WHAT'S HAPPENING AND WHERE?

DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

I. ELIGIBILITY / EVALUATION

A.A. v. Walled Lake Consol. Schs., 70 IDELR 73 (E.D. Mich. 2017). A parent's revocation of consent for the provision of special education programs and services – here resulting from a dispute over the student's placement in a classroom for cognitively impaired students rather than the parent's preferred placement in a general education classroom – does not alter the student's right to relief because the underlying dispute is likely to be an issue with each proposed IEP so long as the student continues to be eligible for FAPE.

L.J. v. Pittsburg Unif. Sch. Dist., 850 F.3d 996, 117 LRP 6572 (9th Cir. 2017). Simply classifying specialized services – like specially designed mental health services, one-on-one paraeducator, and extensive clinical interventions from behavior specialist – as general education interventions for a student with multiple diagnoses (i.e., bipolar disorder, oppositional defiant disorder, and AD/HD) placed in general education and making satisfactory progress with the services provided in the general education classroom does not make the student ineligible for IDEA services. The student's educational progress resulted from the specialized services – services that were not available to his nondisabled peers.

Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 68 IDELR 61 (1st Cir. 2016). Overall academic performance is a factor to consider when determining whether a student has an educational disability such as, here, an SLD in reading fluency. However, simply because a student has excellent academic performance, it does not automatically compel a finding that the student is ineligible for special education. The overall performance may mask the presence of a disability and, as such, the IEP team should consider how the academic measures in question (e.g., report cards and statewide assessments) showing excellent academic performance relate to the student's alleged deficit and whether a more specific measure indicates a possible impairment. The IEP team cannot look at such academic measures in isolation and must consider the relationship between those academic measures and the alleged area of deficiency. However, even if the IEP team affirms the existence of a qualifying disorder, the IEP team must also determine whether the

student "needs" special education and related services as result of the disorder. Here, too, "consideration of [the students] grades and standardized test results is not categorically barred under the need inquiry any more than it is categorically barred under the first prong inquiry."

Haddon Township Sch. Dist. v. New Jersey Dept. of Educ., 67 IDELR 44 (N.J. Super. Ct. App. Div. 2016) (unpublished). A parent has a right to an IEE at public expense even though the school district did not conduct any new assessments but rather reviewed existing data with which the parent disagrees. Under the IDEA, a review of existing data is considered an evaluation.

II. IEP PROCESS

A.M. v. New York City Dep't of Educ., 845 F.3d 523, 69 IDELR 51 (2d Cir. 2017). An IEP team must consider the "clear consensus" of evaluative materials supporting the need for a particular service, methodology, or placement for the student to receive FAPE. Here, the student, a six-year old with autism, was deemed to have been denied FAPE when the IEP team disregarded, without conducting its own assessments, multiple evaluation reports submitted by private evaluators and current, private service providers showing that the student needed one-to-one instruction and intensive ABA therapy to receive FAPE. The IEP team erred when it relied solely on the school district's psychologist's recommendation for a 6:1+1 program that did not use ABA therapy.

S.B. v. New York City Dep't of Educ., 70 IDELR 221 (E.D.N.Y. 2017). Annual goals must align with the student's unique needs as opposed to grade-level expectations or other generic standards. A student would be denied FAPE if the annual goals are not "appropriately ambitious." Annual goals are not appropriately ambitious if they are not attainable. Here, a second-grader with a speech and language impairment was expected – vis-à-vis the annual goals - to identify main ideas, analyze the motivations of characters, and use context clues to improve her vocabulary despite the fact that the student did not know the alphabet and was unable to write words because she was just learning to write the sounds that she heard within words.

Menthacton Sch. Dist. v. D.W., 70 IDELR 247 (E.D. Pa. 2017). Annual goals not based on appropriate baseline data will likely result in a denial of FAPE. The IEP team must have a clear understanding of the student's current strengths and weaknesses (i.e., PLAAFP) before drafting the student's annual goals. Here, the court determined that the student was denied FAPE because the IEP team did not assess the student's specific needs and/or develop challenging goals tailored to the student's specific circumstances, and deferred in making the necessary determinations for after the student was enrolled in the public school.

