., 78 IDELR 222 (E.D. Pa. 2021). Parents of adult student are entitled to reimbursement for unilateral placement in a New York residential transition program (the Vocational Independence Program) for students with intellectual disabilities where none of the district's proposed transition programs would have met the student's needs. The district's obligation to develop an IEP with challenging objectives applies to postsecondary transition goals and services. However, the IEPs proposed for 2015-16 and 2016-17 did not adequately address the student's postsecondary needs. For instance, the district's proposed early childhood education program did not offer any instruction in transportation or independent living skills. Other suggested programs focused on preparing students for college, which was not a path this student intended or offered the same classroom-based instruction in independent living skills that the student

had already been provided. Further, the residential transition program addressed the student's unique needs and interests, allowing her to meet the challenging objective of learning to live independently. Indeed, the student learned to rely on the program-based supports less and learned to handle situations on her own by integrating the program's teachings into her daily life. Thus, the private program is appropriate and the parents are entitled to recover the full cost of the student's placement for the two years, including the residential component and necessary transportation costs.

EXTENDED SCHOOL YEAR SERVICES

A. K.B. v. Katonah Lewisboro Union Free Sch. Dist., 78 IDELR 93 (2d Cir. 2021) (unpublished). Because the high school student with bipolar disorder made academic progress during a 4-month stay in a psychiatric hospital and during her subsequent return to public school, the student did not need ESY services during the summer of 2016 to receive FAPE. Thus, the district court's denial of reimbursement for the student's private summer program is upheld. Clearly, a district must provide ESY only where it is determined that it is necessary for FAPE. Here, the evidence did not reflect a need where the student did not lose any credits during the hospitalization in the spring and summer of 2015 and stayed on track to graduate from high school on time when she returned to school in the fall. Because she did well academically in a unilateral private placement at the beginning of the 2016-17 school year and did not regress during breaks in instruction, the IEP team's decision that she did not need a 12-month program was appropriate. In addition, the district had no duty to evaluate the student until it learned of her hospitalization where she performed well academically despite her self-injurious behaviors and suicidal thoughts.

RESIDENTIAL PLACEMENT

A. J.B. v. Tuolumne Co. Superintendent of Schs., 78 IDELR 188 (E.D. Cal. 2021). The recommendations of the Magistrate are partially adopted that the responsible LEAs failed to place the student in a residential facility in a timely fashion by May 2018. Among other things, the LEAs are ordered to provide compensatory services, fund a residential placement through the end of the 2020-21 school year and to provide a one-to-one aide to the student. In determining whether a residential placement is the LRE for a student, a court or hearing officer must look at factors such as the educational and nonacademic benefits of a full-time regular education placement, the effect the presence of the student has on the teacher and children in the regular classroom, and the cost of placing the student in a full-time regular classroom. Here, neither the Magistrate nor the ALJ presiding over the due process hearing erred in determining that the LEAs should have known that a residential placement was appropriate for the student as of May 2018. While the student previously presented certain maladaptive behaviors, they were appropriately addressed in the less restrictive day program. It was not until October 2017 that the student's behaviors began to escalate and between October 2017 and January 2018, the student engaged in behavior such as striking a teacher with a fire extinguisher, assaulting staff and other children, and bringing a pocketknife to school. By May 2018, the student's behaviors deteriorated to such an extent that the IEP team imposed daily searches of his pockets and socks to ensure he did not bring dangerous items to school. At that point, the LEAs were

on notice that a residential placement was necessary but waited until December 2018 to offer it.

