IDEA ISSUES REGARDING SCHOOL NURSES AND AIDES

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This outline discusses issues that impartial hearing officers may confront when deciding cases in which the services of school nurses or individual aides are in question.

## Nursing Services

With regard to nursing services, issues of interest are:

- Definitional Issues
- Nursing Services and the Duty to Provide FAPE
- Nursing and Transportation
- Nursing and Issues of School Assignment
- Nursing Services Versus Aide Services
- Medication Issues
- Remedies

### Definitional Issues

The IDEA includes in its definition of related services "such developmental, corrective, and other supportive services (including . . . school nurse services designed to enable a child with a disability to receive a free, appropriate public education as described in the individualized education program of the child . . .) as may be required to assist a child with a disability to benefit from special education . . . ." 20 U.S.C. § 1401(26). The IDEA regulations also define related services, and the definition includes the sentence, "Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training." 34 C.F.R. § 300.34(a). The regulation goes on to state that: "School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person." *Id.* § 300.34(c)(13).

The regulations also define medical services. "Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." *Id.* § 300.34(c)(5). Although the IDEA lists medical services as a related service, the statute says that "such

medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. § 1401(26).

The two Supreme Court cases dealing directly with related services have to do with student health and nursing. Specifically, they develop the distinction between those services, which must be provided for free as part of free, appropriate public education, and medical services, which need not be provided, much less provided for free, unless they are for diagnostic and evaluation purposes. *Irving Independent School District v. Tatro*, 468 U.S. 883, 553 IDELR 656 (1984), held that clean, intermittent catheterization was a related service and not excluded under the medical services provision. The Court reasoned that services that may be performed by a nurse or other person with qualifications less than those of a physician are not excluded medical services.

The Court followed the reasoning of *Tatro* in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 29 IDELR 966 (1999), which held that a school district had to furnish a wide range of services to a student who depended on a ventilator to breathe. The services included bladder catheterization, suctioning in connection with tracheotomy care, ventilator maintenance (including air bag administration during maintenance), monitoring and observation, and other daily services. The Court reasoned that none of these activities needed to be performed by a licensed physician, and therefore the case was governed by *Tatro*'s precedent.

Nursing Services and the Duty to Provide FAPE

As *Tatro* and *Garret F.* suggest, the duty to provide free, appropriate public education may entail the duty to provide school nursing services, even very extensive nursing services. In *School District of Philadelphia v. Drummond*, No. CV 14-2804, 2016 WL 1444581, 67 IDELR 170 (E.D. Pa. Apr. 12, 2016), the court affirmed a hearing officer's ruling that extra nursing services were needed for a student who needed monitoring for a potential emergency in the course of gastric-tube feeding. The court noted that the hearing officer found that having one school nurse for 1,350 students did not ensure the student's safety if a feeding-related emergency occurred. The court declared, "An IEP failing to ensure a student's safety denies a FAPE," *Id.* at *5.

*J.L. v. New York City Department of Education*, 324 F. Supp. 3d 455, 72 IDELR 237 (S.D.N.Y. 2018), is an opinion in the combined cases of three unrelated children with severe disabilities who alleged a systemic breakdown in the defendant's provision of services to medically fragile children. The parents maintained that they could not obtain nursing services on the school bus and in school, and that they could not obtain wheelchair-accommodating bus transportation for the children, nor porter services to get the children up and down the stairs of their walk-up apartment buildings to and from bus, causing the children to miss significant amounts of school. The court denied a motion to dismiss claims under the IDEA, Section 504, the Americans with Disabilities Act, and Section 1983 for two of three cases. The allegations stated that the defendant refused to specify some services on the children's IEPs and insisted that the parents contact transportation and health services subunits of the defendant, which rejected paperwork submitted to them and did not respond to efforts to reach them. The parents

said that in other situations, the services were on the IEPs but were not provided, and again the provision of services depended on efforts by the parents to coordinate the arrangements, with the predictable result that personnel and services frequently failed to materialize. The court rejected a defense of failure to exhaust administrative remedies, and found the case not moot despite changes in the defendant's Standard Operating Procedure Manual, reasoning that there was a basis for doubt about how changes would work in practice. The court held that the allegations, if proven, would establish a denial of appropriate education due to failure to implement substantial or significant portions of IEPs, and upheld the other claims. Although the case did not arise from a proceeding before an impartial hearing officer, one could easily imagine a similar complaint being brought in the context of an individual due process hearing.

