SOME POINTS AND AUTHORITIES ON *ENDREW F.*, *G.L.*, AND *FRY*

IDEA HEARING OFFICER TRAINING
NEW YORK STATE EDUCATION DEPARTMENT
MONDAY, OCTOBER 16, 2017 (ALBANY AREA)
THURSDAY, OCTOBER 26, 2017 (NYC)

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I. *ENDREW F.* – FAPE

A. *Endrew* Itself

Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 69 IDELR 174 (Mar. 22, 2017) (vacating and remanding lower court decision that applied "merely more than de minimis" standard for child with autism displaying significant behavioral problems; interpreting *Board of Education v. Rowley*, 458 U.S. 176 (1982), to demand "a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 998; stating that for child fully integrated in regular classroom, IEP typically should enable child to achieve passing marks and progress from grade to grade, but that not every child who advances from grade to grade automatically receives appropriate education; stating that IEP has to be "appropriately ambitious" in light of child's circumstances and that standard is "markedly more demanding than the 'merely more than *de minimis*' test," *id.* at 1000, but rejecting standard that child be provided opportunities to achieve academic success, attain self-sufficiency, and make societal contributions substantially equal to opportunities afforded children without disabilities; noting need to defer to expertise and judgment of school authorities)

B. Court of Appeals Cases

M.L. v. Smith, 867 F.3d 487, 70 IDELR 142 (4th Cir. Aug. 14, 2017) (in case of Orthodox Jewish child with Down Syndrome and intellectual disability, ruling that IEP offered by public school that was not challenged by parents except for failure to instruct child in customs and practices of Orthodox Judaism to permit him to generalize from school to religious life, which instruction parents contended could be accomplished only at religious school, satisfied IDEA requirements, and affirming decision in favor of public school system; reasoning that although Fourth Circuit standard for appropriate education matched that of Tenth Circuit overturned by *Endrew F.*, *Endrew F.* did not affect case; further reasoning that IDEA does not require development and delivery of religious or

cultural curriculum, noting that states may not use IDEA funds to provide religious and cultural instruction; further noting that public school offered to accommodate child's religious preferences; stating: "Because the IDEA does not require a school to provide religious and cultural instruction inside the schoolhouse gates, it likewise does not contemplate how a student may absorb such instruction at home.")

Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, No. 14-1417, 2017 WL 3300349, 117 LRP 31173 (10th Cir. Aug. 2, 2017) (remanding case to district court to apply Supreme Court standard for free, appropriate public education)

C.G. v. Waller Indep. Sch. Dist., No. 16-20439, 2017 WL 2713431, at *2, 70 IDELR 61 (5th Cir. June 22, 2017) (in case of child with autism and pervasive developmental delays whose parents rejected her proposed 2013-14 IEP and challenged refusal to offer extended school year services, and who enrolled child in private school with extra services and sought reimbursement, affirming district court decision upholding determination that child was offered appropriate education; reasoning that factors listed in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), "(1) the program is individualized on the basis of student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated" led district court to analysis fully consistent with *Endrew F.* standard, with district court stating that "[t]he educational benefit . . . cannot be a mere modicum or de minimis; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement" and relying on information regarding needs and performance level of child, including evidence of progress and adding of goals as previous goals were mastered)

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189 (9th Cir. May 30, 2017) (in case of child with blindness and other disabilities, remanding issue of adequacy of IEP goals for reconsideration in light of *Endrew F.*), *petition for cert. filed*, No. 17-325 (U.S. Aug. 31, 2017)

D.B. v. Ithaca City Sch. Dist., No. 16-3491-CV, 2017 WL 2258539, 70 IDELR 1 (2d Cir. May 23, 2017) (applying *Endrew F.* and concluding that proposed IEP would have offered meaningful progress), *aff'ing* No. 514CV01520DNHTWD, 2016 WL 4768824, 68 IDELR 161 (N.D.N.Y. Sept. 13, 2016) (in case of child found to have characteristics of nonverbal learning disability, affirming denial of reimbursement on ground that school system offered appropriate education, reasoning that psychological testing was adequate to enable system to develop child's IEP, that IEP addressed nonverbal deficits through low student-teacher ratio, counseling, consultant services, and other mechanisms, applying standard of opportunity greater than mere trivial advancement)

