RELATED SERVICES ISSUES UNDER THE IDEA

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Impartial hearing officers are frequently called upon to resolve disputes over related services – those services that may be required to assist a child with a disability to benefit from special education. This outline begins with the basic statute and regulatory provisions, then discusses:

- Scope of Related Services and the Medical Services Exception
- Relation to Free, Appropriate Public Education
- Relation to Least Restrictive Environment
- Evaluation for Related Services
- Particular Related Services
    - Nursing and School Health
    - Speech-Language
    - Interpreters and Related
    - Behavior
    - Occupational and Physical Therapy
    - Assistive Technology
    - Transportation
    - Aides and 1:1 Services
    - Services for Teachers
    - Services for Parents
- Remedies for Improper Denial of Related Services

<u>The IDEA, the Federal Regulations, and New York Regulations</u>

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482, related services are defined as:

> 20 U.S.C. § 1401(26) Related services
>
> (A) In general
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> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services,

> psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, 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, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.
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> (B) Exception
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> The term does not include a medical device that is surgically implanted, or the replacement of such device.

The definition is not meant to be exclusive and may cover unlisted services such as music therapy. *Letter to Farbman*, 34 IDELR 7 (OSEP 2000).

The IDEA regulations elaborate on the exception for surgically implanted devices, stating that the exception includes cochlear implants and optimization of a surgically implanted medical device's functioning, and the maintenance or replacement of the device. 34 C.F.R. § 300.34(b). The regulations go on to define various services, *id.* § 300.34(c), including (1) audiology, (2) counseling, (3) early identification and assessment of disabilities, (4) interpreting, (5) medical services for diagnostic and evaluation purposes, (6) occupational therapy, (7) orientation and mobility services, (8) parent counseling and training, (9) physical therapy, (10) psychological services, (11) recreation, (12) rehabilitation counseling, (13) school health services and school nurse services, (14) social work, (15) speech-language pathology services, and (16) transportation. Other regulations define some additional terms relevant to related services, such as assistive technology device, *id.* § 300.5 and assistive technology service, *id.* § 300.6, supplementary aids and services, *id.* § 300.42, transition services, *id.* § 300.43, assistive technology, *id.* § 300.105, and routine checking of hearing aids and external components of implanted devices, *id.* § 300.113.

New York's regulations incorporate the federal definition of the related services term, 8 NYCRR § 200.1(qq). Like the federal regulations, the state regulations also contain definitions of specific related services and other items relevant to related services. These include: (e) assistive technology device, (f) assistive technology service, (ee) medical services, (gg) occupational therapy, (kk) parent counseling and training, (*ll*) physical therapy, (ss) school health services and school nurse services, (bbb) supplementary aids and services, (ddd) transitional support services for teachers, (fff) transition services, (ggg) travel training, (nnn) interpreting services, and (ooo) declassification support services.

Relation to Free, Appropriate Public Education

Related Services are a critical component of the right to free, appropriate public education. Congress recognized from the outset that services and accommodations that are not strictly educational are needed for children with disabilities to learn. In *Irving Independent School District v. Tatro*, 468 U.S. 883, 555 IDELR 511 (1984), the Supreme Court's second decision interpreting the original Education for All Handicapped Children Act, the Court upheld a demand for clean, intermittent catheterization as a related service so that a child who could not urinate normally could attend school for a full day. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 441 IDELR 130 (3d Cir.1988), another basic case interpreting the Act, was a dispute over whether the child with severe disabilities was entitled to physical therapy as part of his package of related services. The court commented:

> For some handicapped children, the related services provided by the EHA serve as important facilitators of classroom learning. . . .
>
> For children like Christopher with severe disabilities, related services serve a dual purpose. First, because these children have extensive physical difficulties that often interfere with development in other areas, physical therapy is an essential prerequisite to education. For example, development of motor abilities is often the first step in overall educational development. . . .
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> Second, the physical therapy itself may form the core of a severely disabled child's special education. This court has recognized that "[t]he educational program of a handicapped child, particularly a severely and profoundly handicapped child ... is very different from that of a non-handicapped child. The program may consist largely of 'related services' such as physical, occupational, or speech therapy." *DeLeon v. Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir.1984).

Polk, 853 F.2d at 176.

Related services are to be specified in the Individualized Education Program (IEP). The recording of the public school's offer of related services on the IEP is the guarantee that the services will be provided, as well as a means by which the parents may make an informed decision whether to bring a due process proceeding to contest the IEP. The federal regulations require that IEPs include:

> A statement of the special education and related services and supplementary aids and services , based on peer-reviewed research to the extent practicable, to be provided the child or on behalf of the child, and a statement of the program modifications or supports for school personnel to enable the child – (i) To advance appropriately toward attaining the annual goals; (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section,

> and to participate in extracurricular and other nonacademic activities; and (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 C.F.R. § 300.320(a)(4).

The IEP must also include "The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications." *Id.* § 300.320(a)(7).