Nursing and Transportation

Several noteworthy cases concern nursing services during transportation to and from school. In *E.I.H. v. Fair Lawn Board of Education*, 747 F. App'x 68, 72 IDELR 263 (3d Cir. 2018), a case involving a child with autism and epilepsy, the court ruled that having nurse accompaniment on the bus route to and from school was a related service that needed to be included in the child's IEP. The court recited the facts that after the child had a seizure, the parent requested the presence of a health professional trained in administering Diastat, an epilepsy drug, during the bus ride, and eventually the district agreed, but it refused to place the service on the student's IEP, instead placing it on a separate individualized health plan. The court reasoned that transportation services may include additional accommodations, and since the child could not safely take the bus unless a nurse was provided to administer the drug when needed, the nursing service was required for the child to have access to free, appropriate public education and had to be on the IEP. The court stated: "Here, accepting that L.H.'s bus transportation is already included in her IEP as a related service, and understanding—as the School District already does—that L.H. needs the nurse on the bus in order to safely get to school in the event of a seizure, it stands to reason that she would not be able to access her FAPE without the nurse. And if that is the case, then the ALJ was correct to include the nurse within L.H.'s IEP as opposed to IHP." *Id.* at 73. *See also Oconee Cnty. Sch. Dist. v. A.B.*, No. 3:14–CV–72, 2015 WL 4041297, 65 IDELR 297 (M.D. Ga. July 1, 2015) (in case of child with seizure disorder and other disabilities, ruling that refusal to provide aide trained to administer seizure medication on bus to and from school denied appropriate education), *appeal dismissed*, No. 15-13461 (11th Cir. Aug. 31, 2015); *Macomb Cnty. Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824, 441 IDELR 600 (E.D. Mich. 1989). (holding that health services during bus transportation that included tracheostomy care and positioning of child using wheelchair, as well as transportation from door of home out to street, constituted required related services for child); *Skelly v. Brookfield-LaGrange Park Sch. Dist. 95*, 968 F. Supp. 385, 26 IDELR 288 (N.D. Ill. 1997) (preliminary injunction) (requiring district to provide tracheostomy tube suctioning for child during transportation to and from school).

As the *E.I.H.* case states, if nursing or other health services are needed to provide a student with a free, appropriate public education, the services must be listed in the IEP. That step ensures that the commitment to provide them is fully enforceable. An

IEP must include "a statement of the special education and related services and supplementary aids and services . . . that will be provided for the child . . . ." 20 U.S.C. § 1414(d). That statement entails "The projected date for the beginning of the services and modifications . . . and the anticipated frequency, location, and duration of those services and modifications." 34 C.F.R. § 300.320(a)(7).

Nursing and Issues of School Assignment

Although a number of courts have refused to require that schools place a child as close as possible to the child's home, typically in the school the child would attend but for the child's disability, *see, e.g., White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 39 IDELR 182 (5th Cir. 2003); *cf.* 34 C.F.R. § 300.116, two prominent cases uphold claims that placement in a more distant school is not justified by the school district's not stationing a nurse at the neighborhood school. In *S.P. v. Knox County Board of Education*, 329 F. Supp. 3d 584, 72 IDELR 269 (E.D. Tenn. 2018), *reconsideration denied*, 388 F. Supp. 3d 947 (E.D. Tenn. 2019), the plaintiffs alleged that the board of education in 2015-17 had a policy of transferring children with epilepsy from schools without nurses to schools with nurses due to need for administration of the drug Diastat. Plaintiffs contended that this violated the IDEA and incorporated state law, Title II of ADA, and Section 504. The court denied the state education department summary judgment on IDEA claim, finding that it had responsibility for compliance with IDEA duties, including placement of children as close as possible to children's home and in the school the children would attend if not disabled. The conclusion was bolstered by Tenn. Code Ann. § 49-50-1602(g)(7), which provides: "An LEA [local education agency] shall not assign a student with epilepsy or other seizure disorder to a school other than the school for which the student is zoned . . . because the student has a seizure disorder." The court denied the motion for summary judgment of the county and the county school board, finding material issues of fact as to what the official policy was and how it was administered, when the IEP meeting notes showed an apparent plan for assignment of the student to a different school with a full time nurse due to the student's seizure disorder, and other evidence indicated that the parents were not informed of any option to have the nurse transferred. *See also R.K. v. Board of Educ. of Scott Cnty.*, 494 F. App'x 589 (6th Cir. 2012) (reversing summary judgment for defendant in case in which student with brittle diabetic condition wished to be placed at neighborhood school that did not have regularly assigned nurse, rather than more distant school).