R.B. v. New York City Dep't of Educ., 689 F. App'x 48, 51, 69 IDELR 263 (2d Cir. Apr. 27, 2017) (in case of student with autism placed by parents in private school who challenged vocational and transition services, measurability of IEP goals, student-teacher ratio, teaching methodology, and suitability of school to deliver services, among other things, affirming decision in favor of school system, noting that assessment and IEP were sufficient and any errors in assessment harmless; interpreting *Endrew F.* to say that "the IEP need not bring the child to grade-level achievement, but it must aspire to provide more than de minimis educational progress")

C. District Court Cases

J.R. v. Smith, No. DKC 16-1633, 2017 WL 3592453, at *4, 70 IDELR 178 (D. Md. Aug. 21, 2017) (in case of teen with intellectual disability, hearing impairment, and rare health disorder, whom school authorities proposed placing at public school for students with severe cognitive disabilities but whom parents placed at private high school with certificate track, affirming decision in favor of defendants, stating: "[E]ven though the ALJ made her decision prior to the Supreme Court's articulation of the *Endrew F.* standard, she went beyond the 'more than de minimus' standard from *O.S.* and laid out an approach that evaluated what progress was appropriate in light of the child's circumstances just as Endrew F. requires."; further stating that success in private placement was not persuasive when proposed placement at public had similarities and differed from previous program that had been unsuccessful)

Unknown Party v. Gilbert Unified Sch. Dist., No. CV-16-02614-PHX-JJT, 2017 WL 3225189, at *5, 70 IDELR 131 (D. Ariz. July 31, 2017) (in case of student with Down Syndrome for whom district proposed to increase special education services time by 20 minutes per day and change location of services away from neighborhood school, affirming decision that increase in service minutes was appropriate under *Rachel H.* analysis, stating that student could not retain skills from general education class and resource room and did not obtain meaningful benefit but instead was overstimulated and became disruptive; further affirming that proposal to move student from neighborhood school was change of location but not change in placement; citing *Endrew F.* for proposition that student is entitled to program permitting more progress than parents said they were satisfied with), *appeal filed*, No. 17-16722 (9th Cir. Aug. 28, 2017)

T.M. v. Quakertown Cmty. Sch. Dist., No. 16–3915, 2017 WL 1406581, 69 IDELR 276 (E.D. Pa. Apr. 19, 2017) (in case of child with autism, global apraxia, and intellectual disability holding that educational services were adequate even though IEP did not include strict adherence to applied behavioral analysis principles and did not include twenty hours of one-on-one ABA programming per week desired by parents; citing *Endrew F.* as well as "meaningful benefit" circuit caselaw)

Paris Sch. Dist. v. A.H., No. 2:15-CV-02197, 2017 WL 1234151, 69 IDELR 243 (W.D. Ark. Apr. 3, 2017) (in case of child with autism diagnosis, reversing hearing officer determination that personnel during child's fourth grade year were not adequately trained; affirming decision that fifth-grade staff were not adequately trained; finding behavior plans for fourth grade inadequate when they did not address behaviors other than noncompliance and ignored nuances of autistic behaviors; finding fifth grade behavior plan substantively inadequate, noting school system's intention to press criminal charges against student but no plan to deal with recurrence of conduct; applying *Endrew F.* to find placement in Alternative Learning Environment for indefinite period not to be appropriate education, noting that Eighth Circuit previously used "merely more than de minimis" test; affirming determination that physical therapy needs were not met and that discontinuance of therapy was not justified)

E.D. v. Colonial Sch. Dist., No. CV 09-4837, 2017 WL 1207919, 69 IDELR 245
(E.D. Pa. Mar.31, 2017) (in case of child with learning disabilities and other conditions, affirming finding that student made sufficient progress during kindergarten year and so was not denied appropriate education, noting that student was among younger of class cohort and received satisfactory grades in several areas; further affirming determination that behavioral services for first grade were adequate)