State regulations echo, and in various ways amplify, these IEP requirements. *See* 8 NYCRR § 200.4(d)(2)(v) (providing that IEP indicate services such as parent counseling and assistive technology, as appropriate) (ix) (expanding on transition services), *id.* § 200.4(d) (3) (requiring consideration of special factors and corresponding services*); see also id.* § 200.6(e) ("Related services shall be recommended by the committee on special education to meet specific needs of a student with a disability as set forth in the individualized education program (IEP). (1) The frequency, duration and location of each such service shall be in the IEP, based on the individual student's need for the service. (2) For students with disabilities determined to need speech and language services, the total caseload of such students for teachers providing such services shall not exceed 65. (3) When a related service is provided to a number of students at the same time, the number of students in the group shall not exceed five students per teacher or specialist except that, in the city school district of the city of New York, the commissioner shall allow a variance of up to 50 percent rounded up to the nearest whole number from the maximum of five students per teacher or specialist. (4) A student with a disability may be provided with more than one such service in accordance with the need of the student. (5) Related services may be provided in conjunction with a regular education program or with other special education programs and services.").

<u>Relation to Least Restrictive Environment</u>

The IDEA embodies the principle that children with disabilities are to be educated in the least restrictive environment, that is, to the maximum extent appropriate, with children who do not have disabilities. To achieve that goal, the statute creates a requirement that related services be offered to prevent separation of students with disabilities. States must guarantee that:

> [S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). In *Oberti v. Board of Education*, 995 F.2d 1204, 19 IDELR 908 (3d Cir. 1993), a prominent IDEA case, the court noted "the apparent tension

within the Act between the strong preference for mainstreaming, and the requirement that schools provide individualized programs tailored to the specific needs of each disabled child." The court said that "The key to resolving this tension appears to lie in the school's proper use of "supplementary aids and services," 20 U.S.C. § 1412(5)(B), which may enable the school to educate a child with disabilities for a majority of the time within a regular classroom, while at the same time addressing that child's unique educational needs." *Id.* at 1214. If the child's presence is said to have a negative effect on other students, "the court must keep in mind the school's obligation under the Act to provide supplementary aids and services to accommodate the child's disabilities. . . . An adequate individualized program with such aids and services may prevent disruption that would otherwise occur." *Id.* at 1217. From this perspective, the command not to segregate students with disabilities becomes a positive entitlement to related services to make inclusive education successful.

Predictably, disputes over least restrictive environment often are conflicts over whether school districts will provide sufficiently intensive services and accommodations to enable children with difficulties to be educated in mainstream settings. In *L.H. v. Hamilton County Department of Education*, 900 F.3d 779 (6th Cir. 2018), the Sixth Circuit affirmed that a proposed placement of a student with Down Syndrome in a largely self-contained class violated the IDEA; it reversed denial of reimbursement for a parental placement of the student in a Montessori school where he was in a general education class and received the services of a 1:1 paraprofessional. The court said that problems the student had mastering the general education curriculum in public school "do not demonstrate a failure of mainstreaming as a concept, but a failure of L.H.'s teachers and the other staff to properly engage in the process of mainstreaming L.H. rather than isolating and removing him when the situation became challenging." *Id.* at 795. The addition of the paraprofessional services made the Montessori program successful.

Other cases apply similar reasoning. In *School District of Philadelphia v. Post*, 262 F. Supp. 3d 178, 70 IDELR 96 (E.D. Pa. 2017), which involved a young child with autism spectrum disorder, the court affirmed a hearing officer decision that the district's decision failed the least restrictive environment test by not giving adequate consideration to placing the child in a general education kindergarten class with supplemental aids and services. Instead, said the court, the district focused single-mindedly on placing the child in an autistic support program solely due to his diagnosis. *See also R.E.B. v. Hawaii Dep't of Educ.*, 870 F.3d 1025, 70 IDELR 194 (9th Cir. 2017) (in case of child whose parent challenged IEP providing for transition from private school to a public school kindergarten, holding that defendant violated IDEA by, among other things, not addressing transition services for move to public school), *opinion withdrawn, rehearing granted*, 886 F.3d 1288, 118 LRP 12999 (9th Cir. 2018); *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).

Evaluation for Related Services

Courts have found evaluations not to meet IDEA standards because they fail to provide enough information for IEP teams to identify the nature and extent of the related services that should be provided. For example, in *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 67 IDELR 227 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1578 (2017), the case of a child eventually found to have an autism spectrum disorder, the court ruled that the school district violated the IDEA by failing to assess the child for autism on the basis of an informal observation despite the district's awareness that the child displayed symptoms of autism. The court said the procedural violation denied the child appropriate education because the absence of an autism assessment deprived the IEP team of important information needed to recommend appropriate services to meet the child's needs. In *Z.J. v. Board of Education of the City of Chicago*, 344 F. Supp. 3d 988, 73 IDELR 95 (N.D. Ill. 2018), the case of student whose parent requested a special education evaluation on January 12, 2016, but the student was not given an initial evaluation until July 29, 2016, and did not receive a central auditory processing evaluation by an audiologist until even later, and the parent's independent evaluations found myopia and a bilateral vision disorder, the court ruled that the district violated its IDEA child find obligation by ignoring clear signs of a disability. The court ordered provision of 36 weeks of weekly vision therapy for the child's oculomotor dysfunction, and reimbursement for the developmental vision assessment.