M.L. v. Smith, 867 F.3d 487, 70 IDELR 142 (4th Cir. 2017). IDEA does not require the IEP to include religious and cultural instruction. The decision in *Endrew F.*, which came after the parties submitted their arguments to the Fourth Circuit but the Court nonetheless mentions, did not affect the case because the IDEA does not provide the remedy the parents were seeking, to wit, that the IEP address the religious and cultural needs of the student to allow this 9-year old with Down syndrome to learn skills such as reading Hebrew and preparing kosher foods to be part of the Orthodox Jewish community.

Unknown Party v. Gilbert Unified Sch. Dist., 70 IDELR 131 (D. Ariz. 2017) (unpublished). Here, an increase of special education services time by 20 minutes per day and reassignment from the neighborhood school to a school with a more intensive special education program resulted in a change in location as opposed to a change in placement. The reassignment of the student did not impact the amount of time the student would spend in the general education classroom, and was intended to meet the student's need for more intensive academic instruction.

R.E.B. v. Hawaii Dept. of Educ., 870 F.3d 1025, 70 IDELR 194 (9th Cir. 2017). In a short, but sweeping, decision, the Ninth Circuit made several rulings of import: an IEP may need to include transition services to meet the IDEA's supplementary aids and services requirement when the student is transitioning from one school or program to another and the transition services are needed to allow the student to be educated and participate in the new environment; an IEP team cannot delegate to others when the student would participate with nondisabled peers in the regular class or the anticipated frequency, location, and duration of the proposed specialized instruction; the IDEA does not require that the IEP team specify the qualifications or training of service providers; and, where a specific methodology (like ABA) is integral to, and plays a critical role in, the student's education, the IEP must include the methodology and the IEP team cannot leave it up to the individual teachers to determine when to use the methodology. Also, noteworthy, the Ninth Circuit notes, "ABA is widely recognized as a superior method for teaching children with autism."

Rachel H. v. Dep't of Educ., State of Hawaii, 868 F.3d 1085, 70 IDELR 169 (9th Cir. 2017). The failure to specify the anticipated school where special education services will be delivered within a student's IEP is not a per se violation of the IDEA. There may be the need to identify a specific school in some instances, including when a parent might require the information to assess whether a proposed IEP is capable of meeting the student's unique needs.

M.C. v. Antelope Valley Union Sch. Dist., 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017). A parent's right to meaningful participation in the IEP development process does not end with the IEP meeting. The parent has the right to monitor and enforce the services that the student is to receive, and any amendments to the IEP subsequent to the meeting (even, as here, when quadrupling the amount of services to the student) must be with the parent's knowledge.

In addressing the parent's claim that the school district failed to develop measurable annual goals in all areas of need, the Ninth Circuit leaves open the possibility that *Endrew F.* has a more demanding standard than *Rowley*. It points out that *Endrew F.* provides "a more precise standard for evaluating whether a school district has complied substantively with the IDEA," and quotes to the "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" language as the now "more precise standard." It then interprets this language and says, "the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can 'make progress in the general education curriculum,' … , commensurate with his non-disabled peers, *taking into account the child's potential*." [Emphasis added.]

T.K. v. New York City Dep't of Educ., 810 F.3d 869, 67 IDELR 1 (2d Cir. 2016). The refusal to discuss bullying at an IEP meeting upon the parent's reasonable belief that it is interfering with the student's ability to receive meaningful educational benefit may significantly impede the parent's right to participate in the development of the IEP, and potentially impair the substance of the IEP and the parent's ability to assess the adequacy of the student's IEP.

N.B. v. New York City Dep't of Educ., 70 IDELR 245 (2d Cir. 2017) (unpublished). The mere fact that the annual goals "implicitly recommended" a specific methodology (i.e., DIR/Floortime) did not require the school district to use the methodology to achieve the goals when the goals could be achieved through the use of other instructional techniques. Here, the school district adopted the annual goals and short-term objectives almost word-for-word from the student's private school. The parent argued, unsuccessfully, that, because the goals and objectives were developed for a DIR/Floortime environment, the school district was obligated to use the DIR/Floortime methodology in the recommended public school placement.