Nursing Services Versus Aide Services

Extensive litigation has occurred in California over whether school personnel who were not licensed nurses could be permitted to administer insulin injections for students with diabetes whose IEPs or Section 504 plans called for administration of the medication. In *American Nurses Ass'n v. O'Connell*, 110 Cal. Rptr. 3d 305, 54 IDELR 259 (Cal. App. 2013), the court held that the California Nursing Practice Act forbade non-nurse personnel to administer the injections, and that the Act was not subject to conflict preemption by IDEA or Section 504. The California Supreme Court, however, reversed the appellate court, ruling that the Act did not bar the non-nurse personnel from administering the injections, and accordingly did not reach the preemption issue. *American Nurses Ass'n v. Torlakson*, 304 P.3d 1038, 61 IDELR 230 (Cal. 2013).

Medication Issues

School districts are not permitted to make parental consent to medication or other health services a condition for eligibility under IDEA. 34 C.F.R. § 300.34(c)(5). On the other hand, parents are not entitled to force a school nurse to administer a higher dose of Ritalin than what is recommended, at least one court has held. *Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754, 27 IDELR 811 (8th Cir. 1998).

Remedies

Compensatory nursing services or reimbursement for privately obtained nursing services would be appropriate remedies for improper past denial of nursing services. *See School Dist. of Phila. v. Drummond*, No. CV 14-2804, 2016 WL 1444581, at *5, 67 IDELR 170 (E.D. Pa. Apr. 12, 2016) (affirming grant of compensatory education in dispute over nursing services and other issues, stating, "The District has not proven the extra nursing services and C[ompensatory] E[ducation] grants are not required to provide a FAPE. . . . The [hearing officer's] grant of extra nursing services and related CE was not error.").

## Aide Services

With regard to aide services, this outline covers:

- New York Regulations on 1:1 Aides
- Aides and the Duty to Provide FAPE
- Aide Services and Placement in the Least Restrictive Environment
- Aide Services and Evaluation and Eligibility
- Aide Services and IEPs
- Supervision of Aides
- Aides and Transportation
- Aides as Sufficient to Provide FAPE
- Aides as a Potential Obstacle to Self-Sufficiency
- Remedies

New York Regulations on 1:1 Aides

IDEA and its regulations do not treat aide services as a necessarily distinct related service, though it is easy to imagine that aides could be a component of special education or a required element of related services in the areas of communication, behavior, or other needs of a child. New York State law has a specific provision regarding one-on-one aides and similar services:

> [P]rior to the IEP recommendation of assignment of additional supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability, consider:

(a) the management needs of the student that would require a significant degree of individualized attention and intervention;

(b) the skills and goals the student would need to achieve that will reduce or eliminate the need for the one-to-one aide;

(c) the specific support (e.g., assistance with personal hygiene or behaviors that impede learning) that the one-to-one aide would provide for the student;

(d) other supports, accommodations and/or services that could support the student to meet these needs (e.g., behavioral intervention plan; environmental accommodations or modifications; instructional materials in alternate formats; assistive technology devices; peer-to-peer supports);

(e) the extent (e.g., portions of the school day) or circumstances (e.g., for transitions from class to class) the student would need the assistance of a one-to-one aide;

(f) staff ratios in the setting where the student will attend school;

(g) the extent to which assignment of a one-to-one aide might enable the student to be educated with nondisabled students and, to the maximum extent appropriate, in the least restrictive environment;

(h) any potential harmful effect on the student or on the quality of services that he or she needs that might result from the assignment of a one-to-one aide; and

(i) the training and support that shall be provided to the one-to-one aide to help the one-to-one aide understand the student's disability-related needs, learn effective strategies for addressing the student's needs, and acquire the necessary skills to support the implementation of the student's individualized education program.

Nothing in this subparagraph shall be construed to prohibit or limit the assignment of shared one-to-one aides at the discretion of the school to meet the individualized needs of students whose IEPs include the recommendation for one-to-one aides. The duties of a teacher aide or teaching assistant providing individualized support to a student with a disability shall be consistent with the duties prescribed pursuant to section 80-5.6 of this Title.