Courts have also found IDEA violations and ordered remedies when behavior assessments have not been provided, keeping students from being offered behavior support services. *See, e.g., Lawrence Cnty. Sch. Dist. v. McDaniel*, No. 3:17-CV-00004, 2018 WL 1569484, 72 IDELR 8 (E.D. Ark. Mar. 30, 2018); *Pocono Mountain Sch. Dist. v. J.W.*, No. 3:16-CV-0381, 2017 WL 3971089, 70 IDELR 200 (M.D. Pa. Sept. 8, 2017). Similarly, courts have ordered remedies when assessments indicated a need for related services but schools failed to provide more complete evaluations or offer the services thought to be needed. *See, e.g., Davis v. District of Columbia*, 244 F. Supp. 3d 27, 69 IDELR 218 (D.D.C. Mar. 23, 2017) (holding that comprehensive evaluations should have been conducted following exit from special education, once independent evaluations in areas of learning disability and speech-language showed basis to suspect disability relating to occupational therapy and auditory processing; ordering evaluations to be conducted or funded). Assistive technology assessment may be required. *See J.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606, 56 IDELR 200 (S.D.N.Y. 2011) (affirming SRO ruling that assistive technology evaluation be furnished to child with severe speech and language deficits); *see also Letter to Fisher*, 23 IDELR 565, 566 (OSEP 1995) ("If a public agency does not . . . assess the functional capabilities of the child as they relate to the need for assistive technology, the parents have a right to seek at public expense an independent evaluation if they believe the evaluation fails to address appropriately the child's needs in this area.").

On the other hand, in some cases courts have found that there was insufficient need for evaluations in areas tied to related services, such as behavior assessment, occupational therapy, vocational services, and augmentative and alternative communication. *E.g., A.L. v. Alamo Heights Indep. Sch. Dist.*, No. SA-16-CV-00307-

RCL, 2018 WL 4955220, 73 IDELR 71 (W.D. Tex. Oct. 12, 2018) (functional behavioral assessment, occupational therapy assessment, vocational assessment); *T.M. v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792, 69 IDELR 276 (E.D. Pa. Apr. 19, 2017) (behavior assessment); *N.G. v. Tehachapi Unified Sch. Dist.*, No. 1:15-cv-01740, 2017 WL 1354687, 69 IDELR 279 (E.D. Cal. Apr. 13, 2017) (behavior assessment), *appeal dismissed*, No. 17-15980, 2017 WL 5485465 (9th Cir. Oct. 11, 2017); *J.L. v. Manteca Unified Sch. Dist.*, No. 2:14-01842, 2016 WL 3277260, 68 IDELR 17 (E.D. Cal. June 14, 2016) (augmentative and alternative communication assessment; functional behavior assessment).

A noteworthy recent case from New York, *A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 69 IDELR 51 (2d Cir. 2017), which was discussed at greater length in an earlier outline concerning services for children with autism, established that the failure to follow the clear consensus of evaluative reports specifically finding a continued need for applied behavioral analysis services and 1:1 support denied the child appropriate education. Several New York cases, also discussed more fully in the earlier outline concerning services for children with autism, determine that additional evaluations were not needed in connection with related services parents sought to obtain for their children: *Y.D. v. New York City Dep't of Educ.*, No. 14 CV 1137-LTS, 2017 WL 1051129, 69 IDELR 178 (S.D.N.Y. Mar. 20, 2017) (holding that school system's reliance on materials from a private school that contained occupational and speech progress reports and goals as substitute for its own evaluations did not constitute procedural violation), *appeal dismissed*, No. 17-1150 (2d Cir. Nov. 15, 2017); *C.M. v. New York City Dep't of Educ.*, No. 15 CIV. 6275, 2017 WL 607579, 69 IDELR 117 (S.D.N.Y. Feb. 14, 2017) (reasoning that alleged failure to fully evaluate student, including the failure to conduct a functional behavioral assessment despite knowing that student exhibited behaviors interfering with learning, did not deny appropriate education, when adequate information was available to CSE about student's behavioral needs); *J.E. v. Chappaqua Cent. Sch. Dist.*, No. 14-cv-3295, 2016 WL 3636677, 68 IDELR 48 (S.D.N.Y. June 28, 2016) (holding that failure to generate separate written functional behavior assessment did not constitute procedural violation when behavioral intervention plan provided information typically included in FBAs), *aff'd sub nom. C.E. v. Chappaqua Cent. Sch. Dist.*, 695 F. App'x 621, 70 IDELR 31 (2d Cir. 2017).

Particular Related Services

Legal developments bearing on the entitlement to specific related services have emerged both in New York area courts and elsewhere. Several specific services and classes of services have received judicial attention.

Nursing and School Health

The two Supreme Court cases dealing directly with related services have to do with student health and nursing. *Irving Independent School District v. Tatro*, 468 U.S. 883, 553 IDELR 656 (1984), mentioned above, held that clean, intermittent catheterization was a related service and not excluded under the provision that medical services need to be provided only if they are for diagnostic purposes. The Court reasoned

that services that may be provided by a nurse or other person with qualifications lesser 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 wide range of services had to be provided for 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. A recent decision that follows directly from *Tatro* and *Garret F.* is *School District of Philadelphia v. Drummond*, No. CV 14-2804, 2016 WL 1444581, 67 IDELR 170 (E.D. Pa. Apr. 12, 2016). There 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 declared, "An IEP failing to ensure a student's safety denies a FAPE." *Id.* at *5.

Several recent cases, including a prominent case from New York, 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. Sept. 5, 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.

J.L. v. New York City Department of Education, 324 F. Supp. 3d 455, 72 IDELR 237 (S.D.N.Y. Aug. 28, 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 the 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. *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).