C.D. v. Natick Pub. Sch. Dist., No. CV 15-13617-FDS, 2017 WL 2483551, 69 IDELR 213 (D. Mass. Mar. 28, 2017) (in case where hearing officer rendered decision on July 24, 2015 holding that IEP was appropriate and action for review was filed on Oct. 21, 2015, but court did not decide case before issuance of *Endrew F.* decision on Mar. 22, 2017, remanding case to hearing officer to apply *Endrew F.*; noting that it was unclear if *Endrew F.* changed First Circuit's "some educational benefit" standard for appropriate education), *subsequent opinion*, 2017 WL 2483551, at *16, 70 IDELR 120 (D. Mass. July 21, 2017) (denying parent motion for summary judgment and remanding case in part for further administrative proceedings as to whether two challenged IEPs satisfied least restrictive environment obligation, stating: "The Court agrees with the hearing officer that the standard articulated in *Endrew F.* is not materially different from the standard set forth in *Elizabeth B.*, and applied by the hearing officer, at least as it applies to the facts of this case. Contrary to plaintiffs' contention, *Endrew F.* did not reject all standards that focus on the level of benefit provided in favor of a standard based on the level of instruction. Rather, *Endrew F.* explains that the benefit to be provided is "appropriate" educational progress. That is consistent with a "meaningful educational benefit." *See Brandywine Heights Area Sch. Dist. v. B.M.*, 2017 WL 1173836, at *10 n.25 (E.D. Pa. March 29, 2017) (concluding that "meaningful educational benefit" standard applied by hearing officer is consistent with Endrew F.)"

II. *G.L.* – LIMITATIONS

A. <u>*G.L.* Itself</u>

G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 620-21, 66 IDELR 91 (3d Cir. Sept. 22, 2015) (holding that under 20 U.S.C. § 1415(b)(6)(B), which provides that valid due process complaint is one alleging injury that occurred not more than two years before when parents knew or should have known about action that is basis of complaint, and 20 U.S.C. § 1415(f)(3)(C), which requires that parents file complaint no more than two years after parents knew or should have known about action that forms basis for complaint, two-year limitations period exists for filing of due process complaint from date parent knew or should have known of IDEA violation, but provisions do not limit time period to consider in ordering compensatory remedy for timely filed claims; stating, "[O]nce a violation is reasonably discovered by the parent, any claim for that violation, however far back it dates, must be filed within two years of the 'knew or should have known' date. If it is not, all but the most recent two years before the filing of the complaint will be time-barred; but if it is timely filed, then, upon a finding of liability, the entire period of the violation should be remedied. In other words, § 1415(f)(3)(C), like its synopsis in § 1415(b)(6)(B), reflects a traditional statute of limitations.")

B. <u>Courts of Appeals Cases</u>

Avila v. Spokane Sch. Dist. 81, 852 F.3d 936, 937, 69 IDELR 202 (9th Cir. Mar. 30, 2017) (in case in which due process complaint filed April 26, 2010, alleged that district failed to identify child's disability and assess him for autism in 2006 and 2007, stating that "IDEA's statute of limitations requires courts to bar only claims brought more than two years after the parents or local educational agency 'knew or should have known' about the actions forming the basis of the complaint. Because the district court barred all claims 'occurring' more than two years before the Avilas filed their due process complaint, we remand so that the district court can determine when the Avilas knew or should have known about the actions forming the basis of their complaint."; adopting analysis of *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015); also noting broad remedial purpose of IDEA)

Reyes v. Manor Indep. Sch. Dist., 850 F.3d 251, 69 IDELR 147 (5th Cir. Mar. 7, 2017) (in case of student with autism and other disabilities who began attending district in August 2010, shortly before 18th birthday and left district in May 2012, whose mother requested due process hearing in February 2013, but was challenged on ground that she did not have legal authority to bring complaint, then in April 2013 obtained guardianship, affirming lower court decision that IDEA claims were barred by one-year statute of limitations, which restricted IDEA claim to period from February to May of 2012; noting that Texas has no procedure to comply

with IDEA obligation to appoint parent or other individual to represent student who reaches age of majority, has not been found incompetent, and does not have ability to provide informed consent, but that parent failed previously to obtain guardianship under conventional procedures, and hearing officer permitted claim to relate back to date of filing of original due process complaint; further refusing to toll limitations for incompetency)