8 NYCRR § 200.4(d)(3)(vii).

Aides and the Duty to Provide FAPE

As the New York provision suggests, one-on-one aide services can take a number of forms and be offered for a number of purposes. A 1:1 aide may be required to help a student with autism to make educational progress. In *I.B. v. New York City Department of Education*, No.15-CV-01309-LTS, 2016 WL 1069679, 67 IDELR 113 (S.D.N.Y. Mar. 17, 2016), involving a child who was at the second percentile in overall cognitive functioning and who demonstrated an inability to attend to tasks without intense support, the court reversed an administrative decision that rejected a request for a 1:1 special education itinerant teacher. The court noted that the student made progress in the past with a 1:1 aide. Similarly, in *Board of Education of Wappingers Central School District v. D.M.*, No. 19 CV 1730, 2020 WL 508845, 75 IDELR 269 (S.D.N.Y. Jan. 30, 2020), the court affirmed an SRO determination that a 15:1 student-teacher ratio placement for the child was not appropriate, when the evidence showed that the child made academic progress with assistance of a 1:1 aide and other 1:1 instruction, but regressed with even small-group instruction; affirming reimbursement award). *See also School Dist. of Phila. v. Williams*, No. CV 14-6238, 2016 WL 877841, 66 IDELR 214 (E.D. Pa. Mar. 7, 2016) (affirming determination that school district deprived student of appropriate education by, among other things, failing to provide 1:1 aide as specified on IEP) (discussed below).

Parents have prevailed in cases regarding provision of one-on-one services in numerous additional cases, with the courts holding that the services were needed for the child to receive free, appropriate public education. *See, e.g., A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 69 IDELR 51 (2d Cir. 2017) (ruling that failure to follow evaluative reports specifically recommending continued need for applied behavioral analysis services and 1:1 support denied appropriate education); *R.K. v. New York City Dep't of Educ.*, No. 09–CV–4478, 2011 WL 1131492, 56 IDELR 168 (E.D.N.Y. Jan. 21, 2011) (magistrate judge recommendation) (finding proposed program with limited 1:1 time and TEACCH methodology inadequate when evidence supported need for high levels of ABA and 1:1 services), *adopted*, 2011 WL 1131522, 56 IDELR 212 (E.D.N.Y. Mar. 28, 2011), *aff'd sub nom. R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 59 IDELR 241 (2d Cir. 2012); *see also S.B. v. New York City Dep't of Educ.*, 174 F. Supp. 3d 798, 67 IDELR 140 (S.D.N.Y. 2016) (ordering reimbursement in case of child placed by parent in private school after independent evaluation recommended 1:1 ABA, who was offered 6:1:1 class but no 1:1 ABA instruction); *P.K. v. New York City Dep't of Educ.*, 819 F. Supp. 2d 90, 57 IDELR 139 (E.D.N.Y. 2011) (holding that termination of ABA therapy and other services denied child with autism appropriate education), *aff'd*, 526 F. App'x 135, 61 IDELR 96 (2d Cir. 2013). A federal court in New York certified a class of children recommended for or attending non-public school programs in a systemic challenge to an alleged policy forbidding CSEs from recommending 1:1 instruction, ABA services, and extended school day, after-school, or homebased services. *M.G. v. New York City Dep't of Educ.*, 162 F. Supp. 3d 216, 66 IDELR 276 (S.D.N.Y. 2016).

In other instances, courts have rejected claims for 1:1 aides or comparable services. An example is *M.T. v. New York City Department of Education*, 200 F. Supp. 3d 447, 68 IDELR 65 (S.D.N.Y. 2016), involving a child with Asperger's Syndrome and

ADHD. The parent removed the student from a general education class with teacher support services and placed him at a private school, then the school system recommended placing him in a 12:1:1 specialized class at a community school with a temporary 1:1 transitional paraprofessional. The court affirmed SRO decisions against the parent, stating even if the 1:1 paraprofessional were discontinued after four months, the IEP would still offer appropriate education. The court stressed that the student had average intelligence and said he would benefit from the general education curriculum; *see also Pavelko v. District of Columbia*, 288 F. Supp. 3d 301, 71 IDELR 165 (D.D.C. 2018) (in case of child diagnosed with autism spectrum disorder and ADHD, finding that program met *Endrew F.* standard when public school system experts or outside evaluators all indicated amount and nature of services in IEP were appropriate or needed to meet child's academic and functional goals, and need for ABA services or individual aide had not been established at time of IEP).