Speech-Language

From early on, courts have stressed the importance of speech and language therapy as a related service. In one notable case, the court required a school district to provide three times the amount of services it was willing to offer. *Johnson v. Lancaster-Lebanon Intermediate Unit 13*, 757 F. Supp. 606, 17 IDELR 456 (E.D. Pa. 1991). Rigid policies denying speech therapy based on maximum developmental ages for producing a sound have also been condemned. *Letter to Vergason*, 18 IDELR 538 (OSERS 1991). Difficulties with developing speech if services are not delivered by the time a student reaches the age of three or six may justify more intense levels of intervention than might seem standard. *See Board of Educ. v. Wilhelmy*, 689 F. Supp. 2d 970, 110 LRP 11713 (S.D. Ohio 2010) (concerning child whose hearing loss was not detected until age three).

Several recent cases consider what levels of speech or language therapy are appropriate for specific children. *T.Y. v. New York City Department of Education*, 213 F. Supp. 3d 446, 68 IDELR 182 (E.D.N.Y. 2016), overturned an SRO decision and awarded tuition reimbursement in accordance with the decision of the IHO, finding, among other things, no justification for a reduction in speech-language therapy. *S.H. v. Mount Diablo Unified School District*, 263 F. Supp. 3d 746, 70 IDELR 98 (N.D. Cal. 2017), involved a 15-year-old diagnosed with autism spectrum disorder and classified as having a speech and language impairment. The court held that failure to specify in the IEP whether speech and language services were group or individual meant the school did not satisfy the requirement of making a formal written offer of services, depriving the parent of the right to meaningfully participate in the IEP process. The court denied reimbursement for a private placement found not appropriate by the ALJ, but it awarded 20 forty-minute sessions of group speech and language services as well as attorneys' fees. *L.M.H. v. Arizona Department of Education*, No. CV-14-02212-PHX-JJT, 2016 WL 3910940, 68 IDELR 41 (D. Ariz. July 19, 2016), *appeal dismissed*, Nos. 16-16467, 17–16642, 2018 WL 994127 (9th Cir. Feb. 16, 2018), the case of a child with learning disabilities, upheld much of the public school's program, but held that the

school district denied the child appropriate education by not relying on peer-reviewed research and taking into account individual student needs when it determined that 240 service minutes of speech therapy was adequate, even though the student had made some progress with that level of services. The court remanded the case to the ALJ for further proceedings on reimbursement and compensatory education issues. In *J.L. v. Manteca Unified Sch. Dist.*, No. 2:14-01842, 2016 WL 3277260, 68 IDELR 17 (E.D. Cal. June 14, 2016), mentioned above in connection with evaluation, the court decided the case of a nine-year-old child with autism. The court largely upheld what the school district had provided for the child, but affirmed an ALJ ruling that the student required direct speech and language services rather than consultation services, in light of student's severe delays in all aspects of communication. *See also E.M. v. Lewisville Indep. Sch. Dist.*, No. 4:15-CV-00564, 2018 WL 1510668, 72 IDELR 22 (E.D. Tex. Mar. 27, 2018), (concerning speech articulation therapy, discussed below under interpretation services), *appeal filed*, No. 18-40409 (5th Cir. Apr. 26, 2018).

The U.S. Department of Education has expressed concern that children with autism are not always receiving adequate speech and language assessment and services when their evaluations focus exclusively on autism-specific manifestations. *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015).

Interpreters and Related

Board of Education v. Rowley, 458 U.S. 176, 553 U.S. 656 (1982), the Supreme Court's first case under the law that became the IDEA, concerned whether a young child with profound hearing loss was entitled to the services of a sign-language interpreter when she was succeeding in mainstream classes and advancing easily from grade to grade. The Court denied the claim, overturning the Second Circuit Court of Appeals, and establishing an interpretation of appropriate education that has stood ever since, although it received a significant gloss in 2017 in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 69 IDELR 174 (U.S. Mar. 22, 2017), which is discussed at greater length below under the topic of behavior-related services. Much recent litigation on communications accommodations has focused on Section 504 and the Americans with Disabilities Act rather than the IDEA, *see, e.g., K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 61 IDELR 182 (9th Cir. Aug. 6, 2013) (regarding ADA Title II claim for Communications Access Realtime Captioning (CART) word-for-word transcription services, reversing judgment against student and holding that claim could succeed even though school's compliance with IDEA was not challenged). Nevertheless, in individual cases, courts have found that the IDEA requires schools to provide programs that include sign language interpretation. *See, e.g., J.G. v. Baldwin Park Unified Sch. Dist.*, 78 F. Supp. 3d 1268, 65 IDELR 177 (C.D. Cal. 2015) (ordering American Sign Language-based program).

E.M. v. Lewisville Indep. Sch. Dist., No. 4:15-CV-00564, 2018 WL 1510668, 72 IDELR 22 (E.D. Tex. Mar. 27, 2018), *appeal filed*, No. 8-40409 (5th Cir. Apr. 26, 2018), is a case that has received significant attention in the special education law world because it represents the intersection of sign language as a mode of communication and assistive technology that may bypass more traditional communication methods. There

the parents of a child diagnosed with autism, a speech impairment, an orthopedic impairment, intellectual disability, childhood apraxia of speech, and other conditions, who was considered to be a non-oral communicator, but who made use of an assistive technology device, objected to the school district's discontinuation of a sign language interpreter and speech articulation therapy. The court upheld the change, stressing that it was based on an evaluation and noting that the student communicated primarily by typing on the AT device. Despite speech articulation therapy, the student had made little progress on articulation. The court further stated that having sign language support was relevant to meeting the least restrictive environment requirement, but ultimately held that the LRE requirement was being met; the court emphasized the student's reluctance to look at the interpreter and difficulty making signs due to a lack of hand mobility. It appeared that she did most of her engagement with peer through the AT device.