III. SERVICES

S.G.W. v. Eugene Sch. Dist., 69 IDELR 181 (D. Or. 2017). Simply offering classes and resources made available to all students without conducting age-appropriate postsecondary transition assessments to determine which additional services, if any, a student needs to prepare for life after high school denies FAPE. Here, the school district offered postsecondary transition services in the form of finance and career classes and the opportunity to participate in career day and to visit a local community college. The school district, however, was not able to demonstrate that these services, available to all students, met the student's specific disability-related needs.

R.G. v. Hill, 70 IDELR 41 (D.N.J. 2017). A "special alert" included in the student's IEP requiring that, if the student were to fall, that he be taken to the "nurse immediately and notify the parent" did not obligate the school district to have a nurse onsite at all times. The finding was based on the facts that the IEP did not list school nurse services as a related service and the notification to the nurse and parent was intended simply for information gathering and to prepare a report for each incident.

Bethel Local Sch. Dist., 116 LRP 26503 (SEA 2016). The school district was determined to have violated the requirements of the IDEA because neither school personnel nor the student, whose IEP listed the use of an iPad, were trained how to use an iPad or the programs on the device.

IV. HEARING OFFICER, INDIVIDUALLY

T.O. v. Cumberland Cty. Bd. of Educ., 69 IDELR 182 (E.D.N.C. 2017), *aff'd*, 70 IDELR 170 (4th Cir. 2017). IDEA hearing officers are afforded immunity for decisions arising from their judicial acts such as, as here, dismissing the parent's due process complaint because of the parent's failure to disclose any documentary or testamentary evidence by the required deadline.

Lou v. Owen J. Roberts Sch. Dist., 68 IDELR 245 (E.D. Pa. 2016). IDEA hearing officers are entitled to absolute judicial immunity because their role is functionally comparable to that of judges.

J.E. v. Chappaqua Cent. Sch. Dist., 68 IDELR 48 (S.D.N.Y. 2016), *aff'd*, 70 IDELR 31 (2d Cir. 2017) (unpublished). The hearing officer's actions did not show bias or lack of impartiality simply because of his previous employment as a superintendent of New York schools. The hearing officer was also found not to be incompetent simply because he was a non-lawyer and was observed to be nodding off during the hearing.

V. PREHEARING

Avila v. Spokane Sch. Dist., 852 F.3d 936, 69 IDELR 202 (9th Cir. 2017). Adopts the rationale in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015), and concludes that the IDEA's two-year statute of limitations period does not prohibit parents from seeking relief for alleged denials of FAPE that occurred more than two years earlier, provided the parents file the complaint within two years of discovering the school district's alleged wrongdoing. Importantly, just because the parent is aware of the underlying facts, it does not necessarily mean that that the parent knew or should have known of the basis of his/her claim because some issues require specialized expertise a parent cannot be expected to have.

E.G. v. Great Valley Sch. Dist., 70 IDELR 3 (E.D. Pa. 2017). In deciding whether alleged claims are untimely, a hearing officer must determine the KOSHK date for each violation. Just because the parent had contemporaneous knowledge of the school district's action does not mean that the parent knew or should have known that the school district' actions denied FAPE to the student. Adopting the rationale of *Damarcus*, *infra*, the court held that what is required is for the hearing officer to conduct a "fine-grained analysis" for each asserted claim for relief independently for the particular deficiency asserted to determine the parent's ability to recognize the violation.

Damarcus S. v. Dist. of Columbia, 67 IDELR 239 (D.D.C. 2016). Adopts the rationale in *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015), and concludes that as long as the complaint is filed within two years of the KOSHK date, the complainant is entitled to full relief for that injury. In determining the KOSHK date, the hearing officer must determine when each alleged violation should have been immediately apparent even to a layperson, like the parent. A lack of progress alone is insufficient to put parents on notice of an IDEA claim because the lack of progress may be attributable, for example, to the student's low aptitude rather than inadequate educational support.