B. A.H. v. Arlington Sch. Bd., 78 IDELR 224 (E.D. Va. 2021). School district is not required to fund the cost of an emotionally disturbed student's unilateral placement in a residential facility in Utah. Here, a teenager diagnosed with Major Depressive Disorder, Social Anxiety Disorder, Autism, Parent-Child Relational Problem, Social Exclusion and PTSD with a history of mental health hospitalizations made academic, social, and emotional progress while attending the district's therapeutic day school. Thus, he does not need residential placement to receive FAPE, and the hearing officer's decision that the district's proposal to continue the student's therapeutic day program is affirmed. While the student's mental health began to deteriorate after he transitioned back to a public school program in the Spring of 2019 after being hospitalized for mental health reasons, the district has no obligation to fund future residential programming that is primarily geared toward addressing the student's mental health needs. The parents' argument that the student's social and emotional needs are intertwined with his educational needs is rejected where the student performed well academically during his time at the therapeutic day school despite dealing with the same mental health issues for which he was hospitalized. Not only did the student earn grades in the mid to high 90s, but he also passed statewide assessments and took advantage of counseling and other therapeutic supports offered by the district. In addition, the hearing officer observed that during the student's nine months attending the district's therapeutic school, he experienced no suicidal episodes, no hospitalizations and no emotional breakdowns. Importantly, the parents' medical insurance paid a significant portion of the residential program's cost based upon the parents' argument that the mental health services were medically necessary. Because the residential placement was not based on educational need, the district is not required to fund it.

C. Banwart v. Cedar Falls Comm. Sch. Dist., 489 F.Supp.3d 846, 77 IDELR 126 (N.D. Iowa 2020). Where 8th grader with Reactive Attachment Disorder made significant progress in a day program for students with emotional and behavioral disabilities, the student's behavioral problems in his parents' absence when they went on vacation does not reflect a need for a residential placement. Thus, the ALJ's decision that the parents are not entitled to reimbursement for the student's placement in a residential treatment facility in Utah is upheld. While the student's academic deficits resulted from his behavioral outbursts and his tendency to walk out of class, the student attended class 90% of the time once being placed in the day program and he had fewer incidents of aggressive behavior. In addition, he made significant progress in reading, writing and math. The student's sudden refusal to attend school in April 2016 was not surprising given the nature of his disability and his fear that his mother would abandon him. Until his parents' vacation at that time, the student had not missed a single day at the day program and some of his most concerning out-of-school behaviors occurred while they were gone. Upon the parents' return from vacation, the student's academic and behavioral performance improved. Thus, the residential placement was not educationally necessary.

COMPENSATORY EDUCATION

A. JKG v. Wissahickon Sch. Dist., 78 IDELR 158 (E.D. Pa. 2021). Hearing officer's decision not to award compensatory education services to the student with autism is upheld. While the district violated IDEA when it failed to conduct a functional behavioral assessment of the student prior to developing his initial IEP in the Spring of 2018 and failed to include in the IEP a social skills goal, an award of relief is not warranted. Parents may only obtain compensatory education by showing that a violation actually resulted in a denial of FAPE to the student or impeded parent participation in the IEP development process. Though the student had some issues with off-task behaviors and invasion of the personal space of others, the student's more serious behavioral issues did not appear until October 2018--several months after the development of the initial IEP. When the initial IEP was developed in the Spring, the child study team issued a report indicating that the student's behaviors were not atypical from that of his peers. In addition, the purpose of compensatory education services is to place a student in the educational place he would have been had the district not committed the IDEA violation. The parent, however, has not been able to show how the omission of a social skills goal actually impeded the student's educational progress. Thus, the student is not entitled to an award of compensatory education services.

B. K.N. v. Gloucester City Bd. of Educ., 78 IDELR 157 (D. N.J. 2021). District is ordered to place $26,017 in a trust fund for the benefit of an elementary school student with autism. This is an appropriate compensatory remedy where the district violated Section 504 by failing to provide a one-to-one aide supervised by a special education teacher to assist the child in an afterschool program. The district's argument that it should provide the services directly is rejected, as the trust fund is more appropriate than having the very entity that committed the discrimination in the first place create the remedy for the student. However, the parent's request for $97,200—an amount needed to hire two one-to-one ABA therapists for 810 hours—is rejected, since the court has ruled previously that the student needs a one-to-one aide supervised by a special education teacher, and the appropriate hourly rate is $16, rather than the $60 rate the parent seeks. In addition, the parent is entitled to attorneys' fees as the prevailing party in this proceeding and in the due process proceeding below.