A service that is not the same as that of an interpreter, but perhaps could be considered to be in the same general category is that of an intervener – a trained person who works one-on-one with a child, typically a student with sensory disabilities, as a bridge to the outside world. In *Letter to McDowell*, 72 IDELR 252 (OSEP 2018), the Office of Special Education Programs stated that if an IEP team "determines that a particular service, including the services of an intervener, is an appropriate related service for a child and is required to enable the child to receive FAPE, the Team's determination must be reflected in the child's IEP, and the service must be provided at public expense and at no cost to the parents."

Behavior

Entitlement to and adequacy of behavior-related services constitute a huge topic in special education law. One crucial development that might be noted is the Supreme Court's 2017 decision in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 69 IDELR 174, which rejected the Tenth Circuit's "merely more than de minimis" standard for determining what constitutes appropriate education. The child in the case had autism, and the condition manifested itself in disruptive behavior as well as other impediments to learning. The Court said that "[t]o 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. The child's IEP must be "appropriately ambitious in light of his circumstances . . . every student should have the chance to meet challenging objectives"; the standard is "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." *Id.* at 1000. Chief Justice Roberts emphasized that the unilateral placement the parents found for Endrew "developed a 'behavioral intervention plan' that identified Endrew's most problematic behaviors and set out particular strategies for addressing them. Firefly also added heft to Endrew's academic goals. . . . Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school." *Id.* at 996-97 (citation to record omitted).

Behavior plans typically include a range of accommodations and services individually designed for a child to facilitate the child's learning and success in an inclusive setting. As such, they are components of appropriate education and related

services. Noteworthy New York cases concerning behavioral services and upholding positions taken by parents include *L.O. v. New York City Dep't of Educ.*, 822 F.3d 95, 67 IDELR 225 (2d Cir. 2016) (finding error in accepting behavior plan's adequacy when it was not based on FBA; noting that one contested IEP did not include BIP at all); *A.W. v. Board of Educ. of the Wallkill Cent. Sch. Dist.*, No. 1:14–CV–1583, 2016 WL 4742297, 68 IDELR 164 (N.D.N.Y. Sept. 12, 2016) (holding that IEPs offered for 2012-13 and 2013-14 were inadequate for failure to consider behavior that impeded learning and to adequately address behavioral needs), *appeal withdrawn*, No. 16-3464, 2016 WL 9819550 (2d Cir. Nov. 23, 2016).

Parental claims regarding behavioral services were unsuccessful in: *C.E. v. Chappaqua Cent. Sch. Dist.*, 695 F. App'x 621, 70 IDELR 31 (2d Cir. June 14, 2017) (holding that parent's claim that school district could not have implemented or updated behavior intervention plan was speculative, and that procedural and substantive challenges to BIP failed); *E.E. v. New York City Dep't of Educ.*, No. 17-CV-2411, 2018 WL 4636984, 73 IDELR 9 (S.D.N.Y. Sept. 26, 2018) (affirming administrative decisions in favor of school system in case seeking reimbursement for parental placement, reasoning that IEP incorporated information regarding causes of behavior and identified strategies, including occupational therapy and speech-language therapy, as well as sensory diet program, previously used successfully by private placement, even though school system did not conduct FBA or implement BIP); W.M. v. Board of Educ. of the Harrison Cent. Sch. Dist., No. 16-CV-8732, 2017 WL 5157768, 71 IDELR 32 (S.D.N.Y. Nov. 6, 2017) (affirming administrative decision against parents on claim for reimbursement of private placement; stating that school system should have conducted functional behavior analysis and created behavior intervention plan, but that procedural violation did not deny appropriate education, in light of assessments and strategies that sufficiently dealt with behavior), *appeal dismissed*, No. 17–3899, 2017 WL 8159198 (2d Cir. Dec. 22, 2017); *C.M. v. New York City Dep't of Educ.*, No. 15 CIV. 6275, 2017 WL 607579, 69 IDELR 117 (S.D.N.Y. Feb. 14, 2017) (upholding SRO decision adverse to parent, reasoning that alleged procedural violation of failing to conduct FBA, despite knowing that student exhibited significant behaviors interfering with education, did not deny appropriate education when adequate information was available to CSE regarding student's functional, developmental and academic needs).

New York regulations at 8 NYCRR § 200.22 set standards for behavioral interventions, and call for functional behavior assessments and behavior intervention plans under specified circumstances. They also establish controls on the use of time-out rooms, emergency interventions, and aversive interventions.

Occupational and Physical Therapy

As noted at the outset of this outline, prominent early cases such as *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 441 IDELR 130 (3d Cir.1988), involved services including physical and occupational therapy. *See also Timothy W. v. Rochester, N.H. Sch. Dist.*, 875 F.2d 954, 441 IDELR 393 (1st Cir. 1989) (finding child eligible for services under statute when program would consist largely of occupational therapy). New York cases concerning OT and PT include: *B.R. v. New York City Dep't of*

Educ., 910 F. Supp. 2d 670, 60 IDELR 102 (S.D.N.Y. 2012) (holding that defendant failed to prove that proposed public school placement could meet child's need for one-on-one occupational therapy specified by CSE, in light of evidence that OT services were available only in group setting with six students; ordering reimbursement for unilateral placement); *Holmes v. Sobol*, 690 F. Supp. 154, 559 IDELR 463 (EHLR 559:463) (W.D.N.Y. 1988) (preliminary injunction) (physical therapy required to be provided in summer months in light of difficulty recouping progress); *Taylor v. Board of Educ.*, 649 F. Supp. 1253, 558 IDELR 243 (N.D.N.Y. 1986) (upholding placement in cerebral palsy center in part on basis that physical therapy was available there).