Jessica E.* v. *Compton Unified Sch. Dist., 70 IDELR 103 (C.D. Cal. 2017). The hearing officer must consider when the parent discovered key facts underlying the claims to determine the KOSHK date, and cannot cursorily determine that the statute of limitations started to run two years before the filing of the due process complaint (i.e., backward-looking analysis).

K.P. v. Salinas Union High Sch. Dist., 67 IDELR 172 (N.D. Cal. 2016). When the claims are premised on deficiencies in the IEP as written (e.g., IEP not including relevant information about deficits known to the parent, failure to give due weight to available information from prior

assessments, inappropriate transition plan), and not on the implementation of the IEP, the KOSHK date would be the date of the IEP because the parent should have known of the deficiencies.

N.E. v. Seattle Sch. Dist., 842 F.3d 1093, 69 IDELR 1 (9th Cir. 2016), *cert. denied*, 117 LRP 42129 (U.S. 2017). In a multi-stage IEP that has been partially implemented, the IEP as a whole determines the student's stay-put placement. Here, the student, who was having behavioral difficulties, was placed in a 1:1+1 class from a general education classroom for the remaining weeks of the school year to be then transitioned to a self-contained classroom at the beginning of the following school year. Though the parents objected to the self-contained classroom placement, upon receiving the IEP, the parents did not file a due process complaint. Over the summer, the parents moved to a different LEA and requested either placement in a 1:1+1 or general education classroom. The new LEA did not agree and placed the student in a self-contained classroom. The parent filed for due process and requested that the student remain in the 1:1+1 or general education classroom. The ALJ, district court, and Ninth Circuit found in favor of the school district.

Hack v. Deer Valley Unified Sch. Dist., 70 IDELR 130 (D. Ariz. 2017). Receipt of FAPE may require enrollment but an offer of FAPE is not predicated on enrollment where the school district is aware of the student and the parent has requested an IEP. However, where the parent rejects the services offered and provides the school district with a 10-business day notice of unilateral placement, the school district does not have an IDEA obligation to create a new IEP.

West Chester Area Sch. Dist. v. A.M., 164 A.3d 620, 70 IDELR 77 (Pa. Cmwlth 2017). Hearing officers may decide whether parents are being subjected to duress. Here, the parents claimed that the school district harassed and coerced them into signing a waiver agreement because it threatened to change the student's honor level classes to lower level courses where he would be bullied based on his disability unless the parents agreed to sign the waiver. The court agreed with the hearing officer's finding that the parents were free to "come and go" and consult with an attorney and, because of this, there was no duress.

Consistent with *J.K. v. Council Rock Sch. Dist.*, 833 F. Supp. 2d 436, 58 IDELR 43 (E.D. Pa. 2011), hearing officers lack jurisdiction to enforce settlement agreements between school districts and parents.

Douglas v. Cal. Office of Admin. Hearings, 650 Fed. Appx. 312, 67 IDERL 228 (9th Cir. 2016) (unpublished). Hearing officers have remedial authority to decide whether the amount of related services determined by another agency is appropriate even though the related services are for medical, not educational, reasons because state law – here California –

provides that all disputes over the agency's recommendations are subject to IDEA's procedural safeguards.

M.C. v. Antelope Valley Union Sch. Dist., 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017). Generally, hearing officers have the authority to restate the issues presented in words different from the words in the due process complaint and to reorganize the issues by consolidating similar issues into a single issue. However, hearing officers should refrain from restating and/or reorganizing the issues when the issues are "intelligibly" outlined in the complaint. In such cases, a party will not be deemed to waive any claim fairly encompassed in the due process complaint if the complainant properly framed the issues in the complaint.

Greenwich Bd. of Educ. v. G.M., 66 IDELR 128 (D. Conn. 2015). Consistent with *Walled Lake Consol. Schs. v. Jones*, 24 IDELR 738 (E.D. Mich. 1996), a hearing officer violates a school district's procedural due process rights by granting a parent's request, over the school district's objection, to take telephonic testimony because the school district is not able to confront the witness.