C. District Court Cases

R.M.M. v. Minneapolis Pub. Schs., Nos. 15-CV-1627, 16-CV-3085, 2017 WL 2787606, at *6, 70 IDELR 64 (D. Minn. June 27, 2017) (in case of child voluntarily placed in Catholic school who received Title I services based on private evaluation through third and fourth grade, then in fifth grade obtained evaluation from Minneapolis public schools, which indicated that she needed special education and who was offered individual service plan, but whose parent was dissatisfied with services and discontinued them, then before sixth grade, private school asked parent to remove child, parent enrolled child in public school for sixth grade, and for seventh grade enrolled child in private special education school, and parent filed due process hearing request alleging failure by school district to timely identify and evaluate child and provide her with timely and appropriate services, and ALJ ultimately determined that public schools violated child find obligation, granting parent's motion for judgment on record, reasoning that reliance on referrals from private schools and parents was insufficient to discharge affirmative duty to identify, locate, and evaluate children with disabilities and that taking passive role did not satisfy obligation; stating as to limitations: "On review of the record, the Court . . . finds that the statute of limitations should not apply here because the School District failed to provide an adequate and complete notice of procedural safeguards as required by the IDEA and by applicable regulations. As the ALJ noted, the evidence suggests that T.M. did not first receive a safeguards notice until January 2014. Importantly, however, that notice contains no information regarding the time period within which T.M. could make a complaint.")

E.G. v. Great Valley Sch. Dist., No. CV 16-5456, 2017 WL 2260707, at *8, 70 IDELR 3 (E.D. Pa. May 23, 2017) (in case of student with severe learning disabilities, affirming decision that district offered appropriate education for two years before filing of due process request on June 12, 2015 but remanding for consideration of claims based on district actions and inactions preceding June 2013, including when parents knew or should have known of claimed IDEA violations; reasoning that although parents had knowledge of district's conduct when it occurred, hearing officer never determined date parents knew or should have known of actions forming basis of complaint so as to be reasonably discovered by parents; stating that hearing officer "must examine *each alleged violation* and determine the date the Parents knew or should have known the

District's conduct violated E.G.'s right to a FAPE and eliminate those discovered more than two years before June 12, 2015.") (citing *G.L.*)

Jackson v. Pine Bluff Sch. Dist., No. 4:16CV00301-JM-JTR, 2017 WL 2296896, 117 LRP 21533 (E.D. Ark. May 12, 2017) (magistrate judge recommendation) (in action concerning placement of child with autism by school district at private school where, allegedly, child was separated from nondisabled peers, mistreated, and not provided appropriate education, recommending dismissal of claims based on conduct that occurred more than two years before August 7, 2015 filing of administrative complaint), *adopted*, 2017 WL 2296956 (E.D. Ark. May 25, 2017) (entering dismissal of IDEA claim against Commissioner and, as to limitations, against state education department, with prejudice; entering dismissal with prejudice of Section 1983 claims against state department of education and without prejudice against Commissioner)

B.B. v. Delaware Coll. Preparatory Acad., No. 16–806–SLR, 2017 WL 1862478, 70 IDELR 16 (D. Del. May 8, 2017) (in case of child identified in preschool as eligible under IDEA and offered IEP providing speech and language services on Nov. 30, 2012, who enrolled in kindergarten at public charter school in August, 2013, but was not evaluated or offered special education services as of Feb. 20, 2014 when parent wrote letter to charter school about delay, whose parents filed due process complaint on Feb. 21, 2014, but withdrew it in May 2014, filed second due process complaint in August, 2014, but withdrew it in September, 2014, then on April 1, 2016, after school district revoked school's charter, filed third due process complaint against state education department and charter school alleging same educational injuries as previous complaints, and hearing panel dismissed complaint based on two-year IDEA limitations and laches, granting state education department's motion to dismiss, reasoning that parents should have known of alleged injuries by Nov. 30, 2013, when they were not asked to participate in revision of IEP, and actually knew of injury by February, 2014 when they wrote letter to charter school) (citing *G.L.*)

Jessica E. v. Compton Unified Sch. Dist., No. CV1604356BROMRWX, 2017 WL 2864945, 70 IDELR 103 (C.D. Cal. May 2, 2017) (in case of 11-year-old with ADHD and possible learning disability who had academic difficulties in first grade, whose mother expressed concern in writing to principal when student was in second grade, who repeated second grade, and who attended private school in third grade, in which case ALJ found denial of appropriate education and ordered tuition reimbursement for one school year, reimbursement for evaluations and limited compensatory services, but not remedies for two earlier years, remanding matter to ALJ, stating that ALJ decision did not reflect consideration of when parent discovered key facts underlying claims, but instead cursorily determined that statute began running two years before filing of due process hearing request) (citing *G.L.*)