In *MB v. City School District of New Rochelle*, No. 17-CV-1273, 2018 WL 1609266, 72 IDELR 12 (S.D.N.Y. Mar. 29, 2018), the court confronted a case of a student diagnosed with hydrocephalus, macrocephaly, epilepsy, cerebral palsy, and spastic dysplasia, who received an ABA program in a 8:1+2 class from 2008 to 2013, then after a reevaluation was assigned for 2013-14 to a middle school 12:1+1 life skills program with ABA and various related services, , then the program was continued for 2014-15 with additional services and again for 2015-16 with the addition of a shared aide, despite the parent's request for a 1:1 aide due to concerns over lack of progress, seizures, and bathroom accidents. The court upheld an SRO decision that the IEPs for all three school years provided FAPE. On the issue of a 1:1 aide, the court reasoned that the evidence supported a 12:1+1 class and that a 1:1 aide was not shown to be necessary. The court declared:

> Similarly, there is no basis to disturb the SRO's conclusion that the School District was not required to provide RAB with a dedicated 1:1 aide. Each CSE subcommittee at issue had detailed information regarding RAB's medical, academic, and safety needs. And each CSE subcommittee concluded that a dedicated 1:1 aide was unnecessary, instead choosing to recommend substantial shared aide services (increasing from two hours per day in 2013-14 to "as needed" during the school day in 2014-15 to "throughout the day" in 2015-16).
>
> It is quite clear, both from the administrative record and plaintiffs' arguments before this Court, that MB would prefer RAB to have a dedicated 1:1 aide. But plaintiffs have failed to demonstrate how or why a dedicated 1:1 aide was necessary as a matter of law. The preponderance of the evidence in the administrative record demonstrates that RAB was supervised by an adult at all times, and that RAB received considerable individualized attention for redirection and refocusing. MB's preference for a dedicated 1:1 aide is understandable, but the IDEA guarantees "an appropriate education, not one that provides everything that might be thought desirable by loving parents." *Walczak*, 142 F.3d at 132. The Court

> concludes that lack of a dedicated 1:1 aide did not deprive RAB of a FAPE for any of the years at issue.

Id. at *15.

One case denied the need for 1:1 aide for a student with a life-threatening genetic condition and other disabilities, reasoning that other staff could monitor the child. "It further appears that D.S. does not require an aid for medical reasons because D.S. attends a school with a full-time nurse. . . . In Kindergarten, D.S.'s teacher and classroom aide were both able to identify when D.S. was experiencing problems with his blood sugar. Therefore, so long as educational staff is appropriately trained, a one-on-one aide should not be necessary for monitoring and identifying signs of low blood sugar." *R.S. v. Morgan Cnty. Bd. of Educ.*, No. 3:18-CV-80, 2019 WL 2518136, at *9, 74 IDELR 200 (N.D. W. Va. June 18, 2019) (further holding that the child made academic progress without assistance of one-on-one aide).

Aide Services and Placement in the Least Restrictive Environment

Aides may be required to facilitate placement of children in less restrictive settings. *See Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 20 IDELR 812 (9th Cir. 1994) (upholding determination that child be placed in mainstream setting with curricular modifications and part-time aide services). *J.A. v. Smith Cnty. Sch. Dist.*, 364 F. Supp. 3d 803, 74 IDELR 16 (M.D. Tenn. 2019), *appeal dismissed*, No. 19-5343, 2019 WL 4943763 (6th Cir. Apr. 18, 2019), is the case of a student with Down syndrome who displayed behavior problems including roaming the classroom and licking furniture and other students. The district proposed placement in a comprehensive development class, which was described as a special education class comprising both disabled and non-disabled students. The parents proposed placement in a general education classroom with a one-on-one aide. The ALJ ruled for school district, but the court on appeal adopted a magistrate judge recommendation that a preliminary injunction be granted to place the student in a general education kindergarten, with a paraprofessional properly trained in dealing with children with Down syndrome. The court further ordered that the district be required to conduct a functional behavior assessment and implement a behavior intervention plan, all to enable the child to succeed in the general education setting.