Two recent out of area cases are of interest on the topic. *Paris School District v. A.H.*, No. 2:15-CV-02197, 2017 WL 1234151, 69 IDELR 243 (W.D. Ark. Apr. 3, 2017), affirmed an administrative determination that the child's physical therapy needs were not met and that discontinuance of the therapy lacked an adequate justification. *J.L. v. Manteca Unified School District*, No. 2:14-01842, 2016 WL 3277260, 68 IDELR 17 (E.D. Cal. June 14, 2016), discussed above, held that direct occupational therapy services were not needed by the child whose program was at issue.

Assistive Technology

The IDEA requires school districts to consider whether a child with a disability needs assistive technology devices and services. 20 U.S.C. § 1414(d)(3)(B)(v). Courts have compelled school districts to provide assistive technology devices and services. *See, e.g.*, *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 who was performing academically at level of second or third grader, affirming hearing officer decision that school district deprived child of appropriate education by not furnishing iPad or equivalent device as provided on IEP, in order to promote vocabulary improvement, learning to tell time, and communication in general); *Kevin T. v. Elmhurst Cmty. Sch. Dist.*, No. 01 C 0005, 2002 WL 433061, 36 IDELR 153 (N.D. Ill. 2002) (finding that district failed to provide assistive technology). As noted in regard to interpretation services, claims for services to facilitate communication might also be brought under the Americans with Disabilities Act and Section 504.

Some recent cases have rejected requests for assistive technology. *See, e.g., E.F. v. Newport Mesa Unified Sch. Dist.*, 726 F. App'x 535, 537, 71 IDELR 161 (9th Cir. 2018) ("Although Plaintiffs presented evidence that children with autistic-like behaviors may begin using electronic AT devices as early as age three, evidence adduced at the administrative hearing also established that some foundational behavioral and communicative skills are necessary in order for children to use electronic AT devices successfully. Accordingly, we hold that Newport did not deny E.F. a FAPE by failing to assess him for an electronic AT device before February 2012."). In one case, a court rejected a request for additional assistive technology assessments when existing devices and services appeared to be providing adequate support for the student. *J.L. v. Manteca Unified Sch. Dist.*, No. 2:14-01842, 2016 WL 3277260, 68 IDELR 17 (E.D. Cal. June 14, 2016) (affirming decision that defendant did not need to conduct augmentative and alternative communication assessment, relying on evidence that school was already

using picture exchange system and had no interest in iPad). One well known case from New York rejected a claim that preventing a student from using a TI-92 calculator violated IDEA. *Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 39 IDELR 181 (2d Cir. 2003).

Assistive technology might be classified as either special education or related services. *Letter to Goodman*, 16 IDELR 1317 (OSEP 1990). Issues may arise whether a given device might be excluded from covered assistive technology services on the ground that it is a surgically implanted medical device. *See* 20 U.S.C. § 1401(26)(B). One court has held that a myoelectric arm used by a child was a medical device rather than a covered AT device. *J.C. v. New Fairfield Bd. of Educ.*, No. 3:08–cv–1591, 2011 WL 1322563, 56 IDELR 207 (D. Conn. 2011).

In *M.C. v. Antelope Valley Union High Sch. Dist.*, 852 F.3d 840, 69 IDELR 203 (9th Cir. Mar. 27, 2017), *as amended and superseded*, 858 F.3d 1189 (9th Cir. May 30, 2017), *cert. denied*, 138 S. Ct. 556 (2017), a prominent case involving a child whose genetic disease caused blindness and who displayed widespread developmental delays, the court ruled that the lack of specification in the child's IEP about which assistive technology devices were to be offered hampered the parent's participation in the IEP process, denying appropriate education to the child.

Transportation

Specialized transportation, and transportation in situations in which a child without a disability would be expected to get to and from school without assistance, are commonly provided related services. Door-to-door services may be required. *District of Columbia v. Ramirez*, 377 F. Supp. 2d 63, 43 IDELR 245 (D.D.C. 2005). Frequently, disputes over transportation concern nursing or other health services to be provided while the child is being taken to or from school, and recent cases of that type are discussed above under the topic of nursing and health services. Early cases include *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); *Macomb Cnty. Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824, 441 IDELR 600 (E.D. Mich. 1989) (ordering tracheostomy care and positioning during transportation).