T.B. v. Prince George's Cnty. Bd. of Educ., No. GJH-15-03935, 2016 WL 7235661, 70 IDELR 47 (D. Md. Dec. 13, 2016) (holding that it is proper in applying two-year statute of limitations to series of alleged violations to start with date due process complaint was filed and look backward two years, including any IDEA violations within two-year period; adopting *G.L.* as to scope of permissible compensatory relief, but finding that error in failing to apply it was harmless when no denial of appropriate education occurred; further determining that repeated failures to respond to parental requests for evaluation of student were harmless procedural error when student was of normal intelligence and could do schoolwork when he chose, and his declining grades were not clear sign of disability; overturning order denying reimbursement for independent evaluation even though school district never conducted evaluation with which parent could disagree), *appeal dismissed*, No. 17-1044 (4th Cir. Mar. 30, 2017), *appeal filed*, No. 17-1877 (4th Cir. July 25, 2017)

A.C. v. Scranton Sch. Dist., 191 F. Supp. 3d 375, 67 IDELR 267 (M.D. Pa. June 13, 2016) (granting in part and denying in part motion to dismiss and denying motion to strike, in damages action under Section 504, ADA, and state law against school district and school contracted with by district, alleging that ten-year-old with autism spectrum disorder and other conditions was subject to improper restraint, deprivation of education, and other mistreatment; applying two-year limitations period up to filing of due process hearing complaint on Apr. 8, 2015, which complaint led to settlement of IDEA claims, and granting dismissal of Section 504 and ADA claims based on allegations predating April 8, 2013; denying motion to strike allegations predating Apr. 8, 2015 as relevant to claims occurring within two-year period) (citing *G.L.*), *subsequent decision*, No. 3:15-2198, 2017 WL 1162839, 69 IDELR 211 (M.D. Pa. Mar. 29, 2017) (dismissing without prejudice private school's crossclaim against school district for contribution; dismissing with prejudice cross-claim for indemnity)

Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 47, 67 IDELR 239 (D.D.C. May 23, 2016) (adopting analysis of *G.L.* and finding that claims were not time barred; stating that lack of educational progress was not enough to put parent on notice of potential IDEA claim, and finding that plaintiffs' claims accrued when mother learned of new psychological and speech-language evaluations at IEP meeting on March 4, 2013, so December 16, 2014 due process complaint was timely; holding that test is if violations would be apparent even to layperson like student's mother, stating: "Because the Hearing Officer erroneously dismissed all claims arising out of pre-December 2012 conduct, on remand she should reconsider the timeliness of those claims, analyzing each alleged IDEA violation individually. As discussed, the Court takes exception only with her blanket dismissal—if she determines that certain alleged violations should have been immediately apparent even to a layperson like Damarcus's mother prior to December 16, 2012, then those claims could

still be properly dismissed as time-barred."; also stating that "IDEA's broad equitable remedies are tied more closely to the child's needs than to the specific deprivations he suffered or when they were suffered. . . . Thus, unlike a traditional damages remedy, which would require a clear delineation of the time-barred, non-compensable injuries, the IDEA affords discretion to fashion an equitable remedy tied to Damarcus's particular challenges.")

K.P. v. Salinas Union High Sch. Dist., No. 5:08-CV-03076-HRL, 2016 WL 1394377, 67 IDELR 172 (N.D. Cal. Apr. 8, 2016) (holding that challenge to IEP was based on deficiencies in IEP as written rather than to implementation in later period, so claims pertaining to IEP were time barred because parent should have known of deficiencies as of date of IEP)