Aide Services and Evaluation and Eligibility

An aide may be needed as part of the evaluation process. *Lawrence Cnty. Sch. Dist. v. McDaniel*, No. 3:17-CV-00004, 2017 WL 4843229, at *5, 71 IDELR 3 (E.D. Ark. Oct. 26, 2017) (granting parent's motion for preliminary injunction requiring district to implement hearing officer order that school district use services of behavior analyst to conduct functional behavioral assessment of student currently served under Section 504 plan, and to propose IEP if needed; evaluate student's pragmatic language deficits, adaptive behavior deficits, and functional impairments, use services of health care aide if needed, and allow mental health professionals to observe student at school); *decision on merits*, 2018 WL 1569484, 72 IDELR 8 (E.D. Ark. Mar. 30, 2018) (affirming hearing officer decision requiring further assessment).

In addition, a need for an aide may demonstrate a child's eligibility for special education. *L.J. v. Pittsburg Unified School District*, 850 F.3d 996, 117 LRP 6572 (9th Cir. February 27, 2017) (as amended), concerned a child displaying suicidal behavior who had diagnoses of bipolar disorder, oppositional defiant disorder, and ADHD. The parties agreed that the child met the standards for the specific learning disability, other-health-impairment, and serious emotional disturbance eligibility categories, but disagreed whether the child was also in need of special education so as to be eligible for services under the IDEA. In ruling that the child should have been found eligible for special education because he was also in need of special education, the court reasoned that his academic performance in the average or above average range occurred when he was provided special services, including specially designed mental health services, assistance from a one-on-one aide, and the school district behavior specialist's extensive clinical interventions. These services were not offered to general education students. Hence, the child was shown to be in need of special education services by reason of his disability.

Aide Services and IEPs

When an aide's services are provided for in an IEP, the failure to actually furnish an aide to the student may be a denial of free, appropriate public education. *See School Dist. of Phila. v. Williams*, No. CV 14-6238, 2016 WL 877841, 66 IDELR 214 (E.D. Pa. Mar. 7, 2016) (in case of ninth-grade student with autism and speech-language impairment functioning academically at second to third grade level, affirming determination that school district deprived student of appropriate education by, among other things, failing to provide 1:1 aide as called for on IEP, preventing child from attending general education art classes; affirming award of compensatory education extending beyond one school year through remainder of student's high school career and requiring hiring of outside consultant, but reducing amount of compensatory speech and language services and reversing order for self-advocacy instruction). On the other hand, the aide's qualifications may not need to be spelled out in the IEP. *See R.E.B. v. Department of Educ.*, 770 F. App'x 796, 74 IDELR 125 (9th Cir. 2019) (affirming district court decision in favor of school district, holding that IEP need not specify qualifications of one-on-one aide, and that for this student IEP need not specify particular ABA methodology to be used when teachers thought it best to use multiple methodologies to meet needs as they arose), *superseding* 886 F.3d 1288 (9th Cir. 2018).

Supervision of Aides

A court ruled that continuing supervision by a Board Certified Behavior Analyst of an aide providing Applied Behavior Analysis services was not needed in order to furnish appropriate education to a child with autism and ADHD, despite the failure to completely eliminate the child's disruptive behavior. *A.W. v. Tehachapi Unified Sch. Dist.*, No. 1:17-cv-00854-DAD-JLT, 2019 WL1092574, 74 IDELR 11 (E.D. Cal. Mar. 7, 2019), *appeal filed*, No. 19-15680 (9th Cir. Apr. 9, 2019).

Aides and Transportation

As suggested by the authorities described above concerning nursing and other health services in getting children with disabilities to and from school, aide services may be needed to make transportation services safe and effective. For example, in a case cited above, a court required provision of an aide trained to administer seizure medications on bus to and from school for child with profound physical and intellectual disabilities, affirming decision of ALJ that IEP denied appropriate education because it lacked adequate health services. *Oconee Cnty. Sch. Dist. v. A.B.*, No. 3:14–CV–72, 2015 WL 4041297, 65 IDELR 297 (M.D. Ga. July 1, 2015) (in case of child with seizure disorder and other disabilities, ruling that refusal to provide aide trained to administer seizure medication on bus to and from school denied appropriate education), appeal dismissed, No. 15-13461 (11th Cir. Aug. 31, 2015); *see also District of Columbia v. Ramirez*, 377 F. Supp. 2d 63, 43 IDELR 245 (D.D.C. 2005) (affirming hearing officer that child with wheelchair be provided aide services for transportation between apartment door and school bus).