Andover Pub. Sch., 68 IDELR 208 (Mass. SEA 2016). A hearing officer may require a school district to turn over to the parent IEPs and Section 504 plans – cleansed of all identifying information – of students enrolled in the student's proposed placement if the records are necessary for the parent to challenge the appropriateness of the student's IEP. Here, the central panel's hearing rules allow discovery in IDEA proceedings.

M.A. v. Jersey City Bd. of Educ., 69 IDELR 57 (D.N.J. 2016). The hearing officer did not err in denying the parent's expert access to other students' records because under state law – here New Jersey – access to student records is limited to authorized organizations or individuals either through consent from the parents of the other students or court order. Further, even if the parent here had requested of the hearing officer that she compel the production of the records – a request that was not specifically made of the hearing officer – the hearing officer would not have erred in denying it because the records of the other students would have very little, if any, bearing on whether the school district provided the student with FAPE.

E.D. v. Colonial Sch. Dist., 69 IDELR 245 (E.D. Pa. 2017). Although emails might be education records, they are not necessarily so. For an email to be an education record, it must both contain information related to the student and be maintained by the school district.

M.B. v. New York City Dep't of Educ., 69 IDELR 132 (S.D.N.Y. 2017). Consistent with *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 (2d Cir. 2013), a hearing officer is without authority to consider claims

that are not raised with sufficient particularity in the due process complaint. The due process complaint cannot incorporate arguments by reference to letters and other documentation.

VI. HEARING

S.W. v. Florham Park Bd. of Educ., 70 IDELR 46 (D.N.J. 2017). Dismissal vis-à-vis summary judgment of a parent's due process complaint before the parent has had an opportunity to present any evidence or witnesses is improper even if the ALJ finds that the school district, who carried the burden of proof (pursuant to state law) offered the student FAPE because IDEA "guarantees parents the right to present both evidence and witnesses at a due process hearing." The parent's evidence may contract the evidence offered by the school district.

B.G. v. City of Chicago Sch. Dist. 299, 69 IDELR 177 (N.D. Ill. 2017). A hearing officer may set reasonable time limits on witness testimony.

Pangerl v. Peoria Unified Sch. Dist., 67 IDELR 36 (D. Ariz. 2016). It is within the discretion of the hearing officer to allow in the record relevant evidence from outside the statute of limitations period.

Jason O. v. Manhattan Sch. Dist. No. 114, 67 IDELR 142 (N.D. Ill. 2016). A procedural violation committed by the hearing officer during the course of a due process hearing is harmless unless the violation results in the loss of educational opportunity for the student. Here, the parents' objected to the hearing officer denying the introduction of a photograph that had not been disclosed within the five-business day requirement, the exclusion of the parents' advocate because the advocate was listed as a witness and was not designated as the individual to assist in the presentation of their case, and the hearing officer's refusal to allow rebuttal witnesses. The court was not persuaded that the hearing officer exceeded his discretionary authority.

VII. REMEDIES

Avila v. Spokane Sch. Dist., 852 F.3d 936, 69 IDELR 202 (9th Cir. 2017). Confirming IDEA's wide-ranging remedial purpose intended to protect the rights of students with disabilities and their parents.

Damarcus S. v. Dist. of Columbia, 67 IDELR 239 (D.D.C. 2016). IDEA affords hearing officers the discretion to fashion equitable remedies tied to the student's needs rather than to the specific deprivations the student suffered or when they were suffered.

M.S. v. Utah Schools for the Deaf and Blind, 67 IDELR 195 (10th Cir. 2016). Because most members of the student's IEP team were

employees of the state school that the student had attended for the past six years and which the court determined inappropriately discontinued the student's residential placement, the Tenth Circuit determined that the court erred in remanding to the IEP team the decision as to an appropriate residential placement. The Tenth Circuit held that the court cannot delegate its remedial authority to IEP teams. The Tenth Circuit noted that the delegation of authority would create an endless cycle of litigation, requiring the parent to seek a due process hearing each time s/he disagrees with the decision of the IEP team.