III. *FRY* – EXHAUSTION

A. *Fry* Itself

Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 69 IDELR 116 (Feb. 22, 2017) (in case of student with spastic quadriplegic cerebral palsy who used service dog for everyday tasks but was barred from bringing service dog to school, then permitted only limited use of service dog, was denied use of dog in following year, then was taken out of school and home-schooled and subsequently moved to different district, vacating dismissal for on ground of exhaustion of administrative remedies and remanding, reasoning that IDEA makes relief available for denials of free, appropriate public education, and in determining if given suit seeks relief for denial of FAPE, courts should look to substance, that is, gravamen of complaint, which depends on complaint actually filed in court, rather than whether family could have filed complaint asking for relief under IDEA; stating that indicators for determining whether gravamen is denial of FAPE include: whether essentially same claim could have been brought where no such obligation exists, as with suit for access to public library lacking ramps, and whether similar suit could have brought by employee or adult visitor at school; conversely, if parents began IDEA administrative proceedings, that would indicate that gravamen of complaint is FAPE denial; leaving open whether exhaustion would be required when complaint relying on ADA or other laws concerns denial of FAPE but specific remedy demanded is not available under IDEA, specifically compensatory damages other than reimbursement for expenses; concurrence in part and in judgment by Alito, J. questioning usefulness of indicators noting that they may not account fully for overlap between IDEA and Section 504, ADA, and additional grounds for suit)

B. Court of Appeals Cases

J.M. v. Francis Howell Sch. Dist., 850 F.3d 944, 69 IDELR 146 (8th Cir. Mar. 7, 2017) (in case seeking damages alleging isolation and restraint in

violation of Section 504, ADA, state law, and Fourteenth Amendment, affirming dismissal for lack of exhaustion, applying *Fry*; declaring that failure to implement IEP concerning use of isolation and restraint formed central issue in litigation, and holding that claim for damages did not take case out of exhaustion rule; rejecting application of futility and inadequate remedy exceptions, stating that although administrative process may not address all claims, agency would have opportunity to develop record for judicial review and apply expertise to claims related to IEP implementation)

Reyes v. Manor Indep. Sch. Dist., 850 F.3d 251, 69 IDELR 147 (5th Cir. Mar. 7, 2017) (in case of student with autism and other disabilities claiming physical abuse and failure to provide appropriate education, applying *Fry* and finding Section 504 claims barred by failure to exhaust, reasoning that they overlapped with student's claims under IDEA and although they were pled in due process hearing request, they were not addressed in prehearing request for relief in due process proceedings, and student did not obtain any decision on them from hearing officer)

S.D. v. Haddon Heights Bd. of Educ., 833 F.3d 389, 68 IDELR 91 (3d Cir. Aug. 18, 2016) (in case of student with multiple medical conditions causing frequent school absences who had Section 504 plan, affirming dismissal on exhaustion grounds of claims alleging violations of Section 504 and ADA from imposition of attendance policy that barred advancement in grade due to absences even though absences were medically excused, as well as failure to make accommodations, reasoning that claims of discrimination and retaliation related to appropriate education; stating that court cannot conclude from facts that student was not eligible for relief under IDEA even though not so identified as eligible by district), *vacated and remanded for reconsideration in light of* Fry v. Napoleon Cmty Schs., 137 S. Ct. 2121 (U.S. May 15, 2017)

C. District Court Cases

Paul G. v. Monterey Peninsula Unified Sch. Dist., No. 16-CV-05582-BLF, 2017 WL 2670739, 70 IDELR 66 (N.D. Cal. June 21, 2017) (in case of 19-year-old student with autism allegedly needing residential treatment facility for students aged 18 to 22, placement not available in California, and who needed to be near family and home community, seeking order to compel state education department to ensure that such facilities are available in California, and to provide such facility if local school district cannot do so, dismissing claims under Section 504, ADA, IDEA, and state education code; finding Section 504 and ADA claims barred for want of exhaustion, reasoning that claims were based on denial of appropriate education, and would arise only in school setting and not for adult visitor or employee, further stating that showing of futility was not sufficient, for failure to assert Section 504 and ADA claims in due process proceeding was voluntary, agency expertise and administrative record would be helpful, and no administrative finding had yet been made that school district needed to provide in-state facility in order to offer appropriate education; granting leave to amend ADA and Section 504 claims)