Aides as Sufficient to Provide FAPE

Courts have in some instances ruled that the provision of an aide pursuant to a school district's proposed IEP is sufficient to address a student's needs, and therefore other services desired by the parent are not needed to provide appropriate education. *J.P. v. City of New York Department of Education*, 717 F. App'x 30, 71 IDELR 77 (2d Cir. 2017), affirmed a decision of an impartial hearing officer and state review officer that the district's IEP met the standard for appropriate education. The court noted that *Endrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017), requires only that the IEP be reasonable, not ideal, and stated that deference should be paid to administrators. The court further said that failure to conduct functional behavior analysis or develop a behavior intervention plan did not deny appropriate education under the facts of the case, reasoning that the IEP identified problem behaviors and addressed them by providing a 1:1 aide and related services. In the case of a middle-school-aged child with autism spectrum disorder, provision of an aide and a program of positive behavioral supports was held to be adequate to meet a child's needs, even though the district did not provide a formal behavior intervention program for the child. *Cook v. Little Rock Sch. Dist.*, No. 4:17CV00218, 2018 WL 4778044,73 IDELR 43 (E.D. Ark. Oct. 3, 2018).

The presence of aide services may reinforce a school district's efforts to place a child in a less restrictive setting. *See M.G. v. North Hunterdon-Voorhees Reg'l High Sch. Dist. Bd. of Educ.*, No. 17-CV-12018, 2018 WL 4761581, 73 IDELR 46 (D.N.J. Oct. 2, 2018) (in case of student diagnosed with autism spectrum disorder and other disabilities, whose parents filed due process hearing requests challenging 2016 and 2017 IEPs, which called for placement in self-contained classroom at local high school with related services rather than current placement at Developmental Learning Center 25 miles from home, which placement was maintained pursuant to stay-put, granting summary judgment to district and denying parents' motion, reasoning that concern about student's leaving building would be addressed in IEP by one-on-one aide and district's proposed program would expose student to higher functioning peers), *aff'd*,

778 F. App'x.107, 111, 119 LRP 24181 (3rd Cir. June 20, 2019) ("[T]he ALJ gave due attention to the concerns M.G.'s father raised about M.G.'s safety and her potential for elopement. Relying on the testimony of the school psychologist, the ALJ determined that the risk of elopement was suitably addressed by the one-to-one aid [*sic*] outlined in the 2017 IEP.").

A court found 1:1 aide services sufficient to address problems a student with disabilities had with being bullied. *See J.M. v. Matayoshi*, 729 F. App'x 585, 586, 72 IDELR 145 (9th Cir. June 29, 2018) (affirming district court decision that hearing officer correctly found that IEP had sufficient protections against bullying when "the 2014 IEP was expressly designed to overcome the deficiencies in the prior plan, mandating a full-time aide for J.M. and containing a crisis plan, which provides that '[i]nteractions with peers will be monitored by an adult' and sets forth a protocol to stop bullying if it occurs. The plan contains many, if not all, of the suggestions to combat bullying set forth in a 'Dear Colleague' letter issued in 2014 by the U.S. Department of Education, Office for Civil Rights. See Dear Colleague Letter: Responding to Bullying of Students with Disabilities (October 21, 2014)."), *cert. denied*, 139 S. Ct. 923 (2019).

Aide as a Potential Obstacle to Self-Sufficiency

It is conceivable that the services of an aide may actually impede a student's development of the ability to do things on the student's own, and that the student might be better off with reduced or tapered aide services. *See generally McKnight v. Lyon Cnty. Sch. Dist.*, No. 3:15-CV-00614-MMD-CBC, 2018 WL 4600293, 73 IDELR 13 (D. Nev. Sept. 25, 2018) (in case of child with autism whose parent challenged IEPs from March, April, and May 2015, affirming a review officer decision in favor of district, ruling that program, in which student made progress, with one-on-one instruction from 8:45 a.m. to 11 a.m. five days per week, and small group instruction for part of the day on some other days, was sufficient under IDEA and Section 504 without additional one-on-one aide services, noting obligation to educate child in least restrictive environment and value of socialization with peers and teacher development of independent learning skills), *appeal filed*, No. 18-16888 (9th Cir. Oct. 3, 2018).