VIII. DECISION

M.C. v. Antelope Valley Union Sch. Dist., 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017). Consistent with Rule 15(b)(2) of the Federal Rules of Civil Procedures, the Ninth Circuit holds that issues not raised in the due process complaint but tried by the parties' express or implied consent, must be treated in all respects as if raised in the pleadings.

The mere fact that the hearing officer questions witnesses during a long hearing and writes a lengthy opinion that reviews the qualifications of the witnesses and culls relevant details from the record does not demonstrate that the hearing officer is "thorough and careful," where the hearing officer fails to address all issues and disregards some of the evidence presented at the hearing.

Somberg v. Utica Cmty. Schs., 67 IDELR 139 (E.D. Mich. 2016). The mere cessation of FAPE violations coupled with IEP modifications to correct deficiencies will generally not be enough to reverse the harm already done to the student. Courts would expect that hearing officers remedy the past violations with some compensatory education.

T.S. v. Utica Cmty. Schs., 69 IDELR 95 (E.D. Mich. 2017). The lack of sufficiently detailed fact findings and reasoning is likely to invite rebuke from the court and result in a remand instructing the hearing officer to identify the specific evidence on which s/he relied in resolving the claims.

P.C. v. Rye City Sch. Dist., 69 IDELR 122 (S.D.N.Y. 2017). Finding that the hearing officer's "rambling, incomplete … [d]ecision," was an "embarrassment" and directing counsel to send a copy to the individual at the SEA responsible for certification of hearing officers.

McLean v. District of Columbia, 70 IDELR 202 (D.D.C. 2017). A hearing officer's decision will be found to be inadequate where, as here, the hearing officer pulls a statement from the parent's expert out of context to support his conclusion when the full statement would suggest contrary to the hearing officer's conclusion, or when the hearing officer does not give any consideration whatever to the professional opinions of

the parent's experts, let alone discredit them.

IX. SECTION 504

B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 68 IDELR 151 (2d Cir. 2016). Although there is a strong possibility that a student who is IDEA eligible may also qualify as an individual with a disability under the IDEA, IDEA eligibility does not automatically create eligibility under the ADA and Section 504. A parent, therefore, cannot seek relief for disability discrimination based on IDEA eligibility alone. The ADA defines disability as a physical or mental impairment that *substantially limits* one or more major life activities. Section 504 adopts the ADA's definition. In contrast, under the IDEA, a student is eligible if s/he has one or more of an enumerated list of impairments requiring special education and related services. The legal standards are distinct. Thus, a student might need special education and related services by reason of an impairment even if that impairment does not *substantially limit* a major life activity.

Lagervall v. Missoula County Pub. Schs., 117 LRP 45538 (D. Mont. 2017). A school district may limit a parent's ability to visit their child's school because of past inappropriate behavior. Here, the school district did not discriminate against the parent with an unknown disability when it required him to notify the principal and obtain permission before coming to his son's school.

X. MISCELLANEOUS

Washoe County Sch. Dist., 69 IDELR 201 (SEA 2016). A school district must provide the assistive technology devices listed in the student's IEP. The failure to do so is a violation of the IDEA, and the school district's allowance of the student's use of his own personal device without reimbursement violates the IDEA's no cost requirement.

Lawrence County Sch. Dist. v. McDaniel, 71 IDELR 3 (E.D. Ark. 2017). A school district must implement a hearing officer's decision pursuant to the IDEA's stay-put provision even though it is appealing the hearing officer's decision and immediate implementation will result in the school district later being precluded from relief because of the nature of the hearing award (e.g., evaluation).

Hopewell Valley Reg'l Bd. of Educ. v. J.R., 67 IDELR 202 (D.N.J. 2016). Appeals of interim decisions of the hearing officer are not permissible under the IDEA because only a party aggrieved by a final administrative decision has the right under the IDEA to appeal that decision in court.

NOTE: REDISTRIBUTION OF THIS OUTLINE WITHOUT EXPRESSED, PRIOR WRITTEN PERMISSION FROM ITS AUTHOR IS PROHIBITED.

THIS OUTLINE IS INTENDED TO PROVIDE READERS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND/OR SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. THE AUTHOR IS NOT RENDERING LEGAL ADVICE TO READERS.