Another issue that has arisen concerns school choice programs in which parents are permitted to place their children in school districts other than the one of residence. Typically, if the student is accepted by the district requested by the parent, transportation will be provided by the district of residence, the receiving district, or some other source. These programs coexist with the common practice of districts, frequently rural or suburban ones, of sharing programs with other districts and busing students who need a given set of services from one district to another, with the home district usually bearing the cost of transportation. *Osseo Area Schools v. M.N.B.*, 344 F. Supp. 3d 1040, 73 IDELR 14 (D. Minn. Sept. 25, 2018), *appeal filed*, No. 18-3255 (8th Cir. Oct. 23, 2018), involved an 11-year-old with emotional and behavioral disorders who was placed at an out-of-district school by the home district, Big Lake, for third and

fourth grade. Big Lake reimbursed the parents for mileage driving the student to and from school pursuant to her IEP, which called for individualized transportation. The parents, taking advantage of a state school choice plan, then applied for open enrollment in the Osseo district, and that district accepted the application. Osseo placed the child in yet another school district, and agreed to reimburse the parents for mileage between the Osseo district boundary and the new school, but not between child's home in Big Lake and new school. The court granted the parent's motion for judgment on the administrative record, affirming an ALJ decision requiring Osseo to provide reimbursement to the parents for driving the child between her home and the school, reasoning that the transportation arrangement was based not merely on parental preference, but on the specific provision in the IEP and the state open enrollment process, which made the child a student of the district that accepted her application.

Least restrictive environment obligations must be observed in the provision of transportation. *B.B. v. Catahoula Parish Sch. Dist.*, No. 11–1451, 2013 WL 5524976, 62 IDELR 50 (W.D. La. 2013), which involved a ten-year-old with Down syndrome, affirmed a hearing officer decision holding that transportation in a special education bus did not satisfy the least restrictive environment duty when the child could have been transported on a regular education bus with a student peer acting as a bus buddy.

New York provides for state aid for transportation of children with disabilities to and from residential placements, including expenditures such as lodging and meals incurred by a volunteer escort, provided the escort is required by the IEP and has a contract with the school district. 8 NYCRR § 200.12.

Aides and Other 1:1 Services

New York 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).

As the New York provision suggests, one-on-one services can take a number of forms and be offered for a number of purposes. As noted in the earlier outline regarding services for children with autism, a 1:1 aide may be required to help a student with that condition to make educational progress. In *I.B. v. New York City Dep't of Educ.*, 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 2nd percentile in overall cognitive functioning who demonstrated an inability to attend to tasks without assistance and needed 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. *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).

Parents have prevailed in cases regarding provision of one-on-one services in numerous cases. *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).

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 MB v. City Sch. Dist. of New Rochelle*, No. 17-CV-1273, 2018 WL 1609266, 72 IDELR 12 (S.D.N.Y. Mar. 29, 2018) (finding that evidence did not show 1:1 aide was necessary).

A federal court in New York has 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 home-based services. *M.G. v. New York City Dep't of Educ.*, 162 F. Supp. 3d 216, 66 IDELR 276 (S.D.N.Y. 2016).

Services for Teachers

As noted in the earlier outline considering services for children with autism, New York law is noteworthy in that it provides in 8 NYCRR § 200.13(a)(6) for services for teachers for the benefit of students who have autism. *See generally A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 539-40 (2d Cir. 2017) ("[S]chool districts are required by § 200.13(a)(6) to 'provide transitional support services,' *id.* § 200.13(a)(6), to an autistic student's special education teacher 'in order to assure that the student's special education needs are being met,' *id.* 'no matter the contents of the IEP,' and they thus 'remain accountable for their failure to do so,' permitting a parent of an aggrieved child to 'file a complaint at any time if they feel the[ir] [child is] not receiving this service.' *R.E.* [*v. New York City Dep't of Educ.*], 694 F.3d [167], at 191 [(2d Cir. 2012)] (citing N.Y. Comp. Codes R. & Regs. tit. 8, § 200.13(d))").

Services for Parents

New York regulations also require that parent of students with autism be offered counseling and training to support intervention activities at home. 8 NYCRR § 200.13(d). The definition of parent counseling and training is "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program." 8 NYCRR § 200.1(kk).

The omission of these services from an IEP is a procedural failing, but it does not necessarily deny free, appropriate public education. *See R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 191, 59 IDELR 241 (2d Cir. 2012) (the presence or absence of a parent-counseling provision does not necessarily have a direct effect on the substantive adequacy of the plan. . . . Moreover, because school districts are required by section 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP."); *see also A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 538, 69 IDELR 51 (2d Cir. 2017) ("While its absence from the IEP constitutes a violation of the procedures of the IDEA, evidence that E.H.'s program actually offered parental counseling and training services and that A.M. was made aware of its presence at the CSE meeting makes clear that the omission of parental counseling and training in the IEP itself was nothing more than an immaterial procedural violation."). Nevertheless, it may contribute to a finding of a denial of a free appropriate public education that would entitle the parents to a remedy. *See R.E.,* 694 F.3d at 194 (holding in one of three cases considered together that failure to include parent training and counseling contributed to denial of appropriate education, stating: "Our conclusion that the IEP was inadequate is buttressed by the CSE's failure to include statutorily mandated speech and language therapy and parent training in the IEP."); *see also L.O. v. New York City Dep't of Educ.*, 822 F.3d 95, 67 IDELR 225 (2d Cir. 2016) (finding that failure of three IEPs to provide for parent counseling and training did not deprive student of appropriate education, but cumulative effect of procedural errors denied appropriate education for all three relevant school years; remanding for determination of relief); *C.F. v. New York City Dep't of Educ.*, 746 F.3d 68, 81, 62 IDELR 281 (2d Cir. 2014) ("The Department's offer of a 6:1:1 placement . . . , particularly when combined with the IEP's failure to produce an adequate, individualized functional behavioral assessment or behavioral intervention plan and the lack of any provision for parent counseling and training, thus denied C.F. a free appropriate education."; awarding tuition reimbursement); *Application of the Bd. of Educ. of the Cazenovia Cent. Sch. Dist.*, No. 14-109 (N.Y. SRO Apr. 22, 2015) (upholding compensatory services award of 20 hours of parent counseling and training).