Rohrbaugh v. Lincoln Intermediate Unit, No. 1:16-CV-2358, 2017 WL 2608869, 70 IDELR 70 (M.D. Pa. June 16, 2017) (in case of student whose IEP called for personal care assistant and behavior intervention plan using de-escalation techniques rather than physical intervention, who was allegedly restrained by newly hired assistant in inappropriate manner, causing bruising and scratches, with incident not reported on daily report sent home with student, granting motions to dismiss claims of violation of Section 504, constitutional due process, and state law, reasoning that gravamen of complaint was denial of appropriate education; citing complaint language concerning restraint not being authorized by IEP and de-escalation being provided in IEP as well as statements about lack of training of assistant; also stating that restraint techniques would not be used on employees or adult visitors or in other public settings; listing cases applying *Fry*; also rejecting futility argument), *appeal filed*, No. 17-2520 (3d Cir. July 19, 2017)

A.A. v. Walled Lake Consol. Schs., No. CV 16-14214, 2017 WL 2591906, 70 IDELR 73 (E.D. Mich. June 15, 2017) (in case challenging ALJ decision that school district's proposed placement of young child with Down syndrome and speech apraxia was in least restrictive environment, denying motion to dismiss case as moot and denying motion to dismiss claims under Section 504 and ADA on ground of failure to exhaust, reasoning that parents had exhausted IDEA procedures and that Section 504 and ADA otherwise do not require exhaustion)

P.H. v. Tehachapi Unified Sch. Dist., No. 117CV00257DADJLT, 2017 WL 3085020, 70 IDELR 37 (E.D. Cal. June 9, 2017) (in action of seven-year-

old nonverbal student with multiple severe disabilities and limited intellectual capacity, alleging that student was tied to chair with blanket and left for entire school days, bruised, battered, verbally abused and left all day in soiled diapers, in violation of ADA, Section 504, and state law, denying motion to dismiss for failure to pursue IDEA administrative remedies; reasoning that complaint sought monetary damages and was premised on alleged denial of equal access rather than inadequacy of special education services; applying *Fry*)

T.H. v. District of Columbia, No. CV 17-0196, 2017 WL 2533354, 70 IDELR 35 (D.D.C. June 9, 2017) (in action concerning teen with disabilities brought under Section 504 and District of Columbia law, denying motion for judgment on pleadings on failure to exhaust, concluding that IDEA exhaustion is not jurisdictional prerequisite to suit but instead constitutes affirmative defense that defendant must plead and prove; adopting analysis of *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011))

J.D. v. Graham Local Sch. Dist. Bd. of Educ., No. 3:17-CV-143, 2017 WL 1807626, 69 IDELR 265 (S.D. Ohio May 5, 2017) (in case of deaf, autistic teen student with history of violent and destructive behavior currently being served at in highly specialized out-of-state school for deaf children, whose parents moved out of country but had grandparent living within school district execute power of attorney taking responsibility for student, denying motion for temporary restraining order to require district to continue to pay for student's placement, reasoning that administrative remedies, which had been initiated, needed to be exhausted)

Smith v. Rockwood R-VI Sch. Dist., No. 4:16-CV-1226-CEJ, 2017 WL 1633065, 69 IDELR 268 (E.D. Mo. May 2, 2017) (in case regarding student with autism spectrum disorder, Tourette Syndrome, emotional disturbance, depression, obsessive-compulsive disorder, and ADHD, who was subjected to long-term suspension despite IEP team determination that misconduct was manifestation of his disability, granting dismissal of action alleging violations of IDEA, Section 504, and Constitution; on Section 504 and constitutional claims, ruling that since claims revolved around IEP team determination, denial of IDEA rights and denial of appropriate education, same set of facts support IDEA and Section 504 claims and exhaustion is required; not citing *Fry*), *appeal filed*, No. 17-2260 (8th Cir. June 7, 2017)

L.D. v. Los Angeles Unified Sch. Dist., No. CV168588MWFMRWX, 2017 WL 1520417, at *2, 69 IDELR 272 (C.D. Cal. Apr. 26, 2017) (in case of sixth-grader with Down Syndrome who was subject of IEP meeting and due process hearing that resulted in settlement requiring provision of behavioral services, followed by current action alleging failure to comply with settlement agreement and discrimination in violation of ADA and Section 504, dismissing case without prejudice, reasoning that relief was