The flip side of a case like *McKnight* is that in some instances the district would prefer to furnish an aide but the parent may justifiably insist on some other intervention, such as a service animal. *See E.F. ex rel. Fry v. Napoleon Cmty. Schs.*, No. 12-15507, 2019 WL 4670738, 75 IDELR 65 (E.D. Mich. Sept. 25, 2019) (denying cross-motions for summary judgment and holding case for jury trial on Section 504 and ADA claims against school district based on refusal to allow five-year-old child with cerebral palsy to bring service dog to school. This case, of course, is a subsequent decision in the litigation about a school's refusal to permit a student to bring a labradoodle named Wonder to school to provide assistance in the classroom. That litigation yielded the Supreme Court's decision about when IDEA administrative remedies must be exhausted in actions seeking relief for violations of other laws, such as the Americans with Disabilities Act and Section 504. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017).

Remedies

Compensatory aide services may be proper as a remedy for unlawful failure to provide aide services. A case found that a remedy of 60 days of 1:1 behaviorally trained aide services and a transition plan was sufficient for a district's failure to provide a functional behavioral assessment and additional services for a limited period. *K.M. v. Tehachapi Unified Sch. Dist.*, No. 115CV001835, 2017 WL 1348807, 69 IDELR 241 (E.D. Cal. Apr. 5, 2017), *appeal dismissed*, No. 17-15904 (9th Cir. Nov. 7, 2017); *see also E.S. v. Conejo Valley Unified Sch. Dist.*, No. CV 17-2629, 2018 WL 3630297, 72 IDELR 180 (C.D. Cal. July 27, 2018) (in case of six-year-old first grader eligible under primary disability of emotional disturbance, and secondary disability of other health impairment due to ADHD, awarding compensatory services for period from April 20 of kindergarten year through end of kindergarten extended school year, including 1:1 aide services, even though such services were provided during unstructured part of school day pursuant to IEP; awarding 52.5 hours of 1:1 aide services, roughly one-third of amount student would have received if IEP had been timely implemented).

Reimbursement for aide services paid for by parents may also be a proper remedy. *See School Dist. of Phila. v. Kirsch*, 722 F. App'x 215, 231, 71 IDELR 123 (3d Cir. 2018) ("[W]e will reverse the judgment of the District Court as to Parents' claim for tuition reimbursement for 1:1 aides for the twins for the 2013-14 through 2016-17 school years and remand to the District Court to enter judgment for Parents as set forth in the June 1, 2016 Order, with the addition of $88,000.00 for tuition reimbursement for 1:1 aides for the twins for the 2013-14 through 2015-16 school years and an amount to be determined by the District Court for the 2016-17 school year.").

One of the most prominent cases of the last several years on the topic of least restrictive environment involved a requested remedy of reimbursement for tuition at a Montessori school as well as reimbursement for the costs of an aide to enable the child to succeed in that mainstreamed setting. *L.H. v. Hamilton County Department of Education*, 900 F.3d 779, 72 IDELR 204 (6th Cir. Aug. 20, 2018), involved a fifteen-year-old with Down Syndrome who was classified as intellectually disabled. The court of appeals affirmed the trial court's ruling that the school district's proposed placement for the student in a comprehensive development classroom was more restrictive than necessary and reversed the court's denial of reimbursement for the placement in the Montessori school with a full-time aide. The court relied on the *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), factors regarding mainstreaming, and with regard to deferral to school authorities noted that a decision about mainstreaming does not require educational expertise as methodology does. The court further reasoned that a child need not master the general education curriculum in order to be educated in the general education classroom; instead, the question is whether the child can make progress toward the IEP goals in the regular education setting. The court went on to rule that the Montessori program, in which student was the only student with disabilities in class and which included a personalized curriculum and a paraprofessional aide dedicated just to that student should be reimbursed despite the lower court's view that it lacked systematic stricture. On remand, the district court ordered $103,274.00 reimbursement to parents for the costs of the private education at the Montessori

School of Chattanooga for third to eighth grade, consisting of tuition and full-time aide services while the child attended school. No.1:14-CV-00126, 2018 WL 6069161, 73 IDELR 121 (E.D. Tenn. Nov. 20, 2018).

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Additional Reference: Mark C. Weber, "Related Services," *Special Education Law and Litigation Treatise* ch. 8 (LRP Pubs. 4th ed. 2017).

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