Remedies for Denial of Related Services

Remedies for improper denial of related services are the same as those for denial of free, appropriate public education in general, but a number of cases on the topic deserve mention. A noteworthy case involves a child with an intellectual disability and other conditions who is awarded two years of compensatory assistive technology as a

remedy for the district's delay in providing a laptop computer with a word and grammar prediction program. *East Penn Sch. Dist. v. Scott B.*, No. CIV. A. 97–1989, 1999 WL 178363, 29 IDELR 1058 (E.D. Pa. 1999). *School District of Philadelphia v. Williams*, No. CV 14-6238, 2016 WL 877841, 66 IDELR 214 (E.D. Pa. Mar. 7, 2016), the case involving the failure to provide an iPad or equivalent, as called for on the IEP, included an award of compensatory education that extended through the remainder of the student's high school career. *Kevin T. v. Elmhurst Community School District*, No. 01 C 0005, 2002 WL 433061, 36 IDELR 153 (N.D. Ill. 2002), mentioned above in connection with denial of assistive technology services, entailed an award of compensatory services, as did a similar case, *School Bd. v. Pachl*, No. 01-342, 36 IDELR 263 (D. Minn. May 10, 2002). *Evanston Community Consolidated School District v. Michael M.*, 356 F.3d 798, 40 IDELR 175 (7th Cir. 2004), affirmed an award of 60 minutes per week of direct, rather than consultative, occupational therapy services as compensatory services for the district's previous use of an unlicensed therapist. *Somberg v. Utica Community Schools*, 908 F.3d 162, 118 LRP 45495 (6th Cir. 2018), affirmed an award of 1,200 hours of tutoring and one year of transition planning as compensatory education. 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 is *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).

M.S. v. Utah School for the Deaf and Blind, 822 F.3d 1128, 67 IDELR 195 (10th Cir. 2016), is a unique compensatory education case that might be instructive. It involved a student with blindness, a hearing impairment, autism, and a cognitive impairment, who was educated at the state school for the deaf and blind. The court vacated a district court decision that had remanded to the IEP team the issue of which residential placement should be site at which compensatory services, including compensatory related services, were to be delivered. The court of appeals ordered the district court to resolve the issue itself, reasoning that delegation to the IEP team would put employees of the defendant school in the position of a hearing officer, and could trap the student in an endless litigation cycle. Impartial hearing officers might follow this guidance and be wary about remanding critical contested issues to a Committee on Special Education when they should properly be decided by the IHO.

Cases entailing awards of full or partial reimbursement for related services wrongfully denied and provided by parents at their own expense include: *Hurry v. Jones*, 734 F.2d 879, 555 IDELR 543 (1st Cir. 1984) (requiring reimbursement of parent for interim transportation services); *A.S. v. Harrison Twp. Bd. of Educ.*, No. 14-147, 2016 WL 1717578, 67 IDELR 207 (D.N.J. 2016) (modifying award of mileage for parental transportation of child to private placement); *Oconee Cnty. Sch. Dist. v. A.B.*, No. 3:14–CV–72, 2015 WL 4041297, 65 IDELR 297 (M.D. Ga. July 1, 2015) (affirming prospective order and reimbursement of transportation costs, reduced for poor cooperation on part of parent), *appeal dismissed*, No. 15-13461 (11th Cir. 2015); *see also Taylor v. Board of Educ.*, 649 F. Supp. 1253, 558 IDELR 243 (N.D.N.Y. 1986) (reimbursement for transportation of student and baby-sitting of siblings). A court required tuition reimbursement for keeping a child in a private placement that provided

itinerant teacher services the student needed, when the school district did not offer a placement that had the services. *I.B. v. New York City Dep't of Educ.*, No. 15-CV-01309-LTS, 2016 WL 1069679, 67 IDELR 113 (S.D.N.Y. Mar. 17, 2016).

Additional New York cases dealing with reimbursement and compensatory services include: *L.K. v. New York City Dep't of Educ.*, 674 F. App'x 100, 69 IDELR 90 (2d Cir. 2017) (in a case concerning pendency order, remanding for determination whether parents ought to be reimbursed for additional occupational therapy obtained for child, whether reimbursement offered by school system was reasonable given New York City market rates for service providers, and what home and community based services child would need to receive appropriate education going forward); *M.M. v. New York City Dep't of Educ.*, No. 15 Civ. 5846, 2017 WL 1194685, 69 IDELR 208 (S.D.N.Y. Mar. 30, 2017) (calculating amounts of compensatory ABA services).

The Second Circuit recently reaffirmed that compensatory education should be available as a remedy for violations of IDEA's maintenance of placement provision. *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 456-57, 65 IDELR 255 (2d Cir. 2015) ("We therefore conclude that when an educational agency has violated the stay-put provision, compensatory education may—and generally should—be awarded to make up for any appreciable difference between the full value of stay-put services owed and the (reimbursable) services the parent actually obtained. In this case, the Board owes reimbursement in the amount the Parent expended for services the Board was required to provide, plus compensatory education to fill the gap of required services that the Parent did not fund.").

* * *

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

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