sought under IDEA in that claims over behavioral issues at school and access to curriculum could not have been brought against other public facilities nor by adult, and parents initially pursued IDEA process, though stating that unsupported claim of denial of less confining program arguably is directed at discrimination; further stating that "Courts addressing similar fact patterns have found a lack of exhaustion when a student and the school district have previously entered into a settlement agreement, and the student subsequently alleges a violation of that agreement. *See, e.g.,* J.P. v. Cherokee Cty. Bd. of Educ., 218 Fed. Appx. 911, 913 (11th Cir. 2007) (affirming dismissal of suit where "[i]t was undisputed that the only request for a due-process hearing relating to J.P.'s FAPE occurred in proceedings that took place in 2001 and resulted in a settlement agreement as to the claims asserted in the 2001 complaint. The instant claims, by contrast, concern whether Defendants' actions in November 2003 violated the IDEA and constituted a breach of the provisions of the settlement agreement"); Pedraza v. Alameda Unified Sch. Dist., 2007 WL 949603, at *5 (N.D. Cal. Mar. 27, 2007) (holding IDEA's exhaustion requirement was not met when parties entered into a mediated settlement agreement).")

Bowe v. Eau Claire Area Sch. Dist., No. 16-CV-746-JDP, 2017 WL 1458822, 69 IDELR 275 (W.D. Wis. Apr. 24, 2017) (in case of student with autism alleging peer harassment and bullying over many years, denying motion to dismiss claims for violation of Section 504 and ADA, noting that school officials disclosed student's condition to classmates and that content of verbal abuse related to his disability; further finding that numerous incidents including assaults, death threats, and verbal abuse supported inference that harassment was severe enough to change conditions of student's education and create abusive education environment; denying motion to dismiss on ground of exhaustion, reasoning that claims could have been brought in situation where there is no obligation to provide appropriate education)

GM v. Lincoln Cnty. Sch. Dist., No. 6:16-CV-01739-JR, 2017 WL 2804996, at *4, 117 LRP 26033 (D. Or. Apr. 21, 2017) (magistrate judge recommendation) (in case of nonverbal student with Down Syndrome communicating through physical touch, who was disciplined for touching those around him by being placed in room about size of closet for bulk of school day for most of school year, often put there through physical force, who alleged violations of Section 504, ADA, Fourth Amendment, due process and equal protection, and state law against school district, principal, teachers, and aides, recommending denial of motion to dismiss, reasoning that under *Fry* and *Payne* existence of educational settings or goals do not mean that case pertains to free, appropriate public education, and further reasoning that complaint does not argue "pedagogical merits of seclusion" or seek changes in IEP or compensation for services, but instead damages for pain and emotional harm, and essentially same claim

could be brought if plaintiff were adult or in non-school facilities), *adopted*, 2017 WL 2804949, 70 IDELR 102 (D. Or. June 28, 2017)

N.S.. v. Tennessee Dep't of Educ., No. 3:16-CV-0610, 2017 WL 1347753, 69 IDELR 280 (M.D. Tenn. Apr. 12, 2017) (in case involving children with developmental disabilities alleged to have suffered injuries in Knox County schools due to policy and practice of allowing and promoting misuse of isolation and restraint, bringing claims under ADA, Section 504, and IDEA, denying motion to dismiss, commenting that reference to violation of state law on use of isolation and restraint were in support of IDEA and other federal claims rather than claim based on state law, and ruling that futility exception to exhaustion applied so exhaustion did not bar suit even though gravamen of pleadings is primarily about denial of appropriate education; stating that *Fry* did not address futility exception)

K.G. v. Sergeant Bluff-Luton Cmty. Sch. Dist., No. C 15-4242-MWB, 2017 WL 1098829, 69 IDELR 216 (N.D. Iowa Mar. 23, 2017) (in case alleging that special education teacher dragged seven-year-old first-grade child with autism across classroom floor causing him serious carpet burns, in violation of Fourth and Fourteenth Amendments, ADA, Section 504, and common law negligence, battery, and intentional infliction of emotional distress, denying motion to dismiss on basis of failure to exhaust when parents filed unsuccessful administrative complaint with state department of education and did not seek judicial review of complaint; reasoning that only one paragraph of complaint related to alleged violation of IEP or behavior intervention plan, and gravamen of wrongfulness of teacher's conduct was not IDEA violation but unlawful and unreasonable use of physical force; further noting that gravamen of ADA claim was discrimination and creation of hostile educational environment; also stating that essentially same claim could have been brought if conduct occurred elsewhere or to adult at school, and discounting importance of pursuit of IDEA administrative complaint)