SERVICE ANIMALS

A. United States v. Gates Chili Cent. Sch. Dist., No. 6:15-cv-6583-CJS-MJP (W.D. N.Y. 2015). The DOJ reported on August 20, 2020 that this long-pending case was settled. Although denying any wrongdoing, the district agreed to revise its service animal policy to provide reasonable modifications to facilitate the use of a service dog by students with disabilities, including, if needed, helping a student to tether or untether the service dog, assist a student with getting water for the dog, and prompting a student to issue commands to the dog. The district also agreed to pay the student's mother $42,000 for out-of-pocket expenses and damages. You can find the DOJ's press release and a copy of the settlement agreement at https://www.justice.gov/opa/pr/justice-department-settles-gates-chili-central-school-district-ensure-equal-access-students.

SECTION 504 "FAPE" ISSUES (CHILD FIND/EVALUATION, PLACEMENT, ETC.)

A. E.P. v. Twin Valley Sch. Dist., 78 IDELR 69 (E.D. Pa. 2021). Although the district conducted an evaluation under IDEA and found the kindergartner with a sensory processing disorder, eating challenges and social/emotional delays not eligible for special education services under IDEA, it ultimately violated Section 504's child find obligations that exist independent of IDEA. Notwithstanding the district's position that the IDEA evaluation showed that the student was gifted and doing well academically and behaviorally in school, there were sufficient reasons to believe that the student needed accommodations to address his emotional regulation and sensory challenges. Among other things, the parent informed the student's teachers of his sensory and eating issues, including a need for an additional protein-based snack at the end of the school day to regulate his afternoon behavior. Clearly, a student may be entitled to receive accommodations under 504 that he would not necessarily be entitled to under IDEA. The hearing officer's decision that FAPE was denied is affirmed and an independent evaluator will determine the appropriate amount of compensatory education to correct the 504 violation.

DISCRIMINATION AND PRIVATE SCHOOLS

A. Beverly R. v. Mount Carmel Acad. of New Orleans, 78 IDELR 159 (E.D. La. 2021). Where the private school received an SBA loan under the Paycheck Protection Program, the school was required to comply with federal discrimination laws for the duration of the loan. The school's argument that it was no longer subject to the parent's claim that it discriminated against her teenager with cerebral palsy by denying her admission is denied. Where private school staff allegedly told the parent that her child was "not a good fit" for the school and that the school could not address her disability-related needs, these discriminatory statements occurred while the PPP loan was active in September 2020. Just because the loan was forgiven on November 24, 2020 does not make this case moot. The school is still required to answer for claims based on conduct that occurred while the loan was outstanding. Thus, the parent's lawsuit will not be dismissed on the basis of mootness.

SECTION 504/ADA DISCRIMINATION GENERALLY

A. G.P. v. Chicago Bd. of Educ., 78 IDELR 104 (N.D. Ill. 2021). Court's previous decision that the district is not required to renovate its 127-year-old Montessori Magnet school to accommodate the student's wheelchair will not be reconsidered. Rather, the district accommodated the student by offering to serve her at another of its Montessori programs in an accessible building. The Title II ADA regulations only require reasonable modifications when necessary to prevent disability discrimination. However, the regulations do not require public entities to make modifications that are unnecessary to avoid discrimination on the basis of disability. Here, the district made its Montessori program accessible by placing the student in a different building where it has the same program and providing transportation services to her. Therefore, the installation of an elevator, lift or ramp from the basement in the student's preferred school was not required to avoid disability discrimination.

B. Lartigue v. Northside Indep. Sch. Dist., 78 IDELR 161 (W.D. Tex. 2021). Parents' allegations are sufficient to support a claim of discrimination under ADA. Thus, the district's motion to dismiss the parents' ADA claim that the district failed to accommodate their hearing impaired high schooler's disability is denied. Here, the parents allege, among other things, that their child has been denied the provision of Communication Access Realtime Translation services in order to participate in a mock legislative assembly competition called Congress. This refusal to provide CART services could constitute discrimination under ADA and the claim may proceed.